IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
IN THE MATTER OF AN APPEAL
FROM A DECISION REGARDING TRANSFERS OF QUOTA

BETWEEN:

SKYACRES TURKEY RANCHES LTD.

APPELLANT

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

BRITISH COLUMBIA TURKEY ASSOCIATION

INTERVENOR

REASONS FOR DECISION

APPEARANCES

For the British Columbia Marketing Board	Ms. Christine Elsaesser, Vice Chair Ms. Karen Webster, Member Ms. Doreen Hadland, Member
For the Appellant	Mr. Christopher Harvey, Q.C. Counsel
For the Respondent	Ms. Maria Morellato, Counsel
For the Intervenor	Mr. Les Burm, President
Date and Place of Hearing	May 3, 2001 Delta, British Columbia May 12, 2001 Richmond, British Columbia

INTRODUCTION

1. In December 1999, the Appellant, Skyacres Turkey Ranches Ltd. ("Skyacres") applied to the British Columbia Turkey Marketing Board (the "Turkey Board") to transfer a series of small quota lots. The proposed lots consisted of one 1000 kg lot to a company employee and six 500 kg lots to children of its principals. A 500 kg turkey quota holding translates to approximately 30 turkeys.

2. On March 13, 2000, the Turkey Board approved the transfer request with conditions, one of which required each transferee to provide a letter "acknowledging that you will be a quota holder but a non-registered grower until such time as you acquire the minimum quota holding required to be a registered grower of 65,000 kilograms". This approval was given in conjunction with a Turkey Board decision earlier that same day to amend its General Orders to establish a minimum farm size (i.e. amount of quota holdings) necessary for a grower to qualify as a "registered grower".

3. The effect of these decisions was to allow the transfer on one hand but on the other, to prevent the transferees from exercising the voting and other rights conferred on registered turkey growers under ss. 19-23 of the *British Columbia Turkey Marketing Scheme*, B.C. Reg. 174/66, as amended (the "*Scheme*"). Section 4(7) of the General Orders describes the matter plainly:

> The minimum quota to be held by a registered grower shall be 65,000 kilograms. Person [sic] holding less than this amount, notwithstanding that they may be quota holders, will not be entered on the Register of Growers;

4. By letter dated April 14, 2000, Skyacres filed its appeal of the Turkey Board's "order and/or decision" dated March 15, 2000.

5. On April 18, 2001, the British Columbia Turkey Association (the "Association") was granted Intervenor status. At the hearing, the Association attended and made a brief oral and written submission in support of the Turkey Board.

ISSUES

6. Skyacres attacks both the decision and the General Orders to the extent that they exclude the transferees from "registered grower" status. Counsel's written argument sets out the grounds of appeal as follows:

    a) Insofar as the Decision is affected by amendments to the General Orders of the TMB the Decision is inconsistent with and contrary to the provisions and purposes of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 and the *British Columbia Turkey Marketing Scheme* and as such the Decision is in excess of the jurisdiction of the Board and should be struck down as *ultra vires*;

    b) the Decision is inconsistent with and contrary to the General Orders of the (Turkey Board) in effect when the application was lodged and with such General Orders

as were valid when the application was determined, and as such the Decision is in excess of the jurisdiction of the Board and should be struck down; and

c) the Decision is unfair, arbitrary, discriminatory and founded on bias and accordingly should be struck down as contrary to the principles of natural justice and based on incorrect principles.

7. By way of remedy, Skyacres seeks an order "striking down the discriminatory provisions of the Order and Decision made on March 13, 2000 and directing the (Turkey Board) to allow the quota transfers unconditionally". Skyacres also asks this Board to make various directions to the Turkey Board for the purpose of implementing a transparent quota exchange and a new entrant program.

LEGISLATIVE BACKGROUND

8. As this is the first appeal to the BCMB from the British Columbia turkey industry in some time, it is useful to note that turkey production in British Columbia is supply managed. The legislation relevant to this appeal is the *Natural Products Marketing (BC) Act* (the "*Act")* and the *Scheme.* There are approximately 50 turkey growers in the industry.

9. The Turkey Board is a three-person regulatory body that governs the industry, subject to the general supervision of, and the right to appeal to, the British Columbia Marketing Board (the "BCMB"): ss. 3(5)(a) and 8 of the *Act*. The regulatory model for this industry is one of "self-governance"; the *Scheme* requires that members of the Turkey Board be registered turkey growers and be elected by registered turkey growers. Sections 19 and 20 of the *Scheme* provide as follows:

> 19. Each member of the board shall be a registered turkey grower in the Province of British Columbia, and shall be elected for a 3 year term or for the balance of a 3 year term if elected as a result of a vacancy. Each member of the board shall hold office until his respective successor is elected.
>
> 20. (1) The board shall hold an annual general meeting no later than March 31 in each year, the meeting to be held, if possible, at the same time and place as the annual general meeting of the British Columbia Turkey Association.
>
> (2) Subject to subsection (3), one member of the board shall be elected in each year in accordance with a procedure determined by the board.
>
> (3) The following persons are entitled to vote in the election of the board member under subsection (2):
>
> (a) each registered grower who is in attendance at the annual general meeting;
>
> (b) each registered grower who is unable to attend the annual general meeting and who resides within the area commonly known as the Lower Mainland of British Columbia, by proxy;
>
> (c) each registered grower who is unable to attend the annual general meeting and who resides outside the area commonly known as the Lower Mainland of British Columbia, by mail-in ballot or by proxy.

