

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL FROM BRITISH COLUMBIA VEGETABLE MARKETING  
COMMISSION ORDER 10/03(a)

**BETWEEN:**

BC VEGETABLE GREENHOUSE I, LP

**APPELLANT**

**AND:**

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

**RESPONDENT**

**AND:**

BC HOT HOUSE FOODS INC.

**INTERVENOR**

**PRELIMINARY ISSUE  
DISCLOSURE OF DOCUMENTS**

**APPEARANCES:**

For the British Columbia  
Farm Industry Review Board

Richard Bullock, Chair  
Christine J. Elsaesser, Vice Chair  
Joseph Truscott, Member

For the Appellant

Christopher Harvey, Q.C., Counsel

For the Respondent

Roy Millen, Counsel

For the Intervenor

James P. Taylor, Q.C., Counsel

## BACKGROUND

1. The Appellant, BC Vegetable Greenhouse I, LP, (“BC Vegetable”) is an American company operating in British Columbia. BC Vegetable grows greenhouse tomatoes in the Delta area. On October 31, 2003, BC Vegetable appealed Order 10/03(a), issued by the British Columbia Vegetable Marketing Commission (the “Vegetable Commission”) on October 7, 2003. The original appeal included a number of different grounds of appeal.
2. The background here is quite complex, and has been described elsewhere (see our September 2, 2004 summary dismissal decision, referred to below). Briefly, the Vegetable Commission passed Order 10/03(a) following the release of the British Columbia Supreme Court’s judgment in *Global Greenhouse Produce Inc., BC Vegetable Greenhouse I, LP and others v. British Columbia Marketing Board and British Columbia Vegetable Marketing Commission*, 2003 BCSC 1508. In that decision, the Court, *inter alia*, dismissed BC Vegetable’s legal challenges to Vegetable Commission Levy Orders 08/01 and 09/02, the levy orders upon which compliance Order 10/03(a) is predicated.
3. Order 10/03(a) reads as follows:

WHEREAS the Commission has passed two orders directing the payment of extraordinary levies by all greenhouse tomato producers in Districts I and II for the purpose of funding costs and expenses associated with trade disputes involving the U.S. tomato industry (namely Order 08/01 dated August 15, 2001 and Order 09/02 dated September 18, 2002);

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

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

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

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

THEREFORE the Commission hereby orders that:

1. BC Vegetable Greenhouse I, LP shall remit to the Commission within 30 days of the date of this Order the amount of \$376,642, an amount equal to the total levy that should have been deducted from it pursuant to the terms of Order 08/01 and Order 09/02.
4. On October 31, 2003, BC Vegetable filed a Notice of Appeal to the Court of Appeal from the October 1, 2003 judgment of Drost J., seeking in part, an order quashing Levy Orders 08/01 and 09/02. On the same date, BC Vegetable also appealed Order 10/03(a) to the British Columbia Farm Industry Review Board (the

“Provincial board”) on the grounds that it was duplicative of levy orders already passed, it interfered with a matter before the Court of Appeal, it was retrospective and/or retroactive, it was passed for an improper purpose (namely to fund debt obligations of BC Hot House Foods Inc.) and finally that the Quantum of the Orders was incorrectly computed.

5. As a result of applications for summary dismissal by the Vegetable Commission and the Intervenor, BC Hot House Foods Inc. (“BC Hot House”), a Panel of the Provincial board in a decision dated September 2, 2004 dismissed a number of issues on this appeal, and as a result found that only the following remained live issues:
  1. Whether the Vegetable Commission had the jurisdiction to issue Order 10/03(a) for the purpose of obtaining the Appellant’s compliance with previously issued Levy Orders?
  2. Whether the quantum set out in Order 10/03(a) is correct?
6. On November 9, 2004, Counsel for BC Vegetable advised the parties that he would be abandoning the jurisdiction issue and as such the only remaining issue on appeal was whether the quantum set out in Order 10/03(a) was correct.
7. This matter is scheduled for hearing in January 2005.

#### **ISSUES TO BE DETERMINED**

8. The purpose of the present hearing was to hear an application by BC Vegetable for production of documents, to provide directions to the parties as to the scope of the appeal and to confirm hearing dates.

