IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM DECISIONS
CONCERNING FREIGHT CHARGES

BETWEEN:

NORTHERN INTERIOR DAIRYMAN'S ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

BC PEACE RIVER MILK PRODUCERS ASSOCIATION
BULKLEY VALLEY DAIRYMEN'S ASSOCIATION
CRESTON VALLEY DAIRYMAN'S ASSOCIATION
ISLAND MILK PRODUCERS ASSOCIATION
KAMLOOPS-OKANAGAN DAIRYMEN'S ASSOCIATION
MAINLAND DAIRYMEN'S ASSOCIATION
BC MILK PRODUCERS ASSOCIATION

INTERVENORS

AND

BETWEEN:

MAINLAND DAIRYMEN'S ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

BC PEACE RIVER MILK PRODUCERS ASSOCIATION
BULKLEY VALLEY DAIRYMEN'S ASSOCIATION
CRESTON VALLEY DAIRYMAN'S ASSOCIATION
ISLAND MILK PRODUCERS ASSOCIATION
KAMLOOPS-OKANAGAN DAIRYMEN'S ASSOCIATION
NORTHERN INTERIOR DAIRYMAN'S ASSOCIATION
BC MILK PRODUCERS ASSOCIATION

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Mr. Hamish Bruce, Member Mr. Richard Bullock, Member
For the Appellants	
Northern Interior Dairyman's Association	Mr. Ueli Grob, President Mr. Barry Jacobson, Member Ms. Evelyn Souster
Mainland Dairymen's Association	Ms. Maria Morellato, Counsel Ms. Lisa Hynes, Counsel
For the Respondent	
British Columbia Milk Marketing Board	Mr. John Jansen, Chair
For the Intervenors	
Bulkley Valley Dairymen's Association	Mr. George Veenstra
BC Peace River Milk Producers Association	Mr. Chris Haab
Creston Valley Dairyman's Association	Mr. Morris Hanson Mr. Wayne Harris
Island Milk Producers Association	Mr. Adrian Vanden Dungen
Kamloops-Okanagan Dairymen's Association	Mr. Lorne Hunter Mr. John de Dood Mr. Bob Honeyman
BC Milk Producers Association	By written submission
Dates of Hearing	February 11-13, July 7-8, 2003
Place of Hearing	Richmond, 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. The appeal challenged the freight rates as a matter of both process and substance. NIDA took the position that its members were unfairly penalised by the increased freight rates charged to them ($4/HL) as a result of the new partial pooling system and argued in favour of a total pooling system.

2. The then British Columbia Marketing Board (the "Provincial board") convened a hearing in Kamloops on January 31, 2002 to hear two preliminary applications made by the Milk Board.[1] On February 25, 2002, the Provincial board issued its preliminary decision dismissing the Milk Board's applications to have NIDA's appeal dismissed as out-of-time or, alternatively, as frivolous, vexatious or trivial.

3. Having dismissed the Milk Board's applications, the Provincial board also noted that the process aspect of the NIDA appeal was "fully argued" as part of the hearing of those applications and found that "the Milk Board's consultation process, while not perfect, was extensive and thorough". It therefore ruled as follows:

> 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.

4. The Panel then directed a three-month adjournment of the appeal. The Provincial board noted that NIDA's appeal "challenges the merits of the chosen pooling system and the new freight rates that resulted as a matter of sound marketing policy" and concluded that hearing the appeal on its merits would be "premature" as "it would benefit NIDA and the industry as a whole to have the opportunity to work these issues out amongst themselves as opposed to having a resolution imposed by the (Provincial board) at this stage". The NIDA appeal was therefore adjourned pending a further review by industry, the Transportation Advisory Committee ("TAC") and the Milk Board.

5. On May 29, 2002, as a result of a recommendation by the TAC, the Milk Board passed the following motion:

> …that the unfixed Base Rate of $2.50 per HL be established effective June 1, 2002 for Zones 4,5,6 and 8 and for Zones 1, 2, 3 and 7 be established a $1.45 per HL, $1.82 per HL, $1.99 per HL and $2.05 per HL respectively and further, any increase to Zone freight costs be shared

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[1] The British Columbia Marketing Board ("BCMB") and the Farm Practices Board ("FPB") were renamed the British Columbia Farm Industry Review Board ("FIRB" or "Provincial board") effective November 1, 2003: see *Miscellaneous Statutes Amendment Act*, SBC 2003 c. 7 and BC Reg. 350/2003.

equally across all Zones and further, if there is a major plant closure in Zones 3 and 7 the increase in freight cost would be limited to the then prevailing Base Rate.

6. On July 8, 2002, the Mainland Dairymen's Association ("MDA") filed an appeal of the above Milk Board decision.[2]

7. Given the broad impact of these policy appeals on the industry at large, a number of producer associations were granted Intervenor status. Originally in the NIDA appeal, the MDA, the Kamloops-Okanagan Dairymen's Association ("KODA"), the Creston Valley Dairyman's Association ("CVDA") and BC Milk Producers Association ("BCMPA") were intervenors. In the MDA appeal, NIDA, KODA, CVDA, and the BCMPA were joined by the Bulkley Valley Dairymen's Association ("BVDA"), the BC Peace River Milk Producers Association ("BCPRMPA") and the Island Milk Producers Association ("IMPA"). The Island Milk Producers Association intervened in support of MDA's appeal and the BCMPA intervened by written submission but did not support either Appellant. The balance of the Intervenor associations supported NIDA and opposed the MDA's challenge to the May 29, 2002 freight rates.

8. Two Vancouver Island producers (Mikerri Farms Ltd. and Brackenhurst Farm (1978) Ltd.) also appealed the May 29, 2002 order. However, these two appeals were withdrawn.

9. The MDA appeal was heard on February 11-13, 2003. However, it became apparent that there was confusion on the part of certain parties as to whether the issues under appeal were merely procedural or whether the potential remedy extended to the actual merits of the Milk Board's decision to enact the $2.50/HL freight rate cap. In light of this confusion, the Panel concluded that, particularly given the importance of the issues and the fact the Respondent and Intervenors were not represented by counsel, the fair and proper course was to adjourn the proceeding and issue further procedural directions. It was the hope of the Panel that the parties would settle their dispute; this was not ultimately possible. As a result, the continuation of the appeal was rescheduled for July 2003.

