

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL REGARDING THE BC MILK MARKETING BOARD'S
DETERMINATION OF THE RAW MILK HAULING RATE FOR A PROPOSED
FARM LOCATION

BETWEEN

ANDY JACOBSEN

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

DECISION

For the British Columbia
Farm Industry Review Board

Brenda Locke, Presiding Member
Chris K. Wendell, Member
Diane Pastoor, Member

For the Appellant:

Andy Jacobsen

For the Respondent:

Robert Hrabinsky, Counsel

For the Interveners:
BC Dairy Association

Louis Schurmann, Member

Mainland Milk Producers
Association

Louis Schurmann, Member

Kamloops Okanagan
Dairymen's Association

Henry Bremer, President

Date of Hearing

November 18, 2016

Place of Hearing

Kamloops, BC

INTRODUCTION

1. The appellant, Andy Jacobsen, is a farmer near Clinton, BC. Mr. Jacobsen wants to become a dairy farmer. After waiting more than 13 years, he has been invited to enter the British Columbia Milk Marketing Board's (Milk Board) Graduated Entry Program (GEP) and receive an allocation of quota.
2. Believing the invitation to join the GEP was imminent; Mr. Jacobsen contacted the Milk Board in late May 2015, and again by letter dated June 10, 2015, to inquire about freight rates for the transportation of milk produced on his farm.
3. Given the economics of a dairy operation, the amount of the freight rate is important to Mr. Jacobsen. Mr. Jacobsen wanted to confirm what he understood as the Milk Board's July 2008 written commitment that upon commencement of a dairy operation, he would be charged a flat fee of \$100 per pick up whenever Highway 97 was used to transport milk, given that this hauling route is only 4 kilometres from his farm. Mr. Jacobsen noted in his June 10, 2015 letter to the Milk Board that in contrast to the situation in the past, milk is today "continuously transported within this extreme proximity of my location".
4. Mr. Jacobsen did not receive any communication in response from the Milk Board until May 2016 when he was advised that he would be subject to the increased transportation costs set out in the Consolidated Order for producers in a Remote Region.
5. The appellant met with the Milk Board on July 5, 2016 seeking clarification of the freight rate he would be charged and followed up by with a letter of July 12, 2016, which states in part:

The purpose of this meeting was to confirm the anticipated freight rate for hauling milk from my farm location upon being invited to the GEP. Because this issue has been discussed before in 2008, and a determination made by the Milk Board that a \$100 dollar fee would apply to my specific circumstances when the transporter uses Hwy 97 as its preferred route, I am confused as to the reason why this decision has unexpectedly been rescinded. It is my understanding that for the past two (2) years all the milk produced in the Bulkley and Cariboo regions has been hauled for processing using Hwy 97.

6. In a letter dated July 20, 2016 (the decision under appeal), the Milk Board took the position that there was no such commitment stating:

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 no further offer of a \$100 fee option since 2008 and it was clearly dealt with in the 2008 appeal.¹

7. In brief, the appellant’s position is that the Milk Board should be required to stand by its earlier determination that he would only have to pay \$100 per milk pickup when the Transporter uses Highway 97 as opposed to Highway 5, set out in a Milk Board letter of July 29, 2008:

The Board has reviewed your request to start up a dairy in Clinton and has determined an appropriate freight rate based upon the Board’s Consolidated Order. As you are aware producers who are located outside of the freight zones as detailed in the Consolidated Order are responsible for the incremental costs for the transport of their milk to the closest boundary of the next closest region. The levy is the greater of \$100.00 or \$2.30 per Transporter route kilometer for each pick up of milk. You are located 266 kilometers round trip from the Okanagan freight zone boundary. The Transporter will do their best to accommodate the pick ups using Hwy 97. However, the Transporter has two (2) routes in which you can be picked up at their discretion based on truck capacity, weather, and road conditions.

The table below accounts for only the charges for kilometers it does not include the stop charge or the monthly provincial freight rate:

	Hwy 97	Hwy 5
Distance (roundtrip in Km)	20	266
Rate per Km or Flat fee per occasion	\$100.00 (flat fee)	\$2.30
Total	\$100.00	\$611.00

The decision of the Board was that you will be responsible for the incremental compensatory rate that exceeds the monthly provincial freight rate (based on the abovementioned), plus the monthly provincial freight rate, plus the standard \$8 stop charge per each pick up. (emphasis added)

8. The Milk Board strongly opposes this appeal. Its initial position taken at the Pre-Hearing Conference (PHC) and advanced on its summary dismissal application was that at no time had it ever made a “commitment” to the appellant or otherwise “for a \$100 fee for milk transportation”. It relied on section 2(h) of the Consolidated Order which provides that a producer shall pay the greater of \$100 or \$2.30 per Transporter route kilometre between the Producer’s dairy farm and the closest border of the next closest region.

¹ The Milk Board’s reference to a December 3, 2008 decision is in error, the proper reference is *Andy Jacobsen v. British Columbia Milk Marketing Board* (BCFIRB, February 20, 2009), referred to in this decision as the 2009 appeal decision.

9. Initially, the Milk Board sought summary dismissal of this appeal arguing that this issue had been fully addressed in BCFIRB's 2009 appeal decision which it argued decided that the appellant must pay a rate that is based on his farm's distance from the "border of the next closest region". The Milk Board argued that this appeal was an attempt to re-litigate the same issue, was frivolous, vexatious or trivial, gave rise to an abuse of process, and there was no reasonable prospect of success. It also argued that this was an appropriate occasion for an award of costs against the appellant.
10. The presiding member of BCFIRB dismissed the Milk Board's request for summary dismissal in reasons issued October 3, 2016 stating in part:

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, as 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.

11. On October 20, 2016, the Milk Board requested that this appeal be referred to BCFIRB's supervisory jurisdiction as it was "clearly evident from the attached Brief of Documents [that] the substantive issues were already litigated before the BCFIRB in 2008" and "these substantive issues cannot be re-litigated. To do so would constitute a clear and obvious breach of procedural fairness insofar as a 'second' appeal would violate the fundamental principle of *res judicata*." The Milk Board argued that the issue concerning the meaning of the 2009 appeal

decision could be resolved by engaging BCFIRB's supervisory jurisdiction without re-litigating the substantive issues already addressed by the BCFIRB in its appellate capacity. The appellant opposed this request.

