



December 31, 2003

File: 44200-50/MMB 03-26

DELIVERED BY FAX & REGISTERED MAIL

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Dear Sirs:

**AN APPEAL BY ISLAND FARMS DAIRIES CO-OP ASSOCIATION
CONCERNING A DECISION OF THE BC MILK MARKETING BOARD
REGARDING BC CLASS 1 MILK LEVY INCREASES**

On December 31, 2003, the Farm Industry Review Board (the "Provincial Board") conducted a telephone conference call to hear a preliminary application by Island Farms Dairies Co-op Association ("Island Farms") for a stay pending a hearing of its appeal of a November 26, 2003 decision of the British Columbia Milk Marketing Board (the "Milk Board") to add a \$1.96/HL increase to the marketing costs and losses levy effective January 1, 2004.

BACKGROUND

The dairy industry in Canada is supply managed nationally. Each province receives an allocation, distributed amongst producers through a quota system. In addition, BC participates along with the three other western provinces in an agreement known as the Western Milk Pool ("WMP"). The WMP is an agreement under which prices paid by processors to producers of milk are pooled from the four western provinces so as to provide an equitable return among producers within each province.

Although BC is a member of the WMP, the Milk Board retains the authority to establish fluid milk prices independent of milk prices in other jurisdictions. On November 26, 2003, the Milk Board issued a Notice to Processors, the relevant portion of which is set out below:

British Columbia
Farm Industry Review Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
3rd Floor, 1007 Fort Street
Victoria BC V8V 3K5
Email: firb@gems9.gov.bc.ca
Website: www.firb.gov.bc.ca

This notice serves as a reminder that effective December 1, 2003 processors receiving raw milk for use in Classes 1(a), 1(b)(i) and 1(c) will pay \$70.19 per hectolitre on a 3.6 kilogram per hectolitre basis. This amount is \$2.94 less than the November 2003 price.

Effective January 1, 2004 there will be no change to the above stated December 2003 cost for milk used in Classes 1(a), 1(b)(i) and 1(c).

Commencing January 1, 2004 the Vendor marketing costs and losses levy fixed and imposed on Vendors reporting sales in Classes 1(a), 1(b)(i) and 1(c) will be increased by \$1.96 to \$3.03 per hectolitre. This levy increase is accompanied by an equivalent decrease in the published milk component prices for Classes 1(a), 1(b)(i) and 1(c). As a result, the cost of milk procured by British Columbia processors for use in the aforementioned milk classes remains unchanged from December 2003.

According to the Milk Board, the purpose of the \$1.96/HL increase in the marketing costs and losses levy is to offset producer losses relating to the impact of the occurrence of bovine spongiform encephalopathy ("BSE") on dairy producers. The closure of the United States-Canada border to live Canadian cattle shipments has created a surplus in Canada in excess of our processing plant capacity. As a result, dairy producers have fewer options for the disposal and marketing of their cull cattle and therefore receive lower prices for them. According to the Milk Board, the cost to the BC dairy producer may be as high as \$5.00/HL.

On December 24, 2003, Island Farms appealed the above decision of the Milk Board arguing that "this unilateral action has forced Island Farms and we believe other BC processors, to be non-competitive in the BC and Alberta marketplaces" and requesting a stay pending appeal.

DECISION

In coming to this decision, the Panel has had the benefit of hearing from Mr. John Jansen, Chair and Mr. Tom Demma, General Manager of the Milk Board and Mr. Eric Erikson, Director of Finance of Island Farms. Time constraints do not allow us to review the arguments in any great detail.

The *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 gives the Provincial Board authority to stay an order, decision, or determination of a marketing board under appeal: s 8(8.2). In determining whether a stay is appropriate in the circumstances, the Panel relies on the three part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 and its predecessor, *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110:

- a) Is there a serious issue to be tried?
- b) Would the applicant suffer irreparable harm if the application were refused?
- c) On the balance of convenience, which party would suffer greater harm from granting or refusing the remedy pending a decision on the merits?

