

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY LILIAN AND SANDY STEWART FROM A DECISION
CONCERNING GRADUATED ENTRY PROGRAM QUOTA ALLOCATION

BETWEEN

LILIAN AND SANDY STEWART

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm
Industry Review Board:

Suzanne K. Wiltshire, Presiding Member
Sandi Ulmi, Vice Chair
Honey Forbes, Member

For the Appellant:

Lilian Stewart
Sandy Stewart
Kirsty McAvoy

For the Respondent:

Blaine Gorrell, Chair
Ken McCormack, General Manager

Intervener:

Mainland Milk Producers Association

Date of Hearing:

January 20, 2009

Place of Hearing:

Kelowna, BC

INTRODUCTION

1. The appellants, Lilian and Sandy Stewart, are appealing a decision of the British Columbia Milk Marketing Board to retract quota which they received in 2002 under the Graduated Entry Program (GEP).
2. The Stewarts and Steve Verdonk, the shipper producing milk under the Stewarts' GEP quota, met with the Milk Board on September 8, 2008. The purpose of the meeting was to give the Stewarts an opportunity to provide the Milk Board evidence of their compliance with the terms of the GEP establishing that they had been consistently "actively engaged in milk production".
3. A decision from the Milk Board dated November 7, 2008, informed the Stewarts that:

...The Board has completed its deliberations and has determined that the GEP allocation of your quota does not qualify for Regularization.

Specifically, you are not in compliance with the terms of the GEP as shown in the Consolidated Order. You advised that there is no written agreement defining any terms of transfer for your GEP allocation to Mr. Verdonk. Consequently, according to the directives of the FIRB for GEP Regularization, your GEP allocation as well as any growth quota allocated to you as a result of your original GEP allocation will be retracted as of December 31, 2008....
4. The Stewarts applied for and were granted a stay of this decision until the appeal could be determined.
5. The matter proceeded to hearing on January 20, 2009.

ISSUE

6. Did the Milk Board err in its November 7, 2008 decision to retract quota previously allocated to the appellants under the GEP as well as any growth quota allocated as a result of the original GEP allocation?

REMEDY SOUGHT

7. The appellants request that the decision of the Milk Board to retract their GEP and all related growth quota be set aside and that they be given to the end of the dairy year to complete a transition of this quota to their own milking facility.

BACKGROUND

8. The GEP has operated in some form in the dairy industry for over 25 years. The overriding principle of the GEP is to support the growth and viability of the milk industry by promoting the ongoing entry of new farmers who wish to be actively engaged in producing milk to meet the demand of BC consumers. Although the

GEP has been amended over the years, this overriding principle remains unchanged.

9. Ms. Stewart put her name on the GEP waiting list in June 1984 and renewed her application annually to maintain her position on the list. In November of 1994, the Stewarts started milking cows under a contract arrangement with another quota holder and continue to do so today at their current farm in Mara.
10. In January 2002, after a wait of 18 years, Ms. Stewart was invited to enter the GEP and was provided with a copy of Schedule 1 to the Milk Board's Consolidated Order of October 1, 2001, setting out the GEP Rules. Because she was unable to attend the meeting with the Milk Board at this time, Mr. Stewart's name was added to the application and both are listed as having an interest in the GEP quota allotment.
11. In January 2002, Ms. Stewart submitted her GEP application to the Milk Board. The application included both a sworn Declaration of Applicant in which she acknowledged that she had read, understood and agreed to the GEP Rules, and a Solicitor's Certificate of Independent Legal Advice. The GEP Rules at that time stated that quota allotted under the program was for the beneficial use of the entrant only and the entrant was required to:
 - operate and control the farm unit which is owned, leased or rented by the entrant and paid for by the entrant;
 - make payments for feed and other farm supplies from a bank account in the name of the entrant;
 - permit Milk Board audits of the farm operation to ensure compliance.The GEP Rules provided that failure to do so could result in termination of the entrant's participation in the program.
12. The Stewarts submitted their business plan to the Milk Board in May 2002 and were subsequently allotted 7000 kilograms of Unused Total Production Quota. The rules of the GEP at this time were such that the 7000 kilograms of quota would eventually be clawed back. In 2004 the Milk Board modified the GEP. The Stewarts elected to participate in the new GEP and were then eligible to convert their 7000 kilograms of quota to permanent non-transferable Total Production Quota which was not subject to a claw back.
13. The Stewarts' initial plan was to have one of their children milk their quota. As this did not work out, the Stewarts entered a verbal agreement with Steve Verdonk to milk their quota in the Fraser Valley. However, their long-term goal was to ship milk on their own quota when they were financially able to buy enough additional quota to sustain their own farm operation. Both parties clearly understood that the Stewarts' plan was to eventually transfer the quota to their own farm. The Stewarts currently live and farm in Mara in the Okanagan region of BC.

