IN THE MATTER OF
THE *NATURAL PRODUCTS MARKETING (BC) ACT*
AND
AN APPEAL FROM A DECISION CONCERNING THE ALLOTMENT
OF PRIMARY AND SECONDARY QUOTA

BETWEEN:

89 CHICKEN RANCH LTD. and
TEXAS BROILER RANCH LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES BY:

For the British Columbia Marketing Board	Ms. Christine Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Richard Bullock, Member
For the Appellants	Mr. Peter Klassen, Counsel
For the Respondent	Mr. Jim Beattie, General Manager
Place of Hearing	Richmond, British Columbia
Dates of Hearing	April 30, 2001

INTRODUCTION

1. The Appellants, 89 Chicken Ranch Ltd. ("89 Chicken Ranch") and Texas Broiler Ranch Ltd. ("Texas Broiler Ranch") are two chicken farms operated by the Mundhenk family. As a result of an earlier appeal before the British Columbia Marketing Board (the "BCMB"), the Mundhenk family was exempted from British Columbia Chicken Marketing Board (the "Chicken Board") orders which prevented the transfer of chicken quota off Vancouver Island and into the Lower Mainland.

2. In its decision dated October 6, 1999, the BCMB allowed the Mundhenk family to sell its Vancouver Island quota into the Lower Mainland on the condition that the quota of one of its farms (at that time there were three) was relocated to a farm on the Lower Mainland. The order required the production unit to be purchased or constructed on the Lower Mainland within a period of one year.

3. During this period of transition, the quota from the three Mundhenk operations continued to be leased out. In May 2000, a farm was purchased to accommodate the entire quota holdings of Glen Lake Chicken Farm Ltd. ("Glen Lake"), the third Mundhenk farm. Although some quota was sold, the Mundhenk family still wished to relocate quota from 89 Chicken Ranch and Texas Broiler Ranch.

4. In August 2000, the Chicken Board enacted new Regulations. These Regulations changed the leasing policy to prevent long-term leasing as of July 1, 2001. The effect of these regulations on the Appellants, who were in the middle of completing the purchase of their second farm, was to preclude them from leasing out their primary and secondary quota from July 1, 2001 until their new farm was operational.

5. On March 27, 2001, Mr. Christian Mundhenk and his solicitor appeared before the Chicken Board and requested an exemption from the new Regulations in order to allow leasing of quota pending renovation of the new farm.

6. On March 28, 2001, the Chicken Board denied the request for an exemption from the leasing provisions stating "[i]n the interim, Mr. Mundhenk will not receive his primary and secondary quota allotments beyond A-39, but will be free to lease out his transitional quota and pro-rata allotments as per the regulations". There were no reasons given for this decision.

7. By letter dated March 29, 2001, the Appellants appealed the decisions of the Chicken Board denying their request for an exemption.

ISSUE

8. Should the Chicken Board have refused to allot primary and secondary quota to the Appellants after period A-39 pending the purchase of property and production space?

FACTS

9. The history which lead to this appeal was summarised in the decision of the BCMB dated October 6, 1999. In that decision, the BCMB states:

> 45. The circumstances of the Appellants can be summarised as follows. The Appellants 89 Chicken Ranch Ltd. and Texas Broiler Ranch Ltd. acquired their respective farms in 1977. Glen Lake Chicken Ranch Ltd. acquired its farm in 1985. Although each farm is a distinct corporate entity, the three farms are run collectively by the Mundhenk family.
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> 46. Over the 20-year period the farms produced on the Island, the Mundhenk family did not purchase any new quota. However, the farms did share in the growth of the industry and now hold approximately 75% more quota than originally purchased. During the period of operation, the Mundhenks made a business decision to only perform repairs on an "as needed" basis. They chose not to undertake capital improvements to their outdated facilities. As a result, a number of the Mundhenk barns were uninsurable as they were considered too old.
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> 47. In December 1996, southern Vancouver Island experienced an extremely severe snowstorm. This storm caused the collapse of some of the Appellants' barns. It may be a comment on the condition of the Appellants' barns that no other chicken barns on Vancouver Island were destroyed in the snowstorm. Following this "Act of God", the Appellants applied to the Chicken Board to transfer their production off Vancouver Island.
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> 48. The Appellants have maintained from the outset of this appeal that it is not viable for them to grow chicken on Vancouver Island, as it is not cost effective to rebuild new facilities at great expense when the profit margins on the Island are so narrow.
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> 49. The position of the Chicken Board and the BCCGA has been that, with the 2.2 cent Island premium, a good Island grower with upgraded facilities using the latest technologies can grow competitively priced chicken. A main theme of their arguments is why should the Appellants be rewarded for not investing in the Vancouver Island industry and allowing their farms to fall into disrepair? The Appellants' request to transfer off Vancouver Island is seen as nothing more than a "cash grab". They simply want to be able to sell their lower price Vancouver Island quota into the Lower Mainland market to receive a financial windfall.
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> 50. The Chicken Board and the BCCGA argue that if an exception were made for the Appellants, others would soon follow. The Vancouver Island industry would be eroded and their financial stake in the industry would be jeopardised. The hope of finding a new processing plant would be extinguished and it would only be a matter of time before the chicken industry and any other agricultural industry on the Island left.
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> 51. The Panel has carefully considered the Mundhenk's situation. In the particular circumstances of this case, we are satisfied that an exemption from the Chicken Board's New Order is justified.
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> 52. The personal circumstances of the Mundhenks and the fact that the originating cause of the request was a natural disaster were relevant but would not by themselves have warranted our decision. The balance was tipped in favour of the Mundhenks in this case by two factors.

