

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL CONCERNING THE CANCELLATION OF QUOTA

BETWEEN:

MS. JANICE SMITH IN HER OWN CAPACITY AND AS
RECEIVER/MANAGER OF RISACCA LIVESTOCK AND GENETICS LTD. AND
MR. RICHARD RUBY

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

BC MILK PRODUCERS ASSOCIATION

INTERVENOR

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board	Mr. Ross Husdon, Chair Ms. Christine Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Jim Collins, Panel Secretary
For the Appellant (by written submission)	Mr. Steve Price, Counsel for Ms. Janice Smith, in her own capacity and as Receiver/Manager for Risacca Livestock and Genetics Ltd. and Mr. Richard Ruby
For the Respondent (by written submission)	Mr. Robert Hrabinsky, Counsel for the British Columbia Milk Marketing Board
For the Intervenor (by written submission)	Mr. Tom Nash, President of the BC Milk Producers Association
For Mr. R. Ruby (by written submission)	Mr. Pat Poyner, Counsel

INTRODUCTION

1. The matter before the British Columbia Marketing Board ("BCMB") is an appeal by Risacca Livestock and Genetics Ltd. ("Risacca") from a decision of the British Columbia Milk Marketing Board ("Milk Board") on July 31st, 1997 to cancel quota effective October 1, 1997.
2. The appeal is somewhat unusual as it arises in the context of a matrimonial dispute. Ms. Janice Smith, the common-law wife of Mr. Richard Ruby is, by virtue of a Supreme Court Order granted on January 10, 1997, the Receiver/ Manager of the financial affairs of Risacca and Mr. Ruby (the "Appellant").
3. Ms. Smith appeals the decision of the Milk Board to cancel the quota held by Risacca.
4. Mr. Ruby, through his own counsel, supports Ms. Smith in her appeal.
5. The BC Milk Producers Association (BCMPA) was granted Intervenor status in this appeal. Mr. Tom Nash, President of the Association, submitted a brief letter in support of the Milk Board's decision
6. Following the Panel's review of the written submissions, a request was made for further clarification from both the Appellant and Respondent. A response was received from the Milk Board on December 19, 1997. The Appellant responded to the Milk Board submission on December 30, 1997.

ISSUE

7. Is the Milk Board's decision of July 31, 1997 to cancel quota flawed due to the Milk Board's continued correspondence with Mr. Ruby in the face of the Receivership Order held by Ms. Smith?

FACTS

8. Effective August 1, 1987, the Milk Board accepted Mr. Ruby into the graduated entry program. As a result, Mr. Ruby received milk quota entitling him to produce 400 litres of fluid milk per day. This quota was non-transferable for 15 years or until August 1, 2002.

9. On April 3, 1989, Mr. Ruby applied to the Milk Board to transfer his quota to Risacca. The Milk Board approved this transfer on the proviso that the shareholders of Risacca remained Mr. Ruby and Sandra Ruby.
10. At some point in time, Mr. Ruby received a further 72 litres of transferable quota from the Milk Board.
11. At some further point in time not made clear in the evidence, Mr. Ruby entered into a common law relationship with Ms. Smith. It appears that there were children from this relationship.
12. The relationship with Ms. Smith appears to have foundered and on June 14, 1995 Master Grist of the Supreme Court of British Columbia ordered that Mr. Ruby be restrained from disposing of matrimonial assets including the milk quota.
13. On March 22, 1996, Master Grist's order was varied to allow Mr. Ruby to dispose of the "saleable quota".
14. On December 15, 1996, Risacca ceased shipping milk.
15. On January 10, 1997, Ms. Smith was appointed Receiver/Manager of Risacca and the affairs of Richard Ruby in respect of Risacca (the Appellant). Mr. Price, counsel for Ms. Smith, sent this Order to the Milk Board on January 24, 1997. Mr. Price requested that the Milk Board "direct or copy all correspondence to Ms. Smith" through his office.
16. By letter dated January 30, 1997, the Appellant was advised (through counsel) that Risacca's quota would expire on February 13, 1997, by virtue of s. 6.03 of the Consolidated Order, unless Risacca resumed shipping milk.
17. On February 6, 1997, Mr. Price requested that the Milk Board extend the time for Risacca to resume production. No date or time period was specified.
18. On February 6, 1997, the Milk Board asked the Appellant to provide a date when production would resume.
19. On February 7, 1997, Mr. Ruby, through his counsel Mr. Terrence Robertson, requested an extension of time to resume production. Mr. Robertson also advised