10. In our procedural decision dated April 8, 2003, the Panel determined that as the industry remained divided on the issue of freight rates, "[t]he interests of certainty, finality and efficiency dictate that any and all existing challenges to the merits of any chosen pooling system, as a matter of sound marketing policy, be dealt with now. In our view, this includes proceeding with the NIDA appeal at this time as well". We specifically considered whether the NIDA appeal should be dismissed as moot since the rates at issue in that case had been replaced by the May 29, 2002 rates. We held that it was not moot, stating "…we intend to make a decision about what the proper rates should be" and a live issue remained as to what account, if

[2] It should be noted that at the time it commenced its appeal, the MDA represented the 87 independent milk producers in the Fraser Valley. Since 2002, MDA has expanded its membership to include those producers who formerly shipped to Agrifoods International Co-operative Ltd. MDA now has 488 members.

any, should be taken of the $4/HL rate in place for NIDA producers between September 2001 and May 31, 2002. We note as well that NIDA continued to express its primary position as favouring the total pooling of freight rates despite its obvious preference for the Milk Board's May 29, 2002 rate in a choice between that rate and the $4/HL rate it originally appealed. NIDA's policy position is clear from the May 22, 2003 Pre-hearing Conference Report that was signed by all parties:

1. NIDA believes full provincial pooling of freight rates should be instituted for BC. (Appeal #1)

2. In the alternative, the May 29, 2002 decision of the Milk Board should be upheld. The May 29 rates were properly arrived at through the TAC process and are essential to the economic viability of producers in the regions. (Appeal #2)

11. NIDA's grounds and approach, as noted in the Pre-hearing Conference Report, were reflected in its position on the appeal. That position was the subject of evidence and submissions from the intervenors and the MDA.

ISSUES

12. Consistent with the above, the specific issues to be decided, incorporating the consolidated NIDA and MDA appeals, may be framed as follows:

a) Should the Milk Board's May 29, 2002 decision be reversed or modified on the merits as being contrary to sound marketing policy? This question includes the process objections outlined in Ms. Morellato's October 25, 2002 letter (MDA appeal). This question also includes NIDA's position that full provincial pooling should be instituted for BC (NIDA appeal).

b) If the Provincial board decides that the Milk Board's May 29, 2002 decision should be upheld as a matter of sound marketing policy, should the Provincial board's decision account in any way for the higher rates that were in place for NIDA members ($4/HL) between September 2001 and May 31, 2002? (MDA appeal/NIDA appeal)

c) If the Provincial board decides that the Milk Board's May 29, 2002 decision should be reversed or modified as a matter of sound marketing policy, what account, if any, should the Provincial board take of rates for NIDA producers that the Milk Board has set since September 2001? (MDA appeal/NIDA appeal)

FACTS

13. In the spring of 2001, Agrifoods International Co-operative Ltd. ("Dairyworld") was sold to Saputo Inc. ("Saputo"). 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.

14. In response to Saputo's decision, the Milk Board held a planning retreat in March 2001 to discuss the ramifications of this change and consider options. 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. As part of 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, Food and Fisheries as well as members of the Provincial board. The Milk Board also met with the Milk Industry Advisory Committee, a group made up of producers, processors, a government representative and an independent chair, and held an all industry meeting.

15. As a result of its consultation, the Milk Board decided that effective October 1, 2001, it would become the first receiver of milk and proceed to develop an equalisation program for milk transportation from various freight zones within the province. The Milk Board established 8 freight zones for achieving orderly pick-up and calculation of producer payments for transportation. The freight rates and zones were as follows:

a)	Zone 1 - Fraser Valley	**$1.38**
b)	Zone 2 - Vancouver Island – South	**$1.86**
c)	Zone 3 - Vancouver Island - North	**$1.86**
d)	Zone 4 - Bulkley Valley	**$2.04**
e)	Zone 5 - Cariboo	**$4.00**
f)	Zone 6 - Kootenays	**$3.15**
g)	Zone 7 - Okanagan	**$2.35**
h)	Zone 8 - Peace River	**$3.94**

16. In addition to these set freight rates, each producer was charged a pooled freight rate calculated by dividing the freight shortfall using the above rates among all producers. Producers were also assessed other charges and adjustments relating to yard configuration and production.

17. At the same time, the Milk Board created the TAC to "provide non-binding recommendations to the …Milk…Board…on matters relating to the pick-up of milk on the farm's (sic) of licensed producers and the delivery of that milk to licensed British Columbia Vendors (processors)". The TAC was comprised of producer representatives from the freight zones, four licensed transporter representatives and a processor representative. A Milk Board member served as chair.

18. According to the testimony of Mr. Jansen, Chair of the Milk Board, at the preliminary application in January 2002, having decided to become first receiver of milk, the Milk Board had to assume responsibility for transportation rates. They considered several pooling models and came up with a starting point. Once the starting point was set, the TAC had a frame of reference from which to review the rates and then recommend a method for making future cost adjustments.

19. NIDA appealed the freight rate of $4/H set for its region (Zone 5 - the Cariboo). However, after the preliminary hearing on January 31, 2002, the Provincial board adjourned the NIDA appeal and directed that the Milk Board, in conjunction with the TAC and the industry as a whole, attempt to work out the regional freight issues amongst themselves. It should be noted that the Provincial board, by including the TAC in the above direction, expanded the TAC's role beyond what was originally contemplated by the Milk Board.

20. On April 19, 2002 the Milk Board wrote to its producers to report on the progress of the TAC and to explain the methodology used for establishing initial freight rates. As for future TAC issues, the Milk Board wrote:

> The primary role of the TAC is to advise the Board on milk transportation matters. Initially, the role of the TAC was principally geared to establishing methodology for adjusting Transporter rates when and where warranted. These rates are different to the Zone rates paid by Producers for the pick-up of milk at farm and its delivery to Processors. Transporter rate adjustments could be due to increases in fuel costs, insurance, capital for equipment investment, labour rates, tires, maintenance, administration, and the like. Over the course of the next few months TAC will be focussing its efforts on this activity,
>
> *As well, TAC is being requested by the Board to review the Producer Zone Rate structure, and make recommendations to the Board for the purpose of bringing resolution to regional freight rate issues.*
>
> [emphasis added]

21. On April 23, 2002, the TAC met to discuss a number of issues. At the meeting, the TAC producer members unanimously recommended that "the Zone Rate is to be capped at $2.00 per HL as soon as possible subject to withdrawal of NIDA Appeal and furthermore, that the Board attempt to recover the freight shortfall and as a last resort the incremental cost is to be charged to the Equalization Pool". The Milk Board discussed this recommendation in its meeting on April 24, 2002 and made the following motion:

> …that the Board accept the TAC recommendation #4 effective June 1, 2002 subject to withdrawal of the NIDA Appeal and that the volume discounts apply to the actual cost before the cap is applied.

22. Shortly after this meeting, the TAC member from Vancouver Island notified the Milk Board that he had reconsidered his support of the TAC's April 23, 2002 recommendation. As a result, the Milk Board asked the TAC to revisit the freight rate issue.