53. First, production from the Mundhenk operations had not been processed on Vancouver Island for approximately seven years prior to the closure of the Lilydale plant. The Mundhenks have not purchased their feed from a Vancouver Island feed company for a similar period of time. Since April 1997, their quota has been leased off Vancouver Island. Thus, the Mundhenk production has not been tied in any significant way to the Vancouver Island chicken industry for many years, nor has the case been made that it is essential to any future solutions in preserving that part of the industry.

54. Second, the Appellants have made it very clear that their interest is not selling all of their quota to the Lower Mainland, but rather, to quote the Appellants: "partial sale, partial transfer". In our view, this is sufficiently consistent with the spirit of the New Order as to justify an exemption from it in all the circumstances of this case.

10. Prior to March 31, 1999, the General Orders (1987) of the Chicken Board provided at section 6(f):

> No Quota grown on a Production Unit on Vancouver Island or the Interior shall be transferred from the area for which it is issued.

11. During the course of the first Mundhenk appeal, and effective March 31, 1999, the Chicken Board repealed the quota transfer prohibition and replaced it with Amendment #7 to its General Orders (1987) which provided in part:

> (f) Relocation Policy
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> i. No Quota grown on a Production Unit on Vancouver Island or the Interior shall be transferred from the area for which it is issued, except that a registered grower who has been registered as a grower for at least two years prior to the date of the quota transfer application may relocate that grower's farming operation anywhere in the Province to a Production Unit owned by that grower, subject to the provisions of this sub-section;
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> ii. A grower who wishes to relocate under this sub-section must have available barn space for all of that grower's primary, secondary and transitional quota within one year of relocation, subject to verification by the Board;
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> iii. In order to relocate quota under this sub-section, a grower must transfer all that grower's primary, secondary and transitional quota and partial quota transfers will not be permitted;

12. In its decision, the BCMB allowed the transfer of quota off Vancouver Island on the following terms:

> 56. The Panel also finds that the Appellants are entitled to an exemption, on the terms set out below, from the prohibition on "partial quota transfers". The following conditions will apply, consistent with the Appellants' representations throughout that their objective is "partial sale, partial transfer":
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> A) Provided one of the Appellants, within one year of this decision, relocates the entire quota of its farm to the Lower Mainland, purchases and constructs a Production Unit to house that entire quota, the quota of the remaining two Mundhenk Production Units may be sold or transferred without restriction in British Columbia.

B) This relocation of quota to the Lower Mainland is subject to the provisions of the New Order and as such the relocated quota cannot be sold or transferred, in whole or in part, for a period of two years.

C) Upon providing the Chicken Board with a written undertaking that it intends to proceed in accordance with A), the Appellants may proceed to transfer their quota from the remaining two farms.

D) In the event that the Appellants fail to purchase or construct a Production Unit to house the relocated quota from the third farm in accordance with A), this quota shall revert to the Chicken Board unless otherwise ordered by the Chicken Board.

E) In the event the Appellants decide not to take advantage of A), they retain the right to deal with their quota in accordance with the General Orders and other regulations of the Chicken Board in effect from time to time.

