

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL BY DANIEL HAAN DAIRY FARM LTD. FROM A DECISION  
CONCERNING GRADUATED ENTRY PROGRAM QUOTA ALLOCATION

**BETWEEN**

DANIEL HAAN DAIRY FARM 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:

Morris Thalen

For the Respondent:

Blaine Gorrell, Chair  
Ken McCormack, General Manager

Date of Hearing:

March 3, 2009

Place of Hearing:

Abbotsford, BC

## **WRITTEN REASONS OF S. K. WILTSHIRE, PRESIDING MEMBER**

### **INTRODUCTION**

1. The appellant, Daniel Haan Dairy Farm Ltd., appeals a November 7, 2008 decision of the British Columbia Milk Marketing Board.
2. In July 2008, the Milk Board gave notice of its intention to enforce compliance with the Graduated Entry Program (GEP) 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 Schedule 1 to the Consolidated Order of the Milk Board (GEP Rules) that require, among other things, that the GEP entrant be “actively engaged in milk production”.
3. The Milk Board had identified a number of GEP entrants, including the appellant, as being possibly non-compliant because others were shipping the GEP quota registered in their names. At the request of the Milk Board, Mr. Thalen, representing the appellant, and Colin Both, the shipper of the milk produced under the appellant’s GEP quota, met with the Milk Board on September 18, 2008. The purpose of the meeting was to give the appellant an opportunity to provide evidence of its compliance with the GEP Rules, or in the alternative, seek regularization of non-compliant GEP quota registered in its name.
4. In their November 7, 2008 decision letter addressed to the appellant the Milk Board advised, in part:

The Board has completed its deliberations and 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. Both. Consequently, according to the directives of the FIRB for GEP Regularization, your GEP allocation as well as any growth allocated to you as a result of your original GEP allocation will be retracted as of December 31, 2008.
5. The Milk Board agreed to stay its decision to retract the appellant’s GEP quota and related growth allocation until the appeal could be determined.

### **ISSUE**

6. Did the Milk Board err in determining:
  - (i) the GEP allocation of the appellant does not qualify for regularization under the Milk Board’s GEP Regularization program;
  - (ii) the GEP allocation of the appellant as well as any growth allocated as result of the original GEP allocation was to be retracted.

## BACKGROUND

### *GEP Quota Allocation and History*

7. In May 1994, Daniel Haan was invited to become a GEP entrant. He completed an application in which he acknowledged that he had read, understood and agreed to the rules respecting the GEP as they existed at that time and understood that he would be bound by future changes to the GEP rules as set out in the Milk Board's Consolidated Order.
8. Under the Milk Board's Consolidated Order at the time:
  - Qualifications for GEP entry included "a genuine intention to be an active dairy farmer" and that the entrant be a Canadian citizen or landed immigrant resident in British Columbia for at least 6 months at the time of application.
  - Quota allotted under the GEP was stipulated to be for the beneficial use of the entrant only and the entrant was required to (i) operate and control the farm unit which was to be owned, leased or rented by the entrant and paid for by the entrant; and (ii) ensure that payments for feed and other farm supplies utilized on the farm were paid from a bank account in the name of the entrant.
  - Quota allotted under the GEP was not transferable for 15 years from the commencement date of production.
9. Daniel Haan was initially allocated GEP quota in December 1994 and commenced production as Daniel Haan Dairy Farm Ltd. on a leased farm property. Daniel Haan purchased the livestock and ran the business side of the operations through Daniel Haan Dairy Farm Ltd. A farm manager was hired and paid wages to look after the day to day dairy farm operations. Daniel Haan Dairy Farm Ltd. paid the lease for the farm property and the accounts relating to the day to day dairy farm operations. The dairy farm was operated in this manner through to December 2004.
10. In the period between December 1994 and December 2004, the following significant events occurred:
  - In 1996 Daniel Haan and his family moved to Alberta.
  - In approximately 2000 Colin Both was hired as the new farm manager after the first farm manager left.
  - In October 2003 Daniel Haan died, appointing his widow, Freda Haan as executor of his estate.
  - Morris Thalen, as Freda Haan's appointee, wrote to the Milk Board to see if it was possible to sell all quota registered in the name of Daniel Haan. In November 2003, the Milk Board responded, advising that at that time 5,968 kg out of the total TPQ held was "encumbered by the terms and conditions of the Graduated Entry Program (GEP)" until December 1, 2009.

