

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING MARKETING COSTS & LOSSES LEVIES

BETWEEN:

ISLAND FARMS DAIRIES CO-OPERATIVE ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

ISLAND MILK PRODUCERS ORGANIZATION
BC MILK PRODUCERS ASSOCIATION

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Wayne Wickens, Member

For the Appellant

Eric Erikson, Chief Financial Officer
Peter Vaartnou, Counsel
Dave Pendray, Director

For the Respondent

Robert Hrabinsky, Counsel

For the Intervenors

Island Milk Producers Organization

Chris Groenendijk, President

BC Milk Producers Association

Len Bouwman, Director

Date of Hearing

June 1, 2004

Place of Hearing

Victoria, British Columbia

INTRODUCTION

1. On November 20, 2003, the British Columbia Milk Marketing Board (the “Milk Board”) issued a decision to increase the Marketing Costs & Losses Levy (“the MCL Levy”). The purpose of the MCL Levy was to require processors to pay a levy to partially offset the economic impact on dairy producers who were experiencing lower rate of returns on cull cow sales as a result of the crisis related to bovine spongiform encephalopathy (BSE).
2. To put the Levy into proper context, it is important to note that the primary impact of the BSE crisis is on beef cattle producers, who have experienced losses of up to 90% due to low prices and the loss of export markets for beef. In the dairy industry, the impact is limited to a producer’s sale of “cull cows”, cows that were no longer actively used to produce milk and sold for meat production. These sales represent approximately 4-5% of the average dairy producer’s total income. The MCL Levy recognised that the BSE crisis impacted this portion of a dairy producer’s income.
3. The MCL Levy effectively makes the policy judgment, at issue on this appeal, that it is appropriate for processors of milk to partly subsidise this economic impact on producers.
4. On December 24, 2003, Island Farms Dairies Co-operative Association (“Island Farms”) filed an appeal of this policy decision to the British Columbia Farm Industry Review Board (the “Provincial board”) and requested a stay of the announced increase. The application for a stay was dismissed and the Provincial board scheduled the appeal hearing for January 27, 2004. Administratively, the Milk Board was to begin collecting the levy in mid-February 2004.
5. In the initial hearing of the appeal, three producer associations were granted Intervenor status. The BC Milk Producers Association (“BCMPPA”) and the Heritage Dairyfarm Association intervened in support of the Milk Board. The Island Milk Producers Organization (“IMPO”) intervened in support of Island Farms. The Heritage Dairyfarm Association did not appear at the continuation of this appeal.
6. Additional relevant background to this matter can be found at paragraphs 1-11 of our February 12, 2004 decision, which we adopt but do not find necessary to repeat here.
7. The appeal was heard on January 27, 2004, and as just noted, the Panel issued a decision on February 12, 2004 suspending the implementation of the MCL Levy, stating in part:
 34. Having given this matter careful consideration, we conclude that the implementation of the MCL Levy under appeal should be suspended for a maximum of 60 days from the date this decision is released. At the conclusion of 60 days or sooner, the parties will report in

writing to this Panel advising whether the appeal has been resolved. If so, the appeal file will be closed. If the Milk Board's decision is to affirm their current order, Island Farms may pursue its appeal. The parties will be required to attend a pre-hearing conference and new hearing dates will be set to conclude the appeal. If however, the Milk Board amends or varies its November 20, 2003 decision, persons aggrieved or dissatisfied by the new decision have a right of appeal.

35. The basis for our decision to temporarily suspend both the \$1.96 increase to the MCL Levy and a final disposition of this matter on appeal relates to the uncertainty regarding whether the other members of the WMP intend to take similar action. As noted above, the Milk Board submitted that other provinces will act "in the very near future"; this suggests that its action was taken in part based on that assumption. However, nearly three months have passed since the Milk Board took action, and no evidence has emerged of similar action by the other provinces. The Appellant was clear that if the other Provinces do act, the Appellant would have no issue with the Levy, as its concern in this context relates to relative rather than absolute cost. We find that the interest in having this point addressed outweighs the temporary prejudice to producers for the 60-day suspension period.

8. In a letter dated February 13, 2004 the Provincial board provided further clarification of its direction, stating:

The Panel has directed that the implementation of the \$1.96/HL increase to the Marketing Costs and Losses Levy be suspended for a period of 60 days, to allow the British Columbia Milk Marketing Board ("the Milk Board") to undertake consultations and thereafter to take whatever action it considers necessary in the public interest.

Finally, we understand that there is confusion as to whether, in light of the suspension, the levy would be back-dated to January 1, 2004 in the event that Island Farms Dairies Co-operative Association ultimately fails in its appeal. This is an issue of remedy that would have to be argued if the hearing proceeds.

9. Following the February 13, 2004 letter, and a further letter from the Provincial board's General Manager on February 18, 2004, the suspension was, with the consent of the parties, extended by two weeks to April 26, 2004.
10. On April 20, 2004, the Panel received a letter from the Milk Board requesting that the suspension of the MCL Levy be lifted and a date set for hearing. The Milk Board submitted that there had been ample time for consultation, and all vendors except the Appellant were remitting levies and there were no developments in the Western Canadian or British Columbian dairy industries materially changing the circumstances giving rise to the appeal. The BCMPPA supported this request.
11. Island Farms, in its letter of April 22, 2004, opposed the lifting of the suspension and requested a resumption of the appeal. It observed that a further federal compensation program was now available in addition to the provincial and federal matching fund discussed in the earlier appeal. In addition, it noted that cull cow prices had rebounded considerably.
12. On April 23, 2004, the Panel determined that in light of the circumstances, the suspension of the \$1.96/HL increase to the MCL Levy should continue until such time as the matter was dispensed with on appeal and further advised:

The parties should come to the hearing prepared to address the issues we raised in our February 12, 2004 decision (paras. 37-40), including the broad policy issue of the appropriateness in these circumstances of one province imposing a levy in circumstances where other provinces choose not to act collectively, in response to a national problem such as BSE.

13. By letter dated May 13, 2004, Counsel for the Milk Board sought a final decision from the Provincial board without further hearing. In its view, Island Farms had failed to comply with the commitment recorded in the May 9, 2004 pre-hearing conference report, to provide confidential business information on the financial impact of the MCL Levy, and had failed to do so despite the Panel's directions on two occasions that Island Farms needed to support its position. Secondly, Counsel for the Milk Board argued that the Panel's February 12, 2004 decision created procedural unfairness by permitting or directing the Appellant to "split its case".

14. In our May 27, 2004 letter, the Panel concluded:

...It is for the Panel to decide whether Island Farms lays a proper evidentiary foundation to prove its case. Disputes about whether Island Farms is or should be obliged to provide additional information or has proved its case, are to be argued before the Panel.

Mr. Hrabinsky's second point is, with respect, misconceived. This is a policy appeal before a specialized administrative tribunal, conducting a rehearing, and with broad remedial jurisdiction to make an order it considers appropriate in the circumstances. A policy appeal about the desirability of a levy is not a criminal or civil trial, and the rules applicable to criminal or civil trials are inapt for deciding a policy appeal. This is why administrative law makes clear that the evidentiary rules applicable to courts do not apply to administrative tribunals.

15. The May 27, 2004 decision further emphasised the policy nature of this appeal, "[o]ur February 12, 2004 decision concluded that as the policy context in which this appeal was heard was dynamic, the course of wisdom was to suspend final decision pending the receipt of more current and cogent information in order to answer this policy question", and reiterated our direction in the February 12, 2004 decision (para 42):

We wish to make it clear that, by issuing this suspension decision, we are not pre-judging the outcome of this appeal if and when it proceeds after the 60-day suspension. What we are saying is that if the Milk Board ultimately confirms its desire to have the suspension lifted, the Panel will expect full and detailed evidence and submissions, on both sides, of the advantages versus the disadvantages of any Levy increase in light of the circumstances. This would include the circumstances prevailing at the time, and also address any contingencies such as whether or how the Levy should be affected by other government policies or programs relative to the BSE problem.