As the parties to this application were unrepresented, both were given copies of recent stay decisions of this Board in order to assist in their understanding of the application of the above test.

Serious Issue to be Tried The Panel is of the view that this appeal, on its face, raises serious policy issues relating to the pricing of fluid milk and BC's role within the national supply management system. The real issue on this stay application is whether Island Farms will suffer irreparable harm if a stay of the November 26, 2003 order is not granted.

Irreparable Harm In considering this second branch of the *RJR-MacDonald* test, the Panel must consider whether Island Farms has satisfied the burden of proving that it would suffer "irreparable harm" if the Milk Board's decision is not stayed pending appeal.

The Panel has considered the submissions of the parties. Based on the brief submissions we heard, Island Farms has not satisfied us that it will suffer irreparable harm if this order is not stayed. First of all, given the complexity associated with milk pricing within BC and its relationship to pricing in Alberta, it is difficult to render a decision of this sort without a complete understanding of all the issues at play. Second, this matter can proceed to a hearing on its merits in a timely fashion. If there are any prospective intervenors, the Panel could have the benefit of their views. Third, the threat to Island Farms of lost contracts or customers resulting from any perceived price advantage of processors with plants in Alberta over BC processors is purely speculative at this point. Fourth, there is an issue relating to the timing of this application and appeal. The Notice to Processors was issued November 26, 2003. The text of that order appears to indicate that this Notice is at least in part a reminder. Had Island Farms anticipated that this order would cause irreparable harm, the Panel would have expected that any stay application would have been made as soon as possible and not on the eve of the expiration of the thirty-day notice period and on Christmas Eve. As a result of statutory holidays and offices being closed, this hearing could only be convened one day prior to the date this order is to take effect.

It is also worth noting that the Supreme Court of Canada has itself recognised that other than in exceptional cases, irreparable harm to the public interest will "almost always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility".¹ In our view, this test is met here.

If on the hearing of this appeal on its merits, Island Farms' arguments are persuasive and the order is set aside, there are meaningful remedies open to the Provincial Board. Further, Island Farms can renew its application for a stay at the hearing of the appeal.

As the Panel has not found irreparable harm, it is unnecessary for the Panel to go further and consider the balance of convenience; however we do so in order to give the parties the benefit of our complete reasons.

¹ See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R.110 at p. 129.

Balance of Convenience The third branch of the test involves a determination of who will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. The Milk Board argues that these are difficult times for dairy producers, not just in BC but in all of Canada, who are facing the fallout of BSE. The Milk Board feels strongly that it has a responsibility to take a leadership role on this issue and not wait for its other provincial counterparts to act. While he supports the idea in principle, Mr. Erikson of Island Farms argues that as BC bases its fluid milk price on that set by Alberta, it is premature for BC to assess a \$1.96/HL levy for BSE in advance of other provinces taking similar measures. By acting prematurely, the Milk Board has created a competitive disadvantage in an already tight marketplace.

In this instance, the Panel prefers to maintain the status quo and allow the Milk Board to exercise its judgement in regulating the dairy industry. As we noted in our October 2, 2000 stay decision in *Hallmark Poultry Processors et al v. British Columbia Chicken Marketing Board*:

“Marketing boards have first instance authority to regulate their stakeholders. They have a responsibility to make those changes where they consider those changes to be in the public interest. Unless otherwise specified, their orders speak from the date of pronouncement and do not require BCMB approval. This is particularly so with regard to legislative orders that affect the whole industry. The “status quo” preceding a change in general orders is not to be preserved for its own sake.”

Accordingly, the application for a stay is dismissed. The Panel recognises the serious nature of these issues and as we advised in the conference call, we are available for an expeditious hearing of this appeal. The parties should contact Ms. White of the Provincial Board to advise of their available dates. At this point a one-day hearing would appear adequate but this may change if there are any applications for intervenor status.

Dated at Victoria, British Columbia, this 31st day of December 2003.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair