



October 3, 2016

File: 44200-50 – File #16-08

DELIVERED BY E-MAIL

Andy Jacobsen
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Dear Sirs:

**RE: AN APPEAL REGARDING THE BC MILK MARKETING BOARD'S
DETERMINATION OF THE RAW MILK HAULING RATE FOR A PROPOSED FARM
LOCATION - SUMMARY DISMISSAL DECISION**

Introduction

The appellant, Andy Jacobsen, seeks to appeal from the July 20, 2016 refusal of the British Columbia Milk Marketing Board (Milk Board) to (as stated on his Notice of Appeal) “honour their commitment for a \$100 fee for milk transportation as set out in the 2008 FIRB decision”. Mr. Jacobsen seeks to argue that the Milk Board should be required to stand by a determination he says it made in 2008 that he would only have to pay \$100 per milk pickup when the transporter uses Highway 97 as its preferred route. Mr. Jacobsen refers to BCFIRB’s previous appeal decision in his case where this determination was before BCFIRB: *Andy Jacobsen v. British Columbia Milk Marketing Board* (BCFIRB, February 20, 2009).

Following an August 22, 2016 prehearing conference, the Milk Board applied to summarily dismiss this appeal, with costs. A written submissions process followed.

This decision is about the Milk Board’s summary dismissal application. It is not about the appeal itself.

For the reasons that follow, the Milk Board’s application is dismissed.

**British Columbia
Farm Industry Review Board**

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The Appeal

By way of background, Mr. Jacobsen is contemplating starting a dairy operation near Clinton, BC. He has been invited to participate in the Milk Board's Graduated Entry Program. This appeal arises as a result of his seeking confirmation from the Milk Board as to the freight rate he will be charged to move his milk given that his farm is "out of zone".

At the pre-hearing conference, the appellant described his grounds of appeal as follows:

- a) The Milk Board stands by the FIRB 2008 decision that was precipitated by the July 29, 2008 letter discussing two possible freight rates dependent on the route used by the transporter.
- b) The July 29, 2008 letter states a "flat fee" of \$100 dollars for those occasions that the Milk transporter uses Hwy 97. This "flat fee" was determined by the Milk Board in accordance to their Consolidated Order. It is important to note that the Board meeting prior to issuing this letter states: "The Board reviewed staff recommendations with respect to A. Jacobsen's out of zone boundary request for milk pick-up and the applicable rates. Staff was directed to obtain legal counsel input from R. Hrabinsky and to charge out of zone producers including A. Jacobsen and according to that defined in the Consolidated Order." Reference: BCMMB – Board Meeting July 28, 2008.
- c) The strict application of the Consolidated Order that Mr. Hrabinsky claims is the position of the Milk Board, was pertaining to the alternate freight route (Hwy 5) and was the basis of the appeal in 2008.
- d) Approximately 2 years ago the transporter for hauling milk changed and Hwy 97 has been the preferred route. The application of the Milk Board's July 29, 2008 letter and its reiteration in the FIRB 2008 appeal decision will conclude a \$100 dollar "flat fee" would apply in my circumstances.
- e) The undisputed fact that the Milk Board established two possible freight rate scenarios proves the Milk Board's acknowledgement of the special circumstances (temporal proximity) pertaining to my farm. Without this acknowledgement the MMB would have determined only 1 freight rate scenario. In my opinion, this nullifies Mr. Hrabinsky's Consolidated Order argument and the MMB's decision to not honor the \$100 dollar "flat fee".

In short, the appellant seeks to argue that the Milk Board sent him a decision letter dated July 29, 2008, specific to his circumstances. In that letter, it determined that where the Transporter uses Highway 5 (which was the case at the time of the 2008-09 appeal), his freight rate would be \$611.00, but also contained a reference to a \$100 freight rate where, as the appellant argues is the case today, the Transporter is using Highway 97 (which is much closer to his proposed operation).