12. In a decision dated October 31, 2016, the presiding member determined that to proceed as the Milk Board suggested would not address the substance of the appellant's issues on appeal (how the 2009 decision applied, if at all, to today's circumstances) and would not fit within the context or intent for a supervisory review.
13. Following the release of the supervisory referral decision, counsel for the Milk Board wrote to BCFIRB seeking directions concerning the conduct of the appeal arguing that the various interlocutory rulings made in support of the appeal left no scope for the parties or interveners to tender evidence or to make submissions. In her decision of November 4, 2016, the presiding member did not agree with the Milk Board's characterization of what the interlocutory rulings had established. She identified the broad issue on appeal as follows:

The broad issue on this appeal is whether the Milk Board erred on July 20, 2016 in refusing to "honour" what the Appellant says was a commitment the Milk Board made in its July 29, 2008 decision stating that the Appellant would only have to pay \$100 per delivery where the transporter used Highway 97.

14. She identified the following specific issues arising within this broad issue:
 - (a) What was the rationale for the Milk Board's July 20, 2016 email response to the Appellant refusing his request to have the Milk Board apply a \$100 freight rate when Highway 97 is used?
 - (b) Did BCFIRB's February 20, 2009 decision establish that the Appellant must pay the \$611 freight rate regardless of the route used by the transporter?
 - (c) If the panel answers "no" to question (b), the following issues arise in relation to the Milk Board's July 29, 2008 decision establishing the rates – and in particular its reference to \$100 where Hwy 97 is used:
 - (i) To what does the reference to \$100 in relation to Highway 97 refer, what does it mean and why was it included in the Milk Board's decision letter? (see October 3, 2016 summary dismissal decision, p. 6)
 - (ii) On the facts, has the preferred route now been changed to Highway 97 since the 2008 appeal was decided, and what if any impact does the change in the preferred route have on the rates as set out in the July 29, 2008 letter?

- (iii) If BCFIRB finds that the Milk Board made a \$100 commitment in 2008 as alleged by the Appellant, should the Milk Board be held to that commitment and if not, why not?
15. In her letter, the presiding member left it open to the parties to provide whatever evidence they considered appropriate to assist the panel to understand the relevant context or background to the Milk Board's July 29, 2008 letter and July 20, 2016 email and the scope of BCFIRB's 2009 appeal decision. The parties could also refer to whatever evidence or legal principle they believe may bear on whether, if a representation was given in 2008, it should be honoured today.
16. Full intervener status was granted to Mainland Milk Producers Association (MMPA) and partial intervenor status was granted to the BC Dairy Association (BCDA) and Kamloops Okanagan Dairymen's Association (KODA) to attend the hearing as observers and provide a written or oral submission.
17. The appeal was heard on November 18, 2016 in Kamloops, BC.
18. It is noted that at the outset of this hearing, counsel for the Milk Board acknowledged that its initial position taken on this appeal that at no time had the Milk Board ever made a commitment to the appellant or otherwise for a \$100 (flat fee) freight rate for milk transportation was made in error, prior to reviewing all the documents.

ISSUE

19. Did the Milk Board err on July 20, 2016 in refusing to "honour" what the appellant says was a commitment the Milk Board made in its July 29, 2008 decision stating that the appellant would only have to pay \$100 per delivery where the transporter used Highway 97?

INTERVENER SUBMISSIONS

20. The interveners support the Milk Board's freight zone policy.
21. KODA is not fundamentally opposed to giving the appellant some relief from the \$611 freight rate, but is deeply concerned about how a variance in this case could create future dilemmas and increase costs to all producers. They support the freight zone policy for out-of-zone shippers and oppose new producers being given consideration similar to that of "an existing producer who made a good argument for special consideration..." and "special consideration ...does not apply to a new producer."² There are many variables to consider regarding a "truck route vs a milk zone". KODA encouraged the appellant to relocate his farm to a designated milk zone.

² See *Lancaster v. British Columbia Milk Marketing Board*, (BCFIRB, March 19, 2009)

22. The MMP and BCDA also support the Milk Board’s freight policy and state that there is strength in the established milk zones. They believe it is “advantageous for all producers to work as a unit” and the Milk Board must stand on its established principles and policies as reflected in the Consolidated Order.

LEGISLATIVE FRAMEWORK

23. Dairy products in Canada are regulated under a supply managed system designed to fill the need of the domestic market. A key component of supply management is quota, which entitles a producer to sell milk in accordance with provincial and federal authorities. In this province, the Milk Board has the authority “to promote, regulate and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of a regulated product within British Columbia and is vested with all powers necessary or useful in the exercise of those powers”.³
24. Given the regulatory framework and the finite supply of quota, it can be difficult for new producers to enter the industry. The Milk Board has created the GEP whereby persons who meet certain requirements can apply for an allocation of GEP quota. As there are more applicants than the program can accommodate, the Milk Board has a waitlist and a limited number of new entrants are invited into the program each year. As a result, applicants like the appellant may spend many years on the waitlist.
25. The Milk Board has enacted its Consolidated Order which set out the rules under which the BC dairy industry operates. The Graduated Entry Program Rules are set out in Schedule 1. Freight rates are set out in Schedule 6 – Levies:

Producer Levies

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.

26. In Part 1 of the Consolidated Order, the Milk Board has defined seven regions by geographic co-ordinates including Bulkley, Cariboo, Fraser Valley, Kootenays, Okanagan, Peace River and Vancouver Island. The appellant’s farm is located in a Remote Region, defined as follows:

³ British Columbia Milk Marketing Board Regulation (B.C. Reg.167/94)

“**Remote Region**” means those regions within the Province of British Columbia excluding Bulkley Valley, Cariboo, Fraser Valley, Kootenays, Okanagan, Peace River and Vancouver Island;

DECISION

27. In coming to our decision, we have accepted the presiding member’s statement of issues as the framework for our analysis.

