

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM ORDERS 1/98 AND 3/98
OF THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD

BETWEEN:

TRUONG MUSHROOM FARM LTD. and
ALL SEASONS MUSHROOM FARMS INC.

APPELLANTS

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD

RESPONDENT

AND:

MONEY'S MUSHROOMS LTD.

INTERVENOR

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine Elsaesser, Vice Chair Mr. Harley Jensen, Member Mr. Richard Bullock, Member
For the Appellants	Mr. David A. Critchley, Counsel Mr. J. Michael Le Dressay, Counsel
For the Respondent	Ms. Maria Morellato, Counsel
For Money's Mushrooms Ltd.	Mr. Stein Gudmundseth, Counsel
Date of Hearing	December 18, 1998
Place of Hearing	Vancouver, BC

INTRODUCTION

1. On December 18, 1998, the British Columbia Marketing Board ("BCMB") heard the appeal of Truong Mushroom Farm Ltd. ("Truong") relating to Order 1/98 issued by the British Columbia Mushroom Marketing Board ("Mushroom Board") on May 12, 1998. In addition, the BCMB heard the appeal of Truong and All Seasons Mushroom Farms Inc. ("All Seasons") of Order 3/98 issued on September 3, 1998. Money's Mushrooms Ltd. ("Money's") was an Intervenor in the Order 1/98 appeal.
2. Due to the urgent nature of these appeals, the BCMB released its decision on January 8, 1999 with full reasons to follow. The following are those reasons.

ISSUES

3. Is Order 1/98 within the jurisdiction of the Mushroom Board to enact? Or is it ultra vires in that its purpose is to control production or alternatively, that it is discriminatory? ("**Jurisdiction**")
4. If Order 1/98 is intra vires, does it apply to Truong whose contract with All Seasons was made prior to Order 1/98 coming into effect? ("**Application of Order to Truong**")
5. Is the Mushroom Board in breach of BCMB Conflict of Interest Guidelines in conducting the hearing ordered in Order 3/98? Is there a reasonable apprehension of bias on the part of the Mushroom Board? ("**Conflict of Interest / Reasonable Apprehension of Bias**")

FACTS

6. In August 1997, the BCMB completed a review of the mushroom industry and the application to designate All Seasons as an agency. On August 19, 1997, the BCMB ordered the Mushroom Board to designate All Seasons an agency within 21 days.
7. On September 4, 1997, the Mushroom Board passed the following Order (the "September Order"):

Pursuant to the *Natural Products Marketing (BC) Act* as well as the British Columbia Mushroom Scheme and the 1994 General Orders, there shall be no increased production of regulated mushrooms for sale or marketing unless approved by the British Columbia Mushroom Marketing Board. Persons seeking such approval must apply in writing to the British Columbia Mushroom Marketing Board.

8. Truong applied under the September Order to the Mushroom Board to increase its production from 0 to 350,000 lbs./month of mushrooms. At the time of its application, Truong was not producing or marketing mushrooms as it was building a new mushroom farm, having sold its farm and contract to another producer in early 1997.
9. In a decision dated November 27, 1997, the Mushroom Board limited Truong's production to 100,000 lbs./month of mushrooms.
10. Truong appealed the November 27, 1997 decision to the BCMB. Following a four-day hearing, the BCMB held in short reasons released on May 7, 1998 and full reasons released on May 22, 1998 that the September Order was beyond the legal authority of the Mushroom Board.
11. During the hearing it became apparent to the BCMB that All Seasons was not functioning as an agency. There was outright hostility between the principals and it was clear that there were real issues as to who were the directors of that company.
12. In its decision of May 7, 1998, the BCMB ordered the Mushroom Board to revoke the agency license if All Seasons could not demonstrate within 90 days that it could operate as a viable agency with an actual market.
13. On the same day, Ms. Tran Truong on behalf of Truong entered into a contract with All Seasons to market 350,000 lbs./month of mushrooms. Mr. Ty Truong and Mr. Binh Trinh executed the contract as directors of All Seasons. At the time of entering into the contract, Truong's mushroom facility was not yet completed.
14. On May 12, 1998, the Mushroom Board issued Order 1/98 which provides as follows:
 1. Any new producer who wishes to market regulated product for the first time or, alternatively, any existing producer who wishes to increase the quantity of regulated product previously marketed by that producer, must meet the following two criteria:
 - (i) there must be a written agreement between the producer in question and an existing agency which specifies the quantity of regulated product to be marketed annually by the agency on behalf of the producer ("Arrangement");
 - (ii) the agency and the producer must jointly apply in writing to the Board for approval of the Arrangement by the Board.
 2. There shall be no increase in the quantity of regulated product currently marketed unless the aforementioned criteria are satisfied. Any application by a new or existing grower must be made jointly with an existing agency.
15. In response to Truong's application on March 17, 1998 for a grower's license to produce 4,200,000 lbs./year of mushrooms, the Mushroom Board, on May 28, 1998

following the receipt of the BCMB's full reasons in the Truong appeal, issued a 1998 grower's license to Truong. The letter enclosing the grower license states:

...the issuance of this license does not provide Truong Mushroom Farm Ltd. with the ability to market your product. Until such time as Truong Mushroom Farm Ltd. has successfully applied for the Mushroom Board's approval to market product as contemplated by Interim Order 1/98, Truong Mushroom Farm Ltd. cannot lawfully sell their mushrooms.

16. On June 9, 1998 Truong appealed Order 1/98 to the BCMB.
17. On July 9, 1998, Truong sought to delay its appeal. On July, 10, 1998 the Mushroom Board agreed to adjourn the appeal on the express condition that it be without prejudice to the Mushroom Board's position that any further or continued attempts by Truong to build its farm and any associated costs were incurred at Truong's own risk.
18. The Mushroom Board made repeated requests to Truong to apply under Order 1/98. These requests went unanswered therefore, on September 3, 1998, the Mushroom Board issued Order 3/98 which provided as follows:
 1. Truong Mushroom Farm Ltd. and All Seasons Mushroom Farms Inc. must apply to the Mushroom Board as soon as possible and no later than September 14, 1998 for approval to market regulated product.
19. Sometime in the fall of 1998, Truong began producing mushrooms and marketing them through All Seasons.
20. Following the release of the BCMB's May 7, 1998 Decision there was confusion regarding the status of All Seasons. It was unclear to the Mushroom Board who represented All Seasons. Correspondence from the Mushroom Board to All Seasons was directed to numerous people including the three alleged principals of All Seasons and their respective counsel. In addition, the alleged principals were operating two separate All Seasons agencies under the one license, one by Mr. Truong and Mr. Trinh and the other by Mr. Hung Do.
21. The Mushroom Board carried out an investigation and review of All Seasons. The results of that investigation and review are set out in the Findings and Decisions of the Mushroom Board's Review of All Seasons' Viability as an Agency dated December 16, 1998. In these reasons, the Mushroom Board ordered that All Seasons' agency license be revoked within 90 days unless it was provided with a court order or a mediated settlement confirming the valid legal identity of its directors; confirmation that only one company was operating under the All Seasons license; and a single address and contact person for All Seasons.
22. The BCMB ultimately heard this appeal on December 18, 1998 at the insistence of the Mushroom Board.

ARGUMENT OF THE APPELLANT

Jurisdiction

23. Truong argues that it is clear from the May 7, 1998 Decision and the May 22, 1998 Reasons of the BCMB that the Mushroom Board has no authority to regulate the production of mushrooms. Order 1/98 is beyond the jurisdiction of the Mushroom Board as it purports to do exactly that. While the express wording in the order purports to regulate "marketing", the purpose of the general order is to regulate production and to discriminate amongst producers.
24. Truong argues that historically the Mushroom Board has not regulated production. The mushroom industry has long been a monopoly where the sole agency, Money's, controlled the production of mushrooms in the province through a system of discretionary contract allocations. When similar difficulties were encountered after Pacific Fresh Mushrooms Inc. ("Pacific Fresh") was granted agency status in 1988, the Mushroom Board had to protect producers from the effect of competing agencies on producer prices. During that time, the Mushroom Board set a minimum price but did not make any attempt to limit the production of mushrooms generally.
25. Truong argues that the drafters of the *British Columbia Mushroom Scheme* (the "Scheme") contemplated this "strange system" of production control. The *Scheme* was put in place at a time when Money's predecessor, the Fraser Valley Mushroom Growers' Co-operative Association, enjoyed the same power over contract allocations that Money's does today hence, the absence of any authority to regulate production. It was not until September of 1997 that the Mushroom Board sought to change its historical role and get into the business of controlling production.
26. Truong argues that by prohibiting the sale of mushrooms through its powers to regulate marketing, the Mushroom Board seeks to effectively control the production of mushrooms. Truong interprets the BCMB's May 22, 1998 Reasons in the Truong appeal as concluding that the Mushroom Board could "achieve its objective of orderly marketing" by using its power to control the quantity of product marketed by any person. Truong submits that the BCMB erred in this conclusion.
27. Truong, relying on *Re: Heppner and Minister of Environment for Alberta et al*, (1977) 80 DLR (3d) 112, argues that the true purpose of Order 1/98 is to achieve an objective not contemplated by the governing legislation and therefore it is ultra vires.
28. Truong further relies on the decision of *British Columbia Mushroom Marketing Board v. British Columbia Marketing Board and Donald B. Coates* [1984] B.C.J. No. 362 where Mr. Justice Gould states that "if the Mushroom Board does not have

the power to prohibit the production of mushrooms, then it cannot use powers to issue licences...to prohibit production. That would be to do indirectly what it cannot do directly."

