

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND IN THE MATTER OF
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA MILK
MARKETING BOARD TO CANCEL QUOTA AND LICENCE

BETWEEN:

MARTINUS VAN HERK and RITA VAN HERK

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA MILK PRODUCERS ASSOCIATION

INTERVENOR

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine J. Elsaesser, Vice Chair
Garth Green, Member

For the Appellant

Delwen Stander, Counsel

For the Respondent

Robert Hrabinsky, Counsel

For the Intervenor BC Milk
Producers Association

Dick Kleingeltink, Director
Robin Smith, Executive Director

Date of Hearing

March 8 and 10, 2006

Place of Hearing

Langley and Abbotsford, British Columbia

INTRODUCTION

1. Martinus Van Herk and his wife Rita Van Herk are appealing a decision of the British Columbia Milk Marketing Board (the “Milk Board”) to cancel Mr. Van Herk’s restricted Total Production Quota (“TPQ”) granted pursuant to the terms of the Milk Board’s Graduated Entry Program (“GEP”).
2. The Milk Board’s decision relating to this cancellation of restricted TPQ was set out in its January 19, 2006 letter:

As an entrant in the B.C. Milk Marketing Board Graduated Entry Program, Martinus Van Herk (Blossom Acres) has been temporarily allotted 7,000 kilograms of restricted Total Production Quota for exclusive use by the entrant. It has come to our attention that this quota has been used by another person for the operation of a dairy farm for the supply of milk. As we understand the circumstances of the dairy farm operation, you are not “actively engaged in milk production” contrary to the requirements of the Program.¹

If the entrant is not “actively engaged in milk production” the restricted Total Production Quota so allotted is “subject to immediate cancellation on notice by the Board to the entrant”. This Registered letter is your notice that the Total Production Quota allotted to you is hereby cancelled effective January 19, 2006. Consequently, your Producer’s Licence is also cancelled and you are no longer permitted to ship milk with the quota allotted under the Graduated Entry Program.

3. On January 30, 2006, Mr. and Mrs. Van Herk and their counsel met with the Milk Board for what the Milk Board described at the appeal as a “show cause hearing” pursuant to s. 53 of the Milk Board’s Consolidated Order. Following this meeting, the Milk Board affirmed its decision cancelling Mr. Van Herk’s restricted TPQ.
4. By letter dated February 2, 2006, the Van Herks commenced their appeal of the Milk Board’s decision to cancel Mr. Van Herk’s restricted TPQ.
5. Prior to the hearing, the Appellants requested production of documents relating to Milk Board policies concerning the GEP as well as documents relating to previous GEP licence cancellations, letters of complaint, decision documents or minutes of meetings concerning the decision to cancel the Appellants’ licence. The Appellants sought more disclosure from the Milk Board in order to know the case they must meet. The Appellants argued that given the quasi-criminal nature of the Milk Board’s decision, principles of administrative fairness required that they know the case against them. The Panel’s decision is set out in our letter dated February 28, 2006:

The Panel has reviewed the Milk Board’s decision under appeal as well as the document disclosure to date. As we regard the matter, the heart of the Appellants’ concern is not disclosure per se (which counsel for the Milk Board has in any event represented has been given in full), but a concern with knowing the case they have to meet.

¹ The reference to actively engaged in milk production comes from s. 7 of the Milk Board’s Graduated Entry Program, Schedule 1 to the Consolidated Order

Our decision is premised on the basis that commodity boards should provide sufficient particulars of their decision so that appellants understand the substantive basis for a decision so that those issues can be properly addressed on appeal....

In the Panel's view, the Milk Board's decision does not set out precisely the basis for its determination that the Appellants were "not actively farming". While we suspect that the Milk Board's concerns would have been discussed verbally with the Appellants at the January 30, 2006 meeting which led to the Milk Board's January 31, 2006 letter declining to reverse its decision, we believe that it would be fair and desirable for the Milk Board to provide formal written particulars to the Appellant so that there is no doubt whatsoever as to the precise basis for the Milk Board's decision.

Section 14 of the *Administrative Tribunals Act* gives the Provincial board the general power to make orders it considers necessary for the purposes of controlling its proceedings. Pursuant to that authority, we direct the Milk Board to provide the Appellants with further and better particulars of its decision. By so doing, we are not asking the Milk Board to prepare a decision after the fact. We are however directing the Milk Board to provide to the Appellants a concise statement of the particulars upon which it relies to support its determination that the Appellants are not "actively engaged in farming". Such a statement is important in view of the nature of the issue on this appeal, and in particular because the specific nature of the allegation may well have an important impact on the answer to what constitutes "active" farming.

6. This matter proceeded to hearing on March 8 and 10, 2006.

ISSUE

7. Did the Milk Board err in its interpretation of s. 7 of the GEP rules in its application to the Appellants in their specific circumstances? The grounds of appeal are as follows:
 - a) The TPQ and Producer Licence were taken away in error through a misapplication of s. 7. The Appellants are actively engaged in milk production in accordance with s. 7.
 - b) The cancellation of TPQ and Producer Licence is without precedent.
 - c) The Appellants were not given an opportunity to be properly heard by the Milk Board.
 - d) The manner in which this case was heard by the Milk Board was a breach of natural justice and leads to an apprehension of bias.