23. On May 1, 2002, the TAC conducted a teleconference meeting to further discuss freight rates. As a result of this call, the TAC made the following unanimous recommendation:

> a) that the Board set the Fraser Valley rate at $1.45 per HL,
> b) that the Board set the Vancouver Island South rate at $1.82 per HL,

c) that the Board set the rate for Zones 3 through 8 at $2.00 per HL,
d) that all discounts and Stop Charge (sic) are applied to these rates,
e) that the $2.00 per HL cap rate be reviewed during the next six months,
f) that in the event of failure to extend the $2.00 cap rate that the Zone Rates will revert to the existing rates as fixed by the Consolidated Order as of April 30, 2002, and
g) that NIDA request their Appeal be generally adjourned.

The TAC producers went on to request that the Board consider grandfathering freight rates and implement quota movement restrictions on existing and new producers to a Zone to reduce the incidence of producers moving into higher freight zones with a capped rate. The TAC also recommends that the Board provide more information on milk movement costs and how the costs are allocated by Zone.

24. On May 15, 2002, the Milk Board met to consider the TAC recommendations. Milk Board minutes state:

> The Board reviewed the TAC recommendations of May 1 2002 and determined that the proposed Zone Rates deviate extensively from the established rates. This, in conjunction with the TAC recommendations for a proposed review of the new rates in six months time, the Board cannot support and decided to request the TAC to reconvene to consider the freight issues and make further recommendations.

The Milk Board rescinded its earlier motion of April 24, 2002 setting Zone Rates and requested that the TAC reconvene to consider freight issues and make further recommendations.

25. On May 29, 2002, the producer members of the TAC held a joint meeting with the Milk Board to discuss the establishment of a Base Rate for all Zones. The summary prepared for this meeting indicates that after “much discussion” the TAC producers made the following unanimous recommendation:

> …that the unfixed Base Rate of $2.50 per HL be established effective June 1, 2002 for Zones 4, 5, 6 and 8 and for Zones 1, 2, 3 and 7 be established a $1.45 per HL, $1.82 per HL, $1.99 per HL and $2.05 per HL respectively and further, any increase to Zone freight costs be shared equally across all Zones and further, if there is a major plant closure in Zones 3 and 7 the increase in freight cost would be limited to the then prevailing Base Rate.

An issue arose during the course of the hearing of these appeals as to whether the TAC motion was in fact unanimous. More will be said on this later.

26. The Milk Board then convened its own meeting on May 29, 2002 to receive and review the TAC recommendation. It then passed its own motion accepting the TAC recommendation in principle. On June 7, 2002, the Milk Board sent out a letter to industry communicating its decision and setting out the new zone freight rates.

27. On July 8, 2002, the MDA filed an appeal of the above Milk Board decision. The basis of its appeal was that the composition of the TAC was fundamentally flawed, as it had no representative from the MDA and further that there was a failure to provide the MDA with an opportunity to respond and provide input into the proposed rate

structure. In addition to these procedural flaws, MDA argues that new freight rates are flawed on their merits.

28. Since the filing of the MDA appeal, the membership of the MDA has expanded from the 87 independent producers to include the former co-op producers. MDA now represents 488 producers and 71% of the province's dairy production. The Panel was advised that the newly configured MDA supports the MDA appeal.

SUBMISSIONS OF INTERVENORS

29. The Panel received many thoughtful and comprehensive submissions from the regional producer associations around the province. Time does not permit an exhaustive review of these submissions but their main points are summarised below.

Creston Valley Dairymen's Association

30. Mr. Morris Hanson, a dairy producer in the Creston area spoke on behalf of the CVDA. Mr. Hanson is also a member of the TAC. The CVDA maintains that while the May 29, 2002 decision of the Milk Board is not perfect, it strikes a balance between producers. The CVDA position is as follows:

1) The May 29, 2002 decision was arrived at by a very thorough process where TAC members took their roles seriously. The TAC was looking at moving from $4/HL to a pooled rate over 3.25 years but no agreement could be reached. By April 10, 2002, the TAC was considering $2/HL. Documents prepared by the Milk Board indicated that a move from $4/HL to $2/HL would cost an additional $0.11 to all producers. TAC made a unanimous recommendation for the $2/HL rate however, one member withdrew his support. Further discussions ensued, ultimately leading to the May 29, 2002 recommendation to the Milk Board.

2) As a result of the Milk Board becoming first receiver of milk, the Milk Board has agreed to supply processors with the milk they want where they want it. Milk no longer flows to the closest plant but rather flows to the plant where processors want the product. This change supports pooled freight rates.

3) Seven out of the eight other provinces with dairy industries use totally pooled freight rates.

4) The freight rates prior to 2001 for producers in the Bulkley Valley, Cariboo, Peace River and Kootenays was not out of line with a $2.50/HL freight rate (averaged rate $2.36/HL)

5) The new way of marketing milk is to ensure processor needs are met. In the absence of processors agreeing to pay a portion of the cost of moving milk, the only fair system is a pooled freight rate on all milk, removing inequities to producers within a region and recognising that any producer's milk may be found in any store in the province.

Bulkley Valley Dairymen's Association

31. Mr. George Veenstra of the BVDA agreed with the submissions of Mr. Hanson on behalf of the CVDA.

BC Peace River Milk Producers Association

32. Mr. Chris Haab spoke on behalf of the BCPRMPA. The BCPRMPA supports the Milk Board's May 29, 2002 decision. The Peace region has BC's largest agricultural land base and has produced milk for the past 50 years. Historically, the Peace had its own processing plants and these were profitable. However, decisions were made to close regional processing plants in favour of larger centralised processing facilities. Now that the Milk Board is first receiver of milk, it has the obligation to deliver milk to where the processor wants it. There is a shortfall of milk in the Lower Mainland of about 11% and that milk must come from outlying areas. Fairness dictates that the cost of supplying this milk should be pooled among all producers. Pooling is not new. Many aspects of the dairy industry are pooled through levies including the cost of administration, membership in the Dairy Farmers of Canada, and both national and provincial advertising. In addition, other provinces including Alberta use pooled freight rates. This is significant as much of the milk produced in the Peace region of BC is shipped to Edmonton.

33. It is in the best interest of the province and the dairy industry to maintain milk production in outlying areas. The Lower Mainland already faces the pressure of increasing population and a decreasing agricultural land base. Low regional freight rates in the Lower Mainland only encourage more production in an already fragile environmental ecosystem.

Kamloops-Okanagan Dairymen's Association

34. Mr. Lorne Hunter spoke on behalf of KODA. His association represents the more than 90 dairy farms in the Okanagan and Shuswap region, a region second only to the Lower Mainland in dairy production. It is KODA's position that a move from \$4/HL to \$2.50/HL is manageable and assists in maintaining a viable volume of milk in each region of the province where no processing plant exists. The cost to each individual producer of such a reduction is minor and results in a greater level of stability and predictability of future freight rates in all regions of the province.

35. The May 29 decision is a strong starting point. It recognises:

- the differences in regional freight rates prior to the Milk Board becoming first receiver,
- the difference in culture between independent and co-operative milk producers,
- the need to pool the cost of moving milk from where it is produced to where the processor requires it, and
- the benefit of allowing the Milk Board to move milk to the processor who will provide the greatest return for the milk processed and consequently obtain the best return for the producer.[3]

36. If the outlying producers were required to pay the full cost of moving milk to a processing facility, the cost could be between $7.00 and $10.00/HL. These producers would very quickly be put out of business. Thus, the question is how much of the freight rate should be pooled and how much should be the responsibility of the producer in a given area. Given that three regions have more plant capacity than milk production (Fraser Valley, Vancouver Island South and Vancouver Island North) and given that milk from other regions makes up the processors' shortfalls, KODA argues that pooling makes sense.

37. KODA suggests that total pooling of all freight charges would be the simplest answer. However, given that total pooling would raise the Fraser Valley producers freight rates beyond historical norms, the May 29, 2002 decision strikes a good interim balance as the Fraser Valley, Okanagan, Vancouver Island North and South all pay close to their previous freight rate averaged over 6 months. The rate for the remaining regions, while arbitrary in nature, is close to the increase seen by Okanagan and Vancouver Island North producers.

Island Milk Producers Association

38. Mr. Adrian Vanden Dungen spoke on behalf of the IMPA and argued that it has always been the responsibility of the producer to pay for the transportation of raw milk to the processor. Ownership of milk does not change hands until the milk has been pumped off at the receiving plant.

39. Island Farms Dairies Ltd., a Vancouver Island processor, has always had a differential freight rate depending on where a producer farms on the Island. The per HL rate varied from $1.25 to $2.15. However, this cost did not reflect the actual cost of moving milk. Up until the time the Milk Board became first receiver, higher rate producers had a least some of their costs covered by other producers. The degree of pooling was controlled by Island producers and their processor.

[3] There are a several different classes of milk. Given that fluid milk brings the highest return, it is in the producers' best interest for fluid milk utilisation to be maximised. Industrial milk requirements bring a lower return and are therefore filled once the fluid needs are met.

40. Now that the Milk Board has become first receiver of milk, Island producers still believe that a producer must bear some responsibility for where he farms. The IMPA recognises that due to plant closures and changing consumer demands, milk is now moved further than at any previous time. They also recognise that a healthy processing industry benefits all producers. As such the IMPA supports some form of cap; however $4/HL is too high and $2.50/HL is too low.

DECISION

Consultation

41. The MDA argues that the consultation leading to the Milk Board decision to impose a $2.50/HL cap on freight rates was inadequate. The decision does not reflect an industry consensus as the MDA was never consulted nor did it consent to this rate. The new rate was established by the TAC after only three meetings (one of which was a phone call) between February 25, 2002 and when the Milk Board's decision was announced on June 7, 2002. The MDA argues that unlike the initial consultation process leading to the $4/HL freight rate cap, the second consultation process was far from extensive or thorough. It did not involve proper input from or meaningful consultation with the MDA, which now represents two-thirds of the milk producers in the province.

42. The MDA takes issue with the composition of the TAC; the then 87-member MDA did not have a representative on the committee. Instead, the one representative from the Fraser Valley was appointed by the BCMPA from the former co-op producers. Thus, MDA producers, which now represent the bulk of milk production in the province, were grossly under-represented on the TAC while producers from the seven other regions each had their own representative. The MDA argues that the TAC's composition impeded rather than facilitated proper representation and resolution of freight rate issues.

43. The MDA points to the failure on the part of the TAC or the Milk Board to provide data or a rationale to producers to justify a reduction in the freight rate cap from $4/HL to $2.50/HL. TAC members did not take the $2.50/HL recommendation back to their constituent members and as such, did not receive feedback from the producer base. Specifically, MDA producers never had an opportunity to respond to any new data or provide input into any new considerations, proposals or rationales supporting the freight rate reduction. Given that the original decision of the Milk Board of $4/HL reflected the status quo in the industry just prior to the Milk Board becoming first receiver, the MDA argues that there should have been some principled basis for moving from $4/HL to $2.50/HL. No such rationale has ever been offered by the Milk Board. Rather the Milk Board relies on an erroneous assumption that there was a consensus among producers reflected in the TAC's "unanimous" recommendation in favour of $2.50/HL.

44. In response, the Milk Board points out that there is no dispute that it is the regulatory agency responsible for making decisions affecting registered producers. There is no requirement that Milk Board decisions be made with industry consensus. Rather, the Milk Board must make regulatory decisions which in its view support the dairy industry at large. In the case of the freight rate cap, the Milk Board argues that its consultation was extensive. This consultation occurred over several months before the initial decision to become first receiver of milk and set a $4/HL cap, and then continued afterwards. There was ongoing consultation after the NIDA appeal was filed and still more consultation after the Provincial board released its decision in February 2002. Two other appeals were filed (and ultimately withdrawn) with respect to the freight rate cap after further discussions. Still further discussions occurred after the MDA appeal was filed and before the appeal was heard in February 2003, and before the resumption of this appeal in July 2003.

45. MDA agrees that the consultation leading to the initial freight rate cap of $4/HL was extensive and thorough. However, the Milk Board argues that the initial consultation was focussed on the different pooling models available. While some sample freight rates were used to explain how various models would work, the actual freight rates to be charged in any given region did not receive significant industry exposure prior to being set, nor was there any industry consensus, zone input or approval. The Milk Board set the initial regional freight rates as a starting point and created the TAC to advise on milk transportation matters.

46. In contrast, after the Provincial board's ruling in the NIDA appeal on February 25, 2002, the TAC was asked to review the Producer Zone Rate structure and make recommendations to the Milk Board for the purpose of bringing resolution to regional freight rate issues. The TAC received provincial zone input over a period of several months and ultimately made a recommendation to the Milk Board. The Milk Board rejects that the TAC was fundamentally flawed in its composition. As with its other committees, the Milk Board chose a "non-apportionment" approach to avoid a Fraser Valley-centric decision where outlying regions would feel disenfranchised from meaningful discussion. The Milk Board felt strongly that the TAC should be structured to have just one member per zone. By so doing, the Milk Board hoped to mitigate against any perception that the ultimate decision was weighted in favour of Fraser Valley producers, given that three out the four producer members on the Milk Board are from the Fraser Valley and the Chair of the TAC (John Pruim) was a member of both the Milk Board and the MDA.

