

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
IN THE MATTER OF AN APPEAL
FROM A DECISION REGARDING A TRANSFER OF QUOTA

BETWEEN:

SKYACRES TURKEY RANCHES LTD.

APPELLANT

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

**REASONS FOR DECISION
APPLICATION TO DISMISS**

APPEARANCES

(by written submission)

For the British Columbia Marketing Board

Ms. Christine Elsaesser, Vice Chair
Ms. Karen Webster, Member
Ms. Doreen Hadland, Member

For the Appellant

Mr. Christopher Harvey, Q.C.
Counsel

For the Respondent

Ms. Maria Morellato, Counsel

INTRODUCTION

1. This is a decision about whether the appeal of Skyacres Turkey Ranches Ltd. (“Skyacres”) should be dismissed as being frivolous, vexatious or trivial pursuant to s. 8(8.3) of the *Natural Products Marketing (BC) Act* (the “Act”).
2. Effective March 15, 2000, the British Columbia Turkey Marketing Board (the “Turkey Board”) amended its General Orders to set minimum farm size at 65,000 kgs (the “March Order”). Prior to this amendment, there was no set minimum farm size.
3. By letter dated March 15, 2000, the Turkey Board granted the Appellant’s request to transfer quota to 7 persons, 6 of whom are family members, in 1000 and 500 kg allotments (the “March Decision”). In the same letter, the Turkey Board advised the Appellant of the March Order setting a minimum farm size. Given that the transferees were considered “below minimum quota holders”, they were advised that their names would not be entered into the Register of Growers. A consequence of the March Order on the transferees was that they would not have voting privileges at the Turkey Board’s Annual General Meetings.
4. In addition, the March Decision required each transferee to submit the following information to the Turkey Board by April 20, 2000:
 1. A business plan which will give details of:
 - a) The name and address of the owner of the property on which they intend to produce the turkeys.
 - b) The distinguishing marks, such as number or colour of the barn in which they intend to produce the turkeys.
 - c) The name and address of the registered processing plant where the turkeys will be killed and inspected.
 - d) Their intention of the method of marketing the turkeys to be produced by them, whether they intend to have the turkey custom killed for sale by themselves or whether they intend to market them to a registered processing plant.
 - e) Their intended growers programme showing the anticipated poult placement dates and the anticipated slaughter dates of the turkeys being produced by them.
 2. An Exclusive Lease Agreement between each transferee and the person referred to in 1.a. above and giving the distinguishing marks referred to in 1.b. above. By an exclusive lease each transferee’s turkeys will be the only turkey (sic) in the leased barn during the period of the lease.
 3. A letter from a registered processor agreeing to slaughter and process their turkeys.
 4. A letter from each transferee acknowledging that they will be a quota holder but a non-registered grower until such time as they acquire the minimum quota holding required to be a registered grower of 65,000 kilograms.

5. The transferees did not submit the information to the Turkey Board and on April 14, 2000, Skyacres appealed the March Decision of the Turkey Board to the British Columbia Marketing Board (the "BCMB"). Given that the March Decision communicated the March Order to the Appellants, the appeal is taken to encompass both the March Order and the March Decision.
6. The Panel has received and considered the following written submissions:
 - a) Submission of the Respondent dated January 17, 2001;
 - b) Submission of the Appellant dated January 24, 2001; and
 - c) Reply of the Respondent dated February 15, 2001.

ISSUE

7. Should the Appellant's appeal be dismissed, pursuant to s. 8(8.3) of the *Act*, as frivolous, vexatious or trivial?

ARGUMENT OF THE RESPONDENT

8. The Respondent argues that the present appeal is frivolous or vexatious. The Turkey Board approved the Appellant's applications to transfer quota to the transferees and as such has allowed those persons to enter the turkey industry. The Respondent maintains that it is not reasonable to argue that the Turkey Board erred or was unfair in concluding that growers who receive minimal quota transfers should not be considered registered growers with voting privileges.
9. There is nothing improper or discriminatory in the Turkey Board's decision to set minimum quota holdings for registered growers. This is a matter of discretion based on sound policy, including facilitating new entrants into the turkey industry and ensuring that election and voting procedures are fair to all growers.
10. The Respondent argues that the decision to set minimum quota holdings for registered growers is clearly within the authority of the *British Columbia Turkey Marketing Scheme* (the "*Scheme*"), is based on sound policy and is above reproach.

ARGUMENT OF THE APPELLANT

11. The Appellant argues that at the time of its application for transfers of quota, there was no prescribed minimum quota holding in the General Orders of the Turkey Board. No licensed grower was disqualified from holding office, attending Annual General Meetings or voting. As such the Appellant argues that the decision to set minimum quota holdings for registered growers is *ultra vires*, discriminatory, unfair and patently unreasonable.

