

IN THE MATTER OF THE APPEAL OF
THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD
GENERAL ORDERS 1994
SIGNED INTO EFFECT APRIL 04, 1994

BETWEEN:

FRASER VALLEY MUSHROOM GROWERS'
CO-OPERATIVE ASSOCIATION

Appellant

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

Respondent

AND:

PACIFIC FRESH MUSHROOMS INC.

Intervenor

DECISION OF THE BRITISH COLUMBIA MARKETING BOARD

DATES OF HEARING:

October 5, 6, 7, December 22, 1994

INTRODUCTION:

1. The matter before the British Columbia Marketing Board (the "Board") is an appeal by Fraser Valley Mushroom Growers' Cooperative Association (the "Co-op") against the passing of the 1994 General Orders by the British Columbia Mushroom Marketing Board (the "Mushroom Board") dated April 4, 1994.
2. The Appellant filed a Notice of Appeal with the Board on May 27, 1994.
3. Pre-hearing conferences were conducted with all parties on July 15, 1994 and September 29, 1994.
4. The Appellant has provided all parties and the Board with particulars of the Appeal dated August 9, 1994.
5. Evidence was presented on October 5 - 7, 1994. Written submissions were filed and oral argument was heard on December 22, 1994.
6. The Appellant Co-op is associated with Money's Mushrooms Ltd., a designated agency through which mushrooms grown in British Columbia are "packed, stored and marketed."
7. The British Columbia Mushroom Marketing Board is a marketing board created pursuant to the Natural Products Marketing (British Columbia) Act (the "Act"). Its powers are set out in the British Columbia Mushroom Marketing Scheme (B.C. Reg 153/66).
8. Pacific Fresh Mushrooms Inc. ("Pacific Fresh") applied for and was granted intervenor status on June 29, 1994. Pacific Fresh is also a designated agency through which mushrooms grown in British Columbia are "packed, stored and marketed."

BACKGROUND:

1. The Mushroom Marketing Board General Orders 1966 (the "1966 Orders"), enacted pursuant to the Act, and the British Columbia Mushroom Scheme (the "1966 Scheme"), designated the Co-op as the exclusive agency through which mushrooms grown in British Columbia "shall be packed, stored and marketed." By the same enactments, the Mushroom Board was appointed to administer the mushroom industry in British Columbia.

2. The Co-op maintained its exclusive agency in relation to the production and marketing of mushrooms until May, 1988 when the 1966 Orders were amended to designate Pacific Fresh as a second agency.
3. From 1966 to 1988, the Mushroom Board was operative in licensing, establishing, and enforcing both pricing controls and industry standards within the industry. Since 1988, the Mushroom Board's activity has been limited to areas involving licensing, and assisting growers and agencies, as required, in enforcing industry standards.
4. In response to the designation of Pacific Fresh as a second agency, it was necessary to change the composition and operation of the Mushroom Board. By Order-in-Council dated December 15, 1988, a three member board was appointed. The Mushroom Board was required to set up operation and physical location independent from the Co-op.
5. In approximately January of 1992, the Mushroom Board recommended that a review of the mushroom industry be conducted to assess industry difficulties.
6. In July of 1992, the Review Committee concluded that the mushroom industry suffered from bootlegging, over-supply, imports, low economic returns and a general lack of cooperation within the industry. The report recommended the continued existence of the Mushroom Board in an expanded five member form.
7. Following the report, the Mushroom Board sent a letter dated October 1, 1992, to all mushroom growers advising of the reports' conclusions and of the need for a growers' vote.
8. On October 15, 1992, the Mushroom Board provided all mushroom growers with a "Mushroom Grower Vote Information Package."
9. On November 9, 1992, a meeting of all mushroom growers was held.
10. On November 16, 1992, the Board of Directors of the Appellant met and made recommendations on the upcoming vote. Recommendations included:
 - a. the Mushroom Board have expanded powers to cancel and/or refuse to re-issue licenses; and
 - b. the Mushroom Board exercise and enforce its power to fix farmgate prices.

11. In November of 1992, a growers' referendum was conducted. Fifty-eight percent of the mushroom growers voted. Generally, the mushroom growers voted in accordance with the recommendations of the Appellant.
12. In May of 1993, the Final Report of the Review Committee was released. It recommended the continuance of the Mushroom Board with three appointed and two elected members, and an amendment to authorize fixing of the farmgate price.
13. On June 24, 1993, the Appellant Co-op met with previous Mushroom Board Chair, Mr. Towsley, to discuss the report and the results of the vote. The Appellant's minutes indicate they were aware that a restructuring of the Board from three to five members would occur "within a few days" and that this necessitated a change to the 1966 Scheme.
14. In August of 1993, the 1966 Scheme was amended to reflect the recommendations of the Review Committee (the "1993 Scheme").
15. On January 19, 1994, Mr. Garth Bean was appointed Chair of the Mushroom Board.
16. As Chair of the Mushroom Board, Mr. Bean had as one of his first tasks the drafting of new General Orders to reflect the amendment to the 1993 Scheme.
17. Prior to drafting the new General Orders, Mr. Bean reviewed reports relating to the B.C. Mushroom industry and the minutes of all board meetings, and had discussions with federal and provincial government employees, growers and agencies. He reviewed the 1966 Scheme, the 1966 Orders, the 1993 Scheme, and the Act.

ISSUES UNDER APPEAL:

1. The Appellant alleges that the Mushroom Board erred by passing its 1994 General Orders (the "1994 Orders") without due process (i.e. without giving the Appellant the opportunity of attending a hearing to make representations).
2. The merits of the 1994 Orders.

POSITION OF THE PARTIES:

1. The Appellant submits that, prior to enacting General Orders greatly expanding the role of the Mushroom Board in the industry, the principles

of natural justice and procedural fairness require that the Mushroom Board hold a hearing at which all affected parties would have the opportunity to express their opinions and interests.

2. The Appellant generally alleges that the 1994 Orders are too broad and as such threaten the Appellant's vested interest and substantial investment in the mushroom industry.
3. Finally, the Appellant raises specific objections with respect to:
 - a. Order No. 1 interpretations:
 - i) "agency" vs. "distributor",
 - ii) "producer" vs. "grower",
 - iii) "regulated product",
 - iv) "transport order";
 - b. Order No. 2 - Books, Records and Information;
 - c. Order No. 3 - Licences;
 - d. Order No. 4 - Growers, Agencies, Distributors, Wholesalers;
 - e. Order No. 7 - Prohibition; and
 - f. Order No. 8 - Exemptions.
4. The Respondent Mushroom Board submits in response that:
 - a. there were meetings with representatives of the Appellant from February through to May of 1994;
 - b. there were ample opportunities for consultation with the Mushroom Board;
 - c. these opportunities for consultation were initiated by the Mushroom Board and directly addressed the concerns expressed by the Appellant about the 1994 Orders; and
 - d. the Mushroom Board considered the concerns expressed by the Appellant and concluded that the 1994 Orders should, nevertheless, remain intact as originally drafted in April.
5. In response to the merits of the 1994 Orders, the Respondent submits that these Orders are very similar to those issued in 1966 and were based on the amended 1993 Scheme. The only substantive change

relating to the Mushroom Board's authority to fix farm gate price is specifically authorized in the Mushroom Scheme.

6. The Intervenor supports the position of the Respondent Mushroom Board and takes the position that the orders of the Mushroom Board are legislative, and, as such, natural justice and procedural fairness are not required.

DISCUSSION:

Issue 1

1. According to Knight v. Indian Head School Division No 19, [1990] 3 W.W.R. 289, three factors must be considered when determining whether a duty of procedural fairness arises:
 - a. the nature of the decision to be made by the administrative body (ie. a decision of a preliminary or administrative nature will not generally trigger the duty to act fairly);
 - b. the relationship between that body and the individual; and
 - c. the effect of the decision on the individual's rights.

The Panel finds the 1994 Orders to be preliminary in nature. The 1994 Orders are not made in the context of a specific dispute or issue in relation to a particular individual or group, but rather are enabling in nature, setting out a framework within the jurisdiction of the 1993 Scheme. The Panel finds that in enacting the 1994 Orders the Mushroom Board was exercising a legislative function reflective of the amendments to the 1993 Scheme. Thus, it is the Panel's opinion that the facts of this appeal do not raise an issue of procedural fairness.

2. Given the Panel's finding that no duty of procedural fairness is imposed at law, the requisite statutory provisions must be considered. Section 13 of the Act does not impose a duty of procedural fairness on the Mushroom Board. According to British Columbia (Egg Marketing Board) v. British Columbia (Marketing Board) (1991) 57 B.C.L.R. (2d) 369, where there are no words in the statute requiring procedural fairness, procedural fairness is not presumed.
3. Alternatively, if the Panel is incorrect and the facts do raise the doctrine of procedural fairness, the Panel finds on all the evidence that the Mushroom Board has met its obligation of procedural fairness. Relevant evidence is as follows:

Following his appointment as Chair, Mr. Bean met with both Pacific Fresh and the Co-op. He circulated a one-page document advising of the Mushroom Board's role, how this was to be achieved, what had been done to date, and what was still to do.

Mr. Bean also conducted farm visits to meet personally with individual mushroom producers including Co-op members.

In February of 1994, Mr. Bean met with Mr. Macdonald, Chair of the committee struck to deal with the Mushroom Board. Mr. Macdonald expressed concern over what he perceived to be the Mushroom Board's attempt to market and sell mushrooms. Mr. Macdonald conceded on cross-examination that he was advised by Mr. Bean that this was not the Mushroom Board's intent. Mr. Macdonald also agreed that he was advised that Mr. Bean would be putting in new General Orders.

The Mushroom Board confirmed its position that it had no intention of infringing on the agency's marketing efforts in a letter to Len Bykowski on February 14, 1994.

In its newsletter of February 14, 1994, distributed to all growers, the Mushroom Board provided a history of the review process and its results. The newsletter confirmed the amendment to the 1993 Scheme and advised that Orders were being written for publication in March of 1994. No inquiries were received from anyone on behalf of the Co-op regarding this notification.

In a further meeting with Mr. Bykowski on February 15, 1994, attempts were made to clear up any misunderstanding on the part of the Co-op regarding the role of the Mushroom Board. Mr. Bean provided a copy of the 1993 Scheme to Mr. Bykowski and advised him that the 1994 Orders were being drafted.

It also appeared from the evidence that there were at least two further meetings in March, 1994. The 1994 Orders were made effective April 4, 1994. The Mushroom Board had two further meetings to discuss the Appellant's concerns regarding the 1994 Orders.

4. From the evidence and submissions of counsel, it appears that the real dispute between the parties is more one of the interpretation to be given particular words of the 1994 Orders rather than the degree of consultation that actually took place. The Appellant has one interpretation, the Respondent and Intervenor another. The Panel doubts that more consultation would have resolved this issue.
5. Had this Panel found that the Board did not properly or adequately consult with the Appellant, we would be reluctant in any case to vary or rescind the 1994 Orders for the following reasons:
 - a. the 1994 Orders are consistent with the powers granted by the amended 1993 Scheme;
 - b. the Appellant has not presented any evidence which demonstrates that the 1994 Orders have, to date, either unfairly affected the interests of the Appellant or interfered with the ability of Money's Mushrooms Ltd to effectively market mushrooms; and
 - c. the 1994 Orders are essentially the same as the 1966 Orders, with the only two substantive changes being the authority to fix farmgate price and the expanded licensing power. These changes were the subject of an affirmative grower referendum and legislated by the 1993 Scheme.

Issue 2

6. Given the Panel's findings in paragraph 5 above, the Panel is not prepared to rescind or revise the 1994 Orders for lack of merit.

Decision

7. This Panel therefore denies the Appeal of the Fraser Valley Mushroom Growers' Co-operative Association and approves the General Orders as enacted on April 4, 1994.

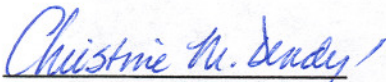
RECOMMENDATIONS:

During the course of the hearing, the Mushroom Board indicated that the 1994 Orders were drafted to allow the Mushroom Board to carry out its duties, specifically with respect to bootlegging, a serious industry problem. The Mushroom Board indicated receptiveness to industry stakeholders' input regarding recommendations for refinements and improvements to the Mushroom Board's operating plans and general orders.

This Panel, therefore, recommends that the Mushroom Board establish an industry advisory committee representing all mushroom growers, agencies, and other major stakeholders to provide a forum for regular consultation and improved relations within the industry.

This Panel requests that the Mushroom Board advise the British Columbia Marketing Board of its timetable for the establishment of such a committee.

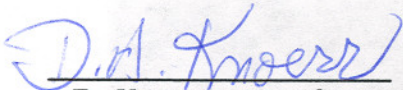
Dated at Richmond, British Columbia this 6th day of January, 1995.



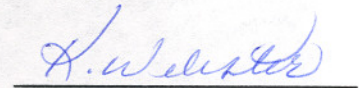
C. Dendy, Vice Chair
British Columbia Marketing Board



C. Moffat, Member
British Columbia Marketing Board



D. Knoerr, Member
British Columbia Marketing Board



K. Webster, Member
British Columbia Marketing Board