

January 28, 2014

## QUOTA POLICY AND GOVERNANCE CONSULTATION

### Summary Discussion of the Principle that Quota has no value

With reference to the BC Milk Marketing Board (BCMMB) Quota Policy and Governance Review discussion paper of September 2013, stakeholders during the consultation input had requested a further explanation of the principle that “Quota has no value”.

Under the *British Columbia Milk Marketing Board Regulation* (a regulation made under the *Natural Products Marketing (BC) Act*), the Milk Board has broad powers to “establish, allot, alter, suspend, or cancel a quota” and “to establish terms on which quotas may be allotted, held, transferred, altered, suspended or cancelled”.

Subsection 7(2) of the *Regulation* vests the following specific powers in the Milk Board:

7. (2) The board is authorized
  - (a) to establish, allot, alter, suspend or cancel a quota, to which no monetary value is to be attached by the board, that applies to any person, [*emphasis added*]
  - (b) to establish terms on which quotas may be allotted, held, transferred, altered, suspended or cancelled,

These provisions must be understood in light of the nature of quota itself.

In *Sanders v. British Columbia (Milk Board)* (1991), 53 B.C.L.R. (2d) 167 (B.C.C.A.). In that case, the appellant producer took issue with the surrender assessment imposed by the Milk Board. The issue before the Court of Appeal was whether quota could be considered “property” as against the Milk Board itself. The Court of Appeal answered in the negative, stating:

The Milk Board may prescribe the terms and conditions on which quotas may be issued, held, transferred or cancelled. The word “cancelled” is particularly significant as indicating the powers intended to be conferred. A quota, a license to produce, which may be issued on prescribed terms and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions. In summary the situation is “the Board giveth and the Board taketh away”; others may in the meantime buy and sell the licence which the Board issues, but they do so knowing that the Board has the right not to approve its further sale.

In addition, the Court of Appeal quoted with approval from the reasons of Hinds J. in these terms:

I therefore conclude that the appellant’s quota should not be characterized as property. In essence, it was a revocable license to produce and ship fluid milk to a dairy plant. As 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.<sup>1</sup>

The governance of quota in BC is thus guided by two overarching legal principles. The first is that the Milk Board is not permitted to attach monetary value to quota, despite the fact that it acquires value in the market place when traded amongst producers. The second principle is that quota remains under the exclusive control of the Milk Board at all points, meaning that a transfer of quota between two producers does not imply a change in the 'ownership' of that quota.

In short, the expression "quota has no value" is a term of art in regulated marketing. It speaks to both the Milk Board and the producer. To the Milk Board, it states that when the Milk Board is issuing quota and making other regulatory decisions regarding quota, it may not attach value to that quota. To the producer, it says that the producer may not assert that quota as property against its regulator, the Milk Board, regardless of its treatment in other contexts.

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For further explanation, please see Appendix 1, Detailed Discussion of the Principle that Quota has no value.

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<sup>1</sup> See also *Taylor v. Dairy Farmers of Nova Scotia*, 2012 NCSA 1. And see the British Columbia Marketing Board appeal decision in *Bifano Farms Ltd. v. British Columbia Milk Marketing Board*, May 30, 1996

## QUOTA POLICY AND GOVERNANCE CONSULTATION

### Detailed Discussion of the Principle that Quota has no value.

With reference to the BC Milk Marketing Board (BCMMLB) Quota Policy and Governance Review discussion paper of September 2013, stakeholders during the consultation input had requested a further explanation of the principle that “Quota has no value”.

Under the *British Columbia Milk Marketing Board Regulation* (a regulation made under the *Natural Products Marketing (BC) Act*), the Milk Board has broad powers to “establish, allot, alter, suspend, or cancel a quota” and “to establish terms on which quotas may be allotted, held, transferred, altered, suspended or cancelled”.

The province receives a finite amount of quota through a national allocation process, and the Board determines and administers the process by which that provincial allocation is distributed among BC’s dairy producers. Similarly, the Board also establishes the rules under which quota is produced and can be transferred among producers.

*Quota confers both a privilege and an obligation to produce milk upon the producers that hold it. Holding quota denotes a commitment to being actively engaged in the BC dairy industry.*

The governance of quota in BC is guided by two overarching legal principles. The first principle is that quota has no monetary value, regardless of the fact that it acquires value in the market place when traded amongst producers. The second principle is that quota remains under the exclusive control of the Milk Board at all points, meaning that a transfer of quota between two producers does not imply a change in the ‘ownership’ of that quota.

#### **The legal principle that Quota has no Value may be summarized as follows:**

1. Quota is a revocable license which provides a conditional entitlement to produce milk, but with no right to renew or retain the quota allotted.
2. Quota is issued from the CDC to the Province with no value (free).
3. BCMMLB under the regulations are stewards of quota for the Province.
4. BCMMLB issues (allocates) quota with no monetary value (free) to produce milk.
5. Quota remains under the exclusive control of BCMMLB at all points.
6. Quota is not owned by producers or the BCMMLB.
7. Producers may trade (sell) quota with permission of BCMMLB to produce milk and create value from cash flow of milk production from the quota.
8. Producers trading (selling) quota use the Quota Exchange “clearing price” based upon the cash flow of the quota but the quota itself still has no value since it is a revocable license and not property.

9. Banks may provide loans to producers based upon the cash flow asset of quota, not the quota as an asset, since quota has no value and may be retracted by the BCMMB at any time.

## **Background:**

### **Legislative Authority With Respect to Quota**

#### *A. Powers Vested in the Milk Board*

The British Columbia Milk Marketing Board (the “Milk Board”) is continued under the *British Columbia Milk Marketing Board Regulation* (B.C. Reg. 167/94) made under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330.

The Milk Board has been vested with broad powers to regulate the production, transportation, packing, storage and marketing of milk, fluid milk, and manufactured milk products (collectively, “regulated products”) within British Columbia.

Section 1 of the *Regulation* defines quota as “the quantity of a regulated product, or of a class, quality, component or grade of a regulated product, that may be allotted under this regulation for production, transportation, packing, storage or marketing within British Columbia”.

Subsection 7(2) of the *Regulation* vests the following specific powers in the Milk Board:

7. (2) The board is authorized
  - (a) to establish, allot, alter, suspend or cancel a quota, to which no monetary value is to be attached by the board, that applies to any person,
  - (b) to establish terms on which quotas may be allotted, held, transferred, altered, suspended or cancelled,

Notably, subsection 7(2) of the *Regulation* employs language that is less restrictive than that which is found in subsection 37(c) of the *British Columbia Egg Marketing Scheme, 1967* (B.C. Reg. 173/67), which reads as follows:

37. The board shall have authority within the Province to promote, regulate and control the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part, and without limiting the generality of the foregoing shall have the following authority:
  - (c) to issue quotas to registered producers as is deemed necessary, such quotas to remain at all times the property of the board and, subject to prior approval of the Provincial board, to vary such quotas and prescribe the terms and conditions upon which

they shall be issued or transferred, provided that the board shall not at any time issue to any registered producer a quota in excess of 5% of the total of all such quotas issued;

The absence of any reference to the “prior approval of the Provincial board” subsection 7(2) of the *Regulation* indicates that the Milk Board – unlike the Egg Board – need not obtain the approval of the BCFIRB before exercising the powers referenced in that subsection.

*B. Limitations and Qualifications on the Milk Board’s Authority Vis-à-vis Quota*

The legislative authority of the Milk Board is at all times subject to the supervisory and appellate jurisdiction of the BC Farm Industry Review Board (the “BCFIRB”) as set out in section 7.1 and 8 of the Act, respectively.

**The Nature of Quota**

*A. The Constitutional Context*

Quota must be understood in the context of our interlocking, federal-provincial supply management system.

In a landmark 1978 case which has come to be known as the “Egg Reference” [*Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 (S.C.C.)], the Supreme Court of Canada unanimously affirmed the constitutional validity of the national egg marketing scheme collaboratively crafted by Parliament and the provinces in response to the Court’s evolving jurisprudence. The Egg Reference has since become the blueprint for federal-provincial marketing schemes.

Exclusive legislative powers are allocated to the provinces and to Parliament under sections 91 and 92 of the *Constitution Act, 1967*. Provincial governments lack jurisdiction over extra-provincial trade in agricultural products, and Parliament lacks jurisdiction over intraprovincial trade. Consequently, the effective regulation of the market requires the joint participation of the Province and Parliament. This is known as the principle of “cooperative federalism”, whereby each level of government enacts laws and regulations based on their respective legislative competencies to create a unified and coherent regulatory scheme.

As a practical matter, the “effective” regulation of the market requires concurrent, overlapping federal and provincial regulation. This is so because the market is “undifferentiated” - in that the regulated product trades both within and without the Province. Because it is not possible to know whether a particular egg produced by a particular producer will be marketed intra-provincially or extra-provincially, overlapping federal and provincial regulation is necessary.

As was noted by Madam Justice Newbury (as she then was) in *British Columbia Milk Marketing Board v. Bari Cheese Ltd. et al.* (11 August 1993), Vancouver Registry, No. C912303 et al. (B.C.S.C.) at pages 126 - 127:

But if the market is an “undifferentiated” one (i.e., the commodity produced in the province trades both inside and outside the province), and if it is to be regulated in all its aspects from local production to ultimate sale, the lesson of the marketing board cases is

that legislation at both levels is required. By that means a “practical scheme for the orderly and efficient production and marketing of a commodity which all Governments concerned agree requires regulation in both intraprovincial and extra-provincial trade” is made possible.

In practice, the Milk Board’s federal counterpart, the Canadian Dairy Commission (the “CDC”), monitors trends in Canadian requirements (demand) and production (supply) on a monthly basis. Canadian requirements are defined as total domestic consumer demand plus planned exports for industrial dairy products. Production includes all production of industrial milk and cream within supply management.

Having regard to these Canadian requirements, the CDC makes a recommendation to the Canadian Milk Supply Management Committee (the “CMSMC”) concerning the national industrial milk production target which is expressed as Market Sharing Quota (“MSQ”). In turn, the CMSMC applies the terms of the National Milk Marketing Plan to establish the provincial shares of the MSQ. British Columbia’s share of the MSQ determines, in part, the amount of quota that is available to be allotted by the Milk Board to producers.

#### *B. Revocable Licence to Produce*

Though no monetary value is attached by the Milk Board to quota (consistent with paragraph 7(2)(a) of the Regulation), quota is routinely purchased and sold among producers and prospective producers. Nevertheless, it has been judicially recognized that quota is a privilege and not a right. In particular, producers have no rights in quota that can be asserted against the Milk Board or the BCFIRB.

In *Sanders v. British Columbia (Milk Board)* (1991), 53 B.C.L.R. (2d) 167 (B.C.C.A.), the appellant producer took issue with the surrender assessment imposed by the Milk Board. The issue before the Court of Appeal was whether quota could be considered “property” as against the Milk Board itself. The Court answered in the negative, stating:

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