IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A JANUARY 28, 2000 DECISION
CONCERNING SECONDARY AND TRANSITIONAL QUOTA HOLDINGS

BETWEEN:

SOUTHPORT ENTERPRISES 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. Christopher Harvey, QC, Counsel
For the Respondent	Mr. Douglas Scullion, Counsel
Place of Hearing	Abbotsford, BC
Date of Hearing	April 6, 2000

INTRODUCTION

1. The Appellant, Mr. Waldemar Froese of Southport Enterprises Inc. ("Southport"), is appealing the decision of the British Columbia Chicken Marketing Board (the "Chicken Board") to not issue him secondary or transitional quota, communicated by delivery of his Grower License on January 28, 2000.

ISSUE

2. The issue on this appeal is whether the Appellant is entitled to secondary quota and transitional quota under the Orders of the Chicken Board.

BACKGROUND

3. This appeal is related to an earlier appeal heard by the British Columbia Marketing Board (the "BCMB"). Mr. Klaas Korthuis, who operates Try Poultry Farms and is a business associate of Mr. Froese, filed his appeal regarding entitlement to secondary and transitional quota in April 1999. The *Try Decision* was issued on October 18, 1999.

4. The BCMB dismissed the appeal and held:

> 38. Thus, the Panel is of the opinion that at the time Orders #303 and #320 were enacted and the rights to secondary and transitional quota arose, the Appellant was not entitled to receive either. He was only entitled to that which the Chicken Board had given him, a right to lease his quota until it could be sold. The Chicken Board could have revoked this right at any time.

5. Despite the finding that Mr. Korthuis was not entitled to secondary or transitional quota, the Panel concluded that broader public policy concerns justified granting some growth:

> 42. … the Panel is of the view that the Appellant should be entitled to receive some form of quota. Order #320 created two different allocations of quota. Transitional quota was issued to those growers who had not previously transferred quota. However, even those growers who had previously transferred quota were given an allocation of primary quota at some future date. This seems to demonstrate a recognition by the Chicken Board that all chicken growers deserved an opportunity to share in industry growth at some level. The Appellant's situation is not unlike that of a grower who has previously transferred quota. Both have had to adopt a certain course of conduct due to economic or financial realities, whatever their source.
>
> 43. Accordingly, the Panel orders that the Appellant be treated like a grower who has previously transferred quota under Order #320 (Page 3, Note (v)) and be eligible for a one-time issuance of 9644 kgs primary quota "at the same time as transitional quota is converted to primary quota in the future."

6. Precedent does not bind the BCMB. Thus, the *Try Decision* is not binding on this Panel. However, given that Mr. Froese and Mr. Korthuis acted in concert with

respect to their Vancouver Island quota, the *Try Decision* cannot be dismissed in its entirety.

7. The appeal was heard on April 6, 2000. After deliberating, an issue arose on which the Panel wished further submissions. On May 11, 2000, the Panel directed a letter to counsel asking whether the fact that the Chicken Board General Orders allowed a registered grower who leased premises from a related family member to still qualify for secondary and transitional quota was relevant in this appeal. Central to the Respondent's argument is that secondary and transitional quota must attach to a premises. In the case of a related family member lease arrangement, a registered grower who does not own a premises still receives secondary and transitional quota.

8. The Panel received and considered the following responses to their inquiry:

    a) Appellant's response dated May 15, 2000;
    b) Respondent's response dated May 17, 2000; and
    c) Appellant's reply dated May 19, 2000.

FACTS

9. Up until 1993, Mr. Froese produced breeder fowl on his production unit on Mt. Lehman Road in Abbotsford. In the fall of 1993, he decided to enter the roaster business on Vancouver Island.

10. The Appellant purchased 15,000 birds of roaster quota from Tucker's Cluckers, a Vancouver Island chicken grower. Mr. Korthuis purchased the balance of Tucker's Cluckers' quota.

11. At that time, Vancouver Island quota was not transferable to the Lower Mainland and this was reflected in the price the Appellant paid for that quota. The General Orders of the Chicken Board provided:

    s.6(f) No Quota grown on a Production Unit on Vancouver Island or the Interior shall be transferred from the area for which it is issued.

12. Consistent with s. 4.01(c.1) of the Chicken Scheme, any quota transfer from Tucker's Cluckers to the Appellant was subject to the Chicken Board's approval of the transfer from a regulatory perspective. The application for quota transfer notified the applicants of the Chicken Board's pre-approval requirements and of the grower's obligations upon any approval being granted:

    1) The transferee of a quota shall be the registered owner of the premises to which the quota is to be attached.
    2) The Board will require a transferee applicant for the transfer of a quota to be interviewed by the Board prior to the approval of his quota transfer.
    3) A new entrant acquiring broiler or roaster quota by transfer is required to arrange for a minimum of 19,290 kg live weight quota.

4) Roaster growers who acquire broiler quota by transfer will be required to operate their production unit on the roaster cycle.
5) It is a condition of the transfer of quota that each premises meet the minimum quality standards in accordance with quota attached to each premises as follows:

...

Roaster	2.57 kg live weight/sq. ft.

...

6) The transferee of a quota in a product unit sale shall be or become the registered owner in fee simple or of a right of purchase of the production unit to which the quota is attached.
7) The transferee of a quota prior to Board approval must complete and sign a declaration and undertaking that no financing is or will be advanced, loaned, guaranteed or otherwise made available directly or indirectly by a Feed Company, a Processor, a Hatchery or any other person who represents or has any financial interest in the Broiler Industry or trade allied to broiler production.

13. On October 29, 1993, the Chicken Board sent the following memo to the Appellant which clearly shows that the approval was conditional on the purchase of a Vancouver Island property within 12 months:

> The Board has approved the transfer of 28,935 kgs. Roaster primary quota to Southport Enterprises Inc. on the understanding a separate property will be purchased on Vancouver Island to establish a new farm to attach the quota to.
>
> The Board has allowed 12 months for the start up of the new farm on Vancouver Island. In the interval the Board has approved the grow out of this roaster quota on other Registered Grower's production unit in the Lower Mainland, providing the live product is shipped to the Lilydale plant at Sooke, B.C.

14. On April 1, 1994, the Chicken Board issued Order #268 granting registered growers, who had not previously transferred a portion of their quota, 9,644 kg live weight of secondary quota. A condition of this Order was that growers had until December 31, 1994 to provide space on their own premises to grow this secondary quota.

15. By the fall of 1994, the Appellant had not purchased a Vancouver Island facility. He applied to the Chicken Board to continue to "grow out" his quota at his farm in Abbotsford. The Chicken Board denied this request stating in an October 7, 1994 letter:

> The Board has permitted these Vancouver Island quotas to be grown on the Mainland for a one year term (Ends Oct. 30, 1994), on the understanding that during this period, farms on Vancouver Island would be established. Long standing policy is that if a grower does not provide a production unit for quota within a 12 month period, this quota is suspended from production. Therefore, effective on and after October 30, 1994 your quotas will be suspended until the required production unit is provided on Vancouver Island or these quotas are transferred to new or existing growers in the Vancouver Island region.

16. The Appellant appealed this decision to the BCMB. In December 1994, Mr. Froese, Mr. Korthuis and the Chicken Board mediated an extension to the deadline

for construction of production facilities to April 1995. The settlement made it very clear that the Appellant's holding of Chicken Board quota continued to be conditional on his meeting the requirement of a Vancouver Island production unit:

1. These quotas eventually have to be attached to property on Vancouver Island.
2. The deadline for new secondary quota space is April 1, 1995.
3. The Board would consider having these quotas leased to Vancouver Island growers until the deadline of April 1, 1995 (Lilydale's request).
4. Try Poultry and Southport Ent. would have until April 1, 1995 to either acquire property and provided (sic) space on Vancouver Island or to transfer their primary roaster quota to existing or new growers on Vancouver Island.
5. On the April 1, 1995 new deadline if none of the above has been complied with, Try Poultry and Southport's primary roaster quotas will be suspended until they are transferred (sold) to Vancouver Island growers.
6. The deadline for the new secondary quota (9,644 kgs.) is April 1, 1995 and Try Poultry and Southport Ent. will not be eligible if they have not provided the required space by April 1, 1995 on Vancouver Island.

17. As a result, the Appellant continued to grow out his quota on his farm in Abbotsford until April 1995 when he requested a further one-year extension. The Chicken Board denied this request and once again suspended his quota from production. The Appellant again appealed this decision to the BCMB.

18. This second appeal was also settled by mediation. This agreement is significant in that it shows that the Appellant had abandoned the notion of attaching the quota to a production unit. Rather than exercising its power to suspend or terminate the Appellant's quota, the Appellant was being permitted by the Chicken Board to maintain his quota for the limited purpose of recouping costs he incurred in the venture to purchase it:

1. This agreement is retroactive to April 1, 1995 and expires March 31, 1996 or sooner if the quotas are sold in full.
2. The parties agree that the Appellants will lease their respective quotas to Vancouver Island Lilydale producers for the duration of this agreement.
3. The parties agree that the Appellants may sell their quota to any Island-based purchaser.
4. The Appellants acknowledge that the CMB (the Chicken Board) does not intend extending the terms of this agreement past March 31, 1996.
5. The Appellants hereby withdraw their appeals currently before the B.C.M.B.

19. The focus in the second mediated agreement shifted from building a production unit on Vancouver Island to selling the quota to a Vancouver Island purchaser. Clearly, neither the Chicken Board nor the Appellant viewed the Appellant as an active producer. Rather, the Appellant was a producer who had not met a condition of his approval, who was being given the indulgence of maintaining the privilege for the purpose of recouping his investment in the quota.

20. After the expiry of the mediated agreement on March 31, 1996, the Appellant continued to lease his quota out to a Vancouver Island grower. No formal agreement was entered into between the Appellant and the Chicken Board;

however, it is clear that the status of his approval did not change. The Appellant continued to try and sell his quota.

21. On September 12, 1996, the Chicken Board issued Order #303 which provided registered growers, who had not previously transferred a portion of their quota, with a further 9,644 kg live weight of secondary quota. Under this Order, a "registered grower" is defined as "any grower who holds a broiler quota or a roaster quota with respect to the production of the regulated product on September 12, 1996." The Order also provides that secondary quota "issued under this order is attached to a grower's premises and may be transferred in the event of a farm sale."

22. On September 25, 1997, the Chicken Board issued Order #320 that provided all registered growers with a share of industry growth. Registered growers who had not previously transferred a portion of their quota received a one time issuance of transitional quota based on a sliding scale. Under this sliding scale, a grower with 15,000 birds of quota was entitled to 11,000 birds of transitional quota. Unlike in previous orders where registered growers who had previously transferred quota were excluded from industry growth, in Order #320 they were entitled to receive 9,644 kg of primary quota at the same time as transitional quota converted to primary quota in the future.

23. Order #320 also states that "the regulated product shall be grown on and marketed from the premises of the registered grower described in their registered grower's license unless the Board otherwise consents in writing."

24. On September 10 and 25, 1997, the Chicken Board revised its leasing program to restrict the percentage of quota leased per cycle and require that production be leased and grown in the same region (i.e. Vancouver Island) but marketed outside of the region. The Order also provided that the total quota could only be leased out one cycle per calendar year. Growers were given one year to comply. On October 10, 1997, Mr. Froese joined Mr. Korthuis and others in an appeal of the revised leasing program. This appeal is still pending and the Chicken Board has extended the lease program compliance deadline.

25. In the August/September 1998 Board Report, the Chicken Board reminded all registered growers that the target date to provide space for secondary quota on their premises was January 1, 2000. Registered growers who did not provide space would have that portion of their secondary quota cancelled.

26. Effective March 31, 1999, Amendment #7 to the Chicken Board General Orders (1987) lifted the quota transfer prohibition as follows:

> (f) Relocation policy
>
> i. No Quota grown on a Production Unit on Vancouver Island or the Interior shall be transferred from the area for which it is issued, except that a registered grower who

has been registered as a grower for at least two years prior to the date of the quota transfer application may relocate that grower's farming operation anywhere in the Province to a Production Unit owned by that grower, subject to the provisions of this sub-section;

ii. A grower who wishes to relocate under this sub-section must have available barn space for all of that grower's primary, secondary and transitional quota within one year of relocation, subject to verification by the Board;

iii. In order to relocate quota under this sub-section, a grower must transfer all that grower's primary, secondary and transitional quota and partial quota transfers will not be permitted;

iv. In considering an application for quota transfer upon relocation under this sub-section, the Board reserves the right in its discretion to make the necessary inquiries to ensure that the movement of the Production Unit meets the test of ownership consistent with the policies and orders of the Board;

v. Where upon application, the Board has approved a transfer of quota to a new Production Unit in accordance with this sub-section, no sale of the quota which is transferred will be approved before a date two years following the date of approval of the quota transfer by the Board.

27. In April 1999, the Appellant began producing his Vancouver Island quota at his Abbotsford farm. It is unclear from the evidence whether the Chicken Board formally approved this transfer pursuant to Amending Order #7. The Panel was not referred to any document where the Chicken Board confirmed the transfer and no representative of the Chicken Board was called to give evidence in the hearing. However, we infer that, sometime in or after April 1999, the status of this quota changed and that the Chicken Board approved the production of this quota as being attached to the Appellant's Abbotsford production unit.

28. On November 25, 1999, the Appellant purchased 15,000 birds of broiler quota from his son-in-law's company, Marvel Enterprises Ltd. in Abbotsford. This transfer was effective January 4, 2000.

29. On January 16, 2000, the Appellant wrote to the Chair of the Chicken Board and advised as follows

> ...I am entitled under the Board Orders to Secondary and Transitional quota. This should have been issued to me earlier. In any event, it was promised to me as of January 1, 2000, subject only to having farm premises at that time. As you are aware I have farm premises so there can be no doubt that I qualify. Please ensure that my license properly records my entitlement to Secondary and Transitional quota.

30. The Chicken Board issued the Appellant's Grower License on January 28, 2000. The license reflects quota holdings of 28,929 kgs. of primary broiler quota and 28,935 kgs. of primary roaster quota. The license does not note any secondary or transitional quota holdings.

31. On February 1, 2000,the Appellant appealed the Chicken Board's decision to not grant him secondary and transitional quota.

ARGUMENT OF THE APPELLANT

32. The Appellant argues that this appeal involves a pure question of statutory interpretation. The *Natural Products Marketing (BC) Act* (the "*Act*") grants power to the Lieutenant Governor in Council to authorise a Board to regulate an industry by enacting Orders. There are three tiers of legislation, the *Act*, the *British Columbia Chicken Marketing Scheme, 1961* (the "*Scheme*") and the Chicken Board Orders. Here we are concerned with the proper interpretation of an Order. The Appellant argues that to properly interpret an Order, the Panel must apply the general rules of interpretation found in the *Interpretation Act* RSBC 1996 c. 238:

> 1. In this Act, or in an enactment:
>
> "**regulation**" means a regulation, order, rule, ...or other instrument enacted
> (a) in execution of a power conferred under an Act, or
> (b) by or under the authority of the Lieutenant Governor in Council,

33. The Appellant argues that the above definition of regulation is broad enough to include Chicken Board Orders. He then cites the following sections of the *Interpretation Act*:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> 14. (1) Unless it specifically provides otherwise, an enactment is binding on the government.
>
> 29. In an enactment:
>
> "**shall**" is to be construed in the imperative;

34. Bearing those principles in mind, the Appellant looks at the various quota allocation orders passed by the Chicken Board. The first order allocating secondary quota was Order #268 enacted April 1, 1994. The Appellant argues that like the subsequent Orders, it is Order #268 itself which effects the grant of quota:

> <u>Section (v) Roaster Secondary Quota:</u>
>
> 1. A registered grower on April 1, 1994 who holds a 202,544 kilograms live weight roaster quota or less and who has not transferred a portion of his quota, under this order is granted a 9,644 kilogram live weight roaster secondary quota or a portion.

35. Order #268 also has the following restriction:

> <u>Section (vii) Utlilization:</u>
>
> 2. All Registered growers have from April 1, 1994 to December 31, 1994 (274 days) to provide space on their own premises at 2.57 kilograms per square foot. The secondary

> quota and roaster secondary quota issued under this authority of this order is allotted by the Board to the registered grower having space at 2.57 kilograms live weight per square foot as measured by the Board when space is available on or before December 31, 1994.

36. The Appellant argues that Order #268 creates an entitlement to secondary quota until December 31, 1994 when, if a registered grower has not provided space, the entitlement ceases to exist.

37. Applying this Order to the Appellant's circumstances, he was a registered grower having purchased his Vancouver Island quota in 1993. He did not build space to accommodate the secondary quota before December 31, 1994 nor did he build space during the extension granted by the Chicken Board through the mediation. The Appellant does not take issue with respect to entitlement to secondary quota under Order #268. However, the Appellant argues that Order #268 is useful when construing the later orders of the Chicken Board.

38. The Appellant continued to lease out his quota on Vancouver Island. However, the Vancouver Island chicken industry experienced an economic downturn and the Appellant abandoned any plan of building a production unit on Vancouver Island. He continued to lease out his quota until April 1999, when he moved his quota to the Lower Mainland. The Appellant argues that what he was entitled to move was his full entitlement to primary, secondary and transitional quota. The entitlement to secondary and transitional quota continued to exist and the Appellant argues that it can be exercised today.

