

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING A DENIED CHICK PLACEMENT PERMIT APPLICATION

BETWEEN:

WILLIAM AND PETER POTTRUFF

APPELLANTS

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine J. Elsaesser, Vice Chair
Sandra Ulmi, Member

For the Appellants

William Pottruff
Peter Pottruff

For the Respondent

David Taylor, Chair
Arlene Lannon, General Manager
Peter Whitlock, Operations Manger

Date of Hearing

January 27, 2005

Place of Hearing

Nanaimo, British Columbia

INTRODUCTION

1. This appeal raises issues with respect to the authority of the British Columbia Egg Marketing Board (the “Egg Board”) to reject applications for Chick/Pullet Placement Permits (“CPP”).
2. In September 2004, the Appellants William and Peter Pottruff applied to the Egg Board for a CPP. The Pottruffs do not hold quota and applied to place 2400 chicks. Apparently, the Pottruffs have been acting as intermediaries raising chicks and selling pullets to other unregulated producers.
3. On September 13, 2004, the Egg Board “declined” the Appellants’ application for a CPP.
4. On September 26, 2004, the Appellants sent a letter to the British Columbia Farm Industry Review Board (the “Provincial board”) appealing the rejection of their CPP arguing that the Egg Board:
 - a) lacked authority to regulate chicks under 19 weeks of age;
 - b) failed to provide reasons for the decision;
 - c) fettered its discretion; and
 - d) failed to consider the facts of the application including the Appellants’ willingness to supply records of their sales and confirmation that the pullets would be placed in compliance with existing regulatory exemptions.
5. The Appellants also argue that the historical context is relevant. In 2001, the Egg Board disregarded their application for temporary quota and by so doing prevented them from becoming part of the regulated system. They argue that this is ultimately why their permit was rejected and by rejecting their permit the Egg Board has acted in an unfair, singular and inappropriate manner.
6. On December 28, 2004, the Appellants applied for default judgment “on the grounds that the (Provincial board) did not hear this matter in the required 60 days” and their “right to a timely hearing of this matter was not observed and the financial damage of the Egg Board’s decision has already been done”. The Appellants argued that as the appeal had not been conducted in accordance with the *Natural Products Marketing (BC) Act*, the appeal should be granted in their favour.
7. On December 29, 2004, the Egg Board applied pursuant to s. 31 of the *Administrative Tribunals Act* for an order that certain grounds for appeal be summarily dismissed as being out of time. These grounds were set out on the pre-hearing conference report as:
 13. The Egg Board has disregarded our application for temporary quota, and thereby not allowed our business ventures to become part of the regulated system resulting directly in this permit rejection.

...

17. The issue of temporary quota, already addressed by the (British Columbia Farm Industry Review Board) be revisited, as the Egg Board is not in compliance with this previous decision dated January 17, 2001.
8. By letter dated January 21, 2005, the Provincial board dismissed the Appellants' application for a default judgment. The application was misconceived as there is no basis in law to win an appeal, let alone obtain a "default judgment", if the body hearing the appeal fails to meet a time limit. The only possible legal consequence could be a loss of jurisdiction if a court so found but in this case, there was no loss of jurisdiction as the parties' agreement to the pre-hearing conference date could be taken as their agreement to a brief extension of the appeal period.
9. As for the application for summary dismissal, the Provincial board found that the "temporary quota" issue was out of time and that the Appellants' argument that not having temporary quota led "directly" to the permit rejection was insufficient to provide special circumstances justifying an extension of the time to appeal. Accordingly, the Provincial board summarily dismissed Ground 3 and Remedy 3, as identified in paras. 13 and 17 of the January 5, 2005 pre-hearing conference report.
10. The matter proceeded to hearing, January 27, 2005 in Nanaimo, BC.

ISSUE

11. Did the Egg Board err in declining the Appellants' application for a CPP so that chicks could be supplied by Echo Hatchery for the unregulated market?

