

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM A DECISION OF THE
BRITISH COLUMBIA MUSHROOM MARKETING BOARD
DENYING APPROVAL OF A PROPOSED CONTRACT
DATED JANUARY 7, 1999

MONEY'S MUSHROOMS LTD. AND
PACIFIC FRESH MUSHROOMS INC.

APPELLANTS

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

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 Appellants

Mr. Stein K. Gudmundseth, QC,
Counsel

For the Respondent

Ms. Lisa Hynes, Counsel

Date of Hearing

March 9, 1999

Place of Hearing

Langley, BC

INTRODUCTION

1. On August 22, 1998, the British Columbia Mushroom Marketing Board (the "Mushroom Board") enacted Order 2/98. The purpose of this Order was to allow for the transfer of grower production between agencies where the Mushroom Board found there were special circumstances. In addition, Order 2/98 provided that "any new or renewed contract between a grower and an agency must first be approved by the Mushroom Board".
2. Money's Mushrooms Ltd. ("Money's") and its subsidiary Pacific Fresh Mushrooms Inc. ("Pacific Fresh"), both agencies of the Mushroom Board, have prepared a new grower contract. The Mushroom Board reviewed the contract and on December 30, 1998, held an open meeting to hear from any grower "affected, concerned, supportive or opposed to this proposed new contract".
3. On January 7, 1999, the Mushroom Board refused to approve the proposed contract because of its concerns about Paragraph 16 (right to terminate contract in the event that any regulatory body sets a price higher than the contract price) and Paragraph 18 (right to obtain injunction and damages if producer sells product to anyone other than the company). The Mushroom Board concluded that Paragraph 16, as drafted, interfered with the Board's power to control farm gate pricing. It concluded that Paragraph 18, as drafted, interfered with the Board's authority to direct product to be transferred from one agency to another in special circumstances.
4. Money's and Pacific Fresh ("the Appellants") appealed this decision to the British Columbia Marketing Board (the "BCMB") on February 5, 1999.

ISSUES

5. The issues raised by the Appellants on this appeal may be summarised as follows:
 - (a) Was the Mushroom Board's decision tainted by virtue of an alleged conflict of interest and reasonable apprehension of bias on the part of the elected Mushroom Board members who participated in the decision? (**"The Bias Issue"**)
 - (b) Under the *British Columbia Mushroom Marketing Scheme* (the "*Scheme*") is it lawful for the Mushroom Board to refuse to approve an agency contract on the grounds identified in the January 7, 1999, decision? (**"The Legality Issue"**)
 - (c) On the facts, was it appropriate to refuse to approve the contracts? (**"The Merits"**)

FACTS

6. In response to concerns raised by a number of mushroom growers as well as a letter from the BC Mushroom Growers Association, the Mushroom Board met with representatives of the Appellants on December 7, 1998, to discuss their new grower contract.
7. On December 30, 1998, the Mushroom Board held an industry meeting to address the concerns regarding the proposed contract. At that meeting, the Mushroom Board was comprised of two Lieutenant Governor in Council (“LGIC”) appointees, Mr. Ron Fontaine, Chair and Mr. Ted DeVries, Vice Chair. The two grower elected members, Mr. Quan Troung and Mr. John Ly were also in attendance. Ms. Kathleen Cross, the third LGIC appointed member was not in attendance at the meeting.
8. In its January 7, 1999, decision, the Mushroom Board took issue with the following two clauses and as such refused to approve the proposed contract on the basis that the provisions undermine the ability of the Mushroom Board to regulate the industry effectively:

16. Notwithstanding any other provision in this Agreement to the contrary, the Company may terminate this Agreement:

...

on 60 days prior written notice to the Grower in the event that the British Columbia Mushroom Marketing Board, or other regulatory agency, requires the Company to pay a higher price for the mushrooms to the Grower than the Company is obligated to pay pursuant to paragraph 6.

18. Without limiting any other right or remedy of the Company under this Agreement or by law of general application, the Grower specifically acknowledges and agrees that if the Grower sells or delivers, either directly or indirectly, while this Agreement is in effect, any mushrooms to any other person, corporation or company other than to the Company then the Grower shall be liable for all consequential damages incurred by the Company, including but not limited to loss of profits and in addition to other remedies the Company shall be entitled to obtain an injunction against the Grower to prevent further outside sales or deliveries and the Grower shall fully indemnify and save harmless the Company from all losses, costs and expenses, including legal fees as a result thereof.
9. In its decision of January 7, 1999, the Mushroom Board summarised its concerns regarding these clauses as follows:

Notwithstanding the above, the Mushroom Board remains concerned about two aspect (sic) of the Proposed Contract which in its view compromises the regulatory authority as it relates to the transference of product between agencies and the setting of farm gate prices. The Mushroom Board asked Money's at the December 30, 1998 meeting to provide it with some comfort in this regard. Specifically, the Mushroom Board inquired whether Money's would consider altering paragraph 18 of the Proposed contract (sic) such that it would not interfere with the Mushroom Board's authority to transfer the shipment of product from one agency to another in special circumstances, pursuant to Order 2/98. The Mushroom Board also expressed concern in its

December 16, 1998 letter about the incompatibility of General Order No. 4 which grants the Mushroom Board the authority to set farm gate price, and paragraph 16 of the Proposed Contract which permits Money's to cancel the Contract in the event that the Mushroom Board or other regulatory agency requires an increase in the price of mushrooms. The Mushroom Board is confident that the language of paragraphs 16 and 17 (sic) can be amended to protect both the interests of Money's in the event farm gate prices change as well as the jurisdiction of the Mushroom Board to control farm gate pricing. The Mushroom Board has made it very clear that it would only review prices paid to growers and fix farm gate price in consultation with the agency, subject to the supervision of the British Columbia Marketing Board. A contractual provision which allows the dominate (sic) agency in the industry to terminate all its growers contracts when the Mushroom Board changes the farm gate price may effectively undermine the authority of the Mushroom Board to control farm gate prices. This is unacceptable.