10. Who then is a "registered grower"? As a first step, it is noted that the *Scheme* defines the term "grower". Section 15 of the *Scheme* states that a "grower" is "any person who operates a farm, or farms, for the production of turkeys…". According to the *Scheme*, the right to vote and to hold office depends on being a "registered grower". However, "registered grower" is not defined in the *Scheme*. The matter of "registration" is instead dealt with in section 26 of the *Scheme*, which has been the focus of argument by the parties, and says this:

> 26. The board shall keep at its head office a record (to be known as the "Register of Growers") of all growers whose names and addresses have been registered in accordance with orders of the board. Such record shall be amended from time to time by the addition thereto of the names and addresses of all growers who are entitled to be registered and by the deletion therefrom of the names and addresses of growers who are not entitled to be registered; provided, however, that before the name of any grower is removed from the said register, the board shall give him 2 weeks notice in writing of the intention to do so, and the name of such grower shall not be removed as aforesaid if he shall, within the said period, give to the board sufficient reason for the retention of his name on the said register.

FACTS

11. On or about December 13, 1999, Skyacres applied to the Turkey Board for approval to transfer 4,000 kg of its 557,582 kg quota holding. Each of the proposed transferees is related to Skyacres or its owners in some manner. A 1000 kg transfer was to go to the farm manager. The other six transferees (500 kg each) are children of the owners. The stated purpose of the applications was to give the recipients an opportunity to get a start in the industry. It appears that there were also business reasons for the applications, but these were not disclosed in any detail.

12. Turkey Board approval was required for the quota transfer: General Orders, s. 6(1). Section 6(2) states that "An application shall be made to the Board for each proposed transfer of quota, in a form provided by the Board, not less than 14 days before the proposed effective date of the proposed transfer". Because each proposed transfer was above the "exempt" limit of 25 turkeys per year, the General Orders would have required any approved transferee to be licenced: General Orders, s. 3(1). At the time Skyacres submitted its application for the transfer, the Turkey Board's General Orders recognised all licenced growers as "registered growers".

13. Prior to Skyacres' transfer applications, the Turkey Board had initiated a process to determine whether minimum and maximum quota holdings should be established as conditions of industry participation. The BC Turkey Advisory Committee, a body made up of representatives from growers, breeders, processors, hatcheries and other industry participants, was asked to consider the issue. On February 17, 2000, the Committee delivered recommendations to the Turkey Board. On the subject of minimum quota size, it said:

> This topic of minimum size had no general consensus. The most logical proposal to put forward to (sic) board was that consideration be given to a minimum flock size to give efficiencies to hatchery, grower, feed companies and the plants.

14. The issue of minimum farm size in the turkey industry has a history that goes back at least to 1981. In 1981, in its decision in *4 R's Turkey Farm v. British Columbia Turkey Marketing Board*, the BCMB overturned a Turkey Board decision refusing to allow a quota transfer of 136,500 lbs. That proposed transfer was significantly higher than the transfers proposed here, but less than the then minimum quota holding level of 420,000 lbs. While the Turkey Board appeared to subsequently construe the BCMB's 1981 decision as meaning that there could be no minimum farm size, we note that the Panel in question stated only that the Turkey Board policy under appeal was "far too restrictive". Importantly, and unlike the 1981 case, the current decisions under appeal are not about refusing quota transfer based on farm size. Rather, they are about whether the Turkey Board may approve small lot transfers but withhold from transferees "full citizenship" such as voting and election privileges.

15. On March 9, 2001, the Turkey Board met with the applicants, and advised them that the applications were being held in abeyance pending the Turkey Board's consideration of the minimum farm size issue. At this meeting, the applicants say that the then Chair of the Turkey Board, Mr. Dan Wiebe, explained that if small quota transfers were allowed, there would be a lot of "these people" coming in and taking over the industry. Based on a gesture allegedly made by Mr. Wiebe, the applicants took the comment to be in reference to Indo-Canadian farmers. The current Turkey Board Chair, Mr. Shawn Heppell, vehemently denies this interpretation, stating that Mr. Wiebe had expressed a legitimate concern about "all sorts of small producers" entering the industry in increasing numbers.

16. The Panel did not hear from Mr. Wiebe with respect to this issue. Counsel for the Turkey Board sought to introduce a letter from Mr. Wiebe on this topic. However, the Panel did not allow it to be introduced into evidence as Mr. Wiebe was not available for cross-examination purposes.

