

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A FEBRUARY 22, 2000 DECISION
CONCERNING THE MARKETING OF VEGETABLES IN EXPORT TRADE

BETWEEN:

BC VEGETABLE GREENHOUSE I, L.P.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC HOT HOUSE FOODS INC.
BC HOT HOUSE GROWERS' ASSOCIATION
LOWER MAINLAND VEGETABLE DISTRIBUTORS INC.
BRITISH COLUMBIA COUNCIL OF MARKETING BOARDS

INTERVENORS

**ADJOURNMENT APPLICATION
DECISION**

APPEARANCES:

For the British Columbia Marketing Board

Mr. Ross Husdon, Chair
Ms. Christine J. Elsaesser, Vice Chair
Mr. Hamish Bruce, Member
Mr. Richard Bullock, Member

For the Appellant
(by written submission)

Mr. Christopher Harvey, QC, Counsel
Mr. Andrew P. Jackson, Counsel

For the Respondent
(by written submission)

Ms. Maria Morellato, Counsel

For the Intervenor BC Hot House Foods Inc.
(by written submission)

Mr. Steven R. Stark, Counsel

The Application

1. This is an application by the British Columbia Vegetable Marketing Commission (“the Commission”) to adjourn an appeal hearing, pursuant to s. 8(7) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (“the Act”):

The Provincial board must hear an appeal under this section not more than 60 days after it receives a notice of appeal under subsection (1) but the Provincial board may adjourn a hearing for the period it considers appropriate at the request of the person bringing the appeal or of the marketing board or commission from which the appeal is being made or on its own initiative.

The Appeal

2. The Appellant is a corporation known as BC Vegetable Greenhouse I, L.P. (“BCVG”). It grows tomatoes in greenhouses in the Delta area. On March 22, 2000, it filed an appeal with the British Columbia Marketing Board (“the BCMB”). Based on the documents accompanying the notice of appeal, the chronology appears to be as follows.
3. On February 2, 2000, BCGV wrote to the Commission through its legal counsel advising that “BCVG is interested in the possibility of marketing its entire production outside the province of British Columbia without the involvement in any way of BCHHFI” [emphasis in original] and requesting as follows:

...we request confirmation from your Commission that our client, if it so chooses, has the legal capacity to engage in the production of greenhouse tomatoes (or other greenhouse commodities) in B.C. solely for the export market, without being subject thereby to the statutory powers of regulation devolved upon BCHHFI through the applicable legislation.
4. “BCHHFI” refers to BC Hot House Foods Inc. (“BC Hot House”) which is a corporation which has been designated under the *Act* as a marketing agency through which regulated product can lawfully be marketed.
5. On February 22, 2000, the Commission Chair wrote to the Appellant advising that, as a result of delegated authority under the federal *Agricultural Products Marketing Act*, “your client is subject to the authority of the Commission and must act in compliance with the enabling legislation, regulations and policies of the Commission and its agencies.”
6. The Appellant’s March 22, 2000 notice of appeal states as follows:

The Commission asserts that it has the right to regulate the marketing of vegetables in export trade with respect to vegetables grown in British Columbia.

We believe that the regulatory powers asserted by the Commission are invalid as against BCGV. Accordingly, on behalf of BCGV, we wish to appeal the February 22, 2000 decision by the Commission.

7. Since the filing of the appeal, the Appellant has expanded upon its grounds of appeal, as reflected in the May 25, 2000 pre-hearing conference report which has been agreed to by the parties, and in a statement of particulars submitted by the Appellant on May 30, 2000.
8. The first group of grounds elaborate on its submission that the Commission has no legal authority to regulate production destined exclusively for export to the United States. The second group of grounds asserts that, even if the Commission has legal authority over an operation such as the Appellant's, it would be unfair to apply that regulatory authority in light of alleged various financial burdens in being required to market through BC Hot House.
9. The Appellant expects that the hearing will occupy one week. In support of its arguments, the Appellant intends to call two expert witnesses. Expert reports have not been provided to the Commission, or to BC Hot House. The Appellant provided its Notice of Constitutional Question on April 19, 2000. Other parties whose interests might be affected by the appeal, including BC Hot House, were not notified until April 25, 2000. Effective May 12, 2000, seven applications were made for leave to intervene with differing degrees of participation requested depending on the intervenor. Intervenor status is granted to these intervenors on the basis set out in the May 25, 2000 pre-hearing conference report.

Decision on Adjournment

10. To be held within 60 days, this hearing would need to have been heard by May 23, 2000. None of the parties has suggested that the appeal could realistically have been heard by that date.
11. The dispute in this case is about whether the appeal should be heard commencing June 19, as requested by the Appellant, or alternatively in August, as requested by the Commission. None of the counsel is available for a five day hearing in July.
12. The Appellant points out that the purpose of the 60 day requirement is to ensure expedient and cost effective appeals. It also states that "it is essential that we to (sic) receive a decision on the appeal by no later than mid-September 2000."
13. In our opinion, the appeal should not be heard in June for two reasons. The first reason is that Commission counsel have other litigation commitments in June and are therefore not available during that month to assist their client in a five day oral hearing on the significant issues raised by this appeal. The second reason is that to proceed in June would be unfair to the Commission and BC Hot House since they have not been provided with the expert reports the Appellant intends to rely upon. They were only provided with written particulars of the appeal on May 30th.
14. Counsel had earlier agreed that August 21st was the next available date that all counsel would be available. However, one of the counsel for the Commission is

evidently committed on August 21st to a non-litigation matter outside the province. Subject to what we say below, the appeal will proceed for five days from August 23-25 and August 28-29 inclusive. The BCMB will make all reasonable efforts to issue its decision before mid-September, as requested by the Appellant.

15. The next matter in issue between the parties is whether, prior to the hearing date, the BCMB should consider the following series of preliminary issues raised by the Commission and BC Hot House:
 - A. Whether, in light of Order-in-Council 631 (May 4, 2000), the Appellant's first ground of appeal – challenging the Commission's jurisdiction to regulate "export production" as a matter of legal authority and constitutional law – should be dismissed as academic.
 - B. Whether the BCMB has jurisdiction to consider and apply the North American Free Trade Agreement in deciding whether the Commission has jurisdiction to regulate "export" production.
 - C. Whether, in the absence of a determination by the Commission on the fairness issues raised by the Appellants, there is even a "decision" on this issue for the Appellant to appeal to the BCMB under s. 8(1) of the *Act*.

16. The Appellant opposes any preliminary determinations being made by the BCMB:

...all of the issues being put before the BCMB should be decided at the hearing. Without considering the issues in their entirety, it would be unjust for the BCMB to determine the proceedings on a preliminary basis. In the event that the BCMB is inclined to consider the objections on a preliminary basis, we submit that Ms. Morellato and Mr. Stark should be able to provide their submissions by June 15 or June 21, 2000, given that their objections have already been succinctly stated in their letters of May 16, 2000. Mr. Chris Harvey will be out of the office during the month of July, and requests one or two weeks to review the objections of Ms. Morellato and Mr. Stark prior to his departure.

17. In our opinion, it is in the interests of justice for the BCMB to consider the preliminary issues raised by the Commission and BC Hot House. Resolution of these issues does not depend on evidence. Determining these issues early will help the parties to know where they stand and what, if any, case they have to advance or meet in August. These objections will be advanced no matter what. To wait until August to address them will only delay the BCMB's consideration of these issues, and unnecessarily prolong the August hearing.

18. We propose to address these preliminary issues by a written submissions process, but reserve the right to hear oral submissions if needed. We agree with the Appellant that proceeding in this fashion, particularly in light of Mr. Harvey's calendar, the nature of the objections and the greater flexibility that a written submission process offers to counsel, justifies an accelerated submission schedule. We therefore direct as follows:
 - A. That the Commission and BC Hot House deliver full written submissions regarding their preliminary objections to the BCMB and the other parties no later than June 16, 2000.

- B. That any submissions from remaining intervenors on the preliminary issues raised by the Commission and BC Hot House be delivered to the BCMB and all other parties no later than June 20, 2000.
 - C. That the Appellant provide its response submissions no later than June 27, 2000.
 - D. That the Commission and BC Hot House provide their reply submissions no later than June 30, 2000.
19. Parties are directed to forward three copies of any case authorities they rely upon in their written submission to the BCMB.

Exchange of Documents

20. The final matter to be addressed is the request by BC Hot House that the Appellant be directed under s. 8(5) of the *Act* to produce copies of all relevant documents in its possession relating to the “merits” issue no later than June 1st. The Appellant does not object to producing relevant documents before June 30 provided the Commission and BC Hot House do the same thing at the same time. BC Hot House answers that it cannot provide relevant documents until it has the Appellant’s documents.
21. The Panel does not propose to make any orders for the production and exchange of documents at this time. From the May 25 pre-hearing conference report, we understand that the parties agreed that, following this decision, a third teleconference would be convened to discuss outstanding procedural questions, including exchange of documents. Consistent with the practice of the BCMB, we propose to leave this matter to be addressed consensually by the parties if possible. If consensus is not possible, we are open to a fresh application under s. 8(5), which we would be prepared to rule on at the same time we issue our decision on the preliminary objections.

Dated at Victoria, British Columbia, this 2nd day of June, 2000.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Ross Husdon, Chair
 Christine J. Elsaesser, Vice Chair
 Hamish Bruce, Member
 Richard Bullock, Member