

File: 44200-50/MuMB 99-20
44200-50/MuMB 99-22✓
44200-50/MuMB 99-23

November 18, 1999

DELIVERED BY FAX

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Mr. Huu Quach
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Dear Sirs/Mesdames:

**RE: AN APPEAL BY ALL SEASONS MUSHROOM FARMS INC. & TRUONG
MUSHROOM FARM LTD. FROM A SEPTEMBER 9, 1999 DECISION OF
THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD
CONCERNING A JOINT APPLICATION FOR INCREASED
MARKETING ALLOCATION**

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AN APPEAL BY ALL SEASONS MUSHROOM FARMS INC. & TRUONG MUSHROOM FARM LTD. FROM A SEPTEMBER 28, 1999 DECISION OF THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD CONCERNING A JOINT APPLICATION FOR INCREASED MARKETING ALLOCATION

AN APPEAL BY ALL SEASONS MUSHROOM FARMS INC. FROM AN OCTOBER 8, 1999 DECISION OF THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD CONCERNING RECORDS RELATING TO MARKETING ALLOCATIONS

Background

All Seasons Mushroom Farms Inc. and Truong Mushroom Farm Ltd. (“the Appellants”) have filed appeals under s. 8 of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (“the *Act*”), from decisions of the British Columbia Mushroom Marketing Board (“the Mushroom Board”) dated September 9, September 28 and October 8, 1999.

The decisions under appeal arise in the wake of the Appellants’ August 27, 1999 joint application to the Mushroom Board for a significantly increased marketing allocation for export purposes.

In its September 9, 1999 decision, the Mushroom Board advised the Appellants that it would not even consider their application until All Seasons’ internal management issues were finally resolved. After the first notice of appeal, a pre-hearing conference and further discussions between the Appellants and the Mushroom Board, the Mushroom Board issued its September 28, 1999 decision to hear the Appellants’ application. However, the Mushroom Board advised that the issue of All Seasons’ ownership and control would be considered in the context of the Joint Application, and submissions from interested parties on this issue would be sought. The October 8, 1999 decision under appeal is a decision regarding disclosure of Mushroom Board

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documents pursuant to the Appellants' request made under the *Freedom of Information and Protection of Privacy Act* ("the *FOIPPA*").

Grounds of appeal

In support of their appeals, the Appellants raise a number of grounds of appeal. They say that in first refusing even to consider their application, and later changing its mind to consider the application but still taking internal management issues into account, the Mushroom Board breached the "settlement agreement" arrived at between the parties in July 1999. They also say that the Mushroom Board has dealt with their application in a procedurally unfair manner. Third, they argue that the Mushroom Board decision is tainted by reasonable apprehension of bias. Fourth, they argue that the Mushroom Board's "Marketing Expansion Export Policy and Procedure" is not appropriate for an application, such as theirs, for export marketing. Fifth, they challenge the Mushroom Board's decision to except certain documents from disclosure under the *FOIPPA*.

Position of the Mushroom Board and Intervenors

In light of the decision by the Mushroom Board to consider the Appellants' application, the Mushroom Board and the intervenors say that it is premature for the British Columbia Marketing Board (the "BCMB") to consider either appeal. In the context of this objection to the appeals proceeding, the BCMB has received and carefully considered the following submissions:

1. Submissions of Appellants dated October 18, 1999.
2. Submissions of the Appellants dated October 21, 1999.
3. Submissions of Intervenor Champ's Mushrooms Inc. received October 25, 1999.
4. Submissions of Mushroom Board dated October 25, 1999.

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5. Submissions of Intervenor, Martin Chia dated October 25, 1999.
6. Submissions of Intervenor, Do Holding Ltd. dated October 26, 1999.
7. Reply of Appellants dated October 27, 1999.

Decision

The Panel has determined that the Appellants' appeals relating to the September 9, 1999 and September 28, 1999 decisions of the Mushroom Board will not be considered at this time. The first appeal has been rendered academic by the Mushroom Board's second decision. As for that second decision, the Mushroom Board has agreed to give full consideration to the Appellants' Joint Application. This it must do objectively and in good faith. The Appellants may succeed in their Joint Application despite the fact that the Mushroom Board intends to consider the issue of ownership and control as a factor in its deliberations. If the Appellants do succeed before the Mushroom Board, the appeals undoubtedly will not proceed. On the other hand, if the Mushroom Board rejects the application, the BCMB will have the benefit of the Mushroom Board's considered decision on the merits.

As the Appellants point out, the Mushroom Board has stated its intention to consider the issue of ownership and control within the context of this application. The Appellants say in effect that in doing so the Mushroom Board has disclosed an intention to proceed with its application on a fundamentally flawed premise which justifies the BCMB by-passing any Mushroom Board decision and proceeding with the appeals now. The Panel does not agree.

In the Panel's opinion, it is not irrelevant for the Mushroom Board to entertain consideration of the unresolved litigation issue regarding ownership on the question whether the Appellants' application should be granted. The Mushroom Board has a duty to regulate the orderly marketing of mushrooms. The litigation is not a basis for the Mushroom Board to abdicate its regulatory responsibility. The Mushroom Board

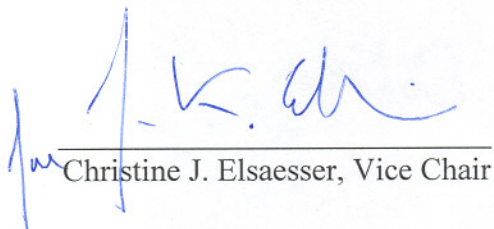
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is entitled to consider the extent to which any uncertainty arising from these issues is relevant from a regulatory perspective in deciding whether to grant the joint application. In doing so, argument will undoubtedly be made regarding the extent to which any alleged uncertainty should be given weight on a Joint Application for increased production for export. All that the Mushroom Board has said is that it will consider this factor. Until it actually hears the application - something which this Board expects to happen as soon as reasonably possible - in the context of the evidence and the arguments, the Mushroom Board cannot pre-determine the outcome of that consideration and its impact on whether the Joint Application will be granted.

For these reasons and the Mushroom Board's specific request that the appeals not proceed until it has made its decision, the Panel concludes that it is appropriate for the appeals from the Mushroom Board's September 9 and 28, 1999 decisions to be adjourned pending the Mushroom Board's decision on the merits: *Act*, s. 8(7).

As for the Appellants' appeal from a "decision" of the Mushroom Board to not disclose certain documents relating to market allocation as a result of a *FOIPPA* request, the Panel is of the opinion that the BCMB is not empowered to hear appeals from decisions made applying the criteria contained in that enactment. That is the unique statutory function of the Freedom of Information Commissioner. Independently of the *FOIPPA*, the BCMB is of course empowered to determine whether certain documents should be disclosed as part of appeal proceedings: s. 8 (5). However, in view of our decision to adjourn the two appeals, the BCMB declines to make such an order at this time.

BRITISH COLUMBIA MARKETING BOARD
Per


Christine J. Elsaesser, Vice Chair