17. On March 13, 2001, the Turkey Board met to consider the issues of minimum and maximum quota size. It determined that there ought to be a minimum quota size to qualify for "registered grower" status (65,000 kg), but that this should not bar new entrants from obtaining quota and participating in the industry. The Turkey Board implemented this decision by amending its General Orders to create a new class, alternatively referred to as "non-registered growers". These growers occupy a middle ground. They are required to be licenced as they market more than the exempt amount of 25 turkeys per year: General Order 3(1). However, they do not have sufficient quota to be entitled to registration:

> "non-registered grower" means a grower who is licensed by the Board as a grower but has not been entered on the Register of Growers (General Orders, s. 1)
>
> The minimum quota to be held by a registered grower shall be 65,000 kilograms. Person [sic] holding less than this amount, notwithstanding that they may be quota holders, will not be entered on the Register of Growers (General Orders, s. 4(7)).

18. The Turkey Board, in its written submissions described the purpose of the General Order amendments as follows:

> The purpose of the General Order under appeal is to permit new growers to enter the industry while at the same time ensuring that there will be fairness in voting and election procedures. Turkey producers who have made significant commitments to the industry will not be adversely affected by those who have sub-divided a farm in order to group together acquired voting rights….
>
> ...If the BCTMB cannot set a minimum quota holding for registration, it will not be able to "regulate effectively" without being forced to refuse licences to those who wish to acquire small amounts of quota (by transfer or otherwise) in order to enter the industry. The power to enact such a General Order is, therefore, necessary in order for the BCTMB to effectively regulate the industry in a manner which is both fair to current growers and facilitates participation of "new" growers….

19. The Turkey Board says that its decision to draw the line at 65,000 kg of quota as a condition of registration was based on input from the Turkey Advisory Committee, its assessment of the requirements of industry infrastructure, its view that "registered" status should demonstrate financial commitment to the industry, and the reality that the smallest registered grower at the time held 65,000 kg of quota.

20. On March 13, 2000, the Turkey Board passed the amendments to the General Orders and then, pursuant to those amendments, approved the Skyacres applications subject to conditions that required each transferee to submit the following information to the Turkey Board by April 20, 2000:

    a) a business plan;
    b) a lease agreement with the owner of the property where the turkeys will be produced;
    c) a processor letter agreeing to slaughter and process the turkeys; and
    d) an acknowledgement that they will hold quota as a non-registered grower until such time as they hold 65,000 kg quota.

21. This information was not provided to the Turkey Board, and subsequently the Appellant filed its appeal with the BCMB. As noted above, the Appellant seeks an Order directing the Turkey Board to allow the quota transfers unconditionally. For its part, the Turkey Board suggests that it would not be appropriate to allow the transfers unconditionally. It notes that, but for the limitation on registration, it might well have refused the proposed transfers altogether.

22. On March 26 and April 18, 2001, the BCMB issued interim decisions regarding the Appellant's application for production of documents. In the March 26 interim decision, the BCMB also dismissed the Turkey Board's application to dismiss the appeal as being frivolous, vexatious or trivial.

DECISION

I. Whether the Turkey Board has the authority to distinguish between classes of growers for purposes of voting?

23. The Appellant's first ground of attack is that the governing enactments give the Turkey Board no authority to distinguish between classes of growers for purposes of voting. It says that the purpose of the register is to be a record of "all growers", and it is not to be used as a means of distinguishing between classes of growers.

24. The Appellant relies on the fundamental rule of statutory interpretation that legislative power delegated to a subordinate body does not, except by express language or necessary implication, include the power to discriminate: *Re City of Montreal and Arcade Amusements Inc.* (1985), 18 D.L.R. (4th) 161 (S.C.C.); *Rempel Bros. Concrete Ltd. v. Mission* (1989), 40 B.C.L.R. (2d) 393 (S.C.).

25. The Appellant emphasises that the discrimination in this case is aggravated not only because the right to vote is fundamental but also by the fact that the Order appears targeted at this particular family.

26. The Appellant argues that the *Act* is very specific about the powers granted to discriminate between classes of persons. Section 28(a) of the *Scheme* allows the Turkey Board to distinguish between "classes of any regulated product", but not between classes of persons. Section 28(d) allows the Turkey Board to grant exemptions from orders or determinations to classes of persons, but the power to grant an exemption is not the same thing as a power to impose a burden. Section 28(f) allows the Turkey Board to set different licence fees for different classes of persons, but the words "for this purpose" make it clear that this power to discriminate is for this purpose only.

27. The Appellant makes clear that the wisdom of drawing the line at 65,000 kg is not what is at issue in this Appeal, rather:

> …[t]his appeal goes right to the heart of the TMB's assertion that it has the power to discriminate between growers or classes of growers. It is the assertion of the power, not the way in which it was exercised, which is at the root of this appeal. The facts relevant to this appeal concern discrimination in many of its manifestations. The legal proposition upon which the Appellants' case is based is that, as a matter of law, the TMB lacks the power to discriminate. That legal proposition is put in issue by the Respondent's defence of its Order and decision of March 13, 2000.