47. While the MDA did not have a member of its choosing on the TAC, there was a Fraser Valley representative. In October 2001, the Fraser Valley producer community was comprised of former co-op producers and independent (MDA) producers. MDA had 87 members, with the remaining 401 former co-op members being represented by the BCMPA. As the Milk Board felt that the interests of the MDA members were no more important than the views of the co-op producers, it requested that the BCMPA recommend a Fraser Valley representative to the TAC.

They chose Mr. John Aarts, a well-respected long time dairy producer. The Milk Board argues that he took into consideration the long-term interests of the industry and was both fair minded and consultative. Further, while the MDA takes issue with its membership not being consulted after the TAC recommendation was made, the Milk Board argues that no zone was consulted in that fashion. MDA producers were treated the same as producers from all zones, through regional representation on the TAC.

48. Having considered the positions of the parties and the Intervenors, the Panel finds that the consultation process was appropriate. The work of the TAC cannot be dispensed with and disregarded in the manner suggested by the MDA as just two meetings and a phone call. It is very clear that the TAC members took the responsibility of making a recommendation on a freight rate cap very seriously. According to the TAC member from Creston, Mr. Hanson, TAC producer members actually met eight times, but not all meetings were officially called by the TAC chair or had minutes taken. Proposals were made and discarded and new proposals were put forward. TAC members spent many hours on the phone with other TAC members as well as their constituents. In his submission on behalf of CVDA, Mr. Hanson states:

> …the TAC took their task seriously as how to balance a freight rate in the four outlying areas now without plants at a rate that was affordable and sustainable to those regions, without unduly putting extra cost on the four regions with plants.

After reviewing the history of the TAC meetings, Mr. Hanson states:

> Why we refer to this History in detail is to indicate to "THE APPEAL BOARD" that diligence has been sought after by all those involved. Both respecting the need to not put extra costs on the Mainland or any other region that was not pooled to all producers while also still being concerned for the producer in the outlying areas that if additional increase beyond the $2.50 would put more pressure on the stability of the milk industry in those areas, as a primary industry supporting those communities.

49. Mr. Hunter, also a TAC member, spoke on behalf of KODA. He had the following comments about the composition of TAC:

> Mr. Aarts, the Fraser Valley representative to the (TAC), was well heard at all the TAC meetings and his counsel was respectively (sic) received and in my opinion had a strong influence in the final May 29th recommendation. The previous advisory or consultative committees have not always had representatives from each geographic region. But it has been my experience that the BC Milk Marketing Board has tried to include as a (sic) diverse grouping as possible to give the BCMMB the best advice possible. I believe this happened with the May 29th decision.

50. It is apparent from the MDA's submission that it does not approve of a $2.50/HL freight rate cap. It was MDA's position that $3.75/HL was more appropriate. Given this position and given the lengthy period the parties had to settle the freight rate issue, a consensus on this issue among producers in all regions seems unlikely. The disagreement on whether there was unanimity by TAC on May 29, 2002

typifies the lack of consensus. It is evident from the Milk Board's analysis that it understood the financial impact that changing freight rates would have on any given zone and it recognised the need to strike an appropriate balance.

The Appropriate Freight Rate

51. Having found that the Milk Board's process was appropriate, the Panel was also asked to consider whether the Milk Board's May 29, 2002 decision should be upheld or alternatively, reversed or modified as being contrary to sound marketing policy on the merits. In fact, it was confusion as to whether the Panel intended to consider the merits of the May 29 decision that lead to the adjournment of the February 2003 hearing. The Panel Chair stated:

> …I think that all parties need to be aware that this panel is prepared in the absence of a consensus agreement to render its decision both on the process issue relating to the consultation but also on the merits issue of the adequacy and the appropriateness of the freight rate, and before we undertake that exercise we want to make sure that we have all the evidence in front of us that all the parties feel is appropriate.

52. In the preliminary decision issued in the NIDA appeal, the Provincial board Panel found that the Milk Board conducted an extensive and thorough consultation prior to implementing its first freight rate order. The evidence in this hearing confirmed that there was further consultation arising in the context of several appeals and through the TAC with the industry at large. Much time has been spent trying to find a consensus within the industry without success. Interior producers maintain that $4/HL is too high. Lower Mainland and Vancouver Island producers believe the $2.50/HL is too low. There was a suggestion by some parties that the appropriate rate is somewhere between those benchmarks; one of MDA's witnesses proposed $3.75/HL. The Milk Board has exercised its discretion as to what it feels the proper freight rate should be. However, the Panel must satisfy itself that the $2.50/HL cap is appropriate in all the circumstances as a matter of sound marketing policy for the milk industry as a whole

53. In *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473, the Court of Appeal confirmed the broad scope of the Provincial board's appeal power. The Supreme Court had previously held that the then Provincial board's appeal power was narrow and did not allow it to reverse the policy judgments of commodity boards unless those judgments disclosed an error of fact, law or procedure. The Court of Appeal however, held that the Supreme Court misconceived the Provincial board's appellate jurisdiction under the *Natural Products Marketing (BC) Act* ("the *Act*") (paras. 13-14):

> The statutory regime created by this legislation clearly indicates that an appeal to the Marketing Board is to be in the nature of a full hearing into the merits of the case. There is nothing in the legislation to suggest that the Marketing Board must give any or any significant deference to the decision of a commodity board, such as the Chicken Board. Where the Chicken Board has heard no evidence, information or argument and has offered no reasons for its decision, the Marketing Board has little alternative under its statutory adjudication regime other than to

> determine the facts and issues based on the evidence and argument presented to it. It has the power to conduct a full hearing into the merits.
>
> In my respectful opinion, the learned chambers judge erred in applying the decision of this Court in *Dupras* to the circumstances of this case. *Dupras* was an appeal from a specialized statutory office to a court, and not an appeal to a specialized administrative appeal board. The Marketing Board is not a generalist court, but a specialized tribunal expected to use its expertise. *That expertise would be lost if it were required to grant deference to a commodity board and to conduct appeals limited as to their grounds.*
>
> [emphasis added]

54. The Court of Appeal accepted that the right of appeal before the Provincial board extends beyond questions of "law, fact and procedure", to a review of the outcomes of individual commodity board decisions on the merits. Individual commodity boards have significant discretion with respect to matters such as transportation, marketing, price and production; their policy judgments have significant impacts on the lives of those affected by the regulated marketing system. The Provincial board was expressly created for the purposes of hearing individual appeals under the *Act*; we are entitled and required to review the policy judgments of the individual commodity boards on appeal.

