IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stewart v. British Columbia Farm Industry Review Board,* 2010 BCSC 602

Date: 20100429
Docket: S19959
Registry: Chilliwack

Between:

Sandy Stewart and Lilian Stewart

Petitioners

And

British Columbia Farm Industry Review Board and British Columbia Milk Marketing Board

Respondents

Before: The Honourable Mr. Justice C.E. Hinkson

On Judicial Review from the Farm Industry Review Board, February 26, 2009.

Reasons for Judgment

Counsel for the Petitioners:	R.A. Wattie
Counsel for the Respondent British Columbia Farm Industry Review Board:	Frank Falzon, Q.C. C. Elsaesser
Counsel for the Respondent British Columbia Milk Marketing Board:	No one appearing, although duly served
Counsel for Steven Verdonk, an interested party:	Wendy Baker, Q.C.
Place and Date of Hearing:	Vancouver, B.C. April 9, 2010
Place and Date of Judgment:	Chilliwack, B.C. April 29, 2010

Introduction

[1] The petitioners, Lilian and Sandy Stewart (the "Stewarts"), are dairy farmers and owners of milk quota. They had a contract milking agreement with a third party, Steven Verdonk, to "milk" their lower mainland quota rather than milk it themselves, in contravention of the rules of the quota system.

[2] The respondents, the British Columbia Farm Industry Review Board (the "BCFIRB") and the B.C. Milk Marketing Board (the "Milk Board"), became aware that many quota holders, like the Stewarts, were renting out their quotas contrary to the rules of the quota system, and therefore began a process of regularizing the system, including dealing with the non-compliant quota holders and those who rented from them.

[3] On November 7, 2008, the Milk Board made a decision to retract the Stewarts' milk quota due to their non-compliance with the rules and to allocate the quota to Mr. Verdonk. The Stewarts appealed the Milk Board's decision to the BCFIRB. In a decision released on February 26, 2009, the BCFIRB dismissed the Stewarts' appeal.

[4] The Stewarts' seek judicial review of the BCFIRB's February 26, 2009 decision, pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241.

Background

[5] The production and sale of many natural food products is managed in British Columbia pursuant to the ***Natural Products Marketing (BC) Act***, R.S.B.C. 1996, c. 330 [***Act***], and the ***Natural Products Marketing (BC) Act Regulations***, B.C. Reg. 516/2004.

[6] The production and sale of milk and at least some dairy products in British Columbia is overseen by the Milk Board, which is subject to the supervision of the BCFIRB.

[7] One of the means by which the milk industry is regulated in British Columbia is through a quota system. This system allows the Milk Board to assign specific quota to milk producers. The term "quota" is defined in the ***British Columbia Milk Marketing Board Regulation***, B.C. Reg. 167/94 as:

> the quantity of a regulated product, or of a class, quality, component or grade of a regulated product, that may be allotted under this regulation for production, transportation, packing, storage or marketing within British Columbia.

[8] One feature of the milk industry quota system, is the Graduated Entry Program (the "GEP") that has existed in the industry in some form for over 26 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 British Columbia consumers. There has been and remains a waiting list of those wishing to participate in the GEP.

[9] In 1984, Lilian Stewart applied to participate in the GEP and was placed on the waiting list for allocation of quota under the GEP. In January 2002, after an 18 year wait, the Stewarts were allotted GEP quota of 5,000 kilograms. They also purchased a growth quota of 2,000 kilograms for a total of 7,000 kilograms of quota.

[10] When they were allocated the 7,000 kilogram quota under the GEP and growth quota, the Stewarts both signed a declaration acknowledging that they had each read, understood, and agreed to the provisions of Schedule 1 to the Consolidated Order of the Milk Board (the "GEP Rules"). They filed a certificate confirming that they had received independent legal advice with respect to their declaration. The GEP Rules required, among other things, that the GEP entrant be "actively engaged in milk production".

[11] By January of 2002, the Stewarts had been engaged in a contract milking arrangement in the lower mainland of the province for some eight years. They asserted that their financial circumstances then precluded them from meeting their debt servicing obligations on a quota of only 7,000 kilograms, so they arranged for Mr. Verdonk, who is sometimes referred to as their "shipper", to "milk their quota"

until they could do so themselves. Although the Stewarts were engaged in milk production for other quota, they were not actively milking the GEP quota themselves. The GEP Rules require that the GEP quota holder actively be engaged in milk production of the GEP quota.

[12] Sometime after 2002, the Stewarts moved from the lower mainland to a larger farm in Mara, in the Okanagan area of the province. They say that they did so in order to have enough acreage to milk both their quota and the GEP quota and the growth quota that they had been allotted in 2002.

[13] During the period from August 2002 until March 2009, the Stewarts were paid for the production of the 7,000 kilogram quota. In turn, they paid Mr. Verdonk 85%, or $798,002.74, from the payments relating to that quota, and retained 15%, or $115,790.74, themselves. On six occasions Mr. Verdonk was unable to produce the entire quota allotment, and it was "milked" by other producers, including two of those occasions where the Stewarts "milked" a portion of the quota.

[14] By March 2007, it had become apparent to the Milk Board that many of those who had received a quota allotment under the GEP were not in compliance with the GEP Rules. In that month, the Milk Board wrote to the BCFIRB asking if the BCFIRB would "entertain a short term tailored solution to address this specific issue with a strengthening of compliance audits…". The Milk Board proposed an amnesty designed to "legitimize the unregistered transfer of quota and bring producers into compliance with the GEP".

[15] On July 16, 2007, the BCFIRB issued supervisory directions to the Milk Board which stated that the "BCFIRB accepts that a one-time only approach to regularizing the situation may on balance be in the public interest" and provided that:

> Regularization will be a one-time only opportunity for a non-compliant GEP participant to have his or her quota allotted to the non-compliant "farm manager" with whom they have a current and direct association. They must appear together before the Milk Board and must make a joint application in which they both agree to have quota that has been issued to the GEP participant as a special allotment cancelled and re-allotted to the farm manager. 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

> This one-time regularization opportunity applies only to GEP participants and directly associated farm managers currently in non-compliance with the GEP who come forward and make a joint application to the Milk Board, as outlined above, prior to December 1, 2007.

[16] In June of 2008, the Stewarts gave Mr. Verdonk 12 months notice of their intention to transfer their GEP quota to the Okanagan and begin milking it themselves.

[17] In July 2008, the Milk Board gave notice of its intention to enforce compliance with the GEP Rules, and to give GEP entrants a one-time opportunity to apply for "regularization" of previously issued GEP quota in situations where the GEP entrant was not in compliance with the provisions of the GEP Rules.

[18] The notice provided:

> Under the terms of the Board's regularization program, the Board is offering existing GEP participants a one-time opportunity to formally transfer their quota to the person who has actually been 'actively engaged in milk production', notwithstanding that the GEP participant has engaged in a violation of the program that could otherwise result in immediate cancellation of the quota.
>
> If you choose this course of action, the quota may be transferred to the person who is actually 'actively engaged in milk production' without going through the Quota Exchange. The Transfer Application form must be signed by the registered GEP participant. A power of attorney or other instrument purporting to confer on some other person the authority to act on behalf of the registered GEP participant will not be accepted by the Board for this purpose. The quota so transferred will not be subject to a transfer assessment according to the '10/10/10' principles specified in the Consolidated Order. This direct transfer of quota must be completed and recorded under the name of the new owner as of December 1, 2008. Under the terms of the regularization program, the quota transferred to the new owner will be deemed to have been allotted as at the date of transfer, and will be subject to the usual transfer assessment provisions and the principle of 'Last In First Out' (LIFO) for any subsequent quota transfer. The offer contained in this letter is to assist you with the transfer of quota at your discretion; you are not obligated to exercise this option. If you do not choose to exercise this option, you will be asked to provide evidence of compliance with the terms of the GEP. This request will be made in September, 2008. A failure to provide satisfactory evidence establishing that you have indeed been consistently

> 'actively involved in milk production' may result in the cancellation of quota. All other provisions of the Consolidated Order continue to apply including assessment under the 10/10/10 rule for Board allocations.

[19] The Stewarts advised the Milk Board that they would be transferring their quota from Mr. Verdonk to themselves, but swore that they were advised by the Milk Board that they would have to wait to do so until after a meeting in September 2008, and to take no steps regarding the quota until that meeting had taken place.

[20] The Stewarts swore that they attended a meeting with representatives of the Milk Board on September 8, 2008, at which time they were advised that there were 21 people like them who had options pursuant to the directions of the BCFIRB. Of the affected quota holders, only the Stewarts indicated that they wished to milk their allotted quota.

[21] The Stewarts swore that they told the Milk Board that it had always been their intention to milk their own quota, and that they reiterated that they wanted to transfer the quota as indicated in their June 2008 notice to Mr. Verdonk. The Stewarts swore that they were not advised that such a transfer was not open to them, nor that the failure to transfer their quota from Mr. Verdonk to themselves right away would prevent them from doing so in June of 2009 as they had planned.

[22] The term "transfer", as it was used by the Stewarts with respect to their 7,000 kilograms of quota, is misleading. As the quota was allotted to them, they did not need to "transfer" it to themselves, but rather needed the permission of the Milk Board to permit them to "milk" that quota in the Okanagan.

[23] On November 7, 2008, the Milk Board wrote to the Stewarts, retracting their quota effective December 31, 2008. Unbeknownst to the Stewarts, the Milk Board also reallocated the 5,000 kilogram GEP quota and the purchased growth quota of 2,000 kilograms assigned to the Stewarts, to Mr. Verdonk. Mr. Verdonk made no payment for the 2,000 kilogram growth portion of the 7,000 kilograms of quota.

[24] The Stewarts sought a stay of the cancellation of their quota on November 11, 2008, on behalf of themselves and Mr. Verdonk, and appealed the cancellation on November 12, 2008.

[25] In late November, the Stewarts learned that Mr. Verdonk had been granted the quota by the Milk Board.

[26] At a pre-hearing telephone conference with the BCFIRB and the Milk Board on November 28, 2008, the Stewarts learned for the first time that the Milk Board had met with Mr. Verdonk in October 31, 2008. On that date the Milk Board determined that the entirety of the Stewarts' quota would be cancelled and awarded to Mr. Verdonk. The Stewarts later requested that Mr. Verdonk's name be removed from their stay application.

[27] The Stewarts did not receive a copy of the Milk Board's decision to allocate the quota to Mr. Verdonk until December 18, 2008. At the pre-hearing conference the BCFIRB gave directions that documents would be exchanged between the Milk Board and the Stewarts. Ken McCormack, general manager of the Milk Board, attended the conference and was directed to provide his notes of the pre-hearing meeting with Mr. Verdonk to the Stewarts. Despite these directions, Mr. McCormack's notes of a pre-hearing meeting were not provided to the Stewarts until January 12, 2009.

[28] The Stewarts' appeal before the BCFIRB panel took place on January 20, 2009.

[29] On March 20, 2009, counsel for the Stewarts wrote to the BCFIRB seeking to appeal the Milk Board's decision concerning the transfer of quota to Mr. Verdonk. They provided as evidence of the decision a letter provided by the Milk Board to the BCFIRB dated March 9, 2009 concerning the allotment of quota to Mr. Verdonk. By e-mail from counsel for the Milk Board dated March 31, 2009, counsel for the Stewarts was advised that "the decision to cancel your clients' quota is separate from the decision to allot quota to Mr. Verdonk (though the decisions are clearly

related and arise in the same factual matrix). Consequently, it is the Milk Board's position that the allotment of quota to Mr. Verdonk will not impede your clients' ability to seek reversal of the decision to cancel the quota."

[30] Then, by letter of April 2, 2009, the Stewarts were advised by the BCFIRB that their notice of appeal was defective because the March 9, 2009 letter was not a "decision" of the Milk Board; rather, the decision of the Milk Board was made on November 7, 2008. They were advised that evidence of that decision would be required, in addition to a request for an extension of time to file the appeal, to cure their notice of appeal. They took no further steps to pursue such an appeal.

[31] On June 26, 2009, the BCFIRB set aside the reallocation to Mr. Verdonk, and ordered that the Stewarts and Mr. Verdonk be given a one-time opportunity to make a joint application to the Milk Board within 30 days with respect to the 7,000 kilogram quota that had been reallocated to Mr. Verdonk.

[32] That decision is the subject of an amended petition for judicial review by Mr. Verdonk, in Action No. S096254 in the Vancouver Registry of this Court.

Preliminary Matter

[33] The Stewarts sought to introduce a further affidavit from Lilian Stewart, dated March 19, 2010, to show that the Stewarts had engaged in what was referred to as quota "swaps". The BCFIRB and Mr. Verdonk took objection to the admissibility of this affidavit.

[34] I am satisfied that there was evidence of so-called quota "swaps" by the Stewarts before the BCFIRB panel that heard their appeal, and that it is unnecessary for them to rely on the affidavit of Lilian Stewart; therefore, I will not rely on it myself in this judicial review.

Relief Sought by Judicial Review

[35] The Stewarts seek:

a) to set aside the February 26, 2009 decision of the BCFIRB panel dismissing their appeal from the November 7, 2008 decision of the Milk Board; and

b) to have their GEP and growth quota of 7,000 kilograms reinstated to permit them to "milk" that quota on their farm in Mara, British Columbia; or, in the alternative

c) that they be given a reasonable time to sell their GEP and growth quota as other farmers were permitted to do under the amnesty provisions determined by the BCFIRB.

Issues on Judicial Review

[36] The Stewarts argue three issues on this judicial review:

a) that the BCFIRB panel failed to deal with one aspect of their appeal;

b) that there was an absence of procedural fairness before both the Milk Board and the BCFIRB panel; and

c) that the decision of the BCFIRB panel is patently unreasonable.

Standard of Review

[37] The ***Act*** defines the BCFIRB as "the Provincial board". Section 3.1 of the ***Act*** provides:

> Sections 1 to 10, 27 to 30, 45, 46, 46.2, 48, 57, 58 and 61 of the Administrative Tribunals Act apply to the Provincial board.

[38] Section 58 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 prescribes:

> (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

Authorities

[39] Schedule 1 to the British Columbia Milk Marketing Board Consolidated Order sets out the Graduated Entry Program Rules. In this schedule, "Independent Production Unit" is defined as "a dairy farm that is geographically and operationally separate from a dairy farm on which any other person is actively engaged in milk production".

[40] Rule 7 of the Graduated Entry Program Rules 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 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 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.

[41] The hearing before the BCFIRB panel was a hearing *de novo.* In ***British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)***, 2002 BCCA 473, Chief Justice Finch, for a unanimous Court held at para. 13:

> The statutory regime created by this legislation clearly indicates that an appeal to the Marketing Board is to be in the nature of a full hearing into the merits of the case. There is nothing in the legislation to suggest that the Marketing Board must give any or any significant deference to the decision of a commodity board, such as the Chicken Board. Where the Chicken Board has heard no evidence, information or argument and has offered no reasons for its decision, the Marketing Board has little alternative under its statutory adjudication regime other than to determine the facts and issues based on the evidence and argument presented to it. It has the power to conduct a full hearing into the merits.

[42] The common law duty of procedural fairness was discussed in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 [***Baker***]. At paragraphs 23 to 28, L'Heureux-Dube J., for the majority, provided a non-exhaustive list of factors relevant to administrative processes:

> a) One important consideration is the nature of the decision being made and the process followed in making it. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
>
> b) A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made.
>
> c) A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected.
>
> d) Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances.
>
> e) Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure

> made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[43] Quota policy is within the domain of the BCFIRB, and not this Court: see ***Belden Farms Ltd. v. Milk Board*** (1987), 14 B.C.L.R. (2d) 60 at 75 (S.C.); ***Delight v. British Columbia Egg Marketing Board*** (1991), 84 D.L.R. (4th) 518 at 534-535 (C.A.); ***Truong Mushroom Farm Ltd. v. British Columbia (Mushroom Marketing Board)***, [1999] B.C.J. No. 1079 at para. 47 (S.C.); ***Swift Canadian Co. Ltd. v. Alberta Hog Producers Marketing Board*** (1979), 9 Alta L.R. (2d) 217 at 227-228 (Dist. Ct.); and ***Ponich Poultry Farm Ltd. v. British Columbia Marketing Board***, 2002 BCSC 1369 at para. 29.

Discussion

a) Did the BCFIRB panel consider the issues raised by the Stewarts?

[44] Pursuant to s. 58 (2)(b) of the ***Administrative Tribunals Act***, this issue attracts a standard of fairness for judicial review.

[45] The Stewarts argued that the BCFIRB panel failed to consider issues raised in their appeal.

[46] In their letter of November 8, 2008, which served as their notice of appeal, the Stewarts “requested”:

> 1) that we be allowed until the end of the Dairy year to complete a fair transition between ourselves and Mr. Verdonk.
>
> or
>
> 2) to at least be given the opportunity to milk our own quota. We have already had a milking facility approved by the barn Inspector.

[47] As indicated above, the Stewarts could not “milk” their 7,000 kilograms of quota in the Okanagan, as they wished, without securing the approval of the Milk Board. At no time did they obtain such approval.

[48] The hearing of the Stewarts' appeal by the BCFIRB took place on January 20, 2009. It was attended by Blaine Gorrell, the Chairperson of the Milk Board, Ken McCormack, the general manager of the Milk Board, the Stewarts, their daughter Kirsty McAvoy, and her husband Jim McAvoy. At the commencement of the hearing by the BCFIRB, the Chairperson of the panel said:

> ...The first thing we're going to deal with is the issue that arises out of the decision of the Milk Board. The Panel understands the issue to be as follows, and this may be slightly a different description than was in the description that was in the pre-hearing conference report, and that's because we have gone to the - - the Panel has looked at the actual decision itself and is taking the wording out of the decision.
>
> Did the BC Milk Marketing Board err in determining, as set out in its November 7, 2008 decision, to retract quota previously allocated to the appellants under the Graduated Entry Program, as well as any growth allocated as a result of the original GEP allocation.
>
> I'm assuming that the parties will agree with the statement of the issue.

[49] The following exchange then took place:

> Ms. Stewart: Mm-hm.
>
> Chairperson: The Milk Board is indicating their agreement with the statement of issue. I'd be happy to re-read it.
>
> Ms. McAvoy: I - - we just have a question regarding - - it was the cancellation of both the quota and the licence - -
>
> Ms. Stewart: According to the Milk Board minutes.
>
> Ms. McAvoy: - - according to the Milk Board minutes, as well as the letter.
>
> Chairperson: Okay, I'll read - - I will just check the actual decision of November 7th. The decision says:
>
> > Your GEP allocation, as well as any growth allocated to you as a result of you original GEP allocation, will be retracted as of December 31, 2008.
>
> Ms. McAvoy: We - - we were referencing Board minutes where it said that they had made a motion to remove both our quota and our licence.
>
> Chairperson: I do not have that in the decision that's in front of us.
>
> Ms. McAvoy: Okay, thank you.
>
> Chairperson: And so I - - you've appealed this specific decision and this is what the decision reads. I'm turning to the Milk Board. If the decision reads broader than what I have stated in the issue, I

would like the Milk Board to raise that and point me to a decision. I don't see it.

Mr. Gorrell: I believe the decision is as you've stated it.

Chairperson: And so we've - -

Mr. Gorrell: In the minutes we may have made reference to a licence, and if you had a situation where a hundred percent [of] the quota held under that licence was the GEP quota, the licence would be cancelled as well. Now, in this case, they had purchased some quota over and above the GEP, so the licence could, I would expect, remain in place, affecting that particular quota. It's only talking about the GEP portion of what they have.

Chairperson: The decision I have in front of me speaks only to - - as I read it, to the GEP quota, and I believe that we now have agreement that that is the issue that's in front of the Panel today, that is the extent of the decision in front of the Panel, and if there is a further issue with respect to the licence or a decision to retract the licence, then you should have received that in a written decision, and I see no such written decision, and the Milk Board is giving an explanation. So that may be a matter that is - -

Ms. McAvoy: That's fair.

Chairperson: - - not part of this decision, that if there is an issue, it will have to be separately sorted out - -

Ms. McAvoy: Okay.

Chairperson: - - between you and the Milk Board, and if there were such a decision, they would have to give you a decision.

Ms. McAvoy: Yeah, that's fair. Thank you.

Chairperson: Good. So I'm glad we've clarified that. So with that, are we agreed with the statement of the issue as I've stated it?

Ms. Stewart: Yes.

Chairperson: The parties are indicating yes? Nodding the head does not help the recording.

Ms. Stewart: That's right. Yes.

[50] In the decision which is the subject of this judicial review, the issue was again described as:

> 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?

[51] Despite the Stewarts' letter of November 8, 2008, the BCFIRB panel's decision described the remedy sought as only:

> 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.

[52] At paragraph 13 of its decision, the BCFIRB panel found that:

> 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.

[53] At paragraph 16 of the decision, the BCFIRB panel stated:

> 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.

[54] At paragraph 30 of the decision, the BCFIRB panel found:

> 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.

[55] At paragraphs 34 and 35, the BCFIRB panel reasoned:

> 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.
>
> 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.

[56] The BCFIRB panel rejected arguments that the Stewarts' non-compliance with the GEP Rules was condoned by the Milk Board taking no action against them or others for a number of years, or that the Stewarts' financial investment in the acquisition and management of their quota allotment warranted any exception from

the GEP Rules or to the “one time” opportunity to have their quota transferred to Mr. Verdonk.

[57] I am unable to accept that the BCFIRB panel failed to consider the issues raised by the Stewarts, or, in particular, their request “to at least be given the opportunity to milk our own quota”. The BCFIRB panel concluded that the Stewarts had failed to deal with their quota allotment within the GEP Rules or in a manner consistent with the declaration they signed when they received their quota, acknowledging that they had each read, understood, and agreed to the provisions of the GEP Rules, or their filed certificate confirming that they had received independent legal advice with respect to their declaration. As a result, the BCFIRB panel was not prepared to accommodate the Stewarts beyond the directive of the BCFIRB with respect to those who, like the Stewarts, had not complied with the terms and conditions of their grant of quota allotment under the GEP.

[58] That conclusion does not mean that the BCFIRB panel failed to consider the second alternative proposed by the Stewarts; only that it was not prepared to permit that result, as it would be an exception to the exception that the BCFIRB had created for those who were non compliant with the terms and conditions of their allotment of quota.

[59] I am not persuaded that the treatment of the Stewarts’ issues by the BCFIRB panel was unfair, and so reject this basis for relief by way of judicial review.

b) Procedural Fairness

[60] This issue also attracts a standard of fairness for judicial review.

[61] The Stewarts argued that there were several instances of procedural unfairness by the BCFIRB panel.

[62] The first instance of procedural unfairness argued by the Stewarts was the failure of the BCFIRB panel to hear the Verdonk “matter” at the same time as their appeal. The Stewarts relied on the factors identified by L’Heureux-Dube J. in ***Baker***.

[63] With reference to the ***Baker*** factors, I make the following findings with respect to the hearing before the BCFIRB panel:

a) The BCFIRB panel was performing a quasi judicial function when it heard the Stewarts' appeal; therefore, this factor suggests a high degree of procedural fairness should be afforded to the Stewarts.

b) The privative clause in the BCFIRB's enabling legislation, coupled with the provisions of the ***Administrative Tribunals Act***, entitles the BCFIRB panel to considerable deference.

c) The Stewarts' livelihood would be greatly affected by whatever decision the BCFIRB panel reached, thereby enhancing the need for procedural fairness.

d) The legitimate expectations of the Stewarts are not readily apparent. On the one hand, they obviously felt that they should be able to transfer their 7,000 kilogram quota for use in the Okanagan; on the other hand, I am hard pressed to accept that that expectation falls within the rubric of "legitimate" as used in ***Baker***, when to do so required them to be relieved of their non compliance with the GEP Rules, and their declaration upon receipt of that quota allotment.

e) The ***Act*** does not set out a stringent appeal procedure to be followed by the BCFIRB panel; therefore, deference should be granted to allow the BCFIRB panel to determine what procedures are applicable in the circumstances.

[64] Taking into account these circumstances, while it might have been preferable for the BCFIRB panel to have heard the Stewarts' appeal together with the Verdonk "matter", I conclude that the choice to hear the two proceedings separately in this case is not a denial of procedural fairness to the Stewarts.

[65] The second instance of procedural unfairness argued by the Stewarts was that the BCFIRB panel failed to remedy an element of procedural unfairness that occurred before the Milk Board. The Stewarts submitted that the Milk Board had failed to provide them with a necessary element of fairness because it determined that the date by which the Stewarts would have had to have been in compliance with the GEP Rules was September 8, 2008, as opposed to December 1, 2008 when the regularization program ended. This unfairness, they argued, should have been remedied by the BCFIRB panel under subsection 8(9) of the ***Act***. That subsection provides that:

> On hearing an appeal under subsection (1), the Provincial board may do any of the following:
>
> (a) make an order confirming, reversing or varying the order, decision or determination under appeal;
>
> (b) refer the matter back to the marketing board or commission with or without directions;
>
> (c) make another order it considers appropriate in the circumstances.

[66] At paragraph 46 of its decision, the BCFIRB panel found:

> 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.

[67] I find that it was open to the BCFIRB panel to refuse to vary the compliance date found by the Milk Board, and, in the result, their decision to decline to do so does not amount to procedural unfairness.

[68] The third instance of procedural unfairness argued by the Stewarts was the reception of Mr. McCormack's typed notes of the September 8, 2008 meeting of the Milk Board on the first day of the hearing before the panel. These notes were produced to the Stewarts for the first time at the hearing. Notes of the other members of the Milk Board who had attended that meeting had previously been

provided to the Stewarts. The Stewarts were offered only a brief period to time to review Mr. McCormack's notes. The Stewarts also complained that the notes contain inaccuracies.

[69] Specifically, the Stewarts disagreed with statements in the notes that:

- Want BCMMB to let status quo remain until they can figure out how to move the GEP quota up to the Okanagan farm *have farmed Okanagan for 3 years?) [sic]
- Verdonk pays all bills up front (draws on account) and pays Stewarts $3/kg and 15% of milk check as a fixed amount each month
- "we know we aren't compliant ... but want to be in time ... can't right now"

[70] It is apparent that the BCFIRB panel was not misled by the first statement, as they recognized that the Stewarts wanted their quota for use in the Okanagan and proposed transferring it there in June of 2009.

[71] Nor was the BCFIRB panel misled by the second statement, as they understood that the Stewarts received 15% of the proceeds of the milk sales each month. How that percentage reached the Stewarts was irrelevant to the BCFIRB panel's decision.

[72] As for the third statement, whether the Stewarts admitted it or not, they were non compliant with the GEP Rules, wanted to cure that non compliance, and had not done so by January 20, 2009.

[73] Although the Stewarts had limited time to review the notes, they were given an opportunity to testify to the BCFIRB panel as to what happened at the September 8, 2008 meeting.

[74] Therefore, I do not find that the reception of Mr. McCormack's notes was unfair.

[75] The Stewarts' other complaints of procedural unfairness before the Milk Board were considered and rejected by the BCFIRB panel. I am satisfied that the *de*

novo nature of the hearing by the BCFIRB panel allowed any prior procedural irregularities to be overcome, and afford no basis for judicial review.

[76] I am therefore not persuaded that the procedural aspects of the hearing by the BCFIRB panel demonstrate unfairness, and so reject this basis for relief by way of judicial review.

c) Was the decision of the BCFIRB is patently unreasonable?

[77] The standard of review on judicial review is self evident from the statement of the issue itself.

[78] The Stewarts argued that the BCFIRB panel's decision was patently unreasonable due to its position that it had only three options open to it. The Stewarts maintain that this position was manifestly incorrect, as the option of permitting them to "milk" the quota in the Okanagan was available on an equitable basis. I am unable to accept this submission. As I have explained above, such a result would create an exception to the exception for non-compliant quota holders, and equitable relief is unavailable to those who are unable to seek it without "clean hands". The very fact that the Stewarts failed to adhere to the GEP Rules and their own declaration disentitles them to equitable relief.

[79] In any event, I am not persuaded that the decision which is the subject of my review is unreasonable, let alone patently so. I therefore reject this ground for relief by way of judicial review.

Conclusion

[80] The petition for judicial review of the February 26, 2009 decision of the BCFIRB panel is dismissed.

"Hinkson J."