

IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (BC) ACT

AND

IN THE MATTER OF AN APPEAL FROM A DECISION CONCERNING
A QUOTA EXCHANGE PROGRAM

BETWEEN:

BIFANO FARMS ET AL

APPELLANTS

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA
B.C. MILK PRODUCERS ASSOCIATION
PINNACLE VIEW DAIRY

INTERVENORS

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board

Panel

Mr. Doug Kitson, Panel Chair
Ms. Christine Moffat, Member
Mr. Don Knoerr, Member
Mr. Frank Falzon, Counsel
Ms. Maggie Barrett, Panel Secretary

For the Appellant

Mr. Delwen Stander, Counsel

For the Respondent

Mr. Steven Stark, Counsel

For the Intervenor
Attorney General of
British Columbia

Ms. Neena Sharma, Counsel

Dates and Place
of Hearing

April 22-25, 1996
White Rock, British Columbia

Introduction

1. On May 7, 1996, the British Columbia Marketing Board (BCMB) issued its decision dismissing this appeal. These are the written reasons for that decision.
2. Section 11(1) of the Natural Products Marketing (BC) Act, R.S.B.C. 1979, c. 296 (the Act) accords a person aggrieved or dissatisfied by an order, decision or determination of a marketing board 30 days to exercise a right of appeal to the BCMB. At issue in this appeal is a decision of the British Columbia Milk Marketing Board (Milk Board) to establish a mandatory quota exchange, which decision was formally communicated to producers in a Milk Board letter dated February 21, 1996.
3. On February 28, 1996, Notice of Appeal to the BCMB was filed by three producers, represented by Mr. Delwen Stander. Over the ensuing weeks, Mr. Stander notified the BCMB as new Appellants came forward. On March 21, 1996, Mr. Stander filed an Amended Notice of Appeal consolidating a list of 27 Appellants. By the commencement date of the appeal hearing (April 22, 1996), one of the Appellants discontinued his appeal and the list settled at 26.
4. For completeness, we would note that on March 15, 1996, the BCMB had also received Notice of Appeal in respect of the same Milk Board decision from two other appellants represented by different counsel. This appeal was discontinued prior to the hearing.

5. As a final introductory matter, we confirm that on April 4, 1996, a differently constituted panel of the BCMB heard an application by the Appellants requesting a "stay" of the Milk Board's determination of March 21, 1996. That determination provided that, because in the Milk Board's view the mandatory quota exchange was tied to removal of barriers to intra-provincial quota transfer, both would, as a result of this appeal, be delayed for one month. The Appellants' stay application objecting to the Milk Board's delay in implementing intra-provincial quota transfers, was dismissed by the BCMB in reasons issued April 10, 1996. By agreement of the parties, a portion of the Transcript from that hearing was adopted for the purpose of the present appeal. Other evidence from that hearing was subject to a ruling by the BCMB on April 23, 1996 at which time we decided to allow Mr. Bifano's April 4, 1996 evidence to be "read in" for the purpose of this hearing, but not that of Ms. Kitzel, who later appeared in person to give her evidence.

The Grounds of Appeal

6. The amended Notice of Appeal sets out the following grounds for appeal:

- "(a) The decision and determination to create a Quota Exchange as detailed by the B.C. Milk Marketing Board ("the Board") is unnecessary and prejudicial to the producers licensed under the legislation, regulations and orders pursuant to which the Board acts;
- (b) The Quota Exchange is economically unsound, and will remove and prevent the very free market principles of quota sale and purchase in B.C. which the Board purports to have as an objective in its creation of the Quota Exchange;
- (c) The Quota Exchange, which is mandatory for most producers in this province, has been instituted without proper administrative fairness to the producers, including a failure by the Board to provide a proper forum for the producers' input into the Quota Exchange scheme, after advance notice to the producers of the proposed details of the exchange;

- (d) The Board's decision to proceed with the institution of a Quota Exchange has been influenced by bias and improper considerations;
 - (e) The Quota Exchange, as created by the Board's decision and determination, is ultra vires, and is prohibited by the legislation pursuant to which the Board must act; and
 - (f) The Quota Exchange violates various provisions of the Charter of Rights and Freedoms."
7. Despite general references to the "Quota Exchange" in the Amended Notice of Appeal, counsel for the Appellants and his witnesses made clear at the hearing that the heart of their objections was not to a quota exchange per se, but to a mandatory quota exchange. This panel was advised that issue (e) raised a jurisdictional question that might well speak to the Milk Board's ability to create any quota exchange. We will address this submission, and the Milk Board's objection to our jurisdiction, later in these reasons.

THE CHARTER [Issue (f)]

8. As required by the Constitutional Question Act, R.S.B.C. 1979, c. 63, the Attorneys General of British Columbia and Canada were served with notice of constitutional question raised by the Appellants in the Notice of Appeal. As a result, the Attorney General of British Columbia intervened and made a preliminary argument (adopted by the Milk Board) concerning the jurisdiction of the BCMB to apply the Canadian Charter of Rights and Freedoms. By agreement, submissions on the issue were made in writing prior to the hearing. In response to the BCMB's questions at the outset of the hearing, counsel for the Appellants confirmed that he was abandoning ground (f) of his Notice of Appeal.

We therefore decline to comment further on Issue (f).

Background

9. Prior to March 7, 1996, the Milk Board allowed producers to either sell quota directly or use a broker. These transfers were subject to final approval of the Milk Board to ensure that the technical requirements and rules regarding quota transfer had been met. Prior to March 7, 1996, the Milk Board prohibited the transfer of quota between regions of production (i.e. different regions of the province), except in extraordinary circumstances.
10. On November 22, 1995, the Milk Board reviewed the institution of a quota exchange. The Board agreed to introduce the quota exchange for all milk quotas, daily fluid and manufactured milk quota (MMQ), effective February 1, 1996, and the Milk Board further agreed the transfer of milk quotas on a province-wide basis was to be permitted on the same date.
11. At their January 16-17, 1996 meeting, the Milk Board reviewed the most recent version of the quota exchange mechanics document.
12. The Milk Board, at their February 13-15, 1996 meeting, decided to establish a mandatory quota exchange effective on or before April 1, 1996, and to cancel the moratorium restricting inter-regional transfers. The quota exchange and freeing of inter-regional transfers was part of an overall package of quota transfer reform.
13. The quota exchange rules require that, with some limited exceptions, all quota must be sold through the exchange. Producers, wishing to buy or sell quota, must submit an offer to buy or sell by the first of the month prior to the month in which the transfer is to take place. The offer must include the volume of quota to be sold or bought and state the sale or purchase price they are willing to accept or pay. A producer may offer to buy or sell more than one lot of quota at different prices.

14. The exchange occurs on the 7th of every month. A clearing price is established where all quota for that month will be bought or sold. The clearing price is the highest selling price where there are buyers willing to buy all the quota offered at that price or more. Buyers who offer to pay less and sellers who ask a higher price for quota will be unsuccessful and may participate in the next month's quota exchange.
15. On February 21, 1996, the Milk Board sent a letter to all milk producers informing them of the decision made at the February meeting and explaining how the exchange functioned.
16. On February 28, 1996, the Appellant filed a Notice of Appeal to the BCMB from the Milk Board decision to implement a mandatory quota exchange.
17. On March 7, 1996, the Milk Board passed Amending Order 10, which, among other changes to the quota transfer system, implemented a quota exchange.

Consideration of Issues and Findings

IS THE MANDATORY QUOTA EXCHANGE CONTRARY TO THE REGULATION? [Issue (e)]

18. The Appellants argue that the quota exchange is contrary to s. 7(2)(a) of the British Columbia Milk Marketing Board Regulation, which, along with s. 7(2)(b) provides as follows:

7(2) The board is authorized

- (a) to establish, allot, alter, suspend or cancel a quota, to which no monetary value is to be attached by the board, that applies to any person,
- (b) to establish terms on which quotas may be allotted, held, transferred, altered, suspended, or cancelled...

19. The Appellants argue that the very creation of a quota exchange designed to create a "market clearing price" necessarily constitutes the attaching of monetary value to quota by the Milk Board, contrary to s. 7(2)(a). The Appellants argue that the "Milk Board establishes, as a rule of the exchange, that quota must sell at a market clearing price which it will determine each month".
20. Before addressing this submission, it is necessary to deal with the preliminary objection of the Milk Board that the BCMB has no jurisdiction to determine whether the quota exchange is consistent with s. 7(2)(a) of the Regulation. Relying on the argument filed by the Attorney General of British Columbia on the Charter issue, the Milk Board argues that, on an appeal under s. 11 of the Natural Products Marketing (BC) Act, the BCMB has no power "to interpret laws, either its governing act and resultant regulation or other laws." The Milk Board conceded that if this submission is sound, it would have the undesirable result of forcing Appellants in a case like this into two different forums to challenge the quota policy - the Supreme Court on the vires questions and the BCMB for all other questions.
21. This submission is without merit. Section 3(4) of the Natural Products Marketing (BC) Act confers on the BCMB general supervisory powers over all marketing boards "in order to carry out the intent and purpose of this Act". It is difficult to understand how the BCMB can carry out the intent and purpose of this Act if it is prohibited from interpreting the Act or its regulations.
22. Second, we know of no authority for the proposition that a statutory appellate tribunal cannot interpret the legislation under which it is created. We find it difficult to understand how the BCMB can effectively discharge its appellate duty (see Reid v. British Columbia Broiler Hatching Egg Commission (February 27, 1995) unreported, B.C.S.C.) - including fashioning a proper remedy (s. 11(8)) - without considering whether a marketing board's empowering legislation gives it the authority to do the act challenged.

23. Third, s. 11(4) specifically provides that, when an appeal is filed, the marketing board in question must "promptly provide the board with every bylaw, order, rule and other document touching on the matter under appeal..." That the BCMB is required to have these instruments strongly suggests that it is intended to interpret them.
24. Fourth, s. 11.1(1) provides a statutory right of appeal to the Supreme Court on a question of law. Such a right would be meaningless if the BCMB had no power to decide questions of law. Indeed, as pointed out to counsel for the Milk Board during the hearing, without the power to interpret law, how could the BCMB make a decision on the very submission before us?
25. With respect to the Issue (e) on its merits, the evidence demonstrated that while quota does have value when it is transferred between producers, it is producers not the Milk Board who attach this value. The proposed quota exchange establishes a "market clearing price" for all successful transfers in a given month. The mechanism for establishing the clearing price is created by the Milk Board, but the exact amount of the clearing price is a function of the offers made by producers. Quota value is not being set by the Milk Board, but rather the market place.

The BCMB finds that the creation of a quota exchange is not ultra vires B.C. Reg. 167/94.

WAS THE MILK BOARD'S PROCEDURE IN ENACTING THE QUOTA EXCHANGE ADMINISTRATIVELY FAIR? [Issue (c)]

26. The Appellants submitted that the Milk Board owed a duty of procedural fairness to each producer because it knew of the opposition to the quota exchange, of the potential negative economic impact on producers and of the interference with "proprietary rights".
27. In the Appellant's submission, that duty required the Milk Board to provide each producer with full written details of the proposal and a meaningful opportunity to respond before the decision was made. The Appellant said that the notices of meeting and committee consultation were inadequate to satisfy this duty because there was evidence that some producers did not know the quota exchange would be mandatory until after the decision was finalized.

28. There is case law supporting the position of the Milk Board that the principles of natural justice do not apply to the setting of a quota policy, although they may apply to individual decisions respecting the granting of quota (Canadian Association of Regulated Importers v. Canada (Attorney General) (1994), 17 Admin. L.R. (2d) 121 (F.C.A.); leave to appeal to S.C.C. ref'd.) or where a decision is aimed at a particular individual: Reid v. British Columbia Broiler Hatching Egg Commission (February 27, 1995, unreported, B.C.S.C.). Because quota is not property (Sanders v. British Columbia (Milk Board) (1991), 77 D.L.R. (4th) 603 (B.C.C.A.)) and because this was a general policy decision, the Milk Board's submission on this point has merit.
29. Even if a duty of fairness did apply, we do not agree that the Milk Board had to go to the length asserted by the Appellants.
30. The Milk Board submitted that producers were given an opportunity to learn about the proposed quota exchange and to express their views to the Milk Board, either directly, through producer association representatives or the Market Share Quota Advisory Committee.
31. The Milk Board has been considering the establishment of a quota exchange since 1991. Consultations with producers were initiated in 1992 when the questions was referred to the Market Share Quota Advisory Committee.
32. There was evidence from Mr. Arne Mykle on behalf of the Milk Board and Mr. Wayne Wikkerink on behalf of the Market Share Quota Advisory Committee that all producers were given notice of this Committee's meetings as it travelled through the province. At these meetings attending producers had the opportunity to learn about the Milk Board's quota exchange proposal and review a mock up of the exchange. At these meetings producer input was received concerning the exchange. There was evidence from Mr. Mykle that the Milk Board did modify their proposal in response to producer input.

The BCMB finds that the procedure used by the Milk Board was proper and fair. The producers of British Columbia, if they so wished, had ample opportunity to know what the Milk Board was considering and to express their views.

IS THERE EVIDENCE OF BIAS OR IMPROPER CONSIDERATIONS?
[Issue (d)]

33. The Appellants assert that the decision to impose a mandatory quota exchange was the product of bias and improper considerations because the Milk Board favoured the views of one group, "appearing to attack" the views of another. The Appellants also assert an appearance of a conflict of interest as members of the Milk Board might have access to inside information about proposed bids prior to the exchange.

The BCMB finds no merit in either the "inside information" argument or the proposition that a decision-maker is biased simply because it prefers the views of one group over another. The BCMB also disagrees that the Milk Board became involved in setting value on quota, a point discussed as part of the "ultra vires" argument.

IS THE QUOTA EXCHANGE UNNECESSARY OR PREJUDICIAL?
[Issues (a) and (b)]

34. In their comprehensive argument, the Appellants submitted firstly that milk producers have been successfully buying and selling quota on a private basis for 40 years (with final processing of applications by the Milk Board) and that a mandatory quota exchange is therefore unnecessary. The Appellants assert that the objectives the Milk Board seeks to achieve by imposing a mandatory quota exchange can be achieved by other means, such as allowing for inter-regional transfers of quota and publication of information sheets about price and amount of quota sold. The Appellants characterize a mandatory quota exchange as an unnecessary bureaucracy, with the appearance of a "make work" project.

35. The Appellants also argued that a mandatory quota exchange was not only unnecessary but was harmful and prejudicial to milk producers because:

- it will involve additional financial costs and take more time in an already demanding and difficult economic climate;
- it takes away freedom of choice in disposing of their "property" on their own or with the help of dealers or brokers;
- the uncertainty of knowing whether or to what extent a transaction will succeed will have adverse effects on business planning; and
- the limited "exemptions" from the exchange remove the flexibility to sell quota on a non-arms length basis to non-family members and removes the opportunity to sell quota on a payment over time basis.

36. There was evidence that the Alberta non-mandatory quota exchange was not working because only a small volume of quota was being traded on that exchange.

37. While there are clearly financial costs associated with selling on the quota exchange, the evidence did not satisfy the BCMB that these costs are greater than the costs of selling privately. Some evidence was given that the introduction of a mandatory quota exchange could result in possible negative tax consequences, however, no useful evidence was given in that regard. In any event, we do not regard these costs as unreasonable or fatal to the exchange. Nor do we regard quota as "property" to which the appellants have a right to dispose of as they wish: Sanders v. British Columbia (Milk Board) (1991), 77 D.L.R. (4th) 603 (B.C.C.A.).

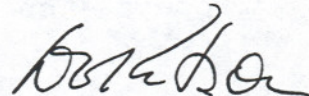
38. The BCMB accepts that the quota exchange may initially lead to uncertainty among producers. However, the effect of this uncertainty is exaggerated. Once the mandatory exchange is operating producers will have more quota information at their disposal. More knowledge will assist producers in structuring their bids for a successful transfer.

The BCMB finds that the mandatory quota exchange was necessary to achieve equality of access and that the quota exchange is not prejudicial to the interests of producers.

Decision

39. The appeal is denied.

Dated at Victoria, British Columbia, this 30th day of May, 1996.



Doug Kitson, Chair

ORIGINAL SIGNED BY

Don Knoerr

ORIGINAL SIGNED BY

Christine Moffat