

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL REGARDING THE BC MILK MARKETING BOARD'S  
DETERMINATION OF A FARM SALE

**BETWEEN**

DONIA FARMS LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA MILK MARKETING BOARD

**RESPONDENT**

**DECISION**

For the British Columbia  
Farm Industry Review Board

Al Sakalauskas, Presiding Member  
Dennis Lapierre, Member  
David Zirnhelt, Member

For the Appellant

David van Keulen  
Stan van Keulen

For the Respondent

Robert Hrabinsky, Counsel

Date of Hearing

By written submission

## INTRODUCTION

1. The appellant, Donia Farms Ltd., (Donia) operates a dairy farm in Surrey, BC. It is appealing a May 27, 2020 decision of the British Columbia Milk Marketing Board (Milk Board) denying its request “for an exception on the Farm Sale provision of the Consolidated Order”.

2. The Milk Board’s May 27, 2020 decision states as follows:

On May 27, 2020, the BC Milk Marketing Board (the Milk Board) reviewed your letter dated May 21, 2020 requesting that Donia Farms be permitted to conduct a delayed “farm sale” transaction. The request as outlined has been denied due to the policy requirements to conduct a farm sale.

As defined in the Consolidated Order: A “Farm Sale” means a transfer where 50% of the Transferor’s available Continuous Daily Quota is Transferred to one purchaser, contemporaneously and together with the Transferor’s total legal and beneficial fee simple interest in the land and associated dairy farm (including the Transferor’s total legal and beneficial interest in all buildings, facilities, equipment and dairy cows used in connection with that dairy farm).

This type of transaction is required to be conducted as a package where all assets on the property including the land be transferred at the same time as the quota, to limit any opportunity for the transferor to retain any beneficial interest in the farm.

There were two areas of concern for the Milk Board, the first was the dates for purchase of land and quota would be different (3 year gap), the second was the 10% growth in quota (3 General Allotments) allocated to Kitzel Farms Ltd. between August 2017 and present, which clearly shows a beneficial interest for the transferor.

3. On June 26, 2020, the British Columbia Farm Industry Review Board (BCFIRB) received an intervener application from the British Columbia Dairy Association. In a written decision dated June 30, 2020, this application was dismissed as the presiding member concluded that the Milk Board could (and in fact had) addressed sound marketing policy arguments about the “Farm Sale” exception in its submissions. Further, the appellant would be prejudiced by allowing an intervener into the proceedings so late in the hearing process as the appellant and respondent had already filed their submissions and supporting documents, June 24, 2020 and July 2, 2020 respectively and only the appellant’s right of reply was remaining.
4. In brief, the appellant’s position is that the “Farm Sale “exception in the Consolidated Orders is sufficiently broad to allow the land and Continuous Daily Quota (CDQ) to transfer under the same contract of purchase and

sale but almost three years apart. In the particular facts of this case, where the contract contemplates as a condition of sale the parties entering into a quota license or lease agreement, and as that agreement is still in effect, the contract can be amended before expiration of the agreement. As such, the appellant argues that the two transfers (of land and quota) are contemporaneous for the purposes of the definition of "Farm Sale" and asks this panel to approve the transfer of 50% of Kitzel Farm Ltd.'s (KFL) CDQ to Donia on or before July 31, 2020.

5. Due to the COVID-19 pandemic and current restrictions on public gatherings, the appeal hearing proceeded by way of written submission. Given the time constraints associated with when the appellant requires a decision, an expedited hearing schedule was established with the last submission being received July 6, 2020.

## ISSUE

6. Did the Milk Board err in its May 27, 2020 decision in finding that the proposed sale of quota did not satisfy the definition of "Farm Sale" on the basis that a three-year time lapse between the sale of CDQ and the sale of the associated land cannot be considered a contemporaneous transfer?

## LEGISLATIVE FRAMEWORK

7. Milk (cow) production in Canada is regulated under a supply managed system designed to fill the need of the domestic market. A key component of supply management is quota, which entitles a producer to sell a specified volume of milk in accordance with provincial and federal authorities. In this province, the Milk Board has the authority "to promote, regulate and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of a regulated product within British Columbia and is vested with all powers necessary or useful in the exercise of those powers".<sup>1</sup>
8. The Milk Board has enacted Consolidated Orders which set out the rules under which the BC dairy industry operates and specific to this appeal, how quota transfers. Section 19(1)(d) requires all CDQ to transfer on the Quota Exchange unless the transfer falls within certain prescribed exceptions relating to transfers to relatives, farm executives, and internal corporate transfers. One such exception is "transfers which constitute a Farm Sale" where "Farm Sale" is defined as follows:

**"Farm Sale"** means a Transfer where:

- (a) 50% of a Transferor's available Continuous Daily Quota is Transferred to one purchaser, contemporaneously and together with the Transferor's total

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<sup>1</sup> British Columbia Milk Marketing Board Regulation (B.C. Reg.167/94)

legal and beneficial fee simple interest in the land and associated Dairy Farm (including the Transferor's total legal and beneficial interest in all buildings, facilities, equipment and dairy cows used in connection with that Dairy Farm);  
(b) the Transferor retains no legal or beneficial reversionary interest in either the Continuous Daily Quota so Transferred or the land and associated Dairy Farm (including any buildings, facilities, equipment or dairy cows used in connection with that Dairy Farm); and

(c) the remaining 50% of the Transferor's Continuous Daily Quota is forthwith Transferred through the Quota Exchange;

all subject to the surrender provisions of this Consolidated Order.  
[emphasis added]

### **KEY FINDINGS OF FACT**

9. This appeal involves a 2017 transaction whereby the Donia, a dairy producer, entered into a transaction to acquire the Kitzel's neighbouring dairy farm.
10. On May 16, 2017, Randy and Jaqueline Kitzel and KFL as sellers, and Donia or its assignee, as buyers entered into a contract of purchase and sale (Contract) with respect to:
  - a. Three properties civically described as 14159 40th Avenue, 13975 40th Avenue, and 13168 48th Avenue, Surrey (the Lands); and,
  - b. A dairy cow herd of approximately 350 head of cattle (the Herd)
11. The Contract was subject to several terms and conditions with the relevant condition 3(f) providing:
  - f. Subject to the Buyer and KFL entering into an agreement on or before the Completion Date for the license of 300.96 kg of Continuous Daily Quota (CDQ) by KFL to the Buyer for a 3-year term commencing on the completion date and at a fee of \$4 per kg of CDQ plus GST.  
  
This condition is for the benefit of the Buyer and the Seller.
12. The Contract expressly stated that "the purchase and sale will complete on August 1, 2017 at the appropriate Land Title Office."
13. On June 1, 2017, the parties entered into an Addendum to the Contract (as contemplated by the Contract) providing for the allocation of the purchase price among the Lands and the Herd and referencing the houses, barns, milking parlor and equipment and computer systems which were not particularized in the original Contract. It also removed the certain "conditions precedent" relating to Buyer's approval of title search, Buyer's

lawyer approval of contract, Buyer's obtaining satisfactory financing and satisfactory allocation of sale proceeds between the Lands and Herd.

14. The Contract as executed does not contemplate the transfer of the seller's CDQ. Rather it provides that entering into a three-year agreement to license the seller's quota is a condition precedent of the Contract.
15. The actual license or lease agreement entered into was not disclosed by the parties, but it is not disputed that Donia and KFL have operated under this agreement and Donia has milked cows under the KFL's CDQ since the Completion Date. The term of the CDQ license agreement ends July 31, 2020.
16. A Land Title search confirms that title to the Lands was transferred to Donia and its assignee on August 1, 2017.
17. It also does not appear to be in dispute that the Kitzel's intention at the time of entering into the Contract was to build a new dairy operation at Pritchard BC and transfer its CDQ to that new location. As it could take some time to complete the land acquisition and development of a new dairy farm, the Kitzel's and KFL entered into the agreement to license their CDQ to Donia for a three-year term.
18. It is also not in dispute that at some point in time after the completion of the purchase of Lands and Herd by Donia in August 2017, the Kitzel's plans changed and they decided not to pursue relocating their dairy operation to Pritchard and they would instead exit the dairy industry. In the normal course, and absent a "Farm Sale", a producer exiting the dairy industry would be required to transfer any CDQ on the Quota Exchange and be subject to any CDQ surrender provisions in the Consolidated Order.
19. On May 20, 2020, Randy Kitzel in his capacity of president of KFL and Stan van Keulen as president of Donia wrote to the Milk Board. After setting out the history of their transaction noted above, they made the following request:

Had the Kitzel Farms 47-330 decided to exit the industry at the time of the Farm sale, Donia Farms would have purchased 50% of the quota under the "Farm Sale" provision of the Consolidated Order. Kitzel Farms 47-330 has now decided not to move the operation and instead is willing to sell 332.05 kgs of Quota which is the amount managed at that farm.

