



File: 44200-50/VMC 01-06
44200-50/VMC 01-09

May 11, 2001

DELIVERED BY FAX

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British Columbia Vegetable
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Ms. Lillian Posch
General Manager
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Dear Sirs/Madam:

**APPEALS FROM DECISIONS OF THE BRITISH COLUMBIA VEGETABLE
MARKETING COMMISSION CONCERNING POOLING OF SALES AND AGENCY
FEE STRUCTURE**

Mr. Graeme James, of Glenmore Valley Greenhouses, is appealing the decision of the British Columbia Vegetable Marketing Commission (the “Vegetable Commission”) to deny his request for exemption from the pooling of sales for the 2001 growing season. In addition, this Appellant and a group of other growers are appealing the Vegetable Commission’s decision to charge a dual marketing fee on a square footage and a per box basis as opposed to a per box fee only.

The Appellant, as part of his appeal on exemption from pooling, seeks an order from the British Columbia Marketing Board (the “BCMB”) requiring the Vegetable Commission to produce a report in its possession, authored by Mr. Tony Kavelaars, regarding the re-measuring of greenhouses in District III (the Interior).

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British Columbia
Marketing Board

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In coming to this decision, the Panel has received and reviewed the following information:

- a) Notice of Appeal from Mr. James dated March 14, 2001;
- b) Letter from Mr. James to the Vegetable Commission dated February 14, 2001;
- c) Letter from the Vegetable Commission to Mr. James dated March 1, 2001;
- d) Letter from Mr. James to the Vegetable Commission dated March 30, 2001;
- e) Letter from the Vegetable Commission to District III Producers dated April 2, 2001;
- f) Notice of Appeal from Mr. James and Other Interior Greenhouse Growers dated April 2, 2001;
- g) Letter from Mr. James to the BCMB dated April 2, 2001;
- h) Letter from the Vegetable Commission to Mr. James dated April 2, 2001;
- i) Undated letter from the Vegetable Commission to BCMB received April 11, 2001;
- j) Undated letter from Mr. James to the BCMB received April 16, 2001; and
- k) Pre-hearing Conference Report dated April 16, 2001.

The Appellant argues that this report is vital to his appeal on exemption from pooling.

The Vegetable Commission argues that the report was received from Mr. Kavelaars on a privileged and confidential basis and as such it should not be disclosed. According to the Vegetable Commission, Mr. Kavelaars is a respected former grower and Vegetable Commission member. In the course of his re-measurement of greenhouses, many growers made candid comments to him in confidence. Upon his return to Vegetable Commission offices, some of these comments were relayed to Mr. Murray Driediger, General Manager of the Vegetable Commission. Mr. Driediger asked Mr. Kavelaars to put his summary of his conversations in writing and mark them "Privileged and Confidential."

The Vegetable Commission argues that when growers contact its office with concerns, they do so knowing that their concerns, which are made in confidence, will remain in confidence. The communications made by Mr. Kavelaars were an extension of this understanding as he was acting under a Certificate of Authority and therefore as an extension of the Vegetable Commission.

The Vegetable Commission argues that the comments in the Kavelaars' report are not new to the Vegetable Commission. Mr. James or the other Appellants to these appeals have already expressed many of these comments. If Mr. James or any of the other Appellants wish to put this information before the Panel they can do so without jeopardizing privileged and confidential communications. The Vegetable Commission argues that some of the comments within the report are prejudicial and should not be disclosed.

The Vegetable Commission receives a significant amount of correspondence in confidence. It is concerned that if it is required to disclose this information, its ability to provide the checks and balances required in the monitoring of agencies and General Order violations may be compromised. Furthermore, disclosure of this type of communication would prevent growers from speaking freely to the Vegetable Commission.

The Vegetable Commission argues that it is the principle of disclosure of documents marked “Privileged and Confidential” which is the basis of this objection and not a concern over any damage to the Vegetable Commission’s position which may result from the disclosure of this information.

In Response, the Appellant argues that he does not seek any personal comments made by individual growers to Mr. Kavelaars. Rather what is sought are Mr. Kavelaars’ views on individual growing facilities in the Interior and the ability of those greenhouses to grow a marketable product. In addition, the Appellant seeks Mr. Kavelaars’ findings on the overall growing conditions in certain greenhouses and any comments regarding the future of the Interior greenhouse industry.

To resolve this issue, the Appellant recommends that an independent panel review the report, strike any personal comments made by individual growers, then release the report. Mr. James denies any intention to release this report to the press and reiterates his belief that the report contains information vital to his appeal regarding the exemption from the pooling process within the Interior Vegetable Marketing Association.

DECISION

The BCMB has considered the issue of disclosure of documents in a recent appeal. In a decision released in the Hallmark Poultry Processors Ltd. appeal dated October 4, 2000, a Panel of the BCMB held as follows:

The production of documents in an appeal to the BCMB is addressed in s. 8(4) and s. 8(5) of the *Natural Products Marketing (BC) Act* (“the Act”):

- 8(4) The marketing board or commission from which an appeal is made must promptly provide the Provincial board (BCMB) with every bylaw, order, rule and other document touching on the matter under appeal.
- 8(5) On its own motion or, on the written request of a party to an appeal under subsection (1), the Provincial board may direct that a party to the appeal provide the Provincial board and other parties to the appeal with a copy of each document the Provincial board specifies in its direction.

Subject to claims of privilege – which are reasonably read into both sections since the law of privilege extends beyond rules of evidence and can only be abrogated by clear legislative language – the legislature has in s. 8(4) imposed a duty of relevant document production upon every commodity board subject to appeal. This duty arises by operation of law and does not depend on BCMB order. In the BCMB’s view, the production required by s. 8(4) is subject only to claims of relevancy and privilege.

The duty contained in s. 8(4) is a duty to provide documents to the BCMB rather than an appellant. As a matter of course, the commodity board under appeal would be expected to provide a copy of the relevant documents to an appellant at the same time. If the duty to produce documents to the BCMB in s. 8(4) is not subject to claims of privilege, the BCMB would in any event be loathe to disclose to any party to the appeal, or to take into account on appeal, privileged documents of the commodity board.

In view of the encompassing nature of s. 8(4), nothing can be added by issuing a specific direction under s. 8(5).

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Thus, the BCMB's ability to order the production of documents is subject to claims of relevance and privilege. The Vegetable Commission does not argue that the report sought is not relevant. Indeed it appears to have been used by the Vegetable Commission in their deliberations with respect to both issues under appeal. Rather the Vegetable Commission argues that the comments of growers made to the Vegetable Commission's agent should be considered to be privileged and confidential in the same way as if those communications had been received directly by the Vegetable Commission.

Usually the type of privilege asserted in hearings before the BCMB relates to information of a financial nature, disclosure of which may harm a person's business operations. The remedy in that type of situation is an in camera hearing.

However, the Appellant does not go so far as to seek production of third party comments disclosed in the Kavelaars' report. Rather he is content to have the BCMB review the document and disclose any information relating to Mr. Kavelaars' conclusions regarding the overall growing conditions in Interior greenhouses and the future of the Interior greenhouse industry. This information would appear relevant to the Appellant's appeal.

Without first reviewing the document, the Panel is not in a position to properly comment on whether or to what extent the information the Appellant seeks ought to be regarded as being privileged, or subject to treatment in camera. Accordingly, the Panel directs the Vegetable Commission to produce the Kavelaars' report to the BCMB not later than Tuesday, May 15, 2001. The Panel will then determine whether and/or how the report ought to be disclosed relative to the issues under appeal. The Panel reserves the right to edit any privileged portions including any comments attributed to individual growers and any other aspect of the report over which privilege should properly attach.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair