April 20, 2016 File: 44200-50 - #16-01

DELIVERED BY E-MAIL

Mark Nagetaal
[redacted]

Robert Hrabinsky
Affleck Hrabinsky Burgoyne LLP
700 – 570 Granville St
Vancouver BC V6C 3P1

Dear Sirs:

RE: Nagetaal v BC Milk Marketing Board

On February 4, 2016 the British Columbia Farm Industry Review Board (BCFIRB) received a Notice of Appeal from Mark Nagetaal, appealing a January 11, 2016 decision of the British Columbia Milk Marketing Board (Milk Board). The Milk Board denied his request for an exemption from the application of the eligibility rules of the Cottage Industry Program (CIP) which prevented him as a former quota holder from participating in the Program. The Milk Board's decision is brief and states:

> On January 6, 2015 (sic) the Board reviewed your request for special consideration to the current Cottage Industry Program rules to allow you to participate in the Cottage Industry Program although you have previously had financial interest in Continuous Daily Quota. As prior financial interest in quota is not permitted within the provisions of the BCMMB Consolidated Order (C.O.), the Board is unable to accommodate your request.
>
> Please refer to Schedule 2 Cottage Industry Program Rules 1(2) which specifically outlines this restriction with respect to previous financial interest.

Section 1(2) of the CIP Rules 1(2) provides:

> 1(2) A Person who has not previously participated in the Cottage Industry Program or predecessor program may apply to participate in the Cottage Industry Program by filing with the Board an application form, obtainable from the Board, completed and sworn before a Commissioner for Taking Oaths or Notary Public, provided that neither the applicant nor the spouse of the applicant may have, or have had at any time, any financial interest in Continuous Daily Quota, or any other licence, permit or quota issued or granted by any other supply management commodity board, whether directly or indirectly, or through any organization or entity.
> [emphasis added]

A pre-hearing conference was held on March 10, 2016 and on March 16, 2016, the Milk Board applied to BCFIRB 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 section 8.1(1) of the *Natural Products Marketing (BC) Act* (*NPMA*) and s. 31(1)(c) and (f) of the *Administrative Tribunals Act* (*ATA*) on the basis that:

> (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;

Frivolous, Vexatious and Trivial/No Prospect of Success

The Milk Board says that this appeal should be dismissed as it is an appeal directed at a supervisory direction made by BCFIRB as part of its Specialty Review in 2005. In September 2005, BCFIRB directed all commodity boards to create eligibility criteria for new entrant programs which at a minimum required applicants not to have been previously involved in supply management quota ownership. In February 2007, BCFIRB further clarified that persons who had owned quota in any of the supply managed sectors (milk, eggs, turkey, chicken or broiler hatching eggs) were ineligible to apply for or receive new entrant quota. The Milk Board amended the eligibility rules for its CIP to be consistent with BCFIRB's directions and the eligibility requirement in section 1(2) (which is the subject of this appeal) has existed in substantially the same form since 2007.

The Milk Board points to further communication from BCFIRB on May 3, 2007. BCFIRB contemplated that there would be cases where a commodity board would be called on to exercise its judgement on cases not specifically contemplated by the rules, where the rules are ambiguous or where exceptional circumstances were found to exist and advised commodity boards, when exercising such judgements, to have regard to the underlying principles of new entrant programs. The Milk Board relies on two of BCFIRB's guiding principles. The first principle is that persons should be genuine new entrants to the system and not have personally profited from that system by having previously held quota. The second principle relied on is that making new entrant programs available to new producers encourages innovation, regional priorities and diversity.

In this case, the Milk Board argues that the appellant was a quota holding dairy producer from 2006 to 2013. He originally invested in excess of $1,000,000 to purchase quota and received allocations of growth. When he sold his quota in 2013, after the application of the Milk Board's surrender assessment rules, he realized a net profit on his quota holdings of approximately $300,000.

Applying these facts to the application for summary dismissal, the Milk Board argues that this appeal is frivolous, vexatious or trivial, gives rise to an abuse of process and that there is no reasonable prospect that the application will succeed. The Milk Board characterizes this appeal as one directed at a supervisory direction of BCFIRB and relying on *Salmon Arm Poultry Farm Ltd. v. British Columbia Egg Marketing Board*, May 16, 2001 and *Elkview Enterprises Ltd. v. British Columbia Egg Marketing Board*, July 8, 2002, says that a person cannot appeal a 'rule' made by a commodity board as a result of a direction from BCFIRB. The Milk Board acknowledges that a person can appeal from a commodity board's judgement about how a person's case should be decided in circumstances not specifically contemplated by the rule, where there is an ambiguity in the application of the rule or where the person seeks an exemption based on exceptional circumstances.