16. The matter proceeded to hearing on June 1, 2004.

ISSUE

17. The issue on appeal is whether the Milk Board erred in policy in increasing the MCL Levy by \$1.96/HL?

EVIDENCE AND ARGUMENT OF THE APPELLANT

18. Island Farms argues, and we find, that British Columbia is still the only province that has created a processor subsidised levy to assist dairy producers in recovering losses associated with BSE. In addition, since the January 2004 hearing, an additional federal compensation program has been instituted and cull cow prices have risen. Given these factors, Island Farms maintains its earlier position that the MCL Levy, which is independent of the Western Milk Pool (“WMP”) price structure, is not the “right vehicle” to address the BSE issue.
19. Island Farms submits that raw milk continues to leave British Columbia and flow into Alberta and Saskatchewan. Processed products continue to flow into the British Columbia market displacing local products. Island Farms is concerned that the \$0.02 price differential created by the MCL Levy will be permanent, putting British Columbia-only processors at a disadvantage. Island Farms called four witnesses in support of its argument.
20. George Aylard was also a witness in the first hearing. He has been a dairy producer since 1959 and has a herd of 140-150 cows. He is the Chair of Island Farms’ Board of Directors. Since the pricing lows of January, Mr. Aylard has seen some rebounding in the price for cull cows. In addition, producers now have access to two programs for compensation, a federal/provincial program and a federal program. As a result, Mr. Aylard estimates that producers will recover about 50% of their lost cull-cow revenue. He does not anticipate a full recovery in the cull cow price until the United States reopens the border to all beef shipments. If and when this will happen is uncertain. Mr. Aylard’s point however, is that British Columbia is in no different a situation than any of the other provinces which have chosen not to apply a levy. We accept Mr. Aylard’s evidence.
21. Wayne Wikkerink gave evidence regarding the particular impact of BSE on his operation. He has a 200 cow dairy operation. In addition, since 1992 he has operated a genetic export business exporting high quality bovine embryos worldwide. When Mr. Wikkerink entered the genetic export business in 1992, he realised there was risk associated with this undertaking due to the rigorous testing required. Previously his genetic export business generated 30-40% of the business, since the discovery of BSE and the closing of the border, he has seen his genetic export business drop by 80%. Despite this “hit”, the company is not failing. Although any compensation will not be refused, it is not essential to the viability of his operation. We accept Mr. Wikkerink’s evidence.
22. Mr. Wikkerink has discussed the BSE situation with other producers and recounted a conversation with an Alberta dairy producer who stated that he would be embarrassed to accept compensation through a levy in light of the dire situation faced by beef producers whose losses may exceed 90%. Mr. Wikkerink submitted, and we agree, that by comparison, the dairy industry is seeing only a very small impact.

23. Gay Hahn, Chief Executive Officer of the milk processor Avalon Dairies, appeared at the hearing by speakerphone. Avalon Dairies processes and markets organic and conventional milk. Ms. Hahn has been in the industry for 23 years, and is chair of the British Columbia Dairy Council (the “BCDC”), which represents dairy processors. The members of the Council include Island Farms, Avalon Dairies, Saputo, Saputo Cheese, Blackwell Dairies, “D” Dutchman Dairies, Punjab Milk and Jersey Farms. Ms. Hahn gave evidence regarding the further discussions regarding the MCL Levy between processors and the Milk Board since the last hearing. She recalled a February 20, 2004 conference call between the processors and John Jansen, Chair of the Milk Board. During that call the processors were advised to “hang in there” and pay the Levy. She did not recall any discussion surrounding the Levy at the BCDC Annual General Meeting on February 24, 2004. At an April 22, 2004 meeting, Mr. Jansen attended and discussed Island Farms’ appeal and its reasons for not paying the Levy but there was no discussion or consideration of the impact of the Levy on the industry. Ms. Hahn was unsure if the MCL Levy had been discussed at any of the Milk Industry Advisory Committee (the “MIAC”) meetings that she attended.
24. Ms. Hahn testified that Avalon Dairies has been paying the MCL Levy, as have other processors with the exception of Island Farms. However after five months, there is no sign of any other province introducing a similar levy. Processors are getting “antsy” and are contemplating stopping paying the MCL Levy. Raw milk is the most significant cost to processors. While all processors in British Columbia pay the same price for milk, those in Alberta purchase milk at a lower cost, as they do not pay the same Levy. British Columbia-only processors are at an economic disadvantage as Alberta milk can enter British Columbia and be sold at a lower cost to consumers. Other costs are fixed and cannot be adjusted to offset the impact of the MCL Levy.
25. John Kine, Plant Manager for Lucerne since 1990 also testified by speakerphone. Mr. Kine has been in the dairy industry since 1974. Mr. Kine attended both of the BCDC meetings and two MIAC meetings and recalls that Mr. Jansen was at all of the meetings. While he recalls discussion about the MCL Levy and factual details of the appeal, he does not recall any details regarding consideration of the impact of the Levy on processors. As for costs, he agrees, and we accept, that fluid milk is the biggest cost for a processor and a \$1.96 difference between Alberta and British Columbia is substantial. Other costs are fixed and cannot be adjusted to cover the cost of the Levy; “they are what they are”. He is also concerned about loss of credibility with his retail customers. In the past when milk prices changed, he could explain that as part of the WMP, British Columbia based its price on a formula based on the Alberta cost of production. The MCL Levy creates an inconsistency between British Columbia’s price and that of the rest of the Western Provinces; it is messy and hard to defend. Lucerne has passed the increased cost of the Levy to their customers; in the event the MCL Levy is rescinded they will refund their customers.

