SUPREME COURT OF NOVA SCOTIA

Citation: Taylor v. Dairy Farmers of Nova Scotia, 2010 NSSC 436

Date: 20101125
Docket: 314398
Registry: Truro

Between:

Paul Taylor, Doug Bacon and Bacon Farms Limited

Applicants

v.

Dairy Farmers of Nova Scotia, a body corporate,
Attorney General of Nova Scotia, representing Her Majesty
The Queen in right of the Province of Nova Scotia

Respondents

Judge:	The Honourable Justice Patrick Duncan
Heard:	February 10 and 11, 2010, in Truro, Nova Scotia
Counsel:	Douglas A. Caldwell, Q. C. , and Ellen Sampson for the Applicants
	Charles A. Thompson, for the respondent, Dairy Farmers of Nova Scotia
	Agnes E. MacNeil, for the respondent Attorney General of Nova Scotia

By the Court:

Introduction

[1] The applicants are Nova Scotia dairy producers who are aggrieved by certain regulations enacted on the direction of their governing body, the respondent Dairy Farmers of Nova Scotia (DFNS). Those regulations provide mechanisms to adjust a producer's non saleable and saleable milk quota. They also create a capped price for the exchange of saleable milk quota. The capped price is being phased in over the period commencing in August 2009 through July 2012 and eventually will set a maximum value that is below the value currently being obtained in trading on the quota exchange.

[2] The applicants' principle challenge is to the purported authority to decrease the quota price. While they maintain support for a supply management system, they favor a quota exchange price that is market driven and not capped. They also seek to ensure that they do not otherwise lose valuable saleable quota already acquired.

[3] At the heart of this dispute is a conflict between some dairy producers who seek to preserve the value of their investment in the dairy industry through

unrestricted quota pricing, and those who fear that an unregulated quota price will render the financial structure of the industry unsustainable in the long term. It is suggested, among other things, that an unrestricted quota price exchange will make it prohibitively expensive for new entrants to the industry.

[4] The issue for this court is whether the legislation, that enables the latter point of view to prevail, is valid. The problem has been presented as an application for a declaration that sections 12(2)(c), 12(2)(d) and 21 of the **Total Production Quota Regulations N.S. Reg 255/2009 (July 21, 2009) (TPQ Regs.)**, made pursuant to section 14(1)(e) of the **Dairy Industry Act** S.N.S. 2000, c. 24 **(DIA**) are *ultra vires* and invalid.

Background

[5] The dairy industry in all Canadian provinces, including Nova Scotia, operates under a domestic marketing program, known as supply management. 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 with the creation of the Canadian Dairy

Commission in 1967, in response to several concerns in the industry. These included seasonal variations in milk production and in market demand for dairy products which created surplus and deficit situations, resulting in an unstable market environment for both sellers and buyers. Farm stability and profitability were seen as threatened by this situation.

[6] Supply management is designed to manage the supply of milk to fill, but not overfill, the domestic market. Supply management operates on three principles, each of which is equally important for the system to function. Those pillars are:

1. Production control: producers are allocated and hold a quota which defines their share of the provincial and national milk market or demand. Quota entitles a producer to produce and sell a certain quantity of milk. As consumption of dairy products grows, more milk is needed so quotas are increased. As markets decline, producers' quotas are reduced to avoid having too much milk produced.

2. Ensuring a fair return to producers: because production is limited by the amount of quota allotted, producers must receive a fair return to stay in

business. Generally, producers are paid for their milk based on a survey of the costs of producing milk.

3. Controlling the importation of dairy products: While respecting Canada's international trade obligations, the federal government must control the importation of dairy products in order to stabilize the supply of milk in the domestic market. Doing this allows for forecasting of supply and market demand, and to make quota adjustments up or down to have adequate milk supplies without surpluses.

[7] There is a National Milk Marketing Plan agreed to by the federal and provincial governments to regulate milk quota, both industrial and fluid milk quota. In Nova Scotia these are treated as one "all milk quota".

[8] The Canadian Dairy Commission (CDC) and Canadian Milk Supply Management Committee (CMSMC) operate to adjust the national milk quota and each province's share of it. Since 2001, the Dairy Farmers of Nova Scotia, constituted under the **Societies Act** R.S.N.S. 1989, c. 435, administers the quota allotted to Nova Scotia.

[9] The dairy industry is, therefore, subject to national and provincial regulation. It is also impacted by the “Agreement on Eastern Canadian Milk Pooling”, which Nova Scotia signed on to in 1995. The so-called “P5" pool participating in the agreement is comprised of the provinces of Ontario, Québec, New Brunswick, Prince Edward Island, and Nova Scotia. Such pools were formed to spread risk. In furtherance of achieving this objective, the pool members agree to share among all producers all milk markets, farm gate revenues and transportation costs.