(a) **What was the rationale for the Milk Board’s July 20, 2016 email refusing the request to apply a \$100 freight rate when Highway 97 is used?**

28. The Milk Board says that its July 20, 2016 email (containing the decision under appeal) was written in response to the appellant’s letter of July 12, 2016 which stated:

Because this issue has been discussed before in 2008, and a determination made by the Milk Board that a \$100 dollar fee would apply to my specific circumstances when the transporter uses Hwy 97 as its preferred route, I am confused as to the reason why this decision has unexpectedly been rescinded. (emphasis added)

29. The Milk Board points out that the appellant’s July 12, 2016 letter makes no reference to the fact that the matters that were “discussed before in 2008” were the subject of a full appeal which ultimately resulted in BCFIRB’s 2009 appeal decision. The Milk Board emphasizes paragraph 38 of the 2009 appeal decision:

...we disagree with the appellant that proximity to a freight route ought to be a determinative factor in establishing milk pick up rates for remote shippers. While it appears that at one point in time, BCMMB staff thought proximity to a freight route may be an appropriate factor to consider in a discretionary decision, it is also apparent that when the BCMMB gave the issue its full consideration, it ultimately rejected this view. This would appear to reflect the reality that as the bid-tender process for the determination of the hauler for a given zone does not reference the proximity of farms to hauling routes; any hauler activity is outside of bid parameters and is addressed separately by the BCMMB. This means that milk volume in the tanker passing the appellant’s farm, irrespective of which route is taken, is not a determinative factor in the rate paid to pick up milk. We agree with the BCMMB that to make an “ad hoc” decision because of proximity to existing freight routes would be fundamentally contrary to the Consolidated Order, introduce “zone creep”, place the integrity of the system in jeopardy and undermine the certainty that all industry participants have. (emphasis added)

30. Milk Board CEO Bob Ingratta’s response to the appellant’s letter dated July 20, 2016, states as follows:

Thank you for your letter of 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 FIRB 2008 (sic) appeal decision. We have 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 (sic) 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 no further offer of a \$100 fee option since 2008 and it was clearly dealt with in the 2008 appeal.

31. It appears that the Milk Board's rationale for its July 20, 2016 response to the appellant was rooted in its understanding of what the 2009 appeal decision decided. Mr. Ingratta testified that the reason why he referenced the 2009 appeal decision was because it contained the fundamental principles (extreme geographical proximity to a zone, extreme temporal proximity to a rule change and exemption for geographic proximity to a freight route is unacceptable because it would create zone creep) and in light of this interpretation, he said the Milk Board's hands were tied.
32. Given that rationale, we turn to a consideration of the 2009 appeal decision.
- (b) **Did BCFIRB's 2009 appeal decision establish that the appellant must pay the \$611 freight rate regardless of the route used by the Transporter?**
33. In answering this question, the first point to be made is that the appellant's 2008 appeal was not about the \$100 (flat fee) part of the Milk Board's July 29, 2008 letter; it was about the \$611 rate.
34. The appellant points to the October 22, 2008 summary dismissal decision issued in his first appeal which states "Mr. Jacobsen disagrees with the Milk Board's determination of \$611.00 when the hauler uses Highway 5 and filed an appeal of the Milk Board's decision on August 27, 2008".
35. The October 3, 2016 summary dismissal decision sets out the appellant's position as follows:

... 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....(page 5, Summary Dismissal Decision) (emphasis added)

36. The Milk Board now concedes that it did initially propose in its July 29, 2008 letter that a \$100 (flat fee) rate be applied when Highway 97 was used. It also says that the appellant clearly articulated his position with respect to the import of this letter in his 2008 appeal, pointing to his letter dated October 4, 2008, which states:

The Transporter when using Hwy 97 passes within 5kms of our farm location. The MMB without reference to its Consolidated Order determined that a flat fee of \$100.00 would be applicable for this service. I agree and find this rate to be fair. The Transporter when using: Hwy 5 passes within 48kms of our farm location. The MMB with reference to its Consolidated Order determined that a fee of \$611.00 would be applicable for this service. I must respectfully disagree with this rate and here is why:...

37. However, the Milk Board argues that at the *hearing* of the 2008 appeal, it rejected its earlier analysis (which it argues provides the basis for the \$100 accommodation) and instead advanced the position that proximity to a freight route is not an appropriate factor to consider and the appellant's circumstances ought to be governed by a strict application of the Consolidated Order.⁴
38. The Milk Board argues that BCFIRB's 2009 appeal decision reflects that the appeal panel was "fully aware" that the Milk Board had offered a special accommodation to the appellant and ultimately rejected the idea that proximity to a freight route could be an appropriate factor to consider in a discretionary decision. The Milk Board, pointing to paragraphs 3-5 and 36-38 of the 2009 appeal decision, argues that the 2009 appeal decision accepted the policy analysis advanced by the Milk Board,

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

⁴ In support, the Milk Board points to its Opening Statement and Written Submission filed in the 2008 appeal. The Written Submission was directed at both the Jacobsen and Lancaster appeal.

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.

...

36. Based on our review of the evidence, the panel finds that the appellant has failed to demonstrate that his circumstances warrant a discretionary decision in his favour. We agree with the BCMMB that to exercise discretion in this case would undermine the fundamental principles inherent in the applicable regulations and would negatively impact the industry as a whole. Further, the decision not to make an exception for the appellant is clearly fact based.
37. The BCMMB is charged with keeping provincial freight rates as low as possible. Currently, regional freight zones are the mechanism by which this goal is achieved. The policy is built on the concept of freight zones, not freight routes.
38. Given the foregoing, we disagree with the appellant that proximity to a freight route ought to be a determinative factor in establishing milk pick up rates for remote shippers. While it appears that at one point in time, BCMMB staff thought proximity to a freight route may be an appropriate factor to consider in a discretionary decision, it is also apparent that when the BCMMB gave the issue its full consideration, it ultimately rejected this view. This would appear to reflect the reality that as the bid tender process for the determination of the hauler for a given zone does not reference the proximity of farms to hauling routes; any hauler activity is outside of bid parameters and is addressed separately by the BCMMB. This means that milk volume in the tanker passing the appellant’s farm, irrespective of which route is taken, is not a determinative factor in the rate paid to pick up milk. We agree with the BCMMB that to make an “ad hoc” decision because of proximity to existing freight routes would be fundamentally contrary to the Consolidated Order, introduce “zone creep”, place the integrity of the system in jeopardy and undermine the certainty that all industry participants have. (emphasis added)
39. Thus, the Milk Board argues that while its July 29, 2008 letter extended a special accommodation of a \$100 freight rate where Highway 97 was used, it later realized that such an accommodation was flawed and so “essentially reversed

course” at the hearing of the 2008 appeal as evidenced by its Opening and Written Submissions as well as the 2009 appeal decision.

40. The appellant, for his part, was adamant that the 2009 decision did not change anything about the July 29, 2008 letter and the Highway 97 rate. When the Milk Board’s submissions were put to him in cross-examination, his response was to the effect that these documents were the Milk Board’s arguments as to why it should not grant him any kind of special consideration for \$611 rate for Highway 5. In the appellant’s view, that is what those documents were about and he acknowledged he lost that appeal. Similarly, he disagreed that the 2009 appeal decision went so far as to take into consideration Highway 97.
41. When asked if it wasn’t “just painfully obvious” that the Milk Board was saying in its arguments on appeal that no special accommodations of any sort should be granted despite what it had said in its July 29, 2008 letter, the appellant disagreed stating the Milk Board’s comments were all pertaining to Highway 5. When pressed for some support for this statement, the appellant pointed to paragraph 34 of the 2009 appeal decision, where the appeal panel stated:

First of all, it is apparent that the BCMMB understood that it had discretion to give the appellant the relief sought. This is not a case where the BCMMB rigidly adhered to its policy. (emphasis added)
42. The appellant says this statement reflects an acknowledgement by the appeal panel of the Milk Board’s decision to have two rates, one for Highway 97 rate and one for Highway 5 (\$611).
43. We have reviewed the record from the 2008 appeal filed by the Milk Board as part of these proceedings. There is no dispute that the July 29, 2008 letter contemplates two freight rates depending on which highway is used by the Transporter, a \$100 flat fee for Highway 97 and \$611 for Highway 5.⁵
44. After reviewing the 2008 Notice of Appeal and the October 4, 2008 letter referenced above by the Milk Board, it is clear that Mr. Jacobsen was challenging only the \$611 freight rate (the rate charged for the usual freight route). He acknowledged that the \$100 flat fee was made without reference to the Consolidated Order but argued that the \$2.30 per kilometre fee (consistent with the Consolidated Order) was excessive in light of the 100 kilometre deviation the Transporter would need to make to pick up milk from the proposed dairy farm. By way of remedy, he sought an amendment to the Consolidated Order or an exercise of discretion in applying the Consolidated Order to his proposed dairy farm (paragraphs 4, 13) charging a per kilometre rate to the nearest freight route (as opposed to the nearest boundary).

⁵ In 2016, we note that the Milk Board’s incremental freight rate was calculated at \$653.20 reflecting a more precise distance calculation.

45. Given that the Highway 5 freight rate was the decision at issue in the 2009 appeal, did the 2009 appeal panel go further, and find that the Highway 5 rate was the rate Mr. Jacobsen would be required to pay, even if Highway 97 was used?
46. We have reviewed the 2009 appeal decision and its underlying record with care.
47. We do not see paragraph 3-5 of the decision as being anything other than a statement of the Milk Board's decision, and the fact that the appeal was about the \$611 freight rate.
48. Paragraphs 36-38 must be read in that context. The appeal panel found the challenge to the merits of the regional freight zone system in the Consolidated Orders was out of time (paragraph 16) and went on to consider the arguments that the Milk Board should have exercised discretion and determined the Highway 5 freight rate for the appellant's proposed dairy farm as being \$230 as opposed to \$611 based on special considerations (primarily proximity, 100 kilometres, to the nearest freight route).⁶ The panel found that Mr. Jacobsen failed to demonstrate that his circumstances warranted a discretionary decision adjusting the Highway 5 freight rate in his favour.
49. The panel's statement that "we do not agree with the appellant that proximity to a freight route ought to be a determinative factor in establishing milk pick up rates for remote shippers" was made in that context. While it is certainly open to the Milk Board to argue that this statement of marketing policy supports its position in this appeal (we consider this argument below), that is very different from arguing that BCFIRB, in 2009, made a specific ruling on the Milk Board's previous commitment about the \$100 freight rate when Highway 97 was used. As our Court of Appeal has recently confirmed, "a case is only authority for what it actually decides".⁷
50. Apart from referencing the \$100 flat fee in the introduction (paragraph 3), the panel was not asked to and nor did it consider that rate further in its decision. Indeed, we agree with the appellant that paragraph 34 of the 2009 appeal decision was an acknowledgement by the appeal panel of the fact that the Milk Board had already made a discretionary decision in the appellant's favour – one which gave rise to no express disapproval by the panel. The fact that the Milk Board had not "rigidly adhered to its policy" could be seen as part of the rationale for why the appeal panel chose not to do anything further for the appellant.
51. We find that the 2009 panel proceeded on the basis that the appeal was a challenge to the per kilometer rate to the closest regional boundary set out in the Consolidated Order. Once it found that an appeal of the Consolidated Order was out of time, the panel turned its mind to whether there was any basis to warrant a

⁶ The rate of \$230 is calculated based on \$2.30 * 100 km.

⁷ *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 28.

discretionary decision in the appellant's favour when the Transporter used Highway 5, which question, in all the circumstances, it answered in the negative.

52. We do not read BCFIRB's 2009 appeal decision as ruling that the appellant must pay a \$611 freight rate regardless of the route used by the Transporter, which ruling would have gone beyond the issue that was appealed. The Milk Board seems to be arguing that this is the logical implication of its arguments advanced and accepted in the 2009 appeal. Whether that is so is a question for argument. But the Milk Board then goes a step further and says what we are dealing with here is an instance of true *res judicata*, the same parties advancing the same issue (a variation from the strict terms of the Consolidated Order before the same decision maker).
53. In our view, while it is open to the Milk Board to argue that the reasoning in the 2009 decision supports its position on this appeal, the 2009 decision did not decide the issue raised on this appeal. We do not see the 2009 appeal decision as making meaningful comment about the \$100 freight rate or its appropriateness as a special accommodation.
54. We also do not read the 2009 decision or the submissions of the Milk Board as evidence that the special accommodation for Highway 97 was "revoked" during the appeal process. Those submissions do not even reference the \$100 freight rate. Further, we found it highly unusual that the Milk Board attempted to rely on its submissions made in the context of an appeal as evidence of a revised position on matters of policy.
55. If the Milk Board felt that its July 29, 2008 letter was unclear or made in error and that it was appropriate to reverse course, that step could have been expressly taken. There has been ample time since 2009 to rectify or clarify its position. It has chosen not to do so. More will be said on this later.
56. Further, we would also observe that it was not just the appellant that felt he had a commitment from the Milk Board regarding Highway 97 freight rates. The Milk Board's October 7, 2015 Issue Document prepared by its Manager of Market Supply and Development, Woody Siemens indicates that as late as 2015, staff was still operating under the assumption that the 2008 letter created a commitment to charge Mr. Jacobsen a \$100 flat fee when the Transporter used Highway 97. They too appear to have been unaware that this commitment had been revoked either as part of the earlier appeal proceedings or as a result of the 2009 appeal decision:

In past letters (2008) sent to Mr. Jacobsen it was proposed by the Board that they would only charge the \$100 minimum charge when trucks used highway 97 and the rate of \$2.30/km when the transporter used highway 5. This was at a time when the transporter often used highway 5 and delivered milk to Alberta, however, highway 97 is always used today.