FACTS

12. In approximately 1994, the Appellant, William Pottruff and his wife purchased two acres of agricultural land at 3259 Hallberg Road in Ladysmith, British Columbia. He built a barn on the property and in 1995 began raising laying hens and operating an unregulated layer farm under the name Iam Eggs Farm. He also runs an egg grading station.
13. Peter Pottruff is the father of William. He is also a former Field Representative of the Egg Board.
14. For some period of time, the Appellants had been purchasing chicks from Echo Hatchery (amongst others) and selling them to unregulated Vancouver Island producers. By doing this and by voluntarily keeping records, they understood they were meeting biosecurity requirements.
15. In July 2004, the Egg Board amended s. 5 of its Standing Order to require pullet growers to obtain a CPP prior to requesting chicks from a hatchery and to report all

sales and shipments of started pullets. Before this revision, producers did not usually complete CPPs. Hatchery operators or pullet growers were simply required to record and furnish sales and shipments information for pullet chicks and started pullets to the Egg Board after the fact.

16. In the fall of 2004, the Appellants were advised by a representative of Echo Hatchery that they had to apply for a CPP before they could receive any chicks. Previously, the Appellants received their chicks from the hatchery without obtaining a permit.
17. On September 7, 2004, the Appellants applied for a CPP from the Egg Board in the amount of 2400 chicks. There was a note at the bottom of the application stating that “all sales to unregulated sector on Vancouver Island (i.e. max 99 Birds). Records of all sales to be maintained as birds are sold.”
18. The Egg Board returned the application to the Appellants on September 13, 2004 marked as “declined”.

ARGUMENT OF THE APPELLANTS

19. The Appellants argue that the Egg Board has no right to refuse the application for a CPP as they were doing what they had always done, supplying chicks to other unregulated producers on Vancouver Island with flocks up to the allowable number of 99 chicks. The permit application clearly stated that while the sales were for the “unregulated market”, they would be sold in lots of maximum 99 birds and records would be kept of all placements.
20. The Appellants maintain that they have been keeping records all along and have done so voluntarily. At no time have they been notified by the Egg Board that procedures have changed. In the past, if there was a CPP involved, the hatchery must have been making the application. In response to the Egg Board’s allegation of continued non-compliance, they argue that their grading station did not receive the November 24, 2003 registered letter notifying them to report marketing and remit levies from all unregistered production marketed by them. The Egg Board has the wrong address for the grading station which may explain why the letter was not received. However, they acknowledged receiving their grading licence which was sent to the same address in January 2005.
21. The Appellants argue that the Egg Board has fettered its discretion. The only reason that the CPP was denied was based on their past history with the Egg Board.¹ It was not based on the facts of the application and the Appellants’ agreement to maintain records. They argue that they are being unfairly singled out.

¹ Both William and Peter Pottruff have been the subject of enforcement proceedings commenced by the Egg Board for illegal production resulting in appeals to the Provincial board.

22. The Appellants also make the rather unique argument that the Egg Board has no jurisdiction over pullet sales as the *British Columbia Egg Marketing Scheme, 1967* (the “*Scheme*”) gives the Egg Board the right to regulate “eggs” and “layers” (birds over 19 weeks of age) but does not include the right to regulate pullets. Therefore, the Egg Board cannot refuse the Appellants’ application for a CPP and has overstepped its authority as set out in the *Scheme*.
23. In terms of remedy sought, the Appellants seek compensation for the \$2/bird of lost profit they have incurred as a result of not being issued a CPP. They calculate their losses at \$7500 and seek that amount in compensation from the Egg Board.

