IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL REGARDING A DECISION OF THE BRITISH COLUMBIA MILK MARKETING BOARD CONCERNING A REQUEST FOR SPECIAL REGULATORY ACCOMMODATIONS

BETWEEN

NEIL E. THOMSON DBA INVERINE DEVELOPMENTS

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

BC MILK PRODUCERS ASSOCIATION
BC DAIRY FOUNDATION
BC DAIRY COUNCIL
MAINLAND MILK PRODUCERS ASSOCIATION
KOOTENAY MILK PRODUCERS
KAMLOOPS OKANAGAN DAIRYMEN'S ASSOCIATION
ISLAND MILK PRODUCERS ORGANIZATION
NORTHERN INTERIOR DAIRYMAN'S ASSOCIATION

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Suzanne K. Wiltshire, Presiding Member Ron Kilmury, Chair Ron Bertrand, Member
For the Appellant	Neil E. Thomson
For the Respondent	Robert P. Hrabinsky, Counsel Jim Byrne, Chair Rob Delage, Acting General Manager
For the Interveners:	
BC Milk Producers Association	Dick Klein Geltink, President

BC Dairy Foundation	Robin Smith, Executive Director
BC Dairy Council	Catherine Tokarz, Director
Mainland Milk Producers Association	Tom Hoogendoorn
Kootenay Milk Producers	Morris Hanson
Kamloops Okanagan Dairymen's Association	Ralph Vandalfsen Bouwe Miedema
Island Milk Producers Organization	Written submission only
Northern Interior Dairyman's Association	Ueli Grob

Date of Hearing	October 27-28, 2011
Place of Hearing	Abbotsford, British Columbia

Introduction

1. This appeal was filed with the BC Farm Industry Review Board (BCFIRB) pursuant to section 8 of the *Natural Products Marketing (BC) Act*, RSBC 1996, c.330 (*NPMA*).

2. Neil Thomson has appealed the June 10, 2011 decision of the British Columbia Milk Marketing Board (Milk Board) denying his request for significant special regulatory accommodations with respect to his proposal to establish a 3000 head dairy farm co-located with an ultra-high temperature (UHT) processing-packaging plant. The regulatory accommodations he seeks in connection with his proposal include the allotment of 2700 kgs of continuous daily quota (CDQ) as well as various regulatory changes at both the national and provincial levels.

3. During the course of the appeal the appellant made references orally and in the various documents he submitted to "Inverine Developments" or "Inverine" and to "Mid Fraser Agro". These are names he has used with respect to his business idea and are not entities separate and apart from him. He is the only appellant and references to Inverine Developments, Inverine and Mid Fraser Agro are to be read as references to the appellant himself.

4. A pre-hearing conference was held on July 25, 2011. At the pre-hearing conference the appellant stated the following as his grounds:

    1. There is a policy directive to accommodate both product and production method innovation; the appellant's proposal is innovative in production method and in finished product.
    2. The [Milk Board] decision engages regulatory mechanics in a manner that obstructs policy intent.

5. At the pre-hearing conference the appellant also identified the remedy he seeks, as follows:

    > Through special consideration, for the Milk Board to allot Inverine 2700 kgs of quota by accessing quota at the national level directed to innovation programs.

6. The Milk Board advised that its position is set out in its July 10, 2011 decision.

7. In its decision the Milk Board noted that the production from a 3000 head dairy farm would be substantial (approximately 5% of British Columbia's current total provincial allocation) and the production rights (approximately 2700 kgs of CDQ) at current quota exchange prices would be worth in excess of $100 million.

8. In the decision the Milk Board observed that the accommodations sought by the appellant would require "sweeping" regulatory changes. The Milk Board concluded that the appellant had not provided a credible basis for the regulatory accommodations requested. It noted that in any event, British Columbia does not have access to "unallocated" production rights in the amount sought by the appellant and that to advance negotiations with other national stakeholders on the strength of the appellant's idea would damage British Columbia's credibility in the national milk marketing system. Even if 2700 kgs of CDQ could be secured, the Milk Board calculated that the appellant's proposal would result in a displacement of approximately 2.5% of all existing production due to the anticipated structural surplus of butterfat that would result from the proposed operations. For these and other reasons it considered to be in accord with sound marketing policy, the Milk Board denied the appellant's request for special regulatory accommodations.

Issue

9. Did the Milk Board err in its June 10, 2011 decision to deny the appellant's request for special regulatory accommodations with respect to the appellant's proposal to establish a 3000 head dairy farm co-located with a UHT processing-packaging plant?