39. Order #303 was issued on September 12, 1996. This Order was a general quota enactment issued pursuant to the legislation. By s. (iii) registered roaster growers were granted 9,644 kg of secondary quota. The Order creates the entitlement for registered growers who have not previously transferred quota. The Appellant argues that the entitlement does not depend on any further order or administrative act. Unlike Order #268, Order #303 does not have any restriction on utilization. It does not say the entitlement will be revoked if the grower does not provide space for the secondary quota. What it does say is that "secondary quota issued under this order is attached to a grower's premises and may be transferred in the event of a farm sale." The Appellant argues that section means that had he found a buyer during this period of time, he could have transferred his entitlement to secondary quota.

40. The Appellant argues that nothing turns on the fact that his yearly license did not note his secondary quota allotment, although in 1997 it was so noted. The entitlement to secondary quota does not spring from the license, a clerical act of the Chicken Board. The entitlement is created by the legislation, Order #303.

41. In support of this interpretation, the Appellant points to a representation by Mr. Art Stafford, then General Manager of the Chicken Board, to Mr. Korthuis in September 1997, that as long as he had barn space by January 1, 2000, he would

receive 5000 birds of secondary quota and 10,940 birds of transitional quota. This conversation was not documented.

42. The Appellant also points to the August/September 1998 Board Report. In that Report there is a Reminder that registered growers must provide space for their secondary quota on or before January 1, 2000. Reading this in conjunction with Order #303 supports the argument that the Appellant, who has barn space for 58,000 birds, is entitled to secondary quota.

43. The Appellant makes the same argument with respect to Order #320 and the entitlement to transitional quota. The Appellant is a registered grower who has not transferred quota and thus he "will be granted a one time issue of transitional quota". The Appellant argues that "will", like "shall" which is defined in the *Interpretation Act*, is imperative. Order #320 creates an entitlement to transitional quota. Clerical errors made by the Chicken Board cannot remove this entitlement.

44. On March 31, 1999, Amending Order #7 came into effect. It repealed 6(f) of the General Orders (1987); the long-standing restriction against transfer of Vancouver Island quota to the Lower Mainland was lifted. The Appellant submits that the relevant sections of the Order are:

> (f) Relocation policy
>
> i. No Quota grown on a Production Unit on Vancouver Island or the Interior shall be transferred from the area for which it is issued, except that a registered grower who has been registered as a grower for at least two years prior to the date of the quota transfer application may relocate that grower's farming operation anywhere in the Province to a Production Unit by that grower, subject to the provisions of this sub-section;
>
> ii. A grower who wishes to relocate under this sub-section must have available barn space for all of that grower's primary, secondary and transitional quota within one year of relocation, subject to verification by the Board;

45. The Appellant argues that he met the requirement in ss. (i) that he be a registered grower for more than two years prior to the transfer of his quota and the requirement in ss. (ii) that he have sufficient barn space for the entire primary, secondary and transitional quota. There is no issue that as of January 1, 2000, the Appellant has enough barn space.

46. The Appellant argues that he is clearly entitled to secondary and transitional quota. The entitlement to secondary arose in 1996; the entitlement to transitional arose in 1997. With the downturn in the chicken industry on Vancouver Island, it has taken the Appellant some time to organise his affairs. However, he has now moved his quota to the Lower Mainland and has produced four or five cycles. He has the barn space and should be entitled to produce the secondary and transitional quota granted under Orders #303 and #320.

ARGUMENT OF THE RESPONDENT

47. The Respondent argues that there are two main issues on appeal, delay and entitlement. Mr. Korthuis made similar arguments in the earlier *Try Decision*. While this decision is not binding on this Panel, the Respondent argues that it is persuasive and refers to the following passages:

> 18. The Appellant argues that when he purchased quota in 1993, it was his intention to build a production unit on Vancouver Island. He did not proceed with this plan because of the economic downturn in the industry. Later, when he was planning to build his production unit, Lilydale announced its plan to close its Vancouver Island processing plant. Acting on information from a Lilydale employee regarding the future of chicken production on Vancouver Island, the Appellant abandoned his plan to build a production unit on Vancouver Island.
>
> 19. The Appellant argues that he is entitled to the secondary and transitional quota allocations since he met the conditions required at the time the quota was issued. He is a "registered grower" as defined by the General Orders of the Chicken Board:
>
> > any Grower who holds a Quota with respect to the Marketing of the Regulated Product and whose name has been entered in the Register of Growers maintained by the Board.
>
> 20. The Appellant also argues that as he "has not previously transferred a portion of (his) allotted quota", he meets the only other requirement, under Section (ii) (1) of Order #320, for transitional quota.
>
> 21. The Appellant further argues that although he did not build a chicken production unit, there is no such requirement imposed on him by the General Orders. In addition, he has met the other terms imposed by the Chicken Board, namely that he grow out his production as directed and attempt to sell his quota. However, due to the poor economic conditions within the industry and the uncertainty on Vancouver Island, he was unable to sell his quota. The one offer he had from a Vancouver Island grower was not completed.
>
> 22. The Appellant argues that he is now able to build a chicken production unit on the Lower Mainland and has made offers to purchase. However, he requires the secondary and transitional quota to enable him to establish an economic enterprise.

48. The Respondent argues that in this case, the issue of competitiveness raised in paragraph 22 is not a consideration for this Panel. Mr. Korthuis was a new grower who had to acquire premises. Mr. Korthuis' need to be economically viable was used by the BCMB to justify a lesser grant of quota. The Respondent argues that the same consideration does not apply to Mr. Froese, an established poultry farmer with his own production unit.

49. On the issue of delay, the Respondent points out that the Appellant is appealing entitlement to secondary and transitional quota from Orders issued in 1996 and 1997. There has been a significant delay in bringing these appeals. The Respondent argues that in normal circumstances appeals under the *Act* must be commenced within 30 days so that issues can be dealt with while they are still fresh. If the BCMB determines that special circumstances exist, it can grant an

extension to hear the appeal. In this case, the Respondent argues that no special circumstances exist.

50. The Appellant appears to argue that because Orders #303 and #320 create an entitlement, it is open to the Appellant to bring his appeal at any time. The Appellant also argues that administrative decisions of the Chicken Board have no effect on the Appellant's right to appeal. The Chicken Board has issued yearly licenses that with the exception of 1997, reflect no secondary or transitional quota holdings. The Quota Production Orders which the Appellant (and every other registered grower) receives at the end of each cycle and which document quota holdings, utilisation and production for the six previous cycles have also never reflected any secondary or transitional quota holdings. The Respondent argues that the right of appeal arose at the time the Appellant received the first Quota Production Order or perhaps the second or third. It does not arise four years down the line. To accept the Appellant's argument is to allow the Appellant to wait indefinitely to bring his appeal.

51. The Appellant appears to rely on a discussion between Mr. Korthuis and Mr. Stafford to justify his delay. Mr. Stafford purportedly stated that as long as Mr. Korthuis built for the quota before January 1,2000, he would receive 5000 birds of secondary quota and 10,940 birds of transitional quota. The Respondent argues that this does not justify the Appellant's delay for three reasons.

52. First, the Appellant did not call Mr. Stafford to give evidence in this hearing. We are left with Mr. Korthuis' recollection of a conversation in 1997. It is significant to note that Mr. Korthuis did not call Mr. Stafford in his earlier appeal and this representation on what would appear to be a significant issue was never reduced to writing in any Board order or minute. Second, Mr. Froese did not testify that he in any way relied on the Stafford advice given to Mr. Korthuis. Instead his evidence was that he relied on his processor. He did not take any issues regarding the status of his secondary or transitional quota to the Chicken Board. Finally, if Mr. Stafford did give advice to Mr. Korthuis in September of 1997, his advice was that Mr. Korthuis had to establish a premises on Vancouver Island to qualify for secondary or transitional quota. If this was Mr. Stafford's advice, it was wrong.

53. As to the issue of entitlement, the Respondent argues that the Appellant is advancing a very narrow interpretation of both Orders #303 and #320. These Orders must be interpreted in light of the wording of the General Orders and the industry-wide understanding that a registered grower must have a quota production unit; he must have a farm premises. The Appellant is not advancing an entitlement to secondary quota under Order #268. However, the Respondent draws the Panel's attention to section (vii)(3) which states:

> Secondary quota and roaster secondary quota issued under this order is attached to a grower’s premises and may be transferred in the event of a farm sale.

54. The Appellant argues that in Orders #303 and #320, there is a consistent theme that secondary or transitional quota attaches to a premises. Order #303 states:

> Section (iv) Utilization
>
> 1. Secondary quota and roaster secondary quota issued under this order is attached to a grower's premises and may be transferred in the event of a farm sale.

55. Order #320 provides:

> Section (iv) Utilization
>
> 6. All quota with respect to the regulated product shall be grown on and marketed from the premises of the registered grower described in their registered grower's license unless the Board otherwise consents in writing.

56. The Respondent argues that by virtue of Order #303, the Appellant would need a farm premises with sufficient space to receive secondary quota.

57. The Respondent does not deny that the Appellant finds himself in a fairly unique situation. He acquired Vancouver Island quota and did not build for it within the required time. He received indulgences from the Chicken Board following two mediations, which allowed him to lease out his quota while attempting to sell it to a Vancouver Island grower.

58. During this time, the Appellant could not have sold his secondary quota. First, he did not have any secondary quota to sell and second, secondary quota can only transfer in a whole farm sale. The Appellant is wrong when he states that had he found a buyer, the entitlement to secondary quota would have transferred. He never purchased a farm on Vancouver Island and consequently no "farm sale" could occur.

59. As to the entitlement to transitional quota, the Respondent argues that it is implicit from the wording of section 6 of Order 320 cited above that a registered grower requires a premises.

REPLY OF APPELLANT

60. In Reply, the Appellant argues that the *Try Decision* is not helpful. In that case, Mr. Korthuis appeared without Counsel. Although he raised the issue of entitlement, he did not develop a legal argument to support this entitlement. The *Try Decision* does not contain any legal reasoning of the sort asserted by the Appellant in this case. The Appellant urges the Panel to consider the arguments in this case without being distracted by the earlier *Try Decision*. While consistency is a good thing, there are different issues, facts and arguments raised in this appeal.

61. With respect to the issue of delay, the Appellant argues that this appeal could not have been brought earlier. Until January 1, 2000 arrived and until a grower proves he has space to accommodate the quota, no appealable issue arises.

DECISION

Out of Time

62. The Respondent raises the issue of delay. In a notice of appeal dated February 1, 2000, the Appellant is appealing the Respondent's decisions regarding his "entitlement" to quota based on Orders enacted in 1996 and 1997. The Respondent argues that the Appellant is well outside the 30-day period for filing an appeal and there are no special circumstances to justify an extension of this limitation period.

63. The Panels finds that the Appellant's conduct after the enactment of Orders #303 and #320 is consistent with a belief that he did not have an entitlement to secondary or transitional quota. The Appellant has had a lengthy relationship with the Chicken Board. He has been through two suspensions of quota and two mediations. After the second mediation in 1995, he was well aware that the Chicken Board was giving him a further indulgence, no longer requiring him to build a facility but rather to sell his quota. The Appellant's interest in the Vancouver Island quota was initially contingent upon building a premises, after the second mediation the Appellant's only interest was the value to be salvaged on a sale to a Vancouver Island grower. For six years after the purchase of the Vancouver Island quota, the Appellant never produced his quota. The Chicken Board gave him indulgence after indulgence to try and recoup what appears at least in hindsight to have been a speculative investment.

64. When Order #303 came into force in September 1996, the Appellant did not question the Chicken Board on his entitlement. If, as the Appellant asserts, the Appellant believed he could have sold his entitlement to secondary quota during this time, one would have expected that he would not sleep on his rights. Yet the Appellant did not question his entitlement.

65. The fact is however, that the real value of secondary and transitional quota did not materialise until the enactment of Amending Order #7 in March 1999. Prior to that, as long as the Appellant was attempting to sell his primary quota to a Vancouver Island grower, secondary and transitional quota had no resale value as Orders #303 and #320 preclude their transfer independent of a bona fide farm premises sale.

66. Amending Order #7 came into effect on March 31, 1999. This Order lifted the restriction on transfer of quota from Vancouver Island to the Lower Mainland. Persons who had been registered Vancouver Island growers for at least two years were allowed to transfer all their quota to the Lower Mainland provided they established a chicken production unit within one year. The Appellant began

producing his primary quota at his farm in Abbotsford. It is unclear whether he in fact applied to transfer his quota but nevertheless, the Chicken Board appears to have acceded to the transfer.

67. Once the Appellant was able to transfer his quota off Vancouver Island and produce it from his farm in Abbotsford, the claim of a right to secondary and transitional quota at that location suddenly assumed a potential value in excess of $300,000. That is no doubt the commercial reality that explains the Appellant's lengthy delay in seeking to assert an "entitlement" to secondary and transitional quota.

68. The Panel is of the opinion that the foregoing circumstances do not constitute circumstances sufficiently “special” that we would, in our discretion under s. 8(1)(b) of the *Act*, countenance such an inordinate delay. To hold otherwise would in our judgment encourage aggrieved persons to hold off on appeals in the hope their position would improve with a change in commodity board orders or a more favourable economic environment. To accept an appeal so long after the events in question, on an entirely *ex post facto* basis and without even an indication that the person had a bona fide objection at the time, is inconsistent with the general legislative intention that appeals be commenced in a timely fashion. The circumstances here are not sufficiently “special” to warrant an exception.

69. The Appellant has raised the issue that no right of appeal arose for the Appellant until after January 1, 2000 when the Appellant had a farm premises to house the secondary and transitional quota. We do not accept this argument. Those registered growers who were entitled to secondary and transitional quota received acknowledgement of such on their Grower's Licence and their Quota Production Orders after Orders #303 and #320 were issued. Secondary and transitional quota has been utilised on an as needed basis since being granted. The time to appeal was in close proximity to the Orders and not four or five years after the fact.

70. In addition, the Panel places no reliance on the alleged comments of Mr. Stafford. Mr. Korthuis, the person to whom these representations were made, did not make reference to them in his earlier appeal. More importantly, there is no evidence from Mr. Froese that he in any way relied on this second hand representation in deciding when to bring his appeal. Finally, any comments Mr. Stafford made would have been made in relation to Mr. Korthuis building premises on Vancouver Island.

71. In the *Try Decision*, the BCMB held that the appeal was commenced out of time and was not prepared to find that there were special circumstances to justify an extension of time for filing an appeal. If anything, the delay by this Appellant has been significantly greater. We find that there are no special circumstances to justify an extension to the time for filing the appeal. Accordingly, the appeal is out of time.

72. Counsel fully argued the issue of "entitlement". In the event that the Panel is incorrect and there are special circumstances justifying an extension of the time for filing an appeal, we have provided our considered reasons on that issue.

Entitlement

73. The Appellant has approached this appeal from the perspective that orders of the Chicken Board are legislative in nature and should be construed in a narrow fashion, most favourable to the result he seeks. This argument appears to be predicated on the notion that, merely by virtue of his status as a registered grower, absolute "rights" or "entitlements" were created by Orders #303 and #320, and that he can now exercise those rights.

74. We find the Appellant's arguments about entitlement creative, but incorrect.

75. We start with the premise that the *Scheme* vests quota, and quota control, in the exclusive control of the Chicken Board to administer, in its discretion, in a fashion consistent with appropriate regulatory control of the industry. Section 4.01 provides:

> 4.1 The board shall have power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore or hereinafter enumerated, and without the generality thereof shall have the following powers:
>
> (c.1) to establish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board;

76. Quota may have commercial value in the marketplace, but it does not confer a property interest on the Appellant. Quota remains within the exclusive control of the Chicken Board, and in that context, the Chicken Board may issue quota subject to the terms and conditions it considers appropriate in the circumstances.

77. What were the circumstances of the Appellant? It is apparent to the Panel that the Appellant's status as a roaster quota holder at the time the Orders were passed was, with the exception of one other grower (Mr. Korthuis), unique. A review of the General Orders of the Chicken Board leads to the conclusion that in the regulated chicken industry, a registered grower who owns quota must have an interest in a production unit for that quota. In this case, the Appellant bought Vancouver Island quota on the condition that he acquire a farm on Vancouver Island to house his quotas. He did not do so. It was only through the indulgence of the Chicken Board that the Appellant continued to hold his quota as late as 1995. By 1995-1996,

neither the Chicken Board nor the Appellant viewed the Appellant as someone who would be an active grower of the Vancouver Island quota. The Appellant assumed the status of being a producer who had not met a condition of his approval, but who was being given the indulgence of maintaining the privilege of quota for the limited purpose of recouping his investment in the quota.

78. Within this context, we consider the Appellant's argument that he had an entitlement, over and above the tenuous quota privilege he was already holding, to "secondary" and "transitional" quota pursuant to the Board's orders.

79. The Appellant accepts that he is not entitled to secondary quota issued under Order #268, as he did not provide space to grow this quota within the time period specified in the Order and subsequently extended by the Chicken Board. However, the Appellant argues that he is entitled to the secondary and transitional quota issued under Orders #303 and #320 as neither of these Orders had any space requirements to preclude the Appellant's initial entitlement. Thus, as the Appellant owned a production unit prior to January 1, 2000 to house the secondary and transitional quota, he argues that he should receive the additional quota.

80. Order #303 was released on September 12, 1996. Order #320 was issued on September 25, 1997. At the time both Orders were passed, the second mediated agreement, allowing the Appellant to lease his quota on Vancouver Island while trying to sell his quota to an Island purchaser, had long since expired. The Appellant continued leasing his quota on an informal extension until he could sell it. Thus, the Appellant's conditional interest in his quota was reduced from that of an intended bona fide production unit, to quota which he held until he could fetch whatever monetary value he could from a Vancouver Island purchaser. It is against this conditional privilege that the Appellant asserts an absolute right to further privilege, i.e. entitlement to secondary and transitional quota.

81. We agree that Orders #303 and #320 should be interpreted in the fashion that "best ensures the attainment of its (their) objects": *Interpretation Act*, s. 8(1). Where there is ambiguity, the Orders should be construed in a fashion that avoids absurdity. As the Supreme Court of Canada has stated: "… an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 27.

82. A fair reading of each Order as a whole reveals that each contains language that clearly and necessarily implies that a registered grower has appropriate premises for the quota in question. The Respondent relies on this language to support its argument that secondary or transitional quota must be attached to a premises. The Respondent argues that as the Appellant does not own a premises, secondary and transitional quota cannot attach. We agree that it would be wrong to interpret the

Orders as granting additional quota simply on the basis that a person is a "registered grower". Fundamental to each order is the language concerning "utilization". Looking at Orders #303 and #320, both contain language that implies that a registered grower has a premises.

83. Order #303, section (iv) provides:

> 2. Secondary quota and roaster secondary quota issued under this order is attached to a grower's premises and may be transferred in the event of a farm sale.

84. Section (iv)6 of Order #320 provides:

> All quota with respect to the regulated product shall be grown on and marketed from the premises of the registered grower described in their registered grower's license unless the Board otherwise consents in writing.

Reference note (vii) states:

> Registered growers must provide space at 2.57 kilograms per square foot live weight on their own premises as recorded by the Board for all primary quota.

85. The fact that, in contrast to Order #268, there is no deadline date with a space requirement for this new issue of quota, does not lead to the conclusion that the Order reflects an absolute grant to any registered grower. The "utilization" provisions must also be given meaning and effect. As we construe them, the "utilization" provisions of the later Orders still require, in accordance with the purpose of secondary and transitional quota issuance, that the quota be granted to registered growers with bona fide production premises at the time of the quota issuance. This serves the legitimate interest of ensuring that secondary and transitional quota are only issued to farmers – growers who are actively contributing to chicken production in the province from their premises. At the time these orders were enacted, the Appellant had no intention to do that with his quota. He was merely trying to sell his quota.

86. The Respondent argues that the Appellant's failure to <u>own</u> appropriate premises by the time the Orders were issued precludes him from receiving secondary and transitional quota under these Orders. The Orders do not specifically refer to "ownership" and the Panel does not believe that <u>ownership</u> of premises is the critical factor when determining entitlement to secondary or transitional quota under these Orders. The Chicken Board General Orders permit a registered grower to lease premises and still qualify for growth: General Orders, s. 6(y). An example of this can be found in the earlier decision of the BCMB in the *Reitsema Decision* dated June 21, 1999. In that case, a registered grower did not own his production unit but rather leased it from his grandmother; he qualified for both secondary and transitional quota under Orders #303 and #320.

87. Given that the Panel felt that this issue could bear some relevance to this Appeal, we asked for submissions from Counsel on this point. The Respondent maintains that the leasing policy set out in s. 6(y) of the Board's General Orders is a very narrow exception to the general rule that growers must own a farm premises upon which their quota will be grown and marketed. If a registered grower meets those conditions, he has a farm premises and qualifies for secondary and transitional quota. The Respondent argues that the Appellant, on the other hand, did not have a premises and did not qualify under the Chicken Board's leasing policy.

88. The Appellant argues that the *Reitsema Decision* would be relevant if the Appellant leased his premises; however he owns his premises and is therefore in a stronger position. The Appellant maintains that as a registered grower who had a farm premises at January 1, 2000, he is entitled to secondary and transitional quota. What the Appellant omits is that he could not lawfully produce his product at those premises until sometime after April, 1999, three years after the Orders in question purported to issue the entitlement.

89. The Panel agrees with the Respondent. Section 6(z) of the General Orders creates an exception to the rule that a registered grower must own a production unit. The Chicken Board imposes conditions on this arrangement and requires the operations to be carried out independently. The Chicken Board has determined that as a matter of policy, registered growers who operate their farms through a leasehold interest with a related person have a premises and thereby qualify to receive secondary and transitional quota.

90. Read in light of their language, intention, the Chicken Board's administrative practice and the General Orders as a whole, the Panel finds that the key to entitlement under Orders #303 and #320 is not ownership *per se,* but rather having a recognised interest in a production unit in compliance with Chicken Board orders. This requirement serves the fundamentally important purpose of ensuring that further quota is issued, not as a windfall, but rather attaches to growers who have in the past actively produced, and continue to do so, quota from their premises.

91. Looking then to the Appellant's circumstances, at the time Orders #303 and #320 allocated further quota, he was not in compliance with the General Orders of the Chicken Board. He did not have an interest, either leasehold or freehold, in a production unit on Vancouver Island within one year of his purchase of quota nor in the six years that followed. At the time these "entitlements" were issued, his quota was in a state of limbo – preserved by the Chicken Board only so that he could attempt to salvage some value before the Chicken Board suspended or revoked it.

92. The Appellant did not appeal his entitlement to secondary quota in the period following the issue of Order #303 or Order #320. The Appellant's monthly Quota Production Orders never reflected any secondary quota. The Appellant might be forgiven his delay as his 1997 Grower's License reported 9,644 kg of secondary

quota. However, when the 1998 Grower's License did not note either secondary or transitional quota, the Appellant did not appeal; he continued to lease out his quota and look for prospective buyers. As set out earlier, the Appellant's conduct is consistent with the mutual understanding that he was not entitled to secondary and transitional quota and that the Chicken Board was granting him an indulgence to allow him the opportunity to sell his primary quota.

