

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
APPEALS FROM DECISIONS OF THE
BRITISH COLUMBIA MUSHROOM MARKETING BOARD
CONCERNING THE MARKETING OF PRODUCT

BETWEEN:

THANH BINH LAM AND TRANG TU LAM
(d.b.a. THANH TRANG MUSHROOM FARM)

VAN HAI DUONG
(d.b.a. CANADIAN MUSHROOM FARM)

APPELLANTS

AND

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

RESPONDENT

AND

MONEY'S MUSHROOMS LTD.

ROSS LAND MUSHROOM FARM LTD.

INTERVENORS

DECISION
APPLICATION FOR STAY OR ADJOURNMENT

APPEARANCES: (via written submissions)

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Richard Bullock, Member
For the Appellants Thanh Binh Lam and Trang Tu Lam	Mr. Ton That Tuan, Agent
For the Appellant Van Hai Duong	Self-represented
For the Respondent	Ms. Lisa Hynes, Counsel
For the Intervenor Money's Mushrooms Ltd.	Mr. Stein K. Gudmundseth, Q.C., Counsel
For the Intervenor Ross Land Mushroom Farm Ltd.	Did Not Appear

Introduction

1. These reasons address an application by the Intervenor Money's Mushroom's Ltd. ("Money's), that the British Columbia Marketing Board (BCMB) stay or adjourn the appeals "pending the conclusion of arbitration proceedings commenced pursuant to the contracts between the appellants and Money's."

The Parties

2. The Appellants are mushroom growers. They have filed separate appeals which, for reasons of convenience, are being dealt with together.
3. The Respondent is the British Columbia Mushroom Marketing Board ("Mushroom Board"). The appeals before us are taken from decisions of the Mushroom Board refusing to authorize the Appellants to sell their product to an agency other than Money's or directly into the market.
4. The Intervenor Money's is an approved agency. It is subject to regulation as part of the regulated mushroom marketing sector. Like growers, Money's is governed by the *Natural Products Marketing (BC) Act* ("the Act") and the *British Columbia Mushroom Scheme* ("Scheme"). It derives benefits and privileges from such regulation. As such, Money's is subject to the regulatory authority of the Mushroom Board, and the BCMB: see generally the BCMB's recent decision in *Money's Mushrooms Ltd. v. British Columbia Mushroom Marketing Board* (June 24, 1999).

5. The Intervenor Ross Land Mushroom Farm Ltd. is another mushroom farm and made no submissions with respect to this application.

Background

6. The Mushroom Board's General Orders require growers to market their product through an entity holding "agency" status as approved under statute: the *Act*, s. 10(4); *Scheme*, s. 4.01. The Appellants are approved to market their product to Money's.
7. The Appellants have entered into contracts with Money's setting out the terms and conditions of sale between the growers and the agencies. As the BCMB has recently confirmed, such private arrangements between regulated actors are at all times subject to the regulatory authority of the Mushroom Board, which is subject to the supervision by the BCMB: *Money's Mushrooms Ltd. v. British Columbia Mushroom Marketing Board* (June 24, 1999).
8. One of the regulatory powers of the Mushroom Board is to authorize growers to transfer product from one agency to another, or to authorize direct sales. The Appellants sought permission from the Mushroom Board to make such a change. This permission was denied by the Mushroom Board on June 15, 1999.
9. The issues raised on these appeals before the BCMB are whether we ought to allow the appeals and authorize the Appellants either to sell their product to another agency, or to sell their product to market directly. The Mushroom Board refused their applications to do so. Under s. 8 of the *Act*, the Appellants have a right to appeal these decisions to the BCMB.
10. The Appellants' grounds of appeal allege a combination of improper decision-making by the Mushroom Board and oppressive conduct by Money's, which they say justifies an order permitting them to sell their product to someone other than Money's.
11. These appeals have arisen on an urgent basis. They were filed on June 23 and 24, 1999. It appears that the Appellants have ceased delivering their mushrooms to Money's. The Appellants allege that their economic well-being is in jeopardy.
12. A pre-hearing conference was conducted on July 5, 1999. The appeals are presently set down for hearing on July 12 and 13, 1999. Money's filed its application for a stay or adjournment on July 6, 1999.

Argument of Money's

13. In collateral proceedings initiated under its contracts with the Appellants, Money's has alleged that the Appellants' failure to deliver product is a breach of

contract and has claimed (a) damages for losses it has suffered and will suffer, and (b) awards “prohibiting” the Appellants from continuing their breach of the contracts. It has requested that an arbitrator address these matters pursuant to the following clause in their contracts:

In the event of a dispute hereunder, that dispute shall be referred to a single arbitrator under the provisions of the *Commercial Arbitration Act (British Columbia)* and the decision of that single arbitrator shall be final and binding upon the parties hereto. The cost of any such arbitration shall be borne equally borne by the parties.