The Appellant's Business Idea

10. The appellant indicated that he began to pursue his idea of establishing "a substantive agro enterprise" after a collection of properties (approximately 14,000 acres) in the Williams Lake area became available in 2010. He noted that his family had been in the dairy industry and the "dynamics of the property offered for sale required a revenue stream that might be expected from an integrated operation". For these reasons he proposed to establish a 3000 head primary production dairy together with a UHT processing plant with capacity sufficient to process the milk generated by the dairy and a packaging plant utilizing "tetra pac" type technology to produce a line of health oriented functional food beverages.

11. The cost to purchase the Williams Lake properties and develop the required assets was estimated by the appellant to require in excess of $75 million in capital, with proposed complementary enterprises requiring additional capital. The appellant confirmed that he has no capital, nor does he have the expertise required to operate every facet of the operations but stated that he has the management skills to obtain and deploy human capital, financial capital and physical resources. He also confirmed that the proposed products had yet to be developed.

Extended Term Operating Agreement

12. The appellant criticized the Milk Board for its failure to accede to his "Extended Term Operating Agreement Proposal". He characterized the proposed Extended Term Operating Agreement (ETOA) as "a means to find an effective long term interface" with the Milk Board and stated that he submitted this document "to offer direction as to how the [Milk Board] might offer support to the appellant's efforts". He described the "ultimate goal" of the document to be to "garner regulatory support for the operation and to have as part of this support an allotment of 2700 kg of CDQ". In his notice of appeal, the appellant described the ETOA as providing "the necessary security to commit the substantive amount of capital to the project that is required".

13. The ETOA as proposed by the appellant calls, among other things, for:
    - The term of the agreement to be long enough to support the proposed enterprise until it becomes established and to provide for its ongoing operation. The suggested term is 10 years.
    - The allocation of 2700 kgs of CDQ to the appellant, perhaps through Milk Board facilitation with the Canadian Dairy Commission, or exemption from the requirement for CDQ.
    - CDQ or right to produce to the capacity requested of 2700kg/day butterfat equivalent be provided in its entirety at the outset to "permit immediate response to onsite production increases as the appellant's enterprise expands the market".
    - CDQ be allotted prior to the completion of construction of facilities and the subsequent permitting of the operations by other regulatory bodies.
    - Regulatory variances to permit the classification of the proposed UHT milk product as something other than a "fluid milk" product.

14. In the ETOA proposal, the appellant acknowledges that he is seeking a number of exemptions from or changes to regulation, including amendment of the Milk Board's Consolidated Order, to specifically accommodate his proposed operation. Among other things, he suggests program modifications and adaptations to expand the Cottage Industry Program (CIP) and to issue a modified class "E" licence, creation of a "special production" classification, a special allotment consistent with the spirit of the Domestic Dairy Product Innovation Program (DDPIP) but of a size to coincide with the scale of the appellant's proposed enterprise, and possible modifications to class D and E Producer Vendor licences or a new class F licence to accommodate the scale of his proposed integrated operation.

Appellant's Submissions

15. The appellant referred the panel to three "policy" documents and submits that these documents all offer support for the appellant's proposed course of action and demonstrate that the Milk Board's June 10, 2011 decision failed to address government policy initiatives. The documents are:
    - Regulated Marketing Economic Policy, Ministry of Agriculture, Food and Fisheries, July 26, 2004 (RMEP)
    - BCFIRB Strategic Plan 2008/09 – 2010/11 (BCFIRB strategic plan)
    - Recommendations for Managing Specialty Agri-Food Products in B.C.'s Supply Managed System, George Leroux, December 20, 2004 (Leroux Report).

16. The appellant submits that his business idea, being innovative in both production method and finished product is consistent with the government "policy initiatives".

17. He submits that the Milk Board should have entered into the ETOA and acted to provide the regulatory accommodations requested to allow for the proposed operation to proceed.

Respondent's Submissions

18. The Milk Board, maintaining that its position is set out in its written decision of June 10, 2011, outlined the key points of its analysis, as follows:

    - The true nature of the appellant's request is obscured by language that is verbose, exaggerated and unintelligible.

    - The appellant has no experience, no capital, no land or facilities, and no product. As stated at page 8 in the Milk Board decision, "In summary, what Mr. Thomson has is simply this: an idea for a dairy product." The appellant does not intend to be involved in the day to day dairy operations or to be actively engaged in the processing and packing business. He "brings nothing to the table beyond his keen desire to be the head of a large commercial enterprise created for him by the regulated marketing system, third-party investors, and outside consultants, experts and service-providers".

