

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
APPEALS FROM TWO DECISIONS OF
THE BRITISH COLUMBIA CHICKEN MARKETING BOARD
CONCERNING TRANSITIONAL QUOTA

BETWEEN:

PETER, ALICE AND JERAL KRAHN

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND

BETWEEN:

WAYNE REITSEMA

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice
Chair

Ms. Satwinder Bains, Member

Mr. Richard Bullock, Member

For the Appellants, Peter, Alice and Jeral Krahn

self-represented

For the Appellant, Wayne Reitsema

Mr. John Durham, Agent

For the Respondent

Mr. Doug Scullion, Counsel

Date and Place of Hearing

April 30, 1999

Abbotsford, British Columbia

INTRODUCTION

1. There are two separate appeals before the British Columbia Marketing Board ("BCMB") involving transitional quota.
2. First, Peter, Alice and Jeral Krahn, doing business as Ponderosa Poultry in Armstrong, BC, appeal the May 15, 1998 decision of the British Columbia Chicken Marketing Board (the "Chicken Board"). This decision confirmed the transitional quota entitlement of Whyte Mountain Farms ("Whyte Mountain"), a farm for which they had entered into a contract of purchase and sale. This same transitional quota was the subject of an earlier appeal by the previous owners of Whyte Mountain. Written reasons in that appeal were released on April 17, 1998.
3. Second, Wayne Reitsema appeals the September 14, 1998 decision of the Chicken Board denying his request to purchase transitional quota as part of a quota transfer from a leasehold interest.
4. Although unrelated, both appeals dealt with the Chicken Board's transitional quota policy as found in Order 320 and the parties agreed to have them heard together.

ISSUES

Krahn Appeal

5. Should the economic viability of Ponderosa Poultry be supported by:
 - a) reinstating the equivalent amount of transitional quota associated with the 10,000 birds of quota originally purchased from Way-Jac Holdings Ltd., or in the alternative;
 - b) reinstating the 9,644 kgs of primary quota reserved for growers who have previously transferred quota?

Reitsema Appeal

6. Is the Appellant Reitsema's purchase of quota from Little Wing Poultry Ltd. ("Little Wing") a "bona fide farm premises sale" as that term is defined within Order 320?
7. Should transitional quota, as well as primary and secondary quota, be transferred to the Appellant as part of his purchase of the Little Wing quota holdings?

FACTS

8. On September 25, 1997, the Chicken Board enacted a new quota transfer policy, Order 320. The purpose of the Order was to increase the minimum broiler farm size in the Province. As part of this plan, the Chicken Board decided to eliminate secondary quota to meet market surges and replace it with transitional quota distributed on a pro rata basis.
9. To meet the goal of increased farm size, transitional quota was issued on a one-time basis with the smallest farm (15,000 birds) being granted the largest share of transitional quota (11,000 birds) and the largest farm (115,000 birds) being granted the smallest share of transitional quota (5,000 birds). Farms in between the two extremes received quota on a sliding scale. According to Order 320, when future growth is required, the Chicken Board will distribute quota pro rata based on farm size.

Krahn Appeal

10. The previous owners of the Krahn farm were caught in the middle of the new quota transfer policy and its predecessor. On July 17, 1997, the Whytes, who had previously transferred quota, entered into an agreement with Way-Jac Holdings Ltd. (Bev and Peter Milner) to replace the earlier sold quota by purchasing 10,000 birds of quota for \$200,000. Although the Appellants had the financing to complete the transfer immediately, the deal did not complete until December of 1997 to allow the Milners time to meet their production obligations.
11. On the date that Order 320 came into effect, namely September 9, 1997, the Whytes were still considered by the Chicken Board as growers who had previously transferred quota. As such, under Order 320, they did not qualify for transitional quota; instead they fell within the group of growers who were only entitled to a lesser one-time issuance of 9644 kgs of primary quota to be issued at the time that transitional quota was converted into primary quota by order of the Chicken Board (approximately 2005).
12. As the Whytes were not satisfied with the one time issuance of quota, they appealed the decision of the Chicken Board denying them transitional quota. On April 17, 1998 a panel of the BCMB ruled in favour of the Whytes and held:
 43. The Appellants as registered growers, who have previously transferred a portion of their allotted quota, fall within Section (ii) 4 of Order 320. Accordingly, under the strict terms of the Order they are only entitled to 9,644 kgs of primary quota and no transitional quota. However, on a policy basis, had the Appellants acquired replacement quota, we understand that despite the wording of Section (ii) 4, they would have qualified for transitional quota.

