

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT RSBC  
1996, c 330

ON APPEAL OF AN ORDER OF THE  
BRITISH COLUMBIA MILK MARKETING BOARD

BETWEEN

ADRIE STUYT dba HOL-AMER FARMS

APPELLANT

AND

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND

BRITISH COLUMBIA DAIRY ASSOCIATION  
MAINLAND MILK PRODUCERS' ASSOCIATION

INTERVENORS

## **DECISION**

### APPEARANCES:

For the BC Farm Industry Review Board

Wendy Holm, Presiding Member  
Dennis Lapierre, Member  
Pawan Joshi, Member

For the Appellant

Morgan Camley, and Melanie Power, Counsel

For the Respondent

Robert P. Hrabinsky, Counsel

For the Intervenors  
BC Dairy Association

Sean Price, Counsel

Mainland Milk Producers Association

Mark Van Klei, President

Date of hearing

By written submissions  
and oral hearing dated May 26, 2022

## I. INTRODUCTION

1. The Appellant, Adrie Stuyt dba Hol-Amer Farms, is a registered producer licensed by the British Columbia Milk Marketing Board (the Respondent or Milk Board) and engaged in the production and marketing of milk from his family dairy farm in Agassiz, BC.
2. After a covert investigation, the Milk Board concluded it had reason to believe that Mr. Stuyt had been selling, shipping for sale, or offering for sale, unpasteurized milk, other than through the Milk Board, contrary to subsection 61(2) of the Consolidated Order from his farm premises. The Milk Board had further reason to believe that such unpasteurized milk had been transported from the farm premises to a warehouse premises. As a result, on August 17, 2021, the Milk Board conducted a show cause hearing.
3. On September 29, 2021, the Milk Board issued its decision that is the subject of this appeal. The Milk Board assessed a charge of \$228,451.02 against the Appellant to compensate the Milk Board for costs and losses incurred during its investigation and hearing process, and further imposed three years of regulatory sanctions (restrictions on his license) as a deterrent (Decision).
4. On October 29, 2021, the Appellant appealed the Decision to the British Columbia Farm Industry Review Board (BCFIRB).
5. On November 3, 2021, and in advance of the pre-hearing conference, the Milk Board advised that in addition to having its Decision upheld, it would be seeking to have the Panel exercise jurisdiction under s. 8(9)(a) of the *Natural Products Marketing Act (NPMA)* to vary the Decision under appeal and order the immediate cancellation of Mr. Stuyt's license and quota, in addition to affirming the charge imposed by the Board under paragraph 35(a) of its Decision.
6. On December 1, 2021, with the consent of the parties, BCFIRB stayed paragraph 35(a) of the Decision which ordered the Appellant to pay charges in the amount of \$228,451.02, until such time as the appeal was decided. The terms and conditions found in paragraph 35(b) of the Decision were not stayed and this Panel's understanding is that those have remained in effect during the currency of the appeal.
7. The BC Dairy Association (BCDA) applied for and was granted full intervener status as well as the Mainland Milk Producers Association (MMPA) which applied for and was granted partial intervener status to make a written submission in the appeal.
8. In brief, the Appellant argues that the Milk Board's investigation process was procedurally unfair, alleging there were gaps in its investigation, unreliable chain of custody procedures relating to the milk seized and tested, compelled statements

without access to counsel, and the Appellant was required to submit evidence without having full disclosure. The Appellant argues the Decision was unreasonable and internally inconsistent and the penalty imposed was disproportionate to the harm caused and appears to be retaliatory. The Appellant asks that the Decision be set aside based on the flawed Investigation and procedural issues leading up to the show cause hearing. The Appellant also argues the Decision is unreasonable and ought not stand, or alternatively, the penalty imposed is based on faulty logic and is not proportionate to the harm alleged and ought to be varied.

9. The Respondent Milk Board argues that no procedural fairness was owed to the Appellant in its investigation stage nor is there any right to “know the case one has to meet” at the investigative stage. The Milk Board argues it exercised lenience and given what it now says is the Appellant’s “failure to cooperate and (his) ungovernability” demonstrated throughout the investigation, show cause hearing, and now this appeal, it asks this Panel to exercise to vary the Decision and, in addition to affirming the compensatory charges imposed under paragraph 35(a), it seeks the immediate cancellation of the Appellant’s license and quota.
10. The appeal proceeded by written submissions on the record before the Milk Board. The Panel received and reviewed the following:
  - a. Written submission of the Appellant dated February 10, 2022;
  - b. Written submission of the Respondent dated February 23, 2022;
  - c. Reply submission of the Appellant dated March 3, 2022 and
  - d. Respondent’s supplementary submission dated May 6, 2022, regarding available enforcement remedies.
11. After reviewing the submissions, the Panel determined it was necessary to hear evidence from the Milk Board regarding the following:
  - a. Quota holdings of the appellant over the seven years in issue;
  - b. Production records of the appellant and explanation of how the raw milk volumes that are the subject of this appeal relate to the appellant’s actual regulated production volumes over the seven-year period (i.e., were the raw milk volumes subject of this appeal in excess of production requirements under quota or within the production requirements under quota);
  - c. Description of all available regulatory enforcement tools;
  - d. Explanation of how the Milk Board chooses between enforcement options including s. 18 of the NPMA;
  - e. Explanation of how and when those options would be applied, and what the Milk Board considers as part of an enforcement decision (e.g., severity of infraction, risk to orderly marketing, risk to public health);

- f. Explanation of how the volume and dollar cost and losses to the pool calculated by the Milk Board in s. 35(a) of the decision were determined;
  - g. Explanation of the potential impact of the terms and conditions imposed in s. 35(b) of the decision on the appellant's dairy operation; and,
  - h. Explanation of how the Milk Board manages license suspension in light of herd management and provincial milk supply.
12. An oral hearing by Zoom proceeded on May 26, 2022, where the Milk Board called its Chair, Janice Comeau to testify. The Appellant cross examined this witness and the Panel asked questions. The parties were also given an opportunity to make further submissions.

## **II. ISSUES ON APPEAL**

13. Were the proceedings (investigation, disclosure, and hearing) leading to the Milk Board's Decision procedurally fair?
14. Is the Milk Board's Decision reasonable (internally coherent, justifiable, absence of improper basis)?
15. Should the BCFIRB exercise its jurisdiction pursuant to s. 8(9)(a) of the *NPMA* to "[vary] the order, decision or determination under appeal", by ordering the immediate cancellation of the Appellant's licence and quota in addition to the charge imposed in paragraph 35(a) of the Decision?

## **III. LEGISLATIVE FRAMEWORK**

16. The production and marketing of natural products in British Columbia is governed by the *NPMA*, which is part of a complex fabric of companion provincial and federal statutes governing regulated marketing in Canada. The primary focus of the *NPMA* is economic regulation of the agricultural sector:
- s. 2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including the prohibition of all or part of that production, transportation, packing, storage and marketing.
17. The *NPMA* authorizes the Lieutenant Governor in Council, by regulation, to create "Schemes" governing defined commodity sectors, define the "regulated product" to which it applies, create an individual commodity board or commission to exercise first instance regulation and vest that commodity board or commission with broad powers, including powers incorporated by reference from the *NPMA*: (section 11). The Milk Board is one such marketing board. It is continued pursuant to section 3 of the British Columbia Milk Marketing Board Regulation (B.C. Reg. 167/94, as amended) (the "Regulation").

18. Pursuant to subsection 7(1) of the Regulation, the Milk Board is vested with the authority to promote, regulate and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of milk, fluid milk or a manufactured milk product (“regulated product”) within British Columbia, including the prohibition of production, transportation, packing, storage and marketing, or any of them, in whole or in part, and is vested with all powers necessary or useful in the exercise of those powers.
19. Pursuant to section 7(1.1) of the Regulation and paragraph 11(1)(q) of the *NPMA*, the Milk Board is vested with the authority to make orders and rules considered by it necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of a regulated product, and to amend or revoke them. In accordance with the authority vested in it, the Milk Board has enacted its Consolidated Order of June 1, 2020 (the “Consolidated Order”).
20. Subsections 59 and 60 of the Consolidated Order set out the obligations on licensees to provide information and permit Inspection by the Milk Board:
  59. (1) Every Person licensed by the Board shall, upon request, provide the Board with any information relating to the production, processing, storing, transporting, and marketing by that Person of the regulated product, and shall make specific answers to any questions submitted to that Person by any member or employee of the Board for that purpose, and shall permit any member or employee of the Board to search vehicles in which the regulated product is transported.
  60. Every Producer shall permit any member or employee of the Board or any Person designated by the Board to inspect the Dairy Farm or other premises of the Producer for the purposes of determining whether or whether or not there has been compliance with the Milk Industry Act, the B.C. Act, the B.C. Regulation or orders of the Board.
21. Subsection 61(2) provides that “No Producer or Producer Vendor shall sell, ship for sale or offer for sale any milk except through the Board”.
22. The regulatory enforcement tools available to the Milk Board to address non-compliance with the Consolidated Order include:
  - a. subsection 7(1.1) of the Regulation and paragraph 11(1)(n) of the *NPMA* provide the Milk Board may “seize and dispose of any regulated product kept or marketed in violation of an order of the marketing board or commission”;
  - b. subsection 7(1.1) of the Regulation and paragraph 11(1)(o) of the *NPMA* provide the Milk Board may “set and collect... charges from designated persons engaged in the marketing of the whole or part of a regulated product..., and... use those... charges received by the marketing board... to pay the expenses of the marketing board..., [and] to pay costs and losses incurred in marketing a regulated product”;
  - c. sections 15 and 17 of the *NPMA* provide the Milk Board may apply to the BC Supreme Court for injunctive relief;

- d. subsection 7(1.1) of the Regulation and paragraph 11(1)(q) of the *NPMA* provide the Milk Board may “make orders and rules considered by the marketing board... necessary or advisable”. Implicit in this power is the power to impose terms and conditions on a license, or to suspend a license;
- e. subsection 7(1.1) of the Regulation and paragraph 11(1)(i) of the *NPMA* provide the Milk Board may “cancel a license for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations”; and
- f. section 18 of the *NPMA* provides that a failure to comply with an order made by the Milk Board constitutes an offence. The Milk Board could lay a private Information pursuant to sections 11, 13 and 25 of the *Offence Act* and initiate a prosecution under the *NPMA*. Section 3 of the *Offence Act* requires that proceedings must not be instituted more than 6 months after the time when the subject matter of the proceedings arose. In the usual course, it is for Crown Counsel to decide whether to take conduct of the prosecution or direct a stay of proceedings after making a charge assessment decision.

#### IV. KEY FINDINGS OF FACT

- 23. Mr. Stuyt chose not to testify under oath and did not put any facts in dispute.
- 24. Mr. Stuyt is a long-time registered milk producer. With the assistance of his family, he is engaged in the production and marketing of milk. He currently holds approximately 160 kgs of quota.<sup>1</sup>
- 25. The Regulation requires registered milk producers to ship their milk through the Milk Board. Unauthorized marketing of milk is prohibited by the Consolidated Order.
- 26. Unauthorized marketing of unpasteurized milk creates a serious public health risk as it has the potential to cause injury and damage to consumers and undermine the integrity of the regulated dairy industry. To emphasize this point, it is worth noting that in addition to the *NPMA* and Regulation, the sale of unpasteurized milk is prohibited under section 6 of the *Milk Industry Act* and its associated regulations and the *Public Health Act* and each statute has its own compliance and enforcement provisions.
- 27. In the spring of 2021, the Milk Board engaged Xpera Investigations (Xpera) to conduct surveillance and information gathering to assist it in assessing whether milk was being sold, shipped for sale, or offered for sale, other than through the

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<sup>1</sup> Based on an average of 1.18 kg of butterfat per lactating cow per day, an efficient milk producer holding daily quota equal to 160 kg of butterfat could be expected to be milking approximately 135 cows [160/1.18]. This average is based on research conducted in Manitoba; BC producers may experience slightly different numbers. ([https://www.gov.mb.ca/agriculture/business-and-economics/financial-management/pubs/cop\\_dairy\\_cow.pdf](https://www.gov.mb.ca/agriculture/business-and-economics/financial-management/pubs/cop_dairy_cow.pdf))

Milk Board, from the Mr. Stuyt's farm, and if so, the means by which such milk was being transported and the locations where such milk was being received and/or further marketed.

28. Xpera conducted surveillance on 19 days over a three-month period (February 8 to May 3, 2021) following which the Milk Board determined that Mr. Stuyt was "selling, shipping for sale, or offering for sale, milk, other than through the Board, contrary to subsection 61(2) of the Consolidated Order" and that the milk had been picked up at the farm on a weekly basis and transported to a warehouse in Surrey.
29. On April 26, 2021, the Milk Board obtained a warrant to enter and search the Surrey warehouse and seize evidence, which was executed on May 3, 2021. Milk Board inspectors found 29 white plastic 20-litre containers in a walk-in cooler containing what appeared to be raw unpasteurized milk. The pickup truck used to transport the milk was detained, and its driver interviewed.
30. The truck driver, Mr. Prystarz, confirmed he had been picking up milk once per week from Mr. Stuyt's farm premises for the past year and delivering it to the warehouse which he understood was rented by one of the owners of Punjabi Sweets bakery. Six empty 20-litre containers were retrieved from the vehicle, which Mr. Prystarz confirmed had contained the milk he had just delivered. He had cleaned the empty containers using hot water. This statement was not recorded or transcribed although Milk Board General Manager Robert Delage took cursory notes of the conversation which were disclosed.
31. Samples of the seized milk were sent to True North Veterinary Diagnostics Lab (True North) and confirmed that the milk was not pasteurized.
32. The same day and after obtaining the warrant, Mr. Delage, interviewed Mr. Stuyt at his farm. After informing him of the seizure of milk from the warehouse, Mr. Stuyt made the following statements:
  - a. He was aware that milk was being transported from (his) Hol-Amer farm in 20 litre containers, approximately once per week.
  - b. He assumed that the person transporting the containers was using the milk to feed calves but suspected that the milk was being used for some other purpose.
  - c. When asked why he was selling the milk, he stated that it was to earn some extra cash.
33. The statement was not recorded or transcribed. Mr. Delage's cursory notes of the conversation were disclosed.
34. On May 10, 2021, the Milk Board issued a show cause notice which provided Mr. Stuyt with an overview of its investigation, attached copies of the Investigation Reports, the Information to Obtain a Warrant (ITO), copies of lab results and the decision in *Van Herk v BC Milk Marketing Board* (BCFIRB, June 19, 2006). The

Milk Board gave Mr. Stuyt until May 27, 2021, to show cause, in writing, why his license and/or quota should not be suspended or cancelled, in whole or in part. The Milk Board advised it would be meeting on June 9, 2021 to consider the matter and invited Mr. Stuyt to attend to speak to his written submission. The Milk Board advised it would take the following into account in its deliberations:

- a. Whether it has been established on the facts that the producer has been selling, shipping for sale, or offering for sale, unpasteurized milk, other than through the Board, contrary to subsection 61(2) of the Consolidated Order.
  - b. The existence of any previous enforcement actions for contraventions of a similar nature
  - c. The gravity and magnitude of the contravention.
  - d. The extent of the harm to others resulting from the contravention.
  - e. Whether the contravention was deliberate.
  - f. Any economic benefit derived from the contravention.
  - g. Efforts, if any, to correct the contravention.
35. On May 26, 2021, at Mr. Stuyt's request, the Milk Board extended the deadline for written submissions and adjourned the show cause hearing to August 17, 2021.
36. By letter dated June 8, 2021, Mr. Stuyt raised concerns of "significant gaps in the show cause package" and asked to be provided with:
- a. Unedited video footage recorded by Xpera during its surveillance conducted in this matter on the specified dates.
  - b. All documents pertaining to the chain of custody of the video footage recorded by Xpera on the specified dates.
  - c. The names of the individuals who conducted the surveillance, as the initials on the investigation reports appeared different from those Mr. Delage relied on to obtain the April 26, 2021 warrant.
  - d. Full recordings or transcripts of the statements allegedly made by Mr. Prystarz and Mr. Stuyt to the Milk Board on May 3, 2021.
  - e. All documents pertaining to the chain of custody of the milk seized by the Board pursuant to the warrant.
  - f. All documents pertaining to the chain of custody of the milk that was tested by True North in May 2021.
  - g. Documents relating to the Milk Board's reporting to the Judicial Justice of the Provincial Court on items seized pursuant to the warrant.
37. By letter dated June 10, 2021, the Milk Board advised Mr. Stuyt:
- a. Access to the unedited video footage recorded by Xpera was made available to his counsel.