26. Mr. Kine states that he could accept a levy if other provinces acted in a similar fashion. However, he feels that a levy is not the proper way to address a national problem such as BSE. It is his belief that as the WMP uses Alberta's cost of production to set price, it is Alberta that must take the lead and modify its formula accordingly.

ARGUMENT OF THE RESPONDENT

27. The Milk Board argues that Island Farms has not provided any evidentiary foundation to support its assertion that the MCL Levy has put them into a non-competitive position. Without an evidentiary foundation, it is impossible to weigh the veracity of its assertion. In fact, the evidence before the Panel supports the conclusion that Island Farms is doing well. Dividends of approximately \$4.8 million were paid out to its members in 2003 and recent newspaper articles confirm Island Farms' aggressive plans for expansion into the Alberta market place. Discussions with Saputo suggest that contrary to the evidence lead by Island Farms in the earlier hearing, Saputo is producing its value added specialty products in BC for the rest of Canada.¹ Mr. Kine of Lucerne indicated that his company did not move milk into British Columbia unless there was a problem with supply here. This evidence all contradicts Island Farm's claim of non-competitiveness. While there may be disadvantages, there are also advantages to being a BC-only processor. However, from the evidence presented at this hearing there is no way to draw a conclusion that the MCL Levy places Island Farms at a competitive disadvantage.
28. As for the impact of BSE on producers, the Dairy Farmers of Canada have estimated a decline in income to producers of ~\$5.02/HL. After taking into account government assistance programs, the Milk Board estimates producers have a decline in income of ~\$3.39/hl. Even with the assistance provided by the MCL Levy, producers will still experience a shortfall of ~2.21/hl. Although the amount of loss will vary from producer to producer, there remains a real and serious impact on dairy producers.
29. Although other provinces have yet to act to implement a similar levy, meaningful discussions are continuing in Alberta and Manitoba. Mr. Jansen believes that the range of levy being contemplated by these two provinces is significantly higher than British Columbia's \$1.96/HL MCL Levy. The Milk Board continues to monitor the actions of other provinces and intends to adjust its Levy should that be required.
30. The Milk Board argues that although it is difficult to precisely quantify, the impact of BSE on producers is real and significant. Even with government assistance, producers are experiencing significant shortfalls. The Milk Board has chosen to take a leadership role, as it has done on other issues. The Milk Board has the right

¹ In response to questions from the Panel, Mr. Jansen conceded that he did not ask whether all value-added products were being produced in BC or if not, what percentage were.

to set and collect levies and this particular levy exemplifies the very best aspects of regulated marketing and represents a progressive response to the problem of BSE by shifting the burden of responsibility from government to industry. The fact that other members of the WMP have chosen not to act in a similar fashion is neither an indication that this decision was unsound nor a measure by which to judge the actions of the Milk Board.