BACKGROUND

8. Mr. Van Herk immigrated to Canada in 1983. Within a few months of moving to the Fraser Valley, Mr. Van Herk placed his name on the Milk Board's wait list under the GEP and paid \$100 annually to maintain his position on the list. In 1998, substantive changes were made to the GEP. At that point in time, Mr. Van Herk was advised of the changes by Milk Board staff and given an opportunity to remove his name from the list and have all previously paid fees returned or stay on the list under the revised program. He chose to stay on the list.

9. On June 8, 2001, Mr. Van Herk was invited to enter the GEP. The program provided that upon completion of a Declaration of Applicant, receiving independent legal advice, obtaining a Producer Licence and meeting with the Milk Board to review his business plan, the Milk Board would allot 7000 kilograms of temporary TPQ. This TPQ would be clawed back after the 6th dairy year but the entrant could purchase additional TPQ. Temporary TPQ was non-transferable.
10. Temporary TPQ was for the beneficial use of the entrant only, and the entrant was required to:
 - operate and control the farm unit which is owned, leased or rented by the entrant and paid for by the entrant;
 - make payments for feed and other farm supplies from a bank account in the name of the entrant;
 - permit Milk Board audits of the farm operation to ensure compliance.
11. Failure to comply with the foregoing restrictions could result in the termination of the entrant's participation in the program.
12. Mr. Van Herk signed the Declaration of Applicant acknowledging that he had read and understood the GEP rules and agreed to abide by the Milk Board's Consolidated Order. Mrs. Van Herk did not apply for temporary TPQ under the GEP as she was also on the wait list. Mr. Van Herk met with the Milk Board to discuss his business plan and according to his May 10, 2001 letter he intended to:
 - 1) buy a herd from a retiring farmer;
 - 2) purchase a tractor with a scraper and a loader;
 - 3) rent a farm with a few acres for grazing;
 - 4) raise his own heifers;
 - 5) purchase additional quota as the temporary TPQ was clawed back.
13. The Milk Board was satisfied with the business plan and the Ministry of Agriculture Fisheries and Food approved the site of the operation at 40309 Campbell Road in Abbotsford, a property owned by Mr. Bud Brar. Mr. Van Herk began operating as Blossom Acres effective August 1, 2001. The arrangement with Mr. Brar was prematurely terminated as a result of personal issues. Mr. Brar suggested to Mr. Van Herk that his neighbours Hartmut and Susan Unruh be approached to continue the arrangement.
14. In the fall of 2001, Mr. Van Herk entered into a Custom Milk Producing Agreement with Mr. and Mrs. Unruh. This agreement stated in part:

Blossom Acres agrees to pay all milk income, levies ,bonuses etc. including advances, as paid out by THE RECEIVER of the milk shipments, less \$800 per month to Harvey & Susan Unruh for all milk shipments starting and including October 1, 2002 for all the following services:

Harmut and Susan Unruh will, for the duration of this agreement only, assume all expenses pertaining to the production of milk required to fill 7000 kilograms of TPQ held by Blossom Acres.

Harvey Unruh agrees, for the duration of this agreement only, to:
Supply barns and equipment for this operation and assume all improvements and maintenance costs, as well utilities....

Harvey and Susan Unruh also agrees, for the duration of this agreement only, to:

- Assume all other costs (for the duration of this agreement only) pertaining to the said milk production such as: custom work (manure spreading, harvesting, drainage, snow removal, driveway access and maintenance for milk transport etc.)
- Veterinary and breeding costs and livestock replacement.
- Insurance on buildings and equipment, including liability insurance.
- Freight, promotion and levies or any other expenses which are deducted from the gross milk sales by THE RECEIVER or the BC Milk Marketing Board or the Canadian Dairy Commission, prior to the cheque received by Blossom Acres from THE RECEIVER of the milk shipments.

Blossom Acres will provide Harvey and Susan Unruh with a complete statement for all shipments and milk income as received from THE RECEIVER of the milk shipments, Dairyworld Foods or the Milk Marketing Board or the Canadian Dairy Commission....

Since Blossom Acres has no ownership on this farm (i.e. Real Property, equipment or livestock) except for the producer licence and milk quota, Blossom Acres is not responsible for accident or injury to anyone on these premises or any damages or losses to property buildings, equipment or livestock.