- b. There were no records pertaining to the chain of custody of the Xpera video.
  - c. The names of three individuals conducting the surveillance were provided.
  - d. There were no recordings/transcripts of the May 3, 2021 statements beyond the handwritten notes of Mr. Delage, which were provided.
  - e. There were no additional records pertaining to chain of custody of the milk seized pursuant to the warrant beyond that disclosed except for a seizure tag which was provided.
  - f. There were no records pertaining to the chain of custody of the milk tested by True North in May 2021.
  - g. A copy of the Report to a Justice was provided.
38. By letter dated June 18, 2021, Mr. Stuyt advised the Milk Board of his significant concerns about the integrity of the investigation, and that a forensic expert was needed to know if any of the surveillance footage was edited or deleted. He asked for Xpera's training manuals and protocols for covert surveillance and sought an extension for written submissions alleging that:
- a. handwritten notes of the May 3, 2021 interviews were cursory and insufficient;
  - b. Mr. Stuyt's statement made under "oppressive circumstances" resulted in an involuntary statement that should be excluded;
  - c. chain of custody of the seized milk was not documented;
  - d. it could not be verified whether the milk seized by the Milk Board was from Mr. Stuyt's farm; and
  - e. chain of custody of the milk sent for testing was not documented.
39. In a letter of June 20, 2021, the Milk Board advised Mr. Stuyt that a detailed examination of the sufficiency of the evidence was premature. If, at the show cause hearing, he denied ever selling, shipping for sale or offering for sale milk other than through the Milk Board, then his arguments may become important. If, however, he admitted to selling milk outside the system, issues related to the sufficiency of evidence were reduced or eliminated. The Milk Board declined to respond to sufficiency of evidence arguments until after its hearing.
40. The Milk Board, relying on section 7(1.1) of the Regulation and section 11(1)(j) of the *NPMA*, asked Mr. Stuyt to provide a sworn statement by June 28, 2021 providing answers to the following questions:
- a. Have you at any time sold, shipped for sale, or offered for sale, milk, other than through the Milk Board?
  - b. If the answer ... is "yes"
    - l. Over what period of time have you sold, shipped for sale, or offered for sale, milk, other than through the Milk Board?

- II. What volumes of milk have been sold, shipped for sale, or offered for sale, milk, other than through the Milk Board?
  - III. Of the milk sold, shipped for sale, or offered for sale, milk, other than through the Milk Board, was any such milk unpasteurized milk, and if so, how much?
  - IV. Did you derive an economic benefit from selling, shipping for sale, or offering for sale, milk, other than through the Board? What is the amount of the economic benefit that you received?
  - V. How was such milk transported from the farm premises?
  - VI. What are the names of the persons you dealt with in connection with the milk sold, shipped for sale, or offered for sale, by you, other than through the Milk Board?
  - VII. Did you keep any records concerning milk sold, shipped for sale, or offered for sale, by you, other than through the Milk Board? If so, provide all such records to the Milk Board.
- c. If the answer... is "no":
- I. What evidence, if any, can you offer to show that you have never sold, shipped for sale, or offered for sale, milk, other than through the Milk Board?
  - II. What evidence, if any, do you have that contradicts the evidence described in the Milk Board's letter dated May 10, 2021?

41. On June 23, 2021, Mr. Stuyt was granted an extension to respond. His July 16, 2021 sworn statement confirmed:

I am providing these responses under protest. I wish to comply with all orders of the Board and do not want to risk any further jeopardy to my family's and my ability to produce milk. Although I still require information about the Board's allegations against me, I fear that if I do not provide information in response to the June 20, 2021 letter of the Board, I will face further reprisal from the board. My responses to the Board's request for further information are as follows:

I have sold milk other than through the Board.

I sold milk to a person named Inder (Andy) Grewal for a period commencing around seven years ago until on or around May 3, 2021.

The arrangement started with me selling Mr. Grewal approximately 200 litres per week on average for around one year. Then, for the following two years, I sold to Mr. Grewal approximately 300 litres per week on average. After this, for the next two years, I sold to Mr. Grewal approximately 400 litres per week on average. Then, for the last two years, I sold to Mr. Grewal approximately 600 litres per week on average.

All of the milk that I sold to Mr. Grewal was unpasteurized. I am not aware of any human or animal being harmed from consuming the milk sold by me to Mr. Grewal.

Mr. Grewal initially paid me 35 cents per litre for the milk. Then, beginning in the fall of 2017, Mr. Grewal paid me 40 cents per litre.

Mr. Grewal had a driver attend my farm. The driver would fill up containers and then transport the milk in a vehicle to Mr. Grewal.

I dealt with Mr. Grewal and Fred Prystarz. Before Mr. Prystarz, Mr. Grewal had another driver, but I do not remember the name of the former driver.

I do not have any records of the arrangement with Mr. Grewal or his drivers, except that I was able to locate the text messages included in Exhibit "A" of this Affidavit.

42. The Milk Board held a show cause hearing on August 17, 2021 to allow Mr. Stuyt to explain why his licence and/or quota should not be suspended or cancelled, in whole or in part, as a result of selling unpasteurized milk other than through the Milk Board. The hearing proceeded before all five members of the Milk Board and its Chair.
43. The Decision can be summarized as follows:
  - a. Mr. Stuyt identified deficiencies in the Milk Board's investigation including that the video and investigation did not show him selling milk, the statement of Mr. Prystarz was unreliable, his statement was not properly documented, there was no direct proof that the milk seized belonged to his farm, and his sworn statement was made under protest as the Milk Board compelled him to submit evidence in advance of the show cause hearing without full disclosure which was a procedurally unfair attempt to circumvent common law rights and BCFIRB's decision in Van Herk (2006) (Decision, paragraph 23).
  - b. Mr. Stuyt conceded that over seven years, he had received approximately \$50,000 from sales of milk other than through the Milk Board. He did not know whether he shipped milk, other than through the Milk Board, on the specific dates in question. Despite his concerns, he did not provide a forensic analysis of the video evidence. He argued that a global fine of \$75,000 payable over 36 months was a fair penalty.<sup>2</sup> (Decision, paragraph 24-25)
  - c. Given Mr. Stuyt's sworn statement admitting to selling milk other than through the Milk Board for seven years (para 28), the Milk Board found it unnecessary to determine if he was marketing unpasteurized milk on the specific dates observed by the Milk Board and its agents. (Decision, paragraph 26)
  - d. The Milk Board was "deeply troubled" by Mr. Stuyt's continued assertion that the Board was "misguided and unfair" in its exercise of authority under subsection 59(1) of the Consolidated Order (Decision, paragraph 27).
  - e. In assessing Mr. Stuyt's conduct, the Milk Board concluded:
    - i. Mr. Stuyt was one of the "dissident farmers" in the *Bari Cheese* matter<sup>3</sup>, but this was considered "too remote" to have any bearing on the current issue.
    - ii. The gravity of the contravention was "the most profound violation of the core objectives of the regulatory system" and orderly marketing.

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<sup>2</sup> Mr. Stuyt made further submissions on whether the Board has authority to impose such a monetary penalty on September 13, 2021.

<sup>3</sup> The reference to Bari Cheese is understood to refer to a series of court cases wherein a group of producers and their processor sought to exclude themselves from regulatory action from the Milk Board on the basis of constitutional arguments related to the inter-provincial nature of their business relationship and as such were asserting a right to produce milk outside the regulatory system.

Because unpasteurized milk was involved, it also places at risk human health and the reputation of the dairy sector.