13. Following the decision of the BCMB on October 6, 1999, the Mundhenk family began looking for an appropriate chicken production facility on the Lower Mainland. During this time, the quota from their three farms continued to be leased to a producer on the Lower Mainland.

14. Although the Chicken Board had enacted a Revised Leasing Program in 1997, which limited registered growers to leasing one cycle of total quota in any calendar year, this program had never been implemented and was under appeal. In December 1999, in the context of the appeal of the Lease Program, the Chicken Board agreed to a final two-cycle extension (to A-31) of its moratorium on the implementation of the Lease Program. The purpose of this extension was to allow stakeholders to assess and respond to the outcome of a review of the Vancouver Island chicken industry.

15. On April 17, 2000, Mr. Mundhenk's solicitor wrote to the Chicken Board and advised that Mr. Mundhenk on behalf of Glen Lake had entered into an agreement to purchase a farm in Aldergrove and sought approval of this transaction. The completion date of the transaction was May 19, 2000. The farm as purchased would house the entire Glen Lake quota. In addition, Mr. Mundhenk's solicitor raised the issue of the 89 Chicken Ranch and Texas Broiler Chicken Ranch quotas. The one year provided for in Order A of the BCMB's decision of October 6, 1999 was insufficient to allow 89 Chicken Ranch and Texas Broiler Chicken Ranch "to order their affairs". In order to keep their options open as to either relocating or selling their quota, the two Mundhenk corporations requested:

    1. That the time under Order A be extended for a further two years, beyond the one year provided for in the order;
    2. That the corporations receive the assurance whether they sell or transfer, that they will be entitled to full primary, secondary and transitional quota;
    3. That until the above named three corporations have either sold or transferred their quota they will be able to continue to lease.

16. By letter dated April 25, 2000, the Chicken Board advised that in its opinion, the one-year requirement identified by the BCMB in its decision guides the corporations in their first relocation. Upon relocating one farm, the other two entities may exercise their option

regarding sale or transfer of quota and Chicken Board policies regarding the sale of quota, provision of space and general production directives will apply to these transactions. With respect to the second request, the Chicken Board advised that primary, secondary and transitional quota may be relocated as part of the BCMB decision if the Vancouver Island owner continues to own the quota and the production unit is on the Lower Mainland. It is not possible for a grower to sell secondary or transitional quota unless there is a bona fide farm sale. With respect to the third request that the corporations be allowed to continue to lease their quota until it was either sold or moved, the Chicken Board advised that the corporations are "captured" by the lease extension to December 31, 2000. After that date, the corporations must conform to all Chicken Board regulations.

17. On August 15, 2000, the Chicken Board enacted its new Regulations. Under Schedule 12 of the Regulations, growers were permitted to lease out their quota until July 1, 2001 if they lacked barn space.

18. On December 11, 2000, the Chicken Board wrote to Mr. Mundhenk and advised him that 89 Chicken Ranch and Texas Broiler Ranch did not have usable barn space owned by them to grow their quota and had not grown their quota on their registered premises for several years. Mr. Mundhenk was further advised that this situation had to be remedied by July 1, 2001. As of July 1, 2001, "growers who do not have adequate barn space to grow 100% of their primary and secondary quota on an 8 week cycle will have their quota permanently reduced to the level which can be accommodated in their barn(s) on an 8 week cycle". Mr. Mundhenk was also advised that until July 1, 2001, 89 Chicken Ranch and Texas Broiler Ranch could lease out quota to compensate for barn space shortages.

19. On March 6, 2001, Mr. Mundhenk's solicitor wrote to the Chicken Board in response to its December 11, 2000 letter and expressed surprise at its precipitous ruling in light of his April 17, 2000 letter. Mr. Klassen advised that the affected farms had been making every effort to sell/relocate the quota at issue, that the Glen Lake quota had been successfully relocated and that relocation or sale could not be affected as quickly as the Chicken Board appeared to anticipate. He further argued that the Chicken Board's December 11 letter frustrates the bona fide efforts of the Mundhenks to sell or relocate the quota of their two remaining production units. Finally, Mr. Klassen sought an assurance that the Chicken Board would "accede to the Mundhenk Production Units continuing leasing their quota until they either sell or are able to relocate... so long as they are using their best efforts to do so".

20. On March 19, 2001, the Chicken Board extended the time for growers to provide barn space for their transitional quota until May 31, 2002. The Chicken Board also allowed growers to lease out their transitional quota during this time period.

