July 22, 2015 File: 44200-50 - #15-09

DELIVERED BY E-MAIL

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[redacted]

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Dear Sirs:

RE: Mountain Valley Dairy Ltd. v BC Milk Marketing Board

On May 15, 2015 the BC Farm Industry Review Board (BCFIRB) received a Notice of Appeal from Mountain Valley Dairy Ltd. (Mountain Valley), appealing the April 17, 2015 decision of the British Columbia Milk Marketing Board (Milk Board) dealing with Mountain Valley's request to review its licensing and pricing structure. The Milk Board's decision stated in part:

> The Board recognized that they have previously reviewed this request from Mountain Valley Dairy and Kootenay Alpine Cheese at both the August 14th, 2013 and November 8th, 2013 Board meeting. The request was previously denied at both previous Board meetings.
>
> Since there are no new circumstances under consideration, the request will not be reviewed again by the Board at this time.

On May 25, 2015, the Milk Board advised BCFIRB of its intention to apply under s. 31(1) of the *Administrative Tribunals Act* (*ATA*) to have the appeal summarily dismissed. BCFIRB established a submission schedule to deal with the subject matter of the application and I have reviewed all the submissions received.

Summary Dismissal Application

The Milk Board applies for summary dismissal relying on sections 31(1)(b), (c) and (f) of the *ATA* on the basis that:

> (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 that the application will succeed;

Out of Time

The Notice of Appeal indicates that the appeal is taken from a "decision" dated April 17, 2015 (the April 17 letter). However, the Milk Board says that it did not make a "decision" on that date. The April 17 letter is merely a response to the appellant's third request to produce and market milk outside the pool, in which the Milk Board informed the appellant that the matter had already been dealt with (twice) in 2013 and as there was no new information, the matter would not be reviewed again.

The Milk Board says it is notable that this third request of the appellant begins by stating "I would like to request (again) that the board…" Further, the Milk Board says the April 17 letter in response expressly states that it had previously reviewed this request and that the request "was previously denied at both of the previous Board meetings" and informed the appellant that "[s]ince there are no new circumstances under consideration, the request will not be reviewed again by the Board at this time."

Frivolous, Vexatious and Trivial/No Prospect of Success

The Milk Board says that this appeal should be dismissed on the ground that it is frivolous, vexatious or trivial or gives rise to an abuse of process. The Milk Board relies on *Thomson dba Inverene Developments* v. *BC Milk Marketing Board* (May 23, 2012) as an example of where BCFIRB has already ruled that it would not be sound marketing policy to permit a vertically integrated producer-vendor to operate outside the pool and says that even if the appeal was brought within the limitation period, there is no reasonable prospect that it would succeed.

Position of the Appellant

Out of Time

The appellant states that its notice of appeal made in reference to the April 17 letter was received by BCFIRB within the 30 day time limit for appeal. The appellant does not agree with the Milk Board's characterization that all three letters (August 2013, October 2013 and March 2015) reiterated the same request. Rather the appellant states "while the letters illustrate an ongoing attempt to engage the board in an amicable dialogue around pricing and licensing questions, each letter raised new issues and a new request".

The appellant says its first letter (August 5, 2013) requested that Mountain Valley be permitted to participate in the organic sleeve and inquired as to whether it was licensed correctly or whether it should become a Class D processor under the Cottage Industry Program (CIP). The Milk Board's response was to allow Mountain Valley to produce the current organic sleeve of 20% for the period August 1 to October 31, 2013. However, the request to be considered a Class D Producer Vendor was refused as Mountain Valley did not meet all the requirements for that

type of license under the Consolidated Order (specifically the requirement that the Producer Vendor not market fluid milk).

The appellant says the second letter (October 2013) followed up on the Milk Board's September 2013 changes to the Consolidated Order which expanded the Class D license to include 27.4 kgs of Continuous Daily Quota (CDQ) fluid production in remote regions and requested three changes to the Consolidated Order to allow its operation to fit within the Class D license:

1. A producer who holds quota may apply to enter the cottage industry program but would not be eligible for CDQ allotments under the program.
2. Remove the current limit for milk (27.4 kg of CDQ) processed into fluid under the cottage industry program.
3. If a participant elects to access third party milk, all applicable freight charges should apply.

The Milk Board's November 2013 response indicates that it discussed how the requested change in classification would affect the business operations of Mountain Valley and the implications of such changes on the industry. After noting that the Class D License and CIP was a directive of BCFIRB as part of its 2005 Specialty Review, the Milk Board denied the request to change the Class D licensing requirements to allow Mountain Valley to fit within the terms of that license.

The appellant says that its third letter (which is the subject of this appeal) followed a 1.5 year intermediary period in which time much had changed for its operation. After two full years of fluid processing, it had developed a market capable of consuming 100% of its production. However, as it continued to pay the pooled milk rate, it was required to pay considerably more than the selling price it receives as a producer because of the industrial class that its milk falls into (on average a cost of $6000 per month). The appellant says that the current licensing model for Class D does not meet the needs of Mountain Valley and what it sought in its third request was a new license class to meet the needs of small on-farm niche processors in outlying regions of the province.

The appellant says that the 30 day time limit was met because the original request dated March 12, 2015, responded to by the Milk Board on April 17, 2015 was appealed on May 15, 2015, within the 30-day time period.

Frivolous, Vexatious and Trivial/No Prospect of Success

The appellant says that this appeal is not frivolous and represents its whole livelihood. The appellant says that it is a long supporter of supply management and the BC dairy industry and through this appeal is seeking a viable licensing and pricing arrangement and clarity in its relationship with the Milk Board. This appeal raises larger issues as the current system does not provide access for organic production to regions of the province outside of the Fraser Valley. Transportation access and costs curtail or prevent production not only for Mountain Valley but other single farm processors in other areas of the province.

The appellant takes issue with the suggestion that the appeal has no prospect of success and the Milk Board's reference to the *Thomson dba Inverene Developments* decision. It says there is no

comparison between what Mountain Valley has done in comparison to what Mr. Thomson sought to do in his appeal and the comparison is "incredibly insulting". The appellant says it is simply looking for a more equitable and viable pricing structure for its milk.

Analysis

Section 8(1) of the *Natural Products Marketing (B.C.) Act* (*NPMA*) provides as follows:

> A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial board.

Given that section 8 requires that a person be aggrieved or dissatisfied from an "order, decision or determination" to file an appeal I have started my analysis with a review of the April 17, 2015 letter. I agree with the Milk Board that this letter (which essentially says that having considered the appellant's requests for regulatory changes to support its operation on two prior occasions, it will not be reviewing the request again) cannot be taken as an "order, decision or determination" of the Milk Board.

While I understand that the appellant views each of their letters (August and October 2013, March 2015) as separate and distinct requests to the Milk Board, after reviewing these letters in detail I do not view them as significantly different. Mountain Valley continues to ask the Milk Board for regulatory amendments to fit its operation and the Milk Board has refused to make the changes sought. Clearly, the times to appeal the August 14, 2013 and the November 22 2013 decisions of the Milk Board denying the request to change the Class D licensing requirements have long past[1]. Looking at the most recent request and the Milk Board's April 17 response, I do not see the Milk Board's letter as an "order, decision or determination" as the Milk Board appears to be saying having considered the request for regulatory changes twice before and on seeing nothing new, it is not prepared to review the matter again.

A similar situation arose in *Saputo vs. BC Milk Marketing Board* (May 9, 2008) where the panel stated:

> On this point, 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. <u>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.</u> [emphasis added]

[1] More will be said on the validity of such appeals below.

