

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION
CONCERNING NON-COMPLIANCE WITH CONSOLIDATED GENERAL ORDERS

BETWEEN:

SAM ENTERPRISES LTD.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

DECISION

APPEARANCES:

For the
British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Mr. Hamish Bruce, Member
Mr. Richard Bullock, Member

For the Appellant
(by written submission)

Mr. Bob Dhillon, Operations Manager

For the Respondent
(by written submission)

Mr. Murray Driediger, General Manager

BACKGROUND

1. On January 25, 2001, Mr. Bob Dhillon, on behalf of Sam Enterprises Ltd. (“Sam Enterprises”), filed an appeal of a decision of the British Columbia Vegetable Marketing Commission (the “Vegetable Commission”) dated October 25, 2000.
2. In that decision, the Vegetable Commission concluded, after conducting a hearing on October 19, 2000, that the Appellant had violated certain sections of the Consolidated General Orders by:
 - a) transporting and offering for sale a regulated product (Nugget Potatoes) without being registered with and licensed by the Vegetable Commission [s. 3(b)];
 - b) offering for sale a regulated product (Nugget Potatoes) below the price established by the Vegetable Commission [s.7(j)]; and
 - c) offering for sale a regulated product directly to a registered wholesaler of the Vegetable Commission without marketing through an agency [s.7(h)].
3. As a result of the violations of the General Orders, the Appellant was assessed \$5000 towards the costs of investigation and hearing and his Class I Grower’s License was cancelled. In addition, he was required to make immediate application for a Class II Grower’s License.
4. Although advised of its right of appeal to the British Columbia Marketing Board (the “BCMB”), the Appellant did not file an appeal within 30 days of the Vegetable Commission’s decision.
5. On January 9, 2001, as the Appellant had not filed an appeal of the October 25, 2000 decision, the Vegetable Commission instructed the Appellant’s marketing agency, Lower Mainland Vegetable Distributors Inc. (“Lower Mainland”), to deduct \$5000 from the Appellant’s December pool proceeds and forward the amount directly to the Vegetable Commission. The agency was also directed to withhold the remainder of the pool proceeds until the Appellant obtained the required Class II License.
6. On January 25, 2001, the Appellant appealed the Vegetable Commission’s October decision and sought a stay of the enforcement of the decision pending appeal.

7. On February 5, 2001, the Vegetable Commission applied to the BCMB for the following orders:
 - a) that the Appellant's appeal be dismissed for being filed outside the 30 days prescribed by s. 8(1) of the *Natural Products Marketing (BC) Act* (the "Act");
 - b) that the request for a stay be declared moot; and
 - c) that should the appeal be allowed, an order that the appeal be dismissed under s. 8(8.3) of the *Act* as being "frivolous and vexatious".
8. On February 9, 2001, the Appellant applied to the BCMB to have the time for filing its appeal extended.

ISSUE

9. Do special circumstances exist to warrant an extension of the time for filing an appeal under s. 8(1) of the *Act*?
10. If special circumstances exist, is the request for a stay moot given that the Vegetable Commission has already obtained payment of the \$5000 through the Appellant's distributor?
11. If special circumstances exist, should the appeal be dismissed pursuant to s. 8(8.3) of the *Act* as being frivolous and vexatious?

APPELLANT'S ARGUMENT

Reason for Delay

12. Mr. Dhillon on behalf of the Appellant argues that it was always his intention to appeal the October 25, 2000 decision of the Vegetable Commission. He had communicated this intention to the General Manager of the Vegetable Commission, Mr. Murray Driediger, on several occasions.
13. Mr. Dhillon argues that he is not well versed in the appeal process as he has rarely been involved in these types of proceedings. He also believes his vocabulary or grammar may have contributed to any miscommunication.
14. He states that he was well aware of the 30 day appeal period. He asked his sister-in-law to draft a letter of appeal to the BCMB. She was given the particulars and instructed to fax the BCMB. Mr. Dhillon maintains that his sister-in-law sent a letter of appeal as instructed.
15. When Mr. Driediger first advised Mr. Dhillon that no appeal had been filed with the BCMB, Mr. Dhillon checked with his sister-in-law who advised that a fax had indeed been sent.

16. In December, Mr. Driediger again advised Mr. Dhillon that an appeal had not been filed. Mr. Dhillon says he did not take Mr. Driediger seriously as his sister-in law had informed him it had been taken care of. He assumed that the BCMB had not processed the paper work yet. He states:

[w]e live in a technological age, where information is located through a computer database. This commonly causes delays due to transferring information onto the computer. I simply assumed that the information most likely had not been processed, resulting in some kind of internal retrieval error, and that this was the same sort of situation. I quite honestly did not see a cause for alarm at that point. I assumed that an appeal application would not be valid until the right to an appeal had been either granted or not, at which point I would receive notification from your office.

