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DELIVERED BY EMAIL

Dwayne Schwaerzle
Windhaven Holsteins

Ken McCormack, General Manger
BC Milk Marketing Board

DWAYNE SCHWAERZLE v THE BC MILK MARKETING BOARD
APPEAL #09-01 - APPLICATION FOR SUMMARY DISMISSAL

Introduction

The appellant, Dwayne Schwaerzle, filed a notice of appeal with respect to a December 29, 2008 letter to him from the respondent British Columbia Milk Marketing Board. The notice of appeal was received by the British Columbia Farm Industry Review Board (BCFIRB) on January 29, 2009.

The Milk Board has applied for summary dismissal of the appeal pursuant to section 31(1)(b), (c) and (f) of the *Administrative Tribunals Act*, S.B.C. 2004, c.45 (ATA):

> **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; …

Section 24 of the ATA provides that a notice of appeal must be filed within 30 days of the decision being appealed. It also provides that the tribunal may extend the time to file a notice of appeal if satisfied that special circumstances exist.

The submissions of both parties on the application for summary dismissal have been considered by the panel. The Milk Board makes application for summary dismissal on several grounds and these are

discussed in the Analysis section below. The appellant argues that his appeal was filed in time, that the appeal arises not out of his actions but because of the regularization of Graduated Entry Program (GEP) quota by the Milk Board and that it is important that his appeal be heard.

Background

The appellant has identified the Milk Board's December 29, 2008 letter as the "decision" that he is appealing. In that letter the Milk Board noted that the appellant had applied to transfer into his name 17,682 kg of Other Total Production Quota and 6,350 kg of GEP Total Production Quota from Anthony Arkesteyn (the GEP entrant). The Milk Board advised that the transfer application had been approved subject to certain conditions. The Milk Board also wrote:

> Following the completion of the above Regularization and transfer of TPQ, in accordance with the B.C. Milk Marketing Board Consolidated Order of November 1, 2006, as amended, Schedule 1, Section 2(2)(e) (copy attached), as advised by letter November 7, 2008, you are no longer eligible to be on the Graduated Entry Program Wait List, and, therefore, effective January 1, 2009, your name will be removed from the Wait List.

In the notice of appeal, the appellant identified the reason for his appeal as being the removal of his name from the GEP wait list as a result of the recent GEP Regularization process that put quota into his name. He wrote:

> The Milk Board has been clearly aware for the past 4 years of my leasing quota. I feel that at no time I have owned quota and should not be penalized due to the changes by the Milk Board.

The appellant requested that BCFIRB direct the Milk Board "to reinstate my name back onto the GEP Wait List or find an amicable solution".

The December 29, 2008 letter from the Milk Board refers to a November 7, 2008 letter. This earlier letter was addressed to Mr. Schwaerzle in reference to the GEP wait list. In that letter the Milk Board advised that the GEP quota registered in the name of the GEP entrant would be registered in Mr. Schwaerzle's name as the actual shipper of the quota as provided for under the Milk Board's Regularization program for GEP quota. The November 7, 2008 letter stated further:

> We also note that your name appears on the GEP Wait List and save for the GEP Regularization decision would qualify as a bona fide Entrant to the GEP. As a direct result of the GEP Regularization you are now a quota holder and no longer qualify for the Wait List. Consequently, your name will be removed from the Wait List effective the completion date of the Name Change transfer application for the GEP Regularization.

The Milk Board in its summary dismissal application notes that the appeal has been brought forward by the appellant on the notion that his ineligibility to remain on the GEP wait list is a result of the regularization of an otherwise impermissible arrangement between the appellant and the original GEP entrant and the formal allotment of Total Production Quota (TPQ) to the appellant. The Milk Board submits that while this notion was reinforced by the Milk Board's letter of November 7, 2008, in reality this appeal concerns the eligibility restrictions with respect to the GEP wait list as set out in Schedule 1 to the Consolidated Order (GEP Rules). Specifically, it is the restrictions set out in rule 2(2)(e) of the GEP Rules which render the appellant ineligible to remain on the wait list because of his pre-existing direct or indirect interest in TPQ as evidenced by the "Purchase Agreement" entered into

between the appellant and the previous quota holder dated January 31, 2005. The appellant in his notice of appeal describes this arrangement as a "lease" of quota.

The Milk Board submits that it is this interest, which by the appellant's own admission existed for at least four years, which renders the appellant ineligible for the GEP wait list. Therefore, the Milk Board argues that at the time of the regularization of the GEP TPQ, the appellant was already ineligible to be on the GEP wait list.

Rule 2(2)(e) of the GEP Rules concerning eligibility to apply to participate in the GEP provides:

> (2) A Person seeking to participate in the program must have the following qualifications:
> ….
>
> (e) neither the applicant nor the Spouse of the applicant may have, or have had at any time, any financial interest in Total Production Quota, or any other licence, permit or quota issued, allotted or granted by any other supply management commodity board or commission in British Columbia, whether directly or indirectly, or through any organization or entity.

This provision of the GEP Rules has been in effect since November 1, 2006. Prior to that time the GEP Rules provided that neither an applicant nor the spouse of an applicant was to have "any financial interest in any other TPQ, directly or indirectly, through any organization or entity".

Analysis

The Milk Board seeks summary dismissal on two substantive grounds and one procedural ground. The panel will address the substantive issues first.

1. BCFIRB Directions

The Milk Board submits that section 2(2)(e) of the GEP Rules while "administratively" reduced to a Milk Board order, is merely a reflection of specific supervisory directions of BCFIRB in the context of its supervisory review of specialty production and new entrant programs. In this regard, we are referred to the first direction in section 5.12 of BCFIRB's September 1, 2005 report entitled *Specialty Market and New Entrant Submissions Policy, Analysis, Principles and Directions* and BCFIRB's letter of May 3, 2007 which provides further supervisory directions with respect to new entrant eligibility. These directions are set out in the Milk Board's application.

We are also referred to BCIRB's letter of May 30, 2006, in particular to the following paragraph addressing rights of appeal in connection with its supervisory directions:

> **Future Process and Rights of Appeal**
> The terms of commodity board orders which have been issued as a result of the supervisory directions FIRB issued in September 2005 cannot be appealed to FIRB. However, persons do have a right to appeal to FIRB their own special circumstances or other issues related to the administrative implementation of a commodity board's orders (where a board has exercised its discretion and makes an independent decision as to how a FIRB direction will be implemented or applied). As an example, FIRB has directed that levies "should be based on the cost of

> providing the service." An order implementing that direction cannot be appealed to FIRB. However, a producer of a certain class of product could appeal an order, decision or determination of a commodity board to impose a levy on the grounds that the levy was not based on actual service provided to that class of quota holder.

The Milk Board submits that the eligibility requirements set out in section 2(2)(e) of the GEP Rules were approved by BCFIRB as being consistent with its specific supervisory directions. As such, the Milk Board submits that the matter of eligibility is in all relevant respects a decision of BCFIRB and not the Milk Board and should therefore be dismissed pursuant to section 31(1)(c) and (f) of the ATA, consistent with the principles set out in *Salmon Arm Poultry Farm Ltd. v. British Columbia Egg Marketing Board*, May 16, 2001 and *MJ Farm Ltd. v. British Columbia Chicken Marketing Board*, March 1, 2007.

We agree that in its present form section 2(2)(e) of the GEP Rules reflects and represents the implementation of directions previously given by BCFIRB. Consistent with the previous decisions cited above, the actual provisions of section 2(2)(e) cannot be appealed to BCFIRB. The appellant's right of appeal is therefore limited, as set out in BCFIRB's letter of May 30, 2006, to an exercise of discretion by the Milk Board taking into account the appellant's special circumstances.

The Milk Board submits that no claim of "special circumstances" was advanced before it and therefore the Milk Board did not make a "decision" about whether the appellant should receive an exemption from the provisions of section 2(2)(e).

The Milk Board submits further that the appeal to BCFIRB is not advanced on the ground that there are "special circumstances" warranting a departure from the rules made as a result of BCFIRB's directions. The Milk Board argues that at most only one feature distinguishes the appellant from any other person who is not eligible to participate in the GEP by reason of an existing direct or indirect financial interest in TPQ. That feature is that the appellant has enjoyed the benefit of an allotment of 24,032 kg of TPQ pursuant to the GEP Regularization program despite his prior participation in an impermissible arrangement with a GEP entrant. The Milk Board argues that this is not a "special circumstance" but rather a circumstance that itself warrants summary dismissal under section 31(1)(c) of the ATA.

The panel observes that while the appellant may see the implementation of the GEP Regularization program as a special circumstance, we do not. The purpose of the GEP Regularization program was to bring to an end abuses under the GEP of the type exhibited in the arrangements made to purportedly transfer the beneficial interest in this GEP quota from the GEP entrant through to the appellant. The appellant's decision to avail himself of the opportunity to regularize his situation with respect to his interest in and production of that quota and become the registered holder of quota in which by his own admission he has had a financial interest for at least four years cannot be seen as a "special circumstance" giving reason for departing from the application of section 2(2)(e) of the GEP Rules.

We agree with the submissions of the Milk Board that there is no reasonable prospect the appellant will be successful if the appeal were to proceed. For this reason, the application is allowed pursuant to section 31(1)(f) of the ATA. We consider and address the arguments pertaining to section 31(1)(c) of the ATA below.

2. Frivolous and Vexatious

The Milk Board submits that the appeal should also be summarily dismissed pursuant to section 31(1)(c) of the ATA.

The Milk Board argues that to permit the appellant to participate in the GEP despite his involvement in an impermissible "lease" and despite his receipt of an allotment of TPQ pursuant to the GEP regularization process is so obviously flawed and contrary to any resemblance of "sound marketing policy" that there is no utility in proceeding with the appeal. The Milk Board submits that "The position advanced by the Appellant clearly runs directly counter to the very policy objective of any new entrant program."

The panel agrees with the submissions of the Milk Board. In essence what the appellant seeks by this appeal is "to have his cake and eat it too". There is no prospect that the appellant will be successful if the appeal were to proceed and to allow it to proceed would indeed be an abuse of process. We also allow the application pursuant to section 31(1)(c) of the ATA.

3. Out of Time

The Milk Board also argued that the notice of appeal was not filed within the applicable time limit. Even in the absence of our findings on the substantive issues above, we would have dismissed the appeal on this ground as well. We find no special circumstances that would call for our extending the time limit for filing the appeal.

We do not accept the Milk Board's argument that since the appeal is taken against the application of a rule concerning GEP eligibility that has been in place for a significant period and since the appellant has been ineligible for at least four years by reason of his admitted "lease" of quota, the appeal has clearly been filed out of time. We do consider it necessary that there be a "decision" of the Milk Board to formally apply the rule to the appellant.

However, we find that it is the Milk Board's November 7, 2008 letter to the appellant that contains the decision of the Milk Board as to the appellant's eligibility as a GEP applicant and therefore his eligibility to remain on the GEP wait list that is the subject of this appeal. The Milk Board's letter of December 29, 2008 is on a plain reading only a reminder of its previous November 7, 2008 decision respecting the appellant's GEP eligibility. Thus, the notice of appeal was clearly not filed within the applicable time limit of 30 days from the November 7, 2008 decision.

The appellant in his brief submission indicates that he met with and continued to have discussions with the Milk Board in November and December but was told there was nothing more they could do. While the appellant may have pursued discussions, we note that in the November 7, 2008 letter the Milk Board clearly advised the appellant that if he disagreed with the decision to remove his name from the GEP wait list he had 30 days to appeal the decision to BCFIRB. We find that the appellant's submissions fall short of establishing special circumstances that would have precluded the appellant from filing an appeal within the applicable time limit or which warrant extending the time for filing the appeal.

We find the appeal was not filed within the applicable time limit and allow the application pursuant to section 31(1)(b) of the ATA.

Conclusion

We allow the application. The appeal is summarily dismissed pursuant to section 31(1) (b), (c) and (f) of the ATA.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

(*Original signed by:*)

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Suzanne K. Wiltshire, Presiding Member
Honey Forbes, Member
Sandi Ulmi, Vice-Chair