

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION
CONCERNING A CANCELLED QUOTA EXCHANGE

BETWEEN

ALLAN CROSS

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Sandra Ulmi, Panel Chair
Christine Elsaesser, Member
Dave Merz, Member

For the Appellant:

Allan Cross

For the Respondents:

Robert Hrabinsky, Counsel

Date of Hearing

September 12, 2006

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The Appellant, Allan Cross, is appealing the decision of the British Columbia Egg Marketing Board (the “Egg Board”) to cancel the Quota Exchange in which he was a successful bidder.
2. Quota is the key underpinning of supply management regulation. The nature and finite supply of quota has meant that it has become very expensive to acquire in the marketplace despite the legislative prohibition on commodity boards assigning value to it. In British Columbia, egg quota can transfer either privately or through the Quota Exchange. In a private transaction, a prospective purchaser negotiates mutually acceptable terms with a prospective seller. The transfer is subject to the approval of the Egg Board and an assessment whereby it retains 5% of the quota transferred to fund the new entrant program.
3. Producers may choose to transfer quota on the Quota Exchange, a public tendering process administered by the Egg Board for the cancellation and allotment of quota. A producer directs an “Offer of Quota” to the Egg Board publicly expressing an offer to cancel a specified number of quota units upon receipt of a minimum sum per quota unit. The “Bid to Receive Quota” is similarly directed to the Egg Board and publicly expresses a willingness to pay a maximum sum per quota unit for a specified number of quota units. In order to promote its use, the Egg Board does not take a 5% assessment on transactions completed on the Exchange.¹
4. Mr. Cross submitted a “Bid to Receive Quota” to the Egg Board on March 20, 2006 for the March 22, 2006 Quota Exchange; his bid was accepted. In the ordinary course, conditional approval would be given by the Egg Board in its next meeting after the Quota Exchange and final approval would follow the meeting after that. In this case, Mr. Cross’s bid received conditional approval. However, the Vendor wanted the effective cancellation date of the quota to be October 2006. Mr. Cross was in agreement with the delayed transfer date. The Egg Board denied the request to delay final approval of the quota transfer and in accordance with the Quota Exchange rules considered the application at its May 3-4, 2006 meeting.
5. Mr. Cross did not submit his bid monies to the Egg Board in advance of this meeting and as such the Egg Board rescinded its conditional approval of the quota transfer and the March 2006 Quota Exchange collapsed.
6. Mr. Cross appealed the decision of the Egg Board to cancel his quota transfer. The matter proceeded to hearing on September 12, 2006.

¹ The Egg Board Standing Order was amended August 16, 2006; now transfers on the Quota Exchange are subject to the 5% transfer assessment. Section 9(t) requires all producers wishing to sell quota to go through the Provincial Quota Exchange; the 5% assessment applies to all quota transfers except transfers between direct family and business reorganization where ownership percentages do not change: s. 9(i).

ISSUES

7. Did the Egg Board err in imposing a 45-day limit for the approval of Mr. Cross's quota exchange?
8. Did the Egg Board change its rules during the time frame of Mr. Cross's application?
9. The Appellant has set out the following grounds:
 - a) He entered into the Quota Exchange in good faith and followed all instructions provided by the Egg Board.
 - b) The Egg Board declined the subsequent quota transfer application with no reasons given.
 - c) The Quota Exchange rules were changed after Mr. Cross had entered the process requiring completion of the financial transaction within 45 days. The Egg Board was aware that a quota transfer of such size is never completed within that time frame and that it is totally impractical to do so.

BACKGROUND

10. Mr. Cross owned and operated a broiler hatching egg operation for thirteen years in partnership with his spouse. Prior to that, he managed a turkey farm, worked as a feed salesman and was the Fraser Valley Agricultural Manager for the Canadian Imperial Bank of Commerce for four years.
11. In 2005, Mr. Cross decided to sell his hatching egg operation and get into the layer business. He became aware that Mr. Veeken, a layer producer in Prince George, was planning on retiring. In February 2006, Mr. Cross and his wife went to Prince George to visit the operation of Veeken's Poultry Farm Ltd. ("Veeken's"). Mr. Cross decided not to purchase this operation and instead decided to wait until Mr. Veeken's quota went on the Quota Exchange.
12. The Quota Exchange was created in 2001 to "raise the confidence of the public that the right to produce is available equally to all persons who are prepared to enter the industry as well as address concerns of producers, especially in the regions who do not always have access to information regarding quota transfers"². Since 2001, there have been only two transfers of small lots of quota on the Quota Exchange. According to the Standing Orders of the Egg Board, quota cannot be transferred from the Interior to the Fraser Valley until it has been offered for sale at least twice, within its region, on the Quota Exchange.
13. On March 20, 2006, Alan and Shelly Cross submitted a bid for the March 22 Quota Exchange to receive 38,392 quota units at a maximum price of \$216.00 per quota

