

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM AN APRIL 16, 1999 DECISION
CONCERNING SECONDARY AND TRANSITIONAL QUOTA HOLDINGS

BETWEEN:

KLAAS KORTHUIS
dba TRY POULTRY FARMS

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Mr. Ross Husdon, Chair
Ms. Satwinder Bains, Member
Mr. Hamish Bruce, Member

For the Appellant

Mr. Klaas Korthuis

For the Respondent

Mr. John Hunter, QC, Counsel

Place of Hearing

Abbotsford, BC

Date of Hearing

August 31, 1999

INTRODUCTION

1. The matter before the British Columbia Marketing Board ("BCMB") is an appeal by Klaas Korthuis, doing business as Try Poultry Farms (the "Appellant"), from a letter of the British Columbia Chicken Marketing Board (the "Chicken Board"), dated April 16, 1999, setting out the Appellant's current quota holdings as 20,935 kgs of primary roaster quota and 0 kgs of secondary and transitional quota.

ISSUE

2. Is the Appellant entitled to secondary and transitional quota as issued by the Chicken Board on September 12, 1996 and September 25, 1997 respectively?

BACKGROUND

3. In the fall of 1993, the Appellant purchased chicken quota on Vancouver Island. At that time, the General Orders (1987) of the Chicken Board provided that quota could not be transferred to the Lower Mainland under any circumstances:

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.

4. This transfer of quota was subject to the Chicken Board's standard conditions, including the requirement that the Appellant must establish, within 12 months from the date of transfer (purchase), a chicken production farm on Vancouver Island.
5. In the interim, the Appellant was allowed to "grow out" his quota on a Lower Mainland registered grower's farm with the condition that the production be shipped to the Lilydale Co-operative Ltd. ("Lilydale") processing plant on Vancouver Island.
6. 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 kgs live weight of secondary quota. A condition of Order #268 was that growers had until December 31, 1994 to provide space on their own premises to grow this secondary quota.
7. On October 6, 1994, the Chicken Board denied the Appellant's request to continue to "grow out" his quota on the Lower Mainland and advised that his quota was suspended from production until he acquired or built, by October 31, 1994, the required production facilities on Vancouver Island. The Appellant appealed this decision to the BCMB.
8. In December 1994, the parties mediated an extension of the deadline for construction of the production facilities to April 1995. As a result, the Appellant was also allowed

to lease out his quota on Vancouver Island until April 1995.

9. In April 1995, the Appellant requested a further one-year extension of the leasing out deadline. The Chicken Board denied this request and again suspended his quota from production. The Appellant appealed this decision to the BCMB as well.
10. This second appeal was also settled by mediation and allowed the Appellant to continue leasing out his quota for a further twelve months to a Vancouver Island Lilydale grower. The Appellant was required to attempt to sell his quota to a Vancouver Island grower. The Chicken Board advised that it would not extend the terms of the agreement past March 31, 1996.
11. On September 12, 1996, the Chicken Board issued Order #303 that provided registered growers, who had not previously transferred a portion of their quota, with a further 9,644 kgs live weight of secondary quota. Under Order #303, a "registered grower" is defined as "any grower who holds a broiler quota or a roaster quota with respect to production of the regulated product on September 12, 1996." Order #303 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." Order #303 has no set deadline for growers to provide space to grow this secondary quota.
12. On September 25, 1997, the Chicken Board issued Order #320 that provided registered growers, who had not previously transferred a portion of their quota, with a one time issuance of transitional quota based on a sliding scale. Under this sliding scale, a production unit the size of the Appellant's was entitled to 21,219 kgs of transitional quota. A condition of Order #320 was 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."
13. On September 10 and 25, 1997, the Chicken Board issued its Revised Lease Program ("the Program"). The Program restricts the percentage of quota leased per cycle and requires that production must be leased and grown in the same region (i.e. Vancouver Island) but may be marketed outside of that region. The Program also allows a grower to lease out the total quota only one cycle per calendar year. Under the Program, Vancouver Island growers were given one year to comply.
14. On October 14, 1997, the Appellant joined in an appeal of the Revised Lease Program. This appeal is still pending and the Chicken Board has extended the Program's compliance deadline.
15. On March 31, 1999, the Chicken Board issued Amendment #7 to its General Orders (1987). Under Amending Order #7, the quota transfer prohibition was repealed and a grower who has been a registered Vancouver Island grower for at least two years was

permitted to transfer quota to the Lower Mainland provided he or she establishes a chicken production farm unit there. Amending Order #7 provides 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 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 subsection, 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.

16. In April 1999, the Appellant requested clarification from the Chicken Board regarding his quota holdings and requested that he be permitted to relocate these quota holdings to the Lower Mainland.

17. Pursuant to Amending Order #7, the Chicken Board granted the Appellant's request to relocate his primary quota to the Lower Mainland. However, the Chicken Board takes the position that the Appellant does not possess secondary or transitional quota. It is this decision that is the subject of this appeal.

ARGUMENT OF THE APPELLANT

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 intention 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.

