

IN THE MATTER OF
THE NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL CONCERNING TRANSITIONAL QUOTA

BETWEEN:

JAMES AND MARY WHYTE
DOING BUSINESS AS WHYTE MOUNTAIN FARMS

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

REASONS FOR DECISION

APPEARANCES:

For the
British Columbia Marketing Board

Mr. Ross Husdon, Chair
Ms. Christine Elsaesser, Vice Chair
Ms. Karen Webster, Member

For the Appellants

Mr. and Mrs. James Whyte

For the Respondent

Mr. Doug Scullion, Counsel

Date and Place of Hearing

March 18, 1998
Kelowna, British Columbia

INTRODUCTION

1. The matter before the British Columbia Marketing Board ("BCMB") is an appeal by Mary and James Whyte, doing business as Whyte Mountain Farms (the "Appellants"), from a decision of the British Columbia Chicken Marketing Board (the "Chicken Board") on October 23, 1997 to deny the Whyte's request for transitional quota.
2. The Appellants maintain that although the 10,000 bird quota they contracted to purchase from Bev and Peter Milner of Way-Jac Holdings Ltd. was not transferred until December 1, 1997, it was their intention in July of 1997 to remain active chicken producers in the Interior of British Columbia.
3. Accordingly, they take the position that they should be entitled to their pro rata share of the one time issuance of transitional quota by the Chicken Board pursuant to Order 320 dated September 25, 1997.
4. Although the transitional quota does not come into effect until the growth can be accommodated in the industry, it does provide an opportunity for growth for producers with smaller farms. The Appellants believe that they are entitled to the transitional quota associated with the quota they purchased from Way-Jac Holdings.

ISSUE

5. Are the Appellants entitled to receive the transitional quota associated with the quota purchased from Way-Jac Holdings?

FACTS

6. In May of 1993, the Appellants purchased their chicken farm in Armstrong, BC. On May 14, 1993, according to Grower License 247, they had 38,096 kgs of primary and 4,822 kgs of secondary broiler quota. "Times were good" according to Mr. Whyte. By January 1, 1996, according to grower license 247, the Appellants held 42,918 kgs of primary and 9,644 kgs of secondary quota.
7. The chicken industry, however, did not continue to enjoy good times and the Appellants experienced financial hardship. In June of 1996, the Appellants were required to sell 19,290 kgs (10,000 birds) of quota in order to get their financial house in order. As of June 14, 1996, according to Grower Licence 247, the Appellants owned 23,628 kgs of primary quota and 9,644 kgs of secondary quota.
8. On September 12, 1996, the Chicken Board issued 9,644 kgs of secondary quota to all qualified growers. As a result of the June 1996 sale of quota, the Appellants were not entitled to this secondary quota. The Appellants believed this was fair and did not dispute their entitlement to that growth.
9. By 1997, the Appellants financial picture had significantly improved. They decided to remain in the chicken industry and began looking for quota to replace the 10,000 birds they had sold earlier.
10. On March 20, 1997, Bev and Peter Milner listed their farm and quota for sale in the Chicken Board's monthly listing circulated to producers. The Milners listed their entire farm for sale as the steady work was becoming too much for them at their age. In addition, the farm was not sufficiently viable to allow them to hire part-time help.
11. In June or July of 1997, the Milners decided to sell off a portion of their quota in order to leave one barn empty. This arrangement would periodically give them time off.

