

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
OF THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD
DATED NOVEMBER 27, 1997

BETWEEN:

TRUONG MUSHROOM FARM LTD.

APPELLANT

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

RESPONDENT

AND:

MONEY'S MUSHROOMS LTD. AND PACIFIC FRESH MUSHROOMS INC.

INTERVENORS

AND:

GROWERS FOR MONEY'S MUSHROOMS LTD.

INTERVENOR

AND:

MR. HUNG DO

INTERVENOR

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Dedar Sihota, Member Mr. Hamish Bruce, Member Ms. Satwinder Bains, Member
For the Appellant	Mr. David A. Critchley, Counsel Mr. Mark Andrews, Counsel
For the Respondent	Ms. Maria Morellato, Counsel
For Money's Mushrooms Ltd and. Pacific Fresh Mushrooms Inc.	Mr. Stein Gudmundseth, Counsel
For Growers for Money's Mushrooms Ltd.	Mr. Peter Kravchuke, Counsel
For Mr. Hung Do	Mr. Martin Chia, Agent
Date of Hearing	January 21, 1998, March 2-3, 1998 and March 27, 1998
Place of Hearing	Langley and Burnaby, British Columbia

INTRODUCTION

1. Truong Mushroom Farm Ltd. (the "Appellant") appeals to the British Columbia Marketing Board ("BCMB") from a decision of the British Columbia Mushroom Marketing Board (the "Mushroom Board") on November 27, 1997 limiting the Appellant's production to 100,000 lbs. of mushrooms/month.
2. At the hearing, the Mushroom Board took the position that its role as an adjudicative body was to not defend the merits of its decisions. Accordingly, the Mushroom Board called no evidence and limited itself to cross-examination and argument.
3. Money's Mushrooms Ltd. ("Money's") and Pacific Fresh Mushrooms Inc. ("Pacific Fresh") were granted Intervenor status at the outset of the hearing.
4. An ad hoc group of growers for Money's Mushrooms Ltd. (the "Growers") applied for Intervenor status at the outset of this hearing. That request was granted by the BCMB. These growers take the position that the Mushroom Board should not have granted any mushroom production to the Appellant.
5. Mr. Hung Do, a director of All Seasons Mushroom Farms Inc. ("All Seasons"), applied for Intervenor status at the outset of the hearing. Given that there was no corporate resolution allowing him to make this application on behalf of All Seasons and given that Mr. Ty Truong Sr., also a director of All Seasons, opposed the application, Mr. Do was granted Intervenor status in his personal capacity as a grower.
6. After the first day of hearing Counsel for the Appellant, Mr. Critchley, withdrew the expert report and oral evidence of Mr. Don Rugg. This was done to avoid a lengthy delay in the resumption of the hearing. After three days of hearing, Mr. Critchley determined that he would have to be a witness in the hearing. In order to accommodate this request, the hearing was adjourned to allow Mr. Critchley to retain and instruct new counsel to complete the remainder of the Appellant's case. Mr. Mark Andrews conducted the Appellant's case at the resumption of the hearing on March 27, 1998.
7. On May 7, 1998 the BCMB released the decision in this appeal with written reasons to follow. These are the written reasons.

ISSUES

8. Did the Appellant have a contract with an existing agency such that it was exempted from the September 4, 1997 Order (the "Order") of the Mushroom Board? ("Exemption")
9. Is the Order within the jurisdiction of the Mushroom Board to enact? ("Jurisdiction")

10. If the Order is valid, did the Mushroom Board properly exercise this power in the circumstances? ("Discretion")

FACTS

11. Mr Ty Truong Sr. the spokesman for the Appellant, has a younger brother also named Ty Truong who participated in this hearing. To distinguish between the two brothers where necessary in this decision Mr. Ty Truong Sr. will be referred to as Mr. Truong Sr. and his younger brother will be referred to as Mr. Truong Jr..
12. The Appellant is a company in the business of mushroom farming. It is unclear when the company was incorporated. However, the President of the company is Mrs. Trang (Jennie) Truong. Her husband, Mr Truong Sr., is the manager of this company. Mr. Truong Sr. has been involved in the mushroom industry for the past 18 years.
13. Mr. Truong Sr. has been involved in a number of different mushroom operations. In the period 1985-1987, Mr. Truong Sr. owned 25% of Ty Mushroom Farm. This operation was sold. In the period 1987-1992, Mr. Truong Sr. owned 40% of Pacific Mushroom Farm. This operation was also sold.
14. At some point in time, Mr. Truong Sr. was also involved with a mushroom farm located at 44A Avenue in Langley. It appears that this farm was owned by the Appellant and was sold to a property developer in April of 1993. In approximately 1990, the Appellant began operating a mushroom farm on 80th Ave. in Langley.
15. On April 3, 1995, Mr. Truong Sr. sought and obtained an undated letter of commitment from Mr. Daniel Ashe of Pacific Fresh. This letter confirmed that "Pacific Fresh Mushrooms Inc. is willing to purchase all of Truong's Mushrooms from its new proposed location".
16. On June 14, 1995, the Appellant entered into an option to purchase agreement with Mr. Binh Trinh and Ms. Trang Trinh for the mushroom farm located on 80th Ave. In order to allow for financing, the option could be completed at any time within a two-year period. During that period, the Trinhs would carry on the mushroom farming operations of Truong Mushroom Farm Ltd. and fulfil the Pacific Fresh contract.
17. During this period of time, Mr. Truong Sr. and Mr. Truong Jr. were planning to acquire another mushroom farm
18. Double T Equipment Manufacturing Ltd. gave a written quotation for equipment on July 13, 1995 addressed to "Mr. Truong of Truong Mushrooms, 185 80th Ave. in Langley, BC". Sometime prior to August of 1995, Mr. Truong Sr. and Mr. Truong Jr. acquired the property on 232nd St. to build a new mushroom farm.
19. This property was purchased in the name of T&T Mushroom Farm Ltd. ("T & T Farm"). Mr Truong Sr. and Mr. Truong Jr. incorporated the company in July 1995

with each being a 50% shareholder. Mr. Truong Jr. was named the company's President.

20. On August 9, 1995, Double T issued an invoice requesting a deposit for the equipment from Truong Mushrooms of 18566 80th Ave in Langley, BC.
21. In August of 1995, T & T Farm signed a contract with Pacific Fresh to supply mushrooms from the 232nd St. property.
22. On October 6, 1995, Double T's COD waybill was issued indicating that T & T Farm of 3675 232nd St. in Langley BC had purchased the equipment.
23. On October 17, 1995, Money's acquired Pacific Fresh. The businesses are operated separately.
24. On March 7, 1997, All Seasons was incorporated. This company was comprised of three separate companies, the Appellant, White Pearl Mushroom Farm Ltd and Do Holdings Ltd. Later in March of 1997, All Seasons applied to the Mushroom Board for agency status to market mushrooms in BC.
25. In April of 1997, Mr. Trinh exercised his option to purchase the 80th St. mushroom farm from the Appellant. The farm now operates as White Pearl Mushroom Farm Ltd..
26. In May of 1997, the Appellant purchased two adjoining lots on 224th St. in Langley and immediately commenced land clearing and construction of a new mushroom farm.
27. In August of 1997, the BCMB completed an industry review and considered the application to designate All Seasons as an agency. On August 19, 1997, the BCMB ordered the Mushroom Board to designate All Seasons as an agency within 21 days.
28. On September 4, 1997, the Mushroom Board passed the following Order:

Pursuant to the *Natural Products Marketing (BC) Act* as well as the British Columbia Mushroom Scheme and the 1994 General Orders, there shall be no increased production of regulated mushrooms for sale or marketing unless approved by the British Columbia Mushroom Marketing Board. Persons seeking such approval must apply in writing to the British Columbia Mushroom Marketing Board.
29. The above Order was sent to all growers with a letter advising that "producers who already have contracts in place with existing agencies will be exempted from this order and need not apply. This Order is intended to apply to any future production

increases which do not currently form part of an existing, written contract with an existing Agency”.