55. That said, it is necessary to review the rationale behind the freight rates set by the Milk Board. At the outset, the point bears making that this appeal is not about the relative merits of pooling in general. The Milk Board's decision to become first receiver and to move to some form of pooling system was not challenged. Rather, the issue to be decided on these appeals is to what degree should producers in each zone be responsible for their own freight costs? To put it another way, how much of the freight shortfall should producers located near a major processing plant be required to absorb?

56. The Milk Board analysed the financial impact of various proposed freight rates on the producers from the eight Provincial Zones. The starting point of analysis is to look at the actual freight costs:

   - The total cost of freight based on the period May 1, 2002 to April 30, 2003, across all eight regions was $12,397,825.87.

   - The net cost of freight (/HL) in each Zone was:

- Zone 1 Lower Mainland	**$ 1.47**
- Zone 2 Van. Island South	**$ 1.88**
- Zone 3 Van. Island North	**$ 1.83**
- Zone 4 Bulkley Valley	**$11.17**
- Zone 5 Cariboo	**$10.63**
- Zone 6 Kootenays	**$ 8.74**
- Zone 7 Okanagan	**$ 2.45**
- Zone 8 Peace River	**$ 7.30**

57. Imposing a freight cap results in a deficit to the pool, i.e. the freight collected is not adequate to pay the total freight costs. Under the current system, the Milk Board takes the shortfall and divides that amount among all producers to create a pooled rate. The pooled rate varies depending on where freight rates are capped, i.e. how much of a region's freight is paid by producers within that region. With the May 29, 2002 freight cap of $2.50, the pooled rate is $0.48. Thus, in interpreting the May 29 freight rates, every producer pays the "unfixed base rates that can change from time to time", set out below, and the pooled rate of $0.48:

- Zone 1 Lower Mainland **$1.45**
- Zone 2 Van. Island South **$1.82**
- Zone 3 Van. Island North **$1.99**
- Zone 4 Bulkley Valley **$2.50**
- Zone 5 Cariboo **$2.50**
- Zone 6 Kootenays **$2.50**
- Zone 7 Okanagan **$2.05**
- Zone 8 Peace River **$2.50**

58. Both the Milk Board and the MDA calculated the impact of various freight rate caps on the size of the shortfall in total freight collected. There are variations in their calculations but the critical factor is the net increase in freight shortfall with a decreasing cap:

Freight Cap($)	**Shortfall ($)**
2.50	2,972,882
3.00	2,468,302
3.50	2,299,103
4.00	2,131,174

59. Setting a $2.50/HL cap increases the freight shortfall in the province by approximately $800,000 and as such the pooled rate increases. Given that MDA has 71% of the province's production, its producers pay 71% of any shortfall (i.e. it has more producers paying the pooled rate).

60. The MDA provided a useful analysis showing how various freight rate caps impact the average producer in a region[4]. For those zones where producers must support the freight shortfall, the effect of raising the cap from $2.50/HL to $3.75/HL results in a savings (over the entire dairy year) to the average producer of:

- Zone 1 Lower Mainland $704
- Zone 2 Van. Island South $676
- Zone 3 Van. Island North $858
- Zone 7 Okanagan $585

[4] Exhibit 16, BC Milk Freight Transportation Cost/Revenue/Shortfall Study, Gerald Adams, June 22, 2003.

Larger producers would save more than the average; smaller producers would save less. Conversely, the effect of raising the freight cap from $2.50/HL to $3.75/HL on the average producer in regions with a freight shortfall results in increased freight costs of:

- Zone 4 Bulkley Valley $ 5,427
- Zone 5 Cariboo $10,260
- Zone 6 Kootenays $12,194
- Zone 8 Peace River $ 7,584

61. The Milk Board came to a similar conclusion; moving from a $2.50/HL freight cap back to $4/HL saves the average MDA producer $484. The smallest MDA shipper would save less ($84.50); the largest MDA shipper would save more ($4,946.56). When viewed as a percentage of total income, the increase is minimal (~0.2%). In comparison, the increased cost to the average Cariboo producer of moving the freight rate cap to $4/HL is in excess of $10,000 (~4% of income).

62. If the Panel's task were limited to the question of preferring one freight rate cap to another, fairness would dictate a $2.50/HL freight cap. The Milk Board's analysis (and the analysis of MDA) demonstrates that increasing the freight rate cap has a far greater negative impact on outlying producers than the corresponding benefit to Lower Mainland and Island producers. A $4/HL cap results in increased freight charges of a magnitude likely to significantly disrupt the businesses of outlying producers while the impact on Lower Mainland and Island producers of a $2.50/HL freight cap cannot be viewed as significant let alone "burdensome" as argued by MDA.

63. From the foregoing, it follows that the Panel does not support the "reasonable partial pooled freight rate cap" of $3.75/HL proposed by MDA. The Panel finds nothing in the evidence or in principle to support implementation of this freight rate; it is an arbitrary number chosen by MDA with little analytical foundation. MDA's witness, Mr. Gerald Adams, a consultant and former manager of milk pick-up and interplant hauling for Dairyworld conceded that it was "a political number that I came up with for a compromise position" and agreed that it was "not based on any calculation or theory" but reflective of historical freight rates in the regions. The Panel accepts the Milk Board's argument that there is little value in looking to the freight rates imposed by Dairyworld when the financial model on which it was based was flawed as demonstrated by the demise of its operations. Further, by the MDA's own calculations, the $3.75/HL rate cap still results in freight charges likely to significantly disrupt the businesses of outlying producers.

64. Furthermore, and after considerable and careful reflection, the Panel has decided that it cannot endorse the Milk Board's $2.50/HL freight rate cap. We have come to the conclusion that it is in the best interest of both the dairy industry and the province to move from a partial pooling model (which the $2.50/HL freight rate

cap represents) to a total pooling model. We have come to this conclusion for a number of compelling policy reasons.

65. First of all, after listening to and reflecting on the justifications advanced by the various parties (including the intervenors) the Panel was struck by the arbitrariness of the decision to set a freight rate at any particular number above the pooled level. Arguments can be made as to what rate a region prefers, however little principled reason or rationale was offered to justify one specific rate over another. This shows that, in the end, the exercise of determining a transportation cost structure fundamentally involves balancing the costs and benefits of a particular approach as applied in one region against the corresponding costs and benefits in another. In performing such an analysis, the wishes of the majority are relevant, as is the fact that many outlying producers were willing to "accept" the lower rate of $2.50 as a necessary political compromise despite their preference for the total pooled rate. In the end, however, we have concluded that our decision must be guided by our assessment of what is best for the industry as a whole as a matter of sound marketing policy. For the reasons that follow, we have concluded that total pooling should be implemented. Total pooling will, in our view, result in some additional expense to Lower Mainland producers, while significantly reducing the existing financial pressure on the fragile interior industry.

