

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Review of Mediated Agreement
Between
Lilian and Sandy Stewart, and Steve Verdonk

March 11, 2011

INTRODUCTION

1. On November 24, 2010, co-mediators Jim Collins of the British Columbia Farm Industry Review Board (BCFIRB) and Ken McCormack of the British Columbia Milk Marketing Board (Milk Board) presented a report summarizing their mediation with Sandy and Lilian Stewart and Steven Verdonk with respect to Graduated Entry Program Regularization.
2. I should note at the outset that I was appointed Chair of BCFIRB in June 2010 and as such, the history of this matter predates my appointment. Prior to this appointment, I was Chair of the British Columbia Chicken Marketing Board. Although I am familiar with many issues arising out of regulated marketing and supply management, I was not familiar with the administration of the Milk Board, the history of the GEP, or the circumstances regarding the Stewarts and Mr. Verdonk. Since receiving the mediators report, I have spent considerable time familiarizing myself with the GEP and the Regularization Program and the various policy decisions made by BCFIRB and the Milk Board in implementing these programs.
3. Very briefly, the Graduated Entry Program (GEP) has been in place in the BC dairy industry for over 25 years. Its purpose is to support the growth and viability of the milk industry by encouraging the entry of new dairy farmers. Although GEP holders were supposed to be actively engaged in producing their milk, many abused the system by leasing their quota or engaging in other types of transactions to transfer this quota from the GEP holder to persons who actually produced and shipped the milk. The purpose of the 2008 Regularization Program was to address the abuses once and for all so that there was compliance with the GEP going forward.
4. As part of the Regularization Program process, the Stewarts were identified as non-compliant GEP producers. They had entered into an agreement with Mr. Verdonk to ship the milk produced under their GEP quota. After meeting with both the Stewarts and Mr. Verdonk, the Milk Board concluded that the Stewarts were indeed non-compliant and revoked their GEP quota. The Milk Board then allocated this GEP quota to Mr. Verdonk.
5. The Stewarts appealed this decision to BCFIRB and their appeal was dismissed on February 26, 2009. However, as the appeal panel observed that the allocation of GEP quota to Mr. Verdonk did not appear to fall within the terms of the Regularization Program, it suggested that BCFIRB may wish to undertake a supervisory review.
6. A different supervisory panel considered the allocation of GEP quota to Mr. Verdonk and on June 26, 2009 concluded that it was inconsistent with the terms of the Regularization Program. The Milk Board misunderstood the terms of the Regularization Program and misapplied it to Mr. Verdonk. As a result of the

error of the Milk Board, the panel attempted to place the parties in the position they would have been in had the Milk Board sought and received appropriate clarification from BCFIRB. The Stewarts and Mr. Verdonk were given a period of time to come to a joint agreement and apply for regularization of the GEP quota in the hands of Mr. Verdonk. Despite an extension of time, no joint agreement was reached as both parties wished to actively farm the quota.

7. The Stewarts applied for judicial review of the appeal decision but were unsuccessful and the revocation of their GEP quota was upheld (April 29, 2010). Mr. Verdonk applied for judicial review of the supervisory decision and was partially successful in that the court ordered a reconsideration by BCFIRB of its decision in light of a procedural defect (April 29, 2010).
8. Following the Court's decision, the parties engaged in the mediation process and reached a mediated outcome, the key terms of which were as follows:

Agreement

26. The parties agreed to the following in order to effect a full and final resolution of this matter and enable them to continue actively farming in the dairy industry:
 - a) Mr. Verdonk agreed that he remains willing and able to pay the Stewarts \$60,000 to settle this matter. Mr. Verdonk also agreed that this amount will be paid to the Stewarts in one lump sum via bank draft or certified cheque effective the date official confirmation is received from BCFIRB that the 2000 kgs permit referred to below is to be issued to the Stewarts;
 - b) both parties agreed that the two regulatory agencies be approached with respect to the 2000 kgs option; and
 - c) if the 2000 kgs is issued to them, the Stewarts agreed that this allotment and the concurrent payment of \$60,000 represents a full and final settlement; and
 - d) the Stewarts agreed to accept that this 2000 kgs of allocation would be issued to their farm in Mara as non-transferrable (except to their immediate family) permit for a period of nine years, after which it would be converted to transferrable quota subject to a 10% transfer assessment as per the tenth and following years of the 10/10/10 provisions for GEP quota; and
 - e) Mr. Verdonk agreed to accept the restarting of his 7000 kgs of GEP quota at day one of LIFO and 10/10/10 if that was so decided by the two agencies.
27. Both parties agreed that the co-mediators would draft a report which, after being reviewed and approved by the two parties, would be presented jointly to BCFIRB and BCMMB. Both parties understand that this report will be the subject of decision-making processes, as determined to be appropriate by the two agencies, which may make this report available to other stakeholders as part of those processes. The parties also understand that the co-mediators will not be making any recommendations to their boards in this report.
28. Both parties accept that should this resolution not be accepted by the two regulatory agencies – or ultimately by BCFIRB alone as the supervisory board – that this matter will return to the supervisory review hearing process.