30. On September 5, 1997, a commitment letter from All Seasons was prepared confirming its intent to purchase all of the Appellant's mushroom production. Mr. Duc (Daniel) Do as a Director of All Seasons signed the letter.
31. On September 5, 1997, Do Holdings Ltd.'s accountant prepared an authorisation letter allowing Mr. Daniel Do to act as director of All Seasons with respect to decisions relating to Do Holdings Ltd. and faxed it to Mr. Daniel Do. This document was signed by the Dos sometime after September 5, 1997 and was backdated to September 2, 1997.
32. On September 10, 1997, the Mushroom Board issued an order granting agency status to All Seasons.
33. On or about October 7, 1997, the Appellant applied for approval to increase its production of mushrooms grown in BC for sale or marketing.
34. On October 29, 1997, the Mushroom Board conducted a hearing into the Appellant's request. On November 27, 1997, the Mushroom Board gave written reasons denying the Appellant's request for production of 350,000 lbs. per month. The Mushroom Board granted the Appellant a license to produce and sell a maximum of 100,000 lbs. of mushrooms per month.
35. As a result of the Mushroom Board's decision, the Appellant stopped construction. The total cost of the project was estimated to be \$2,129,184 of which \$1,233,799 has been expended.
36. The Appellant appealed the decision of the Mushroom Board on December 5, 1997.

PRELIMINARY ARGUMENT

37. The Appellant raised a preliminary argument as to the jurisdiction of the Mushroom Board to enact the Order. The Appellant took the position that if the Mushroom Board has exceeded its jurisdiction, then this Appeal was unnecessary.
38. The BCMB heard argument on this issue. However, at the close of argument we were unable to decide the preliminary issue summarily. The Appeal continued on its merits. The parties were advised that the preliminary issue would be dealt with in our written reasons.
39. Given our analysis that we must first determine whether the Appellant fits within the exemption before we consider the validity of the Order itself, the "preliminary argument" is dealt with in the body of our reasons.

ARGUMENT OF APPELLANT-EXEMPTION

CONTRACT WITH PACIFIC FRESH

40. The Appellant argues in the alternative, that they either had a valid existing contract with Pacific Fresh or All Seasons at the time of the Order.
41. In regard to the contract with Pacific Fresh, the Appellant argues that Mr. Truong Sr. received a letter from Mr. Daniel Ashe, then President of Pacific Fresh, in May or June of 1995. This letter confirmed that Pacific Fresh would purchase all of Truong's mushrooms from its "new proposed location". It was Mr. Truong Sr.'s understanding that after his wife sold the farm operating as Truong Mushroom Farm Ltd., he could build another mushroom farm and ship that production to Pacific Fresh.
42. Mr. Truong Sr. denies that the undated letter from Pacific Fresh was intended to refer to a different mushroom farm which he was developing in conjunction with his brother Mr. Truong Jr. at around the same time he obtained the letter. He argues that these farms are separate corporate entities. Mr. Truong Sr. also points to the fact that when T & T Farm began shipping to Pacific Fresh, it was paid a signing bonus. It is argued that such a payment is inconsistent with a transferred grower's contract.
43. The Appellant contracted to purchase two adjacent properties on 224th St. in Langley in January of 1997. This deal completed in May or June of 1997. In March of 1997, Mr. Truong Sr. and his brother Mr. Truong Jr. attended at Mr. Ashe's office to discuss the letter. A banker had called Mr. Ashe to confirm that the letter applied to the new farm and was advised that the letter was for the T & T Farm at 232nd St. in Langley. Mr. Truong Sr. states Mr. Ashe apologised on that occasion for forgetting about the letter and then confirmed that he was prepared to take the mushrooms from the new farm.
44. The Appellant further relies on the evidence of Mrs. Truong. She stated that prior to entering any agreement for sale of her mushroom farm, she insisted that her husband get an assurance from Pacific Fresh so another farm could be built.

CONTRACT WITH ALL SEASONS

45. Despite the contract with Pacific Fresh, it is the Appellant's wish to sell its product to All Seasons now that it is a designated agency. The Appellant points to the letter dated September 5, 1997 as a valid contract with an existing agency. The Appellant argues that Mr. Truong Sr. and All Seasons had developed market opportunities in the United States and had a commitment from Ostrom's of Olympia, Washington to purchase its production.

46. There is no requirement in common law that a mushroom contract be in writing and therefore the fact that there is no standard grower's contract in place is not significant. The letter evidences a valid agreement on the part of All Seasons to purchase the Appellant's mushrooms. It is unfair for the Mushroom Board to impose the requirement that all contracts be in writing.
47. The Appellant concedes that the All Seasons' letter is dated one day after the Order, however, it submits that it is a contract in writing, documenting an agreement that pre-dates the Order. All Seasons had orally agreed to take the mushroom production from the Appellant. Indeed, this was the foundation of All Seasons' application for an agency licence.
48. The Appellant further submits that All Seasons was in existence prior to the Order. On August 19, 1997, the BCMB designated All Seasons an agency and ordered the Mushroom Board to issue a licence within 21 days. Despite there being a distinction between designation and granting of a licence, All Seasons was nevertheless in existence on September 4, 1997.
49. A great deal of time was spent by the Respondent and Intervenors challenging the validity of the All Seasons' letter and the authorisation signed by Mr. Daniel Do on September 2, 1997. The suggestion was made that Mr. Daniel Do was not a Director and thus the All Seasons' letter was technically flawed. The authorisation allowing Mr. Daniel Do to act on behalf of the shareholders of Do Holdings Ltd. in relation to All Seasons was executed some time after September 5, 1997 and backdated. The Appellant submits that any defect in Mr. Do's authority to act on behalf of All Seasons is irrelevant. No one has disputed that the intent of All Seasons was always to purchase the new production from the Appellant.
50. The Appellant denies the allegation that Mr. Truong Sr. exerted undue pressure on Mr. Daniel Do to sign the September 5, 1997 letter. The Appellant maintains that the relationship with Mr. Daniel Do and the other shareholders of Do Holdings Ltd. remained good throughout September and did not deteriorate until sometime in October 1997.

ARGUMENT OF RESPONDENT-EXEMPTION

CONTRACT WITH PACIFIC FRESH

51. The Respondent argues that the Appellant does not fall within the exemption to the Order. The Appellant did not have an existing written contract with an existing agency for the sale of mushrooms prior to September 4, 1997.
52. The Respondent points to the undated letter of Mr. Ashe. In this hearing, Mr. Ashe gave evidence that the letter was typed on April 3, 1995 and left undated at Mr. Truong Sr.'s request. Mr. Ashe's evidence is that this letter was intended to apply to the T & T Farm that was built in 1995 on 232nd St. in Langley.
53. Mr. Ashe gave evidence that Mr. Shaughnessy of the Royal Bank contacted him about the letter in January of 1997 (and not March of 1997 as alleged by Mr.

Truong Sr.). Mr. Ashe confirmed that the letter was not intended to apply to a new farm that was being built in 1997 rather it applied to T & T Farm.

54. The Respondent argues that this position is further supported by the evidence of Mr. Daniel Do who confirmed that Mr Truong Sr. received the Pacific Fresh letter when he was building T & T Farm. Mr. Do also gave evidence that Mr. Truong Sr. had told him of his intention to use the same letter to build two farms.

CONTRACT WITH ALL SEASONS

55. The Respondent takes the position that at the time of the Order, All Seasons was not an existing agency. It did not become an existing agency until September 10, 1997. Thus, on September 4, 1997 there was no contract between the Appellant and an existing agency.
56. The Respondent also relies on the evidence of Mr. Daniel Do that at the time he signed the September 5, 1997 letter he did so under pressure from Mr. Truong Sr. He was not a director and states he was coerced or persuaded by undue influence to sign the letter. Mr. Do also confirms that the authorisation letter was signed at the request of Mr. Truong Sr. and backdated to September 2, 1997. This was confirmed by the evidence of Ms. Van Chan, the accountant for Do Holdings Ltd., who typed the letter on the afternoon of September 5, 1997.

ARGUMENT OF MONEY'S AND PACIFIC FRESH-EXEMPTION

CONTRACT WITH PACIFIC FRESH

57. Money's and Pacific Fresh support the submissions of the Respondent. They take the position that it is absolutely absurd that the letter was intended to commit Pacific Fresh to buy the Appellant's mushroom production from a farm not yet built, of a size yet to be determined, on property not yet located; and all of which being contingent on a tenant exercising an option to purchase.
58. Money's and Pacific Fresh also rely on the evidence of Mr. Ashe that the letter was for T & T Farm and that Pacific Fresh would not bind itself to mushroom production some two years down the road.
59. They also submit that Mr. Truong Sr.'s own letter of March 25, 1997 which states "we will be joining All Seasons as a shareholder and a grower" is inconsistent with a prior binding commitment to Pacific Fresh.

60. Finally, they submit that the commitment is not a binding contract as it is not mutual and does not stipulate price. It is a letter to a bank indicating Pacific Fresh's intent to buy mushrooms. It cannot form a claim at law.

CONTRACT WITH ALL SEASONS

61. Money's and Pacific Fresh submit that the Appellant has not established a commitment with All Seasons. In addition the Appellant has not established that either it or All Seasons had developed other market opportunities. Specifically, the Appellant was not able to prove it had a commitment with the American company, Ostrom's. As All Seasons' agency licence was not granted until September 10, 1997, a commitment could not lawfully exist before that date.
62. They argue that Mr. Truong Sr. concocted the All Seasons' September 5, 1997 letter after he found out about the Order. Although it appears that Mr. Critchley actually drafted this letter, he did not recall whether the actual idea for the letter came from himself or Mr. Truong Sr.. Money's and Pacific Fresh do not impute any wrongful motive to Mr. Critchley however; they suggest Mr. Truong Sr. had an agenda that Mr. Critchley may not have been aware of.
63. In addition, Money's and Pacific Fresh point to the authorisation signed by Mr. Daniel Do on September 7, 1997 and backdated to September 2, 1997. Mr. Do was not a director of All Seasons as indicated on the authorisation. There had been no formal resignation of Mr. Hung Do as a director. Money's and Pacific Fresh argue that these are not mere technicalities and cannot be done on a verbal say so. They also point to the fact that in subsequent dealings with Mr. Daniel Do, Mr. Critchley took the position that he was not a director according to the company register and therefore would not take instructions from him.
64. Finally, Money's and Pacific Fresh adduced evidence from Ostrom's, the company that Mr. Truong Sr. relied on to support his claims of other available markets. Mr. William Street, President of Ostrom's, in his affidavit filed in these proceedings denied any commitment to accept mushrooms from All Seasons.
65. Money's and Pacific Fresh take the position that arguing that there was either a contract with Pacific Fresh or a contract with All Seasons is mutually exclusive and indicative of Mr. Truong Sr.'s attempt to work "both ends against the middle and his virtual contempt for the Mushroom Scheme".

ARGUMENT OF GROWERS FOR MONEY'S-EXEMPTION

CONTRACT WITH PACIFIC FRESH

66. The Growers argue that the two year old undated commitment letter was satisfied a few months after it was written when Pacific Fresh agreed to accept all the mushroom production from the T & T Farm. They also rely on Mr. Ashe who denied that the letter was ever intended for the farm built by the Appellant some two years later.

CONTRACT WITH ALL SEASONS

67. The Growers argue that there was no contract with All Seasons. If All Seasons did not have a licence to operate then it had no authority to enter into contracts. It had "no business doing business".
68. The Growers argue that the BCMB did not designate All Seasons an agency on August 19, 1997, but rather ordered the Mushroom Board to do so within 21 days.
69. The commitment letters that the Appellant relies on may be sufficient for a bank; however, they are completely unenforceable between the parties for several reasons. The parties were not of one mind. There appeared to be duress in executing the All Seasons letter and there was no consideration of any kind to support either letter.
70. The Growers find the designation of Mr. Daniel Do as a director of All Seasons troubling. Mr. Truong Sr. admitted on cross-examination that Mr. Daniel Do was not in fact a director of All Seasons but was authorised to act as one. The Growers also submit that to accept the assertion of Mr. Critchley that he thought Mr. Do was a director at the time the commitment letter was signed does not explain why later, on his own initiative, Mr. Critchley decided that Mr. Do was no longer a director.
71. The Growers argue that the authorisation relied on by the Appellant is invalid as it was signed after the commitment letter. In addition, the document authorises Mr. Daniel Do to act as a director of All Seasons with respect to decisions related to Do Holdings. This falls far short of authorising Mr. Do to sign commitment letters on behalf of All Seasons. The authorisation is at best limited.
72. Finally, the Growers argue that a marketing plan does not create an obligation on either All Seasons or Pacific Fresh to buy mushrooms from the Appellant; nor does it create an obligation on the Appellant to sell mushrooms.

ARGUMENT OF MR. DO-EXEMPTION

73. Mr. Do did not make any closing arguments. However, based on the evidence he led, Mr. Do believes that the Pacific Fresh letter was intended for T & T Farm and not the Appellant's farm located at 224th St.
74. Mr. Do also takes issue with the All Seasons' letter. Mr. Daniel Do gave evidence that he was not a director of All Seasons at the time the letter was signed, he was uncomfortable signing the letter and he communicated that to Mr. Critchley. In addition, he states his accountant created the authorisation dated September 2, 1997 at Mr. Truong Sr.'s request on September 5, 1997. It was not executed until September 7, 1997.
75. The position of Mr. Do appears to be that the All Seasons' letter was not a legitimate agreement to purchase the Appellant's mushrooms. Rather it was a document prepared under duress and threats of a power play between the other principals of All Seasons.

ARGUMENT OF THE APPELLANT-JURISDICTION

76. The Appellant argues that the Order is not legally valid. The British Columbia Mushroom Marketing Scheme (the “Scheme”) does not authorise the Mushroom Board to prohibit production of mushrooms for any purpose. Without proper legal authority, the Order is null and void.
77. The Appellant relies on the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996 c. 330 (the “Act”). It should be noted that the Act is a revised version of the earlier *Natural Products Marketing (BC) Act*, R.S.B.C. 1979 c. 296. The revisions do not appear to be substantive insofar as the issues on appeal are concerned. Where the old version of the Act is relied on by Counsel it will be specified as the "Old Act". The Scheme has not been recently revised.
78. The Act defines the limits of authority that may be conferred on the Mushroom Board. The extent to which the Mushroom Board has a particular power is dependent on its Scheme. Under the Act, the authority to create natural products schemes and the powers given under those schemes rests with the Lieutenant Governor in Council: s. 2. The Appellant makes particular reference to s. 2(2)(c), which states:

2(2) The Lieutenant Governor in Council may

(c) vest in those boards and commissions powers considered necessary or advisable to enable them effectively to promote, control and regulate the production, transportation, packing, storage and marketing of natural products in British Columbia and to prohibit all or part of the production, transportation, packing, storage and marketing.

79. The Appellant contrasts the provisions of the Old Act with those of the Scheme. In the Old Act, s. 2(1) provides as follows:

2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in the Province, including prohibition of that production, transportation, packing, storage and marketing in whole or in part.

80. The Scheme however, contains a different statement of purpose. Section 2.02 of the Scheme provides:

2.02 The purpose of this scheme is to promote, control and regulate, under a marketing board, subject to the direction of the Provincial Board, the transportation, packing storing and marketing of the regulated product.

