

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL FROM A DECISION TO APPLY A 5% TRANSFER ASSESSMENT ON  
QUOTA OFFERED ON THE QUOTA EXCHANGE

**BETWEEN:**

ABEL O'BRENNAN

**APPELLANT**

**AND:**

BRITISH COLUMBIA EGG MARKETING BOARD

**RESPONDENT**

**DECISION**

**APPEARANCES BY:**

For the British Columbia  
Farm Industry Review Board

Garth Green, Member, Panel Chair  
Christine J. Elsaesser, Member

For the Appellant

Abel O'Brennan

For the Respondent

Peter Whitlock, Operations Manager

Location of Hearing

By Written Submission

## **INTRODUCTION**

1. In March 2006, Abel O'Brennan (the "Appellant") bought 750 birds of laying quota. His plan was to operate a specialty operation producing Omega 3 free-run brown eggs in the Comox Valley on Vancouver Island. Unfortunately very soon after getting into business, the Appellant concluded that his operation was not financially viable. He applied for and received an exemption from the British Columbia Egg Marketing Board (the "Egg Board") from the requirement to hold quota for two years prior to transfer and placed the quota on the August 2006 quota exchange.
2. The quota did not transfer on the August exchange. After the August exchange and before the September exchange, the Egg Board received a direction from the British Columbia Farm Industry Review Board ("BCFIRB") to implement a 5% transfer assessment on quota transferred on the exchange.
3. In response to that direction, the Egg Board cancelled the September quota exchange and directed that all quota transferred on subsequent exchanges be subject to a 5% assessment.
4. The Appellant took issue with being assessed the 5% levy on his transfer and by letter dated October 10, 2006 appealed the Egg Board's decision.
5. The appeal was heard by written submission.

## **ISSUE**

6. The Egg Board erred in applying the 5% transfer assessment to the Appellant's 750 bird quota transfer given that it was placed on the August 2006 quota exchange before BCFIRB issued its assessment directions.

## **DECISION**

7. The facts are not in dispute in this appeal. In March 2006, the Appellant purchased 750 birds of laying quota for \$220/bird intending to operate a specialty operation producing Omega 3 free-run brown eggs in the Comox Valley and selling into a local farmers market. Unfortunately, the business was not financially viable and the Appellant determined that he would have to sell his quota. The Appellant received special permission from the Egg Board to allow an early quota transfer.
8. In preparing to transfer his quota, the Appellant had a phone conversation with Mike Gillanders, Egg Board Controller who advised that there had been some talk of a 5% assessment "possibly being implemented" on all quota transfers. Mr. Gillanders casually mentioned this but did not give a date or provide any written warning of when this change may occur. The Appellant argues that he was lead to believe that any change was not pressing; there was just talk of a possible

change. On July 10, 2006 the Appellant placed his quota on the exchange. He understood based on representations from Mr. Gillanders that the exchange would run for 60 days (August and September).

9. The notification of Quota Offer completed by the Appellant sets out the process. The Appellant's quota would first be offered on the August exchange to Temporary Restricted Licence Quota ("TRLQ") holders in the Vancouver Island Region; if there was no match it would be offered to TRLQ or regular quota holders, resident in the Vancouver Island region. If there was no match then an exchange would run in September. Again the quota would first be offered to TRLQ holders in the Vancouver Island Region; if no there was no match it would be offered to TRLQ and regular quota holders, resident in the Vancouver Island Region. If no match was found, only then would the quota be offered to TRLQ and regular holders resident in all regions. Essentially, the exchange rules provide that quota must be offered within the region on two exchanges before it could be transferred to another region.
10. Although an eligible Vancouver Island producer made an offer (\$222/bird) in the August exchange, the quota did not transfer as the offer was below the Appellant's asking price. Consequently, the quota had to be set down on the September exchange. Before that exchange took place, the Appellant was advised by Mr. Peter Whitlock, Egg Board Operations Manager, that on August 16, 2006 the Egg Board implemented a 5% transfer assessment on all quota transfers including those made on the quota exchange.
11. On September 1, 2006, the Appellant wrote to the Egg Board asking for an exemption from the 5% assessment given that the quota exchange rules had changed midway through his transfer. The Egg Board responded that it did not have the option of grandfathering the Appellant once the new rules were in place. It also advised that the September exchange was cancelled and that the Appellant would need to re-apply under the new rules to participate in further quota exchanges.
12. In this appeal, the Appellant is asking the Panel to allow his quota to transfer on the exchange without the 5% transfer assessment. He argues that he was not properly advised of the imminent rule changes. Further, he argues that because he began his transfer under the old rules he should be grandfathered under the rules in place at the time. He seeks an order allowing him to either participate in the next quota exchange without an assessment or alternatively to accept the original offer of \$222/bird if it is still available without the 5% transfer assessment.
13. The Egg Board for its part argues that in implementing the 5% transfer assessment it was following the directions of BCFIRB and it did not have any independent discretion to exempt producers from that assessment. The Egg Board argues that the July 18, 2006 letter from BCFIRB gives explicit directions regarding the implementation of a quota transfer assessment and exemptions. It states:

FIRB accepts the Egg Board's proposal to assess a 5% transfer assessment on all quota requested for transfer that was issued prior to September 1, 2005, and for all quota issued after September 1, 2005, that has previously been subject to the 10/10/10 assessment on the occasion of its first transfer after allocation.

14. With respect to exemptions, the letter states "the Egg Board may not provide any other exemptions from transfer assessment and directed the Egg Board to make the necessary amendments to its Standing Order to be in effect no later than August 31, 2006." The Egg Board argues that the need to conform to the new rules by September 1, 2006 precluded the running of the September exchange under the old rules. Further, it argues that it could not simply "grandfather" the Appellant's quota transfer given the specific instructions from BCFIRB precluding exemptions from transfer assessment, other than family related cases, after August 31, 2006. The Egg Board was aware of the Appellant's transfer and argues that it made a deliberate decision to delay the implementation of the 5% assessment and the cancellation of the September exchange until the afternoon of August 16, 2006 to ensure that the exchange held the morning of August 16, 2006 was not affected by that decision.
15. With respect to the issue of notice, the Egg Board maintains that Mr. Gillanders specifically advised the Appellant that the Egg Board was expecting new orders from BCFIRB and that these rules *would* impact the quota exchange. Given this direct instruction from Mr. Gillanders, the Egg Board submits that the Appellant placed his quota on the exchange knowing that the pending rule changes may impact his transaction.
16. More generally, the Egg Board argues that the Specialty Review conducted by BCFIRB was ongoing since 2005. Both the Egg Board and the BCFIRB had posted proposed changes to the Standing Order on their websites in order to ensure industry and public awareness of the changes. The Egg Board argues that there was widespread awareness within the egg industry of the Specialty Review and its possible implications, including the 5% transfer assessment. Given the specific advice of Mr. Gillanders and the more general awareness of impending changes, the Egg Board argues that the Appellant should have been aware that a transfer assessment was imminent.
17. The Panel will address the issue of "notification" first. The Appellant argues that he was not properly informed by the Egg Board of the date when the 5% assessment would come into effect and as such it should not be applied to him. The Panel accepts the argument of the Egg Board that there was general industry awareness that changes to quota transfers and transfer assessments were imminent. In carrying out its Specialty Review, BCFIRB had under taken broad, industry-based discussion with all five supply-managed commodities. Potential changes to the Egg Board's Standing Order, including a transfer assessment, had been proposed since 2005 and had been openly and actively discussed at industry meetings and on the respective websites of the Egg Board and BCFIRB. The Panel accepts that few, if

any, participants in the egg industry were unaware of the Specialty Review and its potential ramifications. As a result we find that the Appellant knew or ought to have known of these discussions and the potential for changes to the Egg Board Standing Order as a result.

18. The Panel has also considered the conversation between the Appellant and Mr. Gillanders. The Appellant argues that he was not given specific information that the exchange rules *would* change. He says the conversation was very general and he could not be expected to conclude that a 5% assessment was imminent. He argues that the key word used was “could” and that “could” was not specific enough to make him aware that the 5% assessment *would* be implemented. The Egg Board for its part argues that Mr. Gillanders in fact advised the Appellant that the quota exchange “would” change and therefore he should have concluded that the 5% assessment was going to be implemented and may affect his transfer.
19. Given the high level of awareness in the industry of the pending changes arising out of the Specialty Review, the Panel finds that this appeal does not turn on whether or not Mr. Gillanders used “could” or “would”. Rather, given the industry awareness, we conclude that either word provided the Appellant with adequate warning that the proposed changes were imminent. Knowing that changes were imminent, and being able to calculate what the potential 5% assessment could be, the Appellant had sufficient warning to be conservative in pricing his quota for transfer.
20. The second argument advanced by the Appellant was that because he had placed his quota for transfer before the 5% assessment rule was implemented, the transfer should be “grandfathered” under the old rules and not be subject to the 5% transfer assessment. The Egg Board argues that to make such an exemption requires the exercise of discretion expressly denied as a result of the specific language in the July 18, 2006 letter from BCFIRB. Further, the Egg Board argues that it had no choice but to suspend the September exchange in light of the rule changes.
21. The Panel agrees that the language in the July 18, 2006 letter is explicit. We agree that the Egg Board was not given any discretion in implementing BCFIRB directions. The Egg Board did not have the discretion to allow the Appellant to transfer his quota under the old rules. That said the issue remains as to whether the Appellant has made out a case for this Panel to exercise discretion and allow him to transfer his quota without an assessment.
22. In any regulatory environment there is a need for change. When that change occurs the regulatory body must consider the impact of its change on those regulated. BCFIRB regularly hears appeals where an aggrieved party seeks to be “grandfathered” so that they are not affected or are less affected by a regulatory change. However, producers within the supply management system know or ought to know that the regulatory reality is that policy rules governing how they operate may change at any time, particularly where there is significant controversy calling

for reform such as what lead to the Specialty Review.

23. In this case, the Appellant seeks to be grandfathered from the application of the 5% transfer assessment. He argues that having placed his quota on the exchange in August, he should not be subject to the rule change. We disagree. The exchange creates a public tendering process administered by the Egg Board for the transfer of quota. In order to maintain the integrity of the exchange, all bidding parties must be treated equally and fairly and know precisely what the rules are when they participate. Parties must have certainty as to the amount of quota purchased at what price and what date. A transfer assessment requires a very clear implementation date; those transferring before the date are not subject to the assessment but those transferring after are. It would be unfair to allow one producer to participate in the exchange on a set of rules that do not apply to all other producers.
24. We reject the Appellant's argument that the rules changed "mid way through his transfer". The Appellant did participate on the August exchange under the old rules. Had the transfer been successful, no assessment was applicable. The fact that the transfer was not successful necessitated a further exchange. Had that exchange been unsuccessful, a further exchange would have been necessary. The Panel does not accept that fairness dictates that the Appellant having started the process of trying to transfer his quota before the rule change insulates him from rule changes relating to subsequent transfers. Fairness cannot be viewed merely from the perspective of the Appellant having the opportunity to participate in just one exchange. In our view, the position that he should be "grandfathered" and allowed to transfer quota without an assessment does not accord with the compelling interest of ensuring that quota transfer rules are equally applicable especially in an industry subject to dramatic rule changes from time to time.
25. Ultimately, the transfer of quota is a business decision. Whether or not a seller and buyer successfully conclude the arrangement is a decision made taking into account their own needs and capabilities but also acknowledging the regulatory environment within which the transaction takes place. The regulatory environment must provide as much certainty as possible. Certainty permits the buyer and seller to freely conclude their arrangement without concern that the regulations in effect are subject to interference that would compromise their integrity. By virtue of the directions arising out of the Specialty Review and applying to all five supply-managed boards, BCFIRB removed the potential for ad hoc decisions around the implementation of the transfer assessment ensuring that participants in a quota transfer, such as on the Egg Board's quota exchange, had certainty in their regulatory environment. Having considered the arguments presented, this Panel is not prepared to go further and exercise our discretion to give the Appellant the relief he seeks allowing a quota transfer without the assessment.
26. It should be noted that the Egg Board was scrupulous in ensuring that it did not compromise the integrity of the August exchange. The Panel notes that the

Appellant did receive an offer for his quota higher than his purchase price a few months earlier. We view his decision to offer his quota at a considerably higher price as a business decision made with the awareness that the rules may change. There are inherent risks attendant on business decisions. The vagaries of the market can affect the financial outcome of a transaction; money may be made or lost as a result. This is perhaps more so when the market exists in a regulatory environment where the rules may change at any time. The Appellant made the decision to transfer his quota at the price he thought best knowing that the rules may change. He must accept the outcome of that decision.

**ORDER**

27. The appeal is dismissed.
28. There will be no order as to costs.

Dated at **Victoria**, British Columbia, this **20th** day of **April 2007**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD  
Per

*(original signed by:)*

Garth Green, Member, Panel Chair  
Christine J. Elsaesser, Member