29. Truong further submits that the Mushroom Board's conduct since September 1997 demonstrates that it is ill equipped to enter this most difficult area of regulation and is confused and apprehensive about how to take over the process of controlling mushroom production. Without a comprehensive quota scheme in place, Truong argues that the Mushroom Board should not be allowed to experiment with a "quasi-quota system" to the potential detriment of producers with significant investment in the industry.
30. Truong argues that the Mushroom Board's authority to prohibit marketing is found in section 4.01(a) of the *Scheme* which allows the Mushroom Board:

to prohibit the transportation, packing, storing or marketing, in whole or in part, of any grade, quality, or class of any regulated product...
31. Thus, Truong submits that the Mushroom Board has no authority to prohibit marketing in general, rather its authority extends only to the prohibition of marketing of specific qualities, grades or classes of product.
32. Truong argues that while Order 1/98 purports to allow marketing subject to applicants obtaining approval from the Mushroom Board "prior to entering into any new or increased production contracts", one must read this Order in the context of the facts. Truong argues that it is manifestly clear when one looks at the Mushroom Board's earlier decision in the Truong appeal and the BCMB's direction that the Mushroom Board facilitate transfer of growers between agencies that the purpose of General Order 1/98 is to prohibit all new production. If All Seasons is to obtain any supply in the face of Order 1/98, it must be transferred from an existing contract with either Money's or Pacific Fresh, which neither company will willingly agree to.
33. Truong also argues that the purpose of Order 1/98 is to bring construction of new facilities to a halt. Instead the Mushroom Board wants to put into place a scheme for transferring existing production allocations.
34. Truong argues that the power to regulate by implication includes the power to prohibit. Any power to prohibit that the Mushroom Board does have is extremely limited and cannot be used to limit all production. In advancing this proposition Truong relies on the following passage from *Dexter Construction Company Limited v. The City of St. John* (1981), 35 NBR (2nd) 217 at 231:

It is, I think, also clear that in the absence of any express statutory authority, the mere power to prohibit the excavation of gravel for commercial purposes without first obtaining a permit therefore does not authorize the absolute prohibition of excavation.

35. Truong argues that where the stated intention of the Mushroom Board is to stop new and increased production and put into place a scheme for transferring existing contract allocations, the purpose of Order 1/98 is to prohibit new production outright and as such is *ultra vires* the Mushroom Board.
36. Truong argues Order 1/98 only applies to new producers or those who wish to increase the quantity of regulated product previously marketed. The Order applies to some producers and not others and thus, runs afoul of s. 4.01 of the *Scheme*. Effectively this Order creates two industries each regulated by different rules.
37. The first industry is pre-existing (i.e. Money's and Pacific Fresh and their growers). The second is the one that must be built up by All Seasons and its growers. This industry faces hurdles never before faced in its history; it is faced with controls over price and quantity and must seek approval for every contract allocation. This is compounded by the fact that there are no rules as to how approvals will be made; there is only the stated position of the Mushroom Board that no more approvals will be granted. The effect of Order 1/98 is to impose a license before the farmgate. It creates a class of growers who do not have the same rights as those who came before and who essentially must submit to the unfettered and unguided discretion of the Mushroom Board.
38. In support of this argument Truong relies on three decisions, *Gulf Canada Limited v. Corporation of the City of Vancouver* (1981), 34 BCLR 21 and *Ashby et. al. v. Prince Albert* [1984] 6 WWR 93 and with some emphasis, *Forst v. Toronto* (1923) OLR 256. The *Forst* decision involved a consideration of the appropriateness of actions by certain municipal officials in issuing a permit to move a building. The Court held that if the intention of a by-law was not to create a discretionary right to grant or refuse any application it may be valid, "but if the intention is to create a municipal *cadi*, having supreme power and answerable to no one, the municipal legislation is clearly invalid".
39. Truong argues that the Mushroom Board has done exactly that; it has created a wall through which farmgate product will not move without the permission of the Mushroom Board. There are no rules or guidelines for this ad hoc, discriminatory process.

Application of Order to Truong

40. Truong argues in the alternative that if Order 1/98 is *intra vires* the Mushroom Board, it has no application to Truong as it entered into a contract with All Seasons on May 7, 1998, five days prior to the passing of Order 1/98. Although the construction of the Truong farm was not complete, Truong argues that as of May 12, 1998, Truong was neither a new producer nor a producer seeking to increase its production. Truong with its existing contract with All Seasons was in the same position as any other grower with an existing contract allocation.

41. Truong argues that Order 1/98 cannot have retroactive effect. The power to make an order retroactive is unusual and as it is potentially prejudicial, it must be expressly set out in the governing legislation. Truong relies on the following two cases to support this argument: *Re Day & Ross Ltd. and Jumbo Motor Express Ltd.* (1972), 27 DLR (3rd) 115 and *Commission Des Relations De Travail Du Quebec v. Ludovic Lapierre et. al. cie Paquet Inc.* [1971] SCR 1043. In the *Re Day* case the Court held that a tribunal with administrative and quasi-judicial power was a creature of statute and possessed only those powers that were expressly conferred by the statute and those necessarily inferred. Given that the Act did not grant the power to make orders for the issue of licenses with retroactive effect, the Court held that the tribunal did not have an implied power to license retroactively.
42. Truong also relies on the following passage from the *Commission Des Relations* case:
- Further, under the code what it may prescribe in the absence of a regulation has the same effect as a regulation; but a regulation may not have retroactive effect. It is a fundamental rule that a new requirement does not apply to acts previously accomplished. The legislature may derogate from this rule, not the board. Consequently, a regulation respecting the form of petitions cannot be applied to petitions already and validly made, so as to invalidate them.

Conflict Of Interest / Reasonable Apprehension of Bias

43. The Appellants also appeal Order 3/98, which requires Truong and All Seasons to apply to the Mushroom Board as soon as possible for approval to market regulated product.
44. The Appellants argue that the Mushroom Board cannot conduct the hearing ordered in Order 3/98 as three out of the five Mushroom Board members are in a conflict of interest due to their relationship with Money's. The Mushroom Board recognised the existence of this conflict at the hearing into the viability of All Seasons where certain confidential information could only be received by two Board members who agreed not to disclose the information to the other Board members.
45. The Appellants argue that this raises concerns not only as to the unbiased nature of any decision made as to All Seasons viability but also to the ability of the Mushroom Board to conduct a hearing into the approval of All Seasons' largest contract allocation.
46. The Appellants argue that this conflict on its own creates a reasonable apprehension of bias. However, the Appellants also argue that they have further grounds for a reasonable apprehension of bias based on their treatment by the Mushroom Board since the BCMB's Order of August 19, 1997 approving All Seasons as a designated agency.

47. The Appellants take issue with the following treatment:
- a. During the 21-day period in which the Mushroom Board was to approve All Seasons, it passed the September Order limiting production. This Order effectively applied only to All Seasons and was ultimately found to be ultra vires the Mushroom Board.
 - b. The Mushroom Board in its hearing pursuant to the September Order granted Truong 100,000 lbs. of production despite knowing that All Seasons business plan called for 350,000 lbs..
 - c. There is a grower contract which pre-dates Order 1/98 and the Mushroom Board has never provided the Appellants with any reasons as to how that Order could apply retroactively to Truong. Instead, the Mushroom Board has :
 - i) issued Order 3/98 requiring the Appellants to apply under Order 1/98;
 - ii) scheduled a hearing to cancel the Truong license prior to the delivery of its recommendation on the viability of All Seasons and prior to this appeal; and
 - iii) attempted to seize Truong's product immediately upon arranging an adjournment of the hearing into the cancellation of the Truong license.
48. The Appellants argue that the Mushroom Board has done everything in its power to shut down the Truong farm and to compromise the viability of All Seasons while purporting to conduct hearings into the viability of All Seasons.

ARGUMENT OF RESPONDENT

Jurisdiction

49. The Mushroom Board does not concede that it does not have the power under its scheme to control production. However, recognizing that the BCMB is of that view the Mushroom Board has chosen to attempt to influence legislative change. However, in the context of Order 1/98, the Mushroom Board argues that whether it has jurisdiction to regulate production is irrelevant, as Order 1/98 does not purport to regulate production at all. The Order only regulates increases in the quantity of regulated product marketed by new and existing producers.

50. The Mushroom Board argues that the regulation and control of the marketing of mushrooms is within the jurisdiction of the Mushroom Board. The purpose of the Mushroom Scheme is as follows:
- s. 2.02 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.
51. Section 4.01 of the *Scheme* further grants the Mushroom Board the power to promote, regulate and control in any respect the transportation, packing, storing and marketing of the regulated product. To deny the Mushroom Board the jurisdiction to regulate the marketing of mushrooms within British Columbia is absurd. This is the very purpose that the Mushroom Board was created. Without this power, there is no need for a Board at all.
52. The Mushroom Board argues that no significance can be attached to the Mushroom Board only recently beginning to regulate the marketing of mushrooms. It was not necessary to actively regulate marketing while all the marketing of mushrooms was handled by a single agency. It is only since the BCMB's order of August 1997 dictating further competition that it has become necessary for the Mushroom Board to exercise powers that although granted have been unnecessary to use in the past.
53. As to the purpose of the Order 1/98, on its plain wording it is intended to regulate the marketing, not the production, of the regulated product. The power "to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be transported, packed, stored or marketed by any person at any time" is expressly granted to the Mushroom Board by section 4.01 of the *Scheme*.
54. The Mushroom Board argues that to accept the arguments of Truong is tantamount to ignoring the plain wording of both the *Scheme* and Order 1/98.
55. The Mushroom Board further argues that this unsupportable interpretation of Order 1/98 is contrary to the "ordinary grammatical sense" of the language and thus contrary to the "modern principle" of statutory interpretation stated by Driedger in *Construction of Statutes*, 2d Ed. (1983: Butterworths). Driedger's statement of the modern principle has been recently endorsed by the British Columbia Court of Appeal in *Haida Nation v. British Columbia (Minister of Forests)*, (1997), 45 BCLR (3d) 80. On its plain wording, Order 1/98 is intended to regulate marketing of mushrooms, not production of mushrooms.
56. The Mushroom Board takes issue with Truong's analysis that simply because regulation of marketing is also achieved by Order 1/98 does not validate it when its primary purpose is to regulate production. The control and regulation of marketing is not a peripheral purpose of Order 1/98; it is its primary and only purpose. The

Mushroom Board argues that it cannot be precluded from exercising its expressly granted power to control marketing because of its potential incidental effect on production.