[10] The **Dairy Industry Act** came into force in Nova Scotia in 2001 and made a significant change to the way in which the dairy industry is governed. The DFNS was given responsibility to regulate the production aspects of the industry, subject to the supervision of the Natural Products Marketing Council (NPMC). Under the **Delegation of Powers to Dairy Farmers of Nova Scotia Regulations**, **N.S. Reg. 136/2001 (November 6, 2001)** , the NPMC has delegated regulation making authority to DFNS over a number of producer issues, including producer licensing, milk quota, farm-gate milk pricing and transportation of raw milk.

[11] The DFNS membership includes all licensed dairy producers in Nova Scotia, of which there are approximately 250. It is managed by a Board of Directors, all of whom must be dairy producers. Directors are elected by the producers to three-year terms which are staggered, leaving two or three positions open each September. The Board has an effective communications program with its' membership and at its Annual General Meeting circulates a Policy Paper which sets out the organization's vision, mission and standing policies in many areas. The members are provided the opportunity to vote on issues presented to them.

[12] Quota is a right to produce and sell a certain amount of milk in accordance with the regulatory scheme. It is expressed in kilograms of butterfat per day in Nova Scotia and it is bought and sold, increased and decreased in accordance with a strictly conditioned regulatory regime, captured largely in the **TPQ Regulations**.

[13] Nova Scotia retains approximately 2.2% of the national total of quota. The province is allocated quota through the CDC and the CMSMC, as well as in accordance with the P5 agreement. The exact amount of quota fluctuates with market demand and is regularly adjusted upward or downward. This in turn

triggers an increase or decrease of quota allocation to Nova Scotia producers by the DFNS.

[14] Under the **TPQ Regulations** there are two kinds of quota. The first is saleable quota, or TPQ, which is quota the producers can purchase and sell from each other on the monthly quota exchange that is operated by DFNS. It is permitted to be assigned to lenders with consent of DFNS. The second kind of quota is designated by DFNS as non-saleable, meaning that it is quota that cannot be bought or sold by producers and cannot be assigned to lenders. Non-saleable adjustment quota is referred to as NSAQ. The total of the producer's saleable and non-saleable quota is the producer's production entitlement.

[15] The regulations create a base saleable quota for each producer as at a date certain. The regulations operate to provide producers with a replacement of lost saleable quota after a reduction. New allotments of quota that exceed the producer's base saleable quota are required to be nonsaleable.

[16] In Nova Scotia, the market clearing price of quota has increased steadily, peaking at a value of $35,500 per kilogram in June of 2005. In May of 2007, a

price cap of $30,000 per kilogram was placed on the market clearing price of quota. This initiative was consistent with the actions of other P5 provinces who have been implementing their own measures to reduce or cap the market clearing price of quota. The steps undertaken in Nova Scotia, including the price cap, have contributed to the decline of quota price so that in July 2009 the average for the previous year was $28,801 per kilogram.

[17] Notwithstanding these changes, the P5 provinces continue to be concerned about the state of the industry and have reached a tentative agreement on quota policy harmonization which includes a common goal to reach a market clearing price cap of $25,000 by 2012.

[18] At the Annual General Meeting of the DFNS, held in January of 2009, the harmonization changes were presented to the membership. Ninety-seven producers, out of a total of 258 in Nova Scotia at that time, attended, and 84 (87%) voted in favor of the changes. The approved schedule calls for a monthly reduction of quota cap price by $139 for 36 months, ending at the $25,000 mark.

[19] The evidence adduced in the hearing outlined the policy reasons behind the employment of a price cap. The issue to be resolved by the court is not whether the policy is sound, but whether the imposition of the cap is lawful.

[20] The applicants are licenced milk producers in Nova Scotia, members of the DFNS, and holders of substantial amounts of quota that has been acquired over decades spent working in the dairy industry. They claim that the effects of **TPQ Regulations 12** and **21** generate very substantial losses to producers like them, and that there is no provision to compensate them for those losses.

[21] Mr. Bacon's evidence, for example, is that by reducing the price cap from $30,000 to $25,000 per kg, Bacon Farms Ltd. stands to lose $240,000 based on his 48 kg of quota. This is a notional loss, since the price per kg has been less than $30,000 for some time.

[22] It is fair to say, however, that there has been a financial consequence to those producers who in past years paid the higher quota prices. Again, by way of example, the evidence is that Bacon Farms Ltd. made purchases of quota in 2004-2006 at prices over $33,000 per kg. thus demonstrating the negative consequences

that the cap can generate. The evidence shows that, because of the longevity of that enterprise, the overall average price for quota paid by Bacon Farms has been not greater than an average of $18,248 per kg.