66. The MDA argued strenuously against the freight rate cap of $2.50/HL maintaining that this rate was "too rich", and it even more strenuously opposed the lower total pooled rate estimated at $2.06/HL. It argued that outlying producers having made the decision of where to farm have a responsibility to pay their higher freight costs. The Panel does not accept that it is fair to require regional producers to pay the majority of the cost of shipping their milk to the Lower Mainland. Historically, outlying regions were serviced by their own processing plants. Despite being profitable, regional plants were shut down as a result of corporate decisions to benefit from the economies of scale by using large centralised plants. These decisions were made in the collective best interests of all Dairyworld co-op members. Interestingly enough, independent producers also derived benefit from these decisions, as Dairyworld maintained the "plant of last resort" ("PLR"). When any provincial processor had surplus milk, Dairyworld committed to taking that product to ensure market and price stability. Thus, an independent MDA producer had the benefit of his personal relationship with his processor without any additional obligation to assist other producers with their freight costs and also had the stability associated with access to the PLR.

67. During the course of these appeals, the Panel heard much about the differing "culture" between producers who shipped to a co-op and those who shipped to independent plants. Historically, there were considerable philosophical differences between independent and co-op producers. As part of a co-op philosophy, milk pooling was commonplace. Independent producers on the other hand were on their own to strike their best deal with a processor without any obligation to assist with another producer's freight. They negotiated their own freight rates and received

premiums for producing good quality milk. In some cases, independent producers' premiums offset their actual freight costs. It appears that at least in part, the inability to agree on a freight pooling system is driven by these "cultural" differences. However, with the demise of the Dairyworld co-op and its purchase by Saputo, these "cultural" differences have been largely removed. There is just one dairy industry in BC and it must work together to ensure a healthy stable market. In addition, MDA is now composed of all the Lower Mainland producers, including the former 401 co-op producers. While the merged MDA has supported the appeal of a $2.50/HL cap, the appeal would now appear to be less driven by philosophy than by the combined membership's interest in achieving a more beneficial freight rate than $2.50/HL. Finally, as noted above, this appeal is not about whether BC should move to a pooling system. That decision was made when the Milk Board became first receiver of milk. The only remaining decision relates to the appropriate freight rate.

68. Pooling is not a new concept in the dairy industry. Aside from freight, other aspects of milk production are currently pooled within BC. Since 1993, the entire province has operated as one milk pool; producers receive the same price for their milk regardless of how that milk is ultimately used. Producers are paid from the equalisation pool; monies in that pool result from the amount of milk produced in a given month and the use made of that milk by processors.

69. In addition, BC is a member of the Western Milk Pool ("WMP") along with Alberta, Saskatchewan and Manitoba. This grouping is often abbreviated as the "P4". As part of its obligation as a member of the WMP, BC is required to share in the cost of a PLR. Currently, the Abbotsford cheese plant operated by Saputo is the PLR for BC. The cost to maintain the PLR service is pooled and deducted from the BC producers' monthly revenue and remitted to the PLR. This cost is estimated to be approximately $1,800,000 annually. The PLR under the WMP operates in an analogous fashion to its historical counterpart and remains fundamental to achieving security of delivery for producers across the four provinces. Other than milk from the Peace River and Kootenay regions, the cost of shipping milk to another WMP province is borne by the PLR. Any additional inter-provincial shipments of milk (not covered by the PLR) are borne by producers by way of a deduction from the monthly equalisation pool.

70. According to Milk Board Chair Mr. Jansen, with the exception of BC (6%) and Saskatchewan (2%), the remaining provinces comprising 92% of the milk supply all use pooled dairy freight rates. MDA offered many explanations as to why BC's freight rates should not be pooled including geographical considerations (the existence of ferries and significant mountain passes) and considerations relating to the number and size of farms. BC has apparently fewer farms but of larger size than either Ontario or Quebec which both have many small family farms. Mr. Adams surveyed provincial raw milk pooling policies across Canada and concluded:

> All of the representatives I talked to agreed that BC has a number of raw milk transportation problems not faced by other provinces. In BC, milk is transported great distances, at times through mountain passes. There is lower cost farmland, outside of the Lower Mainland, allowing producers to move and expand with lower capital costs. There is no processing in the Northern regions, Southern region and insufficient processing in the Okanagan. Transportation costs are escalating due to higher fuel costs and increased production volumes being transferred from regions outside of the Lower Mainland to processors.

71. The NIDA producers called Mr. Michel Beausejour, Director of Operations, la Federation des producteurs de lait du Quebec. Mr. Beausejour's responsibilities roughly correspond with those of the Milk Board's general manager. He testified that Quebec too ships milk over long distances, through mountain passes often on gravel roads in harsh winter conditions. Yet since 1991, Quebec's approximately 8000 producers' freight rate has been totally pooled over all regions. Of the 8000 producers approximately 40% are located in outlying regions, the remaining 60% are centrally located. As of April 2003, Quebec's pooled freight rate was $2.23/HL plus an additional $0.10/HL to support the P5 pool (Ontario, Quebec, Nova Scotia, Prince Edward Island and New Brunswick).

72. In Mr. Beausejour's opinion, the pooling of freight supports the regulated marketing system:

> In the eastern parts of Canada actually we have developed some theory regarding the supply management system, the possibility or in the case actually sharing the income coming from the sale of milk and that's why producers decide long time ago now to be sure that if we have to share the income coming from the national system because actually at the national system we share the revenue based on the national pooling, we have to also share the cost to generate the income.

73. Based on his knowledge of the dairy industry, Mr. Beausejour found it difficult to understand why BC producers were opposed to a total pooling system. However, he conceded that the BC producers' reluctance may be due to "a problem or a knowledge or culture or few different other things". Finally, in response to a question from Mr. Jansen, Mr. Beausejour confirmed that BC producers as members of the P4 receive approximately $2-$3/HL more for their milk than P5 producers and BC's pooled freight rate of approximately $2.06/HL would be considerably lower than Quebec's pooled rate of $2.33/HL.

74. When comparisons of this sort are made, it is important to make sure that the comparison is valid. While we are aware that BC supports the WMP by contributing $1,800,000 to the PLR, we are unsure whether this was factored into the comparison put to Mr. Beausejour. However, even if that support was not factored in, our calculations suggest that Mr. Beausejour is still correct in his view that BC's pooled rate is significantly lower than Quebec. The Panel prefers Mr. Beausejour's evidence and finds the MDA's arguments that BC is somehow distinct in comparison to other provinces to be unpersuasive.

