

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Scotia Turkey Producers Marketing Board v. Nova Scotia  
(Attorney General), 2008 NSSC 191

**Date:** 20080619

**Docket:** S.K. No. 276502

**Registry:** Kentville

**Between:**

Nova Scotia Turkey Producers Marketing Board,  
a body corporate,

Plaintiff

and

The Attorney General for the Province of Nova Scotia,  
Natural Products Marketing Council, a body corporate,  
Andre Merks and John Merks

Defendants

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DECISION

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**Revised Judgment:** The text of the original judgment has been corrected according to the erratum dated **April 15, 2009**. The text of the erratum is appended to this decision.

**Judge:** The Honourable Justice Gerald R P Moir

**Heard:** 7 March 2008 at Kentville

**Counsel:** Mr. G. Bernard Conway, Counsel for the Nova Scotia  
Turkey Producers Marketing Board  
Ms. Dale Darling, Counsel for the Attorney General of  
Nova Scotia and the Natural Products Marketing Council

Mr. Andrew Montgomery, Counsel for Andre Merks and  
John Merks

Moir J.:

## Introduction

[1] The turkey production industry is regulated by a commodity board established by the *Natural Products Act*, RSNS 1989, c. 308 and regulations under that statute: the *Nova Scotia Turkey Marketing Plan*, (1984) N.S. Reg. 29/84 as amended by N.S. Reg. 265/92 and the *Nova Scotia Turkey Producers' Marketing Board Regulations* (1992) N.S. Reg. 266/92 as amended by N.S. Reg. 107/96. The Nova Scotia Turkey Producer's Marketing Board is the applicant in this proceeding for judicial review.

[2] The *Natural Products Act* establishes what might be called an umbrella administrative board over the various commodity boards, the Nova Scotia Natural Products Council. The council is a respondent.

[3] Mr. John Merks and Mr. Andre Merks are father and son. They market turkey to processors under marketing licenses granted to them by the board, and they must do so within quota allocated by the board.

[4] The board investigated the Merks for infractions that were, until recently, unspecified. The board purported to fine the Merks without a hearing and then threatened to withhold the Merks' licenses until their "files" were "placed in good standing". Council intervened and it asserted exclusive authority to suspend licenses. The board asked council to hold a hearing about the Merks' failure to provide certain required information. A hearing was scheduled, directions for disclosure before the hearing were made, and it was decided that the board would present its case first at the hearing.

[5] The board requested an adjournment because documents were delivered to it much later than expected. The adjournment was refused. Just when the hearing was about to go ahead, the board started this proceeding. When the hearing convened, the board caused council members to be served, and it withdrew. The board may have expected council to postpone the hearing for the outcome of this review. It did not. The case was dismissed.

[6] The court is requested to make declarations on the power of council to suspend a licence granted by the board and on the burden of proof and order of presentations applicable at a suspension hearing conducted by council.

### Board Withholds Renewal Licenses

[7] In 2003 the board, through a sub-committee, investigated poultry production by the Merks. On December 17, 2003 the board informed Andre Merks "...your file has been audited, and unusual reporting, and activity has been identified in the 2002/03 control period." The letter goes on to refer to "Discrepancies ... based on information received from the Flamingo processing plant, and cross-referenced with reports received from your office." It quotes s. 13(3) of the regulations, which allows for cancellation of quota or a licence when a producer is found to have knowingly provided false information to the board about ownership, size, or use of a turkey production facility. The specifics of the allegation against Mr. Merks seem to be that he registered two buildings but "you had birds shipped from other locations, and you housed birds at your Gaspereau facility belonging to another quota holder."

[8] The letter requires Mr. Merks to "appear before the Investigative Subcommittee January 14, 2004 at 12:30 p.m.". Before the meeting, the board's executive director, Ms. Lorette, visited barns belonging to John or Andre Merks and Mr. Andre Merks was able to point out numerous errors on requisition slips supplied by the operation to whom the Merks shipped turkeys for processing. The meeting of January 14 led to an agreement that further investigation was required. The subcommittee requested:

1. Poult placement delivery slips identifying the number of poults purchased, and barn identification for where they were placed.
2. The trucking requisition slips to coincide with the loads shipped identifying the barn that the turkeys were picked up from then transported to Quebec.
3. Returns are to be submitted for each flock of turkeys shipped, and completely filled out to include the net feed cost, and net poult cost. A blank return is attached for you to make duplicates.

Mr. Andre Merks wrote a letter to the board, but he did not supply the requested information. Ms. Lorette wrote on February 16, 2004. This time the documentation was demanded, it was asserted that failure to deliver it would result in automatic cancellation of quota, and the Merks were told “the onus is on the producer to provide documentation disproving what has been identified in the audit”.