10. In its submissions before the Board, the Mushroom Board submitted that Paragraph 16, which would permit the Appellants to cancel the contract in the event of an increase in the price paid for mushrooms, would undermine the Mushroom Board's authority to set minimum farm gate prices and thereby carry out its statutory mandate. The Mushroom Board's concerns for the efficacy of its regulatory authority were repeated in respect of Paragraph 18 which creates a right of action in conflict with Mushroom Board orders authorising a grower to sell product to another agency.

ARGUMENT OF THE APPELLANTS

The Bias Issue

11. The Appellants argue that they have a reasonable apprehension of bias as a result of the two grower members of the Mushroom Board participating in the public meeting of December 30, 1998, and subsequent decision. They allege that both Mr. John Ly and Mr. Quan Truong are aligned with the minority of mushroom growers who have chosen not to renew their contract with Money's or Pacific Fresh. In addition, Mr. Truong's brother is a director and is becoming a shareholder in a new mushroom marketing agency, Farmers' Fresh Mushrooms Inc. ("Farmers' Fresh").
12. The Appellants argue that the appropriate legal standard to be applied to these circumstances is set out in a number of cases, including *Metropolitan Properties Co. (F.G.C.) v. Lannan*, [1969] 1 Q.B. 577, [1968] 3 All ER 304 (C.A.):

...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand:...Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough:...There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that

reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

13. This test was restated in *Hannam v. Bradford City Council*, [1970] 1 W.L.R. 937, [1970] 2 All ER 690 (C.A) as follows:

If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some of the members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias. Of course, someone else with inside knowledge of the characters of the members in question might say: 'Although things don't look very well, in fact there is no likelihood of bias.' But that would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased.

14. The Appellants argue that applying the foregoing test to the facts of this situation, there exists a reasonable apprehension of bias. The fact that the two grower members have not renewed their own contracts with Money's presumably means that they will be or have entered a contract with a competing agency. A reasonable person with no inside knowledge might well think that those members might be biased as it is their interest to weaken Money's and thereby strengthen their own agency. In addition, the familial relationship between Mr. Truong and his brother, the director and prospective shareholder of Farmers' Fresh, would surely cause the reasonable person to think that Mr. Truong was biased in favour of the his brother's interests.
15. Finally, the Appellants argue that this is not a case where the reasonable apprehension of bias is statutorily mandated. Section 3.03 of the *Scheme* does not preclude the Mushroom Board from conducting a hearing absent member growers who would be in a position of conflict or where there is a reasonable apprehension of bias. Nor is this a case where the statute requires all Mushroom Board members to be are growers and where it might be implied that the reasonable apprehension of bias doctrine does not apply.
16. Thus, where the *Scheme* is silent on whether a grower may sit on the Mushroom Board while in a conflict of interest situation, it should not be assumed that the conflict is authorised. Indeed the Conflict of Interest Guidelines of the BCMB expressly recognise that conflicts of interest extend beyond a member's personal interest to "those of a family member, close friend, business associate, corporation or partnership in which a member holds a significant interest, or a person to whom the member owes an obligation".
17. The Appellants submit that the Mushroom Board, while aware of the family relationship between Mr. Truong and a director of Farmers' Fresh, erred in deciding that this relationship would not have a significant impact. It did not invoke the supervisory assistance of the BCMB nor did it address the key issue of a perception

of bias among those with no inside knowledge of the character or standing of the grower members.

The Legality Issue

18. The Appellants argue that it is not lawful for the Mushroom Board under the *Natural Products Marketing (BC) Act* (the "Act") or the *Scheme* to vary or terminate contracts. They argue by analogy. In *Anderlini v. Fraser Valley Milk Producers Co-operative Association* (1989), 63 DLR (4th) the Legislature expressly vested the Milk Board with the power to vary or terminate contracts in the *Milk Industry Act*. No similar power exists in the *Scheme*.
19. In *BC Mushroom Marketing Board v. BC Marketing Board and Coates*, SCBC, A840648, Mr. Justice Gould found that while the power to prohibit production was contained in other marketing schemes it was conspicuously absent in the *Mushroom Scheme*. He held, therefore that there was no power in the Mushroom Board to prohibit the production of mushrooms.
20. Thus, the Appellants argue that had the Legislature wanted to give the Mushroom Board the ability to interfere with contractual rights it would have done so expressly as it did in the *Milk Industry Act*.

The Merits

21. The Appellants submit that if the Mushroom Board could vary or terminate grower contracts, on the particular circumstances of this case it erred in doing so. The two impugned provisions were in previous contracts to which the Mushroom Board took no objection. In addition, it does not appear on the evidence that the Mushroom Board was concerned with these provisions until a minority of growers who were aligned with competing agencies raised the issue. Only then did the Mushroom Board raise objections to the contract.
22. The Appellants argue that the Mushroom Board seeks to change the rules applying to contracts previously in existence. It does so in the face of majority grower support and in circumstances where there are compelling business reasons for those impugned contractual terms.
23. The Appellants argue that in the absence of compelling evidence that the impugned provisions prevent the Mushroom Board from carrying out its mandate under the *Scheme*, the Mushroom Board should have approved the contract. The only evidence before the Panel is that the terms are commercially justified and reasonable for both the growers and the agency. In particular, there was evidence that the Appellants' banks require the commercial certainty achieved by the contractual terms.

ARGUMENT OF THE RESPONDENT

The Bias Issue

24. The Mushroom Board denies both that its two grower members were in a conflict of interest and that a reasonable apprehension of bias arises as a result of their participation in the contract review. Its arguments are three-fold:
 - (a) Any irregularity in the initial decision of the Mushroom Board is cured by the hearing *de novo* before the BCMB;
 - (b) Upon applying of the correct legal test to the facts, no reasonable apprehension of bias existed;
 - (c) Even if a reasonable apprehension of bias did exist, the doctrine of necessity would require at least one of the challenged grower members to participate in the December 30, 1998 meeting.
25. The Mushroom Board argues that the consideration of whether any conflict of interest or reasonable apprehension of bias existed in the contract review is wholly irrelevant. The appeal before the BCMB is by way of a hearing *de novo*. Section 6 of the *Act's Regulations* makes it clear that on appeal the BCMB may receive any evidence or information as it in its discretion considers necessary and appropriate. Indeed in this appeal, the Appellants received a complete rehearing before the BCMB.
26. Relying on *Lange v. The Board of School Trustees of School District No. 42* (1978), 9 BCLR 232, the Mushroom Board argues that a breach of natural justice in the first instance can be rectified by a full and fair hearing *de novo* either by the body perpetrating the original breach or, if possible, by a differently constituted body with the same powers and status.
27. Although *Lange* was decided in the context of a reconsideration by the same statutory decision maker, the same principle applies to this situation where, by virtue of s. 9 of the *Act*, the BCMB has the full authority to confirm, reverse or vary the decision made in the first instance.
28. In any event, the Mushroom Board argues that the facts before us do not give rise to a reasonable apprehension of bias when the proper legal standard is considered. In contrast to the test advanced by the Appellants, the Mushroom Board argues that the proper test is found in the decision of Mr. Justice de Grandpre in *Committee for Justice and Liberty v. National Energy Board* (1976), 68 DLR (3d) 716 (SCC) at p. 735:
 - ...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In

the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -and having thought the matter through - conclude...

29. In the same case, at p. 736, Mr. Justice de Grandpre noted that natural justice must be rendered. "But its application must take into consideration the special circumstances of the tribunal". He then cites with approval the following passage from Reid, *Administrative Law and Practice* (1971), p. 220:

..."tribunals" is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

30. Thus, the Mushroom Board submits that the proper test to apply in these circumstances is what a reasonable person, viewing the matter realistically and practically and with full information about the tribunal in issue, would conclude. The BCMB must bear in mind the nature of the industry being regulated and the nature of the Mushroom Board itself.
31. Not every "interest" in the outcome of a decision will give rise to a reasonable apprehension of bias. In the decision of the Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee* (1991), 84 DLR (4th) 105 at p 122, it was held that an interest which is too attenuated or remote, will not give rise to a reasonable apprehension of bias.
32. In this case, the Mushroom Board argues that the Appellants are asking the BCMB to take the concept of reasonable apprehension of bias beyond what is rational. There is no allegation that either impugned grower member is a director of a competing agency; nor is there an allegation that the grower member has any interest in a competing agency. The only allegation is that the brother of a grower member is a potential shareholder in a company that has applied for an agency licence. This indirect and remote interest on the part of a grower member cannot give rise to a reasonable apprehension of bias in the mind of a reasonable and informed person. This is especially so in the context of the mushroom industry which is replete with familial relationships.
33. The Mushroom Board submits that the second ground for alleging a reasonable apprehension of bias is even more remote and attenuated. The Appellants argue that neither grower member should have participated in the contract review because they had elected not to renew their contracts with Money's. The assumption being that a grower member who has chosen to enter into a contract with another agency would somehow have an interest in damaging Money's through the contract review.
34. The Mushroom Board argues that a reasonable and informed bystander would understand that all growers would, by necessity, have a contract with some agency. When the Mushroom Board makes decisions which impact on an agency, which argues the Mushroom Board is virtually any decision, the grower members will

have a contract with either the agency directly impacted or its competitor. This is the nature of the industry and of statutory framework that creates the Mushroom Board.

35. In this respect, the Mushroom Board relies on *Brosseau v. Alberta Securities Commission* (1989), 57 DLR (4th) 458 (SCC) for the proposition that no reasonable apprehension of bias can arise as a result of the composition of a tribunal where that tribunal is statutorily mandated. Section 3.02 and 3.03 of the *Scheme* require that two of the five Mushroom Board members be elected registered mushroom growers. The Mushroom Board submits that grower status alone does not create a reasonable apprehension of bias. This is the essence the Appellants' argument.
36. The Appellants in this case are suggesting that grower members of the Mushroom Board should not participate in decisions of the Mushroom Board not only where they have a direct conflict of interest but rather where their status as growers creates an apprehension of bias. The Mushroom Board argues that the grower members' status as growers without something more cannot exclude them from participating in Mushroom Board decisions
37. To accept the Appellants' submission in this regard would effectively preclude the grower members from participating in virtually all Mushroom Board decisions, since most decisions have an impact upon an agency. This was not the intent of the *Scheme* or the BCMB Conflict of Interest Guidelines.
38. Finally, the Mushroom Board argues that even if the BCMB finds that as a general rule, grower members should not participate in decisions involving agency contract reviews, there must be an exception where necessity dictates otherwise. The Mushroom Board cites *Judges v. Attorney General of Saskatchewan*, [1937] 2 DLR 209 to support the proposition that when a disqualifying bias renders a tribunal unable to make a decision, the doctrine of necessity will uphold the decision, since it would otherwise be unable to perform its statutory functions.
39. On the evidence, one of the appointed members was unable to attend the public meeting on December 30, 1998. Had the Mushroom Board proceeded with only its appointed members it would have lacked quorum. In these circumstances, it was necessary for at least one grower member to attend the meeting.

