

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
APPEAL OF A DECISION OF THE BRITISH COLUMBIA EGG MARKETING BOARD
TO REFUSE AN OFF-EXCHANGE QUOTA TRANSFER

BETWEEN:

BREN-DEN VENTURES LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Wendy Holm, Presiding Member

For the Appellant:

Brenton Barkman

For the Respondent:

Robert Hrabinsky, Counsel

Date of Hearing:

October 30, 2023

Location:

via Zoom Video Conference

INTRODUCTION

1. The Appellant, Bren-Den Ventures Ltd., is an egg producer/vendor in Creston, BC. Brenton and Denise Barkman are the shareholder/owners of Bren-Den Ventures Ltd.
2. The Appellant is appealing a June 9, 2023 decision of the British Columbia Egg Marketing Board (Egg Board) to deny the transfer of the Appellant's quota to Mr. Goosen, a prospective farm purchaser (the Purchaser) as part of a *bona fide* Going Concern Sale.
3. In British Columbia, as in the rest of Canada, table eggs are a supply managed commodity. Production quotas allocated by the Egg Board determine how many hens a producer can house. With very narrow exceptions, all quota transfers between producers must go through the Provincial Quota Exchange (the Exchange). Administered by the Egg Board, the Exchange ensures all producers fair and transparent access to quota if they wish to expand their quota allotment. The Exchange also provides special access to producers with small flocks as defined in the Egg Board's Consolidated Order.
4. There are very limited conditions under which the Egg Board will approve a quota transfer that does not go through the Exchange. The conditions for off-Exchange transfers are found in Part V, section 1 of the Consolidated Order. These conditions include the transfer of quota between family members and, as is the case in this appeal, the transfer of quota as part of a bona fide, going concern farm sale ("bona fide Going Concern Sale"). To be considered a bona fide Going Concern Sale, two conditions must be met:
 - a) the proposed farm sale must fit within the definition of Going Concern Sale as specified in section 2 of Part I of the Consolidated Order; and
 - b) the proposed Going Concern Sale must be deemed by the Egg Board, in its sole discretion, to be a "bona fide" sale as defined in Part V section 1, subsection 4 of the Consolidated Order.
5. The Purchaser approached the Appellant in April of 2022, expressing an interest in buying his farm. The Purchaser began communicating with the Egg Board with respect to the potential purchase in August of 2022. Over the following winter months, the Appellant and the Purchaser agreed to terms of sale, legal documents were prepared, and the proposed purchase came before the Egg Board in the spring of 2023 for its approval of an off-Exchange quota transfer as part of a bona fide Going Concern Sale.
6. In its letter of June 9, 2023, the Egg Board advised the parties that their request for an off-Exchange quota transfer was denied because the proposed sale did not qualify as a bona fide Going Concern Sale.

7. On June 21, 2023 the Appellant notified BCFIRB that they wished to appeal the Egg Board's Decision.

ISSUE

8. Did the Egg Board err in its June 9, 2023 decision (the "Decision") refusing to transfer the Appellant's quota to the Purchaser as part of a bona fide Going Concern Sale?

BACKGROUND

9. The Appellant entered the egg industry in 2011 under the Egg Board's New Producer Program (NPP). At that time, the Appellant received an initial quota allocation of 3,000 quota units. Over the ensuing years, the Appellant was allocated an additional 1,311 quota units and sold 800 quota units on the Exchange, leaving him with 3,511 quota units at the time of the proposed sale to the Purchaser. If the sale had occurred, 791 quota units (a percentage of growth and specialty quota allocated over the 10-year period) would have been returned to the Egg Board for distribution to new entrants pursuant to Part V section 3 of the Consolidated Order.
10. The Appellant's farm is located on a property that is jointly owned with Denton and Debra Toews (the Property). Both owners (the Barkmans and the Toews) hold an undivided one-half interest in the Property. In a Co-Ownership agreement between them, the Barkmans and the Toews each grant the other couple the right to exclusive use of their respective portions of the Property as defined on a hand-drawn map annexed to the agreement (the Co-Ownership Agreement). In the case of the Toews, the Co-Ownership Agreement gives them exclusive rights to the front (southerly) 2.96-acre portion of the Property and includes their residence. In the case of the Barkmans, the Co-Ownership Agreement gives them exclusive rights to the rear (northerly) 7-acre portion of the Property which includes the farm buildings, layer barn and grading station. The Co-Ownership Agreement also gives each party the right of first refusal in the event of a proposed sale by the other.
11. Since purchasing the Property in co-ownership with the Toews, the Appellant renovated an existing dairy barn to house chickens, erected a second barn, built a grading station, and eventually combined the two barns into one barn with improved housing. The Appellant sold 800 quota units on the June 1, 2022 Exchange to finance the expansion.
12. With respect to the proposed Going Concern Sale between the Appellant and Purchaser, unless approved by the Egg Board as a bona fide Going Concern Sale, the Appellant's quota could only be sold on the Exchange. The Purchaser would therefore potentially have to compete with other farmers (small flock, new entrants and large growers) to buy the Appellant's quota. If other purchasers wished to purchase some of the Appellant's quota, then it would be divided equally in

accordance with the Consolidated Order. Since the Purchaser wished to acquire all of the Appellant's quota, and the Appellant wished to sell his entire farm operation to the Purchaser, the Egg Board's approval of the transaction as a bona fide Going Concern Sale was critical for both parties.

