

91-12
3/2/93

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

AND

IN THE MATTER OF AN APPEAL
TO THE BRITISH COLUMBIA MARKETING BOARD
FROM THE DECISION OF THE
BRITISH COLUMBIA MILK MARKETING BOARD
MILK SHARING ORDER 31 EFFECTIVE OCTOBER 4, 1991
AND AMENDED ON NOVEMBER 5, 1991 AND SEPTEMBER 1, 1992

BETWEEN:

TOM BARICHELLO AND JOAMY FARM LTD.

APPELLANTS

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

DECISION

ORDERS UNDER APPEAL

The Appellants are appealing the decision of the Milk Board of October 4, 1991, being "Milk Market Sharing Order 31" which was to take effect on October 4, 1991. Milk Market Sharing Order 31 was amended on November 5, 1991, with the amendment to be effective December 1, 1991. It was further amended on September 1, 1992. This Order is also being appealed.

BACKGROUND

The hearing of this appeal commenced on April 7 and 8, 1992. On April 8, 1992 the parties agreed to adjourn the hearing in an attempt to resolve the issues between themselves. Unfortunately, that did not happen and it was necessary to reconvene the hearing. Because of a change to the membership of the British Columbia Marketing Board (the "Board"), it was not possible to have the same panel hear the continuation of the appeal in October. When the appeal reconvened on October 19, 1992, the parties agreed that the transcript of the evidence from the hearing held on April 7 and 8, 1992 would form part of the evidence of the appeal before this panel of the Board.

After the adjournment of the hearing on April 8, 1992, the Appellants and the Respondent British Columbia Milk Marketing Board (the "Milk Board") met and the Milk Board considered submissions made by the Appellants. However, notwithstanding the Appellants' submissions, the Milk Board decided not to make any major changes to the levy structure and on September 1, 1992, the Milk Board passed an amendment to Milk Market Sharing Order 31 (Exhibit 4). The parties agreed that the Appellants' appeal would be expanded to include an appeal from the Order of September 1, 1992.

At the hearing which commenced on October 19, 1992, the Milk Board presented its case first, by agreement. Unfortunately, due to a serious illness in his family, the Appellant, Mr. Chard, was unable to attend the hearing on October 20, 1993. However, he had asked that the Appeal continue in his absence and so the Appellant, Mr. Barichello, presented the Appellants' case. In the afternoon of October 20, 1992 it became clear that it would not be possible to complete the appeal in the time remaining on that date. Consequently, the

Board invited the Appellant, Mr. Barichello, to make closing submissions, and at the end of his submissions on October 20, 1992 the Board adjourned the hearing, with the parties' consent, in order to review the evidence and submissions presented at the hearings in April and October, 1992 to see if the Board members could reach a decision without hearing further from the Milk Board. The Board has been able to reach a decision.

One of the issues which inadvertently did not get resolved at the hearing was the admissibility of the contents of a binder presented by the Appellant, Mr. Chard, and entered as Exhibit "A" for identification. This was dealt with at great length on April 7, 1992. Counsel for the Milk Board objected to the entry into evidence of some of the contents of the binder. Clearly page 7 of Exhibit "A", (which is entitled "Quotes" in the Table of Contents of Exhibit "A") is inadmissible hearsay. Pages 8 - 10 (entitled "Introduction" in the Table of Contents) are more in the nature of an opening statement than actual evidence and will be treated as such. Page 25 of "Exhibit A" was withdrawn as evidence by the Appellant, Mr. Chard, who tendered this Exhibit and accordingly it has not been considered by the Board. As with the Introduction, pages 32 - 34 (entitled "Summary" in the Table of Contents) are more in the nature of a closing statement than actual evidence and will be treated as such. The Board recognizes that some of the remainder of the contents of the binder might not be admissible if the rules of evidence were applied strictly, but allows the entry of the remainder of "Exhibit A" as an exhibit.

INTRODUCTION

Milk produced in Canada is classified as to its end use. Milk which is produced for consumption as fresh, fluid milk is classified as being produced for the "fluid market". Milk which is not produced for the fluid market but is produced for processing into butter, yogurt, skim-milk powder etc. is classified as "industrial milk". The butterfat which is not used from the milk produced for the fluid market is called "fluid skim-off".

