

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION CONCERNING THE ALLOTMENT
OF SPECIALTY PERMIT

BETWEEN:

JOHANNA VAN GINKEL

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine Elsaesser, Vice Chair
Mr. Harley Jensen, Member
Ms. Satwinder Bains, Member

For the Appellant

Mr. John Durham, Agent

For the Respondent

Mr. Jim Beattie, General Manager
Ms. Christine Rickson, Executive
Assistant

Date of Hearing

February 15, 2002

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION:

1. In August 2000, the British Columbia Chicken Marketing Board (the “Chicken Board”) enacted new Regulations. As part of these new Regulations, the Chicken Board created a New Entrant, Niche Market and Specialty Program (the “Program”).
2. On September 4, 2001, Johanna van Ginkel (the “Appellant”) applied to the Chicken Board in her personal capacity for a permit to grow 500-birds/week of specialty chicken under the Program.
3. By letter dated October 1, 2001, the Chicken Board declined to approve the Appellant’s application stating:

This permit program is designed for new entrants, Niche Market and Specialty Programs and one of the requirements is that permits can not be issued to applicants who own quota or who have transferred quota. (Part 43, Section 210 of BC Chicken Marketing Board) (sic) It was the decision of the board that you previously owned quota with your husband while doing business as Boothroyd Poultry.

4. By letter dated October 31, 2001, the Appellant appealed the Chicken Board’s decision to deny her a specialty permit to the British Columbia Marketing Board (the “BCMB”). In a continued attempt to obtain the specialty permit, the Appellant made further submissions to the Chicken Board. However, these efforts were unsuccessful.

ISSUE

5. Should the Chicken Board’s decision to refuse specialty permit in the amount of 500-birds/week to the Appellant be reversed?

FACTS

6. In 1962, the Appellant’s husband, William van Ginkel, acquired broiler quota and operated a broiler production unit at 5468 - 160th Street in Surrey, BC. In 1966, William van Ginkel transferred his quota to the newly incorporated Boothroyd Poultry Ltd. (“Boothroyd Poultry”). The majority shareholder of the company was Mr. van Ginkel with 9 shares; the Appellant, Johanna van Ginkel, had 1 share.

7. In September 1992, Boothroyd Poultry transferred its quota (19,290 kg primary) to Casey John van Ginkel (a grandson) with a 10-year lease on the production unit and property with an option to purchase. This type of arrangement was permitted under the Chicken Board's General Orders (1987), which allowed "related persons" to own quota and in the place of also owning a production unit, to hold a minimum 10-year lease with an option to purchase.
8. In 1995, on the death of William van Ginkel, his 9 shares in Boothroyd Poultry were transferred to Johanna van Ginkel.
9. Casey van Ginkel operated his poultry operation until April 20, 1995, when he transferred his quota holdings of 19,290 kg primary and 9,644 kg secondary to his cousin, Wes Vanderveen, another grandson of William and Johanna van Ginkel. Casey van Ginkel also transferred the 10-year lease with the option to purchase.
10. In January 1999, Wes Vanderveen transferred his quota to Wayne Reitsema, an unrelated party.
11. In July 2001, Casey van Ginkel approached the General Manager of the Chicken Board, Jim Beattie, regarding the possibility of obtaining a speciality permit. Either at that meeting or at some later date, Mr. Beattie discovered that as Casey van Ginkel had previously bought and sold quota, he did not qualify for a specialty permit in his name.
12. The Panel pauses here to observe that, in this context, the Panel heard troubling evidence in the form of a transcript produced by the Appellant from an earlier appeal: *Hong v. British Columbia Chicken Marketing Board*, heard on July 26, 2001. In that transcript, Mr. Beattie gave evidence on behalf of the Chicken Board. As justification for denying a specialty permit to Mr. Hong, Mr. Beattie pointed to other individuals who were actively pursuing opportunities within the specialty chicken program.
13. One such individual was Casey van Ginkel. Mr. Beattie indicated that he had encouraged Mr. van Ginkel to pursue a specialty permit. The point of Mr. Beattie's evidence was that the Panel of the BCMB hearing *Hong* should be disinclined to allow Mr. Hong's appeal for specialty permit production based on special circumstances when there were in fact other eligible individuals seeking the same opportunity. In the *Hong* appeal, Mr. van Ginkel's situation was referred to as "a perfect example of what the board intends" for its specialty program. It is understandable that Mr. van Ginkel was confused by the Chicken Board's change in position in his case. This change would undoubtedly have raised issues for Mr. Hong as well.

14. Mr. Beattie then raised the possibility of Johanna van Ginkel applying for a specialty permit. Mr. Beattie also encouraged Mr. van Ginkel to contact a local processor, Fairline Developments Canada (1992) Ltd. (“Fairline”) Ltd., as Fairline had a market for Buddhist chicken, a specialty chicken produced on vegetarian feed.
15. As a result of Casey van Ginkel’s discussions with Mr. Beattie and Fairline, his grandmother, the Appellant, applied for a specialty permit on September 4, 2001.
16. However, on October 1, 2001, the Chicken Board denied the Appellant’s application.
17. On November 14, 2001, the Appellant wrote to the Chicken Board to provide additional information regarding her status as a minority shareholder with Boothroyd Poultry at the time it held quota, and to request that the Chicken Board reconsider its decision. She wrote in part:

Boothroyd Poultry Farm Ltd. was incorporated in 1966 as the attached Register of Members indicates. After 8/1/66 the company was controlled by William Van Gingle (misspelled) who held 7 plus 2 shares. Johanna Van Gingle (misspelled) was a minority shareholder with 1 share. I did not acquire control of the company until after my husband passed away and his 9 shares were transferred to me on 01/23/95. Clearly, I was not in control of the company at the time chicken quota was transferred in 1992. The BCCMB General Orders (1987), which were in effect at the time of the 1992 quota transfer, recognize corporate ownership and corporate entities, and also recognize the reality of corporate control, see item 6(r). I therefore submit that I did not own quota in the past and should not now be penalized for being a minor shareholder.
18. On December 3, 2001, the Chicken Board met to reconsider its earlier decision regarding the Appellant’s request for a specialty permit. Casey van Ginkel attended this meeting to present a brief history of his family’s farm and to express his reasons why a specialty permit should be granted. After reviewing the Appellant’s letter and hearing from Mr. van Ginkel, the Chicken Board confirmed its earlier decision and denied the Appellant’s application for a specialty permit.

ARGUMENT OF THE APPELLANT

19. The Appellant seeks an Order from this Panel granting a permit to produce 500-birds/week under the Chicken Board’s New Entrant, Niche Market and Specialty Program. The prospective processor, Fairline, has a market for this production in Toronto and San Francisco.
20. In denying the Appellant’s application, the Chicken Board relied on s. 210 of its new Regulations (Part 43). Section 210 states that “[p]ermits will not be issued to persons who own quota or who have transferred quota”.

21. The Appellant argues that the Chicken Board is holding her to a higher standard than registered chicken producers. In the new Regulations, the Chicken Board allows producers who transferred a portion of their quota after September 9, 1997, to qualify for a pro rata share of new growth once transitional quota is converted to primary quota (s. 82). Under previous General Orders, registered producers who had previously transferred quota were excluded from sharing in future growth. Despite the increased flexibility shown to registered producers in the new Regulations, the Chicken Board is denying a similar opportunity to allow producers who have previously transferred quota to obtain a specialty permit. The Appellant argues that this is unfair.
22. The Appellant further argues that s. 210 does not apply to her circumstances. She has never held quota in her own name or been in control of a corporation when a decision was made to transfer quota. Rather at the time of the quota transfer, she was a minority shareholder in a corporation controlled by her husband. The corporation was the “person” who owned the quota and applied to have the quota transferred. The Appellant argues that she should not be considered a “person” within the meaning of s. 210.
23. The Appellant further argues that corporate control has been recognized in the previous General Orders (1987) in s.6(r) which provided:

If the control of a corporate Registered Grower which has been issued a Quota is transferred to a Related Person to whom a Quota has been issued, the Quota of the Corporate Registered Grower control of which has been so transferred, shall, to the extent that the same, together with the Quota held by the Related Person or Persons exceeds the Maximum Quota, be cancelled (sic).
24. Thus, the Appellant argues that as she was not in control of Boothroyd Poultry at the time of transfer, she should not be penalized now as though she was in control.
25. Further, the Appellant argues that there is an ambiguity within s. 210 where it refers to “persons who own quota”. Under the General Orders (1987) which came into effect when Boothroyd Poultry was a registered producer, all quota was and remained at all times the property of the Chicken Board. Therefore, the Appellant argues that Boothroyd Poultry did not own quota within the meaning of s. 210 and consequently did not transfer quota. Boothroyd Poultry held the licence at the pleasure of the Chicken Board and made application to the Chicken Board to transfer that licence to another party. The Chicken Board was the owner of the quota. The Appellant argues that given this ambiguity, s. 210 should be construed in her favour.

26. The Appellant also argues that it is unfair for the Chicken Board to rely on s. 210 to prevent her from holding a specialty permit when there are numerous other registered producers who have previously transferred quota who have specialty permit production. The Appellant points to Rob Donaldson of Bradner Farms who is now a permit producer but was a quota holder in the past. The Appellant also points to Outlander Poultry Farms Ltd. and Stamm's Egg and Poultry Services. Both appear to have owned and transferred quota and yet now hold specialty permits. The Appellant argues that if any of the current permit holders owned quota or still own quota, the Appellant should be granted a specialty permit as well. The Chicken Board's discretion should be applied uniformly and fairly.
27. Finally, the Appellant argues that the Boothroyd Poultry transfer was within the family (initially from grandparents to grandson, then from that grandson to his cousin). Under previous General Orders (1987), the Chicken Board gave special consideration to transfers within a family. The Appellant argues that similar special consideration should be given to the family transfer in this case. She should be entitled to a specialty permit of 500-birds/week especially since there is a market for this additional specialty chicken. The existing permit producers and quota holders do not meet the demand and additional production is required.

ARGUMENT OF THE RESPONDENT

28. By way of background, the Chicken Board argues that as a result of past Chicken Boards' avoidance of establishing a mechanism to supply specialty product to new processors, those processors built up specialty markets relying on permit production and non-regulated production. Unfortunately, not all the product marketed through so called specialty processors was specialty product. It was in fact normal broiler production marketed as a specialty product to get around the regulated system. As a result, there was significant growth in unregulated and permit production.
29. When the appointed Chicken Board took over in 2000, one of its tasks was to bring order to specialty production. The new Chicken Board felt that if it was to regulate chicken production, all chicken production, even that previously exempted, should be regulated. As the amount of specialty production was significant, approximately 800,000 kg/cycle, the Chicken Board felt that the unregulated production undermined the regulated marketing system.
30. In developing its new Regulations, the Chicken Board designed a mechanism whereby unregulated production could be brought into regulation. The new Regulations "grandfathered" those producers growing specialty chicken under the old permit program or without quota, on a one-time basis. These "grandfathered"

producers are the same producers referred to by the Appellant when she argues that producers exist who currently produce specialty chicken under permit but yet previously transferred quota. Once the Chicken Board dealt with the existing specialty production, they developed a mechanism whereby new producers could enter the chicken industry. There was pressure by both the Government and the public that supply-managed commodities, such as chicken, not be viewed as “an old boys network” which excluded new entrants. As a result, the Chicken Board removed the minimum farm size requirement and allowed for previously unregulated producers, and new producers, to apply for a 500-bird/week permit to allow for new market development and opportunities.

31. The Chicken Board argues that this new permit program is not without cost to the regulated industry. The issuance of small 500-bird/week permits impacts on the ultimate date that transitional quota (periodically allocated) held by registered producers in the province will be converted to primary quota (fully allocated). Thus, the issuance of permits to new entrants delays the date at which registered producers will receive a share of increased industry growth. The Chicken Board argues that while maintaining the New Entrant Program is important, one must weigh its impact on the registered producers in the province.
32. With respect to the Appellant’s application, Mr. Beattie recalls meeting with Casey van Ginkel in July 2001. It is his recollection that Mr. van Ginkel was seeking a specialty permit in his own name. However, it is also Mr. Beattie’s recollection that at some point he found out that Mr. van Ginkel had previously held quota and did not qualify for a specialty permit.
33. With respect to the Appellant’s application, Mr. Beattie denies any knowledge of her prior history with Boothroyd Poultry at the initial meeting. Mr. Beattie acknowledges that when it was determined that Mr. van Ginkel could not apply for a specialty permit, he recommended that Mr. van Ginkel apply for a specialty permit in the Appellant’s name and recommended that he contact Fairline.
34. Some time subsequent to that meeting, and after a Chicken Board employee, Mr. Hoven, had attended at the Appellant’s premises to measure the barns, Mr. Beattie became aware of the history involving Boothroyd Poultry’s prior transfer of quota. Given that the Appellant was a shareholder at the time of transfer, the Chicken Board was of the view that Mrs. van Ginkel did not fall within the guidelines for a specialty permit. She was not a new producer as she previously owned quota with her husband while doing business as Boothroyd Poultry, and as such was not entitled to apply for a specialty permit.

35. The Chicken Board argues that this interpretation and approach is consistent with the Chicken Board's prior new producer program of 1989 and 1994 which prevented persons who had ever held quota or related persons from participating in the program.
36. The Chicken Board argues that the Appellant is not precluded from entering the industry. The Chicken Board has removed any minimum farm size requirements and as such, if the Appellant wants, she can purchase a small amount of quota. Further, nothing precludes Casey van Ginkel from re-entering the industry by purchasing quota. If the New Entrant Program is going to be successful, it cannot be allowed to disrupt the chicken industry in BC. The Chicken Board argues that it is reasonable to impose some restrictions or criteria on who can participate in this program. Restricting access to persons who have previously transferred quota is not new. It is a reasonable approach to providing opportunities to achieve financial benefits.
37. The Chicken Board argues that this is not an issue of supplying processors with the product they require. There are opportunities for processors to get product from any number of producers. The Chicken Board's real concern here is not how product is made available to processors, but rather how growth is distributed amongst chicken producers in BC.
38. Finally, the Chicken Board argues that it came to a considered decision in denying the Appellant's application for a specialty permit. The BCMB should respect this decision.

DECISION

39. As noted above, the Chicken Board denied the Appellant's application on the basis that her application was prohibited by s. 210 of the Chicken Board's new Regulations. In its letter of October 1, 2001, the Chicken Board stated:

This permit program is designed for new entrants, Niche Market and Specialty Programs and one of the requirements is that permits can not be issued to applicants who own quota or who have transferred quota. (Part 43, Section 210 of BC Chicken Marketing Board) (sic) It was the decision of the board that you previously owned quota with your husband while doing business as Boothroyd Poultry.

40. The Appellant has made a number of arguments regarding the interpretation of s. 210. As one of those arguments is dispositive, it is unnecessary to address the others.

41. For convenient reference, the language of s. 210 is reproduced below:

210. Permits will not be issued to persons who own quota or who have transferred quota.

42. The Chicken Board has interpreted “person” to include Mrs. van Ginkel in her capacity as a minority shareholder in Boothroyd Poultry. The Chicken Board’s interpretation, in other words, has sought to “pierce the corporate veil”.

43. As a matter of law, corporations and shareholders are separate persons. This is why, when legislation seeks to pierce the corporate veil, it does so in clear and unambiguous terms. However, the Chicken Board’s new Regulations do not pierce the corporate veil with respect to the bar on applying for specialty permits. Instead, those Regulations define “person” in a way that maintains the separate legal personality of corporations and their shareholders. In Part 1 Definitions:

“person” means a person as defined in the *Interpretation Act* and includes

- 1) a partnership as defined in the *Partnership Act*,
- 2) any unincorporated organization that is not a partnership referred to in subclause (1), or
- 3) any group of individuals who are carrying on an activity for a common purpose and are neither a partnership referred to in subclause (1) nor an unincorporated organization referred to in subclause (2).

44. The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 states:

“person” includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law.

45. On the plain wording of the Chicken Board’s own Regulations, Mrs. van Ginkel is not a person who owns quota or has transferred quota. She never held quota. The quota in question was previously owned and transferred by another person: Boothroyd Poultry Ltd.

46. Section 210 of the Chicken Board’s new Regulations does not continue the reference to “related persons” that was contained in the previous General Orders. Nor does s. 210 seek to pierce the corporate veil, as other provisions in the same Regulations apparently seek to do: see Part 28 of the Regulations which deal with limits on existing quota holdings.

47. The Panel finds that the Chicken Board has committed a legal error in interpreting s. 210 of its new Regulations. As s. 210 was the basis for the Chicken Board’s decision, its decision must be set aside.

48. Having set aside the Chicken Board’s decision, the question then arises as to what remedy we ought to grant in the circumstances.

49. Consistent with the function the BCMB has historically exercised on appeals, and consistent with its express remedial power to “make another order it considers appropriate in the circumstances”, the Panel would not, having found such error, hesitate to resolve this issue on the merits. In the interests of resolving administrative appeals efficiently and with finality – the Panel would have determined whether, as a matter of sound marketing policy, Mrs. van Ginkel should receive the permit.
50. However, upon our review of the Supreme Court’s April 24, 2002 decisions in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board* (Vancouver Registry Nos. L012392 and L013023), the Panel concludes that this course is no longer open to us.
51. Had the Chicken Board understood that it had a discretion to exercise, it would presumably have exercised that discretion. How the Chicken Board would have exercised that discretion is difficult for us to predict. On one hand, it was Mr. Beattie who suggested that Mrs. van Ginkel apply for the permit as a separate person when it was determined that her grandson would be ineligible because he previously held quota. On the other hand, Mr. Beattie advanced arguments with reference to the reasons behind the Chicken Board’s previous General Orders regarding “related persons”.
52. Based on the Supreme Court decision referred to above, had the Chicken Board exercised its discretion, we would be required to “defer” to that discretion on the merits unless the outcome of that discretion was “unreasonable”. The Court stated as follows at page 13 of its reasons:
- The Provincial Board (BCMB) cannot impose what they think is fair. The Provincial Board, when exercising its appellate jurisdiction, must review for reasonableness when considering individual appeals from the application of rules upon individual circumstances.
53. While the BCMB has applied for leave to appeal the Court’s judgment, the Panel is bound by that judgment in relation to Chicken Board decisions unless and until the Court’s decision is reversed by a higher Court.
54. It follows from the Court’s decision that, despite the fact that this matter was fully argued before us in our capacity as a specialized administrative tribunal concerned with regulated marketing, the BCMB must first give the Chicken Board an opportunity to exercise its discretion rather than putting this matter to rest now based on the evidence and arguments before us. It seems that the only remedy we

may grant today is a remedy that will result in further expense and complication for the parties – namely, to remit this matter back to the Chicken Board for reconsideration. The Appellant may appeal to the BCMB again if it considers the Chicken Board’s decision to be (a) unreasonable, or (b) tainted by an error of “fact, law or procedure”.

ORDER

55. The appeal is allowed and the matter is remitted to the Chicken Board.
56. The Chicken Board is directed to reconsider Mrs. van Ginkel’s application for a specialty permit in accordance with these reasons.

Dated at Victoria, British Columbia, this 17th day of May, 2002.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine Elsaesser, Vice Chair

Harley Jensen, Member

Satwinder Bains, Member