- Freda Haan and Morris Thalen decided the estate would continue on with the dairy operations until all quota became transferable in December 2009. The result was that the business side of the operations continued to be conducted by Freda Haan and Morris Thalen on behalf of the estate and Colin Both continued to take care of the day to day dairy operations as the farm manager.
  - In 2004 the leased premises on which the dairy farm had operated since 1994 were sold.
  - In December 2004 the appellant entered into a new arrangement with Colin Both for the continuation of the dairy operations on Mr. Both's father's farm.
11. The new arrangement entered into in December 2004 brought to an end the previous employer/employee arrangement between Daniel Haan Dairy Farm Ltd. and Colin Both. The parties agreed orally that commencing December 2004 Colin Both would produce the Daniel Haan Dairy Farm Ltd. quota, paying all accounts related to that production and receiving all proceeds from the sale of milk produced under that quota. Colin Both would pay to Daniel Haan Dairy Farm Ltd. \$4000 per month from December 2004. Provided Colin Both continued to produce the quota until December 2009, he would have the option at that time: (a) if he chose to continue the dairy operation, to purchase the quota from Daniel Haan Dairy Farm Ltd. at \$66 per kg, or (b) if he chose not to continue the dairy operation, to be reimbursed the \$4000 per month he had paid which by then should amount to \$240,000. There is no disagreement between the appellant and Mr. Both as to the terms of this oral agreement.
  12. At the hearing, Mr. Thalen explained that the \$4000 per month payment was intended to be an incentive to ensure Mr. Both continued on with the agreed arrangement until December 2009 when Mr. Both could buy the quota or, if Mr. Both chose not to buy the quota, Daniel Haan Dairy Farm Ltd. could sell the quota to someone else and the \$4000 per month Mr. Both had paid would be reimbursed to him. Mr. Thalen indicated that Daniel Haan Dairy Farm Ltd. would still return to Mr. Both the \$4000 per month he had paid in the event the appeal was not successful and the GEP quota was retracted.
  13. The provisions of the Consolidated Order relating to transfer of quota changed in 2006 with the result that GEP quota held for 10 years or more became transferable subject to a 10% assessment on transfer. Freda Haan and Morris Thalen were unaware of this change and did not attempt to sell the quota and the arrangement made with Colin Both in 2004 continued.
  14. The appellant concedes that because of the arrangement entered into with Colin Both, from December 2004 Daniel Haan Dairy Farm Ltd. was not actively engaged in milk production from the GEP quota.

15. At the time of the Milk Board's November 7, 2008 decision the Milk Board's calculations record the GEP related quota allocated to the appellant as consisting of 6,350 kg of GEP quota plus 1,004 kg of growth allocated in relation to the GEP quota.

### ***GEP Rules***

16. The GEP has operated in some form in the dairy industry for many 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. Because quota trades in the open market at such a high value, in the absence of some type of graduated entry program, the acquisition of quota presents a real barrier to new entrants seeking to enter the industry on a small scale. The high value at which quota trades in the open market also presents ongoing regulatory issues with respect to the potential unauthorized transfer and use of GEP quota after its allocation to a new entrant.
17. Since 1994 there have been several changes to the Consolidated Order provisions with respect to the GEP. The relevant portions of the GEP Rules in place at the time the Regularization Program was instituted and which have remained essentially the same since at least 2001, provide:

#### **Special Restrictions on Allotments Under the Program**

4. (1) Total Production Quota allotted by the Board under the program may be held for production by the entrant only for so long as the entrant:

(a) permits Board audits of the dairy farm operation to ensure compliance with Board orders and all applicable legislation, including all terms and conditions of the program;

(b) is in good standing with all applicable Board orders and all applicable legislation, including all terms and conditions of the program; and

(c) is actively engaged in milk production;

failing which the Total Production Quota so allotted shall thereupon be subject to immediate cancellation on notice by the Board to the entrant.

#### **Determination as to Whether the Entrant is Actively Engaged in Milk Production**

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.

#### **Changes to the Graduated Entry Program**

8. (1) Applicants on the wait list and entrants under the program are subject to all changes that the Board may make from time to time to the terms and conditions of the program.

(2) Notwithstanding subsection (1), the Board may, in its sole discretion, provide to an entrant a written exemption from any term or condition of the program that has come into effect after the entrant's entry into the program, in which event the entrant shall continue to be governed by the terms and conditions of the program as they existed at the time of the entrant's entry into the program except insofar as those terms and conditions may conflict with any subsequent term or condition for which a written exemption had not been granted.<sup>1</sup>

### ***Regularization Program***

18. The *Van Herk* 2006<sup>2</sup> appeal to the British Columbia Farm Industry Review Board (BCFIRB) concerned the lease of GEP quota by a GEP entrant to another individual. The Milk Board's decision to cancel the GEP quota allocated to the Van Herks for non-compliance with the GEP Rules was upheld on appeal to BCFIRB.

19. After the *Van Herk* appeal, the Milk Board became increasingly concerned that there were other GEP entrants who had entered into arrangements in non-compliance with the requirement that a GEP entrant be "actively engaged in milk production".

20. The Milk Board proposed to enforce compliance with the GEP but to give a non-compliant GEP entrant and the individual actually farming the GEP quota (the

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<sup>1</sup> An amended version of the GEP Rules was issued August 1, 2008 but is not materially different.

<sup>2</sup> *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](http://www.firb.gov.bc.ca/appeals/milk/vanherk_dec_06-02_jun19_06pdf)

shipper) a one time opportunity to apply for “regularization” whereby, in appropriate circumstances, the GEP quota could be transferred to the shipper.

21. There was an exchange of correspondence between the Milk Board and BCFIRB respecting the proposed Regularization Program. In its May 14, 2008 letter, BCFIRB advised the Milk Board that the Regularization Program must conform to the supervisory directions BCFIRB had already issued to the Milk Board and that where the Milk Board’s regularization policy did not accord with the supervisory directions, those directions would prevail. In that letter BCFIRB also directed the Milk Board’s attention to the principles underlying the supervisory directions. BCFIRB noted that openness and transparency would be critical to the regularization process. The Milk Board was told that it must ensure that the industry was made fully aware of the regularization process, including the consequences of non-compliance once the regularization process was concluded. The Milk Board was also told that it was to provide the rationale for any decisions made with respect to the regularization process. Finally, BCFIRB advised it agreed with the Milk Board’s suggestion that GEP allocation cancelled by the Milk Board would remain designated for allocation to persons on the GEP wait list.
22. In its July 25, 2008 letter, BCFIRB gave final approval to the Milk Board’s proposed Regularization Program and enclosed for delivery to producers a BCFIRB Notice respecting the supervisory directions.
23. The Milk Board published the BCFIRB Notice with respect to the supervisory directions on its website and included the BCFIRB Notice in its communication of the Regularization Program to GEP entrants and shippers.
24. In the Notice BCFIRB observed:

A very serious situation has developed in the dairy sector 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 British Columbia Milk Marketing Board (Milk Board). This compromises the credibility of all new entrant programs and the supply management system generally. In addition to the Milk Board’s own concerns regarding the matter, the British Columbia Farm Industry Review Board (BCFIRB) is of the view that non-compliance with the GEP is contrary to the public interest. As such, the Milk Board has been directed 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.
25. The BCFIRB Notice pointed out that there were three possible outcomes to the regularization process:
  - The GEP producer is found to be in full compliance with the program and as such retains the quota allocated through the GEP;
  - The GEP producer is found to be non-compliant and the Milk Board enforces its orders and cancels the quota allocated through the GEP. ...; or

- For a limited time period, and after the Milk Board has determined that it is an appropriate disposition of quota allocated through the GEP, regularization may be approved in accordance with BCFIRB's directions.

26. The BCFIRB Notice then set out the key supervisory directions:

1. BCFIRB expects the Milk Board to enforce compliance with its orders.
2. GEP participants and associated farm managers who fail to apply for regularization as outlined below, and who appear to be in non-compliance, will be required to demonstrate to the Milk Board that they are in compliance or face possible cancellation of their quota.
3. Situations in which the GEP quota is being actively produced by a farm manager other than the GEP participant as of November 1, 2006 are eligible for regularization.
4. 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, 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.
5. The Milk Board has noted that there may be some instances where additional quota has been acquired by the (farm manager) but has been officially registered under the name of the GEP participant with whom that farm manager is associated. All quota transfers are subject to the approval of the Milk Board. Any disposition of this or other non-allotted quota involving the non-compliant GEP participant and the non-compliant farm manager must be addressed by the Milk Board as part of the joint application process outlined above.
6. 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.
7. There may be specific situations where the Milk Board in its discretion does not approve an application for regularization. In such cases the Milk Board must take the necessary steps to address any suspected non-compliance. The decision in the Van Herk appeal provides procedural guidance on such matters. Persons who are aggrieved or dissatisfied with a subsequent Milk Board decision can appeal that decision to BCFIRB on the facts of their case.

27. The Milk Board offered an open invitation to the industry to come forward and seek regularization in non-compliant situations and also made direct contact with GEP entrants and shippers with questionable compliance. After meeting with the GEP entrants and shippers, the Milk Board met to consider the circumstances relating to each application for regularization and decide on the outcome.
28. Mr. Thalen and Mr. Both met with the Milk Board on September 18, 2008. The decision of the Milk Board with respect to the appellant is set out in the November 7, 2008 letter referenced in paragraph 4 above.

## **SUBMISSIONS**

### ***Appellant's Submissions***

29. The appellant submits that from the time Daniel Haan was allotted GEP quota in 1994 through to December 2004, Daniel Haan Dairy Farm Ltd. was in compliance with the GEP Rules and was actively engaged in milk production from the GEP quota. The appellant says that but for the death of Daniel Haan in 2003 and the need to relocate the dairy operations in 2004 when the leased farm on which the operations had been conducted was sold, it is likely the manner in which the operations had been carried on prior to December 2004 would have remained the same.
30. The appellant argues that Freda Haan, as the sole beneficiary of Daniel Haan, should not be penalized because in seeking a way to continue the dairy operations of Daniel Haan Dairy Farm Ltd. until the quota became transferable, Morris Thalen, on behalf of the appellant and the estate of Daniel Haan, entered into an oral agreement with Colin Both to produce the quota from his father's neighbouring vacant dairy farm.
31. The appellant also submits that had Freda Haan been aware of the 2006 amendment to the GEP Rules allowing for the transfer of GEP quota after ten years, the appellant could have transferred the quota at that time.
32. By way of remedy, the appellant asks that its GEP quota not be retracted and instead seeks an order allowing the "sale" of the quota to Mr. Both in December 2009 as contemplated under the terms of the oral agreement.

### ***Respondent's Submissions***

33. The Milk Board takes the position that Daniel Haan was never actively engaged in the farming of the GEP quota, observing that he had not even lived in British Columbia since 1996.

34. The Milk Board submits that the Haans, while non-compliant, benefited from the GEP quota at least until December 2004 when the new arrangement with Colin Both commenced.
35. The Milk Board argues that the appellant knew or certainly should have known that the GEP quota allotted to Daniel Haan was available to him only for so long as he was “actively engaged in milk production” and was subject to immediate cancellation in the event he was not.
36. The Milk Board submits that under the Regularization Program it did not have the option to allow GEP producers to remain non-compliant for a period of time so that an agreement between a GEP entrant and a shipper could run its course or so that the GEP quota could become transferable under previous program rules. The GEP entrant was either compliant or non-compliant. If non-compliant, as in the case of the appellant, the quota was to be retracted.
37. The Milk Board requests that its decision to retract the GEP quota allotted to the appellant be upheld and the appeal be dismissed.

## **ANALYSIS**

### ***Compliance with GEP Rules***

38. I have considered the arguments of the appellant and the Milk Board with respect to compliance prior to December 2004 from the standpoint of whether compliance in that prior period would affect the outcome of the appeal and have concluded it would not. This is because commencing in December 2004 there was a shift in the nature of the relationship between the appellant and Mr. Both from something in the nature of an employer/employee relationship to something more akin to an “agreement of purchase and sale” with the formal quota transfer to be completed at a future date and instalment payments toward the purchase price being made in the interim. The appellant admits that the latter arrangement was not in compliance with the GEP Rule that it be actively engaged in milk production.
39. Even if the appellant had been in compliance with the GEP Rules from 1994 to 2004, it would not affect the outcome of the appeal. As an allotment pursuant to the GEP, the GEP quota is subject to the GEP Rules. Consistent with the reason for the establishment and continued existence of the GEP, those Rules provide that quota allotted under the program may be held by the GEP entrant “only for so long as the entrant... is actively engaged in milk production”, failing which the quota is subject to immediate cancellation upon notice. The issue on this appeal is not whether the appellant was actively engaged in milk production during the entire term of the GEP program but whether or not the appellant was in compliance with that requirement of the GEP Rules in 2008 when the Regularization Program was implemented and the appellant met with the Milk Board.

