

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING FREIGHT CHARGES

BETWEEN:

NORTHERN INTERIOR DAIRYMAN'S ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

KAMLOOPS-OKANAGAN DAIRYMEN'S ASSOCIATION
CRESTON VALLEY DAIRYMAN'S ASSOCIATION,
MAINLAND DAIRYMEN'S ASSOCIATION, BC MILK PRODUCERS ASSOCIATION

INTERVENORS

PRELIMINARY DECISION

APPEARANCES:

For the
British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Mr. Harley Jensen, Member
Ms. Satwinder Bains, Member

For the Appellant

Mr. Ueli Grob, President
Mr. Barry Jacobson, Member

For the Respondent

Mr. John Jansen, Chair

For the Intervenors

Kamloops-Okanagan Dairymen's Association
Mr. John deDood, President
Mr. Lorne Hunter, Secretary

Creston Valley Dairyman's Association
Did not appear

Mainland Dairymen's Association
Mr. Stan Van Keulen, President

British Columbia Milk Producers Association
Mr. Wally Smith, President
Mr. John Schut, Vice President

Date of Hearing

January 31, 2002

Place of Hearing

Kamloops, British Columbia

INTRODUCTION

1. On December 5, 2001, the Northern Interior Dairyman's Association ("NIDA") filed its appeal of a decision of the British Columbia Milk Marketing Board (the "Milk Board") imposing new freight rates on provincial milk producers. NIDA takes the position that its members are unfairly penalised by the increased freight rates charged to them as a result of the new regional pooling system.
2. The Milk Board argues that this appeal should be dismissed as either being out of time or frivolous, vexatious or trivial. Accordingly, a preliminary hearing was held to hear this preliminary issue.
3. The Kamloops-Okanagan Dairymen's Association ("KODA") and the Creston Valley Dairyman's Association ("CVDA") applied for and were granted Intervenor status in support of the Appellant in this appeal. The Mainland Dairymen's Association ("MDA") applied for and was granted Intervenor status in support of the Milk Board. The BC Milk Producers Association ("BCMPA"), which is an umbrella organisation, was also granted Intervenor status, however it chose not to support either party in this appeal.
4. An oral hearing was convened in Kamloops on January 31, 2002 to hear argument on two preliminary arguments raised by the Milk Board. Although a written submission was filed, no representative from the CVDA attended at the hearing. Should this matter proceed to appeal on the merits however, the CVDA reserves its right to attend.

PRELIMINARY ISSUES

5. The first issue is whether the appeal should be dismissed, as it was not filed within 30 days after the Appellant received notice of the Milk Board's decision concerning the pooling of transportation charges and there are no special circumstances.
6. The second issue is whether, in view of the extensive consultation process undertaken by the Milk Board in deciding the transportation issue, the appeal should be dismissed summarily, pursuant to s. 8(8.3) of the *Natural Products Marketing (BC) Act*, S.B.C. 1999 c. 38 (the "Act").

FACTS

7. In the spring of 2001, Agrifoods International Co-operative Ltd. ("Dairyworld") was sold to Saputo Inc. ("Saputo"). Unlike Dairyworld, Saputo did not wish to assume responsibility for the transportation of milk to its plants. This was a major change for producers as historically, Dairyworld handled its own freight.
8. In response to Saputo's decision, the Milk Board held a planning retreat in March of 2001 to discuss the ramifications of this change and consider options. As a result of this retreat, the Milk Board developed a consultation plan to discuss with industry whether the Milk Board

should become the first receiver of all milk in the province and develop an equalisation/cost sharing program for milk transportation.

9. In carrying out its consultation, the Milk Board held spring producer meetings, met with representatives of Saputo, the directorship of various associations, processors, representatives of the Ministry of Agriculture and members of the British Columbia Marketing Board (“BCMB”) acting in a supervisory capacity.
10. On June 13, 2001, the Milk Board met with the Milk Industry Advisory Committee, a group made up of producers, processors, a government representative and an independent chair. That afternoon, the Milk Board held an all industry meeting, including the Joint Dairy Committee, the Western Milk Pool Co-ordinating Committee, the BC Dairy Council (processors), transporters and government representatives.
11. Following that meeting, the Milk Board decided that it would become the first receiver of milk and develop an equalization/cost share program for milk transportation within the province.
12. In its September 2001 Newsletter, mailed September 21, 2001, the Milk Board advised producers that effective October 1, 2001, it would implement first receiver of milk and cost sharing of milk transportation. In the Newsletter, the Milk Board established 8 freight zones for achieving orderly pick-up and calculation of producer payments for transportation. The rate set for NIDA’s region, the Cariboo, was \$4.00/HL.
13. In October, the Milk Board held its fall meetings. The meeting for the Cariboo region was held October 16, 2001 in Prince George.
14. On November 19, 2001, producers received their statement and cheques for milk delivered in October.
15. NIDA’s notice of appeal was dated November 27, 2001 and received by the BCMB on December 5, 2001.

DECISION

16. The Milk Board’s first argument is that the appeal filed by NIDA was filed outside the 30-day notice period in s. 8(1) of the *Act*. It argues that the decisions regarding pooling and freight rates were communicated in its Newsletter of September 21, 2001. All producers in the province would have received this Newsletter by September 28, 2001. The appeal was not received by the BCMB until December 5, 2001, some 68 days after receiving notice of the new rates. The Milk Board argues that no special circumstances exist to support waiving the 30-day requirement especially in light of the extensive consultation that the Milk Board undertook prior to making this decision.

17. In the alternative, the Milk Board argues that this appeal ought to be dismissed pursuant to s. 8(8.3) as being frivolous, vexatious or trivial. Although the Milk Board does not like the wording of this section, it argues that because of the extensive consultation process it followed before coming to its decision, this appeal ought to be summarily dismissed.
18. NIDA argues that its appeal is not out of time. In June, the Milk Board announced its proposed freight collection models. Although three models were advanced, a provincial, a regional and a modified model, it was evident to NIDA that the Milk Board did not favour the provincial pooling model. NIDA, who supported a provincial pooling model, does not believe it was consulted about the merits of the three proposed models.
19. In addition, NIDA did not agree with its region's proposed freight rate of \$4.00/HL. It felt that this was too high. When these concerns were raised at the June 13, 2001 meeting, the Milk Board stated in response that it was prepared to review the \$4.00/HL cap on freight rates. On September 5, 2001, the Milk Board advised that it would establish a Transportation Committee with representation from each of the 8 freight zones to review the hauling charges for pickup and delivery of milk. Effective October 1, 2001, the Milk Board became first receiver of milk. During the October 16, 2001 producer meeting, the Milk Board announced its freight rates. However, NIDA was under the impression that these rates were not final and were still subject to review as the Milk Board collected more data and the Transportation Committee offered its input.
20. NIDA argues that it was not until its producers received the October shipment statement on November 19, 2001 that they realised that the Milk Board had imposed the \$4.00/HL freight charge. Up until this time, they thought the freight rate was going to be reviewed.
21. NIDA argues that if this appeal was filed out-of-time, special circumstances exist to warrant an extension in the 30-day requirement for filing an appeal. Until November 19, 2001, NIDA producers did not know that a \$4.00/HL freight charge would actually be imposed for Cariboo shippers. Further, these changes came during the middle of fall grain harvest, an extremely busy time for northern milk producers. In addition, as the members of NIDA are spread out over a wide geographic area, it was not until November 27, 2001 that the members could meet and decide to appeal the Milk Board's freight rates. Finally, NIDA's Secretary/Treasurer, and someone who is also a senior producer, was diagnosed with a serious illness in September 2001. This producer received treatment in October then subsequently developed complications and was hospitalised until November 23, 2001.
22. NIDA argues that a combination of the above factors led to the filing of the appeal on December 5, 2001.
23. With respect to the Milk Board's application to dismiss this appeal as being frivolous, vexatious or trivial, NIDA argues that it is not its intention to cause trouble. In its view, this appeal is not frivolous, vexatious or trivial. The issue at stake on this appeal is the livelihood of northern milk producers. While the Milk Board argues that it undertook

extensive consultation, NIDA does not believe that it was consulted adequately in this process. In addition, the Milk Board instituted its freight rates before the Transportation Committee had an opportunity to offer its input and advice.

Out-of-Time Issue

24. With respect to the out-of-time issue, s. 8(1)(a) of the *Act* requires an aggrieved or dissatisfied person to appeal an order, decision or determination of a commodity board by serving written notice on the BCMB within 30 days after receiving notice of the order, decision or determination. Section 8(1)(b) of the *Act* allows the BCMB, where it finds special circumstances warrant it, to extend the time for filing an appeal.
25. In this case, NIDA filed its appeal approximately 68 days after receiving the September 2001 Newsletter. While it does appear clear from the Newsletter that the Milk Board set freight rates for the 8 zones in the Province, the Milk Board had said earlier that it would review the \$4.00/HL cap and then in September 2001, it created a Transportation Committee to review the freight rates. The Panel accepts that until NIDA saw their November statements, they had some cause to believe that the rates would be reviewed. Given the foregoing, the Panel finds special circumstances exist to warrant an extension in the time for filing this appeal.
26. One point should be made, however. In this case the Appellant is an association with 9 members. Difficulty in getting a collective appellant together to come to a decision about commencing an appeal is not sufficient in and of itself to warrant a finding of special circumstances as an individual producer could always bring an appeal in his own name.
27. The Milk Board argues that because of its extensive consultation process, the Panel should be less inclined to extend the time for filing this appeal. As will be discussed in more detail below, the validity of the Milk Board's process was fully argued before us in the context of these issues, and the Panel is satisfied, based on the evidence, that the Milk Board's process was sound and adequate. For this reason, the Panel declines to extend the time for arguing the process grounds NIDA seeks to advance on this appeal. However, this appeal is not limited to process arguments; it challenges the merits of the chosen pooling system and the new freight rates that resulted as a matter of sound marketing policy. The process that a marketing board follows in coming to its decision is relevant to, but do not determine, the outcome of an appeal on the merits of a commodity board's decision. Thus, arguments about the adequacy of process cannot override the special circumstances that have been established regarding the merits of the appeal.

