BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Supervisory Review of the
Allocation by the British Columbia Milk Marketing Board
of Graduated Entry Program Quota from Lilian & Sandy Stewart to Steve Verdonk

DECISION

June 26, 2009

INTRODUCTION

1. On November 7, 2008, the British Columbia Milk Marketing Board (Milk Board) allocated 7000 kg of Graduated Entry Program (GEP) quota to Steve Verdonk. This supervisory decision is about whether or not that quota allocation should be sustained.

2. This supervisory process arose out of a British Columbia Farm Industry Review Board (BCFIRB) appeal decision made February 26, 2009. Paragraph 52 of that decision stated that: "the decision to issue GEP quota to Mr. Verdonk appears, at least on its face, to raise serious concerns about the administration of the GEP and the regularization program, as well as the broader issue of public interest": *Lilian and Sandy Stewart v. British Columbia Milk Marketing Board* (February 26, 2009), para. 52.

3. While the appeal panel agreed with the Milk Board that the allocation to Mr. Verdonk could not be decided in that case given the issue on appeal, the panel stated that BCFIRB would be following up with the Milk Board in its supervisory capacity under the *Natural Products Marketing (BC) Act (NPMA)*:

> **Supervisory power**
>
> **7.1** (1) The Provincial board
> (a) has general supervision over all marketing boards or commissions established under this Act, and
> (b) must perform the other duties and functions and exercise the authority the Lieutenant Governor in Council prescribes in order to carry out the purposes of this Act.
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> (2) The Provincial board may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.
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> (3) In the exercise of its powers under this section, the Provincial board may make an order requiring a person to do one or more of the following:
> (a) attend as required;
> (b) take an oath or affirmation;
> (c) answer questions;
> (d) produce records or things in their custody or possession.
>
> …
>
> (7) In the exercise of its powers under this section the Provincial board may make rules governing its procedure and the quorum in supervisory matters, including its meetings, and may make rules and issue orders governing the procedure for any exercise of its supervisory powers.

4. BCFIRB commenced this supervisory process on February 26, 2009. Our initiating letter stated that "based on the limited evidence received during the [appeal] hearing, the basis for the allocation of GEP quota to Mr. Verdonk is unclear. Further, it does not appear that the Milk Board disclosed any written reasons in support of this allocation of GEP quota to Mr. Verdonk."

5. The panel established that the supervisory process would proceed with an in-person review. In preparation for the review, the panel received written submissions on behalf of the Milk Board and Lilian and Sandy Stewart, both of whom were represented by counsel. On June 5, 2009, we wrote to the parties regarding our process for the review:

> … this is not an appeal hearing, and we intend to proceed less formally than we would in the case in an appeal. We do not intend to hire a court reporter and we would primarily like to hear from the participants directly. Having read the detailed written submission on behalf of the Milk Board, we are of the view that rather than spend time at the beginning of the session having that submission repeated, the first part of the process will be for BCFIRB to hear directly from the members of the Milk Board regarding the circumstances of the quota allocation to Mr. Verdonk, following which the panel will ask questions. Following this, both Mr. Verdonk and Mr. Wattie may ask the Milk Board questions. If Mr. Schwuchow wishes to ask the Milk Board questions, he will need to obtain the permission of the panel.

6. The review was held on June 9, 2009 in Abbotsford. The Milk Board and the Stewarts appeared with legal counsel. Mr. and Mrs. Verdonk appeared on their own, as did Claus Schwuchow (a GEP producer with an appeal, still in process, before BCFIRB with regard to the Milk Board's regularization decisions). The panel is grateful to all the participants for their assistance on the review.

GRADUATED ENTRY PROGRAM

7. To understand the context of BCFIRB's concerns in this case, it is necessary to provide a brief overview of the GEP.

8. The GEP has operated in some form in the dairy industry for over 25 years. While the terms and conditions of the program have changed from time to time, it has always been recognized that supply management systems need some mechanism to allow new entrants to take the first steps to enter into the industry and become milk producers. New entrants are important, for many different reasons, to the ongoing health of supply managed sectors.