The purpose of the out of zone transport policy is to limit dairy producers to the 7 milk zones and keep the provincial freight rate as low as possible. However, the Board has previously offered to pick milk up from this location at \$100/pickup and staff feels this is a reasonable amount. (emphasis added)

57. In summary, we find BCFIRB's 2009 appeal decision did not establish that the appellant must pay the \$611 freight rate regardless of the route used by the Transporter.
- (c) **Having answered "no" to question (b), what are the relevant considerations in relation to the Milk Board's July 29, 2008 decision?**
- (i) **To what does the reference to \$100 in relation to Highway 97 refer, what does it mean and why was it included in the Milk Board's decision letter?**
58. At the time of the last appeal in 2008, the Consolidated Order placed the appellant's farm in a Remote Region. That meant that his proposed dairy farm was not located within any of the seven defined regions and as such, absent a discretionary decision of the Milk Board, he would be required to pay regional marketing costs and losses levy applicable in the next closest region, plus the greater of \$100.00 for each Delivery of milk or cream; or \$2.30 per Transporter route kilometer calculated at the distance between the Producer's dairy farm and the closest border of the next closest region.
59. The appellant maintains that the July 29, 2008 letter was at odds with the Consolidated Order in that it offered two rates, one for Highway 97 (\$100 flat fee) and one for Highway 5 (\$611). He says that the fact that the Milk Board created these two scenarios for freight rates was an acknowledgement of the special circumstances associated with his close proximity (4 kilometres) to the Highway 97 transportation route and is reinforced by the Milk Board's statement that the "Transporter will do their best to accommodate the pick-ups using Hwy 97." According to the Milk Board's July 28, 2008 minutes, the decision to send this letter was taken after receiving legal advice.
60. From this, we understand the appellant's point to be that on a strict application of the Consolidated Order, his dairy farm would be required to pay \$611 regardless of the route used reflecting the calculated distance between his farm and the closest border of the next closest region and the July 29, 2008 letter should be understood as an exception for those times when the Transporter used the closest route.
61. The Milk Board's CEO Mr. Ingratta testified in these proceedings. Given that he was not employed by the Milk Board in 2008 and the current members came onto the Milk Board more recently, he was not able to explain the then Milk Board's reasons or underlying rationale for the \$100 flat fee contained in the 2008 letter.

62. The Milk Board's letter from then General Manager Ken McCormack dated October 14, 2008 (part of the record in the 2008 appeal) acknowledges that the \$100 flat fee was a variance from the Consolidated Order but does not explain the reasons for the variance:

In his letter of October 4, 2008, Mr. Jacobsen refers to the flat fee of \$100 that was determined by the Board "without reference to its Consolidated Order." In actual fact, the Board has granted a variance to its Consolidated Order for situations when the transporter will normally be using Highway 97. Mr. Jacobsen is expected to pay the freight rate described in the Consolidated Order when the transporter normally travels along Highway 5.

63. While no explanation was forthcoming at the appeal, it seems reasonably apparent that the \$100 accommodation granted to the appellant when Highway 97, the factors considered by the then Milk Board included a combination of the extreme geographic proximity of his farm to that freight route, the fact that he was "in zone" when he bought his farm and applied for GEP quota and the fact that granting him that accommodation did not harm the pool or increase the costs to other producers.

64. The Milk Board's position on this appeal is that this variance or special accommodation was made in error and was taken off the table in the 2008 appeal. It argues that the Consolidated Order as it existed in 2008 is the basis for the regional milk zone policy and it is the distance from the milk zone (or regional boundary) and not distance from the freight route that dictates the freight rate. The Milk Board says that maintaining the integrity of freight zones is for the greater good of the industry.

65. While we understand the Milk Board's current position, it is clear that the July 29, 2008 letter reflected a considered decision and commitment on the part of the Milk Board to charge the appellant a \$100 flat fee when the Transporter uses Highway 97. This view was also shared by Milk Board staff as reflected in the Milk Board's October 7, 2015 Issues Document referenced above which acknowledged the 2008 minimum charge when trucks used Highway 97.

66. In short, it is clear that the reference to \$100 in the Milk Board's July 29, 2008 letter was to the rate the Milk Board had decided to charge the appellant when Highway 97 was used. It was included in that letter because it was a key part of the Milk Board's considered decision. For the reasons outlined above, we do not accept that the Milk Board's submissions in the 2009 appeal served to "revoke" this decision.

(ii) Has the preferred route been changed to Highway 97 since the 2008 appeal was decided, and what if any impact does the change in the preferred route have on the rates as set out in the July 29, 2008 letter?

67. There is no dispute that since the change in Transporter in 2015, the preferred hauling route is now Highway 97, approximately 4 kilometres from the appellant's farm. It was this change, coupled with the appellant's invitation to join the GEP in 2015, which caused him to go back to the Milk Board to confirm the applicable freight rates for his proposed dairy farm. In his letter of June 10, 2015, the appellant wrote:

To respect the concerns of existing dairy producers and the directives of the Consolidated Order, the BCMMB could choose to apply the rules for producing in a "remote region" whereas a compensatory rate of \$2.30 per km or \$100 minimum (whichever is higher) is applied. In this calculation \$100 dollars would be applied rather than the \$18.40 round trip. If this scenario is accepted, the BCMMB can comfortably argue that by allowing my farm to milk at its current location, the levy of \$100 dollars per pick-up will actually lower the overall freight charges to all producers in the province.

68. Milk Board minutes show that the request was considered at the October 15, 2015 meeting:

GEP Candidate Pickup Request

W. Siemens reviewed an issue document dated October 7, 2015 regarding a GEP candidate from Clinton, BC who is currently on the waitlist and will likely be invited in 2016. The Board instructed staff to respond to the candidate advising that the Board will undertake a review of the policy issue that he raised in his letter. The Board instructed staff to bring this issue, along with tank size, pick-up "windows," and other issues to the transportation committee. The Board will consider activating the transportation committee at the next Board meeting to review potential policy changes.

