



September 21, 2007

File: 44200-50/MMB #07-14

DELIVERED BY

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**SUMMARY DISMISSAL OF AN APPEAL BY RONALD AND STEPHANIE SMITS
REGARDING A DECISION OF THE BC MILK MARKETING BOARD TO DENY AN
APPLICATION FOR THE COTTAGE INDUSTRY PROGRAM**

As a preliminary matter in the above appeal which went to hearing in Abbotsford on September 11, 2007, the British Columbia Milk Marketing Board (Milk Board) requested a Summary Dismissal of the appeal.

The issue on appeal was whether the Milk Board erred in not allowing Ronald and Stephanie Smits to participate in the Cottage Industry Program.

In requesting the Summary Dismissal of the appeal, the Milk Board quoted the British Columbia Farm Industry Review (BCFIRB) letter of September 6, 2007 sent to both parties in this appeal which stated:

1. A person cannot appeal a "rule" made by a commodity board as a result of a direction from the BCFIRB
2. Nevertheless, a person may appeal from:
 - a. A judgment about how that person's case should be decided if it is not specifically contemplated by the rule;
 - b. A judgment about how to resolve an ambiguity in the rule as applied to that person; or
 - c. A judgment about whether that person should receive an exemption from the rule based on exceptional circumstances.

The position of the Milk Board was that it had amended the Cottage Industry Program Rules to reflect the September 2005 BCFIRB supervisory directions and the draft supervisory directions issued by BCFIRB on February 16, 2007. These amendments were subsequently approved by BCFIRB. Subsection 1(2) of the Milk Board's Cottage Industry Rules was amended to read:

A Person who has not previously participated in the Cottage Industry Program or predecessor program may apply to participate in the Cottage Industry Program by filing with the board an application form, obtainable from the Board, completed and sworn before a Commissioner for Taking Oaths or Notary Public, provided that neither the

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Farm Industry Review Board**

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applicant nor the spouse of the applicant may have, or have had at any time, any financial interest in Total Production Quota, or any other licence, permit or quota issued or granted by any other supply management commodity board, whether directly or indirectly, or through any organization or entity.

Therefore, the Milk Board argued, the Smits clearly do not qualify for the Cottage Industry Program because they have a financial interest in Total Production Quota and are simply appealing a rule made as a result of direction from BCFIRB. It argued this is not appealable and therefore the appeal should be summarily dismissed.

The Milk Board further contended that the exceptions allowing an appeal as listed in (2) above, do not apply to the Smits case. It contends that paragraphs 2(a) and 2(b) are inapplicable as the eligibility of the Cottage Industry Program was clearly contemplated by the BCFIRB directions and that there is no ambiguity which must be resolved. With respect to 2(c) which is based upon the appellant having exceptional circumstances, the Milk Board argued that the Smits have never claimed special circumstances, and therefore no exemptions are warranted.

In response, the Smits stated they would like to start up a specialty cheese business and they do not agree with the rule stating that anyone having a financial interest in quota is ineligible for the Cottage Industry Program. They believe this is unfair and gives an economic advantage to a competitor who may benefit from this program and receive free quota to start a new business. The Smits do not claim to have any special circumstances; the crux of their argument was simply their perceived unfairness of the Cottage Industry Program rule that made them ineligible because of their financial interest in milk quota.

In the Pre-Hearing Conference report sent out to both parties on August 7, 2007, the parties were asked to be prepared to comment on to what extent BCFIRB's prior supervisory directions and approval of the Milk Board's Orders are relevant to this appeal. The parties were also directed to the letters and the BCFIRB website which set out the BCFIRB's prior dealing with the Milk Board concerning this issue. The Smits did not have any comments to make on this issue.

After giving serious consideration to submissions from both parties, the Panel concluded there was no choice but to grant the Summary Dismissal. In our view, it is very clear that the matter under appeal rose directly from directions given to the Milk Board by the BCFIRB. There was no discretion for the Milk Board when considering the Smit's application for the Cottage Industry Program and no ambiguity in the rules. Furthermore, the Smits conceded that they did not have special circumstances; they simply did not agree with the rule. Since both parties were notified that "a person cannot appeal a "rule" made by a commodity board as a result of direction from BCFIRB" and because the only exemptions to this did not apply in this case, the Panel granted the Summary Dismissal of this appeal.

In this instance, BCFIRB derives its power to summarily dismiss an appeal from Section 31 (f) of the *Administrative Tribunals Act (ATA)* which states:

At any time after an application is filed, the tribunal may dismiss all or part of it if:

(f) there is no reasonable prospect the application will succeed;

For the reasons stated, the Panel concluded that there was no possible way that this appeal would succeed and therefore granted the Summary Dismissal.

In accordance with s. 57 of the *ATA*, “an application for judicial review of a final decision of BCFIRB must be commenced within 60 days of the date the decision is issued.”

It remains open to any party to request BCFIRB, in its supervisory capacity, to review and potentially modify the rules arising from its supervisory directions. This is a separate process from an appeal and a decision made by the entire board, not the Panel hearing this appeal.

Dated at Victoria, British Columbia, this 21th day of September 2007.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Sandra Ulmi
Panel Chair



Wayne Wickens
Member



Honey Forbes
Member