

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION TO REDUCE THE
FARM GATE PICK-UP RATE

BETWEEN

VEEKENS EGGS LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA EGG PROCESSORS COUNCIL

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Sandra Ulmi, Panel Chair
Richard Bullock, Chair
Dave Merz, Member

For the Appellant

Theresa Andren

For the Respondent

Robert P. Hrabinsky, Counsel

For the BC Egg Processors Council

Walter Puetz
Aryn Alibhai

Date of Hearing

April 3, 2007

Place of Hearing

Prince George, British Columbia

INTRODUCTION

1. The production of eggs in Canada is governed by a national supply management system. A national quota of eggs is established each year based on what is needed by the table and processing markets. This amount is allocated to provincial and territorial boards such as the British Columbia Egg Marketing Board (Egg Board), which then allots quota to registered producers in their jurisdiction.
2. Each provincial board sets prices for the eggs produced within its boundaries by using a national cost of production formula. Grading stations pay these set prices to the egg producers and then sell the eggs to wholesalers, retailers, and the institutional sector at negotiated prices. Because eggs are priced on a national formula where provinces price off a base price set for Manitoba, there is little ability for the Egg Board to adjust the price paid by BC graders to egg producers.
3. To assist graders in one province to compete on price against graders in another province, boards have instituted “allowances” such as farm gate pick-up fees which are paid by the egg producers to the graders to defray some of the graders’ costs for transporting and handling the regulated product.
4. The BC farm gate pick-up fees are capped at \$936,000 based on an agreement among the four Western Provinces. This amount is shared among all BC egg graders.
5. Theresa Andren, owner of Veekens Eggs Ltd. (Veekens) is appealing the October 25, 2006 decision of the Egg Board to reduce the farm gate pick-up rate paid to her egg grading station located in Prince George, BC.
6. The appeal was heard on April 3, 2007.

ISSUE

7. Did the Egg Board err in reducing the Appellant’s farm gate pick-up rate below \$.0635172039 per layer?

FACTS

8. Theresa Andren, the Appellant, and her husband Les Andren, own and operate an egg grading station located at 5520 South Blackburn Road in Prince George, BC.
9. When the Andrens purchased the grading station in May 2005, it was grading the eggs from 38,000 birds housed on Veekens Farms owned by Ms. Andren’s brother,

Peter Veeken. In May 2006, Mr. Veeken sold his quota to produce eggs. Over the next few months, production from 18,000 of his birds was transferred to the Fraser Valley, thus removing much of the supply of eggs from the grading station. The remaining 20,000 birds remain at Mr. Veeken's farm located approximately 400 meters from the grading station. The eggs from these birds are produced under a lease arrangement by Toor Farms and are still graded by Veekens.

10. In July of 2006, the Egg Board directed product from Mountain Morning Farms in Salmon Arm to Veekens to make up for some of their lost production. At that time, the Egg Board agreed to pay Veekens a farm gate pick-up rate of approximately \$.06 per layer to transport the eggs from Salmon Arm to Prince George.

11. In mid-October 2006, the Egg Board temporarily directed to Veekens the production of 28,548 layers from Salmon Arm Poultry Farm Ltd., 13,397 layers from Salmon Valley Eggs Ltd. and 5000 layers from Jack Shaule. These farms are all situated in Salmon Arm.

12. On October 18, 2006, Veekens received a letter from the Egg Board stating:

Effective week 42 your farm gate pickup will be amended to include out of area rate of .0635170239 per layer for the above farms. This directive will end all freight recovery arrangements that are currently in place between the British Columbia Egg Marketing Board and Veekens Eggs.

13. On October 25, 2006, the Egg Board sent a letter to Veekens changing this rate. This letter read:

Further to our letter of October 18, 2006, this is to advise that effective week 42/06 your farm gate pickup is *corrected* at a rate of 0.0380865662 per layer at this time.

This rate will be adjusted from time to time as direction of product to and from graders is changed. [emphasis added]

14. No reason or basis was given for the correction.

15. On November 2, 2006, following a board meeting of the Egg Board which reviewed staff decisions on the farm gate pick-up rates paid to Veekens and the concerns expressed in a letter from Aryn Alibhai of Sunshine Eggs, Veeken's received another letter which read:

The decision of the Board is to ensure that farm gate pickup is applied as per agreement with all graders established earlier this year.

In that regard, the farm gate pickup applied to the eggs redirected to you from Mountain Morning Farms cannot exceed the established interior rate, which will be effective November 26, 2006.

16. The interior farm gate pick-up rate is \$0.013586697.

17. Thus, over a period of approximately a month and a half, Veekens' farm gate pick-up rate was reduced from approximately \$.06 to approximately \$.01.
18. At the hearing of the appeal, the Egg Board advised that it had developed a "new adjusted farm gate pick-up rate" to be applied to Veekens having regard to the distance between the grading station and the production facilities. This new rate was \$0.02009652611 per layer.

ARGUMENT OF THE APPELLANT

19. The Appellant argues that in October of 2006, the Egg Board redirected production to Veekens and agreed to pay them \$0.06 per layer. Subsequently, without notice or consultation, and in a very short time frame, the Egg Board reduced this amount, first to approximately \$0.03 and then to \$0.01. This resulted in uncertainty and unfair treatment to Veekens.
20. Veekens submits that for some time they were paid the full freight rate, which is approximately \$0.06 per layer, for transporting eggs to their grading station. They argue that since the Egg Board allowed the quota to leave the Prince George area, the Egg Board should at least honour its commitment to pay farm gate pick-up fees of \$0.06 and that this payment should be retroactive to October 2006.
21. Veekens also argues that there was no negotiation with them regarding the decreases in their farm gate pick-up rates and that they received very little notice of the changes. In addition, they were given no reasons for the decreases in rates.
22. Veekens submits that the calculations for the rates are confusing and that they must take the Egg Board's word for the rates as they have no choice in the matter.
23. Finally, Veekens states that it is very difficult to run a business and to have a valid business plan when the regulatory conditions under which they are doing business change often, without notice, and with no reasons given.

ARGUMENT OF THE RESPONDENT

24. The Egg Board states that the farm gate pick-up fees are a way to defray the transportation costs of graders and that the producers are actually subsidizing graders in paying these costs. It argues that it is not the responsibility of producers to subsidize graders.
25. The Egg Board submits that this is a unique appeal in that it touches upon a number of policies implemented by the Egg Board. In addition, in preparing for the hearing, the Egg Board gave further consideration to the appeal and has changed its position

concerning the proper disposition of the appeal from the determination originally made by it.

26. The Egg Board states that the only reason full freight recovery is paid is when eggs are moved from grader to grader, or to deal with an issue in the industry. The reason that Veekens received full freight payment in 2006 was because of an issue with Mountain Morning Farms necessitating transportation of their eggs to Veekens on a temporary basis to manage the crisis. The Egg Board submits that many decisions made by them to achieve a policy objective will have the effect of conferring an incidental benefit. It argues that because Veekens received full payment at one time, as an incidental benefit, does not mean that they are entitled to it on an ongoing basis.
27. The Egg Board states that the reason Veekens' farm gate pick-up rate was adjusted from \$0.06 to \$0.03 was an error made by the Egg Board and was altered because of the increased volume of eggs then being directed to Veekens from farms in Salmon Arm, BC.
28. The further decrease to \$0.01 was a decision of the Egg Board after it reviewed the interim process with respect to farm-gate pick-up and freight rates put in place by staff. Furthermore, at the same time the Board discussed a letter received from Sunshine Eggs expressing concerns regarding the variance from established farm gate pick-up rates regarding the production directed to Veekens.
29. The Egg Board states that farm gate pick-up rates have been exhaustively considered by the Egg Board and others in the industry, including the British Columbia Farm Industry Review Board (BCFIRB). However, the Egg Board now submits that:

...an adjustment to the Appellant's farm gate pick-up rate may be appropriate – provided that such adjustment is rational and equitable. Specifically, it is the position of the Egg Board that the "Interior" rate of (\$0.0135967220 per layer) can rationally and defensibly be "adjusted" for the Appellant having regard to the following factors:

- a) In or about early 2004, the production from Tabor Lake Eggs moved from the Interior. In September of 2006, Peter Veekens sold all of his quota on the Quota exchange resulting in a further reduction to the production available in the Interior.
- b) The Egg Board has temporarily directed production (up to 46,945 layers) to the Appellant from producers situated in Salmon Arm.
- c) The Appellant continues to receive production from 20,000 layers which is situated within approximately 400 metres from the Appellant's grading station.
- d) The Appellant is the only grading station known to employ common carriers to transport eggs. It is estimated that the cost of using a common carrier is approximately 80% greater than the cost of using grader-operated trucks.

- e) The farm gate pick-up fund has been and should remain capped pursuant to an accord reached among the Western Provinces to stem the erosion of the producer price.
 - f) The “equitable” (though not equal) basis upon which graders share the capped farm gate pick-up fund is to have regard to the grader’s reasonable costs for transportation and handling (to the extent that it is possible to do so within the confines of a “capped” amount).
30. The Egg Board argues that the farm gate pick-up rate can be rationally and defensibly adjusted for the 46,945 layers that Veekens is temporarily accessing from Salmon Arm. However, it argues that it is neither rational or defensible to provide a farm gate pick-up fee for the 20,000 layers situated within approximately 400 metres from the Appellant’s grading station. Nor, it argues, is it defensible to have regard to the Appellant’s costs for transportation on the basis of common carrier expenses.
31. The Egg Board states that adjusting the interior rate for the Appellant, having regard for these factors, would result in a rate of \$0.02009652611 per layer (excluding the production situated next to the Appellant’s grading station). The Board argues that this proposed adjusted rate is proportionate to the rates received by other graders having regard to the distance between grading and production facilities.

POSITION OF THE INTERVENER

32. The Intervener, the British Columbia Egg Processors Council, stated that all graders should be treated fairly and equitably. It argued that to be fair and equitable, the BCFIRB should not reverse the Egg Board’s decision to reduce the Appellant’s farm gate pick-up fees below \$0.06 per layer.

DECISION

33. The Panel accepts the Egg Board’s jurisdiction over the farm gate pick-up fees and how they are administered. Under the *Natural Products Marketing (BC) Act* (the *NPMA*) and the *British Columbia Egg Marketing Scheme, 1967* (the *Scheme*), the Egg Board has the authority to make “such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of the regulated product and to amend or revoke the same”: *Scheme*, s. 37(o).
34. The Panel acknowledges that the Egg Board must frequently make difficult decisions in complex and often overlapping areas. We understand that situations change and rules must be flexible to deal with changing circumstances.

35. The Panel also agrees with the Egg Board that simply because an individual receives a benefit at one time due to a specific situation such as a crisis in the industry does not mean that individual can be assured of receiving those benefits on an ongoing basis. Specifically, we think it is unreasonable for Veekens to expect the Egg Board to pay the same farm gate pick-up rate when they receive a large volume of eggs from the Salmon Arm area compared to the rate paid when the supply was smaller and coming only from Mountain Morning Farms.
36. Neither does the Panel believe that the Egg Board must pay all of the freight costs to supply eggs to Veekens on an ongoing basis simply because there were once eggs produced in the Prince George region and some of those eggs are now produced in the Fraser Valley. Specifically, in this case, Peter Veeken sold his grading station to his sister, Theresa Andren in 2005 and then sold his quota out of the region in 2006, contributing to the supply shortage now being experienced by the Veekens grading station. Businesses change and markets change and the Egg Board cannot be responsible for producers' decisions or businesses leaving one area for another.
37. However, it is the job of the Egg Board to administer all of its programs, including the farm gate pick-up fee program, in a fair and transparent manner. In the opinion of the Panel, part of fair and transparent administration is that everyone involved in programs should clearly understand the rules and know what can be expected from the program.
38. In our opinion, it was not fair, equitable, or transparent to change the rates received by the Appellant three times in a very short time frame without giving reasons or notice. Very little evidence was given by the Egg Board on the rationale for changing the rates paid to Veekens. We accept the evidence of the Appellant that it is very difficult to carry on business when the conditions of doing business keep changing without reasons or notice. We also accept the evidence of the Appellant that in this case, the rules and the calculations were confusing and she was given no explanation and no choice but to accept the decision of the Egg Board when her fees were changed.
39. The Egg Board submits that the freight rates have been exhaustively studied. If this is the case, the Panel is surprised that mistakes are still being made when determining rates and that no reasons are forthcoming for radical changes made to the rates paid. We expected, at a minimum, to be shown the guidelines used by Egg Board when determining rates to pay grading stations and when rates could be altered for extenuating circumstances. No such evidence was presented.
40. The evidence of the Egg Board was that the initial \$.06 rate paid to Veekens was an incidental benefit received by Veekens as a result of an issue in the industry. The Panel expects that in a well-administered system, when an individual receives an incidental benefit, that the recipient would be told that this was a temporary benefit,

given the parameters of the benefit and the conditions which could or would end this benefit. This was not the case for Veekens.

41. After hearing the evidence and reviewing the submissions, neither the reasoning of the Egg Board for the initial determination of Veekens' freight rates, nor what motivated the radical changes to these rates are clear to us. The evidence given was that no other grading station has ever received a farm gate pick-up rate of \$.06 per layer or received 100% of freight costs.
42. Furthermore, the Panel remains very unclear as to the basis and rationale for the new rate – the adjusted interior rate of \$0.02009652611 - proposed by the Egg Board merely days before this hearing. We have carefully considered the explanation the Egg Board has given as justifying the new rate. The Egg Board has stated that the focus should be on "the grader's reasonable costs for transportation and handling (to the extent that it is possible to do so within the confines of a "capped" amount)". We find that general principle to be sound. However, we were given no specific information on how that principle was applied, either in the original interior rate, or in the revised rate, or in any of the previous rates. In the case of both the original interior rate and the revised rate, we were not given a formula, a rationale for the factors used in the formula, information about how those factors were applied, or what weight a particular factor was given, and why. Had that information been available, we assume it would have been provided to the Panel given the mandatory requirement in s. 8(4) of the *NPMA* that the marketing board provide the provincial board every document touching on the appeal. We were, in the end, given a conclusion. On these sorts of policy questions, it is important for a commodity board or commission to take all reasonable steps to avoid the perception that it is taking an ad hoc approach.
43. The Panel received no evidence regarding the criteria for who would qualify for this newly adjusted interior rate nor any evidence regarding any substantive consultation done within the industry to arrive at this rate. The Egg Board argues that this new rate is not out of line because of the distances involved. However, we heard no evidence regarding the specific distance a grader had to be from the producers to qualify for this rate. In this case, the distance from producers to Veekens is approximately 500 kilometers. Would a grading station 300 kilometers from the producer also qualify? What would the difference be in the rate? Are there other graders who would qualify for this rate? How would a grader know if he would qualify for this rate? What is the formula and what precisely are the factors that go into determining a rate that is calculated to 11 decimal places? In our view, this lack of detail shows that the rate structure is not clearly or transparently defined.
44. From the evidence presented, the Panel has no way of knowing what farm gate pick-up rate should, as a matter of sound marketing policy, be paid to Veekens because of the distances involved in transporting eggs from Salmon Arm to Prince George.