69. As set out earlier, the Milk Board's October 7, 2015 Issues Document shows that staff was supportive of the appellant's request, acknowledging the prior commitment, and stating:

However, the proposed farm is approximately 4km off of Hwy 97 in Clinton, BC. Currently, Agrifoods (or Vedder) trucks drive down highway 97, past the farm only 8 km out of the way round trip. The cost of \$653.20/pickup is likely much more than the true cost and the \$100 may be much more representative.
(emphasis added)

70. The Transportation Advisory Committee⁸ (TAC) was constituted in 2016 to deal with this issue amongst others. The TAC recommended that while freight zones should not be changed, it supported charging out of zone producers a

⁸ The TAC is a committee of the Milk Board struck from time to time to consider transportation related issues and provide advice to the Milk Board. Its composition is not defined in the *Consolidated Order* or regulation. In this case, it appears that the Milk Board activated this Committee following its November 25, 2015 meeting and it was comprised of Milk Board staff (one of which was Mr. Siemens), three board members plus an additional 4 producers and a transporter.

compensatory rate to reflect their farms distance off a freight route as set out in “Draft Minutes” dated March 15, 2016 which state:

It was discussed that freight zones should remain the same but producers that are out of zone but on a major highway or route should just pay the compensatory rates of milk pickup as long as the trucks are coming by the location.

TAC recommends keeping zones as they currently are but use the compensatory rate (\$2.30/km or a rate based on time required) for all kilometers off the current route or main highway to the producer’s milk house. This rate would be subject to change depending on route changes and would be the at the risk of the out of zone producer. Any out of zone producer should sign off on acknowledging the risk of changing compensatory freight rate. (emphasis added)

71. The Milk Board reviewed the TAC minutes at its meeting of April 26, 2016 and instructed staff that it was not considering changes to the out of zone freight rate policy. Milk Board staff responded to the appellant on May 2, 2016, advising that the Milk Board would not review the current policies with respect to out of zone shippers and that if he was to pursue a farm in Clinton, he would be subject to the strict provisions of the Consolidated Order.
72. However, it is clear that based on the route change, the appellant would be entitled to the \$100 rate set out in the July 29, 2008 letter if the commitment made in the 2008 letter is applied.

(iii) If BCFIRB finds that the Milk Board made a \$100 commitment in 2008 as alleged by the appellant, should the Milk Board be held to that commitment and if not, why not?

73. As we begin this discussion, and consistent with BCFIRB’s broad role in hearing appeals from commodity board decisions⁹, the issue before us is one of marketing policy. The question is whether the Milk Board made a sound marketing policy decision when it decided that, based on BCFIRB’s 2009 appeal decision or for the same policy arguments it advanced in that appeal, the appellant should receive no accommodation based on its July 29, 2008 decision. Part of sound marketing policy is deciding whether and in what circumstances producers should be “grandfathered” based on commitments previously made.
74. We have concluded that the Milk Board did make a commitment to the appellant in 2008 that it would deviate from the Consolidated Order when the Transporter used Highway 97. We agree with the appellant that this commitment, which was made after the Milk Board took legal advice, was in large part due to the extreme proximity of his proposed dairy farm to the Highway 97 freight route and the actual cost to pick up his milk on that route.

⁹ *B.C. Chicken Marketing Board v. B.C. Marketing Board*, 2002 BCCA 473

75. We have already concluded that we do not read the 2009 appeal decision as making any decision about the \$100 flat fee, let alone any recognition that it was in fact a special accommodation which had been revoked. We see that appeal as a challenging the per kilometer rate to the closest regional boundary set out in the Consolidated Order and seeking a discretionary decision in the appellant's favour when the Transporter used Highway 5.
76. So the question remains whether the Milk Board should be held to this commitment and if not, why not?
77. The panel has considered whether the 2008 commitment, even if the Milk Board now regrets making it, should continue to be extended to the appellant as a matter of sound marketing policy? The appellant points to several factors that support an affirmative answer:
- At the time of purchase in 2000 and his acceptance onto the GEP waitlist, the appellant's farm was located in the Okanagan region. Regional boundaries were only later redrawn (shrunk) in 2004, leaving the farm outside a defined region and within the Remote Region.¹⁰
 - On September 22, 2003, as part of his application for the GEP, the appellant had the Transporter complete a pre-certification/construction evaluation which identified no issues with his farm.
 - The Milk Board found there to be "temporal proximity" for another producer, Mr. Lancaster who purchased his property in 1997 and did not start milking at his new location until 2006.¹¹
 - The appellant's 2000 purchase and subsequent inspections show an honest intent to be a dairy farmer.
 - The appellant has unsuccessfully looked for other suitable "in zone" locations. Further, organic milk production from this location would result in even higher freight rates.
 - The appellant has deferred his plans to become a dairy farmer pending confirmation of his freight rate (and this appeal). If the Milk Board insists on a \$611 freight rate, he cannot become a new entrant producer as the

¹⁰ Amending Order 39 which came into effect January 1, 2004 amended the 2001 Consolidated Orders changed regional boundaries and added a definition for "Remote Region" in which producers would receive different treatment (higher cost monthly freight rates). Prior to that, "Okanagan region" was defined as "that region within the Province of British Columbia south of Clearwater and 100 Mile House, east of Lytton and west of Arrow Lake, excluding Greenwood and any areas east of Greenwood".

¹¹ See *Lancaster, supra*.

margins are so small and no other producer pays that kind of freight rate.¹²

78. The Milk Board's position on this appeal is that the appellant's circumstances should be governed by the Consolidated Order. Any discretion to grant relief regarding freight rates must be based on a set of principles and a consideration of how a variance will impact the regulatory framework and the integrity of the system. Giving the appellant special treatment could lead to other producers claiming special circumstances and ultimately create inequity in the system for other out of zone producers. Further, as a new entrant, the appellant should not be considered for hardship or variances in a manner similar to existing producers. The Milk Board encourages the appellant to commence his dairy operation in a new location inside a defined region.
79. The panel has looked at all the circumstances associated with this case.
80. As stated earlier, we do not agree that the Milk Board in defending the earlier appeal expressly removed the 2008 commitment regarding Highway 97 from the table nor do we agree that the 2009 panel made that finding and as such the 2009 appeal decision is not determinative.
81. The panel also finds it hard to reconcile the Milk Board's position that the 2008 commitment was off the table with the fact that as recently as 2015 and 2016, its staff was acknowledging the previous commitment and felt it was reasonable. We note that the TAC was also supportive of a policy that charged the compensatory rate (based on \$2.30/km or time required) for all kilometers an out of zone producer was off the current route or main highway.¹³ While this appeal is not about whether the Milk Board should change its freight rate policy, it is at least noteworthy that the TAC did not see inherent dangers to the system by providing some accommodation to out of zone producers where there was close proximity to existing freight routes.
82. When the appellant thought his invitation to the GEP was imminent in 2015 he made timely inquiries seeking clarification of freight rates. The Milk Board did not respond at that time advising that the 2008 letter had been written in error. It did not point to the 2009 appeal decision as being determinative. Instead, what transpired was an almost one year delay during which time the Milk Board asked staff and its TAC to consider the issue and make recommendations, which recommendations it ultimately rejected preferring to "stand on the (2009) appeal decision" and its Consolidated Order.