13. In April of 2022, the Purchaser entered into discussions with the Appellant concerning the purchase of the Appellant's farm operation. On August 19, 2022, the Purchaser wrote to the Egg Board, asking:

"...If I buy the corporation that the quota is held in (likely the farm stead and everything would come with), can the quota be moved right away or is there a time to wait on it? We are both from BC interior..."
14. On August 19, 2022 the Egg Board provided the Purchaser with a copy of its *Going Concern Quota Transfer - Conditional Approval* form which stipulates that both the Purchaser and the Appellant must provide to the Egg Board a sworn statutory declaration that the proposed transaction meets all 5 conditions of a bona fide Going Concern Sale. The first of the five conditions stipulates:
 - (a) the Transferee intends and has committed to the satisfaction of the Board to engage in egg production from all of the Layer Quota so Transferred at the Independent Production Unit that is the subject of the Going Concern Sale (Part V – Transfer of Layer Quota, subsection 1 (4) of the Consolidated Order).
15. In his email of November 11, 2022, the Purchaser asked the Egg Board:

"Also wondering if I buy an existing farm (I am in communication with a farmer) for its quota do I have to buy the property too or can I lease the property from the current owner?"
16. In its reply of November 14, 2022, the Egg Board again provided the Purchaser with the *Going Concern Quota Transfer - Conditional Approval* form, noting:

"...The requirements for a going concern sale are in the attached document. Basically, everything must be transferred to the new owner (i.e. land, buildings, equipment, birds and quota)..."
17. On March 7, 2023, the Egg Board again provided the Purchaser with the wording of the statutory declaration required to be signed by both the Purchaser and the Appellant.
18. On March 24, 2023, the Purchaser provided the Egg Board with a package containing the corporate documents of the Purchaser and the Appellant and a partially completed *Going Concern Quota Transfer – Conditional Approval* form. A revised form was submitted to the Egg Board by the Purchaser on April 3, 2023. Still to be submitted were one of the statutory declarations and the offer to purchase.

19. As part of the transaction, it was agreed between the Appellant and the Purchaser that the Purchaser would acquire the Appellant's interest in the Property and all shares of the farm business and enter into a co-ownership agreement with the Toews – the same as existed between the Barkmans and the Toews – to define their rights to their respective portions of the Property. The Purchaser requested and the Appellant agreed to continue working as an employee for two years following the sale to provide whatever assistance the Purchaser needed to run the farm.
20. On April 19, 2023, the Appellant contacted the Egg Board advising all documents would be complete and submitted by May 5, 2023.
21. On May 4, 2023, the Purchaser provided the Egg Board with his statutory declaration, advising that the purchase and co-ownership agreements were in the hands of the parties to complete and submit.
22. In preparation for the Egg Board's May 2023 Board meeting, Egg Board staff prepared an issues document reviewing matters related to the Appellant's request for the Egg Board's approval of a Going Concern Sale to the Purchaser. The document included relevant information for the Board including:
 - a) the share, property purchase, and co-ownership agreements entered into by the parties;
 - b) the Appellant's current quota holdings;
 - c) the explicit conditions that must be met for the Board to determine, in its sole discretion, whether a transfer is a bona fide Going Concern Sale (Part V Section 1.4 subsections a-e of the Consolidated Order);
 - d) the requirement that applicants to the NPP must file a statutory declaration that they own, or will own prior to the commencement of egg production, an Independent Production Unit conforming to all applicable requirements under the Consolidated Order;
 - e) that the Appellant, when he entered the NPP, filed a Land Title Certificate showing his Independent Production Unit was to be located on a parcel of land held jointly with the Toews. Staff noted that the Appellant's co-ownership of his property with the Toews would likely mean that he would not qualify for NPP entrance if the matter was under consideration at the time of the meeting; and
 - f) that the Board may cancel any or all of the Layer Quota of any producer who:
 - (ii) fails to maintain an active Independent Production Unit(s), housing greater than 50% of their layer quota, whereby the total legal and beneficial fee simple interest of the Independent Production Unit is held by that Producer or shareholders of that Producer. (Consolidated Orders section 1 (1) (a). (ii))

