

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL REGARDING A DECISION OF THE BRITISH COLUMBIA
MILK MARKETING BOARD

BETWEEN

ANDY JACOBSEN

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

**KAMLOOPS OKANAGAN DAIRYMEN'S ASSOCIATION
KOOTENAY MILK PRODUCERS
MAINLAND MILK PRODUCERS ASSOCIATION**

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Garth Green, Member (Panel Chair)
Dave Merz, Member
Ron Bertrand, Member

For the Appellant

Andy Jacobsen

For the Respondent

Robert P. Hrabinsky, Counsel
Ken McCormack, General Manager
Chris Bowser, Staff

For the Interveners

Kamloops Okanagan Dairymen's Association

Henry Bremer, President

Kootenay Milk Producers

Ken Kepke, President

Mainland Milk Producers Association

Thomas Wynker, Director

Date of Hearing

December 3, 2008

Place of Hearing

Kamloops, British Columbia

INTRODUCTION

1. The appellant, Andy Jacobsen, is contemplating starting a dairy operation near Clinton, in the Cariboo region of British Columbia. He is currently #47 on the British Columbia Milk Marketing Board's ("BCMMB") Graduated Entry Program ("GEP") and at a minimum rate of 3 successful new entrants each year; the appellant would enter the GEP program in 2023. His entry into the industry may be sooner through attrition of other applicants, increased rate of acceptance of applicants or he may choose to purchase milk production quota at any point and remove himself from the wait list.
2. On May 31, 2008, as part of his operational and financial planning, the appellant wrote to the BCMMB seeking clarification of the BCMMB transportation regulations and milk transportation rates that would apply to his new dairy.
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 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.
6. On September 26, 2008, the BCMMB applied to the British Columbia Farm Industry Review Board ("BCFIRB") to have Mr. Jacobsen's appeal dismissed on the basis that it was "out of time", frivolous, vexatious or trivial and that it had been appropriately dealt with in another proceeding. On October 22, 2008, a BCFIRB panel dismissed the BCMMB's application for summary dismissal.
7. The Kamloops Okanagan Dairymen's Association, the Kootenay Milk Producers and Mainland Milk Producers Association were all granted partial intervener status to

make a presentation to the panel and to answer questions from the panel, appellant and respondent.

8. The matter proceeded to hearing on December 3, 2008 in Kamloops.

ISSUE

9. Did the BCMMB err in its determination of the raw milk hauling rate for Mr. Jacobsen's proposed farm location?

INTERVENERS SUBMISSIONS

10. The Kamloops Okanagan Dairymen's Association ("KODA") submitted that the current milk hauling system in British Columbia is fair and equitable for all producers. The truck routes for hauling milk continue to change as production and plant locations change. They do not want to see Mr. Jacobsen charged a rate based on a current hauling route that could change and result in milk trucks not passing near his farm creating a financial hardship. The current zone system encourages the production of milk in defined areas and this makes it possible to assemble loads into logistically and economically justifiable quantities. If Mr. Jacobsen were to receive special consideration and an accommodation based on his proximity to an existing route, his milk would have to be hauled long distances before it could be aggregated with other milk into an economically justifiable load.
11. The Kootenay Milk Producers ("KMP") submitted that "producers who choose to operate in remote areas should be aware of freight charges over and above the pooled rate". The current Consolidated Order of the BCMMB "clearly defines the province's milk sheds and the consequences of locating outside those areas, in regard to freight costs". They agree with KODA that the BCMMB current system is fair and equitable.
12. The Mainland Milk Producers Association ("MMPA") drew attention to the continuing increase in the cost to producers to haul milk to processors. In their view, Lower Mainland milk producers pay a disproportionate amount of this cost; particularly in light of their close proximity to major processing plants. The BCMMB has the clear authority and responsibility to limit these increases through a containment policy based on zones, as is currently in place. The MMPA endorses that policy and believes that if Mr. Jacobsen's argument succeeds "it would be setting a precedent that would allow expansion of the boundaries of the current milk production regions and further escalate the cost of hauling raw milk to processors".

DECISION

13. In his appeal, Mr. Jacobsen relied on two main arguments:
 - a) His potential farm location is situated close to either of two routes used by milk haulers for the transport of bulk milk within the province. Proximity

to these routes supports an amendment to the Consolidated Order so that he is charged a rate based on the actual distance from either route to his farm.

- b) The BCMMB has the power to act in a discretionary manner with respect to its decisions regarding provincial milk hauling freight rates, has done so on a number of occasions, and they should do so in his case.