9. Commodity boards are not permitted to attach monetary value to the quota they issue. However, the reality is that existing quota does have value among quota holders. Without a new entrant program, it would be practically impossible for the vast majority of potential and legitimate new entrants to purchase, either privately or on the Quota Exchange, even the relatively small amounts of quota required to enter the industry.

10. Commodity boards have to make important judgments regarding how much new entrant quota to allocate in a given year and who qualifies for that quota. In making these decisions, commodity boards know that there is competition not only among potential new entrants for this quota, but also pressure from existing producers who tend to prefer that any additional available quota allocations be assigned to them to grow their existing operations. In the milk industry, the

number of people wanting new entrant quota has historically always been greater than the amount of new entrant quota available.

11. Designing new entrant programs has always been a challenge. There are issues regarding who qualifies as a "new" entrant and whether quota should be allocated purely based on waitlists or other factors. There are issues regarding how large new entrant allocations should be, and whether such quota should ever be transferable.

12. Determining sound marketing policy on all these questions has been regularly addressed and revisited in the milk industry. One feature, however, has remained constant – the rules have always provided that those wanting to be new entrant dairy farmers must be willing to be actively engaged in producing the milk under the quota they are allocated. Thus, the role of regulators has always been to ensure that new entrants do not abuse the system by promising to act as new entrant farmers and then treating their allocation as a commodity that they can rent or sell to others. That is an abuse of what GEP quota is all about.

13. The principle of active engagement of the GEP producer is and always has been key to compliance with the GEP. It is set out as follows in section 7 of the Milk Board's GEP Rules:

> 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:
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> (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 the matters of animal husbandry;
> (c) whether the entrant operates and controls the dairy farm;
> (d) whether the entrant owns, leases, or rents the dairy farm;
> (e) whether the entrant pays for feed and other farm supplies utilized on the dairy farm, and
> (f) whether the entrant enjoys the chance of profit and bears the risk of loss in relation to the operations of the dairy farm.
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> (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.
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> (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.

NON-COMPLIANCE AND THE MILK BOARD'S PROPOSAL

14. Unfortunately, it turns out that some GEP quota holders in the milk industry did abuse the system. These GEP holders made promises to the Milk Board to be

actively engaged in producing milk under the GEP quota allocated to them and then failed to do so. BCFIRB learned that they leased the quota to others to produce, or engaged in different types of oral and written transactions to transfer this quota for personal financial gain. See the BCFIRB decision in *Van Herk v. British Columbia Milk Marketing Board* (June 19, 2006).

15. In March 2007, the Milk Board wrote to the BCFIRB asking if 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."

16. Following BCFIRB's request for more information, the Milk Board responded in June 2007 by providing a draft letter (dated May 15, 2007) that it proposed sending out to non-compliant producers and shippers "offering existing GEP producers a one-time opportunity to formally transfer their quota to the farm manager notwithstanding that the GEP participant may not be actively engaged in milk production contrary to the terms of the program." The letter also indicated that "This direct transfer of quota must be completed and recorded under the name of the new owner as of December 1, 2007."

17. By asking BCFIRB whether it would "entertain" the approach being proposed, the Milk Board recognized its own interest in involving BCFIRB rather than proceeding by itself, and properly recognized BCFIRB's fundamental and longstanding statutory role under the *NPMA* as the supervisor of commodity boards since 1934. The Milk Board was correct to think that a step potentially leading to a significant amnesty for non-compliance had to be addressed directly with its supervisory board. All the supply managed boards have new entrant programs, and BCFIRB's involvement would ensure that this issue was considered not just in the context of the problems identified in the milk industry, but also in the context of the ongoing credibility and administration of new entrant programs generally.

18. While the idea of an amnesty to address widespread non-compliance has some precedent in regulated marketing history, BCFIRB's decision whether to entertain any kind of amnesty here was not an easy one. There were legitimate arguments for revoking all GEP quota that had been utilized by any party contrary to the rules of the GEP program, and leaving it to the parties involved in illegal transactions to take whatever action they saw fit against one another as a result of their illegal acts. This issue was the subject of extensive deliberation by BCFIRB.

19. On July 16, 2007, BCFIRB issued its supervisory directions which stated that "BCFIRB accepts that a one-time only approach to regularizing the situation may on balance be in the public interest." Among other things, BCFIRB's directions stated, in agreement with the Milk Board's proposal, that:

> 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.…
>
> 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, prior to December 1, 2007.