28. Based on these arguments, the key issue the Panel must address is whether the Turkey Board has *any* authority under the *Scheme* to create classes of growers who are entitled to "registration" and classes of growers who are not so entitled. We agree with the Appellant that as a matter of law, commodity boards are not authorised to make General Orders (a form of delegated legislation) that discriminate between classes of growers unless such authority is granted expressly or by necessary implication in the board's empowering legislation.

29. As it is being used here, the term "discrimination" originates from the municipal law context, where the principle is that a by-law cannot make distinctions between persons without legislative authority to do so. In this context, "discrimination" is used "in the non-pejorative but most neutral sense of the word", since a by-law may be rendered invalid "even though the distinction on which [it is] based is perfectly rational or reasonable in the narrow or political sense, and was conceived and imposed in good faith, without favouritism or malice": *Re City of Montreal and Arcade Amusements, supra*, p. 189.

30. More recent cases have confirmed that this principle is not limited to the municipal law context. It also applies to the General Orders of commodity boards (*Re Sanders and Milk Board* (1991), 77 D.L.R. (4th) 603 (B.C.C.A.)) and to delegated legislation generally: *Waldman v. Medical Services Commission*), [1999] B.C.J. No. 2014 (C.A.). The principle has been stated as follows:

> Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality's powers as defined by its empowering statute. Discrimination in this municipal sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.
>
> It follows that when it is alleged that a municipality has improperly discriminated against a citizen, the question for the court is whether the discrimination was authorized by the statute from which the municipality draws its powers. If the legislation authorizes the impugned distinction, the rule is not breached: *R. v. Sharma*, [1993] 1 S.C.R. 650. As my colleague Sopinka J. puts it, "the appropriate question is whether discrimination is explicitly or impliedly authorized" (p.25).
>
> *Shell Products (Canada) v. Vancouver*, [1994] 1 S.C.R. 231, at para. 56-57, per McLachlin J. (dissenting but not on this point).

31. In this case, there is no question that the General Orders "discriminate" between growers for the purposes of voting. The March 2000 amendments create a class of small growers who are now formally recognised as part of the industry, but tells those growers they cannot vote and hold office because their quota holding is too low. The question posed by the Appellant is whether the *Scheme* authorises any discrimination between classes of growers for the purposes of voting.

32. In the Panel's opinion, section 26 of the *Scheme* clearly grants the Turkey Board authority to distinguish between growers who are entitled to be registered, and those who are not so entitled. Section 26, enacted pursuant to the Lieutenant Governor in Council's authority to vest in commodity boards those "powers considered necessary or advisable to enable them to effectively...regulate... marketing" (*Act*, ss. 2(2)(c)), states as follows:

> The board shall keep at its head office a record (to be known as the "Register of Growers") of all growers whose names and addresses have been *registered in accordance with orders of the board*. Such record shall be amended from time to time by the addition thereto of the names and addresses of all *growers who are entitled to be registered* and by the deletion therefrom of the names and addresses of *growers who are not entitled to be registered*; provided, however, that before the name of any grower is removed from the said register, the board shall give him 2 weeks notice in writing of the intention to do so, and the name of such grower shall not be removed as aforesaid if he shall, within the said period, give to the board sufficient reason for the retention of his name on the said register. [emphasis added]

33. The Appellant says that the Register was designed to act as a register of "all growers", and submits as follows:

> Nothing in this section could be interpreted as allowing the TMB to establish two separate records so that "all growers" are effectively separated into classes of growers, some with voting rights and some without. This would require a change in statutory wording from "all growers" to "some growers".

34. The Appellant's submission does not accord with the plain wording of section 26. The words "all growers" cannot be read in isolation from the sentence they are contained in, or from the section at large. From a plain reading of s. 26, three points are clear:

    a) Section 26 itself distinguishes between growers who are entitled to be registered and growers who are not entitled to be registered, and thus plainly recognises a class of "growers" who are not entitled to be registered.

    b) The reference to "entitlement" presupposes the existence of criteria to determine that entitlement.

    c) The *Scheme* does not determine entitlement. Instead, registration is expressly recognised as a matter to be determined "in accordance with orders of the board".

35. This interpretation is reinforced by a review of other sections of the *Scheme*. Section 15 defines "grower" in a comprehensive fashion that conspicuously avoids the adjective "registered". The term "registered grower" is not defined anywhere in the *Scheme*, yet the *Scheme* reserves voting and election rights to "registered growers": *Scheme*, ss. 19, 20, 22. Thus, when section 26 refers to growers who are and are not entitled to be registered, and to registration "in accordance with orders of the board", it can only mean that the Turkey Board is charged with making distinctions between growers for the purposes of registration, and therefore, of voting.

36. While neither counsel relied on this point, it is in our view significant and reinforcing that the *Scheme* has conferred and retained this entitlement authority in the Turkey Board, despite the *Natural Products Marketing (BC) Act Regulations*, B.C. Reg. 328/75, as amended ("the *Regulation*"). Section 3(q) of the *Regulation* provides that persons producing or marketing product that is "exempt" under a commodity board's orders do not have the right to vote: s. 3(q). Section 3(q) of the *Regulation* and s. 26 of the *Scheme* must be read together. The purpose of the *Regulation* is to establish a global set of "powers, duties and obligations" that complement, not contradict, the 11 commodity schemes. Also, as the opening words of s. 3 of the *Regulation* make clear, these provisions are subject to any particular scheme; they do not override any scheme.

37. Had the Lieutenant Governor in Council – who passed both the *Regulation* and the *Scheme* – intended s. 3(q) of the *Regulation* to be exhaustive on the matter of voting rights for all producers in all sectors, it could easily have said so rather than focusing only on the subject of exempt producers. That Cabinet found it sensible to enact an "across the board" disqualification for exempt producers is understandable. Regardless of the sector, "exempt" producers essentially operate outside the regulated marketing system and the

Regulation, by definition, deals with general rules applicable to all sectors: s. 2. However, making special provision for people operating outside the system in a general regulation does not, either as a matter of logic or policy, imply that a commodity board cannot go further under its individual scheme, as discussed above, and address the separate issue of registration by "non-exempt" producers given the realities of their particular industries.

38. To infer from the *Regulation* a general fetter on all commodity boards from further and forever addressing the question of registration over and above exempt producers, regardless of the realities confronting a particular industry, would in our view have required much clearer language. Such a result would be inconsistent with the Cabinet's intent to ensure effective and timely governance in a dynamic context which varies significantly as between different commodity sectors. It would also be inconsistent with the reality that commodity boards are designed to have wide and flexible governance powers: *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2. It would also be inconsistent with the fact that the *Regulation* is subject to the schemes. It would, in the end, amount to an unhelpful use of the "*expressio unius*" principle which, when used artificially and mechanically, can be "an unreliable tool" for determining legislative intent: *Driedger on the Construction of Statutes* (3d ed), p. 337.

39. The Lieutenant Governor in Council could easily have adopted a number of alternatives if it specifically intended to make s. 3(q) of the *Regulation* exhaustive in respect of the Turkey Board and clearly dictate that every non-exempt grower must be "registered". For example:

- It could have defined "grower" in s. 15 of the *Scheme* to mean a person not exempt under the Turkey Board's General Orders, and then deleted all reference to "registered" in ss. 19-21 of the *Scheme*;

- It could have amended s. 26 to remove the reference to entitlement "in accordance with orders of the board";

- In the further alternative, it could have defined entitlement not with reference to the Orders of the Board, but with reference to s. 3(q) of the *Regulation*.

40. The *Scheme* did not do any of these things. Rather, from a review of the plain language of s. 26, read in the context of both its neighbouring sections and the *Scheme* as a whole, the Panel concludes that the *Scheme* (a) contemplates the existence of a category of growers who are not registered, (b) reserves voting and election privileges to registered growers and, (c) contemplates in s. 26 that registration entitlements are to be determined by Turkey Board order. In our view, the legislative language and intention is clear. If the law is to change, the exercise of law reform is for the Lieutenant Governor in Council, not the BCMB under the guise of statutory interpretation.

41. The Appellant notes that its argument on this issue is not about the wisdom of distinguishing between registered and non-registered growers, or about where the line should be drawn, but rather is about the authority to do so. In our view, the authority to do

so is clear. In light of our conclusion on this point, the Panel does not find it necessary to consider the Turkey Board's alternative argument that this authority is implicitly authorised by ss. 28(b), (d), (e), (n) and (o) of the *Scheme*.

II. Whether the Turkey Board could properly apply its amended Order to the Appellant's application?

42. This issue gives rise to two sub-issues. The first is whether the Turkey Board's General Order amendment was even effective at the time it decided Skyacres' transfer application.

43. The facts here are that the Turkey Board met on March 13, 2000 and passed the amendments to its General Orders. Following this, and at the same meeting, it then approved the applications in accordance with the amendments.

44. The Appellant says that while the amendments were passed on March 13, 2000, they were not "in effect" until March 15, 2000 when growers were notified of them. If the legally effective date of the amendments *was* March 15, 2000, the Turkey Board would have had no right to apply them to a March 13, 2000 decision respecting the applications.

45. At first glance, the argument that the amendments were not legally in effect until March 15, 2000 is appealing. The very face of the consolidated General Orders provided to the BCMB on this appeal states "Amended March 15, 2000" beside each of the amendments in question. The top of the document is worded slightly differently, reading "And as amended to March 15, 2000".

