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DELIVERED BY FAX

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Dear Sirs/Mesdames:

AN APPEAL BY BC VEGETABLE GREENHOUSE I, L.P. FROM BOARD ORDER 10/03(a) OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

INTRODUCTION

This decision addresses preliminary applications by the British Columbia Vegetable Marketing Commission (the “Vegetable Commission”) and BC Hot House Foods Inc. (“BC Hot House”) for an order summarily dismissing the appeal of BC Vegetable Greenhouse I, L.P. (“BC Vegetable”) from Vegetable Commission Order 10/03(a) requiring BC Vegetable to remit \$376,642 in outstanding levies.

ORDER UNDER APPEAL

On October 31, 2003, BC Vegetable appealed Order 10/03(a), issued by the Vegetable Commission on October 7, 2003. Order 10/03(a) reads as follows:

WHEREAS the Commission has passed two orders directing the payment of extra-ordinary levies by all greenhouse tomato producers in Districts I and II for the purpose of funding costs and expenses

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associated with trade disputes involving the U.S. tomato industry (namely Order 08/01 dated August 15, 2001 and Order 09/02 dated September 18, 2002);

AND WHEREAS BC Vegetable Greenhouse I, LP is a producer of greenhouse tomatoes in District I and is accordingly subject to Order 08/01 and Order 09/02;

AND WHEREAS the amount of \$14,239 remains due and owing from BC Vegetable Greenhouse I, LP pursuant to Order 08/01;

AND WHEREAS BC Vegetable Greenhouse I, LP has not remitted any levies to the Commission, through an agency or otherwise, pursuant to Order 09/02;

AND WHEREAS the Petition of BC Vegetable Greenhouse I, LP and others to the Supreme Court of British Columbia in Action L021876, challenging the validity of Order 08/01 and Order 09/02, has been dismissed by order of the Court pronounced October 1, 2003;

THEREFORE the Commission hereby orders that:

1. BC Vegetable Greenhouse I, LP shall remit to the Commission within 30 days of the date of this Order the amount of \$376,642, an amount equal to the total levy that should have been deducted from it pursuant to the terms of Order 08/01 and Order 09/02.¹

GROUND OF APPEAL

BC Vegetable appeals from Order 10/03(a) on five grounds, articulated in Mr. Harvey's letter dated November 28, 2003. The first four grounds allege that the Order is "invalid and an abuse of process" because:

1. It is duplicative of levy orders already passed.
2. It interferes with a matter before the BC Court of Appeal.
3. It is retrospective and/or retroactive.
4. It was passed for an improper purpose, namely to fund debt obligations of BC Hot House in circumstances where BC Hot House has no valid claim against the Appellants for such obligations or, if it has, such claim is subject to the arbitration provisions of the Grower Marketing Agreement.

The fifth and final ground alleges that "the Quantum of the Orders is incorrectly computed". In response to a request from Lisa Hynes, then counsel for the Vegetable Commission, Mr. Harvey has clarified this ground, explaining "that the amount stated in the Order is incorrect in that when the account to which it is directed is examined, with all debits, credits and times properly entered and computed, the result is something different than that stated in the Orders".

¹ On October 8, 2003, the Vegetable Commission issued a similar order (Order 10/03(b)) requiring payment of outstanding levies (approximately \$100,000) from another grower, South Alder Greenhouses Ltd. ("South Alder"). South Alder was originally an appellant, but withdrew its appeal in April 2004.

BACKGROUND

The background against which the summary dismissal applications are made is quite complex. The Vegetable Commission passed Order 10/03(a) following the release of the British Columbia Supreme Court's judgment in *Global Greenhouse Produce Inc., BC Vegetable Greenhouse I, L.P. and others v. British Columbia Marketing Board and British Columbia Vegetable Marketing Commission*, 2003 BCSC 1508. Among other things, the Court dismissed BC Vegetable's legal challenges to Levy Orders 08/01 and 09/02.

Levy Order 08/01 was issued on August 14, 2001 when BC Hot House was the sole agency designated to market greenhouse tomatoes in Districts I and II. That Order stated that the Vegetable Commission had approved "an extraordinary levy on all greenhouse tomatoes produced in Districts I and II, for the purposes of funding expenses associated with trade disputes involving the U.S. tomato industry." The Order required BC Hot House to deduct the Levy using the formula set out in the Order (based on revenue from crop sales), and included a year end reconciliation of that portion of the Levy based on estimated sales for 2001. According to Order 10/03(a), \$14,239 remains due and owing from BC Vegetable pursuant to Order 08/01. BC Vegetable acknowledges that "[a]lthough the persons subject to the levy are not named it is evident that it applies to anyone producing tomatoes in Districts I and II. The Appellants produced tomatoes in Districts I and II after the promulgation of this levy Order and are therefore subject to it".