81. The Scheme has deleted the reference to “production”. Since the wording is otherwise identical its omission must be interpreted as being significant. The Appellant argues that although the Act allows for prohibition of production as a purpose and intent under s. 2(1), this wording is not carried forward into the Scheme. Thus, the Appellant argues that there is no intent in the Scheme to control production.

82. The Appellant contrasts s. 13(1)(a) of the Old Act (s. 11(1)(a) of the Act) with s. 4.01(a) of the Scheme. The Act provides that the Lieutenant Governor in Council may vest in a marketing board or commission the power to regulate the time and place at which a regulated product shall be produced, packed, stored, transported or marketed; and to prohibit the production, transportation, packing, storage or marketing of a grade, quality or class of a regulated product. The wording of the Act is mirrored in the Scheme with the exception that the words “produced” and “production” are omitted.

83. The Appellant argues that the omission of production control or prohibition cannot be taken as inadvertent. It is clear that the Lieutenant Governor in Council in creating the Scheme chose not to include powers that limit or prohibit production.

84. The Appellant argues that the mirroring of “production” in s. 13(1)(b) and (c) of the Old Act (or s. 11(1)(b) of the Act) with s. 4.01(b) and (c) of the Scheme is further evidence that the earlier omission of “production” in s. 4.01(a) is intentional.

85. The Appellant suggests that the most compelling comparison is found in s. 1 of the Act which defines “marketing” as including “producing, buying, selling, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person.” Section 1.02 of the Scheme on the other hand defines “marketing” as including “buying, selling, shipping for sale or storage and offering for sale, and in respect of a natural product includes its transportation in any manner by any person.” The most notable difference between these definitions is that “producing” is removed from the Scheme. Thus, under the Act, provisions that relate to regulation of marketing can be interpreted to include the regulation of production, whereas under the Scheme they cannot.

86. The Appellant argues that the conclusion that the Mushroom Board does not have the power to prohibit production is inescapable. This conclusion is supported by the decision of Mr. Justice Gould in *British Columbia Mushroom Marketing Board v. British Columbia Marketing Board and Donald B. Coates* [1984] B.C.J. No. 362 ("Coates"). He held that "the Lieutenant Governor in Council did not intend the Mushroom Board to have the power to prohibit production of mushrooms." That being so, it was not open to the Mushroom Board to indirectly achieve the same result by denying a grower license to a producer.
87. The Appellant finally takes issue with the Mushroom Board hiding behind the thirty-day appeal period found in s. 11(1) of the Old Act (s. 8 of the Act). The Appellant did not appeal the Order but rather appealed the decision to limit its production. The Mushroom Board argues that it is too late to raise the issue of jurisdiction. The Appellant submits that the issue of a board's jurisdiction to enact an order is live on appeal and cannot be defeated by the assertion of a limitation. To give effect to this argument would be to ratify and make legal that which is patently illegal.
88. In the alternative, the Appellant argues that the BCMB has the power to extend the thirty-day limitation period and formally requests such an order.

ARGUMENT OF THE RESPONDENT-JURISDICTION

89. The Respondent argues that this appeal is not the proper avenue to challenge the validity of the Order. Section 8 (1) of the Act sets out the procedure to follow in filing an appeal. The time period in which an aggrieved person is to commence his appeal is within 30 days of receiving notice of the order.
90. The Appellant chose not to appeal the Order but rather made application under that Order to increase mushroom production. This is an appeal of that decision. The Respondent argues that the jurisdiction argument is a disguised attempt by the Appellant to pursue a remedy that is no longer available to it.
91. The Respondent further argues that there are no "special circumstances" which exist to warrant an extension from the BCMB of the time for filing an appeal. The Appellant had ample opportunity to appeal the Order but chose not to.
92. As to the argument on its merits, the Respondent argues that the Order falls within the powers granted to the Mushroom Board by the Act and Scheme. Section 4.01 of the Scheme grants to the Mushroom Board a general power to "promote, regulate and control in any respect or in all respects the ...marketing,...of the regulated product, including the prohibition of such ...marketing...,in whole or in part." In order for this power to be effective, it must include the power to regulate the amount of product that is to be marketed. The broad wording is indicative of the intent to include such a power within its meaning.

93. Section 4.01(a) of the Scheme explicitly grants the Mushroom Board the power to regulate the quantity of mushrooms that may be marketed by any person at any time.
- 4.01 The board ...shall have the following powers:
- (a) to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be transported, packed, stored or marketed by any person at any time.
94. The Respondent argues that the power to regulate the quantity of mushrooms that may be marketed must include the power to regulate the quantity of mushrooms that may be produced for marketing. There is no substantive difference between these two concepts.
95. The Mushroom Board argues that any gap in s. 4.01(a) is addressed by s. 4.01(p) of the Scheme:
- 4.01 The board ... shall have the following powers:
- (p) to make orders, each one of which shall be effective as soon as it is signed, and no publication or other notice thereof shall be required:
96. This subsection "imposes no limitation whatsoever upon the Mushroom Board's ability to make orders." The only limitation imposed on the Mushroom Board's order-making authority exists in the wording of s. 11(q) of the Act that expressly refers to the authority to control production and marketing of a regulated product. Accordingly, on proper interpretation of the relevant provisions of the Act and Scheme, the Mushroom Board has the power to make orders it considers necessary or advisable to promote, control and regulate effectively the production for marketing of regulated product.
97. The Respondent relies on the "incidental powers" doctrine found in *Re Schumacher* (1969), 70 W.W.R. 309 and *Re MacLean and Alberta Racing Commission* (1969), 8 D.L.R. (3d) 371. It is a well established rule of statutory interpretation that whatever may be fairly regarded as incidental to, or consequential upon, that which the legislature has authorised ought not, unless expressly forbidden, be held to be outside its powers (*ultra vires*).
98. The Mushroom Board also relies on s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238. If the BCMB finds an ambiguity in the order making powers of the Mushroom Board, then principles of statutory interpretation require these provisions be construed in light of the purpose of the regulatory scheme under which the Mushroom Board was created. Both the Act and Scheme must be construed as

remedial and must be given such fair, large and liberal construction to ensure the attainment of their objects.

99. Finally, the Mushroom Board relies on the Supreme Court of Canada decision of *Re Maple Lodge Farms Ltd. and Government of Canada* [1982], 2 S.C.R. 2, for the proposition that a narrow, technical construction of legislation must be avoided.
100. In summary, the Mushroom Board's argument is that the stated purpose of the Scheme is to promote, control and regulate the transportation, packing, storage and marketing of mushrooms grown in BC. It was clearly the intent of the Legislature that the Mushroom Board established under the Act and Scheme be able to carry out its mandate to control and regulate the mushroom industry in the Province. If the Mushroom Board is to effectively carry out its responsibility to establish an orderly marketing system, it must have the ability to control the quantity of the regulated product available to the market.
101. In response to the Appellant's arguments, the Respondent argues that the *Coates* decision is easily distinguishable from this case. In that case, the grower had made an application for a licence to produce mushrooms. The issue before the Court was whether the Mushroom Board had the jurisdiction to prohibit the production of mushrooms by refusing a licence.
102. In this case, the Appellant has been granted a licence to produce 100,000 lbs./month. The Order does not prohibit the production of mushrooms but rather regulates the amount of mushrooms produced for marketing purposes. Also, the Respondent argues that it is significant that the Court did not consider s. 4.01 of the Scheme in the *Coates* case, which expressly states that the Mushroom Board may prohibit the marketing of mushrooms.

ARGUMENT OF MONEY'S AND PACIFIC FRESH-JURISDICTION

103. Money's and Pacific Fresh adopt the arguments of the Respondent as to jurisdiction. They add that the BCMB should not be persuaded that the omission of the word "producing" has any significance. Section 1 of the *Interpretation Act* defines "enactment" as an Act or a regulation or a portion of an Act or regulation. "Regulation" is defined as "a regulation, order, rule,...proclamation...by or under the authority of the Lieutenant Governor in Council."
104. Section 8 of the *Interpretation Act* provides that every enactment such as the Scheme be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
105. Money's and Pacific Fresh argue that s. 13 of the *Interpretation Act* is determinative. It provides that "an expression used in a regulation has the same meaning as in the enactment authorising the regulation." The effect of this is that

the word "marketing" as used in the Scheme, has the same meaning as "marketing" in the Act and thereby includes "producing".

106. In addition, they argue that *Coates* is not determinative or binding as the arguments relating to the *Interpretation Act* were not before the Court. In addition, the Court does not deal with the express wording of the Act, which grants the authority to regulate quantity and quality. These arguments are equally applicable to the reasons of the British Columbia Court of Appeal in refusing leave to the Mushroom Board to appeal the *Coates* case.

ARGUMENT OF GROWERS FOR MONEY'S-JURISDICTION

107. The Growers agree with the Respondent's submissions that the Appellant is out of time to raise issue with the validity of the Order. They submit that the 30-day appeal period has been missed; there has been no application for an extension of time to appeal; and the letter of appeal did not set out that the Order was also being appealed.
108. As to the missed 30-day appeal period, the Growers argue that this is not a mere technicality. Society has determined that to prevent endless litigation over the same issues, appeal periods be put in place and adhered to. If a person is aggrieved by a short limitation period, the remedy is to apply for an extension.
109. In this case, the Appellant never sought an extension of the 30-day appeal period. Seven months after the Order was issued, the Appellant seeks to put the Order in issue, without requesting an extension and without evidence of special circumstances.
110. Finally, the Growers state that the Act requires a Notice of Appeal to include a statement of the matter being appealed. There is no discretion. In this case, the Appellant limited itself to appealing the decision of the Mushroom Board dated November 27, 1997 and chose not to refer to the Order.
111. The Growers argue that the Order does not prohibit the production of mushrooms. Only production for marketing is prohibited.
112. The Scheme expressly gives the Mushroom Board the authority to "determine the ...quantity ...of the regulated product that shall be... marketed by any person at any time..." By implication the Mushroom Board must be able to regulate production for marketing as how else could the Mushroom Board regulate quantity?
113. The Growers argue that there is no indication that these arguments were considered in the *Coates* case. Mr. Justice Gould commented that " all counsel submitted, respectively, various arguments which are not touched upon in these reasons, because the decisive issue can be readily isolated, and the resolution of it is inevitable from the wording of the legislation."

114. The Growers submit that the legislation is less clear than this passage would suggest. The Growers submit that the better view is that quantity cannot be controlled without controlling production.

ARGUMENT OF MR. DO-JURISDICTION

115. Mr. Do adopted the submissions of the Respondent and Money's and Pacific Fresh on the jurisdictional issue.

ARGUMENT OF THE APPELLANT-DISCRETION

116. The Appellant argues that it ought to be granted production in any event to fulfil All Seasons' business plan.
117. Although the business plan was not before the BCMB in this hearing, Mr. Truong Sr.'s evidence was that the plan specifically included 350,000 lbs./month of production from the Appellant.
118. The BCMB held a public meeting on July 23 and 24, 1997. There were various issues under review including the All Seasons application for agency designation as well as Pacific Fresh's status as an agency. The issues of supply and pricing of mushrooms in the Province were raised in this hearing and considered by the BCMB in its decision of August 19, 1997.
119. The Appellant argues that it should not be put in the position of proving a market demand outside the fact that an agency is willing to take its product as that alone is determinative of demand.
120. The Appellant argues that the production prohibitions instituted by the Mushroom Board in its Order do not allow the market to operate and do not allow the industry to grow.
121. The second prong of this argument is that fairness and equity dictate that the Appellant be permitted to follow through with the plans to build the farm for which so much time, effort, expense, worry and emotional energy has been expended.
122. Prior to September 4, 1997, all that was necessary for a grower to increase production was an arrangement with an agency. A letter from the agency that could then be used to obtain financing typically documented the arrangement. A grower could only sell his product through an agency. The Appellant argues that it is safe to assume that the agency would not agree to take the production if it did not feel capable of selling it in the market place.
123. The Order created a sweeping change in the manner in which the mushroom industry operated. The Mushroom Board recognised this and created a grandfather clause to exempt those persons who had contracts with existing agencies. The Appellant argues that even if it does not fit within the exemption, the BCMB ought to allow the application based on the specific and unique circumstances of this case.

124. The Appellant has spent in excess of \$1,200,000.00 in the construction of a new mushroom farm. A further \$895,000.00 remains unpaid as the mushroom farm sits incomplete.
125. The Appellant suggests that the earlier expenditures were made in reliance on the Pacific Fresh letter. Even if that letter was not a binding commitment, the Appellant urges this Panel to look at the state of mind of Mrs. Truong who genuinely believed that her company was protected and could build a new farm.
126. The Appellant relied on the historical practice in the mushroom industry and the letter from Pacific Fresh. The Appellant urges the BCMB to correct any injustice caused to the Appellant by the "changing of rules in the middle of the game."

ARGUMENT OF THE RESPONDENT-DISCRETION

127. The Respondent takes issue with the Appellant's position that it should not have to establish that a market exists where an agency is prepared to take its product. The very reason that a hearing is required to increase production is to ensure that an agency is willing to buy product and that the agency has ensured there is a market for that production.
128. The BCMB must ask itself on a balance of probabilities whether All Seasons will purchase the Appellant's mushrooms and whether it has a market for 350,000 lbs./month of mushrooms.
129. The Respondent argues that farmgate pricing cannot be controlled if the quantity of production to market is not regulated.
130. As to the issue of fairness, the Respondent argues that the Appellant was given the ability to sell 100,000 lbs./month. of mushrooms in its November 27, 1997 decision. In determining what is fair, the Respondent looks to the evidence of the other growers. Mr. David Luu, a mushroom grower, stated that his family could survive on 50,000 lbs./month (600,000 lbs./year). Mr. Verhagen of Money's gave evidence that 30-35% of producers in BC produce in excess of 1,000,000 lbs./year of mushrooms while approximately half of all producers grow less than 500,000 lbs./year.
131. The Respondent made every effort to be fair to the Appellant and to balance its interests against those of the other growers and the industry at large.

ARGUMENT OF MONEY'S AND PACIFIC FRESH-DISCRETION

132. Money's and Pacific Fresh take the position that the Appellant has not demonstrated a market for its proposed production. There is no agency to purchase the production as All Seasons is in disarray.
133. The only evidence before the BCMB is that there is no market for additional mushroom production in BC. Unless new markets are developed, increased production will adversely affect the production and opportunities of existing growers. The market conditions have significantly deteriorated since the July public hearing and the November decision of the Mushroom Board.
134. Money's and Pacific Fresh dispute the Appellant's reliance on the Pacific Fresh letter. There is no evidence of any grower contract with an agency. Likewise there is no evidence that the rules have changed for the Appellant. The Appellant never had a grower contract with any agency; all it had was an expectation based on Mr. Truong Sr.'s role as a director of All Seasons. The expectation was not dashed by the Order but rather by the collapse of the goodwill of the principals.
135. They further dispute the two grounds upon which the Appellant seeks equitable relief, namely reliance on the historical practice in the industry and the letter from Pacific Fresh. Money's and Pacific Fresh argue that the Appellant has not shown the existence of an arrangement between itself and an agency. Nor has it shown reliance on the Pacific Fresh letter.
136. Money's and Pacific Fresh dismiss the Appellant's complaint about "changing rules in the middle of the game" and argue that it cannot be a ground for allowing the appeal as the Order is not under appeal.

ARGUMENT OF GROWERS FOR MONEY'S-DISCRETION

137. The Growers argue that as no evidence was led regarding the All Seasons business plan, there is no basis to allow the appeal on this ground. The Growers caution the BCMB against using evidence from a previous hearing. Its use is dubious, as it has not been subject to cross-examination. Accordingly, the Growers argue that there is no All Seasons marketing plan for the purposes of this appeal.
138. The evidence of parties who had dealings with the Appellant show that it was well aware of the risk it was taking in this new venture. The Appellant, or rather Mr. Truong Sr. was warned of the risks and chose to ignore them. The Growers dispute that the Appellant relied on the Mushroom Board, the BCMB or any agency. If the Appellant feels aggrieved by any of these parties that is a matter for the courts.
139. The Growers do not believe the Appellant as "the squeaky wheel" deserves grease at the expense of those growers who have quietly waited for years to increase

production. The Growers request that an equitable system be put in place with recognition of the fact that older farms deserve some priority.

140. The Growers submit that there is nothing unique or compelling in this case. Mr. Truong Sr. demands production capacity at the expense of other growers in the Province. These are the demands of a developer in the business of selling mushroom farms and not of a mushroom grower interested in the organised, controlled and regulated sale of mushrooms.

ARGUMENT OF MR. DO-DISCRETION

141. Mr. Do did not make any submissions on the issue of discretion and chose to rely on the submissions of the Respondent and other Intervenors.

FINDINGS OF THE BCMB

EXEMPTION

142. The logical first question is whether the Appellant is entitled to an exemption from the Order. If the Appellant is exempted from the order, it becomes unnecessary to address the issue of jurisdiction in this appeal.
143. The Appellant argues that it either had a valid contract with Pacific Fresh or a valid contract with All Seasons. The BCMB will consider each argument in turn.

CONTRACT WITH PACIFIC FRESH

144. The BCMB accepts the evidence of Mr. Ashe that the Pacific Fresh letter was written on April 3, 1995 and not some time in May or June as alleged by Mr. Truong Sr. in this hearing or in July as he alleged in the hearing before the Mushroom Board. There is a dispute about whether this letter was to apply to Truong Mushroom Farm Ltd. or to T & T Farm. Mr. Truong Sr. was the lead man for both operations and thus, the confusion is understandable.
145. On this issue as in many of the issues on appeal there was a great divergence in the evidence of Mr. Truong Sr. and the other parties. Where possible the BCMB has attempted to seek independent factual confirmation in order to try and determine what was or was not intended by certain actions, statements or documents. The obvious falling out between the principals of All Seasons has complicated this task. On more than one occasion the hearing escalated into a heated dispute between the Dos on one hand and the Truongs and Trinh on the other. The BCMB is concerned that the obvious animosity of the principals may have coloured their recollection of certain events.
146. Mr. Ashe states that his letter applied to the farm that Mr. Truong Sr. and Mr. Truong Jr. were planning to build. Mr. Ashe was aware they were in the process of

acquiring land and equipment in the same time frame as his letter and that is why he referred to the "new proposed location". The letter was for bank financing purposes. Mr. Ashe's commitment to "Truong's Mushrooms" was not intended to refer to the Appellant. Rather it was nothing more than a commitment to Mr. Truong Sr. that Pacific Fresh would purchase mushrooms from his new location. Mr. Ashe says that against his better judgement and at Mr. Truong Sr.'s request, he did not date the letter.

147. Mr. Ashe believed that Mr. Truong Sr. was "Truong's Mushrooms" as he was the contact person Pacific Fresh routinely dealt with. The equipment purchase for T & T Farm supports that Mr. Truong Sr. held himself out in this manner. Mr. Verhagen, who in 1995 was employed by Double T Equipment, dealt primarily with Mr. Truong Sr. The two quotes given to Mr. Truong Sr. were in the name of Truong Mushrooms of 80th Ave. in Langley. Mr. Verhagen did not recall the name T & T Mushroom Farm and he had already left that dealership when the equipment was ultimately shipped in October 1995 in the name of T & T Mushroom Farms Ltd.
148. Mr. Ashe further states that at the time he wrote his letter he was not aware of the Appellant's intention to sell its mushroom operation. On April 3, 1995 he did not know that the Truong's intended to enter into an option to purchase with the Trinhs, which they did on June 14, 1995. Mr. Ashe was adamant that Pacific Fresh could not make an indefinite commitment to purchase an unknown quantity of mushrooms at any time over a two-year period. He could not tie Pacific Fresh to such an uncertainty.
149. The evidence of Mr. Daniel Do supports Mr. Ashe's version of events. His evidence was that Mr. Truong Sr. had told him of his intention to use the Pacific Fresh letter twice, once for the T & T Farm in 1995 and again in 1997. It was Mr. Do's evidence that Mr. Truong Sr. knew this was a risky endeavour.
150. Mr. Truong Sr. vehemently denies that the Pacific Fresh letter was ever intended to apply to the T & T Farm. He states that the two operations are completely separate. He does not have any ownership interest in Truong Mushroom Farm Ltd., rather it is wholly owned by his wife. Mrs. Truong's evidence was that she told her husband to get the letter of commitment from Pacific Fresh to ensure that she could build a new farm.
151. Mr. Truong Sr.'s evidence was that Mr. Ashe chose not to date the letter. Mr. Ashe knew in 1995 that the letter applied to the Appellant and knew it was going to build a farm large enough to produce 350,000 lbs./month of mushrooms.
152. Mr. Truong Sr. proved to have a good understanding of company law during this hearing. He was very careful to say that Truong Mushroom Farm Ltd. was his wife's company. It is readily apparent from the evidence in this hearing that Mr.

Truong is the operating mind of Truong Mushroom Farm Ltd. regardless of what the corporate register reveals.

153. Mrs. Truong is not convincing, as her evidence in response to a question from the Panel was that she did not know anything about the mushroom farm (i.e. her company), as she was busy at home with her family. Mrs. Truong's credibility was strained when she stated under cross-examination that she did not know anything about the T & T Farm, as that was her husband's business with his brother. She even denied knowing that her husband and his brother were building the T & T Farm.
154. The BCMB does not find Mrs. Truong a credible witness. It is difficult to believe that she knew nothing about the T & T Farm and yet was sufficiently involved with the business to insist on a letter of assurance from Pacific Fresh so that she could build a new farm when the Trinh's exercised the option to purchase.
155. This conclusion is supported by Mr. Truong Sr.'s letter of March 25, 1997 to the Mushroom Board wherein he stated that the Appellant. "will be joining All Seasons as a shareholder and a grower". If such a declaration is to be given any meaning either the Appellant did not have a prior agreement with Pacific Fresh or it was perfectly content to do Pacific Fresh out of its rightful production. Neither interpretation assists the Appellant.
156. The Mushroom Board in its decision of November 27, 1997 found that while Mr. Truong Sr. was of the understanding that he had an agreement with Pacific Fresh, Mr. Ashe's evidence had persuaded it that there was no actual agreement in place. The evidence in this hearing was more complete than in the earlier hearing and as such the BCMB finds that Mr. Truong Sr. did not have an honestly held belief of an actual agreement with Pacific Fresh.
157. On the balance of the evidence, the BCMB finds that the Pacific Fresh letter was never intended to apply to the Appellant's mushroom farm on 224th St.. It is more likely that the letter applied to the T & T Farm. Accordingly, the BCMB finds the Appellant has not proven that it had a prior existing contract with Pacific Fresh.

CONTRACT WITH ALL SEASONS

158. The Appellant's alternate argument is that at the time of the Order, it had an existing contract with All Seasons. This contract is evidenced by a letter from All Seasons agreeing to buy all of the mushrooms produced by Truong Mushroom Farm Ltd. and signed by Daniel Do, Director. There is no suggestion that the Appellant and All Seasons are at arm's length. Mr Truong Sr. is the operating mind of the Appellant and clearly a driving force behind All Seasons.
159. The Mushroom Board in its November 27, 1997 decision found that the Appellant's letter from All Seasons did not form a written contract with an existing agency such

that it was exempted from the Order. This decision was based on the fact that All Seasons was not yet an agency and the letter was not a contract. There was no evidence before the Mushroom Board that documents were backdated or obtained through duress or undue pressure. It is difficult to understand why if this were the case such issues were not raised before the Mushroom Board.

160. The evidence of Mr. Do was disturbing. There were allegations that Mr. Truong Sr. had threatened Mr. Do and his family. There was also evidence from Mr. Do that Mr. Truong Sr. was attempting a power play with the other principal of All Seasons to wrest control from the Do family. Mr. Truong Sr. denied these allegations.
161. It is interesting to note that during a particularly heated exchange that occurred while Mr. Truong was being cross-examined by Mr. Chia, Mr. Truong Sr. appeared to threaten Mr. Chia. Mr. Truong Sr.'s accent made understanding him difficult especially when he became angry. Mr. Critchley's interpretation of the exchange was that it was not a threat but rather a "cultural thing".
162. In any event, the true state of affairs is difficult if not impossible for the BCMB to determine. However, there is no doubt that Mr. Truong Sr. is a very powerful man in his community. He has brought a number of people into the mushroom industry; the Trinh and Do families are two such examples.
163. Up until some time in October or November of 1997, it appears that the principals of All Seasons with perhaps the exception of marketing director, Mr. Martin Chia, were all on side. Mr. Critchley's evidence was that he did not observe any unwillingness or duress on the part of Mr. Daniel Do at the time the letter was signed. The BCMB finds his evidence persuasive. However, this is not determinative of the issue of the validity of the All Seasons contract.
164. It is more likely that at the time the authorisation was signed the Do family participated willingly in the backdating of documents. They stood to benefit from All Seasons establishing itself as an agency. The Do family did not take issue with the All Seasons letter until the breakdown in their relationship with Mr. Truong Sr. and the alleged "power play" by the Truongs and Trinh. If the Dos were being ousted from their position in All Seasons it is understandable why they no longer wish Mr. Truong Sr. to have any increased production, as they would not see a benefit.
165. The conduct of the Dos and the Truongs causes the BCMB considerable concern about the legitimacy of All Seasons' letter.
166. The Appellant argues that the letter merely confirms an arrangement that predated the Order, which arrangement was known and approved of by the BCMB in its hearing of July 18 and 19, 1997. The BCMB rejects this argument. It was not readily apparent to the BCMB that Mr. Truong's production was new and amounting to 8% of the production of this Province. The BCMB was not asked to conclude there was sufficient market to absorb the Appellant's increased production, rather the concern was whether the market justified a new agency.

167. The Appellant argues that the fact that an agency is willing to take its mushrooms is alone determinative of demand. The BCMB disagrees with this proposition in the case of Mr. Truong Sr., as he is not solely a mushroom grower. Rather history confirms that he is also a mushroom farm developer. A mushroom farm without a contract to produce mushrooms is not a saleable commodity. However, a mushroom farm with a contract to produce 350,000 lbs./month is a considerable asset as a going concern. Mr. Truong Sr. as the operating mind of the Appellant and the driving force behind All Seasons stood to benefit by having a growers contract for reasons completely independent of whether there was a market for the mushrooms.
168. Apart from what Mr. Truong Sr. stood to gain, All Seasons' goal was to set up an agency. To assert a presence in the market, it may very well commit to production and try and move into the markets of its competitors. While this is the nature of business, it can not be inferred that an agreement to take mushrooms in the case of a new agency is indicative of a market for that production. For the forgoing reasons, the BCMB is not prepared to assume just because All Seasons wrote a letter agreeing to take the Appellant's production that there was a market for that production.
169. It is apparent from the evidence led at this hearing that circumstances have changed drastically since the public hearings. Apart from Mr. Truong Sr.'s evidence that there was a market for increased production, there was no other evidence led to support the existence of such a market. In fact, the evidence of Money's and Ostrom's is that the market is currently saturated. The growers who were called to give evidence supported this position. Accordingly, the BCMB is not satisfied that a market exists at this time for increased production sought by the Appellant.
170. The BCMB finds that at the time of the Order, All Seasons was an existing agency. Even though the Mushroom Board chose not to issue the agency licence until September 10, 1997 the BCMB had reviewed All Seasons' application and found it warranted an agency licence. It would be unfair to All Seasons to hold otherwise.
171. However, the letter of commitment is a separate issue altogether. The letter is not a contract in writing sufficient to allow the Appellant to fall within the exemption to the Order. The BCMB cannot infer that All Seasons had a market for the Appellant's production. There may be many reasons why All Seasons and Mr. Truong Sr. wanted increased production independent of an actual market.
172. Finally, the circumstances surrounding the execution of the letter and authorisation lead the BCMB to conclude that the principals of All Seasons were trying to craft an agreement to get around the Order. Accordingly, the BCMB finds that the

Appellant did not have an existing contract with All Seasons. Thus, the Appellant does not fall within the exemption to the Order.

JURISDICTION

173. The next issue raised was whether the Order is beyond the legal authority of the Mushroom Board. The Respondent and the Intervenors have not persuaded the BCMB that we are precluded from reviewing the legal validity of the Order despite the fact that the Order is not under appeal. The issue of jurisdiction is live on this appeal. Had the Appellant sought to increase production several years after the Order was passed, it would still be able to raise the issue of the jurisdiction of the Mushroom Board to enact the Order.

174. The Appellant argued that the Order was an attempt by the Mushroom Board to control production, something that the Lieutenant Governor in Council specifically did not empower the Mushroom Board to do. This is a compelling argument.

175. In a review of the Act and Scheme it is noteworthy that while s. 2(2)(c) and s. 11 of the Act specifically distinguish between the activities of "production, transportation, packing, storage and marketing", the definition of marketing in s. 1 of the Act appears to embrace all of these activities:

"marketing" includes producing, buying, selling, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person.

176. The Legislature evidently considered it important not only to specifically capture all these activities in the definition of "marketing", but also to make specific and separate reference to each where referring to the Lieutenant Governor in Council's authority to create and empower commodity boards. It is also significant that s. 2(2)(c) and s. 11 specifically distinguish between the "regulation" of production and the "prohibition" of production, reflecting not only that "production" is something unique, but that the power can be granted both to regulate and/or prohibit production.

177. When one reads the definition of "marketing" in s. 1 of the Scheme in conjunction with s. 4.01 of the Scheme their language tracks perfectly with the Act's definition, with the conspicuous exception of the word "production":

"marketing" includes buying, selling, shipping for sale or storage and offering for sale, and in respect of a natural product includes its transportation in any manner by any person.

178. Section 4.01 provides as follows:

The Board shall have all the powers of a body corporate, and shall have the power within the Province to promote, regulate and control in any respect or in all respects the transportation, packing storing and marketing, or any of them, of the regulated product,

including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and without limiting the generality thereof shall have the following powers:

(a) to regulate the time and place at which and to designate the agency through which any regulated product shall be packed, stored or marketed; to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be transported, packed stored or marketed by any person at any time; and to prohibit the transportation, packing, storing or marketing, in whole or in part, of any grade, quality or class of any regulated product and determine the charges that may be made for its services by a designated agency.

179. In contrast to the Act which expressly includes "production" in the definition of "marketing" and specifically mentions "production" in the list of powers that may be conferred on marketing boards, the Scheme does neither. The word "production" is noticeably absent from the definition of "marketing" and from the list of activities that s. 4.01 allows the Mushroom Board to regulate and prohibit.
180. This is in sharp contrast to the other schemes such as the British Columbia Broiler Hatching Egg Scheme, British Columbia Milk Marketing Regulation and the British Columbia Turkey Marketing Scheme. This comparison only serves to reinforce the significance of the exclusion of "production" from the Scheme. Any interpretation of the Scheme must fairly acknowledge this conspicuous and repeated omission.
181. That the omission of "production" is deliberate is supported by the juxtaposition of s. 2(1) of the Act with s. 2.02 of the Scheme. The purpose of the Act is "to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing." The purpose of the Scheme on the other hand is "to promote, control and regulate, under a marketing board, subject to the direction of the Provincial Board, the transportation, packing, storing and marketing of the regulated product".
182. That this was an intentional omission is also supported by provisions of the Scheme which expressly recognise the reality of mushroom production while carefully avoiding any granting of power on the Mushroom Board to control the activity of production. The definition of "producer", s. 2.01, s. 4.01(b-d), (f), s. 5.01 and s. 5.02 are all examples of provisions which recognise the reality of production by producers. The very fact that the Scheme recognises those engaged in production and specifically gives the Mushroom Board other powers over those engaged in production, makes the Scheme's clear refusal to acknowledge the power to control the activity of production all the more significant. It is therefore inescapable that while producers have been recognised under the Scheme and have certain rights and are subject to certain Mushroom Board powers, the Mushroom Board was not intended to have the authority to regulate or prohibit the activity of production itself.

183. This was precisely the conclusion reached by Mr. Justice Gould in the *Coates* decision. He held that "the Lieutenant Governor in Council did not intend the Mushroom Board to have the power to prohibit production of mushrooms". It is also significant that the Court of Appeal refused to grant the Mushroom Board leave to appeal the decision. In those reasons the Court held:
- Secondly, it seems to me that there is not sufficient merit in the argument of the Mushroom Board that marketing includes the power to refuse licences to allow the matter to go ahead. If the health and financial liability of the mushroom industry in the province is in jeopardy by reason of the lack of power on the part of the Mushroom Board to control production by refusing licences, it seems to me that that problem can be more appropriately addressed at the executive level or ministerial level of government.
184. Given that the BCMB was not referred to any relevant change in the Scheme in the 13 years since the *Coates* decisions that would alter their result, the BCMB finds the attempts to distinguish *Coates* unpersuasive.
185. The Mushroom Board contends that it does indeed have the authority to control the quantity of mushrooms produced for marketing purposes and relies on its power to regulate the quantity of mushrooms that may be marketed (s. 4.01(a)). It asserts that "the power to regulate the quantity of mushrooms which may be marketed must include the power to regulate the quantity of mushrooms which may be produced for marketing. There is no substantive distinction between these two concepts."
186. This submission flies in the face of the clear statutory distinction between the terms "production" and "marketing". This distinction is repeated in the Act and in many schemes that authorise production control. It is a distinction reflected in the Mushroom Scheme itself. The significance of this distinction has been noted and upheld by the Courts. Thus, while we are sympathetic to the Mushroom Board's assertions regarding the importance of orderly marketing, the law does not entitle the Mushroom Board to use production control as a means to achieve that end.
187. Given that the Order purports to regulate production, it is beyond the legal authority of the Mushroom Board. Short of an amendment to the Scheme, the Mushroom Board's regulatory focus must be on the activity of marketing, in conjunction with the use of the other powers under s. 4.01. Presumably, regulations which are lawfully focused on marketing will allow producers to make their own decisions about how much mushroom production is appropriate in their individual circumstances.
188. The Mushroom Board argues that any gap in its general powers in s. 4.01(a) is addressed by s. 4.01(p) of the Scheme which allows the Mushroom Board "to make orders, each of which shall be effective as soon as it is signed, and no publication or other notice thereof shall be required."

189. The Mushroom Board asserts that this subsection "imposes no limitation whatsoever upon the Mushroom Board's ability to make orders". This submission is highly unpersuasive. Subsection (p) simply confirms that the Mushroom Board may issue orders that do not require formalities such as notice and publication before becoming effective. Its language, context and structure do not suggest an intent to speak to the substance of order-making powers. Even less reasonable is the Mushroom Board's assertion that the words "to make orders" imports all the powers of s. 11 (q), thereby rendering the remainder of s. 4.01, including the preface to the section, effectively irrelevant, circumventing all the other clear indicators of legislative intent to exclude production control.
190. The Mushroom Board seeks to rely on the "incidental powers" doctrine, the *Interpretation Act* (s.8), the inclusive definition of marketing the Scheme and the proposition enunciated in the *Maple Lodge Farms Ltd.* case that too narrow, technical construction of marketing statutes should be avoided. None of these principles can be used to legislate powers that have been clearly excluded from legislation. To do that would breach the very principles relied on by the Mushroom Board. Expediency cannot dictate statutory interpretation. The BCMB's duty is to give the Scheme such fair, large and liberal interpretation as best ensures the attainments of its objects. The objects of the Scheme do not include production control.
191. The BCMB recognises the concerns that led the Mushroom Board to enact the Order. The market appears saturated and any growth in the industry must be monitored and fairly distributed amongst the growers. It is within the power of the Mushroom Board to achieve its objective of orderly marketing. Indeed, it recognises that other means exist by which orderly marketing can be achieved when it submits that production control is "simply another mechanism by which the Mushroom Board seeks to establish an orderly marketing system and to prevent oversupply." It is those other means that the Mushroom Board must focus on until such time as the Scheme is amended. The BCMB is not prepared to draft an alternate Order however Counsel for the Growers suggested possible wordings that may be within the legal authority of the Mushroom Board.

DISCRETION

192. Given that the BCMB has determined that the Order is outside the legal authority of the Mushroom Board, we do not need to consider the issue of discretion. However, given the findings of fact regarding the credibility of Mr. Truong Sr. and the crafting of the All Seasons agreement, the BCMB would not have exercised its discretion in favour of the Appellant in any event.
193. A few comments about the status of All Seasons are also warranted.
194. Had the Appellant been given the production it sought, the BCMB is not satisfied that All Seasons could resolve its internal conflicts and operate as an agency. In

addition, we are not convinced that a market exists for what amounts to an 8% increase in provincial production. It appears that the Appellant has attempted to access a huge share of market production at the expense of a number of long time mushroom growers. It is not fair to allow the Appellant to proceed with its plans on the backs of other growers who appear to be struggling to survive.

195. The BCMB made a decision in August of 1997 that the mushroom industry would benefit from another agency. With the merger of Money's and Pacific Fresh, the second agency has been in name only. All Seasons made a good case for agency status and the BCMB supported it in its quest. However, it appears that All Seasons is crumbling from the inside. There is outright hostility between the principals. It is difficult to say if or how much the Order led to this falling out.
196. It may be that All Seasons can resurrect itself and the BCMB feels it should be given that opportunity. Accordingly, the BCMB orders that All Seasons be given a period of 90 days in which to demonstrate that it can operate as a viable agency with an actual market.
197. If after 90 days All Seasons cannot demonstrate its viability, then the Mushroom Board should revoke its agency licence. The Mushroom Board is free to entertain other requests for agency status in the meantime. However, should another candidate apply, the Mushroom Board is ordered to hold a public hearing to deal with the application. Notice of the application should be given to all growers and agencies, including All Seasons.

DECISION

198. The BCMB finds that the Appellant does not fall within the exemption to the Order of September 4, 1997.
199. The BCMB finds that the Mushroom Board did not have the legal authority to pass the Order. Accordingly, the Order is struck down.
200. The BCMB orders the Mushroom Board to give All Seasons a period of 90 days from May 7, 1998 to prove that it can operate as a viable agency. The Mushroom Board may entertain requests from other potential agencies in the meantime. Such requests shall be considered in a public hearing with notice to all existing agencies, including All Seasons.
201. The BCMB orders that no costs are payable in this appeal.

RECOMMENDATION

202. Viable competition between agencies is needed in the mushroom industry. The Mushroom Board in consultation with its Industry Advisory Committee is

encouraged to set up a process by which a new agency can begin to operate and facilitate movement of growers between agencies.

Dated at Victoria, British Columbia this 22nd day of May, 1998.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine Elsaesser, Vice Chair