17. Mr. Dhillon maintains that it was not until his agency withheld his December pool proceeds that “red flags went up”. He could not understand how that could happen without being informed as to the status of his appeal. He then contacted the BCMB and learned that there was no record of an appeal being filed. BCMB staff provided Mr. Dhillon with instructions for filing an appeal.
18. He contacted his sister-in-law and advised her to “re-fax” the letter to the BCMB. He then learned that his sister-in-law had not kept a copy of the letter because “she had not anticipated a problem”. Mr. Dhillon faxed the appeal guidelines to his sister-in-law and instructed her to redo a letter. It was at this point that his sister-in-law advised that she had never sent a cheque for \$100 as no one had told her to do so. In addition, she had not sent the letter by registered mail.
19. Mr. Dhillon states that the bottom line is that neither he nor his sister-in-law had a clue as to the correct procedure and if they had all this time and frustration could have been avoided.

Merits of Appeal

20. Mr. Dhillon does not dispute the findings that the Appellant acted outside the Vegetable Commission’s Consolidated General Orders. Rather the basis for appeal is that the assessed costs are too high. Mr. Dhillon wishes an opportunity to voice his concerns.

Frivolous and Vexatious Appeal

21. As to the application by the Vegetable Commission to have the appeal dismissed as being frivolous and vexatious, Mr. Dhillon maintains that such an application is unwarranted. The vegetable business is the Appellant’s livelihood; it has a right to protect its interests, as does the Vegetable Commission.

ARGUMENT OF THE RESPONDENT

Reason for Delay

22. The Respondent takes the position that the Appellant had ample opportunity to file an appeal with the BCMB within the 30-day time period provided. In addition, the Respondent through its General Manager, Mr. Driediger, has consistently advised the Appellant of the hearing process before the Vegetable Commission, the right to be represented by legal counsel and the BCMB appeal process.
23. Mr. Driediger spoke with Mr. Dhillon following the October 25, 2000 decision and reminded him of his right of appeal. Mr. Dhillon felt that the assessed costs were excessive and that he would probably appeal.
24. Following the expiration of the 30-day time period, Mr. Driediger contacted the BCMB and learned that no appeal had been filed. Mr. Driediger then phoned Mr. Dhillon and advised that if he intended to appeal he should do so immediately. In December, Mr. Driediger again contacted the BCMB and again confirmed that no appeal had been filed. He phoned Mr. Dhillon and again advised him that the BCMB had not received an appeal.
25. At this point, Mr. Driediger assumed that Mr. Dhillon had no intention of appealing the October decision. He advised Mr. Dhillon that as no appeal had been filed, the Vegetable Commission would be making arrangements for the payment of assessed costs from the Appellant's pool payments. Mr. Dhillon still maintained that he was planning on appealing.
26. On January 9, 2001, as it was apparent that no appeal had been filed or was going to be filed, the Vegetable Commission instructed Lower Mainland to deduct \$5000 from the Appellant's December pool proceeds. It was only after learning that the Appellant would in fact have to pay the assessed costs that Mr. Dhillon, on January 25, 2001, filed the appeal.
27. The Respondent argues that the Appellant had ample opportunity to file an appeal. In three separate instances, Mr. Dhillon was advised that no appeal had been filed and the 30-day deadline had lapsed. The Respondent argues that the appeal is out of time. There were reasonable opportunities available for the Appellant to appeal and yet it chose not to act. Any further extensions are unwarranted.

Stay of Decision

28. The Respondent argues that should the BCMB grant an extension of time for filing this appeal, the Appellant's request for a stay should be considered moot. The monies owed by the Appellant have been collected and are being held in trust pending final resolution of this appeal.

Frivolous and Vexatious Appeal

29. Finally, the Respondent argues that should the BCMB allow an extension of the time for filing an appeal, the appeal should be dismissed under s. 8(8.3) as being “frivolous and vexatious”. In making this argument, the Respondent relies on the BCMB’s earlier decision: *In the Matter of the Natural Products Marketing (BC) Act and an Appeal from an August 22, 2000 Decision Concerning Non-Compliance with the Consolidated General Orders between Jorge Gomes and the British Columbia Vegetable Marketing Commission* dated January 17, 2001. At paragraph 18, the BCMB states:

The Appellant argues that he has been singled out for enforcement. The evidence from the Vegetable Commission does not support this allegation. In fact, the evidence is to the contrary. The Vegetable Commission is trying to enforce orderly marketing in District III. The Appellant takes issue with the investigation costs assessed against him. A review of the costs assessed against the other producers demonstrates that the Vegetable Commission has been even handed and fair in its assessments.