Levy Order 09/02 was issued on September 18, 2002, a week after the Provincial board's September 11, 2002 supervisory decision giving directions on several divisive issues within the greenhouse industry. One supervisory direction authorised the Commission to issue a further Levy Order for the purposes of funding the remaining, outstanding costs related to the then-concluded trade action. That Order required all greenhouse producers in Districts I and II to pay the Levy in instalments according to a formula based on square metres of production for the 2001 crop season, and ordered "[a]ll agencies designated by the Commission" (which by then included Global Greenhouse Produce Inc.) to collect the Levy. According to Order 10/03(a), a point not in issue between the parties, BC Vegetable has not remitted any Levies to the Vegetable Commission pursuant to this Order.

As noted earlier, the BC Supreme Court dismissed BC Vegetable's legal challenges to these Levy Orders on October 1, 2003. At pages 50-58, the Court described the Levies and their history, described BC Vegetable's arguments challenging the Levies for lack of requisite federal authority under the *Agricultural Products Marketing Act* ("APMA"), and made the clear finding that the Vegetable Commission had the proper federal authority to pass both Levies.

Order 10/03(a) reflects the Vegetable Commission's view that since the Levy Orders have not been stayed, and as the Supreme Court held them to be valid and as BC Vegetable and one other grower have failed to pay the amounts owing under the Orders, it was appropriate to issue

individual Orders directed to those specific growers, outlining the specific amounts owing under Levy Orders 08/01 and 09/02 and requiring payment of the outstanding amounts within 30 days.

On October 31, 2003, BC Vegetable took two actions:

1. Filed Notice of Appeal to the Court of Appeal from the October 1, 2003 judgment of Drost J seeking in part, an order quashing Levy Orders 08/01 and 09/02.
2. Filed Notice of Appeal to the Provincial board from the October 7, 2003 from Order 10/03(a).

BC Vegetable did not apply to the Court of Appeal for a stay of the order of the Supreme Court. Thus, those orders, upholding Levies 08/01 and 09/02, are valid and binding unless and until they are set aside by the Court of Appeal. BC Vegetable has also not formally applied to the Provincial board for a stay pending its appeal from Order 10/03(a). Mr. Harvey's November 28, 2003 letter does, however, state as follows:

The Appellants intend to apply for a stay pending appeal, and do so by this letter. However, the Appellants require production of the accounting and other documents relating to the computation of the levy in order to formulate their stay application and their position re securing the levy pending appeal.

Accordingly, the Appellants, by this letter, apply to the FIRB for an order compelling the Commission and BC Hot House to disclose all correspondence, accounts and other documents relevant to both the present Orders and the prior Orders which the present orders apparently encompass. We request full disclosure. This documentation should indicate the purpose of the levy, how it was computed and what payments have been received on account to date and from whom. When this is in hand the Appellants will perfect their stay application and apply for a hearing date. The Appellants' position re security will be given at that time.

THE PRELIMINARY OBJECTIONS

In December 2003, the Vegetable Commission and BC Hot House made a preliminary objection that BC Vegetable's appeal should be dismissed. Their arguments in support of their objection may be summarised as follows:

- A. The Appellant's argument that Order 10/03(a) should be set aside as being "duplicative" of Levy Orders 08/01 and 09/02 is devoid of merit. Order 10/03(a) is a compliance order. It merely quantifies the amounts the Appellants owe under those existing orders, and issues a demand for compliance. There is no new Levy.
- B. The Appellant's argument that Order 10/03(a) "interferes with a matter before the BC Court of Appeal" is also devoid of merit. Order 10/03(a) merely directs the Appellant to pay up under Levy Orders the Supreme Court found to be valid, which Court decision the Appellant has not applied to stay pending appeal.

- C. The Appellant's arguments that Order 10/03(a) is "retrospective / retroactive" and "was passed for an improper purpose" should be dismissed as being an abuse of process because these arguments were rejected by the Court when the Appellant challenged Orders 08/01 and 09/02.
- D. The Appellant's argument that the amount in Order 10/03(a) is incorrectly computed should not proceed to appeal, and should be resolved by alternative means.
- E. The Appellant is in defiance of the Order and the appeal should not be heard until the Appellant purges its contempt.