14. In June 2008, the Stewarts gave Mr. Verdonk 12 months notice of their intention to transfer their quota to the Okanagan and begin milking it themselves.
15. As a result of the Van Herk 2006¹ appeal to the British Columbia Farm Industry Review Board (BCFIRB), the Milk Board and BCFIRB became aware that a very serious situation had developed with the GEP involving the potential unauthorized transfer of production rights worth millions of dollars and the accrual of significant financial benefits to individuals in non-compliance with the orders of the Milk Board. In addition to the Milk Board's own concerns regarding the matter, BCFIRB was of the view that non-compliance with the GEP was contrary to the public interest. Therefore, by way of a letter issued on July 25, 2008, the Milk Board was directed by BCFIRB to proceed with enforcement to rectify these non-compliant situations through a regularization process, with the clear objective of protecting the long-term integrity of the GEP. The Milk Board was asked to include BCFIRB's directions in its mail out to all GEP participants.
16. The regularization program as developed by the Milk Board and approved by BCFIRB, provided a one-time opportunity for any GEP participant and the individual actually farming the GEP quota (the shipper) to meet with the Milk Board and present evidence in support of an application to have the quota transferred to the shipper. The Milk Board offered an open invitation to the industry to come forward and also made direct contact with GEP entrants and shippers where there was some question as to their compliance with the program. After meeting with the entrants and shippers, the Milk Board met to consider each applicant's circumstances and rule on the outcome. There were three possible outcomes to the process:
 - a) The GEP participant was found to be in full compliance with the program and as such retained the quota allocated through the GEP;
 - b) The GEP participant was found to be non-compliant and the Milk Board enforced its orders and cancelled the quota allocated through the GEP; or
 - c) For a limited time period, and after the Milk Board had determined that it was an appropriate disposition of quota allocated through the GEP, regularization was approved and the quota was transferred to the shipper.
17. The Stewarts were identified as possible non-compliant GEP participants as they were understood not to be residing on the farm where the GEP milk was being produced and therefore eligible for this regularization process. They met with the

¹ *Van Herk v. British Columbia Milk Marketing Board*, June 19, 2006 Full text available on the BCFIRB website at http://www.firb.gov.bc.ca/appeals/milk/vanherk_dec_06-02_jun19_06pdf

Milk Board on September 8, 2008 with their shipper, Mr. Verdonk to explain their circumstances. The Stewarts did not apply for regularization, as it was their intention to milk their GEP quota on their own facility in the Okanagan. On November 7, 2008 the Stewarts were notified of the Milk Board's decision to retract their quota effective December 31, 2008. They applied for and were granted a stay of this decision until the appeal was determined.

POSITION OF THE INTERVENER

18. The Mainland Milk Producers Association provided a written submission supporting the position of the Milk Board and its decision to retract the GEP quota of the Stewarts. They submit that at no time were the Stewarts actively farming their GEP quota, contrary to the program's rules. In addition, there is no record that the Stewarts requested that their entry to the GEP be deferred until they were able to establish their farm in the Okanagan. The Mainland Milk Producers hope that the regularization process and the new measures put in place by the Milk Board will ensure that all GEP entrants will be active dairy producers and that the program is fair and equitable for all.