- iii. The only evidence of harm was the lost revenue to the producer pool and processors from the volume of milk marketed outside the Board for a period of 7 years. Based on Class 2B (yoghurt) price and 600 litres per week for seven years (the Milk Board's assessment of Mr. Stuyt's sales volume) the loss to the pool (for milk shipped outside the pool) was calculated at \$195,184.77
  - iv. The contravention was repeated and continuous for seven years.
  - v. The contravention was deliberate.
  - vi. As Mr. Stuyt was unable to confirm whether he had sold milk outside the system on the specific dates observed during the investigation, the Milk Board had little confidence in the accuracy of his statement that he had received approximately \$50,000 from his sales of unpasteurized milk.
  - vii. As for Mr. Stuyt's efforts to correct the contravention, while he maintained that he ceased marketing unpasteurized milk other than through the Board immediately after May 3, 2021, his protests regarding the Milk Board's authority to require him to provide information and answer questions seriously eroded the Milk Board's confidence in future compliance (Decision, paragraph 29)
- f. The Milk Board concluded it did not have authority to impose a monetary penalty as the provisions imposing administrative penalties for biosecurity infractions are not applicable and while the *NPMA* allows for monetary penalties relating to enforcement, none have yet been promulgated (Decision, paragraph 31-33).
- g. The Milk Board relied on its authority under Schedule 6, subsection 7 of the Consolidated Order to compensate for costs and losses incurred in marketing a regulated product:
- ...The Board may, from time to time, impose a charge on a Producer to recover costs or losses incurred as a result of that Producer's non-compliance with any order, decision or determination of the Board, or as a result of any conduct on the part of the Producer that results in an increase in insurance premiums paid by the Board...
- h. As a result, the Milk Board ordered:
- 35. Having considered all of the above, and in lieu of cancellation of Mr. Stuyt's licence and quota, the Board has decided to take the following actions:
    - (a) A charge is hereby imposed against Mr. Stuyt, dba Hol-Amer Farms, in the amount of \$228,451.02. This amount represents costs and losses incurred with respect to the milk improperly marketed by Mr. Stuyt having regard to the sum of \$195,184.77 lost to the producer pool and \$33,266.25 for costs incurred in connection with the Board's investigation and hearing proceedings.

This sum of \$228,451.02 is to be paid to the Board within 90 days of receipt of this decision. If payment is not made as required herein, the producer license will be suspended without further order until such time as payment is received in full. The unpaid balance of the charge imposed against Mr. Stuyt shall be recoverable from the proceeds of any sale or other disposition of quota by Mr. Stuyt, unless the Board otherwise directs; and

(b) Having regard to Mr. Stuyt's past impermissible marketing of milk, the following terms and condition are imposed on Mr. Stuyt's licence for a period of three years commencing from the date of this decision:

(i) Mr. Stuyt may not buy Continuous Daily Quota on the Quota Exchange or otherwise;

(ii) Mr. Stuyt may not receive a general allotment of Continuous Daily Quota by the Board; and

(iii) Mr. Stuyt may not receive incentive days

36. Mr. Stuyt may submit a written request to the board if he wishes to sell quota. (Decision, paragraph 35-36)

44. In her testimony, Milk Board Chair Ms. Comeau explained the two components of its Decision, the first being compensatory and the second being a deterrent.

#### **Compensatory Aspect of Decision**

45. The Milk Board imposed a charge to recover its costs of investigation and proceedings estimated at \$33,266.25 and compensation for lost revenue had the milk been properly marketed through the Milk Board and sold at a particular class price. The Milk Board estimated the loss to the producer pool to be \$195,184.77.

46. In explaining the calculations, Ms. Comeau stated "...First and foremost... was the fact that we had a sworn statement from Mr. Stuyt that indicated he had been selling unpasteurized milk other than through the Board." The Milk Board calculated the amount of revenue the pool would have recognized based on its higher estimate of sales (600 litres a week) for seven years based on the higher Class 2B fluid milk price for yoghurt (as opposed to the annual blend price), for which the Milk Board understood the milk had been used.

47. The Milk Board used 600 litres a week for its calculation despite Mr. Stuyt's sworn statement of increasing weekly milk sales beginning at 200 litres/week, 300 litres/week for the second and third years, 400 litres/week for years four and five, and 600 litres/week for years six and seven. As Mr. Stuyt did not produce any evidence to corroborate his alleged sales volumes and was unable to confirm whether he had sold unpasteurized milk on the dates observed in the investigation, the Milk Board lacked confidence in his estimates and concluded "that it was more than likely that he was selling at least 600 litres of milk per year for the last seven years..."

48. The “loss to the pool” was calculated on the gross amount of revenue that the Milk Board determined it would have received from the processor had Mr. Stuyt not sold the milk outside the system but through the pool.
49. Ms. Comeau conceded that the Milk Board is obliged to pay the producer for milk shipped such that the “loss to the pool” would not be the gross proceeds received but instead would be the lesser net amount retained by the Milk Board in producer levies after paying the producer for the milk. In calculating its “loss”, Ms. Comeau agreed that the Milk Board calculated the revenue it would have received from the processor for the milk without deducting the amount payable to the producer for that milk. While she indicated she may “want to seek further clarification on how it all works”, no further clarification was received in this appeal.

### **Deterrent Aspect of Decision**

50. The Milk Board considers the sale of unpasteurized milk outside the regulated system to be a serious matter given the significant risk it poses to consumer health and to the reputation of the dairy industry. The Milk Board proceeded with leniency and decided not to cancel or suspend the producer’s license in favour of compensation to recover costs and losses and deterrence through restrictions on the producer’s license based on his agreement to comply with Milk Board direction. Ms. Comeau explained that the Milk Board felt imposing conditions on the producer’s license to limit his ability to grow his production (buy or acquire quota) for a period of three years provided a sufficient deterrent to prevent others from engaging in this type of serious violation in the future.

## **V. SUBMISSIONS OF INTERVENORS**

### **BC Dairy Association (BCDA)**

51. The BCDA argues that the Appellant’s conduct threatens BC’s dairy supply management system. Quota is a privilege, not a right. Dairy farmers who benefit from the system have an obligation to comply with the restrictions that make the system functional. If individual farmers believe they can personally do better by selling milk outside the quota system, then pricing stability is lost, and all dairy farmers are worse off. The BCDA says the Appellant has tried to escape culpability by drumming up procedural irregularities and none of his complaints alter the fundamental essence of his admissions of selling milk outside the system.
52. The Milk Board’s requests to the Appellant are consistent with its authority under section 58(1) of the Consolidated Order. By his deliberate and protracted conduct, the Appellant has risked harm to dairy farmers, to the integrity of the supply management system, to the industry, and to the public. He has also failed to pay producer levies on the amount of milk sold outside the Milk Board. The BCDA says the Appellant is a “rogue farmer,” and questions the Appellant’s alleged profits as being “implausibly low” and notes that disgorgement (repayment of all monies

earned) is not a sufficient deterrent. The BCDA takes issue with “rogue farmers such as the Appellant” earning a substantial financial benefit from selling unpasteurized milk outside the system, and urges BCFIRB to make an order that “...reflects the severity of the Appellant’s misconduct and the effect it has on dairy farmers, the dairy industry, the licensing regime and the public...”

### **Mainland Milk Producers Association (MMPA)**

53. The MMPA supports the Decision. Consumer health and safety is paramount to all milk producers and selling unpasteurized milk puts consumers at risk. Allowing the Appellant to continue to produce milk outside the supply management system, jeopardizes the long-term sustainability of the dairy sector.

## **VI. ANALYSIS AND DECISION**

54. In addressing the issues on appeal, the Panel will first consider the Appellant’s arguments related to standard of review and the right to legal counsel before turning to his procedural fairness arguments advanced in relation to the investigation process and the subsequent show cause hearing. The Panel will then address the Appellant’s substantive arguments related to the merits of the decision and the appropriate remedy.

### **Standard of Review**

55. The Appellant made a submission on the standard of review applicable to an appeal before the BCFIRB arguing it is “hearing *de novo*” or, alternatively, “reasonableness”. In response, the Milk Board argues that standard of review concepts applicable as between courts and tribunals do not apply as between two levels of administrative bodies and the phrase “hearing *de novo*” should not be regarded as a “standard of review”, but rather as a description of the nature of the appeal proceeding itself.
56. The Panel agrees with the Milk Board. Where there are defects in the process leading to a decision of a commodity board, the *NPMA* allows for BCFIRB to conduct appeals “*de novo*”, meaning that an appellant can lead all relevant evidence and make all relevant submissions with respect to the issues at stake and BCFIRB conducts a full hearing into the merits of the case. The result of a hearing *de novo*, is that procedural deficiencies, if any, in the originating decision may be cured by the appeal process. We have proceeded on this basis.

