

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY WHALEY FARMS LTD. FROM A DECISION CONCERNING
GRADUATED ENTRY PROGRAM QUOTA ALLOCATION

BETWEEN

WHALEY FARMS LTD.

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:

George Boyes
Deborah Amrein Boyes

For the Respondents:

Blaine Gorrell, Chair

Date of Hearing

March 10, 2009

Place of Hearing

Abbotsford, BC

INTRODUCTION

1. The appellant, Whaley Farms Ltd., a company owned and operated by George Boyes, is appealing a decision of the British Columbia Milk Marketing Board with respect to the conditions attached to GEP quota reallocated to it under the Milk Board's Regularization Program.
2. The quota in this matter was originally issued to GEP entrant Leonard Hoisington in 1992 under the terms of the GEP in place at the time and subsequently registered with the Milk Board in the name of his company, Bel Holsteins Ltd. Whaley Farms acquired the shares of Bel Holsteins in 1998 from another producer (not Leonard Hoisington) and became the shipper of this GEP quota. Mr. Boyes met with the Milk Board on September 8, 2008. The purpose of the meeting was to determine whether Mr. Hoisington was a non-compliant GEP entrant, and if so, whether the GEP quota allocated to Mr. Hoisington would qualify for regularization and could be reallocated to Mr. Boyes' company, Whaley Farms.
3. In its November 13, 2008 decision the Milk Board, advised that the GEP quota would be reallocated to Whaley Farms under the following conditions:

That portion of your [Leonard Hoisington's] quota that was allocated by the Board under the GEP will be registered to the recipient [George Boyes, dba Whaley Farms] as the last quota in and therefore the first quota assessed in a transaction (LIFO principle). Under the 10/10/10 and LIFO principles, if at some future date the Regularized quota is transferred, the GEP quota will be the first quota transferred and it will be subject to a retraction based on the 10/10/10 Retraction principle.

Furthermore, it is the shipper [George Boyes dba Whaley Farms] who is the GEP Entrant and who will be subject to all the terms defining the GEP. The shipper will be subject to audits and must remain in compliance with the terms of the GEP as written in the Consolidated Order. After Regularization, the shipper (including spouse) will be the only persons with an interest in the quota. There can be no merging of this quota with any other quota.

4. Whaley Farms appealed the decision on the ground that the Milk Board erred when it applied the 10/10/10 transfer assessment¹ and the last in first out (LIFO) provisions to the GEP quota allocated to it, because this would affect the ability to sell or pledge the quota and essentially require the appellant to start over under the GEP program. The appellant also appealed the Milk Board's decision to treat the quota as GEP quota and apply the GEP rules as set out in Schedule 1 to the Milk Board's Consolidated Order to the regularized quota Whaley Farms would be allocated.
5. The Milk Board applied for summary dismissal of the appeal.
6. In our March 3, 2009 decision, this panel summarily dismissed the appellant's appeal relating to the application of the 10/10/10 and LIFO provisions to the GEP

¹ The "10/10/10 transfer assessment" refers to a sliding scale of transfer assessment (from 100% down to 10%) depending on the year of transfer, applicable on transfers of quota.

quota allocated to Whaley Farms. The Milk Board had no discretion with respect to the application of these specific provisions as they were dictated by supervisory direction of the British Columbia Farm Industry Review Board (BCFIRB).

However, as the panel found that the Milk Board did have discretion to “determine after reviewing the applications whether further conditions, such as any of the rules relating to GEP in Schedule 1 of the Consolidated Order, should be applied to the farm managers in order to forestall future abuses with respect to the disposition of this quota”, the appellant’s remaining issue was not summarily dismissed.

7. The only issue which remained to be addressed in the hearing on March 10, 2009 is set out below.

ISSUE

8. Did the Milk Board err in determining that the portion of the quota allocated by the Milk Board under the GEP that is to be transferred to the shipper Whaley Farms Ltd. will be subject to all GEP terms as set out in the Consolidated Order of the Milk Board, including audits, and that the shipper will be the GEP entrant and the shipper (including spouse) will be the only persons with an interest in the quota?

REMEDY SOUGHT

9. By way of relief Mr. Boyes asks that the regularized quota allocated to the appellant by the Milk Board not be subject to the GEP rules stating:

the quota in question has already graduated from the GE program and has therefore been transferable as regular quota from the name of Leonard Hoisington into the name of Whaley Farms since at least September 2007, and should therefore be eligible for transfer without delay into the name of Whaley Farms. As such, this quota is then subject to the 10% transfer assessment, which terms we accept.

BACKGROUND

10. 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.
11. In 1992, Leonard Hoisington was invited to become a new entrant under the GEP and was allocated 6350 kg. of quota. Under the then terms of the GEP, this quota was not transferrable for 15 years (September 2007). In September 1992, Mr. Hoisington changed the name the GEP quota was registered under from “Leonard Hoisington” to “Bel Holsteins Ltd.” indicating to the Milk Board that he and his wife were the only shareholders of the company.

12. In March 1998 and despite the fact that GEP quota was non-transferable, Mr. Boyes acquired an interest in Mr. Hoisington's GEP quota (which continued to be registered with the Milk Board under "Bel Holsteins") from another producer who was milking it at the time. In that transaction, Whaley Farms became the sole shareholder in Bel Holsteins and Mr. Boyes separately obtained a power of attorney from Mr. Hoisington for Bel Holsteins. Mr. Boyes as the attorney for Bel Holsteins then gave notice to the Milk Board that the quota had moved to his farm in Agassiz. Since then he has produced the milk from the GEP quota on his farm.
13. Between June 1999 and January 2003, Mr. Boyes purchased significant quota under the name of Bel Holsteins. Between June 2003 and July 2007 he sold quota totaling 15,703 kg. including some of the non-transferable GEP quota in March, April and July of 2007. By August 2008, Bel Holsteins was left with 4,385 kg. which Milk Board records indicate was all part of the original GEP quota allocated to Mr. Hoisington.
14. After the *Van Herk* 2006² appeal to BCFIRB, the Milk Board and BCFIRB became increasingly 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 Consolidated Order 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. With the long term objective of protecting the integrity of the GEP, BCFIRB directed the Milk Board to proceed with enforcement to rectify these non-compliant situations and issued supervisory directions to the Milk Board with respect to the Milk Board's proposed regularization process. The Milk Board was asked to include BCFIRB's directions in its mail out to all GEP participants.
15. The Regularization Program, as developed by the Milk Board and approved by BCFIRB subject to its supervisory directions, 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 entrant was found to be in full compliance with the program and as such retained the quota allocated through the GEP;

² *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_06.pdf

- b) The GEP entrant was found to be non-compliant and the Milk Board enforced its orders and cancelled the quota allocated through the GEP; or
 - c) The GEP entrant was found to be non-compliant and, 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 reallocated to the shipper.
16. In October 2007, as a result of a Central Securities Register search of the shareholder registers for a number of limited companies, the Milk Board became aware that since March 1998, Whaley Farms had been the sole shareholder of Bel Holsteins. As a result, Mr. Hoisington was identified as a possible non-compliant GEP entrant with Whaley Farms, owned by Mr. Boyes, as a possible non-compliant shipper potentially eligible for the regularization process.

DECISION

17. The panel heard and reviewed all the evidence presented during the appeal although we do not intend to address all of it in these reasons. The panel gave Mr. Boyes a great deal of latitude in presenting his evidence and while he strayed into evidence and argument relating to the summarily dismissed aspect of his case, we intend to confine our decision to only the issue on appeal.
18. Mr. Boyes argues that the transfer of the GEP quota to him under the Regularization Program should not be subject to all terms of the GEP including the 10/10/10 and LIFO provisions because he sought and relied on advice from the Milk Board in 1998 before spending money to obtain the quota.
19. In response, the Milk Board points to the letter of March 23, 1998 sent to Mr. Boyes from the Milk Board regarding this requested information. The letter states:

With respect to your direct question and the issue of leasing of milk quotas and consistent with the powers and duties of the Board set out in section 7(2)(a) of the British Columbia Marketing Board Regulation 167/94, the British Columbia Milk Marketing Board (BCMMB) does not provide for consequently it does not have a position or policy regarding the leasing of milk quotas.

In light of the forgoing the BCMMB would like to inform you of its view of the individual and independent activities of licensed producers who hold milk quotas and attain compliance with the Consolidated Order and meet milk quota obligations by way of contractual arrangements. In instances just described and **subject to a licensed producer remaining in compliance with the Board's Consolidated Order** a licensed quota holder is at liberty to make private treaty contractual arrangements for the production of milk and thereby meet milk quota obligations. [emphasis added]

20. In the panel's opinion, it is not clear from the above letter whether or not the Milk Board was aware that the quota in question was GEP quota but it is clear that the producer was expected to remain in compliance with the Milk Board's Consolidated Order. Therefore, in our view, this letter cannot be construed as giving permission to Mr. Boyes or Whaley Farms to lease GEP quota from Mr. Hoisington or Bel Holsteins. More importantly in the panel's view, Whaley Farms' acquisition of all the shares of Bel Holsteins was not a lease arrangement but rather was an attempt to indirectly transfer non-transferable GEP quota in contravention of both the transfer provisions and the requirements respecting milk production from GEP quota by the GEP entrant as set out in the Consolidated Order. The end result is that all the milk produced under the GEP quota by Whaley Farms has been contrary to the GEP and the Consolidated Order.
21. Mr. Boyes also argues that since he has been operating Bel Holsteins and has been milking the GEP quota for over 10 years and the quota became fully transferable in 2007, he should now be allowed to transfer it subject to only a 10% assessment. He notes that he sold some of this GEP quota in 2007 and the sale was allowed by the Milk Board. He states that he could have sold the remainder of the quota over a year ago with only a 10% transfer assessment, but that he was unaware that the Milk Board planned to take steps to regularize GEP quota and that he had no incentive at the time to change the status quo. According to Mr. Boyes, the problem is that, unlike other producers, he did not sell all the GEP quota before the regularization program came into effect.
22. The Milk Board argues that Mr. Boyes has been producing milk for some time as a shipper using GEP quota allotted to Leonard Hoisington under the name of Bel Holsteins. This practice is not permitted under the Consolidated Order and Mr. Boyes either knew or should have known that he was non-compliant with the program and the Milk Board could have cancelled the quota at any time.
23. The panel notes on this point that Mr. Boyes did acknowledge that he was in fact aware in 1998 when Whaley Farms acquired Bel Hosteins that the quota was GEP quota and that he was aware that the GEP rules required that the GEP quota be produced by the GEP entrant.
24. The Milk Board further argues that the GEP quota never became transferrable as it was being produced in conditions that were non-compliant with the GEP rules. The only way GEP quota could be "transferred" was through arrangements like this which required that the transfer occur without the Milk Board "catching" the parties in a non-compliant transaction.
25. The panel agrees that there is no dispute that Leonard Hoisington was not in compliance with the GEP rules which state that the entrant must be "actively engaged in milk production". Mr. Hoisington has not been compliant since at least March of 1998 when his company, Bel Holsteins, was sold through a transfer of all of its shares to Whaley Farms and the granting of a power of attorney to Mr. Boyes.

26. Mr. Boyes seems to believe that the only reason he is in this position is that he did not sell the GEP quota sooner and should be allowed to do so now. In the panel's view, the fact that Whaley Farms purchased Bel Holsteins does not negate the GEP entrant's non-compliance nor does it give Mr. Boyes, Bel Holsteins or Whaley Farms a valid interest in the GEP quota. Despite the 1998 acquisition of the shares of Bel Holsteins and the purported transfer of GEP quota, the fact remains that GEP quota was and is non transferable. This transfer was done outside the authority of the Milk Board and without Milk Board approval for the very reason that such approval would not have been forthcoming as it was inconsistent with the Consolidated Order. While Mr. Boyes continued to produce the GEP quota through Bel Holsteins, all such production was non-compliant with the Consolidated Order. Consequently we find Mr. Boyes and Bel Holsteins were never in a position to "sell" GEP quota as they appear to have done in 2007 and the fact that this quota was "sold" does not in any way give Mr. Boyes or Bel Holsteins the right to sell the rest of it now. Nor is there any basis for the Milk Board or this panel to permit such a "sale" of GEP quota now, particularly in view of BCFIRB's supervisory directions respecting the Regularization Program.
27. Having established Mr. Hoisington's non-compliance, the Milk Board had two options under the Regularization Program. It could cancel the GEP quota, or on a one-time basis, it could reallocate the quota to the shipper as "regularized" quota. The Milk Board chose to regularize the quota and reallocate the quota to Mr. Boyes' company, Whaley Farms. As noted in the panel's March 3, 2009 summary dismissal decision, if Mr. Boyes is to receive GEP quota through the Regularization Program that quota, according to the BCFIRB supervisory directions, is subject to the 10/10/10 and LIFO provisions. To the extent that Mr. Boyes argues that these provisions do not apply to him, he is wrong. This matter was addressed in the summary dismissal; these terms are not appealable as they do not reflect an independent exercise of Milk Board discretion. Simply put, if Mr. Boyes wants to be regularized, the GEP quota is subject to these conditions.
28. The only further issue for the panel's consideration on this appeal is whether the Milk Board erred in the exercise of its discretion when it determined that the quota reallocated to Whaley Farms under the Regularization Program would take on the nature of GEP quota and be subject to the GEP rules.
29. The Milk Board states that it imposed the GEP rules on the quota transferred to Mr. Boyes because "the intent of the GEP Regularization Program would be lost completely if non-compliant shippers were permitted to receive the quota with no conditions attached". Therefore, the Milk Board exercised its discretion and imposed the GEP rules on this quota as of the date of reallocation to the shipper.
30. The imposition of such a further condition by the Milk Board was contemplated by BCFIRB in its supervisory directions respecting the Regularization Program. Direction 4 states, in part:

Should the Milk Board be satisfied that the specific circumstances warrant regularization, this new allotment of quota shall be issued directly to the farm manager and, effective the date of the Milk Board's approval, commence being subject to the 10/10/10 assessment schedule and "Last In, First Out" principle at sections 22(1) and (2) of the Milk Board's Consolidated Order. We leave it to the Milk Board to determine after reviewing the applications whether further conditions, such as any of the rules relating to GEP in Schedule 1 of the Consolidated Order, should be applied to the farm managers in order to forestall future abuses with respect to the disposition of this quota.

31. In the opinion of the panel, this further condition is reasonable in that it is consistent with the intent and purpose of the GEP and the Regularization Program. It addresses the public policy interests of ending instances of non-compliance by offering a one-time opportunity to non-compliant shippers who had no entitlement to produce milk from GEP quota, to, in effect, become GEP entrants. Imposing the GEP rules on the regularized quota has several positive features. It requires the Milk Board to consider the appropriateness of the allocation of quota that is to be characterized and treated as GEP quota to a shipper. Where that shipper is regularized, it requires the shipper to continue actively producing milk from the GEP quota and further, permits the auditing of GEP production to avoid future abuses and manipulation of the GEP rules to create profit from non-compliant quota transactions rather than from milk production itself.
32. If Mr. Boyes does not want the allocation of GEP quota if that quota is subject to the GEP rules, the Milk Board must cancel the quota and allot it to the next qualified person on the GEP wait list.
33. We close these reasons by emphasizing that this was the appellant's appeal, and as such this decision deals solely with the appellant's challenge to the conditions attached to the regularized quota he was allocated. This decision does not address the prior question whether the regularization decision itself was appropriate. We make this point because we are aware that BCFIRB has commenced a supervisory panel to consider the appropriateness of another regularization decision. That supervisory process having been activated, we will leave any further consideration or comment on these types of issues to BCFIRB, as it considers appropriate, in the exercise of its supervisory mandate.

ORDER

34. The appeal is dismissed. The Milk Board did not err in characterizing the quota allotted to Mr. Boyes upon regularization as GEP quota subject to the GEP rules.
35. There will be no order as to costs.

Dated at Victoria, British Columbia this 3rd day of June 2009.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Suzanne K. Wiltshire, Presiding Member



Honey Forbes, Member



Sandi Ulmi, Vice-Chair