



September 16, 2008

File: 44200-50/MMB #08-05

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**RE: SAPUTO INC. V. BRITISH COLUMBIA MILK MARKETING BOARD APPEAL 08-05:
REQUEST FOR THE REPEAL OF “PART VII-ALLOCATION OF MILK SUPPLY AMONG
VENDORS” OF THE BRITISH COLUMBIA MILK MARKETING BOARD *CONSOLIDATED
ORDER***

INTRODUCTION

The appellant, Saputo Inc. (Saputo) has appealed the May 13, 2008 amendment of “Part VII-Allocation of Milk Supply Among Vendors” (sections 27 to 29.3) of the *Consolidated Order* (Order) of the British Columbia Milk Marketing Board (Milk Board). The amendment implements the adoption by the Milk Board of a traditional allocation policy (TA Policy) in place of its previous discretionary allocation policy.

Saputo has advanced a number of grounds of appeal that it has labelled A through E:

- A. The TA Policy has been adopted in contravention of the Milk Board’s commitment to Saputo and Saputo’s legitimate expectations.
- B. Sections 27(3)(a), 27(4)(c) and 29(1) of the TA Policy are designed to increase the amount of the discretionary milk pool that can be freely allocated by the Milk Board by increasing the volume of unallocated milk.
- C. Section 27(4)(a) creates an improper link between plant of last resort (PLR) services and the milk-on-demand system.
- D. Section 27(5)(f) creates an invalid penalty.
- E. Sections 27(5)(g) and 29.2(3) grant the Milk Board unfettered and discretionary powers to reduce and restrict the traditional allocation of any dairy processor for no legitimate reason.

The same labelling is used here for reference purposes.

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Farm Industry Review Board

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Pursuant to section 8.1(1) of the *Natural Products Marketing (BC) Act (NPMA)* and sections 24(1) and 31(1)(b), (c) and (f) of the *Administrative Tribunals Act (ATA)*, the Milk Board has applied for summary dismissal of some or a portion of some but not all of the above grounds of appeal.

The Milk Board makes no application with respect to appeal ground A advanced by Saputo. It challenges the remaining grounds of appeal B through E as those grounds pertain to certain sections of the Order as amended, on the basis that they are time-barred and/or are frivolous, vexatious and trivial and have no reasonable prospect of success.

RELEVANT STATUTORY PROVISIONS

Pursuant to section 8.1(1) of the *NPMA*, sections 24 and 31 of the *ATA* are applicable to this appeal.

The relevant portions of sections 24 and 31(1) of the *ATA* are:

Time limit for appeals

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

Summary dismissal

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(b) the application was not filed within the applicable time limit;

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

(f) there is no reasonable prospect the application will succeed;

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

DECISION

Time-Barred Application under Section 31(1)(b)

The Milk Board argues that the parts of the appeal relating to the following sections of the amended Order and grounds of appeal have not been filed within the applicable time period and should be summarily dismissed:

- section 27(4)(c) under ground B
- section 27(5)(f) under ground D
- section 27(5)(g) under ground E.

The Milk Board submits that these sections have existed in the Order, substantially unchanged, since 2001 and the appeal with respect to them is clearly out of time.

Saputo argues that:

- The impugned sections of the TA Policy are not identical to the corresponding provisions in the previous milk supply allocation policy and constitute new provisions.
- Even if the impugned sections are found to be identical to the previous sections, the TA Policy represents a “fresh decision” of the Milk Board in May 2008.
- No limitation period can apply to a challenge on *ultra vires* grounds.
- Special circumstances exist entitling Saputo to an extension of time to appeal in any event.

I have considered all of the time-barred submissions. I reject the time-barred arguments of the Milk Board but for somewhat different reasons than any of those advanced by Saputo.

I find the May 2008 amendment of the Order implementing the TA Policy effected an overall policy change, replacing the previous discretionary allocation policy with a traditional allocation policy. While the implementation of the new TA Policy in the Order resulted in the use of some of the same or very similar wording in certain sections, I find the adoption of the new TA Policy by the legislative act of amending Part VII of the Order constitutes in its entirety a new order of the Milk Board. I distinguish this from the “fresh decision” cases cited by Saputo which concern actions of an administrative nature involving what are really reconsiderations of previous administrative decisions. In the present instance, the amendment of the Order in May 2008 is an entirely new legislative act. It is neither feasible nor appropriate to carve out parts of that amendment on the basis that similar or even identical wording was previously used in Part VII of the Order with respect to the previous allocation policy.

Application under sections 31(1)(c) and (f): Frivolous, Vexatious and Trivial and Having No Reasonable Prospect of Success

The Milk Board argues that the following parts of the appeal should be summarily dismissed under section 31(1)(c) and (f) of the *ATA* because they are frivolous, vexatious and trivial and have no reasonable prospect of success:

- section 27(4)(c) under ground B
- section 27(4)(a) under ground C
- section 27(5)(f) under ground D
- section 27(5)(g) under ground E.

Saputo argues that the Milk Board’s allegations in this regard are without merit. Saputo notes that it has, in any event, challenged all of these provisions pursuant to section 9(2) of the *NPMA* on the basis that they are contrary to sound marketing policy. Saputo argues it is inappropriate to attempt a determination of soundness in the context of a summary dismissal action.

I have carefully reviewed the submissions and observe that, for what are alleged to be frivolous, vexatious or trivial matters having no reasonable prospect of success, much paper and ink has been expended by both parties advancing what appear to be fairly substantive arguments pro and con as to the nature of each matter and its likelihood of success. In light of the foregoing, I reject the Milk Board’s application under sections 31(1)(c) and (f).

The challenge to section 27(4)(c) under ground B of the appeal assumes that the time-barred argument will be successful and that it is only those parts of the section that vary from the previous similarly worded section that are appealed. Were this the case, since the differences are insignificant, I agree the appeal would be frivolous, vexatious and trivial. However, with the failure of the time-barred argument, this argument too must fail since it is the entire section 27(4)(c) that is the subject of appeal and not only the differences.

The challenge to the remaining sections under grounds C, D, and E raise issues relating to sound marketing policy, whether a provision is in the nature of a penalty, the point of time at which it is appropriate to challenge an order of the Milk Board, and the extent of legislative discretion versus administrative discretion. These are complex matters and on their face I do not consider the issues raised to be frivolous, vexatious or trivial. Nor do I consider it appropriate to assess prospects of success on any of these matters in a summary proceeding. I note further that many of the Milk Board's arguments in support of summary dismissal turn on an acceptance that the provisions are consistent with and reflective of sound marketing policy. In my view, this is a central issue to be addressed on this appeal and it can only be dealt with in a full hearing context after all relevant evidence has been presented and full argument made.

CONCLUSION

The Milk Board's application for summary dismissal of all or parts of grounds B, C, D, and E of the appeal is dismissed in its entirety.

British Columbia Farm Industry Review Board
Per

A handwritten signature in black ink, appearing to read 'S K Wiltshire', is written over a light blue rectangular background.

S K Wiltshire
Panel Chair