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DELIVERED BY E-MAIL

Paul and Janet Kuszyk
Three Gates Farm

Claire E. Hunter, Counsel
Hunter Litigation Chambers

SUMMARY DISMISSAL APPLICATION – DECISION

Introduction

1. The appellants, Paul & Janet Kuszyk dba Three Gates Farm, filed a notice of appeal with the BC Farm Industry Review Board (BCFIRB) of a November 9, 2011 BC Chicken Marketing Board decision (the AoS decision). That decision denied the appellants' request to grow 18,000 kg live weight under an Assurance of Supply lease (AoS lease) in period A-109.
2. The Chicken Board has applied for summary dismissal of the appeal pursuant to section 31(1)(b) and (c) of the *Administrative Tribunals Act*, SBC 2004, c.45 (ATA) on the basis that the appeal was filed outside the applicable time period or, alternatively, on the basis that it is frivolous, vexatious or trivial or gives rise to an abuse of process.

Background

3. The appellants began growing chicken in 2006 when they were allotted 7,716 kg of quota under the Chicken Board's New Entrant Grower Program for Vancouver Island.
4. In September 2009 the appellants and Claremont Poultry Group applied to the Chicken Board for approval to transfer 8,198.25 kg of quota from Claremont Poultry to the appellants.
5. Chicken Board staff changed the amount in the transfer documents to 8,198 kg by striking out the 0.25 kg in the transfer application documents because the Chicken Board has a practice of not recognizing fractional quota.
6. The minutes of the Chicken Board record that on October 21, 2009, the Chicken Board approved "...the quota transfer of 8,198 kg primary quota from Claremont Poultry Group Ltd to Paul and Janet. Kuszyk dba Three Gates Farm effective quota period A-96..." (the 2009 Transfer Decision). On the same date a memorandum was sent by staff of the Chicken Board to the transferee Claremont Poultry Group, and copied to Paul & Janet Kuszyk dba Three Gates Farm, advising them that the Chicken Board had "approved the quota transfer of 8,198 Kgs Primary Quota..." from Claremont Poultry to the Kuszyks effective period A-96.
7. Subsequent documents sent to the appellants, including production allotment forms, reflected the appellants' total quota holdings as 15,914 kg (the sum of the 7,716 kg of new entrant

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grower (NEG) quota held by the appellants plus the 8,198 kg of quota approved for transfer by the Chicken Board).

8. In September 2011, the appellants indicated to the Chicken Board that they wished to transfer all of their quota and subsequently applied to the Chicken Board to transfer 12,056 kg of quota to Prairie Central Poultry.
9. The Chicken Board calculated the amount available to the appellants for transfer by deducting the applicable transfer assessment pursuant to the General Orders (50% of total NEG quota held or 3,858 kg) which was retained by the Chicken Board. This calculation resulted in 12,056 kg (3,858 kg NEG quota remaining after deduction of transfer assessment and 8,198 kg quota previously approved and acquired pursuant to the 2009 Transfer decision) remaining for transfer. The minutes of the Chicken Board record that the Chicken Board approved the transfer of 12,056 kg of quota from the appellants to Prairie Central on September 23, 2011 (the 2011 Transfer decision). In a memorandum of the same date staff of the Chicken Board advised the appellants (copy to Prairie Central) that the Chicken Board had approved the transfer of 12,056 kg of quota.
10. With this transfer, the appellants ceased to be a grower as that term is defined in the General Orders because according to Chicken Board records, the appellants' quota holdings were reduced to zero.
11. In November 2011, the appellants applied to grow 18,000 kg live weight under an AoS lease in period A-109, maintaining that they met the program requirement of being a grower by virtue of a 0.5 kg quota holding which they calculated as follows:

Quota Holdings:	15,914.25 kg	
Amount to be Transferred:	12,056.00 kg	
Transfer Assessment:	3,857.75 kg	(50% of 7715.5 kg)
Balance:	0.50 kg	

12. The November 9, 2011 minutes of the Chicken Board record its consideration of the appellants' request for an AoS lease in period A-109, in part, as follows:

3 Gates Farm, by way of e-mail dated November 9, 2011, requested to grow 18,000 kg AoS lease in A-109 with claim of 0.25 kg retention of primary quota. He since increased the claim to 0.5 kg ownership. ... The Board reviewed the briefing note prepared by the Production Coordinator ... The Production Coordinator's perspective was that as of December 18, 2011, 3 Gates Farm is no longer a grower ... having fully transferred all of its quota. This transfer was approved by the Board September 23, 2011. The standing administrative convention of the Board, endorsed by practice since 1961 is to deal with whole quota units only and not to account for parts or fractions of quota, and none had been accounted for 3 Gates Farm so that the Board records indicated a nil or zero balance of quota holdings registered to 3 Gates Farm. ... The Board made a decision not to intervene in this administrative convention and not to reassess its transfer of quota made in September 23, 2011.