This decision deals with the request by the Vegetable Commission and BC Hot House for a summary dismissal of the appeal.

DECISION

Section 8(8.3) of the *Natural Products Marketing (BC) Act* (the "Act") states that "[o]n the request of a party to an appeal, the Provincial board may dismiss an appeal as frivolous, vexatious or trivial." The power to dismiss an appeal necessarily includes the power to dismiss portions or grounds of appeal that meet this test. The Provincial board discussed this power in *Skyacres Turkey Ranches Ltd. v. British Columbia Turkey Marketing Board* (March 26, 2001) at para. 18:

Section 8(8.3) was enacted in December 1999. The purpose of this amendment was to grant the BCMB the authority to dismiss an appeal on the application of a party where that appeal was "frivolous, vexatious or trivial". This power can only be exercised in limited situations, where it is clear on its face that an appeal cannot possibly succeed or that it is devoid of merit.

This power is to be exercised with considerable restraint. An appeal or ground of appeal will not be dismissed merely because it is novel. However, it will be dismissed as "frivolous" or "trivial" where it is plain and obvious that it cannot succeed. It will be "vexatious" if, amongst other things, it amounts to a clear abuse of process: *Toronto (City) v. C.U.P.E., Local 79* 2003 SCC 63 at paras. 35, 38.

A. Preliminary objection to the duplication argument

The Vegetable Commission submits that BC Vegetable's duplication argument has no merit because it is self-evident that Order 10/03(a) does not duplicate the previous Orders. It is obviously and properly characterised as a compliance order, which in no way purports to replace or re-enact the previous Orders but merely quantifies the amount the Appellant is required to pay under the previous Orders. The Vegetable Commission submits:

The Commission did not, in enacting the Orders, impose a new levy. Rather, the Orders merely direct the payment of levies already owing pursuant to prior, validly enacted, levy orders of the Commission. The Commission must have the authority to direct that those subject to its regulation comply with its valid orders. It is not an abuse of process for the Commission to direct such compliance. This is all the Orders purport to do....

Order 03 does not impose a new levy. Nor does it repeal and replace Orders 01 and 02, both of which remain outstanding, valid orders of the Commission. It simply directs that the Appellants, the only producers subject to Orders 01 and 02 who have not fully complied with those orders, pay the amount owing to come into compliance. ...[I]t is not inconsistent for the Commission to demand compliance with Orders 01 and 02, by an order specifying the amount owing, prior to taking enforcement proceedings pursuant to sections 15 and 17 of the Act.

BC Vegetable argues that Order 10/03(a) is duplicative precisely because it does not purport to repeal the two previous Orders. It says that this unnecessary Order is flawed as:

- (i) It may allow the Vegetable Commission to enforce this Order even if the Court of Appeal finds the Levy Orders to be invalid.
- (ii) It creates a new calculation that is not apparent from the previous Levy Orders, and may shield the Vegetable Commission from the audit requirement set out by the Provincial board as a term of the Levy.
- (iii) It lacks statutory authority because enforcement orders are inconsistent with the statutory scheme.

The Panel rejects the Appellant's first concern as it is based on a patently incorrect reading of Order 10/03(a). On its face, Order 10/03 is a compliance order predicated and inherently dependent on the validity of Orders 08/01 and 09/02. It does not re-enact them. If either (or both) earlier Orders is quashed by a higher court, an essential condition precedent for the existence of Order 10/03(a) would be gone and Order 10/03(a) would cease to operate.

The Panel finds that the Appellant's second concern has no merit on the duplication ground, as it is not an argument about duplication. The Appellant's real concern here is that Order 10/03(a) does something new, namely, establish a quantum that does not follow from the previous Orders which have their own mechanism for quantification. While this is a legitimate issue relative to the calculation ground of appeal, it is not a duplication argument.

The Appellant's third concern is that there is no authority for the Order because, under the *Act* and the federal *APMA*, only the Court can issue a compliance order. The Appellant argues that if the Vegetable Commission wishes to enforce Levy Orders 08/01 and 09/02, it must do so "in the normal way". This submission appears to concede that the Vegetable Commission can address any refusal to pay by going directly to Court, without regard to Order 10/03(a). While this raises a question for the Vegetable Commission regarding the most practical way to enforce Orders

08/01 and 09/02, the narrow question for the Panel is whether we should summarily dismiss, as being devoid of merit, the legal argument that regulatory compliance Order 10/03(a) is not authorised by the *Act*.

