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File: 44200-50/MMB #08-02

DELIVERED BY E-MAIL

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**AN APPEAL REQUESTING A REPEAL OF SECTION 5 OF SCHEDULE 6 OF THE
*BRITISH COLUMBIA MILK MARKETING BOARD CONSOLIDATED ORDER***

Dear Sirs:

On February 20, 2008 the British Columbia Farm Industry Review Board (BCFIRB) received an appeal filed by Saputo Inc. (Saputo) from a letter written by counsel for the Milk Board dated January 21, 2008. In its appeal, Saputo amongst other things seeks a Repeal of Section 5 of Schedule 6 of the *British Columbia Milk Marketing Board (Milk Board) Consolidated Order* and reimbursement of Accommodation Levies paid pursuant to Section 5.

As a result of BCFIRB's review of Saputo's Notice of Appeal, two preliminary issues were identified for further clarification in advance of further procedural steps in the appeal:

- 1) What is the order, decision or determination of the Milk Board that is the subject of this appeal?
- 2) If the date of that order, decision or determination is more than 30 days prior to February 20, 2008, are there any special circumstances that exist for extending the filing date of the appeal?

As Panel Chair, I have received and reviewed the following submissions:

- a) Saputo submissions dated March 25, 2008
- b) Milk Board submission dated March 28, 2008
- c) Saputo submission dated April 8, 2008

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DECISION

Saputo takes the position that the decision under appeal is a January 21, 2008 letter from counsel for the Milk Board written in response to Saputo's December 21, 2007 and January 17, 2008 request for repeal of Section 5 of Schedule 6 of the *British Columbia Milk Marketing Board* (Milk Board) *Consolidated Order* and reimbursement of accommodation levies paid pursuant to Section 5.

The content of the January 21, 2008 letter from counsel for the Milk Board is remarkably similar to his January 4, 2008 letter. Both letters state that as Saputo appears to be taking issue with the substance and *vires* of the Accommodation Levy enacted September 1, 2001, the proper course was for Saputo to apply to BCFIRB for an order extending the time to file its appeal setting out any special circumstances for the late filing of the appeal as required by s. 8.1(1) of the *Natural Products Marketing (BC) Act (NPMA)* and s. 24(2) of the *Administrative Tribunals Act (ATA)*.

Saputo disagreed with this approach and filed its appeal of the January 21, 2008 letter maintaining that as the Accommodation Levy is a continuous order, the Milk Board has power to repeal, vary or modify it at any time. Further, Saputo argues that it can request that the Milk Board exercise its power to repeal, vary or modify its order at any time. To the extent that the January 21, 2008 letter can be seen as a refusal on the part of the Milk Board to consider the request for rescission and reimbursement, Saputo argues that the refusal is a determination or decision that can be appealed. Given Saputo's foregoing position, it argues that the appeal was filed in time and s. 8.1(1) of the *NPMA* and s. 24(2) of the *ATA* have no application and as such no special circumstances need be considered.

The Milk Board observes that Saputo has not offered any special circumstances to justify an extension of the time for filing an appeal and instead relies on the argument that the January 21, 2008 letter is a decision or determination of the Milk Board that creates a right of appeal. The Milk Board argues that the January 21, 2008 letter which simply advises Saputo to apply to extend the time for filing its appeal of the Accommodation Levy is not in the nature of a decision, determination or order of the Milk Board. Further, the Milk Board argues that if an appeal is properly taken from the January 21, 2008 letter, the issues on appeal are incomprehensible: whether the Levy has been in effect since September 2001 or whether special circumstances exist to challenge the Levy. Finally, the Milk Board argues that if an appeal is properly taken from the January 21, 2008 letter, is the appeal out of time in any event as the same advice was given on January 4, 2008?

The Milk Board observes that it appears that Saputo takes issue with the Accommodation Levy. However, the letter of January 21, 2008 does not impose a levy; that was done in 2001. In addition, Saputo appears to take issue with the *vires* of 6 year old Levy Order and argues that passage of time cannot cure a null order. However, the Levy Order is not under appeal.

The Milk Board argues that the appeal as articulated by the Appellant serves no useful purpose and therefore seeks an order that the appeal is frivolous, vexatious and trivial and as such pursuant to s. 8.1(1) of *NPMA* and s. 31(1)(c) and(f) of *ATA*, it should be summarily dismissed.

I have started my analysis by accepting the Appellant's position that it is appealing the January 21, 2008 letter from counsel for the Milk Board. However, I find I must agree with the Milk Board that a letter from counsel which in effect gives advice on how to properly commence an appeal can not be taken as a "order, decision or determination" of the Milk Board. Further, I do not accept the argument that the letter can be seen as "decision or determination" by the Milk Board not to grant Saputo the relief it sought in its December 21, 2007 letter i.e. rescission of the Levy Order and reimbursement of levies. I find that the letter is an acknowledgement by the Milk Board that if Saputo wants to take issue with the Accommodation Levy, Saputo will need to demonstrate special circumstances as to why it has waited six years to raise this issue.

I do not accept that an Appellant can, simply by writing a letter to a commodity board objecting to a given order or seeking clarification, generate a right of appeal. A similar issue arose in *Klaas Korthuis dba Try Poultry Farms. v British Columbia Chicken Marketing Board* October 18, 1999, where Mr. Korthuis sought clarification of his quota holdings from the Chicken Board and then used the clarification letter as a basis to challenge the underlying quota orders which had been enacted several years earlier. In my view, it is improper for aggrieved persons to attempt to "breathe life" into an appeal merely by requesting that a board reconsider an issue. If a person has a legitimate complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period. This is especially important where it is the regulatory framework that is challenged. Certainty and stability require that appeals be heard on a timely basis. Where the time to appeal is missed, it is incumbent on the Appellant to show special circumstances why the time to file the appeal ought to be extended.

Given that I do not accept that the January 21, 2008 letter is an "order, decision or determination" of the Milk Board, it follows that there is no associated right of appeal. Accordingly, the appeal is dismissed. If I am wrong in my conclusion that the January 21, 2008 letter is not an "order, decision or determination" of the Milk Board, I find that there is merit to the argument that the January 21, 2008 letter is simply a restatement of the January 4, 2008 letter and as such any right of appeal was created on January 4, 2008. The Notice of Appeal which was not received until February 20, 2008 is clearly outside the 30 day time limit prescribed and as such is out of time. Saputo has not offered any special circumstances for why it missed the 30 day time limit and accordingly, I would have dismissed the appeal on that basis.

Dispensing of the appeal is not the end of the matter. Both parties recognised the funding of the Accommodation Levy as a significant policy issue and invited BCFIRB to undertake a

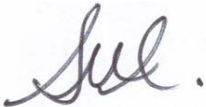
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supervisory review. Indeed, while some of the submissions were framed in legalistic terms in an attempt to advance an appeal, a careful review of those arguments suggests that beneath them are fundamental policy issues that are appropriate for supervisory review.

There is no single method by which BCFIRB exercises its supervisory mandate. In my view, it is appropriate as a first step that a review of the Accommodation Levy policy be undertaken by the Milk Board before any further process and decision-making by BCFIRB. The Milk Board, as the first instance regulator of the milk industry, has detailed information about the background and operation of the Accommodation Levy, and is appropriately placed to provide a considered report to BCFIRB on the merits of the issues raised by Saputo, including the advantages and disadvantages of adopting the course of action Saputo proposes. The Milk Board is encouraged to consult fully to ensure its views are informed by the input of all industry stakeholders.

In the circumstances, I direct the Milk Board to forward to BCFIRB its review of the Accommodation Levy within 120 days of the date of this decision. Once the Milk Board has completed this first step, BCFIRB will be in a position to determine what further steps, if any, are necessary to complete its supervisory process.

Yours truly,

A handwritten signature in cursive script, appearing to read "Sulmi".

Sandra Ulmi
Panel Chair