ARGUMENT OF THE RESPONDENT

23. The Chicken Board argues that the Appellant is excluded from receiving the secondary and transitional quota because he has never had a chicken production unit and does not have any growing facilities. It is the Chicken Board's position that secondary and transitional quota is issued to growers with premises, "with farms to grow chicken, not to use as a commodity to lease out indefinitely".

24. The Chicken Board argues that the initial transfer of quota was conditional on the Appellant building a production unit on Vancouver Island within 12 months. The Appellant did not comply with this condition. This situation was the subject of two appeals and two mediated settlements, both of which required the Appellant to establish that chicken production unit. In both instances, the Appellant did not follow the agreed mediation settlement.

25. The Chicken Board does not accept the Appellant's argument that he is entitled to the secondary and transitional quota simply because he was a registered grower at the time of issuance. The Chicken Board asserts that Orders #303 and #320, which establish secondary and transitional quota, must be read in their entirety. It is the intent of these Orders and the Chicken Board's General Orders that chicken growers have a farm. The Chicken Board argues that the fact the Appellant has remained a registered grower is evidence of the indulgence of the Chicken Board. The Chicken Board would have been well within their powers to require the Appellant to sell his primary quota or to suspend the quota.
26. Further, the Chicken Board disagrees with the argument advanced by the Appellant that he requires the secondary and transitional quota to establish an economic operation. If the Appellant requires additional quota, he can purchase it.
27. The Chicken Board is suspicious of the Appellant's motives in appealing his entitlement to secondary and transitional quotas now. The timing is suggestive of the Appellant simply trying to "bulk up" on quota in order to have more to sell. Quota is not to be used "like a stock and a bond", it is supposed to be used for growing chicken.

DECISION

28. Since 1993, when the Appellant originally purchased quota, the Chicken Board has issued three additional quota allocations under Orders #268, #303, and #320. Only Order #268, issued in 1994, required growers to provide space to grow the secondary quota within a specified time period. Order #303 initially did not contain a set deadline for growers to provide space for that secondary quota. However, in a subsequent amendment to the Order, the Chicken Board required growers to have space to grow this quota by January 1, 2000. There is at this time no requirement for a grower to have space to grow the transitional quota issued under Order #320. The Appellant concedes that he is not entitled to the quota issued under Order #268, as he did not provide space to grow this quota within the time period specified. However, he argues that he is entitled to the secondary and transitional quota issued under Orders #303 and #320 respectively because he is currently in compliance with the time requirement for providing space to grow the quota. In addition, the Appellant argues that he is a "registered grower" as defined by Orders #303 and #320.
29. The Chicken Board concedes that at the time of these quota allocations, the Appellant was a "registered grower". However, they argue that it is implicit in the operation of the regulated chicken industry that the registered grower who is receiving quota operates a farm. The Appellant has not and does not operate a farm.
30. The question arises as to what was the Appellant's status in the chicken industry at the time the secondary and transitional quotas were issued? Order #303 was released on September 12, 1996. At that time, the second mediated agreement that allowed the

Appellant to lease quota on Vancouver Island and sell his quota to an Island purchaser had expired. A term of the mediated agreement was that the Chicken Board did not intend to extend the agreement beyond March 31, 1996. Although no further mediated agreement was entered into, according to the evidence of the Appellant Mr. Vic Funk, then a member of the Chicken Board, orally agreed to allow the Appellant to continue leasing his quota until he could sell it. Thus, it appears that after March 1996, the Chicken Board chose not to suspend the Appellant's quota for failing to build a production unit and allowed him further opportunity to salvage some value from his quota by selling it. The Appellant did not appeal the Chicken Board's decision to not issue him secondary quota under Order #303.

31. Order #320 was issued on September 25, 1997. The Appellant was not issued transitional quota under this Order. He did not appeal this decision either and continued to lease out his quota and look for prospective buyers. The Appellant's conduct in not appealing the decisions to not grant him either secondary or transitional quota supports the view that the Appellant perceived that he was receiving an indulgence from the Chicken Board in being given the opportunity to sell his primary quota. Another interpretation could be that as the Appellant was trying to sell his primary quota holdings, he would not derive any benefit from either the secondary or transitional quota as Chicken Board orders preclude their transfer independent of a bona fide farm premises sale.
32. In any event, the Appellant made no attempt to appeal his quota entitlements until after the Chicken Board enacted Amending Order #7 on March 31, 1999. This Order allowed persons who had been registered Vancouver Island growers for at least two years to transfer all their quota to the Lower Mainland provided they establish a chicken production unit there. In response to this fundamental change in the Chicken Board's quota relocation policy, the Appellant applied to move his quota to the Lower Mainland. He also sought clarification of his quota holdings. As noted earlier, the Chicken Board granted the Appellant's application to move quota off Vancouver Island and confirmed that he held no secondary or transitional quota.
33. The Appellant now seems to be arguing that even if he was not strictly in compliance with Chicken Board orders when the right to secondary and transitional quotas arose, it is within his ability to get into compliance and have space for the secondary quota by January 1, 2000. As such, he should be granted both secondary and transitional quota.
34. To accept the Appellant's argument would be to reward his conduct in not complying with Chicken Board orders. In addition, it would penalise the Chicken Board for working with the Appellant and granting him the indulgence of selling his quota rather than losing it.
35. It is significant to note that the Appellant did not offer any reason as to why he did not appeal his entitlement to secondary and transitional quota instead of waiting 30 and 20 months respectively. Usually where an Appellant has delayed in bringing an

appeal, it is necessary, under s. 8(1) of the *Natural Products Marketing (BC) Act* ("the *Act*"), to show special circumstances as to why an extension for bringing an appeal should be granted. On the facts, the only special circumstance here is that the game has changed for the Appellant. He can now transfer quota off Vancouver Island, something that up until March 31, 1999 had been prohibited for the past 40 years. Now secondary and transitional quota has some value to him and he seeks entitlement.

36. In the Panel's opinion, this would not constitute special circumstances so as to warrant an extension of the time for filing an appeal had we been faced with that application. Nor in the Panel's view does it retroactively create an entitlement for the Appellant to either secondary or transitional quota.
37. Further, the Panel has some doubt as to whether this is in fact a proper appeal. Does the Appellant's request for clarification of his quota holdings on April 15, 1999 create an independent right of appeal? In the Panel's opinion, the Chicken Board's letter of April 16, 1999 is a statement of the quota holdings in the Appellant's file with the Chicken Board at that time. That statement is a reflection of prior Chicken Board decisions, which decisions had been embodied in the Appellant's grower license issued annually. It is doubtful whether the Chicken Board's letter of April 16, 1999 is an "order, decision or determination" sufficient to create a right of appeal as contemplated by s. 8 of the *Act*.
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.
39. Although the Appellant is not entitled to either secondary or transitional quota under a proper understanding of Orders #303 and #320, the Panel must consider the broader public policy implications of this decision. Although the Appellant has been less than diligent in building a production unit, he was confronted with the economic downturn in the industry coupled by the uncertainty caused by the closure of the Vancouver Island Lilydale processing plant. The Chicken Board itself recognised these difficulties; as Amending Order #7 that now allows growers to move their quota off Vancouver Island demonstrates.
40. The Panel agrees with the Chicken Board that the Appellant could purchase additional quota to create a more economic production unit. However, one of the Chicken Board's rationales for issuing transitional quota was a desire to minimise farm splitting and create farms of an economic size without forcing growers to incur the large debt associated with purchasing quota. Accepting this rationale, should the Appellant be entitled to receive some form of quota in accordance with that principle?
41. The Appellant made a significant investment in the chicken industry several years ago by purchasing quota. He has indicated a present desire to build a production unit on

the Lower Mainland. He introduced two potential deals, one for purchase of land and one for land and quota, to demonstrate his intent to build or purchase a farm in the Lower Mainland. The Chicken Board has supported the Appellant in his endeavour by allowing his transfer of primary quota to the Lower Mainland. By doing so, the Chicken Board has given the Appellant the opportunity to get into compliance with Chicken Board orders.

42. Given the foregoing, 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 followed 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."
44. The Panel is aware of the Chicken Board's desire to ensure that quota does not become a commodity used to make money by being leased out. This concern can be addressed by authorising this future one-time issue of primary quota to the Appellant, who has stated that he intends to farm and is actively seeking property on which to build a chicken production unit, on a conditional basis.
45. This future one-time allocation could be on the condition that the Appellant has a chicken production unit in place by January 1, 2000. If this is not in place, or the Appellant cannot provide evidence, satisfactory to the Chicken Board, of a commitment to purchase either land or a production unit within a reasonable time, as determined by the Chicken Board, then the Appellant will no longer be eligible for this allocation of primary quota. The Appellant would then be subject to any Chicken Board regulations concerning the production of his original primary quota.
46. The Chicken Board has a concern that the Appellant is simply trying to "bulk up" his quota holdings so that he has more to sell. However, this concern is addressed by authorising only a future one-time allocation of primary quota to the Appellant.

ORDER

47. Accordingly, the BCMB makes the following order:
 - a. Klaas Korthuis, as the owner of Try Poultry Farms, is not entitled to receive any secondary quota under Order #303;

- b. Klaas Korthuis, as the owner of Try Poultry Farms, is not entitled to receive any transitional quota under Order #320; and
 - c. Klaas Korthuis, as the owner of Try Poultry, is eligible, under Note (v) on Page 3 of Order #320, to be granted a one-time issuance of 9644 kgs primary quota “at the same time as the transitional quota is converted to primary quota in the future.”
48. This eligibility is conditional upon Klaas Korthuis establishing a production unit in accordance with Amending Order #7, the terms outlined in the Chicken Board’s letter of April 16, 1999 and the conditions outlined in paragraph 45 of this decision.
49. In the event that the Appellant does not meet the above conditions, he will not be eligible for the one-time issuance of primary quota and will be subject to any further orders of the Chicken Board with respect to the use of his primary quota.
50. As neither party requested costs, no such order shall be made.

Dated at Victoria, British Columbia, this 18th day of October, 1999.

BRITISH COLUMBIA MARKETING BOARD

Per

Ross Husdon, Chair