

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

AND

IN THE MATTER OF AN APPLICATION FOR COSTS IN AN APPEAL

BETWEEN:

FOREMOST FOODS LTD.

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

AGRIFOODS INTERNATIONAL COOPERATIVE LTD. and  
BRITISH COLUMBIA MILK PRODUCERS ASSOCIATION

INTERVENORS

## **DECISION**

### APPEARANCES BY WRITTEN SUBMISSION:

**For the  
British Columbia Marketing Board**

Mr. Doug Kitson, Panel Chair  
Ms Christine Moffat, Member  
Ms Karen Webster, Member

**For the Appellant**

Mr. William C. Kaplan, Counsel

**For the Respondent**

Mr. Steven Stark, Counsel  
Mr. Edward F. Macaulay, Counsel

## **INTRODUCTION**

1. The matter before the British Columbia Marketing Board (BCMB) is an application by the British Columbia Milk Marketing Board (Milk Board) for costs resulting from a decision of the BCMB dated December 15, 1995.
2. Applications for costs were also made by Agrifoods International Cooperative Ltd. (Agrifoods) and the British Columbia Milk Producers Association (the Association).
3. Subsequently both Agrifoods and the Association withdrew their applications.
4. The matter is addressed in written submissions as follows:
  - January 23, 1996, letter from Mr. Steven Stark, Legal Counsel representing the Milk Board;
  - August 29, 1996, letter from Mr. Bill Kaplan, Legal Counsel representing Foremost Foods Ltd. (Foremost);
  - August 30, 1996, letter from Mr. Steven Antle, Legal Counsel representing Agrifoods;
  - November 15, 1996, letter from Mr. Steven Stark (Milk Board);
  - November 29, 1996, letter from Mr. Bill Kaplan (Foremost);
  - December 2, 1996, letter from Mr. Steven Stark (Milk Board);
  - December 3, 1996, letter from Mr. Bill Kaplan (Foremost); and
  - January 20, 1997, letter from Mr. Ed Macaulay, new Legal Counsel representing the Milk Board.

## **ISSUE**

5. Should costs be awarded to the Milk Board?

## **BACKGROUND**

6. At the appeal, the BCMB addressed three preliminary issues:
  1. Was the appeal out of time?
  2. If the appeal was out of time, were there any special circumstances for extending the statutory time limit?
  3. If the appeal was to be heard, would the British Columbia Marketing Board have the jurisdiction to refund freight charges?

7. The factual background of the appeal was as follows:
  - On July 12, 1994, Foremost sent a letter to the Milk Board claiming that Foremost had been wrongfully charged \$281,260.16 for freight charges in respect of milk transferred from Okanagan producers to Agrifoods in Vernon and Armstrong throughout the period of 1988 to 1993.
  - The Milk Board responded to the July 12, 1994, letter on August 12, 1994. In that letter the Milk Board clarified the freight charge calculation and denied Foremost's request for reimbursement.
  - By letter dated September 8, 1994, Foremost sought confirmation from the Milk Board that the 30 day time limit on the right to appeal did not commence until discussions between Foremost and the Milk Board had been concluded.
  - By letter dated September 20, 1994, the Milk Board advised that following the receipt of requested correspondence, the Milk Board would provide a response from which the 30 day time limit on the right to appeal would commence.
  - By letter dated October 18, 1994, the Milk Board again denied Foremost's request for reimbursement.
8. After hearing arguments from the parties, the BCMB found that:
  1. The appeal was out of time.
  2. There were no special circumstances which warranted an extension of the time for filing the appeal.
  3. Given the foregoing two findings, it was unnecessary to answer the third issue.
9. Counsel for the Milk Board argues that the BCMB should direct Foremost to pay the Milk Board's actual costs in accordance with Section 11(9) of the *Natural Products Marketing (BC) Act*.
10. Counsel for the Milk Board submits in his January 23, 1996, submission that "The BCMMB's legal fees are ultimately paid by the "new producer pool" who should not be prejudiced by a lengthy delay caused by "Foremost, a large company and a sophisticated party with the ability to retain counsel."
11. In response, Counsel for Foremost argues, in his November 29, 1996, submission, that costs should not be awarded to the Milk Board for various reasons including:

"that the conduct of the Milk Board certainly disentitles it to any legitimate claim for costs in respect to that jurisdictional hearing"; and

“that the particular statutory position of a tribunal is inconsistent with the tribunal taking an adversarial position as against a person that it regulates.”

**FINDINGS**

12. The BCMB has considered all the written arguments and case law provided.

The BCMB finds as follows:

13. The subject matter of the appeal related to events that occurred in 1984, 1985, 1986, and 1987.

14. Foremost’s appeal, while unsuccessful, was not frivolous as the exchange of letters occurring between July 12, 1994, and October 18, 1994, gave Foremost arguable grounds to appeal.

15. The Milk Board, in advising Foremost that they would provide a response from which the time limit to appeal would commence, may have encouraged Foremost as to the timeliness of the appeal.

**DECISION**

16. The Milk Board’s application for costs is denied.

Dated at Victoria, British Columbia, this 13<sup>th</sup> day of May, 1997.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

Doug Kitson, Panel Chair  
Christine Moffat, Member  
Karen Webster, Member