44. The Appellants are in a unique situation. The Chicken Board was not aware of any of the other 33 growers who had previously transferred quota being caught between the old orders and Order 320 in the manner in which the Appellants find themselves.
 45. The Appellants fit within the policy or the intent of Order 320 but not within the letter of its wording. This Panel is of the view that it would have been more appropriate to issue transitional quota to the Whytes as opposed to the Milners, who as of September 1, 1997 had made the decision to leave the industry. As young producers in the Interior, the Whytes should be encouraged to grow and become more viable as they represent the future of the industry.
 46. This Panel finds that the Appellants are exempted from receiving transitional quota on the strict wording of Order 320. However, the Chicken Board has the discretion to allow the Appellants to receive transitional quota and in these circumstances that would be the appropriate course. The Chicken Board made a decision to issue transitional quota to the Milners, this Panel is not prepared to interfere in that decision.
 47. The Chicken Board expressed a perfectly legitimate concern about growers speculating in quota. This Panel does not find any evidence that the Appellants were speculating in quota in their 1996 and 1997 transactions. However, the concern can be addressed by issuing transitional quota to the Appellants on a conditional basis. Should they sell their farm within 5 years of the date of issuance of the transitional quota, the quota would revert to the Chicken Board and not transfer with the farm as a unit.
 48. This condition is justifiable because the Appellants are in a unique circumstance. They are being given the benefit of the doubt as young producers in the industry and it is appropriate that this benefit be recognised as being given to them alone and not some future purchaser.
13. Thus, as a result of their successful appeal, the Whytes were granted transitional quota with the additional restriction that should they seek to sell their farm within five years of the date of its issuance, the transitional quota would revert to the Chicken Board.
 14. The Krahn's who were working abroad in Saudi Arabia became interested in purchasing a broiler operation in 1994. They enlisted the aid of Art and Elsie Friesen, retired poultry farmers from Alberta, to locate a suitable operation. In early March 1998, the Krahn's became aware that the Whytes were interested in selling their farm. The Whyte farm and the adjacent Lansdowne farm were originally built and operated as one farm with a number of shared services.
 15. The purchase of the Lansdowne farm proceeded without complication.
 16. On April 6, 1998, the Krahn's made an offer to purchase the Whyte's farm and quota. The Whytes accepted the offer on April 21, 1998. In the transaction, the Whytes represented to the Krahn's that in addition to their primary quota, the sale also included 5000 birds of transitional quota (the one-time issuance of 9644 kgs of primary quota) and a potential for 10,000 birds of straight transitional quota as a result of Whyte Mountain's appeal to the Chicken Board.

17. As a result of the Chicken Board's letter of May 15, 1998 directed to the Whytes, this information was proven to be in error. The Krahn's revoked their offer and negotiated a \$15,000 reduction in the purchase price of the farm. The deal ultimately completed on January 4, 1999.

Reitsema Appeal

18. In the summer of 1998, Mr. Wayne Reitsema, a dairy farmer, approached Mr. Vanderveen, the owner of Little Wing, with an interest in buying his quota holdings. Mr. Vanderveen owned 15,000 primary, 5000 secondary and 11,000 transitional birds of quota. He leased the lands and buildings upon which he farmed from his grandmother.
19. Mr. Reitsema negotiated a deal to buy the entire Vanderveen quota. Subsequently, Mr. Reitsema and Mr. Vanderveen met with the Chicken Board to determine whether the transitional quota was transferable as part of a "whole farm transfer".
20. On September 14, 1998 the Chicken Board denied Mr. Reitsema's request to acquire the Vanderveen transitional quota, as the purchase was not a "bona fide farm premises sale" as set out in Reference Note (xii):

Transitional quota cannot be transferred from one registered grower to another. Transitional quota can only be transferred in a bona fide farm premises sale.