21. On March 27, 2001, Mr. Mundhenk and Mr. Klassen appeared before the Chicken Board to request an exemption from the new Chicken Board Regulations. As the Chicken Board denied the request for an exemption from the leasing provisions, the Appellants appealed the decisions of the Chicken Board to the BCMB.

DECISION

22. The issue before the BCMB is very narrow. The Appellants argue the new Regulations contemplate an exercise of discretion by the Chicken Board in determining whether a grower can be exempted from the leasing provisions. In circumstances of necessity (i.e. where there has been damage to or destruction of a registered premises), the Chicken Board, where it deems appropriate, may permit leasing.

23. The Appellants argue that any exercise of discretion by the Chicken Board must be within those limits imposed by the Courts. Relying on *Re Retmar Niagara Peninsula Developments Ltd. and Farm Products Marketing Board of Ontario et al* (1976) 8 O.R. 549 at p. 555-6, the Appellants argue that the following applies to the Chicken Board:

    1. In the purported exercise of its discretion, a statutory body must not do what it has not been authorized to do;
    2. It must act in good faith;
    3. It must not be swayed by irrelevant considerations;
    4. It must act within the letter and the spirit of the legislation that gives it the power to act;
    5. It must not act arbitrarily.

24. In this instance, the Appellants argue the Chicken Board failed to act within the letter and spirit of its new Regulations. Leasing is not bad in and of itself. It is the abuse of leasing that the Regulations are aimed at.

25. In requesting an exemption from the leasing provisions, the Appellants do not seek to abuse leasing. Rather, the Appellants seek to lease based on an enumerated reason under s. 196, the destruction of their premises. They have made bona fide attempts to relocate their quota and get back into production. They have proceeded as expeditiously as possible in light of the difficulty in locating appropriate facilities complicated by the health problems of Mr. Mundhenk.

26. The Chicken Board argues that the Mundhenk family has been given numerous concessions over the years. They have been on notice since 1999 that the ability to lease all of their quota without restriction was coming to an end. Although the Appellants may have had a specific idea as to how they wished to proceed, they were under an obligation to stay compliant with Chicken Board orders. Had the Appellants wanted to comply with the BCMB's October 6, 1999 decision and the Chicken Board Regulations, it was well within their power to do so. During this time frame, quota has been selling at a premium and there have been many start-up opportunities in the Fraser Valley.

27. The Chicken Board also argues that the new Regulations were designed to meet the interests of all stakeholders. They were implemented after consultation and have been modified only where there has been a broad industry interest at stake. The BCMB and the Chicken Board have generously accommodated the Appellants' special circumstances and there is no compelling reason to modify the new Regulations to further accommodate the Appellants.

28. The Chicken Board does not argue that the Appellants do not fall within the exemption set out in s. 196 nor do they address the issue of the scope of their discretion to grant an exemption. Rather, the Chicken Board's argument is that having spent considerable time consulting and preparing the new Regulations, it is not appropriate to modify those Regulations to fit the circumstances of the Appellants.

29. Turning to the evidence, the Panel accepts that Mr. Mundhenk and his real estate agent, Mr. Greg Walton, made diligent efforts to relocate the Appellants' operations to the Lower Mainland. Given the amount of quota being relocated and the size of the investment being made, it is understandable that locating an appropriate production unit took some time. The task is not comparable to purchasing a bungalow in Richmond; numerous factors must be weighed and considered to determine the suitability of a particular production unit.

30. By May 2000, approximately seven months after the BCMB decision, the Appellants had relocated the quota from Glen Lake to a property in Aldergrove purchased for $1.3 million.

31. The Panel accepts Mr. Mundhenk's evidence that in December 2000, he was hospitalised after suffering a heart attack. His health problems and subsequent period of convalescence caused uncertainty and placed a hold on his plans to either sell or transfer the remainder of the quota from 89 Chicken Ranch and Texas Broiler Ranch.

32. In March 2001, Mr. Mundhenk entered into a contract of purchase and sale on a second property for $750,000. This deal does not complete until July 30, 2001. After that time, some renovations are necessary to accommodate broiler production. It is clear that the Appellants will not have the barn space to accommodate their quota effective July 1, 2001. However, the Appellants maintain that their barns will be ready to accommodate broiler production for the next cycle (A-40), commencing August 26, 2001.

