

**IN THE MATTER OF
THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN
MARKETING BOARD DATED MARCH 10, 1997
CONCERNING THE TRANSFER OF QUOTA**

BETWEEN:

89 CHICKEN RANCH LTD., TEXAS BROILER RANCH LTD.
AND GLEN LAKE CHICKEN RANCH LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS ASSOCIATION

INTERVENOR

AND:

TOP SHELF FEEDS INC.

INTERVENOR

DECISION

APPEARANCES BY:

For the British Columbia Marketing Board	Mr. Ross Husdon, Chair Ms. Christine Elsaesser, Vice Chair Ms. Satwinder Bains, Member Mr. Hamish Bruce, Member
For the Appellants	Mr. Peter Klassen, QC, Counsel
For the Respondent	Mr. John Hunter, QC, Counsel
For the British Columbia Chicken Growers Association	Mr. Tobin Robbins, Counsel
For Top Shelf Feeds Inc.	Mr. Stuart Armour, Owner
Place of Hearing	Victoria and Richmond, BC
Dates of Hearing	February 17-19, March 12-13, 1998 April 6-9, May 20, 1999

INTRODUCTION

1. Texas Broiler Ranch Ltd., 89 Chicken Ranch Ltd. and Glen Lake Chicken Ranch Ltd. (the “Appellants”) originally commenced their appeal on April 7, 1997. The hearing began on February 17, 1998. The British Columbia Marketing Board (“BCMB”) heard nine days of evidence, a one-day adjournment application and one day of argument with respect to this appeal. The appeal concluded on May 20, 1999.
2. The issue on appeal is significant and involves the decision of the British Columbia Chicken Marketing Board (the “Chicken Board”) to deny the Appellants’ request to transfer the chicken quota from each of their farms off Vancouver Island. Although each farm is a distinct corporate entity, the three farms are run collectively by the Mundhenk family.
3. 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.

4. During the course of this appeal, and effective March 31, 1999, the Chicken Board repealed the quota transfer prohibition and replaced it with Amendment #7 to its General Orders (1987) (the “New Order”):

(f) Relocation Policy

- 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;
- 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;
- 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;
- iv. In considering an application for quota transfer upon relocation under this sub-section, the Board reserves the right in its discretion to make the necessary inquiries to ensure that the movement of the Production Unit meets the test of ownership consistent with the policies and orders of the Board;

- v. Where upon application, the Board has approved a transfer of quota to a new Production Unit in accordance with this sub-section, no sale of the quota which is transferred will be approved before a date two years following the date of approval of the quota transfer by the Board.
5. The Appellants aspire to sell the larger part of their quota on the Lower Mainland, where they can obtain a higher “price” than they could by selling the quota on Vancouver Island. They also wish to farm the remaining portion of their quota at a Lower Mainland location. This type of “partial sale” arrangement is not permitted by s. 6(f) of the New Order.
6. The Appellants strongly challenge the Chicken Board’s assertion that the issue before us is whether there should be “free and unrestricted transfer of quota” throughout the Province. In their reply to the Chicken Board, the Appellants have specifically represented: “Wrong, (Mundhenk’s) position remains same partial sale/partial transfer.”

BACKGROUND

7. The British Columbia Chicken Growers Association (“BCCGA”), Lilydale Co-operative Ltd. (“Lilydale”) and Top Shelf Feeds Inc. (“Top Shelf”) applied for and were granted Intervenor status prior to the commencement of the appeal. Each intervened to support the Chicken Board’s quota transfer policy.
8. However, in early April 1998, Lilydale advised that it intended to close its processing plant on Vancouver Island. Lilydale withdrew as an Intervenor on June 30, 1998.
9. Pursuant to the *Job Protection Act*, R.S.B.C. 1996, c. 240, the Minister of Agriculture and Food (the “Minister”) requested that the Job Protection Commission review the plant closure. The parties agreed to adjourn the appeal until such time as the Commission’s report was completed and the impact of the closure assessed. In its June 1998 report, the Commission concluded: “Lilydale is financially and strategically justified in closing the Langford Plant.”
10. On July 3, 1998, the Chicken Board applied to adjourn the appeal generally in order that the Commission’s report and any response from the Minister could be assessed. The Appellants opposed this application.
11. On July 17, 1998, the BCMB adjourned the continuation of the appeal to a date no later than January 31, 1999 and held:
 20. This very recent release of the Commissioner’s report has created a dynamic situation. Depending on the response to the report, the appeal may either become moot, or it may take on an entirely new dimension, which places an onus on all the parties to adduce new evidence. While the Appellants say that whatever happens is irrelevant to (or can only reinforce) their argument, the situation is different for the

other parties who are also entitled to fairness and whose position the BCMB is not prepared to prejudice.

