

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL REGARDING ENTRY INTO THE BC MILK MARKETING  
BOARD'S GRADUATED ENTRY PROGRAM

**BETWEEN**

ALFRED DUTRA

**APPELLANT**

**AND:**

BRITISH COLUMBIA MILK MARKETING BOARD

**RESPONDENT**

**DECISION**

For the British Columbia  
Farm Industry Review Board

John Les, Chair and Presiding Member  
Diane Pastoor, Member  
Al Sakalauskas, Member

For the Appellant:

Katelyn E. Crabtree, Counsel  
Ian M. Knapp, Co-counsel

For the Respondent:

Robert Hrabinsky, Counsel

Date of Hearing

April 6, 2017

Place of Hearing

Abbotsford, BC

## INTRODUCTION

1. The appellant, Alfred Dutra, is a hay farmer in the Fraser Valley with prior experience in livestock management. He comes from a family of dairy farmers and has long wanted to be a dairy farmer himself. On March 13, 2002, he applied to be entered onto the waiting list for the British Columbia Milk Marketing Board's (Milk Board) Graduated Entry Program (GEP). His application was accepted.
2. The GEP is intended to provide an effective means for new producers to enter the dairy industry. The GEP commenced in 1998 and has resulted in excess of 100 new producers, many of whom are still in operation.
3. By letter dated May 5, 2015, the Milk Board invited the appellant to enter the GEP. He completed a notarized application form, prepared a business plan and scheduled an interview with the Milk Board. Following that interview, on September 18, 2015, the Milk Board wrote to the appellant asking him to provide the following additional information:
  - 1) Revised 5-year business plan including a financial plan with current dairy operating costs.
  - 2) Detailed plan to ensure proposed dairy farm meets the requirements for a Dairy Farm License issued by the Ministry of Agriculture and successful inspection.
  - 3) Letter from financial institution demonstrating sufficient borrowing available to sustain the planned dairy operation.
  - 4) Plan to gain specific knowledge within the dairy industry in order to ensure the strong support network required to operate a successful dairy operation.
  - 5) Signed lease agreement for minimum two years from date of commencing dairy production.
4. Over the subsequent months, the appellant attempted to satisfy the Milk Board's requirements. He asked for an extension in the time to commence operations beyond January 31, 2016 which was granted. Following the completion of the Ministry of Agriculture (Ministry) and animal welfare inspections, the appellant made efforts to address the identified deficiencies while communicating his frustration to Milk Board staff with the inspection and entry process.
5. On June 15, 2016, the Milk Board's GEP committee conducted a second interview with the appellant to communicate its significant concerns regarding the appellant's readiness to commence production. Following this meeting, the Milk Board wrote to the appellant on July 7, 2016 reiterating concerns and outstanding issues discussed at the meeting including building condition and disrepair, cleanliness of milking equipment, animal welfare compliance and general

knowledge of dairy farming. The letter asked him to present a written plan to address the concerns expressed and advised:

If you have not addressed the outstanding issues raised in this letter (with the appropriate bodies) and provided a suitable plan to the Board within 30 days of the receipt of this letter, then your status on the GEP waitlist will be terminated.

6. Although the appellant made attempts to address the outstanding issues, on August 24, 2016 the Milk Board wrote to the appellant advising that he was not approved for entry into the GEP. It is this decision that is the subject of this appeal.
7. The reasons given for the August 24, 2016 decision included the failure to comply with the requirements of the July 7, 2016 letter (but did acknowledge that the Ministry issues had been resolved after the 30 days expired), a general failure to demonstrate knowledge of dairy farming or willingness to comply with the requirements of a regulated industry and poor attitude.
8. On September 2, 2016, the appellant filed his Notice of Appeal with the British Columbia Farm Industry Review Board (BCFIRB). The parties agreed to hold the appeal in abeyance until such time as the Small Claims actions commenced by the appellant in related matters could be addressed.
9. The Small Claims actions were ultimately dismissed. This appeal was heard in Abbotsford on April 6, 2017.
10. In brief, the appellant's position is that the Milk Board's decision to refuse his entry into the GEP was flawed in three main respects. First, the decision was made through a process that was inconsistent with the Milk Board's Consolidated Order (CO). Second, the process was internally inconsistent. Third, the decision was based on personal factors wholly irrelevant to sound marketing policy. The appellant argues that each of these errors constitute a denial of procedural fairness and he seeks to have the Milk Board's decision terminating his enrollment quashed and an order reinstating him in the GEP. The appellant seeks in the alternative, should the decision to deny the appellant's entry into the GEP be upheld, that the Milk Board be ordered to pay the amount of costs incurred by the appellant after July 7, 2016 to address the Milk Board's issues. The appellant also seeks his costs of this proceeding.
11. The Milk Board opposes this appeal and the relief sought. It says that the duty of procedural fairness and the duty owed by a responsible regulator to the public at large are elements of the BCFIRB's "SAFETI"<sup>1</sup> principles, which oblige commodity boards to make decisions that are inclusive, transparent, fair,

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<sup>1</sup> The "SAFETI" principles have been developed by BCFIRB in consultation with the commodity boards it supervises to support a principles based approach to decision-making by commodity boards to carry out their responsibilities. SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", "Transparent", and "Inclusive".

effective, strategic and accountable. It says its decision was consistent with SAFETI and sound marketing policy; the appellant was given a full and fair opportunity to demonstrate his suitability as a GEP new entrant. With respect to the relief sought that the Milk Board pay “the amount of costs incurred after July 7, 2016”, the Milk Board says that while section 8(9) of the *Natural Products Marketing (BC) Act (NPMA)* confers a broad remedial jurisdiction, it is clear that the BCFIRB has no ability to award compensatory damages of the kind sought by the appellant.

## **ISSUE**

12. Did the Milk Board err in its August 24, 2017 decision to not approve the appellant’s entry into the GEP?

## **BACKGROUND**

13. Dairy products in Canada are regulated under a supply managed system designed to fill the need of the domestic market. A key component of supply management is quota, which entitles a producer to sell milk in accordance with provincial and federal authority. The Milk Board is the first instance regulator of dairy products, and administers the quota system through allotments of Continuous Daily Quota (CDQ) to milk producers who are required to produce that volume of milk on a daily basis.
14. Given the federal and provincial regulatory framework and the finite supply of quota, it can be difficult for new producers to enter the industry. The Milk Board has created the GEP to allow new producers to enter the dairy industry with an allocation of milk production quota at no cost. GEP allocations are highly sought after. Once on the waiting list, an applicant can wait many years before receiving an invitation to join the GEP as the Milk Board only allocates quota to a limited number of applicants each year.
15. The Milk Board has enacted its CO which set out the rules under which the BC dairy industry operates. The process by which a person becomes a producer through the GEP is set out in s. 4 of Schedule 1:
  - 4(1) The Board:
    - (a) will invite a minimum of three applicants to enter the Graduated Entry Program each year;
    - (b) may establish a maximum number of applicants who will be invited to enter the Graduated Entry Program in a year and that maximum number may vary from year to year; ...
  - (2) Where an applicant from the wait list is invited by the Board to become an entrant to the Graduated Entry Program, the following provisions apply:

- (c) the entrant shall file a “Program Entry” application, obtainable from the Board, completed and sworn before a Commissioner for Taking Oaths or Notary Public;
- (d) in the event the entrant is in breach of any of those matters which would cause an applicant to be struck off the wait list, the entrant’s invitation shall be revoked;
- (e) the entrant shall obtain a Producer licence from the Board of the appropriate class;
- (f) the entrant, including all partners if the entrant is a partnership, must meet with the Board prior to August 1 of the year when the invitation is extended and must present a 5 year business plan, containing information deemed appropriate by the Board, including:
  - (i) proof, in a form satisfactory to the Board, of the entrant’s financial ability to establish an acceptable Independent Production Unit for the production of milk; and
  - (ii) proof, in a form satisfactory to the Board, that the entrant has economically viable plans to sustain the production of milk on an acceptable Independent Production Unit;
- (g) commencing August 1, upon receipt of the production of a qualifying entrant by a Vendor, the Board will allot to the entrant 13.7 kilograms of Continuous Daily Quota;
- (h) the entrant must commence production between August 1 and the following January 31, failing which the entrant’s participation in the program shall be terminated. (emphasis added)

## **DECISION**

- 16. The appellant argues that that the process followed by the Milk Board was procedurally unfair, inconsistent with the CO, internally inconsistent and took into account irrelevant personal considerations to influence the decision made.
- 17. We will address each argument in turn.

### **Inconsistency with Consolidated Order**

- 18. The appellant says the process employed by the Milk Board was inconsistent with the CO - that the Milk Board treated the GEP as an extensive and continuous application, at all times subject to the discretion of the Milk Board and its staff. This led the Milk Board to impose extraneous pre-conditions on the appellant and frustrated his ability to meet the actual prerequisites contained in the CO.
- 19. The appellant’s argument seems at least in part to be that s. 4 of Schedule 1 sets out a complete code whereby GEP applicants must only satisfy defined criteria (a completed application and a business plan subject to Milk Board approval). The business plan, according to the CO, focuses on the entrant’s financial ability to establish a production unit, and proof of economically viable plans to sustain that production unit.

20. The appellant argues that having submitted a business plan satisfactory to the Milk Board, he should be able to begin producing his quota, subject only to obtaining a facility licence from the Ministry. Requirements relating to standards of production and animal welfare are properly viewed as conditions subsequent and subject to Milk Board verification, compliance and enforcement. He says it is difficult to assess compliance in the absence of an active dairy operation.
21. As examples of requests inconsistent with the CO, the appellant points to the Milk Board's January 2015 direction that all GEP "starts" be subject to animal welfare inspections within the first 6 months of production.<sup>2</sup> The appellant argues that he alone was the exception to this direction as the Milk Board staff strongly implied that a successful animal welfare inspection was a mandatory pre-requisite to commencing production.
22. The appellant also points to the 30-day deadline imposed in the Milk Board's July 7, 2016 letter. This deadline is not contained in the CO which only requires that quota shall be allocated to GEP participants between August 1 and January 31 of the application year. Milk Board staff advised the appellant in a February 15, 2016 email that he did not need to apply for another extension while he addressed deficiencies, which the appellant argues effectively, took him out of the 2015 GEP class. As he is now in the 2016 GEP year, he says he has until January 31, 2017 to obtain his Ministry licence, commence production, then obtain his quota and producer licence.
23. The Milk Board has a very different view of decisions made to approve entrants to the GEP under s. 4 of Schedule 1. It acknowledges that the decision to accept or reject a GEP entrant as a new producer affects the rights, privileges and interests of the applicant and as such, is subject to a common law duty of procedural fairness. The Milk Board says this means that the person whose interest is affected "should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions." See: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.
24. The Milk Board cautions that the right to procedural fairness must not be conflated with a supposed "right to quota", or in this case, a "right" to become a GEP producer. Industry participants do not have a commercial "right" to participate in a regulated industry which may be asserted against the regulators themselves: *Sanders v. British Columbia (Milk Board)*, [1991] B.C.J. No. 236 (C.A.). The Milk Board argues that although its procedure must be fair, the substantive decision to accept or reject a GEP entrant is entirely discretionary although it must be consistent with sound marketing policy. Further, as noted by

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<sup>2</sup> The January 2015 date appears to be in error as the Milk Board minutes in evidence reference a January 26, 2016 meeting where animal welfare inspections were discussed.

- the Supreme Court of Canada in *Baker*, the procedural rights of the appellant must be “appropriate to the statutory, institutional and social context of the decisions”. Decisions about GEP applicants must be made in a manner consistent with the Milk Board’s duty of procedural fairness owed to the applicant while also having regard to the “social context” or “social licence” under which it operates. It must not start new dairy producers under the GEP if there is cause for concern that the GEP producer’s facilities or management could give rise to concerns regarding animal abuse or neglect.<sup>3</sup>
25. The Milk Board says that the duty of procedural fairness and the duty owed by a responsible regulator to the public at large are elements of the BCFIRB’s SAFETI principles which oblige commodity boards to make decisions that are inclusive, transparent, fair, effective, strategic and accountable.
  26. Insofar as the appellant submits that a satisfactory business plan entitles him to produce GEP quota (subject only to a Ministry facility inspection and licence), we disagree.
  27. Section 7 of the *British Columbia Milk Marketing Board Regulation* confers upon the Milk Board the broad authority set out in the *NPMA* to promote, regulate and control in any and all respects the production of milk. This substantive power, which includes the authority to “allot quota”, necessarily and properly includes the broad substantive discretion to ensure that persons applying for quota are satisfactory to the Milk Board in respect of all matters reasonably relevant to the production of milk. As the Milk Board has submitted, no one has the right to quota.
  28. The CO provisions set out above, properly understood, are procedural steps designed to assist the Milk Board in exercising its broad substantive discretion. They do not fetter that discretion.
  29. All this is evident when s. 4(2)(f) of the CO is read carefully. This provision does not merely require an applicant to submit a business plan focused on the financial ability to establish and sustain a production unit. While the business plan must “include” those matters, the word “include” makes clear that the Milk Board’s consideration will be broader than that.
  30. In addition, and separate from whether the business plan is satisfactory, every applicant is required to meet with the Milk Board. This meeting also has a functional purpose, which is necessarily linked to the Milk Board’s standing power and responsibility, to exercise its regulatory due diligence to ensure that a potential producer will be a suitable producer.

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<sup>3</sup> The Milk Board has particular sensitivity to the animal welfare issue given an incident on a dairy farm in 2014 which resulted in an investigation by the BC Dairy Association and the BC Society for the Prevention of Cruelty to Animals and ultimately, criminal convictions.

31. If the Milk Board were to attempt to limit its gaze solely to the ability of an applicant to finance a farm, it would be improperly fettering its discretion. As all regulators know, and as should be self-evident to all prospective producers, a person's suitability to produce milk necessarily includes a wide variety of factors, including an assessment of the person's knowledge, facilities and willingness to constructively engage with the regulator in all key areas of what is a highly regulated industry.
32. Where the Milk Board reviews a business plan, meets with the applicant and identifies various relevant issues, shortcomings or red flags that require further inquiry, it is entirely appropriate that the Milk Board write a letter setting out its outstanding concerns and give the applicant the opportunity to address them. This is not "inconsistent with the CO". Rather, it is precisely how a licensing system can and should work before the Milk Board makes its final decision.
33. The fact that the Milk Board has broad licensing power does not of course answer the question whether any particular exercise of that power was exercised appropriately.
34. Whether the Milk Board has, on these particular facts, exercised its discretion in accordance with sound marketing policy, and whether it has, procedurally, given the applicant a meaningful opportunity to be heard, is the issue to which we turn next.

### **Internal Inconsistency**

35. The appellant submits that while the Milk Board's initial correspondence described a relatively simple process of presenting a business plan (which plan was accepted), the Milk Board improperly continued to add additional requirements for the appellant to fulfill, including:
  - An animal welfare inspection in addition to the Ministry inspection, both of which required the appellant to take further steps to improve his facilities and obtain follow up inspections;
  - An implied obligation to conform to the British Columbia Dairy Association's (BCDA) guidelines;
  - Demands to develop sufficient knowledge and the requisite attitude necessary to succeed as a dairy farmer without guidance or direction;
  - An arbitrary 30 day deadline to address outstanding issues with no clear Milk Board direction as to its expectation, develop a plan to address the concerns or actually resolve the concerns.
36. On the issue of the arbitrary timelines, the appellant says that the Milk Board initially advised him that he could extend the time required to start production by one year. He was initially granted a one month extension and then told he did not need to apply for a further extension while he addressed the deficiencies on his premises. However, the Milk Board then imposed the 30-day deadline in



July 2016 notwithstanding the Milk Board's acknowledgement that start up could be extended to January 31, 2017.

37. The Milk Board, for its part, says that its decision reflects the good judgment of a responsible regulator and is consistent with sound marketing policy. The decision stated:

We are writing to advise you that the Board has not approved you for entry into the GEP program as you have not successfully completed the requirements to become a GEP licensed producer. More specifically, you have failed to comply with the instructions in our July 7, 2016 letter:

1. You did not address the outstanding BC Ministry of Agriculture and BC Milk Marketing Board issues within 30 days of the July 7, 2016 letter. We understand that you did resolve the BC Ministry of Agriculture issues after the 30 days expired.
2. Knowledge of Dairy Farming  
During the two GEP interviews, the committee members did not receive satisfactory responses from you regarding your knowledge of dairy farming. **During the past year, the communication between you and the Board's staff and contractors have identified the following concerns:**
  - a. **A lack of understanding and/or an unwillingness to comply with the requirements of farming in a regulated industry.**
  - b. **A lack of respect for the Board staff, contractors, and BC Ministry of Agriculture employees who were trying to assist you in understanding the requirements of the various regulations and orders.**
  - c. **Unwillingness to comply with or understand the required industry programs such as Animal Welfare, Canadian Quality Milk, Biosecurity, and Environment.**
  - d. **A general lack of understanding of animal care requirements and recommended best practices. (emphasis added by Milk Board)**

38. Robert Delage, Senior Director, Finance and Operations for the Milk Board reviewed the extensive history of its dealings with the appellant following the August 2015 meeting. Mr. Delage testified, and we accept, that as the Milk Board began its vetting process, asking questions regarding the appellant's business plan, the appellant began expressing contempt for the Milk Board and its staff and threatened to commence legal proceedings.

39. The Milk Board says, and we accept, that the inspection process resulted in a flurry of "bizarre, hostile and contemptuous" communications from the appellant. The appellant took issue with the Ministry's inspector, saying his report was inaccurate and biased and he asked for another inspector. The appellant was highly critical of the Milk Board's animal welfare inspector as well, challenging her qualifications and credentials, stating he had "no confidence in any report (she) could possibly make". He stated there was no point in having further

communications with her, accused her of lying in her report and again threatened legal proceedings if the Milk Board did not take steps to deal with her. Ultimately, the appellant commenced Small Claim's actions against both inspectors, which were summarily dismissed.

40. The Milk Board points to a meeting between representatives of the BCDA and the appellant in January 2016 to review proAction (a set of guidelines regarding common farm procedures, animal care food safety principles, planning and record keeping). As a result of this meeting, the BCDA wrote to the Milk Board stating it was unable to conclude that the appellant had a reasonable chance of successfully implementing proAction.
41. The Milk Board says that it communicated its grave concerns to the appellant that he was demonstrating an inability to work within the highly regulated milk industry and continuing to question the authority of Milk Board staff and Ministry employees. It says these concerns were met with further contempt, hostility and threatened legal proceedings.
42. The Milk Board argues that the dairy industry is highly regulated and successful producers must have sufficient knowledge of the regulatory requirements, acknowledge the authority of the regulator and be willing to comply with directions. Facilities can be improved, equipment purchased, producers educated, deficiencies can be rectified. However, the inability to acknowledge the authority of the regulator and the unwillingness to comply with directions presents an intolerable risk to the industry and the "social licence" under which it operates.
43. The Milk Board says that allowing the appellant more time to comply would not have addressed the underlying issue of his inability or unwillingness to work within the regulated system. Its considered view is that the appellant's chances of success as a dairy producer were low and as such it was unfair to allow him to remain on the GEP waitlist when there are so many other willing and eager candidates.
44. In response to the procedural fairness arguments, the Milk Board says it gave the appellant a full and fair opportunity to demonstrate his suitability as a new entrant. It rejects the notion that it should have reassessed his application (again) upon the completion of a successful Ministry inspection on August 11, 2016. Its decision to remove the appellant from the GEP did not rest with the technicality of missing the 30-day deadline. Rather, it was grounded in the appellant's lack of understanding and/or unwillingness to comply with the requirements of farming in a regulated industry, lack of respect for the Board staff, contractors, and Ministry employees who were trying to assist him in understanding the requirements of the various regulations and orders, an unwillingness to comply with or understand the required industry programs and a general lack of understanding of animal care requirements and recommended best practices.

45. The Milk Board cautions that a challenge to its substantive assessment must not be confused with an allegation of procedural unfairness. There is nothing in the procedure it employed that could reasonably be described as “unfair”, as the process was fair and transparent with the Milk Board clearly communicating the requirements imposed on the appellant and its expectations. The appellant asked for and received an extension. He was given a second in-person interview in June 2016 so that the Milk Board could convey its concerns. As the matter progressed, the Milk Board continued to articulate its deepening concerns. Its position is that it gave the appellant every opportunity to demonstrate his understanding of, and willingness to comply with, requirements and respect for the persons trying to assist him in understanding the regulatory requirements.
46. Rather than denying the appellant a meaningful opportunity to demonstrate his suitability or unsuitability, the Milk Board argues that the appellant availed himself of every opportunity to convincingly demonstrate his total unsuitability to operate within the context of a modern, highly regulated dairy industry.
47. We have already accepted that the Milk Board’s decision to approve GEP new entrants is a discretionary decision involving a consideration of the respective merits of an applicant. As we have found above, s. 4(1) of Schedule 1 represents the first step in a process of information gathering designed to allow the Milk Board to assess the relative merits of an applicant as a dairy producer.
48. The panel has considered the Milk Board’s process in detail. We find that the Milk Board identified issues with the appellant’s business plan at the initial meeting which caused it to write to the appellant for clarification (see paragraph 3 above).
49. In response to what the panel finds were very reasonable requests in support of the Milk Board’s regulatory due diligence to assess the viability of the appellant’s business planning assumptions, his plan for gaining the requisite knowledge and meeting the requirements of the Dairy Farm Licence, the appellant responded in his November 20, 2015 email advising that he had consulted with his lawyer and was objecting to adjusting his plan to account for current dairy costs including rent and overhead. He set out various reasons why he felt these requests were unnecessary stating: “I am much older than yourself and every member of the board and have much more experience in these matters and it does not matter that my costs are lower than other farmers as that is irrelevant”. The appellant states that he did not require a bank letter as his mother was financing his dairy, “and she does not know what is wrong with you people!” The appellant disparaged the relative youth of staff and Milk Board members and threatened legal proceedings.
50. Unfortunately, it appears that the next step (a preliminary inspection) did little to allay the concerns with this application. The Ministry’s dairy inspection technician conducted a preliminary inspection on November 19, 2015 and noted a

number of deficiencies with animal housing including lighting, heating, cleanliness and maintenance of facilities and equipment including the bulk tank.

51. It appears that, at around the same time, the appellant was having his own concerns about running a viable dairy operation. In an email dated November 27, 2015, the appellant advised Milk Board staff that his banker had gone to Mexico, he could not get a hold of his accountant and he was having a great deal of difficulty getting work done. He had apparently bought cows (although he was not yet able to ship milk) and they were eating more than he thought and losing weight fast. The cold weather was taking a toll on the calves and he did not want to buy more. He described having one problem after another and wondering whether he should just sell the livestock and go to Mexico or cut his losses and postpone until things settled down. He candidly admitted that “the discrepancies are more challenging than I thought and this appears to be more of a money losing venture than expected.” He asked whether the Milk Board would approve of him delaying his plans until the weather was better and how late could he postpone things before he would be “booted out of the program?”
52. The Milk Board granted the extension sought (February 28, 2016) and reminded the appellant to “...please ensure that all information requested in the September 18, 2015 letter from the Board...is submitted in a complete and timely manner.”
53. On January 21, 2016, two BCDA staff representatives met with the appellant to review its proAction program requirements which all dairy producers are expected to follow. Their stated purpose was to offer the appellant technical assistance in meeting the program’s nationally recognized standards for milk quality, food safety and animal care. They advised Milk Board staff as follows:

To successfully implement proAction, producers must demonstrate a knowledge of common farm procedure, animal care, food safety principles, and commit to keeping plans and records to confirm their practices. We are unable to conclude that Mr. Dutra has a reasonable chance of successfully implementing the proAction program.
54. We find that this exchange of information from the appellant, the Ministry inspector and the BCDA would not have addressed any of the Milk Board’s concerns and could reasonably be seen as being yet more red flags regarding the appellant’s suitability as a successful producer in the regulated dairy industry. Given the events recounted above, it is fair to say that the Milk Board was reasonably and properly giving weight to the Ministry and animal welfare inspections in determining the merits of the appellant’s application.
55. We note here the appellant’s argument that he was singled out to have an animal welfare inspection as a mandatory prerequisite to entering the GEP (as opposed to within the first 6 months after the start of production). We do not accept this characterization of the evidence. Animal welfare inspections have been

- mandatory within the dairy industry since October 2014.<sup>4</sup> The Milk Board Minutes of January 26, 2016 confirm that after passing the motion requiring an animal welfare inspection of the appellant's farm prior to allocating quota, staff was instructed to advise all GEP starts that they would be inspected prior to the end of their first six months. However, the eight new invitees were to be advised that they would receive inspections prior to start up. It would thus appear that the appellant was treated no differently than the other 2016 invitees.
56. On February 10, 2016, Ministry and animal welfare inspections were conducted of the appellant's premises. No animals were on the farm. The animal welfare inspector's report identified a lengthy list of deficiencies including inadequate calf housing, poor barn condition, insufficient lighting, ventilation concerns and debris accumulation. She documented concerns about the appellant's reluctance to provide appropriate veterinary care, as required by the Animal Welfare Code of Practice. Even in his testimony before us, the appellant adopted what we would describe as a "wait and see attitude" relating to the treatment of sick animals suggesting that it was often wrong to immediately "jump on" the situation with veterinary care and medication.
  57. The animal welfare inspector concluded "(i)n summary, there are a number of facility and proposed management deficiencies that will prevent this dairy operation from being compliant with the Code of Practice and providing dairy cattle with an acceptable living environment."
  58. In her report, the animal welfare inspector identified a lack of manure management facilities. This was a point of contention for the appellant, as he noted that there is a manure pit on the farm (which he variously described as 50 or 75 feet in diameter). As a result of this alleged error, the appellant dismissed all of the inspector's observations and recommendations, describing her as "unprofessional", "inaccurate", "disrespectful" and "a liar". He subsequently demanded a different animal welfare inspector.
  59. The panel had the benefit of testimony from Milk Board member Jeremy Wiebe, who attended the appellant's farm. He stated and we accept that the manure pit was easily overlooked due to vegetation growth. As an experienced dairy farmer, he did not see the inspector's oversight in missing this particular manure pit as reflecting on either her competence or reliability.
  60. The Ministry inspector also made numerous observations as to the suitability of the proposed dairy facility. In addition to the extensive notes on the inspection report, he prepared a typewritten addendum with specific concerns relating to the condition of facilities and equipment which needed to be improved to reduce risks to milk quality and safety. He agreed with the animal welfare inspector's concerns around free stall management, design and ventilation and highlighted that fifteen items on the inspection report noted "needs improvement".

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<sup>4</sup> Letter from V Crites to appellant dated April 6, 2016.

61. We agree with the Milk Board that inspections are a benefit to potential producers as they help to identify health or safety risks that might interfere with the producer's ultimate success in the dairy industry. It does not however appear that the appellant saw any benefit in these inspections. His attitude towards the inspectors and their findings became increasingly hostile. Some examples of his hostility and outright rejection of the inspectors' authority and qualifications include:
- March 30, 2016 letter requesting that the Milk Board to arrange for a different Ministry inspector as his "last inspection report was inaccurate, and shows a bias."
  - April 5, 2016 letter dismissing findings of inspectors as "not a concern", "not necessary", "can be ignored" and again disparaging the inspectors and their qualifications at length;
  - April 6-7, 2016 emails taking issue with the animal welfare inspector's experience and expertise, commenting that a university degree doesn't make a farmer, dismissing concerns with regard to his readiness to commence dairy farming and asking for a different inspector. He calls the inspector a "liar" and states "(i)f you do not do something about (her) and this report, I will go to my lawyer".
  - May 13, 2016, Small Claim's action commenced against Ministry inspector complaining he had refused to issue a "Milk Permit", had given "poor service", "poor advice" and had expressed "misplaced concern".
62. The Milk Board Minutes of April 26, 2016 summarized that the appellant had still not passed the Ministry inspection and stated that a further site assessment was necessary. The appellant had not addressed the six concerns arising out of the animal welfare inspection necessary for compliance with the Code of Practice and was refusing the current-Board retained independent inspector for all possible future assessments.
63. The Milk Board Minutes of May 20, 2016 indicate that the Milk Board had decided that a further meeting with the appellant was necessary to discuss the "unresolved issues regarding both the Board's and BC Ministry of Agriculture's requirements before your application to become a producer can be considered."
64. This second interview was held on June 15, 2016. The committee's concerns regarding the appellant's readiness to commence production were discussed. The Milk Board followed up this meeting with a letter dated July 7, 2016 itemizing concerns arising out of the inspections and then summarized the Milk Board's position, stating in part:
- The Board will not be able to favorably consider your application to become a GEP producer until you have resolved the concerns addressed in this letter. It is your responsibility to address the concerns in this letter with the appropriate bodies (BC Milk and BC Ministry of Agriculture). If you have not addressed the outstanding issues raised in this letter (with the appropriate bodies) and provided a suitable plan to the Board within 30 days of receipt of this letter, then your status on the GEP waitlist will be terminated.

65. In response, the appellant emailed the Milk Board (July 7, 9, and 14, 2016) continuing to express his disregard and disdain for the animal welfare inspector. On July 29, 2016 (a week prior to the deadline), he commenced a Small Claims action alleging she had “filed a false report”.
66. Looking at the history set out above, the panel has no difficulty concluding that that the Milk Board has demonstrated that the information it sought from the appellant was grounded in meeting its due diligence requirements to ensure that the appellant was a suitable GEP candidate and would fit within the regulatory environment of the dairy industry. The Milk Board’s concerns with the appellant’s initial application only amplified over time as more information came to light as a result of the Milk Board’s vetting process, a process which we find was consistent with the underlying sound marketing policy objective of ensuring the suitability of the appellant as a GEP producer.
67. We do not agree that the Milk Board owed the appellant yet another chance to comply. While we acknowledge that the appellant worked hard to address the deficiencies and did receive a successful Ministry inspection on August 11, 2016, other requirements were not addressed. The appellant argued that the fact that he passed the Ministry inspection (albeit after the 30-day deadline) should have been sufficient to allow him to entry to the GEP. However, the appellant had still not completed a successful animal welfare inspection and as noted above, he remained very critical of that inspector and had commenced legal proceedings against her. Apart from addressing the Ministry inspector’s deficiencies, the appellant did not take steps to demonstrate his willingness to comply with regulatory requirements. His correspondence during this period remains hostile. When the Ministry inspector advised of a delay in conducting the inspection to accommodate having another colleague present, the appellant accused him “purposely using this as an excuse” to delay matters. It does not appear that the appellant took the necessary affirmative steps to show a change in attitude or a willingness to comply with or understand the required industry programs, animal care requirements and recommended best practices.
68. We appreciate that under the CO, as a 2016 entrant, the appellant had until January 31, 2017 to commence production. The Milk Board says that more time would not have resolved the underlying issue of the appellant’s unwillingness to work within the regulated environment of the dairy industry; his chance of success was low. In these circumstances, it was unfair to allow the appellant to remain on the waitlist.
69. In our view, based on the extensive history of correspondence, the Milk Board properly exercised its discretion to deny the appellant entry to the GEP based on what we have concluded above to be well-founded and grave concerns as to the appellant’s ability to produce high quality milk and work with various regulators and advisers to avail himself of the expertise required. We agree that giving the appellant more time would not have changed this outcome.

## **Irrelevant Personal Considerations**

70. The appellant argues that the Milk Board allowed irrelevant personal considerations (described as “dislike” of the appellant) to influence its decision to terminate his participation in the GEP. He says that whether a decision-maker likes a person subject to a discretionary decision is a wholly irrelevant factor and yet that is what transpired here.
71. The appellant acknowledges that his relationship with the Milk Board became increasingly tense especially after January 2016 but says that this response was reasonable in light of the Milk Board imposing obligation after obligation on him. The appellant acknowledges his frustrations and that he was vocalizing those frustrations to Milk Board staff. He says the Milk Board’s response was to write letters questioning the appellant’s knowledge of dairy farming and his commitment to the regulatory regime.
72. The appellant characterized the Milk Board’s concerns as inherently personal in nature, with no place in determining his entitlement to a benefit conferred by a government agency. He says he has a constitutional right to express displeasure to persons in authority. The Milk Board’s dissatisfaction with his attitude has nothing to do with his ability to produce CDQ in compliance with the applicable regulations and had no place in a decision respecting his place in the GEP.
73. The Milk Board rejects the appellant’s characterization of the events and takes the position that its decision reflects the good judgment of a responsible regulator, and that the decision is consistent with sound marketing policy.
74. We do not find that the Milk Board allowed irrelevant considerations to influence its decision. Instead, the history, which the panel has reviewed in its entirety and much of which we have summarized above, shows that the Milk Board properly took into account the appellant’s continued reluctance to accept the authority of the Milk Board, its staff and inspectors. While the appellant had the constitutional right to express his displeasure to persons in authority, what he actually said mattered too - particularly where, as here, it reflected adversely on his willingness to constructively engage with a regulator in a highly regulated industry. This is not decision-making based on “dislike”. It is responsible decision-making based on an entirely legitimate assessment of an applicant’s willingness to accept the authority of the regulator to require that certain on farm production standards be met.
75. The appellant says that his attitude has nothing to do with his ability to produce CDQ in compliance with the applicable regulations. Once again we disagree. The Milk Board, the inspectors and the BCDA all found fault with the appellant and his proposed dairy facility. Instead of remedying the deficiencies in a timely manner, the appellant challenged the authority of the Milk Board to require him to do so, questioning the judgment of Milk Board members, staff, inspectors and any



other person making a recommendation. We see the appellant's conduct and attitude going to the very core of his ability to be a successful dairy producer.

76. The record of correspondence between the appellant and the Milk Board and its staff shows, that despite the sometimes vitriolic tone of the appellant's correspondence, the Milk Board maintained a professional and courteous tone throughout the process. It continued to offer assistance and advice which was largely rejected by the appellant. All this belies the charge of decision-making based on "dislike".
77. The Milk Board says its decision to deny the appellant entry into the GEP is consistent with sound marketing policy and BCFIRB's SAFETI principles. We have applied the SAFETI lens below and agree:

**Strategic:** As first instance regulator, the Milk Board is required to ensure that the milk produced in BC is of the highest quality. Failure to ensure high milk quality standards would quickly erode public confidence in the dairy industry damaging the social license under which it operates, potentially causing the industry great collective harm to say nothing of the health risks involved. To ensure high quality standards are met, it is necessary that all prospective dairy farms are modern and sanitary and adhere to the CO as well as all health and safety requirements. Compliance with industry programs and animal welfare standards is crucial in an environment of sometimes rapidly changing societal values. Becoming a producer through the GEP is a privilege and not a right but that does not mean that regulators can or should take a cavalier attitude. In this case, we find that the decision to deny entry to the GEP where the appellant demonstrated an unwillingness to work with the Milk Board to satisfy reasonable regulatory requirements, a lack of respect for those trying to assist him, an unwillingness to comply with or understand industry programs and a general lack of understanding of animal care requirements was both strategic and forward thinking. It reflected an appropriate regulatory perspective, which we find systematically examined whether the appellant would fit within the highly regulated dairy industry going forward.

**Accountable:** The Milk Board is accountable to the producer/processor community as well as the public at large. It needs to be able to assure all parties that the milk produced and sold in BC is safe and has a significant role in ensuring that producers (including new entrants) produce high quality milk and is ready, willing and able to take appropriate steps where producers fail to meet those high standards.

**Fair:** The Milk Board gave the appellant every opportunity to demonstrate his suitability as a GEP new entrant (as every other GEP applicant to date has successfully done). Despite what we have found to be the appellant's hostile and abusive conduct, the Milk Board continued to deal with the appellant in a professional fashion, identifying its concerns and offering assistance and advice.

**Effective:** The Milk Board has had some form of GEP since 1998 and in excess of 100 new entrants have successfully entered the program. The uncontroverted evidence of the Milk Board is that the appellant is the only applicant to date denied entry. Clearly, this was not a decision the Milk Board took lightly, and we have similarly examined that decision with a critical eye. Based on the evidence we heard, the Milk Board's refusal of the appellant's application was in our view an effective exercise of regulatory discretion and responsibility.

**Transparent:** Given the nature of the allegations here, we have taken great care to review the entire application process, the supporting letters, emails and minutes of meetings. As we have said above, the Milk Board conducted itself in a very transparent manner, its regulatory requirements were identified and its specific requests for supporting information or action were clear and easily understandable. Milk Board staff and the inspectors went out of their way to explain the nature of their concerns and expectations. We find that the appellant's unsuccessful application for entry into the GEP has nothing to do with a lack of transparency by the Milk Board or its staff.

**Inclusive:** The Milk Board broadly availed itself of all industry expertise to assist in its decision-making, including the animal welfare and Ministry inspectors and BCDA staff. The Milk Board, its GEP Committee and its staff were accessible and responsive to the appellant. We find that the Milk Board made a decision in the best interest of the public and the dairy industry.

78. In summary, we find that the Milk Board's conclusion that the appellant "is incapable of becoming a good dairy citizen" is well supported by the evidence. Based on the history here, we agree with the Milk Board that this applicant has failed to provide the necessary degree of confidence that he would or could comply with the dairy industry's complex regulatory environment. Entry into the GEP is highly sought after. In our view, the appellant has only himself to blame for his removal from the GEP. In spite of what can only be characterized as bizarre and abusive behavior, the Milk Board and its staff and inspectors worked very hard to assist the appellant with his challenges. This proved to be a thankless task.

### **Recovery of Costs Incurred after July 2016**

79. Having dismissed the appellant's grounds of appeal, we now consider his claim that should the decision to deny his entry into the GEP be upheld, that the Milk Board should be ordered to pay the amount of costs incurred by the appellant after July 7, 2016 to address the Milk Board's issues.
80. The Milk Board, relying on a number of prior decisions of this board argues that BCFIRB has no ability to award compensatory damages of the kind sought by the appellant.

81. We do not find it necessary to decide the legal argument advanced by the Milk Board concerning the scope of BCFIRB's remedial authority on appeal.<sup>5</sup> The appellant did not develop this argument in oral submission, and we find no basis on which we would make such an order. No one has a right to GEP quota. Every applicant who seeks that quota must expend costs to attempt to obtain that benefit. Where, as here, the regulator clearly acted in good faith, there is no principled basis for compensating an applicant who expends costs but fails to convince the regulator that he is a suitable candidate. In our view, as a matter of sound marketing policy, the financial risks attendant on an application that was found by the Milk Board, and by BCFIRB, to be unsuccessful, properly lie with the applicant.

**ORDER**

82. The appeal is dismissed.

83. There will be no order as to costs.

Dated at Victoria, BC, this 19<sup>th</sup> day of May, 2017.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**



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John Les, Chair and Presiding Member



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Al Sakalauskas, Member



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Diane Pastoor, Member

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<sup>5</sup> *Horizon Hatchery Ltd. v. British Columbia (Broiler Hatching Egg Commission)* [1992] B.C.J. No. 2458