15. In 2004, the Milk Board modified the GEP. Mr. Van Herk elected to convert to the new GEP which allowed him to convert his temporary TPQ to restricted TPQ which was not subject to a claw back but was permanent and non-transferable.
16. The Van Herk's relationship with the Unruhs continued through until the fall of 2005 when Mr. Van Herk advised of his intention to move milking operations to a new site. The Unruhs were surprised by what they viewed as an early termination of their arrangement which they thought would last five years (until August 2006). The Unruhs approached staff of the Milk Board to seek advice on how to deal with this issue. During this meeting, Mr. Unruh gave a copy of the Custom Milk Producing Agreement to a Milk Board staff member. The staff member brought the Agreement to the attention of the Milk Board General Manager who in turn advised the Milk Board.
17. It appears that the Milk Board staff and the Milk Board accepted the Custom Milk Producing Agreement at face value and determined that, to the extent the agreement defined the relationship between the Van Herks and the Unruhs, the relationship was in violation of the GEP rules. As a result, the Milk Board General Manager, Ken McCormack, wrote the January 19, 2006 letter to the Van Herks which is the subject of this appeal.

DECISION

18. The Panel heard extensive evidence during this appeal. We do not consider it necessary to set out all evidence in detail in this decision. The brief background above places the appeal in context. We will now deal with each of the Appellant's grounds of appeal and discuss the evidence and position of the parties within that context. The Panel has carefully considered all of the evidence and submissions, even though we do not intend to refer to it all in the course of this decision.
19. The Appellants' appeal proceeded on two main grounds. They attack the merits of the decision arguing that they were actively engaged in milk production and as such the Milk Board erred in cancelling the restricted TPQ. They also attack the process followed by the Milk Board in coming to its decision. They argue that the Milk Board's decision making process was fundamentally flawed in that it made its decision without giving the Appellants an opportunity to be properly heard. The Appellants allege a breach of natural justice sufficient to create an apprehension of bias on the part of the Milk Board. We will first deal with the Appellants' procedural issues then consider the substantive issues.

Breach of Natural Justice

20. The Appellants rely on the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 to set out the appropriate principles of law. Madame Justice L'Heureux-Dubé decision is summarised in the headnote as follows:

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights within the duty of fairness is to ensure that administrative decisions are made using a fair and open procedure appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

21. The Appellants argue that a review of the January 19, 2006 decision of the Milk Board discloses several violations of administrative fairness. They allege that the Milk Board:
 - a) failed to disclose that there was any issue with Mr. Van Herk's TPQ prior to making the decision to cancel his TPQ;
 - b) failed to disclose the precise nature of any allegations to Mr. Van Herk prior to making the decision to cancel the TPQ;
 - c) failed to disclose what evidence it was relying upon to Mr. Van Herk in its decision to cancel his TPQ;

- d) failed to properly consider the matter, either through an investigation or by consulting the Van Herks, prior to making its decision;
 - e) was biased in its decision as it only considered a document and/or information received from Mr. and Mrs Unruh;
 - f) conducted a sham hearing on January 30, 2006, as the matter had already been prejudged and, as such, the Van Herks reasonably apprehended bias on the part of the Milk Board; and
 - g) failed to give sufficient and clear reasons to the Van Herks for its decision to cancel the TPQ;
22. The Appellants argue that in the circumstances, where they relied on the TPQ for a substantial portion of their livelihood, the Milk Board was required to adhere to principles of natural justice. In these circumstances, they say that the decision of the Milk Board amounts to an abuse of its discretion and, as such, the decision should be quashed and Mr. Van Herk's TPQ should be reinstated along with compensation for lost revenue from February 6, 2006 forward.
23. The Milk Board accepts that there is a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. As such, it concedes it owed a duty of fairness to Mr. Van Herk concerning the decision to cancel his quota and licence. However, the Milk Board argues that as quota and licence are not rights but privileges the precise content of the duty of fairness is different than when a property right is involved.
24. In the present case, the Milk Board argues that Mr. Van Herk knew or should have known that TPQ was allotted to him only as long as he was "actively engaged in milk production".² Likewise, he knew or ought to have known that TPQ was subject to "immediate cancellation on notice by the Board to the entrant" in the event he was not "actively engaged in milk production". He also knew or ought to have known that he would have an opportunity to "show cause" why a decision to cancel should be reconsidered by the Milk Board in accordance with s. 53 of the Consolidated Order. Thus, the Milk Board argues that its procedure followed in this case was entirely consistent with the procedural expectations of the Appellants.
25. The Milk Board maintains that it made its January 19, 2006 decision to cancel TPQ and licence on the basis of the Custom Milk Producing Agreement. While the Milk Board concedes that the Appellants were not given an opportunity to be heard before that decision was made, the decision is subject to the right of the affected person to make submissions at the s. 53 show cause hearing. Section 53 of the Consolidated Order provides:

- 53. (1) Where the Board decides on a contravention, it shall so advise the Person directly affected by such decision, as soon thereafter as is practicable, and may , at the

² See s. 7 of the Milk Board's Graduated Entry Program, Schedule 1 to the Consolidated Order.

discretion of the Board, provide that Person with an opportunity to show cause as to why the decision should be reconsidered by the Board.

