

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY SOUTH ALDER HOLDINGS LTD. FROM A DECISION
CONCERNING A DENIAL OF RELIEF OF A89 UNDER PRODUCTION

BETWEEN

SOUTH ALDER HOLDINGS LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm
Industry Review Board:

Ron Bertrand, Presiding Member
Suzanne K. Wiltshire, Member
Dave Merz, Member

For the Appellant:

Harvey Krause

For the Respondent:

John J. L. Hunter, QC
Bill Vanderspek, General Manager

Date of Hearing:

April 20, 2010

Place of Hearing:

Abbotsford, BC

INTRODUCTION

1. The appellant, South Alder Holdings Ltd., operates a broiler farm located in Aldergrove.
2. The president of South Alder is Harvey Krause. Mr. Krause represented the appellant at the hearing.
3. On January 22, 2009, the South Alder farm manager noted a higher than normal level of bird mortalities and arranged for the testing of dead birds. Subsequent test results confirmed the mortalities were due to colibacillosis¹.
4. Later on the same day (January 22, 2009), the Canadian Food Inspection Agency (CFIA) placed the farm under quarantine due to an outbreak of avian influenza (AI) on a neighbouring turkey farm.
5. The broilers were shipped from the South Alder farm in early February when the birds were 35 days old. The total weight of birds shipped resulted in underproduction for period A89 of 35,890 kg.
6. Mr. Krause wrote to the Chicken Board requesting that South Alder be allowed to recover the portion of its production for period A89 that would be lost, by granting it an additional allocation of 24,618 kg in a future quota period.
7. On May 27, 2009, the Chicken Board denied South Alder's request.
8. On June 18, 2009 South Alder appealed the Chicken Board's May 27, 2009 decision to the British Columbia Farm Industry Review Board (BCFIRB). The appeal was heard in Abbotsford on April 20, 2010.

ISSUE

9. Did the Chicken Board err when it decided on May 27, 2009, to deny South Alder's request to regrow 24,618 kg of production lost in period A89 in a later period?

BACKGROUND

10. South Alder was allotted 187,873 kg of quota for period A89 (January 4 to February 28, 2009).

¹ Colibacillosis is caused by *Escherichia coli* infection. *E. coli* is a bacteria which normally inhabits the intestinal tract of all animals.

11. South Alder contracted with the hatchery for the placement on January 5 and 6, 2009, of sufficient chicks to fill the quota allotted and for the shipment of the birds as broilers 35 days later on February 9 and 10, 2009.
12. The chicks were placed as scheduled.
13. On January 22, 2009 the farm manager noticed an increase in mortalities and the dead birds were sent for testing.
14. Later in the day on January 22, 2009, South Alder was “quarantined” by the Canadian Food Inspection Agency (CFIA) as a result of an outbreak of avian influenza (AI) on a nearby turkey operation. The movement of all poultry, poultry products, poultry by-products, manure or anything used in respect to poultry, including clothing or vehicles likely to be infected or contaminated was restricted. Movement of the commodities off the premises, if allowed, required a CFIA permit.
15. On January 26, 2009, the test results confirmed that the increased mortality at South Alder was due to colibacillosis. However, because of South Alder’s proximity to the confirmed case of AI, CFIA continued to test the South Alder flock for AI and South Alder remained under quarantine until March 24, 2009.
16. Because of the increased mortalities and anticipated resulting loss of production, Harvey Krause spoke with hatchery personnel to see if the kill date could be extended. The hatchery was willing to work with South Alder to avoid underproduction by extending the kill date. However, it was up to South Alder to obtain the necessary CFIA permit.
17. Mike Krause, the general farm manager, noting difficulties already experienced in dealing with CFIA, considered it would be difficult to obtain a permit for later shipment within the limited time remaining because of the need to provide paperwork and detailed information to CFIA with respect to the change in shipping arrangements and the shortage of time for CFIA to respond. He also was concerned that the risk of the flock contracting AI was increasing with each day the birds remained on the farm.
18. While also concerned with the increasing risk that the flock might contract AI the longer shipping was delayed, Harvey Krause did call the CFIA office several times between January 27 and 30, 2009, to see if the kill date for the flock could be extended for a few days so as to increase the weight of the birds to be shipped and avoid underproduction of the quota. While leaving several messages, he did not connect with an appropriate person to get an answer.
19. When South Alder did not obtain a permit for a later shipping date, the birds were shipped for processing when they were 35 days old under the CFIA permit earlier obtained by the farm for the original agreed shipping dates.