¹² In response to questions from the panel, Mr. Ingratta agreed that a freight charge of \$611 would be a hardship for a new entrant amounting to almost \$10,000/month.

¹³ Accepting TAC's recommendation would result in a considerably lower freight charge for the appellant of (8*2.30=\$18.40 as opposed to the \$100 flat fee.

83. We observe that this was an opportunity for the Milk Board to have offered a thoughtful and meaningful explanation as to why it felt that the 2008 commitment should no longer be in play. It could have turned its mind to a consideration of whether the appellant had demonstrated sufficient special circumstances to warrant a departure from the Consolidated Order in 2015 or 2016. Any such decision could then have been the subject of an appeal regarding the merits of that decision, rather than an appeal about whether BCFIRB's 2009 decision "tied its hands" or about whether it had even made a commitment. Instead, the Milk Board's response was "we have 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". Given the history here, this response is not accurate nor is it transparent or helpful.
84. Had the appellant received a timely notification that the 2008 commitment was in error and his farm in the Remote Region would be subject to the strict provisions of the Consolidated Order, he could have made appropriate business decisions regarding his investment and his commitment to becoming a dairy farmer. He could have considered whether it would even be possible to establish a farm in a defined region. He could also have added the "revocation" decision to his 2009 appeal.
85. Instead, eight years have passed and the appellant is awaiting his allocation of GEP quota having reasonably relied on the 2008 commitment. He has had to defer receiving the quota pending this appeal and the determination of his freight rate. If the \$611 (or some higher) freight rate stands with regard to milk transportation on a route that passes only 4 kilometres from his operation, he says he cannot become a milk producer.
86. Despite his efforts to exercise due diligence and ask appropriate questions, the Milk Board's acknowledged error places him in a difficult position. We do not accept the suggestion that the appellant should or could simply commence his dairy operation inside a defined region. There is no evidence before us that such a move is even possible given the limited time frame before GEP quota is allocated and the appellant's financial circumstances.
87. Also, we observe that this is not a situation where the appellant chose to locate his farm in a Remote Region and then seek concessions. Rather, at the time the farm was purchased in 2000 and at the time the appellant was accepted onto the GEP waitlist, the property was within the Okanagan region. Regional boundaries were redrawn later, in 2004, placing the appellant's farm in a Remote Region. Given the long periods of time prospective new entrants sit on the waitlist before receiving GEP quota and the financial commitment required to purchase land and develop a dairy farm, they are particularly vulnerable with few options available to respond to changing circumstances.

88. We are of course well aware that what we have said in the previous paragraph was also the case in the 2009 appeal, and was part of the basis for the appellant seeking relief from the \$611 rate where Highway 5 is used. However, it is clear that the given the distances involved where Highway 5 was used (almost 100 kilometres), BCFIRB did not consider that those factors justified an exception to the general principles underlying the regional freight zone policy, which principles BCFIRB endorsed. However, that does not mean those principles are undermined where an exception is made, and later honoured, based on extreme proximity to a freight route.
89. The Milk Board places a great deal of weight on the integrity of the regional freight zone system and the fact that “ad hoc” decisions made because of proximity to existing freight routes are contrary to the Consolidated Order. The Milk Board raises the spectre of other “out of boundary” producers seeking discretionary relief which would introduce “zone creep”. As noted earlier, these are legitimate concerns that were identified by the 2009 appeal panel.
90. While we acknowledge the importance of regional freight zone system, we also recognize that persons who are subject to regulation need to be treated fairly and transparently. When a commodity board makes a commitment, which a person reasonably relies on, it should be held to that commitment unless it can be shown that to do so would undermine sound marketing policy. In our view, and for the reasons that follow, we think that honouring the 2008 commitment in the circumstances of this case is consistent with sound marketing policy.
91. If the appellant were still years away from receiving GEP quota, it could be argued that little harm would result from the Milk Board revoking its 2008 commitment now as there would be ample time for the appellant to reconfigure his business plan or relocate. However, it is 2017 and the appellant’s allocation of GEP quota is imminent. In fact he has deferred receiving GEP quota pending resolution of this issue on appeal as he says he cannot afford to farm if his freight rate is in excess of \$600. We do not agree that relocation to a defined region would be a simple matter.
92. Further, we are not persuaded by the Milk Board’s argument that to grant the appellant the discretionary relief he seeks – which is essentially a form of grandfathering – would foreseeably result in applications from other out-of-boundary producers (causing “zone creep” and raising transportation costs for producers). The discretionary relief here is predicated on the very narrow set of facts where the Milk Board made a particular commitment for a discretionary rate in 2008 which the appellant has reasonably relied on for the past 8 years. The Milk Board has not demonstrated that it made the same commitment to any other GEP applicant, and it has not explained how grandfathering the appellant based on the commitment it made will undermine the integrity of the system. Further, we do not agree with the policy argument that the appellant needs to be an

existing producer to obtain this accommodation. In these circumstances, we find the appellant can rely on the 2008 commitment.