57. According to *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board* (1968), 67 DLR (2d) 1, what is important is that orders be directed at the regulation of a subject within the jurisdiction of the tribunal. The Mushroom Board argues that this is exactly what Order 1/98 does.

58. The Mushroom Board also takes issue with Truong's submission that the Mushroom Board does not have the authority under s. 4.01 of the *Scheme* to prohibit marketing in general. The Mushroom Board argues that Truong has failed to read the beginning of s. 4.01 which grants just such a general authority:

The Board shall have all the powers of a body corporate, and shall have power within the province to promote, regulate and control in any respect or in all respects, the transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and without limiting the generality thereof shall have the following powers...

59. Thus, in addition to the authority to regulate marketing in s. 4.01(a), the Mushroom Board has the general power to prohibit the marketing, in whole or in part, of the regulated product.

60. The Mushroom Board goes further to argue that despite having the express authority to prohibit marketing, that is not what Order 1/98 does. Order 1/98 is not a prohibition, rather it merely requires producers wishing to increase their marketing, to apply to the Mushroom Board for approval before doing so. Truong has not been prohibited from marketing rather it has simply refused to make application under this Order.

61. The *Dexter Construction* case relied on by Truong as authority for the proposition that the power to regulate does not include by implication the power to prohibit is distinguishable on two grounds. In that case, there was no express statutory authority to prohibit absolutely while in the *Scheme* there is. Second, the zoning by-law at issue absolutely prohibited excavation in certain areas; Order 1/98 does not contain any such prohibition.

62. The Mushroom Board argues that in any event the prohibition argument is premature as it assumes that Truong's application will be turned down before the application has even been made.

63. The Mushroom Board also disputes Truong's argument that Order 1/98 is discriminatory as it applies to some producers of regulated product and not all. This is not the case. Order 1/98 applies equally to all producers who wish to increase the quantity of regulated product currently marketed by them. The cases

relied on by Truong to support the argument of discrimination can be distinguished as the Mushroom Board is not refusing to grant a license in order to limit the number of businesses operating in a specific area. In those cases, the policy had no effect on already licensed businesses; decisions only affected unlicensed businesses. In this case, all licensed growers, existing and new, fall under the authority of Order 1/98. The fact that Order 1/98 may not affect those growers who do not seek to increase production does not make it discriminatory.

64. Truong's argument that Order 1/98 adversely impacts growers doing business with All Seasons is also unpersuasive. Any grower, new or existing, currently doing business with Money's may wish to expand its marketing of regulated product; these growers must apply under Order 1/98 for approval of their arrangement. If a new agency is designated, its growers may wish to do the same.
65. The Mushroom Board argues that even if the application of Order 1/98 results in the exclusion of some persons from participating in an industry, case law supports that this consequence should not be allowed to defeat the intent of a statute where the language is clear and specific. It is not a valid objection that a regulatory enactment acts to the benefit of some individuals and not others, if at the same time it is in the public interest: see *Robbins v. Ontario Flue-Cured Tobacco Growers' Marketing Board* (1963), 41 DLR (2d) 107 at 118(Ont. H.C.).
66. In summary, the Mushroom Board states that its decision to exercise its jurisdiction to regulate marketing has resulted from the changes within the industry. It cannot be precluded from exercising this jurisdiction in the best interests of mushroom industry stakeholders and the public at large simply because it will impact on the way certain persons do business. If the Mushroom Board does not take action, it has real concerns that the long-term viability of the mushroom industry would suffer.

Application of Order to Truong

67. As to the retroactive effect of Order 1/98, the Mushroom Board argues that Truong is attempting to make the same argument in this appeal that it unsuccessfully made in its appeal of the September Order. Order 1/98 is a different order; there is no exemption for producers who already have contracts in place. The argument while available in the earlier appeal, is not available here.
68. As to the validity of the contract, the Mushroom Board has received a great deal of correspondence from the principals of All Seasons and their respective counsel which paints a very contradictory picture of who is authorised to act on behalf of All Seasons. In light of this contradictory information, the Mushroom Board asserts that it cannot be assumed that Mr. Trinh was lawfully entitled to act on behalf of All Seasons at the time the contract was executed. Nor can it be assumed

that All Seasons was in a position to enter binding contracts at all or that there was an intention on the part of those legally entitled to act for All Seasons to enter into the contract.

69. In these circumstances, the Mushroom Board cannot rely on the records of the Registrar of Companies to determine who is entitled to act on behalf of All Seasons as it has actual notice of irregularities in its internal corporate procedures. Accordingly, the Mushroom Board submits that the BCMB cannot reach a conclusion as to whether Mr. Trinh is entitled to act as director of All Seasons or whether All Seasons has the legal capacity to enter into the contract due to the ongoing dispute between its various proponents.
70. Thus, the Mushroom Board asserts that the BCMB cannot determine the validity or invalidity of the contract. For this reason, the contract cannot render Order 1/98 inapplicable to Truong as that requires the BCMB to assume the validity of the contract.
71. The Mushroom Board further submits that the concept of retroactivity or retrospectivity does not apply to these circumstances. Order 1/98 is neither retrospective nor retroactive. It neither purports to change the law prior to its enactment nor does it attach new consequences to an event that occurred prior to enactment. Rather it applies only to those increases after May 12, 1998. Its application is both "immediate" and "general" as those expressions are explained at page 517 of R. Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (1994 : Butterworths):

"Immediate" in the sense that the new rule operates from the moment of commencement, displacing whatever rule was formerly applicable to the relevant facts, and "general" in the sense that the new rule applies to all relevant facts, ongoing as well as new.

72. The fact that legislation may have an impact on a contract entered into prior to its enactment does not mean the legislation is retrospective nor does it mean that the legislation does not apply to the contract. Both *Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.* (1988), 56 DLR (4th) 416 (Sask. C.A.) and *Board of Commissioner of Public Utilities v. N.S. Power Corp.* (1976), 75 DLR (3d) 72 (N.S.C.A.) are examples of cases where the Court concluded that the mere fact that regulations interfered with the provisions of pre-existing contracts did not mean that the regulations were operating retrospectively. The regulations operated prospectively altering the contract from the date of regulation and not a past date.
73. The Mushroom Board applies this same reasoning to Order 1/98 and submits that it does not affect Truong retrospectively rather its effect is prospective applying to increases in marketing after May 12, 1998. Significantly, Truong marketed no regulated product at all prior to May 12, 1998. Truong did not begin marketing mushrooms until some time in the fall of 1998. Thus, any increase in marketing by Truong occurred after the issuance of Order 1/98.

74. The Mushroom Board submits that if Order 1/98 required Truong to obtain approval prior to entering into a written agreement, Truong might have an argument that the Order does not apply. However, Order 1/98 requires a producer to have a written agreement with an agency and apply for Board approval before increasing the quantity of regulated product marketed over that which was previously marketed by the producer. When the agreement was entered into is irrelevant; what is essential is that Mushroom Board approval be obtained prior to the increase in marketing.
75. Contrary to Truong's submission, merely entering into a contract does not constitute an increase in marketing sufficient to remove Truong from the application of Order 1/98. "Marketing" as it is defined in the *Scheme* is an aggregate of several activities, including "buying, selling, shipping for sale or storage and offering for sale, and in respect of a natural product includes its transportation in any manner by any person". The primary purpose of marketing is as its plain meaning suggests, the buying and selling of regulated product.
76. A review of the *Scheme* including sections 2.02 and 1.02 makes it abundantly clear that the legislature intended the Mushroom Board to have the power not only to regulate marketing, as that term is commonly understood, but also those other functions which form part of the broader meaning of marketing. However, these activities are subsidiary to the primary purpose of marketing, the buying and selling of product.
77. This analysis is confirmed by the Ontario High Court decision in *Campbell Soup Co. Ltd. v. Farm Products Marketing Board* (1975), 63 DLR (3d) 401. The Court in considering the meaning of the term "marketing" reviewed the Webster dictionary definition. The Court held:
- ...the similarity between this definition and that in the Act may be noted, particularly that feature which gives the "aggregate of functions" a servient role in carrying out the dominant purpose of "transferring title and ... moving goods from producer to consumer.
78. Truong argues that since part of the definition of marketing includes "offering for sale" then Truong, by merely entering into a contract contemplating a certain amount of product being produced by the grower for an agency, was engaged in marketing before Order 1/98 was issued. The Mushroom Board argues that on a plain reading of Order 1/98, this was clearly not its intent.
79. Order 1/98 requires that before a producer increases the quantity of regulated product being marketed that there be a written agreement specifying the quantity of regulated product to be marketed annually by an agency. The written agreement does not constitute an increase in marketing rather it contemplates a future increase in marketing. The written agreement is a pre-requisite to the producer increasing its quantity marketed. Order 1/98 contemplates that something more must occur before the increase takes effect, i.e. a joint application to the Mushroom Board.

80. If Truong's argument were accepted then every producer entering into a written agreement increasing the quantity of mushrooms marketed would be in breach of Order 1/98 before even applying to the Mushroom Board for approval of the arrangement. This is nonsensical.
81. The Mushroom Board gains further support for this argument from the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, ss. 6(5)(6) and 21. The grower contract between All Seasons and Truong is not a contract for purchase and sale rather it is an agreement to agree to sell unascertained goods. It does not constitute a sale until the regulated product is actually provided to All Seasons by Truong. Thus, until such time as the regulated product is actually produced, there is no increase in the quantity of regulated product marketed as contemplated by Order 1/98.
82. The Mushroom Board further argues that the revision of contractual terms by Order 1/98 does not amount to an interference with proprietary or vested rights such as to exclude Truong from its application.
83. In *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.* [1993] BCJ No. 1748 (BCSC), Madame Justice Newbury considered the right to carry on business in a regulated industry. She concluded that the imposition of a regulatory scheme did not deprive producers of their businesses or their right to carry on business. Rather, it merely imposed conditions on the carrying on of that business.
84. In coming to this conclusion, Madame Justice Newbury referred to *Re Bedesky and Farm Products Marketing Board of Ontario* (1975), 58 DLR (3d) 484 (Ont. H.C.). This case has similarities to the case at bar. The Ontario Chicken Board began exercising jurisdiction over marketing of roaster chickens; its former jurisdiction had been solely with respect to marketing of broiler chickens. The Chicken Board was granted authority to set quota allocations for marketing roasters. It was thought that these allocations would be based on the size of production facilities and on this basis several producers increased their facilities in anticipation of receiving a larger quota. The system ultimately adopted required the actual marketing of roasters in the qualifying period. The producers who had expanded their facilities claimed they were unfairly dealt with. The Court held that the producers who had expanded their facilities had taken a chance. They had no legal basis for expecting roaster quota. On this basis the unfairness argument failed.
85. Truong advances a similar unfairness argument in submitting Order 1/98 ought not to apply to it. It has incurred the cost of constructing new facilities in anticipation of future increases in the quantity of regulated product to be marketed. As a participant in a regulated industry, Truong had no right to expect that regulations would remain unchanged over time.
86. In summary, the Mushroom Board submits that Truong's ability to market certain quantities of mushrooms is always subject to regulation by the Mushroom Board,

regardless of the existence of a grower contract. Merely entering into a contract does not grant Truong or All Seasons the right to market that quantity for all time. Such existing rights are always subject to regulation.

Conflict of Interest / Reasonable Apprehension of Bias

87. The Mushroom Board submits that the argument of conflict of interest is premature. The Mushroom Board must have an opportunity to consider the issue of conflict of interest in its Order 3/98 hearing. If it concludes that a conflict of interest exists the matter will be referred to the BCMB for determination as has been done in the past. If the Mushroom Board proceeds with the hearing, Truong has a right of appeal.
88. The Mushroom Board also disputes that the conflict of interest raises a reasonable apprehension of bias. The alleged conflict and resulting bias arise in part out of the fact that two out of the five members of the Mushroom Board are growers elected by industry. Truong alleges that these individuals could benefit personally from the failure of All Seasons.
89. The composition of the Mushroom Board is statutorily mandated. Section 3.02(2) of the *Scheme* provides the Mushroom Board shall consist of 5 members, 3 of whom shall be appointed by the Lieutenant Governor in Council and 2 shall be elected by registered producers from among themselves. The Mushroom Board submits that where the legislation specifically requires two of the Mushroom Board members to be elected from among the registered producers, no reasonable apprehension of bias can result from those members participating in the regulatory decisions and activities of the Mushroom Board.
90. Accepting Truong's argument would place the two elected Board members in a conflict in respect of virtually every Mushroom Board decision, thus defeating the clear intention of the legislature that producers participate in the regulation of the industry. Further, applying Truong's analysis would result in every marketing board potentially having a reasonable apprehension of bias. This cannot be the legislative intent especially since such issues are addressed through the BCMB's disclosure requirements that allow potential conflicts to be identified and dealt with by boards.
91. Finally, the Mushroom Board argues that there is no evidence before the BCMB to support what amounts to the Appellants' inflammatory accusations of conflict of interest or reasonable apprehension of bias. All the Mushroom Board's activities in this matter have been undertaken in the legitimate exercise of its jurisdiction to regulate and control the marketing of regulated product. The recent exercise of this jurisdiction is not an attempt by the Mushroom Board to frustrate the Appellants but rather is motivated by the changing landscape of the mushroom industry.
92. Finally, the Mushroom Board argues that Order 3/98 is clearly applicable to the Appellants. The Order is within the jurisdiction of the Mushroom Board and the

Appellants must apply for approval to increase marketing as directed. When the Mushroom Board makes a decision under Order 3/98, the Appellants have a right of appeal. Until such a decision is made, the Appellants' arguments with respect to Order 3/98 are premature.

ARGUMENT OF INTERVENOR

Jurisdiction

93. Money's agrees with the Mushroom Board that Order 1/98 is *intra vires* and submits that the historical approach of the Mushroom Board to regulating production is irrelevant. Now that additional agencies are being designated, the stability of the industry can no longer be ensured through allocations determined by grower-agency contracts.
94. The general and specific powers set out in s. 4.01 of the *Scheme* authorize the Mushroom Board to regulate or prohibit the marketing of mushrooms by agencies. The BCMB in its reasons in the Truong appeal of the September Order acknowledged that the Mushroom Board has the objective and the authority to ensure the orderly marketing of mushrooms:
 187. ...Short of an amendment to the Scheme, the Mushroom Board's regulatory focus must be on the activity of marketing, in conjunction with the use of the other powers under s. 4.01. Presumably, regulations which are lawfully focused on marketing will allow producers to make their own decisions about how much mushroom production is appropriate in their individual circumstances.
 191. The BCMB recognizes the concerns that led the Mushroom Board to enact the Order. The market appears saturated and any growth in the industry must be monitored and fairly distributed amongst the growers. It is within the power of the Mushroom Board to achieve its objective of orderly marketing. Indeed, it recognizes that other means exist by which orderly marketing can be achieved when it submits that production control is "simply another mechanism by which the Mushroom Board seeks to establish an orderly marketing system and to prevent oversupply". It is those other means that the Mushroom Board must focus on until such time as the Scheme is amended.
95. Following that lead, the Mushroom Board enacted Order 1/98 on May 12, 1998. On September 3rd, 1998, the Mushroom Board enacted Order 3/98 stipulating that Truong and All Seasons apply by September 14, 1998 for approval to market regulated product pursuant to Order 1/98. Both orders are squarely within the mandate and authority of the Mushroom Board to regulate the marketing of mushrooms under the clear wording of s. 4.01(a).
96. The true purpose behind Order 1/98 is not as Truong suggests, to control production. The Mushroom Board is not doing indirectly what it cannot do directly. Rather the purpose of the Order is to do directly what the Mushroom

Board is empowered to do directly; namely to regulate the orderly marketing of mushrooms in the Province.

97. Money's argues that the fact that regulation of marketing may also affect production is not relevant. Orderly marketing is the objective; control of production is an incidental effect. The Mushroom Board may affect production levels in many ways, for example limiting the number of agencies limits the sales options for producers. In practical terms, it would be impossible for the Mushroom Board to control marketing without having some effect on production levels.
98. Money's relies on s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 224, which provides that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Excluding measures that have an indirect effect on production levels would render the Mushroom Board incapable of promoting the objectives of the *Scheme*.
99. Money's argues that the *Heppner* case does not support the position taken by Truong. That case concerned an Order-in-Council issued for the purpose of creating a transportation and utility corridor, a purpose largely unrelated to that of the governing Act which was the preservation of the environment. In this case, the purpose of Order 1/98 is both consistent and intimately connected with the *Scheme*, which is the regulation of the transportation, packing, storing and marketing of mushrooms (s. 2.02). In fact, *Heppner* supports Money's position that the Orders were within the authority conferred by the *Scheme*. According to Mr. Justice Lieberman:

A Court when considering the validity of subordinate legislation must proceed on the assumption that such legislation is within the authority conferred by the Act and will not declare it invalid unless there is clear evidence to support such a finding.

100. By requiring approval before any increase in the quantity of mushrooms currently marketed, the Mushroom Board avoids the risk of an oversupply driving down prices, thus maintaining the health of the mushroom industry, a central purpose of the *Scheme*.
101. Money's argues that the definition of "marketing" in the *Scheme* when read together with the *Natural Products Marketing (BC) Act* (the "*Act*") bolsters the conclusion that the power to regulate "marketing" necessarily involves incidental effects on production. Money's advanced a similar argument in the earlier Truong appeal. The definition of "marketing" in the *Scheme* is non-exhaustive and does not refer to producing. However, s. 1 of the *Act* defines "marketing" as including "producing, buying, selling, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person." Section 13 of the *Interpretation Act* provides that "[a]n expression used in a regulation has the same meaning as in the enactment authorizing the regulation". Money's argues

that it follows that if "marketing" includes "producing", then regulating marketing in a manner that impacts production cannot logically be characterized as acting outside the scope of the *Act* or the *Scheme*.

