

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION OF
THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD
DENYING AN APPLICATION FOR AGENCY STATUS
DATED NOVEMBER 24, 1998

CHAMP'S MUSHROOMS INC.

APPELLANT

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

RESPONDENT

AND:

MONEY'S MUSHROOMS LTD.

INTERVENOR

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	Mr. Tony Wattie, Counsel
For the Respondent	Ms. Lisa Hynes, Counsel
For Money's Mushrooms Ltd.	No one attending
Date of Hearing	February 17, 1999
Place of Hearing	Richmond, BC

INTRODUCTION

1. On April 24, 1998, Champ's Mushrooms Inc. ("Champ's") applied to the British Columbia Mushroom Marketing Board ("Mushroom Board") for an agency license to market mushrooms in British Columbia.
2. The Mushroom Board conducted a public hearing on August 24, 1998. In written reasons dated November 24, 1998, the Mushroom Board denied Champ's application for agency status.
3. On December 21, 1998, Champ's appealed the decision of the Mushroom Board to the British Columbia Marketing Board ("BCMB") pursuant to s. 8 of the *Natural Products Marketing (BC) Act* (the "Act").
4. On February 17, 1999, the BCMB heard the Champ's appeal. Although Money's Mushrooms Ltd. had requested and been granted Intervenor status, no one appeared at the hearing on its behalf.
5. Representatives of Farmers' Fresh Mushrooms Inc. ("Farmers' Fresh") appeared with Counsel, Mr. Lee Sawatzky at the hearing. Farmers' Fresh did not seek Intervenor status but appeared in support of Champ's application.

ISSUES

6. Should the Mushroom Board have refused to recommend Champ's as an agency because it does not have sufficient marketing expertise? (**Marketing Expertise**)
7. Should the Mushroom Board have refused to recommend Champ's as an agency because it does not have adequate contingency plans to protect its growers in the event that Champ's ceases to operate or encounters financial difficulties? (**Contingency Plan**)
8. Should the Mushroom Board have refused to recommend Champ's as an agency out of concerns that Champ's would be, in effect, an agency controlled by a single extended family? (**Corporate Structure**)
9. Should the BCMB order the Mushroom Board to pay Champ's costs in this appeal?

FINDINGS

10. The BCMB is of the view that the process followed by the Mushroom Board in reviewing Champ's agency application was appropriate in the circumstances. The Mushroom Board has followed the directions of the BCMB contained in both the Mushroom Agency Designation Review dated August 19, 1997 and the BCMB Guidelines for Approving the Appointment of Designated Agencies (the "Guidelines").
11. It is the responsibility of the Mushroom Board to develop appropriate procedures and guidelines to ensure the stability and sustained growth of the industry in the public interest. Thus, the BCMB is prepared to give a certain amount of deference to the decisions of the Mushroom Board as to the appropriateness of granting agency status to a particular organisation.
12. However, it is significant to point out that apart from the Mushroom Board, no one appeared in opposition to Champ's application at this appeal. The Mushroom Board did not call any evidence and was content to rely on its Findings and Decision of November 24, 1998.

Marketing Expertise

13. The BCMB has reviewed Champ's business plan and compared it to the successful applications of Ridge and Farmers' Fresh on the issues in question, namely marketing experience, contingency plans and corporate structure.
14. The Mushroom Board was not satisfied that "the principals of Champs, and those who would be in charge of the day-to-day operations of the agency, possess sufficient marketing experience and skills to enable them to successfully operate a marketing agency". The Mushroom Board contrasts this with Mr. M. Chia of Ridge and Mr. T. Nguyen of Farmers' Fresh who both possess experience in the marketing of produce.
15. In response, Mr. H Quach states that although the principals of Champ's are not expert marketers, it is their intention to hire skilled individuals to assist them in running the agency. The business plan contemplates this expense.
16. Based on the evidence before the Panel, the BCMB is not prepared to find that the inexperience of the principals of Champ's in marketing is sufficient to deny the application. If a person with marketing experience was hired, this deficit would be cured. However as a cautionary note, it may be appropriate to have this expertise available at the initial planning stages to ensure that assumptions made in the business plan regarding potential markets and marketing are, in fact, realistic.

Contingency Plan

17. The second reason for denying Champ's application is the inadequacy of contingency plans to protect growers in the event of ceasing operations or financial difficulties. Champ's argues that this is not a sufficient reason to deny its application. It was never questioned at the initial hearing regarding its contingency plan despite the fact its proposal contained one. In the event the Mushroom Board found the contingency plan inadequate, it could have granted the application on the condition that an adequate contingency plan be put in place.
18. This was the course followed with the Ridge application where at page 32(h) of its August 6, 1998 Decision, the Mushroom Board states:

Ridge must submit a contingency plan which addresses what would happen if Ridge ceases to exist, and, in particular, how growers who have become part of Ridge would proceed.
19. Champ's also argues that its intention is to only contract with the farms of its shareholders initially. Once it is more stable, it would proceed to other growers and thus "protect the integrity of the agency".
20. Champ's also argues that as an organisation, it is similar to Farmers' Fresh. Growers who are shareholders of the company run both. In the case of Farmers' Fresh, the Mushroom Board granted the application on the following condition, at paragraph 36(h):

(h) Farmers' Fresh must establish a contingency plan for the payment of growers in the event that Farmers' Fresh encounters financial difficulty;
21. Thus, Champ's argues that inadequacy of its contingency plan is not a valid reason for objecting to its application.
22. The Panel cannot find any reason why Champ's should be treated differently than Ridge or Farmers' Fresh. Conditions have been imposed on successful applicants in order to protect the interests of growers who choose to deal with an agency. Similar conditions could have been imposed on Champ's.
23. It should be noted in the case of the Ridge application, in order to deal with the concerns raised about the credit-worthiness of Mr. M. Chia, Ridge offered to post a \$500,000 bond on terms satisfactory to the Mushroom Board. The BCMB approved Ridge's application subject to such a bond being put in place. This does not mean that such a bond is necessary in every application for an agency license. However, it demonstrates that conditions can be imposed on agency applicants to deal with the specific concerns of the Mushroom Board.

24. The Panel agrees with Champ's that an inadequate contingency plan is not of itself sufficient reason to deny the application. Any inadequacy could be remedied by imposing conditions on the license.
25. However, there may be circumstances where the fact that there is an inadequate contingency plan may be indicative of some other problems with an application, such as under-financing or inadequate preparation and planning. This would be a different issue and as such could form a basis for denial. However, our reading of the Mushroom Board's Findings and Decision does not indicate such a concern.

Corporate Structure

26. The Mushroom Board's major concern in not granting an agency license to Champ's is its corporate structure. In the Mushroom Board's view the regulatory aims of the British Columbia Mushroom Scheme (the "Scheme") are better achieved where the relationship between a single grower or a group of related growers and an agency is at arms-length. Where the principals, shareholders and/or directors are primarily related to a single family there is a problematic potential for conflict of interest or a reasonable apprehension of bias.
27. The Mushroom Board is of the view that to grant Champ's a license would, in effect, license Champ's as a "producer-vendor". Such a license would not be in the best interests of the industry and could be the source of unnecessary and preventable conflict, apprehension of unfair treatment and possibly reluctance on the part of non-family growers to join a family run agency. This is contrary to the legislative objective of a centralised agency, to create consistent standards of quality and the ability for small producers to compete.
28. Champ's, on the other hand, argues that the BCMB Guidelines do not prevent a single family from controlling an agency. Mr. M. Chia controls Ridge, Mr. T. Truong controls All Seasons Mushroom Farms Inc., Money's is controlled by a co-operative of growers and Farmers' Fresh plans to be controlled by shareholder/growers. Champ's argues that family control is far better than control by one person because it requires consensus.
29. In addition, between the Quach family and Mr. T. Doan, an unrelated shareholder, Champ's controls 18% of the production in the Province. Champ's argues that to deny it an agency license strictly because it is controlled by one family is contrary to fairness, justice and the BCMB's Guidelines.
30. Champ's argues that the Mushroom Board's concerns are not valid. It is not the control of the agency that is important rather what is important is the means by which the agency serves the industry. Do they give good service; do they pay on time; do they pay fairly; do they service their customers? Champ's does not see the difference between an agency controlled by one person or one family. Rather it is its position that the Mushroom Board is attempting to thwart Champ's for some unknown reason.