DECISION

19. The panel heard extensive evidence during this appeal. We have carefully considered all of the evidence and submissions, even though we do not intend to refer to it all in the course of this decision.

(a) Compliance with GEP

20. The Stewarts argue that they are in compliance with the intent of the GEP program as it has always been their dream to milk cows. They state that they currently own and operate a dairy farm and are actively engaged in milk production and milk cows every day on the farm they own in Mara and operate utilizing quota under contract from another quota holder. They breed and feed cows, hire labour, own lands and dairy buildings necessary to be active in dairying. In addition, they use their income to pay bills necessary to be active in milk production and are involved in the profit and loss of the operation.
21. The Stewarts note that the Milk Board identified them as possibly non-compliant because they were not residing on the farm where the GEP milk quota was being produced. However, they argue that it is not necessary to reside on the farm according to a May 20, 2004 BCFIRB letter which states "while it may be preferable that the producer reside on the premises, the FIRB will not direct that it is a mandatory requirement of the program".

22. The Stewarts also argue that they just need more time to complete their agreement with their shipper, Mr. Verdonk. In June 2008, they gave Mr. Verdonk 12 months notice of their intention to transfer their GEP quota to their own facility in the Okanagan. They gave Mr. Verdonk this much notice to allow him time to adjust to this change. The Stewarts argue that if they had simply taken back their quota last June, they would have been found compliant and would not be in this appeal.
23. The Stewarts state that their income from their GEP quota varies each month according to the amount of milk shipped as they receive 15% of their GEP milk receipts while Mr. Verdonk gets 85%. Therefore, they argue that they share in the profit and bear the risk of loss. They also approve the quota “swap in” and “swap out” applications for their GEP quota and do not give their shipper, Mr. Verdonk, the power of attorney necessary to do this on his own. In this way, they argue, they are involved in the day-to-day decisions on the farm where their GEP quota is produced.
24. The appellants maintain that contrary to the Milk Board’s determination, they were actively engaged in milk production in accordance with section 7 of the GEP Rules which provides:
 7. (1) The Board will determine, in its sole discretion, whether an entrant is actively engaged in milk production for the purposes of the program. Without limiting the generality of the foregoing, the Board will have regard to the following factors:
 - (a) whether the restricted Total Production Quota allotted under the program is being used for the benefit of the entrant;
 - (b) whether the entrant is active in the day-to-day affairs of the dairy farm, including the matters of animal husbandry;
 - (c) whether the entrant operates and controls the dairy farm;
 - (d) whether the entrant owns, leases, or rents the dairy farm;
 - (e) whether the entrant pays for feed and other farm supplies utilized on the dairy farm, and
 - (f) whether the entrant enjoys the chance of profit and bears the risk of loss in relation to the operations of the dairy farm.
 - (2) For the purpose of determining whether the entrant is actively engaged in the production of milk, the Board shall have regard to the substance and effect of any arrangement made between the entrant and any other Person, irrespective of the form of that arrangement.
 - (3) Where it appears to the Board that the entrant is primarily engaged in the business of administering Total Production Quota allotted under the program, and that some other Person is primarily engaged in the business of milk production associated with that Total Production Quota, the entrant shall be deemed not to be actively engaged in milk production.
25. They argue that it is not necessary to be in compliance with all of these factors and that the Milk Board could have used its discretion to find them in compliance. They submit their situation is very different from that of other GEP participants who applied for regularization and never intended to milk their own GEP quota. The Stewarts stressed that they never attempted to sell their quota, unlike most others who applied for the regularization program.