    - The appellant was entirely unable to substantiate his position concerning the essentiality of "vertical integration". He does not need a 3000 head dairy farm if he truly desires to develop, manufacture and market a fluid milk dairy product because his proposed plant, like all other dairy plants, would enjoy unlimited access to fluid milk, on demand, from the pool.

- The appellant's focus on the alleged essentiality of "vertical integration" is a calculated attempt to divert attention from the real purpose of his request, namely: to use the requested quota allocation as a basis to solicit capital from investors; and, to obtain a supply of fluid milk that, to the extent it is not subject to the Milk Board-ordered pool price, is effectively outside the supply management system.

- It is not possible to grant the accommodations sought. Both the DDPIP and the CIP are restricted to industrial milk and these programs have no application to fluid milk because every processor already has unlimited access to fluid milk, on demand, from the pool. Further, there is no unlimited "bank" of unallocated "quota" under the DDPIP for industrial milk production. The national stakeholders have agreed to cap the amount of production right that may be allocated (in excess of Canadian estimated requirements) at 3% of national Market Sharing Quota (MSQ), which is the production target for industrial milk in Canada. Approximately 2.4% of that cap is already utilized, leaving only 0.6% to satisfy industrial milk requirements under DDPIP for all of Canada.

- It is not necessary to grant the accommodations sought for the appellant to be able to develop and process the proposed product, as every plant processing fluid milk products has unlimited access to fluid milk on demand.

- It would not be equitable or reasonable to grant the accommodations sought. If the eligibility for an allotment of 2700 kgs of CDQ was simply a requirement that the applicant have an idea for a dairy product, it is doubtful anyone would be ineligible. Quota is a finite resource and it would not be possible to administer such a program.

- It would be detrimental to grant the accommodations sought and would have a profound destabilizing effect on the dairy industry, and the regulated milk marketing system itself, because if the appellant were considered to be eligible to receive an allotment of 2700 kgs of CDQ and to receive a supply of fluid milk essentially outside the supply managed system, it would be difficult to imagine that any person would be ineligible for such accommodations.

- It would create a structural surplus of approximately 480,600 kgs of butterfat per year, effectively resulting in a reduction to the quota holdings of existing producers of 1350 kgs of CDQ or a displacement of approximately 2.5% of the raw milk production in British Columbia. In the absence of an equivalent reduction to British Columbia's provincial allocation, the Province would be

exposed to significant overproduction penalties under the National Milk Marketing Plan.

- The credibility of the supply management system should not be used to facilitate what is essentially a stock promotion scheme intended to generate a "finder's fee" of approximately 2% on $75 million of capital to be raised from investors. Further the strength of the dairy industry in British Columbia depends heavily on the ability of the Province to maintain credibility in its negotiations with other stakeholders in the national marketing system. To advance negotiations with other national stakeholders on the strength of the appellant's idea would damage that essential credibility.

19. The Milk Board requests that the appeal be dismissed.

Interveners' Submissions

Producer Organizations

20. Organizations representing the interests of dairy producers in all parts of the province intervened in the appeal and made submissions. Their submissions have a common thread. They also echo the submissions of the Milk Board and so are not fully repeated here.

21. The interveners submit that to grant Mr. Thomson the quota and the accommodations he seeks would be unfair to the producers of British Columbia who purchased quota and worked hard to build their businesses. It would also be unfair to prospective new entrants who have been on the Graduated Entry Program wait list for a long time awaiting an opportunity to become new entrants and who are required to provide a thorough business plan including demonstration of financial resources to finance their venture prior to receiving any quota. Additionally, the interveners argue that to accede to Mr. Thomson's requests would be unfair to existing processors.

22. The interveners submit that milk is already a "functional, health-oriented beverage", UHT processing is not a new concept and at least one processor has already begun production of products similar to those proposed by Mr. Thomson. Demand for products such as those the appellant proposes is uncertain and even if there is demand, such products may simply replace milk already produced rather than increase overall demand for milk production. If Mr. Thomson wants to proceed with UHT processing he has an equal opportunity to procure milk through the milk pool to produce any kind of new product he would like to market.

23. The interveners argue it would be irresponsible of the Milk Board to give Mr. Thomson what he seeks based merely on his dream, which one intervener described as "short on reality and lacking in substance" and others argued would have significantly greater costs than estimated. The interveners submit that if Mr. Thomson were to be granted quota and given the accommodations he seeks and then failed, those he had persuaded to invest in his idea and the whole dairy industry would be negatively affected and the Province's continuation in the national supply managed system for milk would be put at risk.