Given that I do not accept that the April 17, 2015 letter as an "order, decision or determination" of the Milk Board, it follows that there is no associated right of appeal and I dismiss the appeal on that basis. However, in the event that I am wrong in this conclusion, I have also considered the Milk Board's other grounds for summary dismissal below.

I understand that the terms "vexatious" and "frivolous" can appear somewhat jarring to persons who are not legally trained. However, as used in statutes they have established meanings. For the purposes here, a "vexatious" appeal is one made with an intent to harass, or even if not made with such intent, which abuses the board's process because it would lead to no possible good. A "frivolous" appeal is one that is lacking in substance. I understand why the appellant would take offence to the suggestion that this appeal frivolous and vexatious and I do not agree that this appeal is made with any malintent or that it lacks substance. The appellant has raised questions about whether the structure of its small dairy fits within the current regulatory regime.

I recognize that there might be challenges for organic production and processing in rural parts of the province as identified by Mountain Valley. These challenges may increase costs over operations in or with better transportation links to the Fraser Valley. The Milk Board has also recognized these challenges and in its paper *BC Quota Policy & Governance Consultation* dated April 2014:

> The Milk Board's Cottage Industry Program (CIP) aims to facilitate small scale, on farm production of consumer-ready manufactured dairy products. It also includes provisions to support the production of fluid milk in specified 'Remote Regions' of the province.

In that paper, the Milk Board also reported that it assessed the CIP as part of its quota governance review and recommended "no changes to policies to the Cottage Industry Program at this time."

The issues faced by Mountain Valley are not justification for an appeal in the present circumstances. I say this for the following reasons. The appellant has sought on three separate occasions to have the Milk Board change the regulatory regime to accommodate its circumstances, which efforts have been unsuccessful. I do not think it is significant to this analysis that the regulatory changes sought by the appellant may have varied over time. Arguably none of the letters would have been sufficient to create a right of appeal as what the appellant is challenging is an existing regulatory framework and not a particular exercise of discretion by the Milk Board to address special circumstances in the application of an existing regulation. The essential elements of this regulatory regime have been in place for nearly 10 years and similar to the *Saputo* decision quoted above, such an appeal would be out of time.

More significantly, the provisions with respect to specialty production found in the Consolidated Order (and which the appellant seeks to change) arose out of BCFIRB's 2005 Specialty Review and at BCFIRB's direction. I agree with the Milk Board that it cannot simply change those provisions. These provisions are in all relevant respects decisions of BCFIRB not the Milk Board and as such, I conclude that an appeal that seeks to change those provisions is not properly before

BCFIRB. This conclusion is consistent with previous decisions of this board: *Salmon Arm Poultry Farm Ltd. v. British Columbia Egg Marketing Board*, May 16, 2001 (paras. 37 – 53), *MJ Farm Ltd. v. British Columbia Chicken Marketing Board*, March 1, 2007 (para. 27), *Schwaertzle* v. *British Columbia Milk Marketing Board*, March 21, 2009 (pages 3-4).

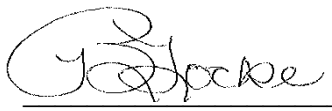
Having reached this conclusion, the fact that challenges for 'Remote Regions' may exist is one example of why the Milk Board should monitor and update its policies on an ongoing basis; as the Milk Board itself seems to have recognized. Sound marketing policy respecting the marketing of a regulated product may change over time in response to evolving production, processing, regional, consumer or other requirements. As BCFIRB advised the commodity boards at the time, directions and orders issued in 2005 and 2006 as a result of the Specialty Review should be monitored on an ongoing basis as to whether they still reflect sound marketing policy. They should not be considered or used as a barrier to change. Decisions or recommendations, as appropriate, for potential change rest with the Milk Board in the first instance as the regulator of the BC dairy industry.

Decision

For the reasons I explain above, the appeal is dismissed, pursuant to s. 31(1)(a), and (f) of the *ATA*.

In accordance with s. 57 of the *ATA*, "an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued".

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:



Brenda Locke, Presiding Member