Ms. Smith has no legal or equitable interest in the dairy quota. The Receiver Manager Order excludes her from dealing with the quota. Please direct further inquiries to the writer.

20. On February 11, 1997, the Appellant requested at least a 90 day extension to resume production stating:

It is not (Janice Smith's) long term desire to support herself solely by the operation as a Dairy Farmer in this province at this time. From her point of view this quota is an asset that needs to be protected and she is doing everything in her power to protect it, both to protect her own interest and those of Mr. Ruby.

At this point in time I would expect that it will take at least three to four months for Mr. Ruby to properly assess his situation and to make proper and fundamental plans as to how and under what conditions he wishes to operate. I would therefore request that the BC Milk Marketing Board ...provide us with...a holding period of at least 90 days...

21. On February 14, 1997, the Milk Board advised both Mr. Price and Mr. Robertson that they were reviewing the situation. On March 27, 1997, the Milk Board wrote to Mr. Ruby personally and advised him of their decision to extend the grace period to resume production to April 30, 1997. This letter was copied to Mr. Robertson on April 23, 1997.
22. On April 30, 1997 (the scheduled date for expiry of the quota), Mr. Ruby's counsel requested a further 20 day extension.
23. In response to this request, the Milk Board wrote to Mr. Ruby and advised him of their decision to grant him a further 60-day extension from May 1, 1997 to August 1, 1997. This letter was not copied to the Appellant or her counsel.
24. On May 7, 1997, the Milk Board received its first correspondence from Mr. Price since his request for an extension on February 11, 1997. Mr. Price advised that in corresponding with Mr. Robertson the Milk Board was "dealing with someone who has no authority in law or in fact to speak for Mr. Ruby". He demanded copies of all correspondence between Mr. Ruby, his counsel and the Milk Board. The Milk Board responded to this request on May 12, 1997.
25. On May 23, 1997, the Milk Board advised Mr. Price that it would circulate copies of all correspondence to Mr. Price.
26. On May 28, 1997, Mr. Price responded "we are Mr. Ruby... we speak for and on behalf of him...and...act in his stead". He once again requested copies of all correspondence.

27. On May 29, 1997, the Milk Board directed a letter to Mr. Price asking that he direct the enclosed letter to Mr. Ruby to protect his interest in "endeavouring to establish a dairy farm, which might be the furthest thing from (the Appellant's) interest."
28. The enclosed letter was a summary of the status of the Risacca transferable and non-transferable quota. It confirmed that the graduated entry program quota was non-transferable until August of 2002. The transferable quota required priority consideration because after August 1, 1997 it would revert to the Milk Board.
29. On June 2, 1997, Mr. Price sent a fax memo to the Milk Board requesting further copies of correspondence to Mr. Ruby or his counsel and the nature, extent and history of the quota.
30. On June 3, 1997, the Milk Board confirmed with Mr. Price that he was in receipt of all correspondence.
31. On July 25, 1997, Mr. Ruby personally requested a further extension of the grace period to October 1, 1997. On July 28, 1997, the Appellant also requested a further extension to October 1, 1997.
32. On July 31, 1997, the Milk Board advised the Appellant and copied Mr. Ruby and his counsel with their decision. The Milk Board granted a further extension to the Appellant to October 1, 1997. This extension however, required the Appellant to list the transferable quota on the September 7, 1997 quota exchange or alternatively it would be cancelled. The non-transferable quota (which could not be listed) would be cancelled effective October 1, 1997.
33. On August 22, 1997, the Appellant commenced her appeal of the July 31, 1997 decision.