## Right to Counsel

57. The Appellant argues that until such time as the Milk Board determined that it would not be pursuing penal consequences under section 18 of the *NPMA*, the Appellant should have been afforded the same protections given to those accused of *Criminal Code* violations including the right to counsel and says the Milk Board's failure to do so, renders the Appellant's statement inadmissible.
58. In response, the Milk Board argues that the *NPMA* is not penal, criminal or quasi-criminal in nature. While section 18 of the *NPMA* is penal as it establishes offences punishable by fine, imprisonment or both, that section was not engaged in the current processes. Further, neither the Milk Board nor the BCFIRB have jurisdiction to determine whether an offence under section 18 has occurred, or to impose a fine or order incarceration.
59. The Milk Board argues that the proper test to be applied is whether the predominant purpose of the exercise of authority is the determination of penal liability. The Milk Board argues that where authority is being exercised within a regulated field, for regulatory purposes, such authority is distinguishable from true penal proceedings: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 1987 CarswellSask 385; and *R. v. Jarvis*, [2002] 3 S.C.R. 757.
60. Further, it argues the charge imposed by the Milk Board was not a "penalty" but rather a charge expressly authorized under paragraphs 11(1)(o)(i) and (ii) of the *NPMA* "to pay costs and losses incurred in marketing a regulated product." Given the "regulatory" nature of the authority engaged, *Charter* rights applicable to criminal proceedings do not apply and there is no right to legal counsel as a precondition to regulatory compliance. To find otherwise, the Milk Board argues would render the express constitutional right to counsel in section 10(b) of the *Charter* redundant: *British Columbia (Attorney General) v. Christie* [2007] 1 S.C.R. 873. In that case, the Supreme Court of Canada held that even under the Canadian Constitution, the only constitutional right to legal representation is confined to when an arrest or detention occurs.
61. The Appellant's tries to place the circumstances of this case within the caveat to the general principle enunciated in *Wigglesworth*, where "an individual is to be subject to penal consequences such as imprisonment – the most severe deprivation of liberty known to our law – then he or she, in my opinion, should be entitled to the highest procedural protection known to our law".
62. In the Panel's view, the primary purpose of the *NPMA* is economic regulation of the agricultural sector. Through its Regulation, the Milk Board has sweeping authority to promote, regulate and control in any and all respects (including prohibition) the production, transportation, packing, storage and marketing, or any of them, of milk, fluid milk or a manufactured milk product within British Columbia, in whole or in part, and is vested with all powers necessary or useful in the



exercise of those powers. The existence of the offence provisions in section 18 are insufficient to render the *NPMA* a penal statute such that a commodity board is required to give Charter warnings to registered producers when conducting investigations into compliance and enforcement with the regulatory regime.

63. This is especially so when the regulatory framework expressly contemplates that persons licensed by the Milk Board are under an affirmative duty to provide the Milk Board “with any information relating to the production, processing, storing, transporting, and marketing by that Person of the regulated product”, and “make specific answers to any questions...for that purpose, and shall permit any member or employee of the Board to search vehicles in which the regulated product is transported”: subsection 59 Consolidated Order. Similarly, subsection 60 creates an affirmative duty on registered producers to permit inspections “for the purposes of determining whether or not there has been compliance with the *Milk Industry Act*, the *B.C. Act*, the B.C. Regulation or orders of the Board”.

### **Procedural fairness of the Milk Board’s Investigation and Hearing**

64. The Appellant argues that the procedural fairness deficiencies in the Milk Board’s investigation, including the failure to provide chain of custody data of the milk tested and seized, failure to interview key witnesses; failure to record and/or transcribe witness statements and disclose the complete Xpera investigation file in advance of requiring a sworn statement or attending the show cause hearing, are significant and warrant the decision being set aside.
65. The Appellant relies on the Supreme Court of Canada’s decision in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, which summarizes the duty of procedural fairness as follows:
- Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural 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.
66. Relying on *Baker*, the Appellant argues that the Milk Board owed the Appellant the highest standard of procedural fairness, in its investigation and show cause hearing, even though quota is a privilege and not a right, given that his livelihood was at stake. The Appellant concedes that in the investigation phase, while the duty of procedural fairness owed is less onerous, it must still be thorough and neutral.

67. The Appellant argues the show cause hearing was also deficient relying on the following passage from the *Van Herk* decision:
- [W]hen the Board purports to exercise its authority under s. 53 of the Consolidated Order [now s. 64], it must ensure that disclosure of all relevant information is made at the notice letter stage. Further, the notice letter must make 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.
68. The Appellant points to deficiencies in the show cause letter. As a show cause hearing is, by definition, a reverse onus proceeding, the Milk Board must be held to a strict standard with respect to disclosure, and further, it should have informed Mr. Stuyt that the *prima facie* decision is dependent on his ability to show the decision is in error. Mr. Stuyt was not afforded the opportunity to thoroughly investigate the evidence due to inadequate disclosure and not being able to test the milk seized. Despite its failure to provide adequate disclosure as required, the Milk Board compelled him to provide a sworn statement. The statement was "under protest" as it was made without full disclosure and compelled in circumstances unfair to Mr. Stuyt and as such the Appellant, ought not be considered in this proceeding.
69. The Appellant argues that the proper course was for the Milk Board to have adjourned the show cause hearing to provide the Appellant with the information and disclosure he was seeking. It declined to do so despite its heightened duty of procedural fairness owed to the Appellant.
70. The Appellant argues that the Milk Board's hearing failed to meet the *Baker* factors given its adjudicative nature and reverse onus, the potential serious consequences on his livelihood as a dairy producer, his legitimate expectations that the Milk Board would hear his case openly and fairly and consider whether the investigation was procedurally sound enough to establish a contravention. It also failed to meet his further expectation that there would be reasons provided for its determinations and choices made to proceed with the hearing despite not providing full disclosure and interviewing key witnesses. As a result, the Appellant argues that the show cause hearing was not procedurally fair, and the decision should not stand.
71. The Respondent, Milk Board argues that the fundamental principle is "[i]f an investigation involves no conclusions or findings as to the rights of the individual, then there is likely no duty to act fairly in the investigation. Simply collecting information and producing a report is not generally sufficient to attract the application of the rules of natural justice": Casey & Berkenshire, "The Duty of Fairness in the Investigative Stage of Administrative Proceedings": (2002), 40 Admin. L.R. (3d) 50. This proposition is supported by the decision of *Strauts v. College of Physicians & Surgeons (British Columbia)*, (1997), 36 B.C.L.R. (3d) 106, 1997 Carswell BC 1403 (BCCA) where the Court of Appeal found that natural justice and procedural fairness including the right to "know the case one has to

meet” should not be imposed at the investigative stage as such protections would be in play at the adjudicative stage.

72. The Milk Board argues that Mr. Stuyt misconceives the entire purpose of the show cause hearing. It did not need to conduct any preliminary investigation at all and could have identified the nature of its concern with precision, together with the potential consequences flowing from a finding of non-compliance, and then invited Mr. Stuyt to appear in order to “provide the Board with any information relating to the production, processing, storing, transporting, and marketing by [him] of the regulated product, and [to] make specific answers to any questions submitted to [him] by any member or employee of the Board for that purpose”, consistent with subsection 59(1) of the Consolidated Order.
73. With respect to the level of precision required in a notice to show cause letter, the Milk Board argues it only needed to provide Mr. Stuyt with: “sufficient information... so that the affected individual understands: 1) whether the individual is the subject of the proceeding; 2) relevant issues; 3) the evidence which is before the agency; and 4) the consequences which may flow from the proceeding”: Regimbald, Guy "Canadian Administrative Law" (1st ) (Lexis Nexis, 2008) page 256, citing *Kane v. University of British Columbia* (1980] 1 S.C.R. 1105; and *Lakeside Colony of Hutterite Brethren v. Hofer* (1992] 3 S.C.R. 165
74. In response to the various allegations of breach of the duty of procedural fairness, the Milk Board takes umbrage with the suggestion that the Milk Board must establish non-compliance, at a forensic level, before a producer is even obliged to “provide the Board with any information relating to the production, processing, storing, transporting, and marketing by [him] of the regulated product, and [to] make specific answers to any questions submitted to [him] by any member or employee of the Board for that purpose”, as required by subsection 59(1) of the Consolidated Order. Similarly, it takes issue with the suggestion that statements made in the investigation are “unreliable”, because there is no recording or transcript of the statements, as Mr. Stuyt chose not to challenge the content of those statements and, in fact, confirmed their content in his sworn admissions.
75. It also challenges the assertion that lab test results of the seized milk are unreliable due to an alleged failure to "properly verify the chain of custody" as in the criminal law context and the notion that responses to requests for information under s. 59(1) of the Consolidated Order, can be made “under protest”. The Milk Board argues that the Appellant’s positions are not those of person who is engaging with candour, in relation to a significant compliance matter where human health is at potential serious risk.
76. The Panel agrees with the Milk Board that as a regulator, it owed no duty of procedural fairness to the Appellant when conducting its investigation. Despite owing no duty of procedural fairness, the Panel does not find fault with the Milk Board’s investigation. The Milk Board conducted detailed surveillance which

confirmed multiple instances of raw milk being transported in containers in the back of a pickup truck from the Appellant's farm to a warehouse in Surrey in February, March and May 2021. These instances are verified through photographs, video and reports and were fairly and properly disclosed to the Appellant, who, despite having an opportunity to do so at the hearing and before this Panel, offered no contrary version of events.