24. The producer organizations request that the Milk Board decision be upheld and the appeal be dismissed.

Processors

25. The BC Dairy Council (BCDC), a trade association of dairy processors, says its members are concerned that the appellant's proposal would allow him to operate outside the supply managed system for milk.

26. BCDC notes that raw milk is marketed through a single desk system within each province and that processors depend on this level playing field for sourcing raw milk. BCDC argues that to grant the accommodations the appellant seeks would give an unfair advantage to the proposed plant. BCDC submits that raw milk must be supplied to the appellant on the same basis as it is to other processors.

27. BCDC notes that other processors currently manufacture UHT milk within the supply managed system. In addition, BCDC introduced evidence that one processor has recently developed a functional UHT drink, such as that proposed to be developed by the appellant, and has begun to market it. It has done this within the supply managed system.

28. BCDC states that its members are not opposed to competition but are opposed to permitting the appellant to operate outside the supply managed system. If the appellant is permitted to do so, other processors will be forced to demand the same accommodations, introducing chaos that could unravel the supply managed system.

29. Further, the surplus butterfat that would be created by the proposed operations would have the effect of reducing the raw milk delivered to other processors.

30. BCDC submits that to gift the appellant the quota requested when other dairy producers would not be able to access quota at the same levels requested by the appellant is patently unfair. Further there is no need for the appellant to obtain quota

since he can, subject to obtaining the necessary licencing, establish a plant and obtain the fluid milk required for the manufacture of his proposed product.

31. BCDC asks that the Milk Board's decision be upheld.

Analysis

32. First we wish to address the appellant's insistence that the Milk Board should have simply entered into an agreement in principal such as the ETOA he proposed. In our view the Milk Board cannot be criticized for having failed to enter into the ETOA as to do so would have fettered its discretion and committed it to support the appellant's requests and to either grant or seek to obtain the accommodations requested. The appropriate first step for the Milk Board was to consider the appellant's request for accommodations in their totality and to decide if it would allow or deny the appellant's request. This is what it has done, resulting in its decision to deny the accommodations requested and making any further consideration of the ETOA by it unnecessary.

33. Before turning to consideration of the specific accommodations requested, some understanding of the supply management system for milk is necessary in order to place the appellant's requests into context. The system is complicated. Milk is a supply managed commodity governed by legislation at both the federal and provincial level and subject to various federal-provincial and inter-provincial arrangements and agreements. Supply management rests on three pillars: planned production; price setting; and import controls. Supply management uses quota to balance milk production with consumption of dairy products. Under the provincial and national milk systems, producers and provinces are expected to produce their full quota in a defined production period, without significant over or under production. Discipline is imposed on production through charges or levies for overproduction. Failure to produce may result in retraction of quota.

34. There are two main markets for milk in Canada: the fluid milk market and the industrial milk market. These markets are defined by the end use of the milk. The end products the appellant proposes to produce are UHT milk beverages that fall within the fluid milk market classification. The industrial milk market includes products such as butter, cheese, ice cream and yogurt.

35. In Canada, the marketing of fluid milk is regulated at the provincial level through the delegation of federal authority in this area to the provinces. The Canadian Dairy Commission (CDC) exercises federal jurisdiction over the marketing of industrial milk and dairy products in interprovincial and export trade. A federal/provincial

agreement, the National Milk Marketing Plan, sets out the structure for the calculation of the national industrial milk production target (i.e. MSQ) required to meet the demand for domestic and export markets. The Plan also provides for the allocation of this quota to the provinces. Policy determination and supervision of the provisions of the Plan are the responsibility of the Canadian Milk Supply Management Committee (CMSMC), a committee of the CDC.

36. In British Columbia, the *NPMA* provides for the promotion, control and regulation of the production, transportation, packing, storage and marketing of agricultural products through the establishment of schemes for those purposes and the constitution of marketing boards to administer the schemes. The British Columbia Milk Marketing Regulation B.C. Reg. 6/2005 (the Scheme) vests the Milk Board with the power to promote, control and regulate those activities with respect to milk, fluid milk or a manufactured milk product within British Columbia.