The Legality Issue

40. The Mushroom Board argues that it does not require specific authority to vary or terminate contracts. The *Act* and *Scheme* implicitly grant the Mushroom Board the power to vary contracts within the general authority and responsibility to regulate the industry and to oversee the operations of designated agencies found in s. 10(4) of the *Act* and s. 4.01 of the *Scheme*.

41. The subject matter of the impugned paragraphs fall within areas of express Mushroom Board authority set out in the *Scheme*: namely the authority to fix prices (s. 4.01 (g)) and the authority to designate the agency through which mushrooms are marketed (s. 4.01 (a)).
42. The Mushroom Board argues that it must have the power to address these issues and to prevent a designated marketing agency from exercising functions, which it has been empowered by the Mushroom Board to exercise, in a manner which undermines the Mushroom Board so as to render it ineffective.
43. The Mushroom Board argues further that the power to vary or terminate contracts is fairly incidental to the legislative objectives of the *Scheme* and thus, ought not to be held *ultra vires* unless expressly forbidden: *Re Schumacher* (1969), 70 WWR 309 at 31(BCSC). The Mushroom Board argues that the Appellants are seeking to eliminate this principle entirely from the statutory construction of regulatory schemes by advancing their argument with respect to the *Coates* decision.
44. However, the Mushroom Board argues that *Coates* cannot be read as broadly as the Appellants suggest. Central to Mr. Justice Gould's decision was that the *Act* authorised the Lieutenant Governor in Council to vest marketing boards with the power to regulate and prohibit production of a regulated product. However, in enacting the *Scheme*, the Lieutenant Governor in Council chose not to vest the Mushroom Board with the power to prohibit production in the Mushroom Board. At the same time however, other schemes under the *Act* were vested with that power. The omission from the *Scheme* was obvious and reflective of a legislative intent to omit the power to prohibit production from the *Scheme*.
45. The Appellants in advancing their argument are not comparing the *Scheme* to other schemes enacted under the *Act*. Rather they are attempting to extend the analogy to an entirely different piece of legislation, the *Milk Industry Act*. It is not accurate to say that because the legislature has chosen to expressly include a specific authority in one piece of legislation that same authority cannot be found in another piece of legislation by virtue of the necessarily incidental doctrine.
46. The Mushroom Board submits that the approval of contracts between growers and agencies is simply the exercise of a power that is fairly incidental and consequential upon those general powers granted to the Mushroom Board by the *Act* and the *Scheme*.

The Merits

47. The Mushroom Board argues that it is appropriate to vary or terminate contracts and in the circumstances of this case, it was appropriate for it to refuse to approve the proposed contract as the two impugned terms undermine its ability to regulate the transfer of growers between agencies and to set minimum farm gate price.

Paragraph 16 allows the Appellants to terminate grower contracts if the Mushroom Board exercises its authority to raise farm gate price; this is incompatible with General Order No. 4 which provides:

The Board shall review the prices to growers and if necessary shall fix the price that will be paid for the regulated product or a grade or class of the regulated product by a designated agency. This shall be done in consultation with the Agencies and is subject to the supervision of the Provincial Board.

48. The Mushroom Board argues that Paragraph 16 effectively defeats the purpose of having a regulatory body set the farm gate price. If the Appellants as the dominant agencies in the industry can terminate all of their growers contracts if the Mushroom Board raises farm gate price, that effectively prevents the Mushroom Board from exercising its authority. This would effectively result in the Appellants controlling the price setting authority. The Mushroom Board argues that it was this concern of the BCMB in the Mushroom Agency Designation Review dated August 19, 1997, which resulted in its direction to the Mushroom Board to take effective regulatory control of this area.
49. The Mushroom Board argues that the Appellants' concerns regarding this paragraph, which stem from allowing an outside body to set the price they must pay their growers, are only valid if the Mushroom Board exercises its authority capriciously. The Mushroom Board argues that there is no reason to suggest that there is any risk of this happening. This is particularly so in light of the BCMB's recommendation in the Mushroom Agency Designation Review that the Mushroom Board set farm gate price in consultation with a pricing committee on which would be agency representatives. The BCMB noted that this process would provide "checks and balances in the use of the authority" as would the right of appeal.
50. The Mushroom Board has proposed a revised Paragraph 16, which provides for any disputes to be resolved by an independent arbitrator. The Mushroom Board argues that this provides an additional check and balance on its use of the price setting power. Thus, the Mushroom Board submits that the Appellants are adequately protected from any potential abuse of this authority.
51. With respect to the Appellants' suggestion that Paragraph 16 is necessary to satisfy the concerns of their bankers, the Mushroom Board is prepared to consider alternate wording which does not render useless its price setting authority but the Appellants have not suggested any alternatives. The Mushroom Board is prepared to work with the Appellants to find wording which will satisfy the Appellants commercial needs and address its regulatory concerns.
52. The Mushroom Board has similar concerns with Paragraph 18. It argues that this term undermines its authority to regulate the transfer of product between agencies by imposing liability on a grower who sells or delivers product to a third party. The Mushroom Board is concerned that this term interferes with its ability to transfer

product from one agency to another in special circumstances as provided by Order 2/98.