33. The relevant sections of the Chicken Board's Regulations with respect to leasing quota are as follows:

> 194) Leasing of quota shall not be approved for the purposes of circumventing barn space requirements, making up under production, relieving a grower of production requirements in any quota production period in which that grower receives an allotment, or for any other reason other than those included in these Regulations.
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> 195) A grower may apply for a limited periodic lease of quota during the time of transition leading to the elimination of the 10% barn space tolerance and the rationalization of barn space to accommodate all primary, secondary and transitional quota allotted to growers as described in Schedule 12. All leases during the elimination of barn space tolerances will be based on the precise number of quota units as required to be leased in order that a grower maximizes the grower's existing barn space on an 8 week cycle.
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> 196) The Board may permit a lease in the case of damage to or destruction of a registered premise, or for any other reason that the Board deems appropriate.

34. The Panel agrees with the Appellants that the purpose in enacting the new leasing policy was to prevent abuses of the leasing system. The Chicken Board has made a philosophical

decision that quota, subject to limited exceptions, should be grown by the quota holder during the period allotted. The Panel accepts that such a policy is appropriate in the context of a supply-managed commodity.

35. The Chicken Board recognises that there may need to be some limited periodic leasing necessary during the elimination of the 10% barn space tolerance. That situation does not arise on this appeal. The Chicken Board also recognises that where there has been damage to or destruction of registered premises, "or for any other reason that the Board deems appropriate", it may permit leasing of quota.

36. In defence of its position on this appeal, the Chicken Board argues that it is not appropriate in these circumstances to modify the Regulations to accommodate the Appellants. In their view, the Appellants have been accommodated enough over the past four years. However, the Chicken Board has failed to demonstrate why the Appellants do not fall within the wording of the exemption of s. 196. Clearly, the Chicken Board has discretion to grant an exemption in circumstances it deems appropriate. There is no evidence before the Panel that the Chicken Board turned its mind to the appropriateness of exercising its discretion in this case.

37. Having found that the Chicken Board failed to consider the issue of whether the Appellants fell within the wording of s. 196 or alternatively whether circumstances were such as to justify the Chicken Board exercising its discretion, it falls to the Panel to consider this issue.

38. Under s. 8(9) of the *Natural Products Marketing (BC) Act*, the BCMB has the power on appeal to not just confirm, reverse or vary an order but also to make another order it considers appropriate in the circumstances.

39. Looking at the evidence before the Panel, we are of the opinion that the Appellants fit within the exemption in s. 196 of the Regulations for damaged or destroyed premises. The circumstance which lead the Mundhenk family to originally apply to move their quota off Vancouver Island was the damage and destruction of their facilities in a snow storm in 1996. The delay in rebuilding has been largely a function of the Chicken Board regulations in place at the time. Originally, Vancouver Island quota was not transferable off Vancouver Island. Mr. Mundhenk successfully appealed the decision preventing the transfer of quota off Vancouver Island. Since the BCMB decision in 1999, he has made bona fide efforts to comply with the spirit of that decision and relocate some quota and sell off the balance.

40. Further, the Panel is of the opinion that even if the damage and destruction of the Mundhenk facilities is considered too remote to qualify under s. 196, the circumstances are such that the Panel deems it appropriate to allow the Appellants to lease out their quota for the one cycle necessary to allow them to complete their renovations.

41. The Chicken Board has not introduced any evidence to suggest that the Appellants are in any way trying to circumvent barn space requirements. There is nothing before the Panel to suggest that the Appellants have been less than diligent and bona fide in their efforts to re-establish their broiler operations. If nothing else, the Appellants' $2.5 million investment in the broiler industry demonstrates the legitimacy of their efforts. Indeed had there been evidence of attempts to circumvent the Regulations, it would not be appropriate to exercise the discretion in s. 196 in favour of the Appellants.

ORDER

42. The Appeal is granted.

43. The Chicken Board is directed to reinstate the Appellants' primary and secondary quota for period A-39. How and when that quota is to be grown out is to be determined by the Chicken Board in consultation with the Appellants.

44. The Appellants have asked for their costs in this appeal. Had this matter been fully argued by the Appellants before the Chicken Board prior to its March 28, 2001 decision, the Panel might have felt compelled to make such an order. However, as that was not the case, there will be no order for costs.

Dated at Victoria, British Columbia, this 3rd day of August, 2001.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Richard Bullock, Member