² Excerpted from a May 14, 2001 letter from the Chair of the Egg Board, David Taylor to all registered producers.

unit. On March 21, 2006, Veeken's offered 38,392 quota units to be cancelled upon payment of at least \$215.00 per quota unit. On March 22, 2006, the Egg Board's agent, the accounting firm KPMG, reported on the results of the exchange to Veeken's, Elkview Enterprises Ltd. ("Elkview"), and Allan and Shelly Cross. The Cross bid was successful for 33,203 quota units. Elkview was the successful bidder for the balance of 5189 quota units.

14. Prior to acquiring quota, Mr. Cross had to sell his home and farm, acquire property and build new barns to accommodate the layer operation; all of which takes time. He approached Mr. Veeken to propose an October 2006 closing date if his bid was accepted. Neither Mr. Veeken nor Mr. Cross thought there would be a problem with an October 2006 date for final approval as both parties were in agreement. By letter dated April 10, 2006, Alan and Shelly Cross and Mr. Veeken requested a delay of final approval of the transfer until October 2006. On April 13, 2006, the Egg Board advised both parties that conditional approval for the quota transfer had been granted, that their request for a delay of final approval until October was denied and final approval would be considered at the Egg Board's May meeting. As Mr. Cross did not forward payment to the Egg Board in advance of this meeting, the Egg Board rescinded the conditional approval previously granted and the transaction was collapsed.

DECISION

15. The first issue to be considered is whether the Egg Board erred in imposing a 45-day limit for the approval of Mr. Cross's quota exchange. To be clear, the Egg Board's Quota Exchange Policy does not refer to 45 days. The idea of 45 days originates from the timing of the Egg Board approval process which is conditional in the first meeting held after the Quota Exchange and finalized in the next meeting. Given that the Egg Board holds monthly meetings, roughly 45 days passes between KPMG advising the successful bidder and the final approval of transfer by the Egg Board.
16. Policy #9 of the Egg Quota Exchange Policies and Procedures states:

....At its monthly meeting, the Board will receive the results of the Exchange for that month, and, subject to BCEMB Standing Order it will pass and give conditional approval. At the following Board meeting and upon payment it will pass a final approval resolution to allot quotas to the successful bidders and cancel the quotas of the successful sellers.
17. Mr. Cross argues that this policy does not *require* final approval resolution at the following board meeting; it allows for final resolution *if* the criteria are met. He argues that this policy merely means that approval will occur at a board meeting and that payment must be made before final approval. He argues that such an interpretation does not conflict with the wording of Policy #9.
18. Mr. Cross also argues that the Egg Board's acceptance of his Letter of Credit from Farm Credit Canada, which he submitted with his Bid to Receive Quota and which

was valid until December 15, 2006, is evidence that the Egg Board understood his situation and should have known that final approval for his quota bid would be in the fall of 2006. Mr. Cross also called Pat Baker who is involved with agricultural financing with Farm Credit Canada. Mr. Baker confirmed that he had multiple conversations with Mike Gillanders, controller with the Egg Board, regarding the terms of the revocable letter of credit. It is Mr. Baker's view that Mr. Gillanders was aware that Alan and Shelly Cross's purchase of quota was predicated on the sale of their broiler breeder farm.

19. Mr. Cross points out that the Egg Board does not always follow its Orders to the letter. He points to the Egg Board Standing Orders s. 9 (d) which states:

When considering an application for transfer or purchase of quota or for the issuance of permit, the Board shall take into account the experience in the egg industry of the applicant concerned and shall also take into account the conditions under which the applicant proposes to finance the Egg Production Unit or Quota concerned.

20. Mr. Cross noted that the Egg Board did not ask him any questions about his experience in the egg industry or the particulars of his financing. He says that on the one hand, the Egg Board says its rules must be followed and on the other hand, the Egg Board ignores its rules. Mr. Cross argues that in this case a flexible approach should be used to interpret Policy #9 to reflect what he was trying to accomplish and also what the Egg Board knew he was trying to accomplish and expressed no exception to in first instance.
21. In response, the Egg Board argues that the details of the Quota Exchange including the timing of the conditional and final approvals are set out in the information package given out in response to inquiries and on the Egg Board website. When Mr. Cross submitted his Bid form, he certified that he had read and understood the provisions of the Regulations and Directions pertaining to the Quota Exchange. Similarly, Mr. Veeken also certified that he had read and understood the Regulations in his Offer form.
22. The Egg Board argues that if Mr. Cross wanted a different closing date than the one specified by the Egg Board's rules, his option was a private transaction where Vendor and Purchaser negotiate an agreeable closing date or any other mutually desirable terms. Unlike a private transaction, the Quota Exchange is a public contest between offerors and bidders. It is meant to accommodate anonymous transactions which close on the date of the Egg Board's final approval. Further, the Egg Board maintains that a term delaying closing date could have been added to the Veeken's Offer of Quota, thus making the condition known to all potential bidders. Just as the Veeken's Offer of Quota imposed a term that the entire quota be purchased in order for the transaction to be successful, a similar term could have set the closing date in October 2006. In this way, all bidders would have known all the conditions of the offer. Without an express condition stating otherwise, the Egg Board must follow the rules in place. The Egg Board states that common law imposes a legal obligation to treat all bidders fairly and equally in order to preserve