46. The Turkey Board argues that despite the reference to "Amended March 15, 2000" on the consolidation document, the legally effective date was the *decision* date of March 13, 2000.

47. The Turkey Board further argues that its General Orders are "regulations" within the meaning of the *Interpretation Act* since they are orders enacted by or under the authority of the Lieutenant Governor in Council, which enacted the *Scheme*. It also says, and we agree, that as with the regulations in *Re Compensation Stabilization Act* (1985), 62 B.C.L.R. (2d) 70 (S.C.), its General Orders are not "regulations" that must be deposited pursuant to the strictures of the *Regulations Act*.

48. As regulations subject only to the *Interpretation Act*, commencement is governed by section 3(5) of that Act:

> Every regulation of a class that is exempted from the application of the *Regulations Act* or to which that Act does not apply and that is not expressed to come into force on a particular day comes into force the day the regulation was enacted.

49. The Turkey Board refers to the definition of "enact" in s. 1 of the *Interpretation Act*, which states that "enact includes to issue, make, establish or prescribe".

50. There is no question that these regulations were made and established on March 13, 2000. The Appellant itself concedes that March 15, 2000 was merely the date the Turkey Board "gave notice of decisions made on March 13, 2000...". As *Re Compensation Stabilization Act*, *supra*, makes clear at p. 75, a regulation can be effective under the *Interpretation Act*, (i.e. it can be made or established) before it is formally communicated to the public.

51. But what of the repeated references in the consolidated Order itself to "Amended March 15, 2000"? Are these expressions of the Turkey Board's intent to have the amendments come into force on that later day, as referenced in s. 3(5) of the *Interpretation Act*? Had the evidence disclosed that the General Orders contained this language when the Turkey Board approved them, the Panel would not have hesitated to answer this question "yes".

52. However, on the evidence, we are satisfied that what actually happened was that, following the Turkey Board's approval of the substance of the amendments, its Secretary-Manager issued a General Order amendment which he "signed" on March 15, 2000. He also created a general consolidation incorporating the amendments into the body of the existing General Orders and inserted the references to "Amended March 15, 2000". For some unknown reason, he headed the consolidation document as if it were published in the British Columbia Gazette-Part II. This appears to be the usual way in which the Turkey Board publishes its General Orders.

53. As an aside, it should be noted that the Panel does not approve of the form chosen by the Turkey Board to publish its General Orders. By replicating the style of publishing used by the British Columbia Gazette-Part II, the Turkey Board creates potential confusion as to the author of the General Orders. The formality adopted by the Turkey Board could lead persons to believe that these are not orders of a commodity board and as such appealable but rather are regulations adopted by the Lieutenant Governor in Council. Even if the General Orders were at one time published in this manner, they are not now. Accordingly, it is improper to represent the General Orders as being so published.

54. The Panel is satisfied on the evidence that the references to amendments as of March 15, 2000 are the Secretary-Manager's editorial insertions after the fact. While these edits caused understandable confusion, we find that to interpret them as the Turkey Board's expressed intent regarding the amendments' effective date would not convey the truth of what the Turkey Board did, or what it intended. In our view, the Turkey Board clearly intended that both of its March 13, 2000 decisions, whenever they might be communicated, would be effective as and when they were made.

55. Having concluded that the Order amendments were effective at the time the transfer decision was made, the second sub-issue is whether Skyacres had a vested right to have its application decided based on the General Orders as at the date of their application in December 1999, irrespective of any later change in the General Orders?

56. The Panel finds that Skyacres, simply by making an application for quota transfer in December 1999, did not obtain an unqualified right to have its application decided in

accordance with the Turkey Board's General Orders as of that date. As noted in *Quebec (A.G.) v. Quebec (Expropriation Tribunal)*, [1986] 1 S.C.R. 732, and the cases discussed therein, enactments are presumed to take immediate effect. The usual rule is that a change in the law applies to determine the future legal consequences of "facts in progress". This is particularly so where its purpose is to ensure uniformity and consistency in the public interest.

57. While "vested" or "accrued" rights can sometimes survive a change in the law, it is difficult to see what sort of right Skyacres could have accrued back in December 1999. It had no right to transfer its quota, or to do so under any particular terms and conditions: *Re Sanders v. Milk Board, supra;* its only "right" was to have the Turkey Board make a decision about its application in accordance with what was best for the industry. An "investigation to decide whether some right should or should not be given" is not recognised as a vested right: *Director of Public Works v. Ho Po Sang*, [1961] A.C. 901 (J.C.P.C.) at p. 922.

58. Further, we do not think that the "14 days" in s. 6(2) of the General Orders imposed an obligation on the Turkey Board to make a decision within that time. The 14 days is clearly an obligation on the transfer applicant regarding the "proposed effective date" of the "proposed transfer". Moreover, it is not apparent to the Panel that the change in the law seriously prejudiced the Appellant in any way. We are not satisfied that the Appellant would inevitably have been successful with the Turkey Board in a choice between small lot transfers with full registration, or no transfers at all.

