

IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (BC) ACT

AND

IN THE MATTER OF APPEALS TO THE
BRITISH COLUMBIA MARKETING BOARD
AGAINST A DECISION OF THE
BRITISH COLUMBIA MILK MARKETING BOARD
DATED JUNE 7, 1990

BETWEEN:

DONALD HURFORD

APPELLANT

AND

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

REASONS FOR DECISION

Appearances:

D. Hurford

APPELLANT

J. Malenstyn, Member
G. Thorpe, General Manager
J. Schalin, Milk Market Share Advisory
Committee
Allan Gould, Legal Counsel

RESPONDENT

DATE OF HEARING

DECEMBER 11, 1990

1. The matter before the British Columbia Marketing Board ("the Board") is an appeal by Mr. Donald Hurford against the decision of the British Columbia Milk Marketing Board ("Respondent") made June 7, 1990 to deny an exemption from the provisions of Section 7.01 (a) of the Milk Market Sharing Order 28.
2. The appeal was filed with the Board on July 4, 1990, and was heard in Nanaimo, British Columbia on December 11, 1990.
3. The Appellant was not represented by counsel and presented his own case. The Respondent was represented by Counsel. Opportunity was given to call and cross-examine witnesses, file documentary evidence, file written submissions and make oral submissions on the facts and the law.
4. The submissions made by the Respondent included
 - a) The Appellant is a milk producer licenced by the Respondent, holding both fluid milk quota and market share quota ("MSQ"). In the dairy year 1987/1988 ending July 31, 1988, the Appellant had not maintained his production at 85% of MSQ. As a result, and in accordance with the Milk Market Sharing Order, Section 7.01(a), the Appellant's MSQ was reduced effective August 1, 1988.
 - b) The Respondent provides shippers with monthly statements of the status of their MSQ. The Appellant was aware throughout the year that he was not maintaining his production, and had alternative courses of action he could have taken, including the sale of fluid quota or buying more cows.
 - c) It has been the consistent position of the Respondent that in order to restore lost MSQ, an event must have occurred which fits within the definition of catastrophe set out in Section 2 of the Milk Market Sharing Order. Previous policy, well established by precedent, had been that mastitis was not a factor which the Respondent would consider in reinstating lost MSQ.
 - d) The matter was reviewed on several occasions by the Respondent and the Market Share Advisory Committee established under the Milk Market Sharing Order. After each review, the Respondent maintained its original position that the Appellant's MSQ ought not to be restored.

- e) Other producers have experienced similar problems and have lost MSQ as a result. The Respondent considers any type of mastitis to be a management problem. There are significant implications for the industry if the appeal is upheld.
 - f) The closing words in the definition of catastrophe, e.g. any other factor the Board may consider eligible, do not make the definition open-ended, and the factors which the Respondent would consider eligible would be factors that are similar to those set out earlier in the definition.
5. The Respondent requests that the appeal be dismissed.
6. The submissions made by the Appellant included
- a) The Appellant states that he suffered a catastrophe in the dairy year 1987/88 and outlined the history of the event as follows:

In the spring of 1987, the Appellant's herd began to experience cases of an unusual mastitis which did not respond to prescribed treatments. The Appellant had suspicions that the mastitis resulted from an approved dry cow antibiotic called Bio-tef Dry Cow. However, on the advice of his veterinarian, he continued to use the product.

Later in the year, on the advice of his veterinarian, the Appellant vaccinated his herd with Cattlemaster 4 and VL5. The Appellant states that the Cattlemaster suppressed the immune system of the animals and opened the door for the nocardial bacteria to take hold. As a result, the Appellant's milk production dropped further. The animals subsequently diagnosed with nocardial mastitis did not respond to treatment and had to be slaughtered. Even though the Appellant purchased some animals during the January to May period, he was unable to produce the required 85% of his MSQ and commencing August 1, 1988, his MSQ was reduced.

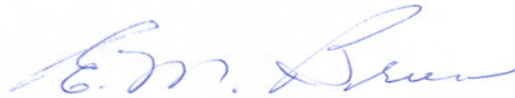
- b) The Respondent erred in their reasoning and should not have reduced the Appellant's MSQ beginning August 1, 1988. The Respondent did not take into account, the complete definition of catastrophe as set out in Section 2, Milk Market Sharing Order, specifically the clause "or any other factor the Board may consider eligible".

- c) The Appellant used recognized management practices and a catastrophe resulted through circumstances which happened when using good management techniques. The Appellant provided written testimonials from the District Agriculturist, the Agricultural Officer and the Farm Services Representative of Dairyland Foods Ltd., attesting to the very good milk management practiced by the Appellant.
 - d) Milk Boards in other provinces have granted exemptions to shippers who have undershipped as a result of nocardial mastitis.
 - e) In the two years following the dairy year 1987/88, the Appellant has maintained his MSQ shipments at the 1987/88 quota level although maintenance of these levels has resulted in over-quota penalties.
 - f) The Appellant provided numerous articles and letters linking the provincial and national outbreak of nocardial mastitis to the use of dry cow preparations containing neomycin, such as Bio-Tef which was used by the Appellant.
7. The Appellant requests that the Board reinstate his MSQ to the level held in the year 1987/1988, less the reduction due to his sale of 200 liters of fluid quota.
8. Having carefully considered the arguments and the evidence presented, the Board finds that:
- a) the Respondent acknowledged that the outbreak of nocardia mastitis would have been judged to be a catastrophe had the manufacturer (Upjohn) admitted there was something wrong with the dry cow preparation they supplied;
 - b) there was evidence presented to indicate that the dry cow treatment was the cause of the outbreak of nocardial mastitis;
 - c) the Respondent erred in applying too severe a standard of proof to the question of the cause of the nocardial mastitis. In this Board's opinion, the evidence presented by the Appellant, including the decision by Upjohn to remove the product from the market, is sufficient evidence that the dry cow treatment caused the nocardial mastitis. Nocardial mastitis, in the

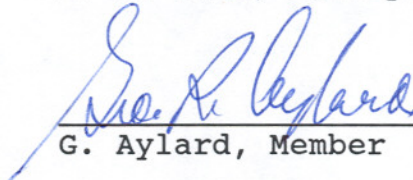
circumstance where it is shown to be caused from agents beyond the control of a shipper with no demonstrated link to poor management practices and where the results are catastrophic, is a catastrophe within the meaning of section 2 of Milk Market Sharing Order 28, as, applying the rule of interpretation known as sui/generis, it is sufficiently similar to the items described in the first portion of the definition of catastrophe to be included in the words "any other factor the board may consider eligible".

9. The Board orders that the Respondent restore the Appellant's MSQ effective August 1, 1988, less the reduction due as a result of the sale of 200 litres of fluid quota.
10. In keeping with this Board's Rules of Appeal, the Appellant's entire deposit shall be refunded.

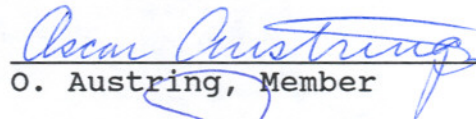
Dated this 23rd. day of January, 1991 in Victoria, British Columbia



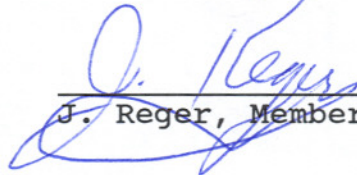
E. M. Brun, Chairperson



G. Aylard, Member



O. Austring, Member



J. Reger, Member