We, Donia Farms and Kitzel Farms, are asking the board to allow the delayed implementation of the "farm sale" provision of the Consolidated Order. Based on the meaning of the rule, we would wholly qualify, except for the implied timing of "together with". The transaction meets all the requirements: Donia Farms bought the herd, buildings, land and equipment associated with the Dairy Farm. Kitzel Farms no longer has any legal or beneficial reversionary

interest in the land and Dairy Farm, not the quota post-transaction. This transaction meets all the requirements to qualify for a “Farm Sale”.

20. The Milk Board’s May 28, 2020 decision which is the subject of this appeal is set out above at paragraph 2. The Milk Board denied the request concluding that the transfer did not fall within the definition of “Farm Sale”:

There were two areas of concern for the Milk Board, the first was the dates for purchase of land and quota would be different (3 year gap), the second was the 10% growth in quota (3 General Allotments) allocated to Kitzel Farms Ltd. between August 2017 and present, which clearly shows a beneficial interest for the transferor.

## **ANALYSIS AND DECISION**

21. The Panel has approached our analysis by asking the following questions.

- a) What did the parties intend when they entered the August 2017 Contract of Purchase and Sale?
- b) Is it open to the parties to amend the Contract during the term of the three-year lease to incorporate a transfer of quota?
- c) Is there a sound marketing policy reason to support treating this transfer of quota as part of a “Farm Sale”?

### **a) What did the parties intend when they entered the August 2017 Contract of Purchase and Sale?**

22. On the clear wording of the Contract and the appellant’s May 21, 2020 request to the Milk Board, the panel concludes that the clear intention of both parties at the time they entered into the Contract was to affect the sale of the Lands (and associated buildings) and the Herd. A transfer of CDQ was expressly not contemplated by either party. Rather a three-year licensing agreement was contemplated to allow time for the Kitzels and KFL to move its dairy operations to Pritchard. The panel concludes that this transaction as it was structured in 2017 would not fall within the definition of “Farm Sale” as it discloses no intention to transfer any CDQ at the time of completion of the sale of the Lands and Herd, contemporaneously or otherwise. Further, transaction would be offside with subsection (b) of the definition of “Farm Sale” which requires that the transferor retain no legal or beneficial reversionary interest in either the Continuous Daily Quota so Transferred or the land. Clearly, the effect of a lease or licensing agreement is to retain legal interest in the CDQ in the Kitzels.

23. The panel observes that the appellant chose not to introduce any evidence of the intentions of the parties at the time they entered into the Contract or subsequently. We do not know why the Kitzels and KFL changed their minds about moving their dairy farm to Pritchard. We do not know the terms of the licensing agreement the parties entered into, nor is it clear whether the Milk Board was advised of, or in fact would have approved of, this type of quota licensing or lease agreement. We also do not know what Donia's original plans were to acquire sufficient CDQ to cover the milk production for the newly acquired farm once the three-year licensing agreement came to an end.

**b) Is it open to the parties to amend the Contract during the term of the three-year lease to incorporate a transfer of quota?**

24. The appellant's main argument relates to condition 3(f) of the Contract:

- f. Subject to the Buyer and KFL entering into an agreement on or before the Completion Date for the license of 300.96 kg of Continuous Daily Quota (CDQ) by KFL to the Buyer for a 3 year term commencing on the completion date and at a fee of \$4 per kg of CDQ plus GST.

This condition is for the benefit of the Buyer and the Seller.

25. The appellant argues that as the licensing agreement contemplated by this condition does not expire until July 31, 2020, it is open to the Buyer and Seller to waive this condition and amend it so as to provide for a transfer of CDQ as part of the same Contract. The appellant argues that not all the conditions of the purchase and sale have been met so the sale is not complete.

26. The appellant's argument is that if the Contract can be amended to reflect a transfer of CDQ as opposed to a lease or license agreement, then the requirements of "Farm Sale" are met. The transfer of CDQ under such an amendment would meet the definition of "contemporaneous" which should be given a broad and flexible interpretation to reflect an identifiable period of time during which the transfer of quota and the transfer of an interest in land both happen. These events do not have to happen together, at the same time or on the same date. Instead, the relevant period should be determined in light of the facts and context.

27. The appellant says that the proper interpretation of the two requirements in the definition of "Farm Sale" is to read "together" as meaning that the transfer of land and CDQ both arise out of the sale of the dairy farm and the related but separate return of CDQ to the Milk Board. "Contemporaneously" requires both transfers to happen during the period of time associated with the two separate transfers by two separate entities (the Seller and the Milk Board) at separate times. While it may be more typical for both transfers to happen close to the same time under a single deal, there will be situations

like this one where a single sale process over time involves transfers of different things, (e.g. herds, buildings, land, or milk production equipment by the dairy farm seller on the one hand and the later 50% transfer of CDQ by the Milk Board on the other) at quite different times.

28. In its reply to the Milk Board's submission, the appellant also points to the June 1, 2017 Addendum which referenced buildings and equipment not listed in the original Contract. The appellant says this supports its position that the Contract may be amended subsequently (including at this time) for any of the following reasons: it expressly contemplates a process that extends until August 1, 2020; it is still open to amendment; and, condition 3(f) is still not met or waived.
29. The appellant argues that the Contract is clearly referring to the "completion" of the land purchase (i.e. the "fee simple interest") which was one transfer in an overall process including the sale of the Herd, the sale of the equipment and computer system added by Addendum a month later was another transfer in this process and now the approval of the transfer of 50% of the Kitzel CDQ will be another (and final) transfer which is part of the overall ongoing process (or "Farm Sale") set to conclude August 1, 2020.
30. The Milk Board's response to the appellant's argument is brief. It says that no reasonable interpretation of the "Farm Sale" definition could support the appellant's interpretation to permit persons to engage in private (i.e., "off-exchange") quota transactions in circumstances where the transferor disposed of its entire legal and beneficial interest in lands three years earlier, without any intention to do so "contemporaneously" or "together with" a transfer of quota.
31. The panel first considers the appellant's argument that 2017 Contract remains open and subject to amendment as long as the parties are in the term of their licensing or lease agreement.
32. This argument is without merit. It mischaracterizes the purpose of conditions precedent to a contract of purchase and sale which, as the Contract makes clear, must either be fulfilled or waived by the identified party (Buyer or Seller) prior to completion of the sale. The failure of a party to fulfill a condition precedent may trigger rights in terms of who is entitled to the deposit should the deal collapse. In this case, the reality is that condition precedent 3(f) was in fact fulfilled by both the Buyer and the Seller upon them entering into the contemplated agreement to license 300.96 kg of the Seller's CDQ on or before the completion date. It is not in dispute that this agreement was in fact entered into by the Buyer (Donia) and Seller (KFL) and the appellant has milked under this agreement for the better part of three years.



33. Term and Condition 19 provides:
19. **Representations and Warranties:** There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and any other agreements in writing between the Buyer and the Seller (or any of them) all of which will survive the completion of the sale.
34. The intent of this provision is to make clear the license agreement is contemplated by the Contract and it survives the completion of the sale.
35. Term and Condition 23 provides:
23. **Acceptance Irrevocable:** The Seller and the Buyer specifically confirm that this Contract is executed under seal. It is agreed and understood that the Seller's acceptance is irrevocable, including without limitation, during the period prior to the date specified for the Buyer to either:
- (a) Fulfill or waive the terms and conditions contained herein; and/or
- (b) Exercise any option(s) herein contained.
- [Emphasis added]
36. Once the license agreement was entered into prior to the completion date, the condition precedent was fulfilled.
37. The panel agrees with the Milk Board that the appellant's argument is without merit. These arguments might have had some relevance if the original Contract disclosed an intention by the parties to enter into a lease to own CDQ as part of the original 2017 transfer of the Lands and Herd. We say "might" as the panel does not know whether such an arrangement would even have been approved by the Milk Board. Presumably, had the parties intended to effect a transfer of CDQ on whatever terms in 2017, the Milk Board would have been notified of the arrangement and Milk Board approval would likely have been a condition of the original Contract. However, that is not what transpired.
38. Both parties having fulfilled condition precedent 3(f) and the sale having completed as contemplated by the terms of the Contract on August 1, 2017, it is not open to the appellant to now waive condition 3(f) so as to try and convert the lease or license agreement to a transfer of CDQ. There is simply nothing left to waive.
- c) Is there a sound marketing policy reason to treat this transfer of quota as part of a "Farm Sale"?**
39. The appellant argues that approving the transfer of CDQ from the Kitzels and KFL is consistent with sound marketing policy as it supports the purposes and objectives of the Milk Board. The appellant references BCFIRB's "Public Accountability and Reporting Project and highlights BCFIRB 's expectations. The appellant's arguments are summarized under each Milk Board expectation:

- "Provide effective and efficient quota management policies and address the future of consolidation of farming."

The proposed quota transfer furthers this policy goal and will not result in another closure of a family dairy farm or the loss of jobs through consolidation. This is the first time in 60 years that Donia has sought a transfer of quota as part of a "Farm Sale" and the Milk Board should want Donia to remain viable and grow as part of BC's family dairy farm sector.

- "Provide policies for B.C. producers and processors growth and innovation. Enable and maximize the Innovation Policy."

This transfer brings new investment and better management to this dairy farm as the milk would be part of "Donia Farms" milk and butter retail line resulting in more consumer recognition and a bigger market share to BC based family owned long time dairy farms. Not granting the request creates an immediate financial problem and puts an artificial lid on Donia's growth prospects. Selling approximately 300 cows and sitting idle promotes neither growth or innovation.

- "Milk industry growth and innovation through increased production, efficiencies, new products and markets and in other areas benefits the dairy supply chain, farmers and consumers. The Milk Board focused on communicating and promoting new processor opportunities."

Donia engages in innovative practices and marketing through its "Heritage" brand of grass-fed milk and butter. Allowing the transfer helps Donia improve its practices and marketing. Not allowing the transfer creates a loss of both investment and future income as the property will sit idle.

- The Milk Board is responsible for the production and promotion of milk in B.C. Quality milk to meet consumer demand relies on establishing and enforcing production standards. The Milk Board has made the Dairy Farmers of Canada proAction program mandatory for all B.C. licensed dairy producers, effective January 1, 2018, resulting in 100% compliance. The proAction modules include animal welfare standards, milk quality standards and environmental standards.

Donia is an acknowledged leader in animal welfare, milk quality and environmental standards and supports the Milk Board's initiatives.

This transfer will help Donia continue to meet those standards and advocate for these standards in the dairy industry at large.

40. Finally, the appellant argues that a reason for the "Farm Sale" exception is to address the Milk Board's concerns about a private market in quota transfers where there is no related sale of a dairy farm operation. The appellant agrees that preventing speculation in quota or quota 'stockpiling' is a good policy but it argues that such concerns are not present here. The sequence of events with the Kitzels and KFL is that the transfer of the land, cows, equipment and buildings took place at an earlier point in time than the proposed 50% quota transfer but this is exactly the order of that the "Farm Sale" exception contemplates.
41. The Milk Board argues that to permit the "Farm Sale" exception requested by the appellant would allow for private "off-exchange" quota transactions where the transferor disposed of its entire legal and beneficial interest in land without any intention of doing so together with a transfer of quota. This is not sound marketing policy. The exceptions to the general requirement that quota be transferred on the Quota Exchange should receive a narrow interpretation as to do otherwise undermines the important policy objective of ensuring liquidity in the market for milk quota.
42. This interpretation is supported by the sound marketing policy articulated by BCFIRB in its Quota Assessment Tools Supervisory Review dated February 2, 2018. This decision confirmed the basic principles in quota management that "the overall availability of quota and the cost of quota acquisition in the producer quota market creates barriers to enter these industries" (paragraph 33) and recognized that quota liquidity "allows quota to move between producers based on their business objectives" and helps producers "establish an optimal farm size for efficiency" (paragraph 31).
43. The panel agrees with the Milk Board that there is no sound marketing policy justification to allow the appellant to reconfigure his deal with the Kitzels three years down to the road so as to fit within the "Farm Sale" exception. The appellant's original intent was to license or lease the Kitzel CDQ for a three-year period and then presumably to acquire CDQ over that period on the Quota Exchange to support milk production on the newly acquired farm. The panel did not hear any evidence about what CDQ, if any, Donia has acquired since 2017 to support this new dairy operation.
44. It would appear that the only thing that has changed is the Kitzels' desire to now sell their CDQ as opposed to move it to a dairy farm in Pritchard. Presumably there is some unspoken advantage to both parties to have this transfer proceed through a private arrangement as opposed to through a transparent transfer on the Quota Exchange. In our view, sound marketing policy dictates that the Kitzel CDQ should transfer on the Quota Exchange

in the normal course. This promotes quota liquidity and allows broader producer access to quota which is consistent with sound marketing policy.

45. In the panel's view, it would be in the best interests of all concerned including the milk industry in general for the appellant to engage with the Milk Board to manage any production issues which may arise during the period of transition from the CDQ license or lease agreement.

**ORDER**

46. The appeal is dismissed.
47. There is no order as to costs

Dated at Victoria, BC, this 16<sup>th</sup> day of July 2020.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**



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Al Sakalauskas, Presiding Member



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Dennis Lapierre, Member



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David Zirnhelt, Member