Milk consists of water, solids contained in that water and butterfat. The non-fat solids contained in milk are referred to as "solids non-fat". Solids non-fat consist of elements such as calcium, phosphorus, and protein.

British Columbia is a signatory to a federal-provincial agreement which governs the production of milk and milk products in Canada. As well, British Columbia is a member of the National Milk Marketing Plan (the "Plan"), a national agreement for the supply management of milk products. This plan is managed by the Canadian Milk Marketing Supply Management Committee (the "Committee").

As a signatory to the federal-provincial agreement and as member of the Plan, certain benefits and obligations result. As a member of the Plan, the Milk Board is required to implement decisions of the Committee. While these decisions may be necessary for the effective supply management of milk and milk products nationally, the decisions are not always in what British Columbia milk producers (or at least certain of these milk producers) feel is their best interest. However, when one becomes a member of a national plan, one must take the bad with the good.

British Columbia producers can have two kinds of quota - "fluid quota" and "market sharing quota" or "MSQ". Fluid quota is measured in hectolitres and is the amount of milk which a producer is allowed to produce for the fluid market. MSQ is a producer's share of the market for industrial milk which is allocated under the National Milk Marketing Plan and is measured in kilograms of butterfat. The production of milk for both markets is governed by the Plan.

There are some people who produce milk without holding quota. Their right to produce milk without holding quota is the subject of a case currently being heard by the British Columbia Supreme Court. This production is not relevant to this appeal.

ISSUES

At the heart of this appeal is the Appellants' dissatisfaction with the method which the Milk Board adopted in the fall of 1991 and retained in September, 1992 to deal with a national problem in the milk industry: the declining consumption of butterfat. It was common ground that consumer preferences have changed and as a result there is more butterfat being

produced in Canada than is wanted by the market. Mr. Mykle, the Chair of the Milk Board, testified that the demand for butterfat has declined approximately 15% in the last three to four years.

At least by the fall of 1990, the Committee met to try to come to terms with the declining demand for butterfat in the market-place. At the meeting of the Committee held September 26, 1990 it was decided that the Secretariat (a subcommittee of the Committee which is generally composed of staff and members of the various provincial milk boards) should meet and prepare a report to deal with this complex issue. This is reflected in the September 26, 1990 minutes of the Committee (Exhibit 5, Tab 1). A number of meetings of the Committee were held throughout 1991 and at the September 26 - 27 meeting of the Committee, it was agreed that each province would be fully responsible for the butterfat **from fluid** skim off.

As a result of this decision, it was necessary for each province to develop a strategy for dealing with a cost which was formerly dealt with on a national level.

Prior to the passing of the orders which are the subject of this appeal, the Milk Board assessed levies on industrial milk deliveries from British Columbia producers on the basis of the hectolitres of milk produced. Milk Market Sharing Order 31, as amended in November 1991 and confirmed in September 1992, assesses levies on the kilograms of butterfat delivered by British Columbia producers. The Milk Board felt that by assessing levies based on kilograms of butterfat, they would be addressing the excess butterfat problem.

The Appellants' own Jersey herds. The majority of producers in British Columbia have Holstein herds. It was the evidence of the Appellants, which was not seriously disputed by the Milk Board, that, generally speaking, Jersey cows produce milk which has a higher butterfat content than that produced by many Holsteins. Because of this, Jersey producers and other producers who produce milk with a high butterfat content are affected more by the Orders under appeal than are producers of milk with a lower butterfat content. The Appellants also presented evidence that milk which has a higher butterfat content contains

a greater proportion of desirable elements (solids non-fat) for which producers of milk with a higher butterfat content ought to be compensated.

In reaching its decision as to how it would deal with the excess butterfat problem, the Milk Board consulted with a number of groups. These included the B.C. Federated Dairymen's Association; the Independent Dairymen's Association, and the Market Share Advisory Committee.

The first of these associations represents approximately 750 of the approximately 900-plus dairy producers in British Columbia. The second association represents the remaining dairy producers who are "independent" producers who do not ship their milk through a co-op. The Market Share Advisory Committee is a committee which has been established by the Milk Board. It is comprised of four dairy producers, and at the time consultations with the industry were taking place regarding Milk Market Sharing Order 31, at least one of the members was a high butterfat producer. The Milk Board consults with this committee on a regular basis, and was doing so at the time Milk Market Sharing Order 31 was passed and subsequently amended.