20. BCFIRB concluded, on balance, that if the parties to the illegal transactions were willing to "come clean" and by way of joint application convince the Milk Board that the quota should be registered in the name of the person actively producing the milk under the quota (albeit illegally), the system should be prepared to regularize the quota in the name of the active producer.

21. The joint application requirement meant that regulators were not to look behind each private transaction to determine whether it was "fair" or what "value" was paid. Where it was in the joint interest of the parties to support the allocation to the shipper, the application would be entertained for consideration. Where it was not, the quota would be revoked and the parties would be left to take their private remedies against each other.

22. BCFIRB's July 16, 2007 supervisory directions were not immediately implemented by the Milk Board. As we understand it, the Milk Board continued to discuss the matter internally. In November 2007 and again in March 2008, the Milk Board approached BCFIRB with proposed changes to the regularization program.

23. Following further letters and meetings between the Milk Board and BCFIRB about this subject, on May 14, 2008, BCFIRB reiterated its July 2007 directions, and advised the Milk Board as follows:

> BCFIRB is of the view that there are only three possible outcomes with respect to the disposition of GEP allocation in cases of alleged non-compliance:
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> (a) the GEP producer is found to be in full compliance with the program.
>
> (b) the GEP producer is found to be non-compliant and the Milk Board enforces its orders, with BCFIRB's decision in Van Herk providing procedural guidance on such matters; or
>
> (c) for a limited time period, and after the Milk Board has determined that it is an appropriate disposition of GEP allocation, regularization may be approved in accordance with BCFIRB's July 16, 2007 directions.
>
> In all cases, no GEP allocation held by a non-compliant GEP producer is to be disposed of other than through the regularization process or through cancellation…

> The only change to the initial BCFIRB directions relates to the previous condition that the regularization option will expire prior to December 1, 2007. Given that this original deadline is now passed, and that this deadline had been suggested by the Milk Board, BCFIRB requires the Milk Board to set a new, comparable deadline for the expiration of the regularization program.

24. Finally, in July 2008, the Milk Board provided formal notice communicating the final terms of the regularization program to the milk industry. The notice included a document drafted by BCFIRB summarizing its "Supervisory Directions to the BC Milk Marketing Board Regarding Graduated Entry Program Regularization" and a document drafted by the Milk Board headed: "IMPORTANT NOTICE: Regularization Policy for Non-Compliance under the Graduated Entry Program". These documents portrayed a common approach to regularization.

25. The Milk Board's document made it very clear that regularization required the participation of the non-compliant GEP producer:

> 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 a non-compliant GEP participant chooses this course of action, the quota may be transferred to the person who is "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 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…..

THE ALLOCATION OF GEP QUOTA TO STEVE VERDONK

26. The appeal panel's decision in *Lilian and Sandy Stewart v. British Columbia Milk Marketing Board* sets out much of the background that resulted in the Milk Board's decisions to: (a) revoke the Stewarts' quota; and (b) allocate the GEP quota to Mr. Verdonk. We will not repeat that discussion here. For the purposes of this decision, the key facts are as follows.

27. On July 28, 2008, the Milk Board wrote to the Stewarts, with a copy to Mr. Verdonk, in a standard form letter almost identical to the proposed letter the Milk Board provided to BCFIRB in June 2007. That letter advised them of the Stewarts' "one time opportunity to formally transfer their quota" to Mr. Verdonk, emphasizing that the transfer application must be signed by the registered GEP participant and stating that "This direct transfer of quota must be completed and recorded under the name of the new owner as of December 1, 2008". The letter concluded as follows:

> 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 engaged in milk production" may result in the cancellation of quota…. [bold in original]**

28. The recipients of this letter would learn two things. First, that they had until December 1, 2008 to make a decision to transfer quota if they wished to apply for regularization. Second, that the Milk Board would be meeting with them in September 2008 for them to provide "evidence of compliance".

29. On September 3, 2008, the Milk Board wrote a standard form letter to the Stewarts advising them that a meeting was scheduled for September 8, 2008 in order to "review your GEP status and the circumstances under which your quota is being shipped if by someone other than yourself".