[9] Mr. Andre Merks met with the board in June 2004. He asked that the board limit its request to documents on flocks the board could not reconcile. In July, the board identified flocks purchased from the Merks on eight days in 2002 and 2003. Mr. Merks says he delivered all the requested documentation before the end of August 2004. Five months later the board purported to impose penalties on the Merks.

[10] In a letter dated February 4, 2005 the board’s solicitor stated the board had completed its audit resulting from “allegations that you had illegally produced turkeys and related products”. The letter required the Merks to attend a meeting at the solicitor’s office on February 24, 2005. The purpose of the meeting is not stated.

[11] The Merks requested a copy of the audit findings. Nothing was provided. They did not attend the meeting. On February 24, 2005 Ms. Lorette purported to fine Andre Merks \$52,877 and to reduce his quota by twenty percent. She claimed to do this under the *Summary Proceedings Act*. Neither she nor the board have any authority to do as she purported.

[12] Ms. Lorette’s letter quotes extensively from regulations. She then states “the above outlines the severity of your operation”, but “the above” provides no factual information or any finding of fact. The reader is left completely in the dark as to what commission or omission is found against the Merks.

[13] Later in February, the board provided the Merks with a copy of a 110 page file. On May 12, 2005 the board’s solicitor reiterated the February 24, 2005 letter but added that the board had concluded that Mr. Merks did the following:

- failed to submit proper reports to the board;
- produced quota in production facilities that were not registered to you; and

- transferred to another producer poults without the prior written consent of the board.

Mr. Andre Merks responded by referring to the board's obligation to provide procedural fairness.

[14] The February 24, 2005 letter purports to withhold the Merks' 2005/06 quota licence "until this file is brought to good standing", which I take to mean until the fine is paid. The May 12, 2005 letter purports to withhold the Merks' 2006/07 licence. Despite these apparently final decisions, the board provided the Merks with details of the findings against them in a fax dated February 23, 2006:

This is a follow up from our previous discussion whereby you asked for information pertaining to your file and that of your father's for a better understanding of the Board's findings with respect to the audits.

We have attached records as they were received at the Board office along with support documentation.

Page 1 identifies a producer return not belonging to yourself but has marketing's that were charged to your file which is identified on page 2.

Page 3 is a copy of a file delivered to the Board office from another producer indicating that 20% of that operations production was grown in a facility owned by either yourself or John.

Page 4 is a recap sheet of production grown by another producer in facilities owned by either yourself or John without Board permission.

Page 5 is a return in your name submitted to us from your office, and identifies production belonging to another producer. Attached to the return are the production records that coincide with it and although page 6 is okay, page 7 identifies two marketing's belonging to another producer which you have claimed as being your own.

Page 8 is a recap of John's marketing which your office has agreed that the numbers are accurate. However, page 8 is a summary of John's production scheduled received from Flamingo which in all cases does not coincide with his marketing's.

This communication ends with a suggestion that the information is provided because the Merks are seeking to bring their “files” into “good standing”.

[15] Andre Merks met again with the board on March 15, 2006. Afterwards, Ms. Lorette wrote to him thanking him for “in depth preparation work” and she posed three very detailed questions “to bring this to a satisfactory closure”. However, she required the information “to avoid further licensing delays”.

[16] The Board made a decision in February 2005 to withhold the Merks’ licences, and the decision was made on information not disclosed to the Merks. It appears that the Board reiterated the decision in May 2005 with a slight modification about when licences would be withheld and with disclosure of only the most general of findings. It appears that the board kept the decision about withholding licenses in place but, from August 2005 into 2006, continued to investigate the very issues that had led to its decision.

#### Council’s Intervention

[17] On March 25, 2006 the Marketing Council’s general manager asserted to the Board that it had no authority to suspend the Merks’ licences: “the authority to refuse, suspend or revoke licences rests solely with the council, and involves a hearing”. The Board persisted in requiring new and greater information about the Merks’ 2002/03 production year. On September 15, 2006 council reiterated its position, stated that the board had not made “a formal written request to council that the licences ... be revoked or suspended”, and directed the board to “physically issue the license ... immediately”. The council also stated:

If the Board wishes Council to suspend or revoke a producer’s license for the upcoming production period beginning in January 2007 it must advise us before October 17th to ensure enough time for Council to make its decision and offer an opportunity for the producer to respond, as is required by section 10 of the *Natural Products Act*.