26. The Milk Board, for its part, argues that the Stewarts do not meet the GEP Rules for being “actively engaged in milk production” as set out in section 7 because it is their shipper, Mr. Verdonk who:
- a) leases or owns the land, buildings and equipment related to the dairy operation;
 - b) owns the herd related to the dairy operation;
 - c) is exclusively active in the day-to-day affairs of the dairy farm, including matters of animal husbandry;
 - d) exclusively operates and controls the dairy farm;
 - e) exclusively pays for the feed and all other farm supplies utilized on the dairy farm from an 85 per cent share of the monthly cheque; and
 - f) exclusively enjoys the chance of profit and exclusively bears the risk of loss in relation to the operations of the dairy farm; and
 - g) pays the Stewarts on a monthly basis for the privilege of milking the Stewarts’ allotted GEP quota.
27. Further, the Milk Board argues that the Stewarts knew or should have known that the quota issued to them under the GEP was available to them only for so long as there were “actively engaged in milk production” and was “subject to immediate cancellation on notice by the Board to the entrant” in the event that they were found to be not actively engaged.
28. The Milk Board states that the Stewarts’ position in the September 8, 2008 meeting was that they knew that they were non-compliant but asked for more time to get their financial affairs in order before they would be expected to farm their own GEP quota.
29. The Milk Board submits that under the regularization program they did not have the option to allow non-compliant GEP participants to become compliant. The GEP entrants either were or were not compliant. If they were not compliant, their quota was to be retracted.
30. The panel agrees with the Milk Board’s determination that the Stewarts were not “actively engaged in milk production” from their GEP quota. While we accept that there may be a continuum of activities sufficient to conclude that a person is actively engaged, in this case we find that the Stewarts were not sufficiently connected to the GEP operation to be considered actively farming. Specifically, we find that while the Stewarts used their GEP quota for their benefit and received 15% of the proceeds of the milk sales per month, it was Mr. Verdonk who enjoyed the opportunity of profit and would bear any losses from producing this quota. The Stewarts were not active in the day-to-day affairs of the farm where their GEP quota was being produced; they were not involved in herd health decisions; they did not pay for feed and other farm supplies; they did not lease or own the farm on

which the GEP quota was being produced; they did not operate and control the farm on which the GEP quota was being produced. The minimal act of approving the quota swaps for the farm, in our opinion, is not a sufficient indication of active involvement in the farm. We find that the arrangement between the Stewarts and Mr. Verdonk was contrary to the GEP Rules. While the panel accepts that the Stewarts were actively engaged in milk production from their contract quota, they were not actively engaged in milk production from their GEP quota.

(b) Agreement between the Stewarts and Mr. Verdonk

31. The Stewarts argue that it has always been their intention to move the GEP quota to their own farm when they were financially able to buy enough quota to have a sustainable operation. They had a verbal agreement with their shipper, Mr. Verdonk, that they would eventually transfer the GEP quota to their own farm. They have not profited from the sale of the GEP quota as some other new entrants have. At no time did they offer to sell the quota to Mr. Verdonk. In June 2008, they gave Mr. Verdonk 12 months notice of their intention to transfer the quota and if the Milk Board had given them the 10 months amnesty they requested, they would have moved the GEP quota to their own facility in the Okanagan.
32. The Milk Board did not deny that this verbal agreement was in place but argued that the Stewarts knew or should have known that their GEP quota was “subject to immediate cancellation on notice by the Board to the entrant” in the event that they were not “actively engaged” in milk production. The Milk Board argued that since the Stewarts were not actively engaged, they were not in compliance with the GEP Rules and the Milk Board had no alternative but to find them non-compliant. Further, the Milk Board argues that while the Stewarts may have become compliant if given another 10 months, there had to be a “line drawn in the sand somewhere” and a date of compliance determined. This date was the September 8, 2008 meeting between the Milk Board, the Stewarts and their shipper.
33. Further, the Milk Board argues that the Stewart’s request to allow more time to become compliant was not an option according to the rules of the regularization program which, as stated above, allowed only three possible outcomes to the process.
34. The panel accepts that the Stewarts may well have intended to eventually milk their GEP quota themselves. However, the panel also notes that the Stewarts have had since 2002 to become compliant with the GEP Rules which require the entrant to be actively engaged in milking their GEP quota. The Declaration of Applicant signed by Ms. Stewart in 2002 stated, among other things, that the applicant would abide by the “Board’s Consolidated Order as amended from time to time” and included the understanding that:

(i) I must, together with any co-applicants, commence production between August 1 of this year and the following January 31. Failure to do so could result in termination of participation in the program for myself and any co-applicants.