37. The Milk Board allots British Columbia producers quota (CDQ) which is measured in kilograms of butterfat. CDQ is composed of Market Sharing Quota (MSQ) allocated by the CDC to the province for industrial milk production and Fluid Milk quota determined by the Milk Board. Based on demand, the Milk Board will receive additional allotments of MSQ from the national level and distribute the quota as part of CDQ to its producers. The CDC may also retract quota from provinces, and in turn the Milk Board can retract quota from producers. The Milk Board as the regulator of the system provincially decides whether to increase or decrease the provincial CDQ in response to its determination of changing demand for fluid milk and any changes in national allocation with respect to industrial milk demand.

38. With respect to BCFIRB's jurisdiction, section 9 of the *NPMA* provides:

> 9 (1) The Provincial board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined by the Provincial board under this Act or a federal Act and to make any order permitted to be made.
> (2) Without limiting subsection (1), the Provincial board has exclusive jurisdiction to inquire into, hear and determine whether a decision, order or determination of a marketing board or commission accords with either or both of the following:
> (a) sound marketing policy;
> (b) a scheme or the orders of the marketing board or commission.

39. The appellant bases his appeal upon a policy argument. Basically, he says that in denying his request the Milk Board failed to act in accordance with the policy initiatives outlined in the three documents he has referenced. Accordingly, he says, the Milk Board erred.

40. While giving consideration to the RMEP and the BCFIRB strategic plan, the Milk Board decision addresses the appellant's request for accommodations in terms of what the Milk Board considers to be sound marketing policy. The Milk Board argument then focuses upon the nature of the appellant's business idea, the appellant's qualifications, the lack of any need to grant the accommodations in view of the ability to obtain fluid milk on demand for processing, and the risks to the regulated milk marketing system if the accommodations sought by the appellant were to be granted.

41. We agree with the appellant that it is incumbent upon the Milk Board to have regard to government policy in exercising its powers under the *NPMA* and the Scheme; however, government policy is not binding on either the Milk Board or BCFIRB. Rather, both the Milk Board and BCFIRB in the exercise of their powers are to take government policy into consideration, but must necessarily do so in the context of sound marketing policy within, in this case, the supply managed system for milk.

42. In the present case, the RMEP would be considered government policy. It is a 3 page document that makes broad economic policy statements with respect to the operation of the regulated marketing sector. As referenced by the appellant these policy statements cover a number of areas, including:

- National Systems – Indicates government support for the participation of British Columbia producers in national supply management systems and the need for government and BCFIRB to support the supply managed boards in national and regional negotiations to secure agreements providing for: opportunities for industry growth and new opportunities in primary and further processing; and, sufficient allocations for the development of specialty markets, such as organic and other products differentiated at the farm level.

- Maintaining and Gaining Markets and Serving British Columbia Demand – Calls for the regulated marketing system to support the development of new markets identified at the production, marketing and processing level to facilitate growth and competitiveness. Encourages regulated industries to both serve domestic demand, including developing demand for organic food and other products differentiated at the farm level and to capture markets outside British Columbia. Calls for commodity boards and commissions to: ensure policies and practices pertaining to pricing, levying, marketing and production requirements provide the producer with the ability to pursue new markets and to capture market premiums for products differentiated at the farm level; and, accommodate financially viable, competent sales agencies and processors who wish to pursue new markets

for existing products as well as markets for new value-added processed products and for products differentiated at the farm level.

- Entry of New Producers – Looks to the regulated marketing system to facilitate the entry of new producers to sustain and renew regulated industries in new and existing markets.

- Value Chain – Looks to the regulated marketing system to facilitate cooperation among producers, marketing agencies, input industries, processors and retailers with a view to achieving efficiencies throughout the system and enhancing value in the marketplace.

- Regional Industries – Calls upon commodity boards and commissions to ensure their policies and decisions do not inhibit the economic viability of regional industries, to consider the need for appropriate mechanisms to sustain regional industries, and to accommodate producers and processors who pursue innovative or specialized market opportunities that are available in a region because of the region's location or natural characteristics.

43. As noted in the BCFIRB strategic plan, BCFIRB reviewed and considered the RMEP in developing its strategic vision. Thus BCFIRB's strategic plan may to some extent echo the RMEP, but this does not make it government policy.

44. The Leroux Report was prepared by Mr. Leroux, a consultant, in 2004 at the request of the then Ministry of Agriculture, Food and Fisheries and outlines a number of recommendations.

45. It is important to note that in 2003 BCFIRB commenced a supervisory review of specialty production and new entrant programs in the supply managed sector. During the course of that supervisory review, which became known as the Specialty Review and which extended into 2005, the RMEP was issued and the Leroux Report was delivered. In conducting the Specialty Review, BCFIRB took into consideration both the policies outlined in the RMEP and the recommendations outlined in the Leroux Report.

