

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY MJ FARM LTD. FROM A DECISION CONCERNING THE
CONVERSION OF SPECIALTY PERMIT

BETWEEN

MJ FARM LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Wayne Wickens, Panel Chair
Christine Elsaesser, Member
Honey Forbes, Member

For the Appellant:

John Giesbrecht
John Durham (agent)

For the Respondents:

Michael Stephens, Counsel

Date of Hearing

November 7, 2006

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The Appellant, MJ Farm Ltd. (“MJ Farm”) operated by John Giesbrecht, has been a specialty chicken producer in British Columbia since 1988. Up until 2000, MJ Farm’s specialty chicken was exempted from regulation by the British Columbia Chicken Marketing Board (the “Chicken Board”). However, in 2000 the Chicken Board enacted new policy rules which included, amongst other types of specialty chicken, the silkies produced by MJ Farm.¹
2. As a result of an appeal filed in respect of the August 15, 2000 policy rules, MJ Farm reached a mediated settlement with the Chicken Board in 2003 and received a specialty permit recognizing its demonstrated past production effective August 15, 2000. This permit became transferable after 6 years (August 15, 2006) and was to be converted to broiler quota after 12 years (August 15, 2012). The permit was attached to the farm property and was only transferable with a bona fide whole farm sale.² In exchange for the permit, MJ Farm was required to pay levies which were banked and after the expiration of 12 years were to be applied to the purchase of quota.
3. On September 1, 2005 the British Columbia Farm Industry Review Board (the “Provincial board”) issued its directions arising out of its specialty review. As part of its directions, the Provincial board directed all supply managed commodity boards to establish specialty quota to be used to service the markets for specialty production. To create consistency among the commodity boards, the direction required commodity boards with existing permit programs for specialty production to convert those to the new class of specialty quota.
4. The Chicken Board’s General Orders enacting these directions were approved by the Provincial board on January 23, 2006 and on March 7, 2006, MJ Farm along with 39 other existing permit holders had their permits converted to either mainstream or specialty quota depending on the nature of the chickens being produced. MJ Farm’s chicken fell within the definition of specialty chicken and therefore its permit was converted to specialty quota in the amount of 33,642 kg live weight (based on an 8 week cycle).
5. As with the other 39 producers, the allocation of quota was subject to a declining transfer assessment effective the date of issuance of the original permit, August 15, 2000. What this means is that should MJ Farm choose to transfer its quota, the transfer would be subject to a declining assessment over time (i.e. if there is a transfer in the first year, 100% of the quota is automatically retracted, subsequently

¹ Silkies have different physical characteristics from standard broiler chickens (including different coloured skin and meat, different texture, different uses). They take longer to grow and have a different diet. They are marketed almost exclusively to Asian consumers.

² Initially the permit program did not allow for transfer prior to the 12-year period conversion period. The Chicken Board changed its policy to allow permit growers a one-time whole farm transfer after six years,

the amount retracted declines by 10% per annum). The minimum assessment of 10% would be reached in year 10.

6. Mr. Giesbrecht was unhappy with the manner in which the new General Orders were applied to MJ Farm and as such he filed an appeal on June 19, 2006. The appeal was filed outside the 30-day limit but this time limit was extended by the Provincial board as it was satisfied that special circumstances existed to warrant such an extension. The appeal was heard on November 7, 2006.

ISSUE

7. Should the special circumstances associated with MJ Farm's mediated agreement entitle MJ Farm:
 - a) to an exemption from the declining transfer assessment such that it should either not apply or alternatively its effective start date should be 1988 and;
 - b) to the option of producing specialty or mainstream chicken (such that the quota could be sold as either mainstream or specialty quota).

DECISION

8. This appeal involves the issue of how an existing specialty chicken producer should be transitioned from the existing regulatory regime to a new regime and what impact the producer's individual circumstances have on how that transition is managed.
9. Mr. Giesbrecht acknowledges that MJ Farm is regulated by the Chicken Board and has received benefits because of regulation. He accepts the Chicken Board's decisions pertaining to the rebate of fees, payment of levies, and amount of specialty quota assigned to him. He does not argue that the directions arising out of the specialty review should not apply to him but instead argues that as a long time producer, the declining transfer assessment should not apply. The declining transfer assessment erodes the value of his operation. Even if he holds his quota beyond 10 years, he will be subject to a 10% transfer assessment and his quota will be worth 10% less than under his permit unless any transfer falls within an exemption (i.e. a transfer to direct family members or for business reorganizations where ownership percentages do not change). Neither exception is possible for Mr. Giesbrecht.
10. In the alternative, Mr. Giesbrecht argues that if a declining transfer assessment is applied, the start date should not be the effective date of his permit (August 2000) but rather should reflect his 18 years in business. The effect of using 1988 would be that, rather than currently being in year 6 with a 50% assessment, he would be beyond year 10 and only subject to a 10% assessment on any transfer. Mr. Giesbrecht advises that he intends to farm for another three or four years in order to minimize the impact of the declining transfer assessment.

11. The second part of Mr. Giesbrecht's argument is that the Chicken Board should exercise its discretion and allow MJ Farm to transfer its quota as either mainstream or specialty. This would return Mr. Giesbrecht to the position he was in when he entered his 2003 mediated agreement. In support of this argument he makes two points. Other permit growers upon transition to the new regime became regular broiler growers. Therefore, Mr. Giesbrecht argues that the Chicken Board has been flexible to other growers in the permit conversion. Further, during the time MJ Farm was a specialty producer under permit, Mr. Giesbrecht paid permit fees as consideration for the eventual acquisition of mainstream (not specialty) quota.
12. Mr. Giesbrecht argues that the acquisition of mainstream quota figures largely in his retirement planning which includes the ability to sell mainstream quota as an entity separate from the other assets of the operation. He argues that this is especially significant for him as there is a possibility that his land may be expropriated for an airport expansion project, thereby jeopardizing his ability to sell his operation as a going concern. He planned his future on the known value of mainstream quota and not on the current unknown value of specialty quota.
13. In response to the Appellant's arguments, the Chicken Board argues that in coming to its decision to enact new General Orders it was simply implementing the September 2005 directions of the Provincial board. Once it was established that MJ Farm's production was specialty chicken, as defined in Part 1 of its General Orders, there was no discretion but to convert the permit to specialty quota and apply the declining quota assessment. As for the start date of the assessment, the Chicken Board argues that the Provincial board's directions were incorporated into Part 36.6 of the General Orders:

The starting point for the declining transfer assessment is:

- a. In the case of quota issued in respect of permit conversion, the date established by the board after consultation with the former permit holder, such date to be not earlier than the date on which the permit was issued and not later than the date on which the quota was issued; or
- b. In the case of all other quota issued after September 1, 2005, the date the quota was issued.

Using this criterion, the Chicken Board established the start date of August 15, 2000, the effective date of MJ Farm's permit.

14. The Chicken Board also argues that MJ Farm's pre-permit production was taken into account in the granting of the original permit. MJ Farm received substantially more permit production than new entrants with no prior production.
15. In response to Mr. Giesbrecht's argument that he be able to transfer his quota as mainstream quota, the Chicken Board argues that this would limit his ability to sell his operation as a going concern (i.e as a specialty producer). A purchaser would require specialty quota in order to service the specialty market. Under the new rules, unlike with the old permit system, a producer can not use mainstream quota to produce specialty chicken nor can a specialty producer produce conventional

broilers.

16. As for the permit fees paid by MJ Farm, the Chicken Board argues that the permit fees were not paid on account of an offer to purchase quota but rather were fees paid for the right to produce. The fees fall far short of the price of quota in the open market but are larger than required to administer the permit and, in that regard, were intended to demonstrate a bona fide intention by the producer to work towards the acquisition of quota through a production permit.
17. In order to fully understand the arguments of the parties it is important to understand the policy framework out of which this appeal arises. There are five supply managed commodities in British Columbia, chicken, milk, turkey, broiler hatching eggs and eggs. Regulated producers require quota in order to sell the regulated product into the market place. Historically, there have been unregulated producers operating outside the regulated system supplying specialty and niche type markets. There has long been a struggle as to if, and how, regulation applied to these specialty producers. Over time commodity boards developed different programs to try and bring some form of regulation to the specialty sector with varying levels of success.
18. MJ Farm was one such producer. For many years, MJ Farm produced silkie chicken, developing its own market. Historically, the Chicken Board exempted this production from regulation under the British Columbia Chicken Marketing Scheme, 1961. Over time, the Chicken Board became aware that some so called specialty producers were in fact circumventing the regulated system and producing conventional broilers under the guise of non-regulated production. In order to restore order to the system, the Chicken Board enacted new policy rules in 2000 to include all chicken production. In order to transition non-regulated producers to the new permit system, the Chicken Board grandfathered existing producers at their proven production levels. It was through this process that MJ Farm received its permit.
19. In September 2005, the Provincial board issued general directions to the five supply managed commodity boards. These directions followed a two year review by the Provincial board and the Ministry of Agriculture and Lands concerning how specialty production, new entrant and quota programs were to be administered by the five boards. The boards were required to draft orders in compliance with the general directions and submit their orders to the Provincial board for review and prior approval before implementation. Commodity boards were advised that their specialty and new entrant submissions were assessed on certain principles, the following of which are key to this appeal:

Production and Marketing Quota

- g. Specialty classes of quota are to be designated. Each class of quota should be managed separately from other classes of quota. Quota administration policies should be similar for all classes with exceptions only when necessary.....

- i. Existing specialty permit programs are to be converted to quota of a class applicable to the type of product produced, except in the case of small lot programs (see below)). Production volumes recognized for quota should be equal to the permittee's production in the twelve months ending December 2004, or the nearest applicable quota period ending after December 2004.....

Quota Transfer

- q. New quotas issued through permit conversion, specialty program establishment and new entrant programs are to be subject to license conditions, including a declining transfer assessment schedule.
 - r. The assessment schedule should provide for 100% of the issued quota to be automatically retracted (i.e. non-transferable) in the first year following issuance if the producer ceases production or purports to engage in commercial quota transfer. Subsequently, the amount retracted declines by 10% per annum until it reaches a minimum assessment of 10% in year 10. Transferability, therefore commences in year two, at 10% of the quota allocation and increases by 10% per year, until it reaches 90%.
 - s. The starting point for the declining transfer assessment schedule should be the date on which the new quota was issued, or in the case of permit conversion, a date reasonably established between the Board and the permittee....
 - u. Exceptions to transfer assessment for all classes of quota are to be permitted only for transfers among direct family members, defined as spouse, sons, and daughters; and for business reorganizations where the ownership percentages do not change.
20. The Provincial board had an expectation that all supply managed commodity boards would develop their new policies in accordance with the September 2005 directions. However, the Provincial board did recognize that certain details would need further discussion and some adjustments would need to be made. Boards were advised to monitor whether and to what extent the proposed changes were achieving their policy objectives, and to consider amendments as appropriate. Thus, while the Provincial board had an expectation that its principles would be applied by the commodity boards, individual commodity boards were expected to fine tune the principles to their respective industries.
 21. On May 30, 2006, the Provincial board wrote to all the commodity boards to provide an update on the on the specialty review. In that letter, the Provincial board clarified the rights of appeal as follows:

The terms of commodity board orders which have been issued as a result of the supervisory directions FIRB issued in September 2005 cannot be appealed to FIRB. However, persons do have a right to appeal to FIRB their own special circumstances or other issues related to the administrative implementation of a commodity board's orders (where a board has exercised its discretion and makes an independent decision as to how a FIRB direction will be implemented or applied).
 22. Looking now to the circumstances of the appeal, the Appellant argues that as a long time specialty producer he should either not be subject to the declining transfer assessment or alternatively the assessment should reflect his business start date in

1988 to minimize its impact. The Chicken Board argues that as it was directed by the Provincial board to convert all permits to quota subject to a declining quota assessment, there is no independent exercise of discretion by the Chicken Board upon which to base an appeal.

27. The Panel agrees with the Chicken Board on this point. To the extent that the Chicken Board was ordered by the Provincial board to convert permits to quota and impose a declining transfer assessment, these decisions are not independent exercises of discretion of a commodity board and cannot be appealed. The reasoning of our predecessor, the British Columbia Marketing Board in *Salmon Arm Poultry Farm Ltd. Et al. v. British Columbia Egg Marketing Board*, April 3, 2001 is equally applicable to this case.
28. However, that does not dispense with the issues on this appeal. It remains open to the Appellant to argue that the Chicken Board erred in not considering any special circumstances unique to MJ Farm which as a matter of fairness would require an exemption from the application of the General Orders in this case.
29. On this point Mr. Giesbrecht points to several factors. He has been a specialty producer since 1988. He had a mediated settlement with the Chicken Board which granted him a permit effective August 2000 to cover his past production. Up until 2005, he paid levies on account of quota and according to the terms of the permit, after 12 years he was to receive mainstream quota. He argues that it is unfair to void the mediated settlement and impose a different, less attractive arrangement.
30. Looking at this assertion of unfairness or prejudice, we turn to a consideration of the mediated settlement with the specialty permit conversion. Under the new regime, MJ Farm receives specialty quota now and pays a declining quota assessment upon transfer of quota. The assessment would be 40% in 2007 declining 10% per annum to a minimum assessment of 10%. Any levies now payable are for administrative purposes only and not for the right to produce. Under the mediated agreement, MJ Farm had a non-transferable permit, which became transferable in a whole farm sale after 6 years and converted to broiler quota after 12 years. During the term of the permit, levies were payable on account of this right to produce.
31. The Panel is not satisfied that Mr. Giesbrecht has established that special circumstances exist sufficient to warrant exempting him from the new regime. A basic principle behind the specialty review was servicing and developing the specialty market place. To give certainty to these producers, existing permit programs which were in the main non-transferable were replaced with specialty quota that was transferable although subject to a declining transfer assessment. The intent of the assessment was to provide a source of quota to allocate to new entrant programs thereby strengthening the industry as a whole. The significance of this decision can be seen when one realizes that all quota transfers are now subject to an assessment on transfer unless that transfer fits within certain narrow exceptions

(certain transfers within families and business reorganizations).

32. The second point Mr. Giesbrecht raises is that any quota he receives should be mainstream quota as that was what was negotiated in the mediated agreement. A couple of points should be made. In 2000, there was only one type of quota. Under the new regime, specialty quota has been created in order to ensure that specialty markets are protected and serviced. To allow MJ Farm, a specialty producer, to transfer its quota as mainstream would defeat the central purpose behind the specialty review to ensure that specialty markets are serviced.
33. The argument that other permit producers were granted regular and not specialty quota does not assist Mr. Giesbrecht's argument on this point. Prior to converting permits to quota, the Chicken Board looked at what type of production was being produced under the permit. In order to ensure that market needs were met, someone producing regular broilers under permit was granted regular broiler quota while those producing specialty birds received specialty quota. The Chicken Board's focus, rightfully in our view, was on ensuring the market is serviced not ensuring the maximum return to a producer speculating on quota value.
34. Mr. Giesbrecht argues on this point that his retirement plans were contingent on him having broiler quota to sell independent of his farm which may be expropriated. He says broiler quota is more marketable and at least at this point in time receives a higher price in the market place. These arguments are really centered on Mr. Giesbrecht's desire to maximize his financial return upon exiting the industry and have little to do with servicing the specialty market. As such this argument does not assist Mr. Giesbrecht in establishing special circumstances sufficient to warrant an exemption from the new regime.
35. Taking these arguments at face value it would appear that the remedy Mr. Giesbrecht seeks is the right to "cherry pick" the most beneficial aspects of the old and new regimes. There is nothing in the evidence before us that would lead us to bestow such special status on him. Users of a regulated system are subject to rules and users must expect these rules to change over time. The specialty review was extensive; input from all industry stakeholders was sought and considered over a two year period. The resulting orders enacted by the commodity boards are the rules under which those within the system must now abide. Needless to say, whenever there are regulatory changes there are perceived winners and losers. Changes that benefit the industry as a whole may be less beneficial for an individual, however, that fact in and of itself is insufficient to warrant ad hoc exceptions to those rules.
36. The Panel agrees with the Chicken Board decision that MJ Farm as a specialty producer with a permit falls within its General Orders. As such the Chicken Board did not err in converting MJ Farm's permit to specialty quota subject to a declining transfer assessment. Further, the Panel finds no special circumstances exist sufficient to set aside the decision of the Chicken Board regarding the start time for

the declining transfer assessment. MJ Farm has been treated fairly by the Chicken Board. In the years prior to its permit, MJ Farm received the benefits of revenues from its production. At the time of conversion to permit, historical production levels were recognized and grandfathered. In response to concerns about an exit strategy from the industry given his age, special consideration was given to Mr. Giesbrecht to allow his permit to be transferable in a whole farm sale. The conversion of that permit now to specialty quota subject to a declining transfer assessment is fair especially when one realizes that transfer assessments are now the norm irrespective of whether a producer is mainstream or specialty. Further, while historically the MJ Farm operation had value through sale as a going concern or, after 2000, through a whole farm permit transfer it now has quota, a transferable asset separate from the farm. It represents a significant benefit to MJ Farm achieved from a relatively short period of participation in the supply management system.

ORDER

37. The appeal is dismissed.
38. There will be no order as to costs.

Dated at Victoria, British Columbia this 1st day of March 2007.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(original signed by)

Wayne Wickens, Panel Chair
Christine Elsaesser, Member
Honey Forbes, Member