Issue

[23] Are Regulations 12(2)(c) ,12(2)(d) and 21 of the **Total Production Quota Regulations** N.S. Reg 255/2009 (July 21, 2009), made under clause 14(1)(e) of the **Dairy Industry Act** S.N.S. 2000, c. 24 (DIA) *ultra vires* and so invalid?

Analysis

[24] There are two aspects to this question. The first is whether the impugned regulations are, *prima facie*, a proper exercise of authority delegated by the legislature. The second is whether the effect of the regulations is to expropriate property without compensation, and without statutory authority to so expropriate.

Validity of TPQ regulations

[25] Regulations 12(2)(c), 12(2)(d) and 21 in the **Total Production Quota Regulations** were enacted pursuant to section 14(1)(e) of the **Dairy Industry Act**, and read:

> 12 (1) The Board may make an interim adjustment to Provincial TPQ to ensure that an adequate supply of milk is available to meet market requirements.
>
> (2) After consulting with the Quota Committee, the Board may allot any adjustment to the Provincial TPQ to producers based on the following conditions:
>
> (a) if a producer has NSAQ, an increase in Provincial TPQ will be allotted to their NSAQ as a percentage of the producer's TPQ as of the date of the adjustment;
>
> (b) if a producer does not have NSAQ and their TPQ is less than their base TPQ, an increase in Provincial TPQ will be allotted as follows:
>
> (i) first to their TPQ as a percentage of their TPQ holdings as of the date of the adjustment until their TPQ is equal to their base TPQ, and
>
> (ii) then to their NSAQ;
>
> (c) if a producer has NSAQ, a decrease in Provincial TPQ will be deducted as follows:
>
> (i) first from their NSAQ allotment as a percentage of their TPQ as of the date of the adjustment, and

> (ii) then from their TPQ after the producer's allotment of NSAQ has been reduced to zero;
>
> (d) if a producer does not have NSAQ, a decrease in Provincial TPQ will be deducted from their TPQ as a percentage of the producer's TPQ as of the date of the adjustment.
>
> ...
>
> 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.

[26] The **Natural Products Act** R.S.N.S. 1989 c. 308 creates a statutory basis for regulating the marketing of certain natural products, including "dairy products". (s. 2(f)(i)). The **Act** provides for the establishment of a body corporate called the Natural Products Marketing Council (Council) (s. 3). The Council has broad powers that are set out in section 6 of the **Act**. The Council also has regulatory authority over quota in relation to natural products generally (s. 9).

[27] The **DIA** provides specific authority to the Council for supervisory jurisdiction of the dairy industry, but mandates that the producers regulate the "production, transportation and sale of raw milk..." Section 2 of the **DIA** states:

> 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. 2000, c. 24, s. 2.

[28] Section 8 of the **DIA** provides very broad powers to the Council to meet the purposes of the **Act**. It includes the authority to oversee the actions taken by the Board when acting under its delegated authority.

Powers of Council

8 The Council may

...

(f) investigate, arbitrate, adjudicate upon, adjust or otherwise settle any dispute arising under this Act;

(g) require the Board to file with the Council regulations, orders or by-laws made by the Board pursuant to this Act;

(h) do such acts and make such orders and directives as are necessary to enforce this Act and the regulations. 2000, c. 24, s. 8.

[29] The **DIA** authorizes the Council itself to make regulations specifically relating to the regulation of quota:

Regulations

9 The Council may make regulations

(a) fixing and allotting quota for marketing or production;

...

(aj) deemed necessary or advisable to carry out effectively the intent and purpose of this Act. 2000

[30] The **DIA** also provides the Council with statutory authority to delegate its' powers to the Dairy Farmers of Nova Scotia (the "Board"; *see,* s. 3(a)):

> 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.
>
> ...
>
> (4) On giving the notice that the Council considers reasonable in the circumstances, the Council may, by regulation, revoke a delegation made pursuant to subsection (1) where
>
> (a) the Board has failed to comply with this Act or the regulations or any of the powers delegated to the Board; or
>
> (b) the Council considers it advisable in the public interest to revoke the delegation. 2000, c. 24, s. 13.
>
> 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 of 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 a 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;
>
> (f) providing for the establishing and administering of a pooling program whereby all producers receive a comparable price for milk that is adjusted for any geographic pricing considerations;
>
> ...
>
> (2) The exercise by the Board of the authority contained in subsection (1) is regulations within the meaning of the **Regulations Act**. 2000, c. 24, s. 14.

