IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY V.I.P. PRODUCE LTD.FROM A DECISION CONCERNING
AGENCY DESIGNATION

BETWEEN:

V.I.P. PRODUCE LTD.

APPELLANT

AND:

BC VEGETABLE MARKETING COMMISSION

RESPONDENT

DECISION

For the British Columbia Farm Industry Review Board	Suzanne K. Wiltshire, Presiding Member
For the Appellant	Patrick K. McMurchy, Counsel
For the Respondent	Tom Demma, General Manager
Location of Hearing	By Written Submission
Date of Decision:	April 9, 2013

Introduction

1. By letter dated January 21, 2013, Counsel for V.I.P. Produce Ltd. (VIP) wrote to the British Columbia Farm Industry Review Board (BCFIRB) in respect of Appeals #12-03 and #12-05 asking to proceed with these appeals. In his February 22, 2013 letter, the BCFIRB Executive Director established a submission process to allow the appellant an opportunity to identify what, if any, issues remained to be determined on these appeals in light of subsequent events.

2. As the presiding member on these appeals, I have reviewed the procedural history and the submissions received. It should be noted that although Vancouver Island Farm Products Inc. (VIFP) was given an opportunity to participate in this process, it chose not to.

Background

3. Appeal #12-03, filed April 12, 2012, is an appeal of a March 23, 2012 decision of the British Columbia Vegetable Commission (Vegetable Commission). The Vegetable Commission granted conditional temporary authority to Rage's Farms Ltd. (RFL) to direct market regulated product (cucumbers) after learning that the designated agency (VIP) "no longer had capacity to represent and market regulated product in the same manner that it has ably performed over the years". The purpose of the temporary authority was to allow perishable regulated products to be moved to market over a three week period (until 24:00 hours April 15, 2012) in the face of an apparent disruption at the designated agency until such time as the agency situation could be rectified.

4. During this same time period, the Vegetable Commission received an application from VIFP to be designated as an agency. As an aside, I note that Mr. Rage of RFL is a director of VIFP. Following a hearing on April 25, 2012, the Vegetable Commission issued a decision (April 27, 2012) with reasons that followed on May 10, 2012 recommending that VIFP be designated an agency for greenhouse vegetables and directing that VIP's agency licence be revoked effective May 5, 2012.

5. Appeal #12-05A is an appeal by VIP of the decision to recommend VIFP's agency status to BCFIRB while Appeal #12-05B is an appeal by VIP of the decision to revoke VIP's agency licence. Appeal #12-04 was an appeal by VIFP of the decision to limit its agency designation to greenhouse vegetables.

6. On May 25, 2012, the parties entered into an interim agreement to manage the Vancouver Island vegetable industry until such time as the designated agency issue could be resolved. As part of this agreement, the parties agreed that their appeals would be held in abeyance pending further direction from BCFIRB. The parties then embarked on a facilitation process which was not successful in resolving the dispute.

7. On November 21, 2012, and following a submission process, as the presiding member of the panel appointed to hear the appeals I determined that the appeals relating to the designation of VIFP as an agency and the revocation of the VIP agency licence would be

more appropriately dealt with in a supervisory process given that such decisions require the prior approval of BCFIRB. The supervisory process resulted in a January 7, 2013 Supervisory Decision which made a short term order granting VIP and VIFP interim agency designation to market storage and greenhouse crops ending December 31, 2013 on conditions and a long term order directing the Vegetable Commission to provide a report outlining the vision and strategic direction for the Island regulated vegetable industry.

8. Subsequently, VIFP withdrew its appeal. Although its status as an agency was at issue in Appeal #12-05, VIFP did not participate in this submission process.

Decision

Appeal #12-03

9. I now turn to address the three appeals before me. Appeal #12-03 was adjourned generally; it was not part of the supervisory process. The decision under appeal was a short term solution to address the issue of marketing of a perishable commodity in the face of a disruption in the designated agency. The cucumbers have long since been marketed or perished as the case may be.

10. The appellant says this issue must be heard as it concerns both procedural and substantive issues that go to the heart of how the Vegetable Commission conducts itself and supervises its agencies. It says the appeal raises serious issues concerning the integrity of Vegetable Commission processes and decision making. The remedy sought is to place the appellant in the position it ought to be in as far as that is possible.

11. The Vegetable Commission argues that Appeal #12-03 should be summarily dismissed. This appeal was not referred to a supervisory process as it was a decision to grant RFL temporary authority to market greenhouse cucumbers in a defined period long since passed. The appellant has not identified what remedy it seeks; there is no jurisdiction in BCFIRB to award damages. The Vegetable Commission argues that the appeal is moot and to hear it would result in an abuse of process.

12. It is unclear from the submissions of the appellant what the procedural issues are in relation to the process followed by the Vegetable Commission in coming to its decision to grant a temporary authority to RFL to direct market vegetables. However, as an appeal to BCFIRB proceeds by way of a hearing *de novo*, which would cure a procedural defect, the appellant needs to identify substantive reasons why the decision should be overturned and what practical remedy would flow from that. In its notice of appeal, the appellant concedes that there was disruption in the operation of its agency (staff resignations without notice) but that this was corrected quickly. The notice of appeal then articulates misconduct on the part of RFL (selling product in unauthorized packaging, operating as sub-agency, marketing other grower's product) none of which speaks to a substantive reason for why the decision of the Vegetable Commission was in error. Apart from alleging that substantive issues exist, the appellant has not articulated what these issues are.

13. My assessment is as follows. Appeal #12-03 appears to arise out of an early decision of the Vegetable Commission made in response to volatility in the agency structure on Vancouver Island. The decision was short term in nature and allowed for perishable product to be marketed. If there were procedural defects in that decision, an appeal would cure those issues. If I assume that the appellant has identified a substantive issue (i.e. that the decision was inconsistent with sound marketing policy) what then? Even if a panel were to find that the decision to grant a temporary authority to market vegetables was in error, and not supported on the facts, it is unclear to me what the remedy would be. The panel cannot, as the appellant asks, put the appellant in the position it ought to be in as a panel cannot award damages. At best, the panel could find an error and make some forward speaking direction possibly around process or procedure. This is not a satisfactory result and I find that to allow this appeal to proceed would give rise to an abuse of process within the meaning of s. 31(1)(c) of the *Administrative Tribunals Act*.

14. As such, I summarily dismiss Appeal #12-03.

Appeal #12-05A and B

15. As referenced above, I directed that Appeals #12-05A and B be referred to the supervisory jurisdiction of the BCFIRB as agency designation requires BCFIRB approval. The appellant argues that s. 8.4 of the NPMA sets out a mandatory requirement that following a supervisory process, if an appellant requests that his appeal be heard, the BCFIRB must proceed with and decide the appeal.

16. This submission of the appellant relies on the unique provisions of s. 8(8) and 8(8.4) of the *NPMA*, which provide as follows:

> 8(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the commodity board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed….
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> 8(8.4) If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial board must proceed with and decide the appeal.

17. Sections 8(8) and 8(8.4) are unique statutory provisions. They reflect BCFIRB's concurrent supervisory and appellate responsibilities, and are designed to ensure that where appeals arise that raise issues (usually, systemic and industry wide issues) that are more amenable to the supervisory process than the formal appeal process, the appeal can be deferred until the supervisory process is completed.

18. The appellant is correct to observe that s. 8(8.4) ultimately allows an appellant to decide whether it intends to proceed with the appeal, and requires BCFIRB to proceed with and decide the appeal. Importantly, however, the obligation to "to proceed with and decide the appeal" does not require BCFIRB to ignore the outcome of the preceding supervisory process. Where issues have been decided in that process, it would abuse the appellate

process to require those issues to be decided all over again, to require the appeal panel to resolve issues or grant remedies that have become academic or unnecessary in all the circumstances. Where, as here, the supervisory process has addressed key issues of substance, the summary dismissal factors set out in s. 31 of the *Administrative Tribunals Act*, which apply to appeals, are operative:

> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
> (a) the application is not within the jurisdiction of the tribunal;
> (b) the application was not filed within the applicable time limit;
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
> (d) the application was made in bad faith or filed for an improper purpose or motive;
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
> (f) there is no reasonable prospect the application will succeed;
> (g) the substance of the application has been appropriately dealt with in another proceeding.

19. The language reflected in section 31(1)(g) has been interpreted as being a statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process -- doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness: *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 322.

20. The appellant argues that Appeals #12-05A and B raise issues of abuse of process and the violation of fundamental principles of justice and that the impugned decisions caused and continue to cause harm to the appellant. The appellant argues that there is nothing hypothetical or theoretical about the issues on appeal; these appeals are not frivolous or vexatious nor were they filed in bad faith or for an improper purpose or motive. There is a reasonable prospect of success given the tacit acknowledgement of all parties to the supervisory process that the Vegetable Commission acted improperly. The appellant argues that the substance of these appeals has not been addressed by the supervisory process as it was limited to managing the problems created by the decisions. What is needed is for the BCFIRB to review the Vegetable Commission's decisions and as far as is possible correct the decisions to place the appellant in the position it would have been in had the process been fairly followed.

21. The Vegetable Commission argues that the substance of these appeals was appropriately addressed by the supervisory process and to allow them to proceed in the face of the supervisory decision would undermine the supervisory process itself and constitute an abuse of process.

22. I have set out the chronology of events above and I do not intend to repeat that history here. Appeal #12-05A appeals the decision to recommend VIFP's agency status to BCFIRB while Appeal #12-05B appeals the decision to revoke VIP's agency licence. As a result of the supervisory process, BCFIRB did not confirm either decision of the Vegetable Commission. BCFIRB instead replaced the Vegetable Commission decision with a

decision of its own that grants both VIP and VIFP interim agency designation for a one year period pending a further review by the Vegetable Commission addressing larger issues relating to the systemic and structural economic questions of marketing of regulated vegetables on Vancouver Island within the provincial regulatory framework. After this review, the Vegetable Commission will make recommendations to BCFIRB as to the number and type of designated agency(ies) on Vancouver Island and the regulated vegetables they will market to best serve Vancouver Island. BCFIRB will in its supervisory capacity make the final decision to approve or not approve the recommendations, which decision will be subject to judicial review.

23. While I appreciate the appellant wants to argue about the procedural defects of the Vegetable Commission's process in coming to its April 2012 decision, that decision has in effect been overtaken and superseded by BCFIRB's January 2013 decision. The appeal panel cannot now, based on procedural defects, grant a remedy which returns everything to its previous state of affairs when a new decision affecting both licences has since been made by a supervisory panel, which decision itself contemplates further action and regulatory decision-making.

24. What this reflects is a reality of licensing in the highly specialized regulated marketing sector. BCFIRB is not a mere surrogate for a court on judicial review. While a court might quash a licensing decision based solely on procedural grounds, BCFIRB, which exercises supervisory authority and *de novo* appeal powers (which would normally cure any defects in the process below) will not always consider remittal on procedural grounds to be the appropriate outcome. As a regulatory body, BCFIRB will at times be required to look beyond the procedural complaints to examine underlying substantive marketing policy issues arising in respect of the order that was made. There will be times when, in this process, the ultimate regulatory order made by BCFIRB must turn on the substantive policy question concerning "what is the right order to make" in the context of sound marketing policy rather than on a simple view of whether there was a procedural flaw.

25. I should add that in this particular case, the procedural defects asserted by VIP do not appear to have been lost on the supervisory panel, as they have informed the panel's order restoring VIP's licence on an interim basis (together with that of VIFP) and requiring the Vegetable Commission to undertake a broader industry review, with ongoing BCFIRB supervision, before making long term decisions with respect to designation of agencies on Vancouver Island, and have restored VIP's licence during this period.

26. If the appellant wants to challenge the supervisory decision, that should be done directly through judicial review, not indirectly through the hearing of these appeals. I am not prepared to substitute my view of an appropriate resolution for that of the supervisory panel or to engage in a collateral attack on its decision.

27. I am of the view that sections 31(1)(c)(f) and (g) of the *Administrative Tribunals Act* all have application in these circumstances. These appeals could be seen as "vexatious" as a vexatious appeal is one even in the absence of an intent to harass which abuses the board's processes because it is asking the board, and the opposing party, to commit resources to

matters that have been addressed in another proceeding. These appeals could also be seen as frivolous in that a "frivolous" appeal is one that is inappropriate to refer to a hearing because it has no reasonable prospect of success in respect of the ultimate remedy sought. It is fundamentally unfair and contrary to the public interest to establish a hearing with regard to an appeal that has no reasonable prospect of success. Finally, with respect to s. 31(1)(g), and contrary to the arguments of the appellant, the substance of these appeals has been appropriately dealt with in the supervisory proceeding. The BCFIRB supervisory panel has not just "managed" the situation; the orders under appeal no longer have any force or effect because they have been replaced by orders of the supervisory body. In these circumstances, there is no meaningful remedy I can offer in respect of orders that have no effect.

28. As such, I summarily dismiss Appeals #12-05A-B.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

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Suzanne K. Wiltshire
Presiding Member