21. Mr. Reitsema completed the purchase of the primary and secondary quota and appealed the Chicken Board's decision to deny the transfer of transitional quota. Mr. Reitsema agreed that in the event he was successful on this appeal, he would pay Mr. Vanderveen a further \$15,000 for the 11,000 birds of transitional quota.

ARGUMENT OF THE APPELLANTS - KRAHN

22. The Krahn's argue that Whyte Mountain has not received any of the additional quota contemplated under Order 320. Whyte Mountain did not receive any transitional quota nor is it entitled to receive the one time issuance of primary quota when transitional quota is converted to primary. Thus, Whyte Mountain is in the unique position of not qualifying for any growth under Order 320. The Krahn's argue that under Order 320, a grower must qualify for one or the other and thus, they query how did Whyte Mountain lose all its growth?
23. The Krahn's argue that they have demonstrated a commitment to the Chicken Board's recognised goal of increased farm size. They have purchased the Lansdowne and Whyte Mountain farms with the intent of running them as one operation. They argue that it is unreasonable for the Chicken Board to exclude them from growth opportunities in the industry given their commitment to the chicken industry and their stated goal of having their 33 year old son take over their farm on retirement.

24. The Krahn's argue that they purchased Whyte Mountain for \$46.38/bird as opposed to \$25.83/bird for the Lansdowne operation. This indicates the high cost of operating Whyte Mountain and suggests that at its present size, Whyte Mountain is not economically viable.
25. In the Whyte Mountain appeal, the BCMB made an exception for the Whytes as young producers who should be encouraged to grow and become more viable. The Krahn's argue that this same sentiment applies to their son who they argue will be a credit to the industry.
26. In further reference to the Whyte Mountain appeal, the Krahn's point to the provision that the Whytes would be granted transitional quota on the condition that they not sell their farm for five years from the date of issuance. Paragraph 48 reads:

They are being given the benefit of the doubt as young producers in the industry and it is appropriate that this benefit be given to them alone and not some future purchaser.
27. The Krahn's argue that Mr. James Whyte gave them verbal assurances during the negotiations which date back to April 6, 1998, that as a result of the appeal, he had 5000 birds of transitional quota (one time issuance) available for sale. Some time in May 1998, the Krahn's understood that the one time issuance of primary quota had not been formally issued or was in abeyance until the results of the appeal of the entitlement to transitional quota was known.
28. When the Krahn's became aware that the one time issuance of primary quota was not forthcoming, they invalidated their offer. The Whytes were firm on their price and advised the Krahn's that it was up to them as the new owners to pursue the Chicken Board. Given that a deal had been completed on the companion Lansdowne farm, the Krahn's negotiated a \$15,000 reduction in price and concluded their purchase of Whyte Mountain.
29. In summary, the Krahn's argue that at its present quota levels, Whyte Mountain is marginally viable. It is unfair to exclude the farm from growth for a period of 10 years, as this will result in further marginalisation. As it is the Krahn's intent to remain in the broiler business for the foreseeable future, they argue that the BCMB should exercise its discretion and allocate either 10,000 birds of transitional quota or 5,000 birds of primary quota at the time the transitional quota is converted to primary. The Krahn's do not oppose the BCMB placing any restrictions on transitional quota transfer.

ARGUMENT OF THE APPELLANT - REITSEMA

30. Mr. Reitsema is seeking an order from the BCMB that he be entitled to the transitional quota of Little Wing. As it stands now, that quota has reverted to the Chicken Board and the growth is lost to the industry. Mr. Reitsema takes the position that the Chicken Board's decision in refusing to transfer the transitional quota is flawed as a result of the Chicken Board's failure to investigate the circumstances of the transfer, which led to it being unaware that:

- a) the only principal farm asset of Little Wing was quota;
- b) Little Wing's lease was not registered in the Land Title Office as required by the Chicken Board's General Orders;
- c) by acquiring the quota, Reitsema was a bona fide purchaser of a farm as there was no lease; and
- d) by acquiring the shares of Little Wing, Reitsema could have acquired all the quota and no transfer would have been necessary.

31. Mr. Reitsema argues that Order 320 was not intended to prevent transfers of transitional quota. It does permit transfer to a "bona fide purchaser of a farm". In this case, Mr. Reitsema has purchased the only asset of the farm and thus, argues he should be considered a "bona fide purchaser of a farm".

32. He further argues that the exclusion in Section (iii) 2 of Order 320 which provides "[t]ransitional quota issued pursuant to this order may not be transferred from one registered grower to another" does not apply in these circumstances. A transfer of quota need not have taken place as he could have simply acquired the shares of the company. Alternatively, even if a transfer took place, Mr. Reitsema argues that as he was not a registered grower at the time of transfer, he does not fall within the exclusion in Section (iii) 2.

33. In these circumstances, Mr. Reitsema argues that he has acquired Little Wing's farm, as there was no lease registered against the production unit and the only asset of the farm was the quota. Further, the Chicken Board appears to exercise some lenience in following its General Orders. In this case, the lease was unregistered contrary to Board policy. In addition, the Chicken Board has allowed transfer of secondary quota, which is also contrary to Chicken Board policy. Given the Chicken Board's demonstrated flexibility in interpreting its rules, Mr. Reitsema suggests that flexibility should be used in this circumstance as well. He argues that it is unfair that a person who owns his own farm should be advantaged over someone who has leased premises.

34. As a matter of policy, Mr. Reitsema argues that it is the responsibility of the Chicken Board to administer the *British Columbia Chicken Marketing Scheme, 1961* for all industry stakeholders and prospective stakeholders. This responsibility includes providing full disclosure on how the system works and how to work within the system. In this case, the Chicken Board has failed to discharge its responsibility. Mr. Reitsema has moved the quota from a temporary leasehold situation to an independent production unit. He has demonstrated a long-term commitment to the broiler industry and deserves an opportunity to increase the sustainability of his operation.

ARGUMENT OF THE RESPONDENT

35. The Chicken Board argues that both appeals in essence turn on hardship. Although it is the hope of the Chicken Board that these two growers will remain in the industry a long time, the Chicken Board must still apply the rules.

36. In the case of Mr. Reitsema, there is no technical irregularity that needs to be corrected. He completed his deal and got what he paid for. In essence, Mr. Reitsema is asking the Chicken Board to prefer the interests of lease holders to people who own their own farm. As the Order stands now, if a grower who owns his farm wishes to dispose of his transitional quota, he can only do so by disposing of his production unit. To allow lease holders to transfer their transitional quota in a sale of primary and secondary quota would give them an advantage over the owner/farmer with the greater capital investment.

37. The Chicken Board argues that this is really an appeal by the wrong person at the wrong time. The arguments advanced by Mr. Reitsema are really the arguments that Mr. Vanderveen would have made had he chosen to appeal the Chicken Board's refusal to allow his transfer of transitional quota. Mr. Vanderveen is the party who did not obtain a benefit from the transitional quota. It has now reverted to the Chicken Board. Mr. Reitsema on the other hand was aware of the Chicken Board's policy before completing his deal and he got exactly what he bargained for.

38. Mr. Reitsema has expressed concern that his farm does not meet the new minimum farm size set out in Order 320. The Chicken Board argues that this is not a valid concern as growers who have smaller farms will be "grandfathered" and will not be required to expand.

