NOVA SCOTIA COURT OF APPEAL

Citation: *Chicken Farmers of Nova Scotia v. Oulton*, 2002 NSCA 155

Date: 20021202
Docket: CA 181466
Registry: Halifax

Between:

The Chicken Farmers of Nova Scotia

Appellant

v.

Robert Oulton, Gerard Ansems and Lewis Silver

Respondents

Judges:	Saunders, Chipman and Hamilton, JJ.A.
Appeal Heard:	December 2, 2002, in Halifax, Nova Scotia
Written Judgment:	December 5, 2002
Held:	Appeal dismissed per oral reasons for judgment of Chipman, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Randall P.H. Balcome, for the appellant Douglas W. Lutz, for the respondents

Reasons for Judgment:

[1] This is an appeal by the Chicken Farmers of Nova Scotia (CFNS), from a decision of Wright J. granting relief against it in favour of the respondents. CFNS is an agricultural commodity board, a body corporate pursuant to the **Natural Products Act**, R.S., c. 308, as amended (the **Act**). CFNS is constituted under and administers the Nova Scotia Chicken Marketing Plan (the Plan) to promote, control and regulate the production and marketing of chickens in the Province. It acts as the body that sets chicken quota for producers and growers.

[2] Also constituted under the **Act** is an agency known as the Natural Products Marketing Council (NPMC) which may make regulations and delegate its powers to a commodity board such as the Board. The Board is empowered under the Plan to administer regulations made by NPMC and to make regulations subject to the approval of NPMC and the Governor-in-Council respecting the marketing or production of chickens on a quota basis and the fixing and allotting of quotas for the marketing or production of chickens.

[3] CFNS kept a waiting list for those who wished to become chicken producers. Whenever quota became available it was the practice of CFNS to allocate quota free of charge according to priority on the list.

[4] The three respondents had been on the waiting list maintained by CFNS for approximately 20 years.

[5] In 1998 the respondent, Oulton, was at the top of the list. On June 26th of that year, CFNS passed a motion to allocate to Oulton a new quota of 235,000 kilograms for a fee of $117,500 and advised him that if he did not accept the quota on these terms his name would be removed from the list. On September 28th, 1998, the Board of CFNS passed administrative policy No. 23 which provided that new quota would be transferred free of charge for one-half of the weight, and as to the remaining half, at the rate of $1.00 per kilogram to be paid by any person receiving the quota.

[6] On February 15, 1999, Oulton paid CFNS $117,500 and received 235,000 kilograms of quota.

[7] On February 28th, 2000, the Board of CFNS passed a motion to allocate new quota to the next two growers on the list, and at the same meeting passed an amendment to administrative policy No. 23 providing for a "new entrance" fee of $117,500 to be paid by anybody receiving new quota.

[8] In 2000, the respondents Silver and Ansems reached the top of the waiting list. CFNS offered them 235,000 kilograms of quota on condition that they pay the fee of $117,500. They were given a deadline of one month to pay or be dropped from the waiting list. They both accepted and paid $117,500, Silver doing so "under protest".

[9] Each of the respondents brought actions by originating notice in the Supreme Court claiming that the Regulations under the **Act** governing CFNS did not authorize it to charge the respondents a fee as a condition of acceptance by them of a quota. They sought relief which included a return of the fees paid, a declaration that CFNS acted ultra vires its jurisdiction when it charged the entrance fee and an order that the respondents retain their quotas of 235,000 kilograms.

[10] The several proceedings brought by the respondents by originating notice (action) were subsequently consolidated and amended to a proceeding brought by originating notice (application).

[11] The consolidated proceeding was heard by Wright J. and in a detailed written decision released March 18th, 2002, he found that the Regulations made by the Board under the **Act**, both old, governing Oulton and new, governing Silver and Ansems, were not sufficiently framed so as to empower CFNS to charge a fee for the quota and that, short of authority by Regulations, the administrative policies passed by the Board were *ultra vires* to the extent that they purported to authorize the charging of a fee for the new quota. He referred to the fact that courts have consistently held that the power to impose a fee or a levy or anything in the nature of a tax in the regulation of an industry must be explicitly conferred by the enabling legislation. See **Cheticamp Fisheries Co-operative Ltd. et al. v. Canada** (1995), 134 N.S.R. (2d) 13; [1994] N.S.J. No. 356 (Q.L.) (S.C.) at para. 29, reversed on other grounds (1995), 139 N.S.R. (2d) 224; N.S.J. No. 127 (Q.L.)(C.A.), leave to appeal to S.C.C. dismissed [1995] S.C.C.A. No. 202, **Attorney General v. Wilts United Dairies**, [1922] 127 L.T. 822 (H.L.) .

[12] Wright J. ordered CFNS to return the monies paid by the respondents to it. He rejected a contention of CFNS that if the money were to be refunded, the respondents were not entitled to retain their quota. He rejected the contention of CFNS that judicial deference was owed to it with respect to its decisions. He rejected the submission that the respondents had not asserted their claims in a timely manner and were thus barred by laches.

[13] We have reviewed the record and the written submissions of counsel and having heard counsel on behalf of the parties, we are satisfied that Wright J. was correct in the result that he reached, and we are in substantial agreement with his reasons in support thereof.

[14] We dismiss the appeal with costs to be paid to the respondents collectively in the amount of $1500 plus disbursements.

Chipman, J.A.

Concurred in:
Saunders, J.A.
Hamilton, J.S.