



October 22, 2008

File: 44200-50/MMB #08-10

DELIVERED BY E-MAIL and FAX

Andy Jacobsen

Ken McCormack, General Manager
BC Milk Marketing Board

**RE: AN APPEAL REGARDING THE BC MILK MARKETING BOARD'S
DETERMINATION OF THE RAW MILK HAULING RATE FOR A PROPOSED
FARM LOCATION - SUMMARY DISMISSAL DECISION**

The Panel has had an opportunity to review and consider the arguments provided by the Appellant, Mr. Jacobsen and the British Columbia Milk Marketing Board (Milk Board) with respect to the issue of summary dismissal. The Milk Board seeks an order for summary dismissal of Mr. Jacobsen's July 27, 2008 appeal to the British Columbia Farm Industry Review Board (BCFIRB) on the basis that the appeal was not filed within the applicable time limit, is "frivolous, vexatious or trivial" and that "the substance of the application has been appropriately dealt with in another proceeding" pursuant to s. 8.1(1) of the *Natural Products Marketing (BC) Act (Act)* and ss. 31(1)(b), (c) and (g) of the *Administrative Tribunals Act (ATA)*.

By way of background, Mr. Jacobsen states that he wants to start a dairy farm near Clinton. He informed the Milk Board of this intent by letter on May 31, 2008. In that letter, Mr. Jacobsen outlined what he thought the freight rate would be for milk picked up at his proposed farm location. He calculated that the rate should be "somewhere in the neighbourhood of \$300.00 per pickup". The Milk Board replied to Mr. Jacobsen in a letter dated July 29, 2008 that they had reviewed his request and "determined an appropriate freight rate based on the Board's Consolidated Order." The kilometre rate quoted in the letter was \$100.00 for those occasions when the milk hauler uses Highway 97 as its primary pickup artery and \$611.00 when the hauler uses Highway 5 as its primary pickup artery (quoted rates exclude the stop charge and the monthly provincial freight rate). Mr. Jacobsen disagrees with the Milk Board's determination of \$611.00 when the hauler uses Highway 5 and filed an appeal of the Milk Board's decision on August 27, 2008.

A Pre-hearing Conference (PHC) was held on September 18, 2008. At the PHC, the Milk Board gave notice that it was asking for a summary dismissal of the appeal on the grounds set out above.

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Farm Industry Review Board

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DECISION

The Milk Board argues that this appeal should be dismissed as it was not filed within the applicable time limit, is “frivolous, vexatious or trivial” and that “the substance of the application has been appropriately dealt with in another proceeding. We will deal with each argument in turn.

Out of Time

The Milk Board argues that Mr. Jacobsen’s appeal is out of time; the applicable sections of its General Orders were published in January 2004 and Mr. Jacobsen cannot now appeal a decision that results from a direct application of those sections by the Milk Board. The Milk Board relies on the BCFIRB’s decision of *Saputo v. British Columbia Milk Marketing Board, May 29, 2008* wherein it states:

I do not accept that an Appellant can, simply by writing a letter to a commodity board objecting to a given order or seeking clarification, generate a right of appeal.

...

In my view, it is improper for aggrieved persons to attempt to “breathe life” into an appeal merely by requesting that a board reconsider an issue. If a person has a legitimate complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period.

...

Mr. Jacobsen contends that the ruling he is appealing was made in the July 29, 2008 letter from the Milk Board and as such his appeal is not out of time.

The Panel disagrees with the Milk Board’s argument that the appeal was filed outside the time limit prescribed by the *Act*. Section 8(1) of the *Act* provides:

A person aggrieved or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial board.

Section 24(1) of the *ATA* provides:

A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed unless the tribunal’s enabling Act provides otherwise.

The Panel finds 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*.

Further, we note that this is not a situation like that referred to in the *Saputo* decision above. Mr. Jacobsen is not a long time participant in the milk industry who like *Saputo* operated under the

rules for many years before seeking to impugn them. Mr. Jacobsen is seeking to enter the milk industry and he is legitimately trying to determine how the rules will be applied to a dairy in a remote operation. The Milk Board made a determination as to how its rules should be applied to someone in Mr. Jacobsen's position. Mr. Jacobsen does not agree that the determination adequately considers his circumstances and as such he is aggrieved and dissatisfied and has a right of appeal.