- (2) a show cause hearing may be held in person, or by way of the receipt of written submissions from the Person directly affected by the decision, or in such other manner as the Board, in its discretion, deems advisable.
26. The Appellants did make submissions at the show cause hearing and did address the Custom Milk Producing Agreement upon which the Milk Board based its decision. However, the Milk Board candidly says that the procedure followed by the Milk Board may deny an affected person with a real opportunity to address the point of substance but that is not so in this case. As for the allegation of bias, the Milk Board argues that the Appellants must produce evidence from which it can be reasonable inferred that the decision maker had so made up its mind that any representations at the show cause hearing were unlikely to be effective. Disqualification does not follow when an adjudicator expresses a tentative opinion in relation to the evidence known to that point, relying on *Emcon Services Inc. v British Columbia (Council of Human Rights)*, 1991 Carswell BC 912 49 Admin. L. R. 220, 20 C.H.R.R. D/193
27. Finally, the Milk Board argues that if this Panel finds that the Milk Board failed in its duty of fairness owed to the Appellants, that failure does not, in and of itself, relieve Mr. Van Herk from the obligation to comply with the GEP rules. The Milk Board argues that a breach of a duty of fairness can be “cured” by this appeal given that it is in the nature of a *de novo* hearing, where the Appellants do not bear a burden of proof any more onerous than in the first instance and where this Panel is free from any reasonable apprehension of bias and conducts a hearing fairly: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.
28. The Appellants strenuously oppose this last submission arguing that to the extent that the *Harelkin* decision pre-dates *Baker*, it cannot be considered good law. Even though this was a hearing *de novo* they were in no better position before entering this appeal. All they knew was that the Milk Board looked at the Custom Milk Producing Agreement in coming to its decision. The Appellants argue that this is simply not enough to know what case they have to meet. During the course of the hearing the Appellants found out that Mr. Unruh met with the Milk Board on two occasions and with a Milk Board member on his farm on another occasion and these meetings all pre-dated the January 19, 2006 decision. The Appellants do not know what transpired in any of these meetings or what evidence the Milk Board gathered in these meetings. In the circumstances, the Appellants argue that this hearing does not cure anything.
29. The Panel agrees that the Milk Board owed Mr. Van Herk, as the holder of restricted TPQ, a duty of fairness in determining whether to cancel his TPQ and licence. We also agree that the content of this duty of fairness is attenuated by the fact that quota and licencing are privileges and not rights. As recognised by Mr. Justice Macdonald in *Sanders v. Milk Commission* (1991), 53 B.C.L.R. (2d) 167 at page 178 “[a] quota, a license to produce, which may be issued on prescribed terms

and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions”. In summary, the situation is “the board giveth and the board taketh away”.

30. The Milk Board imposes a number of requirements on entrants to the GEP and makes it clear from the outset that entrants who fail to meet the requirements will have their TPQ immediately cancelled. Even though the GEP has been amended and varied over the years, this fundamental component of the GEP has remained unchanged. Given the breadth of this power, it is incumbent on the Milk Board to be transparent in its decision making with respect to its requirements and what will result in cancellation of TPQ and licence.
31. In looking at the circumstances of this case, we find that the Milk Board’s process was flawed. The Milk Board came into possession of a Custom Milk Producing Agreement which, *if* it accurately depicted the relationship between the parties, was in clear contravention of the GEP rules. As a matter of fairness, the Milk Board should have disclosed the Agreement and the circumstances by which that Agreement came into its possession to the Appellants. Having done that, the Milk Board should then have advised the Appellants that the Custom Milk Producing Agreement was, in its view, *prima facie* evidence that Mr. Van Herk was not “actively engaged in milk production” as that phrase is defined in the GEP and that his TPQ and producer licence were under immediate cancellation subject to Mr. Van Herk’s right to show cause as to why the decision should be reconsidered by the Board, pursuant to s. 53 of the Consolidated Order.
32. Had the Milk Board followed this process, the procedure would have been clearer to the Appellants. Before this Panel, the Appellants articulated their views that the Custom Milk Producing Agreement did *not* accurately depict the nature of their relationship with the Unruhs and they should have had an opportunity to fully develop their arguments in front of the Milk Board. The process followed by the Milk Board left the impression with the Appellants that the decision had been made on January 16, 2006, reduced to letter form on January 19, 2006 and that nothing said on January 30, 2006 would change that outcome. Understandably this process left the Appellants with the feeling that the hearing process was unfair resulting in an apprehension of bias on the part of the Milk Board.
33. The Panel finds that when the Milk Board purports to exercise its authority under s. 53 of the Consolidated Order, it must ensure that disclosure of all relevant information is made at the notice letter stage. Further, the notice letter must make it clear that any decision made by the Milk Board is tentative or *prima facie* and subject to the affected person’s right to show cause as to why the decision is in error. Had the Milk Board followed this process in this instance, it would have satisfied the duty of fairness owed to Mr. Van Herk.
34. The Panel finds that the Milk Board’s decision was flawed in that Mr. Van Herk was not given proper notice of the allegations against him, nor was he advised of

the Milk Board's view that the evidence they had supported a tentative or *prima facie* case against him. However, the Panel does not accept at face value that Mr. Van Herk did not appreciate the nature of the allegations against him. He was aware that the Milk Board was relying on the Custom Milk Producing Agreement. Comparing that Agreement with the GEP rules would have given him a good idea of what the Milk Board was alleging he had done wrong. However, as a regulatory body, the Milk Board needs to act in a clear, unequivocal manner so that affected persons are not required to guess as to the precise nature of the allegations against them.