14. Money’s alleges that, having initiated arbitration proceedings alleging a breach of contract, the BCMB ought to stay or adjourn its proceedings in favour of the arbitral tribunal. Money’s relies by analogy on ss. 15(1) and 15(2) of the *Commercial Arbitration Act*, and on Court decisions that have concluded that court litigation ought not to proceed in favour of informal and expedient arbitration processes that have been contractually agreed to: *Gulf Canada Resources Ltd. v. Arochen International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.); *Hebdo Mag. Inc. v. 125646 Canada Inc.*, [1992] B.C.J. No. 2960 (S.C.); *Prince George (City) v. McElhanny Engineering Services Ltd.*, [1995] B.C.J. No. 1474.
15. Money’s concedes that ss. 15(1) and (2) apply only to actions filed in Court. It says that the arguments in principle are just as compelling, particularly where the issues have already been decided by the administrative tribunal with “primary jurisdiction”.

Decision

16. For the following reasons, we reject Moneys’ application that the appeal be adjourned or stayed.
17. First, it is doubtful that we have the authority to stay or adjourn an application in the absence of an application by the either the Appellant or the Respondent: the *Act*, s. 8(7). Money’s concedes that the BCMB is not a court and that ss. 15(1) and (2) of the *Commercial Arbitration Act* are therefore not legally operative in this circumstance.
18. However, even assuming that we had the discretion to stay or adjourn an appeal at the instance of an intervenor and in the absence of an application by an appellant or a commodity board, we would exercise that discretion only in a compelling case. To frustrate the right of an appellant and commodity board to have an appeal heard and decided in accordance with the specific and specialized legislative framework for challenging commodity board decisions would be exceptional indeed.

19. Section 8 of the *Act* creates a right of appeal specifically tailored to the realities, demands and needs of the highly specialized area of regulated marketing. The broad right of appeal was specifically designed by the Legislature to allow commodity board decisions to be reviewed efficiently, effectively and afresh by the BCMB - the supervisory board with overriding responsibility regarding regulated marketing. The Legislature has vested the BCMB with a responsibility to hear those appeals promptly and efficiently, and to ensure accountability. That role, specifically added to the *Act* in 1974, is essential to the proper and credible operation of the regulated marketing system.
20. Even if they had attempted to do so, parties could not contract out of the regulated marketing system: *Money's Mushrooms Ltd. v. British Columbia Mushroom Marketing Board* (June 24, 1999). Even less could they contract between themselves in such a way that would prevent the BCMB from hearing appeals requesting that we scrutinize the decisions of a commodity board. That is what the appeals before us are about. Money's assertion that the argument for a stay is stronger when the Mushroom Board has already made a decision provides little comfort when a core issue before the BCMB is an urgent concern respecting the very fairness of the commodity board's decision-making.
21. The specialized forum created by the *Act* allowing the BCMB to hear appeals from commodity board decisions must not be frustrated by "private" arrangements created by parties (both of whom are subject to regulation within a marketing context) to address disputes between themselves. Indeed, we conclude that the limitation of s. 15 of the *Commercial Arbitration Act* to "courts" necessarily recognizes that very different considerations arise when specialized administrative tribunals are involved. Such tribunals are designed to address the very needs for effective, efficient, informed and specialized dispute resolution which arbitration was designed to provide when the only other choice was litigation in the courts. On the basis of efficiency alone, we note that on these appeals, a pre-hearing conference has already been conducted, interim applications have been addressed, and the appeals are set to commence hearing on Monday, July 12, 1999. On the basis of the grounds of appeal, we note that the arbitrator has no jurisdiction to review the decisions of the Mushroom Board.
22. We are not suggesting that Money's cannot proceed under the arbitral clause to seek damages for past actions and alleged breach of contract. However, to the extent that Money's is seeking prospective orders from the arbitrator purporting to "prohibit" any sale to another agency, any such decision would be subject to the regulatory authority of the BCMB. Whether the arbitrator would decide to stay or adjourn the arbitration is a question he or she would have to decide should Money's continue to press that forum.

23. However, as a matter of public policy, the Legislature has made the choice of forum where commodity board decisions are questioned. We see no legitimate basis for exercising a discretion to question that judgment in this case.
24. The appeals will proceed as scheduled on July 12-13, 1999.

Dated at Victoria, British Columbia, this 9th day of July, 1999.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Karen Webster, Member

Richard Bullock, Member