SUBMISSIONS OF INTERVENORS

BCMPA

31. The BCMPA Board of Directors unanimously supports the Milk Board's decision to implement the \$1.96/HL increase in the MCL Levy. The BCMPA argues that the Canadian agricultural sector, and specifically the dairy industry, has been devastated by the discovery of BSE. The Milk Board has the legislative authority to set milk prices in the province to ensure a fair return to producers and should be allowed to do so. In this case, as producers continue to experience a decline in income of \$2.74/HL on an annual basis, the MCL Levy is an appropriate response to this loss.

IMPO

32. The IMPO supports Island Farms in this appeal arguing that the Milk Board acted unilaterally when it imposed the increased MCL Levy. The better course would have been to work within the WMP or nationally to find relief for all dairy producers. Although IMPO commends the Milk Board for its leadership, given that British Columbia has been the only province to impose a levy, the result negatively impacts BC-only processors.

DECISION

33. In our February 12, 2004 decision, the Panel suspended the implementation of the MCL Levy as a result of our uncertainty regarding whether the other members of the WMP intend to take similar action. As this was, in part, the justification for the Milk Board's actions in implementing the MCL Levy, the Panel felt that upholding the MCL Levy was premature. In addition, the Panel accepted the common sense position that "a significant increase in the cost of the largest component of production carries more than a speculative risk of loss of market share in a market where out of province processors are aggressively seeking to obtain a greater share". The Panel did, however, state that if a subsequent hearing were convened to permanently cancel the MCL Levy, it expected more detailed evidence from both Island Farms (regarding precisely how the levy affects its competitive position) and the Milk Board (regarding how the BSE crisis has impacted BC dairy producers both in absolute terms and as a percentage of their net income).

34. This appeal was reconvened on the question whether the MCL Levy should be cancelled. We have considered first the factor of the impact of the MCL Levy on Island Farms specifically. For its part, Island Farms chose not to provide us with detailed evidence or economic analysis regarding how, specifically, its competitive position would be negatively impacted by the MCL Levy. Rather, it continued to rely on what it regards as the obvious proposition that competitiveness is adversely affected by raising the relative cost of the most important cost of production.
35. Island Farms' approach made it impossible for the Milk Board to test the specifics of Island Farms' assertion, a difficulty complicated by the fact that the Provincial board does not presently have the power to compel testimony. As a result, the Panel considered whether we ought, in the circumstances, to conclude that Island Farms' appeal should fail based on an adverse inference against Island Farms for its approach to this question.
36. After careful deliberation, we decided that this was not the proper approach to take on a policy appeal of this nature. We find this for three reasons. First, despite the Milk Board's valid argument that "competitiveness" is a complex economic equation, we find it difficult to reject the policy and economic reality that raising the cost of a processor's single largest expense, the cost of fluid milk, will adversely affect the ability of that processor to compete against processors from other provinces not experiencing a similar increase. The Panel finds that the Milk Board failed to refute this proposition by way of any inquiries or analysis of its own either before or during the hearing. The very existence of a WMP and a common pricing formula emphasises the undesirability, from the perspective of market stability, of differential pricing. Second, while Island Farms has put the MCL Levy in issue, the MCL Levy affects not only Island Farms but the entire industry, including other processors and the producer sector, as set out in the submissions and evidence received by the Panel from other processors and producers. The final resolution of difficult and multi-faceted policy questions such as this affecting numerous stakeholders within an integrated industry is not, in our view, facilitated by making the outcome turn on a legalistic concept akin to "adverse inference", which is designed to assist courts in making findings of primary fact in civil litigation between adversaries. While the present proceeding is an appeal, it must be remembered that it is a policy appeal in which we, as a policy board, are entitled to hear and consider all relevant evidence by way of rehearing: *British Columbia (Chicken Marketing Board) v. British Columbia Marketing Board*, 2002 BCCA 473. Finally, in the circumstances of this case, we conclude that Island Farms' inability to show a clear and demonstrable short-term harm from the MCL Levy is much more relevant to the remedy we ought to grant, as discussed below.
37. On the first factor relevant to whether the MCL Levy should continue, we conclude that while Island Farms has not demonstrated the precise impact of the MCL Levy on its particular competitive position, we accept the evidence and the position that the MCL Levy necessarily creates economic conditions that cause a significant risk of undermining the competitive position of the British Columbia processing

industry, which impacts will vary somewhat from processor to processor. However, this conclusion does not end the matter. As noted in our previous decision, what needs to be weighed on the other side is whether the purposes, objects and importance of the MCL Levy outweigh its effect on processors. We therefore turn to the policy issue of the desirability of the MCL Levy, considered in light of current circumstances.