23. The issues document concluded with a staff recommendation to the Egg Board to "...conditionally approve the Going Concern Sale of 2,720 quota units along with the purchase of the Independent Production Unit..." providing an updated title certificate and co-ownership agreement is submitted by June 30, 2023.
24. On May 11, 2023, the Purchaser provided the Egg Board with a copy of the co-ownership agreement to be entered into between himself and the Toews once the quota transfer was approved by the Board. In his email, the Purchaser included the following comment:
- I think I have written Scott our business plan some time back but would like to remind you of it. We do have clients here in the South Okanagan who are looking for local eggs and the demand keeps growing. We have tried to stay within the guidelines set out by BC Egg but have found it restrictive. Specifically, there had been no quota for sale on the exchange for a few years and when some came for sale almost a year ago we were bumped out of the bidding. We can not apply for quota as a new entrant because BC Egg has restricted this. So we have the demand from clients but BC Egg is not allowing us to move forward. If they again deny us we may have no choice but to present our situation to BC Farm Industry Review Board (who has been sympathetic to moving quota out of the lower mainland and with local food production).*
- We cannot deny that it is not our intent to keep the yardsite in Creston longer than is necessary. We would like to move the quota to our location and where the demand is. This would also clean up the conflict of a co-ownership arrangement and would present new opportunities with a new hen house. However, don't get us wrong, our buying Brenton's farm is not to circumvent the quota exchange but because we find no other way to buy or get quota.*
25. On May 12, 2023, staff advised the Purchaser that the request for a Going Concern quota transfer was scheduled to go before the Egg Board at its May 2023 meeting.
26. At its meeting on May 15, 2023, the Egg Board considered the Appellant's request for quota transfer as a bona fide Going Concern Sale. Deciding further staff analysis was needed, the Egg Board deferred its decision to its June 8, 2023 meeting. The Egg Board advised the parties of the deferral on May 17, 2023.
27. On May 18, 2023, in response to a request from the Appellant to provide reasons for the delay, the Egg Board advised the parties that because the application contained several "unique elements", specifically the co-ownership agreement and the Purchaser's "written intent to relocate the quota to the South Okanagan" the Egg Board needed additional time to review.
28. In a May 31, 2023 issues document to the Egg Board in preparation for its June 9 meeting, Egg Board staff reported as follows:
- a) that they had contacted the Appellant to suggest a potential way in which this transfer could be approved (if the Appellant relocated his farm to the proposed independent production unit (IPU) location that the Purchaser

resides at - and where he plans to actually house the quota - then transfer the Appellant's IPU to the Purchaser) but that the Appellant had rejected this option as too costly;

- b) that the Appellant, prior to first flock placement and quota issuance under the NPP in 2011, had submitted to the Egg Board a copy of the Co-Ownership Agreement;
- c) that staff believes the Appellant's acceptance into the NPP was an error and that the co-ownership of the Property should have prevented the Appellant from receiving quota, as "full land ownership" has always been a requirement of the NPP;
- d) that approval of this transfer as part of a bona fide Going Concern Sale was inconsistent with the Consolidated Order;
- e) that many Going Concern purchasers do not wish to also purchase the residential part of the property on which the IPU is located, but must do so because this is a requirement of a Going Concern Sale transfer; and
- f) that by allowing an exemption to the Going Concern Sale transfer requirements, the Board would be (a) unfair to producers who have in past been required to also purchase the residential part of the property, and (b) create a loophole that will result in buyers and sellers organizing "elaborate transfers" to take advantage of this in future transactions.

The issues document repeats the background information presented in the Egg Board's May 11 briefing, closing with the recommendation that the Egg Board decline to approve the quota transfer as a bona fide Going Concern Sale.

- 29. On June 6, 2023, the Appellant sent an email to the Egg Board saying that the Purchaser was prepared – if necessary - to go ahead with the sale on the understanding that he would not be able to resell it in future as an operating egg farm unless the Toews agreed to sell him their one-half undivided interest in the Property. The Appellant also noted that the Co-Ownership Agreement has not posed any problem to Farm Credit Canada, the insurance companies, and others with whom they have dealt with in the past concerning the Property.
- 30. On June 7, 2023, the Purchaser sent an email to the Egg Board noting that the Appellant "would continue to run the farm in Creston as an employee...".
- 31. At the board meeting on June 8, 2023, the Egg Board passed the following motion:
 - WHEREAS Per the Consolidated Order Part V 1. (4) The Board will determine, in its sole discretion, whether a Transfer is a bona fide Going Concern Sale.
 - WHEREAS Per the Consolidated Order Part V 1. (6) it appears to the Board that parties to a Going Concern Sale have structured the transaction for the primary purpose of circumventing the requirement that Layer Quota be Transferred through the Quota Exchange, the Transfer shall be deemed to lack bona fides.

THAT the Board of Directors decline the Going Concern transfer proposed from Bren-Den Ventures to Grasslands Oasis Ltd.

32. On June 9, 2023, the Egg Board wrote to the parties informing them of the Board's decision that the proposed sale was not a bona fide Going Concern Sale and, because of this, the off-exchange quota transfer was not approved. Furthermore, the Egg Board noted that since the Co-Ownership Agreement does not actually divide the Property into two legal titles (only sets out the rights and obligations as between the co-owners to the property as a whole) the Appellant's co-ownership presents "an additional issue" because the proposed transfer "did not contemplate that the entire land title will be transferred to the purchaser as required by the definition of Going Concern Sale..."
33. On June 12, 2023, the Appellant advised the Egg Board that he would be appealing the Decision to BCFIRB.
34. On June 21, 2023, BCFIRB received the Appellant's Notice of Appeal of the Decision. The Appellant subsequently advised BCFIRB that the Purchaser is no longer interested in purchasing the Appellant's farm operation and therefore would not be participating in the appeal.

EVIDENCE AND SUBMISSIONS

35. In addition to the documents and written submissions provided by the Appellant and Respondent (the Parties) to this appeal, the Parties provided oral evidence and submissions to the Panel at the hearing which is summarized below. The Panel has reviewed and considered all of the evidence presented by the Parties and has included in this written decision the relevant portions of that evidence that are material to the Panel's determination of the issues at stake in this appeal.