#### Council Hearing

[18] The board requested council “call a show cause hearing”. The board chairman wrote:

This is a follow up from the correspondence received at the Board office dated September 15, 2006 regarding the Board's authority regarding revocation or suspension of a quota holder's license.

The Board has made several attempts to obtain information from Andre Merks, and John Merks pertaining to the 2002/03 control period, however to date the information has not been forthcoming.

Although the Board has the authority to cancel each of their quotas we see this action to be too severe, therefore we formally request that Council call a show cause hearing so Andre and John can provide evidence to substantiate why Council should not suspend or revoke their license effective January 1, 2007.

The council accepted this request. It advised the board that the board would be a party, asked for a recommendation and a clear statement of the alleged facts and the reasons for the recommendation. The letter provided for delivery of relevant materials to the council. A hearing date of January 22, 2007 was set and an order for disclosure and production of documents was made.

[19] Apparently, the board delivered its documents to council as directed and council disclosed them to the Merks. The Merks provided their documents to council on or before January 15, 2007. Council staff promised to courier them to the board, but the documents got put in the mail instead. They were disclosed to the board electronically on January 18, 2007. Ms. Lorette says this was too late for her to be able to meet with counsel to review the Merks' documents before the hearing.

[20] When the hearing convened, Ms. Lorette served the originating notice that started this review on council members, and she left the hearing. Council heard from Mr. Montgomery on behalf of the Merks and made a decision in writing on January 30, 2007. Council "dismissed the matter in its entirety" for these reasons:

- Without the presence of the Turkey Board at the oral hearing, the Panel was unable to assess the recommendations of the Turkey Board regarding action on the licenses of John and Andre Merks.
- Although the Turkey Board had submitted documentation prior to the hearing, the Panel could not properly admit these documents as evidence given that the Turkey Board was not available to speak to potential objections by the other party about the admissibility of the documents, or



to be examined on the documents, their meaning and their correlation to the recommendations.

- Counsel for John and Andre Merks submitted that the allegations against his clients were unclear and unfocused.
- The Turkey Board was not available to make representations or to be cross examined by John and Andre Merks on its documentation or claims.
- This created a fundamental unfairness to John and Andre Merks.
- The Panel was unable to properly evaluate the matter.

### Standard of Review on First Issue

[21] Mr. Conway frames the first issue this way:

Has the authority to issue, refuse, revoke or suspend licenses been delegated to the Turkey Producers' Marketing Board pursuant to the Natural Products Act, the Nova Scotia Turkey Marketing Plan and the Nova Scotia Turkey Producers' Marketing Board Regulations?

The council's jurisdiction to refuse, suspend, or revoke a licence is challenged on the ground that that jurisdiction has been turned over to the board.

[22] This issue focuses on the assertion of council that only it had authority to suspend the Merks' licences. The requirement for a formal request by the board and the scheduling of the January 2006 council hearing followed on that assertion.

[23] In my opinion, council's decision to assert exclusive jurisdiction to suspend the Merks' licenses must be reviewed for its correctness rather than reasonableness. Council had to be more than reasonable, it had to be correct. This conclusion is reached by following the pragmatic and functional approach for determining the level of deference the reviewing court must give to a decision under review: *Dunsmuir v. New Brunswick*, [2008] S.C.J. 9.

[24] The *Natural Products Act* contains no provision for appeal or against judicial review.

[25] The issue raised firstly on this review turns on legislative interpretation, a subject about which the court has expertise that is equal to council's.

[26] I will discuss the scheme and purpose of the legislation later. Marketing schemes that rely on quota allocation, licencing, and price control can be very complex. However, the present issue is not about the complex policy issues that surround the establishment, allocation, and administration of quota. It is not about pricing policies. It is about adjudication: whether a licence to carry on business was to be taken away, or not renewed, as a penalty. The overall purposes of the statute are not as important in this case for determining level of deference. The specific purpose of the licencing provisions takes us closer to the traditional role of the court in supervising adjudication.

[27] Finally, as Ms. Darling points out, the fourth consideration in the pragmatic and functional approach weighs heavily in favour of the correctness standard in this case. The question is truly jurisdictional. In fact, it involves a dispute about jurisdiction between two administrative tribunals. So, in addition to the rule of law interest in having the court review truly jurisdictional decisions, there is the need for an independent adjudication between conflicting tribunal positions.

#### Argument on Jurisdiction to Suspend Turkey Marketing Licence

[28] Section 10 of the *Natural Products Act* provides:

The Council may refuse to grant or renew any licence provided for under the regulations and may suspend or revoke any such licence for failure to observe, perform, or carry out any of the provisions of this Act, the regulations, any plan or any order or direction of the Council, but in every such case the applicant shall be afforded an opportunity of appearing before the Council to show cause why the licence should not be refused, suspended or revoked or why the renewal should not be refused, as the case may be.