Mrs. Johanna Mellor, who testified on behalf of the Milk Board at the October, 1992 hearing, was the president of the B.C. Federated Dairymen's Association at the time of the hearing. It was her evidence that she was present at the meeting held by the Milk Board on November 13, 1991 where the Milk Board presented its proposal for dealing with the provincial responsibility for fluid skim-off. She stated that "There was producer representation from every corner of the province" and that it was agreed by those who were present at that meeting that the Milk Board's proposal was "as fair and equitable as anybody could offer" and was approved by the B.C. Federated Dairymen's Association and by the Independent Dairymen's Association.

Mrs. Mellor is herself a high butterfat producer. It was her evidence that under the system adopted by the Milk Board her levies have tripled. While she was not pleased that her levies had significantly increased, she recognized the need for the increase in levies. It was

also Mrs. Mellor's evidence that the general consensus in the Federation of Dairymen was not to change the levy structure for the 1992-93 dairy year.

After the April 7th and 8th, 1992 hearing was adjourned, the Appellants provided the Milk Board with three proposals for assessing levies. These proposals are found in Exhibit 6. It is obvious that the Appellants went to a great deal of work to develop these proposals.

It was the evidence of Mr. Mykle (the Chair of the Milk Board) that the Milk Board considered the Appellants' written proposals prior to making its decision regarding the levy structure to be in place for the 1992-1993 dairy year. It was also Mr. Mykle's evidence that although the dairy committees which the Milk Board met with did not receive copies of these written proposals, they were made aware of the fact that such proposals would be received by the Milk Board. However, these committees did not want the Milk Board to change the levy structure which it had adopted because the members of these committees felt that such a change would confuse producers. These committees apparently felt that because an entirely new levy structure would likely have to be adopted by August, 1993, it would not be wise to implement a new, temporary levy system.

The Milk Board presented evidence that it appears as if many of the provinces will be moving towards the implementation of multiple component pricing and that the Milk Board's goal is to implement such pricing by August 1, 1993. Multiple component pricing has been adopted in Ontario and Quebec and is the method of pricing which the Committee has been considering having the all of provinces adopt. However, it was Mr. Mykle's evidence that at least Alberta is resisting this method of pricing. Thus it is unclear whether or not this method of pricing will be adopted on a national basis. The Appellants favor adoption of multiple component pricing of industrial milk because it takes into account the value of solids non-fat which are present in higher amounts in milk which contains higher butterfat.

Although the Appellants are dissatisfied with the levy structure which has been implemented by the Milk Board, it is clear that not all producers who produce high butterfat milk are

dissatisfied, as evidenced by the testimony of Mrs. Mellor. The Board appreciates that the Appellants are affected by the Orders under appeal to a greater extent than many other producers, but the Board finds that this is justifiable in all of the circumstances.

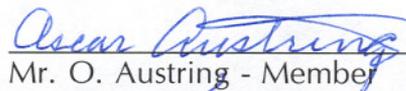
While it may be that one or all of the proposals advanced by the Appellants might result in a fairer pricing system than that adopted by the Milk Board, this Board does not find that the Milk Board took any improper considerations into account in passing the Orders under appeal and in fact expended a great deal of time and effort in consulting with producer representatives and reviewing possible ways of implementing an equitable levy system.

As became apparent at the hearing of this appeal, the issues of pricing milk and imposing levies are extremely complex. While the method adopted by the Milk Board might not be the best method it could have adopted, the Board finds that Orders passed by the Milk Board are reasonable in all of the circumstances. Accordingly, these appeals are dismissed, and as provided by the rules governing this appeal, the Appellants' deposits are forfeited.

However, the Board urges the Milk Board to review its levy orders and current pricing mechanism, as well as to review the pricing mechanisms being adopted in other provinces. While the Board is cognizant of the other major issues facing the Milk Board and acknowledges that a full review may take some time, the Board would ask the Milk Board to implement what it feels will be a long-term method of pricing milk and levying producers as quickly as possible.



Ms. D. Iverson - Chairperson



Mr. O. Austrung - Member



Mr. D. Kitson - Member