75. As for a comparison with the other P4 member provinces of the WMP, the Panel did not receive evidence which allows an accurate comparison to be made. While

we are aware that Alberta has a pooled rate of $1.70/HL, its $15.00 stop charge is considerably higher than BC's stop charge of $8.00. Similarly, Manitoba producers pay a pooled rate adjusted monthly (at the time of survey it was $1.52/HL) and a $14.43 stop charge. New Saskatchewan producers pay actual freight costs, however, established producers pay their "old freight rate" but not more than $2.23/HL. There is also an $0.85/HL pool charge over and above established rates for all producers. We heard no argument from any of the parties that a pooled rate of $2.06 would put BC at a competitive disadvantage within the WMP. Finally, the fact that BC enjoys the lowest per HL transporter cost in Canada is a compelling factor in not accepting MDA's arguments.

76. A main argument of the MDA producers in opposition to a total pooling model concerned what they termed the "containment" issue. What this means is that if a total pooling system is implemented, there will be a trend for movement of milk production out of centrally located, low freight areas (such as the Lower Mainland) to high freight areas (with generally lower land, labour and property tax costs). Such a drift of production would cause a net increase in the freight shortfall as more production moved to outlying regions. In support of this argument, MDA's witness Mr. Adams testified that he was aware of one Lower Mainland producer who was acquiring land in the Okanagan where land prices and property taxes were lower, and had also heard of two other producers planning similar moves. However, on cross-examination, Mr. Adams conceded that total milk production in the Fraser Valley has actually increased since 1998 and that had milk quota not been transferred out of the province the increase would have been more significant. In fact, movement of milk has been fairly stable over the past 5 years.

77. The Quebec experience after moving to a total pooling system, as observed by Mr. Beausejour, was no significant exodus of producers out of the high priced land areas into less populated areas. While there has been a small drift of producers to the eastern part of the province, producers accept this; the greater impact on the pool has been caused by increased fuel costs, costs of trucks and vehicle use as well as the closing of regional plants.

78. The Panel is not convinced that freight rates alone would drive a producer to make the move to a different region. The decision to move a significant dairy operation would not be made for the sole reason of saving a few thousand dollars annually in freight. There would have to be some other fundamental business justification for making such a move.

79. The experience of other provinces according to Mr. Adam's own report is that at least for Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia little movement of milk production has been observed since moving to a totally pooled system. Where provinces anticipated a problem arising, policies were put in place limiting a producer's ability to move by making that producer responsible for additional freight charges. Likewise in BC, if the Milk Board felt, based on a reality that was unfolding, that a "containment" policy was warranted, it has the

authority to implement one on terms appropriate to the circumstances. The Panel rejects MDA's argument that "containment" is justification for the Milk Board not moving to a total pooling system.

80. A further factor taken into account by this Panel in determining that a move to a total pooling system is appropriate is a desire to support the public policy objective of maintaining regional milk production within outlying areas. By maintaining production in regions, an undesirable concentration of milk production is avoided, and regional agriculture is preserved. Furthermore, existing processing capacity is supported and the potential for re-establishing processing capacity is not further undermined.

81. There is a tangible benefit to BC in having a reasonably segregated and diversified production base spread throughout the province. Agricultural operations in the Lower Mainland are under increasing pressure from urban sprawl. With ever-encroaching development of residential properties, it becomes increasingly more difficult to farm, especially where that farming involves large numbers of livestock. Manure disposal and odour issues are becoming more and more commonplace. Maintaining agricultural production in less populated areas of the province supports the future of agriculture in BC and promotes long-term stability.

82. A further benefit to moving to a pooled freight rate can be seen by recent events. Since the hearing of this appeal in July 2003, Saputo has announced that it intends to close the Armstrong cheese plant in the Okanagan region, early in 2004. Other regional plants may also close. These types of events are not positive developments for a region. However, a total pooling system would support regional production by sharing the cost of moving milk (previously destined for the cheese plant) out of the zone. Under a totally pooled system, these costs would be borne by all producers and not just those producers who must now move their milk to the Lower Mainland. Without such an arrangement, there is a real risk that the increased cost of freight would negatively impact the industry in outlying regions.

83. There are advantages to bringing certainty and finality to the freight rate issue. The Milk Board has been grappling with this issue for three years. If the Provincial board were to support freight rate caps, the industry dynamic is such that the issue would remain unsettled and there would be further uncertainty and instability. The purchase of Dairyworld by Saputo has brought about fundamental changes to the BC milk industry. A total freight pooling system will give producers more certainty as to how freight rates will be determined and what their freight rates will be. Fluctuations will be attenuated. A total freight pooling system will also allow the Milk Board to get on with the business of regulating its industry. Given that BC is a member of the WMP and given the trend to pooling across several provinces, achieving harmony with the rest of Canada will serve to promote greater industry stability.

84. Finally, the comments made by the Panel relate to the issue of freight rates. None of our comments are to be construed as dealing with the issue of charges and volume discounts. In the past, the Milk Board has set policies regarding charges and volume discounts; the Panel anticipates that it will continue to do so.

ORDER

85. The NIDA appeal of the Milk Board's September 2001 decision to implement a $4/HL freight cap for the Cariboo is allowed.

86. The MDA appeal of the Milk Board's May 29, 2002 decision to implement a $2.50/HL freight rate cap for the Cariboo is dismissed.

87. The Panel orders that the Milk Board implement a total pooling system across the eight Provincial Zones. This system is to be in place no later than August 1, 2004, the commencement of the new dairy year.

88. In the interim, the Milk Board's decision of May 29, 2002 remains in force and full effect until such time as the Milk Board rescinds that order in favour of an order that complies with paragraph 87.

89. Finally, we have considered the question whether, in view of NIDA's success in its principal argument, we ought to order that it be granted some sort of "credit" for having been required to pay rates since September 2001 that are higher than the rate we have deemed appropriate as a matter of sound marketing policy. In our view, the answer is "no" as our decision is, fundamentally, a pure policy decision effecting a change in the industry at large. Quite apart from the accounting complications involved in calculating "credits" for all producers who had to pay more than what the pooled rate would have been, the fact is that this is not a question of NIDA's "rights" having been breached or of the Milk Board having committed a legal "error". What we have decided is a legislative policy question, applicable to the entire industry, to be effective at the commencement of the next dairy year. Having decisively answered that policy question, we are of the view that it is in the best interest of the industry for all parties to move forward in the direction laid out.

90. In the circumstances, there will be no order as to costs.

Dated at Victoria, British Columbia this 19th day of January, 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair