

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
IN THE MATTER OF AN APPEAL  
FROM DECISIONS REGARDING TRANSFERS OF QUOTA

**BETWEEN:**

WESTVIEW POULTRY FARMS LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA TURKEY MARKETING BOARD

**RESPONDENT**

SKYACRES TURKEY RANCHES LTD.,  
RALIN HOLDINGS INC., MOUNTAIN VIEW POULTRY LTD., 576336 BC LTD.,  
MIDWEST FARMS LTD., COUNTRY FRESH POULTRY LTD.,  
STAR COUNTRY FARMS LTD., C.J. FARMS LTD.,  
SPRINGMEADOW FARMS LTD., GREEN ACRES HOLDINGS LTD.,  
DOUBLE D FARMS LTD., ROCKY RIDGE TURKEY FARM LTD. and  
POPLAR ENTERPRISES LTD.

**INTERVENORS**

**REASONS FOR DECISION**

**APPEARANCES**

For the British Columbia Marketing Board

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

For the Appellant

Mr. Harry Froese, General Manager

For the Respondent

Mr. Colyn Welsh, Secretary-  
Manager

Date and Place of Hearing

June 14, 2001  
Abbotsford, British Columbia

## INTRODUCTION

1. Westview Poultry Farms Ltd. (“Westview”) appeals three separate decisions of the British Columbia Turkey Marketing Board (the “Turkey Board”) to approve certain transfers of quota.
2. The Appellant, Westview, operates a turkey farm in the Lower Mainland. The sole shareholder is Alvira Froese. Her husband, Harry Froese, is General Manager of the farm. He presented the Appellant’s case at the hearing of the appeal.
3. The three quota transfers under appeal do not involve the Appellant but rather involve other turkey growers.
4. The British Columbia Marketing Board (the “BCMB”) approved the application for intervenor status of Skyacres Turkey Ranches Ltd. (“Skyacres”), who intervened in support of the Appellant. Dudley Brooks appeared on behalf of Skyacres and gave both written and oral submissions at the hearing of the appeal.
5. The BCMB also approved the application for intervenor status of Ralin Holdings Inc. (“Ralin”), Mountain View Poultry Ltd. (“Mountain View”) and 576336 BC Ltd. (“576336”), three of the growers who participated in the transfers appealed by the Appellant. These three growers intervened in support of the Turkey Board in this appeal. Ray Nickel on behalf of Ralin and Shawn Heppell on behalf of Mountain View and 576336 both gave written and oral submissions at the hearing of the appeal.
6. Finally, the BCMB approved the applications for intervenor status for Midwest Farms Ltd., Country Fresh Poultry Ltd., Star Country Farms Ltd., C.J. Farms Ltd., SpringMeadow Farms Ltd., Green Acres Holdings Ltd., Double D Farms Ltd., Rocky Ridge Turkey Farm Ltd. and Poplar Enterprises Ltd.. All of these turkey growers intervened in support of the Turkey Board’s decisions and were given an opportunity to provide written submissions and to make oral submissions to the Panel at the hearing of the appeal.

## ISSUES

7. Were the transfers of turkey quota by Mountain View to 576336 on January 6, 2000 and Nicson Enterprises Ltd. (“Nicson”) and Maple Leaf Farms Ltd. (“Maple Leaf”) to Ralin on April 20, 2000 made contrary to the General Orders of the Turkey Board?
8. Were the General Orders of the Turkey Board, in respect of these quota transfers, applied differently to growers who are members of the Turkey Board?
9. These two technical grounds of appeal will be dealt with first. However, much of the appeal was consumed by submissions of the Intervenors which, rather than focussing on whether the quota transfers were contrary to the General Orders of the

Turkey Board, dealt with the merits of broader policy issues regarding leasing and issuance of more than one quota to a grower or to a production unit. These issues will be dealt with in the second part of the decision.

## LEGISLATIVE BACKGROUND

10. The legislative background of the Turkey Board was recently reviewed in the BCMB's decision in *Skyacres Turkey Ranches Ltd. v. British Columbia Turkey Marketing Board*, dated August 1, 2001. As set out in that decision, turkey production in British Columbia is supply managed. The legislation relevant to this appeal is the *Natural Products Marketing (BC) Act* (the "Act") and the *British Columbia Turkey Marketing Scheme* (the "Scheme"). There are approximately 50 turkey growers in the industry.
11. The Turkey Board is a three-person regulatory body, comprised of turkey growers, that governs the industry, subject to the general supervision of and subject to appeals to the BCMB: ss. 3(5)(a) and 8 of the *Act*.
12. Section 3 of the *Scheme* directs the Turkey Board, by order or regulation, to establish a quota system. The purpose and application of the *Scheme* are set out in s. 16 and s. 17 as follows:
  16. The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product within the Province, including the prohibition of such production, transportation, processing, packing, storage and marketing in whole or in part.
  17. The scheme shall apply to all persons who produce, transport, process, pack, store or market the regulated product and to all kinds and grades of the regulated product.
13. The Turkey Board has enacted General Orders from time to time to carry out the authority delegated by the *Scheme*. The sections of the April 24, 2000 consolidation of the General Orders in effect at the time and relevant to this appeal are as follows:
  1. In this order and in all other orders of the Board...

"associated or related persons" means persons connected as follows:

    - (i) individuals are associated or related persons when
      - (a) one is the child of the other, or wholly dependent on the other and is under the age of 19 years,
      - (b) one is the brother or the sister of the other and is under the age of 19 years,
      - (c) one has been adopted by the other, either legally or in fact, and is under the age of 19 years,
      - (d) one is married to the other or lives with the other as if they were married,
      - (e) one is the daughter-in-law or son-in-law of the other, and is under the age of 19 years, or
      - (f) they are partners;
    - (ii) an individual and a corporation are associated or related persons when

- (a) the individual controls the corporation,
- (b) the individual and an individual who controls the corporation are associated or related persons,
- (c) the individual and a corporation that controls the corporation are associated or related persons, or
- (d) they are partners;

“exclusive lease” means an agreement between **two registered growers** whereby one provides barn space for the exclusive use of the other for a specified time period as required by the Board. (Amended January 30, 1989)...