59. Finally, whatever "accrued" rights a party may have at the time the law changes, those rights are subject to a clear legislative intent to have the changed rules apply to the matter in question: *National Trust Co. v. Larsen* (1989), 61 D.L.R. (4th) 270 (Sask. C.A.) at pp. 277, 288. In this case, there is little doubt that the amendments to the General Orders were intended to apply to Skyacres' transfer application. In fact, one of the Appellant's main objections, discussed below, is that the amendments targeted Skyacres.

60. Accordingly, the Panel finds that the Order amendments were effective March 13, 2000 and apply to Skyacres' December 1999 transfer applications.

III. Whether the Decision and Orders should be struck down as being arbitrary, discriminatory and founded on bias?

61. The Appellant's third ground of attack focuses not on legal arguments but takes direct issue with the motives and merits of what the Turkey Board has done.

62. On the issue of motives, the Appellant says that following its applications, the Turkey Board did not deal with the applications "other than by laying the groundwork for a discriminatory decision which was already in the planning stage" by the date of the Turkey Board's January 6, 2000 meeting. It alleges that the Turkey Board delayed dealing with the Appellant's applications, while approving other small lot transfers by two other growers. It

states that the decision had the effect of relegating the proposed transferees to the status of second class growers, and that the sting is made worse by the intent to focus on one family in particular. It also suggests that the eventual March 13, 2000 decisions had undertones of racial animus.

63. Dealing with the last point first, the Panel is not satisfied that the March 13, 2000 decisions were racially motivated. The preponderance of the evidence does show that on March 9, 2000, in seeking to persuade the applicants to come on side with the Turkey Board's concerns, Mr. Wiebe made a clumsy comment that was reasonably understood as reflecting his sentiment in favour of refusing quota transfers to persons outside the industry's homogeneous status quo. While this comment affects our concern about the absence of a thoughtful and well-defined new entrant program (discussed below), the evidence does not in our view demonstrate that racial hostility was the underlying reason for the Turkey Board's March 13, 2000 decisions. As noted above, those decisions *granted* quota in this case, albeit with a restriction on registration. Furthermore, we emphasise that an appeal before the BCMB is a re-hearing, and in coming to our decision we have exercised our own judgement in examining the merits of the Turkey Board's actions.

64. We also are not convinced that bad faith or animus motivated the Turkey Board's dealings with the applicants. Their applications presented the Turkey Board with a unique situation, and came in the context of ongoing discussions about minimum farm size. The applications having crystallised the need for a decision, the Turkey Board legitimately took some time to consider fundamental questions regarding who ought to be entitled to "full citizenship" and, depending on the answer to that question, whether small lot transfers could or should be accommodated.

65. We are not convinced that the Turkey Board's decision to "approve" the small lot transfers by two other growers was part of any conspiracy against the Appellant. The Panel accepts the evidence of the Turkey Board's Secretary-Manager who indicated that the two small quota holdings of Jaedel Enterprises Ltd. ("Jaedel") and Wincrest Pacific Enterprises Ltd. ("Wincrest") were the result of an oversight. The Turkey Board was of the understanding that both growers had, by way of eight quota transfers, sold their entire quota holdings. It was not until some months later when the Secretary-Manager was setting up the yearly grower's accounts that it became apparent that Jaedel had 180 kg of quota in its account and Wincrest had 200 kg. At about this point in time, the Turkey Board was in a dispute with Jaedel over the discontinuing of a breeder subsidy and it was felt the residual quota issue should be left until the larger breeder subsidy issue was resolved.

66. By January 24, 2000, these two small lots of quota had been transferred to a registered grower. The Turkey Board determined that during the period of time that Jaedel and Wincrest held their small lots of quota, no meetings requiring grower voting had been held. Thus, neither grower had exercised any voting rights associated with their small quota holdings.

67. The Appellant also takes issue with the merits of what the Turkey Board has done. In response to the Turkey Board's earlier submission that the distinction between growers based on their quota holdings is fair and reasonable, the Appellant submits as follows:

> But how can the TMB possibly argue that someone with 50,000 kgs. is any less fit to vote and hold office than someone with 65,000 kgs. or 1,375,000 kgs. Many small growers in the past have made useful contributions to the industry and to the provincial economy. Moreover, Alberta functions quite well without any disqualification for small quota-holders. The Past-Vice-Chair and former Chair of the Alberta Turkey Marketing Board, Michael Loewn (who is still a director) has only 3000 kgs. of quota. The Alberta Board apparently does not consider it to be fair and reasonable that he should be deprived of his office and right to vote. Nor does the (Alberta) Growers Association see any reason to withhold privileges to those holding small amounts of quota.

68. This submission raises basic questions about what, if any, limitations ought to exist on the exercise of "full citizenship" rights in the turkey industry. Expressed in the language of the *Scheme*, who ought to be "entitled" to be registered grower? A number of models are possible.