12. Following a pre-hearing conference on October 28, 1998, the appeal was scheduled to continue on March 15, 1999.
13. On February 25, 1999, the Chicken Board applied to adjourn the appeal to a date no earlier than May 15, 1999 “to provide sufficient time for industry consideration and comment” on its February 16, 1999 proposed “Relocation of Farm Operation Policy”.
14. The Intervenors, BCCGA and Top Shelf, sought an adjournment for one year to March 15, 2000, “to allow a reasonable time period for the members of the Growers Association on Vancouver Island to conclusively determine whether it is feasible to construct a poultry processing plant on Vancouver Island”.
15. The Appellants in a related appeal of the Chicken Board’s quota leasing policy were granted limited intervenor status in the March 1, 1999 hearing to provide written submissions. This other appeal has been adjourned pending the release of this decision.
16. On March 4, 1999, the BCMB adjourned the appeal to April 6-9, 1999. The Chicken Board was ordered to complete its consultation with respect to its proposed Relocation Policy not later than March 31, 1999.
17. On March 31, 1999, the Chicken Board enacted the New Order: para 4, *supra*. The effect of the New Order is to permit growers to relocate their quota to other parts of the Province with certain restrictions intended to discourage speculation in quota.
18. The appeal reconvened on April 6, 1999.
19. Because of the wide spread implications of our decision, the BCMB allowed late applications for Intervenor status by the Cowichan Valley Regional District and the Regional District of Comox-Strathcona. Both Regional Districts made submissions in support of preserving the agricultural industry on Vancouver Island.

POSITION OF THE APPELLANTS

20. As noted above, the Appellants wish to be allowed to “move” all the quota they collectively hold from Vancouver Island to the Lower Mainland, and to farm the lesser portion there while selling the larger part at Lower Mainland prices.
21. Faced with the Chicken Board’s New Order, which prevents them from proceeding in this way, the Appellants have raised a number of issues and arguments before the BCMB in favour of the relief they seek. We propose to address those issues as follows.

Issue 1: Order “ultra vires” because it is contrary to the purposes of the Act and is “arbitrary, unreasonable and discriminatory”.

22. The Appellants argue that the New Order is contrary to the purposes of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (the “Act”), and in particular s. 11(1)(q) which states:

11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

(q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of a regulated product, and to amend or revoke them.

23. This legislative grant of power to Cabinet to vest authority in the Chicken Board resulted in the enactment of s. 4.01(1) of the *British Columbia Chicken Marketing Scheme, 1961*, BC Reg. 188/61 (the “Scheme”), from which the Chicken Board’s authority specifically arises:

4.01 The board shall have power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore and hereinafter enumerated, and without the generality thereof shall have the following powers:

(l) 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.

24. The Chicken Board has also referred to s. 4.01(c.1) of the *Scheme*, which confers the explicit power:

(c.1) to establish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board.

25. Under the rubric of “*ultra vires*”, the Appellants make two submissions. First, they argue that the New Order is contrary to the purposes of the *Act* because without a processing plant on Vancouver Island, the New Order does not promote the Vancouver Island chicken industry, rather it merely delays its inevitable demise.

The Appellants argue that only by enacting a policy of free and unrestricted transfer of quota throughout the Province can the Chicken Board promote the industry effectively. They further argue that the New Order is “arbitrary, unreasonable and discriminatory” as it favours those growers on Vancouver Island who wish to delay free transfer in order to maintain their premium and transportation subsidy over those growers who by virtue of ageing facilities seek to relocate to a more economic chicken producing area. The Chicken Board has taken this action despite the concerns of Lilydale, set out in its April 6, 1998 letter, that the Island price premium and transportation costs have resulted in insufficient operating margins.