ARGUMENT OF THE RESPONDENT

24. The Egg Board argues that since the Avian Influenza (“AI”) outbreak, the Egg Board has tightened its regulations in order ensure that it can identify the location of all flocks in British Columbia. While this is a work in progress, the requirement for all producers to obtain a CPP is a step in the right direction in support of improved biosecurity for the BC poultry industry.
25. Unregulated birds were always supposed to be tracked, but now the Canadian Food Inspection Agency wants all small flocks tracked so that a map can be provided of the location of all birds throughout the province in the event of another emergency. In response, the Egg Board amended its Standing Orders and in September 2004 advised all hatcheries that it needed to know where all chicks were being placed. Hatcheries are now required to receive approved CPPs from all individuals before they provide them with birds. In order to approve CPPs, the Egg Board must have the names and addresses of the final destination of the chicks.
26. In a letter dated November 24, 2003, the Egg Board notified all grading stations (including Iam Egg Farm operated by the Appellants) by registered mail, that they must report marketings and remit levies from all unregistered production marketed by them. The Egg Board noted that the Appellants have not complied with this letter and have not been remitting levies or reporting the chicks being brokered.
27. In response to the Appellants’ argument that the Egg Board does not have jurisdiction over pullets, the Egg Board argues that all layers hatched for the purposes of egg production fall under its jurisdiction as outlined in the *Scheme*. The Egg Board maintains that its authority to regulate any chick hatched to become a layer has been previously upheld by the courts.
28. The Egg Board has had a long history with the Appellants. They have not paid levies or given the Egg Board the names and addresses of the persons who have bought their birds, and have generally disregarded the rules of the Egg Board. The Egg Board is simply not prepared to approve the Appellants’ CPP when they do not fall within the guidelines (i.e. they do not have a permit or quota and they are not producing the 2400 birds). Further, they are not prepared to take the risk that the

Appellants will live up to their agreement to report where all birds are placed. While the Egg Board has no problem with what the Appellants want to do, it wants a demonstration that they will follow the regulations of the Egg Board in good faith before giving any concessions and issuing a CPP.

DECISION

29. The first issue to consider is the Egg Board's authority to regulate the sale and distribution of pullets (birds less than 19 weeks of age). The Appellants argue that the *Scheme* defines regulated product as "layers and all classes of eggs of the domestic hen". The Egg Board's definition of "layer" in its Standing Order is a bird 19 weeks or older. The Egg Board only has authority over "regulated product", namely eggs and layers. The Appellants therefore argue that the Egg Board lacks the authority to regulate pullets, as they are birds less than 19 weeks of age and as such not within the Egg Board's mandate. By attempting to regulate pullets, the Egg Board has overstepped its authority. While the Appellants see value in managing where the birds are grown and supports this initiative on a voluntary basis, they maintain that there is no regulatory requirement for them to report.
30. The Egg Board argues that the definition section of the *Scheme* includes any bird hatched to become a layer: (s. 15). Regardless of age, these birds are part of the egg production process and subject to Egg Board regulation.
31. We commence our analysis by reviewing the Scheme and the Standing Order. The following definitions found in s. 15 of the *Scheme* are of note:

"layer" as applied to chickens means laying hens and layers and any class of female chicken hatched for the purposes of egg production;

"regulated product" means layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed;

The Egg Board's Standing Order enacted under the authority of the *Scheme* defines the following terms in s. 1:

"layer" as applied to chickens means laying hens and layers and any class of female chicken hatched for the purposes of egg production that is aged nineteen (19) weeks or older.

"pullet" means a female chicken raised for the purposes of egg production that is under the age at which it would be determined a layer.

"pullet-grower" means any person who grows or acts as a grower of chicks which are to be delivered as pullets.

"regulated product" means layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed.