102. Truong argues that the Mushroom Board has no authority to prohibit marketing in general and that it is manifestly clear that the purpose of Order 1/98 is to prohibit all production. Money's argues that this submission is flawed in two respects.
103. The Mushroom Board has the authority in s. 4.01 both to prohibit marketing in general and to prohibit increased marketing specifically. Without the power to limit increases in the quantity of mushrooms marketed, the Mushroom Board would be incapable of regulating the marketing of mushrooms.
104. Aside from having the authority to make such an order, Money's argues that the purpose of Order 1/98 is not to prohibit all new production. Rather, it sets up a screening and approval process to evaluate the advisability of any proposed increases in the quantity of mushrooms marketed. This is not, as Truong argues, an outright prohibition on new marketing or indirectly on new production. In fact, in a similar process set up under the September Order, Truong was granted a license to produce and sell 100,000 lbs. of mushrooms per month.
105. Money's distinguishes the *Dexter* decision relied on by Truong as it held that in the absence of any express statutory authority, the mere power to prohibit did not authorize the power to prohibit absolutely. In this case, s. 4.01 provides express authority to prohibit the marketing of mushrooms, in whole or in part. Order 1/98 does not purport to prohibit marketing absolutely rather, it prohibits new and increased marketing of mushrooms absent approval of the Mushroom Board.
106. Truong also argues that Order 1/98 discriminates between a class of growers who must submit themselves to the unfettered and unguided discretion of the Mushroom Board and a class of existing licensed growers who are excluded from this "mysterious and untested process". Money's argues that Order 1/98 is not discriminatory, it applies to all new producers and all existing producers who wish to increase the quantity of mushrooms previously marketed. It applies equally to all parties.
107. Contrary to assertions by Truong, Order 1/98 does not just affect All Seasons. Growers working with Money's have also expressed the desire to increase production. If they choose to do so, they must apply to the Mushroom Board for approval.
108. Money's argues that even if Order 1/98 were discriminatory, the Mushroom Board would still be within its jurisdiction. Section 4.01(b) provides that the Board has the power "to exempt from any determination or order any person or class of

persons engaged in the... marketing of the regulated product, or any class, variety or grade thereof".

109. Truong also relies on the *Gulf Canada Ltd.* and *Ashby* decisions in furtherance of its discrimination argument. Money's argues that these cases are easily distinguishable. Both cases dealt with municipal licensing schemes where the courts held that the power to license did not include the power to limit the number of licenses issued. In contrast, the *Scheme* is specifically designed in part to regulate the marketing of mushrooms for the benefit of the industry. This mandate necessarily requires the Mushroom Board to limit the quantity of mushrooms marketed when their demand is met. The Mushroom Board has done so in a non-discriminatory manner. Moreover, the Mushroom Board had the explicit power to do so in a discriminatory manner had it so chosen.

Application of Order to Truong

110. Truong argues that on the date that Order 1/98 was passed, it was neither a new producer nor a producer seeking to increase production. Truong asserts that it was in the same position as any other grower with an existing contract allocation. Truong argues that Order 1/98 cannot be applied retroactively. The power to make a retroactive order is unusual and must be expressly set out in the statute.
111. Money's argues that applying Order 1/98 to Truong does not give it retroactive effect. Truong is confusing retroactivity with impairment of vested rights. An enactment is only retroactive if it "reaches into the past" and attributes present legal consequences to actions wholly in the past. Money's cites Pierre-Andre Cote in *The Interpretation of Legislation in Canada* (2nd ed.) at p. 123:

...A statute is not retroactive merely because its application encroaches on vested rights. In general, it is purely prospective statutes that threaten the future exercise of rights that were vested before their commencement. The application of a new statute to the future occurrence of ongoing situations depends on whether or not a statute has immediate effect, not retroactive effect.

...When a new statute ascribes new consequences to an ongoing fact, this may be justified by the application of the statute just as soon as it occurs, in effect, a fraction of a second after commencement of the statute...it is basically irrelevant that the fact began before or after commencement.

112. The Supreme Court of Canada has expressly distinguished between retroactivity and immediate effect in *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 SCR 261 and *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 SCR 880. The *Gustavson* case concerned amendments to a taxing statute that removed a deduction previously enjoyed by the Appellant. At p. 279, Mr. Justice Dickson reasoned as follows:

...the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters existing rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were at the earlier date. The effect...is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.

113. In *Venne*, at p. 915, Mr. Justice Beetz formulated the following example which parallels this case:

The following example comes to mind. Sections 70 and 72 of the Act prohibit the removal of topsoil and lawn turf for purposes of sale unless the Commission has issued a permit authorizing this. If, before the Act took effect, the owner of a lot had concluded a contract with a contractor to remove the topsoil on his lot, if the Act had taken effect before the contract was performed and if the Commission denied the permit requested, such a contract surely could no longer be lawfully implemented. This consequence would result not from the retroactivity of the Act but from its immediate application. [emphasis added]

114. Money's argues that in this case Truong concluded a contract with All Seasons prior to the issuance of Order 1/98. Applying Order 1/98 to the previously concluded contract from the time of enactment does not give it retroactive effect; rather it gives it immediate effect. The Mushroom Board does not purport to invalidate the contract from the time it was concluded, rather it invalidates the contract at the time of and subsequent to Order 1/98. It has immediate effect on all contracts and thus, there is no issue of retroactivity.
115. Money's argues that the *Re Day & Ross* case relied on by Truong is not helpful as it differs substantially from this case. There, the administrative tribunal attempted to issue a license on August 25, 1971 dated from October 9, 1968. This was truly a retroactive effect because the tribunal attempted to reach into the past and legalize conduct that was prohibited by statute. The situations are not analogous. The Mushroom Board has not attempted to legalize past acts; it merely attempts to impose duties on Truong and All Seasons in the present.
116. Money's also distinguishes the *Commission Des Travail* case relied on by Truong. In that case, the court held that the administrative tribunal could not change the rules respecting the form of petition so as to invalidate a valid petition already received. Money's argues that this vested rights argument has no application as Truong has no vested right to Mushroom Board approval of its grower contract with All Seasons. In order to establish a vested right, an individual must prove both a distinctive and concrete legal right and that the legal right is sufficiently individualized and materialized: Cote, supra at pp 144-150.
117. Truong has not established that it enjoyed a particular right to approval by the Mushroom Board or that the right it had was sufficiently materialized. Truong was in the same position as all other producers at the time Order 1/98 was passed. Truong has never been led to believe that the Mushroom Board would approve its

entire marketing increase or that it was entitled to an increase in the quantity of mushrooms marketed. In fact, the Mushroom Board has made it very clear to Truong that it would only be allowed to market 100,000 lbs./month.

118. Money's argues that Truong could only have a vested right to market a certain quantity of mushrooms if it commenced production and marketing prior to the issuance of Order 1/98. The Order is clear "[t]here shall be no increase in the quantity of regulated product currently marketed unless the aforementioned criteria are satisfied".
119. By its own admission, Truong had not commenced production or marketing of mushrooms at the time Order 1/98 was passed. In fact, the Truong farm was not finished construction until much later. Thus, Money's argues that any increase in the quantity of mushrooms marketed by Truong did not occur until well after Order 1/98. The mere existence of a contract with All Seasons, an agency not at arm's length, does not suffice to create a vested right to market a quantity of mushrooms.
120. Money's states that courts will often weigh social and individual consequences in order to determine whether vested rights should be recognised and protected: Cote, supra at p. 142. Here, weighing the consequence of increased marketing on the marketplace and the fact that others seek to expand vs. a grower who has wilfully and recklessly ignored the directions of the Mushroom Board supports the application of Order 1/98 to Truong.
121. In support of this argument, Money's points to Truong's conduct. Truong has attempted to frustrate the intentions of the Mushroom Board and the integrity of the approval process. At all times Truong has been aware of the Mushroom Board's intention to limit increases in mushroom marketing due to market surpluses. Despite this, Truong has crashed ahead, eyes fully open and invested heavily in building a new production facility. Truong now invokes those same construction expenses to get sympathy for its plight. Truong seeks to circumvent the approval process by relying on a contract concluded on the same day as the BCMB struck down the September Order. Money's argues that to maintain respect for the Mushroom Board and the integrity of the approval process requires that Order 1/98 be applied to Truong and All Seasons.
122. Money's further argues that Truong is attempting to increase the quantity of mushrooms it markets at the expense of other growers. Despite the objections of other growers, Truong was granted a license to produce 100,000 lbs./month of mushrooms in the Mushroom Board's November 1997 decision. That license because it was issued under the September Order is void. Now, Truong seeks to uphold a contract to produce and market 350,000 lbs./month, making it the biggest producer in the province. Meanwhile, many existing producers have expressed interest to the Mushroom Board in expanding their production.

123. The mushroom market is currently saturated. Any capacity for increased production and marketing, when it occurs, needs to be allocated fairly between all interested parties. The Mushroom Board has established an Industry Advisory Committee to assist with this task. Truong is attempting to "jump the queue" and frustrate the intentions of the Mushroom Board and deprive existing growers of an opportunity to compete for the privilege of increasing the quantity of mushrooms they market.

REPLY OF THE APPELLANTS

Jurisdiction

124. Truong takes issue with the Mushroom Board's characterization of the true purpose of Order 1/98 as a "red herring". Truong takes no issue with the fact that the Order appears to fit within the "plain wording" of the *Scheme*. However, the analysis is not that simple. The analysis must involve questions as to what is the purpose of the Order. The cases relied on by the Appellant support a purposive analysis and this is what is required in circumstances where the facts leading up to the passing of the Order are known to all parties.
125. The Mushroom Board argues that the primary purpose of Order 1/98 is to regulate marketing. Truong disputes this. On its face, Order 1/98 applies only to producers and marketing that occurs at the farmgate. Thus, its primary purpose is to regulate farmgate marketing with the effect of regulating production.
126. The Mushroom Board disputes the relevance of the licensing cases relied on by Truong. Truong however submits that this is a licensing case. The Mushroom Board concedes that it cannot withhold a license when applied for and it cannot stop a mushroom grower from producing mushrooms. However, the Mushroom Board now requires approval of any and all marketing of product from new or expanded facilities. This approval process amounts to a license. A farmer effectively needs a license to legally sell increased or new production in the form of an approval under Order 1/98.
127. As was made clear in the *Coates* decision, the Mushroom Board cannot do indirectly what it cannot do directly. As such, it is irrelevant whether the Mushroom Board withholds a license to produce or withholds the approval to sell the production, as is the case here. Both amount to indirect attempts to control production and as such are illegal.
128. The Mushroom Board argues that Order 1/98 is not prohibitive as Truong has never applied under the Order and thus no prohibitive order was made. Truong responds that it is trite to say there is no prohibition when although no specific order has issued, the Mushroom Board has hired independent inspectors to seize product

being marketed by Truong outside Order 1/98. All production outside Order 1/98 is prohibited and the Mushroom Board has demonstrated its intent to enforce this Order.