Based on the Milk Board's July 29, 2008 letter, the appellant seeks to appeal from this July 20, 2016 email response he received from the Milk Board's Chief Executive Officer:

Thank you for your letter dated July 12, 2016 regarding another request for exemption to current transportation policy. As Woody Siemens had explained in his email of May 2, 2016, the current

policy remains intact and the Board stands on the BCFIRB 2008 appeal decision. We consistently provided the same answer to your request for exemption to transportation policy and explained in detail again during our meeting on July 6, 2016.

As you noted in your letter, the \$100 fee was raised in 2008. The BCFIRB appeal decision of December 3, 2008 addressed the \$100 fee proposal and agreed with the Board that the policy is built on the concept of freight zones not freight routes. There has been other offer of a \$100 fee option since 2008 and it was clearly dealt with in the 2008 appeal.¹

The Milk Board's position

The Milk Board seeks an order for summary dismissal on the basis that the appeal is out of time, is frivolous, vexatious or trivial or gives rise to an abuse of process and there is no reasonable prospect the appeal will succeed: see s. 8.1(1) of the *Natural Products Marketing (BC) Act* and ss. 31(1)(b), (c) and (f) of the *Administrative Tribunals Act*.

The argument that the appeal is out of time relates to the fact that the Milk Board's decision to not grant an exemption to the appellant from the application of subsection 2(h) of Schedule 6 to the Consolidated Order was made in 2008, a decision from which the Milk Board has never deviated.

The argument that the appeal is frivolous, vexatious or trivial, gives rise to an abuse of process and has no reasonable prospect of success relates to the fact that the Milk Board's decision has already been the subject of an appeal to BCFIRB and following a careful examination, BCFIRB dismissed that appeal. The Milk Board has made no other decision and as such, the matter cannot be re-litigated. The appellant cannot "breathe life" into an appeal simply by asking the Milk Board to reconsider an earlier decision.

In terms of background facts, the Milk Board argues that at no time has it ever made a "commitment" to the appellant or otherwise "for a \$100 fee for milk transportation". It argues that, on the contrary, subsection 2(h) of Schedule 6 to the Consolidated Order sets the following rates for a producer located outside established regions (and has stated since prior to 2008):

2. A regional marketing costs and losses levy is fixed and imposed on Producers as follows:
 - (h) where the Producer is situate in a Remote Region, the Producer shall pay the regional marketing costs and losses levy applicable in the next closest region, plus the greater of:
 - (i) \$100.00 for each Delivery of milk or cream; or
 - (ii) \$2.30 per Transporter route kilometre for each Delivery of milk or cream, calculated at the distance between the Producer's dairy farm and the closest border of the next closest region.

¹ Note that while the Milk Board's letter refers to BCFIRB's decision having been made in 2008, it is common ground that the appeal decision is the decision referenced above, heard on December 3, 2008 and decided on February 20, 2009.

The Milk Board says that in 2008, the appellant sought an exemption from a strict application of subsection 2(h) which the Milk Board refused. That refusal was the subject matter of a 2008 appeal to the BCFIRB.

The Milk Board emphasizes paragraph 27 of BCFIRB's February 20, 2009 decision:

27. The BCMMB has set rates for producers who chose to establish farms outside of the established freight zones. The zone boundaries, based on geographic coordinates, and the rates for shippers in remote regions are published in the Consolidated Order. Producers whose farms fall outside established zones are required to pay the "greater of \$100.00 for each delivery of milk or cream, or \$2.30 per transporter route km for each delivery of milk or cream calculated at the distance between the producer's dairy farm and the closest border of the next closest region". The BCMMB maintains that it is Mr. Jacobsen's responsibility to read and understand these Orders prior to establishing his dairy farm.

As I understand it, the "strict application of the section" referred to by the Milk Board relates to the fact that the Consolidated Order calculates the transportation fee (\$100 minimum or \$2.30 per km) based not on the producer's proximity to the particular freight route used by the transporter, but rather the distance between the producer's farm and "the closest border of the next closest region".