53. The Mushroom Board argues that it enacted Order 2/98 in response to specific directions from the BCMB to establish a process for the orderly transfer of growers between agencies: Mushroom Agency Designation Review, August 19, 1997 p. 17; Truong Appeal, May 22, 1998, paragraph 202. Order 2/98 creates a system by which a grower can apply to the Mushroom Board for approval to transfer product from one agency to another. The Order states that such applications will only be considered in special circumstances. In addition, the procedural guidelines contemplate that affected agencies will be consulted before the Mushroom Board makes a decision on the application.
54. The Mushroom Board argues that its efforts in enacting Order 2/98, and establishing guidelines for a transparent and orderly process for transferring product between agencies, are aimed at creating an orderly marketing system. The newly designated agencies require producers from whom to purchase product. If those producers are tied into long term contracts, with lengthy termination notices, the Mushroom Board will have an obvious problem in creating an orderly marketing system.
55. If the grower contract has an explicit provision entitling the agency to pursue damages against any grower who transfers product to another agency, there will be a "chilling effect" on a grower's willingness to even apply for a transfer. Thus, the Mushroom Board submits that Paragraph 18 as written undermines its regulatory efforts.
56. The Mushroom Board has suggested amending Paragraph 18 to make it clear that this term does not interfere with its regulatory authority and adding a further term that the contract is subject to the lawful exercise of Mushroom Board authority. However, the Appellants are unwilling to make this amendment.

REPLY OF APPELLANT

The Bias Issue

57. The Appellants dispute that a hearing *de novo* by the BCMB cures a defect in the hearing before the Mushroom Board. The Appellants are entitled to a hearing before the Mushroom Board and an appeal before the BCMB. If there is a reasonable apprehension of bias, the Appellants argue that the first stage of the statutory requirement has not been fulfilled and as of right, the Appellants are entitled to another hearing before the Mushroom Board.
58. The Appellants argue that the *Lange* case does not stand for the proposition that the appellate tribunal should substitute its decision. Rather in *Lange*, there was another

hearing before a differently constituted original body with the same powers and status. The Appellants argue that in this case, that can only be achieved through a hearing before the Mushroom Board without the participation of Mr. Ly or Mr. Truong.

59. With respect to the argument that the interests of Mr. Ly and Mr. Truong are too attenuated or remote, the Appellants argue that the BCMB must consider the significant and disruptive impact that changing long-standing contractual terms has on them. They argue that the interests of the two grower members cannot be considered remote or attenuated where the consequences to them are so severe.
60. Contrary to the submissions of the Mushroom Board, the brother of the grower member is a director and was in the process of becoming a shareholder in Farmers' Fresh. The Mushroom Board's submission that Farmers' Fresh had not yet been licensed at the time of the impugned Mushroom Board decision distorts the issue. On December 16, 1998, the Mushroom Board determined that Farmers' Fresh should be granted an agency license. Although this decision was subject to BCMB approval, it was not remote that Farmers' Fresh would become a competing agency.
61. The Appellants argue that not every decision of the Mushroom Board would require grower members to be excluded. However, in a case such as this, where the effect of the Mushroom Board decision is to undercut long-standing contractual language and jeopardise the banking relations of a multi-million dollar industry, the consequences are far from remote and the benefits to a competing agency are obvious.
62. The Appellants argue further that it is a question of the degree of impact of the matter to be decided which will determine the appropriateness of a grower member participating in the decision-making process.
63. Finally, the Appellants argue that the doctrine of necessity does not apply to these circumstances. The doctrine is not available where non-grower members of the Mushroom Board could have made a decision. The meeting could have been re-scheduled or Ms. Cross could have attended by phone. In any event, even if the doctrine of necessity applies, only one grower member should have attended not both.

The Legality Issue

64. In their reply, the Appellants argue that the Mushroom Board may not refuse approval where contractual provisions do not conflict with its regulatory powers. The right to terminate grower contracts in the event of an increase in farm gate price does not prevent the Mushroom Board from increasing farm gate price. The requirement for notice in accordance with the termination provisions of the contract

does not prevent growers from moving to another agency as long as they comply with reasonable termination provisions.

65. Thus, the Appellants argue that there is no conflict between the contractual provisions and the exercise of Mushroom Board authority. The Mushroom Board can exercise its authority and fulfill its mandate without prohibiting Paragraph 16 and Paragraph 18 of the draft contract.
66. The Appellants argue that it is not fairly incidental, necessarily incidental, necessary or advisable that the Mushroom Board have the power to terminate a contract where the agency for commercial reasons determines it cannot pay the grower a higher farm gate price than originally contracted for. It is also not necessarily incidental to the Mushroom Board's powers that it have the ability to abrogate reasonable termination provisions in a grower contract by refusing approval of standard, reasonable rights and remedy provisions. The Mushroom Board is seeking far-reaching powers that are not authorised by the *Scheme*.
67. Finally, the Appellants argue that the Mushroom Board has no power to prohibit contractual language containing reasonable termination provisions under its *Scheme*. While other marketing schemes do contain specific powers to abrogate existing rights, such as quota, there are no such specific powers permitting the Mushroom Board to abrogate reasonable termination or remedy provisions. Relying on *Coates*, such powers ought not to be read into the *Scheme*.