129. The Mushroom Board also disputes the claim that Order 1/98 is discriminatory. Truong reiterates its earlier arguments and the position set out in the *Forst* decision. Truong takes issue with a discretionary approval process with no rules to guide the exercise of discretion and states that such a process is not authorised by the *Scheme*.
130. With respect to the issues raised by Money's, the Appellants point out that Money's is a competitor of All Seasons. Money's support of Order 1/98 confirms to the Appellants that the Order is discriminatory. Money's is unaffected as it currently has all the growers and production that it wants. All Seasons is shackled and prevented from effectively entering the competitive arena.
131. Finally, the Appellants take issue with Money's attempt to resurrect the argument that because s. 1 of the *Act* includes "production" in the definition of "marketing" that therefore that definition is somehow imported into the *Scheme*. Clearly it is not. Support for this proposition comes from the *Coates* decision and the BCMB's decision of May 22, 1998.

Application of Order to Truong

132. The Mushroom Board takes the position that actual marketing must have occurred prior to the enactment of Order 1/98 in order to be exempted. The word "actual" is not mentioned in the Order. The Mushroom Board appears to be confusing "production" with "marketing". While it is true that Truong was not growing mushrooms when Order 1/98 was issued, Truong was engaged in "marketing" by the offering for sale and agreement to sell found within the contract.
133. The Mushroom Board also argues that it is impossible to find the contract of May 7, 1998 valid. Truong argues that All Seasons is comprised of the corporate entities of three families namely, Truong, Trinh and Do. The BCMB heard no evidence on the invalidity of the contract and thus, it cannot assume the contract was invalid. Even if the Dos were against this contract, two of the three were still in favour as their signatures appear on the contract.
134. Truong argues that it is inappropriate to make any determination as to the corporate governance of All Seasons. The only evidence before the BCMB is the sworn evidence of Mr. Trinh; there is no evidence to the contrary. Truong also argues that the proper place for a dispute about corporate governance is the Supreme Court of British Columbia and not in an appeal before the BCMB.
135. Truong further argues that the Mushroom Board did not raise any timely concerns about the validity of the contract. It received the contract in July of 1998 and yet it

did not take dispute the validity until it filed its written submissions in this appeal. Truong cites this as further evidence of the Mushroom Board's lack of probity and fairness in dealing with the Appellants.

136. Truong further submits that implicit in Order 3/98 is an admission by the Mushroom Board that a written agreement does in fact exist.
137. The Appellants deny ignoring the Orders of the Mushroom Board and instead state they relied upon their rights of appeal. The Appellants state they were prepared to mediate this dispute.
138. With respect to retroactivity, Truong agrees with the Mushroom Board that Order 1/98 can only operate from May 12, 1998 forward. Truong argues that there is effectively an exemption from Order 1/98 for an existing producer who does not wish to increase the quantity previously marketed. Truong state that the exemption should not be interpreted to so as to give Order 1/98 a retroactive effect.
139. Truong disagrees with the Mushroom Board when it suggests that one can only market that which one possesses. There is no requirement in the *Scheme* that sales must only be for product that is then in existence. In fact, virtually all grower contracts are for product to be produced in the future. To agree with the Mushroom Board's argument would render all Money's grower contracts invalid because they deal with future production.
140. Truong takes issue with the Mushroom Board's submission relating to the *Sale of Goods Act* which provides that a sale of unascertained goods does not occur until the time when the regulated product is actually provided. This argument is irrelevant as it focuses on "sale" whereas Truong relies on the different concept of "offering for sale".
141. Finally, Truong takes issue with the Mushroom Board's reliance on the *Nova Scotia Power Corp.* and *Bari Cheese Ltd.* decisions. *Nova Scotia Power Corp.* dealt with a fundamentally different proposition involving the mandatory adjustment of future price for a future product. The Court noted that this was an entirely different in kind from divesting or taking away proprietary rights without compensation. In this case, if the Mushroom Board's position is accepted Order 1/98 amounts to a complete divestiture. The *Bari Cheese Ltd.* case was decided in the context of a regulated marketing system with a well-defined quota system of long standing. In this case, the Mushroom Board has effectively imposed a quota system on a *Scheme* that does not authorize one and thereby is depriving Truong of its business and its right to carry on business. To state that Order 1/98 merely imposes conditions on that business is to misstate the facts. Order 1/98 gives sole discretionary authority to the Mushroom Board without any qualifications or guidelines whatsoever. The effect of this is to say to Truong "you can't produce anything unless we say you can".

Conflict of Interest / Reasonable Apprehension of Bias

142. The Mushroom Board asserts that an applicant must show that a market exists for the increased production. Truong says this is the first indication of what the Mushroom Board expects to see on an application. All Seasons is concerned about putting any confidential market information before the Mushroom Board given the "admitted" conflict of interest of three Mushroom Board members. Thus, Truong argues that the Mushroom Board is incapable of even hearing such an application as only two members could hear and consider the evidence on the fundamental aspect of the application.

FINDINGS OF THE BCMB

Jurisdiction

143. In the BCMB's May 22, 1998 Reasons, the following findings were made regarding the jurisdiction of the Mushroom Board:
187. ...Short of an amendment to the Scheme, the Mushroom Board's regulatory focus must be on the activity of marketing, in conjunction with the use of the other powers under s. 4.01. Presumably, regulations which are lawfully focused on marketing will allow producers to make their own decisions about how much mushroom production is appropriate in their individual circumstances.
191. The BCMB recognizes the concerns that led the Mushroom Board to enact the Order. The market appears saturated and any growth in the industry must be monitored and fairly distributed amongst the growers. It is within the power of the Mushroom Board to achieve its objective of orderly marketing. Indeed, it recognizes that other means exist by which orderly marketing can be achieved when it submits that production control is "simply another mechanism by which the Mushroom Board seeks to establish an orderly marketing system and to prevent oversupply." It is those other means that the Mushroom Board must focus on until such time as the Scheme is amended. The BCMB is not prepared to draft an alternate Order however Counsel for the Growers suggested possible wordings that may be within the legal authority of the Mushroom Board.
144. This Panel accepts that the Mushroom Board is charged with the responsibility of establishing an orderly marketing system. As part of that responsibility, the Mushroom Board must deal with the issue of over-supply. Until such time as there is a legislative amendment, attempts to establish an orderly marketing system must focus on the activity of marketing and not production.
145. Truong argues that Order 1/98 is beyond the jurisdiction of the Mushroom Board. Despite the wording of the Order, its purpose is to regulate production. The Mushroom Board does not have this power and thus Order 1/98 amounts to an attempt to do indirectly what the Mushroom Board cannot do directly.
146. The Panel disagrees. The purpose of Order 1/98 is to regulate and control the marketing of mushrooms within the Province. This power is expressly granted by

the *Act* in ss. 2.02 and 4.01 of the *Scheme*. On a plain reading of these two sections, it is difficult to understand what other regulatory purpose there could be in a Mushroom Board. To interpret the legislation in the manner suggested by Truong effectively strips the Mushroom Board of any meaningful power and is inconsistent with the rules of statutory interpretation

147. The Panel does not attach any significance to the fact that the Mushroom Board has only recently begun regulating the marketing of mushrooms. It was not until August of 1997, when the BCMB decided that the industry would benefit from additional competition that it became necessary for the Mushroom Board to turn its mind to an equitable system for allocating growth and facilitating transfer of producers between agencies. This decision was driven by a desire on the part of the BCMB to create stability in the industry by giving the mushroom producers more options. Truong argues that these changes over the past few years have really been aimed at it and All Seasons. In fact, the changes have been driven by the desire of the Mushroom Board to retake control of the regulatory system from the existing agencies.
148. The purpose of Order 1/98 is to regulate the marketing of mushrooms. Although this Order may have an incidental affect on production, that is not fatal. It is difficult to imagine how the Mushroom Board could control marketing without having some effect on production.
149. The Mushroom Board has also been expressly granted the power to prohibit marketing both in general and in specific. To the extent that Order 1/98 can be viewed as a prohibition against marketing of mushrooms, it is still within the jurisdiction of the Mushroom Board to enact.
150. As our earlier reasons make clear, the defect in the Mushroom Board's September Order was that it was carrying out a valid purpose (orderly marketing) via invalid means (production controls). The new Order has the same valid purpose, and now addresses that purpose via valid means. It is just the opposite of "doing indirectly that which it cannot do directly". Both in purpose and effect, the new Order falls squarely within the Mushroom Board's domain.
151. Pursuant to Order 1/98, no person is legally prohibited from producing mushrooms. The mischief against which the Order is directed is the sale of mushrooms in such quantities as would undermine industry and producer interests. This is the "pith and substance" of the Order. That valid interest has now been achieved via means, which are desirable, fair, and clearly within the jurisdiction of the Mushroom Board under the *Scheme*.
152. Truong also argues that Order 1/98 is discriminatory in its application. The Panel does not accept this argument. The purpose of Order 1/98 is to follow the guidance of the BCMB in its May 22, 1998 Decision and set up a fair and transparent process

whereby producers could transfer between agencies and proposed increases in the quantities of mushrooms marketed could be fairly allocated between agencies and producers.