the integrity of the bidding process.

23. The Egg Board relies on *Martel Building Ltd., v. R.*, [2000] 2 S.C.R. 860, in which the Supreme Court of Canada summarized the general principles as follows:
 88. ...Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.
24. The Egg Board also notes that the other successful party in the Quota Exchange, Elkview, had a reasonable expectation that the final approval for the quota transfer would occur at the May meeting. Since the condition of Veeken's offer was that all quota was to be sold or none of it would be sold, delaying final approval would have unfairly penalized the other bidder Elkview who was not privy to this term.
25. The Egg Board also argues that on a purely practical level, Mr. Cross and Veeken's could have made private arrangements to accommodate the quota transfer after the successful closing of the Quota Exchange. Veeken's could have leased back the farm from Mr. Cross until his barns were in place and ready to go into full production.
26. Finally, the Egg Board disagrees with Mr. Cross's argument that the fact that it did not question him about his background in the egg industry can influence the interpretation of Policy #9. The Egg Board was aware of Mr. Cross and his experience in the industry and had no reservations about him purchasing quota and starting a layer operation. The purpose of Standing Order s. 9(d) is to allow the Egg Board to inquire about the source of financing to ensure that feed companies are not financing layer operations.
27. The Panel finds that the purpose of the Quota Exchange is to create a public tendering process administered by the Egg Board for the cancellation and allotment of quota. We agree with the Egg Board that to maintain the integrity of the Quota Exchange, the Egg Board must follow the Quota Exchange Policies and Procedures to ensure that all bidding parties are treated equally and fairly and know what to expect when they make a bid. Keeping in mind this purpose and looking at the plain meaning of Policy #9, the Panel accepts the interpretation that conditional approval would be given by the Egg Board in the next meeting after the Quota Exchange and final approval would follow in the meeting after that provided that payment has been made. This interpretation ensures a process where there is no uncertainty as to amount of quota purchased, price and by virtue of the conditional and final approval process, completion date.
28. Mr. Cross's interpretation of Policy #9 is that final approval comes after payment such that there is no finite limitation on when the transfer would be approved. This interpretation would result in bids from the Quota Exchange being outstanding for

indefinite periods of time awaiting final payment and an Egg Board meeting. In such a system, there is no certainty as to completion and it remains at the whim of the bidder; clearly an untenable situation. Given that quota values fluctuate over time, a bidder not knowing that a vendor was prepared to delay the transfer of quota would have difficulty in assessing market price. The Panel finds that this interpretation is at odds with the purpose of the Quota Exchange where certainty and fairness to the parties are paramount.

29. Had the Egg Board allowed Mr. Cross to defer final approval, the Panel finds that this would have been a material change to the conditions upon which others bid or considered bidding. However, had the transfer date of October been noted on the Offer form, all bidders would have been equally aware of the conditions and made their decisions accordingly. In a public bid process it is incumbent on bidders and offerors to expressly state the conditions attached to a bid or offer. The Egg Board cannot be expected to administer a program where bidders and offerors have unexpressed conditions or side deals. To do so would render the whole process unfair and a sham and allow the Quota Exchange to be a vehicle whereby parties crafted whatever deal they wanted under the guise of a Quota Exchange purely as a mechanism to get around the 5% assessment of quota.
30. The Panel understands that Mr. Cross would like to have the Quota Exchange rules applied with the same leeway used with Standing Order s. 9(d). However, no prejudice falls to Mr. Cross by the Egg Board choosing not to question him about his financing arrangements. Had they turned down Mr. Cross as a quota applicant, he may have been able to take issue with the Egg Board's failure to consider his past industry experience. The fact that the Egg Board did not interview Mr. Cross yet still found him to be a worthy candidate to hold layer quota is fair to Mr. Cross. Likewise fairness dictates that the Egg Board act consistently in interpreting rules and procedures; it cannot change its interpretation relating to the Quota Exchange depending on the wishes or needs of the parties involved. To do so would be to ignore the reasonable expectations of those who bid or did not bid based on the circumstances as they understood them.
31. Mr. Cross argued that a transaction of this magnitude could never be completed within the Egg Board's time frame and that such a tight time frame discourages large transactions from successfully using the Quota Exchange and as such discriminates against larger producers. The Egg Board acknowledges the difficulty in completing large transactions on the Quota Exchange and recognizes that the Quota Exchange was intended for transfers of small lots of quota. The usual course is for large transfers of quota to be done through private arrangements so that both parties can accommodate their respective timelines relating to production, property acquisition and barn construction. This option was open to Mr. Cross however to do so meant the transaction would be subject to the 5% assessment.