14. We address the “proximity” argument first. The elements of the raw milk hauling system in British Columbia are found in the BCMMB’s Consolidated Order enacted on October 1, 2001 and amended on June 11, 2003 and December 12, 2003. The system is a “zone” or “region” based system with eight milk hauling zones established within the Province based mainly on historical aggregations of milk producers around regionally based milk processing plants. The BCMMB conducts a bid-tender process wherein potential milk haulers are given zone descriptions and associated data such as projected milk volume and possible destinations for the milk in the zones. Prospective haulers submit bids based on the information provided in the tender document. The intent of this process is to obtain the lowest possible price for milk transportation on a zone basis. Rate equalization in the province ensures that all producers within defined zones pay the same milk hauling rate. This rate is derived largely from the pooling of the respective successful bids for each zone.
15. “Out-of-zone” or “remote” producers are situated outside of the defined zones and the Consolidated Order provides that they be charged a minimum rate of \$100 per stop or \$2.30 per km based on distance to the nearest zone boundary. Remote producers are not included in the bid-tender process as they are outside of the defined zones. Each producer is dealt with individually through the application of the remote charges unless they were “grandfathered” and treated as if they were in a zone, based on their “temporal proximity” to the commencement of the regional transportation or subject to a discretionary decision due to their geographic proximity to the zone boundary.
16. Under the provisions of the *Natural Products Marketing (BC) Act*, a person aggrieved by or dissatisfied with the enactment of the zone freight rate system in 2001 and amended in 2002 and 2003 was required to commence his appeal within the prescribed time period (30 days). To the extent that Mr. Jacobsen sought to challenge the regional freight zone system found in the Consolidated Order and propose an alternate methodology for calculating rates based on proximity to existing milk transport routes under this ground of appeal, the panel finds this ground of appeal out of time. We do not find any special circumstances to warrant the time for filing an appeal on these grounds.
17. This issue was also addressed in the panel’s summary dismissal decision of October 22, 2008. On the out-of-time issue, the panel found that this was not an appeal of the merits of the Consolidated Order; such an appeal would have been out-of-time. Rather, the panel agreed with Mr. Jacobsen that:

“the Milk Board’s July 29 letter contains the determination that Mr. Jacobsen is appealing. The Milk Board states in the first line of the letter that it “has **determined** an appropriate freight rate based upon the Board’s Consolidated Order” (emphasis added). The Milk Board’s General Orders provide a methodology for calculating freight rates but do not address an applicant’s potentially unique issues. Inherent in the application of the methodology contained in the General Orders is the necessity for the Milk Board to exercise discretion to assess and make determinations based on each applicant’s circumstances. Mr. Jacobsen’s application was assessed by the Milk Board and a determination regarding freight rates was made on July 29, 2008. As Mr. Jacobsen’s appeal was filed on August 27, 2008, the Panel finds that the appeal was commenced within the 30 day limit prescribed by the ATA. “

18. To the extent that Mr. Jacobsen’s arguments on the proximity issue can be seen as an argument that the BCMMB should have exercised its discretion in his favour, these arguments will be addressed as part of the second issue that the BCMMB could, and should, exercise discretion and determine a freight rate for his potential farm based on the special considerations inherent in his situation.
19. Mr. Jacobsen is a prospective dairy farmer in British Columbia. He has a farm location and is registered on the wait list for the GEP. The panel accepts that it was reasonable for a businessman considering establishing a business of considerable magnitude to, as part of his planning process, perform due diligence regarding the factors influencing the viability of his business. One aspect of due diligence would be enquiries to all government agencies and regulatory bodies that may impact the ultimate operational, and by extension, financial success of the contemplated enterprise. The panel does not accept that Mr. Jacobsen’s current position on the GEP waiting list, which extrapolates to acceptance into the program in 2023 is a relevant consideration to this appeal. Theoretically, Mr. Jacobsen could commence shipping in the very near term if he were to acquire quota and as such we find that it was appropriate for the BCMMB to take his rate query at face value.
20. Mr. Jacobsen argues that the BCMMB erred in failing to exercise its discretion in his favour and points to the cases of four remote dairy farmers (Phil Owen, Gordon Fox, B. Vander Wyk and Richard Lancaster) who received special consideration from the BCMMB. He observes that these situations involved producers looking to start farms in “remote” locations or who are already in remote locations and asking for special rate consideration.
21. Mr. Owen was an existing milk shipper in Agassiz who sought to relocate his farm operation to Barnhartvale, outside of Kamloops. The BCMMB initially took the position that the new location was 43 km from the nearest milk zone boundary and the minimum charge of \$100.00 per pickup would apply. Mr. Owen asked for reconsideration of the rates for his proposed location. In its “Issue Document” prepared for Mr. Owen’s situation, the BCMMB noted that “most if not all of the loads hauled out of the Okanagan pass both ends of the Barnhartvale/Old Vernon Hwy Road” and concluded with a recommendation “that Mr. Owen’s Barnhartvale location is 15 km from a major freight route; a charge that equals \$2.30 per km to the freight route (\$34.50) could be considered.” Ultimately, however Mr. Owen did not relocate to Barnhartvale but moved his farm to Lumby, near Vernon. He advised the

BCMMB that the farm he was contemplating buying was one km outside of the current Okanagan freight zone boundary and asked that this location be included in the Okanagan freight zone. The BCMMB Issue Document regarding Mr. Owen's circumstances states:

“the minimum incremental charge of \$100.00 per delivery seems to be very high considering the location falls 1 kilometre outside the freight zone. Other options are to charge him the incremental cost of \$2.30 per kilometer on each delivery based on the actual distance that he falls outside of the zone or to change the boundary to include his proposed new location in the Okanagan freight zone.”

The BCMMB minutes of March 23, 2006 show that “the current charge of \$2.30 would be applied; however, once the property is purchased the producer may make written request to have the charges set aside.”

22. Mr. Fox wanted to relocate his dairy farm from Saanich to Westwold (outside the Okanagan zone) between Armstrong and Kamloops. The location was “right off Highway 97 where all the milk trucks drive by every day.” The BCMMB considered a presentation on the Okanagan zone boundaries and according to BCMMB minutes “decided to revise the coordinates having consideration for road allowances and geographic boundaries to make more land available within the zone.” Mr. Jacobsen points out that this revision required an amendment to the Consolidated Order and suggests that this could easily be done to accommodate his circumstances as well.
23. The final two out of zone producers are Mr. Vander Wyk and Mr. Lancaster. Mr. Jacobsen argues that the discretion exercised by the BCMMB in these cases supports a similar exercise of discretion in his case. Mr. Vander Wyk was invited to start shipping milk on the GEP program and had a farm located in the Columbia Valley area of the Lower Mainland outside the Fraser Valley freight zone. Mr. Vander Wyk requested special freight rate consideration from the BCMMB given his location and circumstances. The BCMMB gave him two options, defer his start on the GEP by one year to find a farm within an existing freight zone, or stay at his current site and the \$100.00 minimum charge would be waived and the \$2.30 per km charge for his 30 km round trip would reduce his pick-up charge to \$69.00.
24. Mr. Lancaster is located in Wallachin, 136 km from the boundary of the Okanagan freight zone. The BCMMB decided that his freight rate:

“will be based upon the distance traveled from the closest transportation route. Specifically, in your situation that route would be Hwy. #5. Most of the year there is milk from the Okanagan being transported down that Highway to the Fraser Valley for processing. This will reduce your incremental compensatory rate down to 96 kilometres round trip.”

Mr. Lancaster was also advised that the hauler would be told to try to pick up Mr. Lancaster's milk when traveling to the Fraser Valley from the Bulkley Valley to reduce his “compensatory freight rate” even further as that would only entail a 48 km round trip.

25. Finally, Mr. Jacobsen pointed to a real estate document describing a dairy farm for sale in Quesnel, 7 km from Highway 97. This farm is comparable in size to his farm but even though it is farther from Highway 97, it does not have to pay out-of-zone hauling charges because it is within the boundaries of the Cariboo freight zone. He finds this incongruous and illogical in light of the similarity in geographical placement between the two farms.
26. The BCMMB argues that as a public regulatory body it can only make discretionary decisions in situations exhibiting obvious “special circumstances”. Under the category of special circumstances, it argues that it can only countenance applying discretion when either one or both of the following applies: extreme geographical proximity to freight zone or extreme temporal proximity to the date at which the freight rules were implemented.
27. The BCMMB has set rates for producers who chose to establish farms outside of the established freight zones. The zone boundaries, based on geographic coordinates, and the rates for shippers in remote regions are published in the Consolidated Order. Producers whose farms fall outside established zones are required to pay the “greater of \$100.00 for each delivery of milk or cream, or \$2.30 per transporter route km 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”. The BCMMB maintains that it is Mr. Jacobsen’s responsibility to read and understand these Orders prior to establishing his dairy farm.
28. The BCMMB argues further that at the time the freight zones were established, there were a number of dairy farms outside zone boundaries. The BCMMB did not feel it was appropriate to extend the boundaries to include these farms as it would make the zones too large. Instead, these outlying farms were “grandfathered” into a zone and the respective zone’s freight rate was applied. However, the BCMMB argues that the existence of these farms is not a justification for Mr. Jacobsen to receive like accommodation with respect to freight rates for his prospective farm; these were one-time exceptions made at the inception of the provincial freight zones system and have no application to Mr. Jacobsen’s desire to start a new farm in a remote area.
29. Regarding the expansion of the Okanagan zone referred to as a precedent by Mr. Jacobsen, the BCMMB argues that these zone changes were made as a result of it realizing that Blackwell Dairy in Kamloops was outside the Okanagan zone. In keeping with the intent to include regional processors in zones, the Okanagan zone boundary was extended to include Blackwell Dairy. By doing so, the proposed Owen and Fox locations fell within the revised Okanagan zone boundary but “this was not an attempt to accommodate any ‘special circumstances’ advanced by Mr. Owen or Mr. Fox.
30. The BCMMB argues that Mr. Owen and Mr. Vander Wyk are examples of shippers in “extreme geographical proximity to freight zone” and as a result the minimum \$100.00 charge was waived and they received the \$2.30 per km rate. When

