



BC Farm Industry Review Board

May 16, 2024

File: N2308

DELIVERED BY EMAIL

Fred Doberstein
Island Milk Producers Organization
[REDACTED]

Robert Hrabinsky
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[REDACTED]

Dear Parties:

RE: ISLAND MILK PRODUCERS ORGANIZATION V BRITISH COLUMBIA MILK MARKETING BOARD

Introduction and Procedural Background

On November 15, 2023, the Appellant, Island Milk Producers Organization (IMPO), filed an appeal with the British Columbia Farm Industry Review Board (BCFIRB) from a decision of an unspecified date of the BC Milk Marketing Board (Milk Board) to enter into an agreement with the Canadian Dairy Commission (CDC). The Appellant says the effect of the decision was to “enter B.C. producers into an All-Milk Pooling agreement” which resulted in \$72 million in transfer amounts from the BC industry out of province and significant economic hardship for Island producers.

BCFIRB staff followed up with the Appellant to clarify the date of the decision under appeal. By letter dated December 2, 2023, the Appellant confirmed that the Milk Board decision was made in May 2020. While they acknowledged the “30-day window” to file an appeal had expired, they sought a pre-hearing conference with BCFIRB taking the position that they were not properly consulted or informed of the decision by the Milk Board at the time.

A pre-hearing conference was set for March 5, 2024.

On February 10, 2024, the Milk Board applied for summary dismissal of the appeal pursuant to sections 31(1)(a) and (b) of the *Administrative Tribunals Act* (ATA) and Rule 9 of BCFIRB’s Rules of Practice and Procedure for Appeals under the *Natural Products Marketing (BC) Act*, alleging the appeal was outside the jurisdiction of BCFIRB as it was not directed at any “order, decision or determination” of the Milk Board, and that it was statute-barred as a result of being filed outside the applicable limitation period of 30 days under section 24 (1) of the ATA.

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In support of its submission, the Milk Board indicated that it was prepared to provide, in confidence and on an *ex parte* basis, a copy of the Canadian Milk Supply Management Committee (CMSMC) minutes for the meeting held on January 22 and 23, 2020, wherein the subject decision had allegedly been made.

By letter dated March 1, 2024, BCFIRB established a written submission process for the summary dismissal application and invited the Milk Board to apply for a non-disclosure order pursuant to BCFIRB's Rule 12. BCFIRB also requested supplementary submissions from the Milk Board on its summary dismissal application regarding the composition of the CMSMC and its decision-making process and the role of the CDC. The Appellant was given an opportunity to respond to the non-disclosure application, summary dismissal application, and the Milk Board's supplemental submission.

I granted the Milk Board's order for non-disclosure of the redacted portions of the CMSMC minutes for the January 22 and 23, 2020 meeting and considered those documents in my deliberations on the summary dismissal application. I set out the reasons for granting that order below, together with my reasons for allowing the Milk Board's application for summary dismissal of the appeal.

Accordingly, this appeal is dismissed.

The Appeal

The Appellant says the Milk Board's decision to sign an agreement with the CDC in 2020 which entered BC producers into an "All-Milk Pooling agreement" with all 10 provinces, has resulted in significant economic hardship for BC producers, especially those on Vancouver Island. The Appellant alleges that the Milk Board signed the agreement without providing transparency and due consultations with BC producers and failed to recognize the substantial Cost of Production (COP) difference between BC and the eastern provinces.

By way of background, the Milk Board has been a signatory to the National Milk Marketing Plan (the National Plan) since 1984; it is a federal-provincial agreement that regulates the marketing of milk and cream products relating to Canadian domestic requirements and any additional industrial milk requirements. The CDC is the administrator of the National Plan. According to the National Plan, the CMSMC serves as the national body for policy development in the dairy production and processing sectors, and also reviews and monitors the commercial and promotional activities of the CDC, the pooling of market revenues, and the provincial distribution and utilization of quotas.

As of 2004, the Milk Board is also signatory to the Comprehensive Agreement on Pooling of Milk Revenues, which is a federal-provincial agreement of the National Plan signatories to pool revenues based on industrial classes of milk across all provinces, also known as "P10 pooling".