[31] The Council has delegated its' powers to the DFNS Board in the **Delegation of Powers to Dairy Farmers of Nova Scotia Regulations N.S. Reg. 136/2001 (November 6, 2001)** (**Delegation Regs**.) made under Sections 13 and 14 of the **Dairy Industry Act**. It references and duplicates the provisions of section 14(1) and in particular clause (e). It reads:

> 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

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

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

(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,

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

(v) prohibiting any person to whom a 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 [of the Act], 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
>
> (clause 14(1)(e) [of the Act]);
>
> (i) providing for the establishing and administering of a pooling program whereby all producers receive a comparable price for milk that is adjusted for any geographic pricing considerations (clause 14(1)(f) [of the Act]);
>
> ...
>
> (2) Regulations made by Dairy Farmers of Nova Scotia in accordance with subsection (1) shall be subject to Council approval as to form only.

[32] In my view, the legislative intent is abundantly clear in the provisions cited above. When read in the context of the entirety of the legislative framework, that intention was to construct a comprehensive regulatory scheme for every part of the dairy industry in Nova Scotia including production, sale and transportation of raw milk.

[33] The quota system is a means of production control, which is one of the three so called "pillars" of the supply management system, on which the entire dairy industry in Canada operates. The legislature has set as a purpose of the **Dairy**

Industry Act, that it is the producers, through the DFNS, that regulate all facets of the quota system.

[34] Looking at the specific concerns raised as to **Regulation 12(2)(c) and(d)** I find that the power to adjust quota as set out therein is authorized by section 14(1)(e) of the **DIA** and in particular clauses (i), (ii), (iv), and (vi). I further find that those powers were properly delegated to the DFNS by **Regulation 2(1)(h)** of the **Delegation Regulations**.

[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.**

[36] I therefore conclude that the impugned regulations are *intra vires* and *prima facie* valid.

Expropriation without Compensation

[37] The applicants submit that milk quota is “property” and that the legislative scheme mandates expropriation of that “property” without compensation, and without statutory authority to do so. They argue that the impugned legislation is invalid for those reasons.

[38] The “expropriation without compensation” argument is rooted in the rule stated by Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508., where he said, at p. 542:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

[39] The nature of the applicants’ opposition to **Regulations** 12(2)(c) and (d) changed from pre-hearing submissions to that advanced by the end of the hearing. When asked to particularize the applicants’ complaint, counsel for the applicants stated in summation, that their concern is how the Board will treat TPQ that a producer acquired after August 1, 2009 (the date on which Base TPQ was set) when making an allotment generated by an adjustment to the Provincial TPQ.

Their concern stems from the 2009 Policy statement of the Board responding to the P5 Harmonization Plan where it says:

> ...all quota increases after August 1, 2009, will be non-saleable; decreases first come from non-saleable quota, no saleable quota base or cap; ... .

[40] The applicants feel there is a gap in the regulations that has the potential to disadvantage the producer by replacing saleable quota acquired after August 1, 2009, with non-saleable quota, hence reducing its value.

[41] The argument seemed to me to be an attack on the cumulative effect of section 12(2) and not solely on (c) and (d) as pleaded in the application.

[42] In my view, the evidence and the regulations do not support the applicants' interpretation, but it is unnecessary to resolve this question. I will assume for the purposes of this analysis that the applicants' fears are accurate and that there could be a conversion of saleable quota to non-saleable quota in limited circumstances.

[43] The challenge to **Regulation 21** (the price cap) was presented as set out in the Application and supporting briefs.

Quota as “property”

[44] What, the applicants argue, is being lost is not the actual quota but the theoretical loss of a portion of value of the quota. There is an assumption that quota prices, in an unregulated market will only rise, not fall. That notional value is an intangible asset. It is not determinative of my conclusion whether the alleged “property” is the actual quota, or the notional value of the quota. The analysis is the same.

[45] For the applicants to succeed, they must first establish that milk quota/ the notional value of milk quota is their “property” and so capable of being expropriated. If it is not “property” then their line of argument fails. *i.e.*, there must be a “property right” that is being expropriated without compensation.

[46] Whether and when an intangible asset may be characterized as “property” has been the subject of considerable judicial discussion for at least the past 30 years.

[47] The applicants submit that the question of whether milk quota is “property” has been answered in Nova Scotia by the decision of Glube C.J. T.D. (as she then was) in *Ackerman v AGNS* (1988) 82 N.S.R. (2d) 238 where the court considered analogous issues, but in the context of predecessor legislation.

