



January 14, 2005

File: 44200-50/VMC 03-23

DELIVERED BY FAX

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Attention: Christopher Harvey, Q.C.

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Attention: Maria Morellato

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Attention: James P. Taylor, Q.C.

Dear Sirs/Mesdames:

APPEAL BY BC VEGETABLE GREENHOUSE I, L.P. FROM BOARD ORDER 10/03(a) OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

The Panel of the British Columbia Farm Industry Review Board (the “Provincial board”) is in receipt of the flurry of correspondence that has followed Mr. Harvey’s January 11, 2005 letter, advising as follows:

Please be advised that the Appellant has elected to discontinue the above-noted appeal.

The Notice of Appeal is, accordingly, withdrawn.

This withdrawal triggers the application of s. 17(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the “ATA”) which, by s. 8.1(1) of the *Natural Products Marketing (BC) Act* (“NPMA”), is applicable to the present appeal:

17(1) If an applicant withdraws all or part of an application ... the tribunal must order that the application or the part of it is dismissed.

The word “application” includes an appeal. The requirement that the tribunal order the appeal dismissed makes clear that the effect of withdrawal is not mere discontinuance. The requirement the appeal be “dismissed” by order reflects the legislative objective of ensuring finality. An order dismissing the appeal finally concludes the appeal against the appellant.

We reject Mr. Harvey's submission that s. 17(1) is not operative here. He has unambiguously stated that the Notice of Appeal, which has been outstanding for some 15 months and which has given rise to interlocutory proceedings and considerable time and expense, is withdrawn. We have no option other than to order, pursuant to s. 17(1), that the BC Vegetable Greenhouse I, L.P.'s appeal from Order 10/03(a) of the British Columbia Vegetable Marketing Commission (the "Vegetable Commission") is dismissed.

Ms. Morellato initially responded to Mr. Harvey's withdrawal of appeal by applying to the Provincial board to convene a hearing under other powers (which she lists as ss. 7-11 of the *NPMA* and which includes our supervisory powers) for the purpose of receiving an "affirmation" of the appropriate quantum of levy Order 10/03(a). Even assuming, without deciding, that we had the power to do so, we are not persuaded that it would be appropriate. Order 10/03(a) stands as a valid order unless and until set aside by law. The appeal from that Order is dismissed. Order 10/03(a) would be no more or less valid because the Provincial board has affirmed it in some other type of proceeding. Nor are we convinced that s. 8.4 of the *NPMA*, which provides for the filing of a certified copy of the Provincial board's final decision with the Supreme Court, is inapplicable where an appeal is ordered dismissed under s. 17(1) of the *ATA*.

However, even if that the Vegetable Commission chooses or is required to re-institute proceedings under ss. 15 or 17 of the *NPMA* in order to obtain compliance with their Orders, we do not share the assumption that this authorises an appellant to, in the Vegetable Commission's words, "circumvent the regulatory system" by raising issues by way of defence that were addressed or should have been raised in the appeal process. It is far from clear that the Court would, on a s. 15 or s. 17 *NPMA* application – which sections are intended to give regulators a tool to ensure compliance rather than to invite backdoor appeals from commodity board orders – exercise a discretion to hear arguments that could have been raised before the specialised appeal board whose decisions are protected by a strong privative clause: *NPMA*, s. 9. The Court's inherent jurisdiction in public law cases always includes the discretion to refuse to entertain arguments where a party has failed to exhaust a specialised statutory process: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706. The facts here are of course that the appeal has been filed and dismissed.

In the result, the appeal is ordered dismissed. If the parties wish to address the matter of costs of the appeal, including the interlocutory proceedings to date, they may contact Mr. Collins at the Provincial board office to set a hearing date or to request a schedule for written submissions.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

Christine J. Elsaesser
Vice Chair

cc: Murray Driediger, General Manager
British Columbia Vegetable Marketing Commission