31. Champ's denies that any conflict of interest exists or will be perceived to exist if its agency license is granted. Because this issue has been raised, Champ's submits that there is now even less risk of such a conflict occurring. The shareholders will make abundantly sure that before any new grower is allowed to market through the agency, he is aware not only of his rights as a grower but also Champ's rights and obligations as an agency.
32. Champ's submits that the proper course is for the BCMB to review its Guidelines, acknowledge that Champ's has met the Guidelines, add any restrictions or conditions to the license and then grant Champ's its agency license.
33. The Panel considered the Mushroom Board's concern about the potential problems that may arise with an extended family operating an agency at length. Although the Mushroom Board is opposed to the licensing of what amounts to a "producer-vendor", its attempt to explain the evil behind such an arrangement was not convincing. Accordingly, the Panel is not satisfied that the concerns regarding licensing a "producer-vendor" are valid.
34. There are mechanisms open to the Mushroom Board to deal with its concerns regarding fair treatment of non-related growers who choose to join the agency. Dispute resolution mechanisms can be put in place, as can contractual terms so as to protect the interests of all growers. The risk of apprehension of bias and potential conflict can be dealt with through properly enforced disclosure statements and Conflict of Interest guidelines.
35. The Panel recognises that after the August 24, 1998 hearing and before the Mushroom Board's Findings and Decision of November 24, 1998, Champ's brought in a new shareholder, Mr. T. Doan. He holds 10% of the company shares and is the corporate secretary. The Quach family controls the remaining 90% of company shares. The addition of Mr. Doan as a shareholder is not sufficient to deal with the concerns raised by the Mushroom Board. However, as stated earlier, the Mushroom Board can work with Champ's to ensure that policies and contractual terms are put in place sufficient to protect all growers.
36. The Panel is supportive of the Quach family in its quest for an agency license. The family is taking a significant financial risk. If the agency is not successful, the Quach's own farms are in peril. This is a very real incentive to create a viable agency. Champ's plan is to develop its markets initially with family production and then, as markets expand, bring in new growers. This is a conservative approach that minimises the potential risk to unrelated growers who choose to transfer to Champ's.
37. The Mushroom Board's concerns that family member's farms will expand and grow at the expense of unrelated growers can be dealt with by applications under Order 1/98. The Mushroom Board has the authority to allocate growth in marketing in a manner that is fair and transparent.

38. Mr. H. Quach is a credible witness who appears to be well respected within the industry. His business plan appears to be well thought out and deserving of consideration. Accordingly, the Panel is prepared to approve Champ's as a designated agency on conditions.

DECISION

39. The BCMB in the exercise of its appellate jurisdiction and after giving careful consideration to both the hearing before it and the proceedings before the Mushroom Board finds as follows:

- a) the lack of marketing experience by the principal's of Champ's is not fatal to the application for an agency license as it can be remedied by the employment of a person with suitable marketing experience;
- b) the inadequacy of the contingency plan in the Champ's application can be remedied by the imposition of appropriate conditions and thus, is not fatal to the application for an agency license; and
- c) the fact that Champ's is controlled by a single extended family does not preclude its application for an agency license.

40. The Panel approves Champ's application for an agency license subject to the following conditions:

- a) Champ's will co-operate with other agencies during the period of transition, under the authority of the Mushroom Board;
- b) Champ's will fully co-operate with the Mushroom Board in its efforts to address the illegal sale of regulated product outside the Scheme;
- c) Within 30 days of this decision, Champ's will develop a contingency plan satisfactory to the Mushroom Board. The contingency plan will be subject to review by the Mushroom Board from time to time;
- d) Prior to accepting regulated product from a grower, Champ's will develop a grower contract subject to the approval of the Mushroom Board; and
- e) Champ's agency designation is a privilege conferred under the Act. It is not transferable and is not an approval in perpetuity. The designation may be reviewed by the Mushroom Board from time to time and upon any material change in the circumstances giving rise to this approval. In the event of a proposed sale of Champ's business whether by sale of assets or of shares, a third party seeking to continue the business of the agency must receive prior approval from the Mushroom Board. In the absence of prior approval, this agency license will terminate.

41. The BCMB directs the Mushroom Board to advise all producers using this agency of the following disclaimer contained in s. 17 of the Guidelines:

BCMB approval is not a warranty to producers concerning any aspect of the agency's business, including the ability of the agency to pay for products delivered to them. Each producer should independently and consistently assure themselves of the financial viability of the entity to which they sell product.

42. There shall be no costs awarded in this appeal.

Dated at Victoria, British Columbia this 25th day of March, 1999.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice-Chair

Hamish Bruce, Member

Richard Bullock, Member