77. On May 3, 2021, the Milk Board executed a search warrant at the warehouse in Surrey and interviewed the driver of the pickup truck. The Milk Board's General Manager attended at Mr. Stuyt's farm and advised him of the seizure of milk from the warehouse in Surrey. Mr. Stuyt's candid response confirmed that he was aware that milk was being transported from his farm in 20 litre containers approximately once per week. While he initially stated he assumed that the person transporting the containers was using the milk to feed calves, he subsequently conceded that he suspected that the milk was being used for some other purpose and he was selling the milk to earn extra cash.
78. The Panel does not find any procedural unfairness in Mr. Stuyt not being provided with transcribed or recorded statements especially given that he did not take issue with the content of either statement. However, to avoid similar arguments being advanced in the future, and given the seriousness of the issues being investigated, it would be prudent for the Milk Board to adopt a more formal approach to how it conducts interviews and records statements to preserve the record.
79. Similarly, the Panel finds no unfairness in the Milk Board failing to provide "chain of custody" evidence in relation to the videos taken and the milk tested in circumstances where the Mr. Stuyt corroborated the surveillance findings and agreed that raw milk was being transported from his farm on a weekly basis so he could earn "extra cash". Further, we note the Milk Board provided access to the unedited video to the Appellant and there was no evidence adduced in this appeal impugning the accuracy of that evidence. In the face of admissions from the Appellant, there was no unfairness in the Milk Board's decision to not interview more witnesses.
80. The Panel has already found that the circumstances surrounding the May 3, 2021 interview between the Appellant and Mr. Delage was not penal in nature, was not oppressive and did not attract the right to counsel. It is incumbent on registered producers to cooperate with the first instance regulator especially where matters of human health and well-being are at stake. Indeed, the failure of a licensee to comply with the obligation to answer questions and allow inspection by the regulator are themselves breaches of the Consolidated Order which can result in a show cause hearing to demonstrate why sanctions such as licence suspension and/or cancellation should not be assessed: see *Cross v. British Columbia Hatching Egg Commission*, (BCFIRB, December 24, 2021).

81. As for the adequacy of the show cause letter, the Panel does not find any procedural unfairness or prejudice to the Appellant. The Milk Board identified its *prima facie* case that it had reason to believe that Mr. Stuyt had been selling, shipping for sale, or offering for sale, unpasteurized milk, other than through the Board, contrary to subsection 61(2) of the Consolidated Order. It identified the farm premises, the vehicle used and where that milk was being transported to; lab tests confirmed the milk was unpasteurized. The Panel concludes the letter was sufficient to provide adequate notice of the case to be met.
82. In the show cause hearing, it was open to Mr. Stuyt to rebut any of the elements of the Milk Board's *prima facie* case, but he chose not to do so. Instead, he focussed on procedural fairness arguments to render inadmissible statements taken during the investigation and his sworn statement made under protest but conceding the elements of the *prima facie* case and admitting to selling milk other than through the Milk Board for a period of seven years. In the face of these admissions, the Panel finds the Milk Board's conclusion that it was unnecessary to proceed further and determine if the Appellant was marketing unpasteurized milk on the specific dates observed by the Milk Board and its agents was neither unfair nor unreasonable in the circumstances.
83. In the event the Panel is wrong on its determination of the procedural fairness provided by the Milk Board in its investigation or show cause hearing, we conclude that the *de novo* nature of this appeal provided sufficient opportunity for the Appellant to make his procedural fairness arguments and as such, is sufficient to cure any procedural defects which may have occurred.

### **Merits of Decision**

84. Having found that the Appellant breached the Consolidated Order by selling unpasteurized milk other than through the Board, the Milk Board chose not to suspend or cancel the Appellant's licence but instead took what it saw as a more lenient approach and imposed a two-part sanction:
  - a) A compensation component to recover charges (costs of investigation and hearing processes) - \$33,266.25 and losses incurred in the marketing of regulated product - \$195,184.77, and
  - b) A deterrent component imposing terms and conditions on the Appellant's license and restricting his ability to increase production for a three-year period.
85. The Appellant argues that the Decision is internally incoherent as the Milk Board accepts certain admissions that Mr. Stuyt marketed unpasteurized milk for seven years while rejecting other admissions related to the volume of milk sold and the price paid. The Appellant also argues that the decision is based on improper considerations where it references his role in the *Bari Cheese* matter and fears of future compliance and criticizes his assertion of rights to full and fair disclosure.

86. The Appellant argues that the penalties imposed by the Milk Board are not proportionate to the harm caused in that the “fine” assessed represents a global figure based on sales of 600 litres/week for seven years at market price (\$195,184.77) despite the Appellant’s evidence that he did not sell that much milk over the entire period, that he sold the milk for less than market price<sup>4</sup> outside the quota system, that he never failed to meet his quota requirements, that it does not represent a loss of milk to the dairy industry as a whole and that there is no evidence of harm to any consumer. With respect to the \$33,266.25 for “costs incurred in connection with the Milk Board’s investigation and hearing proceedings”, the Milk Board did not provide any breakdown of these numbers.
87. In summary, the Appellant argues that the Milk Board has not provided reasons as to how the amount assessed represents a fair and proportionate penalty; it has not provided any accounting as to what losses were incurred by the industry as a whole and as such, it is not a fair remedy.
88. For its part, the Milk Board does not respond to these arguments but instead argues that its sanctions were intended to be lenient. In the face of what it now describes as the Appellant doubling-down in this appeal to evade responsibilities owed to the regulator and to the industry, the Milk Board’s considered view is that a lenient disposition promoting remediation is futile. Instead, it now asks this Panel to exercise its jurisdiction under section 8(9)(a) of the *NPMA* to “[vary] the order, decision or determination under appeal”, and order the immediate cancellation of Mr. Stuyt’s licence and quota, in addition to payment of the charge at paragraph 35(a) of the Decision.
89. The Panel finds it appropriate to consider the sanctions imposed by the Milk Board and the Appellant’s related arguments before addressing the Milk Board’s “ungovernability” arguments.
90. The Appellant argues the Decision was based on irrelevant considerations pointing to the reference to his involvement in the *Bari Cheese* matter. The Panel disagrees. It was the Milk Board’s reliance on the biosecurity investigative process which caused them to look into (and report on) the Appellant’s prior history. The decision expressly notes that his *Bari Cheese* involvement was too remote to be considered a factor in these proceedings and the Panel heard nothing in this appeal which suggested otherwise.
91. The Panel agrees that selling unpasteurized milk outside the regulatory system is a very serious offense that poses risks to human health and the reputation of the dairy industry. It is an extremely serious regulatory breach which undermines the tenets of the national supply management system. The Milk Board relies on strict producer compliance with regulatory production controls to balance supply and

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<sup>4</sup> The Appellant initially calculated the amount of his milk sales outside the system at \$47,520, but in response to questions by the Panel chair, counsel for the Appellant conceded there was an error in the calculation and the amount would in fact be \$60,000 over the seven-year period.

demand and ensure a safe and sustainable dairy sector. In its Decision, the Milk Board opted not to proceed with license suspension and/or cancellation in favour of recovering charges, costs and losses coupled with sufficient regulatory sanctions to deter future misconduct. We consider each element in turn.

### **Charges**

92. The Milk Board has the authority to “set and collect... charges from designated persons engaged in the marketing of the whole or part of a regulated product..., and... use those... charges received by the marketing board... to pay the expenses of the marketing board..., [and] to pay costs and losses incurred in marketing a regulated product.”
93. Relying on this authority, the Milk Board assessed \$33,266.25 for the costs incurred in connection with the Board’s investigation and hearing proceedings. Ms. Comeau’s evidence that these costs were in fact incurred by the Milk Board was not challenged by the Appellant. Further, in his written submissions, he accepted that these expenses make up a portion of the monetary amount of the Decision and did not dispute they were proper ‘charges’ or ‘levies’.
94. Although the Panel would have preferred a breakdown of how the sum of \$33,266.25 was arrived at, properly supported by invoices and other related documents, we accept that the Milk Board is entitled to recover its legitimately incurred expenses associated with this investigation and hearing. Accordingly, the Panel affirms this part of the Milk Board’s order.

