NOVA SCOTIA COURT OF APPEAL
Citation: ***Taylor v. Dairy Farmers of Nova Scotia***, 2012 NSCA 1

Date: 20120104
Docket: CA 342854
Registry: Halifax

Between:

Paul Taylor, Doug Bacon and Bacon Farms Limited

Appellants

v.

Dairy Farmers of Nova Scotia, a body corporate, and the Attorney General of Nova Scotia

Respondents

Judges:	Saunders, Fichaud and Bryson, JJ.A.
Appeal Heard:	November 8, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable by the appellants to the respondent, Dairy Farmers of Nova Scotia, per reasons for judgment of Fichaud, J.A.; Saunders and Bryson, JJ.A. concurring.
Counsel:	Dennis J. James and Melissa P. MacAdam for the appellants Charles Thompson for the respondent Dairy Farmers of Nova Scotia Agnes E. MacNeil for the respondent the Attorney General of Nova Scotia

Reasons for judgment:

[1] Dairy production in Nova Scotia operates under statutory supply management. A feature of this system is producers' milk quota. A provincial regulation prescribes the maximum price for the sale of milk quota. The regulation's purpose is to encourage the entry of new producers and expansion of production by existing producers. The appellants are established dairy producers, with quota, who challenge that regulation. The enabling statute authorizes regulations that govern "the terms and conditions on which the transfer [of quota] may take place", but does not expressly mention price. The appellants say that this wording does not authorize a regulation that prescribes a price ceiling for quota. The issue is whether that regulation is *ultra vires*.

Background

[2] The affidavit of Mr. Brian Cameron, general manager of the respondent Dairy Farmers of Nova Scotia, summarizes the historical context for supply management in the dairy industry:

> 8. The concept of controlling the supply of milk through quotas began in some parts of Canada in the 1950s, but supply management for the dairy industry on a wide scale was initiated by the Federal government in the 1960s/early 1970s in response to several concerns in the industry. Seasonal variations in milk production and in market demand for dairy products created surplus and deficit situations, resulting in an unstable market environment for both sellers (dairy farmers, or producers) and buyers (milk processors such as Farmers Dairy and Scotsburn, who purchase raw milk and process it into milk, cream, cheese and other productions for consumption). Farm stability and profitability were being threatened by this disconnect.
>
> 9. Also, in the early 1970s, improvements in technology and innovation in agriculture generally, and dairy in particular, caused increased efficiency and production. Dairy farms were producing more milk but faced a seasonal demand for their milk. Often they had no market for their milk and had to feed some of it on-farm to calves or other animals.

[3] Supply management involves a regulated - *ie.* fixed - price of milk, so producers obtain no less than what is thought to be a fair return. Generally, the regulated price of milk exceeds what would be the price in a competitive market.

Quota is needed to maintain the milk price at the elevated level. Mr. Cameron's affidavit explains:

> 30. ...Without quotas, the supply of milk could exceed market demand, causing a surplus, and in that scenario it would be impossible to set a milk price that provided a fair return to producers.

For the same reason, supply management involves a restriction on milk imports. Uncontrolled imports would inundate the market, leaving surplus milk that would not sell at the regulated price.

[4] This case focuses on production quota.

[5] Quota is the right to produce and sell a specified volume of raw milk for processing, expressed in kilograms of butterfat per day. One kilogram of quota allows the producer to sell daily a milk volume that contains one kilogram of butterfat. A dairy cow produces about one kilogram of butterfat per day. So a producer generally needs one kilogram of quota for each lactating cow. Each dairy farmer tries to fill, but not overfill, his farm's quota. The producer is given a margin of tolerance above and below his quota, but is paid nothing for milk delivered over the upper tolerance.

[6] Dairy supply management operates nationally under a National Milk Marketing Plan established by the federal and provincial governments. The process is authorized by the *Canadian Dairy Commission Act*, R.S.C. 1985, c. C-15 and the *Dairy Products Marketing Regulations*, SOR/94-466, as amended, under that *Act*. Further to pooling agreements among the regulatory authorities, Nova Scotia is allocated a share of the national milk quota. As of August 2009, Nova Scotia's share was about 18,000 kilograms of daily quota, or approximately 2.2% of the national quota.

