

LexisNexis® Agricultural Law *NetLetter*

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Friday, July 21, 2017

Issue 376

Issues added on the 7th and 21st of every month.

HIGHLIGHTS

- * The British Columbia Court of Appeal has overturned the decision of a Justice of the British Columbia Court of Queen's Bench who granted the petition of the British Columbia Milk Marketing Board to direct a milk processor to pay funds due pursuant to the Milk Marketing Board's Consolidated Order. The funds had been withheld by the processor to offset alleged damages occurred because the Board had supplied contaminated milk. The chambers Justice had also dismissed the milk processor's application to convert the petition to an action, and had refused to permit the processor to add the two milk producers who had supplied the milk as third parties to the action. As a result of the Court of Appeal's decision the Milk Marketing Board now has to sue in debt to recover the withheld funds (rather than being able to rely on the mandatory provisions of the Consolidated Order) and the milk processor is permitted to raise Sale of Goods Act defences with respect to the contaminated milk, and to seek leave to third party the producers who had supplied the contaminated milk through the Marketing Board. (*British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, [CALN/2017-052](#), [\[2017\] B.C.J. No. 1244](#), British Columbia Court of Appeal)

NEW CASE LAW

British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.;

[CALN/2017-052](#),

Full text: [\[2017\] B.C.J. No. 1244](#);

[2017 BCCA 247](#),

British Columbia Court of Appeal,

R.J. Bauman C.J.B.C., R. Goepel and L. Fenlon JJ.A.,

June 28, 2017.

Marketing Boards -- Claims Against Marketing Boards for Supplying Contaminated Products -- Processor's Obligation to Pay for Contaminated Product Delivered Through Marketing Boards.

Saputo Products Canada G.P. ("Saputo") appealed to the British Columbia Court of Appeal from the decision of a Chambers Justice who denied Saputo's application to convert a British Columbia Milk Marketing Board ("Marketing Board") petition into an action, and Saputo's application for leave to join two milk producers, Chilliwack Cattle Sales Ltd. ("Chilliwack") and Cedarwal Farms Ltd. ("Cedarwal") as third parties to the action.

The Marketing Board administers the national milk supply management system in British Columbia under authority delegated to it pursuant to the Natural Products Marketing (B.C.) Act, [RSBC 1996, c 330](#).

Pursuant to s. 7(1) of the British Columbia Marketing Board Regulation, BC Reg 167/94, the Marketing Board has the authority to regulate and control the production, transportation, packing, storage and marketing of milk, fluid milk and manufactured milk in British Columbia. Specifically, the Marketing Board is vested with the authority to set prices and the authority to make orders and rules to market milk.

Pursuant to the Marketing Board's consolidated order of September, 2013 (the "Consolidated Order") processors dealing in milk or manufactured milk products received milk from producers through the Marketing Board are required to make an advance payment to the Marketing Board on behalf of producers for the milk received from producers during the first 15 days of the month. At the end of each month, these processors are required to report to the Marketing Board the quantity and nature of the milk received. The Marketing Board then uses this information to calculate a final settlement due from the processor to the Marketing Board on behalf of the producers.

Pursuant to s. 18 of the Natural Products Marketing Act, it is an offence to fail to comply with a provision of the Act, or Regulation, scheme, rule or requirement made under the Act.

On August 12, 2013, milk was collected from a producer and delivered to Saputo's Burnaby plant. The milk was put into the production process. At the time the milk was delivered, Saputo was not informed of the producer's identity. Saputo used the milk in its production process assuming that the milk was fit for production.

On August 13, 2013, after using this milk in its production process, Saputo learned the milk was contaminated. Saputo had already blended the contaminated milk with uncontaminated milk, which caused a total of 223,230 litres of milk and cream to be contaminated as a result of which Saputo suffered alleged damages totalling \$65,317.15.

Pursuant to the Consolidated Order, Saputo paid the Marketing Board for the contaminated milk shortly after receiving it. On January 8, 2014, Saputo requested that the Marketing Board reimburse it for the damages allegedly incurred as a result of the contaminated milk. The Marketing Board refused to do so.

In May of 2014 Saputo withheld payment of \$65,317.57 owed to the Marketing Board for a subsequent shipment of milk in compensation for the losses sustained.

Saputo subsequently learned that Chilliwack was the producer of the contaminated milk.

A second incident occurred in February of 2015. At some point prior to February 20, 2015, Saputo received deliveries of organic milk at two of its plants. The milk was produced at a dairy farm which was later identified as Cedarwal. Following delivery the organic milk was co-mingled with milk already stored in silos at each plant. On February 20, 2015, the Canadian Food Inspection Agency (the "CFIA") informed Saputo that as a result of an inspection the CFIA conducted at Cedarwal, the CFIA determined that Cedarwal's organic feed contained aflatoxin in amounts above permissible levels.

The CFIA subsequently told Saputo that the milk did not present a risk to human health, but given the interim delay as well as the shelf life of some of the affected products, Saputo was obliged to isolate and rework products affected by the suspect milk and sustained alleged damages of \$26,303.64.

In May of 2015, Saputo withheld \$26,364.00 from a subsequent shipment to offset its damages for this claim.

On June 12, 2015, the Marketing Board commenced proceedings by way of a petition for an order forbidding, restraining or enjoining Saputo from complying with the Consolidated Order and directing it to pay the amounts which had been withheld.

On April 1, 2016, Saputo filed a cross application seeking an order to have the Marketing Board's petition converted into an action and for an order granting Saputo leave to file and serve third party notices against Chilliwack and Cedarwal pursuant to British Columbia's Supreme Court Civil Rules (the "Rules").

The Marketing Board opposed this application and took the position that converting the application to a petition was not appropriate, and that by doing so would allow Saputo to avoid its statutory obligation to make the payments called for under the Consolidated Order.

Chilliwack also argued that it would be unfair to allow Saputo to now issue a third party notice against it, because any claim it might have had against Chilliwack was statute barred.

The chambers justice dismissed Saputo's application on July 17, 2016.

Decision: Goepel, JA (Bauman and Fenlon, JJA concurring) allowed the appeal, allowed Saputo to convert the proceeding into an action, directed the Marketing Board to file a

Notice of Civil Claim, and directed that any issues concerning the proposed third party claims be determined at trial [at para. 56].

Goepel, JA referred to a number of cases which considered the British Columbia rule which allows conversion of a proceeding commenced by petition into an action by ordering a trial on the hearing of a matter in chambers [at para. 42 to 44], including a decision in *Boffo Developments (Jewel 2) v Pinnacle International (Wilson) Plaza Inc.*, [2009 BCSC 1701](#), [\[2009\] B.C.J. No. 2476](#) [Boffo] in which Ballance, J suggested that the mere existence of a bona fide triable issue may not in itself warrant conversion to the trial list.

Boffo had been relied on by the chambers justice, however, Goepel, JA noted [at para. 46] that the test for determining whether a matter should be converted into an action is not the test used to determine suitability for a summary trial, but rather is akin to that on an application for summary judgment [at para. 46]. Goepel, JA then concluded, at para. 50 to 52, as follows:

[50] With respect, I find that the trial judge erred in principle in resolving the matter in the manner he did. He did not consider whether Saputo raised a bona fide triable issue and the implications that would flow from such a determination. He did not find that Saputo was bound to lose.

[51] In my respectful view, on the material before us, Saputo has raised bona fide triable issues concerning the quality of the milk it purchased, and the remedies available to it at common law and under the Sale of Goods Act, [R.S.B.C. 1996 c. 410](#) in the circumstances of a product sold through a marketing board.

[52] In the result, I would order that the petition be converted into an action. The Board should file a notice of civil claim and the proceedings can then continue. I would reiterate that converting the petition into an action does not prevent either party from seeking to have the matter ultimately determined summarily pursuant to Rule 9-7.

With respect to the proposed third party claim, Goepel JA stated [at para. 54 and 55]:

[54] At the hearing of the appeal, we asked counsel whether Saputo, if it was successful on the appeal in having the petition converted to an action, would require leave to issue the third party notice. This issue requires determining whether the 42-day grace period in which a third party notice can be delivered without leave runs from the delivery of the initial petition or alternatively, from the delivery of a notice of civil claim ordered as a result of the proceedings being converted into an action. Before us, counsel was not fully prepared to argue that question.

[55] I am of the view that it would not be appropriate for this Court to grant leave to issue the third party notice. Rather, that issue should be determined in the first instance by the trial court if Saputo renews its application to seek

leave to issue the third party notices. If Saputo issues a third party notice without leave, it will then be for the third parties to determine whether they should apply to set the third party notices aside on the ground that leave is required.

CREDITS

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