#### **DECISION**

##### **a) Disclosure of documents**

9. Counsel for BC Vegetable has outstanding document requests going back to November 14, 2003. Although the Vegetable Commission has provided disclosure, BC Vegetable argues that the disclosure to date is “woefully inadequate”; that the documents disclosed are largely undated and incomplete; that many appear to be summaries generated by the Vegetable Commission as opposed to the source documents sought; and that many of these documents appear to be generated after the fact and in response to this appeal.
10. The position of BC Vegetable regarding document disclosure was set out in its October 13, 2004 letter to Jim Collins, Acting General Manager of the Provincial board. The following documents were sought:

1. Documents relating to paragraph 3 of Order 08/01 (gross sales revenue in 2001 broken down by the stated nine product groups; income derived by application of the specific levy rates attributed to each product group).
  2. Documents relating to paragraph 4 of Order 08/01 (year-end reconciliation based on gross revenue and collected or redistributed on a kilogram basis).
  3. Documents relating to paragraph 5 of Order 08/01 (Commission trust account statements showing amounts received).
  4. Documents relating to paragraph 6 of Order 08/01 (records relating to disbursements from trust by Commission; and relating to confirmation of legitimacy of expenses).
  5. Documents relating to paragraph 7 of Order 08/01 (documents relating to decision-making process of Commission under this section of the Order).
  6. Documents relating to the final paragraph of Order 08/01 (ongoing monitoring and any adjustments).
  7. Documents relating to paragraph 1 of Order 08/01 (cap of \$2.5 million, e.g. documents showing whether cap was reached, or if not, what is the shortfall).
  8. Documents relating to paragraph 1 of Order 09/02 (accounting data pertinent to each of the four instalments, showing calculation of amount of levy and payment of the levy; and with respect to the 4<sup>th</sup> instalment, all documents relevant to the Commission audit and its result).
  9. Documents relating to paragraph 2 of Order 09/02 (the “complete accounting” documents submitted to the Commission by Hot House; and any other remittances under this Order).
  10. Documents relating to paragraph 3 of Order 09/02 (all trust account documents and records both of receipts into the trust account and disbursements therefrom; also documents pertaining to Commission audit).
  11. Documents relating to paragraph 4 of Order 09/02 (audit documents including copies of all such documents disclosed by the Commission to all greenhouse tomato producers and agencies prior to assessment of the final instalment of the Levy).
11. In addition, BC Vegetable seeks production of electronic documents relating to the above categories which were generated on a computer and subsequently deleted or over written. BC Vegetable argues that a computer technician should be able to retrieve these documents.
12. BC Vegetable also seeks production of documents relating to the November 8, 2002 decision of the Vegetable Commission to impose a levy on Houweling Nurseries Ltd. (“Houweling”) of \$16.50 per case until such time as the sum of \$490,250 has been collected. To the extent that this levy was imposed to offset Houweling’s contribution to the 2001 trade dispute, BC Vegetable argues these documents are relevant to the issues under appeal. If the Vegetable Commission recovers from Houweling, BC Vegetable argues that any liability it potentially has should be reduced accordingly.

13. BC Vegetable argues that it is not limited to strictly technical arguments with respect to the calculation of the levies. As such its requests for disclosure are broad. The issue on appeal stems from the injustice of using the production from 2001 as a basis for the levy to pay for a trade dispute resulting from 2000 production. Producers, such as BC Vegetable, that increased production in 2001 were unfairly assessed a greater proportion of responsibility for the trade dispute. In addition, BC Vegetable reserves the right to examine all relevant documents relating to the levy orders 08/01, 09/02 and 10/03(a) in order to determine whether any technical arguments can be made relating to their calculation.
14. The Vegetable Commission maintains that it has made full disclosure of all relevant documents to BC Vegetable. It says that there are no documents relating to a trust account as no trust account was required, and that because BC Hot House incurred expenses well before the levy was collected, the Vegetable Commission was always behind in paying. The Vegetable Commission says that expenses were paid on the understanding that a final audit would be performed to ensure that only those expenses properly part of the defence of the trade dispute were paid. There are no more documents to be disclosed. To support its position, the Vegetable Commission introduced the following into this preliminary hearing:
  - a) Vegetable Commission audit report prepared by Jack Wessel (undated);
  - b) 2001 greenhouse tomato quota (square metres);
  - c) Review of Trade Action Costs;
  - d) Reconciliation of 2001 Trade Action Costs;
  - e) Two binders of approved disbursements, expenses and accounts received from BC Hot House and paid by the Vegetable Commission;
  - f) Barbara Fisher October 26, 2004 letter to Chris Harvey enclosing amended tables entitled Levy #1 Producer Payments, Levy #2 Producer Payments and Summary for Both Levies;
  - g) Guide to the Financial Data, September 2004;
  - h) Documentation Schematic (undated); and
  - i) Submission of the Vegetable Commission (undated).
15. With respect to electronic documents, the Vegetable Commission states that all computer-generated documents still in the Commission's possession have been disclosed.
16. With respect to documents relating to Houweling, the Vegetable Commission maintains that these documents are wholly irrelevant to the present appeal. However, the Vegetable Commission has disclosed its decision with respect to this levy, and it is found as Exhibit "A" of the November 19, 2004 affidavit of its General Manager, Murray Driediger, filed in the Supreme Court enforcement proceedings. There is no independent levy order other than that decision.
17. Finally, the Vegetable Commission takes issue with BC Vegetable's characterisation of the issues under appeal. The issue relating to the injustice of

using 2001 production as the basis of the levy to fund the trade dispute may be interesting but it is not relevant. Further, this issue was dispensed with by Drost J. on BC Vegetable's judicial review application and as such is *res judicata*.

18. BC Hot House agrees with the submissions of the Vegetable Commission with respect to the request for disclosure of documents. The summaries generated by the Vegetable Commission are documents produced in the ordinary course of business; reliance upon them is proper. With respect to the request for a forensic examination of the Vegetable Commission's computer, BC Hot House states that before an unusual request like this is granted there must be some basis laid for why such an order is necessary beyond just a fishing expedition.
19. The Panel is satisfied that the Vegetable Commission has made proper disclosure with respect to the issues on appeal. However, to clarify certain issues raised by BC Vegetable as to the timing of when certain documents were prepared, the Panel orders the Vegetable Commission to disclose to the parties the following within seven days of the date of this decision:
  - a) A copy of any Vegetable Commission minutes disclosing the date the audit report was prepared;
  - b) A copy of any Vegetable Commission minutes disclosing the date(s) the audit report was received and or discussed by the Commission;
  - c) A copy of the file compiled by Jack Wessel during the audit;
  - d) A copy of any document or minutes of the Vegetable Commission which demonstrate when the Guide to Financial Data and Documentation Schematic was prepared;
  - e) A copy of any document or minutes which demonstrate when the "Submission of the BC Vegetable Commission into the Costs Incurred as a Result of the Tomato Trade Disputes Between Canada and the US" was produced.
20. The Panel dismisses the Appellant's request for a forensic examination of the Vegetable Commission's computer. The Appellant has not satisfied the Panel that this is necessary or that it amounts to anything more than a fishing expedition.
21. The Panel finds that the issues relating to the levy assessed against Houweling are not relevant to this appeal; as such the request for disclosure of documents with respect to this levy is dismissed.

**b) Scope of the appeal**

22. This appeal relates to whether the quantum set out in Order 10/03(a) is correct. The issue relating to the alleged unfairness associated with using the production from 2001 to calculate the levy for a trade dispute flowing from 2000 production is not properly under appeal. The Panel agrees with the submissions of both the Vegetable Commission and BC Hot House that this issue was dispensed with. First by the Provincial board in its September 11, 2002 supervisory decision, and then by Drost J. on the judicial review application. This issue cannot be argued on appeal under the guise of an attack on the quantum of the levy assessed under Order 10/03(a). Any attempt by the Appellant to try and reargue issues which have been dealt with in other forums or in preceding decisions of the Provincial board will not be permitted.
23. The issues the Panel is prepared to hear evidence and argument on are as follows:
- a) Did the Vegetable Commission make an error in calculating the levy under Order 08/01 (which related to the kilograms of BC Vegetable's production of nine categories of tomatoes in 2001);
  - b) Did the Vegetable Commission make an error in calculating the levy under Order 09/02 (which for the first three instalments is \$0.50 per square metre of BC Vegetable's greenhouse tomato quota allocated by the Vegetable Commission for the 2001 crop season); and
  - c) Did the Vegetable Commission make an error in calculating the levy under Order 09/02 (which for the final instalment was calculated after a final audit disclosing the balance owed to BC Hot House)?
24. The levy assessed against Houweling in 2002 is to be distributed among all producers who contributed to the trade dispute through payment of the original levy. As such, it is not relevant to the issues on this appeal regarding whether the original levy as assessed against BC Vegetable was properly calculated.

**c) Length of hearing**

25. Since the hearing of this application, the parties have agreed that this matter will be heard over three days January 17-19, 2005. We will keep this time available, but with the caveat that it is our expectation, based on the issues on appeal, that the hearing should be completed in two days.

Dated at Victoria, British Columbia, this 10<sup>th</sup> day of December 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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Richard Bullock, Chair

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Christine J. Elsaesser, Vice Chair

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Joseph Truscott, Member