35. Further, the panel finds that regardless of the agreement in place between the Stewarts and their shipper, or that they eventually intended to milk their own quota, the fact is that the Stewarts were not in compliance with the GEP Rules which they agreed to and have not been in compliance for over six years. The regularization program was intended as a one-time limited opportunity to correct certain abuses in the GEP program and to put into place measures to ensure a fair and equitable program with all entrants in compliance with the rules. The panel agrees with the Milk Board that having determined the Stewarts were non-compliant, it was not an option under the regularization program to allow the non-compliance to continue.

(c) The BC Milk Marketing Board has condoned the arrangement since 2002 through their silence.

36. The Stewarts argue that the Milk Board has previously not taken enforcement measures against non-compliant GEP entrants and this gave the impression to those in the industry that arrangements with alternative shippers were acceptable to the Milk Board. In essence, the Milk Board's silence condoned the non-compliant arrangements entered into by many GEP participants.
37. In response, the Milk Board argues that it had no direct evidence suggesting that a non-compliant situation was occurring and that without evidence of non-compliant activity, the Board would not have conducted an audit. Further, the Milk Board argues that it is a poor argument to suggest that "silence" from the Milk Board somehow exempted the Stewarts from the GEP Rules and justified their non-compliance to the extent that they should now be given special consideration under the regularization program. The Milk Board maintains that if it had evidence of non-compliance prior to this time, it would have acted sooner to retract the Stewarts GEP quota.
38. It was because of suspected non-compliance with the GEP Rules that BCFIRB, in its supervisory capacity, directed the Milk Board to undertake the regularization program to rectify abuses and put into place measures to ensure that the GEP is fairly and equitably administered. However, previous "silence" on the part of the Milk Board cannot be seen as licence for the Stewarts or any other GEP participant to be allowed to circumvent rules which they accepted and understood when they entered the program. It is the obligation of every GEP participant to operate in accordance with the GEP Rules and the Milk Board Consolidated Order. The GEP Rules clearly provide that failure to do so may result in retraction of the GEP quota.

(d) Financial Hardship

39. The Stewarts state that they used their GEP quota as security to buy additional quota. Their bank has taken an assignment of the GEP quota and their farm

financing is dependent on this asset. The Stewarts argue that the Milk Board has not protected their financial interests and has put them in a serious financial position which could result in them losing their farm.

40. The Stewarts argue that their circumstances are not similar to those in the Van Herk appeal. The Van Herk quota was not transferable and had no lending value and therefore there was no commitment to the bank. They argue that in assessing their situation, the Milk Board owes them a higher duty of fairness because their GEP quota was transferable and leveraged.
41. For its part, the Milk Board declined to comment on the financial aspects of the Stewart's situation.
42. After considering all the evidence, the panel finds that the Stewarts were not in compliance with the GEP Rules at any time and should have been aware of the consequences. The GEP Rules clearly provide that the quota allotted by the Board under the program may be held by the entrant only for so long as the entrant is actively engaged in milk production, failing which the allotted quota is subject to immediate cancellation on notice by the Board to the entrant. The fact that the Stewarts chose to leverage their GEP quota to purchase further quota when they knew or ought to have known that a consequence of their non-compliance could result in cancellation of their quota, was a risk of their choosing. The financial implications of the retraction of the Stewarts' GEP quota, while unfortunate, do not change the fact of their non-compliance, nor give reason to set aside the decision.

(e) Procedural Fairness

43. The Stewarts question the procedural fairness of the Milk Board. They take issue with the Milk Board holding a private meeting between the chair of the Milk Board, Blaine Gorrell, the general manager of the Milk Board, Ken McCormack, and Steve Verdonk on October 31, 2008. The appellants argue that it was procedurally unfair for the Milk Board to allow this meeting to occur without prior notice to them or without allowing them to be present at the meeting.
44. In response, the Milk Board argues that Mr. Verdonk was advised at the end of their meeting that none of the information he provided was likely to influence the Milk Board's decision affecting the disposition of the GEP quota belonging to the Stewarts.
45. The panel agrees with the Stewarts that the Milk Board's process in conducting this private meeting was procedurally flawed. Given that the regularization program has the potential to significantly affect the financial situations of many individuals and is extremely sensitive, procedural fairness is of the utmost importance. While the Milk Board argues that the information it received in this meeting did not influence its decision regarding the appellant's quota, the optics of a private meeting where a commodity board meets with one interested party in the absence

of the other party is extremely troubling. Further, this procedurally unfair process cannot be cured by the Milk Board saying that it did not rely on anything heard in that meeting. The duty of fairness necessitates an open and transparent process where all parties are included in any and all communications on the subject.

46. Despite the fact that we have found that the Milk Board relied on a flawed process in coming to its determination of the Stewarts' compliance with the GEP, we agree with the Milk Board's ultimate conclusion that the Stewarts were not in compliance. The Milk Board came to that determination by following exactly the GEP Rules and the directions laid out for regularization. It stated correctly that this was not a situation for regularization and correctly retracted the GEP quota from the Stewarts. For the Stewarts, this is the end of the matter.
47. We also note that as this appeal was a *de novo* hearing before BCFIRB, the procedural defects in the Milk Board's process regarding the Stewarts are addressed by this rehearing.
48. We turn now to the more difficult issue raised by the Stewarts regarding what they consider to be the allocation of their GEP quota to Mr. Verdonk. The appellants argue that they did not apply for regularization and did not want to see their quota transferred to their shipper, Mr. Verdonk, but wanted to eventually milk it themselves. They state that at no time did they offer their quota for sale - a fact confirmed by Mr. Verdonk. The Stewarts argue that unlike others who were regularized by this program, they did not profit financially from the illegal sale of their quota and because of their unique situation, have been penalized more harshly than other entrants.
49. In their argument, the Stewarts questioned why Mr. Verdonk should receive their GEP quota when he has no financial consideration in this quota and in light of the Milk Board's determination that the Stewarts did not qualify for the regularization process that could have resulted in a transfer of their GEP quota to Mr. Verdonk.
50. The Milk Board's response to this argument is that it is not relevant as the only issue under appeal is the Milk Board's decision to retract the quota from the Stewarts as non-compliant GEP entrants. The Milk Board argues that its decision to assign the Stewarts' GEP quota to Mr. Verdonk was a separate decision, made in a separate letter which was not appealed by the Stewarts.
51. Upon a careful review of the Notice of Appeal, the Pre-hearing Conference Report and a consideration of the manner in which this appeal proceeded in the January 20, 2009 hearing, the panel agrees with the Milk Board that this issue is beyond the scope of the issues on this appeal.
52. However, the panel is concerned that the decision to issue GEP quota to Mr. Verdonk appears, at least on its face, to raise serious concerns about the

administration of the GEP and the regularization program, as well as the broader issue of public interest.

53. The purpose of the GEP program is to promote the entry of new farmers into the industry. This one-time opportunity for regularization was to rectify non-compliant GEP situations with the clear objective of protecting the long-term principles and integrity of the program. The rules in place to guide not only the regularization process, but also the GEP program itself, must be fairly and consistently applied. It is not clear that the decision to allot 7000 kilograms of quota to Mr. Verdonk meets the required standards for fairness, consistency and transparency.
54. Therefore, the panel has requested that BCFIRB, acting in its supervisory capacity, follow up with the Milk Board to address these concerns.

ORDER

55. The appeal is dismissed.
56. There will be no order as to costs.

Dated at Victoria, British Columbia this 26th day of February 2009.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(Original signed by)

Suzanne K. Wiltshire, Presiding Member
Honey Forbes, Member
Sandi Ulmi, Vice-Chair