39. The Krahn appeal can also be described as an appeal based on hardship. They bought a farm that had been the subject of an appeal before the BCMB. It would be wrong in principle to allow the Krahns to step into any better shoes than those of the Whytes. At the time that the Krahns entered into their contract of purchase and sale, the Whytes had successfully appealed their entitlement to quota. Rather than obtaining a one-time issuance of primary quota of 5000 birds in approximately 2005, the Whytes were granted 10,000 birds of transitional quota effective April 17, 1998 on the proviso that the farm was not sold for a period of 5 years.

40. Mr. Krahn argues that the Whyte farm was over-priced and thus, is less viable. That may be the case, however, that can not be laid at the feet of the Chicken Board. It also appears that Mr. Whyte actively misrepresented his entitlement to transitional quota and the one time issuance of primary quota. Likewise, Mr. Whyte's misconduct is not the fault of the Chicken Board.
41. The Chicken Board states that the thrust of Mr. Krahn's argument is that Whyte Mountain is not viable as a single unit. It would appear that the lack of viability is at least in part attributable to an inflated purchase price. It should be noted that the Lansdowne farm was purchased for a considerably lower price. Mr. Krahn also argues that it is unfair that Whyte Mountain will not see any growth for a period of ten years if this decision is allowed to stand.
42. It is significant to note that had the purchase and consolidation of the two farms been completed prior to Order 320 being enacted, the Krahn operation would have been entitled to less than half of the transitional quota that it ultimately received. This is by virtue of the fact that transitional quota was distributed on a sliding scale with the smallest farms receiving the largest share of transitional quota.
43. The Chicken Board takes the position that on the facts of both the Reitsema and Krahn appeals, there is nothing to justify the BCMB exercising its discretion to set aside the decisions of the Chicken Board. The Chicken Board asks that both appeals be dismissed

FINDINGS OF THE BCMB

Reitsema Appeal

44. The Appellants are seeking relief from the express wording of Order 320. Both argue that in their specific circumstances, the express provisions regarding the transfer of transitional quota work a hardship on their future viability.
45. Mr. Reitsema argues that as a person who has purchased the entire asset of a farm (i.e. the quota holdings) he should qualify as a bona fide purchaser of a farm. In support of this argument, Mr. Reitsema points to certain situations where the Chicken Board has not strictly enforced its General Orders and suggests in this situation the same flexible approach should be used.
46. The Panel does not agree with Mr. Reitsema. The Chicken Board has established rules for the transfer of quota. A decision was made to change the rules for distributing growth. The Chicken Board recognised that farms were going to have to grow to remain viable. Their old policy, which gave each farm the same amount of growth, encouraged farm splitting and thus was counter-productive. The Chicken Board, after much consultation, determined that secondary quota would no longer be issued and instead there would be a one-time issuance of transitional quota. The

smallest farm would receive the greatest amount of quota. Larger farms would receive quota on a sliding scale with the largest farm receiving the least amount of quota. All future quota increases would then be issued on a pro rata basis.

47. As transitional quota was a one-time allocation meant to increase farm size, the Chicken Board wanted to discourage speculation. It did so by providing that transitional quota could only be transferred in the event of a bona fide farm premises sale. A farmer could only transfer transitional quota if he sold his entire production unit and his quota.
48. Mr. Reitsema argues that this policy discriminates against leaseholders such as Mr. Vanderveen. All Mr. Vanderveen owns is his quota, that is his "farm". Therefore why should he be prevented from transferring his transitional quota? Mr. Reitsema has now attached this quota to a production unit and he argues that he should be entitled to Mr. Vanderveen's growth.
49. The Panel accepts that the Chicken Board must balance the interests of its growers when setting new rules for quota distribution. In the case of Order 320, a farmer who owns his production unit cannot sell his transitional quota unless he sells his entire production unit. In the Panel's view, to allow a farmer who operates his farm under a leasehold to transfer transitional quota would give him an unfair advantage over a farmer/owner with the greater capital investment in the industry.
50. In the circumstances of this case, the Panel accepts there is a sound policy at the heart of the restriction of transitional quota transfer. Accordingly, we are not prepared to exercise our discretion in favour of Mr. Reitsema.

Krahn Appeal

51. The Krahn appeal presents a more troubling issue. As was set out earlier, the transitional quota the Krahns seek was the subject of an appeal by James and Mary Whyte. In that appeal, the Whytes pleaded hardship and successfully argued that they were caught in between the old and new quota orders. They were granted transitional quota by the BCMB on the condition that if they sold their farm within five years, the transitional quota would revert to the Chicken Board. This condition was placed on the Whytes presumably because an exception was made for them as young growers with a stated intent to remain in the chicken industry and not to speculate in quota.
52. It now appears that the Whytes were only interested in speculating in quota.
53. The whole basis of their appeal appears to have been an effort to maximise their quota holdings before a sale. Contrary to their evidence in the Whyte Mountain appeal hearing on March 17, 1998, the Whytes were actively trying to sell their farm and had been approached by the Krahn's agent in early March of 1998.

54. Despite the foregoing, Mr. Whyte in his evidence before the BCMB represented himself as a young producer who was the future of the industry. He argued that he deserved a chance. The BCMB accepted his representations at face value and granted him transitional quota on the condition stated above.
55. While the appeal decision was pending, the Whytes were negotiating a sale with the Krahns despite the uncertainty as to what quota, if any, they would receive as a result of the appeal. On April 21, 1998, four days after the release of the BCMB's decision in the Whyte Mountain appeal, the Whytes signed the contract of purchase and sale including the transitional quota. This was done despite the fact that the Whytes knew that according to the BCMB's decision their transitional quota would revert to the Chicken Board in the event of a sale. It does not appear that the Whytes advised the Krahns of this fact.
56. In addition, the Whytes knew or ought to have known from a review of the BCMB's decision that unless the Chicken Board made an order to the contrary, they no longer qualified for the lesser one-time issuance of primary quota. Despite this knowledge, it appears that the Whytes represented to the Krahns that they had transitional quota both in terms of the one-time issuance of primary quota and possibly the straight transitional quota.
57. At the very least, it appears that the Whytes misrepresented their quota holdings to the Krahns. Unfortunately, the Krahns relied on their agent and were unaware of the full extent of the misrepresentation until after they took possession of the farm and found copies of certain documents including the BCMB's decision in the Whyte Mountain appeal.
58. On these facts, the Krahns may have a potential cause of action against the Whytes for negligent or fraudulent misrepresentation. However, does the conduct of the Whytes justify this Panel in exercising its discretion? The Panel has decided it does not. We agree with the Chicken Board that the misconduct of the Whytes cannot be laid at the feet of the Chicken Board.
59. In addition, the Krahns could have sought independent confirmation from the Chicken Board as to the exact quota holdings of the Whytes before completing their transaction. We do recognise however that the Krahns were in a very difficult position. These deals were negotiated from overseas through an agent and once the deal was concluded on the adjacent farm, Whyte Mountain was needed to make the entire operation viable.
60. The Krahns in acquiring Whyte Mountain cannot acquire anything more than the Whytes had to sell. By virtue of their appeal, the Whytes did not qualify for the one time issuance of primary quota, as they had been successful in obtaining transitional quota. They were not entitled to both. Because their transitional quota had a further restriction of reverting to the Chicken Board in the event of a farm sale within 5 years,

it could not transfer to the Krahns. This was exactly what was contemplated by the BCMB in its earlier decision.

61. The Whyte's misconduct does not, in this Panel's view, justify a further issuance of quota to the Krahns.

ORDER

62. The Reitsema appeal is denied.

63. The Krahn's appeal is denied.

64. There will be no orders as to costs.

Dated at Victoria, British Columbia this 21st day of June, 1999.

British Columbia Marketing Board
Per

(Original signed by):

Christine J. Elsaesser, Vice-Chair
Satwinder Bains, Member
Richard Bullock, Member