[48] Certain portions of then **Regulations** 20 and 21 of **Nova Scotia Regulation 123-87** made by the Nova Scotia Dairy Commission (the antecedent to the DFNS) under s. 117(j) of the **Agriculture and Marketing Act,** R.S.N.S. 1967, c. 3, purported to impose a 3% levy on fluid milk quota offered for sale, and to do so without compensation to the quota holder. The court granted a declaration that the regulations were *ultra vires* the authority granted the Commission under the **Act**.

[49] After reviewing the finding of the Supreme Court of Canada in *Manitoba Fisheries Ltd. v. The Queen* (1978), 88 DLR (3d) 462, that goodwill in a fish marketing company though intangible was “property”, Glube C.J., concluded, at p. 8:

> In the present case, there is evidence before me that fluid milk quota has been treated as property. The affidavit of Mr. Dickie indicates that fluid milk quota has been accepted by recognized lending authorities as security. There is other evidence that fluid milk quotas have been sold on the open market and at auction. There is further evidence that a dairy farmer has to have a milk quota in order to

> obtain an income from the sale of milk. Even the Commission, in its effort to regulate the sale and the amount that sale of quota commands by introducing a quota exchange, leads me to the conclusion that fluid milk quota is more than just an intangible item. The fact that it has traded freely on the open market shows it is more concrete than good will.
>
> ...
>
> I find that fluid milk quota is property. It has a value to a purchaser and a seller. It is capable of being transferred and it has been pledged to secure loans.

[50] The court concluded that the regulations did result in an expropriation without compensation and without statutory authorization.

[51] The decision was appealed, *see, Ackerman v. Nova Scotia (A.G.)*(1988) 88 N.S.R. (2d) 75, but, prior to hearing, the regulation was changed, rendering that part of the appeal moot. MacDonald J.A. had this to say:

> 9 The value of milk quotas are shown on the "break-up" of a dairy farm purchase price. They may well be a form of intangible property. Whether they are or not is not now for decision by this Court. We, therefore, neither affirm nor reject Chief Justice Glube's conclusion that quotas are in fact a form of property. The resolution of that issue by this Court must await another day.

[52] A different approach and conclusion from that of Chief Justice Glube was reached in *Re National Trust Co. and Bouckhuyt* (1987), 61 O.R. (2d) 640 (C.A), where one of the questions to be resolved was whether the Basic Production Quota

("BPQ") allotted by the Ontario Flue-Cured Tobacco Growers' Marketing Board (the "Tobacco Board") was intangible personal property, as that term was defined in the **Personal Property Security Act**, R.S.O. 1980, c. 375.

[53] Cory J.A. (as he then was), after a review of the statutory policies and objectives, concluded that the regulations controlled "... each and every aspect of the production, sale and marketing of tobacco in Ontario". He states:

> 23 There may well be a market for BPQ's among licensed producers of tobacco. However, the BPQ, and its allotment, reduction and cancellation are at the complete discretion of the Tobacco Board. The very essence of the authorizing legislation and the regulations passed pursuant to it is the control of every aspect of the industry. That control is, as it must be, based upon the control of the quotas themselves. The Act and regulations are such that a tobacco crop cannot even be produced in the absence of a licence and a quota (BPQ). In fact, it is apparent from the Act and regulations that to grow tobacco without such licence or quota would be illegal. The BPQ is thus no more than the manifestation of permission to do that which is otherwise prohibited by statute and regulation; the BPQ represents the granting of a privilege. It is by its nature subject to such discretionary control and is so transitory and ephemeral in its nature that it cannot, in my view, be considered to be property.
>
> 24 The notion of "property" imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable licence, which simply enables a person to do lawfully what he could not otherwise do: ...
>
> 25 ...

> 26 The principle enunciated there is, I think, applicable to the facts of this case. Although the BPQ might be sold in a limited market, the mere fact that it could be exchanged, sold, pledged or leased does not in itself make it property.
>
> 28 ... the BPQ is, in reality, a licence to produce which can, in turn, be granted only to a licensed producer.
>
> 29 ... I conclude that a BPQ does not constitute intangible personal property as that term is utilized in the P.P.S.A.

[54] The specific question of whether milk quota is property was addressed in the case of *Sanders v British Columbia (Milk Board)* (1990), 43 B.C.L.R. (2d) 324 (SC), per Hinds J., and affirmed at 53 B.C.L.R. (2d) 167; 77 D.L.R. (4th) 603. The British Columbia Milk Board required licensed producers to surrender a percentage of their milk quota, without payment, upon the sale of any or all of their quota. An affected producer challenged the validity of the order that established the levy.

[55] Justice Hinds concluded that the quota system was consistent with the policy and the objectives of the legislative scheme in place to regulate the milk industry. He reviewed and distinguished the decision in *Manitoba Fisheries, supra,* and then went on to reject the analysis of Chief Justice Glube, preferring instead the

approach adopted in *Re National Trust Co. and Bouckhuyt* (1987), 61 O.R. (2d) 640 (C.A):

> 30 ... I therefore conclude that the appellant's quota should not be characterized as property. In essence, it was a revocable licence to produce and ship fluid milk to a dairy plant. As the quota has not been characterized as property, the foundation for the appellant's argument that the board cannot expropriate property without compensation has crumbled and has ceased to exist.

[56] The applicant suggests that the decision in *Re National Trust Co. and Bouckhuyt* be treated with "caution" as it has been the subject of some criticism. I have been referred, in that regard, to the decisions in *CIBC v Hallahan* (1990), 39 OAC 24, and *Saulnier (Receiver of) v. Saulnier* 2008 SCC 58.

[57] In the *CIBC* case, the Ontario Court of Appeal concluded that milk quota was not property under that province's **Personal Property Security Act.** The court agreed that it might be "useful" to reconsider the *Bouckhuyt* rationale in light of ".... the realities of commercial transactions within the regulatory framework of a modern farm products marketing scheme" (at para.8) , but was unwilling to do so in the matter before it.

[58] The issue in *Saulnier, supra*, was whether a fishing licence was “property” within the meaning of the **Bankruptcy and Insolvency Act** R.S.C. 1985, c B-3, and the **Nova Scotia Personal Property Security Act** S.N.S. 1995-96, c. 13. Binnie J., writing for the court identifies the criticism of the *Bouckhuyt* approach for being:

> ... insufficiently sensitive to the particular context of personal property security legislation, which (so the critics say) commands a broader concept of intangible property if the purposes of that legislation are to be achieved.
>
> at para 27.

[59] While I respect the note of caution urged by the applicants in this case, I do not accept that the concerns expressed assist their position. That an intangible asset may be “property” within the meaning of a particular statute and yet not “property” for other purposes was recognized early in the *Saulnier* decision:

> 16 The questions before the Court essentially raise a dispute about statutory interpretation. We are not concerned with the concept of "property" in the abstract. The notion of "property" is, in any event, a term of some elasticity that takes its meaning from the context. The task is to interpret the definitions in the **BIA** and **PPSA** in a purposeful way having regard to "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the **Act**, the object of the **Act**, and the intention of Parliament" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1). Because a fishing licence may not qualify as "property" for the general purposes of the

> common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.

[60] This distinction is reinforced by the court when it says:

> 23 It is extremely doubtful that a simple licence could itself be considered property at common law. See generally A. M. Honoré, *"Ownership"*, in A. G. Guest, ed., Oxford Essays in Jurisprudence (1961). On the other hand, if not property in the common law sense, a fishing licence is unquestionably a major commercial asset.
>
> (Emphasis added)

[61] The court was specific in saying that the expanded notion of an intangible asset, including quota, as “property”, was to be assessed in the context of the legislation.

> 27 ... As discussed below, more recent cases have tended to restrict *Bouckhuyt* to its facts. Even in the "regulatory cases" the courts now adopt a more purposeful approach to the definitions in the **BIA** and in personal property security legislation, and consider traditional common law notions of property as less of a stumbling block to recognition of licences and quotas as "**property**" for statutory purposes. I agree with this evolution.

[62] The court ultimately concluded that the **BIA** and the **PPSA** are “largely commercial statutes which should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes.” (at para 42.)

[63] I have concluded that the approach adopted in *Sanders* is preferable on the facts of this case to that adopted in *Ackerman.* In my opinion, quota and the "opportunity" it presents for profit in an open market, while capable of being used as security for borrowing purposes and for purchase and sale, is not "property" capable of being subject to expropriation. It is a revocable licence that provides a conditioned entitlement to produce milk, but with no right to renew or even retain the quota allotted.

[64] The indicia of property relied upon by the court in *Ackerman, supra,* must be assessed in light of the current legislation.

[65] **TPQ Regulation 10** specifies the lending institutions to which quota can be assigned as security and that such an assignment requires the consent of the Board. It is the Board, not the producer, who controls whether and the extent to which the quota may be used as security.

[66] The court in *Ackerman* referred to quota as "traded freely on the open market". That is not the case now, and has not been for some years. More

importantly, the legislative framework purposely ensures that it is not traded in that manner.

[67] The producer needs to qualify for, and obtain a licence in order to have the ability to acquire quota, and must meet ongoing standards for volume and quality of production to retain that licence. I agree with the language used by Cory J. A. in *Bouckhuyt* that:

> The notion of "property" imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable licence, which simply enables a person to do lawfully what he could not otherwise do: ...
>
> Although the BPQ might be sold in a limited market, the mere fact that it could be exchanged, sold, pledged or leased does not in itself make it property.