69. One model, promoted by the Appellant, would confer full citizenship rights (one vote and the right to hold office) on each licensed grower, irrespective of the size of their quota holdings. This model has the initial appearance of "democracy" and "universality". It addresses the Appellant's argument that a person's fitness to hold office does not necessarily depend on their quota holdings.

70. In considering this argument, however, two things must be kept in mind. The first is, under the *Scheme*, being "registered" means having the right to hold office and the right to vote. A person cannot be "registered" for one purpose but not for the other. The second is that in society at large, voting is tied to a human person, who is not divisible in order to expand his or her voting power. However, where a vote in a turkey industry comprised of only 50 growers is tied to any quota over 25 birds, there is a serious risk that some growers will sub-divide their quota into numerous small blocks and, in purpose or effect, unfairly accumulate blocks of voting rights. In our view, the Appellant's argument does not address the risks or the unfairness caused by such a situation.

71. A second model is the one used in Alberta. Every quota holder is given the right to vote and hold office, subject to a system of "weighted voting" whereby voting power increases with quota holding. While this model is more inclusive, its most obvious drawback is that the wealthiest producers exercise the greatest power.

72. A third model is the one chosen by the Turkey Board, namely to grant full citizenship to any licensed grower who meets a "threshold" appropriate to demonstrate that person's genuine and meaningful commitment to the industry. Upon reaching that threshold, universality is achieved, with no disadvantage based on the fact that others may hold significantly larger quota holdings.

73. Under this model, it obviously becomes important to consider what the threshold will be. If it is too low, the risks described in the first model come to the fore. If it is too high, it can be used as a device to exclude growers truly committed to the industry over the long term, and to exclude diversity and change.

74. The Turkey Board's decision to draw the line at 65,000 kg quota for registered status was based in part on its view, supported by the Turkey Advisory Committee, that the number should be set at a level that would provide efficiencies for hatcheries, feed companies and processing plants. It was also based in part on the reality that the smallest registered grower at the time was just over 65,000 kg, in an industry with 50 growers, and where the average size of a farm is 421,000 kg, 200,000 kg is considered "small".

75. The Turkey Board also felt that as non-registered growers were entitled to lease quota and to participate as full members in the Growers Association, there was still ample opportunity for non-registered growers to participate and grow in the industry. To some extent, this offsets the loss of voting rights.

76. Line drawing is always a difficult exercise. Exactly where the line should be drawn is not a question the Panel needs to ultimately decide in this appeal, although we accept the legitimacy of the Turkey Board's submissions that there should be some sort of link between the minimum amount of quota held and the right to vote. We are satisfied that, wherever the line is drawn, significant mischief and unfairness in this industry, given its realities, would result from granting full registered grower status to persons whose proposed quota holdings are merely 500 kg and 1000 kg.

RECOMMENDATION

77. This having been decided, after hearing this appeal the Panel is cognisant of the need for the turkey industry to encourage new entrants, persons described by the Appellant as "outsiders who are young and/or without significant financial means". While the Turkey Board's decision to facilitate small quota transfers in a "non-registered" category has been a first step, the Panel is concerned, particularly in light of the reference to "all sorts of small producers" entering the industry, about the apparent absence of a considered and well defined new entrant program and lack of a transparent quota exchange, as exists in other regulated industries.

78. The Panel recommends that the BCMB, acting in its supervisory capacity, examine these and related issues further with the Turkey Board. This review may also facilitate a fuller examination of minimum and maximum farm size for the purposes of registration.

ORDER

79. The appeal is dismissed.

80. In dismissing the appeal, the Panel confirms the Turkey Board's decision to approve the transfers subject to the conditions regarding registration.

81. The proposed transferees will have 21 days from the date of this decision to comply with the conditions originally imposed on the approval. As part of making the transfer consistent with the Turkey Board's General Orders, and so that there is no confusion resulting in "unregistered producers" being denied transfer, we further direct that the Turkey Board immediately amend s. 6(3) to make provision for quota transfer to an "unregistered grower".

82. Finally, each party will bear its own costs of the appeal, except that the Turkey Board will pay the Appellant's costs, relative to the application to dismiss the Appellant's appeal as frivolous and vexatious. A commodity board should only make application to summarily dismiss an appeal in circumstances where an appeal is clearly and patently without merit. In our view, this appeal was not clearly and patently without merit. It is therefore appropriate, despite the Turkey Board's success on the main appeal, that it pay the Appellant's costs on that application.

83. As to the amount of costs to be paid, s. 8(11) of the *Act* provides as follows:

> In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board.

84. In this case, we direct the Turkey Board to pay costs to the Appellant in accordance with Scale 3 of Appendix B to the Supreme Court Rules. If the parties cannot agree as to the amount of costs payable, either party can apply to the Panel for directions.

Dated at Victoria, British Columbia this 1st day of August, 2001.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine Elsaesser, Vice Chair
Karen Webster, Member
Doreen Hadland, Member