



May 27, 2004

File: 44200-50/MMB 03-26

DELIVERED BY FAX

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Dear Sirs/Mesdames:

**AN APPEAL BY ISLAND FARMS DAIRIES CO-OP ASSOCIATION FROM A
NOVEMBER 26, 2003 DECISION OF THE BRITISH COLUMBIA MILK MARKETING
BOARD CONCERNING AN INCREASE IN THE VENDOR MARKETING COSTS AND
LOSSES LEVY**

The Panel is in receipt of Robert Hrabinsky's May 13, 2004 letter on behalf of the British Columbia Milk Marketing Board (the "Milk Board"). No response has been received from Island Farms Dairies Co-Op Association ("Island Farms") or any of the interveners. In his application, Mr. Hrabinsky seeks a final decision from the British Columbia Farm Industry Review Board (the "Provincial board") without further hearing.

British Columbia
Farm Industry Review Board

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Mr. Hrabinsky makes two points. First, he states that, despite providing documents to the Milk Board, Island Farms has failed to comply with its commitment at the May 7, 2004 pre-hearing conference to provide the Milk Board with confidential business information on the financial impact of the challenged levy. Mr. Hrabinsky points out that this Panel's January 21, 2004 and February 12, 2004 reasons both emphasised the need for Island Farms to substantiate its position regarding the impact of the levy. Second, citing criminal and civil litigation cases, Mr. Hrabinsky states that our February 12, 2004 decision creates procedural unfairness by permitting or directing the Appellant to "split its case". Based on these two points, the Milk Board argues that the Provincial board should not convene any new hearing and should issue a final decision on the evidence adduced to date.

Mr. Hrabinsky's first point is not a proper basis to refuse to proceed to hearing. It is for the Panel to decide whether Island Farms lays a proper evidentiary foundation to prove its case. Disputes about whether Island Farms is or should be obliged to provide additional information, or has proved its case, are to be argued before the Panel.

Mr. Hrabinsky's second point is, with respect, misconceived. This is a policy appeal before a specialised administrative tribunal, conducting a rehearing, and with broad remedial jurisdiction to make an order it considers appropriate in the circumstances. A policy appeal about the desirability of a levy is not a criminal or civil trial, and the rules applicable to criminal or civil trials are inapt for deciding a policy appeal. This is why administrative law makes clear that the evidentiary rules applicable to courts do not apply to administrative tribunals.

Our February 12, 2004 decision concluded that as the policy context in which this appeal was heard was dynamic, the course of wisdom was to suspend final decision pending the receipt of more current and cogent information in order to answer this policy question. As noted by the Panel at para. 42:

We wish to make it clear that, by issuing this suspension decision, we are not pre-judging the outcome of this appeal if and when it proceeds after the 60-day suspension. What we are saying is that if the Milk Board ultimately confirms its desire to have the suspension lifted, the Panel will expect full and detailed evidence and submissions, on both sides, of the advantages versus the disadvantages of any Levy increase in light of the circumstances. This would include the circumstances prevailing at the time, and also address any contingencies such as whether or how the Levy should be affected by other government policies or programs relative to the BSE problem.

[emphasis added]

(see also our April 23, 2004 letter)

There is no procedural unfairness to the Milk Board in proceeding this way. Our decision makes perfectly clear what the outstanding issues are, and who is required to address them. Apart from the question of disclosure by Island Farms, which will be dealt with at the hearing, Mr. Hrabinsky has not given a single example of where his client would be "taken by surprise, prejudiced or confused" (to use the language of the cases he cites) by attending the scheduled hearing. The Milk Board will have a full and fair opportunity to respond to any additional evidence adduced by the Appellant.

The Milk Board's application is dismissed and the hearing will proceed as scheduled.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser
Vice Chair, Panel Chair

cc: Jim Byrne, Assistant General Manager
British Columbia Milk Marketing Board