

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION
CONCERNING A PRODUCTION PENALTY

BETWEEN:

ORANYA FARMS II HOLDINGS INC.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

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

For the Appellant

Mr. Corry Spitters, President

For the Respondent

Ms. Sarah Pike, Counsel

Date of Hearing

March 14, 2002

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION:

1. This appeal involves the assessment of an over-production penalty against the Appellant, Oranya Farms II Holdings Inc. (“Oranya Farms”).
2. By letter dated November 9, 2001, the British Columbia Chicken Marketing Board (the “Chicken Board”) confirmed over-production penalties against Oranya Farms as assessed by Chicken Board staff.
3. By letter dated November 13, 2001, Oranya Farms appealed the decision of the Chicken Board to the British Columbia Marketing Board (the “BCMB”).

ISSUE:

4. Did the Chicken Board err in determining when period A-36 began for the Appellant’s farm and in so doing, did the Chicken Board err in its calculations of the over-production penalty assessed against the Appellant.

FACTS:

5. Mr. Corry Spitters is the President and sole shareholder of Oranya Farms. He has owned his own farm since approximately June 1989. Although he now grows broiler chickens, initially he grew roaster chickens. He has been involved in the industry since 1977.
6. Mr. Spitters and fellow chicken grower Mr. Daryl Arnold developed a spreadsheet to manage their farms' quota production so as to keep their quotas in line. As both gentlemen were involved in a feed mill, they used their spreadsheet to assist their customers in managing their quota as well.
7. In 1998, Mr. Spitters was elected to the Chicken Board. He was a member of the Chicken Board in January 2000 when an appointed Chicken Board replaced the elected Chicken Board.
8. When Mr. Spitters entered the chicken industry, he purchased roaster quota. The growing of roasters does not fit neatly into the 56-day cycles set by the Chicken Farmers of Canada (“CFC”) for broiler quota allocations. Roasters are a larger bird and as such the average roaster grower produces chicken on a 63 - 70 day cycle. As a result, while a broiler grower produces chicken 6-½ cycles a year, a roaster grower effectively loses a cycle during the year.
9. In August 2000, the Chicken Board enacted new Regulations, which are the policy rules that govern the chicken industry. As part of these Regulations, the Chicken Board implemented period by period compliance for quota production. What this

means is that chicken growers are required to produce their allocated quota within a 5% tolerance in the period that it is allocated. In order to move from the old system, where there was some flexibility in which cycle quota was produced, the Chicken Board determined that period A-36 would be an over-production penalty period. As a result, all producers were required to bring their quota into line for period A-36 or face over-production penalties.

10. For broiler growers, period A-36 commenced December 19, 2000. As Oranya Farms was a roaster grower at that time, there was some issue as to when period A-36 commenced for the Appellant. In reviewing Oranya Farms' history of chick placements and shipments, the Chicken Board determined that period A-36 commenced with the September 28, 2000 chick placements.
11. As a result of commencing A-36 with the September 28 chick placements, the Chicken Board determined that Oranya Farms was over-produced in A-36 by 15,250 kg. After applying the 5% tolerance, an over-production penalty of 8,348 kg was assessed against Oranya Farms.
12. Subsequently, the Chicken Board revised Oranya Farms' quota production order for A-36 having determined that a late chick placement on November 28, 2000 should also properly fall within period A-36. As a result, the Chicken Board determined that Oranya Farms was in fact over-produced by 58,002 kg. Despite determining that Oranya Farms' over-production was actually in excess of 58,000 kg, the Chicken Board maintained its initial over-production assessment of 8348 kg.
13. Mr. Spitters made numerous attempts to try and resolve the issue of his over-production for period A-36. However, despite numerous letters and meetings with Chicken Board staff, Mr. Spitters was unsuccessful. After a November 6, 2000 meeting with the Chicken Board, the Chicken Board wrote to Mr. Spitters on November 9, 2001 stating:

The Board does not accept your rationalization that your farm's A-36 cycle commences with placements on October 23, 2001 (sic). Acceptance of this placement date would legitimize your own placement system, which clearly contravenes the regulations.

14. On November 13, 2001, Mr. Spitters appealed to the BCMB stating:

The decision was regarding the starting date and subsequent shipping of chicken production for period A-36. I was not issued an A35 (sic) production period, and was jumped from an A-34 period into an A-36 production period earlier than I had expected. In fact 2 of my A-36 placements were in fact shipped in A-35's production period. This caused my farm to incur an over production penalty.

My argument is that I was unaware of the Marketing Board staff starting my A-36 period in A-35, before I had sufficient time to adjust my production to be line for their chosen A-36 production period. I was not made aware of their decision to chose (sic) the early start date until after the period was completed and my shipments were made on December 18, 2000. Had the Board staff picked the dates which only shipped in A-36, as planned for I would not have been in a penalty position.

15. The BCMB heard the appeal on March 14, 2002.

ARGUMENT OF THE APPELLANT

16. The Appellant argues that the Chicken Board was wrong in dropping cycle A-35 and choosing to start cycle A-36 with the September 28 chick placements. The Appellant argues that the Chicken Board should have commenced period A-36 with its October 23 chick placements. The September placements should have been treated as part of an earlier cycle, either A-34 or A-35. By choosing to commence A-36 on September 28, the Chicken Board creates a situation where there is insufficient quota allocated to cover the Appellant's production. It is the Chicken Board's allocation of quota to a given cycle that results in Oranya Farms being shorted the 25 days of quota allocation necessary to cover its production.
17. The Appellant argues that an October 23 start date truly captures the production grown and shipped completely in period A-36. The Chicken Board's methodology of picking a start date of September 28 distorts the production and places roughly 44,000 kg of production into period A-35. In the Appellant's case however, it was not issued an allocation for A-35 (as this was a dropped cycle). As a result, the Chicken Board counted this actual production in A-36.
18. The Appellant argues that the choosing of start dates for cycles is more complicated for Oranya Farms than for the average roaster grower. At the time in issue in this appeal, the summer and fall of 2000, the Appellant's farm operated on a multi-placement system. In order to accommodate its processor, the Appellant placed chicks in its barns on varying dates so as to have staggered roaster production over the growing cycle. In addition to multiple placements of chicks over perhaps a 3-4 week period, the Appellant also shipped chicken on multiple dates. Further, the Appellant did not allow its barns to stand empty for a 1-2 week period but rather cycled production through after approximately 2-3 days. As a result, the determination of when a given cycle commenced for the Appellant was much more difficult to establish than for the average roaster or broiler grower.

19. In contrast, the “normal” broiler grower operates his farm on a 56-day cycle, during which time chicks are placed, grown and shipped to the processor. The barn is cleaned and then left vacant for several days after which chicks are placed for the next cycle. The “normal” roaster grower operates his farm on a longer 63-70-day cycle, with chick placements occurring only once.
20. The Appellant argues that according to his spreadsheet and his calculations, his farm was not over-produced during period A-36 and as such he should not be penalized.
21. The Appellant also points to a meeting he had with Chicken Board employee Carol Blatz in November 2000. As a result of this meeting, Carol Blatz generated a document setting out Oranya Farms’ production for 2000. The Appellant argues that while there are numerous mistakes in this document, it confirms that Chicken Board staff agreed that A-36 would commence on October 23, 2000. The Appellant argues that he relied on this representation and planned his production accordingly. The Appellant also argues that had Chicken Board staff not agreed to commencing cycle A-36 on October 23, there was still time to adjust production to avoid an over-production penalty position.
22. The Appellant argues that he understood that A-36 for him would commence on October 23, 2000. As such, he did his due diligence to ensure he was not over-produced.
23. The Appellant argues that the BCMB should use October 23, 2000 as the beginning of A-36 as it fully captures and qualifies the amount of quota that would have been fully given during that period.
24. The Appellant also argues that the failure of the Chicken Board to advise that in advance that Oranya Farms would not receive an allocation for A-35 resulted in insufficient time to plan. In addition, the Appellant argues that in previous dealings with the Chicken Board regarding other growers in similar situations, the Chicken Board exercised its discretion and did not penalize the grower. The Appellant argues that in this case, the Chicken Board has not exercised its discretion to offer relief from the penalty and this is unfair.

ARGUMENT OF THE RESPONDENT

25. The Chicken Board argues that this appeal boils down to a choice made by the Chicken Board staff as to when period A-36 should begin for Oranya Farms. At its core, this is an appeal over who has the right to choose when that period begins.

26. It is the Chicken Board's submission that it has the right to choose when A-36 commences as long as the start date is reasonable. The Chicken Board does not have to accept the farmer's view as to when the period begins. In this case, the Chicken Board chose a date 63 days after the previous period, a cycle length approximately equivalent to each of the previous 5 or 6 periods for this particular farm. The date chosen was a reasonable, logical and practical choice conforming to Oranya Farms' own history of growing roasters.
27. The Appellant is asking for either a 25-day A-35 or A-36 cycle or, alternatively, an 88-day A-34 cycle. The Chicken Board argues that none of these are reasonable choices. There is no evidence to support a 25-day cycle and an 88-day cycle does not conform with previous production by Oranya Farms.
28. The numbers argued by the Appellant for either a 25 or 88-day cycle are "after the fact" numbers calculated to make better sense of his actual production. They are numbers that he has derived simply because he did not plan correctly at the time.
29. The Chicken Board also takes issue with the Appellant's argument that he was not given notice that his A-35 cycle would be dropped. The Chicken Board argues that the Appellant could have predicted that his next cycle would begin on or about September 28. Looking at the history of his quota production orders, he would know that his cycle would be approximately 63 days in length. Creating an 88-day cycle is not a reasonable proposition.
30. The Appellant argued that if he had known that cycle A-36 was commencing September 28, he could have delayed placement to October 23. By so doing, his A-36 allocation would be based on 88 days and therefore, the same amount of production could be grown without penalty. The Chicken Board argues again that an 88-day cycle is not a reasonable option and that the Appellant had the necessary information to choose not to make the last 2 placements in A-36 and thereby avoid a penalty. However, the Appellant chose not to do so.
31. The Chicken Board also argues that the Appellant has created the difficulty of determining cycle start dates by using a multi-placement system. However, it was the Appellant's choice to be flexible for his processor and thereby create the very complexity that led to the difficulty of determining when a particular cycle commences.
32. The Chicken Board also takes issue with the Appellant's characterization of his meeting with Carol Blatz. The evidence of Ms. Blatz was unequivocal. She stated that she never suggested to the Appellant that A-36 would have a start date of October 23. The document created by Ms. Blatz was developed for discussion purposes, at Mr. Spitters' request to demonstrate the effect of using an October 23 start date.

33. In summary, the Chicken Board argues that it has considered this issue at length. There have been many discussions regarding when A-36 should begin. The Chicken Board staff has considered this issue as has the Chicken Board itself. In the end the Chicken Board's decision has not changed. In circumstances where the Chicken Board is faced with a mistake it is willing to correct its mistake. However, in this instance there is no evidence of a mistake and the Chicken Board has done things in a reasonable and fair manner.
34. Finally, the Chicken Board argues that the over-production penalty has been assessed against Oranya Farms. It should be noted that the penalty was not significant in terms of effective dollar value. In fact, the Appellant agrees that he is not here because of the dollar value of that penalty upon his operation. Further, the BCMB should take notice of the fact that the production penalty could have been higher had not the Chicken Board exercised its discretion in favour of Oranya Farms.

DECISION

35. The Appellant takes issue with the Chicken Board's decision to start cycle A-36 with its September 28 chick placements. The Appellant argues that starting A-36 with the October 23 chick placements would have more accurately captured the production grown and shipped in period A-36. The Chicken Board's methodology of picking a start date of September 28 distorts the production and places roughly 44,000 kg of production into period A-35 for which the Appellant did not receive a quota allocation.
36. The Chicken Board argues that it has considered this issue at length. The Appellant has not demonstrated that the method used was in any way wrong or mistaken. Rather the Appellant argues that, in hindsight, it would prefer another start date than that chosen by the Chicken Board. The Chicken Board argues that it has the authority to make this decision and in this instance, it has exercised its discretion in a reasonable and fair manner.
37. After this appeal was heard and subsequent to our initial panel deliberations, the decision of Mr. Justice Metzger was released in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, (unreported) April 24, 2002, L012392, Vancouver Registry (BCSC). This decision, which is now under appeal, articulates a significantly narrower appellate role for the BCMB than has previously been recognized.
38. Mr. Justice Metzger held that the BCMB is required to "defer" to the discretion of the Chicken Board unless the outcome of that discretion was "unreasonable". The Court stated at page 13:

The Provincial Board (BCMB) cannot impose what they think is fair. The Provincial Board, when exercising its appellate jurisdiction, must review for reasonableness when considering individual appeals from the application of rules upon individual circumstances.

39. On June 12, 2002, the Court of Appeal granted the BCMB leave to appeal the decision of Metzger J., and has agreed to an expedited hearing, scheduled for August 16, 2002.
40. We considered whether we ought to await release of these reasons until that appeal is heard. However, we have decided not to do so in the circumstances, as we would dismiss this appeal however broadly or narrowly our appellate jurisdiction is defined.
41. The evidence presented by the Appellant falls short of demonstrating that the Chicken Board erred in setting the start date for A-36 at September 28 for Oranya Farms. Further, the Chicken Board has demonstrated a reasonable basis for choosing the start date it did. The start date is not arbitrary and conforms approximately to the Appellant's prior cycle lengths of 63 days. While the Appellant may disagree with this date, there is no basis upon which the BCMB can find the September 28 start date unreasonable or in error.
42. Further, the BCMB does not accept that the document generated by Ms. Blatz in November 2000 demonstrates an agreement on the part of the Chicken Board or its staff to commence A-36 on October 23, 2000. The Panel prefers the evidence of Ms. Blatz that this was a planning document generated at Mr. Spitters' request to demonstrate the effect of using an October 23 start date. Accordingly, it follows that the Chicken Board did not err or act unreasonably in failing to place any weight on the Appellant's alleged reliance on this document.
43. Finally, it should be noted that the Appellant, as a roaster grower, knew that one allocation cycle per year would be dropped. As A-30 had previously been dropped for the Appellant, he should have been aware that it was almost time to drop another cycle. Given that A-36 was to be a penalty cycle, it could not be the dropped cycle. If one of the 6 cycles per year must be dropped, it was reasonably foreseeable that the cycle subject to being dropped was A-35. In view of the foregoing, the Panel accepts that the method adopted by the Chicken Board in allocating quota to the Appellant in A-36 was correct and reasonable and in accordance with previous allocations. Had the Appellant exercised prudence, it was within his ability to produce his quota within the allocated tolerances. His inability to do so is not evidence of an error on the part of the Chicken Board.
44. Accordingly, the appeal is dismissed.
45. There will be no order as to costs.

Dated at Victoria, British Columbia, this 12th day of July, 2002.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

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