### **Losses**

95. The Milk Board calculated a loss to the producer pool of \$195,184.77 and assessed the Appellant accordingly. The Appellant says this “fine” is based on internally inconsistent findings and is disproportionate. He criticizes the Milk Board’s reliance on “global” numbers (assuming 600 litres per week over 7 years) and market values to generate an inflated assessment of loss to the pool. The Appellant argued for a global fine of \$75,000 but in response, the Milk Board maintains that it lacks the authority to assess such a fine under the *NPMA*. The Panel agrees with the Milk Board that it lacks authority to issue a fine or monetary penalty of the kind sought by the Appellant.
96. As raised in its submissions, the Milk Board has the authority to promulgate use of administrative monetary penalties for enforcement of certain mandatory programs. However, It has yet to do so. In the Panel’s view, this case highlights the need for the Milk Board to implement a full range of regulatory tools to address non-compliance.
97. With respect to the Appellant’s arguments that the Decision is internally incoherent, the Panel agrees that it is the job of the regulator to determine what

evidence it accepts or rejects. However, where it chooses to reject certain evidence, there should be a meaningful explanation for why it did so. In this case, the Milk Board's reasons for why it chose to reject the Appellant's evidence and adopt a global approach is not entirely clear.

98. In looking at the Appellant's production records for the past seven years, the Panel finds that the Milk Board's global approach – assuming 600 litres of milk per week, the final sale volume, persisted over the course of the seven years rather than the Appellant's assertion that sales began at 200 litres/week and built up slowly over time - likely overestimates the volume of milk sold in earlier years. It seems more plausible that the Appellant's misguided venture would have started on the smaller scale he describes and grown with demand as Punjabi Sweets' use of the product to make yoghurt increased.
99. On this basis, we prefer the Appellant's estimation of milk sold (200 litres/week, increasing to 300 litres/week for the second and third years, 400 litres/week for years four and five, and 600 litres/week for years six and seven) as being more reflective of his unauthorized sales. However, we acknowledge there is a great deal of imprecision to these gross milk sales volumes and had either the Milk Board or Appellant wanted more precise data, information could have been sought from Punjabi Sweets.
100. Having accepted the Appellant's numbers as a starting point, the Panel estimates that the Appellant's sales of unpasteurized milk outside the system represented on average 1.6% of his authorized shipments and 1.56% of his quota. Over the seven-year period, the Appellant substantially increased his quota holdings while fulfilling his quota commitments. From 2015 to 2021, his quota holdings increased from 99.5 kg/day to 159.87 kg/day (an increase of 61%) and he produced and shipped on average 96% of his quota allocation. On this basis, the Panel agrees that the amount of unpasteurized milk sold did not likely represent a loss to the dairy industry.
101. However, in the Panel's view, the fact that the Appellant's unauthorized milk sales make up a very small percentage of his overall production and there is no evidence of a loss to the system or actual harm to consumers are neither relevant nor mitigating factors. By his own admission, the Appellant has engaged in a long-term subversion of the regulated system that benefits regulated producers to the exclusion of others and placed that system at risk to simply generate "extra cash".
102. Turning now to consider the Appellant's arguments that the "fine" is disproportionate, the Panel finds problems with the Milk Board's calculations, but not for the reasons advanced by the Appellant. The problem with the calculation of \$195,184.77 is not so much that it is disproportionate to the non-compliance but rather that the calculation does not reflect the actual regulatory authority of the Milk Board "...to recover losses incurred in the marketing of a regulated product". The



Milk Board overstated its loss by including the value of the milk which, if shipped, would have been payable to the producer.

103. Regardless of whether the Appellant sold 600 litres of milk per week for seven years, or whether his sales were graduated over that same period, any loss calculation needs to account for the fact money paid by the processor for milk shipped is not the Milk Board's to keep. The Milk Board is obligated to pay the producer for all milk shipped less applicable levies and/or fees. As a result, in the Panel's view, the Milk Board erred when it concluded the "loss incurred in marketing a regulated product" is equivalent to the gross amount that it determined that a processor would have paid to the Milk Board for the particular class of milk had the Appellant shipped all his milk through the pool. Instead, the Panel concludes that the proper calculation of the "loss" to the Milk Board would be the net amount remaining (in levies and fees), after paying the producer for the milk shipped, which amount is owed to the Milk Board to fund its operations.
104. The Panel measured the loss to the Milk Board by calculating the amount of levies and fees the Milk Board failed to receive on the Appellant's estimated production sold outside the system. In response to the Panel's requests, the Milk Board provided the following information related to levies which were constant over the seven years in question:
  - a. BC Milk Administration - \$0.25/hectolitre
  - b. Dairy Industry Development Council (all milk) - \$1.064/hectolitre
  - c. Dairy Industry Development Council (industrial milk) - \$1.17/hectolitre
105. The Milk Board provided data confirming that the amount of industrial milk produced per year has varied from 51% to 59% of all milk produced in the province for an average of 55% over the relevant time period. Applying this percentage to the industrial milk levy and adding in the other two levies, the Panel calculated a total levy of \$1.9475/hectolitre<sup>5</sup> and applied that levy to the estimated production marketed outside the system, using both the Milk Board's and Appellant's sales volume assumptions:

Estimated Levies Payable to BC Milk Marketing Board  
for Unpasteurised Milk Marketed Outside the System

	Levies Payable, 600 litres/week	Levies Payable Graduated Sales, (Appellant)
2014-2015	\$ 608	\$ 203
2015-2016	\$ 608	\$ 304
2016-2017	\$ 608	\$ 304
2017-2018	\$ 608	\$ 405
2018-2019	\$ 608	\$ 405
2019-2020	\$ 608	\$ 608
2020-2021	\$ 608	\$ 608
Total	<b>\$ 4,253</b>	<b>\$ 2,836</b>

<sup>5</sup> The calculation:  $(0.25+1.054+(1.17/100*(55))) = \$1.9475/\text{hectolitre}$ .

106. As the Panel prefers the use of the graduated sales volume for reasons stated above, the cumulative loss to the Milk Board in uncollected levies over the seven years in question for milk shipped other than through the pool would be in the order of \$2,836. For comparative purposes, the Milk Board's global sales figures result in uncollected levies in the amount of \$4,253. Recognizing that neither number is particularly precise, the Panel calculates the loss of levies and fees to the Milk Board at \$3,000. As a result, in our view, the Milk Board overestimated its compensatory losses by approximately \$190,000.
107. It should be noted that the Milk Board did have an opportunity to address its loss calculation in its supplemental closing arguments at the conclusion of the oral hearing. The Milk Board argued that since the Appellant had received compensation for the milk sold outside the system "... that side of the ledger is taken care of, and for that reason...there should be no deduction from the Milk Board assessment of costs and losses to the pool."
108. The Panel does not find this argument persuasive as it lacks both logic and merit. The fact that the Appellant benefited from his illegal acts and received compensation for the milk he illegally sold does not create a corresponding justification for the Milk Board to attempt to disgorge those ill-gotten gains in the absence of the actual authority to do so.
109. Accordingly, the Panel finds the Milk Board's losses incurred in the marketing of regulated product to be \$3,000.

### **Terms and Conditions**

110. Subsection 7(1.1) of the Regulation and paragraph 11(1)(q) of the *NPMA* provide, the Milk Board may "make orders and rules considered by the marketing board... necessary or advisable". The Milk Board relies on this power to impose terms and conditions on a licence, or to suspend a licence as a means of deterring future non-compliance by this producer and other producers.
111. The Panel heard that the Milk Board had a range of sanctions available to it after concluding that the Appellant had sold milk other than through the Milk Board. Given the seriousness of the non-compliance and its lengthy duration, license suspension and/or revocation of quota were available options. However, the Milk Board decided, based on its assessment of all the circumstances, that imposing conditions on the Appellant's license limiting his ability to increase production (through acquisition of quota or quota credits) for a period of three years provided a sufficient deterrent to dissuade producers from engaging in this type of serious violation in the future.
112. The Appellant after setting out his own formulation of a penalty reflecting the amount of milk sold and a monetary deterrent of \$25,000 asked that the terms and

conditions be quashed or, alternatively reduced to one year, with credit for time already served.