46. The Specialty Review culminated with the release of BCFIRB's September 1, 2005 report entitled "Specialty Market and New Entrant Submissions - Policy, Analysis, Principles and Directions" (BCFIRB 2005 report). The BCFIRB 2005 report included a number of directions and BCFIRB subsequently issued further directions

concerning implementation issues.[1] The directions as issued and subsequently amended are binding on the respective boards and commissions; other parts of the BCFIRB 2005 report and related documents are not. Boards implemented the directions through changes to board orders to, among other things, put specialty, innovation and new entrant programs into place and address regional interests.

47. This is not an instance where the Milk Board failed to consider government policy in connection with the appellant's application. In its decision the Milk Board makes it clear that it considered both the RMEP and BCFIRB's strategic plan in connection with the appellant's request for accommodations. Under the heading Guiding Principles the Milk Board states that it was "guided by the principles expressed" in the RMEP and in the BCFIRB strategic plan, and makes reference to those principles to which it gave particular consideration. We note that those are essentially the same principles referenced by the appellant.

48. In considering the merits of this appeal, we too have considered the principles set out in the RMEP and have come to the conclusion that to the extent the principles are applicable, and considering the milk industry as a whole, the Milk Board's decision is not inconsistent with the RMEP principles. More importantly we have concluded that the Milk Board's decision to deny the appellant's request accords with sound marketing policy which in our view must take precedence.

49. First we note that the appellant has not made application under any of the existing programs put in place by the Milk Board, including those in response to the RMEP and the directions issued by BCFIRB as part of the Specialty Review, to encourage innovation, specialty production and new entrants and to take into account regional interests. In developing his business idea, the appellant appears to have taken concepts from existing programs such as the Graduated Entry Program (GEP) for new entrants, the CIP and the DDPIP and then attempted to characterize his application as being similar in purpose to the objectives of those programs. However, what the appellant seeks is much more than any of those programs would provide, if indeed the appellant were even able to qualify under those programs. In this regard, we note that the milk to be produced by the proposed dairy component would not be considered to be differentiated at the farm level, nor would the appellant's proposal appear to be consistent with the requirements of the GEP which call for a new entrant to be actively engaged in milk production and for a 5 year plan demonstrating financial ability to establish an independent production unit and sustain milk production. Further the UHT milk product that the appellant proposes to produce would fall into

[1] Interested persons may source these and other documents pertaining to the Specialty Review in their entirety at: http://www.firb.gov.bc.ca/specialty_review.htm

the fluid milk classification and as discussed below would not qualify under either the CIP or DDPIP.

50. What the appellant requests is to be given a very significant amount of quota which at current rates for transfer of quota on the quota exchange would have a value in excess of $100 million. He wants this quota allotted upfront before he acquires land or constructs any facilities for his proposed operations and despite anticipating that he will initially only produce a fraction of the quota, with milk production growing only as demand for his proposed and as yet undeveloped product grows. We observe this upfront allocation of quota appears to be critical to the appellant's strategy for raising capital. Further, the ETOA suggested term of 10 years seems to be a recognition of the 10/10/10 transfer assessment provisions[2] found in the Milk Board's Consolidated Order and the need to hold quota for 10 years so as to ensure that the maximum amount (90%) of the quota allotted will become transferable.

51. We agree with the Milk Board's assertion that the quota request both in amount and structure has as its purpose the immediate creation of an asset upon which the appellant plans to raise funds (approximately $75 million) from investors as capital for the implementation of his idea. We note also the appellant's intention to take a finder's fee with respect to the capital he raises. We agree with the Milk Board that the appellant's proposal demonstrates a clear intention to, for the foreseeable future, use quota not to produce milk but as an asset to trade upon and leverage. In this respect alone the appellant's proposal does not accord with sound marketing policy.

52. Further, it would be entirely contrary to sound marketing policy to grant quota that was not going to be produced for a considerable period or possibly not at all. In this respect the appellant's request for quota to be allotted upfront fails to take into consideration the fact that milk is a supply managed commodity and that milk production is regulated to match supply with demand through the quota system. Quota is therefore finite. Quota that is allotted is to be produced and if it is not produced may be cancelled. It is only when demand increases that more dairy quota may be made available for allotment. But the demand must come first. The appellant argues his innovative product will increase demand but given the stage of his proposal, which at this point is no more than an idea, this is neither certain nor quantifiable. Consistent with sound marketing policy, it would not be appropriate to grant quota upfront as requested by the appellant in the hope it would eventually be produced.