93. We have considered BCFIRB's earlier decision in *Lancaster, supra*. Mr. Lancaster was a dairy producer who, after 6 years of planning, moved his farm from the Fraser Valley region to Walachin (then in a Remote Region) in 2004. Despite receiving assurances from Milk Board staff that he would be "grandfathered" at the existing rate, when he began shipping milk in 2006 he was charged a higher freight rate. In 2008, this rate was increased again and Mr. Lancaster sought a discretionary decision based on his unique circumstances. The Milk Board exercised its discretion in Mr. Lancaster's favour, based on his "temporal proximity to the implementation of the zone hauling regime", and charged a "compensatory rate" of \$101.25 per pickup (in addition to the provincial pooled rate for the Okanagan zone and a stop charge of \$8.00), a significant reduction from the \$322.00 rate that would apply on strict application of the Consolidated Order.¹⁴ Mr. Lancaster appealed, seeking a more preferential freight rate (Okanagan pooled rate without penalty).
94. The Milk Board advanced the argument that as a public regulatory body, it can only make discretionary decisions in situations exhibiting obvious "special circumstances" as to do otherwise would compromise the integrity of its Consolidated Order. In considering special circumstances, it argued that it would only apply discretion when there was "extreme geographical proximity" to a freight zone or "extreme temporal proximity" to the date at which the freight rules were implemented.¹⁵ In Mr. Lancaster's case, it based its decision on the latter and adjusted the rate accordingly.
95. The appeal panel declined to give Mr. Lancaster the additional discretionary freight rate he sought, concluding that
- ...the decision made by the BCMMB in the appellant's case gives him considerable monetary relief from the full impact of the milk hauling rate methodology outlined in the Consolidated Order. We disagree with the appellant that the BCMMB erred in its exercise of discretion in the appellant's favour. Instead, we find that the BCMMB's decision recognized the appellant's special circumstances while at the same time did not compromise the integrity of the Consolidated Order. The BCMMB's reasons for giving the appellant relief are clear and fact based following an opportunity to heard.
96. We recognize that the appellant's farm does not fall within the "extreme geographical proximity" to a defined region, that he has not yet begun to farm, and that he cannot be said to fall within "extreme temporal proximity" to the date

¹⁴ Mr. Lancaster's farm was located 136 kilometres round trip from the Okanagan zone boundary, 96 kilometres round trip from Highway 5 and 48 kilometres round trip from Highway 97. The basis for the \$101.25 "compensatory rate" is unclear.

¹⁵ We note this same argument was made in the first Jacobsen appeal.

the freight rules were implemented. However, in our view, to limit the discretion to those factors takes too narrow a perspective. The appellant's location was in the Okanagan region at the time the appellant joined the GEP waitlist. The boundaries of that region were redrawn only after he had purchased his property, received pre-certification and been accepted on the GEP waitlist. While this factor alone is not conclusive, this factor, combined with his extreme geographic proximity to the route which clearly informed the 2008 commitment upon which he reasonably relied for the next 7 years, warrants an exercise of discretion in his favour.

97. We are satisfied that this result will not compromise the integrity of the Consolidated Order. It will not adversely impact the rates of other producers. With regard to “zone creep”, we have been provided no evidence that grandfathering the appellant to the commitment the Milk Board made in 2008 would open the floodgates to others making the same claims or fundamentally undermine the rationale behind establishing the regional freight zones.
98. We have carefully considered the reasoning set out at paragraph 38 of the 2009 appeal decision which stated at one point that geographic proximity to a freight route should not be “determinative”, and at another point appeared to go further and endorse the position that such proximity is not even “relevant” to determining freight rates. Given that the language used in previous BCFIRB decisions must be understood in the context of what was being decided, it is far from clear to us that the 2009 panel would have said, if asked, that the appellant's \$100 accommodation for Highway 97 was improper and contrary to sound marketing policy despite the panel's general approval of the regional freight zone policy. As noted by the appellant, the appeal panel, if anything, saw that \$100 accommodation as a reflection of decision-making that showed considered judgment – that the Milk Board did not “rigidly adhere to its policy”: 2009 decision, para. 34.
99. This is not the appropriate case for us to comment on whether and to what extent, as a matter of fresh decision-making, proximity to a freight route can be relevant (rather than “determinative”) to “special circumstances” decision-making. This issue can be addressed at the Milk Board level, which is a discussion the TAC appears at least to have started in its 2016 meeting as reflected in its Minutes. It will suffice for us to state that in our view, and having considered the 2009 appeal decision with care, the present case does not involve “ad hoc” decision-making which was of concern to the 2009 panel. Our decision in this case reflects what we believe, for the reasons stated above and as a matter of sound marketing policy, is a proper exercise of the discretion commodity boards have always had to grandfather applicants in appropriate circumstances. While we are well aware that supply management requires rules, and that considerable care and caution must be taken before making exceptions to those rules, we are satisfied that in all the circumstances, the July 2008 commitment made by the Milk Board, and reasonably relied on by the appellant since then, should continue to be honoured

today and that it does not create an outcome that is contrary to sound marketing policy.

100. We close by making two points.
101. First, we observe that the appellant is not without risk choosing to establish a dairy farm in a Remote Region. While we have found that the 2008 commitment warrants a discretionary decision in his favour, we would observe that if circumstances change (for example if the Transporter no longer uses Highway 97) the appellant will find himself subject to the strict provisions of the Consolidated Order as upheld by the 2009 appeal panel.
102. Finally, we want to acknowledge the appellant who we found to be a thoughtful and competent participant throughout the appeal process. He has exercised due diligence and appears to be dedicated to becoming a dairy farmer. That he remains enthusiastic and respectful of the opportunity before him despite some of the challenges he has had to endure in pursuing his appeals is to his credit and we expect him to become a valued member of the dairy industry. He is an example of the kind of dedicated new entrant that commodity boards are seeking to attract through their new entrant programs.

ORDER

103. The appeal is granted. We find that the Milk Board erred in failing to exercise its discretion to grant the appellant relief on his freight rates where the Transporter uses Highway 97. While we considered remitting this matter back to the Milk Board for it to properly exercise its discretion, we have decided that the appellant is entitled to some certainty given his invitation to become a GEP producer.
104. The Milk Board is to charge the appellant a compensatory rate of \$100 per pick-up (plus the regional freight rate and the standard \$8 stop charge) where the Transporter uses Highway 97.
105. Finally, there is the question of costs. In this regard, we observe that the Milk Board adopted a particularly aggressive response to this appeal. It denied the very existence of a commitment (which position was ultimately corrected at the outset of the hearing). There were several procedural hurdles for this unrepresented appellant, including a Milk Board request seeking summary dismissal with costs (a highly unusual request before BCFIRB), a request for referral to the supervisory jurisdiction and directions on the conduct of the appeal given the various interlocutory rulings which it argued “left no scope for the parties or interveners to tender evidence or to make submissions”. While we have

considered whether this warrants an order of costs in favour of the appellant, we have concluded that the Milk Board's actions were based on its view, albeit in error, of what BCFIRB did and did not decide in 2009. In all the circumstances, there will be no order as to costs.

Dated at Victoria, BC, this 27th day of February, 2017.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Brenda Locke, Presiding Member



Chris K. Wendell, Member



Diane Pastoor, Member