Appellant

36. The Appellant (Mr. Barkman) submitted that the Co-Ownership Agreement should not have impaired the proposed sale of his farm operation to the Purchaser from qualifying as a Going Concern Sale.
37. The Appellant noted that in 2010, at the time he applied for entry into the NPP, he was in the process of constructing a residence closer to town where he intended to live. The sale of that property at that time would have been difficult as the residence was only partially completed.
38. The Appellant purchased the Property which included a house and an old dairy barn suitable for conversion to layer housing with friends (the Toews) who wished to live in the residence. The parties entered into the purchase agreement and became co-owners, with each couple having an undivided one-half interest in the Property.

39. The Appellant reviewed the certificate of title and the Co-ownership Agreement between the Appellant and the Toews when the Property was purchased. The Appellant submitted that the wording of the Co-Ownership Agreement is sufficient to meet the conditions required of a Going Concern Sale in that the Co-Ownership Agreement defines what portion of the Appellant's "undivided, one-half interest" is to be transferred to the Purchaser.
40. In his 2011 application to the NPP, the Appellant provided the Egg Board with the state of title certificate which showed the joint ownership and the Co-Ownership Agreement. Both the title to the Property and the Co-Ownership Agreement have remained unchanged since the Appellant's acceptance into the NPP.
41. The Appellant noted that since acquiring the Property he has modified the dairy barn to house layers, built another barn for a second flock, joined the two barns together with enhanced housing, and built a grading station. The farm was operated exclusively by the Appellant and his family. The Appellant and his wife own 100% of the shares in Bren-Den Ventures Ltd., which is the registered owner of the layer quota and is the operator of the farm business.
42. The Appellant stated that until the proposed sale to the Purchaser came before the Egg Board in the spring of 2023 for approval of an off-exchange quota transfer as part of a bona fide Going Concern Sale, the Appellant was not aware of any concerns the Egg Board had with the Co-Ownership Agreement. The Appellant testified that other institutions and organizations with whom he has dealt over the years – bankers, Farm Credit Canada, Canada Revenue Agency – have accepted the Co-Ownership Agreement when assessing his financial portfolio. The Appellant submitted that since the Egg Board accepted the Co-Ownership Agreement when he entered into the NPP, they should be bound to accept it now with respect to any assessment of his farm operation as a Going Concern Sale.
43. In the words of the Appellant:

“...I was not aware until this came up. I was not aware that that was going to be any issue, and you have admitted yourself. You said that was an oversight by the board. How would I know that that was an oversight by the Board? So now, when it comes to the selling the farm that's the first time that that ever came up. and had I known that from the beginning... if they had told me in the beginning, if they would have said, 'you know what? this is not going to work for you to have this property...' I would have never bought that property. I would have went and found another farm to buy. And now is not appropriate time to tell me that this doesn't work. To me it's a huge deal, because I would have needed to know that in the beginning, so I would have never built my business on that property...”
44. Although the Purchaser in this Appeal has since backed away from the sale, the Appellant further submitted that he should be able to sell his property in the future as a Going Concern Sale.

Respondent – Egg Board

45. The Egg Board submitted that the Purchaser's admission in his May 11, 2023 email to the board that he intended to move the quota as soon as possible from its current IPU location in Creston to his Osoyoos location meant that the proposed purchase did not meet the requirements to qualify as a bona fide Going Concern Sale.
46. The Egg Board noted that one of the purposes of the "bona fides" test is to ensure that prospective purchasers in a Going Concern Sale will continue to produce eggs at the seller's IPU location. If the prospective purchaser cannot demonstrate that it will remain at the current location then the quota must be sold on the Exchange as it would in any other normal quota transfer.
47. The Egg Board submitted that keeping quota at the sellers IPU location is an important policy objective and that a lack of quota available for purchase on the Exchange creates a significant barrier for entry into the industry and impedes the ability of existing producers to respond to market conditions. Therefore, quota liquidity, achieved by means of an equitable and transparent quota exchange, is an essential policy objective and can only be avoided under strict conditions like those required for a Going Concern Sale.
48. The Egg Board noted that, in the past, producers have at times engaged in improper attempts to circumvent the Exchange in order to secure advantages that would only be available to them in an "off-exchange" transaction. When this occurs, the policy objective of providing producers and prospective producers with equitable and transparent access to quota is not met.
49. Consequently, to achieve the desired objectives of equity and transparency, the Egg Board's Consolidated Order requires that all quota be transferred through the Exchange, except in certain narrowly prescribed circumstances. Exceptions to this rule include transfers to immediate family members and transfers which constitute a "bona fide Going Concern Sale".
50. In her testimony, the Executive Director of the Egg Board provided the Panel with an explanation of how the Exchange works:
 - a) There can be up to four Quota Exchanges per year, depending on the interest of sellers and buyers. One Exchange covers the Interior and a second the Lower Mainland. Those who wish to sell quota notify the Board, and those who wish to buy quota provide the Board with the minimum and maximum number of units they wish to purchase. If there is quota offered on the Exchange, the first 1000 units are made available on an equal basis to Pool A small producers (under 6000 unit of quota) or producers wishing to enter the industry (to become a registered producer they must purchase a minimum of 400 units). Any remaining quota is made available to Pool B producers - those with more than 6000 units as well as Pool A bidders who

want to be included in Pool B. Available quota is allocated on an equal basis (up to the purchaser's limit if there is one). If all quota is not cleared by one regional exchange, the remaining quota is placed on the Exchange for the other region. ¹