According to the Appellant, the change in 2020 from P10 pooling based on revenues of industrial milk classes to all-milk pooling based on revenues of fluid and industrial milk has more than tripled the yearly transfer amounts from BC producers to the other provinces. The Appellant claims that the increase in net transfer amounts and the lack of recognition of the substantial COP differences between BC and the eastern provinces has significantly reduced farm gate receipts to BC producers, creating serious economic issues. The Appellant further alleges that the Milk Board signed the “All-Milk Pooling agreement” without properly consulting BC producers or providing transparency on the economic impacts.

In its reply submission, the Appellant indicated it was seeking an order that the Milk Board provide notice to withdraw from the National Plan with the view to recognizing that the COP of BC producers is substantially higher than the CDC COP. Alternatively, the Appellant seeks recognition that the higher COP of Vancouver Island producers is analogous to that of Newfoundland/Labrador which the Appellant asserts do not participate in the All-Milk Pool despite being a full member of the P10. In the absence of a new National Milk agreement, the Appellant requests that BCFIRB undertake a supervisory review to provide an economic solution for Vancouver Island producers.

Non-Disclosure Order

A copy of the redacted minutes of the CMSMC meeting held on January 22 and 23, 2020 was provided to the parties. A non-redacted version of the document was provided to BCFIRB pursuant to BCFIRB’s Rule 12. The Milk Board seeks an order that the unredacted portions of the meeting minutes remain confidential and not be disclosed to the parties.

The Milk Board argues that the CMSMC deliberations are highly confidential, and distribution of its minutes are expressly limited to “P10 Signatories only”. CMSMC deliberations are invariably trade-sensitive, and disclosure would be harmful to intergovernmental relations or negotiations, and harmful to the financial or economic interests of a public body, including the government of BC. There is a clear public interest in maintaining confidence over this information and the Appellant does not need to receive the redacted portions of the CMSMC minutes to advance their appeal.

The Appellant did not provide a response to the Milk Board’s application for non-disclosure.

After reviewing the non-redacted minutes, I am satisfied that the information that the Milk Board seeks to have redacted is highly confidential and trade sensitive and its disclosure could harm intergovernmental relations. Further, I conclude the redacted information would not assist the Appellant in its appeal. Given my findings and that the Appellant did not provide any response to the Milk Board’s non-disclosure application, I am not satisfied that the redacted portions of the document ought to be disclosed.

Accordingly, I grant the Milk Board's application for a non-disclosure order over the information redacted from the minutes of the CMSMC January 2020 meeting.

Summary Dismissal Application

Submissions of the Milk Board

The Milk Board seeks an order summarily dismissing this appeal on two grounds: the appeal is not within the jurisdiction of BCFIRB, and the appeal was filed outside of the applicable time limit.

On the first ground, the Milk Board argues that as the appeal relates to a decision of the CMSMC in 2020 and not an "order, decision, or determination" of the Milk Board that could provide the basis for an appeal pursuant to subsection 8(1) of the *Natural Products Marketing (BC) Act* (NPMA), it should be dismissed as it is not within the jurisdiction of BCFIRB pursuant to section 31(1)(a) of the ATA.

The Milk Board says that the appeal is erroneously directed at "an agreement [made by the Milk Board] with the Canadian Dairy Commission to enter B.C. Producers into an All-Milk Pooling Agreement," when in fact, there is no such "agreement". The Milk Board explains that the appeal is directed at a decision of the CMSMC made at its January 22 and 23, 2020 meetings where, in response to international trade decisions, the CMSMC decided that revenues from Classes 1 to 5(d) (fluid and industrial milk classes) be pooled among the P5 (i.e., Prince Edward Island, Nova Scotia, New Brunswick, Quebec and Ontario), the Western Milk Pool (i.e., Manitoba, Saskatchewan, Alberta and British Columbia), and Newfoundland and Labrador, based on all-milk sales¹.