20. Total mortality was 12.68% at time of shipment. After total condemned of 1.60%, total production was 151,983 kg, resulting in total underproduction of the quota allotted of 35,890 kg.
21. In cases of underproduction, Part 26 Undermarketing of the General Orders of the Chicken Board provides, in part:
 - 26.1 Where a grower, in the quota production period, markets fewer kilograms than indicated on the prescribed form, the grower may be allotted the amount of the undermarketing, not exceeding 6% of the grower's allotment, in the sixth and seventh quota production period following that in which the undermarketing occurred.
 - 26.2 Undermarketing exceeding 6% of the allotment to the grower shall be forfeited.
22. Because the 24,618 kg of underproduction in excess of the 6% sleeve would be lost, South Alder wrote to the Chicken Board on May 25, 2009, requesting the right to carry that amount of quota forward to be regrown in period A95. In its letter South Alder described its situation as extraordinary, noting the colibacillosis it had experienced and the surrounding AI events in period A89. South Alder wrote:

In review we had some chick issues and disease in the flock. Then our biggest problem was related to the Avian Flu situation where we were under quarantine, as well we were not able to keep the birds a few days longer. I have taken a very big loss on this batch and not from anything I could have corrected. It was a number of things that went wrong but the Avian Flu issue is what complicated it the most.
23. In its decision letter of May 27, 2009, the Chicken Board noted that as part of its deliberations it had reviewed relevant sections of the General Orders including Part 20 *Force Majeure Event* and had also discussed historical precedent as it related to similar requests from other growers in the past in similar situations. The Chicken Board advised that it had determined to deny South Alder's request and the underproduction in excess of the 6% sleeve would not be carried forward and would be lost to production.
24. Part 20 *Force Majeure Event* provides, in part:
 - 20.1 A grower or processor may be excused for failure to perform an obligation under the General Orders when the failure to perform is caused by a Force Majeure Event.
 - 20.2 A Force Majeure Event is an event that satisfies all of the following conditions:
 - a. The event must render performance by the grower or processor impossible, not just difficult.
 - b. The event must not be reasonably foreseeable; and
 - c. The event must be beyond the grower or processor's control.

ARGUMENT OF THE APPELLANT

25. South Alder submits that it is a modern broiler farm managed in a way to minimize disease risk and to ensure that production meets the allocation from the Chicken Board. However, even under the best of management, disease problems can arise.
26. In situations such as the colibacillosis outbreak in period A89, the underproduction due to mortalities is usually offset by keeping the remaining birds longer (two to three days in this case) and allowing them to gain more weight. Although shipping dates are planned well in advance, it is not unusual for broiler growers to work with processors to change dates when such situations arise.
27. While agreeing that the occurrence of colibacillosis, in and of itself, is not a force majeure event as defined in Part 20 of the General Orders, South Alder argues that the disease outbreak it experienced in combination with the occurrence of AI on a neighbouring turkey farm and the subsequent quarantine placed on South Alder by the CFIA constitutes a force majeure event.
28. South Alder argues that this event met all of the criteria to be a force majeure event. The event rendered performance by the grower impossible, not just difficult. Because of the CFIA quarantine and the risk of AI spreading to South Alder, Mr. Krause submits that it was not possible nor prudent to change the kill date and therefore, not possible to recover the lost production by keeping the birds on the farm for a longer period of time. The event was not reasonably foreseeable and the event was beyond the grower or processor's control.
29. South Alder argues that in a similar situation the Chicken Board allowed Vanmar Poultry Ltd. to regrow lost production in a later period when the supply of water to the farm was interrupted due to a broken water main. In that case, the Chicken Board deemed the broken water main to be a force majeure event. Mr. Krause submits that the situation faced by Vanmar was of a much lesser magnitude than the situation faced by South Alder since all farms should plan for water supply interruptions and have a back up supply in place. Therefore, if the Chicken Board deemed the water interruption at Vanmar to be a force majeure event then surely the AI outbreak and quarantine faced by South Alder must be a force majeure event.
30. South Alder asks that it be allowed to regrow the 24,618 kg of production lost in period A89, in a later period.

ARGUMENT OF THE RESPONDENT

31. The Chicken Board submits that South Alder's underproduction in period A89 is due to the high mortality from colibacillosis.
32. The Chicken Board argues that diseases are a part of doing business and cannot be considered force majeure events. As a matter of application and general practice,

the Chicken Board does not consider a disease event to be a reason to allocate additional production in a future period to offset lost production in a particular period. The Chicken Board points out that any increase in allocation for one grower must come from the other growers. If one producer gets more, all others get a little bit less. Disease issues, in the view of the Chicken Board, are solely a matter for resolution between the hatchery and the grower.

33. The Chicken Board allows all growers a generous 6% production sleeve to deal with unforeseen circumstances such as diseases that are not force majeure events.
34. Allowing routine management issues (e.g. diseases, feed quality, machinery malfunction) to be defined as force majeure events would open the flood gates. If the South Alder appeal were to be allowed, there would be no basis for denying a large number of requests to regrow lost production. This would be very problematic for a supply managed system.
35. In this regard, the Chicken Board referred the panel to the November 7, 2003, BCFIRB decision in *Shiell Farms Ltd. and Sunset Poultry Ltd.* at paragraphs 45, 46 and 48 to 50 with respect to the important role that penalties for over or underproduction play in allowing the Chicken Board to fulfill its responsibility to ensure growers comply with policy and produce their allotment within certain tolerances. As highlighted in *Shiell* over and underproduction penalties are important tools for the Chicken Board in ensuring effective industry regulation. The Chicken Board submits that in the result, exceptions by way of relief under Part 20 ought to be very rare. If Part 20 exemptions were to become the rule, rather than the exception it would be nearly impossible for the Chicken Board to achieve the necessary production controls and effectively regulate the industry.
36. While Part 20 of the General Orders gives the Chicken Board some discretion to provide relief, what constitutes a force majeure event is narrowly defined.
37. The Chicken Board submits that in South Alder's case there was no force majeure event. It argues that the incidence of AI on a nearby turkey farm and the consequent quarantine of the South Alder farm are of no relevance. It submits that the only effect of the AI quarantine was that no birds could move off the farm until tested. All South Alder needed to do was to notify CFIA the kill date had been changed in order that testing could be rescheduled but it did not pursue that option.
38. While appreciating that it was a challenging time for South Alder, the Chicken Board argues that because the hatchery was prepared to accommodate a later shipping date to avoid underproduction and the AI quarantine did not make it impossible to change the shipping date, there is no force majeure event.