35. Having found that the Milk Board's decision making process was flawed, we accept the Appellants' argument that the process left them with an apprehension of bias on the part of the Milk Board. The Panel has considered the appropriate remedy. On this point, we find that the fact that this appeal has been a hearing *de novo* is sufficient to cure the procedural deficits on the part of the Milk Board. The Appellants had every opportunity in this appeal to demonstrate that the Custom Milk Producing Agreement was not a true reflection of their relationship with the Unruhs and to put forward whatever evidence they considered appropriate. Moreover, to the extent the Appellants required more particulars from the Milk Board, this Board directed that the Milk Board provide particulars as part of this appeal.

Merits

36. Having dispensed with the Appellants' procedural arguments, we move on to consider the Appellants' arguments on the merits. On this point, the Appellants maintain that contrary to the Milk Board's determination, they were actively engaged in milk production in accordance with s. 7.(1) and 7.(2) of the GEP Rules which provides:
 7. (1) The Board will determine, in its sole discretion, whether an entrant is actively engaged in milk production for the purposes of the program. Without limiting the generality of the foregoing, the Board will have regard to the following factors:
 - (a) whether the restricted Total Production Quota allotted under the program is being used for the benefit of the entrant;
 - (b) whether the entrant is active in the day-to-day affairs of the dairy farm, including the matters of animal husbandry;
 - (c) whether the entrant operates and controls the dairy farm;
 - (d) whether the entrant owns, leases, or rents the dairy farm;
 - (e) whether the entrant pays for feed and other farm supplies utilized on the dairy farm, and
 - (f) whether the entrant enjoys the chance of profit and bears the risk of loss in relation to the operations of the dairy farm.
 - (2) For the purpose of determining whether the entrant is actively engaged in the production of milk, the Board shall have regard to the substance and effect of any arrangement made between the entrant and any other Person, irrespective of the form of that arrangement.

37. The Appellants argue that the GEP rules do not require that all the factors found in s. 7(1) exist for a successful determination of being “actively engaged”. The presence of one or more of these factors places a GEP quota holder on the continuum of active engagement sufficient to satisfy the test. The Appellants maintain that despite the wording of the Custom Milk Producing Agreement, a document they allege was prepared by or for the Unruhs, their agreement was actually a flexible one in which they:
- rented the Unruh’s dairy farm;
 - used the TPQ allotted to them under the GEP for their benefit;
 - were active in the day to day affairs of the dairy farm, including scrutinising cleanliness, giving advice regarding herd health, visiting the farm several days per week;
 - were active in scrutinising and controlling expenses and the volume of milk production;
 - sometimes paid for feed themselves and sometimes paid the Unruhs for feed and farm supplies purchased on behalf of the Van Herks;
 - enjoyed the opportunity of profit and the risk of loss as borne out in the financial spreadsheets introduced as exhibits in this hearing and before the Milk Board.
38. The Appellants argue that they were not leasing their quota as people who lease quota do not bother to check up on herd health, attend the property regularly, pay for feed, provide advice on herd health and herd replacement or keep detailed books showing the breakdown of the costs associated with the operation. To the extent that the Unruhs’ version of events differs, the Appellants argue that the Unruhs are on a vendetta, seeking revenge for the Van Herks’ decision to terminate the Agreement, move to another property and become more active in milk production.
39. The Milk Board called the Unruhs as their witnesses. At the Appellants’ request, Mr. and Mrs. Unruh were excluded from the hearing room and testified separately. Their version of events contradicts the evidence given by the Van Herks on a number of issues. They claim that they did not draft the Custom Milk Producing Agreement; it was presented to them by Mr. Van Herk for signature after their initial discussions. They maintain that the Agreement is an accurate reflection of the milking arrangement and, in fact, was a continuation of the arrangement the Van Herks had with Mr. Brar. As Mrs. Unruh stated “...we read it and that’s what farmers do, they take care of their own stuff”. The Unruhs were the farmers and responsible for milking the TPQ and in turn, the Van Herks took \$400 off each milk cheque for a total of \$800 per month before giving the balance to the Unruhs. The arrangement did not vary. According to Mrs. Unruh, Mr. Van Herk only came to the property to drop off the cheque and certainly was not involved in herd management. Mrs. Unruh stated “I actually never saw him. Harty saw him once.” The Unruhs both maintain that the Van Herks did not pay for feed, veterinary or

any other kind of bills.

40. Given the diametrically opposing versions of events, the Panel must make a decision about the credibility of the witnesses and whose version of events to believe. We find that where the version of events testified to by the Van Herks differs from that of the Unruhs, we prefer the evidence of the Unruhs. We find the evidence of Mr. and Mrs. Van Herk unreliable and inconsistent. We found both Van Herk witnesses evasive and less than forthright. The following passages demonstrate this conclusion:

Mr. Van Herk's evidence from transcript pages 44-58 (under cross examination by counsel for the Respondent):

Q. Why don't you explain to me the way the payment was made?

A. Okay. If there's cows to be bought or auctioned off, you know, when we provide -- you look at this \$800 per month figure, which was our best estimate. This originated from the Brar farm. What I'm talking about here is any costs that occurred as a result of operating the dairy farm was paid by us. The way it was done cheque-wise is a different story. So what it looks like here is like \$800 a month is our cut. It isn't, because the profit or loss would be ours because the risk also -- if a dairy farm is not operated properly there wouldn't be any income for us.

Q. As a matter of fact, Mr. Van Herk, what you received during the currency of the Custom Milk Producing Agreement was exactly \$800 per month, no more, no less, and that was retained by you from the milk receipts each and every month, correct?

A. If that's what you say. I don't agree to that because our statements show different....

Q. Okay. Let's be clear about something here, Mr. Van Herk, and I want to be very clear. I put it to you that each month you retained \$800 from the milk receipts; is that correct?

A. Correct.

Q. And you retained the sum of \$800 per month from the milk receipts each and every month; no more, no less, correct?

A. Yes, based on our estimation, that's what I said.

Q. And you would retain \$800 per month from the milk receipts regardless of whether the price for feed went up or down, correct?

A. This is what it shows. This is our best estimation, like I said before.

Q. This is what it shows, and this is, in fact, what happened, correct?

A. This is what it is, yes.

Q. You would receive \$800 per month; no more, no less, regardless of whether or not the Unruhs had a vet bill or had to buy an additional cow; isn't that right?

A. That's what it appears to be to you, yes.

Q. Well, why do you say that's what it appears to be. You were a party to this arrangement. That's what it was in fact, correct?

A. You talk about \$800 a month. Yes, once again it's based on the estimates. Some months there was no extra. Say you have a C-section, there was no money to be made. Obviously other months there was some money.

Q. For the Unruhs?

A. For us.

Q. But each month you retained \$800?

A. Correct.

Q. That you retained from the milk proceeds?

A. Absolutely.....

Q. What you paid the Unruhs was the entire of the milk receipts less \$800 which you retained, correct?

A. As based on our estimations, yes.....

Q. Returning to the second page of the Custom Milk Producing Agreement, you'll agree with me that Blossom Acres was to provide the Unruhs the complete statement of all the milk shipments and milk income that you received from the Milk Board, correct?

A. Correct.

Q. And the purpose of that obligation was so that the Unruhs could be satisfied that they were receiving the correct amount for the milk proceeds. They needed to know how much the Milk Board was paying for the milk produced on their farm, so then they could see that after you have deducted the \$800 they received everything else, correct?

A. To cover the costs, yes....

Q. The Unruhs were active in the day-to-day affairs of the dairy farm?

A. Yes, they were. They were doing the milking for us, yes.

Q. They were responsible for matters of animal husbandry?

A. Yes, they were. So were we.

Q. The Unruhs exclusively paid for all feed and other farm supplies that were utilized on the dairy farm?

A. They paid for feed supplies, and also we paid for feed supplies as well.

Q. Now, when you say that you also paid for feed and supplies, we should be clear about this so that the panel knows exactly what you're saying. You're saying you paid for feed and supplies because you were giving to the Unruhs the entirety of the milk receipts subject to the deduction that you withheld of \$800?

A. Correct.

Q. So the fact that the Unruhs received all the milk receipts, subject only to the \$800 deduction which you retained, to your way of thinking that means that you paid for expenses relating to the dairy farm; that's really what you're saying, isn't it?

A. Yes.

Q. If there were changes to the accounting values for milk components, either up or down, you still retained \$800?

A. We actually -- we have to -- like I said before, the \$800 a month was based on the estimation. Any extra proceeds were, of course, to our benefit as, you know, making a business run.

Q. But any extra proceeds over and above -- let's say the value of milk goes up, all right. That might mean hypothetically that the milk proceeds for that month are going to be greater than they were in the previous month.

A. Okay.

Q. You understand that?

A. I understand that, yeah.

Q. And in the previous month you would have deducted and retained \$800?

A. Correct.

Q. The month in which the milk was more valuable you would have deducted and retained \$800?

A. That's like I said.

Q. And in each month the Unruhs would receive whatever was left over after you took out your \$800?

A. Paying for the all the costs, yes....

Q. And this document at tab R16 was a document that you in fact prepared for the purpose of your January 30th --

A. This is a compilation of agreement statements which is done over the year, which is done by Rita.

Q. Now, taking a look at document R16. There is a line item for relief milking, field work, et cetera. Do you see that?

A. Correct.

Q. And from January to December of 2005 you show that amount varying from, I think a low of about \$1,600 to a high almost \$3,000. Do you see that?

A. Correct.

Q. That line item was -- you intended that line item to create the impression that you were paying the Unruhs an amount that varied from month to month for relief milking, field work, et cetera?