The Milk Board explains that while the Milk Board has representation on the CMSMC by virtue of BC's participation in the National Plan, it cannot dictate the outcome of CMSMC decisions, and a decision of the CMSMC cannot be regarded as an "order, decision or determination" of the Milk Board. In its supplementary submissions, the Milk Board further explains that the CMSMC is comprised of representatives from each provincial signatory to the National Plan and a representative from the CDC. The ten provinces and the CDC each have one vote on the CMSMC. BC has three Milk Board members sitting at the CMSMC table, one of whom (the Chair) is designated to vote. BC representatives attend each meeting of the CMSMC to ensure that BC's positions are heard. The Milk Board's positions are first discussed at Milk Board meetings which include a discussion on upcoming CMSMC meetings so that Milk Board members can provide input to their CMSMC representatives on CMSMC agenda topics. These discussions at the Milk Board meeting are not confirmed or otherwise recorded in the Milk Board's minutes.

Pooling is a facet of the National Plan by virtue of the three pooling agreements administered by the CDC: the Western Milk Pooling Agreement (WMPA), the

¹ The CMSMC decision was a response to the proposed changes to national policy in response to the requirements of the Canada–United States–Mexico Agreement (CUSMA) to eliminate class 7 and reclassify the products based on their end use.

Agreement on Eastern Canadian Milk Pooling (P5 Agreement), and the Comprehensive Agreement on Pooling of Milk Revenues. The CDC acts as the secretariat for all dispute settlement processes, pursuant to the dispute settlement processes set out in Schedule II of the Comprehensive Agreement on Pooling of Milk Revenues.

CMSMC decisions are binding on all signatories including the Milk Board, and should a dispute arise, as occurred here², it is settled through arbitration by the CDC. The decision of the CDC arbitration panel is final and binding on all parties, including the Milk Board as well as the CMSMC, in accordance with the “cooperative federalism” reflected in the National Plan. The Milk Board argues that when a province decides to participate in the National Plan, it is necessarily subordinating itself to the CMSMC and, in the case of an arbitration, to an arbitration panel.

The Milk Board does not follow any further process locally before implementing a decision of an arbitration panel, although every signatory to the National Plan has the option to withdraw, just as BC did in 1983 and as it threatened to do again in 1989.

The Milk Board concedes that BCFIRB retains a general supervisory jurisdiction with respect to BC’s participation in the National Plan but argues that this appeal must be dismissed as being beyond the appellate jurisdiction of the BCFIRB pursuant to paragraph 31(1)(a) of the ATA.

As to its second ground, the Milk Board argues that the appeal was filed outside the applicable limitation period and is statute-barred: (s. 8.1, NPMA and ss. 24(1) ATA). CMSMC’s decision is now four years old, and the Appellant has been aware of the decision since at least January 27, 2020. The CMSMC’s decision was specifically addressed by the Milk Board at a meeting with the Appellant on January 27, 2020 and at the Milk Board’s “IMPO Fall 2020 Presentation” on October 20, 2020. The Milk Board says that the Appellant has not offered any compelling explanation for the delay in filing an appeal or demonstrated any special circumstances to justify extending the time to file an appeal.

Submissions of IMPO

The Appellant’s submissions addressed the merits of its appeal. It takes issue with the process by which the Milk Board signed the “All-Milk Pooling agreement” which it says lacked transparency and adequate consultation with BC producers and failed to recognize the substantial COP differences between BC and the other provinces. The change from P10 pooling based on revenues of industrial milk classes in 2020 to the “All-Milk Pooling agreement” increased yearly transfer amounts from BC from \$10-20 million previously to \$72 Million per year resulting in transfers of \$168,000 per average producer per year to the All-Milk Pool, compared to \$44,000 per average producer per year prior to 2020. The net effect of the All-Milk Pool has led to the transfer of

² The Milk Board disclosed the CDC’s Arbitration Decision dated May 7, 2020, wherein it addressed unresolved issues between the WMP and P5 arising out of the CMSMC’s January 2020 meeting, which decision was final and binding and resulted in no cost differential between the P5 and WMP being acknowledged.

approximately \$158 million from BC producers to the All-Milk Pool over the past three years, severely reducing farm gate receipts for BC producers.

The Appellant highlights the CDC's arbitration decision of May 7, 2020, which stated that in the context of national pooling of revenues, no cost differential would be acknowledged between the WMP and the other provinces; WMP will receive a declining scale transition adjustment totaling \$63 million over a 3 year period to reduce the initial economic impact of all milk pooling and allow producers enough time to adapt to the new pooling environment.