30. Mr. Stewart advised us that, several months prior to receiving this letter, he and his wife had been seeking a meeting with the Milk Board in order to discuss with them the Stewarts' plan to move the quota to a new operation and start farming it themselves as had always been their intent, and to ask whether the Milk Board would agree to an extension of time to allow a transition between Mr. Verdonk and the Stewarts. Mr. Stewart advised us that the Milk Board advised them that they needed to wait for a meeting until September 2008.

31. Mr. Stewart also advised us that prior to the September 2008 meeting, the Milk Board asked him and his wife whether they would mind if Mr. Verdonk also attended. The Stewarts agreed.

32. The record shows that on September 4, 2008, the Milk Board wrote to Mr. Verdonk (this letter was not copied to the Stewarts) stating that "you have agreed to meet the Milk Board to review your status as a milk shipper...". The letter states:

> **If the quota has been sold and transfer is pending the outcome of this meeting**, it will be necessary for you to provide supporting information…. The Board will make use of this information in determining your participation in the GEP Regularization program. [emphasis added]

33. The meeting was held on September 8, 2008. The meeting notes record that the meeting took 30 minutes. The Stewarts' position at that meeting was that it was always their intention to farm the quota and that they should retain the quota. No regularization application was made either by the Stewarts or Verdonk, let alone jointly. No transfer application was made by the Stewarts. There is no record that the December 1, 2008 transfer date was discussed by anyone.

34. On October 31, 2008, Mr. Verdonk was granted a request for a private meeting

with the Milk Board. Mr. Verdonk advised the Milk Board that he was "told" by the Stewarts to say nothing at the September 8, 2008 meeting. Mr. Verdonk wanted the Milk Board to know that he had offered to buy the quota for $500,000 (the Stewarts refused), that he was ready, willing and able to produce the milk, and that his understanding of his arrangement with the Stewarts (prior to their giving notice in June 2008) was that he would have several more years to continue under their arrangement. The Milk Board advised Mr. Verdonk that the information presented was unlikely to affect the Board's decision.

35. The parties confirmed with us that Mr. Verdonk offered to buy the GEP quota from the Stewarts following the September 2008 meeting, and that the Stewarts refused. Mrs. Stewart advised us that when Mr. Verdonk phoned her with this purchase offer, he said "Lilian, I have been told to offer you money for the quota". We did not learn who the source of that information was.

36. On November 7, 2008, the Milk Board wrote two decision letters. The first, written to the Stewarts (copy to Mr. Verdonk), stated:

> The BC Milk Marketing Board wishes to acknowledge your cooperation and that of Mr. S. Verdonk in attending the interview with the Board on the matter of GEP Regularization. The Board has completed its deliberations and has determined that the GEP allocation of your quota does not qualify for Regularization.
>
> Specifically, you are not in compliance with the terms of the GEP as shown in the Consolidated Order. You advised that there is no written agreement defining any terms of transfer for your GEP allocation to Mr. Verdonk. Consequently, according to the directives of the FIRB for GEP Regularization, your GEP allocation as well as any growth quota allocated to you as a result of your original GEP allocation will be retracted as of December 31, 2008.

37. Also on November 7, 2008, the Milk Board wrote a letter to Mr. Verdonk, which was not copied to the Stewarts. This letter stated:

> This letter is further to the October 28, 2008 letter to E. & S. Stewart and copied to you. In its decision, the Board has recognized your long standing relationship with E. & S. Stewart by directing that the original GEP quota totaling 7,000 kg allocated to E. & S. Stewart on August 1, 2002 will be registered to you as of January 1, 2009….
>
> If you have any questions as to the content of this letter, please contact us for clarification. If you do not agree with the decision of the Board in the matter of regularization, you have the opportunity to Appeal to the Farm Industry Review Board within thirty days of receipt of this letter.

FINDINGS

38. We make several findings regarding the events we have set out above.

39. First, it is disappointing that the Milk Board did not, in accordance with our July 25, 2008 correspondence, provide "full public disclosure of all (its) decisions (including the rationale for such decisions)." Quite apart from the fact that the

Milk Board was directed to do this, those reasons would have assisted BCFIRB and the industry. They would also have assisted the Milk Board in ensuring that its ultimate decisions reflected the terms of the program and the supervisory directions they had been given.