[2] The "10/10/10 transfer assessment" refers to a sliding scale of transfer assessment (from 100% in year 1 down to 10% in year 10) depending on the year of transfer, applicable on transfers of quota.

53. The appellant asserts that his proposal does recognize that quota is finite and that to grant him the requested quota will have no impact on incumbent producers. But this is to ignore reality. Quota being finite it must come from somewhere. As discussed above MSQ is determined at the national level and the Province's share of MSQ is a set amount. Provincially, if quota is not available to an applicant because they do not qualify under an existing program or because the quota sought exceeds the amount available under an existing program, the quota must come from quota set aside for utilization under other existing programs such as those for new entrants or from quota allotted to existing producers.

54. Additionally, there is the potential displacement of raw milk production as a result of the structural surplus of butterfat that would be created by the proposed operation. The appellant does not dispute that his proposal would result in a structural surplus of the magnitude indicated by the Milk Board and raised as a concern by the processors. However, he suggests that the impact - either an equivalent reduction to British Columbia's allocation (in effect a reduction to the quota holdings of existing producers of approximately 1350 kgs of CDQ) or significant overproduction penalties under the National Milk Marketing Plan - would be avoided because he would just dump the surplus. We agree with the Milk Board's submission that dumping of a food product is not a viable option and would be contrary to sound marketing policy within the supply managed system for milk.

55. The appellant asserts there is sufficient quota available at the national level directed to innovation programs and that the 2700 kgs he requests can be made available to him by accessing that quota. The evidence is to the contrary. The national program to which the appellant refers is the DDPIP. Laval Letourneau, Chief of Commercial Operations at the Canadian Dairy Commission and the administrator of this program gave evidence with respect to the program. He advised that the program does not apply in the case of processors requiring fluid milk because fluid milk is available on demand. Rather, the program is designed to increase flexibility in the restricted supply of industrial milk so that licenced processors who have fully developed a new innovative product can obtain a greater supply of industrial milk to produce the product. The quantity of quota available for the purposes of the DDPIP is determined by the CMSMC as a percentage of the total MSQ available nationally. This limit is being raised from 2% because of anticipated full utilization in the current year to 3% for next year with anticipated immediate utilization of 2.4%. This leaves only 0.6% unutilized for all of Canada. Based on Mr. Letourneau's evidence, which we accept, the appellant's proposed operations would not qualify under this program. Indeed, even if the appellant's end product were to be reclassified as something other than a fluid milk product (see discussion below), the appellant would not meet the other

DDPIP requirements. He could not access the program based only on an idea for a product.

56. The appellant also referred to the CIP. This program does envision an integrated operation but on a small scale "cottage" level and is again restricted to industrial milk products such as cheese and yogurt. It provides for between 4.1 and 27.4 kgs of CDQ to be allotted to an applicant depending on annual processing requirements as the processing operation grows over the first 15 years of operation. Clearly, the appellant's proposal (which seeks roughly 100 times that quota limit) does not fit within this program either. As the Milk Board argues, to allot the quantity of quota the appellant requests would result in no quota being available for programs such as the CIP and the GEP for new entrants that are responsive to the RMEP principles and consistent with sound marketing policy.

57. Mr. Thomson is aware that the DDPIP and CIP are restricted to industrial milk. To accommodate his request for quota he requests a "single instance exclusion" for his proposed product from the definition of fluid milk. Presumably one reason for his making this request is to bring his proposal within the spirit if not the production limits of these programs. The Milk Board is correct in refusing to accommodate this request. As pointed out by the Milk Board, the refusal to grant quota does not preclude the appellant from proceeding to develop his proposed product and establishing a plant to process it because fluid milk in sufficient quantities for such production can be obtained on demand from the pool. There is no need to grant the accommodation sought. The on demand system for fluid milk supports innovation by processors of new products that require fluid milk and it would be contrary to sound marketing policy to implement regulatory changes to reclassify an innovative fluid milk product as something other than a fluid milk product and thereby potentially restrict access to supply.

58. We understand that the appellant's proposal is based on vertical integration and not only processing of the proposed new product. Indeed the overall proposal would appear to dictate that the operations be both structured as he proposes and with the accommodations he requests.

59. The Milk Board submits that the appellant's claim of efficiencies arising from vertical integration is not substantiated and that the real purpose of the proposed vertical integration is to provide a supply of fluid milk that is not subject to the Milk Board ordered pool price for fluid milk. We agree that the evidence does not demonstrate significant efficiencies from vertical integration and to this extent does not offer any reason to grant the accommodations requested. Nor do we consider vertical integration to be an innovative production method.