The Appellant claims that the total dollars involved in the WMP transition adjustment are all derived from the BC milk pool. The Appellant further claims that the BC Milk Industry Advisory Committee (MIAC) should have been aware of what was at stake and argues that there was a lack of communication and consultation before and after the signing of the "All-Milk Pooling agreement". There has been a lack of transparency in conveying the actual cost of this "agreement" to producers. The Appellant says the Milk Board is being disingenuous when they say they do not have a decisive role to play in situations that impact producer revenues by these amounts. The Appellant emphasizes that it is critical that the economic conditions in the BC dairy industry be addressed as soon as possible since BC producers will now be exposed to the full cost of this "agreement" going forward.

The Appellant asserts that there is a systemic industry issue in terms of the economic conditions for producing milk in BC and that those conditions are more dire on Vancouver Island, as reported by the BC Dairy Association's 2023 COP study where cash costs for Vancouver Island milk producers were the highest in the province. The Appellant further argues that compelling local food security, biosecurity, environmental and economic reasons exist to maintain milk production on Vancouver Island.

Decision

Section 8 of the NPMA provides that a person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission" may appeal to BCFIRB. Subsection 31(1)(a) of the ATA allows for summary dismissal of an appeal where that appeal is not within the jurisdiction of the tribunal; subsection 31(1)(b) applies where the appeal is not filed within the applicable time limit (30 days).

Based on my review of the submissions, I find that the Appellant is not appealing an "order, decision or determination" of the Milk Board, but rather is seeking to appeal the decision of the CMSMC made in January 2020 wherein the CMSMC determined that revenues from fluid and industrial milk classes would be pooled among the ten provinces, based on all-milk sales. Further, unresolved issues at the CMSMC table were the subject of a CDC arbitration decision dated May 7, 2020, which decision confirmed the CMSMC decision, and did not acknowledge a cost differential between the P5 and WMP. The CDC decision was binding on the CMSMC and the Milk Board.

The Appellant's appeal attacks the wisdom of the CMSMC decision and points to the economic hardship that has resulted for BC producers generally and Island producers more specifically. BCFIRB has no jurisdiction to hear appeals from decisions of either the CMSMC or the CDC.

As I have concluded that the decision the Appellant seeks to appeal is not a decision of the Milk Board, it follows that the appeal is not within the jurisdiction of BCFIRB and as such, I summarily dismiss the appeal pursuant to s. 31(1)(a) of the ATA. As a result of concluding that BCFIRB lacks jurisdiction to hear this appeal, it is unnecessary to go further and consider whether the appeal was also filed out of time and I decline to do so.

Finally, as I noted above, in responding to the summary dismissal application, the Appellant did not address the issue of who made the decision but rather focused on the merits of its appeal, and in particular challenged the wisdom of the Milk Board entering into what it calls "the All-Milk Pooling agreement" in light of the significant ongoing financial hardships that it alleges that decision has caused. The Appellant's requested remedies, specifically that (a) the Milk Board issue a notice of withdrawal from the National Plan to acknowledge that BC's COP is substantially higher than the CDC's COP, (b) that it enter into a special arrangement for Vancouver Island producers similar to Newfoundland/Labrador; or (c) BCFIRB undertake a supervisory review to provide an economic solution for Vancouver Island producers, are all aimed at addressing the larger systemic issues it says arises out of the decision.

Notwithstanding my decision that I lack jurisdiction to hear this appeal, I acknowledge that the Appellant has raised significant concerns regarding the potential impacts of the CMSMC's January 2020 decision to move to an All-Milk Pooling arrangement and whether that arrangement has operated in the best interests of BC and is consistent with SAFETI³ principles and sound marketing policy. BCFIRB may consider, in the context of related issues it is currently addressing, whether there is a need to exercise its supervisory jurisdiction.

³ SAFETI is an acronym that BCFIRB employs through BCFIRB's accountability framework to ensure decisions of BC's agriculture commodity boards and commissions are principles-based and are Strategic, Accountable, Fair, Effective, Transparent, Inclusive

Order

The Milk Board's application for summary dismissal is granted and the appeal is dismissed. There is no order as to costs.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read "Gunta", is written over a faint, light-colored background that includes a watermark of the British Columbia Farm Industry Review Board logo.

Gunta Vitins, Vice Chair and Presiding Member