13. The November 10, 2011 letter communicating the Chicken Board decision advised:

The Board confirmed the staff assessment that upon completion of shipments for quota period A-108 and the quota transfer effective the start of quota period A-109, Three Gates will no longer hold any quota. As such there is no allotment available for A-109 for Three Gates and the request for Assurance of Supply lease in the amount of 18,000 kg live weight will not be accommodated.

Submissions

Chicken Board

14. The Chicken Board argues that the appeal should be dismissed on the basis that while framed as an appeal of the AoS decision, the appeal is in essence a challenge to the October 2009 Transfer decision which did not allow the transfer of the fractional interest of quota.
15. The Chicken Board submits that the 2009 Transfer decision approving the transfer of 8,198 kg of quota was clearly communicated to the appellants in the memorandum dated October 21, 2009. The appellants did not take any action to question the transfer amount. The Chicken Board submits that the deadline to appeal the 2009 Transfer decision is past and that the appellants have not established special circumstances to excuse the delay.
16. The Chicken Board submits that the only issue raised by the appellants on the appeal of the AoS decision is the Chicken Board's confirmation that the October 2011 Transfer decision did not allow the transfer of a fractional interest of quota. The Chicken Board argues that by seeking what is essentially a reconsideration of the 2009 Transfer decision, the appellant seeks to re-open the appeal period for that decision. The Chicken Board submits there is no basis for the appellants to do so and the appeal of the AoS decision should be dismissed on the basis that it was filed outside the applicable time limit.
17. The Chicken Board submits alternatively that the only issue on the present appeal is whether or not the appellants' quota holding is 0 kg or 0.5 kg and as such is trivial, even to the appellants since they did not make any enquiries at the time of their September 2011 transfer request to confirm any amount of quota was being retained following the transfer. The appellants were repeatedly made aware following the 2009 Transfer decision and during proceedings in 2010 of the Chicken Board's position with respect to the appellants' total quota holdings. However, the appellants did not raise the denial of the transfer of the fractional quota in 2009 and the attempt to now challenge the 2009 Transfer decision gives rise to an abuse of process.

Appellants

18. The appellants argue they were not informed that their quota transfers would reduce their quota holdings to zero and cancel their license to produce. They submit the 2009 Transfer decision was not formally communicated to them and was, at best, ambiguous. They argue that they did not recognize the unsigned computer-generated form from the Chicken Board as a formal communication of the amount of quota being transferred and that it made no direct reference to any forfeiture of quota. They state that they intentionally retained a small amount of quota for specific business purposes and that it only became clear to them that a portion of the 2009 quota may have been forfeited when their request for an AoS lease was

denied in November 2011, whereupon they promptly appealed.

19. The appellants argue that the key issue raised by the present appeal of the AoS decision concerns Chicken Board records and assertions that the appellants do not hold any quota. The appellants submit that special circumstances should permit a re-examination of the alleged 2009 Transfer decision.
20. With respect to the 2011 Transfer decision, the appellants advance a further entitlement to quota arguing that taken at face value, the transfer approval forms used to rubber stamp that decision approved the transfer without “any transfer assessment penalty” since the transfer was not stated to be conditional on part 35 of the General Orders. They submit that interpreted literally this confirms approval of their 2011 transfer request without retraction of any of their NEG quota and accordingly they should have an additional 3,858 kg of quota.

Decision

21. The Chicken Board has made application for dismissal of the appeal of the AoS decision under section 31(1)(b) and (c) of the *ATA*, which reads:

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

...

(b) the application was not filed within the applicable time limit;

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

22. With respect to the appeal period, section 24 of the *ATA* applies and provides:

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal’s enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

23. Quota is a production right that can only be transferred with the approval of the Chicken Board. Part 21.1 of the General Orders states :

21.1 As provided in the Scheme, the Board may establish, issue, permit transfer, revoke or reduce quotas to any person as the Board in its discretion may determine from time to time, whether or not these quotas are in use, and may establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the Board.

Part 35.1 of the General Orders makes quota transfers subject to approval of the Chicken Board and subject to the provisions of Part 35 and other Parts of the General Orders.

24. We find the Chicken Board's October 21, 2009 approval of the transfer of 8,198 kg of quota from Claremont Poultry to the appellants is a decision of the Chicken Board and includes the decision to round down the amount of quota approved for transfer to 8,198 kg.
25. We find further that Chicken Board staff clearly communicated the October 2009 Transfer decision approving the transfer of 8,198 kg of quota from Claremont Poultry to the appellants in the memorandum dated the same date as the decision.
26. The decision was not appealed within 30 days of the date it was made as required under section 24 of the *ATA*.
27. We agree with the Chicken Board's submission that the appellants have failed to establish special circumstances with respect to their failure to appeal the 2009 Transfer decision within 30 days of that decision being made.
28. Accordingly, we find no basis upon which to extend the time limit to appeal that decision.
29. The 2009 Transfer decision is therefore determinative of the quota holdings transferred in October 2009. The amount approved for transfer was 8,198 kg of quota and did not include the 0.25 kg fractional share of quota that the appellant now says it holds.
30. The appellants cannot now resurrect their right to appeal that decision by appealing the AoS decision which refers to the conclusions reached in that earlier decision; namely, that the 0.25 fractional share of quota was effectively cancelled and only 8,198 kg of quota was approved for transfer.
31. This means the appellants did not in September 2011 when they applied to transfer 12,065 kgs of quota net of transfer assessments hold the 0.25 fractional share of quota that they say they retained at that time. Therefore based on their own calculations, they could not in November 2011 when they applied to grow 18,000 kg live weight under an AoS lease in period A-109 have held the 0.5 kg of quota that they say they then retained.
32. We note the appellants' submissions regarding the 2011 Transfer decision and their argument that based on a literal reading of the transfer approval form they should have retained 3,858 kg of quota. We reject that argument. Pursuant to Part 35.1 of the General Orders all quota transfers are subject to the terms and conditions of the other provisions of Part 35. Part 35.5 makes all quota issued by the Chicken Board after September 1, 2005 subject to a declining transfer assessment as set out in that Part. In the case of the 2011 transfer request, the transfer assessment rate applicable to the 7,616 kg of NEG quota issued by the Chicken Board to the appellants in 2006 is 50%. We note the appellants agree that prior to the transfer the General Manager of the Chicken Board had confirmed the transfer assessment would be 50%. This means that the transfer assessment applicable to the September 2011 quota transfer was 3,858 kg.
33. Accordingly, pursuant to the previous unappealed 2009 Transfer decision, the operation of the General Orders respecting transfer assessments and the transfer of the appellants remaining quota pursuant to the unappealed 2011 Transfer decision, the appellants' quota holdings after the 2011 transfer of 12,056 kg of quota were reduced to zero.
34. Having determined that the appellants did not continue to hold any quota at the relevant time in relation to their application for an AoS lease in November 2011, we turn to consideration

of whether or not the appeal of the AoS decision should be dismissed as frivolous, vexatious or trivial or because it gives rise to an abuse of process.

35. Because the appellants hold no quota and are no longer a grower they do not meet the requirements to receive an AoS lease. Accordingly, we find the appeal of the AoS decision has no reasonable prospect of success.
36. An appeal which has no reasonable prospect of success is one which is frivolous and vexatious and to permit the appeal to continue would give rise to an abuse of process.
37. Pursuant to section 31(1) of the *ATA* the appeal of the AoS decision is therefore summarily dismissed.

Costs

38. The Chicken Board has applied pursuant to section 47 of the *ATA* for costs “in light of the frivolous nature of this appeal”.
39. The appellants submit each party should cover their own costs because the appeal raises legitimate process concerns.
40. We have considered the submissions and in the circumstances of this case, have determined that it is appropriate to make a lump sum award of costs in favour of the Chicken Board. We do so based on our finding above that the appellants did not have any basis to assert a remaining fractional interest in quota. We do not agree with the appellants’ submission that this appeal raised legitimate process concerns. Rather, our award of costs reflects our disapproval of the appellants’ purposeful business strategy to attempt to divest themselves of all but a fraction of their quota holdings solely for the purpose of attempting to retain status as a grower to take advantage of that status to participate in programs that may be made available. This business strategy is completely inconsistent with the requirement to produce quota in a manner consistent with the General Orders; it is manipulative in nature and does not in any sense accord with sound marketing policy.
41. Accordingly, the panel orders the appellants to pay to the Chicken Board the sum of \$500 payable forthwith on account of the Chicken Board’s costs in making application for summary dismissal.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Cheryl Davie, Presiding Member



Suzanne K. Wiltshire, Member