40. Second, we must say that we understand why the Stewarts were concerned to learn that there was a private meeting with Mr. Verdonk, and then a separate letter to Mr. Verdonk (not copied to the Stewarts) allocating "regularized" quota to him when the Milk Board's letter to the Stewarts appeared to say just the opposite. While the Milk Board seemed to suggest that this was merely a problem of semantics, accuracy in language is obviously important when issues of this significance are at stake. The distinction between "compliance" and "regularization," as directed to be used in this particular process, should be clear to regulators responsible for creating and administering this program.

41. Third, there is no question that based on the information available to the Milk Board as of November 7, 2008, and specifically in the absence of a joint application for regularization by the parties, this situation did not qualify for regularization as that program was framed both by BCFIRB and by the Milk Board in their notices to producers.

42. When asked whether this situation fit the regularization program, the General Manager of the Milk Board replied "kinda sorta". Even that description is generous. On a fair review of everything the Milk Board wrote to the industry, and based on BCFIRB's directions, this situation simply did not fall within the scope of regularization as matters stood in November 2008.

43. The Milk Board told us that, despite what it wrote, it always assumed that there was an implied discretion on its part to deal with situations that did not fit within the program. The Milk Board emphasized that there was never any intention to "thumb its nose" at BCFIRB's directions.

44. We do not find that the Milk Board intentionally thumbed its nose at our directions. However, from the perspective of sound governance we find it difficult to comprehend how the Milk Board could approach BCFIRB for approval of an amnesty program in March 2007, obtain specific directions over a 16 month period involving numerous letters and meetings, convey those same directions jointly to the industry, and then regularize quota where the Milk Board itself accepted, contrary to its own notice to the industry (and its own letter of the same date to the Stewarts), that there was no agreement to transfer the quota.

45. For the Milk Board to regularize quota in the absence of a joint application was, in our view, very problematic. These are serious concerns that were properly pointed out by the appeal panel, and that are properly under review in this process.

46. The Milk Board suggested that it did not see its role as running to BCFIRB whenever a new situation developed. We find it difficult to accept that position where, as here, the Milk Board considered it appropriate and in its interest to invite its supervisory board's participation in the first place, where BCFIRB issued specific directions, and where the decision in question here was so clearly outside the lines of those directions.

47. The Milk Board suggested at one point in our review that it was concerned about compromising BCFIRB's appeal role. This is also difficult to accept given BCFIRB's involvement in the first place and given that the whole point of the supervisory process was to ensure that the program rules reflected sound marketing policy. If the Milk Board came to the view that the rules themselves were contrary to that policy, the only proper place to address that would be in the ongoing supervisory process initiated in March 2007 at the Milk Board's own request. As the Milk Board knows, there are many supervisory boards and other regulatory agencies that have dual regulatory and enforcement (appellate) roles and the law recognizes that these functions can and do effectively and efficiently work together.

48. The Milk Board took the position on this review that the "joint application" requirement made no sense as it gave too much leverage to the non-compliant GEP producer who would be given a "veto" over the transfer even if regularization was appropriate.

49. The first thing we must say here is that it was very surprising to see the Milk Board take a position that its own original proposal, accepted by BCFIRB and conveyed by the Milk Board to the industry, was now seen by the Milk Board as being "irrational" despite the Milk Board never raising this concern with BCFIRB in the 16 months the policy was under development.

50. In fact, the policy was not irrational. The requirement to have people make a joint application ensured that regularization would focus on cases where there was a demonstrable transfer or intention to transfer – the types of situations identified by the Milk Board as the reason for the amnesty it proposed – and where it was in the joint interest of the parties to come to an agreement to regularize that transfer. We accept that a minor accommodation might need to be made where the GEP holder was long gone and completely out of the picture, but the shipper could demonstrate an agreement to transfer (this situation arose in a recent appeal). But there was no basis to regularize quota where that agreement did not exist. Those would be enforcement cases.

51. To regularize quota where a joint application to transfer did not exist, as in this case, would amount to granting a general amnesty, which is precisely what BCFIRB refused to do. Requiring a joint application as part of the regularization program, coupled with scrutiny of each application by the Milk Board (see below), was intended to address BCFIRB's concerns in this regard.