A. No. Those figures are put together, like I said before, Rita is my bookkeeper and accountant, so she takes care of the paperwork. That's exactly done by her. So this is not an illusion. This is a reflection of what happened over a period of months.

Q. You would agree with me that the line item, relief milking, field work, et cetera, tends to suggest that you were paying an amount that varied from month to month to the Unruhs?

A. Naturally.

Q. Right. But in fact the arrangement between yourself and the Unruhs, as we canvassed extensively now, was such that the Unruhs received all of the milk proceeds subject only to a deduction of \$800 per month, correct?

A. Based on average, once again.

Q. And if we look at the line item for balance to debt and overhead, you'll agree with me that that line item has a tendency to suggest that the amount that you received as part of this arrangement varied from month to month, correct?

A. Is that what it indicates?

Q. Well, I'm asking. If you disagree with me, that's fine.

A. I disagree with that as well....

Q. Mr. Van Herk, in January of 2005 you deducted and retained \$800 from the milk proceeds, correct?

A. You got me cornered with numbers because I -- I got -- here is this sheet.

Q. Forget about the sheet. I'm asking you in January of 2005, isn't it a fact that you deducted and retained \$800 from the milk proceeds?

A. This is once again, based on the average. That's why we see this number 800.

Q. Mr. Van Herk, I'm going to try this again. In January of 2005 the fact of the matter is that you deducted and withheld the sum of \$800 from the milk proceeds?

A. I don't know what to answer in this question, sir, because I am looking at my numbers here and I cannot remember from month to month. We talk about the average here and I'm talking about actual. I'm looking at actual numbers on the sheet here, so that's my confusion. Sorry about that.

Q. And that's exactly the point that I'm trying to make, that this document creates confusion, because the reality is that each and every month you deducted and retained not more and not less than \$800 per month from the milk proceeds, whereas this document has a tendency to suggest something else, correct?

A. I disagree to that as well.

Q. Okay. Isn't it, in fact, the case that in January of 2005, without regard to this document, the fact of the matter is you deducted and withheld the sum of \$800 from the milk proceeds?

A. I cannot recall that particular month for \$800.

Q. So is it your evidence now that the amount that you deducted and withheld from the milk proceeds varied from month to month?

A. No, it's -- okay, I'll say yes, \$800 a month then, okay. I understand.

Mrs. Van Herk's evidence from transcript page 98, 105 and 111:

Q. You heard your husband give evidence that you deducted and withheld \$800 from the milk proceeds each and every month?

A. I heard him say that.

Q. Is he wrong about that?

A. As a matter of fact, he's wrong about that.

Q. I see.

A. Can I explain what happened?

Q. Sure.

A. We got the costs. Now, I got to tell you that I did the books for Marty and I'll allow that maybe he didn't understand, you know, the way I entered this. But we got the slips, we entered the cost and then sometimes it was over, it was under, so we gave them what it was. So let's say, for example, in January it was 826. April, it was 1500 and May, it was less. It fluctuated. He meant to say that it averaged out. It happened to average out to that. We had reason to feel where we were going and how we were in line, because, like I said, at the Brar's we kept a close tab on that.

Q. And you say sometimes you received, as you put it, slips for these items?

A. Right.

Q. And sometimes you would not?

A. Right, that's right.

Q. You would be able to provide copies of those slips, subject to your counsel --

A. I'm not sure. Their stuff was done on notepads and grocery slips, so no, I didn't have much.

Q. The ones that you did receive, are you saying you destroyed them?

A. I see. I would keep them until I had them entered in, so I would remember them for my taxes.

Q. So they're all in the garbage now?

A. I would assume some of them, maybe.

Q. But not all of them?

A. I haven't checked. I'd have to check. It was important to me to have it down, to make sure I was paying my taxes....

41. In this case, the Appellants' position appears to be that the Agreement is not their agreement so it should not be used against them. According to the Van Herks, the Agreement does not in fact mirror the relationship of the parties and the evidence of the actual relationship demonstrates that they were actively engaged in milk production. Finally, whatever the Agreement was, it was intended to be temporary and circumstances beyond the Van Herks' control (inability to obtain financing and Mrs. Van Herk's illness) prevented them from farming in the manner that they wished, as soon as they wished.
42. The Panel does not find the Appellants' arguments compelling. The Panel does not know who created the Agreement document, but if it had been prepared by the Unruhs or someone on their behalf, we would have anticipated that Mr. Unruh's name would have been properly spelled. We accept the Unruhs' version of events that this document was created by the Van Herks or someone on their behalf. This conclusion is supported by reviewing the terms of the Agreement. It is inconsistent for the Unruhs to insist on formalising their Agreement and then use haphazard slips and phone calls to document and confirm monthly expenses. If the Appellants seriously wanted to advance this argument, there was an onus on them to introduce sufficient credible documentary evidence to displace the Agreement duly signed by Mr. Van Herk and the Unruhs. However, the Appellants chose not to adduce any financial statements, bank statements or income tax returns confirming their version of events. They point to two feed receipts for 2003 and assert that they bought this feed for the Blossom Acre herd; the Unruhs, however, deny ever receiving feed from the Van Herks. None of the alleged "slips of paper" received from the Unruhs seeking reimbursement were tendered as exhibits and, in fact, the Unruhs are adamant that they paid the expenses.
43. The Van Herks point to a spread sheet titled Income and Expense Summary 2005 which sets out the monthly milk receipts and various deductions for farm rent, hydro, water, herd lease, building equipment repairs, supplies, vet, relief milking, field work, forage and grain. While the monthly balance varies, income for 2005 is \$9,600 (i.e. \$800 X 12). No back up information was offered to support this document and, in fact, Mrs. Van Herk's evidence was that once this document was generated, she threw away the back up information. The Unruhs independently denied that any of the expenses set out on the spreadsheet were ever paid by the Van Herks. As we said earlier, we find Mr. and Mrs Unruh to be credible witnesses and we prefer their version of events over that of either Mr. or Mrs Van Herk.

44. Finally, as for the temporary nature of the Agreement, it is clear that the Agreement does not have a term. The Appellants point to memos or letters written in November 2002, December 2003 and 2004 and November 2005 as evidence of the temporariness of the arrangement. The November 2002 letter states:

Although you only wanted to do business by profit sharing, we cannot stress that this will be a temporary solution. We are trying to re finance to enable us to buy – not lease- our herd and again operate as we intended; hands on and your help only when needed. We cannot, therefore make any long term commitments with you, but are glad you have been willing to temporary help us out.

The December 2003 note states:

Nothing remains unchanged from our stand that we intend to actively operate our farm again.....Again we stress that as soon as we are able to restructure our finances, your help will only be needed on a temporary, relief milker basis.

The December 2004 note thanks the Unruhs for their support in this difficult time (referring to Mrs. Van Herk's illness) and states:

You asked we put in writing that we will need to retain your services at this time and that our July letter of this past year will not be acted upon until we know how Rita will be. Again, we will give you reasonable notice. We had discussed that I would take over the milking, but with Rita in the hospital, a family to run, as well as a job, that is not possible at this time.

45. Here again, the Unruhs independently denied ever receiving these letters. Both thought that their arrangement would last 5 years (their understanding of the length of the GEP). Including the time at the Brar operation, they anticipated milking until July 31, 2006.
46. Essentially, the Appellants ask this Panel to believe their version of events with little supporting evidence. The feed receipts for 2003 are not conclusive. The spread sheet is a document created by the Appellants and offered without supporting evidence. The fact that the annual return to the Appellants was exactly \$9600, or \$800 per month, leads us to believe that Mr. Van Herk governed himself in accordance with the Agreement. We do not accept the expenses set out in that spreadsheet at face value. The Van Herks had the opportunity to introduce supporting documents but chose not to do so. In contrast, the Unruhs both expressed a willingness to disclose their books and documents should the Panel so direct.
47. We also do not accept that the four memos referred to above by the Appellants are evidence that the relationship was intended to be temporary. Even if the relationship was intended to be temporary, we do not find that this assists the Appellants. These four memos all acknowledge that the existing relationship did not conform to the GEP and express a future desire to “actively operate the farm”.
48. Finally, and perhaps most damaging to Mr. Van Herk's credibility, is his admission that he did not know that the Unruhs had purchased the Brar herd. Had Mr. Van

Herk been as actively involved in either operation as he wants this Panel to believe, he should have recognised the herd he was milking. He did not and the Panel takes this as a clear indication that he was not involved in the day to day operation of the herd consistent with the evidence of both Mr. and Mrs. Unruh.

49. Accordingly, we find that the Milk Board was correct in its determination that Mr. Van Herk was not “actively engaged in milk production”. While we accept that there may be a continuum of activities sufficient to conclude that a person is actively engaged, in this case we find that neither Appellant was sufficiently connected to the operation. Specifically, we find that the Van Herks used their TPQ for their benefit to the extent that they received \$800 per month. However, it was the Unruhs who enjoyed the opportunity of profit and the benefits of their hard work. The Van Herks were not active in the day to day affairs of the farm; they were not involved in herd health decisions; they did not pay expenses. Mrs. Van Herk was not involved in keeping an eye on the efficiency of the operation through monitoring of expenses. We find that this arrangement was a pure quota lease and not a lease of a farm and herd.
50. The Appellants argue that they controlled the farm because the quota being milked was theirs. We reject this argument. Active engagement in milk production involves more than just owning quota. Contrary to views of the Appellants, the fact a farmer allows someone to milk his quota does not create sufficient control to place him on the continuum of “active engagement”. To allow this interpretation would be to read down “active engagement” so as to be meaningless.

ORDER

51. The appeal is dismissed. Mr. Van Herk’s restricted TPQ and producer license are cancelled effective February 1, 2006.
52. There will be no order as to costs.

Dated at Victoria, British Columbia this 19th day of June, 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Panel Chair
Garth Green, Member