26. While the Appellants have sought to express these arguments in terms of “*ultra vires*”, they are in truth public policy arguments, whose fundamental attack lies in the argument that the Chicken Board exercised bad judgement in continuing any limitation on quota transfer given the purpose of the original prohibition and present economic realities. This is reflected in the Appellants’ submission that: “In the instant case, the General Order passed by the Board cannot, in any way, be considered to be effective promotion, control or regulation of the chicken industry on Vancouver Island.”
27. Given the broad and specialised appellate function of the BCMB, the Appellants are certainly entitled to submit that the Chicken Board’s policy is unwise, and to ask the BCMB to take a different view of the matter. We will consider that question in the next part of these reasons.
28. However, there can be no question in our opinion that the Chicken Board’s New Order is lawful. It is, by definition, a legislative order - a regulation of general application concerned with quota transfer policy. The only legislative condition on the exercise of such an order is that it be *deemed* by the Chicken Board to be necessary and advisable to achieve the purposes set out in s. 4.01 of the *Scheme*. This grant of authority in the subjective is consistent with the nature of legislative judgement and the creation of public policy.
29. The legal test is not whether, in fact, the policy is wise or effective, but whether the Chicken Board deemed it to be so in good faith. Based on all the evidence, we are satisfied that the Chicken Board did issue the New Order based on its judgement, in good faith, that it was necessary and advisable in view of changed circumstances in the chicken industry. On one hand, the intent was to support a chicken industry in regions other than the Lower Mainland, while on the other hand, permitting growers to relocate their quota to other parts of the Province, with restrictions intended to discourage speculation in quota. An order for this purpose is clearly within the lawful authority of the Chicken Board. The Chicken Board did not abuse its discretion when it acted for these purposes.

30. For the same reasons, we reject the Appellants' attack on the *vires* of the Chicken Board's New Order based on arbitrariness, unreasonableness and discrimination. We do not see these arguments as going to the *vires* of the Chicken Board's decision. Rather, they amount to disagreements with the policy underlying the law, and as such will be dealt with below.

Issue 2: Order should be set aside on the grounds of public policy.

31. Although the Chicken Board is authorised to enact the New Order, the real issue for the BCMB is whether, in our judgement, the New Order is, for the present, appropriate given the economic realities in place in British Columbia and the best interests of the chicken industry. We find that it is.
32. In approaching this issue, we express our agreement with the Chicken Board that "the concept of truly free transfer of quota is a legal impossibility." Whatever economic value it has acquired, quota remains the property of the Chicken Board. The terms and conditions on which quota is held or transferred are subject to the exercise of the Chicken Board's regulatory authority. There is no premise that quota will be transferable unless the Chicken Board proves to the contrary. The question, rather, is whether and in what circumstances quota transfer should be permissible as a matter of sound marketing policy.
33. It is well known throughout the agricultural community that the agri-food industry is changing. It has become increasingly more difficult for producers and processors in BC to remain competitive. The loss of the Feed Freight Assistance subsidy as of 1997 resulted in increased feed costs to Island producers. Chicken processors are voicing concerns about paying the 2.2 cent Island price premium to subsidise chicken production on the Island. In addition, BC's higher labour costs make it more difficult for processors to compete with processors from other jurisdictions. Markets are changing as consumers demand a wide variety of high quality fresh products. Also, the move by some major grocery chains towards centralised distribution systems located on the Lower Mainland or in Alberta limits the access of Vancouver Island and Interior producers to their regional markets. These are but a few of the myriad of factors that face poultry, dairy and other agricultural producers on the Island and, to a lesser extent, in the rest of BC.
34. The Ministry of Agriculture and Food ("MAF") is in the process of developing policy on how the Government should deal with the issues surrounding regionalisation.
35. In the course of this hearing, it has been made very clear that the issue of allowing free transfer of chicken quota has ramifications far beyond the Vancouver Island or Interior chicken industries. The loss of a significant number of chicken growers would have an impact on local feed suppliers such as Top Shelf and would likely drive up feed costs. Increases in feed costs would have an impact on any livestock

that require feed, including laying hens, turkeys and dairy cows. Additionally, there would be a negative impact on any of the secondary industries required to support the chicken industry, such as farm supply, transport, construction, clean out and catching. These impacts would be felt at the municipal and regional district level.

36. The Job Protection Commission reviewed the closure of the Lilydale plant and concluded, based on a number of the above factors, that Lilydale's decision to close its plant was made upon sound business factors. In light of that conclusion, the Commission recommended that affected parties such as the Vancouver Island Chicken Growers Association, the Chicken Board, the BCMB and input industries

meet to discuss the implications of the closure and develop ways to stabilize this market...If chicken producers on Vancouver Island believe there is an opportunity to promote "Island Grown" product then they should co-ordinate with others in the Island agri-food industry and participate with the BC Ministry of Agriculture and Food to evaluate the potential for such a targeted promotion.

37. The Appellants have challenged the BCMB to issue a judgement effectively concluding that there is "no hope" for a processing plant, and therefore no basis for a policy that fetters quota transfer. We reject that approach as being unwise. By definition, the creation of public policy requires an informed assessment to be made about the future. Very often, it is about creating an environment in which those solutions can arise. Perhaps the answer will lie in a new processing plant. Perhaps some other creative approach will be developed.

38. We have been asked to render a judgement about all this today. We have also been asked by all parties not to take into account subsequent developments, such as recent correspondence between Lilydale and the Chicken Board in connection with Lilydale's purchase of chicken produced on the Island. Having respected that wish and made our decision based on the evidence and arguments before us, we are not satisfied that the future is so bleak, and the solutions so improbable, as to justify our rendering a decision which sounds a death-knell for the Vancouver Island chicken industry. A major decision such as this requires time, thought and consultation, much of which must include participants from other agricultural sectors. Before any decision is made that has the potential of altering almost 40 years of agricultural practice on Vancouver Island, all affected parties deserve an opportunity to be heard. The BCMB sees merit in a review and believes that although the Chicken Board must review the situation within its own industry, MAF must lead the industry-wide discussion on regional issues, including those involving Vancouver Island. The future of the chicken industry on Vancouver Island is inextricably linked with the future of agriculture at large on the Island.

39. In the Panel's view, the Chicken Board has taken the first step. To date, the Chicken Board has responded to the changes within the chicken industry and consulted with its grower membership and other industry stakeholders. As a result of that consultation, the New Order was enacted. The evidence led demonstrates that the Chicken Board was aware of the differing views regarding their proposed quota

relocation policy. They considered the different views and came up with a balanced policy. The Chicken Board recognises that the chicken industry on Vancouver Island is in a state of flux and accordingly, the New Order will need to be reviewed and amended from time to time.

40. The Chicken Board has also realistically acknowledged that this New Order will not likely be in place for as long as the previous order. Whether or not a new chicken processing plant is built, it may require refinement or it may be repealed altogether. Based on the evidence we heard and our own deliberations, we are not, in this decision, prepared to impose a deadline on the matter. While we will continue to monitor this matter in our supervisory capacity, we are satisfied that, for the present, the New Order provides the appropriate balance between the conflicting interests of individual growers, and the attainment of legitimate marketing policy and objectives.
41. Not all growers are happy with the New Order. Some, like the Appellants, think it does not go far enough. Others think it goes too far and is in fact “the thin edge of the wedge” in terms of the demise of the regional chicken industry on Vancouver Island. The New Order allows some relaxation of the previous prohibition. However, there are still enough brakes in place that the regional impact of the New Order will allow opportunity for creative solutions to be offered to revitalise the Vancouver Island chicken industry.
42. The Panel is of the view that the New Order represents a thoughtful and balanced attempt to deal with what is an extremely difficult issue. No matter what decision the Chicken Board made, there would have been significant financial consequences on many industry participants, not just the Appellants.
43. The Panel’s judgement is that the free transfer of quota off Vancouver Island is not presently in the interests of the British Columbia chicken industry in general, or the Vancouver Island industry in particular. Accordingly, the Panel confirms the New Order.

Issue 3. Exemption of the Appellants from the New Order.

44. The Appellants argue that even if the New Order is valid, their individual circumstances justify an exemption from the terms of the New Order.
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.
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.

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.
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.
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.
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 matter of time before the chicken industry and any other agricultural industry on the Island left.
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.
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.

ORDER AND REMEDY

55. The Panel finds that the Chicken Board’s New Order is valid and appropriate as a matter of public policy, in accordance with the legislation.
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”:
- 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.
57. There shall be no costs awarded on this appeal.

Dated at Victoria, British Columbia, this 6th day of October, 1999.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine Elsaesser, Vice Chair