52. Further, as became evident in our review, the Milk Board regularized people without further consideration of whether any of those situations should *not* be regularized, as BCFIRB had expressly identified at item 7 of our July 16, 2007 directions. In the end, the Milk Board's position was that if the person was a shipper and had a *bona fide* intention to actively produce milk under the quota, they should be regularized. That is a long way from the regularization program proposed by the Milk Board and approved by BCFIRB. To take that approach in a non-compliance situation would not require <u>any</u> involvement by the GEP producer. Again, that is a significant change to the regularization program, which we did not authorize the Milk Board to make either expressly or by implication.

53. It was a key term of the regularization program that non-compliant GEP producers and shippers would be given the opportunity, prior to December 1, 2008, to complete and record the transfer of quota.

54. This raises the question as to what should have happened where, as here, the Milk Board had a compliance decision to make at the first stage, and the Milk Board determined that the party was in non-compliance.

55. This is an area where we acknowledge that our directions should have been more prescriptive. The December 1, 2008 deadline meant that once the compliance issue had been determined, the parties could still have an opportunity to make a joint application to register the transfer prior to December 1, 2008. This is certainly reinforced by the Milk Board's own language in its July 28, 2008 letter to the parties, quoted above.

56. The Milk Board told us that it did not understand our directions this way. It took the view that having addressed the compliance issue at the September 2008 meeting, it had to make a final decision whether to regularize or not without giving people the further opportunity, in light of that finding, to determine a course of action prior to December 1, 2008.

57. In fact, the Milk Board told us that it would have been wrong to give the parties a chance to come to an agreement following a meeting that determined non-compliance, as this would somehow "benefit" the non-compliant GEP Producer. The Milk Board took the view that while this was not in any of the documents it sent to the industry, and was not in any of the BCFIRB directions, the only agreements it would recognize for regularization were those entered into before November 1, 2006.

58. The result was that when the Milk Board sat down to consider what to do with Mr. Verdonk, it felt it had to either revoke the quota or grant him the quota outright despite the fact that there was no joint application indicating an agreement to transfer, no prior intention to transfer and no expectation on the part of Mr. Verdonk that he would ever receive that quota. Despite the Milk Board's

suggestion that the rent Mr. Verdonk paid, and the cows he purchased, somehow made this situation acceptable for regularization under the terms of the program, given the absence of a joint application to transfer, that was clearly not the case.

59. It is easy to see how the allocation to Mr. Verdonk could be seen as granting him a windfall.

60. As we consider how to address this latter issue, other points are important to note. First, the Milk Board candidly told us at the June 9 review that some of the joint applications it approved - while dated prior to November 1, 2006 - may well have been inked in the weeks or days leading up to the meetings with the Milk Board. The Milk Board took no steps to verify when agreements were actually entered into. Second, we do not agree that the opportunity the parties were given under the regularization program gives one or the other party undue "leverage" if the Milk Board has determined that the GEP producer is non-compliant. In the absence of a joint application, both parties lose everything and any remedies lie between themselves in other forums. To the extent that regulators should even be concerned about such matters, that levels the playing field considerably.

61. We acknowledge that our supervisory directions did not specifically address what would happen where, as here, a GEP producer had no joint application and indeed no agreement or prior intention to transfer, the Milk Board made a finding that the producer was in non-compliance, but there was still time left under the policy to register a transfer. The problem was complicated because, as noted above, it appears that ultimately the BCFIRB and the Milk Board had a conflicting view of whether joint arrangements dated after November 1, 2006 would be accepted. Our view, as expressed in our July 2007 and July 2008 correspondence and as initially expressed by the Milk Board in its original (May 15, 2007) draft letter and its July 2008 notice to industry, was that active quota holder-shipper relationships as of a date certain would have a period of time (eventually until December 1, 2008) to apply for regularization. BCFIRB's expectations regarding the meaning of the date and the appropriate governance of the regularization program on this issue could have been clearer and more prescriptive.

62. All these issues could have been brought to our attention in a timely fashion by the Milk Board as it was processing these applications. Unfortunately, they were not.

63. We do not think that the parties should suffer because of issues regarding the governance of the regularization program.

DECISION

64. Had the process here worked in a fashion that was fair, transparent and in accordance with the purposes of the regularization program, the Stewarts and Mr. Verdonk could have been given an opportunity, <u>after</u> the Milk Board found

the Stewarts to be in non-compliance, to make a joint application for regularization prior to December 1, 2008. They were not given this opportunity.

65. We appreciate that the Stewarts chose to appeal, but that was their right and they secured their right to have their issue heard by BCFIRB. The system should have been able to accommodate a further opportunity for a joint application after the compliance issue had been decided by the Milk Board in the context of the Stewarts' right of appeal. For example, the Stewarts could have been given an opportunity to enter into a joint arrangement that was contingent on the outcome of the appeal. The Milk Board could have helped to ensure that the system functioned fairly and effectively by providing adequate reasons for its decisions.

66. In our opinion, all this needs to be made right, both to ensure that the directions and purposes of the regularization program are met, and to avoid the result of granting 7000 kg of quota to Mr. Verdonk in the absence of a joint application to transfer the quota to him - quota which he freely admitted he never had any prior expectation of receiving at the time he began shipping the milk illegally after having effective "jumped the queue."

67. Having considered this matter carefully in light of all the information given to us on the review, including a careful review of the Milk Board's process, we are convinced that despite the two options originally set out in our counsel's May 21, 2009 letter, a third option, which we subsequently agreed to allow the Stewarts' counsel to advance, is appropriate.

68. That option is to give the Stewarts and Mr. Verdonk the opportunity they should have been given after the compliance decision was made – namely, a one-time opportunity, within 30 days from the date of this decision, to make a joint application to the Milk Board in accordance with the regularization program.

69. This option will give these parties an opportunity that is no different from many of the other regularizations the Milk Board has approved under the program, and that is consistent with a remedy BCFIRB granted in a recent appeal decision.[1]

70. If, at the end of 30 days, no such application is made, the quota originally issued to the Stewarts (and retracted from them for reasons of non-compliance, which decision was upheld on appeal) will also be retracted from Mr. Verdonk and placed back into the GEP pool in accordance with BCFIRB's original directions respecting regularization.

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[1] The remedy we are granting in this case is similar to the one ordered by the appeal panel in the case of *Daniel Haan Dairy Farm Ltd. v. British Columbia Milk Marketing Board* (May 8, 2009). The facts of that case differed from these in that the panel was satisfied that there was a pre-existing intention to transfer the quota. We are extending that approach here because, as noted above, we are satisfied that the parties should have been given an opportunity to make a joint application after the compliance issue had been decided by the Milk Board.

FURTHER ISSUES

71. Throughout this review – in fact, throughout our entire involvement with the regularization program – BCFIRB has been extremely concerned about the position and perspective of those new entrants who have played by the rules and those potential new entrants who have remained on the waitlist while others jumped the queue and appeared to get "rewarded."

72. As noted earlier in this decision, the entire regularization process has had some distaste to it from the beginning, and the governance issues noted above have not made things easier.

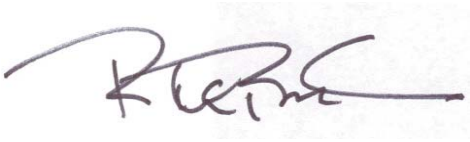
73. The Milk Board has emphasized that it is going to be very strict in its enforcement going forward. That is the least we can expect. Abuses like this cannot be allowed to happen again.

74. Future enforcement does not affect the position of those honest people who have waited their turn while others jumped the queue. This has caused us to conclude that it is appropriate to examine why exactly it is that people remain on the waitlist for so long, and why so little GEP quota is made available despite the considerable new entrant interest.

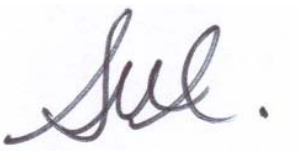
75. The Chair of the Milk Board, as we understood him, indicated that there was no reason why the Milk Board could not invite more than three new GEP entrants per year into the industry.

76. It may well be that, depending on the state of the waitlist, there would be significant benefit in making substantial amounts of GEP quota available in the near future. We will be following up on this issue with the Milk Board.

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



Richard Bullock
Chair



Sandi Ulmi
Vice Chair