9. On December 8, 2010, Mr. Collins wrote to the parties as follows:

I propose to recommend to the BCFIRB Chair the following two stage process to address the court's order and the mediated outcome in the Report.

1. At the first stage, BCFIRB Chair Ron Kilmury would receive written submissions regarding whether BCFIRB should accept the "regulatory option" (the 2000 kgs option) set out at paragraph 26 of the Report. The process would proceed as follows: (i) the Report would be published within the industry; (ii) any person objecting to the Report would be given an opportunity to make that objection by a first deadline date; (iii) the Milk Board would provide its comments at a second deadline date; and (iv) Mr. Verdonk and the Stewarts would be given an opportunity to make their submissions at a third deadline date.
 2. If the regulatory option is approved by the Chair, that would be the end of the matter.
 3. If the regulatory option is not approved by the Chair, a three person supervisory panel would be struck for an oral hearing. Procedural issues and directions regarding that stage would follow a prehearing conference.
10. The parties having made no objection to the process, the agreement was circulated to the Milk Board and other industry participants for comment. Submissions were received from the Milk Board, the Mainland Milk Producers Association, GEP waitlist members C and J Maarhuis and registered producer D Rennie.

FINDINGS AND DECISIONS

11. This would have been a simple case if it had involved simply a private agreement between the Stewarts and Mr. Verdonk. This was the remedy that the Supervisory Panel attempted to achieve in the June 26, 2009 Supervisory Decision in an effort to give the parties the opportunity they ought to have had when their matter originally went before the Milk Board under the Regularization Program: Supervisory Decision, paras. 68-69. While the parties were unable to come to an arrangement then, the Court's decision setting aside the Supervisory Decision created another window for them to comply with the regularization program requirements.
12. The complication that arises here is that the proposed agreement does not just involve action by the Stewarts and Mr. Verdonk. It involves the Milk Board, at the same time, making a 2000 kg permit allocation to the Stewarts. The question for me is whether, as a matter of sound marketing policy, this proposed allocation can be justified.
13. For the reasons that follow, I think it can, provided the allocation is not made at the expense of the GEP pool.
14. I acknowledge that an appeal panel has ruled that the Stewarts, as non-compliant GEP producers, were not entitled to retain their GEP Quota. However, my approving this allocation will not reverse that decision.

15. The allocation proposed is a substantially lesser allocation, it will not be taken from the GEP Pool, and it is being made with the proper intention of addressing the regulatory problems in the handling of this matter under the Regularization Program.
16. The Supervisory Panel tried to grant such a remedy. But the problem is that the remedy did not place the parties in the same position they would have been in had this situation been properly handled when the issue first arose under the Regularization Program in 2008, since by the time Supervisory Panel made its order, Mr. Verdonk had already been granted the quota. Mr. Verdonk had gone from someone with no legitimate expectation of receiving GEP quota to someone to whom the Milk Board had rightly or wrongly allocated 7000 kgs of GEP quota. The parties were not really returned to the position they would have been in had the Milk Board and BCFIRB discussed this matter beforehand in September 2008.
17. It is my judgment that had the Milk Board taken a properly informed approach at the relevant time, a facilitated agreement could very likely have been reached that met the core value of encouraging new entrants into the industry. This is central to GEP objectives and could have resulted in that the industry having two producers, both with a well demonstrated desire to be actively engaged in milk production, or at least a joint application that satisfied both their interests.
18. In my view, boards have the obligation to respond to situations that they have in part been responsible for creating, even if in utmost good faith. As noted in one of the submissions, “this agreement is a recognition of mistakes made by all parties”.
19. Nor do I see this as being fundamentally offensive to the larger objects of regulated marketing or the GEP program. The Stewarts did have the intention to become milk producers and unlike other off-side GEP entrants they were producing milk quota, just not their GEP quota. Clearly they were non-compliant with the GEP. But in the spectrum of wrong doing, the Stewarts’ conduct is less morally offensive than that of the many GEP producers who were regularized, who cut deals and pocketed money on illegal transfers and then departed the industry. Some producers shipping GEP milk who were allowed to be regularized were not new entrants at all.
20. While the Stewarts’ long term intention to produce the GEP quota themselves was not sufficient to win them their appeal, it is a factor that I think is appropriate to take into account in the particular context here for this more modest permit allocation, within the context of this global resolution of an issue that has been festering for several years without resolution and which allocation will not have any wider implications for other parties. It is unique to this situation.

21. While the Milk Board and the Mainland Milk Producers Association both endorsed the mediated agreement, two individual GEP waitlist members (C and J Maarhuis) and registered producer D Rennie both opposed the agreement.
22. The Marhuuis submission opposing this agreement reflects the commonly held sentiment that as both the Stewarts and Mr. Verdonk broke the GEP rules they should not be entitled to anything. To persons sitting on the GEP waitlist patiently waiting their turn, an allocation to either producer is done at their expense and rewards illegal conduct. While I completely understand this sentiment, it does not take into account the fact that a policy decision was made to address old abuses to restore the credibility of the GEP. Many GEP producers that would otherwise have had the quota revoked were allowed to regularize their quota in the hands of their shipper. As has been repeatedly recognized, there is no doubt that the Stewarts and Mr. Verdonk entered into an illegal arrangement, as did so many others. But the purpose of this exercise is to determine whether there is a principled basis for accepting the mediated agreement. Further, as noted below, I will be directing that 2000 kg allocation to the Stewarts not be made at the expense of the GEP Pool.
23. The Rennie submission opposes the Stewarts' receiving any allocation under the mediated agreement. As a registered producer, Mr. Rennie argues that the GEP quota should be allocated to Mr Verdonk in the same manner "it was issued to the other 17 producers. There should be no exceptions or preferential treatment." This argument is problematic as well. It does not recognize that because there was no joint agreement, Mr. Verdonk was not in the same position as the other shippers who were regularized by the Milk Board. The fact that the Milk Board failed to make this distinction resulted in a long and tortured path of appeals, reviews and court proceedings where the parties sought to clarify their respective positions.
24. All parties have expended considerable resources trying to bring clarity and finality to this issue. Staff of the Milk Board and BCFIRB as well as both parties spent many long hours trying to find a possible alternate dispute resolution in the face of some considerable financial hardship for the two parties. The negotiated result does in my view respect the core values of the GEP and the ambitions as set out in the regularization initiative. It results in two active farms. It also brings resolution to a matter that has been outstanding for more than two and half years. In my view, for the reasons outlined above, the proposed quota allocation to the Stewarts is not contrary to sound marketing policy in all the circumstances.
25. Thus, on the basis that the parties will meet their obligations under paragraph 26 of the mediated agreement, I am prepared to approve the one time allocation by the Milk Board of 2000 kgs of quota to Sandy and Lilian Stewart by way of a non-transferrable (except to their immediate family) permit for a period of nine years, after which time it would be converted to transferrable quota subject to a 10% transfer assessment as per the tenth and following years of the 10/10/10

provisions for GEP quota. The only condition I attach to this approval is the Milk Board is to ensure that the allocation to the Stewarts in no way adversely affects the quota available for allocation under the GEP.

26. I agree with the Milk Board's recommendation that Mr. Verdonk's 7000 kg of GEP quota be reset to day one for the purpose of 10/10/10 and Last In, First Out assessment calculations.
27. It is expected that, as with all GEP, Cottage Industry Program and other special allotments, the Milk Board will take the steps necessary to ensure that the terms of this agreement are maintained.
28. In light of the agreement presented to me, it will not be necessary for BCFIRB to hold a formal supervisory decision about whether, in the absence of any agreement, Mr. Verdonk should receive the quota on a "no strings attached" basis. There is now an agreement, and my approval of the allocation, after careful and extensive consideration, brings this particular matter to a close. As noted in Mr. Collins' December 8, 2010 letter:

If the regulatory option is approved by the Chair, that would be the end of the matter.

OTHER CONSIDERATIONS

29. BCFIRB will be meeting with the Milk Board to identify amongst other things whether there are any current abuses of the GEP, what is being done by the Milk Board to address any abuses and whether the GEP, including its waitlist, as currently configured is adequately meeting its fundamental goal of encouraging legitimate new entrants.

Dated at Victoria, British Columbia, this 11th day of March 2011.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Ron Kilmury
Chair