- 4. (1) All quotas and permits shall remain the property of the Board and shall have no monetary value.
- (2) A quota will be assigned by the Board to:
  - (a) each registered and non-registered grower, and
  - (b) the legal description of each registered and non-registered grower’s turkey production unit.

The quota will be categorized by the Board as to light turkey, heavy turkey or breeder turkey or a combination thereof, and may be categorized by time periods within a quota year.

**The Board will not issue two or more quotas to the same registered grower nor to the same turkey production unit.** However where two or more registered growers are sharing the same turkey production unit as at October 1<sup>st</sup>, 1986 they may continue to do so. (Amended October 1, 1986)

Notwithstanding the above;

- (a) A registered grower who is a parent may, with the written consent of the Board enter into an exclusive lease with his child so that the child can provided (sic) the minimum space require (sic) by (8) of this Section, (Amended January 30, 1989)
- (b) **A registered grower whose turkey production unit is vacant during some period(s) of the year may**, with the written consent of the Board **enter into an exclusive lease with another registered or non-registered grower** so that the other registered or non-registered grower can provide the minimum space required by (8) of this Section during such vacant period(s). (Amended November 30, 1987)

...

- (4) The maximum quota to be held or controlled by any person shall be 1,375,000 kilograms. (Amended March 15, 2000)
- (5) Registered and non-registered growers who are associated or related persons shall not hold or control quota exceeding 1,375,000 kg in total. (Amended March 15, 2000)...

[emphasis added]

14. With respect to transfers of quota, the April 24, 2000 consolidation of the General Orders provide in part:

- 6. (1) No quota shall be transferred unless this section has been complied with and the prior written consent of the Board has been obtained.
- (2) An application shall be made to the Board for each proposed transfer of quota, in a form provided by the Board, not less than 14 days before the proposed effective date of the proposed transfer.

- (3) **Each transferee must be, or be capable of becoming and become, a registered grower on the completion of the transfer** including the provisions contained in Section 4 of this order. (Amended October 1, 1986)

[emphasis added]

15. With respect to prohibitions on transfers of quota, the April 24, 2000 consolidation of the General Orders provides in part:

7. ...

- (11) **No more than one registered and/or non-registered grower shall produce regulated product on any turkey production unit;** (Amended January 10, 1986)
- (12) **No registered and/or non-registered grower shall rent, lease nor make available to another grower space in his/her turkey production unit;** (Amended January 10, 1986)
- (13) The Board will not approve any transfer where the transferee cannot prove that he can provide the minimum space required by Section 4(8) of this order (Amended October 1, 1986)
- (14) Notwithstanding (sic) (11) and (12) above;
- (a) A registered grower who is a parent may, with the written consent of the Board enter into an exclusive lease with his child, so that the child can provide the minimum space required by 4. (8) of this order, (Amended January 30, 1989)
- (b) A registered grower whose turkey production unit is vacant during some period(s) of the year may, with the written consent of the Board enter into an exclusive lease with another registered or non-registered grower so that the other registered or non-registered grower can provide the minimum space required by 4. (8) of this order during such vacant periods(s). (Amended January 30, 1989)

[emphasis added]

16. As an aside, although the foregoing was meant to be a consolidation, some sections had minor amendments that were not noted (underlined above). Although the minor amendments do not impact this appeal, any revision to the general orders of a commodity board should be made formally. More will be said on this issue below.

## FACTS

### **Transfer of Quota from Mountain View to 576336**

17. On December 21, 1999, Mountain View (a company controlled by then member and now current Turkey Board Chair, Shawn Heppell) applied to transfer 606,000 kg of turkey quota to 576336 (a company controlled by his wife, Denise Heppell) effective January 5, 2000.

18. On January 6, 2000, the Turkey Board approved the transfer of quota from Mountain View to 576336 subject to an “exclusive lease” being drawn up between both parties.

19. In response to a request by the Turkey Board, by letter dated February 3, 2000, Mountain View sent a copy of its “exclusive lease” with 576336. The letter states:

To the board,

As per your request Mountain View Poultry is entering into an exclusive lease with 576336 B.C. Ltd. For (sic) the production facilities located at 1765 Lefevre Rd. Abbotsford B.C.

20. In response to a further request by the Turkey Board, by letter dated February 14, 2000, Mountain View sent the following letter to the Turkey Board:

TO THE BOARD,

AS PER YOUR REQUEST MOUNTAIN VIEW POULTRY IS ENTERING INTO AN EXCLUSIVE LEASE WITH 576336 B.C. LTD. FOR THE PRODUCTION FACILITIES AT THE ABOVE ADDRESS.

THIS LEASE OF FACILITIES WILL RUN FROM THE DATE OF NOVEMBER THE FIRST TO APRIL 30 EVERY YEAR. THE LEASE RATE 576336 B.C. LTD. HAS AGREED TO PAY IS 10 CENTS A KILOGRAM LIVE WEIGHT. WE TRUST THIS AGREEMENT MEETS YOUR REQUIERMENTS (sic).

### **Transfers of Quota to Ralin**

21. On April 4, 2000, Ralin (a company controlled by Ray Nickel) applied to the Turkey Board to transfer 8,095 kg of turkey quota from Nicson (a company controlled by his father and Turkey Board member Walter Nickel) to its operation. At the same time, Ralin also applied to transfer 30,000 kg of turkey quota from Maple Leaf to its operation. At the time the requests for quota transfer were submitted, Ralin was not a turkey grower and did not own a turkey production unit.

22. On April 20, 2000, Ralin applied to the Turkey Board to approve the leasing out of the Nicson/Maple Leaf quota. In its meeting of the same date, the Turkey Board approved the quota transfers and the lease subject to receipt of all original documentation. Walter Nickel, the father of Ray Nickel, seconded the motion allowing the transfer of quota between Maple Leaf and Ralin. The Turkey Board did not receive original documents from Maple Leaf until June 22, 2000.

### **The Appeals**

23. By letter dated May 31, 2000, Mr. Froese on behalf of the Appellant wrote to the Turkey Board and advised of Westview’s intention to appeal several decisions of the Turkey Board involving quota transfers. He also requested copies of all quota transfers approved by the Turkey Board over the prior 12-month period.

24. The Turkey Board provided the Appellant with information on these transfers and a copy of its General Orders on June 2, 2000. Over the period of several months, Mr. Froese attempted to resolve his concerns with the Turkey Board “in house” rather than proceed with an appeal. As this process was not successful, by letters dated January 25, 2001 and February 8, 2001, Mr. Froese filed Westview’s Notice of Appeal with the BCMB. The basis of the appeal was that the transfers of quota from Maple Leaf and Nicson to Ralin and from Mountain View to 576336 were contrary to the Turkey Board’s own regulations.
25. On February 14, 2001, the Turkey Board applied to have this appeal dismissed for being filed outside the 30-day time limit prescribed by s. 8(1)(a) of the *Act*. The Turkey Board also sought to have the appeal dismissed, pursuant to s. 8(8.3) of the *Act*, as being frivolous, vexatious or trivial.
26. On March 28, 2001, the BCMB issued a preliminary decision denying the Turkey Board’s application to dismiss the appeal.
27. By letter dated May 10, 2001, the Turkey Board sent a letter to all registered and non-registered growers regarding this appeal. In the letter, the Turkey Board states:

An appeal has been lodged with the British Columbia Marketing Board (BCMB) regarding the British Columbia Turkey Marketing Board (BCTMB) decision to approve three transfers of quotas.

Should the appeal be successful, then the BCTMB will not be allowed to authorize the issuance of more than one quota to any grower nor to any farm (legal description). This is the situation, as it is understood now, in the chicken industry.

This type of ruling could have a far reaching effect on growers who hold turkey quota. In that the grower will have to be the registered owner or lessee of the farm. No other grower’s turkeys would be permitted to be raised on that farm.....

Growers who are potentially affected by the issues under appeal may apply to the BCMB for intervenor status. However if you wish to apply, you must do so immediately to be approved by the BCMB in time for hearing.....

28. It was in response to this letter that the majority of the Intervenors applied to intervene in this appeal.

## **DECISION**

### **Standing to Bring Appeal**

29. As noted above, the Westview appeal is a technical one in which Westview argues that quota transfers approved by the Turkey Board did not comply with the General Orders in effect at the time. However, Westview was not a party to either transaction. Although the Turkey Board did not raise the issue of Westview’s standing to bring this appeal, it is the first issue that the Panel must determine. If Westview does not have standing to bring this appeal, the appeal must be dismissed.

30. Under s. 8(1) of the *Act*, the following appeal rights have been legislated:

A person aggrieved or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal...

31. The question then arises, is Westview a person aggrieved or dissatisfied with an order, decision or determination of the Turkey Board? In *Money's Mushrooms Ltd. v. British Columbia Mushroom Marketing Board*, November 30, 1998, the BCMB considered the meaning of "aggrieved or dissatisfied" as used within s. 8 of the *Act*. In that case, relying on *Ghuman v. Minister of Transport* (1983) 2 Admin. L.R. 1 (Fed. T.D.), the BCMB accepted that a person "aggrieved" is one whose legal rights have been infringed. If no legal right exists, a person cannot be aggrieved.

32. Applying that test to the issue under appeal, Westview does not have a legal right that has been infringed by virtue of the approval of the quota transfers. Rather it maintains that the transfers of quota approved by the Turkey Board contravened its General Orders. Westview is not "aggrieved" and has no standing on that ground to bring the appeal.

33. However, the question remains whether Westview is a person "dissatisfied with an order... of the Turkey Board". In the *Money's Mushroom* decision, the BCMB held (at page 7):

We are satisfied that the Legislature intended a broad right of appeal from decisions of all commodity boards as a necessary safeguard in order to ensure that the powers of commodity boards are not wielded in a fashion detrimental to either the public interest or the purposes of the *Act*. This understood, cases from outside the regulated marketing system, while instructive, are not determinative. Clearly, the Legislature has determined that the power given to boards under the *Act* is significant and thus justifies a broad scope of persons who may appeal. In our view, this intent would be undermined by the narrow construction advanced by Ridge. This said, the Panel does not believe that "dissatisfied" is to be interpreted so broadly as to include simply anyone in the mushroom industry who does not like a decision, without regard to an assessment of his personal interest in the appeal. To be "dissatisfied" under s. 8, a person should have a significant and genuine present interest in the outcome of the proceeding. The question of whether a particular person satisfies this definition will of course be determined by the BCMB on a case-by-case basis. Thus, the real question in this case becomes whether, on the facts, Money's satisfies this requirement.

34. Looking to this appeal, Westview, as a registered grower, is arguing that the Turkey Board has approved transfers directly contravening its General Orders. The appeal seeks to have the decisions overturned, not for personal advantage but rather because the Turkey Board has not applied its own rules correctly. This said, Westview has more than a passing interest in these matters. Westview's evidence is that it sought but was unable to obtain quota transfer from Maple Leaf – which transfer eventually went to Ralin – based on its understanding that Ralin's method of acquiring the quota was not permitted under the General Orders. This has caused the Appellant to look closely at the General Orders and to argue that in a regulated marketing system, growers must know not only what the rules are but also that the same rules apply to everyone regardless of position.



35. The Panel finds that the Appellant is a “dissatisfied” person within the meaning of s. 8 and as such has a right to appeal decisions of the Turkey Board relating to these transfers of quota. In our view, this is exactly the kind of appeal contemplated by the Legislature when it created the broad right of appeal in s. 8 of the *Act*. A regulated marketing system imposes significant restrictions on producers of regulated commodities. In order to wield such power, commodity board actions must be subject to review. That review cannot always be at the initiation of the BCMB acting in its supervisory capacity. Sometimes it is the appeal process that highlights a particular issue or problem within a particular regulated commodity. In this sense, appeals function as a safeguard to ensure that the broader public implications of commodity boards’ decisions are considered. Where a person is not a mere busybody, and the appeal is neither frivolous nor vexatious, the right of appeal ensures that the BCMB can meaningfully exercise its statutory mandate.

### **Validity of Quota Transfers**

36. Having found that Westview does in fact have the right to appeal the Turkey Board’s decisions, it is necessary to consider the merits of the appeal. The Appellant’s argument is very simple. After reviewing the Turkey Board’s General Orders in place at the time of the Mountain View and Ralin quota transfers, the Appellant argues that both transfers were contrary to the General Orders and as such should be rescinded.
37. The Appellant argues that the General Orders as they stood at April 24, 2000 contain a lot of holes. In addition, the Turkey Board has not followed its own procedures as set out in the General Orders. The Appellant argues that regulations must make sense, they must not be ambiguous and they must be followed.

## **Transfer from Mountain View to 576336**

38. On January 6, 2000, the Turkey Board approved a quota transfer from Mountain View, a company owned by Shawn Heppell, to 576336 a company owned by his wife, Denise. The transfer was apparently done to create a tax advantage. Shawn and Denise, are “related persons” according to the General Orders as “one is married to the other”. Their respective companies are considered associated persons as “they are both controlled by different persons, whether individuals or corporations, that are associated or related persons” (see paragraph 13 above). At the time of this transfer, Shawn Heppell, now Chair, was a member of the Turkey Board.
39. The two companies entered into an “exclusive lease”, which under the General Orders, is defined as “an agreement between two registered growers whereby one provides specified barn space for the exclusive use of the other for a specified time period as required by the Board”. This exclusive lease applies to Mountain View’s production unit at 1765 Lefevre Road. The transfer and exclusive lease arrangement meant that while title to the quota changed hands for tax reasons, the actual production arrangements on the farm remained unchanged.
40. The effect of allowing this transfer is that there are now three quotas on the 40-acre parcel known as 1765 Lefevre Road. For a period of approximately 10 years, Shawn Heppell and his brother, Mike Heppell, have each operated their own individual production unit from this same property. This has been done with the express knowledge of the Turkey Board. Shawn Heppell and his brother have apparently been attempting to have the farm legally sub-divided and although they have the support of the municipality, they have yet to win the support of the Land Reserve Commission. Although this arrangement contravenes the General Orders’ prohibition against two or more quotas on the same production unit, the Turkey Board of the day appears to have given the Heppell brothers an informal exemption to operate two separate farms from one property. Although this informal exemption is not the subject of this appeal, more will be said on this later in the context of the broader issues raised by this appeal.
41. Leaving the issue of Mike Heppell’s operation aside, and looking just to the Mountain View transfer, two quota holdings on one turkey production unit appears to be a direct contravention of s. 4(2) of the General Orders which provides in part:

The Board will not issue two or more quotas to the same registered grower nor to the same turkey production unit. However where two or more registered growers are sharing the same turkey production unit as at October 1<sup>st</sup>, 1986 they may continue to do so.  
(Amended October 1, 1986).
42. The second part of that provision was meant to be a “grandfathering” provision at the time of amendment. It does not apply to a transfer after October 1, 1986. Looking next to the exemptions in s. 4, they provide:

Notwithstanding the above;  
(a) A registered grower who is a parent may, with the written consent of the Board enter

into an exclusive lease with his child so that the child can provided (sic) the minimum space require (sic) by (8) of this Section, (Amended January 30, 1989)

- (b) A registered grower whose turkey production unit is vacant during some period(s) of the year may, with the written consent of the Board enter into an exclusive lease with another registered or non-registered grower so that the other registered or non-registered grower can provide the minimum space required by (8) of this Section during such vacant period(s). (Amended November 30, 1987)

43. Sub-section (a) is not applicable as it applies to a lease between a parent and child, not between spouses or their related companies. If the transfer is to be exempted it must fall within subsection (b) or the similarly worded prohibition and exemption in s. 7 of the General Orders which provides in part:

7. ...

- (11) No more than one registered and/or non-registered grower shall produce regulated product on any turkey production unit; (Amended January 10, 1986)
- (12) No registered and/or non-registered grower shall rent, lease nor make available to another grower space in his/her turkey production unit; (Amended January 10, 1986)
- (13) The Board will not approve any transfer where the transferee cannot prove that he can provide the minimum space required by Section 4(8) of this order (Amended October 1, 1986)
- (14) Notwithstanding (sic) (11) and (12) above;
  - (a) A registered grower who is a parent may, with the written consent of the Board enter into an exclusive lease with his child, so that the child can provide the minimum space required by 4. (8) of this order, (Amended January 30, 1989)
  - (b) A registered grower whose turkey production unit is vacant during some period(s) of the year may, with the written consent of the Board enter into an exclusive lease with another registered or non-registered grower so that the other registered or non-registered grower can provide the minimum space required by 4. (8) of this order during such vacant periods(s). (Amended January 30, 1989)

44. Based on s. 4 and s. 7 of the General Orders as they stood at the time of the Mountain View transfer, there was a prohibition against the existence of two quota holders on the same production unit and a further prohibition against a registered or non-registered grower renting, leasing or making available space in his production unit. The only way that the Mountain View transfer and lease can be said to be lawful under the Turkey Board's General Orders is if they fall within the wording of the exemption which allows a registered grower whose turkey production unit is vacant during some period(s) of the year to enter into an exclusive lease.

45. The Turkey Board argues that subsection (b) of both "notwithstanding" clauses (s. 4 and s. 7) allow a grower with available barn space in his production unit to lease that space to another grower. It argues that "turkey production unit" has a broad definition, which includes barn space. Thus, the Turkey Board argues that by virtue of Mountain View's transfer of half its quota holdings to 576336, it has vacant barn space, which can be exclusively leased to 576336. This lease is authorised by subsection (b) of both "notwithstanding clauses". The Turkey Board maintains that this interpretation is within the letter and spirit of the General Orders.

46. The Panel disagrees with the Turkey Board's analysis. Its analysis ignores the prohibitions against two or more quotas being issued to the same turkey production

unit and against more than one registered and/or non-registered grower producing quota from any production unit.

47. The term “turkey production unit” is defined by the General Orders to mean “a farm or other facility on or at which turkeys are grown”. This definition clearly refers to the farm as a whole and not to barns or barn space within that farm. The specific reference to “space in his/her turkey production unit” in s. 7(12) is consistent with an interpretation of the turkey production unit as the whole and not part of the production facility. All this is reinforced by s. 4(2)(b) of the General Orders, which refers to quota being assigned according to the *legal description* of the turkey production unit. A “legal description” does not deal with barn space.
48. Thus, when the exemption requires a turkey production unit to be vacant, the construction most consistent with plain wording and intent of the General Orders, read in their entire context, is that the grower’s facility or farm must be vacant before a grower can enter into an “exclusive lease”. This interpretation, unlike the interpretation advanced by the Turkey Board, is consistent with the express prohibition against leasing found in s. 7(12) and the prohibition against two quotas or two growers on one turkey production unit.
49. To accept the Turkey Board’s interpretation of subsection (b) of both “notwithstanding” clauses (s. 4 and s. 7), would in effect deprive s. 7(11) and s. 7(12) of any meaning. An action that is expressly prohibited under s. 7(11) (more than one registered or non-registered grower producing turkey on any production unit) or s. 7(12) (leasing of quota) would be allowed under the more broadly worded exemption. In short, the Turkey Board’s analysis undermines the very basis for enacting the prohibitions in the first place. It would turn the “notwithstanding” clause into a standing permission, rather than an exception to a prohibition.
50. The Panel does not accept the reasoning of the Turkey Board. General orders should never be interpreted so as to create ambiguity and thus allow a commodity board to assert an interpretation of its choosing. Interpretations of general orders must give meaning and internal consistency to their various provisions.
51. Accordingly, on a plain reading of the General Orders relative to the appeal, subject to the two exemptions below, the Turkey Board cannot issue two or more quotas to one registered or non-registered grower nor to the same turkey production unit. The first exemption applies to allow a parent to enter into an exclusive lease with a child. In this case, the Turkey Board may allow more than one quota on a turkey production unit. The second exemption applies to allow a grower whose production unit is vacant for some period of the year to enter into an exclusive lease with another grower. In this case, the Turkey Board may allow two registered or non-registered growers to produce turkey on the same turkey production unit albeit at different times.
52. Thus, the Panel agrees with the Appellant and finds that the transfer of quota from Mountain View to 576336 contravenes the General Orders. The effect of the

transfer was to create two quotas on one production unit, which was expressly prohibited by the General Orders in question. The creation of an “exclusive lease” does not save the transfer as the lease is not for the production unit but rather for space within the production unit. As such, the lease does not fall within a proper interpretation of the exemption.

53. Having made this finding, and recognising the broad remedial discretion given to the BCMB under s. 8(9) of the *Act*, the Panel must turn its mind to consider whether there is any overriding public policy justification for not setting aside this transfer despite its contravention of the Turkey Board General Orders in effect at the time of the transfer.
54. The evidence regarding this transfer was that it was done for tax purposes. It is a paper transfer between companies owned by spouses, with the result of creating two “registered growers” while the factual reality has been that there has always been only one. Other than the loss of preferential tax treatment, no prejudice has been shown, particularly as it relates to the goals of sound marketing policy or the protection of innocent, arm’s length parties, to justify this Panel taking the unusual step of declining to remedy this illegality. The protection of innocent, arm’s length parties is, however, a factor that will be considered below regarding the Ralin quota transfer.
55. In allowing this part of the appeal, the Panel is aware that in April 2001, well over a year subsequent to the transaction and after the filing of this appeal, the Turkey Board amended its General Orders to specifically authorise two or more quotas for the same turkey production unit. The present appeal is about the legality of the Turkey Board’s actions under its previous General Orders. Those were illegal decisions and they remain illegal decisions today. The Turkey Board’s General Orders are not retroactive and they do not purport to “validate” earlier, unauthorised Turkey Board action. Illegality has consequences. The situation will remain illegal unless and until the transaction is undone.
56. If a lawful decision can be made under new General Orders, a fresh application must be made, and a new, considered decision must be rendered by the Turkey Board. We should add that while we do not formally rule on the point, it is not obvious to us that this transaction would necessarily be approved under the present General Orders. Arguably, the discretion to approve more than one quota per turkey production unit, and leasing of barn space, should be favourably exercised where a lawful marketing purpose can be shown. How the *Scheme’s* purposes are served by a transfer done purely for federal income tax purposes is not readily obvious. This may well be an issue to be considered by the BCMB in its supervisory capacity.

57. Accordingly, the Panel reverses the Turkey Board's decisions approving the transfer of 606,000 kg of quota from Mountain View to 576336 and approving the exclusive lease. The approvals are set aside and regulatory approval for them is denied. The result is that the transfer and the lease are illegal.

### **Transfers of Quota to Ralin**

58. The Appellant has also challenged the transfers of quota from Nicson and Maple Leaf to Ralin. In this case, Westview argues that Ralin did not own a suitable turkey production unit at the time it applied for the transfer of quota. The existing facility at 1839 Mt. Lehman Road required renovations, as it had not been used for poultry production for 25 years. Instead of renovating, Ralin immediately applied for approval of a year-to-year lease arrangement of the facilities at SpringMeadow Farms Ltd. ("SpringMeadow"). SpringMeadow (which, as noted above, was granted leave to intervene on this appeal) is a registered grower with 657,065 kg of turkey quota.
59. The Appellant takes issue with the Turkey Board's approval of this transfer and lease arrangement on a similar basis to the Mountain View transfer and lease. The General Orders relative to the appeal expressly prohibit two or more quota holdings on a turkey production unit. The General Orders also prohibit the renting, leasing or making available of space in a turkey production unit. As with the Mountain View transfer, the first exemption, where a parent can enter into an exclusive lease with a child clearly does not apply. The second exemption allows a registered grower to lease where the turkey production unit is vacant for some period of the year.
60. Given that the lease approved by the Turkey Board was again a lease of barn space not the turkey production unit, the Panel finds that this lease violates the terms of the General Orders.
61. There is a further problem with the Ralin/SpringMeadow lease, which highlights a serious internal inconsistency within the General Orders. Sections 4 and 7 of the General Orders target the exemption for an "exclusive lease", which is specifically defined in s. 1 of the General Orders as "an agreement between two registered growers whereby one provides barn space for the exclusive use of the other for a specified time period as required by the Board". [emphasis added] On this basis, at the time it applied to lease its quota, Ralin was not a registered grower; it was a non-registered grower in that its quota holdings were below the 65,000 kgs required to be a registered grower. Yet when one reads on within the exemptions, they appear to contemplate an exclusive lease – something which by nature applies only between registered growers – being entered into with an unregistered grower! How the Turkey Board, let alone an individual grower, is supposed to govern itself and achieve certainty with this language is not obvious. This is yet another example of bad drafting and internal inconsistency within the Turkey Board's General Orders.

62. Finally, looking to the transfer itself, it does not appear that the Turkey Board inquired into the status of the facilities at 1839 Mt. Lehman Road. Frontier Farms Ltd. (“Frontier”), a company of which Ray Nickel is President, owns this facility. Frontier does not appear to be a registered grower. Further inquiry may have led to the conclusion that attaching the quota to the Mt. Lehman property would result in a further violation of the General Orders. If in fact a registered grower does not own the property, Ralin and Frontier do not – even with the inconsistency referred to above – meet either the requirement that an exclusive lease be an agreement between two registered growers or the exemption which allows a registered grower (which Frontier is not) to lease to a registered or non-registered grower.
63. The Panel agrees with the Appellant. At the time of the transfer of quota, Ralin did not meet the requirements in the Turkey Board’s General Orders to provide the minimum space for the production of turkey. Ralin did not have adequate barn space and a lease of the property owned by Frontier would have been invalid, as it would not be a lease between two registered growers. In addition, the approved exclusive lease between Ralin and SpringMeadow was also invalid, as it also was not an agreement between two registered growers and it violated the express prohibition against two quotas on the same turkey production unit. As such the Turkey Board erred in approving the transfer.
64. Having found that the transfer of quota to Ralin was authorized in violation of the General Orders, and recognising the broad remedial discretion given to the BCMB under s. 8(9) of the *Act*, the Panel must consider whether there is any overriding public policy justification for not setting aside this transfer.
65. This was not a structured, non-arm’s length transaction for tax purposes. In this case, Ralin has expended a considerable amount of money acquiring quota from a company (Maple Leaf) at arm’s length. In addition, SpringMeadow and Ralin have incorporated a new company, Coligny Hills Farms Ltd. to produce this quota. They intend to develop a new farm to produce this quota in the “near future”.
66. The Panel is of the opinion that it would be unfair to Ralin to revoke the transfers of quota from Maple Leaf and Nicson at this late date. Ralin applied to the Turkey Board for approval of the transfer of two lots of quota. It should not be faulted for the Turkey Board’s error in approving the transfers of quota in violation of its own General Orders. It is not fair to penalise Ralin for the mistakes of the Turkey Board. Unlike the Mountain View transfer, this is not a paper transfer. Business decisions have been made and there has been reliance on decisions in an attempt to develop a new turkey production facility. Accordingly, although the Panel finds that this transfer of quota was contrary to the General Orders, the Panel is not prepared to revoke the transfer approval.

## **Broader Policy Considerations**

67. A number of Intervenor appeared before the Panel to argue in favour of preserving the ability to lease barn space and quota. It appears that despite the wording of the General Orders in effect at the time of the appeal, there are situations in which two or more growers use the same production facility and where one grower produces more than one quota from his production facility. It was suggested that approximately 25 of the 50 growers use one form of lease or another. It was further suggested that leasing of quota and barn space has been a practice within the turkey industry for the past 15 years.
68. Intervenor list various advantages, which accrue to them through the flexibility of leasing quota or leasing barn space. There are efficiencies associated with producing a larger numbers of birds at one time including reduced input costs such as heating, litter, feed transportation and handling of manure. It was also suggested that leasing of barn space allows growers to purchase quota and not incur the immediate expense of having to build facilities.
69. Many of the Intervenor argued that if Westview was successful with its appeal, there would be serious ramifications for the many turkey growers who lease quota or barn space.
70. The various submissions of the Intervenor are troubling, given that the General Orders as they stood at the time of the appeal expressly prohibited leasing of barn space and/or the issue of two or more quotas to the same grower or to the same production unit. The Intervenor are asking the Panel to preserve a status quo created in and by the industry when it was expressly prohibited and illegal under the Turkey Board's General Orders.
71. Given that the General Orders are the Turkey Board's own regulations enacted from time to time, it is hard to understand why the way the industry actually runs can be so at odds with the General Orders.
72. The purpose of general orders is to allow every producer of a regulated product to know the rules that apply. In the case of the turkey industry, the Panel is not satisfied that all growers know the ground rules, as all the rules are not contained within the General Orders. In the case of Westview, it too wanted to acquire the Maple Leaf quota. Before doing so, in accordance with the General Orders at the time, Westview built further barn space. Westview did not get the quota it sought. Ralin acquired that quota without barn space and then immediately leased the quota to SpringMeadow. While Westview does not take issue with another grower getting the quota, it does take issue with the fact that Ralin did not need to have the barn space required by the General Orders.
73. While certain growers may be aware of how the Turkey Board interprets its General Orders through past experience or through family connections, that is not how a



regulated commodity system is supposed to work. Rules should be clearly stated and apply equally to all.

74. As a result of the hearing of this appeal, the Panel has serious concerns about the manner in which the turkey industry has been regulated. These concerns are summarised below:

### **The General Orders**

- a) As a whole, the General Orders relative to the appeal are badly drafted. They are unclear and ambiguous. In some cases, amendments have been made and not identified as such in the consolidation. It appears that the General Orders have been amended frequently on an ad hoc basis with little thought as to how an amendment may impact other sections. In addition, amendments appear to have been very frequent, which leads to obvious questions about the adequacy of the General Orders in the first place.
- b) The General Orders appear contradictory. In some sections absolute prohibitions are set up only to be exempted in other sections, sometimes with duplication. Not only is this an issue with quota transfers and leasing as discussed in this decision but also with restrictions on total quota holdings. A person reading these General Orders would believe that the Turkey Board wanted to limit total quota holdings of families. However, the definition of related persons creates a situation where upon reaching the age of 19, a grower ceases to be “related” to parents, in-laws or siblings. What then is the purpose of a limit on total quota holdings?

### **Turkey Board Composition**

- c) The turkey industry is small, comprised of approximately 50 growers. A few families dominate the industry. In such circumstances, it is absolutely incumbent on the Turkey Board to be transparent and accountable. Conflict of Interest Guidelines must be implemented and strictly adhered to. During the course of the hearing, Turkey Board Chair, Shawn Heppell indicated the Turkey Board did not have Conflict of Interest Guidelines. This is incorrect. All commodity boards have conflict of interest guidelines established by the BCMB in April 1997. The fact that the Chair of the Turkey Board is unaware of these Guidelines may explain some of the apparent conflict of interest concerns evidenced in this hearing.
- d) One ready example of conflict was the approval of the Ralin quota transfer. Turkey Board minutes indicate the motion to approve this transfer was seconded by Ray Nickel’s father Walter. This is inappropriate. Not only should Walter Nickel not have seconded the motion, he should have recused himself from the item altogether.

- e) The fact that the Turkey Board Chair's quota transfer violates General Orders is also troubling. It is more troubling that the Turkey Board Chair and his brother were in violation of the General Orders (by operating two quotas from 1765 Lefevre Road) even before the appealed transfer was approved. People cannot be faulted for thinking there is at least the appearance of impropriety or favouritism.
- f) Given the size of the turkey industry and the degree of inter-relationship between growers, the Turkey Board must be fastidious in its concern for unbiased administrative decision making. The Turkey Board does not appear to be sensitive to this concern.

### **Leasing Policy**

- g) After reviewing the General Orders in depth, it is difficult to understand how the Turkey Board wants to regulate the industry, as a matter of policy. The General Orders say one thing: that except in very limited circumstances leasing is not allowed. The Turkey Board and the Intervenor say something quite different. They all argue: "maintain the status quo". That status quo for many of the Intervenor is leasing of barn space and leasing of quotas with little restriction. It is difficult to understand how the status quo for the Intervenor could develop at odds with the Turkey Board's General Orders. The Panel is at a loss to understand how growers who are not part of this group of long time growers would know what rules applied to regulated turkey production in BC. Clearly, the Turkey Board needs to be in a situation where its General Orders say what they mean, and mean what they say, for everyone.

### **Quota Policy**

- h) Another concern made very apparent on this appeal, is the closed nature of the turkey industry. A very few families control the industry. Families hold huge blocks of quota and transfers of quota and leasing of production units occur between very tight circles. The regulatory system appears to have been used as a barrier to ensure the financial success of a few to the exclusion of others.
- i) It is this closed nature of the industry that makes the existence of written and unwritten rules so troubling. All growers, not just a select few, should know what regulations apply to their operations.
- j) In addition, every grower should have equal access to quota. The insular nature of the industry requires fair and transparent quota transfer policies.

### **New Entrant Policy**

- k) The lack of a real new entrant policy is also troubling. The Turkey Board

maintains that a system, which allows sons and daughters of existing growers to acquire quota and lease barn space from a parent, is a valid new entrant program. By itself, this type of program only perpetuates the insular nature of this industry and acts as a further barrier to real new entrants.

### **Communication Policy**

- l) There was evidence before the Panel indicating that General Orders when amended are not circulated in a timely fashion amongst growers. The Turkey Board must work with its growers to ensure that growers are adequately informed in a timely and factually accurate fashion.

### **Governance**

- m) As mentioned above, in an industry as small as this, the failure to enforce a conflict of interest policy is troubling.
- n) Given the size of the industry, the Turkey Board should rely heavily on its Industry Advisory Committee to ensure that it considers the broader policy implication of its decisions.
- o) The status quo sought to be preserved by the Intervenors and the Turkey Board is indicative of a failure on the part of the Turkey Board to consider the needs of all its growers. Ad hoc interpretations of the General Orders, which appear to favour of Turkey Board members or their relations, add to the Panel's concerns.
- p) Evidence of sloppy record keeping is also a concern. Documents relied on by the Turkey Board in this hearing were often not dated. The very brief letters that the Turkey Board accepts as "exclusive leases" are insufficient to define the legal relationships between growers to ensure the Turkey Board can regulate the industry. The forms filed on transfer of quota do not provide the legal description of where the quota will be grown. Transfers of quota are made and leases granted before the original documents are in the possession of the Turkey Board.
- q) A further concern is the adversarial position adopted by the Turkey Board on this appeal. When confronted with the appeal, which on its face raised legitimate questions regarding the application of the General Orders to certain quota transfers, the Turkey Board applied to dismiss the appeal for being out-of-time despite having engaged in discussions with the Appellant to hear his concerns. The Turkey Board also applied to dismiss the appeal as being frivolous, vexatious or trivial, despite the clear and obvious difficulty raised in the appeal about whether its actions and General Orders were reconcilable. Finally, when it was apparent that this appeal would proceed, the Turkey Board under the guise of notifying the industry, delivered what amounted to a "call to arms". The Turkey Board put its own

characterisation on the Appellant's appeal, maintaining that if it was successful the Turkey Board would not be allowed to authorise the issuance of more than one quota to any grower or to any farm. (This of course is not the case given that the Turkey Board can always amend its orders to make its intention clear.) Taken together, and even recognising the reality that commodity boards have a broader role as full parties in BCMB appeals, all these factors reflect an unduly adversarial approach, which gave rise to the perception that the Turkey Board represents some but not all growers.

75. In light of the foregoing concerns, the Panel recommends that the BCMB acting in its supervisory capacity conduct a thorough review of the administration and regulations of the Turkey Board. Although the supervisory panel will be responsible for setting its own terms of reference, this Panel would recommend that at a minimum the issues identified in the above paragraphs should be addressed.
76. The Panel is aware that the Turkey Board enacted yet another set of General Orders on April 30, 2001. However, we are not assured that the Turkey Board in its new General Orders has adequately addressed all the fundamental concerns that underlie the issues raised above.
77. In the Panel's view, it is clearly time for a rigorous, thorough and independent review of the turkey industry and the rules that govern it. Pending the announcement of a supervisory review, current appeals of the Turkey Board's General Orders, including appeals based on the new General Orders enacted on April 30, 2001, are adjourned. Anyone with a current appeal is directed to raise his or her specific concerns to the BCMB in the context of the supervisory review. Failing resolution of their concerns through that process, any Appellant will be entitled to have their appeal heard by an appeal panel of the BCMB following the conclusion of the supervisory process.
78. There may be concerns about the business and economic impact of this review on turkey growers and their operations. Any review must take such concerns into consideration. However, turkey growers in British Columbia receive many benefits and protections from being part of a regulated marketing system. Along with these benefits and protections comes the responsibility of administering the *Scheme* in the public interest: see generally Madam Justice Southin, writing for the British Columbia Court of Appeal in *Money's Mushrooms Ltd. et al v. British Columbia Marketing Board et al* (July 9, 2001), Vancouver Registry (C.A.)

## **ORDER**

79. The appeal with respect to the transfer of quota from Mountain View to 576336 on January 6, 2000 is granted. The transfer and lease approvals are reversed.
80. The appeal with respect to the transfer of quota from Nicson and Maple Leaf to Ralin on April 20, 2000 is dismissed and the transfers are confirmed.

81. As to the issue of costs, the Turkey Board will pay the Appellant's costs of this appeal. In addition, in accordance with the BCMB's earlier *Skyacres* decision, *supra*, this Panel directs the Turkey Board pay the Appellant's costs, relative to the application to dismiss the Appellant's appeal as either frivolous, vexatious or trivial or out-of-time. As was held in the *Skyacres* decision, *supra*:

A commodity board should only make application to summarily dismiss an appeal in circumstances where an appeal is clearly and patently without merit. In our view, this appeal was not clearly and patently without merit.

82. As to the amount of costs to be paid, s. 8(11) of the *Act* provides as follows:

In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board.

83. Even though Counsel did not represent Westview, we direct the Turkey Board to pay costs to the Appellant calculated in accordance with Scale 3 of Appendix B to the Supreme Court Rules. Given that the Appellant was required to file a notice of appeal, seek disclosure of documents through the pre-hearing conference, defend an application to dismiss the appeal and prepare for and attend a one-day appeal, the Appellant is entitled to costs calculated as follows: 20 units x \$80 = \$1600 plus disbursements. This sum plus disbursements is payable forthwith by the Turkey Board. If the parties cannot agree as to the amount of disbursements payable, either party can apply to the Panel for directions.

Dated at Victoria, British Columbia this 27<sup>th</sup> day of August, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

Christine Elsaesser, Vice Chair

Karen Webster, Member

Satwinder Bains, Member

Doreen Hadland, Member