12. On July 17, 1997, the Appellants offered to purchase 10,000 birds from the Milners. A price of \$200,000 was agreed upon. Although the Appellants had the financing to complete the transfer immediately, the Milners wanted to delay the transfer until December of 1997 in order to allow them to meet production obligations and to facilitate shutting down for one cycle without under-production concerns.
13. Mr. Whyte agreed to the transfer of quota being delayed until December as there was no other Interior quota for sale and there was another buyer for the Milner quota. On July 11, 1997, Mr. Whyte paid a down payment of \$20,000 with the balance due at the time of transfer.
14. On September 1, 1997, Mr. Milner paid a quota transfer fee, as prescribed by the Chicken Board's General Orders (1987), revised June 4, 1994, in the amount of \$250. After a 90-day advertising period, Mr. Milner was free to transfer his quota to the Appellants.
15. The Chicken Board held a three-day meeting at Harrison Hot Springs on September 8-10, 1997. The purpose of this meeting was to review the industry situation and plan for the future. One topic discussed was the current system for issuing growth to the industry. The Chicken Board decided to create an alternative method of quota allocation to promote economic efficiencies. The Chicken Board passed the following motion:

That subject to consultation at the Sept. 25/97 PPAC meeting that registered growers *who have not previously transferred a portion of their quota* as of September 9, 1997 be issued a 1 time adjustment of transitional quota based on their existing quota prior to implementation of growth being issued on a pro rata basis in the future. (emphasis added)
16. The motion lead to the enactment of Order 320 on September 25, 1997.
17. Mr. Arne Mykle, Chair of the Chicken Board, testified as to the rationale behind Order 320. The Chicken Board policies in place prior to Order 320 led to an increase in the number of producers in BC (from 200 in 1986 to 305 in 1997). When secondary quota was issued, all farms regardless of size received 5,000 birds of quota. Advance notice of the issuance enabled producers to maximise the benefits by splitting their farms in order to receive two or more issues of 5,000 birds of secondary quota. This resulted in sharp increases in quota costs and decreased farm size. As a result, processors had expressed concerns to the Chicken Board of the need to increase farm size to reduce inefficiencies.
18. At the September meeting, the Chicken Board concluded that increased farm size was a worthwhile goal. The Chicken Board decided to eliminate secondary quota which had been used to meet market surges and replace it with transitional quota distributed on a pro rata basis. To meet the goal of increased farm size, transitional quota was issued on a one-time basis. The smallest farm (15,000 birds) would be granted the largest share of transitional quota (11,000 birds) while the largest farm (115,000 birds) would be granted the smallest share of transitional quota (5,000 birds). Farms in between the two extremes would receive quota on a sliding scale. As future growth required, the Chicken Board would issue quota on a pro rata basis to all growers.
19. The Chicken Board selected September 9, 1997 as the effective date of Order 320 in order to avoid the problem of farm splitting.
20. Prior to Order 320, the Chicken Board's General Orders prevented, "save as permitted by order of the Board", a producer who had transferred a portion of quota, from acquiring quota by transfer or by issue from the Chicken Board until two years had elapsed. Once the two years had elapsed, a producer who had acquired quota equal to that held before was entitled to receive additional quota issued by the Chicken Board. These Orders were replaced by Order 320.

21. Prior to enacting Order 320, the Chicken Board considered the issue of the 33 growers who had previously transferred quota who were excluded from growth under the old Orders. The Chicken Board passed the following motion:

Subject to consultation at the Sept. 25/97 PPAC Meeting, that the 33 growers who have previously transferred a portion of their quota prior to the Sept. 9/97 start of the 100% pro rata, will be eligible for all future growth and additionally will receive 5,000 birds (9,644 kgs.) at the same time.

22. A draft of Order 320 was circulated to the chicken industry including the British Columbia Chicken Growers Association and the Pricing and Production Advisory Committee ("PPAC"). Revisions were made to the Order and on September 25, 1997 the amended Order 320 was issued. The Appellants received a copy of Order 320 sometime after that date.
23. On October 16, 1997, the Appellants wrote to the Chicken Board and inquired as to whether they would be entitled to transitional quota on the 10,000 birds they had contracted for on July 11, 1997. They explained that their earlier transfer of quota in 1996 was not for financial gain but rather to ensure their survival in the chicken industry.
24. Mr. Whyte's evidence was that at the time he entered into the contract with the Milners, he was not aware of the possibility of transitional quota. He does not recall seeing anything in the Chicken Board's 'Board Reports' discussing the impending change. From the evidence it does not appear that such a change was generally contemplated prior to the September meetings.

ARGUMENT OF APPELLANT

25. The Appellants argue that on July 11, 1997, they had a valid contract to purchase quota. They had replaced the quota they had earlier sold and therefore, should qualify for transitional quota under Order 320.
26. The justification for Order 320 is the Chicken Board's belief that growers must move to larger, more economical farms. September 9, 1997, the effective date of Order 320, was arbitrarily set to avoid producers attempting to maximise their entitlement to transitional quota by farm splitting. The Appellants argue that they fit within the intent of Order 320 and therefore should receive the benefit of transitional quota.
27. The Appellants also argue that no reason exists to penalise them further. They have not speculated in quota. Financial circumstances drove them to sell quota but they struggled hard to replace the quota and put themselves back in a position to participate in the growth of the industry.

ARGUMENT OF THE RESPONDENT

28. The Chicken Board argues that the Appellants are excluded from receiving transitional quota as they fall within the exclusion of a producer who has previously transferred quota.
29. The relevant sections of Order 320 are as follows:

Section (ii) Transitional Quota:

1. A registered grower on September 9, 1997 who has not previously transferred a portion of their allotted quota, will be granted a one time issue of transitional quota, based on a sliding scale of the total amount of quota (Primary and Secondary quota) held by each eligible registered grower.
4. Registered growers who have previously transferred a portion of their allotted quota, under this order will be granted 9,644 kgs. Primary quota, at the same time as the transitional quota is converted to primary quota.

30. The Chicken Board further argues that the purchase of the 10,000 birds of quota from the Milners does not entitle the Appellants to receive transitional quota, as the transfer did not complete until December of 1997. As of September 9, 1997, the Appellants had at best an interim agreement to be completed at some later date. Although the amount of quota and price were agreed to, the Chicken Board argues that this was not a binding contract. The Milners gave evidence that had Mr. Whyte found a better price he could have backed out of the deal.
31. The Chicken Board concedes that despite the wording, Order 320 does not prevent a producer from receiving transitional quota if he has subsequently replaced the sold quota.
32. However in this case, the Appellants had not replaced their earlier transferred quota at the time Order 320 took effect. Indeed, by virtue of s. 6 (j) of the General Orders (1987) in effect prior to Order 320, the Appellants would not have been able to replace their quota until a period of two full years had elapsed (July of 1998) unless otherwise ordered by the Board.
33. It was the evidence of Mr. Mykle that he was not aware of the Chicken Board ever allowing such an exception. He further gave evidence that the purpose of the two-year waiting period was to prevent a grower from speculating in quota. Mr. Mykle did agree however, that in this case there was no suggestion that the Appellants were speculating in quota or that their earlier transfer of quota was driven by anything other than financial concerns.
34. The Chicken Board argues that the Appellants are attempting to take the best from the old General Orders and Order 320 in order to advance their position. Under the old Orders, the July purchase of quota would have been turned down and the Appellant would not have qualified to receive growth. Under Order 320, the two-year waiting period was removed and therefore the December 1, 1997 transfer was permissible. However, at the time Order 320 was passed the Appellants were producers who had previously transferred quota and did not qualify for transitional quota.
35. As to the issue of retroactivity of the order, the Chicken Board submits that such orders are not on their face improper. The Chicken Board referred the Panel to *Van der Wereld v. British Columbia Chicken Marketing Board* as an example of a case where the BCMB upheld such an order.
36. The Chicken Board also referred to *Wilson v. British Columbia Chicken Marketing Board* as persuasive authority in these circumstances. In this case, the BCMB found that the Appellant became a registered grower when the deed transferring ownership of the farm was registered in the Land Title Office. The Appellant did not become a registered grower upon entering into an interim agreement.