60. Certainly the appellant's proposal envisages that milk produced by the proposed dairy will not go into the pool and that the processing side of the proposed operations will access raw milk at less than the Milk Board ordered price. To do this the appellant seeks further accommodations from the minimum price paid by processors for various classes of milk established by the Consolidated Order. As BCDC noted in its intervener submissions, to accede to the accommodations requested would effectively permit the appellant to operate the processing side of his operations outside the supply managed system by allowing him to source milk at a lower price than other processors. In effect one of the three pillars of supply management, price setting, would not apply to the milk produced by the appellant. As a result, we agree that the Milk Board's refusal to accommodate the appellant by allowing him to access fluid milk outside the pool at less than the Milk Board ordered price is completely consistent with sound marketing policy within the supply managed system for milk.

61. The panel has concluded that the appellant's proposal although couched in the language of innovation within the supply management system is nothing of the sort. The appellant's business idea is that the supply management system for milk should be rewritten to give him alone special status not just as a producer but as a processor as well. In fact, the only aspect of supply management that the appellant appears to accept or want is quota. At its most basic, he asks to be allocated a significant quota holding to use as leverage to create a dairy farm/processing plant to operate outside the supply management system. But upon close inspection, the front end aspect of the proposal (acquiring land and cattle and building a dairy) is completely unnecessary in a supply managed "milk on demand" system. A processor does not need its own supply of fluid milk where that milk can be supplied by the Milk Board upon request.

62. It appears to the panel that the only purpose of the appellant's vertical integration model is to create an air of legitimacy to somehow justify the many accommodations he seeks. However, the fact that the appellant wants to develop a vertically integrated dairy/processing operation does not mean that the Milk Board or this panel must accede to that request.

63. The supply managed system for milk is just that, a system, with balances and counter-balances. It cannot be maintained if both national and provincial supply and price controls are effectively abandoned. In our view to grant the quota and other special regulatory accommodations requested by the appellant would be to do just that and would therefore be contrary to sound marketing policy. Accordingly, we find the Milk Board's decision to deny the appellant's request accords with sound marketing policy.

Costs

64. Both the appellant and the respondent have applied for an order for costs pursuant to section 47 of the *Administrative Tribunals Act*, SBC 2004, c. 45 (*ATA*) and Rule 20 of the BCFIRB Rules of Practice and Procedure for Appeals (the Rules). Under section 47 of the *ATA* and Rule 20, BCFIRB may require a party to pay part of the costs of another party.

65. The respondent Milk Board submits that the appellant has engaged in a deliberate effort to obscure the true nature of his request through verbosity, exaggeration and unintelligible language. The Milk Board submits that the audacious nature of his request for regulatory "accommodations" has required the Milk Board to devote considerable time and resources to address the many implications that would flow from it. The Milk Board says the appellant on the other hand has shown concern only for his narrow interests and little concern for the impact of his request on producers, processors and the regulated milk marketing system itself.

66. The appellant submits that he engaged the Milk Board in good faith to garner support in a legitimate matter for a legitimate business pursuit and that the nature of the supply managed system made it necessary for him to deal with the Milk Board and that the ensuing processes required him to invest time and resources. He submits that it is not appropriate to award costs against him and that to refuse to grant him costs is to in effect fine him for engaging in the process.

67. We observe that both the appellant's and respondent's requests appear to include costs incurred prior to the initiation of the appeal. The power under section 47 of the *ATA* to award costs is "in connection with the application", which in this case would in our view limit any costs to those incurred in connection with the appeal and not costs incurred prior to and in connection with the initial request to the Milk Board and the rendering of its decision.

68. To the extent the appellant found the entire process, both before and in the course of pursuing the appeal, to be long and time consuming, we can only observe that to a large extent this was a result of the manner in which he chose to present his proposal. In this regard we agree with the submission of the Milk Board that the appellant's presentation of the proposal and his arguments in support of it were unduly long and the language difficult. In our view this made the appeal process longer than it need have been but not to the extent that an award of costs against the appellant is appropriate.

69. The appellant has been unsuccessful on the appeal and his submissions with respect to his own application for costs are without merit.

Conclusion

70. The appeal is dismissed.

71. The respondent's application for costs is denied.

72. The appellant's application for costs is denied.

Dated at Victoria, British Columbia this 23rd day of May 2012.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

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Suzanne K. Wiltshire, Presiding Member

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Ron Kilmury, Chair

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Ron Bertrand, Member