On behalf of the board, Mr. Conway submits that council delegated this power to the board and could no longer exercise it. It was without jurisdiction at the January 22, 2006 hearing.

[29] Mr. Conway refers me to some of the numerous decisions of the Supreme Court of Canada that have endorsed Professor Driedger's approach to legislative interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87.

[30] Mr. Conway also refers me to the adoption by the Supreme Court of Canada of the principle, also stated by Professor Driedger, that regulations are to be read with the enabling statute, and particularly the constraints on regulation-making authority in the enabling statute: Donald J. M. Brown & John M. Evans, *Judicial Review of Administration Action in Canada*, looseleaf (Toronto: Canvasback, 2007) p. 13-15. He also refers me to the discussion at p. 13 to p. 25 of *Brown & Evans* about subdelegation.

[31] Subsection 6(2) of the *Natural Products Act* allows the Marketing Council to:

... delegate to a commodity board such of its powers as the Council deems necessary for the proper enforcement of a plan under which a commodity board is constituted ... .

The subsection also provides that the council "may at any time terminate such delegation of power". This would include power to delegate, and terminate the delegation, of s. 10 powers.

[32] Regulation 15(4)(b) expressly gives the board the powers to "suspend or revoke or refuse to renew a licence to a processor". No such explicit provision is made for licences of producers. However, Mr. Conway argues that various provisions in the plan and the regulations, when read together and in full context, show that the board is similarly empowered to suspend, revoke, or refuse to renew a producer's licence. He relies on s. 3 of the plan, which includes regulation of production for the purposes of the plan, clause 8(c) concerning licencing, clause 8(f), which conveys a broad discretion to do what the board finds to be advisable

for the effective carrying out of the plan, and s. 9, which provides for the board to issue licences on the advice of a committee.

[33] Mr. Conway also relies on the regulations that recognize the board's authority to issue licences to turkey producers, prohibit turkey production without a licence, and require board approval to transfer a licence. Most important is s. 13(3) of the regulations:

Any producer who knowingly provides false information to the Board pertaining to the ownership of, or to the size or use of any production facility in which the producer is producing or is intending to produce turkeys, shall, at the option of the Board, render the producer liable for cancellation of any allotted quota or marketing licence held by that producer.

Mr. Conway also refers to s. 12(4), which provides for cancellation of licences or quota of a producer who produces turkeys in excess of the producer's quota.

[34] Mr. Conway's written submission concludes "Thus, the initial grant of authority to issue, refuse, revoke or suspend licences has been subdelegated to the board."

[35] For the council, Ms. Darling points out that "there is no process under the plan that addresses suspension or revocation of licences". She contrasted, during oral submissions, the reference in s. 13(3) of the regulations to "quota or marketing licence" with "licence" in s. 10 of the statute. Her main argument is that council has the power under s. 6(2) of the Act to terminate a delegation of its powers.

[36] Mr. Montgomery submits that a delegating authority cannot abdicate its powers to a sub-delegate. He also supports the proposition that council terminated any delegation in accordance with s. 6(2). Further, he supports the position that the provision in s. 13 of the plan prohibiting the Turkey Marketing Board from "exercising any powers under this Plan that would restrict the production of turkeys in Nova Scotia" limits the Turkey Marketing Board's authority to licence. And, a similar argument is made regarding s. 7(3), which requires the Turkey Marketing Board to "exercise its quota authority so as to maximize the volume of turkey produced". He concludes in his brief on behalf of Andre and John Merks:

Thus, both implicitly by the nature of delegation and explicitly within the *Natural Products Act* and the *Turkey Marketing Plan*, the NPMC has retained the

exclusive power to revoke or to refuse to re-issue production and marketing licences.

### The Problem with Section 10

[37] In my view, this case presents a classic problem in legislative interpretation. The plain meaning of s. 10 when it is read in isolation fits exactly with the conclusion expressed by Mr. Montgomery, but when we see it in context it cannot mean what it seems to say.

[38] Section 10 provides two kinds of power:

... Council may refuse to grant or renew any licence provided for under the regulations ...

... Council ... may suspend or revoke any such licence for failure to observe, perform, or carry out any of the provisions of this Act, the regulations, any plan or any order or direction of the Council.

Both the power to refuse a licence and the power to suspend one are qualified by the applicant's right to a hearing, also provided for in s. 10.

[39] The powers are to grant or suspend "any licence provided for under the regulations". A licence issued by the Turkey Marketing Board is a licence provided for in regulations made under s. 9(1)(c) and s. 11(d) of the *Act*. So, when s. 10 is read alone, rather than in context, it seems that the Marketing Council has the powers to revoke, suspend, refuse to renew, or refuse to grant a licence even though the power to grant the licence is with the Turkey Marketing Board rather than the Marketing Council.

[40] Section 10 seems to provide that the Turkey Marketing Council has power to refuse to grant a licence it has no power to grant and to refuse to renew a licence it has no power to renew. Also, it seems to give the Turkey Marketing Council power to suspend or revoke a licence to produce within a quota only the Turkey Marketing Board can cancel. When we look to the whole of the Act and see that it contemplates licencing and quota allocation by a commodity board in some fields, we see that s. 10 is part of an inconsistency.

[41] Although our interpretation of regulations is informed by the enabling statute, not the other way around, I think it is helpful in this case to look at the actual regulations before interpreting s. 10 and the provisions that enable regulations. After setting out my understanding of the relevant parts of the regulations, I will discuss the purpose, scheme, and relevant text of the statute.

### Regulations

[42] There are two sets of applicable regulations. Who made the regulations is relevant to the argument that they also constitute a delegation of powers. (The consolidation made available on line by the Department of Justice does not show who made the regulations. For that, one has to go to the official publication in the *Royal Gazette*.)

[43] The first set of regulations is called the *Nova Scotia Turkey Marketing Plan*, which I shall refer to as the *Turkey Marketing Plan* for short. This was “made by the Nova Scotia Turkey Marketing Board, on the recommendation of the Natural Products Marketing Council” under then s. 7 of the *Natural Products Act*: Order in Council 84-209, N.S. Reg. 29/84. This *Turkey Marketing Plan* was amended “on the recommendation of the Nova Scotia Turkey Producers’ Marketing Board by the Natural Products Marketing Council”, and the amendment was approved by Governor in Council under the present s. 11: Order in Council 92-1201, N.S. Reg. 265/92. I think we can now treat the *Turkey Marketing Plan* as regulations made by the Marketing Council and approved by Governor in Council.

[44] The second set is “Regulations Respecting the Nova Scotia Turkey Marketing Plan”. It was made by the Marketing Council, and it was approved by Governor in Council on the same day as the amendment to the *Turkey Marketing Plan*: Order in Council 92-1202, N.S. Reg. 266/92. This set was made under both s. 9 and s. 11 of the *Natural Products Act*. It was amended by Governor in Council once: Order in Council 96-453, N.S. Reg. 107/96. I shall refer to the second set as *Turkey Marketing Regulations* for short.

[45] Subsection 9(1) of the *Turkey Marketing Regulations* prohibits turkey producers from marketing turkey without “a valid marketing licence issued by the Board”. Subsection 9(4) ties the licences to quota: “Marketing licences may be issued by the Board ... to each holder of allocated quota...”. Subsection 2(1)(a) gives the Turkey Marketing Board power to allocate quota:

Subject to these regulations, the Board may allot quota for the production of turkeys within the Province of Nova Scotia to producers who own land and have buildings which they allocate to the production of turkeys.

Section 8 allows for extra allotments by the Turkey Marketing Board. Subsection 4(1) provides for cancellation of allotted quota by the board when, under s. 4(1)(a), production levels are not maintained, under s. 4(1)(c), production ceases for two cycles, or under s. 4(1)(b) or (d):

- (b) the producer fails to submit to the Board the proper reports with respect to the producer's production or marketings, as provided for in the Plan or these regulations ...
- (d) a producer violates any provision of the Plan or any regulations of the Board.

[46] Although the *Turkey Marketing Regulations* do not directly provide for cancellation of a licence by the board, they provide for cancellation of the quota upon which the licence depends. In that respect, at least, the Turkey Marketing Board's powers under the regulations seem to overlap with the Marketing Council's powers under Section 10 of the Act.

[47] The *Turkey Marketing Plan* also deals with quota and licencing. The Turkey Marketing Board has authority for "the marketing or production of turkey on a quota basis": s. 7(1)(a). It has authority to fix and allocate quota: s. 7(1)(b). It can refuse quota "for any reason that the said Board deems proper": s. 7(1)(c). It can cancel or reduce quota "for any reason that the said Board deems proper": s. 7(1)(e). The board also has power to "prohibit ... any person to whom quota has not been fixed and allotted ... from marketing any turkeys".

[48] The *Turkey Marketing Plan* recognizes the connection between licencing and quota allocation. Clause 8(e) authorizes the Turkey Marketing Board to issue licences to producers and others and goes on to provide: "Every licence shall be valid for the period specified or until cancelled by the Turkey Board." The *Plan* makes no other reference to licence cancellation and makes no attempt to provide criteria for cancellation. The reference to "until cancelled by the Turkey Board" must be read in context. The only other reference to cancellation is to cancellation of quota. That would amount to the same thing as cancellation of a licence.

[49] Thus, it seems that the express powers of the Board under the *Turkey Marketing Plan* and the *Turkey Marketing Regulations* to refuse, cancel, or reduce quota and to cancel a licence overlap with the Marketing Council's powers under s. 10 to refuse, suspend, or revoke a licence or renewal. Are these overlapping regulations authorized by the *Natural Products Act* and, if so, do the authorizations amount to an inconsistency?

#### Purpose, Scheme, and Text of *Natural Products Act*

[50] **Legislative Purpose.** Section 3 of the *Turkey Marketing Plan* provides a statement of its purpose, but the *Natural Products Act* itself does not. Section 3 states three purposes:

- “to promote and regulate the marketing, production and sale of turkeys”
- “to establish from time to time the fair or minimum price at which turkey shall be purchased by producers”
- “to cooperate with other boards, agencies and committees set up in other provinces for the same or similar purpose”.

The first two of these aptly describe what we find in the *Natural Products Act* itself, so long as we substitute “selected agricultural products” for turkeys.

[51] The former *Agriculture and Marketing Act* provided specifically for regulating the marketing and price of cow's milk, a subject that is now under the supervisory jurisdiction of the Marketing Council: *Dairy Industry Act*, S.N.S. 2000, c. 24. The marketing and price control provisions for the dairy industry were discussed by Justice Angus MacDonald in *Ackerman v. Nova Scotia (Attorney General)*, [1988] N.S.J. 462 (SC, AD). In explaining the provisions for publically controlled quota, he said at para 14:

The supply management of farm commodities is a concept based on the theory that, if the production of a commodity can be controlled, the farmer will gain stability in prices, increased income for his efforts and a greater return on his investment.



At para. 15, Justice MacDonald referred to the inquiry chaired by R. Lorne MacDougall QC and, at para. 16, he referred to the subsequent legislation bringing in a publically controlled dairy quota system.

[52] Justice Wright also discussed the supply management system applicable to broiler chicken production under the *Natural Products Act* in *Oulton v. Chicken Farmers of Nova Scotia*, [2002] N.S.J. 127 (S.C.).

[53] I would say that the overall purpose of the *Natural Products Act* is to provide stability for farmers through systems of publically controlled supply management and price control in selected agricultural markets.

[54] **Legislative Scheme.** The overall scheme of the *Natural Products Act* involves a regulatory regime for each selected market administered under the general authority of the Marketing Council or the specific authority of a board specialized in a selected market.

[55] The most important provisions that implement this overall scheme are those that constitute, and give broad powers to, the Marketing Council and the provisions enabling the two kinds of regulations. The first regulation-making authority is the Marketing Council's in s. 9, by which Marketing Council may make regulations including regulations governing commodity boards. The other is in s. 11. The Governor in Council or, with its approval, the Marketing Board may make "plans" that amount to regulations. The commodity boards are constituted under these plans.

[56] There are now at least ten commodity boards established under s. 11. They are responsible for the marketing of cattle, chicken raised for meat, flue-cured tobacco, wheat or rye grains, hen eggs, greenhouse vegetables, hogs, potatoes, sheep's wool, and turkeys.

[57] Consistent with the legislative scheme, the enabling provisions permit the Marketing Council, with the approval of the Governor in Council, to make regulations allowing a commodity board to administer a quota-based supply management system. Under s. 11(d) regulations may:

empower commodity boards to exercise such powers and authority of Council, mentioned in Section 9, as it deems necessary for the proper operation of the plan.

The powers mentioned in s. 9 include “providing for the licencing of persons” in s. 9(1)(b), “fixing and allotting ... quotas” in s. 9(1)(c)(ii), “refusal to fix and allot to any person a quota” in s. 9(1)(c)(iii), “cancellation of or reduction of ... a quota” in s. 9(1)(c)(v), “prohibiting ... any person to whom a quota has not been fixed and allotted ... from marketing”, and, tying all of that into licencing, “providing ... the terms and conditions upon which licences may be issued, renewed, suspended or revoked”. The Marketing Council has, with the approval of Governor in Council, made regulations that empower the Turkey Marketing Board on these subjects.

[58] *Text.* I discussed the text of s. 10 in para. 37 to para. 41 of this decision. It recognizes that licences are provided for under the regulations and it gives the Marketing Council power to “refuse to grant or renew any licence provided for under the regulations”. Also, it gives the Marketing Council power to “suspend or revoke any such licence” for specified failures on the part of a licenced producer. Finally, it provides to a producer the right to be heard before either of the powers are exercised.

[59] The much broader powers of the Marketing Council are found in s. 6. It does not give the Marketing Council power to allocate quota, or grant licences, to producers. There is no mention of quota and the only mention of “licence” is in connection licence fees “provided for in a plan that the Council or commodity board is authorized to implement”: s. 6(1)(j).

[60] So, the powers to allocate quota to producers and to licence producers are subjects left entirely to the regulations. Regulations “providing for the licencing of persons engaged in the marketing or production of any natural product” are authorized by s. 9(1)(b). Power to make regulations for “the marketing or production of a regulated product or a quota basis” is provided in s. 9(1)(c)(ii), and further regulations about quota are authorized in s. 9(1)(c) and (d).

[61] Regulation-making authority is expressly provided on the subject at the core of this case. Subclause 9(1)(c)(v) authorizes regulations providing for:

the cancellation or reduction of, or the refusal to increase, a quota fixed and allotted to any person for the marketing or production of a regulated product for any reason that the Council deems proper.

[62] As I said before, s. 11 allows for marketing plans and the constitution of a commodity board to administer the plan. In s. 11(d) Governor in Council or, with approval, the Marketing Council is authorized to

empower commodity boards to exercise such of the powers and authority of Council, mentioned in Section 9, as it deems necessary for the proper operation of a plan.

Thus, it is recognized that a commodity board may, by regulation, be given powers over quota and licencing. Clause 9(e) authorizes regulations providing for,

... the terms and conditions upon which licences may be issued, renewed, suspended or revoked.

### Interpretation

[63] In my assessment there are a number of ambiguities in s. 10 and in its relationship with other parts of the *Natural Products Act*. It is internally ambiguous because it gives the Marketing Council power to refuse to grant or renew a licence the Marketing Council cannot grant or renew. It is contradictory of the regulation-making power that allows for regulations under which a commodity board, rather than the Marketing Council, grants or cancels licences. And, since a licence is meaningless without a quota, it is inconsistent with the regulation-making powers that allow for regulations under which a commodity board, rather than the Marketing Council, allocates or cancels quota.

[64] Just as plain meaning is ascertained in total context, when meaning is clearly unplain the ambiguity is resolved in the full context of scheme, purpose, and text: *Montreal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. 63, para. 15 and 16. The ambiguity here is not one of scope, as in *Montreal*. The ambiguities could be classified as an “objective absurdity” in one case (see *Driedger*, p. 30 to 35 and 49), and an inconsistency in the other. Mr. Conway suggests one way of resolving these ambiguities. Subsection 6(2) provides that:

The Council may delegate to a commodity board such of its powers as the Council deems necessary for the proper enforcement of any plan under which a commodity board is constituted and may at any time terminate such delegation of power.

The dilemma that results from the ambiguities is resolved if Marketing Council delegated its powers under s. 10.

[65] I respectfully disagree with the submission that, when the Turkey Marketing Board exercises a power to grant or suspend a licence, it is exercising a power under s. 10 delegated by the Marketing Council under s. 6(2).

[66] If the Marketing Council had made a delegation under s. 6(2), it did not do so in the formal way it chose in Delegation of Powers to Pork Nova Scotia, N.S. Reg. 56/2006 made under s. 6(2). In light of s. 19 making the exercise of a power under s. 6 “regulations”, it may well be that any subdelegation under s. 6(2) has to be done that way.

[67] More seriously, I think it stretches the text too far to read into s. 7 words to the effect that making s. 7 regulations for a commodity board is a subdelegation, under s. 6, of s. 10 powers. And, I do not see any other way for subdelegation to resolve the dilemma.

[68] With respect for Ms. Darling’s presentation on this issue, I cannot provide an interpretation that supports the position taken by the Turkey Marketing Council that “the authority to cancel or revoke licences rests solely with the Council” and the Turkey Marketing Board merely issues licences “physically”. As the licencing and quota provisions of the *Turkey Marketing Plan* and *Turkey Marketing Regulations* show, the Turkey Marketing Board has significant powers over licence holders and a failure to divulge required information is certainly a basis for exercising those powers, if that is what happened.

[69] In addition to taking too narrow a view of a commodity board’s powers to cancel quota and licences, the Marketing Council’s interpretation leaves us with the ambiguities. There remains the paradox of power to refuse to grant or renew a licence without power to grant or renew it in the first place. Also, the inconsistency of s. 10 with s. 11 and s. 9 remains.

[70] In my opinion, the ambiguities have to be resolved and the way that would be truer to the statute, including its scheme and purpose, is to read s. 10 more narrowly than a literal reading would do.

[71] The scheme and purpose of the *Natural Products Act* are not consistent with divided licencing powers. Nor is that consistent with text: there is a unity of quota allocation and cancellation powers.

[72] Section 10 reads as though commodity boards do not exist. The same is true of some parts of s. 9. For example, the power to fix or allocate quota in s. 9(1)(c)(iii) is to be “for any reason that the Council deems proper”. It assumes that Council will be replaced in a specialized market by a commodity board when one is constituted.

[73] The text of s. 10 should be read, despite its literal meaning, to apply to licences the Marketing Council grants. That resolves the absurdity of providing that the Marketing Council may refuse to grant a licence only the Turkey Marketing Board grants. It resolves the inconsistencies with s. 9 and s. 11 by allowing them full force. And allowing full force to the s. 9 and s. 11 powers is in harmony with the scheme and purpose of the *Natural Products Act*.

#### Conclusion on First Issue

[74] In my opinion, the correct interpretation of s. 10 is that it only applies to licences granted by Council under regulations authorizing it to do so. This interpretation strays from the literal meaning of s. 10 in order to resolve an internal ambiguity and to avoid a conflict between s. 10 and the enabling provisions and regulations made under them. It accords with the purpose and scheme of the *Act* because it treats licencing as part of the whole system including quota, and because it does not lead to an impractical division of licencing powers.

#### Second Issue

[75] The board argues that, by requiring it to present its case first, the council reversed an onus established by the “show cause” wording in s. 10 of the *Natural Products Act*:

The Council may refuse to grant or renew any licence provided for under the regulations and may suspend or revoke any such licence for failure to observe,

perform, or carry out any of the provisions of this Act, the regulations, any plan or any order or direction of the Council, but in every such case the applicant shall be afforded an opportunity of appearing before the Council to show cause why the licence should not be refused, suspended or revoked or why the renewal should not be refused, as the case may be.

It would not be appropriate, in a judicial review, to comment on the effect of the show cause wording because, in my assessment, the Natural Products Marketing Council did not, expressly or implicitly, make a decision on onus.

[76] The order of presentations may, but does not necessarily, follow onus. For example, Rule 30.04 allows the court to give directions on “which party is to begin ... at the trial” and, only in the absence of directions otherwise, “a plaintiff shall begin by opening his case”. Another example of the disconnection between order of presentations and onus is the application of the rule against splitting a plaintiff’s case so as to present evidence in rebuttal on a fact the defendant has the onus of proving: eg., *Reid v. Halifax Insurance Company* (1984), 66 N.S.R. (2d) 181 (S.C.).

[77] In my opinion, the council made no decision on onus. The decision on order of presentations is within the council’s authority to set its own procedures, to which great deference is given.

### Conclusion

[78] The board sought a declaratory judgment that “the authority to issue, refuse, revoke or suspend licenses has been delegated to the board”. I will grant a declaration, without reference to delegation, that the authority rests with the Nova Scotia Turkey Producers Marketing Board and not the Natural Products Marketing Council. Since the council dismissed a proceeding in which it had no jurisdiction, further relief is unwarranted.

[79] The rest of the board’s application is dismissed.

[80] The division of success inclines me to order no costs.

J.

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Scotia Turkey Producers Marketing Board v. Nova Scotia  
(Attorney General), 2008 NSSC 191

**Date:** 20080619

**Docket:** Ken 276502

**Registry:** Kentville

Between:

Nova Scotia Turkey Producers Marketing Board,  
a body corporate,

Plaintiff

and

The Attorney General for the Province of Nova Scotia,  
Natural Products Marketing Council, a body corporate,  
Andre Merks and John Merks

Defendants

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ERRATUM

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**Revised Judgment:** The text of the original judgment has been corrected according to this erratum dated **April 15, 2009**.

**Judge:** The Honourable Justice Gerald R P Moir

**Heard:** 7 March 1008 at Kentville

**Counsel:** Mr. G Bernard Conway, Counsel for the Nova Scotia Turkey Producers Marketing Board  
Ms. Dale Darling, Counsel for the Attorney General of Nova Scotia and the Natural Products Marketing Council  
Mr. Andrew Montgomery, Counsel for Andre Merks and John Merks



Moir, J:

[81] The reference to s. 12 in the fourth line of para. 36 of the original decision is corrected to read s. 13.

[82] The reference to Andre and John Marks in the last sentence of para. 36 of the original decision is corrected to read Andre and John Merks.

J.