

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

DECISION

APPEARANCES:

| | |
|--|---|
| For the British Columbia Marketing Board | Ms. Christine Elsaesser, Vice Chair Mr. Harley Jensen, Member Mr. Richard Bullock, Member |
| For the Appellant | 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. The Appellant Truong Mushroom Farm Ltd. ("Truong") appeals Order 1/98 issued by the British Columbia Mushroom Marketing Board ("Mushroom Board") on May 12, 1998. The Appellants Truong and All Seasons Mushroom Farms Inc. ("All Seasons") collectively appeal Order 3/98 issued on September 3, 1998. Money's Mushrooms Ltd. ("Money's") is an Intervenor in the Order 1/98 appeal.
2. The British Columbia Marketing Board ("BCMB") heard the appeals on December 18, 1998. Written submissions, which were submitted prior to the hearing, were expanded on both by argument and viva voce evidence. Subsequent to the hearing, a reply was received from both Counsel for the Appellants on December 21, 1998. The Appellants also reiterated their request for a stay. The Mushroom Board responded to the stay application on December 29, 1998 and to the balance of the appeal on December 31, 1998. Money's responded to the stay application only on January 8, 1999.
3. Due to the urgent nature of these appeals and the complexity of the arguments made the BCMB has decided to release our decision with more detailed reasons to follow. Every attempt will be made to have the written reasons released as soon as possible.

ISSUES

4. 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?
5. 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?
6. 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?

FINDINGS

7. The BCMB finds Order 1/98 is within the authority granted to the Mushroom Board by the *Natural Products Marketing (BC) Act* (the "*Act*"). The Order addresses the concerns raised by the BCMB in its decision of *Truong Mushroom Farm Ltd. v. British Columbia Mushroom Marketing Board* dated May 7, 1998 with full reasons released May 22, 1998.
8. The BCMB finds that the purpose of Order 1/98 is to regulate and control the marketing of mushrooms within the province of British Columbia, a power expressly

granted by the *Act*. The Mushroom Board cannot be precluded from exercising this power simply because of the incidental effect that such a regulation may have on production.

9. The BCMB finds that Order 1/98 is not discriminatory in its application. The purpose of the Order is to set up a fair and transparent approval process whereby proposed increases in the quantity of mushrooms marketed may be evaluated. Upon receipt of such an application the Mushroom Board in conjunction with its industry advisory committee would assess whether such an increase is in the best interest of the mushroom industry. This is a significant improvement over the process in the past where an agency could arbitrarily determine which producers could market product.
10. 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 BCMB is of the view that the Mushroom Board must regulate its industry to ensure the best interests of all industry stakeholders. The BCMB finds Order 1/98 to be a step in this direction.
11. The Appellants argue if Order 1/98 is *intra vires*, it is inapplicable to Truong as it entered into a contract with All Seasons five days before Order 1/98 was issued. This was the very date that the September 4, 1997 Order, the Mushroom Board's original attempt to control marketing, was struck down by the BCMB.
12. Truong made a similar argument in that earlier appeal. In that appeal, Truong claimed to fall within an exemption to that Order as a party with an existing contract. This argument was rejected on credibility grounds as the BCMB concluded that the principals of All Seasons were trying to craft an agreement to get around the Order.
13. 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 as its production unit was still under construction.
14. The BCMB does not have to consider the validity of the May 7, 1998 contract nor does it need to consider who is or is not a director of All Seasons and who can properly bind that agency.
15. It is significant to note that Truong's plan is to market 350,000 lbs. of mushrooms per month (8% of the current provincial market). The Mushroom Board specifically considered this request in its reasons of November 27, 1997 and found insufficient market to support the increase and instead approved the marketing 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 Mushroom Farm Ltd.) 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.

16. Despite the forgoing, Truong has continued with his plans to build the largest mushroom production unit in the province. The impact of these mushrooms flooding the provincial market is rightly a concern of the Mushroom Board as a saturated market is not in the best interest of the mushroom industry or the public at large.
17. The BCMB finds that 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 have made it very clear that Truong would not be granted the increase that it sought. Fairness dictates that any such increase must be allocated fairly between all interested parties.
18. Order 3/98, which requires Truong and All Seasons to apply to the Mushroom Board as soon as possible and no later than September 14, 1998 for approval to market regulated product is within the power of the Mushroom Board to enact. The prior history between Truong and the Mushroom Board provides ample explanation for why such an order was necessary. In order for the regulated marketing system to operate fairly and equitably it must be applied equally to all growers including Truong.
19. Finally, the Appellants have raised the issue of reasonable apprehension of bias on the part of the Mushroom Board. They argue that the hearing contemplated under Order 3/98 cannot be conducted. They allege that a conflict of interest exists as three directors have some interest in Money's. According to the Mushroom Board, the Appellants are raising this issue for the first time on appeal.
20. There is no dispute that the current structure of the Mushroom Board is statutorily mandated by the British Columbia Mushroom Marketing Scheme. The two elected directors must be registered growers. At the time of the last election, almost all growers produced mushrooms for either Money's or its wholly owned subsidiary, Pacific Fresh Mushrooms Inc.. The remaining members of the Mushroom Board are appointed by Order-in-Council.
21. No evidence is before the Panel to indicate the nature of any alleged conflict of interest by any member of the Mushroom Board. In the absence of such evidence, this ground of appeal is dismissed.

22. The Mushroom Board has scheduled a hearing to proceed on January 18, 1999. Whether the Appellants choose to lead evidence of an alleged conflict of interest or bias is for them to determine. If the Appellants are dissatisfied with that hearing, they have a right of appeal to the BCMB.
23. The Appellants also allege a reasonable apprehension of bias on the part of the Mushroom Board as a result of its treatment of the Appellants since August 19, 1997. As insufficient evidence was lead to support this very significant allegation, this ground of appeal is also dismissed.
24. The Appellants have also requested a stay. Given the Panel's decision on the appeal on its merits, it is unnecessary to consider the request for a stay.

DECISION

25. Order 1/98 is intra vires the Mushroom Board.
26. Order 1/98 applies to Truong.
27. Order 3/98 is intra vires the Mushroom Board. Accordingly, the Mushroom Board is ordered to complete its hearing pursuant to Order 3/98.
28. The appeal relating to conflict of interest or reasonable apprehension of bias is dismissed.
29. The request for a stay is denied.
30. There will be no order as to costs.

Dated at Victoria, British Columbia this 8th day of January 1999.

British Columbia Marketing Board
Per

(Original signed by):

Christine Elsaesser, Vice Chair