DECISION

39. Each appeal must be considered on its own merits. Based on the limited description of the circumstances in the Vanmar situation available to it, the panel does not consider the water supply interruption at Vanmar Poultry to present a situation similar to that in the present appeal. The panel therefore does not consider the Vanmar decision a helpful precedent for its consideration.
40. The panel agrees with the position taken by the Chicken Board that a disease outbreak, such as that experienced by South Alder, is of and by itself not a force majeure event. Indeed, the appellant is apparently in agreement that the outbreak of colibacillosis, by itself, would not be a force majeure event.
41. It is also clear from the evidence that the reason for the underproduction at the previously agreed kill date of 35 days was the mortality at that point of 12.68% of the flock due to colibacillosis.
42. We do however accept the evidence that had the birds been kept for a further two to three days, the loss in production due to mortality could have been made up for by the increase in weight of the surviving birds as they continued to grow.
43. The question for the panel then is whether the outbreak of AI on a neighbouring turkey farm and the subsequent quarantine placed on the South Alder farm when combined with the disease outbreak in this case resulted in a force majeure event relieving South Alder from the consequences of its underproduction in period A89.
44. Pursuant to section 20.2 of the General Orders , a force majeure event is an event that satisfies all of the following conditions:
 - a. It renders performance by the grower impossible, not just difficult,
 - b. It is not reasonably foreseeable, and
 - c. It is beyond the grower's control.
45. Did the outbreak of AI on the neighbouring turkey farm and the CFIA imposed quarantine make performance by South Alder impossible, not just difficult? Was there a reason why it was impossible for South Alder to change the shipping date for the birds so that the lost production due to colibacillosis could be recovered by keeping the birds on the farm for two to three more days?
46. There is no evidence before the panel that the hatchery, CFIA or any other entity required the birds to be shipped at 35 days of age.
47. Indeed the evidence is that the hatchery was prepared to assist by accepting a later shipping date but needed as much lead time as possible to do so. Absent the AI quarantine, this would have been arranged between the hatchery and grower. However, given the quarantine, it was up to South Alder to obtain a permit for a later shipping date.

48. The evidence from South Alder is that CFIA was very difficult to deal with. They were not prompt in returning phone calls, some of their officials were not knowledgeable about the chicken industry in British Columbia, and it was difficult to talk to the same person about the situation. What the South Alder evidence does establish is that the level of frustration on the part of South Alder was such that South Alder chose to stay with the original shipping date rather than vigorously pursue a permit for a later shipping date through CFIA.
49. The evidence also establishes that South Alder did not contact others who might have been of assistance such as the Chicken Board, the BC Chicken Growers Association or the AI emergency response committee.
50. It is clear that South Alder was also concerned that the longer it kept the flock the greater the risk that the flock might contract AI. Shipping the birds at 35 days rather than keeping them on the farm to recover lost production was, in South Alder's view, prudent to protect both the South Alder farm and the industry in general. It was a difficult choice: significant underproduction if South Alder chose to ship the birds at 35 days versus the spectre of increasing risk of contracting AI in the flock every day the birds remained onsite.
51. The panel accepts that the confluence of these two events, an outbreak of colibacillosis and the quarantine due to the nearby AI event, was a very stressful and unsettling time for all involved with South Alder. However, did this situation make it impossible for South Alder to recover lost production by delaying the shipping date?
52. Before something can be considered to be impossible, all reasonable and feasible avenues must be explored to find a solution even if there are difficulties. The evidence before the panel is that there were avenues that could and should have been explored. The processor was willing to accommodate a change in shipping date. CFIA did not prohibit a change in shipping date. While dealing with CFIA may have been difficult, only minimal attempts were made to obtain a permit for a later shipping date and no efforts were undertaken to engage the services of others who could have helped to sort out any issues with CFIA. We conclude that faced with difficulties in dealing with CFIA and the risk of keeping the flock longer, South Alder made a choice to ship the birds at 35 days.
53. Accordingly, the panel finds that the appellant has failed to prove that it was impossible for South Alder to achieve its production allocation for period A89 by obtaining a permit from CFIA for a later shipping date and keeping the birds two to three days longer to produce the quota allotted for period A89.
54. Section 20.2 of the General Orders requires all three conditions be met for an event to be considered a force majeure event. Since the appellant has failed to establish that the confluence of the outbreak of colibacillosis in the South Alder flock and the incidence of AI in a nearby turkey flock with consequent quarantine of the South

Alder farm rendered performance by it (i.e. production of the quota allotted in period A89) impossible, the panel finds the confluence of these events do not constitute a force majeure event.

55. We therefore find the Chicken Board did not err when it decided on May 27, 2009, to deny South Alder's request to regrow 24,618 kg of production lost in period A89, in a later period.
56. The appeal is denied.
57. There will be no order as to costs
58. Dated at Victoria, British Columbia, this 9th day of June 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Ron Bertrand, Presiding Member



Suzanne K. Wiltshire, Member



Dave Merz, Member