32. The Panel recognizes that this time frame of approximately 45 days is difficult for a large business transaction such as the one attempted by Mr. Cross. However, the Panel is not persuaded that the Egg Board erred in denying Mr. Cross's request for a delay in final approval. Fairness dictates that the Egg Board follow the Quota Exchange Policies and Procedures so that all persons who have read those policies know with certainty exactly what the rules are and how they will be administered. Further, as mentioned earlier, Veeken's could have publicly disclosed a later closing date so that all bidders were aware of the condition prior to making their bids. By so doing, the obligation of fairness would have been met as there would be an even playing field amongst all bidders.
33. Mr. Cross attempted to establish through the evidence of Mr. Baker that the Egg Board knew that the quota transfer could not complete within the time frames set out in Policy #9 on its strict interpretation. The Egg Board knew that Mr. Cross would require until October to sell his farms and get his financing in place yet did not make any concerns known to him. In the Panel's view, the evidence of both Mr. Cross and Mr. Baker falls short of demonstrating any representations were made by the Egg Board that the quota transfer would be approved if left outstanding until October. Mr. Baker agreed that his concern in talking to Mr. Gillanders was to manage risk on the part of Farm Credit Canada in issuing a letter of credit. He was very concerned about the wording of the conditions in order to protect Farm Credit from having to pay out any of the \$829,267.20 secured by the Line of Credit should the transfer not occur. Further, Mr. Baker had no prior experience with this Quota Exchange and was unfamiliar with its rules. He was unaware of the timelines set out in those rules and it does not appear that he discussed the specifics of any timelines with Mr. Gillanders.
34. The plain meaning of Policy #9 is that a successful quota transfer will be approved within approximately 45 days of the Exchange. Mr. Baker offers insight into why on the face of these rules, Mr. Cross opted to enter the March Quota Exchange when he needed several months to sell his hatching egg operation and build a layer operation. Mr. Cross expressed a concern to Mr. Baker that the rules around quota transfers were going to change and that all quota transfers may soon be subject to an assessment. The Panel takes this as further confirmation that what transpired here was an attempt by Mr. Cross to interpret Policy #9 so as to allow a private deal with terms favourable to his particular financial situation on the public Quota Exchange for the sole purpose of avoiding the transfer assessment.
35. The Panel is satisfied that Policy #9 is clear on its face and as such, this aspect of the appeal is dismissed.
36. The second issue to be considered is whether the Egg Board changed its rules during Mr. Cross's application. Mr. Cross argues that he followed the application process carefully and thoroughly and was told that he would have adequate time to complete the transaction if he was successful in his bid. He argues that the Egg Board accepted his Letter of Credit which was valid until December 15, 2006; this

date should have put the Egg Board on notice that he required some time to close the transaction. Mr. Cross states that he was not told about the 45-day time frame until *after* his successful bid. He argues that few if any producers have empty, equipped barn space ready to accommodate the purchase of a large lot of quota in the 45-day time frame allowed.

37. In response, the Egg Board argues that the Appellant was unable or unwilling to make payment by May 4, 2006 in accordance with the terms and conditions disclosed to all bidders and potential bidders on the Quota Exchange. It is an integral and obvious element of the legal obligation imposed upon the Egg Board to treat all bidders fairly and equally; they do this by strictly adhering to the rules as set out in the Quota Exchange Policies and Procedures which Mr. Cross certified he read and understood.
38. While acknowledging the difficulty in completing a transaction of this magnitude in the time frame imposed, the Panel finds no evidence that either the rules or their interpretation were changed by the Egg Board during Mr. Cross's application. It appears that Mr. Cross either did not understand the rules regarding the timing of final approval of the bid for quota or wrongly assumed the Egg Board would accommodate him. We however, find no evidence that the Egg Board changed its rules or changed the interpretation it gave to those rules and as such, this aspect of the appeal is also dismissed.

ORDER

39. The appeal is dismissed.
40. There will be no order as to costs.

Dated at Victoria, British Columbia this 10th day of November, 2006

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(Original signed by:)

Sandra Ulmi, Panel Chair
Christine J. Elsaesser, Member
Dave Merz, Member