[7] I will summarize Nova Scotia's legislative framework that governs supply management of the dairy industry and, in particular, production quota.

[8] The *Natural Products Act*, R.S.N.S. 1989, c. 308, ss. 2(f)(i), 3 and 6, gives the Natural Products Marketing Council ("Council") broad authority over the production and marketing of natural products, including dairy products. Section 9 authorizes the Council to enact regulations governing production quota. Sections

2(a), 6(1), 9 and 11 contemplate the establishment of commodity boards to administer the production and marketing of individual commodities.

[9] The *Dairy Industry Act*, S.N.S. 2000, c. 24 regulates the production and sale of milk, including the distribution among producers of Nova Scotia's allocated quota. The respondent Dairy Farmers of Nova Scotia ("DFNS") was established under the *Societies Act*, R.S.N.S. 1989, c. 435. DFNS formerly was known as the Nova Scotia Milk Producers Association. Section 5 of the *Dairy Industry Act* continued it as "Dairy Farmers of Nova Scotia". DFNS' membership includes the approximately 250 licensed dairy producers in Nova Scotia, and it is managed by a board of directors comprised of dairy producers. Section 3(a) of the *Dairy Industry Act* defines DFNS as the "Board", and empowers the Board to exercise production functions that I will discuss. For consistency with the *Dairy Industry Act*, I will sometimes refer to DFNS as the "Board" when I discuss its statutory powers under that *Act*.

[10] The *Dairy Industry Act* provides that, subject to the Council's supervision, the Board (*ie*. DFNS), representing dairy producers, is to exercise upstream powers over unprocessed raw milk. The Council handles processing and retail sale of dairy products. Sections 2(a) and (b) to this effect are quoted below (para 41).

[11] Sections 9(a) and (aj) of the *Dairy Industry Act* authorize the Council to make regulations "fixing and allotting quota for marketing or production".

[12] Sections 13(1) and 14(1) of the *Dairy Industry Act* then authorize the Council to delegate its powers to the Board:

> **Delegation of Powers**
>
> 13(1) The Council may delegate to the Board such of its powers as the Council deems appropriate to provide a flexible, efficient structure to regulate the dairy industry.
>
> **Powers that may be delegated**
>
> 14(1) The Council may delegate the following powers to the Board, including the power to make regulations:

. . .

(e) providing for the regulation of the supply of milk by producers to processors, including the marketing or production milk on a quota basis, and for that purpose

(i) fixing and allotting quota for marketing or production,

(ii) refusing to fix and allot quota to persons,

(iii) subject to Section 10, transferring quota among producers supplying milk and ***setting the terms and conditions on which the transfer may take place***,

(iv) cancelling, reducing or refusing to increase the quota fixed and allotted to any person,

(v) prohibiting any person to whom quota has not been fixed and allotted from marketing and producing milk,

(vi) prohibiting any person to whom a licence has been issued and a quota allotted from marketing or producing milk in excess of the quota,

(vii) prohibiting the purchase, sale or transfer of quota by any person,

(viii) authorizing the assignment of quota to a creditor as security for money loaned or advanced,

(ix) subject to Section 10, providing for the purchase, sale or transfer of quota through a quota exchange,

(x) providing for the purchase and sale of quota by the Board,

(xi) providing for the retention of a percentage of quotas as an assessment on each transfer of quota;

[emphasis added]

I have emphasized the words that were the focus of the submissions on this appeal. Section 10, mentioned in s. 14(1)(e)(iii), deals with the transfer of quota outside Nova Scotia, and is immaterial to this case.

[13] Under ss. 13(1) and 14(1), the Council delegated its dairy quota powers to the Board. The Council's *Delegation of Powers to Dairy Farmers of Nova Scotia Regulations*, N.S. Reg. 136/2001 (November 6, 2001), ["*Delegation Regulations*"] say:

> 2(1) Pursuant to Sections 13 and 14 of the *Dairy Industry Act*, the Natural Products Marketing Council delegates the following powers, including the power to make regulations, to Dairy Farmers of Nova Scotia:
>
> (a) fixing and allotting quota for marketing or production (clause 9(a) and subclause 14(1)(e)(I) [of the Act];
>
> . . .
>
> (h) providing for the regulation of the supply of milk by producers to processors, including the marketing or production of milk on a quota basis, and for that purpose
>
> . . .
>
> (iii) subject to Section 10 [of the Act], transferring quota among producers supplying milk and ***setting the terms and conditions on which the transfer may take place*** [emphasis added]

I have quoted Regulation 2(1)(h)(iii) that is central to this appeal. Regulation 2(1)(h) also expressly delegates to the Board the power to make regulations on the other topics set out in ss. 14(1)(e)(i) through 14(1)(e)(xi) of the *Dairy Industry Act*, quoted above (para 12).