The Merits

68. In their reply, the Appellants reiterate their position that Paragraph 16 does not defeat the purpose of having the Mushroom Board set farm gate price. The fact that an agency can terminate its grower contracts does not defeat the Mushroom Board's ability to set farm gate price as there are other competing agencies.
69. It is unreasonable to expect the Appellants to remain bound to a contract that requires it to pay a higher price than forecasted by its business plan. Likewise, a prudent banker would not accept such an uncertainty. Arbitration does not solve this uncertainty. It adds delay and uncertainty and places ultimate business judgement in the hands of a third party with none of the financial risk of either Money's or Pacific Fresh, their shareholders or bankers. If as the Mushroom Board states it is not their intention to exercise the power capriciously, then presumably it would not raise farm gate price so high as to cause the Appellants to exercise their rights under Paragraph 16 and terminate the contract. Thus, Paragraph 16 should not be an issue to the Mushroom Board.
70. Finally, it does not matter that the Mushroom Board intends to follow due process in exercising its regulatory authority to fix farm gate price. The fact remains that

the Mushroom Board seeks to require the Appellants to pay whatever price it or an arbitrator decides regardless of the financial consequences.

71. With respect to Paragraph 18, there is no evidence to suggest that the Mushroom Board's authority is in any way hamstrung by this contractual provision. On the contrary, new agencies are attracting growers and the Appellants' growers seek the protection afforded by Paragraph 18. To suggest that this paragraph should be subject to the lawful authority of the Mushroom Board, avoids a determination now of whether the Mushroom Board has the authority to transfer a grower contract, and ignores reasonable termination provisions and the rights and remedies available in the event of a breach of those provisions.

FINDINGS OF THE BCMB

The Legality Issue

72. The Appellants have raised the issue of reasonable apprehension of bias on the part of two members of the Mushroom Board to participate in a review of the Appellants' draft grower's contract. This issue however is academic if the Mushroom Board committed an error of law under the *Scheme* in even undertaking such a review.
73. The Appellants argue that the Mushroom Board may not lawfully vary or terminate contracts under their *Scheme*. They assert that because the Legislature has seen fit to put such express provisions in other legislation such as the *Milk Industry Act*, these powers should not be implied within the *Scheme*.
74. The Panel disagrees with this analysis as it fails to recognise a fundamental philosophical underpinning of the *Act*, namely that marketing boards must be able to intervene in the private marketplace. Section 2.02 of the *Scheme* provides:

The purpose of this scheme is to promote, control and regulate, under a marketing board, subject to the direction of the Provincial board, the transportation, packing, storing and marketing of the regulated product.

75. One must read s. 2.02 in conjunction with s. 4.01 of the *Scheme* which grants the Mushroom Board extensive powers including the power to regulate and control in any and all respects, the marketing of regulated product, including, without limiting the generality of that, the power to regulate the time and place at which, and to designate the agency through which, any regulated product may be marketed.
76. The very purpose of the Mushroom Board under the *Scheme* is to regulate "marketing". The term "marketing" is expressly defined in the *Mushroom Scheme* as "including buying, selling, shipping for sale or storage and offering for sale...." Manifestly, the power to regulate the marketing of mushrooms "in any and all respects" must necessarily include the power to regulate the terms of the contracts

that an agency designated by the Mushroom Board enters into with licensed growers. This power is only reinforced in the case of such contracts by the other powers listed in s. 4 of the *Scheme*, including the power to fix farm gate prices and order transfer of product, all of which must be subject to the fullest exercise and respecting which any agency contract must be subordinate.

77. The Panel is of the opinion that this language clearly authorises the Mushroom Board to make decisions regarding what regulated product will be directed to which agencies and the terms on which this may be done. This statutory authority must be able to monitor and regulate the contractual relationship between a grower and an agency. Indeed, this is the very purpose behind such statutory powers. The Mushroom Board would be effectively powerless if agencies could simply contract out of the regulated marketing system and its regulatory policy objectives as determined by the Board from time to time. While the Appellants may not like it, they exist in a regulated marketing system, which accords them many benefits. Although the Mushroom Board may not have chosen in the past to exercise its powers to review or vary grower contracts, that does not preclude it from now choosing to do so.
78. The special position of the Appellants must be emphasised. They are not private corporations operating within a free enterprise system. They are marketing agencies appointed under statute with special rights to receive regulated product from regulated growers. So appointed, these agencies enjoy unique and virtually exclusive rights to market regulated product. Agencies are essentially statutory surrogates that perform the very marketing functions that boards themselves are empowered to undertake and do undertake in other commodity sectors. By virtue of their statutory privileges, agencies can exercise enormous power over “their” growers, who enjoy far less contractual bargaining power than they would in a free enterprise environment. Attempts by individual growers to market product independently is vigorously suppressed as illegal “bootlegging”: see *Truong Mushroom Farm v. British Columbia Mushroom Marketing Board* (April 12, 1999, unreported, B.C.S.C.). Money’s and Pacific Fresh have been on the forefront of efforts over a number of years to stop and penalise the sale of mushrooms by anyone but a designated agency. They have been keenly interested in and have often opposed applications by other persons attempting to obtain agency status. The enormous benefits that the Appellants derive from the regulatory scheme are self-evident.
79. The unique statutory status and the benefits granted to agencies under the legislation properly give rise to corresponding responsibilities and regulatory supervision on the part of the Mushroom Board, and the BCMB. Agencies are a fundamental part of the regulated mushroom marketing system. They are not in charge of it. If the regulated marketing system is to operate effectively, the actions of agencies, including the terms and conditions under which they purchase product from growers, must necessarily be subject to regulation. The body with first instance

regulatory responsibility is the Mushroom Board, which is subject to supervision by the BCMB.

80. The Panel does not believe that the existence of lawful power to regulate the terms by which agencies seek to obtain product from growers can be seriously debated. Nor do the decisions in *Anderlini* and *Coates* assist the Appellants. Neither case in any way suggests that a commodity board, which has the power to regulate in any and all respects the marketing of regulated product, is powerless to regulate the contracts that agencies designated under statute propose to enter into with growers. The real question in this case is not whether the power exists. It is whether the Mushroom Board's judgment in refusing to approve the proposed contracts was exercised appropriately. Before reviewing that issue, however, it will be appropriate to address the bias issue raised by the Appellants.

The Bias Issue

81. The Appellants argue that applying the appropriate legal standard to the facts of the case before us, they had a reasonable apprehension of bias on the part of the Mushroom Board when it made its decision. They seek to have the decision flowing from the December 30, 1998, meeting quashed and sent back to a properly constituted Mushroom Board, i.e. one without grower member participation.
82. It is not, strictly speaking, necessary for us to determine whether in fact a reasonable apprehension of bias existed on the part of the Mushroom Board. The fact that we have conducted a full rehearing and reviewed this matter afresh in light of our own authority and judgment is a complete answer to the Appellants' argument. The hearing conducted by the BCMB on March 9, 1999 has cured any deficiency in procedural fairness in the hearing before the Mushroom Board. In our opinion, the Supreme Court of Canada decisions in *Harelkin v. University of Regina* [1979] 2 SCR 561 and *King v. University of Saskatchewan*, [1969] SCR 678 are determinative on this point.
83. However, in view of the arguments raised by the Appellants, it may be appropriate for the Panel to offer the following observations regarding the "merits" of Appellants' bias allegations.
84. The Panel agrees with the Mushroom Board that the appropriate legal standard to be applied is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude..." *Committee for Justice and Liberty v. National Energy Board, supra*. This test does not set a fixed standard. The Courts have made clear that the test is to be applied flexibly in view of a number of factors including the nature of the decision in question, the nature of the tribunal and the regulatory environment in which it operates, and the statutory scheme.

85. The Panel also accepts that if the “interest” of a board member is either too attenuated or too remote, it will not give rise to a reasonable apprehension of bias.
86. The Appellants argued that the two grower members should not have participated in the contract review. One ground asserted on this point is that both grower members have chosen not to renew their contracts with Money's and thus are part of the minority of industry growers who choose to market their product through a different agency. The Appellants argue that this raises the spectre of bias, as it is in the grower directors' interest to “weaken Money's” to strengthen the agencies to which they will sell mushrooms.
87. We are unable to accept this argument. By law, no grower, without an exemption from the Mushroom Board, can market product except through an agency. Also by law, two elected members must sit on the Mushroom Board. It follows therefore that two members of the Board must at all times have contracts with one or another agency.
88. To accept the argument that the elected directors are biased against Money’s because they are seeking contracts with other agencies implies that those directors would be biased in favour of Money's if they had chosen to remain Money’s growers. Although it is noted that even if they were “Money’s growers”, Money’s still might assert bias on the basis that growers and agencies have different contractual interests and that growers would prefer terms more favourable to growers.
89. The effect of all this would be that the elected members of the Board would be incapable of participating in any decision that could “adversely” affect any agency. But it must be recognised that because of the reality that agencies are the fundamental linchpin in the mushroom marketing industry, agencies will be implicated in and affected by the vast majority of the Board’s regulatory decisions. The result of excluding elected members from any issue that may have an “adverse” effect on the private interests of the agency would effectively undermine the legislative policy decision in favour of grower participation on marketing boards.
90. It is no answer for the Appellants to say that the appointed members can sit. If the practical result is that the elected members can never (or rarely) participate on the Board in a meaningful way, the legislative intent has been undermined, contrary to the Supreme Court of Canada’s specific direction: *Brosseau v. Alberta Securities Commission* (1989), 57 DLR (4th) 458 (S.C.C.).
91. Furthermore, we think it is very important to emphasise that the Mushroom Board’s decision is more properly understood as a general public policy decision that would in the nature of things be applicable to all agencies, rather than a specific decision aimed to penalise or take benefits away from a particular agency. The Mushroom Board’s actions in this case have their genesis in the directions of this Board in

1997, which identified a mushroom industry in crisis. To address that crisis, this Board encouraged the Mushroom Board to exercise its regulatory powers to maintain an orderly marketing system by taking a more active role in the mushroom industry, exercise its authority to set farm gate price and facilitate the transfer of growers between agencies.

92. It is against this backdrop that the Mushroom Board began to exercise authority to review the contracts of the agencies. Its decision was not aimed at a single person, but at matters of policy and the need to strike an appropriate policy balance between numerous complex interests at stake in this fragile industry. For a board such as this, and even apart from statute, “a strict application of reasonable apprehension of bias as a test might undermine the very role that has been entrusted to them by the legislature: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 2 SCR 623.
93. By their very nature, the Board’s decisions had application to all agencies. They were general policy questions, inextricably linked with the efficacy of the Mushroom Board as a board. In considering the appropriate test for bias, it is much too simplistic to view this decision as simply about the “rights” of Money’s. We therefore conclude that, quite apart from our fresh hearing and the statutory authorisation, no reasonable apprehension of bias would arise at common law merely because the two elected directors are not “Money’s” growers. A reasonable person, viewing the matter realistically and practically and with full information about the tribunal in issue would not conclude that the participation of two grower members in the contract review amounts to a reasonable apprehension of bias.
94. The Appellants’ second bias concern arises from the fact that one of the four Board members who participated in the case has a brother who, at the time of the decision, was a director and was “in the process of becoming” a shareholder, of a company that had been recommended for agency approval by the Mushroom Board but that had not yet received approval by the BCMB. The Appellants argue that this familial relationship would cause a reasonable person to think Mr. Truong is biased in favour of his brother’s interests.
95. At the time the Mushroom Board made its decision, the BCMB had not made its decision whether to approve Farmers’ Fresh as an agency. Even if one were to speculate at that time that the BCMB would approve the proposed agency, it is not clear why the decision in question would be seen as particularly “in the interests” of the Board member’s brother. Because the Board’s decision would inevitably apply to all agencies equally, the result would be that no agency would have any contractual advantage over any other either in terms of farm gate price, or in terms of the ability of a grower to apply to the Board to transfer to another agency. As noted above, there was no question in this case of the Board doing anything other than making policy judgments that would in the nature of things have been applicable equally to all agencies. Moreover, we agree with the comments of the

Mushroom Board that in determining whether a reasonable apprehension of bias exists in law, it is relevant to consider the relatively small grower community out of which the *Scheme* requires two elected directors to sit on the Mushroom Board.

96. All this being said, we do not wish to be taken as preventing boards from adopting higher standards of protocol than the legal baseline established by the common law. Nor do we wish to be taken as saying that it is appropriate – aside from arguments about the effect of a hearing at the BCMB or the effect of the legislation - for elected members of boards to make decisions in individual matters in which family members stand to gain special and direct benefit from the decision in question. In such cases, board members should take the appropriate steps to address the situation.

The Merits

97. Having determined that the Mushroom Board has the legal authority to regulate the terms and conditions of agency contracts with growers, the remaining issue arises as to whether in these circumstances the Mushroom Board has exercised the power appropriately. The Mushroom Board takes the position that Paragraph 16 and Paragraph 18 unreasonably undermine the Mushroom Board's authority to fix farm gate price and to transfer product between agencies. The Appellants argue that these two paragraphs are necessary to ensure business certainty for not only themselves but also their bankers and shareholders.
98. We share the Mushroom Board's concern that no agency should be permitted to enter into contractual terms with its growers, which would reasonably undermine the regulatory authority of the Mushroom Board.
99. In our opinion, Paragraph 18 of the proposed Appellants' contract is fundamentally inconsistent with the Mushroom Board's regulatory authority to direct which growers shall sell mushrooms to which agencies. This clause would undermine marketing policy in two fundamental ways. First, it purports to entitle the Appellants to damages and even to seek an injunction to stop the very transfer of product, which the Board has authorised. In this respect it is probably inconsistent with the general law, by which a grower, armed with a Mushroom Board transfer order, would likely be able to rely on the doctrine of frustration as a defence to any enforcement action taken by the Appellants. However, notwithstanding the general law should the matter proceed to court, Paragraph 18 will in practical terms act as a powerful disincentive to any grower to even request a transfer. The effect would be to consolidate the Appellants' private position at the expense of the public policy objectives set out by this Board. As drafted, that paragraph is inappropriate.
100. We therefore direct that for the contract in general, a term should be added stating that the Agreement is subject to the lawful exercise of the Mushroom Board's authority under the governing legislation. We have been advised that the

Mushroom Board has proposed such a term and we endorse its insertion in the Agreement.

101. As to Paragraph 16, we take a different view. While we understand the Mushroom Board's concerns about the potential instability should the Appellants terminate all their contracts based simply on an increase in farm gate price, we do not believe that they should be compelled to perform contracts which they are incapable of performing for cost reasons. Nor do we believe that this paragraph would or should act as a fetter on the Mushroom Board's authority to establish farm gate price. In the nature of things, the Board would make such decisions in close consultation with agencies and growers in any event. Should a crisis ever arise in which a lawful Board increase in farm gate price give rise to wholesale contract terminations by an agency, we are confident that other agencies would be available to take the production which an agency has chosen to give away. Failing that, there is the option of an appeal to the BCMB to address the pricing issue.
102. As an aside, the Mushroom Board proposed that the farm gate price could be established by an arbitrator. While this Panel is not adverse to the use third-party advice in a price discovery process, it must be understood that the authority to set the price would continue to reside with the Mushroom Board alone.
103. Our only qualification on the latter point is that in order to ensure an orderly transition in production should the Appellants ever take such action, we would direct that the notice provision in Paragraph 16(b) be 180 days notice to the grower rather than 60 days. Should the 180 day period work hardship to an agency or grower, they could seek an exception from the Mushroom Board.
104. We wish to make three points by way of conclusion. First, we would reiterate that the legal authority to affect agency contracts ought not to be confused with the fundamental importance of good judgment in the exercise of that authority. Second, it would be highly exceptional for the Mushroom Board, having considered the question as a policy matter, to establish different terms for different agencies. Third, the BCMB endorses the Mushroom Board's approach of applying its Orders under appeal only to existing contracts which have expired, or to new contracts, rather than affecting existing contracts.

DECISION

105. Subject to our comments, in paragraph 100 of our decision directing the insertion of an additional term in the contract and in paragraph 101 concerning the setting of a farm gate price, the appeals are dismissed.
106. There will be no orders for costs on these appeals.

Dated at Victoria, British Columbia this 24th day of June, 1999.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Richard Bullock, Member

Hamish Bruce, Member