Thus, the Milk Board's position, as I understand it, is that even if the transportation truck drives right by the appellant's out of zone farm, the appellant still has to pay a rate that is based on his farm's distance from the "border of the next closest region". The Milk Board argues that this is precisely what BCFIRB upheld in the 2009 appeal decision.

The Milk Board also makes reference to paragraphs 3-5 of BCFIRB's 2009 appeal decision:

3. In its July 29, 2008 response to the appellant, the BCMMB calculated the appropriate freight rate based on its Consolidated Order of \$100.00 (the prescribed minimum fee) for those occasions when the milk hauler uses Highway 97 as its primary artery and \$611.00 when the hauler uses Highway 5. The \$611.00 was calculated by multiplying the 266 km round trip from Mr. Jacobsen's proposed farm to the nearest Okanagan freight zone boundary point by the \$2.30/km rate set in the Consolidated Order. The BCMMB explained that producers outside of defined freight zones are responsible for the "incremental cost of the transport of their milk to closest boundary of the next closest region". The BCMMB indicated that the hauler would "do their best to accommodate the pick-ups using Hwy 97" but that this option was at the hauler's discretion.
4. In his August 8, 2008 letter, the appellant disagreed with the \$611.00 rate and argued that as the distance from the proposed farm to the closest point the tanker passed using this route (Cache Creek) was less than 100 km round trip, the BCMMB should either amend its Consolidated Order to permit the calculation of his rate in the manner he proposed or "reconsider its earlier decision" and exercise discretion in the application of its Consolidated Order to his proposed farm location.
5. By letter dated August 26, 2008 the BCMMB confirmed its earlier decision. Mr. Jacobsen filed his appeal of the BCMMB's July 29, 2008 decision on August 27, 2008.

The Milk Board argues that while paragraph 3, read in isolation, might tend to suggest that the Milk Board exercised its discretion in 2008 to exempt the appellant from a strict application of the Order, any alleged “commitment” to charge only \$100 “is not sustainable when read in the context of the decision as a whole. After all, it must be remembered that the 2008 appeal was taken against the decision **to not grant relief** from a strict application of the Order”. [emphasis in original].

The Milk Board further argues that the chart contained in the July 29, 2008 letter relied on by the appellant contains no “commitment” that the appellant need only pay the lesser sum of \$100, and that a follow up letter dated August 27, 2008 confirms the Milk Board’s advice to the appellant that rates would be “based on the Consolidated Order”.

Based on its view that this issue has already been decided and adjudicated, the Milk Board argues that this appeal is out of time as challenging a decision it made in 2008, and argues therefore that this is an instance of an appellant seeking to improperly bypass the appeal provisions by purporting to appeal an affirmation of an earlier decision. On the same basis, the Milk Board argues that the appeal is frivolous, vexatious or trivial and gives rise to an abuse of process, and there is no reasonable prospect that the application will succeed, and that this is therefore an appropriate occasion for an award of costs against the appellant.

Appellant’s response

In response, the appellant emphasizes the specific text of the Milk Board’s July 29, 2008 letter, which set out a table “showing the two possible freight rates relating to my farm: Hwy 97 (\$100) and Hwy (5) (\$611). The letter also indicated that the transporter ‘will do their best’ to accommodate pickups using Hwy 97.”

The appellant argues that the 2008 appeal was not about the \$100 flat rate part of the Milk Board’s decision; it was about the \$611 rate:

... the 2008 FIRB appeal was filed solely on the basis that the Milk Board determined \$611 was an acceptable rate for pickup when the Transporter used Hwy 5. Since this is no longer a preferred route by the Transporter, it no longer warrants further discussion. It is, however, very important to note that the 2008 FIRB appeal was based on the July 29, 2008 letter from the Milk Board that indicates two (2) possible freight rates. The 2008 [sic] FIRB decision acknowledges the two (2) freight rates and how they are applied. On February 29, 2008 FIRB communicated its decision to accept the Milk Board’s argument based on their July 29, 2008 letter without conditions. This decision confirms the Milk Board determined my appropriate freight rate to be a flat rate of \$100.00 when the Transporter uses Hwy 97....