- b) A price per unit is established by the Egg Board going into each Quota Exchange based on whether the previous exchange ended in a surplus or deficit. In simplified terms, if the amount of quota offered on the exchange was more than 1.5% of BC's total provincial quota, and if offers to buy were filled by 50% or less (shortage of supply), the price is increased by \$5 per unit for the next Provincial Quota Exchange. If the volume of quota for sale exceeds by more than 50% the volume of quota purchased (shortage of demand), the price drops by \$5 per unit on the next Exchange.²

- 51. The Egg Board further submitted that even if the Purchaser had not made the admission that he intended to move the quota, an off-exchange quota transfer as part of a Going Concern Sale may only be approved by the Egg Board where the total fee simple interest in the property associated with the IPU is transferred to the Purchaser. The Appellant was unable to satisfy this condition because the Co-Ownership Agreement does not affect the legal title to the property; after the transaction, the Toews would continue to hold an undivided one-half interest in the land.
- 52. The Egg Board referenced past BCFIRB Decisions in support of the importance of requiring all quota – except in very narrow circumstances - to trade through the Exchange to ensure transparent and fair access to production opportunities.
- 53. The Egg Board noted that there is nothing that would prevent the Appellant from selling his farm as a Going Concern Sale in the future. However, to do so, he must fit himself within the terms of the regulations. The Egg Board suggested that the Appellant could either subdivide the Property or purchase the Toews interest in the Property in order ensure that the sale of the farm operation included the entire fee simple interest in the Property.

¹ For example, according to the BC Egg Board website, the Appellant placed 800 units of quota for sale on the June 1, 2022 Interior Quota Exchange. This was the only offering. The Purchaser bid for it, but was unsuccessful because to become a registered producer he must have a minimum of 400 birds and with three bidders, equal allocation of 800 units would fall short of his minimum purchase. Had there been only two bidders, the Purchaser would have been successful in acquiring 400 quota units.

² According to the BC Egg Board website, since 2015, when regulations were changed to force quota transfers to the exchange, the price of quota has been very stable. There have been seven successful exchanges since 2015; two in 2016, three in 2017, one in 2018 and one in 2022. The market clearing price on the March 6, 2024 Exchange (if there is one) will be \$360.00 per unit of Layer Quota. In comparison, the market clearance price on the March 2, 2016 Exchange was \$345 per unit.

LEGISLATION

54. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (*NPMA*) the Lieutenant Governor in Council has the power to establish boards and commissions, and to confer upon them certain powers (section 11).
55. Pursuant to this power, the Egg Board was established by *the British Columbia Egg Scheme*, B.C. Reg. 173/67 (Scheme) which vests the Egg Board with the authority within the Province to promote, regulate and control the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part.
56. Quota is a privilege and not a right. As recognized by Mr. Justice Macdonald in *Sanders v. British Columbia (Milk Board)*, 1991 CanLII 2036 (BCCA), 53 B.C.L.R. (2d) 167 at page 178, “A quota, a licence to produce, which may be issued on prescribed terms and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions.”
57. It is the policy of the Egg Board that all quota must be sold through the Provincial Quota Exchange except in very narrow circumstances as are outlined in Part V, Transfer of Layer Quota, section (1) subsection (3) of the Consolidated Order:
 - (3) Layer Quota may only be Transferred through the Provincial Quota Exchange and in accordance with the Provincial Quota Exchange Rules set out in Schedule 8, except where:
 - (a) Layer Quota is Transferred, or deemed to have been Transferred, to the Transferor’s spouse, child, or child and the child’s spouse;
 - (b) Layer Quota is Transferred among Related Corporate Producers;
 - (c) subject to subsections (4), (5), (6) and (7) Layer Quota is Transferred in a bona fide Going Concern Sale;
 - (d) Layer Quota is Transferred by way of a Permissible Lease;
 - (e) one or more Producers Transfer Layer Quota to a corporate Producer and the direct or indirect interest of each such Transferor in the corporate Producer is proportionate to the Layer Quota so Transferred by each such Transferor;
 - (f) there is a deemed Transfer between partners or shareholders.
58. A Going Concern Sale is defined in Part 1, section (1), subsection (2) of the Consolidated Order:

“Going Concern Sale” means a Transfer where:

 - (a) all of a Transferor’s Layer Quota is Transferred to one or more purchasers, contemporaneously and together with the Transferor’s total legal and beneficial fee simple interest in the associated Independent Production Unit (including the Transferor’s total legal and beneficial interest in all buildings, facilities, poultry

equipment and Layers used in connection with that Independent Production Unit including the land on which it resides); and

- (b) the Transferor retains no legal or beneficial reversionary interest in either the Layer Quota or the associated Independent Production Unit (including any buildings, facilities, equipment, or Layers used in connection with that Independent Production Unit).