38. The Milk Board argues that the MCL Levy is an appropriate exercise of its authority to deal with a significant problem for its producers. It has taken a leadership role and should not be faulted simply because other provinces have not acted in a similar fashion.
39. The Panel has deliberated on this issue at length. In the end, while the Panel recognizes and has sympathy with dairy producers for the economic impact of the BSE crisis on the cull cow portion of their revenues, we are not on balance satisfied that the objective of compensating producers for what amounts on average to a reduction of 4-5% of a producers' income (which reduction is also being partly compensated by other provincial and federal programs) justifies continuing to require British Columbia processors to not only subsidise that reduction but also assume what we regard as the more serious marketplace risks of a "BC-only" Levy. As we noted at paragraph 36 of our February 12, 2004 decision "[c]learly, the health of the BC processing industry is closely linked with the health of the BC regulated industry as a whole".
40. In the end, therefore, while we commend the Milk Board for its leadership, we cannot support it acting in these circumstances to impose a Levy in the absence of similar actions taken by other provinces in the WMP. Given that under the WMP, the prices paid by processors to producers of milk are pooled over the four western provinces to provide an equitable return for producers in each province, by implementing the Levy, the Milk Board has in effect raised the price of milk for BC processors over that which is paid by its WMP counterparts. BSE is a national problem, if an industry-based solution is warranted, the Panel is of the view that any solution should be at least regional, if not national. To do otherwise allows large processors operating in several provinces a competitive advantage. As we stated in our February decision "it is not unreasonable from a policy perspective (despite the commendation rightly due the Milk Board for taking a leadership role rather than sitting on its hands in the face of this problem) to seek a co-ordinated regional solution".
41. If an industry-based solution cannot be agreed to, dairy producers still have access to the same government assistance programs made available to non-supply managed commodities. However, there remains the public policy issue of the appropriateness of supply managed producers having access to both industry based solutions and government assistance programs, but that philosophical issue is beyond the scope of this appeal.

ORDER

42. The \$1.96/HL increase to the MCL Levy is rescinded, effective June 30, 2004.
43. The parties are to note that we have rescinded the MCL Levy effective June 30 rather than retroactively. We have done so quite consciously, and for several reasons. First, while we have concluded that the MCL Levy is not in the long term best interests of the industry, Island Farms has not persuaded us, as noted above, that the MCL Levy has or would have created immediate burden or harm to its competitive position. As Island Farms itself disclosed in the most recent hearing, its fundamental concerns arise in the medium and longer term, and in particular that the MCL Levy might become “permanent”. Second, we have not felt bound to grant a retroactive remedy because we have not made any finding that the MCL Levy is illegal or *ultra vires*. As we have repeatedly emphasised, this is a policy appeal, and in our view the Provincial board has greater flexibility in granting a remedy on policy appeals than where the issue is legality. Thirdly, we note that other processors have been paying the MCL Levy to date, and as such we consider it appropriate for Island Farms to be in no better or worse position than those other processors. Finally, while we have overturned the Milk Board, we do not consider that the Milk Board’s policy error was so “serious” as to justify requiring it to return the MCL Levy incurred thus far to processors. This has been a close case, with valid producer interests in the balance. It is not an unjust result to allow the Milk Board to give producers the benefit of the MCL Levy incurred thus far while giving processors the certainty of knowing that the MCL Levy will terminate on a date certain, and that no similar Levy will be imposed unless there is joint action among WMP members.
44. The Milk Board is directed to continue working with its WMP counterparts to determine what if any adjustments to accommodate BSE are anticipated. The above direction is without prejudice to the Milk Board’s authority to act as it sees fit, should the other WMP provinces act to impose a levy or adjustment of their own.
45. In the circumstances, there will be no order as to costs.

Dated at Victoria, British Columbia this 25th day of June, 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Karen Webster, Member

Wayne Wickens, Member