Mr. Owen eventually relocated to a site near Lumby, approximately 1 km outside the Okanagan zone boundary, the BCMMB argues that it acted appropriately by charging Mr. Owen the \$2.30 per km rate for the distance he was beyond the closest zone boundary. It also states that exercising its discretion in these special circumstances did not compromise the integrity of the existing rules.

31. With respect to Mr. Vander Wyk, the BCMMB argues that a discretionary decision was appropriate in his case given his proximity to the Fraser Valley freight zone (15 km) and because of mitigating personal circumstances that the BCMMB felt compelled to acknowledge¹. This discretionary decision was designed to encourage Mr. Vander Wyk to relocate but if he did not, the BCMMB was prepared to waive the \$100.00 minimum and charge only the \$2.30 per km rate. The BCMMB argues that this discretionary decision does not compromise the integrity of the existing rules and does not create a precedent applicable to the appellant's circumstances.
32. Finally, with respect to Mr. Lancaster, the BCMMB argues that it exercised its discretion in his favour based on its history of transactions with him that included a BCMMB error respecting the appropriate rate to charge. The BCMMB conceded that it erroneously made a decision to accommodate Mr. Lancaster based on his proximity to a milk transfer route. When the BCMMB received Mr. Jacobsen's request, it realized its error and acted to ensure that Mr. Lancaster was being treated in a manner consistent with Mr. Jacobsen.² Upon its review, the BCMMB concluded that Mr. Lancaster's situation was indeed a real 'special circumstance' and warranted a discretionary decision. Some of the circumstances relied on by the BCMMB included a possibly misleading email from a BCMMB member and the acknowledgement that Mr. Lancaster's decision to move to Wallachin was known to the BCMMB well before the enactment of the regional freight zone policy. The BCMMB argues that Mr. Lancaster's circumstances are unique and cannot be used as justification for giving special consideration to Mr. Jacobsen.
33. The panel has considered the arguments of the appellant and respondent. We accept that the BCMMB has the authority to exercise discretion in making decisions regarding the application of freight rates to individual circumstances. The panel observes that any public regulatory body making a discretionary decision that is at odds with its regulations must have a very clear framework in place to guide them in making that type of decision.
34. The appellant argues that the BCMMB erred by not granting him a discretionary freight rate or alternatively by not redrawing zone boundaries to provide him with a lower freight rate. We are not satisfied based on our review of the evidence that the Milk Board erred in not exercising its discretion in the appellant's favour. We say

¹ Mr. Vander Wyk has spent a large amount of money modifying his current residence to allow access for a physically disabled child.

² Mr. Lancaster has an appeal regarding his freight rate before the BCFIRB that was heard on December 4, 2008. The detailed circumstances surrounding the BCMMB decision will be addressed in a subsequent BCFIRB decision.

this for a number of reasons. 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. Its handling of the various applications for discretionary decisions on freight rates demonstrates that the BCMMB recognized the dynamic nature of the regional freight zone system. Over time and as circumstances warranted, the BCMMB has adapted and amended its system. In future, the Milk Board will need to continue to adapt and amend the milk hauling system to reflect changes in circumstances and government policy.

35. Further, we find that the BCMMB had in place a set of principles or criteria that it applied to applications for freight relief by remote producers and its decision to not grant relief to the appellant accorded with those principles. We also find that the BCMMB has followed a rational and principled approach to exercising its discretion. The BCMMB understood the nature of the appellant's alleged circumstances which he felt justified an exercise of discretion in his favour before turning its mind to the appropriateness of the discretionary relief sought. The BCMMB also considered the impact of any discretionary decision on the existing regulatory framework and whether an exercise of discretion would negatively impact that framework sought to be exempted from. By so doing, the BCMMB has made its discretionary decisions with the intention of preserving the integrity of existing rules.
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.

39. The appeal is dismissed.

40. Given our conclusion that the BCMMB did not err in exercising its discretion not to grant the appellant relief on his milk pick up rates, Mr. Jacobsen’s request for an amendment to the Consolidated Order to include his farm in an established freight zone is also dismissed.

41. There is no order as to costs.

Dated at Victoria, British Columbia this 20th day of February, 2009.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(Original signed by)

Garth Green, Panel Chair, Member

Dave Merz, Member

Ron Bertrand, Member