40. The appellant points to the untimely death of Daniel Haan, closely followed by the need to relocate the dairy operations because of the sale of the leased farm on which the operations were located as reasons for the change in the relationship with Mr. Both in December 2004. While these events may have directly or indirectly prompted the changed relationship, they do not excuse the appellant from compliance with the GEP Rules.
41. Following the untimely death of Daniel Haan, the appellant sought to “sell” all quota, including the GEP quota, and was reminded by the Milk Board in November 2003 that the GEP quota was subject to the GEP Rules and was (at the time) not transferable until December 2009. The result was that the operations continued on after Daniel Haan’s death the same as before, with Mr. Both carrying on the day to day operations as the employed farm manager. The death of Daniel Haan cannot therefore be seen as the direct cause of the change in relationship that occurred in December 2004.
42. It was the sale of the leased farm premises on which the appellant had conducted its operations that prompted the change in the relationship with Mr. Both in December 2004. This change was one which suited the convenience of both the appellant and Mr. Both. The appellant could not transfer the GEP quota until December 2009 and needed to relocate the dairy operations in order to carry on the dairy operations until the quota became transferable. Mr. Both’s father’s farm was available and the arrangement with Mr. Both, like a “sale” of the quota, transferred all responsibility for and control of the dairy operations to Mr. Both until such time as the quota could officially be “sold” to him in December 2009. Notwithstanding the Milk Board’s earlier reminder that the GEP quota was not transferable and was subject to the GEP Rules, the appellant chose to ignore the GEP Rule requiring it to be actively engaged in milk production and also chose to ignore the consequences of non-compliance.
43. The appellant’s decision to ignore the GEP Rules cannot now be accepted as a reason to waive its ongoing non-compliance since December 2004.
44. The appellant also raises its failure to realize that there had been a change in 2006 in the Consolidated Order provisions respecting transfer of GEP quota. The appellant argues that had this change not been overlooked by Freda Haan, ostensibly because of her husband’s death in 2003, then the appellant could have transferred the quota at that time and would not be in its present position. I observe that while this may be a source of regret for the appellant, the simple fact is that the appellant did not transfer the GEP quota at that time. Further, in 2006, the appellant was not in compliance with the GEP rules and had not been in compliance since at least December 2004 putting into question whether or not a proposed transfer would have been approved by the Milk Board had it known of the December 2004 arrangement with Mr. Both.

45. In view of the appellant's admission that it has not been actively engaged in the production of milk from the GEP quota since December 2004, I find that the appellant has not been in compliance since at least December 2004 with the requirement in section 4 of the GEP Rules that the GEP entrant be actively engaged in milk production.

### ***Consequences of Non-Compliance***

46. The Milk Board submits once it made a determination that a GEP entrant was non-compliant with the GEP Rules it had only two options available to it: to retract all GEP quota or to permit regularization of the GEP quota by transfer to the shipper. I agree that once the determination of non-compliance with the GEP is made, these are the only potential options available under BCFIRB's supervisory directions.

### ***Eligibility for Regularization***

47. In the present case the decision appealed raises a further question as to whether or not the GEP quota held by the appellant is eligible for regularization.

48. The Milk Board's November 7, 2008 decision addressed to the appellant states the GEP quota allocated to the appellant does not "qualify" for regularization. If correct, the only option available with respect to this GEP quota is cancellation; it cannot be regularized by reallocation to Mr. Both.

49. Pursuant to BCFIRB's supervisory directions, GEP quota is eligible for regularization in situations where milk has been actively produced by a shipper other than the GEP entrant since November 1, 2006. Given that in the appellant's case, the GEP quota has been actively produced by Mr. Both since December 2004, in my view, this quota is clearly eligible for regularization.

50. The Milk Board conceded at the hearing that the GEP quota "qualified" for regularization. However, the explanation of its reasons for that concession raise further concerns with respect to the regularization process which are addressed below.

### ***Regularization Process***

51. BCFIRB's supervisory directions call for the non-compliant GEP entrant and the shipper currently producing the GEP quota to appear before the Milk Board and make an application if they seek regularization. If the Milk Board is satisfied that the specific circumstances warrant regularization, the GEP quota allotted to the GEP entrant is to be cancelled and re-allotted to the shipper subject to the 10/10/10 transfer assessment schedule<sup>3</sup> and the last in, first out (LIFO) provisions set out in

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<sup>3</sup> 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 all transfers of quota.

section 22(1) and (2) of the Consolidated Order commencing from the effective date of reallocation.

