

IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (B.C.) ACT

AND

IN THE MATTER OF AN APPEAL
OF ALVEREZ AND OTHERS
FILED OCTOBER 25, 1991

BETWEEN:

HELIODORO ALVEREZ
JOHN ANKER
JOHN MALJAARS
RON BARTEN & GERALD TIMMERS (GLAZIER FARMS)
BARRY & KAREN COATES (FRASER MEADOW FARMS)
EDWARD & ROSE MARIE CURYLO (NOVELLA FARMS LTD.)
PETER & NELL DEGROOT (GROVO HOLSTEINS)
TON & CORINE DEGROOT (HIGHFIELD FARMS)
MIKE DEVRIES (BERDINA FARM)
ED DUTRA (DUTRA DAIRIES)
JOHN ESTOK
RON GRISNICH (MOUNTAIN VIEW)
DAVID GULIKER (E & E FARMS)
MIKE & TAMARA HOSSMANN (ROUNDVIEW DAIRIES LTD.)
LEN & GRACE KRAHN (BIRCHWOOD DAIRIES)
OENE KRIST
JOHN & KAREN LOEWEN
JOHN MAZEREEUW
MICHELLE & MARCEL MEYER (PUNKYN ENTERPRISES LTD.)
FRANK NEELS
JACK NEELS
JERRY OLIVER
FRED PORTER
WILLIAM PORTER
GORDON POSIEN
GORDON SMITH (ROLLING HILLS FARM)
JAMES STOUTJESDYK (LEGENDARY FARM)
ADRIE & MICHELLE STUYT (HOL-AMER HOLSTEINS)
GRANT & JUDY TOCHER (CLEARVIEW DAIRY)
ED VANOORT (MIDVALLEY VEAL & DAIRY)
PETER & RALPH VANTIL
JOHN & ROSALIE VERDONK
STEVE & KATHIE ZENATTA (MARIAN DAIRIES)

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

DECISION

There are three parts to the Appellants' appeal against the British Columbia Milk Marketing Board (the "Milk Board" or the "Respondent"). The Appellants allege that:

1. The Respondent refused to restore licenses of Grovo Holsteins, Highfield Farms, Berdina Farm, and John and Rosalie Verdonk (the "Licence Decision").
2. The Respondent refused to restore fluid quota of Grovo Holsteins, Highfield Farms, Berdina Farm, and John and Rosalie Verdonk (the "Quota Decision").
3. The Respondent refused to grant MSQ to all the appellants sufficient to cover their current producing level (the "MSQ Decision").

Notice of the Appeal was sent to the British Columbia Marketing Board (the "Board") by way of a letter dated October 25, 1991.

The Notice was amended by a letter dated October 28, 1991, adding the name of William Porter as a party appealing all three of the Decisions.

By agreement of counsel for the Appellants and the Respondent, the only matter dealt with at the commencement of the hearing on January 27, 1992, was an application of the Respondent concerning whether the Board has jurisdiction to hear this appeal.

Facts

Grovo Holstein, Highfield Farms, Birchwood Dairies, John Verdonk and William Porter allege that the Respondent has refused to restore their licenses. Tab 5A of Exhibit 1 contains five licenses, each one of which relates to each of these Appellant's operations. On the face of the licenses, four of the licenses have expired. The licence of the Appellant, William Porter was issued August 1, 1991 and, on the face of it is current. Counsel for the Respondent acknowledged that this licence has not been cancelled, although the licence may have been issued inadvertently. Consequently, the Appellant, William Porter, has no grounds for appealing from the Licence Decision, as he has a current licence.

Letters dated August 1, 1991 (Tab 3 of Exhibit 1) were sent by the Respondent to the five parties appealing the Licence and Quota Decisions. These letters state that the parties' Daily Fluid Quota ("Quota") and Milk Market Sharing Quota ("MSQ") are cancelled. None of these letters purport to cancel licenses; rather, the letters state that the party to whom each letter is addressed is producing (or, in the case of the letter addressed to Birchwood Dairies, producing and processing) milk without the required licenses. The letters do, however, purport to cancel Quota and MSQ.