[14] Exercising its delegated power under Regulation 2(1) of the *Delegation Regulations*, the Board enacted the *Total Production Quota Regulations*, N.S. Reg. 255/2009 (July 21, 2009, effective August 1, 2009) and by N.S. Reg. 112/2010 (July 15, 2010, effective August 1, 2010) ["*TPQ Regulations*"]. The *TPQ Regulations* prescribe how quota is determined, allocated, bought and sold among producers in Nova Scotia.

[15] The *TPQ Regulations* establish saleable quota ("total production quota" or "TPQ") and non-saleable quota ("non-saleable adjustment quota" or "NSAQ").

The sum of each producer's saleable and non-saleable quota is that producer's production entitlement. The *TPQ Regulations* prescribe a base saleable quota for each producer as of a fixed date, permit the replacement of the producer's lost saleable quota to replenish but not exceed that base, and provide that new quota allotments over the producer's base are non-saleable. By March 2009, about 6 % of the total quota held by Nova Scotia's producers was non-saleable.

[16] Producers may buy and sell TPQ among themselves. The acquiring producer may wish to enter the market, expand his operation, or use technological and breeding advances that will increase production from his herd. The transferor may wish to downsize, leave the market or just retire. Section 15(2) of the *TPQ Regulations* says that, with limited exceptions, quota transfers occur on the Quota Exchange. The Quota Exchange is operated monthly by the Board, and provides all producers with the opportunity to bid on quota that is offered for sale. Producers offer to sell at a price they stipulate, and interested parties bid to purchase at a price they stipulate. The Board calculates the "market clearing price" as the price with the smallest difference between the cumulative volumes of quota offered for sale and bid for purchase. All quota is transferred at that market clearing price. Producers who offered to sell at a price equalling or below the market clearing price succeed, as do producers who bid to purchase at or above the market clearing price. Volumes are prorated to achieve a match. Roughly 2 % of Nova Scotia's quota is transferred annually through the Quota Exchange.

[17] The current system of quota began in 1994, replacing an earlier system. In October 1994 the market clearing price for quota was $13,000 per kilogram. The market clearing price has risen steeply over time, reaching $35,500 per kilogram in 2005. This led to concerns about barriers to entry by new producers and disincentives to expansion by existing producers. Mr. Cameron's affidavit says:

> 70. The high cost of quota has been, and remains, a concern to the dairy industry, and in particular to producers and DFNS, for a number of reasons. Producers have to take on large amounts of debt to finance quota acquisitions, making the cost of expansion extremely high. Producers have to use money to purchase quota that is much needed for infrastructure development and modernization of their farms. The high cost of quota is also a barrier to the next generation or new entrants to begin dairy farming.

Further evidence is quoted below (para 44).

[18] Nova Scotia, together with New Brunswick, Prince Edward Island, Quebec and Ontario (known in the industry as the "P5" provinces) have implemented measures to reduce the quota price. In May 2007, the quota transfer price was capped at $30,000 per kilogram. In the autumn of 2008, the P5 Provinces tentatively agreed to a "harmonized" goal of reducing the market clearing price cap to $25,000 per kilogram by July 2012.

[19] In January 2009, DFNS' annual general meeting considered the P5 provinces' harmonization proposal for reduction of the quota price. Eighty-seven percent of the attendees voted for the proposed reduction of the quota price cap. The approved proposal would institute 36 consecutive monthly reductions in the quota price cap, ending at $25,000 per kilogram by July 2012.

[20] The other P5 provinces have implemented the declining caps, to culminate at the agreed level of $25,000 by the July 2012 target date.

[21] DFNS (as the "Board" under the *Dairy Industry Act)*, with the Council's approval, amended the *TPQ Regulations* - see N.S. Reg. 255/2009 and N.S. Reg. 112/2010. The amendments came into effect on August 1, 2009. *TPQ Regulations* 12 and 21, as amended, have been the focus of this proceeding.

[22] *TPQ Regulation* 12 prescribes how the Board can adjust or reduce a producer's quota. In the proceeding before the Supreme Court of Nova Scotia that is under appeal, the appellants challenged Regulation 12 as an expropriation of property without compensation. Justice Duncan rejected that submission (2010 NSSC 436). In the Court of Appeal the appellants withdrew their challenge to Regulation 12. I will not discuss that matter further.

[23] *TPQ Regulation* 21, as amended, reads:

> **Market clearing price cap**

> **21** The Board must reject any offer to buy or offer to sell TPQ on a TPQ exchange at a price greater than the amount set out in Schedule A for the month of the TPQ exchange.

Schedule A prescribes the 36 monthly reductions in the quota price cap, ending at $25,000 in July 2012.

[24] The appellant Mr. Taylor, jointly with Mr. Bill Munroe, has 33.74 kilograms of saleable quota and 0.26 kilograms of non-saleable quota, totalling 34 kilograms. The appellant Bacon Farms Limited has 48.31 kilograms of saleable quota and 0.38 kilograms of non-saleable quota, totalling 48.69 kilograms. The affidavits of Mr. Taylor and Mr. Bacon say they have pledged quota to the Nova Scotia Farm Loan Board as security. If the quota value diminishes substantially, so might the value of their security. Each of Mr. Taylor's and Mr. Bacon's affidavits predicts that such an outcome could cause "severe financial detriment to my dairy operation".

[25] In the Supreme Court, the appellants challenged the validity of *TPQ Regulation* 21. They said that the price cap, fixed by regulation, was *ultra vires* the enabling provisions of the *Dairy Industry Act*. Justice Duncan heard the motion on February 10 and 11, 2010, and issued a decision on November 25, 2010 (2010 NSSC 436). The judge dismissed the claim, saying:

> [35] I further find that **Regulation 21**, fixing a price cap, is authorized by section 14(1)(e) of the **DIA**, and in particular clause (iii) which authorizes "...setting the terms and conditions on which the transfer [of quota among producers] may take place". This authority was properly delegated to the DFNS by section (2)(1)(h)(iii) of the **Delegation Regulations**.

[26] The appellants appeal that ruling to the Court of Appeal.

Issue and Standard of Review

[27] The issue is whether *TPQ Regulation* 21, authorizing a price cap on transfers of milk quota, is *ultra vires* the enabling legislation. This is a question of law for which the standard of review is correctness.

Analysis

[28] The *Dairy Industry Act* neither delegates directly to the Board, nor authorizes the Council to delegate to the Board any explicit power to set "maximum prices for quota". Rather, section 14(1)(e)(iii) of the *Act* authorizes the Council to delegate to the Board "the power to make regulations ... providing for the regulation of the supply of milk by producers to processors, including the marketing or production of milk on a quota basis, and for that purpose ... ***transferring quota*** among producers supplying milk and ***setting the terms and conditions on which the transfer may take place***" (emphasis added). By regulation 2(1)(h)(iii) of the *Delegation Regulations*, the Council delegated to the Board the power to make regulations in those same terms. There is no issue in this appeal about the propriety of sub-delegation.

[29] The question is whether the price cap for quota is one of those "terms and conditions" for the transfer of quota among producers, within the meaning of s. 14(1)(e)(iii). If it is not, I would agree with the appellants that the quota price cap in *TPQ Regulation* 21 is *ultra vires*.

[30] Under *Driedger*'s "one principle" of interpretation, legislation should be read according to its plain meaning and grammatical sense, harmoniously with its statutory context and legislative objective: *R. v. Sharpe*, [2001] 1 S.C.R. 45, para 33 [referring to E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87], *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, para 27, among many other decisions of the Supreme Court of Canada and this Court.

[31] I will start with plain meaning, turn to statutory context, and conclude with legislative objective.

[32] Anyone who is asked "What are the basic terms of a sale?" would mention "price" in his spontaneous reply. *The Shorter Oxford English Dictionary*, 3rd ed. (Clarendon Press, Oxford) defines "term" to include:

> Stipulations for payment in return for goods or services; conditions with respect to price or wages; payment offered or charges made.

In my view, the plain meaning of “terms and conditions” for the transfer of quota in s.14(1)(e)(iii) includes the price payable to the transferor.

[33] I will move to statutory context.

[34] The appellants cite s. 9 of the *Dairy Industry Act*, which authorizes the Council to make regulations:

> (b) prescribing the ***price*** structure for raw milk and any component of milk and the basis of the calculation of the ***price*** structure having regard to any or all of the following circumstances:
>
> (i) the prevailing market ***price*** of milk.
>
> (ii) the conditions of production,
>
> (iii) the manner of delivery,
>
> (iv) the cost of handling and delivering milk,
>
> (v) any other circumstance that has an effect on the ***price*** of milk.
>
> (c) prescribing
>
> (i) the ***price or prices*** or the maximum or minimum ***prices*** for fluid milk products,
>
> ...
>
> (iii) the ***price or prices*** or the maximum or minimum ***prices*** for fluid milk products when sold or offered for sale in quantities or containers as prescribed;
> [emphasis added]

[35] The appellants submit that, if the Legislature intended “terms and conditions” in s. 14(1)(e)(iii) to include the price of quota, the Legislature would have specifically discussed “price” with the same solicitude as appears in s. 9.

[36] Despite the submission’s superficial attraction, I am unable to agree. Section 9 relates to the price of dairy products. That price is the linchpin of dairy

supply management. The price should be fair to the consumer while generating a fair return to the producer. That tension of fairness is gauged by the regulatory authority, in an essentially abstract process without the automatic leavening of the competitive market. Quota is a different matter. When the milk price is fixed at a level above the competitive equilibrium, supply will exceed demand unless production is restricted. Restricted supply creates a "right to supply", which in turn generates quota that allocates the right to supply. As Mr. Cameron's affidavit puts it:

> 31. Quota is a right to produce and sell a certain amount of milk. It has never been designed or intended to be an asset or retirement vehicle for dairy producers.

[37] Milk is the material commodity that is targeted by the *Dairy Industry Act*. Quota value is a byproduct kindled incidentally by the microeconomics of supply management. It is not surprising that the Legislature paid more meticulous attention to the price of milk than to the value of quota.

[38] At the hearing in this Court, the appellants' counsel was asked - If quota price was not one of the "terms and conditions on which the transfer may take place" in s. 14(1)(e)(iii), then what would those "terms and conditions" be? Counsel responded with three topics - (1) control over entry to ensure that producers were qualified, (2) consideration of historical production, so that a producer who failed to use his quota would not compile sterile quota, (3) retention of a percentage of quota as a transfer assessment.

[39] With respect, the responses are unpersuasive. Section 14(1)(e)(iii) concerns terms and conditions of the "transfer" of quota. The first two topics in counsel's response are of no particular interest to the transferor. Rather, they are licensing or production issues that are handled by the regulatory authority separately under other provisions of the *Dairy Industry Act* and its Regulations: *e.g.* ss. 7, 9(f)-(i), of the *Act*; *Milk Producer Licensing Regulations*, N.S. Reg. 204/2003 (September 9, 2003, effective July 3, 2003) as amended up to N.S. Reg. 116/2010 (July 15, 2010, effective August 1, 2010); *Schedule 2 - Milk Production Regulations*, N.S. Reg. 117/94 (July 18, 1994), as amended up to N.S. Reg. 204/2003 (September 9, 2003 effective July 3, 2003); *TPQ Regulations*, ss. 4, 7(2), 9 and 17. The third topic is expressly governed by s. 14(1)(e)(xi) of the *Act*, that authorizes the Council to delegate to the Board the power to enact regulations "providing for the retention of

a percentage of quota as an assessment on each transfer of quota". Similarly, regulations on the process and mechanics of the Quota Exchange are authorized elsewhere by s. 14(1)(e)(ix) [quoted above, para 12].

[40] The appellants' suggested "terms and conditions" under s. 14(1)(e)(iii) would be substantially redundant, and leave the question largely unanswered - If "terms and conditions" does not include price, what is the point of s. 14(1)(e)(iii)?

[41] Now to the legislative objective. The analysis starts with section 2 of the *Dairy Industry Act*:

> **Purpose of Act**
>
> **2** The purpose of this Act is to provide a structure to regulate the dairy industry in the Province so that
>
> (a) subject to the supervisory jurisdiction of the Natural Products Marketing Council, the production, transportation and sale of raw milk will be regulated by producers;
>
> (b) the processing of raw milk and the pricing, packaging, distribution and sale of dairy products will be regulated by the Natural Products Marketing Council; and
>
> (c) subject to the approval of the Minister, all national and inter-provincial agreements regarding total Provincial production quota and out-of-Province sales will be negotiated and regulated by the Natural Products Marketing Council and producers jointly.

[42] Section 2(a) recites a legislative purpose that the "production" of raw milk be regulated by producers. The *Dairy Industry Act* designates DFNS as the "Board" that represents producers. The DFNS' annual general meeting adopted the schedule of price caps on quota, and the DFNS enacted *TPQ Regulation* 21 that incorporated the schedule. If the price cap on quota pertains to the production of raw milk, then Regulation 21 would broadly conform to the legislative objective.

[43] The appellants contend that the price cap on quota does not pertain to the production of raw milk. Their factum says:

> 62. Section 2(a) is the most applicable [subsection of s. 2 of the *Dairy Industry Act*] in this situation, as it sets out the regulation of the production of raw milk by producers. However, what the TPQ Regulations in question deal with is not the regulation of the production of raw milk, but controlling the transfer of quota, which is not included as a purpose of the DIA.

[44] I respectfully disagree. The transfer of quota affects the production of raw milk. Earlier (para 17) I quoted Mr. Cameron's affidavit that the high cost of quota discourages expansion, infrastructure development and modernization of dairy farms and is a barrier to the next generation and to new entrants in the dairy industry. The affidavit of Harvey Whidden, vice-chair of DFNS, elaborates:

> 25. The high cost of quota is a major concern to DFNS, and the Board of Directors has discussed this issue extensively. The reasons that the Board of Directors of DFNS is concerned about high quota values include the following:
>
> (a) Producers must borrow large amounts of money to purchase quota, resulting in a high debt load on producers that is restricting their ability to invest in new technology that will improve their operations.
>
> (b) The high cost of quota is making it very difficult for small dairy farms to expand. Many smaller producers are selling their quota rather than continuing in the dairy industry. There are many vacant dairy farms in Nova Scotia, a lot of which have good buildings and land. The high cost of quota has made these farms unviable.
>
> (c) Dairy farmers' average age is increasing. Many existing producers will be retiring over the next ten to twenty years. The high cost of quota means that it is extremely difficult for a new farmer to enter the industry, and as a result more dairy farms will be shut down and the quota sold to larger, existing producers.
>
> (d) The high cost of quota makes it nearly impossible for anyone to enter the dairy industry as a producer.
>
> (e) The current international trade talks of the World Trade Organization are very worrisome for the dairy industry. There is a great deal of pressure on Canada and other countries to allow more

> imported dairy products, which threatens the supply management of dairy. If the trade talks result in unrestricted access for importation of dairy products, the supply management system will not be sustainable.

[45] From this evidence, clearly the price cap on quota is critical to the regulation of the production of raw milk.

[46] The legislative objective is that, subject to the Council's supervision, the organization representing dairy producers - DFNS - shall assess and determine whether a proposed measure properly balances any differing interests among dairy producers in order to enhance the efficiency of raw milk production. That is what DFNS did when it adopted the proposal at its annual meeting, then enacted *TPQ Regulation* 21.

[47] The appellants submit that the legislative objective, and s. 14(1)(e)(iii) in particular, should be interpreted to avoid interference with the appellants' freedom to operate their business. That perspective explains the appellants' reading of the word "production" in s. 2(a) to exclude room for any cap on a freely negotiated price for the sale of their quota. The appellants' factum puts it this way:

> 52. For farmers, such as the Appellants, the restriction on their ***ability to operate their business freely*** and the financial impact that comes with it is serious. The freedom to carry on business was recognized as important in *Prince Edward Island Retail Gasoline Dealers Assn. v. Prince Edward Island Public Utilities Commission,* [(1981), 37 Nfld & PEIR 46]:
>
> > 9. It is always open to the legislative authority to restrict that general common law principle by statutory enactment where it considers it appropriate to do so, and thus restrict that ***individual liberty*** of action. However, any statute which purports to modify what was hitherto part of the common law, such as ***the right to trade freely***, must be clear and distinct in its intention so to do, and in the absence of a concise and ambiguous declaration of intention in the statute, there is no presumption, whether by inference or otherwise, that the common law is to be altered. ...
> > [emphasis added]

[48] The appellants plea for "the right to trade freely" as an interpretive canon is a wayward interloper in this case. If producers had the right to trade raw milk (as

opposed to quota) freely, there would be no restrictions on the "right to supply", meaning no quota and no quota value. Mr. Taylor's 33.74 kgs of saleable quota, jointly held with another individual, would be worth about $843,500 at $25,000 per kilogram under Regulation 21. Similarly Bacon Farms' 48.31 kgs of saleable quota would be worth about $1,207,750. If producers had the right to trade (raw milk) freely, their quota value would be zero. The appellants' quota value - the *raison d'être* for this litigation - stems from the supply management system that preempts the right to trade freely.

[49] One of the difficulties inherent with supply management is that the price of quota erects barriers to entry or expansion of production. DFNS, exercising its powers as the "Board" under the *Dairy Industry Act*, addressed this difficulty. The Board determined that, for dairy supply management to continue viably, there should be a price cap on quota transfers. In the Board's view, the price cap is a natural and necessary component of an effective supply management system from which the appellants derive their quota value.

[50] The Board's enactment of Regulation 21, in my respectful view, is fully consistent with both the legislative objective to promote supply management in the dairy industry and the Board's powers over production in s. 2(a) of the *Dairy Industry Act*. Regulation 21's cap is the price the appellants pay for benefits of supply management, one such benefit being their quota value.

[51] In my view, the comments of the Court, quoted by the appellants and set out above (para 47), in *Prince Edward Island Retail Gasoline Dealers Assn.* are inapplicable. More apposite is the approach of the British Columbia Court of Appeal in *Sanders v. British Columbia (Milk Board)*, 1991 CarswellBC 13, paras 11-12, 28 [77 D.L.R. (4th) 603]. In *Sanders*, the appellant challenged the validity of an Order under British Columbia's *Milk Industry Act* that required milk producers to surrender a percentage of their production quota upon a transfer of quota to another producer. The Order's purpose, not dissimilar to the purpose of Regulation 21 here, was described by the trial judge, quoted by the Court of Appeal (para 10):

> In 1986, a number of milk producers expressed to the board their concern over the ever-increasing price at which quota was being sold on the open market. It threatened the continuity of the milk industry by making it prohibitively expensive for a young farmer to acquire quota and thereby

> enter the industry. To address the problem, the board implemented the 'graduated entry program" ... The surrender of a percentage of a producer's quota on his transfer to another producer, as provided in subss. (*d*) and (*f*) of s. 7.09 of the order, was an integral part of the "guaranteed entry program".

The British Columbia Court of Appeal dismissed the appellant's challenge to the Order, saying:

> 12. ...I respectfully agree with these statements in the reasons of Hinds J. (at p 330):
>
> > Section 39(1)(*s*) of the Act empowered the board to make orders in relation to the production of milk including the establishment of quotas and the variation thereof and also the "terms and conditions on which quotas may be issued, held, *transferred*, or cancelled" [emphasis in original].
> >
> > In my view, subss. (*d*) and (*f*) of s. 7.09 of the order pertain to the terms and conditions on which quotas may be transferred, a matter within the policy and objectives of the Act and within the power of the board to implement.

[52] From an analysis of the plain meaning, statutory context and legislative objective of the enabling legislation, in my opinion Regulation 21 is *intra vires*.

Conclusion

[53] I would dismiss the appeal. The costs in the Supreme Court were $18,000 plus disbursements. For the appeal, I would order the appellants to pay DFNS 40% of this amount, or $7,200, plus reasonable disbursements. The Attorney General did not seek costs.

Fichaud, J.A.

Concurred: Saunders, J.A.

Bryson, J.A.