IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*
AND IN THE MATTER OF AN APPEAL (#05-03)
FROM A DECISION CONCERNING A RAP NET NEGATIVE INVOICE

BETWEEN:

CLAREMONT POULTRY GROUP LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine J. Elsaesser, Vice Chair Garth Green, Member
For the Appellant	George Gray, Manager
For the Respondent	Ian Christman, Counsel
Location of Hearing	Abbotsford, British Columbia
Date of Hearing	August 9, 2005

INTRODUCTION

1. The Appellant, Claremont Poultry Group Ltd. ("Claremont") runs a layer operation in the Fraser Valley. During the 2004 avian influenza ("AI") outbreak in the Fraser Valley, Claremont had two flocks destroyed (approximately 5200 pullets at the "Bergen" farm and 4800 birds at 1311 Clearbrook Road) as part of Canadian Food Inspection Agency ("CFIA") ordered AI prevention measures.

2. As a result of AI, there were a number of compensation programs set up by different agencies. CFIA compensated affected producers for lost revenue for the remaining life of slaughtered birds. The Canadian Egg Marketing Agency ("CEMA") and the British Columbia Egg Marketing Board (the "Egg Board") entered into an agreement, called the Orderly Repopulation Adjustment Program ("RAP"), to compensate producers for additional downtime experienced as a result of the need to repopulate in a staggered, orderly fashion. RAP was designed to compensate producers for the extended time they were required to wait beyond the 76 week maximum stipulated by the CFIA compensation program. Producers would be eligible for RAP payments from the time when they were last compensated directly by CFIA until their replacement flock was ready to commence production at 19 weeks of age.

3. In accepting the compensation package, the Egg Board committed to CFIA and CEMA that there would not be any "double dipping". A condition of the RAP program was that BC producers who had received CFIA compensation while they were also receiving egg revenue would be required to refund their compensation for the period in which "double dipping" occurred to offset CEMA's cost for the RAP program. As well, downtime was to generally be kept to the minimum required to ensure an orderly repopulation so as to mitigate CEMA's costs.

4. Claremont received CFIA compensation in the amount of $139,536.00 for its two destroyed flocks. The Egg Board determined that Claremont fell within the definition of double dipping and as such in October 2004, it assessed a claw back of $106,900.82 against Claremont's layer production revenues. The Egg Board has also been deducting levies of $569.73 weekly from Claremont since September 2004, for a flock housed at 1224 Clearbrook Road.

5. Claremont appeals this decision and maintains that the rules regarding double dipping have been misapplied to its operation.

PRELIMINARY ISSUE

6. At the outset of the hearing, the Egg Board raised the issue that this appeal may have been filed out of time and advised that it would make a submission to that effect at the conclusion of the evidence. In closing argument, the Egg Board advised that as the decision which is at the core of this appeal was made by the Egg Board on November 5, 2004, the appeal filed on June 22, 2005 was outside the 30-

day time period for filing an appeal. As this argument requires a review of the evidence, it will be dealt with in our decision.

ISSUES

7. The Appellant argues that the Egg Board erred:

    a) in its assessment that Claremont owes $106,331 as a result of double payment (compensation from CFIA and egg production revenue) arising out of events during and after the AI outbreak;
    b) in assessing approximately $25,000 in levies against Claremont; and
    c) in refusing to respond to Claremont's September 2004 and March 2005 applications for quota credits.

DECISION

Preliminary Issue

8. The Egg Board raised a preliminary issue as to whether this appeal was filed outside the 30-day time limit for filing an appeal pursuant to s. 24 of the *Administrative Tribunals Act* (the "*ATA*"). It appears from the evidence that the Egg Board made its initial decision to assess a claw back against Claremont in approximately September 2004. Unfortunately around this time, Terry Marson, President of Claremont was seriously ill and in the hospital. Egg Board staff made a decision that the invoice would not be sent. George Gray, managing Claremont on Mr. Marson's behalf, however sent his letter of October 1, 2004 clarifying the situation and had a meeting with the Egg Board on November 5, 2004. Subsequent to this meeting, the Egg Board maintains that it advised Mr. Gray of their decision to proceed with the claw back. Mr. Gray maintains that at no time did he receive any such advice. While he recalls talking to Peter Whitlock of the Egg Board's staff, it was his impression that no decision had yet been made. There is no letter confirming this decision until June 15, 2005 when the Egg Board sent a letter to the attention of Mr. Marson advising that since the amount of $106,331 had not been paid it would be deducted from future production payments. It was this letter which was ultimately appealed.

9. Section 24 to the *ATA* allows an extension of the time to file an appeal where a panel is satisfied that "special circumstances exist". In this case, we find that there are a number of special circumstances warranting an extension of the time for filing an appeal. There was a great deal of uncertainty in the industry arising out of AI and it is only very recently that the formal compensation agreement with CEMA was finalised. These factors coupled with the failure on the part of the Egg Board to communicate to both Mr. Gray and Mr. Marson in writing regarding its decision on this contentious matter, especially in light of Mr. Marson's health concerns, satisfy the requirement for "special circumstances". We will now address the substantive issues on this appeal.

Did the Egg Board Err In Clawing Back Compensation?

10. The main issue on appeal is whether the Egg Board erred in clawing back compensation paid to Claremont. The Appellant denies that it was double dipping and maintains that the Egg Board has misapprehended the complicated circumstances regarding its return to production after AI. The two other issues, largely contingent on our decision on the first issue are, whether the Egg Board erred by imposing approximately $25,000 in levies and by not issuing quota credits in response to Claremont's September 2004 and March 2005 requests.

11. In developing its case on appeal, the Appellant set out a complicated series of transactions involving leases of barns and purchase and the ultimate sale of pullets (layers less than 19 weeks of age) to other producers. For the purposes of this decision, the Panel does not intend to set out the very detailed chronology submitted by the Appellant. We instead will deal with each of the Appellant's grounds of appeal. That said, the Panel wishes to expressly note that we have carefully considered all of the evidence and submissions, even though we do not intend to refer to it all in the course of this decision.

12. For the purpose of this decision, the Panel makes the following findings of fact:

- In March 2004, Claremont housed its normal 13,800 bird placement by placing 9800 pullets on Vancouver Island and 4100 pullets (and 700 quota credit birds[1]) in a barn at 1311 Clearbrook Road in Abbotsford owned by W&G Poultry Ltd. ("W&G") of Abbotsford.
- In April 2004, the CFIA slaughtered the 4800 birds at 1311 Clearbrook Road and Claremont received $139,536.00 in compensation and in July 2004, Claremont paid $27,916.68 on account of levies attributable to these birds.
- On April 6, 2004, approximately 5200 pullets were placed at the "Bergen" farm in Abbotsford, a farm leased by Ken Vanderkooi. Walter Siemens of W&G asked Mr. Vanderkooi to raise the additional 5200 pullets concurrently with Mr. Vanderkooi's own pullets. The 5200 pullets were recorded on Chick Placement Permit ("CPP") #1709 in the name of Claremont.
- Shortly after the pullets were placed at the Bergen farm, the CFIA slaughtered all the birds at that location as part of AI control measures and

[1] Quota credits are issued by the Egg Board to assist in dealing with production related developments that cause producers to either be long or short on production. The majority of circumstances resulting in the use of quota credits are related to husbandry issues (e.g., abnormal bird survival rates). The Egg Board maintains a quota credits balance for each registered producer.

compensated Gray Farms Ltd. ("Gray Farms") $36,563.94 as CFIA pays the operator of the location where the birds were housed.

- In April 2004, Claremont acquired 14,560 pullets for flock replacement on Vancouver Island under CPP #1712.
- Of these, 4000 had to be placed somewhere other than the home farm due to pending cage density requirements.
- In August 2004, the 4000 Claremont birds from CPP #1712 were combined with 1600 excess pullets purchased from Rice Springs Farms Ltd. ("Rice Springs"). Mr. Gray arranged for all these pullets to be raised in a leased G&W barn at 1224 Clearbrook Road, under the ownership of Salmon Arm Poultry Ltd. ("Salmon Arm").
- In October 2004, the Egg Board issued an invoice to Claremont for $106,331.00 on account of the 4800 layers destroyed by CFIA ($83,942) plus an additional amount ($22,389) for the flock of 5121 pullets. The Egg Board determined that Claremont was receiving both egg revenue (from the 4000 birds ultimately sold to Salmon Arm) and CFIA compensation for 32 weeks based on a determined flock placement date (week 37) of the 4800 birds. With respect to the 5121 pullets at the Bergen farm, compensation was based on 8 weeks age and a calculated business interruption cost of $4.432 per bird (CFIA payment for a pullet at 8 weeks minus the deemed cost of raising pullet for 8 weeks).

13. Turning to the compensation issue first, the Panel accepts that the Egg Board has the authority to enter into compensation agreements on behalf of its producers; in this case it exercised its authority and entered into AI related compensation agreements with both CFIA and CEMA. The CFIA agreement compensated growers for loss of egg revenue from birds destroyed during the AI outbreak. The CEMA agreement (RAP) addresses orderly repopulation and compensates egg producers for lost production while waiting to repopulate.[2] Orderly repopulation ensures that egg production is managed and that the market does not experience a surplus or deficit of eggs. The Panel also accepts that these compensation programs are expensive and are funded either by taxpayers (CFIA), or industry (CEMA).

14. Because of the significant sums of public and industry money involved, the Panel finds that it is incumbent on the Egg Board to be diligent in ensuring that the programs are administered equitably and fairly among producers. The process of determining whether a producer qualifies for these programs requires close scrutiny.[3] This "second look" is fundamental to ensuring that the requirement for

[2] The Appellant only received CFIA compensation. It was not delayed in repopulating and therefore did not receive RAP compensation.

[3] In furtherance of this, the Egg Board did retain KPMG to perform an audit of the compensation programs to satisfy CEMA that the program was properly administered and those producers who had double dipped were assessed.

fairness and accountability is met. The Panel also accepts that preventing "double dipping" is fair, reasonable, and necessary, to ensure that producers' CEMA levies are no higher than required. Further, Egg Board scrutiny of transactions relating to the CFIA and CEMA compensation programs must not only include a review of the actions of a producer, but more importantly, must also consider producer motive. Egg producers hold quota and produce eggs for the market. Their legitimate motivation is to profit from egg sales not maximise benefit from compensation programs.

15. For this appeal to succeed, the Appellant must offer compelling arguments to convince the Panel that the Egg Board erred in concluding that the Appellant's motive in transferring pullets and birds was to avoid a claw back of compensation. If we are not persuaded that there is a valid business rationale for the pullet and chick transfers, we cannot rule in favour of the Appellant.

16. The Appellant argues that it is being subjected to a claw back because the Egg Board wrongfully attributed ownership based on CPP's for the 5121 pullet flock (the Bergen flock) and the 4000 bird flock. On this point, the Appellant relies on the evidence of several witnesses (Fred Krahn, John Penner, and Messrs. Vanderkooi and Siemens). These registered producers, all but the latter also members of the Egg Board, confirmed:

    a) It is not uncommon for pullets to be raised on a contract basis by someone other than the producer who ultimately houses the pullets as layers.
    b) Prior to AI, ownership of birds was determined by CPP's, hatchery submitted lists and through bird counts carried out by Egg Board inspectors. However, CPP's were not routinely filled in and as such are not reliable indicators of bird ownership.
    c) In fact, some producers either did not know that the "old" CPP's existed or had not filled them out when transferring birds to another producer.
    d) It is not uncommon for pullets to be sold by one producer to another for animal husbandry or purely business reasons. Historically, the Egg Board has not interfered in pullet transfers between registered producers, irrespective of whether a producer will be above or below quota. These commercial business transactions occur in a free market and the Egg Board plays no role, and never has played a role, in the commercial dealings of registered producers with respect to the transfer of pullets.

17. Accordingly, the Appellant submits that ownership of a flock cannot be attributed to Claremont based on a CPP or through any representation made by Mr. Gray about CPP's. CPP's deal with pullets, not layers. It is only after a pullet reaches 19 weeks of age and becomes a layer that it can be assigned an owner. Pullets are freely transferable without Egg Board involvement. Thus, the Appellant argues that it was wrong for the Egg Board to attribute ownership of the Bergen flock of pullets based on the CPP and consider the $22,389 paid when calculating "double dipping". In fact, Claremont maintains that it did not receive *any* compensation from CFIA for this flock; those monies were paid to Gray Farms as the operator of

the farm. Further, the Appellant argues that it is wrong to attribute ownership of the 4000 bird flock based on the CPP as a valid business decision was made to transfer those birds.

18. The Panel concludes that the Egg Board was correct in attributing ownership of the Bergen pullets to Claremont. In the course of the hearing, we heard no contrary evidence suggesting that the Bergen pullets were not intended for Claremont. Rather, the argument is that as pullets not layers were destroyed, ownership had not yet attached. Presumably the significance is that up until 19 weeks of age these pullets could have been freely traded. Since Claremont needed the layer production from this pullet flock to meet its obligation to produce to its quota allocation, we reject this argument.

19. The Appellant also points out that Gray Farms was paid compensation for the birds, not Claremont. The Panel finds that whatever private arrangement existed between Gray Farms and Claremont, it is not binding on the Egg Board. The Panel also accepts the evidence of Terry Preast, a contract pullet grower who confirmed that when he received the CFIA compensation, he transferred the compensation to the owner of the pullets. Similarly, Gray Farms could have reimbursed Claremont for its share of the compensation. In any event, for the purpose of determining whether there was an overlap in compensation and layer revenue, the Panel finds that the Egg Board was correct in attributing to Claremont the compensation received with respect to the Bergen flock.

20. Regarding the 4000 bird flock, the Panel finds that the Egg Board was correct in attributing ownership based on the CPP, as Claremont needed the production from this flock to meet its quota obligations. It remains however, to be determined whether the transfer of those pullets to Salmon Arm should have been recognised by the Egg Board. We deal with this issue below.

21. The Appellant also argued that the 4000 bird flock was not intended to be replacement birds for those destroyed as a result of AI. Rather these birds were the "replacement of the next flock of birds being housed in the adjusted normal flow" and as such there is no overlap of compensation and revenue. The Egg Board was clear on how it applied the rules to all producers. Both Messrs. Krahn and Whitlock confirmed that the Egg Board did not concern itself with a producer's normal production pattern or flock succession. Rather it looked at the time frame over which the producer received compensation and whether the producer received a new flock within that same time frame; if so, there was a deemed overlap. In the case of the Appellant, CFIA compensated to week 16 of 2005; however the new birds, according to CPP #1712, came into production in week 37 of 2004. This meant there was a 32 week overlap when Claremont would have been in receipt of both compensation and egg revenue, but for the sale of the 4000 bird flock to Salmon Arm.

22. On this flock succession issue, the Panel notes that the Appellant does not dispute that CPP #1712 identifies Claremont as the original owner of the birds. Rather it

contends that a deeper review of the historical flock replacement schedule indicates that these birds were not intended to replace the slaughtered birds, but were birds set on the regular schedule. However CFIA, CEMA and the Egg Board developed the rules for how compensation was to occur, how double dipping would be assessed, and the Egg Board applied these rules to all producers. Further, KPMG has completed an independent audit on the compensation programs to ensure the rules were followed. The Panel is not satisfied that the Egg Board erred in agreeing to the compensation program or in its application of the program rules to producers. As such, we find the arguments about historical flock rotation to be an irrelevant consideration.

23. We turn now to consider whether there were legitimate business motivations behind the transfer to Salmon Arm or whether this was simply an attempt to maximise compensation revenue. The Appellant maintains that there were significant operational and business motivators behind the transfer to Salmon Arm. These include:

- New cage size requirements forced Claremont to find alternative housing for the birds. The Lower Mainland was a possibility because there was available housing; however uncertainty created by AI led to discussions regarding Salmon Arm possibly raising the birds in Kelowna.
- Rice Springs had approached Mr. Gray regarding the disposition of 1600 excess pullets. Combining those birds with Claremont's 4000 birds allowed more efficient use of the Lower Mainland barn space.
- A global quota reduction ordered by the Egg Board in August 2004 required Claremont to reduce its quota by 4%, providing an incentive to sell.

24. The Appellant concedes that in spite of the uncertainty of AI, Salmon Arm raised the birds in the Lower Mainland, but there were good operational reasons. The alternative Kelowna facility was 1.5 hours from Salmon Arm's home farm and required renovation. Salmon Arm had prior experience with Mr. Gray as a manager and there was an industry advantage in having the eggs produced in the Fraser Valley where they were needed.

25. For its part, the Egg Board challenges the legitimacy of the transfer of Claremont birds to Salmon Arm. The Egg Board also points to the evidence of both Messrs. Penner and Gray who agreed that there was considerable concern about the viability of the poultry industry in the Fraser Valley in the wake of AI. Indeed, they highlighted this as the key factor in their formulations of alternative management plans for the birds ("Plan A and Plan B"). The Egg Board argues that in light of the uncertainty, it is unclear why Salmon Arm would house these birds in the centre of the Fraser Valley and not Kelowna. The Egg Board suggests that the real reason these birds were housed in the Fraser Valley was because the "sale" to Salmon Arm was only created to bolster the argument that these were not Claremont's birds.

26. The Panel agrees with the Egg Board. We find no evidence of any legitimate motivation for transferring the 4000 birds other than maximising compensation. On its own evidence, the Appellant was under quota during the relevant time frame. Given this, it is not clear why the Appellant would choose to transfer production. The whole point behind the Plan A/Plan B scenario would appear to be opt for Plan A unless that would trigger a claw back by the Egg Board in which case the Appellant would opt for Plan B. Further, we specifically find that the way the Plan A/Plan B scenarios were designed was to provide flexibility so as to allow either option to be retrofitted to suit the Appellant's decision whenever it happened to make that decision. We say this because the production remained in the Lower Mainland, going to the same grader, in a barn that the Appellant could just as easily have had access to, and the monies continued to flow to Claremont with no issue by either producer. We can come to no other conclusion but that the Appellant's motivation was solely to protect its compensation.

27. Given this finding, it follows that we also reject the Appellant's argument that Golden Valley's request to the Egg Board to have the egg revenues from the 4000 bird flock deposited in Salmon Arm's bank account is independent proof of the transfer to Salmon Arm. We accept Mr. Whitlock's evidence that it was very peculiar for such a request to come from the grader and not the producer. Further, when the Egg Board did not respond to this request, it heard nothing from either Salmon Arm or Claremont. If the request were valid, the Egg Board would have expected one or both parties to contact them and formally ask for the change to be made. The Panel agrees. Failure of either producer to contact the Egg Board and demand a change in the deposit information leads us to conclude that having the grader make this request was an attempt to bolster the ownership argument, rather than a demonstration of legitimate concern over who should properly be paid.

28. The Appellant also argues that the Egg Board having approved the sale to Salmon Arm through licensing, enumeration and the claiming of quota credits cannot also attribute those same birds to Claremont. The Appellant argues that the Egg Board's conduct proves the flock does not belong to Claremont. Several witnesses attested to the existence of written and verbal agreements, made outside the Egg Board office, regarding the flock and its rightful owners. The Panel heard and considered this testimony. However in the end, we conclude that motive must play a role in the analysis of this argument as well. The Egg Board's actions in approving the transfer of pullets to Salmon Arm do not alter our characterisation of the Appellant's conduct or the underlying motive. The decision to sell birds to Salmon Arm is inconsistent with an intent to get back into production as soon as possible. If that was Claremont's intent, taking the first flock available would be logical. Selling the first flock and putting oneself in a position where one cannot meet the primary business objective of egg production, only makes sense if one is trying to maximise compensation.

29. A key aspect of the Appellant's argument rests on the contention that the staff of the Egg Board did not respond in a timely manner to Claremont's repeated requests

for clarification and direction on the proposed Plan A or Plan B. Had there been solid answers to its questions, the Appellant argues it would have been able to make appropriate management decisions. The Panel finds ample evidence of discussions between the Egg Board and Claremont. Claremont wrote to the Egg Board on several occasions, to both seek advice and provide clarification as to what they were doing. In November 2004, after the issuance of the RAP invoice, Mr. Gray met again with the Egg Board. The Egg Board does not deny that Claremont was repeatedly asking for direction, but instead maintains that this speaks to Claremont's motive. With respect to why the staff did not provide concrete direction, Mr. Whitlock stated:

> Once it was evident that---that what you were looking at doing was selling the birds to avoid the claw back, the staff's opinion on that is that that needed to be brought to the Board and the Board needed to make a decision of whether they would allow that or not.