In this case, the appellant seeks relief on the third ground, an exemption based on its exceptional circumstances. The Milk Board argues that the appellant's request for exemption from the CIP eligibly rules (the relevant facts of which the Milk Board summarizes as an inability to make a dairy farm "cash flow" and no relatives operating within the dairy industry) does not create an exceptional circumstance. Rather, the Milk Board argues that this is a direct challenge to BCFIRB's direction that persons are ineligible to participate in the CIP if they previously held quota. It falls outside the additional guidance given to commodity boards by BCFIRB in May 2007 which emphasized the importance of applicants to new entrant programs being genuine new entrants to the system and not having personally profited from that system by previously holding quota.

The Milk Board says that the appellant is not only a former dairy farmer of some seven years, he was realised a net gain exceeding $300,000 from the appreciation of his quota holdings. To grant an exemption in these circumstances would totally undermine the policy objectives of BCFIRB's eligibility restrictions. These circumstances are virtually identical to *Smits v. British Columbia Milk Marketing Board*, September 21, 2007, an appeal summarily dismissed by BCFIRB.

Position of Appellant

The appellant says that the purpose in filing this appeal is a desire to be actively engaged in milk production under the supply management system in BC.

Relying on BCFIRB's May 3, 2007 letter referenced above, he says that BCFIRB advised commodity boards to exercise judgments having regard to the principles underlying the new entrant program:

- new entrant programs exist because it is desirable as a matter of sound marketing policy to encourage persons to enter into the supply management system;
- persons should be genuine new entrants and not have personally profited from that system by having previously held quota either personally or through their financial interests in a corporation or partnership;
- new entrant programs should recognize that diversification of the producer base is equitable and desirable having regard to the history and development of the quota system; and

- making new entrant quota available to new producers encourages innovation, regional priorities and diversity, new ideas and new voices in the supply management system.

The appellant argues that he should receive an exemption from the eligibility rules for the CIP based on exceptional circumstances which he summarizes as follows:

1. He attempted to start and maintain a dairy operation in BC that was unsuccessful.
2. Neither the appellant nor his wife had any connection to family that have been or are currently involved in supply management in Canada.
3. The dairy operation was 100% financed and the operation was unable to cash flow and as a result, the quota was sold and he ceased milk production.
4. The appellant and his wife were eligible for provincial and federal low income assistance during the operational time of his dairy business.
5. The Milk Board's Graduated Entry Program (GEP) intended to assist new entrants into the BC dairy industry was closed in 2006 when the appellant entered the industry and remains closed to this day.
6. The appellant is unaware of any other person in BC in the last ten years successfully establishing a dairy operation without the aid of a new entrant program or immediate and/or extended family involved in supply management in Canada.
7. BCFIRB's directive results in the appellant and his wife being ineligible for any new entrant program in the supply managed sectors.
8. The appellant and his wife were genuine new entrants to the dairy industry in 2006. Realizing that there was no access to the Milk Board's GEP program, he is effectively being punished forever by being denied access to any new entrant program of any commodity board because of his attempt to become a dairy producer in BC.

In response to the Milk Board's argument regarding the sale of his quota, the appellant does not deny receiving more for his quota than it cost to purchase. However, the appellant does not agree that this can be described as benefitting financially from involvement in the system because, "quota has no value".

The appellant describes quota as a revocable license which provides a conditional entitlement to produce milk. There is no right to renew or retain the quota allotted. Quota is issued from the Canadian Dairy Commission to the Province with no value (free) and the Milk Board is the steward of that quota for the Province. The Milk Board issues (allocates) quota with no monetary value (free) to produce milk and quota remains under the exclusive control of Milk Board. It is not owned by producers or the Milk Board. Producers may trade (sell) quota with permission of the Milk Board to produce milk and create value from cash flow of milk production from the quota. Producers trading (selling) quota use the Quota Exchange which sets a "clearing price" based upon the cash flow of the quota but the quota itself has no value as it is a revocable license and not property. While banks may provide financing to producers based upon the cash flow asset of quota, quota is not an asset as it has no value and may be retracted by the Milk Board at any time.

The appellant argues that he was not able to cash flow his dairy operation but he had nothing to do with determining the actual monetary value of the quota he owned. He disputes that any

increase in the value of quota he sold can be characterized as profiting from the system. Further, he argues that the fact that the value of quota fluctuates over time means that a producer is not guaranteed to profit from the sale of quota nor can the producer influence its value. Given that the value of the quota could just as easily have been worth less at the time of sale, the appellant argues that it is not reasonable to use the increase in quota value over any period of time as evidence of personally profiting from that system. The appellant argues that the opportunity to personally profit from the system can only be tied to a producer's ability to generate cash flow while actively involved in milk production.