153. Order 1/98 contemplates a process whereby the Mushroom Board with the assistance of the Industry Advisory Committee can evaluate applications for increased marketing of mushrooms and assess whether such increases are in the best interest of the industry. This is a significant improvement over the process in the past where an agency could arbitrarily determine which producers could market product with no recourse and no avenue of appeal.
154. It is significant to note that prior to August of 1997, there were checks and balances in the system to prevent a surplus situation. A producer could only increase the quantity of mushrooms marketed through an agency if he purchased the production unit and contract of another producer. Facilities could then be upgraded to allow for the increased quantity of mushrooms to be marketed. Interestingly, Truong unsuccessfully attempted to side step this requirement in the first Truong appeal. Now that a multi-agency system is in place, there is a need on the part of the Mushroom Board to regulate the market to avoid a market surplus.
155. Order 1/98 does not affect producers for All Seasons in a different fashion than producers for Money's. Any producer who wishes to increase the amount of mushrooms currently marketed must apply with his respective agency for approval. It is true that All Seasons does not have a large stable of producers. However, one would expect if All Seasons ever functioned as an agency this would change as the Mushroom Board is facilitating transfers between agencies. In fact Do Holdings Ltd., a principal of All Seasons, gave notice to Pacific Fresh of its intent to terminate its contract. Although this production was destined for All Seasons, it appears that the hostility between the principals led Do Holdings Ltd. to market through its own version of All Seasons and put its support behind the application of a new agency, Ridge Mushrooms Inc..
156. It must be recognised that the mushroom industry has undergone significant changes over the past two years. The Mushroom Board decision to begin exercising its jurisdiction to regulate marketing has been driven by these changes. The Panel is of the view that the Mushroom Board must regulate its industry to ensure the best interests of all industry stakeholders.

Application of Order to Truong

157. Truong argues in the alternative that if Order 1/98 is *intra vires*, it has no application to Truong as it entered into a contract with All Seasons on May 7, 1998, five days prior to Order 1/98. Not surprisingly, this was the very date that the September Order was struck down by the BCMB.

158. Truong made a similar argument in its earlier appeal of the September Order. In that appeal, Truong claimed to fall within an exemption to that Order as a party with an existing written contract. This argument was rejected on credibility grounds as the BCMB concluded that the principals of All Seasons had attempted to craft an agreement in a deliberate attempt to get around the September Order. It should also be recalled that Truong's alternative argument that it had a pre-existing contract with Pacific Fresh also failed on credibility grounds.
159. Order 1/98 does not create the same exemption. It applies to all producers who wish to increase the quantity of regulated product previously marketed by them. At the time this Order was issued, Truong was not marketing anything; its production unit was still under construction. The BCMB does not accept the tortured reasoning of Truong that merely by entering into a contract Truong was "offering for sale" and thereby actively engaged in marketing.
160. The Panel prefers the reasoning of the Mushroom Board that what is intended by Order 1/98 is actual marketing. Although "marketing" is defined in the *Scheme* as an aggregate of activities, the primary purpose of marketing is the buying and selling of regulated product. This interpretation of marketing is supported by the *Campbell Soup Co. Ltd.* decision of the Ontario High Court.
161. The Panel concludes that on May 12, 1998, Truong was not an existing producer as it had long sold its mushroom facility and associated contract to a company owned by the Trinh family. Trinh is the existing producer in relation to that production. Truong was building a new facility with the intention of marketing its production through All Seasons. For the purposes of Order 1/98, Truong was a new producer. The production from the Truong operation was not transferred from another agency and thus was adding to the provincial surplus of mushrooms to be marketed.
162. The Panel heard the arguments about the validity of the contract in view of the concerns pertaining to the status of All Seasons. If the Panel had found it necessary to address this issue, it would have also had to comment on its serious concerns about the credibility of Mr. Trinh's evidence. However, if one assumes that the written agreement between Truong and All Seasons is valid, Order 1/98 still requires Truong, a new producer who wishes to market for the first time or an existing producer who wishes to increase the quantity of product previously marketed, to obtain the Board's approval.
163. Truong seeks to argue that Order 1/98 does not apply to it because it was neither a new producer nor an existing producer seeking to increase the quantity of product previously marketed. It argues that to do so would give the Order retroactive effect.
164. In our view, Truong is clearly captured by the language and intent of Order 1/98. As pointed out above, Truong had not been previously "marketing" any product, within the meaning of the Order, when the Order came into effect. The mere fact

that Truong had entered into a contract was not sufficient to render it an existing producer. In this respect, the Panel agrees with and adopts the submission of the Mushroom Board as summarized in our reasons at paragraphs 78-80.

165. As will be noted below, there is nothing “retroactive” about the Order’s application to Truong. It did not go back in time to change the past consequences of past events. It “immediately” applied to all persons within its scope. To be sure, it imposed new regulation in connection with existing circumstances, but that is the case with all new laws.
166. Nor are we persuaded that Truong can operate outside the terms of Order 1/98 based on some sort of “vested right” to production outside the scope of future regulation by the Mushroom Board.
167. Money's has suggested that where vested rights are concerned a Court will weigh social and individual consequences in order to determine whether vested rights should be recognised and protected, relying on Pierre-Andre Cote in the *Interpretation of Legislation In Canada* (2nd ed.) at p. 142. The social consequences of allowing one producer to increase provincial marketing by approximately 8% where the market is allegedly saturated clearly outweigh the individual consequences to Truong.
168. The Mushroom Board in its reasons of November 27, 1997 found insufficient market to support an increase of 350,000 lbs./month and instead approved an allocation of 100,000 lbs./month. In its May 22, 1998 Reasons, the BCMB was also not convinced that a market existed for such an increase in provincial production and concluded at paragraph 194:

...It appears that the Appellant (Truong) has attempted to access a huge share of market production at the expense of a number of long time mushroom growers. It is not fair to allow the Appellant to proceed with its plans on the backs of other growers who appear to be struggling to survive.
169. Truong argues that Order 1/98 cannot operate retroactively so as to alter Truong's rights as they existed on the date it entered the contract. Both Money's and the Mushroom Board argue that Order 1/98 does not have retroactive effect. Rather it has immediate effect from May 12, 1998 forward. It operates prospectively, not retroactively.
170. The Panel accepts that legislation may have an impact on a contract entered into prior to its enactment without the legislation having retroactive or retrospective effect. The *Saskatchewan Power Corp.* and *Nova Scotia Power Corp.* cases are examples of two situations where a Court of Appeal concluded that the mere fact that regulations interfered with provisions of pre-existing contracts did not give them retrospective effect. The BCMB is not satisfied that these cases are fundamentally different from the present appeal.

171. Truong argues that this appeal is entirely different as Order 1/98 amounts to complete divestiture of proprietary or vested rights without compensation. With respect, it is unclear precisely what vested right Truong has lost.
172. Up until the spring of 1997, Truong was a licensed mushroom producer. Any right to market mushrooms was determined by a contract allocation with an existing agency, either Pacific Fresh or Money's. Truong having sold its contract and facility had neither. Thus in the pre-August situation, Truong's only ability to market mushrooms depended on obtaining a new contract with either Pacific Fresh or Money's. Presumably, this contract would only be forthcoming if and when the market surplus had been satisfied and Pacific Fresh or Money's determined they needed new growers. Despite this, Truong began building a new facility without having any assurance that there would be a market and/or a new agency for its mushrooms.
173. All Seasons was approved as an agency by the BCMB on August 19, 1997. Truong was a driving force behind this application. Did the approval of All Seasons grant Truong a vested right to produce mushrooms? Certainly Truong argues that it did. The argument appears to be that because All Seasons business plan referred to marketing the production from three farms, that this somehow amounted to a license to produce those amounts.
174. The Panel does not accept this argument. The BCMB's approval of All Seasons concerned an application for designation of an agency. The application was presented and accepted on the basis that additional competition among agencies was necessary and healthy for the mushroom industry. The BCMB's approval of All Seasons did not and was never intended to confer a vested right to market upon any or every person presented in the Business Plan as potential agency suppliers. The All Seasons Business Plan did not suggest that its viability was tied to the production level of any particular producer and thus, the approval of All Seasons did not carry with it the implication that any particular producer should have a legal right to a particular level of sales to All Seasons regardless of the impact of such marketing on the mushroom industry. The approval of All Seasons did not confer a private right on All Seasons; the approval makes clear that agency designation is a privilege. Such a privilege must exist to the extent, and only to the extent, that it is compatible with orderly marketing objectives. Order 1/98 is the next step. It sets out a process by which the Mushroom Board may be made aware of proposed marketing and determine the extent to which such marketing is compatible with orderly marketing objectives.
175. The All Seasons Business Plan, although thorough, is silent on Truong's precise status as a mushroom grower. It does not state that All Seasons can be viable only if Truong adds 350,000 pounds of new marketed production per month through All Seasons. While the Business Plan set out desired goals, it was also sensitive to the

issue of over-supply and states that the member growers will only expand to utilize their existing capacity.

