IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A FEBRUARY 22, 2000 DECISION
CONCERNING THE MARKETING OF VEGETABLES IN EXPORT TRADE

BETWEEN:

BC VEGETABLE GREENHOUSE I, LP

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC HOT HOUSE FOODS INC.
BC HOT HOUSE GROWERS' ASSOCIATION
LOWER MAINLAND VEGETABLE DISTRIBUTORS INC.
BRITISH COLUMBIA COUNCIL OF MARKETING BOARDS

INTERVENORS

PRELIMINARY ISSUES
DECISION

APPEARANCES:

For the British Columbia Marketing Board	Mr. Ross Husdon, Chair Ms. Christine J. Elsaesser, Vice Chair Mr. Hamish Bruce, Member Mr. Richard Bullock, Member
For the Appellant (by written submission)	Mr. Christopher Harvey, QC, Counsel Mr. Andrew P. Jackson, Counsel
For the Respondent (by written submission)	Ms. Maria Morellato, Counsel
For the Intervenors BC Hot House Foods Inc. and BC Hot House Growers' Association (by written submission)	Mr. Steven R. Stark, Counsel

BACKGROUND

1. The Appellant, BC Vegetable Greenhouse I, LP, is an American company operating in British Columbia that grows tomatoes in greenhouses in the Delta area. On March 22, 2000, it filed an appeal of a February 22, 2000 letter of the British Columbia Vegetable Marketing Commission (the "Commission") advising that, as a result of delegated authority under the federal *Agricultural Products Marketing Act*, "your client is subject to the authority of the Commission and must act in compliance with the enabling legislation, regulations and policies of the Commission and its agencies."

2. On June 2, 2000, the British Columbia Marketing Board (the "BCMB") issued written reasons in the adjournment application in this appeal. As part of its decision, the BCMB ordered that the following preliminary issues be dealt with by written submission in advance of the appeal.

PRELIMINARY ISSUES

3. Whether, in light of the May 4, 2000 Order-in-Council 631 ("OIC 631"), the Appellant's appeal challenging the Commission's jurisdiction to regulate "export production" should be dismissed.

4. Whether the BCMB has jurisdiction to consider and apply the North American Free Trade Agreement ("NAFTA") in deciding whether the Commission has jurisdiction to regulate "export" production.

5. Whether, in the absence of a determination by the Commission on the "fairness" issues raised by the Appellants, there is even a "decision" on this issue for the Appellant to appeal to the BCMB under s. 8(1) of the *Natural Products Marketing (BC) Act* (the "A*ct"*).

WRITTEN SUBMISSIONS

6. The Panel has received the following written submissions:

   a) June 15, 2000 from Counsel for BC Hot House Foods Inc. ("BC Hot House") and the BC Hot House Growers' Association (the "Growers' Association");
   b) June 16, 2000 from Counsel for the Commission;
   c) June 23, 2000 from Counsel for the Appellant;
   d) supplementary response dated June 29, 2000 from Counsel for the Appellant;
   e) July 10, 2000 from Counsel for the Commission; and
   f) July 10, 2000 from Counsel for BC Hot House and the Growers' Association.

DECISION ON PRELIMINARY ISSUES

7. The Appellant raised the argument that by the BCMB considering certain preliminary issues by written submissions, it is being denied its right to a hearing under the *Act*. In administrative law, a hearing may embrace either an oral or written hearing. The only requirement in the *Act* is that the hearing be public. The *Act* does not forbid a written submissions process where the BCMB considers it just, fair and economical to proceed in that fashion. While this procedure may be unusual in practice, the BCMB is entitled to hold a written hearing, provided it is public.

8. As was noted in paragraph 17 of our earlier decision in the adjournment application, the preliminary issues raised by the Respondent and Intervenors are legal in nature and do not require the hearing of evidence:

> In our opinion, it is in the interests of justice for the BCMB to consider the preliminary issues raised by the Commission and BC Hot House. Resolution of these issues does not depend on evidence. Determining these issues early will help the parties to know where they stand and what, if any, case they have to advance or meet in August. These objections will be advanced no matter what. To wait until August to address them will only delay the BCMB's consideration of these issues, and unnecessarily prolong the August hearing.

CHALLENGE TO THE COMMISSION'S JURISDICTION

9. The first preliminary issue is whether this appeal should be dismissed insofar as the Appellant purports to maintain its challenge to the Commission's jurisdiction to assert regulatory authority over the Appellant if it chooses to engage exclusively in production for export to the United States.

10. A review of the chronology is important. On February 2, 2000, the Appellant wrote to the Commission advising that it was "interested in the <u>possibility</u> of marketing its entire production outside the province of British Columbia without the involvement in any way of BCHHFI." [emphasis in original] The Appellant requested confirmation from the Commission that it has the legal capacity, "if it so chooses", to engage in the production of greenhouse tomatoes solely for the export market, without being subject to the statutory powers of regulation devolved upon BC Hot House through the applicable legislation. The Appellant did not disclose any specific or concrete plan or timetable to engage in such marketing.

11. On February 22, 2000, the Commission replied, setting out the applicable federal enactments and the Supreme Court of Canada's decision in *Reference Re Agricultural Products Marketing Act* (1978), 84 DLR (3d) 257. It went on to advise that the Commission has the authority to regulate the marketing of vegetables in inter-provincial and export trade with respect to vegetables grown in BC and that the Appellant is subject to this authority. While confirming its own authority, the Commission did not comment, one way or the other, on whether any

particular plan or proposal for export marketing would have to take place through the auspices of BC Hot House, which is an agency appointed pursuant to the *British Columbia Vegetable Scheme*, BC Reg. 96/80. Under section 10(4) of the *Act*, the Commission has, subject to the BCMB's approval, the statutory discretion to appoint one or more agents through which the marketing of regulated products can take place.

12. On March 22, 2000, the Appellant appealed the Commission's February 22, 2000 decision, stating that "[w]e believe that the regulatory powers asserted by the Commission are invalid as against [BC Vegetable Greenhouse I, LP]".

13. Section 8(1) of the *Act* reads as follows:

> 8(1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal….

14. It is clear from the foregoing that the Appellant's appeal was filed and founded on an objection to any assertion by the Commission of regulatory power against it if the Appellant chooses sometime in the future to devote all its production to United States markets.

15. The Appellant's March 22 appeal from the February 22 decision was premised on the argument that the Commission had no authority to accept or utilise delegated federal authority to control exports in the absence of a provincial order-in-council under s. 5 of the *Act* allowing it to exercise federal powers.

16. On May 4, 2000, OIC 631 was enacted giving the Commission authority to accept and exercise the federal delegation of power to control inter-provincial and export trade, contained in the *British Columbia Vegetable Order*, SOR/81-49 passed pursuant to the *Agricultural Products Marketing Act*.

17. In the Panel's opinion, OIC 631 is conclusive in respect of the appeal filed by the Appellant against the Commission's jurisdiction. By virtue of the federal and provincial legal authority in place effective May 4, 2000, the Commission has clear and unequivocal jurisdiction to regulate production of vegetables in British Columbia for any purpose and the marketing of those vegetables both within the province and for export trade. The validity of such delegations have been conclusively upheld in the *Reference re Agricultural Products Marketing Act* (1978), supra.

18. In the Panel's opinion, there is no practical purpose in the BCMB considering the accuracy of the Commission's view expressed as of February 22, 2000, since that letter only dealt with the *possibility* of marketing for export, not actual exporting that had occurred.

19. The Panel agrees with Counsel for BC Hot House that whether or not the Commission was correct at that time in asserting the right to control export trade—a point on which we need express no opinion—it is based on a legal reality which has changed. Any deficiencies in the legislative enactments identified by the Appellant in the pre-hearing conferences have been rectified in respect of the possible future marketing by the Appellant exclusively to the United States.

20. The issue of whether the Commission had the authority to regulate export production pre-OIC 631 is irrelevant in any practical sense, since the appeal is really about proposed *future* marketing of greenhouse tomatoes for export. The issue of retroactivity does not arise in these circumstances, as the Appellant had not been marketing export production when it inquired about the possibility of doing so.

21. In short, insofar as this appeal is about the Commission's jurisdiction, OIC 631 is legally conclusive and dispositive of the appeal as framed. To proceed with an inquiry into whether the Commission possessed jurisdiction at the time it wrote its letter—when the issue concerned only the possibility of future marketing by the Appellant—is neither necessary nor appropriate.

FAIRNESS

22. After filing its appeal against the Commission's February 22 letter, the Appellant sought to raise an entirely new issue—namely, that being forced to market through BC Hot House creates a significant interference with free trade. The Appellant maintains that it is unrealistic to place these issues of "fairness"—which term is not used in the administrative law sense of fair procedure but rather as an objection to the wisdom of marketing through BC Hot House—before the Commission, as it is unrealistic to assume that the Commission would allow export outside its statutory regime.

23. The Appellant argues that this is similar to the proposition discussed in *Air Canada v. Turner* (1984) 57 BCLR 322 (SC). In response to the argument that a party seeking judicial review of the imposition of a taxation regime should have appealed to the same Minister who enforced it, the Court stated this suggestion was "reminiscent of the spider's invitation to the fly or perhaps the invitation of the wolf to Little Red Riding Hood".

24. Section 8 of the *Act* defines the scope of the BCMB's appellate authority. Where a person is aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission, that person may appeal to the BCMB. In this case, the Appellant's original letter sought confirmation of the Commission's jurisdiction. Now the Appellant seeks to add entirely new grounds, arguing that as it is unrealistic to assume that the Commission will consider any challenge to the universality of its marketing regime, it has in effect made a decision that the

Appellant must market through BC Hot House. The Panel disagrees. How discretion is exercised is a very different question than whether it exists in the first place.

25. While the Commission has confirmed its own jurisdiction to regulate the Appellant, the Commission has not made any "order, decision or determination" with respect to any request by the Appellant to market its product other than through BC Hot House as the marketing agency. The Panel is not prepared to presume how the Commission would have answered had the Appellant chosen to ask the question. It remains open to the Commission to consider such a request and hear any evidence the Appellant wishes to call in support of its position. The Commission has discretion under the *Act* to designate the Appellant as an agency and allow it to export its own product. Alternatively, it may deny the request or it may choose a remedy somewhere in between. There is no basis to conclude that the Commission will consider any such application in anything other than total good faith. In the absence of a decision arising from a plan or proposal put forward by the Appellant which the Commission has had an opportunity to consider, it is contrary to the *Act* to allow an appeal to proceed since there is no "order, decision or determination" that has been appealed.

26. To do otherwise and allow an appeal in the absence of a decision by the Commission, in the Panel's opinion, places the Commission in the invidious position of defending a decision it has not made and inventing defences rather than exercising its adjudicative discretion in the first instance. The Legislature has wisely foreclosed such a state of affairs by conferring appellate jurisdiction on the BCMB only where there is a pre-existing order, decision or determination by a marketing board or commission.

NAFTA ARGUMENTS

27. In arguing that there continues to be a live controversy between the parties despite the enactment of OIC 631, the Appellant argues that the question of whether it was entitled to export its production free of the Commission's marketing controls on February 22, 2000 is relevant to the investor protection provisions of NAFTA. The Appellant also appears to make the more general argument that, notwithstanding federal and provincial legislation, the exercise of any authority over proposed export operations would contravene NAFTA and should not be allowed.

28. The Appellant argues that as the BCMB has jurisdiction to consider and decide points of law, NAFTA as part of international law is part of the applicable body of law that the BCMB may consider. The Appellant asserts that the BCMB has a duty to consider the international obligations placed on Canada by NAFTA. The BCMB must consider these international obligations in its determination of whether the Commission has the power to restrict trade to the US in contravention of NAFTA.

29. The Commission and the Intervenors argue that the BCMB has no specialised knowledge in respect of NAFTA and as such, any decision rendered by the BCMB on this issue would be given no deference on appeal. They argue that the proper tribunal to consider the impact of NAFTA on the actions of the Commission would be a tribunal constituted under NAFTA.

30. In the Panel's opinion, while it is open to the BCMB to consider treaties such as NAFTA as an aid to statutory interpretation where legislation is ambiguous, such treaties cannot be used to override clear and explicit domestic legislation.

31. NAFTA does not impair the sovereignty and constitutionality of clear laws passed by Parliament and provincial legislatures. The economic consequences of such laws under NAFTA would be for a tribunal constituted under NAFTA to decide and not an issue for the BCMB. If clear and unequivocal legislation has the effect of breaching a treaty, the remedies for the breach are those external remedies provided by the treaty.

32. In this case, the legislation grants the Commission clear authority to regulate export production of vegetables. NAFTA would only be relevant insofar as it could assist in interpreting an ambiguous legislative provision. It cannot be used to override what, in the Panel's opinion, are clear and unambiguous provisions of both federal and provincial legislation.

33. The Appellant also argues that the terms of NAFTA are relevant to how the Commission exercises its discretion, even if it has jurisdiction. The problem with this argument is that it is, at best, premature. The Commission has not made a decision on the ability of the Appellant to export its own product. Its decision on this issue could ultimately render any arguments made with respect to NAFTA academic. As such, we are not prepared at this time to comment on whether any particular exercise of regulatory discretion would offend NAFTA, or whether the BCMB has jurisdiction to override the Commission's exercise of discretion purely on that basis. Our jurisdiction is limited to enforcing domestic law and as such we would, if the matter were to come before us again, require more careful argument which addresses issues such as those reflected in cases such as *Antonsen v. Canada (AG)*, [1995] 2 FC 272 (TD) and *Pfizer Inc. v. Canada*, [1999] 4 FC 441 (TD).

ORDER

34. As the enactment of OIC 631 has rendered the Appellant's appeal of the February 22, 2000 letter of the Commission academic, the BCMB dismisses the appeal.

RECOMMENDATION

35. The Appellant has raised significant issues in this appeal which challenge the current vegetable marketing regime in BC. The ultimate decision of the Commission will have impact beyond the immediate parties to the appeal and as such, the Commission is encouraged to proceed in a timely fashion to address this matter.

Dated at Victoria, British Columbia, this 28th day of July, 2000.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Ross Husdon, Chair
Christine J. Elsaesser, Vice Chair
Hamish Bruce, Member
Richard Bullock, Member