Frivolous, Vexatious and Trivial/No Prospect of Success

In response to the Milk Board's argument that that this appeal is vexatious and "would lead to no possible good", the appellant argues that the contrary is true. He says it is in the best interest of the Milk Board, BCFIRB, and the dairy industry as a whole, to be aware of this situation and the challenges that face anyone who desires to be part of the dairy industry.

The appellant argues that it is impossible to start dairy farming in BC without the aid of a new entrant program and in BC, new entrant program lists have been closed for more than a decade. The appellant does not agree with the Milk Board's characterization of this appeal as "taking a flyer" at the cost of a filing fee and says this is a complete and absolute misunderstanding of his purpose in filing the appeal. The appellant argues that there is a very large chasm between the rules and regulations under which the dairy system operates and the realities of what is possible on a dairy farm. The appellant says his appeal is not a lottery ticket but rather reflects his desire to establish an independent dairy production unit in BC.

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.[emphasis added]

In my view, the matter under appeal arises directly from directions given to the Milk Board by the BCFIRB as part of the Specialty Review. The Milk Board cannot simply change the eligibility provisions for the CIP. These provisions are in all relevant respects decisions of BCFIRB not the Milk Board and as such, 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).

I now turn to consider whether this appeal falls within one of the three situations where an appeal to BCFIRB properly lies (namely where a commodity board exercised its judgement in cases not specifically contemplated by the rules, where the rules are ambiguous or where exceptional circumstances were found to exist). This is not a case where the Milk Board failed to exercise

discretion on a matter not specifically addressed by the eligibility requirements for the CIP and the appellant has not pointed to any ambiguity in the CIP rules. The only argument the appellant makes is that exceptional circumstances exist which justify an exemption from the eligibility requirements of the CIP.

I agree with the Milk Board that to grant the exemption the appellant seeks would undermine the policy objectives behind the BCFIRB's Specialty Review in general and its specific directions made in respect of the CIP as a new entrant program. Further, in the 2013-14 Quota Governance Review, the Milk Board and BCFIRB revisited this issue. They confirmed the long-held view that new entrant programs such as the GEP and CIP should only be only available to actual new entrants with no previous interest in quota as fundamental to fairness in the existing regulatory framework. The Milk Board is not required and nor does it have the discretion to go behind the quota holdings of an applicant to determine whether or not the applicant was successful in its former enterprise.

Given that the limited nature of the Milk Board's January 11, 2016 reasons for its decision, I do not think it is fair to characterize this appeal as "vexatious" or "frivolous". A "vexatious" appeal is one made with an intent to harass, or even if not made with such intent, which abuses a board's process because it would lead to no possible good. A "frivolous" appeal is one that is lacking in substance. The Milk Board's decision does not advise the appellant that the eligibility requirements of the CIP were part of a BCFIRB direction arising out of the Specialty Review or the limitation that fact would place on a potential appeal. The appellant became aware of the Milk Board's position after filing his appeal. I understand why the appellant might take offence to the suggestion that his appeal is frivolous and vexatious and I do not agree that this appeal is "taking a flyer" or that it lacks substance. The appellant expressed what to him are legitimate concerns regarding the Milk Board's new entrant program.

That being said, however, I have no hesitation finding that this appeal has no prospect of success. I agree with the Milk Board that to give the appellant the remedy he seeks would undermine the policy objectives of restricting new entrants to those persons who have never held quota within the supply managed system.

I recognize that the appellant has faced challenges with his dream of being a dairy producer in BC but unfortunately these challenges do not support an appeal. Sound marketing policy changes over time in response to evolving production, processing, regional or consumer demands. As BCFIRB advised the commodity boards at the time of the Specialty Review, the directions issued are not written in stone and they should be monitored on an ongoing basis to ensure that they still reflect sound marketing policy. They should not be considered or used as a barrier to change.

The Milk Board has already committed to BCFIRB that it will reopen a new, revised GEP after it has brought the new entrants on the current list into production. It has also provided opportunity for other persons who wish to enter the industry directly to obtain priority consideration in purchasing quota on the Quota Exchange. It remains the responsibility of the Milk Board to continue reviewing all of its quota policies on an ongoing basis to determine if and when there is a need for change to benefit the BC dairy industry.

With respect to the Milk Board's request for costs payable forthwith, given my findings above that the conduct of the appellant was not "improper, vexatious, frivolous or abusive", I find that costs are not appropriate in the circumstances of this appeal.

Decision

For the reasons above, the appeal is dismissed, pursuant to s. 31(1)(f) of the *ATA*. There will be no order for costs.

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:

Chris Wendell, Presiding Member