[68] Saleable milk quota, undoubtedly, has value. It is an important component in the financing of investment in the dairy industry. It is understandable that quota is made available to lenders as security and that it may be seen as property for certain statutory purposes, but that does not imbue it with the character of "property" capable of a *defacto* expropriation.

[69] The evidence points to a desire by the industry to reduce the reliance of the producers on quota backed lending. This is one of the rationales for increased allotments being made only as non-saleable quota - so that it cannot be used as security.

[70] While not reproduced in this decision, there are significant statutory restrictions in the **Dairy Industry Act**, controlling the acquisition of a licence to produce milk, and retaining that licence. Once licenced, the regulatory control of that producer's ability to obtain, retain and transfer quota is comprehensive. The producers, in fact, exercise very little control over quota.

[71] I find that milk quota is not "property" for the purposes of this argument, and that the application fails. I conclude that the regulations are valid.

Was the "property" expropriated?

[72] In the event that I am wrong, and that the notional value of milk quota is "property" capable of being expropriated, I will address the question of whether there was an expropriation of that property?

[73] It is common ground that there has been no actual expropriation. It is also common ground that no compensation has been provided for the loss of quota or potential loss of value created by the cap.

[74] In *Canadian Pacific Railway Co. v. Vancouver (City)* 2006 SCC 5, McLachlin C.J. described the concept of a "*de facto* taking":

> 30 For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (*see Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S.C.A.), at p. 716; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; and *The Queen in Right of British Columbia v. Tener*, [1985] 1 S.C.R. 533.

[75] In *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999) 178 N.S.R. (2d) 294 (NSCA), landowners had their waterfront land designated for protection under the **Beaches Act** R.S.N.S. 1989, c. 32. It so restricted the use of

the land that they took action. Cromwell J.A. (as he then was) described the claim in the following terms:

> 11 The respondents' claim is that there has been a *de facto* expropriation, so called because it is claimed that there has been an expropriation, in fact, even though the formal procedures of expropriation were not followed and no legal title has been lost or acquired. The claim is that the restrictions on the use of the land arising from the application of the **Beaches Act** and **Regulations** have taken away virtually all the economic value and benefits of ownership of the land and that there has been a resulting enhancement of the value of publicly owned land.

[76] In *Manitoba Fisheries Ltd. v. The Queen* (1978), 88 DLR (3d) 462, the court identified the goodwill of a company that had been built up over decades as "property". This case has been regularly seen as the leading Canadian decision on the presumption of "no taking without compensation". The court concluded that the government acquired the company's property to its' own use by enacting legislation that not only closed down the applicant's business but established a government run agency that took the full benefit of that business to its' own benefit. It did this without compensating the applicant. The court found that to be a case of "expropriation without compensation".

[77] This may be contrasted with legislation that establishes regulatory controls and which give nothing to government, though it may adversely affect the citizen.

This concept was discussed and applied in the case of *A and L Investments Ltd. v. Ontario* (1997) 104 O.A.C. 92.

[78] At issue in *A and L Investments Ltd.* was the "... voiding by the **Residential Rent Regulation Amendment Act, 1991** of orders already obtained by [a number of] landlords giving them the right to charge rent increases into the future." The landlords argued that the legislation represented a "... statutory taking of their property, requiring compensation...". The court rejected this argument, holding that the legislation was a proper exercise of the Crown's regulatory authority, and not an act of expropriation. The court did not accept the suggestion that those who are adversely affected by a statute that regulates their affairs were presumptively entitled to compensation unless the statute said otherwise.

[79] Goudge J.A. began his analysis by assuming that the right to receive future increased rents constituted "property rights" that the impugned legislation extinguished. *see*, paragraphs18-19. He then went on to quote at length from the decision of the Supreme Court of Canada in *Manitoba Fisheries Ltd. v. The Queen.* The decision then reviewed cases that supported the view that there is a presumption of direct compensation when the property of the subject is taken away

by statute. The cases cited were *The Queen in Right of British Columbia v. Tener et al.* (1985), 17 D.L.R. (4th) 1 (SCC); *Steer Holdings Ltd. v. Government of Manitoba*, [1993] 2WWR 146 (Man. CA); *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508; and *Burmah Oil Co. Ltd. v. Lord Advocate*, [1965] A.C. 75 (HL). He sums up:

> 27 What emerges from this analysis is that for the presumption of compensation to apply, the rule of statutory interpretation discussed in *Manitoba Fisheries* requires that the legislation must create what is in essence an expropriation of the plaintiff's property by the state. The state must acquire the property taken from the plaintiff either for its own use or for the purpose of destruction. The rationale for such rule is clear: where the state acquires for itself the property of the citizen it is sensible and fair presumed that the state will pay for it unless stated otherwise in the legislation.

[80] Applied to the facts of the matter before that court, it was held that the property rights of the landlords were taken away from them but they were not acquired by the Crown. That is, the Crown did not transfer property from the plaintiffs to itself by means of the legislation. *see, at para 28.* The decision continues:

> 29 The **1991 Act** is not an act of expropriation by the Crown. Rather it is an exercise of its regulatory authority. There is no principle of statutory interpretation that would presume that those adversely affected by a statute regulating their affairs are entitled to compensation unless the statute says otherwise. No policy basis is readily apparent for such a rule. Indeed, such a principle would severely hamper the operation of the modern state where most

> regulatory legislation, however remedial, adversely affects someone. Moreover, if regulatory legislation voiding but not expropriating property rights triggered a presumed right to compensation from the state, the effect would be to give property rights the equivalent of the protection accorded by s. 7 of the **Charter** despite the clear exclusion of such rights from the **Charter of Rights and Freedoms** by its drafters. In other words, an individual would have the right not to be deprived of his property by regulatory legislation except with compensation or with an explicit override of that right by legislative language. This would seem to do indirectly something the framers of the **Charter** declined to do.

[81] The court concluded that it is insufficient to found a claim for "no taking without compensation" where an economic advantage has been transferred to another citizen by the legislation. In order to trigger the statutory presumption of compensation it must be demonstrated that the citizen's property has been transferred to the state. *at para 30.*

[82] So the question must be asked: What is the DFNS (the state agency) acquiring by capping the quota price?

[83] It has been suggested that the individual Board members stand to gain by the capping. There is no evidence on which to reach such a conclusion. Even if there were, it would not be relevant to the issues of whether the DFNS acquires the property of those producers who suffer an imputed loss by the imposition of the capped price. It is the DFNS who must be shown to have acquired, not one or

more of its' individual members. Those Board members are there at the will of their electorate.

[84] I am asked to say that the "opportunity" to achieve a price that is higher than the maximum cap price is property and which is being taken away without compensation. Even if true, it does not put that opportunity, or any notional value attached to that opportunity into the pocket of the state. The state acquires nothing. The impugned quota regulations are an exercise of regulatory authority and not an act of expropriation.

[85] For this reason, the first requirement of the test for *de facto* taking, as set out by McLachlin C.J., has not been met.

[86] I add that the uses of quota are not destroyed by the cap, and so the argument fails on the second criteria for "*de facto* taking", as well.

Statutory authority for taking without compensation

[87] Even if quota was property, and that it was expropriated, it is still open to the respondents to show that the legislation authorized it to be taken without compensation. I would find that it does.

[88] While it is true that there is no specific language saying that the DFNS has the right to take away quota, or potential quota price increases, without compensation, it is the only logical inference to be drawn from the provisions that it does have that authority. There is a clear statement of its' authority to set the "terms and conditions" for quota exchange. There is no language that limits the way in which this is accomplished.

[89] **Regulation 21**, in setting a price cap that is less than historical and current levels, implicitly takes away the potential for the higher prices paid or that might later be paid. The DFNS is composed of the producers - the people who suffer the loss. They gain nothing by the imposition of the cap. To require compensation to be paid would be to require the producers to set a value on what the "loss" is, and then allocate it among themselves. They would then have to contribute from their

own income streams to pay themselves the compensation. It is a nonsensical proposition and one that the legislature could not be taken to have intended.

[90] I therefore conclude that the legislation would permit the taking without compensation.

Conclusion

[91] **Regulations 12 and 21** of the **TPQ Regulations** are *intra vires* and valid as being a lawful exercise of legislative authority delegated to the DFNS by the Natural Products Marketing Council pursuant to the **Dairy Industry Act** and the **Delegation of Powers to Dairy Farmers of Nova Scotia Regulations.**

[92] For the purposes of interpreting **Regulations 12 and 21** of the **TPQ Regulations** I find that quota, or the notional value of quota, is not "property", capable of expropriation by "*de facto* taking".

[93] I also find that, even if quota was "property", there has been no acquisition of that property by the state, nor have all of the uses of the "property" been

destroyed, thus failing to meet either of the two criteria necessary to a constitute a "*de facto* taking".

[94] Finally, I conclude that the only reasonable reading of the **TPQ Regulations**, is that the statute intended to cap the quota price, without compensating the quota holders for any loss of value.

[95] In the result the application is dismissed.

Costs

[96] If the parties are unable to agree as to costs I will receive their written submissions.

Duncan J.