59. For a Going Concern Sale to be considered a *bona fide*, the proposed transaction must also satisfy the following criteria (Consolidated Order, Part V, Transfer of Layer Quota):

- (4) The Board will determine, in its sole discretion, whether a Transfer is a bona fide Going Concern Sale having regard to the following factors:
 - (a) whether the Transferee intends, and has committed to the satisfaction of the Board, to engage in egg production from all of the Layer Quota so Transferred at the Independent Production Unit that is the subject of the Going Concern Sale;
 - (b) whether there is a legitimate business purpose for the structure of the Transfer unconnected with the mere objective of circumventing a requirement to Transfer all or any part of the Layer Quota through the Provincial Quota Exchange;
 - (c) the reasons, if any, as to why it would not be possible or practical for the Transferor or the Transferee to Transfer Layer Quota on the Provincial Quota Exchange;
 - (d) whether the parties to the Transfer have entered into any oral or written agreements as might suggest that the Transfer was structured for the primary purpose of circumventing a requirement to Transfer all or any part of the Layer Quota through the Provincial Quota Exchange; and
 - (e) any other facts or circumstances as might suggest that the Transfer was structured for the primary purpose of circumventing a requirement to Transfer all or any part of the Layer Quota through the Provincial Quota Exchange.
- (5) For the purpose of determining the bona fides of a Going Concern Sale, each party to the proposed transaction must provide to the Board a sworn statutory declaration attesting to the factors described in subsection (4) and exhibiting all draft and executed written agreements in connection with the proposed transaction. The Board may require any party to the proposed transaction to provide such further information and documentation as it may deem necessary, and shall have regard to the substance and effect of any arrangement made between the parties to the Transfer, irrespective of the form of that arrangement.
- (6) Where it appears to the Board that parties to a Going Concern Sale have structured the transaction for the primary purpose of circumventing the requirement that Layer Quota be Transferred through the Quota Exchange, the Transfer shall be deemed to lack bona fides.
- (7) Notwithstanding any previous determination that may have been made by the Board concerning the bona fides of a Going Concern Sale, if at any time it appears to the Board that a Going Concern Sale is not or was not a bona fide Going Concern Sale, the Board may cancel all or any part of the Layer Quota Issued to any or all of the parties to the Transfer.

60. Part IV of the Consolidated Order sets forth the requirement for new entrants into the table egg industry. Below are the sections relevant to this Appeal:

1. Application to Participate in the New Producer Program

...

(4) Applications to participate in a New Producer Program draw are made by filing with the program administrator:

...

(h) proof, in a form satisfactory to the Board, that the applicant will be able to establish an Independent Production Unit³ conforming to all applicable requirements under the Consolidated Order and the applicable New Producer Program draw for the production of eggs within a time period acceptable to the Board;

...

(j) proof, in a form satisfactory to the Board, that the applicant owns, or will own prior to the commencement of egg production, an Independent Production Unit, independent of any other supply managed production unit, conforming to all applicable requirements under the Consolidated Order and the applicable New Producer Program draw;

...

(m) a statutory declaration declaring:

(i) that the applicant understands, and agrees to be bound by and to comply with the terms and conditions of the New Producer Program as specified herein;

(iii) that the applicant owns, or will own prior to the commencement of egg production, an Independent Production Unit conforming to all applicable requirements under the Consolidated Order and the applicable New Producer Program draw;

(8) A Person seeking to participate in a New Producer Program draw must have the following qualifications:

(a) genuine intention to be actively engaged in egg production from an Independent Production Unit conforming to all applicable requirements under the Consolidated Order and the applicable New Producer Program draw that is owned by the applicant, or will be owned by the applicant prior to the commencement of egg production;

5. Special Terms, Conditions and Restrictions on Layer Quota Issued Under the Program

(1) Layer Quota issued under the New Producer Program may be held for production by the entrant subject to all special terms, conditions and restrictions

³ An "Independent Production Unit" means one or more Egg Production Units that are geographically and operationally independent, including automated packing equipment and coolers. An Independent Production Unit may be owned or leased. (Consolidated Order Section 1 Definitions).

imposed with respect to the applicable New Producer Program draw, and only for so long as the entrant:

- (a) permits Board audits of the farm operation to ensure compliance with Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;
- (b) is in good standing with all applicable Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;
- (c) is actively engaged in egg production;
- (d) continues to own an Independent Production Unit conforming to all applicable requirements under the Consolidated Order;

failing which the Layer Quota so issued shall thereupon be subject to immediate cancellation on notice by the Board to the entrant;

- (2) An entrant issued Layer Quota under the New Producer Program may only change:
 - (a) production of, or from, the applicable class or classes or Regulated Product;
 - (b) the applicable Region; or
 - (c) the applicable mode of production or marketing; upon the express, written approval of the Board

61. All BC Egg Producers, including those in the New Entrant Program, are governed by Part IX of the Consolidated Order.

1. Obligation to Produce

(1) The Board may cancel all or any part of the Layer Quota:

(a) issued to a Producer who:

...

(ii) fails to maintain an active Independent Production Unit(s), housing greater than 50% of their layer quota, whereby the total legal and beneficial fee simple interest of the Independent Production Unit is held by that Producer or shareholders of that Producer.

(2) The Board may cancel any licence held by:

(a) a Producer who:

...

(ii) fails to maintain an active Independent Production Unit(s), housing greater than 50% of their layer quota whereby the total legal and beneficial fee simple interest of the Independent Production Unit is held by that Producer or shareholders of that Producer.