ARGUMENT OF RESPONDENT

34. The Respondent Milk Board argues that there must be controls on the volume of production in any supply management system. In the dairy industry in BC, one such control is found in s. 6.03 of the Consolidated Order which provides that if production ceases entirely for more than 60 days, the dairy producer's quota can be cancelled.
35. Risacca ceased production on December 15, 1997. There followed a series of three requests for extension of the grace period. The final request by both the Appellant and Mr. Ruby requested an October 1, 1997 deadline.
36. The Respondent submits that the Appellant is appealing the very request she made of the Board.

37. The Respondent further submits that the decision appealed from was a decision to postpone the date for cancellation of quota from August 1, 1997 to October 1, 1997. If this decision is in fact cancelled, the quota would have been cancelled effective August 1, 1997.
38. The Respondent further submits that any irregularity in the Milk Board's dealings with the Appellant were rectified prior to the Appellant's request that is the basis of the decision appealed from.
39. Finally, the Respondent submits that no production has occurred under Risacca's quota as Mr. Ruby (the actual dairy farmer) is presently incarcerated. Ms. Smith has made it clear to the Milk Board that it is not her desire to be a dairy farmer in BC; rather she wants to preserve the quota as a saleable asset.

ARGUMENT OF APPELLANT

40. The basis for the Appellant's appeal is that the Milk Board erred in dealing with Mr. Ruby instead of the Appellant.
41. The Appellant argues that any Order which flows from decisions made in correspondence with Mr. Ruby is void and of no force and effect.
42. The Appellant's second basis for appeal is that the July 31, 1997 decision of the Milk Board required the Appellant to list the transferable quota for sale on the quota exchange. The January 10, 1997 Court Order required a further Order of the Court before an asset could be dealt with and therefore, the time for listing the quota for sale was insufficient. The Appellant argues that an Order that can not be complied with is invalid.
43. The Appellant's final ground of appeal is that even if the July order is valid, it should not extend to the "saleable" portion of quota. "Such quota should remain and be held for sale upon proper clearance of any such sale by the Court or the cancellation of the Court Order."

ARGUMENT OF MR. RICHARD RUBY

44. Mr. Ruby generally concurs with the submissions of the Appellant. He argues that the Respondent Milk Board proceeded in an improper manner by continuing to deal with him despite the fact that he was "suffering from a major brain injury".

45. Mr. Ruby further argues that the Respondent "led (him) to believe that he continued to have an active role in the decisions being made with respect to quota when in fact he had no such role".
46. Mr. Ruby further argues that it was the Respondent's responsibility to proceed in a proper, efficient, and procedurally correct manner. This was not the case and therefore all the decisions made by the Respondent Milk Board were void and of no effect.
47. Mr. Ruby further submits that providing copies of all correspondence prior to the impugned decision can not cure the procedural irregularity of failing to correspond only with the Appellant.
48. Finally, Mr. Ruby argues that there are compassionate grounds justifying a further extension of the time period to re-establish production. He states he has been a dairy farmer all his life. He has had numerous obstacles to overcome in the past 23 years including barn fires, marital and personal difficulties. He remains incarcerated but believes he could be in full production by "early 1998".

ARGUMENT OF THE BC MILK PRODUCERS ASSOCIATION

49. The BCMPA submits that it is important to maintain the credibility of the regulated milk marketing system by having rules that are followed by all players in the industry. The fundamental basis of the milk marketing system is that all quota holders meet their quota requirements

REPLY OF RESPONDENT

50. The Respondent submits that at no time did its decisions or actions adversely affect the Appellant. On the contrary, her interests were protected and preserved.
51. They reiterate that there is a 'vacuum of logic' in the Appellant's efforts to appeal the very decision she requested.
52. The Respondent submits that it is significant that the Appellant made no attempt to request a further postponement of the quota cancellation prior to October 1, 1997.
53. The Respondent further submits that neither Mr. Ruby who is presently incarcerated nor Ms. Smith with her long-term desire to not support herself solely as a dairy farmer is likely to produce milk under the quota. They further submit that the interests of the dairy industry are not served by what they infer as "an attempt by the

Appellant to preserve non-transferable quota, in an unproductive state, in order to preserve its 'asset' potential".