52. Mr. Thalen, as the representative of the appellant, and Mr. Both met with the Milk Board on September 18, 2008. It is at this point that the regularization process, including the Milk Board's analysis of the options available to it, appears to have broken down.
53. Mr. Thalen testified that he understood the purpose of the September 2008 meeting with the Milk Board was to establish that the appellant was compliant with the GEP Rules. For this purpose he had brought a file of financial information to show the appellant had been actively involved in the dairy operations until December 2004. He had been surprised at how little had been discussed in this fifteen minute meeting and by the Milk Board's indication that they did not want to see the information and documents he had brought. He did not recall discussing the 10/10/10 and LIFO provisions but conceded this could have taken place.
54. Mr. Both recalled that the Milk Board asked a few questions at the September 2008 meeting but did not recall 10/10/10 and LIFO or regularization being discussed. He stated that his intent had been to purchase the GEP quota from the appellant in December 2009 as per the terms of the oral agreement; but he did not want to do so if the GEP quota would be subject to the 10/10/10 transfer assessment from the date of allocation to him and LIFO. It was for this reason that he and the appellant did not want regularization when they met with the Milk Board in September 2008 and the Milk Board did not ask him if he was in favour of regularization at that time. He confirmed, consistent with the remedy sought by the appellant, that he still wanted to carry out his agreement with the appellant but did not want to start over again under the 10/10/10 transfer provision.
55. Following the September 2008 meeting the Milk Board did not request any further information from the appellant. It proceeded to consider the issue of the appellant's status under the GEP at its November 3, 2008 board meeting and to issue the November 7, 2008 decision letter to the appellant.
56. The Milk Board now says that the statement in its November 7, 2008 letter that the GEP allocated to the appellant did not qualify for regularization was not really a correct expression of the Milk Board's deliberations. The Milk Board explained that in situations of non-compliance it had looked for a pre-existing written agreement to transfer the GEP quota to the shipper as a condition of its approval for regularization. In its deliberations, the Milk Board had been prepared to consider regularization based on the oral agreement between the appellant and Mr. Both because both acknowledged the prior agreement giving Mr. Both the opportunity to buy the GEP quota.

57. I can only observe that on a plain reading the Milk Board failed to convey that the GEP quota was eligible for regularization in its decision letter of November 7, 2008 addressed to the appellant. Indeed it conveyed the opposite. The minutes of the Milk Board meeting of November 3, 2008 do not reflect any such deliberations, only recording that the Milk Board determined that the original quota provided under the GEP program and all allocations associated with that GEP would be taken back and the appellant's licence cancelled.

58. However, the Milk Board minutes of November 3, 2008 go on to record (again without giving reasons) that the Milk Board determined at the same time that the original GEP quota amount would be awarded to Mr. Both as the shipper and that he would be registered as a new GEP entrant starting over under the GEP. In this regard, the Milk Board issued a second separate decision letter to Mr. Both, also dated November 7, 2008. In that letter the Milk Board wrote:

In its decision, the Board has recognized your long standing relationship with the quota registered to M. Thalen as executor of the estate for the deceased D. Haan, by directing that the original GEP quota allocated to D. Haan on December 1, 1994 will be registered to you as of January 1, 2009. In its decision, the Board has determined that you will not receive the growth quota allocated as a result of the original GEP allocation awarded to D. Haan.

The Milk Board went on in the letter to advise that as a GEP entrant Mr. Both would be subject to the GEP Rules and the quota allocated would be subject to the 10/10/10 and LIFO provisions with effect from the date of allocation to him.

59. The appellant appealed the November 7, 2008 decision addressed to it. Mr. Both in support of the appellant's appeal sent a facsimile to the Milk Board on January 2, 2009 to indicate he did not agree with the Milk Board taking the quota from the appellant and that this went against his agreement with the appellant.

60. The Milk Board advised that it viewed Mr. Both's facsimile of January 2, 2009 as a rejection of the decision to allocate GEP quota to him. The Milk Board also suggested at one point it was for this reason the GEP quota in question did not qualify for regularization. However, this cannot have been the case at the time of the November 7, 2008 decision addressed to the appellant because Mr. Both did not convey this position until January 2, 2009.

61. The process and decisions of the Milk Board do not appear to be in accord with BCFIRB's directions respecting regularization.

62. BCFIRB did not direct that there be evidence of a pre-existing written agreement for transfer between the GEP entrant and shipper for eligibility for regularization. The only requirement for eligibility was that the GEP quota was being actively produced by a shipper other than the GEP entrant. While evidence of a pre-existing transfer agreement may have been one way of establishing that the shipper was the person actively engaged in milk production, whether that agreement was written or oral would be immaterial. Other evidence could also

- provide proof of the required active engagement in milk production on the part of the shipper, such as a lease of the GEP quota by the shipper or an arrangement such as that existing between the appellant and Mr. Both. As was noted in the *Van Herk* decision, there may be a continuum of activities sufficient to conclude that a person is actively engaged in milk production.
63. I also note that the Milk Board appears to have had an incorrect and incomplete understanding of the arrangements the appellant had made with respect to the GEP quota both before and after December 2004. The Milk Board was unaware of the nature of the relationship as well as other details respecting the operations up to December 2004 and the full details of the oral agreement respecting the operations after that time until this evidence was presented at the appeal hearing. This points to serious deficiencies in the Milk Board's process. In its haste, the Milk Board failed to obtain relevant information and appears to have made erroneous conclusions as to factual matters that may have impacted its deliberations.
64. It appears that the Milk Board's emphasis on a pre-existing written transfer agreement, or even an oral transfer agreement, may have led it to erroneously conclude and communicate that the GEP quota in this case was not eligible for regularization. Certainly there is nothing in the record of its deliberations to indicate that it came to the opposite conclusion.
65. While the appellant and Mr. Both did appear together before the Milk Board on September 18, 2008, it is unclear whether they fully appreciated (or whether the Milk Board explained to them) that this was their one time opportunity to apply for regularization in the event the Milk Board considered their situation to be non-compliant. As a result they did not apply for regularization and were not subsequently given the opportunity to do so.
66. As for the November 7, 2008 decision directed separately to Mr. Both, I fail to understand how the Board could have determined to allocate GEP quota to Mr. Both when it had determined the GEP quota in question did not "qualify" for regularization. If the GEP quota did not "qualify" for regularization it was to be cancelled. Nor do I understand how the Milk Board could have determined to allocate the GEP quota in question to Mr. Both when there had been no application for regularization of that quota.
67. I do not have the benefit of the Milk Board's thought processes or rationale leading to the two separate November 7, 2008 decisions since, contrary to BCFIRB's instructions, the Milk Board failed to fully reflect its decisions in the record of its deliberations or its decision letters and failed entirely to reduce the rationale for its decisions on quota cancellation or regularization to writing. It appears, however, that the Milk Board did not appreciate at the time the difficulties represented by these two seemingly irreconcilable decisions.

### *Options – Regularization or Cancellation*

68. The fuller understanding of the facts gained by the Milk Board from the evidence presented by the appellant at the hearing prompted the Milk Board to state in its closing submissions that it was still prepared to accept a joint application from the appellant and Mr. Both for regularization of the GEP quota. If circumstances so warranted, the Milk Board could then transfer the GEP quota to Mr. Both pursuant to the Regularization Program. This GEP quota, as with all other regularized GEP quota, would be subject to the application of the 10/10/10 transfer assessment and LIFO provisions of the Consolidated Order from the effective date of the transfer to Mr. Both.
69. Notwithstanding Mr. Both's professed reluctance at the hearing to acquire GEP quota if it is to be subject to the 10/10/10 and LIFO principles, in the circumstances of this particular appeal I am prepared to give the appellant and Mr. Both an opportunity to make their application for regularization as suggested by the Milk Board. However, since all regularization applications were to have been dealt with by December 2008, I require that they do so within 30 days from the date of this decision. After that, there will not be any further opportunity to apply for regularization. In the absence of an application for regularization, the GEP quota must be retracted.
70. The specific nature of the separate decision addressed to Mr. Both is not before me. Because it views Mr. Both's letter of January 2, 2009 as a rejection of the offer to allot GEP quota to him, the Milk Board advises that the decision has ceased to have any effect and they will not proceed to allocate quota to Mr. Both pursuant to that decision. That being the case, I do not intend to address that decision further.
71. Finally, I wish to comment on the remedy sought by the appellant in this appeal. Mr. Thalen and Mr. Both strongly urged that their oral agreement which is clearly contrary to the terms of the GEP be allowed to run its course, so that the GEP quota would become freely transferable. This remedy is not an option as it asks me to ignore the very type of abuse of the GEP that led the Milk Board and BCFIRB to implement the Regularization Program. In the face of the abuse by GEP entrants, the only available concession was the one time opportunity for deserving shippers to be "regularized". What this means is despite the fact that shippers were not GEP entrants and despite their abuse of the program, in appropriate circumstances, they could be given the opportunity to produce the GEP quota going forward subject to certain conditions. In my view, the appellant and Mr. Both must be placed on the same footing as other non-compliant GEP entrants and shippers.

## **CONCLUSION**

72. I find that the Milk Board did not err in its determination that the appellant was non-compliant.
73. While I find that the GEP quota was eligible for regularization, since no application for regularization was made at the time of the November 7, 2008 decision, the Milk Board did not err in its decision to retract the GEP quota. In that sense the appeal is dismissed.
74. However, in view of the particular circumstances of this appeal, retraction is to be stayed for 30 days from the date of this decision to permit the appellant and Mr. Both to apply to the Milk Board for regularization if they so choose. If such an application is made the Milk Board will then need to consider the application and decide if the GEP quota is to be regularized in accordance with the terms of the Regularization Program, including BCFIRB's supervisory directions. If the appellant and Mr. Both do not apply for regularization or if the Milk Board decides the GEP quota will not be regularized, the GEP quota must be cancelled.

## **ORDER**

75. Subject to the right of the appellant and respondent to apply for regularization within 30 days from the date of this decision, the appeal is dismissed and the GEP quota held by the appellant shall be retracted.
76. There will be no order as to costs.

Dated at Victoria, British Columbia this 8<sup>th</sup> day of May 2009.

## **BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

*(Original signed by:)*

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Suzanne K. Wiltshire, Presiding Member

**CONCURRING REASONS OF S. ULMI, VICE CHAIR AND H. FORBES,  
MEMBER**

1. We have read the decision written by the panel chair and agree with the outcome of the decision. However, we write separately because we regard it as very important to provide our separate analysis regarding the issue of compliance with the GEP rules, since compliance is key to the integrity of the GEP.
2. We agree that the nature of the relationship between the appellant and Mr. Both after the sale of the land in 2004 was clearly non-compliant with the GEP Rules. However, in our view, not only was the appellant non-compliant in 2004, but he was in fact non-compliant long before that time.
3. There are several rules under s. 7 of the GEP Rules under the Milk Board's Consolidated Orders relating to tests of compliance. Under s. 7 (3) one of those is:

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

4. This rule specifically addresses the administration of GEP quota for profit. It confirms that quota obtained through the GEP program is not the same as regular quota. GEP quota is given by the Milk Board to new entrants free of charge, not purchased by the producer. Like all quota, it remains the property of the Milk Board and falls under Milk Board regulations. In our view, when quota is given free of charge and for a specific purpose such as the GEP, it requires an even more stringent level of supervision than regular quota. It is the ongoing duty of the Milk Board to ensure that GEP participants remain in compliance with the GEP rules. If participants are not in compliance, the Milk Board must enforce its orders and where appropriate, retract the GEP quota.
5. We agree with the Milk Board that the appellant was more of an investor than an actively engaged dairy farmer. Mr. Thalen admitted that Mr. Haan had never worked or lived on the dairy farm where his GEP quota was produced and had never milked cows, even when he lived in British Columbia. He gave instructions for cows to be purchased but did not buy feed or attend to the farm on a daily, or even weekly basis after moving to Alberta; he did pay the bills. Rather, it appears that the appellant saw an opportunity to receive quota free of charge and not at market value. He structured his operation with the intention of having someone else farm the GEP quota until it ultimately became freely transferable. We do not agree that after the Haans moved to Alberta, the appellant could be considered actively engaged in milk production, even though his income tax returns indicate that he paid the bills and received the income from the GEP quota milk.

6. The intent of the GEP has always been to provide individuals with a desire to be actively engaged in dairy farming an opportunity to enter the supply managed system without the significant barrier presented by the high market value of quota. In our opinion and as a matter of sound marketing policy, the GEP was not and is not intended to give individuals with no real intention of farming a vehicle to simply acquire and hold quota until it can be freely transferred for a windfall. Unfortunately, this has all too often been the result of the GEP.
7. We make these comments with respect to compliance to emphasize the importance going forward that GEP entrants meet the intent of the program and are not merely investors in quota. As the Regularization Program allowed a one time opportunity to correct past abuses, all future participants must be fully aware of the requirement that they be “actively engaged in milk production” as prescribed and as intended in the GEP from its inception.
8. In all other respects, we confirm the decision of the panel chair.

Dated at Victoria, British Columbia this 8<sup>th</sup> day of May 2009.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

*(Original signed by:)*

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Honey Forbes, Member  
Sandi Ulmi, Vice-Chair