ANALYSIS

62. This appeal has been brought to determine whether the Egg Board erred in its Decision of June 8, 2023 to deny an off-Exchange transfer of the Appellant's quota to the Purchaser as part of a Going Concern Sale. At the outset it is worth noting that given the fact that the Purchaser has indicated that he is no longer interested in purchasing the Appellant's quota, the appeal of the Decision with respect to that particular transaction is essentially moot. However, both parties presented evidence and submissions on the broader implications of the Decision for the sale of the Appellant's farm operation going forward. The analysis below therefore sets out the Panel's consideration of the merits of the appeal as presented by the Parties.
63. Ensuring all producers have fair and transparent access to quota when they wish to grow their flock is central to the Egg Board's regulatory mandate. The requirement that quota be transferred through the Exchange is also rooted in policy to support small flock-holders and new entrants. It is for this reason that all transfers of quota between producers – with very narrow exceptions - must go through the Exchange.
64. Without regulation requiring that quota transfers go through the Exchange, those wishing to buy and sell quota could arrange to do so in private deals. This would mean that farmers wishing to buy more quota would not necessarily be aware of quota that becomes available, nor have a fair chance to bid on that quota.
65. Over the years, BCFIRB has emphasized the importance of a transparent and fair access to quota for all producers:
 - a) From its October 26, 2000 Supervisory Review Decision:

“The BCMB Panel heard throughout the review that all regions are short of production and, that a transparent method of quota transfer is necessary to provide confidence to producers in all regions that they have equal opportunity to access quota. The confidence of the public that the right to produce is available equally to all persons who are prepared to enter the industry is important to a positive perception of the regulated marketing system. The BCMB Panel heard also that some producers, especially in the regions, did not always have access to information regarding quota transfers. A provincial quota exchange provides the transparency and fair access needed to maintain producer and public confidence in the system.”
 - b) From its December 2, 2015 Pilot Quota Exchange Approval Decision:

“A quota exchange is an instrument for transferring quota between sellers and buyers. Exchanges are intended to enable efficient transfer of quota and provide a ‘one stop shop’ for transparent quota buying and selling. Absent an exchange, it is difficult if not impossible for all producers wanting to buy quota to know when quota is available, or for sellers to efficiently find buyers – impacting equality of access. Quota exchanges provide other benefits including a venue for completing

the transaction, a transparent record of the transaction and certainty for both buyers and sellers.

BCFIRB's policy position has been to support quota exchanges as a means of providing equality of access for quota... For a variety of reasons, producers wishing to sell quota can make side arrangements with potential buyers as to volume and price before the buyer and seller go to the Quota Exchange. This can effectively reduce opportunities for others looking to purchase quota who are not "in on the deal". While select buyers and sellers may share inside information between themselves, this information is not available to all who may be selling/buying on the Exchange. The characteristics of an effective quota exchange include sellers and buyers having as close to perfect information and equal access to information about the opportunity".

66. The Egg Board, in submissions and oral evidence, explained that by ensuring purchasers in a proposed Going Concern Sale meet the "bona fide" criteria (in this case purchasing the farm with the intent of producing at that location) they effectively screen out those who are using the proposed sale as a vehicle to acquire quota outside of the Exchange.
67. To receive Egg Board approval for an off-exchange transfer, the proposed sale had to clear two hurdles:
 - a) it had to fit the definition of a Going Concern Sale under the Consolidated Order (transfer 100% fee simple title to the property the IPU is located on); and
 - b) at the sole discretion of the Egg Board, it had to be judged to be a bona fide Going Concern Sale (not considered to be one structured to bypass the Exchange).

Failing either test meant the Board could not approve the off-exchange transfer.

68. As communicated in its letter to the parties on June 9, 2023, the Egg Board decided to refuse the off-exchange quota transfer due to its lack of bona fides. The Egg Board's decision that the sale lacked bona fides was based on correspondence from the Purchaser (August 19, 2022, November 11, 2022 and May 11, 2023; see paragraphs 13 – 15 above) advising them of his intent to move the quota as soon as possible to another location. This indicated to the Egg Board that the Purchaser's interest in buying the Appellant's layer farm had more to do with securing production rights for transfer to another location than operating the farm as a going concern. This is inconsistent with the criteria which - at the sole discretion of the Egg Board - must be satisfied before the proposed off-exchange quota transfer could be considered to be part of a bona fide Going Concern Sale.