54. Finally, the Respondent states that this is an appeal of the July 31, 1997 decision. The Appellant in her submissions seems to suggest that this is an appeal of a series of decisions. The original submissions of the Respondent and the Reply respond to the appeal as framed by the Appellant in her letter of August 22, 1997 and not otherwise. In any event, should the Appellant be seeking to expand her appeal, the time limit for doing so has long since expired.

FINDINGS OF THE BCMB

55. The parties proceeded with this appeal by written submissions. Given that the panel felt the decision appealed from was ambiguous, further clarification was sought and received from the parties. The Respondent confirmed that the intent of the July 31, 1997 decision was to allow the Appellant an opportunity to dispose of the transferable quota and recoup its cost.
56. The Respondent has suggested that this appeal can be dispensed with because the Appellant is appealing the very request she made of the Board. We do not agree. In her letter of July 28, 1997, the Appellant sought an extension of the grace period to allow Risacca to re-establish milk production. This was also the intention of Mr. Ruby's earlier requests. The Respondent Board's earlier extensions to April 30, 1997 and to August 1, 1997 both anticipated the possibility that milk production would be resumed.
57. In their July 31, 1997 decision, the Respondent gave the Appellant something quite different than she asked for. They effectively cancelled her quota with an extension to allow for the sale of the transferable quota.
58. The Respondent's second argument is that if the July 31, 1997 decision is successfully appealed, then the quota would be cancelled effective August 1, 1997. This is not convincing. Should this appeal be successful, the BCMB has the power to amend the Milk Board's order. If circumstances warrant it, the BCMB could grant the Appellant an extension of the grace period to resume production.
59. The real issue here is whether the Respondent's continued correspondence with Mr. Ruby and his counsel has resulted in a flawed decision. The Respondent submits that any irregularity was remedied prior to the Appellant's request.
60. In reviewing the evidence, it is clear that despite the Receivership Order, the Respondent Milk Board continued to deal directly with Mr. Ruby and his counsel.

61. In the face of both Mr. Price's letter of January 24, 1997 and Mr. Robertson's letter of February 6, 1997, the Milk Board's confusion is understandable. Mr. Price makes no attempt to explain the effect of the Order. He advises that no steps can or should be taken... "to alter, change, assign, close or expand the quota without reference to Ms. Smith". He then asks for correspondence to be directed or copied to his office.
62. This letter is by no means clear. Mr. Price does not say as he did in his letter of May 28, 1997 that by virtue of this Order Ms. Smith "is Mr. Ruby" and she alone makes all the decisions with respect to quota. The extension of the time to re-establish production, would not appear to be covered by this letter.
63. Mr. Robertson's letter of February 6, 1997 adds to the confusion. He advises the Respondent Milk Board that "Ms. Smith has no legal or equitable interest in the dairy quota. The Receiver Manager Order excludes her from dealing with the quota. Please direct further inquiries to the writer".
64. In the face of this exchange, it is understandable that the Respondent may have been confused as to who was able to make decisions regarding the quota. Some of this blame must lie at the feet of the Appellant, Mr. Ruby and their respective counsel.
65. In any event, the Respondent continued to deal with Mr. Ruby and his counsel. This Panel does not attribute any wrongful motive to the Respondent. It appears the Milk Board was trying to resolve this issue fairly to all concerned.
66. The Milk Board granted the first extension to Mr. Ruby. Both Mr. Robertson and Mr. Price had requested this extension. Given that the extension granted exceeded the requests of both counsel, it is difficult to see how the Appellant was prejudiced.
67. Mr. Robertson requested a further 20-day extension on behalf of his client. The Respondent granted a 60-day extension to August 1, 1997. It is during this extension that Mr. Price discovered that the Appellant had been left out of the loop and decisions had been made without his knowledge. It is also significant to note that this was the Appellant's first contact with the Respondent since the February 11th request for an extension.
68. Mr. Price requested and received copies of correspondence between the Milk Board, Mr. Robertson and Mr. Ruby by May 29, 1997. On June 3, 1997, the Milk Board provided Mr. Price with a standard form letter that was missing from the earlier package. Thus, by June 3, 1997, the Appellant was in receipt of all documents pertaining to the second decision of the Milk Board to extend the grace period. The Appellant chose not to appeal the second decision of the Milk Board. The reason is obvious. Despite being left out of the loop, the Appellant was content with the extensions that had been negotiated on her behalf.
69. The Appellant was in a difficult situation. She was charged with looking after the affairs of Risacca. However, it does not appear that she had any control over when