Frivolous, Vexatious and Trivial

The Milk Board further argues that this appeal is frivolous, vexatious and trivial as the wording regarding freight rates in "Section 2(i) of Schedule 6 of the General Order is clear" and applies directly to Mr. Jacobsen. The Appellant disagrees and argues that given the opportunity he can provide "supportive" evidence to prove his contention.

Section 31(1)(c) of the *ATA* is intended to give administrative tribunals the authority to summarily dismiss "frivolous, vexatious or trivial" appeals. To deprive an appellant of its right of appeal is an extraordinary remedy and as such this power can only be exercised in limited situations, where it is clear on the face of an appeal that it cannot possibly succeed or that it is devoid of merit. To support an application for summary dismissal, the Milk Board must do more than merely assert a position; the Milk Board must satisfy the Panel that this appeal is frivolous, vexatious or trivial. The Canadian Oxford Dictionary (1998) defines frivolous as meaning "silly or wasteful...having no reasonable grounds...not sensible or serious". The Panel finds that this appeal raises serious issues as this appeal impacts the potential profitability of Mr. Jacobson's prospective operation. "Vexatious" is defined as meaning "not having sufficient grounds for action and seeking only to annoy the defendant". While the Milk Board's preference may be that this appeal not proceed, the Panel does not accept that the purpose behind filing the appeal was to annoy the Milk Board. Mr. Jacobsen has a legitimate interest in the freight rates he will be required to pay should he set up his operation in Clinton. Finally, "trivial" is defined to mean "of little importance or consequence; trifling" While the additional freight cost may only be a few hundred dollars per pick up, it is significant to Mr. Jacobsen who is trying to enter the milk industry.

Substance of Application Appropriately Dealt with in Another Proceeding

The Milk Board also argues that this appeal should be summarily dismissed as the substance has been appropriately dealt with in another proceeding: s. 31(1)(g). The argument appears to be that there have been a number of different appeals relating to freight rates and "anyone with an interest in freight rates had ample opportunities to apply for intervener status in these appeals".

In the Panel's view, the Milk Board misconceives the meaning of s. 31(1)(g). "Another proceeding" as it used in s. 31(1)(g) of the *ATA* is akin to the common law doctrines of *res judicata* or issue estoppel. What this means is that in order for s. 31(1)(g) to apply, the "other proceeding" referred to would need to involve the same or similar parties as well as the same or similar issues. We note however, that this does not mean that every appeal brought by the same parties raising the same issues would necessarily be summarily dismissed given that BCFIRB is not bound by precedent. Decisions regarding what is in the public interest or what is sound marketing policy may evolve over time, as such BCFIRB needs the flexibility to consider and apply changes in policy and circumstances on each appeal.

It is not enough for the Milk Board to point to other appeals which dealt with freight rates and argue that they are determinative of this particular appeal on a summary basis. While we agree these appeals touch on freight rates and freight rate policy, the Milk Board fails to show any basis for how these appeals are sufficiently determinative of the freight rate policy for a person in Mr. Jacobsen's position so as to deprive him of his right of appeal. Mr. Jacobsen has raised a legitimate issue as to whether the freight rate determined by the General Orders is appropriate to a producer in his particular circumstances; he is entitled to have his appeal heard.

The Panel finds that it would be inconsistent with the broad right of appeal found in the *ATA* and the extraordinary nature of the summary dismissal power to dismiss this appeal on this ground.

ORDER

The Milk Board's application for summary dismissal pursuant to ss. 31(1)(b), (c) and (g) of the *ATA* is dismissed.

This matter will proceed to appeal on November 20, 2008 in Kamloops, British Columbia. Dates regarding witness identification, identification of possible interveners and exchange of documents are contained in the September 18, 2008 Pre Hearing Conference Report. BCFIRB staff will forward further details regarding hearing room location and times to all parties.

Dated at Victoria, British Columbia this 22nd day of October, 2008.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

Original signed by:

Garth Green, Panel Chair

Sandi Ulmi, Member

Dave Merz, Member