93. The Appellant now wants secondary and transitional quota. Even if he was not in compliance with Orders #303 and #320 in 1996 and 1997, as of January 1, 2000 he has a production unit and he has space. His Vancouver Island quota can now be grown on the Lower Mainland. This transfer is, according to the Respondent, a sizeable windfall given that Lower Mainland quota generally has a market value approximately 50% greater than Vancouver Island quota. If the Appellant were granted secondary and transitional quota, he would receive a further 16,000 birds, more than doubling his initial quota holdings.

94. As a matter of public policy, the Chicken Board must interpret and enforce its orders in a fair and equitable manner. In this case, the Chicken Board has interpreted Order #303 and Order #320 as creating an entitlement amongst registered growers to secondary and transitional quota arising at the date the Orders were issued. We agree that this was the intent and effect of the Order. A person who was not entitled to these specific and discrete quota grants when the Orders were issued cannot plausibly assert an entitlement arising three years later.

95. The Chicken Board must treat registered growers fairly. Here, the Chicken Board properly takes the position that growth should be allocated to all registered growers in compliance with Chicken Board orders. The Chicken Board has not been rigid in its application of orders and in fact has indulged the Appellant, allowing him a great deal of time to get his house in order.

96. It seems rather outrageous for the Appellant to now argue that he be placed in a better position than registered growers who complied with Chicken Board Orders. In essence, that is how the Appellant wants us to interpret the Chicken Board's orders. Despite the fact that he owned a production facility on the Lower Mainland, the Appellant made a business decision to purchase the less expensive Vancouver Island quota. He never undertook any capital investment on Vancouver Island citing hardship and economic downturn. He then leased the quota to other registered producers and was able to generate income for a period of six years. In April 1999, his quota became Lower Mainland quota with a resultant 50% increase in value. Now he seeks to double his initial quota holdings through acquisition of transitional and secondary quota. All this without any capital investment in respect of the Vancouver Island quota beyond his initial purchase.

97. In our opinion, to interpret Orders #303 and #320 as permitting such a result would be to accept an interpretation which is "absurd" as that term has been defined in *Rizzo Shoes,* and which is not dictated by the language of the Orders in question

98. Had the Appellant's initial purchase been Lower Mainland quota instead of Vancouver Island quota, he would not have the benefit of the first windfall (increased quota value) but he would have the benefit of the second windfall (transitional and secondary quota). Thus, he would have been in the same position as any other Lower Mainland grower. Had the Appellant acquired a farm on Vancouver Island within the agreed time, he could potentially receive the second windfall and yet still be entitled to transfer his quota to the Lower Mainland. His first windfall would have been diminished to the extent of his initial capital investment. In this situation, he would have been in the same position as any other Vancouver Island grower.

99. The question arises as to why the Appellant, who owned a production unit on the Lower Mainland, would choose to purchase Vancouver Island quota? If he was serious at that time about becoming a chicken farmer why wouldn't he have purchased Lower Mainland quota? The Appellant's conduct suggests speculation and may have been predicated in part on the belief that at some point in the not too distant future, Vancouver Island quota would be allowed to transfer to the Lower Mainland.

100. Whatever the motivation, the Panel finds no public policy justification to place the Appellant in a better position than those registered growers on the Lower Mainland and on Vancouver Island who complied with Chicken Board orders. To accept the Appellant's interpretation of Orders #303 and #320 is to do just that. Such a result is, in the eyes of the Panel, an absurdity not intended by the Chicken Board in enacting its Orders.

101. The Panel agrees with the Chicken Board's interpretation of its orders. The Appellant was not entitled to either secondary or transitional quota under Orders #303 and #320 at the time either Order was enacted and is not entitled to secondary and transitional quota as of January 1, 2000.

102. Finally, the Panel was referred to the earlier *Try Decision*. In that decision, the BCMB found that the appeal was commenced out of time and that Mr. Korthuis was not entitled to either secondary or transitional quota. Despite the foregoing findings and independent of formal "entitlement" under Orders #303 and #320, the BCMB exercised its discretion and granted Mr. Korthuis a somewhat extraordinary one-time issuance of 9,644 kg of primary quota at the same time that the transitional quota was converted to primary quota in the future, ordering that he be treated "like a grower who has previously transferred quota": para. 43. The justification for this decision appeared to be a desire to assist Mr. Korhuis, as a new chicken grower, to create a more economically viable production unit.

103. The Respondent argues that a similar one-time issuance of quota is not warranted in this case. Mr. Froese is not new to the poultry business. He is a long time producer of breeder fowl who already owns a production unit. Mr. Froese owns 15,000 birds of roaster quota and 15,000 birds of broiler quota. Unlike Mr. Korthuis, his operation exceeds the Chicken Board's minimum farm size. The Appellant's entire case rests on the argument that he is entitled to secondary and transitional quota under the Orders in question. He does not request some lesser issuance of quota as a matter of discretion in the event he is not entitled to secondary or transitional quota. The Appellant urged this Panel to consider the arguments in this case without being distracted by the *Try Decision* and argues that while consistency is a good thing, this appeal raises different issues, facts and arguments.

104. The Panel agrees that this appeal raised different issues, facts and arguments. Accordingly, we are not satisfied that the particular circumstances of Mr. Froese warrant a special exercise of discretion to grant a one-time issuance of quota outside of either Order #303 or Order #320.

ORDER

105. For all the reasons we have given, the BCMB makes the following order:

a) Waldemar Froese, as the owner of Southport is not entitled to secondary quota under Order #303;

b) Waldemar Froese, as the owner of Southport is not entitled to transitional quota under Order #320; and

c) Waldemar Froese, as the owner of Southport is not entitled to a special one-time issuance of primary quota at the same time that transitional quota is converted to primary quota in the future.

106. There will be no order as to costs.

Dated at Victoria, British Columbia, this 19th day of June 2000.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

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