Summary Dismissal Issue

28. In a related argument, the Milk Board argues that this appeal should be dismissed pursuant to s. 8(8.3) as being "frivolous, vexatious or trivial". The BCMB's ability to summarily dismiss an appeal of an aggrieved or dissatisfied person is understandably narrow. Having given a broad remedy of appeal to the BCMB, it would be inconsistent for the Legislature

to easily allow for summary dismissal without the benefit of a hearing on the merits. Looking to the *Act*, s. 8(9) sets out the BCMB's remedial power on appeal. After hearing an appeal, the BCMB can make an order confirming, reversing, or varying a commodity board decision, refer the matter back to the marketing board with or without directions or make another order appropriate in the circumstances.

29. The BCMB's authority to dismiss an appeal, without the benefit of a hearing on the merits, is found in s. 8(8.3). Thus, the Milk Board must satisfy the Panel that this appeal is frivolous, vexatious or trivial. *The Canadian Oxford Dictionary* (1998) defines frivolous as meaning "silly or wasteful...having no reasonable grounds...not sensible or serious". The Panel finds that this appeal raises serious issues. It was Mr. Jacobson's position that this appeal directly impacted on the livelihood of northern producers. "Vexatious" is defined as meaning "not having sufficient grounds for action and seeking only to annoy the defendant". While the Panel recognizes that the Milk Board would rather not have this appeal proceed, the Panel does not accept that the purpose behind filing the appeal was to annoy the Milk Board or other producers. Finally, "trivial" is defined to mean "of little importance or consequence; trifling". To the extent that the \$4.00/HL freight rate presents a significant increase in the previous freight charges paid by northern producers, it cannot be said that this appeal is trivial in nature.
30. Accordingly, the Panel finds that s. 8(8.3) does not apply to this appeal and as such this application is also dismissed.

Directions

31. Having dismissed both preliminary applications of the Milk Board, it is necessary to make additional comments in the circumstances of this case in view of the process issues that were fully argued before us. As noted above, the Milk Board introduced evidence regarding the adequacy of its consultation process prior to its coming to the decision under appeal. In addition, the Panel heard from KODA, the MDA and the BCMPA. It appears that there was a great deal of dissension and discord industry-wide with respect to the proposed freight rates during the Milk Board's consultations. It appears that no one wanted to see his or her rates increased. With 472 producers (69%) in the Lower Mainland and the balance spread throughout the province, it is easy to see that the Milk Board had a difficult task in weighing the competing interests.
32. Having listened carefully to the evidence, the Panel is satisfied that the Milk Board's consultation process, while perhaps not perfect, was extensive and thorough. NIDA argues that it was not consulted. However, from the evidence it is clear that the Milk Board was aware of NIDA's concerns. One of NIDA's main complaints is having created a Transportation Committee, the Milk Board then ignored it and imposed new freight rates.
33. However, the Panel prefers the evidence of Mr. Jansen, Chair of the Milk Board, which was that last year was a time of great change in the milk industry. Having decided to become first receiver of milk, the Milk Board also had to assume responsibility for

transportation rates. They considered several pooling models and came up with a starting point. Having set the starting point, the Transportation Committee now has a frame of reference from which to work. This is a work-in-progress and may take many months to finalise.

34. Given the “fluid” nature of the freight rate issue and given that the Transportation Committee is now charged with the task of reviewing the rates and to recommend a method by which future cost adjustments may be made, the Panel finds that hearing this appeal now would be premature. As NIDA has a representative on the Transportation Committee, it would benefit NIDA and the industry as whole to have the opportunity to work these issues out amongst themselves as opposed to having a resolution imposed by the BCMB at this stage.
35. Accordingly, pursuant to s. 8(7) of the *Act* the Panel directs that this appeal be adjourned for a period of three months commencing February 25, 2002. During this period, the parties are encouraged to work together to resolve the regional freight issue through the Transportation Committee process.
36. Given the Panel’s finding that the Milk Board’s consultation process was appropriate in the circumstances, should this matter proceed to appeal, the Appellant must focus on the inadequacy of the Milk Board’s actual decision as opposed to any defect in the consultation process.

ORDERS

37. The Milk Board’s application to have the appeal dismissed as being out-of-time is dismissed.
38. The Milk Board’s application to have the appeal dismissed as being frivolous, vexatious or trivial is also dismissed.
39. The appeal is adjourned until May 25, 2002.
40. There will be no order as to costs.

Dated at Victoria, British Columbia this 25th day of February 2002.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Satwinder Bains, Member
Harley Jensen, Member