113. Given our view that the Milk Board lacks jurisdiction to issue monetary penalties as sought by the Appellant and that we agree that the seriousness of the Appellant's non-compliance over a seven-year period demands a significant sanction to ensure integrity of the regulated system and to act as a disincentive to others contemplating the same actions, subject to our comments below related to ungovernability, the Panel affirms paragraph 35(b) of the Decision.

### **Ungovernability**

114. The Panel now turns to consider the rather remarkable request of the Milk Board, that the Panel exercise its jurisdiction pursuant to section 8(9)(a) of the *NPMA* to "[vary] the order, decision or determination under appeal", by ordering the immediate cancellation of the Appellant's licence and quota in addition to the charge imposed by the Board under paragraph 35(a) of its Decision on the basis that the Appellant is "ungovernable".
115. The Milk Board was clearly troubled by what it saw as the Appellant's aggressive approach to its compliance and enforcement proceedings; he questioned the reliability of the Milk Board's evidence and demanded proof of non-compliance at a forensic level before responding to requests for information, alleged statements were given under duress and not transcribed or recorded and could not be relied on and demanded verification of "chain of custody" of seized milk as required in the criminal law context. The Milk Board noted its concerns at paragraph 27 of its Decision:
27. Having said that, the Board is deeply troubled that Mr. Stuyt repeatedly advanced the position that it was "misguided and unfair" for the Board to exercise its authority as set out in subsection 59(1) of the Consolidated Order...
116. Despite these concerns, the Milk Board took what it described as a lenient approach in its Decision and chose not to suspend or cancel the producer's licence. The Milk Board now characterizes the Appellant's arguments advanced in this appeal as a doubling-down of his efforts to evade responsibility to the regulator and industry. It sees its decision to not cancel the Appellant's licence and quota as a futile attempt at remediation. It now lacks all confidence that Mr. Stuyt is governable given his assertions on appeal that his obligation to report to the Milk Board is subject to preconditions such as access to counsel, and that BCFIRB cannot rely upon his sworn admissions to serious non-compliance where human health is at potential risk.
117. The Milk Board acknowledges the significant impact cancellation of licence and quota will have on Mr. Stuyt, but it argues that the financial interests of a single producer must be subordinate to the interests of the regulated industry. While the

content of the duty of procedural fairness must be commensurate with the significant impact of a decision to cancel licence and quota, the right to procedural fairness must not be conflated with a right to licence and quota. 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.).

118. To permit Mr. Stuyt to participate in the industry when he continues to reject the authority of the regulator and not comply with its directions presents intolerable risks to the industry and to the social licence under which the regulated system operates. In short, the Milk Board says the Appellant cannot be effectively managed. As a result, it seeks to have the charge imposed in paragraph 35(a) of its Decision affirmed and the terms and conditions paragraph 35(b) varied such that Mr. Stuyt’s licence and quota are immediately cancelled. Such an order, it says, reflects the good judgment of a responsible regulator, and is consistent with sound marketing policy.
119. The Appellant strenuously disagrees with the assertion that he is ‘ungovernable’ and not capable of being remediated. On the facts, the Appellant does not have any prior contraventions of the regulatory scheme. He has complied with all requests to furnish information, albeit under protest given what he saw as a lack of procedural fairness afforded to him. He immediately discontinued selling milk outside of the system and complied with all Milk Board directions. He has not attempted to mislead the Milk Board and is not in breach of any of the conditions imposed. His only points of protest were not being afforded access to counsel when he was potentially facing penal consequences, adequate disclosure in advance of his show cause hearing and in exercising his right of appeal. He should not be labeled “ungovernable” and punished simply because he exercised his right to appeal and challenge an administrative decision affecting his livelihood.
120. Given the highly unusual nature of the relief sought by the Milk Board, the Panel questioned the Milk Board Chair to understand what changed in its assessment of the Appellant from the time of its hearing and its Decision of September 29, 2021 and November 3, 2021 when the Milk Board advised, in response to the Notice of Appeal, that it was seeking cancellation of the Appellant’s licence and quota.
121. The Milk Board Chair explained it was not so much that anything had changed, but rather the fact that things had continued. In his appeal, the Appellant raised the same procedural fairness concerns brought before the Milk Board in the months leading up to its hearing which in turn, caused the Milk Board to view him as “ungovernable” and request his license cancellation. The Milk Board believes it ran a fair process, opted for leniency, and then felt betrayed when the same arguments about procedural fairness and challenges to its authority surfaced in this appeal. This continued challenge to their authority caused the Milk Board to view the Appellant as ungovernable and seek his license cancellation.

122. The Panel finds the Milk Board's request troubling. As is evident from our reasons above, the Panel has generally agreed with the Milk Board's approach to compliance and enforcement in this case. We rejected the Appellant's arguments that the Milk Board's processes were procedurally unfair, in the face of his admissions. We did however note that more formality around recording and preserving witness statements may well improve the Milk Board's investigation processes. The Panel also agreed with the Milk Board's approach to its sanctions seeking to recover the costs associated with its investigation and hearing processes and any losses incurred and placing terms and conditions on the producer licence to deter future bad actors.
123. However, as the Panel concluded above, the Milk Board made a significant error in calculating its "losses incurred in marketing a regulated product" and overstepped its authority by not focussing on the loss the Milk Board (or the industry) had suffered as a result of these sales. As a result, the Panel concluded that Milk Board overestimated its losses by \$192,439.21.
124. The Panel does not find it surprising that Mr. Stuyt sought and retained legal advice when he received his show cause letter. He would have understood that he was being investigated for selling milk other than through the Milk Board and that the Milk Board had a strong *prima facie* case. If found in non-compliance, the Appellant understood that sanctions could result in his licence being cancelled or suspended. It is also not surprising that, with the benefit of legal advice, Mr. Stuyt aggressively advanced any and all positions that might result in a more favourable outcome than licence suspension or cancellation. Similarly, it is not surprising that when faced with the Milk Board's sanctions amounting to almost \$230,000 payable in 90 days, coupled with restrictive terms and conditions on his ability to expand for three years, Mr. Stuyt decided to exercise his right of appeal and vigorously advance his positions and concerns before BCFIRB.
125. Apart from pursuing his right of appeal, and the arguments advanced within that context, the Milk Board did not point to any other conduct on the part of Mr. Stuyt to support a finding that he was ungovernable. It does not dispute that he admitted to seven years of sales outside the system to Mr. Delage or that he immediately stopped the practice. The Milk Board did not offer any evidence to discredit the Mr. Stuyt's sworn statement that he intended "to comply with all orders of the Board and [I] do not want to risk any further jeopardy to my family's and my ability to produce milk..." In fact, Ms. Comeau's evidence was that he has been in full compliance since last May with no further issues arising.
126. Based on a review of all the evidence, the Panel does not agree that Mr. Stuyt is ungovernable. At all times, in relation to the show cause hearing and the appeal, he was acting on legal advice. Strong arguments were made on his behalf, many of which did not find favour with the Milk Board or this Panel. However, leaving aside the multitude of procedural fairness arguments, had the overall compensatory charge been correctly calculated in the Decision to properly reflect

the loss to the Milk Board, it would have been in the range of \$35,000 - \$40,000 instead of the \$228,451,52 assessed. In such a case, the Panel questions whether there would have been an appeal challenging the Milk Board's authority, in which case arguments of ungovernability would not have arisen. The Panel says this as the Appellant did not dispute that some form of sanction was appropriate and his assessment of a proportionate sanction was \$75,000, payable over 36 months coupled with a cancellation or shorter term on his licence restrictions.

127. The Panel dismisses the Milk Board's request to vary paragraph 35(b) of its Decision to order the immediate cancellation of the Appellant's licence and quota.

## **VII. ORDER**

128. The appeal is granted in part.
129. The Appellant is ordered to pay to the Milk Board, the sum of \$36,266.25 payable within 90 days of the date of this order to compensate the Milk Board for:
  - a) \$33,266.25 on account of costs incurred by the Milk Board in its investigation and hearing processes and,
  - b) \$3,000 on account of the Milk Board's losses incurred in marketing a regulated product due to unpaid levies for milk marketed outside the regulated system.

130. The terms and conditions imposed by the Milk Board on the Appellant's license in paragraph 35(b) of the Decision which have been in place since September 29, 2021 are affirmed and will remain in place until September 21, 2024.

131. There is no order as to costs.

Dated at Victoria, British Columbia this 5<sup>th</sup> day of October, 2022

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



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Wendy Holm, Presiding Member



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Dennis Lapierre, Member



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Pawanjit Joshi, Member