176. Of the three farms, Do Holdings Ltd. and White Pearl Mushroom Farm Ltd had pre-existing contracts with Pacific Fresh. White Pearl Mushroom Farm Ltd. operated the former Truong operation. Both producers gave notice to Pacific Fresh and as said earlier Do went on to market through its version of All Seasons and White Pearl markets through Truong's All Seasons. Truong had no facility and no contract. It however had a plan to produce 350,000 lbs./month of mushrooms.
177. During the agency approval process, All Seasons and Truong recognised that if an approval was granted there would be a need to work co-operatively with the Mushroom Board and other agencies "to ensure a co-ordinated approach which considers the interests of the industry and that supports an orderly marketplace". It appears that once All Seasons was approved as an agency, this sentiment was lost.
178. The introduction of an entirely new agency, approved by the BCMB, introduced a new element of competition among agencies, and in turn introduced new regulatory challenges for the Mushroom Board whose fundamental role is to ensure orderly marketing. To this end, it enacted the September Order, not with the intent of prohibiting new production, but with the intent of ensuring that such production was allocated in a fair and orderly fashion between producers. While the means chosen by the Order were invalid, the purpose of the Order was entirely legitimate and consistent with the BCMB's decision to approve All Seasons as a competitor to Money's and Pacific Fresh. To suggest a "vested right" in particular production levels for specific producers is to mischaracterize the very basis of the regulatory changes introduced in 1997.
179. Thus, if Truong does have a vested right that has been interfered with it can only come from the May 7, 1998 contract. As stated earlier, the Panel does not find that this contract created any vested right to market mushrooms. Truong falls within the express wording of Order 1/98. The Order is not retroactive nor does it interfere with vested rights. The Mushroom Board and the decision of the BCMB in the earlier appeal are clear that given concerns regarding market surplus, Truong would not be granted the right to market 350,000 lbs./month of mushrooms. The market forces may have changed since November of 1997. It may well be that adequate markets may be demonstrated to justify Truong receiving an increase in its market allocation. However, fairness dictates that any such increase must be allocated through due process and fairly between all interested parties.

Conflict of Interest / Reasonable Apprehension of Bias

180. The Appellants jointly raise the issue of reasonable apprehension of bias on the part of the Mushroom Board. They argue that the hearing directed under Order 3/98 cannot be fairly conducted due to an alleged conflict of interest and reasonable apprehension of bias.
181. We note that the Appellants have not purported to challenge Order 1/98 on this basis, properly so. Order 1/98 is a legislative instrument of general application and, as such, it is not subject to the requirements of procedural fairness: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 SCR 735; *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 FC 247 (C.A.). Truong and All Seasons however challenge Order 3/98, which directs them to comply with Order 1/98 on the basis of conflict of interest and bias.
182. The Appellants raise two separate arguments in support of their argument on this ground. The first argument is that three members of the Mushroom Board are allegedly in breach of the BCMB's "conflict of interest guidelines", thus giving rise to reasonable apprehension of bias. The second argument relates to the Mushroom Board's conduct, which the Appellants say proves a reasonable apprehension of bias.
183. With respect to the first ground, no evidence was led other than the bare assertion that "of the five members of the Mushroom Board, only two are not in a conflict of interest". The suggestion appears to be that in respect of the two elected members, a conflict of interest arises from the fact that, as growers, they have contracts with Money's or Pacific Fresh. In our view, it is far from clear that this assertion alone, without more, is sufficient to affect the validity of Order 3/98 based on reasonable apprehension of bias. The composition of the Mushroom Board is statutorily mandated by the *Scheme*. The two elected members must be growers. At the time of the last election, almost all growers produced mushrooms for Money's or Pacific Fresh. Thus, the status of the elected members arises as of necessity, mandated by the legislative structure.
184. In the absence of evidence going beyond their mere status as elected members, the Panel does not accede to the submission that a reasonable apprehension of bias arises. The law is clear that common law principles relative to bias are subject to statutory modification: *Brosseau v. Alberta (Securities Commission)*, [1989] 1 SCR 301. Clearly, such modification arises here where the legislative policy choice has been made to have elected growers on the Mushroom Board.
185. The Appellants also impugned a third member of the Mushroom Board. The Appellants did not name this member, and led no evidence to suggest the fashion in which this conflict arose. Allegations of bias are serious matters and must be

supported by evidence. As noted by Southin J.A. in *Vancouver Stock Exchange v. BC Securities Commission* (September 28, 1990, unreported, B.C.C.A.) at p. 3:

To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between people is an affront of the worst kind, and unless it is founded on the evidence it is not something that should ever be said.

see also *Adams v. Workers Compensation Board* (1989), 42 BCLR (2d) 228 (C.A.)

186. The Appellants have not laid a proper evidentiary foundation in respect of this allegation. In the absence of evidence on this point, the Panel dismisses this submission.
187. Based on the evidence adduced before us, the Panel has not been persuaded that Order 3/98 ought to be set aside based on reasonable apprehension of bias. Nor does the evidence persuade us that the relationship between Board members and designated agencies is such that the Mushroom Board is incapable of fashioning a quorum that can give the Appellants a fair hearing. At any such hearing, it is of course open to the Appellants to make any bias allegations, and in those circumstances it is appropriate that the Mushroom Board address those allegations at first instance. This approach not only ensures the integrity of the administrative process by allowing the Mushroom Board to address the issues squarely, but also ensures that if the matter is appealed, the BCMB will have the benefit of the Mushroom Board's considered reasons on the subject. As noted in *Flamborough v. National Energy Board* (1984), NR 95 (Fed. C.A.) at p. 104:

I should have added that the proposition that a member of a tribunal against whom an allegation of an apprehension of bias has been made cannot, himself, dispose of or participate in disposing of that allegation is utterly fatuous. The practical effect, if that were the law, would be the paralysis of tribunals, and trial courts, at the whim of anyone willing to allege bias.
188. Should the Appellants be dissatisfied with any ruling of the Mushroom Board on the bias issue, they would have a right of appeal to the BCMB. Should this branch of the bias issue arise before us on a future appeal based on arguments and evidence that have not been put before us on this appeal, the BCMB will of course consider any such arguments on their merits.
189. The second branch of the Appellants' bias allegation arises not from the status of the Mushroom Board but rather from several decisions of the Mushroom Board, which they say demonstrate a reasonable apprehension of bias.
190. The first is the enacting of the September Order. Although this Order was ultimately struck down, the BCMB supports the intent of controlling the market to avoid over-supply. The Order did not apply only to All Seasons growers and accordingly, it does not demonstrate bias on the part of the Mushroom Board.

191. The Appellants take issue with the Mushroom Board's hearing conducted pursuant to the September Order after which they granted Truong the right to produce 100,000 lbs./month of mushrooms, not the 350,000 lbs./month it requested. In addition, the Mushroom Board stated that no further allocations would be approved for seven months. The Appellants argue that the Mushroom Board was well aware that All Seasons could not survive and be viable on that basis. These issues were dealt with in the first Truong appeal. The BCMB accepted the submissions from both Money's and the Mushroom Board that the market was saturated. Given that finding, the decision to allow 100,000 lbs./month of mushroom production to Truong is entirely appropriate. The Mushroom Board was acting in the public interest and in the best interests of the mushroom industry. Further, there is no evidence to support the allegation that All Seasons could not be viable on that basis. The problems with All Seasons' viability go beyond the Mushroom Board's decision to not grant Truong the entire production it sought. It appears that the infighting and power struggles between principals began almost from the time that approval was granted. It is unfair and inaccurate to lay the blame for All Seasons' troubles on the Mushroom Board.
192. The Appellants also take issue with the fact that the Mushroom Board has never provided reasons as to how Order 1/98 could apply retroactively. Instead the Mushroom Board issued Order 3/98 requiring the Appellants to make a joint application to the Mushroom Board; scheduled a hearing to cancel the Truong license prior to its decision on the viability of All Seasons, and after adjourning the hearing into the cancellation of the Truong license employed independent inspectors to seize product.
193. This argument is unclear. The Panel is not aware of any obligation on the part of the Mushroom Board to explain the validity of its Order to the Appellants. It is entitled to proceed on the assumption that its Order is valid until such time as it is set aside. The Mushroom Board was aware on May 14, 1998 that Truong was taking the position that Order 1/98 had "no effect on Truong Mushroom Farm Ltd.". The Mushroom Board also was aware that Truong continued to build its facility despite Order 1/98. In the circumstances, Order 3/98 is entirely appropriate.
194. The Appellants also take issue with the timing of a hearing to cancel Truong's grower license and the attempt to seize mushrooms from the Truong operation. The Mushroom Board is of the view that Truong is producing mushrooms outside the regulated marketing system. Given this view, it would appear appropriate to schedule a hearing to cancel Truong's license. The Appellants appear to take issue with the timing of the hearing however, no evidence was led on this point. It may be that a tentative date was set as often occurs in issues of these type. Nothing suggests however, that somehow by the timing of the hearings the Mushroom Board prejudiced the Appellants. As to the attempt to seize mushrooms prior to the stay application on December 15, 1998 and the hearing of this appeal on December 18, 1998, the Mushroom Board was exercising a power authorised under the

Scheme. In the absence of evidence, this Panel is not prepared to find that the Mushroom Board was improperly exercising this power. It should be noted that Truong's request for a stay on the enforcement of Order 1/98 was subsequently turned down on this basis.

195. In conclusion, the Appellants have adduced no credible evidence to satisfy us that it is accurate to portray them victims at the hands of the Mushroom Board. Certain conduct of Truong has admittedly raised the stakes within which decisions were made, and the Mushroom Board has in return been required to make difficult decisions and take strong measures. Based on the material before us, however, the Panel is not satisfied that Order 3/98 should be set aside based on reasonable apprehension of bias.

DECISION

196. Order 1/98 is *intra vires* the Mushroom Board.
197. Order 1/98 applies to Truong.
198. Order 3/98 is *intra vires* the Mushroom Board. Accordingly, the Mushroom Board is ordered to complete its hearing pursuant to Order 3/98.
199. The appeal of Order 3/98 relating to conflict of interest and reasonable apprehension of bias is dismissed.
200. There will be no order as to costs.

Dated at Victoria, British Columbia, this 11th day of February 1999.

British Columbia Marketing Board
Per

(Original signed by):

Christine Elsaesser, Vice Chair
Harley Jensen, Member
Richard Bullock, Member