In apparent response to these letters, Mr. Harvey, Appellant's counsel, wrote to counsel for the Respondent on August 13, 1991 (Tab 4A of Exhibit 1) requesting, among other things:

"2. That the Milk Board restore the licenses of those of our clients whose licenses were cancelled on the basis of deliveries of milk to Bari Cheese for custom processing.

3. That the recent reported cancellations of the fluid milk quota held by some of our clients be reversed and the quotas restored by the Milk Board, for the same reasons.

4. That the Milk Board now notify the Canadian Dairy Commission that it withdraws its objections to the grant of MSQ to those of our clients whose applications for MSQ were approved under the Innovative Dairy Program. We make this request for the same reason, namely, that the Board's objection to these grants of quota was based on the Board's position that the custom processing arrangement offended the Board's Orders, which position has not been ruled upon, adversely to the Board, by the Court of Appeal."

...

In the circumstances of the recent judgment in our client's favour, we trust that it will not be necessary to appeal the cancellations of licenses and quotas to the British Columbia Marketing Board. However, if this is necessary, we ask that this letter stand as a notice of appeal. We are sending a copy of this letter to the British Columbia Marketing Board for this purpose."

(Emphasis added)

On September 19, 1991, Mr. Harvey, again wrote to the Respondent (Tab 4B of Exhibit 1). In this letter, he stated that his clients' activities were lawful until the revision to the Respondent's Orders which took place September 17, 1991. He went on to request, on behalf of his clients, allotments of MSQ.

Following instructions from the Respondent, the Respondent's counsel, Mr. Stark, wrote a letter to Mr. Harvey on October 8, 1991 (Tab 4C of Exhibit 1). In this letter, Mr. Stark stated:

"As you are aware, we are of the opinion that neither the Clearview II case nor the Bari Cheese appeal case determined that the operations of your clients are outside Board orders. There has been no determination that your client's (sic) activities are lawful. It is the Board's view that the activities are not lawful as your clients are producing milk without quota or licence issued by the Board. Therefore, there is no question of our client expropriating your clients' business or goodwill.

As your clients' production results in total British Columbia

production exceeding that which British Columbia has agreed to accept, there is no MSQ available from the Board to satisfy your client's (sic) demands."

On October 17, 1991, Mr. Harvey wrote to the Board (Tab 5D of Exhibit 1). This letter states:

"We represent Grovo Holstein, Highfield Farms, Birchwood Dairies and John Verdonk with respect to the cancellation of their fluid quota by the Milk Board.

By letter dated August 13, 1991 (copy enclosed) we gave notice of an intention to appeal this decision.

The Milk Board have (sic) not reconsidered or altered their (sic) position. Accordingly, our clients would like to proceed with this appeal. Could you please advise us on the procedure to be followed and available dates for hearing.

We look forward to hearing from you."

(Emphasis added)

Then, as stated, a Notice of Appeal was filed on October 25, 1991 and amended on October 28, 1991.

Licence and Quota Decisions

It does not appear as if there was any decision made by the Respondent with respect to the cancellation of licenses, nor was there any evidence before the Board that there were any applications made by the Appellants for licenses which were refused. Additionally, as stated, William Porter apparently has a licence. Mr. Harvey's letter of August 13, 1991, makes it clear that he mistakenly thought that the August 1, 1991 letter of the Board cancelled the licenses of those Appellants appealing the Licence Decision. Accordingly, the appeals from the Licence Decision are dismissed.

The October 17, 1991 letter of Mr. Harvey evidences that at that time, he was wishing to proceed with the appeal with respect to the cancellation of quota, notice of which was set out in his letter dated August 13, 1991. Clearly, this letter allows the inference to be drawn that the subject matter of the Appellant's appeal was the actual cancellation of Quota and MSQ as set out in the letter dated August 13, 1991, and the perceived cancellation of licenses.

Appellants' counsel conceded that the five parties who had their quota cancelled had received notice of that sometime prior to August 13, 1991. Appellants' counsel also acknowledged that that letter was not sent to the Board, and that that letter itself cannot stand as a Notice of Appeal. However, Appellants' counsel argued that they were not appealing the cancellation of licenses or cancellation of quotas, but rather the refusal to restore licenses and quotas, and thus their

Notice of Appeal was filed within time. The Board does not accept this argument.

In most circumstances, parties cannot miss a deadline for the bringing of an appeal and then hope to revive their right of appeal by stating that a decision making body has declined to reconsider its decision. As stated, the wording contained in Mr. Harvey's letter of October 17, 1991 (Tab 5D of Exhibit 1) make it clear that the Licence and Quota portions of the appeal actually relate to the Respondent's decision relayed in their letters of August 1, 1991. Accordingly, the appeals from the Quota Decision are dismissed.

MSQ Decision

The Respondent's position on this decision is somewhat troubling. It argues that there was no order, decision or determination made with respect to this aspect of the Appeal, therefore, there is nothing to appeal from. In support of this, the Respondent relies on the Statutory Declaration of W.A. (Robin) Robinson sworn January 24, 1992 (Exhibit 2).

The Appellants argue that Mr. Stark's letter of October 8, 1991 (Tab 4C of Exhibit 1) communicated a decision that there would be no MSQ allocated to the Appellants. However, the Respondent argues and has presented evidence which indicates that no decision was made. On the evidence before the Board, the Board finds that no decision was made and thus it finds itself in a position where it must direct the Respondent to make such a decision.

It should be noted that this is not the first occasion on which the Respondent has appeared before the Board to argue that it has not made a decision. As a supervisory board, it is the duty of the Board to ensure that the boards and commissions it supervises carry out their duties properly. A board or commission cannot hope to avoid an appeal by neglecting or refusing to make a decision. While the Board is reluctant to find that the Respondent is not carrying out its duties properly, the Respondent's own counsel submitted that the Respondent did not make a decision regarding the Appellants' request for MSQ. The Board considers the Respondent's failure to make this decision a failure on the part of the Respondent to properly carry out its duties. The Board trusts that this will not continue to happen.

Respondent's counsel also submits that it is not within the Respondent's jurisdiction to issue quota without dealing with the other provinces or participants in the national plan. While the Board accepts that there may be constraints on the amount of quota that can be issued by the Respondent, the Respondent does have jurisdiction to issue quota. It may well be that the Respondent, at times, has to refuse to issue quota because there is insufficient quota available to be issued. If that is the situation here, it is something which may well be raised as a defence to a refusal to issue quota, if the Respondent makes such a decision.

Accordingly, the Board directs the Respondent to make a decision whether or not to grant MSQ to all the appellants sufficient to cover their current production level.

The Board further directs the Respondent to make this decision and to convey it to the Board and to Appellants' counsel no later than Friday, April 17, 1992.

Further Comments

There are clearly three separate decisions being appealed from. The parties to the Licence and Quota Decisions are not the same as those to the MSQ decision. In future, the Board directs that separate appeals be filed in such circumstances.

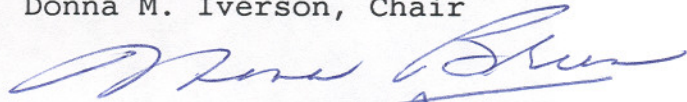
Conclusion

The Appeal is dismissed. In accordance with the rules governing this appeal, the Appellants' deposit is forfeited.

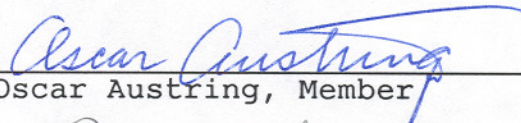
Dated at Victoria, British Columbia, this 20th day of March, 1992.



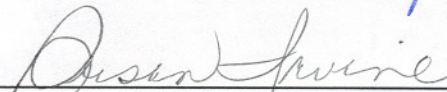
Donna M. Iverson, Chair



Mona Brun, Vice-Chair



Oscar Austring, Member



Susan Irvine, Member