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March 26, 2001

DELIVERED BY FAX

Fasken Martineau DuMoulin
Barristers & Solicitors
Suite 2100
1075 West Georgia Street
Vancouver, BC V6E 3G2
Attention: Mr. Christopher Harvey, Q.C.

Blake, Cassels & Graydon
Barristers & Solicitors
Suite 2600, Three Bentall Centre
PO Box 49314
595 Burrard Street
Vancouver, BC V7X 1L3
Attention: Ms. Maria Morellato

Dear Sirs/Mesdames:

**AN APPEAL BY SKYACRES TURKEY RANCHES LTD. FROM A DECISION OF THE
BRITISH COLUMBIA TURKEY MARKETING BOARD CONCERNING MINIMUM
FARM SIZE AND THE TRANSFER OF QUOTA**

Introduction

This is a decision about the production of documents in the above appeal.

On August 11, 2000, the Appellant requested the production of certain documents and information from the British Columbia Turkey Marketing Board (the "Turkey Board") in order to prepare for this appeal. As the Appellant felt it did not receive an adequate response to its request, on January 17, 2001 it applied to the British Columbia Marketing Board (the "BCMB") to compel production of the requested documents and information.

On January 31, 2001, the Turkey Board in its Response produced some but not all of the documents and information requested by the Appellant. On February 22, 2001, the Appellant replied to the Turkey Board's production of documents submission.

British Columbia
Marketing Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria, BC V8W 9B5

Telephone: (250) 356-8945
Facsimile: (250) 356-5131

Location:
3rd Floor
1007 Fort Street
Victoria

Decision

The BCMB has considered the issue of production of documents in a recent appeal brought by Hallmark Poultry Processors Ltd. and others from a decision of the British Columbia Chicken Marketing Board.

In an October 23, 2000 decision in that appeal, the BCMB held as follows with respect to the production of documents under sections 8(4) and 8(5) of the Natural Products Marketing (BC) Act (“the *Act*”). Note that in the *Act*, the BCMB is referred to as the Provincial board.

B. Scope of the duty to disclose in these appeals

20. On judicial review or statutory appeal to the Courts where the issues focus on questions of law, there are no rights of discovery: *Nechako Environmental Coalition v. British Columbia (Ministry of Environment, Lands and Parks)*, [1997] B.C.J. No. 1790 (S.C.). The same is true at common law before certain regulatory tribunals: *Re: CIBA-Geigy Canada Ltd.*, [1994] F.C.J. No. 884 (C.A.). At the other end of the spectrum is the right of document discovery in civil litigation under the Rules of Court, where Rule 26(1) has been given extended meaning (*Homalco Indian Band v. British Columbia* (1998), 56 B.C.L.R. (3d) 114 (S.C.)), though not to the point of excess: *British Columbia (Milk Marketing Board) v. Aquilini*, [1996] B.C.J. No. 1433 (S.C.). All these contexts are of interest, but for our purposes are subsidiary to the requirements of the *Act* itself.
21. For convenience, we repeat sections 8(4) and 8(5):
 - 8(4) The marketing board or commission from which an appeal is made must promptly provide the Provincial board with every bylaw, order, rule and other document touching on the matter under appeal.
 - 8(5) On its own motion or, on the written request of a party to the appeal under subsection (1), the Provincial board may direct that a party to the appeal provide the Provincial board and other parties to the appeal with a copy of each document the Provincial board specifies in its direction.
22. It is useful to analyze these provisions by comparing them:
 - i. *Who must disclose*: Section 8(4) is a disclosure obligation directed exclusively to the commodity board whose decision is appealed. Section 8(5) addresses disclosure by any party to the appeal.
 - ii. *How the duty arises*: Section 8(4) imposes on the commodity board an automatic disclosure obligation; no BCMB order is required. Section 8(5) requires an Order of the BCMB, either on application by a party or by the BCMB on its own motion.
 - iii. *What must be disclosed*: The standing duty in s. 8(4) is to promptly provide the BCMB with “every bylaw, order, rule and other document touching on the matter under appeal”. Section 8(5) refers to “a copy of each document the Provincial Board specifies in its direction.”

23. The Chicken Board argues that the disclosure required by the sections is “limited in scope”. It says that the phrase “other documents” in s. 8(4) should be limited to “formal statements of the Chicken Board akin to by-laws, orders and rules and perhaps the formal record before the Board.” It argues that ss. 8(4) and 8(5) should not be expanded to permit “discovery of the Chicken Board by a stakeholder group”, and does not include “the email correspondence of individual Board members.”
24. In our view, the obligation in s. 8(4) is not limited to documents akin to orders, rules and bylaws. Section 8(4) – which must be read subject only to claims of relevancy and privilege – is in our view designed to ensure that an expanded documentary record of the decision is placed before the BCMB to ensure a full and proper appeal hearing. The BCMB was designed to hear appeals on all questions of jurisdiction, law, fact and policy. It should not be surprising therefore that a comprehensive right of appeal has been supported by a corresponding statutory obligation to produce documents.
25. The word “documents” is used in both ss. 8(4) and 8(5). In our view, it should be interpreted consistently in both subsections. Section 8(5) applies to documents held by all parties, including appellants and intervenors. To suggest, for example, that disclosure by an appellant should be limited to documents they possess akin to a “bylaw, order (or) rule” would rob s 8(5) of meaning. To suggest that “documents” has a broader meaning in s. 8(5) than it does in s. 8(4) has no support in the language or context of the subsections. Nor does our interpretation make s. 8(5) redundant to the commodity board; there may well be cases where an order under s. 8(5) is necessary because the commodity board has not complied with s. 8(4).

The foregoing passages are instructive in determining which documents the Turkey Board should properly produce. The obligation to disclose documents is broad, subject only to claims of relevancy and privilege. A full and proper hearing before the BCMB requires an expanded documentary record of the decision made by the commodity board.

We find it convenient to structure our decision in accordance with the headings utilised by the Appellant to seek production of documents.

1. The Grower’s List as at December 15, 1999.

Mr. Harvey, Counsel for the Appellant, initially sought production of the Grower List as at December 15, 1999 to show the make-up of the industry in terms of growers and quota holdings at that time. The Turkey Board’s General Orders were changed effective March 15, 2000, to establish a minimum quota holding requirement. Mr. Harvey maintains that a Grower List compiled after the General Orders were changed is irrelevant. The Turkey Board maintains there is no December 15, 1999 Grower List and that Grower Lists dated August 1, 1999 and May 19, 2000 were circulated to all growers including the Appellant.

In Reply, the Appellant argues that there is in fact a December 15, 1999 Grower List; it has a copy in its possession. However, that list does not include “particulars of quota holdings, leases, current allocations, over/under production etc.” that the Turkey Board obviously has in its possession which the Appellant requires.

The Appellant appears to assume that a Growers List will show the make-up of the industry. This assumption appears to be incorrect. As such the Appellant's request for a December 15 Growers' List is really a request for the Turkey Board to prepare a new document, which incorporates "particulars of quota holdings, leases, current allocations, over/under production etc."

Sections 8(4) and 8(5) of the *Act* set out the BCMB's power with respect to production of documents. In the Panel's opinion, the power to order production of documents extends to all documents "touching on the matter under appeal". However, this power is restricted to documents that already exist. It does not require a marketing board or commission to provide answers to questions posed by another party. Thus, as the Turkey Board seems to have circulated a Grower List in effect at December 15, 1999, the Panel is not prepared to order production of a further list. The Turkey Board is not required to prepare a new list with particulars of quota holdings, leases, current allocations and over/under production.

That said, the issue remains as to whether the Turkey Board should produce all documents in its possession relating to quota holdings, leases, current allocations and over/under production. Based on the information before us, it is unclear what documentary evidence exists relating to this request. In addition, it is not clear whether these documents are privileged or relevant to this appeal. The request for a December 15 Grower List was expanded by the Appellant in its Reply to include, particulars of quota holdings, leases, current allocations and over/under production etc.. The Panel has not had heard from the Turkey Board on the issue of privilege or relevance of such documents to the appeal.

Accordingly, the Panel cannot make a decision on the production of these further documents based on the submissions before us.

2. *A breakdown of the numbers for Jaedel Enterprises (1978) Ltd. ("Jaedel").*

This information has been provided.

3. *When did Jaedel first approach the Turkey Board for concessions?*

Once again, it appears that the Appellant is seeking information rather than the production of specific documents. As set out in 1 above, ss. 8(4) and (5) do not require a marketing board or commission to provide answers to questions posed by another party. Subject to any arguments of relevance, the Appellant may, at the hearing of the appeal, choose to cross-examine a representative of the Turkey Board regarding this issue.

4. *Was Lorne Bustin on the Turkey Board when the Turkey Board agreed to (3)?*

This information has been provided.

5. *Who were the Turkey Board members when Jake and Marvin Friesen's quota was permitted to transfer?*

This information has been provided.

6. *What was the amount and date of quota transferred by both Jake and Marvin Friesen, prior to them ending up with 180 and 200 kgs. respectively?*

This information has been provided.

7. *To whom was the Friesen's quota transferred?*

This information has been provided.

8. *Who purchased their small remainders or to whom was it transferred? Where did the 380 kgs. end up?*

This information has been provided.

9. *How were export credits distributed among growers prior to the Turkey Board's arrangement to lease export credits to Jaedel for production of off-line toms as well as off-line hens?*

The Turkey Board argues that the issue of export credits in no way relates to the appeal, even if one considers the unsubstantiated allegations of discrimination. The Appellant states that this is an "informational question the answer to which is required for the purpose of drawing a comparison relevant to the discrimination issue."

Based on the submissions of Counsel, the Panel is unable to determine what specific documents the Appellant is seeking and the relevance of those documents to this appeal.

10. *How was the amount of export credit regrow arrived at for Skyacres/Anne Timmerman before and after Jaedel was permitted to grow off-lines deducted from export credits?*

This information has been provided.

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11. *Information on how much quota was leased out from Rullo on the Island and to whom was it leased in the 1999-2000 and 2000-2001 quota years?*
12. *Who has made leasing an issue?*
13. *What are the concerns over leasing?*

As with Request 9, the Turkey Board takes issue with the relevance of this request and the Appellant maintains that this information is necessary to determine if a general discriminatory practice exists.

The Panel is again unable to determine the relevance of these documents to this appeal. Further, Requests 12 and 13 seem to be seeking information, rather than documents, and if so our comments with respect to Requests 1 and 3 may also apply here.

Further Directions

The Panel is unable to come to a decision regarding the production of documents requested in Items 1, 9 and 11-13, as the submissions filed are insufficient to make a determination. As a result, the Panel is prepared to hear further oral submissions by telephone conference call in order that the production of document issues can be resolved in advance of the hearing currently scheduled for April 23-24, 2001.

BCMB staff will be in contact with the parties in order to determine a suitable time and date for further argument on the production of documents issue.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

cc: Mr. Dudley Brooks
Skyacres Turkey Ranches Ltd.

Mr. Colyn Welsh, Secretary-Manager
British Columbia Turkey Marketing Board