32. In addition, ss. 5, 16 and 19 of the Standing Order regulate pullet-growers. Section 5(d) requires pullet-growers to obtain an approved chick placement permit prior to requesting chicks from a hatchery, s. 16 applies quality standards to pullet barns and s. 19 allows for pullet-growers to be appointed to the Egg Industry Advisory Committee.
33. From the foregoing, it would appear that the Appellants' argument is that because the Egg Board has chosen to define "layer" as laying hens and layers and any class of chicken hatched for the purposes of egg production that is aged nineteen (19) weeks or older, it cannot regulate pullets as they are birds under 19 weeks of age. The Appellants have misconceived the authority of the Egg Board. In order to understand the extent of the authority of the Egg Board, one must look to the enabling legislation with the starting point being the *Scheme* which sets out the following purpose:
16. The purpose and intent of this scheme is to provide for the effective promotion, control and regulation of the production, transportation, packing, storage and marketing of the *regulated product* within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part.
[emphasis added]
34. The *Scheme's* definition of regulated product above includes "layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed". The Appellants' argument may have had some weight if this was only applicable definition. However, in addition to the definition of regulated product, one must also consider the *Scheme's* definition of layer which includes "*any class of female chicken hatched for the purposes of egg production*". There is no ambiguity in this definition. Pullets are female chickens hatched for the purposes of egg production and thus fall within the definition of layer and as such are incorporated into the definition of regulated product. There is no gap in the definition and as such, the Appellants' argument fails.
35. Having found that the Egg Board has the authority to regulate pullets, the Panel finds that the revisions to the Standing Order requiring pullet-growers to obtain a CPP prior to acquiring chicks and to report all sales and shipments of started pullets are appropriate regulatory requirements. Biosecurity is a significant public interest issue, especially in light of AI concerns. The Egg Board must develop systems which enable it to know the whereabouts of all flocks in the province. This problem is complicated when producers choose to go outside the province to source their chicks; however the Egg Board has the authority to regulate all production in the province. Going forward, it would not be surprising to see heightened vigilance by the Egg Board and other agencies in terms of compliance and enforcement given the public safety concerns associated with biosecurity.
36. We now turn to consider the issue of the CPP and whether the Egg Board erred in not issuing a CPP to the Appellants. On this issue, the Appellants argue that the Egg Board fettered its discretion by basing its denial on the Appellants' past history

with the Egg Board and not the facts of the application including the agreement to keep records. In essence, the Appellants argue that their application should have been taken at face value. The Egg Board's response is that the Appellants' application was rejected because it did not fit within its regulations. Any similar application would also have been rejected. The Appellants have not given the Egg Board a marketing plan nor have they reported the eggs sold through their grading station; they have not paid levies.

37. With respect to the issue of fettering of discretion, the Panel finds that the Egg Board did not fetter its discretion in considering the Appellants' application. The Appellants are not the egg producers for the chicks they seek to place. Given the concerns around biosecurity, the Egg Board is within its authority to require that CPPs be completed by the actual producer. Further, the Egg Board was well within its authority when it considered its past dealings with both Appellants and its ongoing concerns about non-compliance when the Appellants sought special consideration. The Egg Board pointed to the Pottruffs' historical pattern of ignoring the regulatory authority of the Egg Board. This is a relevant consideration for the Egg Board now that the Pottruffs maintain that they are prepared to comply with the recording requirements of the Egg Board.
38. The Panel finds that rather than fetter its discretion, the Egg Board considered whether an exercise of discretion was appropriate and found that given the history of non-compliance, it was not. Further, the Panel finds that the Egg Board has not singled out the Appellants. The basis for the rejection of the CPP is that the Appellants do not hold quota or permit for 2400 birds nor are they the intended producer of the 2400 birds. They do not comply with the requirements for a CPP and as such it was properly declined. Any similar application would have been treated in like fashion.
39. Finally, in response to allegations of non-compliance, the Appellants argue that they did not receive notice of the amendments to the Standing Order and other orders of the Egg Board. The Egg Board sent correspondence to a wrong (old) address. As they were unaware of the changes and the need to have a CPP, their business venture failed. They argue that as the fault for their lack of notice rests with the Egg Board, they should receive "costs" to offset the substantial financial hardship suffered by the rejection of the CPP. By "costs", the Appellants are actually seeking damages or compensation for lost profits.
40. The Egg Board noted that registered letters were sent to all grading stations on November 24, 2003 informing graders of the new reporting requirements. The Egg Board did not receive the Appellants' registered letter back and assumed it had been received. As for any claim for reimbursement, the Egg Board maintains that this is inappropriate in the circumstances.
41. The Panel is of the opinion that it is the responsibility of producers to ensure that the Egg Board has their correct address. The Appellants are operating within a

regulated system and have an obligation to keep the Egg Board apprised at all times of their contact information especially when it changes. As to the issue of compensation, given our decision on the merits of the appeal, there is no basis for this claim and as such it is denied.

ORDER

42. The appeal is dismissed.
43. There will be no order as to costs.

Dated at Victoria, British Columbia this 25th day of August 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Sandra Ulmi, Member