30. It is clear to the Panel that Egg Board staff suspected Claremont's motives from the outset. We also note that the final details of the CFIA and CEMA agreements were not known during the time of these discussions and, in fact. the CEMA agreement was not finalised until two weeks prior to this hearing. Given the potentially severe consequences associated with providing erroneous information, the Panel finds that it was prudent and proper for staff to avoid providing Claremont with firm answers to their queries. Mr. Gray indicated that in the absence of solid answers from the Egg Board, Claremont made management decisions on its own. However, the Egg Board suggests, and the Panel agrees, that Claremont and more specifically, Mr. Gray, were not operating in an information vacuum. The Egg Board sent numerous letters to registered producers relating either generally or specifically to the CFIA and CEMA compensation programs. The April 7, 2004 letter is particularly instructive in this regard. Aside from stressing that the key principle in repopulation decisions would be fairness and equity, the Egg Board put all producers on notice that "no private arrangements will be allowed". While this statement was made in the context of quota movement, this letter and the other letters noted, provided producers with insight into the nature and tenor of the discussions taking place at the time regarding compensation programs.

31. The Panel also acknowledges that Mr. Gray was in a unique position of knowledge within the industry. He was on the repopulation committee from its inception and was privy to detailed discussions regarding how compensation programs would work. He was at a particular advantage with respect to repopulation plans and the negotiations between the Egg Board, CFIA and CEMA. It is not inconceivable that this knowledge informed Mr. Gray's advice to Claremont. Mr. Gray's other roles in the industry (e.g. hatchery representative and manager of his own farm) make it unlikely that he was unaware of Egg Board correspondence to producers and the evolving negotiations regarding compensation programs. In the end, the Panel finds that Mr. Gray's persistent attempts on behalf of Claremont to obtain some form of relief or exemption stems in part from his high level of awareness with respect to how the compensation programs would ultimately work.

32. Having addressed the detailed submissions advanced before us, we consider it appropriate, finally, to emphasize in more general terms that this appeal is fundamentally about the administration of spending programs designed to assist poultry producers to recover from a crisis. Persons applying under these spending programs are not akin, for example, to persons trying to structure their affairs so as to lawfully minimize tax under a taxation statute. There was no coercive aspect to these programs. Pure spending programs like these are not matters of right; they are not entitlements. They were established in good faith and at considerable expense of taxpayers and the industry, to ensure that deserving producers, making all proper efforts to get back into production, were assisted through a crisis owing to reasons beyond their control. The fact that money was paid before the formal agreements were ultimately formalized demonstrates the crisis response nature of the program. Those creating and funding the program rightly expected that those seeking monies were doing so in accordance with its intended purposes, and that monies would not be paid out to persons seeking to take advantage of the programs by arranging their affairs so as to achieve maximum compensation for its own sake; hence the concern about double payment.

33. Accordingly, we find that the Egg Board did not err in assessing a claw back of $106,331 on account of double payment to Claremont.

34. Based on that conclusion, we affirm the Egg Board's assessment of approximately $25,000 in levies against Claremont for the 4000 bird flock. Levies are the responsibility of the owner of the birds and are therefore owed by Claremont.

35. Finally, we affirm the Egg Board's decision to deny Claremont's September and March application for quota credits. Quota credits are designed to assist producers in dealing with unpredictable events in the production cycle that impact bird numbers. They are not intended for use in cases where bird numbers have been affected by deliberate actions of the producer shorting production.

ORDER

36. The appeal is dismissed.

37. Initially, the Panel thought that this may be an appropriate appeal in which to assess costs against the Appellant. However, we do not do so for two reasons. The Egg Board did not seek its costs in this appeal. Further, the Panel did not have the benefit of hearing from Mr. Marson, President of the Appellant, regarding the issues on this appeal. In the absence of having that opportunity, we are not prepared to assess costs against the Appellant.

Dated at Victoria, British Columbia this 8th day of March 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by)

Christine J. Elsaesser, Vice Chair
Garth Green, Member