30. The Respondent argues that the circumstances and evidence surrounding this appeal are identical in all respects. The Vegetable Commission obtained overwhelming evidence of the Appellant’s violations of the Consolidated General Orders. The Appellant admitted to selling regulated product illegally and selling regulated product below the Vegetable Commission’s minimum price. The Appellant had not registered with the Vegetable Commission and has not purchased a Class II License as required by the October decision. Of the \$9036.35 of actual costs expended on the investigation and hearing, the Appellant was only assessed \$5000. A payment schedule was offered but the Appellant refused to accept or even respond to the offer.
31. As a result, the Respondent argues that this appeal should be dismissed as being frivolous and vexatious.

DECISION

Is the Appeal Out of Time?

32. Under s. 8(1)(b) of the *Act*, if the BCMB considers special circumstances warrant it, an extension of the 30-day period for filing an appeal may be granted. In these circumstances, the Appellant argues that the delay in filing an appeal was caused by a lost fax. This argument is not convincing. Mr. Dhillon was advised on numerous occasions by the General Manager of the Vegetable Commission of his right of appeal. In addition, Mr. Dhillon was advised on several occasions that despite his stated intention to appeal, no appeal had been received by the BCMB.

33. Despite these warnings, Mr. Dhillon chose to do nothing. Instead of making inquiries with the BCMB, he justifies doing nothing as such delays were common in this technological age. He attributes the delay in processing to an “internal retrieval error”. This is less than convincing.
34. When Mr. Dhillon realised that the Vegetable Commission had enforced its October Order, only then was he moved to act. He asked his sister-in-law (no name was given) to “re-fax” the letter of appeal. Despite its importance, no copy of this alleged letter was ever kept nor does the BCMB have any record of a fax notice of appeal being received.
35. Mr. Dhillon has not adequately explained his inaction in the face of repeatedly being told that the BCMB had no record of an appeal. As such, the Appellant has failed to demonstrate that special circumstances exist to warrant granting an extension of the time for filing an appeal. Accordingly, the Appellant’s appeal is dismissed as being filed out of time.
36. In coming to this decision, the Panel is mindful of the Appellant’s grounds of appeal. The Appellant is not appealing factual findings made by the Vegetable Commission at its October hearing. The Appellant admitted to violating the Vegetable Commission’s Consolidated General Orders. Rather what this Appellant really objects to is the amount of the costs assessed against it. The grounds of the appeal are hardship.
37. The Respondent has enforced its October Order by deducting the entire amount of the assessed costs from the Appellant’s December pool proceeds. This manner of enforcement may have caused hardship to the Appellant. The Vegetable Commission’s decision of January 9, 2001 to enforce its October Order is a separate decision which is subject to appeal.
38. Should the Appellant wish to file a new appeal of the January 9, 2001 decision, the Panel would be prepared to allow an extension to the 30-days prescribed by the *Act*. Until such time as the BCMB ruled on the out-of-time issue with respect to the first appeal, the Appellant would not have known whether it was necessary to appeal the January decision. The unknown status of the first appeal would provide special circumstances to warrant an extension in the time to file an appeal of the January 9, 2001 decision.
39. The Appellant must realise however, that any appeal of the January decision would be restricted to the issue of enforcement of the October Order. It would not be an appeal of the reasonableness of the amount of costs assessed. The only issue would be the appropriateness of lump sum recovery of the assessed costs. The Appellant would be entitled to raise the issue of hardship as it relates to this issue on appeal.
40. As it is not clear whether the Vegetable Commission has had an opportunity to consider the issue of hardship, the appropriate manner in which to proceed is to refer this issue back to the Vegetable Commission. The Vegetable Commission

may decide, if it has not already done so, whether circumstances warrant a partial return of pool proceeds to the Appellant and/or the creation of a payment schedule.

41. If the Appellant is not satisfied with any clarification or reconsideration by the Vegetable Commission, the BCMB will entertain a new appeal.

Stay of Decision

42. In its notice of appeal, the Appellant asked for a stay of enforcement of the Vegetable Commission's October Order. Given our decision that the appeal was filed out of time, no stay will be granted.

Frivolous and Vexatious Appeal

43. Given our decision that the appeal was filed out of time, there is also no need to consider the issue of whether the appeal is frivolous and vexatious. It should be noted however that there are differences between this appeal and the Gomes Appeal. In Gomes, the Appellant argued that the Vegetable Commission had singled him out for enforcement. The evidence demonstrated that that was not the case.
44. In this case, the Appellant argues not that he was singled out but rather that for reasons of hardship, the assessed costs are too high. The issue of hardship can be dealt with under a new appeal of the Vegetable Commission's January 9, 2001 decision to enforce its October Order once the Vegetable Commission has considered the hardship issue.

ORDER

45. The appeal of the October Order is dismissed.
46. The application for a stay of the October Order is dismissed.
47. The Respondent is directed to consider the issue of the potential hardship of its January 9, 2001 decision to enforce the October Order.
48. There will be no order as to costs.

Dated at Victoria, British Columbia, this 14th day of March 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

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