DECISION

37. In September of 1997, the Chicken Board went through a process of review and planning in an attempt to prepare the chicken industry for the future. The BCMB recognises this process is absolutely necessary in these times of changing markets.
38. The Chicken Board recognised that small farms were increasingly less viable and attempted to resolve this problem. What followed was Order 320. When reviewed in its entirety this Order appears to be a thoughtful attempt to resolve a number of issues facing the chicken industry.
39. The Chicken Board designed an order in support of the strategic goals of both the Board and industry stakeholders. They are to be commended.
40. The Appellants entered into an agreement with Way-Jac Holdings to purchase quota on July 11, 1997. This was a binding agreement on both the Milners as Vendor and the Whytes as Purchaser. Had Mr. Milner sought to get out of the agreement, the Appellants would have been entitled to sue for specific performance.

41. The Respondent argues this was "merely an interim agreement" similar to a purchase of land. However, an interim agreement is no less a binding contract. "Interim" does not imply conditional; this may be why in transfers of land, agreements are now referred to as Contracts of Purchase and Sale. The agreement is a binding contract with all the civil remedies afforded.
42. On September 9, 1997, the Appellants had a binding contract to acquire new quota. They were operating a chicken farm and were registered growers. The effective date of the acquisition of the new quota was December 1997. This completion date was at the convenience of the Milners as the Appellants were in a position to acquire the quota in July of 1997.
43. The Appellants as registered growers, who have previously transferred a portion of their allotted quota, fall within Section (ii) 4 of Order 320. Accordingly, under the strict terms of the Order they are only entitled to 9,644 kgs of primary quota and no transitional quota. However, on a policy basis, had the Appellants acquired replacement quota, we understand that despite the wording of Section (ii) 4, they would have qualified for transitional quota.
44. The Appellants are in a unique situation. The Chicken Board was not aware of any of the other 33 growers who had previously transferred quota being caught between the old orders and Order 320 in the manner in which the Appellants find themselves.
45. The Appellants fit within the policy or the intent of Order 320 but not within the letter of its wording. This Panel is of the view that it would have been more appropriate to issue the transitional quota to the Whytes as opposed to the Milners, who as of September 1, 1997 had made the decision to leave the industry. As young producers in the Interior, the Whytes should be encouraged to grow and become more viable, as they represent the future of the industry.
46. This Panel finds that the Appellants are exempted from receiving transitional quota on the strict wording of Order 320. However, the Chicken Board has the discretion to allow the Appellants to receive transitional quota and in these circumstances that would be the appropriate course. The Chicken Board made a decision to issue transitional quota to the Milners, this Panel is not prepared to interfere in that decision.
47. The Chicken Board expressed a perfectly legitimate concern about growers speculating in quota. This Panel does not find any evidence that the Appellants were speculating in quota in their 1996 and 1997 transactions. However, the concern can be addressed by issuing transitional quota to the Appellants on a conditional basis. Should they sell their farm within 5 years of the date of issuance of the transitional quota, the quota would revert to the Chicken Board and not transfer with the farm as a unit.
48. This condition is justifiable because the Appellants are in a unique circumstance. They are being given the benefit of the doubt as young producers in the industry and it is appropriate that this benefit be recognised as being given to them alone and not some future purchaser.

ORDER

49. Accordingly, the BCMB makes the following order:
 - a. James and Mary Whyte, as owners of Whyte Mountain Farms, are entitled to receive the equivalent amount of transitional quota associated with the 10,000 birds of quota purchased from Way-Jac Holdings Ltd.;
 - b. the transitional quota received by the Whytes is not transferrable, even in the event of a whole farm sale, for a period of five years from the date of issuance. In the event of such a sale, the transitional quota reverts to the Chicken Board; and
 - c. this conditional issuance of transitional quota to the Whytes does not in any way affect the transitional quota already issued to Way-Jac Holdings Ltd.

50. As neither party requested costs, no such order will be made.

Dated at Abbotsford, British Columbia, this 17th day of April, 1998.

(Original signed by):

R. Husdon, Chair
C. Elsaesser, Vice Chair
K. Webster, Member