Mr. Ruby re-established production. From December, 1996 when production ceased, it was postulated that production would resume in three to four months or 90 days (from February 11, 1997), in 60 days (from Feb. 13, 1997), in 20 days (from April 30, 1997), in 60 days (from Aug 1, 1997) and finally, in early 1998.

70. Given that the Appellant did not appeal the second extension, can the failure of the Milk Board to deal solely with the Appellant nullify the third and impugned extension? This Panel does not believe so as there is no evidence of any prejudice suffered by the Appellant as a result of the contact with Mr. Ruby.
71. Given that this panel does not find the July 31, 1997 decision of “no force or effect”, we must consider the decision on its merits. Section 6.03 of the Milk Board’s Consolidated Order provides that where a licensed producer ceases deliveries of qualifying milk for 60 days, the Milk Board can cancel the producer’s quota. The Milk Board may reinstate the quota if the failure to supply milk was due:
- i.) to a catastrophe, or
 - ii.) to any other reason which the Board considers appropriate in the circumstances.
72. Has there been a catastrophe that has prevented Risacca from producing milk? Sometime prior to December 1996, there was a break down in the relationship of Mr. Ruby and Ms. Smith. On the facts of this case, we not view this as a "catastrophe" as defined in s.6.03.
73. Mr. Ruby was violently assaulted at his home on September 25, 1996. As a result of the assault Mr. Ruby sustained severe facial and head trauma which resulted in memory and balance problems, dizziness, depression and anxiety. His treating physician Dr. Delair was of the opinion in February 1997, that Mr. Ruby would be sufficiently recovered from his injuries in April of 1997 to resume farming.
74. This Panel is prepared to accept that the assault was a “catastrophe” to Mr. Ruby. It clearly prevented him from producing his quota. Had this been an appeal of a decision of the Respondent to not grant the initial extension, the assault would justify an extension. However, the assault and subsequent injuries do not explain why Mr. Ruby did not resume farming after April 1997 when, by his own Doctor’s evidence, he was capable of doing so.
75. The answer appears to be complicated. By December 1996, Ms. Smith and Mr. Ruby did not have a farm. Whether or not they still had a dairy herd is unclear on the evidence. According to Mr. Robertson’s letter to Crown Counsel of May 5, 1997, property had to be located and a herd secured, if milk production was to be re-established. Mr. Ruby was released on bail on February 6, 1997 and was facing criminal charges for “alleged actions against (Ms. Smith)”. Terms of his bail provisions required him to reside outside BC. It is unclear when Mr. Ruby returned

to BC, however sometime in 1997 Mr. Ruby was incarcerated. His release was not contemplated until sometime in “early 1998”.