On July 20, 2016, I received a letter ... that indicated the Milk Board would no longer honour its earlier determination that a \$100 fee would apply even though the Transporter’s preferred route is Hwy 97. This completely contradicts the July 29, 2008 Milk Board letter and the FIRB 2008 [sic] decision....

Despite the numerous attempts of the Milk Board to suggest that I am trying to relitigate the 2008 FIRB decision, this allegation is completely false....

DECISION

Let me state at the outset that I agree with many of the general legal principles outlined by the Milk Board. If I had found this to be a clear instance of an appellant seeking to file a “back-door” appeal to get around the 30 day limitation period simply by seeking an “affirmation” of decisions previously made (*Schwaerzle v. British Columbia Milk Marketing Board*, March 24, 2009, *Saputo v. British Columbia Milk Marketing Board*, May 29, 2008 and *Mountain Valley Dairy Ltd. v. British Columbia Milk Marketing Board*, May 29, 2008) or an instance of seeking to re-litigate an issue already decided by BCFIRB, I would not hesitate to summarily dismiss the appeal on the basis set out by the Milk Board.

The question for me is whether this is a clear instance of attempting to re-litigate an issue. If it is, the resources of the parties and BCFIRB should not be wasted on hearing the appeal. However, if the appellant has raised a live issue as to whether he should be entitled to rely on the Milk Board’s July 29, 2008 letter, he should not be deprived of his right of appeal and the issue should go to an appeal panel for a full hearing and decision. On a summary dismissal application, the burden is on the Milk Board to show that the case is so clear that it would be inappropriate to hear an appeal. The power to summarily dismiss an appeal, which will deprive an appellant of his right of appeal, should only be exercised where it is clear on the face of the appeal that it cannot possibly succeed or that it is devoid of merit.

I have not been convinced that the appeal is out of time or that there is clearly no merit to this appeal.

In my opinion, the appellant has raised an *arguable* case that BCFIRB’s 2009 appeal decision was only about the Milk Board’s decision not to grant him an individual exemption from the \$611 transportation fee when Hwy 5 was used, and that BCFIRB did not go so far as to say that the \$611 would apply regardless of which route was used. He has raised an *arguable* case that since BCFIRB’s decision was informed by the Milk Board’s July 29, 2008 letter, which specifically referenced the \$100 flat fee where Hwy 97 was used, the 2009 appeal decision cannot correctly be read as having endorsed or required a strict application of s. 2(h) of the Consolidated Order regardless of the route being used by the Transporter. In short, the question of who, between these two parties, is accurately characterizing the overall context of the 2009 appeal decision is in my view open to argument. I am not making that decision here. That decision should be made by an appeal panel after hearing all the evidence and the arguments of the parties.

I note that the Milk Board acknowledges that the July 29, 2008 letter was a “decision”. While the Milk Board has characterized that decision as being “a decision to refuse to grant an exemption” without qualification, and states that there was no “commitment”, the Milk Board has not for the purpose of this application clearly explained (and this may come out on the appeal) what the reference to \$100 in relation to Highway 97 refers to, what it means, and why it was mentioned if it was not part of the July 29, 2008 decision.

In my opinion, the appellant's appeal from the Milk Board's July 20, 2016 email determination "standing on" the 2009 BCFIRB appeal decision is not simply a "backdoor" attempt to avoid the limitation period. Instead, it raises an arguable issue that should be heard by an appeal panel - namely, whether the Milk Board's July 20, 2016 email determination to the appellant contradicts the Milk Board's July 29, 2008 decision and incorrectly characterizes the BCFIRB 2009 appeal decision.

ORDER

The Milk Board's application for summary dismissal is dismissed.

There is no order as to costs.

Dated at Victoria, British Columbia this 3rd day of October, 2016.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

A handwritten signature in cursive script, appearing to read "B. Locke", written in black ink.

Brenda Locke, Presiding Member