69. Based on the facts before it and the evidence presented in the hearing, the Panel is satisfied that the Egg Board acted in accordance with its statutory responsibility in denying the off-exchange quota transfer sought by the Appellant. The Panel finds that the Egg Board did not err in making the Decision and as a result the Appellant's appeal of the Decision is dismissed.
70. The Appellant, in his submissions and in his closing statement, asked the Panel to further determine the issue of whether he would be able to sell his farm as a Going Concern Sale in the future, despite its unique ownership structure (shared, undivided one-half joint tenant interest with another family; Co-Ownership Agreement).
71. In the Egg Board's letter to the Appellant and the Purchaser of June 9, 2023, the Board raised concerns with the Appellant's ownership structure and his inability to deliver 100% fee simple title to the property associated with the IPU as required to qualify as a Going Concern Sale. The basis for the Egg Board's rejection of the off-exchange quota transfer was because it lacked bona fides as noted above, however the Egg Board also made further submissions during the course of this appeal regarding the Appellant's co-ownership of the Property and its effect on the Appellant's ability to sell his farm operation as a Going Concern Sale.
72. In the hearing brief submitted in this appeal, the Egg Board elaborated on its difficulties with the joint title arrangement:
 20. The Egg Board submits that the proposed transfer did not satisfy the requirements for a "Going Concern Sale" exemption. On a proper interpretation of the Consolidated Order, the exception is applicable only where "the total legal and beneficial fee simple interest of the Independent Production Unit" is transferred. In the circumstances before the Egg Board, Denton and Denise Toews would hold an undivided ½ interest as joint tenants in the Independent Production Unit, both before and after the proposed transaction.
73. Having found that the Egg Board did not err in making the Decision which is the subject of this appeal the Panel nevertheless considers it a worthwhile endeavor to consider the issue of the Appellant's ownership of the Property and how it may affect his ability to sell his farm operation as a Going Concern Sale in the future given the extensive submissions made by both Parties on the issue and the likelihood that the issue will arise again in the future.
74. The Panel is sympathetic to the frustration of the Appellant. When he applied for and was accepted into the NPP in 2011, the Egg Board of the day expressed no concern with his shared title and Co-Ownership Agreement, both of which were made available to the Egg Board and staff at that time. The Appellant was approved as a new entrant even though the NPP required - then and now - that all successful applicants hold 100% fee simple interest in the land their IPU is located on. The Appellant understood, as was seemingly confirmed to him by the Egg

Board's approval, that the Co-Ownership Agreement did exactly what his Notary told him it would do – it “cured” any impediments arising from the shared title.

75. In its June 9, 2023 letter to the Parties, the Egg Board notes that the Co-Ownership agreement on the Property does not actually divide the property into two portions, except as between the parties to the Co-Ownership Agreement. *“...To the world at large, currently Brent and Denise Barkman and Denton and Debra Toews, each own 100% of the land together in undivided shares...”*
76. The Panel agrees with the Egg Board that a private, civil contract between two parties does not create a subdivision or alter the rights of each party under the Land Title Act. The Co-Ownership Agreement can arrange the affairs between co-owners in terms of their respective rights and obligations to each other for a property that they purchased together and own as joint tenants. The Co-Ownership agreement does not change the fact that the Appellant can only legally convey his undivided one-half interest in the Property. He could not, as required under the definition of a Going Concern Sale, convey 100% fee simple title to the Property associated with the IPU to the Purchaser.
77. The Egg Board acknowledged that the Board at the time that the Appellant was accepted as a new entrant under the NPP overlooked this title impediment in error. The Appellant testified that he was unaware until the proposed sale went before the Egg Board that his shared title was an issue at all much less an impediment to the sale of his farm as a Going Concern Sale. The Appellant said had he known there was an issue back in 2011, he would have purchased another property and consequently feels the Egg Board “owes” him and his family the right to sell the farm and have the quota transferred as a bona fide Going Concern Sale.
78. The Panel acknowledges and accepts the Egg Board's warning that allowing an exemption to the Going Concern Sale rules for this Appellant would create loopholes that could be exploited in the future by others to the detriment of orderly marketing. In its evidence, the Egg Board notes the precedent that might be set by such a decision and the implications that may hold for future stakeholder decision-making. In its May 31, 2023 issues document, the Egg Board elaborated on this concern:

“...by allowing an exemption to the Going Concern Transfer requirements, the Board would be a) unfair to producers who have in past been required to also purchase the residential part of the property, and b) create a loophole that will result in buyers and sellers organizing “elaborate transfers” to take advantage of this in future transactions.”
79. The Egg Board noted that the Appellant is free to continue to operate under his present arrangement, and he is also free to sell his quota on the Exchange. The Egg Board further noted that if the Appellant wants his farm to qualify as a Going Concern Sale in future, he needs to fit his farm to the regulations, not the other way around. As noted above, the Egg Board has suggested that the Appellant

could also seek to subdivide the Property or to purchase the interest held by the Toews in order to qualify as a Going Concern Sale. The Panel agrees that both options are reasonable potential solutions for the Appellant.

80. Alternatively, the Appellant could offer all his layer quota for sale on the Quota Exchange and sell his interest in the Property to another farmer that might make productive use of the buildings and land with a different commodity. The Panel further notes that while the Appellant incurred expenses improving his farm operation on the Property, he also gained a benefit from the 2011 Egg Board's error insofar as he received quota under the NPP (quota that he can now sell on the Exchange) while operating under a type of property ownership that met his needs at the time but should have disqualified him under the NPP.
81. The Panel finds that providing an exemption for the Appellant contrary to the regulations and rules governing Going Concern Sales in an attempt to redress a 2011 Egg Board error threatens to exacerbate, not rectify, the original error. The Panel is particularly mindful that the potential harm to orderly marketing in approving the transfer would likely exceed the harm to the Appellant of not doing so.
82. Therefore, in addition to the conclusion above that the Egg Board did not err in its Decision to deny the off-exchange quota transfer as a result of the Purchaser's stated intentions to relocate the quota, the Panel further finds that the sale would not have met the requirements of a Going Concern Sale due to the Appellant's inability to transfer 100% ownership of the property associated with the IPU.

ORDER

83. The appeal is dismissed.

Dated at Victoria, British Columbia this 16th day of January 2024

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Wendy Holm, Presiding Member