76. While Mr. Ruby appears to have suffered a series of unfortunate circumstances, he would appear to be the author of his own misfortune. This Panel is not prepared to find that overall the events that befell Mr. Ruby in 1996 and 1997 were a catastrophe.
77. It remains to be considered whether this series of events justify an exercise of discretion under s.6.03 (c)(ii)?
78. This Panel is of the view that the Respondent considered all the relevant circumstances in rendering their earlier extensions, as well as their decision of July 31, 1997. Having reviewed the matter for ourselves, we are not prepared to vary that decision on this appeal.
79. The Appellant raised some technical grounds for appeal that deserve comment. The Appellant argues that by virtue of the Receivership Order, a further Order of the Court was required before the quota could be “dealt with”. Thus, the July decision of the Respondent could not be complied with and was invalid.
80. The Panel does not accept this argument. On July 31, 1997, the Respondent made a decision that there would be no further extensions to allow the Appellant to resume milk production. If the Appellant wanted to recoup any value from the transferable quota (the only asset), she had to act. As Receiver, the Appellant had the power to obtain the Court’s consent to allow the quota to be sold. This could have been before the Court on little notice. The Appellant could also have sought a further extension from the Respondent if it proved difficult to get Court approval in the 36 days provided. However, it was not an option for the Appellant, charged with the responsibility of being a Receiver, to sit and do nothing and simply allow the quota to revert to the Milk Board.
81. The Respondent has not transferred or sold the quota in violation of the Order. Rather the quota has ceased to exist by virtue of the Appellant’s inactivity. This arose because of the Appellant's inactivity and is certainly not the responsibility of the Respondent.
82. The Appellant finally argues that even if the July decision is valid, it should not extend to the “saleable” portion of the quota. Section 6.03 does not recognise any difference between transferable and non-transferable quota. Both are subject to the same conditions for re-instatement. To argue that the transferable quota should be reinstated is further proof that the Appellant never intended to resume production and sought only to preserve the quota for sale. No reason however has been offered as to why the Appellant took no steps to list the quota before it reverted to the Milk Board.
83. In the absence of such evidence, this Panel is not prepared to reinstate the transferable quota.

84. Before disposing of this appeal, the submissions of Mr. Ruby deserve a few comments. Strictly speaking, Mr. Ruby has no standing in this appeal. The Appellant as Receiver is charged with his interests in Risacca and represents him in this appeal.
85. Mr. Ruby raised serious allegations against the Respondent stating they proceeded in an improper manner dealing with him despite his "major brain injury". Mr. Ruby was represented by counsel at all times during these discussions. There was never any suggestion to the Respondent that Mr. Ruby was incapable of instructing counsel or handling his affairs. Indeed both Mr. Ruby's doctor and lawyer felt he would be capable of working by April 1997. Further, it does not appear that Mr. Robertson, Mr. Ruby's lawyer at the time, took issue with Mr. Ruby communicating directly with the Milk Board to negotiate an extension.
86. Mr. Ruby also argues that the Respondent led him to believe he had an active role in decisions regarding quota when he in fact did not. This Panel does not accept that there was any attempt by the Respondent to mislead Mr. Ruby. His own counsel remained of the view that Mr. Ruby was still responsible for making decisions regarding quota. The Respondent accepted that representation on face value and negotiated with Mr. Ruby in good faith.
87. Finally, Mr. Ruby argues that there are compassionate grounds justifying a further extension until 1998. As set out earlier, this Panel does not find that the circumstances before us justify an extension of the grace period to a period exceeding one year from the date production ceased.
88. Quota is a sought after commodity in this province. However, more than just an asset, it assures a regular, stable supply of milk. If quota is in the hands of persons who are incapable of meeting their required production it is difficult to see why it should not be reallocated to someone who can.

DECISION

89. The appeal to reinstate the non-transferable quota is denied.
90. Given our view that the Respondent has properly exercised their discretion, we are not prepared to re-instate the transferable quota and thus, the alternate ground of appeal is also denied.
91. The Panel affirms the Respondent's decision of July 31, 1997.

92. Neither party has sought costs in this appeal. However, had the Respondent made such a request, it would have been denied given the financial consequences of this decision on the Appellant.

Dated at Victoria, British Columbia, this 22nd day of January, 1998

British Columbia Marketing Board



Mr. Ross Husdon, Chair



Ms. Christine Elsaesser, Vice Chair



Ms. Karen Webster, Member