45. While recognizing the difficulties of making judgment calls in a complex area, based on the evidence and submissions presented at this hearing, the Panel finds that there were significant errors in practice and judgment in the process carried out by the Egg Board. Making changes without consultation, not being clear on the basis for rates paid and varying the rates from the set rates without giving reasons leave us with the opinion that this program is not being consistently and fairly administered.
46. The Egg Board must address this shortcoming and ensure that the Appellant, and all others in the industry, are clear as to what farm gate pick-up fees should be at any location in the province and in all circumstances. This can only be done through thorough consultation with industry stakeholders resulting in a clear and understandable set of rules for administering the farm gate pick-up program. While flexibility may be built into the guidelines, the basic reasoning behind the rates and when the rates can vary must be clear to all.
47. The Panel is aware that a similar challenge, to develop clear and transparent guidelines, was given to the Egg Board by BCFIRB less than a year ago. It appears that the guidelines developed by the Egg Board, and accepted by BCFIRB at that time, did not contain sufficient detail to prevent appeals such as this from developing.

ORDER

48. The Egg Board is ordered to submit to BCFIRB, within 90 days of the date of this decision, and following consultation with Veekens, the British Columbia Egg Processors Council, the Egg Industry Advisory Committee and other interested parties, a recommended farm gate pick-up rate for the interior region. This recommendation must describe: (a) the formula used in calculating the rates; (b) a documented rationale for each element used in the formula, (c) the weight each element in the formula has been given, and why, and (d) the rationale for any recommended departure from the formula in the case of Veekens. We will then make a determination which rate should be paid to Veekens in order to resolve this appeal, subject to obtaining such further information we may require.
49. The Order we have just made requires us to determine what rate ought to be paid to Veekens in the interim, until this appeal is finally decided. This is not an easy question to answer. We have just held that none of the several rates the Egg Board has extended to Veekens over a relatively short period of time has a clear policy rationale, justification or superiority. The very point of this decision is to enable the determination of a rate that does.
50. Any rate that we choose at this stage must necessarily be provisional until a final rate is determined. As such, it is our view that the interim rate we choose should be

the minimum rate that the best evidence suggests would not jeopardize Veekens' ability to carry on business until the issue has ultimately been resolved.

Ms. Andren testified that \$.03 is the minimum rate she requires to carry on business. In all the circumstances of this case, including our findings above regarding the difficulties Veekens has experienced on this issue, we accept that number for this limited purpose.

51. We order the Egg Board to pay Veekens \$.03 per layer for eggs transported from Salmon Arm from the date of this decision until further order from this Panel. This interim rate will allow Veekens to carry on business until the resolution of this appeal, without undue unfairness to others, as we have not been advised of any other grader who is in the same circumstances as Veekens.
52. In setting this interim rate, we wish to emphasize that the business needs of Veekens or any other grader cannot dictate the freight rates ultimately chosen. The appropriate rate ultimately selected may well be higher or lower than \$.03, and may well vary depending on the consideration of reasonable cost given distances involved. It is important to note that freight rates are not to be created or used to protect and sustain graders for their own sake when markets and production patterns change. The purpose of freight rates is to help achieve the public interest in efficient and effective egg production. Freight rates - if they are considered appropriate at all - are intended to enable production to be graded and transported for the benefit of the industry. Where egg production must be shipped long distances to achieve marketing policy objectives, the rates should reflect the importance and realities of that task, and be calculated in a principled way within the limits of the overall funds available. Any proposal submitted by the Egg Board pursuant to this Order must reflect this principle.
53. The Panel has considered whether the circumstances of this appeal warrant a review and revision of the freight rate policy on a provincial level. We have decided to defer answering that question until this appeal has been resolved.

Dated at **Victoria, British Columbia** this **7th** day of **June, 2007**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(original signed by)

Sandra Ulmi, Panel Chair
Richard Bullock, Chair
Dave Merz, Member