12. With respect to the application to dismiss the appeal pursuant to s. 8(8.3), the Appellant argues that its appeal cannot be summarily dismissed without a public hearing. With respect to the merits of the application, the Appellant argues that the Appellant can be deprived of its right to appeal “only in plain and obvious cases” and where the court is satisfied that the case is beyond doubt: *Hunt v. Carey Canada* (1990) 49 BCLR (2d) 273 (SCC).
13. The Appellant maintains that the tenor of the *Scheme* as a whole is that each licensed grower is entitled to hold office, attend Annual General Meetings and vote. The general intent of the Register of Growers is to record all growers and not distinguish between classes of growers. The Appellant argues that the Turkey Board does not have the power to discriminate between growers or classes of growers.

REPLY OF THE RESPONDENT

14. In Reply, the Respondent argues that the narrow test set out in the *Hunt* decision does not apply to s. 8(8.3). This test arises not in a regulatory context but rather in a court setting where if pleadings do not disclose a reasonable cause of action, an action can be dismissed. The appropriate test is one where the BCMB only need conclude there is no reasonable prospect of success on appeal. In the alternative, if the *Hunt* test does apply, the Respondent argues that this is a plain and obvious case in which the Appellant has no chance of success on appeal.
15. The Respondent argues that the right to distinguish between classes of persons arises both expressly and by necessary implication in s. 28 of the *Scheme*, which provides for effective control and regulation of the turkey marketing industry. The decision to set minimum quota holdings for registered growers falls squarely within this authority.
16. The Respondent further argues that the appeal has been rendered moot. The appeal questions whether the Appellant must comply with certain conditions attached to the approval of the transfers. Given that the transferees failed to fulfill the four conditions by the April 20, 2000 deadline, the conditional transfers can no longer take place. These conditions are not at issue in the appeal, and as such, the Respondent argues that the issue of the appropriateness of the disputed conditions is moot.
17. The Respondent argues that the BCMB should not entertain an appeal based on conditional transfers where the transferees have refused or neglected to comply with the conditions. On that basis alone, the Respondent argues that the appeal should be dismissed.

DECISION

18. Section 8(8.3) was enacted in December 1999. The purpose of this amendment was to grant the BCMB the authority to dismiss an appeal on the application of a party where that appeal was “frivolous, vexatious or trivial”. This power can only be exercised in limited situations, where it is clear on its face that an appeal cannot possibly succeed or that it is devoid of merit.
19. In this case, the Appellant argues that the decision to set minimum quota holdings for registered growers is *ultra vires*, discriminatory, unfair and patently unreasonable. The Turkey Board argues that it has acted within its authority in making its decision. However, a decision can be within the authority of a board or commission to enact and yet still be discriminatory, unfair or unreasonable.
20. Based on the pre-hearing conference report and the subsequent application for disclosure of documents, it appears that the Appellant is of the view that the March Decision discriminates against the transferees. Implicit in this argument is that other turkey producers have been dealt with differently by the Turkey Board.
21. The written submissions we have received are insufficient to allow the Panel to make a determination regarding the alleged discriminatory conduct on the part of the Turkey Board and as such, this aspect of the appeal cannot be dismissed summarily under s. 8(8.3).
22. Finally, the Turkey Board argued that this appeal should be dismissed, as it was moot. The initial transfers of quota to the transferees were conditional on compliance with certain conditions (see paragraph 4 above). The transferees did not fulfill the required conditions by April 20, 2000 and the Appellant did not raise the issue of compliance with the conditions as an issue in this appeal. The Respondent argues that at the very least, the issue of the appropriateness of the conditions was rendered moot upon the termination of the conditional approval.
23. In its April 14, 2000 Notice of Appeal, the Appellant appealed the “order and/or decision” of the Turkey Board communicated in its March 15, 2000 letter. A copy of the letter was attached to the Notice of Appeal. In the pre-hearing conference report, the Appellant took issue with its obligation to comply with certain conditions, namely 1.d., 3. and 4.. The stated grounds of appeal were that the decisions were discriminatory, unreasonable and demonstrated favouritism.
24. The broad allegation of favouritism places in issue the obligation of the transferees to comply with the conditions. Implicit in the allegation is that other transferees have been dealt with differently. Accordingly, the Panel is satisfied that this matter should proceed to hearing and should not be summarily dismissed.

ORDER

25. The Respondent's application is dismissed. This matter will proceed to hearing as scheduled on April 23-24, 2001.
26. The Turkey Board has requested its costs in this application. Given our decision, this request is dismissed. The Turkey Board may choose to renew this request at the conclusion of the hearing on its merits.

Dated at Victoria, British Columbia this 26th day of March, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine Elsaesser, Vice Chair

Karen Webster, Member

Doreen Hadland, Member