While a panel of the Provincial board has previously held that commodity boards are entitled to issue individual orders that have the character of administrative enforcement action (*Klaas Korthuis v. British Columbia Chicken Marketing Board*, June 26, 2000), the precise legal point raised here has not been previously argued before the Provincial board. Further, this submission was not directly addressed by the Vegetable Commission or BC Hot House in their reply submissions. As such, we are reluctant to dismiss this particular argument as being devoid of merit merely because it is novel. Even though Order 10/03(a) is qualified by the previous Levy Orders, it still stands as a separate Order. If it is beyond the Vegetable Commission's authority in some way or if (as discussed below) there is a legitimate question as to quantum, we agree that an appeal on this basis is properly before us and raises a live issue.

B. Preliminary objection to the argument that Order 10/03(a) “interferes with a matter before the BC Court of Appeal”

The Vegetable Commission's basis for objecting to the previous ground applies here as well. It argues that there is no merit to the argument that Order 10/03(a) interferes with the appeal to the Court of Appeal. That appeal will deal with Levy Orders 08/01 and 09/02. Order 10/03(a) assumes the validity of those Levies, and merely orders the Appellant to comply.

BC Vegetable submits Order 10/03(a) “is an attempt to establish an independent basis for claiming the same levies imposed by Orders 01 and 02. This has the potential of subverting and rendering moot the litigation before the Court of Appeal.”

For the reasons given above, the Panel finds this argument devoid of merit as it rests on a patently incorrect characterisation of the true nature of Order 10/03(a). Order 10/03(a) does not seek to establish an independent basis for claiming the same Levies. It is predicated on the validity of those Levies, and directs compliance based on them. Because it is plain and obvious that Order 10/03(a) is predicated on and inherently dependent on the validity of Orders 08/01 and 09/02, there can be no merit to the argument that it is somehow an independent basis to impose the same Levies, or that it might survive a Court of Appeal judgment overturning those Levies.

C. Preliminary objection to the “retrospective / retroactive” and “improper purpose” grounds

BC Hot House submits that these two grounds of appeal should be dismissed because they constitute an impermissible collateral attack on, and abuse of process relative to, the Court's decision on the validity of Levy Orders 08/01 and 09/02. BC Hot House submits that the Supreme Court has already decided these very grounds and it is an abuse of process for the

Appellant to try to re-litigate them in relation to Order 10/03(a). BC Hot House relies on the legal principles relative to abuse of process, collateral attack and *res judicata* discussed in the cases of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 and *Ontario v. O.P.S.E.U.*, 2003 SCC 64. BC Hot House also relies on the law relating to *res judicata* and issue estoppel: *Danyluk v. Ainsworth Technologies*, [2001] 2 SCR 460; *Angle v. Minister of National Revenue*, [1975] 2 SCR 248.

BC Vegetable's response is that there is no collateral attack because it is challenging a different Order which "incorporates or re-enacts levies imposed previously". For the reasons we have given above, this premise is flawed. Order 10/03(a) does not re-enact the previous Levies. It is a compliance order that depends on them. Consequently, we agree that it is a clear abuse of process for the Appellant to attempt to challenge Order 10/03(a) as being a retroactive / retrospective Levy imposed for an improper purpose. It invites the Provincial board to make findings that contradict the final judgment of a Supreme Court judge on the very same issues, involving the same parties, and thereby constitutes a collateral attack and abuse of the Provincial board's process. Those issues have already been finally decided. This is not one of those exceptional cases where relitigation "will enhance, rather than impeach, the integrity of the judicial system": *Toronto (City) v. C.U.P.E., Local 79*, *supra*, para. 52. The point is so obvious that we do not find it necessary to engage in an extensive review of the case law outlined in BC Hot House's comprehensive submission on this point. See *Toronto (City) v. C.U.P.E., Local 79*, *supra*, approving the following quotations, at paras. 37 and 38:

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined....

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

We do however wish to make three additional points regarding the Appellant's arguments in response to this objection. The first relates to the Appellant's submission as follows:

If the Appellants did not lodge an administrative appeal to Order 03 they would later be accused of failing to exhaust their alternative remedies. They would be forever barred from challenging Order 03 regardless of the outcome of the present appeal of Orders 01 and 02.

The duty to exercise appeal rights does not allow a person to file an appeal on grounds that would constitute an abuse of process. Our finding is not that the Appellant is deprived from appealing Order 10/03, but it must do so on legally permissible grounds. To the extent that its appeal advances grounds already decided by the Supreme Court, it is properly dismissed on a summary basis. Secondly, contrary to the Appellant's argument at paras. 39 and 42, BC Hot

House has not argued, and nor do we find, that the computation argument is an abuse of process. Our finding of abuse of process relates to the appeal insofar as it relates to Grounds 3 and 4 of this appeal. Finally, we must address the Appellant's new "alternative" argument regarding the Levies, namely, that because BC Hot House incurred the litigation debt during an international trade dispute, the proper means for making a claim against the Appellant in relation to that debt was to make a claim under the Growers Marketing Agreement rather than through a Levy imposed by the Vegetable Commission. This new argument is not relevant to the compliance order, because the compliance order does not incorporate the previous Levies. This argument is collateral to Order 10/03(a), and is based once again on a misunderstanding of that Order. This ground is devoid of merit because it does not pertain to any relevant issue, or to any relief the Provincial board could grant in relation to Order 10/03(a).

D. Preliminary objection to the computation argument

The Vegetable Commission argues that since the Levy formulae are so straightforward, the only possible dispute with respect to Levy Order 09/02 must arise as to the determination of the balance owing under Order 08/01 and the quantum of the fourth instalment under Order 09/02, which quantum was determined by the Vegetable Commission following a review of various invoices and accounts. The Vegetable Commission submits that this matter would be most efficiently and expeditiously dealt with by way of an independent auditor reviewing relevant invoices and accounts. The Vegetable Commission says that it is prepared to contribute to the cost of such an auditor in the interests of finally resolving this matter.

Whether or not the Vegetable Commission's suggested process would provide the most expeditious outcome, such a process requires the Appellant's consent. Failing such consent, the Appellant has a right to appeal to the Provincial board on the computation issue.

E. Preliminary objection relating to contempt by Appellants

The Vegetable Commission and BC Hot House argue that before the Appellant may proceed with its appeal, it must either comply with the Order or have it stayed pending appeal. BC Hot House relies on the principle that a party on an appeal should not be heard on appeal if that party is in contempt of the Order sought to be impugned, until that party purges itself of the contempt.

A party that refuses to comply with a Vegetable Commission order under appeal exposes himself to a court application for contempt. However, this does not in our view prevent the Provincial board from hearing the appeal. As noted, there are two legitimate triable issues properly before the Provincial board on appeal.

ORDER

The appeal will proceed to hearing on the following grounds:

1. Whether the Vegetable Commission had the jurisdiction to issue Order 10/03(a) for the purpose of obtaining the Appellant's compliance with previously issued Levy Orders?
2. Whether the quantum set out in Order 10/03(a) is correct?

The balance of the grounds advanced on this appeal are dismissed under s. 8(8.3) of the *Act* as being either devoid of merit (as being based on a patently wrong characterisation of the nature of Order 10/03(a)) or an abuse of the Provincial board's processes (as having already been decided by Drost J.). The Panel will make a decision regarding the costs of this application at the conclusion of the appeal.

This decision leaves outstanding the issue of production of documents, and the Appellant's unperfected stay application. In the interests of efficiency, the Panel directs the Vegetable Commission, within 21 days from the date of this decision, to provide the Provincial board, the Appellant and BC Hot House with the documents touching on the computation issue relative to BC Vegetable.

Board staff will be contacting the parties to arrange hearing dates, however, the Panel encourages the parties to reconsider whether discussion might resolve this matter once documents have been provided. The Panel also wishes to make clear that (a) this decision is without prejudice to any separate enforcement action that may arise regarding payment required by Levy Orders 08/01 and 09/02, (b) no stay of Order 10/03(a) is in place as the Appellant has not perfected its stay application.

Finally, the Panel acknowledges, and apologises to all parties for the time it has taken to consider and release this decision. Several extraordinary circumstances have arisen for the Provincial board over the past several months, including the requirement to address several complex, time-consuming and unexpected matters. This has required us to extend the time for hearing this appeal. This decision having been issued, the Provincial board will make every effort to bring it to final resolution as expeditiously as possible.

Dated at Victoria, British Columbia, this 2nd day of September 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Christine J. Elsaesser
Vice Chair