



March 31, 2004

File: 44200-50/MMB 04-03

DELIVERED BY FAX

Allan, Francis, Pringle
Lawyers
Justice Park Place
3009B – 28th Street
Vernon, BC V1T 4Z7
Attention: David L. Schaefer

Macaulay McColl
Barristers & Solicitors
Suite 600
840 Howe Street
Vancouver, BC V6Z 2L2
Attention: Robert Hrabinsky

Dear Sirs:

**AN APPEAL BY PAN-O-RAMIC FARMS (1990) LTD. FROM A DECISION OF THE
BRITISH COLUMBIA MILK MARKETING BOARD REGARDING THE NON-
RENEWAL OF TRANSPORTER CONTRACT**

On March 29, 2004, the British Columbia Farm Industry Review Board (the “Provincial board”) conducted a hearing by way of telephone conference call, supported by written submissions, to consider the application by Pan-O-Ramic Farms (1990) Ltd. (“Pan-O-Ramic”) for a stay pending its appeal from the January 22, 2004 decision of the British Columbia Milk Marketing Board (the “Milk Board”) giving Pan-O-Ramic written notice of the Milk Board’s intention not to renew Pan-O-Ramic’s transporter contract. Pan-O-Ramic’s stay application is made pursuant to section 8(8.2) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (the “Act”):

8(8.2) The Provincial board may order that an order, decision or determination of a marketing board or commission that is under appeal is stayed pending the outcome of the appeal.

The Milk Board opposes the application for a stay. Further, the Milk Board cross-applies for an order summarily dismissing Pan-O-Ramic’s appeal. The Milk Board submits that Pan-O-Ramic has no standing to appeal its decision because Pan-O-Ramic is not “a person aggrieved by or dissatisfied with an order, decision or determination of a marketing board”, within the meaning of s. 8(1) of the *Act*. The Milk Board also argues that Pan-O-Ramic’s appeal should be dismissed at this stage under s. 8(8.3) of the *Act* as being “frivolous, vexatious or trivial”:

8(8.3) On the request of a party to an appeal, the Provincial board may dismiss an appeal as frivolous, vexatious or trivial.

British Columbia
Farm Industry Review Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
3rd Floor, 1007 Fort Street
Victoria BC V8V 3K5
Email: firb@gems9.gov.bc.ca
Website: www.firb.gov.bc.ca

BACKGROUND

Pan-O-Ramic has operated a business as a transporter of milk in the interior of BC since 1999, when it acquired its transporter license from the Milk Board. Its operation consists of yard facilities with a tank trailer washer, a tractor trailer unit and a food grade milk trailer.

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.

In response to Saputo's decision, the Milk Board made the significant regulatory decision that effective October 1, 2001, the Milk Board would become the first receiver of milk, and consequent to this developed an equalisation program to address the costs of milk transportation within the province.¹ This was further to the Milk Board's power to "promote, regulate and control" milk transportation "in any and all respects" (*British Columbia Milk Marketing Board Regulation*, B.C. Reg. 167/94, section 7(1)) and various provisions of s. 11 of the *Act*, including s. 11(1)(r), which empowers the Milk Board to purchase a regulated product.

The Milk Board's decision to become the first receiver of the regulated product necessarily required regulatory judgment to be exercised in order to ensure that the milk it purchased was collected and properly transported from those farms to the new processor, Saputo. To this end, the Milk Board made the further regulatory decision, as expressed in its *Consolidated Order*, that any existing or future holder of a transportation licence would, as a condition of that licence, be required to enter into "agreements" with the Board, which agreements contained such terms and conditions as the Milk Board considered appropriate to ensure that milk transportation takes place in accordance with sound marketing policy.

One such agreement was the September 25, 2001 Agreement the Milk Board entered with the licensee Pan-O-Ramic. The inextricable link between the licence, the Agreement and the Board's regulatory responsibilities is reflected in the recitals to the Pan-O-Ramic Agreement:

WHEREAS:

- A. The Board is a marketing board continued pursuant to section 3 of the *British Columbia Milk Marketing Board Regulation* (B.C. Reg. 167/94) made under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330;
- B. The Company owns or operates a vehicle or vehicles for the transportation of Milk in bulk;
- C. Pursuant to the Board's *Consolidated Order*, as amended from time to time, no Person shall act as a Transporter unless in possession of a current and subsisting licence of the applicable class issued by the Board to a Person in good standing with respect to each and every requirement therefor (sic); and

¹ The Milk Board's equalisation program was subsequently appealed to the Provincial board and was the subject of an extensive hearing and a recent appeal decision: *Northern Interior Dairyman's Association v. British Columbia Milk Marketing Board et al* (January 19, 2004).

- D. Pursuant to the Board's Consolidated Order, as amended from time to time, the holder of a Class "H" and Class "H-FED" Transporter licence must, with respect to the transportation of Milk other than Commercial Export Milk, enter into a written agreement with the Board concerning the terms and conditions of transport;

NOW THEREFORE the parties hereto agree as follows.... [emphasis added]

The Agreement contains various terms, including paragraph 3, which requires the Company to "attend at the dairy farm of such Producers as may be assigned to the Company by the Board from time to time...", and paragraph 9, which provides that "The Company shall abide by all Board directions, including any direction made by the Board from time to time to deliver written materials to all or any of those Producers assigned to the Company pursuant to paragraph 3 herein, and shall abide by the applicable provisions of the *Milk Industry Act*, the *Natural Products Marketing (BC) Act*, and the Board's *Consolidated Order*, all as amended from time to time." The language of these paragraphs, read with the recitals, leaves no doubt that the terms of the agreement are a regulatory mechanism by the Milk Board to ensure that the regulatory objective of ensuring seamless and efficient milk marketing is achieved.

In this context, paragraph 15 of the Agreement provides that the Agreement, which operates on terms of three months, shall "automatically be renewed" unless either party gives 2 months notice. Paragraph 16 provides that it may also be terminated for any of the reasons set out in that paragraph:

Commencement and Term

15. This Agreement shall come into effect on October 1, 2001 and, subject to the terms hereof, shall continue for a term of 3 months and thereafter shall automatically be renewed for further consecutive terms of 3 months each unless either party gives to the other written notice of non-renewal at least 2 months prior to the end of the then current term.

Termination

16. This agreement may be terminated immediately by notice in writing given to the Company by the Board:
- (a) in the event of any default by the Company of its obligation to abide by any Board direction regarding the transportation of Milk, or of its obligation to abide by any applicable provision of the *Milk Industry Act*, the *Natural Products Marketing (BC) Act*, or the Board's *Consolidated Order*, all as amended from time to time;
 - (b) in the event that the Company has notified the Board of any possible or impending strike by the Company's employees, agents or Operators;
 - (c) upon the attempted assignment by the Company of this agreement or any of its rights or obligations hereunder without the previous written consent of the Board; or
 - (d) in the event that the Company ceases to function as a going concern, or otherwise continues to operate through a receiver appointed with respect to it, or in the event that the Company makes a proposal or an assignment for the benefit of creditors.

Pan-O-Ramic has operated under the terms of this agreement since September 2001. However, by letter dated January 22, 2004, the Milk Board advised Pan-O-Ramic that:

Consistent with Section 15 of the agreement commonly referred to as the Transporter Contract...notice is hereby provided that the "agreement" will not be renewed at the end of the current term – March 31, 2004....

The reasons for the BCMMB deciding that the "agreement" is not to be renewed are best characterized as ones that pertain to overall performance matters.

Pan-O-Ramic appealed this decision by letter dated February 19, 2004. It seeks to appeal on the basis that the Milk Board never told Pan-O-Ramic what "performance matters" were of concern to the Milk Board, thus raising what appears to be a procedural fairness argument. Pan-O-Ramic further states that it has a reasonable expectation of renewal unless the Milk Board has a good reason for non-renewal, which appears to be both a fairness and a policy argument. Questions as to the policy justification for the Milk Board's decision are also reflected in Pan-O-Ramic's argument that the firm it believes the Milk Board has been identified to replace Pan-O-Ramic operates with several non-compliance issues.

ARGUMENTS

As noted above, the *Act* gives the Provincial Board authority to stay an order, decision, or determination of a marketing board under appeal: s 8(8.2).

Pan-O-Ramic's argument for a stay is quite straightforward. Pan-O-Ramic has held a transporter license since 1999. Originally, it contracted with producers and processors to deliver milk. Since September 2001, it has, as required by the Milk Board's *Consolidated Order*, signed a contract with the Milk Board to perform those same services. In order to operate as a transporter of milk, Pan-O-Ramic has expended considerable funds. As recently as December 2003, in response to Milk Board requests, it has upgraded its facilities. Pan-O-Ramic has never received notice of any non-compliance or performance issues. In the absence of such notice, Pan-O-Ramic maintains that it has a reasonable expectation that its contract for services will be renewed on an on-going basis. Pan-O-Ramic argues that the Milk Board's decision to not renew the contract is reviewable and as such it is entitled to a full appeal hearing on the merits.

The Appellant notes that it would have been preferable for the appeal hearing to take place before the end of March, but this is not possible due to Milk Board members and staff being unavailable. Pan-O-Ramic says if the agreement is allowed to expire prior to the appeal hearing, the effect would be to in effect decide the merits of the appeal in that the Agreement would be terminated before the appeal is heard.

The Milk Board strongly opposes Pan-O-Ramic's application. The Milk Board argues that the Provincial board would be descending down a "slippery slope" if it chose to make "private contracts freely entered into" the subject of an appeal. This is not a case where the Appellant's licence has been cancelled nor has its contract been terminated under paragraph 16 of the contract. Rather the Milk Board has exercised its right under paragraph 15 to give notice that the contract will not be renewed upon the expiration of its term. The Milk Board argues that the stay

sought by the Appellant is unfounded. Rather than seeking to preserve the *status quo*, the Appellant seeks to compel the Milk Board to enter into a new contract. As it does not have the legal right to do so, there is no serious issue to be tried.

Likewise, there is no irreparable harm as the Appellant does not assert a legal right and a breach thereof. The contract has simply run its course. As for the balance of convenience, the Milk Board argues that where a stay is aimed at a public authority such as a commodity board, the public interest must be taken into consideration. Given what is at issue here is the sanctity and certainty of contracts entered into by the Milk Board, the balance of convenience favours the Milk Board. To hold otherwise would jeopardise the Milk Board's ability to enter into any contract. Given that a stay effectively gives the Appellant the right to unilaterally impose new contractual terms and obligations on the Milk Board, the Milk Board argues that this application should be dismissed.

In its cross-application, the Milk Board argues, for many of the same reasons as it advances to oppose the stay, that Pan-O-Ramic is not a person aggrieved within the meaning of s. 8(1) as, by definition, a person aggrieved is one who has had his legal rights infringed. In this case, Pan-O-Ramic has no legal right to compel the Milk Board to enter into a contract. The Milk Board also argues that Pan-O-Ramic is not "dissatisfied" within the meaning of s. 8(1), for two reasons. The decision to not renew the contract is purely administrative and does not concern a matter of policy or an exercise of the Milk Board's regulatory jurisdiction. Further, while Pan-O-Ramic may have a strong desire to have a contractual relationship with the Milk Board, this is no more a "personal interest" than that of anyone else who would like to contract with the Milk Board.

For similar reasons, the Milk Board argues that Pan-O-Ramic's appeal should be dismissed as being frivolous, vexatious or trivial. The Milk Board's decision is purely administrative, the appeal does not concern a matter of policy or an exercise of the Milk Board's regulatory jurisdiction, it does not allege a legal right to compel the Milk Board to enter into a contract and Pan-O-Ramic is neither aggrieved or dissatisfied within the meaning of s. 8(1) of the *Act*.

DECISION

Having summarised and carefully considered the Milk Board's submissions, we find that the fundamental proposition lying at the heart of its argument is that the Milk Board's action in this case is not a "decision" within the meaning of s. 8(1), and hence not reviewable by this Board on appeal. In our view, the success of this argument must stand or fall on whether the Milk Board's January 22, 2004 letter is, as argued by the Milk Board, "purely administrative" in nature, or whether it represents an exercise of the Milk Board's regulatory authority.

In our view, it is inaccurate to characterize the Milk Board's action in this case as the mere giving of notice under a "private agreement". We respectfully disagree with the suggestion that this agreement is like a contract for janitorial or accounting services. As described in the "Background" section of this decision above, the Agreement in this case flows from and is

inextricably linked with the Milk Board's public, regulatory responsibility to ensure that the milk it purchases from producers is transported to the processor for processing, by persons who meet a need and are considered fit to do so as a condition of licensing.

The milk industry is highly regulated, and the Milk Board has been given broad regulatory powers to achieve its regulatory ends. As section 7(1) of the *British Columbia Milk Marketing Board Regulation*, B.C. Reg. 167/94 makes clear, the Milk Board's broad powers extend to promoting, regulating, controlling and prohibiting in any and all respects the transportation of milk:

7(1) Subject to subsection (2), the board is vested with the power to promote, regulate and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of a regulated product within British Columbia, including the prohibition of production, transportation, packing, storage and marketing, or any of them, in whole or in part, and is vested with all powers necessary or useful in the exercise of those powers.

(1.1) Without restricting subsection (1), the board is vested with the powers set out in section 11(1)(a) to (v) of the Act. [emphasis added]

Without limiting the generality of s. 7(1) of the *Milk Marketing Board Regulation*, the power incorporated by reference from section 11(1)(b) of the *Act* empowers the Milk Board to "determine the manner of distribution" of a regulated product that is to be transported. Section 11(1)(f) empowers the Milk Board to "require persons engaged in the ... transporting ... of a regulated product to register with and obtain licences from the marketing board..." Section 11(1)(r) empowers the Milk Board to "purchase a regulated product in relation to which it may exercise its powers and package, process, store, ship, insure, export, sell or otherwise dispose of the product purchased by it."

Within this regulatory context, the Board's *Consolidated Order* requires the Appellant to hold a transporter licence to lawfully transport milk. It further requires that before a licence holder may lawfully transport milk, that holder must enter into an agreement with the Board respecting the "terms and conditions" of transport. The licence and the agreement are thus woven together by the Milk Board's own *Consolidated Order*. The licensee must enter into an agreement as a condition of holding the licence. The terms of the agreement, in substance and as a matter of regulatory reality, become incorporated as terms and conditions of lawful transport under the licence itself and thus serve the end of "controlling" the terms and conditions of milk transportation, pursuant to s. 7 of the *Milk Marketing Board Regulation*. Without an agreement, the licence becomes an empty shell. A transporter contract cannot be viewed as a pure private contract as it flows directly from and is a direct exercise of the regulatory backdrop created by the *Milk Marketing Board Regulation* and the various licencing requirements imposed under the *Consolidated Order*.

The terms of the Agreement, read with the recitals, make clear that their purpose is not to serve the private, administrative needs of the Milk Board, but rather are designed as a regulatory mechanism to ensure that the regulatory objective of ensuring seamless and efficient milk transportation – a key element in the chain of regulated marketing – is achieved. The Agreement,

and decisions taken pursuant to it respecting a licenced transporter who was required to sign the Agreement, are clearly in the nature of regulation. The relationship between the Appellant's licence and the Agreement are such that Milk Board action to terminate the Agreement affects the privileges granted by the licence. It follows that Milk Board action to terminate the agreement directly impacts on the licence, and is appealable to this Board as a "decision" or "determination" covered by s. 8(1) of the *Act*.

The contrary argument advanced by the Milk Board, which seeks to unravel the Agreement from the licence and from all the Board's regulatory powers, is artificial. In our view, it is also contrary to the purpose of s. 8(1), as it raises the spectre of marketing boards using agreements as a device to successfully "contract out" of appellate review by this Board. To accept such an argument in this case would undermine the language and purpose of section 8, and allow form to triumph over substance.

The Milk Board has emphasized that Pan-O-Ramic has no "legal right" to an agreement with the Milk Board, and says it would set a dangerous precedent for this Board to hear an appeal that has the prospect of creating a new agreement where a previous agreement has simply "expired".

With regard to the "legal right" point, no one has a legal "right" to licences, permits or quota either, but there is no question that the Milk Board's decisions to limit any of those regulatory mechanisms is reviewable by this Board on appeal. Furthermore, it is wrong to characterize this case as one involving an agreement that merely "expired". The agreement, consistent with the regulatory approach used in many types of licences and permits, operates on a presumption of automatic renewal. "Expiry" requires a positive act by the Milk Board to interrupt that cycle. The Milk Board cannot, by arguing that its action arises from an agreement, escape appellate review of affirmative action which takes place in a regulatory context anymore than another commodity board would be able to if the wording in paragraph 15 of this agreement were written in a licence document itself.

If, as we have found, the Milk Board's action is reviewable, it follows that the Appellant must be found to be a person "dissatisfied" with the Milk Board's decision. The January 22, 2004 decision terminates the Appellant's ability to exercise the privileges of its transporter licence.

In making these findings, the Panel wishes to emphasize two points. First, we are not ruling that every decision made by a commodity board under an agreement is reviewable by this Board on appeal. However, the Agreement is inextricably linked with the exercise of Pan-O-Ramic's rights under the licence, and it follows in our view that the Milk Board's decision to take such action is a decision that is subject to review. Second, whether this appeal will succeed on the merits has not been decided. We have made no finding that the Milk Board was wrong in giving the Appellant notice under the Agreement. The appeal on the merits will decide whether the Milk Board had a duty to give the Appellant notice and a chance to be heard before terminating

the Agreement², or whether, having advised the Appellant that “overall performance matters” triggered the notice, the Appellant should receive a remedy if the Panel finds that the overall performance matters referred to by the Milk Board are not valid or did not justify giving notice not to continue the Appellant’s ability to operate as a transporter. The sole finding we make at this stage is that this is an appealable decision, and the appeal does not meet the test for summary dismissal.

Having dismissed the application for summary dismissal, we turn to the stay application. In our view, the case for a stay is compelling. The primary reason this appeal is not being heard in March is because the Milk Board is not available before the March 31 “expiry”. Should a stay not be granted and should the Appellant be successful on appeal, serious remedial issues would flow from the fact that any such remedy would have the potential to harm innocent third parties – most notably the new transporter and producers – who are not parties to this appeal. In light of this factor, and given as well that (1) the Panel is prepared to move ahead with this appeal expeditiously, (2) the agreement would have automatically renewed but for the Milk Board action under appeal, and (3) the circumstances here are localized and particular, it is our view the balance of convenience clearly favours granting the stay pending appeal.

ORDER

The application for a stay of the January 22, 2004 decision giving notice of termination is granted. The Milk Board’s application to summarily dismiss this appeal is denied.

The parties are directed to contact Vicki White of the Provincial Board to advise of their available dates. At this point a one-day hearing would appear adequate.

Dated at Victoria, British Columbia, this 31st day of March 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

cc: Tom Demma, General Manager
British Columbia Milk Marketing Board

² See for example, *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311, and *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.