

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL FROM A DECISION CONCERNING AN  
EXEMPTION FROM POOLING OF SALES  
AND  
AN APPEAL FROM A DECISION CONCERNING  
AGENCY FEE STRUCTURE

**BETWEEN:**

GRAEME JAMES dba GLENMORE VALLEY GREENHOUSES,  
DWAINE ALGATE, GREG FERNANDES JOE FERNANDES,  
JORGE GOMES, ERIC HEARLE, JIM LUTE, JOHN LUTE,  
GERRY STEADMAN and TOM WILSON

**APPELLANTS**

**AND:**

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

**RESPONDENT**

**AND:**

INTERIOR VEGETABLE MARKETING AGENCY

**INTERVENOR**

**REASONS FOR DECISION**

**APPEARANCES:**

For the British Columbia Marketing Board

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

For the Appellants

Mr. Graeme James

For the Respondent

Mr. Murray Driediger, General Manager

For the Intervenor

Ms. Lillian Posch, General Manager

Date and Place of Hearing

Kelowna, British Columbia  
May 31, June 1 and July 10, 2001

## INTRODUCTION

1. The following are the reasons for our August 29, 2001 decision in these appeals.
2. By agreement with all parties, two appeals were heard by the British Columbia Marketing Board (the "BCMB") at the same time. The first appeal brought by Mr. Graeme James, dba Glenmore Valley Greenhouses, seeks an exemption of his greenhouse tomato and Long English cucumber production from the requirement to pool sales through the Interior Vegetable Marketing Agency (the "IVMA").
3. The second appeal brought by Mr. James and nine other greenhouse producers seeks to change the fee structure charged by the IVMA from a dual marketing fee comprised of a greenhouse square footage fee and a per box fee to just a per box fee.
4. The IVMA was granted intervenor status in support of the British Columbia Vegetable Marketing Commission (the "Vegetable Commission").
5. The appeal was heard over three days in Kelowna. None of the parties were represented by Counsel. Mr. James was the spokesperson for the Appellants in the fee structure appeal and spoke on his own behalf on the pooling of sales appeal.

## ISSUES

### Pooling of Sales Appeal

6. Is it unfair that Glenmore Valley Greenhouses ("Glenmore") is not exempted from pooling of sales for the 2001 season? Glenmore raises the following grounds:
  - a) pooling unfairly subsidises poor growers, whose poor quality product brings the overall pool price down;
  - b) growers with sub-standard facilities cannot produce during the "shoulder" season (when Interior greenhouse products are in demand);
  - c) the influence of these growers on the IVMA Board of Directors has resulted in the IVMA not enforcing effective grading standards and not requiring growers to improve their facilities;
  - d) extra transportation costs from outlying areas (e.g. Kamloops and Merritt) negatively impact on the price paid to other growers; and
  - e) the IVMA is losing market share.

## Agency Fee Structure Appeal

7. Should the IVMA dual marketing fee (10 cents per square foot plus a fee per box shipped) be changed to a per box only fee? The Appellants raise the following grounds:
  - a) growers selling through farmers' markets or their own stores are paying the IVMA square footage fee for product not shipped through the IVMA;
  - b) the combination of a per box fee and a square footage fee means that growers with a poor production year have an inordinately high handling cost "per box" for each box shipped;
  - c) the square footage fee paid by growers who start late subsidises other growers; and
  - d) the general economic state of the industry, with increased competition and high heating costs.

## FACTS

8. The Vegetable Commission is empowered under the *British Columbia Vegetable Scheme* (the "*Scheme*") to regulate the marketing of greenhouse produce in the Province of British Columbia. In District III, comprised of the Kamloops, North Okanagan and South Okanagan districts, tomatoes and Long English cucumbers are regulated. Greenhouse peppers are not regulated in District III.
9. The IVMA is a designated agency of the Vegetable Commission operating in District III. The IVMA is producer/member owned and its mandate is to sell regulated commodities such as tomatoes and Long English cucumbers to wholesale and retail outlets in British Columbia and Alberta. Producers who sell product through the IVMA are subject to a price pool where the producer return is averaged over a two-week period.
10. Over the past two years, the Vegetable Commission has initiated a major restructuring of the Interior greenhouse industry. This process was commenced as a result of a great deal of conflict within the industry. Producers had expressed concern over the management of the IVMA, some producers took issue with a manifest sales system which precluded them from selling directly to stores which they had developed as customers, some producers were selling to retailers and not reporting sales or paying fees to the agency. Producer returns were dropping and there was general frustration within the industry.

11. In December 1999, as part of this restructuring, the Vegetable Commission directed the IVMA, with the assistance of a committee of producers, to develop a business plan to address the major issues facing the agency. Two of the Appellants, Graeme James and Gerry Steadman were members of this producer committee. The business plan focussed on the need to improve the overall financial viability of the agency by implementing a funding formula consisting of a combination of square footage, manifest sales fees and agency fees to be paid by greenhouse producers.
12. In June 2000, following extensive consultation with their producers, the IVMA submitted their proposed agency fee structure to the Vegetable Commission for approval. The proposed fee structure was comprised of an area-based fee of \$.10 per square foot based on regulated greenhouse vegetable quota area in production.
13. During this time period, the Vegetable Commission also stepped up its enforcement actions against illegal sales. Six Interior producers were found in violation of the General Orders, primarily for failing to report direct sales to a retailer.
14. As a result of these hearings and the obvious conflict between producers who were selling their product through the IVMA and those who were selling product directly to “their” stores in competition with the IVMA, the Vegetable Commission determined that the manifest sales system needed to be revised.
15. On August 24, 2000, the Vegetable Commission sent a Notice to all District III producers. In this Notice, the Vegetable Commission instructed the IVMA to design a manifest sales system which complied with the General Orders and which specifically required all sales to retail chain stores to be through the IVMA and all proceeds to be pooled in the interests of all producers.
16. In addition, and in response to dissatisfaction voiced by some greenhouse producers over the operations of the IVMA and the manifest sales system, as well as frustration over illegal sales, reduced producer returns and general distrust amongst the membership, the Vegetable Commission proposed three options:
  1. Maintain the current structure with a revamped manifest sales system enforced by the (Vegetable) Commission.
  2. Hold a vote to determine support for continued regulation.
  3. Create three sub-agencies in the interior.

17. On November 3, 2000, the Interior Greenhouse Grower's Association (IGGA) held a meeting and determined there was general support for regulation. However, they wanted to preserve optional marketing through the designated agency and direct store sales. On November 10, 2000, the Vegetable Commission reviewed this proposal and found it unacceptable. The Vegetable Commission found that the IGGA wanted legislative protection to ensure a quota system to limit competition from new producers in the Interior but it did not want to comply with the orders of the Vegetable Commission and maintain orderly marketing.
18. As a result, the Vegetable Commission decided to hold a public hearing prior to proceeding to a vote on the continuation of regulation and on future agency status. At the public hearing on December 12, 2000, the Vegetable Commission made a presentation on the state of the greenhouse industry and the role of the Vegetable Commission. The IVMA gave a presentation on its financial situation. The Vegetable Commission also presented the questions to be voted on by dual ballot.
19. The voting process completed on January 5, 2001. Ballot A was on the continuation of regulation with a new manifest sales system and Ballot B asked whether the greenhouse producers wished to remain with the IVMA or form a new agency. On Ballot A, 52.4% of producers representing 62.5% of total production area voted for continued regulation. Opposing regulation were 47.6% of producers representing 37.5% of total production area. Looking at the voting numbers based on regulated commodity, 60% of tomato producers representing 54.9% of total production area voted in favour of deregulation. Also voting for deregulation were 50% of Long English cucumber producers, representing 24.9% of production.
20. Based on these results, the Vegetable Commission determined there was no clear consensus on regulation or deregulation. As the guideline in the Vegetable Commission General Orders requires 70% of producers representing 70% of total production to support regulating a commodity or area, the Vegetable Commission felt that a similar guideline should apply to deregulation. The Vegetable Commission was also mindful of its obligation to make decisions in the best overall interests of the industry. As a result, the Vegetable Commission undertook further consultation with the greenhouse and storage crop producers marketing through the IVMA.
21. Given that the Vegetable Commission felt that the industry was having difficulty resolving its issues independently, a restructuring committee was struck. Vegetable Commission member John Savage chaired this committee, comprised of four storage crop producers and four greenhouse producers. This committee met seven times and submitted its report to the Vegetable Commission on March 27, 2001. The report dealt with nine areas of IVMA operations:
  1. Greenhouse Crop Projections for 2001 (due to increased gas costs)
  2. Staffing Reorganization
  3. IVMA Budget

4. Allocation of 2001 Budget Between Crops
  5. Transportation and Distribution
  6. Quality Control
  7. Office Location
  8. Board of Directors & Governance
  9. Professional Code of Conduct.
22. The greenhouse producers on the restructuring committee did not raise the issue of area-based fees as a concern. The Vegetable Commission accepted the report and presented it at the IVMA Annual General Meeting on March 28, 2001. The IVMA 2001 Budget, which included a per box and an area-based fee structure, was approved by the producers in attendance at the meeting. The fee schedule designed by the IVMA attempted to balance the revenue received from the greenhouse sector with the revenue received from the root crop sector. In this manner, the IVMA's operating costs could be split evenly between the two sectors.
  23. On March 28, 2001, the Vegetable Commission enacted Order 1/01. The purpose of this order was to strictly regulate manifest sales. It imposed daily reporting requirements, prohibited producer-producer sales and required per case charges equivalent to those of the IVMA. In addition, the order created a list of restricted stores within District III which producers could contact and sell to directly with the prior consent of the IVMA. District III producers were expressly prohibited from contacting retail customers outside their district. This Order was not appealed.
  24. Following the IVMA's Annual General Meeting, and in preparation for the new area-based fee structure, the Vegetable Commission re-measured Interior greenhouses to ensure an accurate record of quota area prior to assessing area-based fees.

### **Fee Structure Appeal**

25. On April 2, 2001, the ten Appellants collectively appealed the fee structure presented at the IVMA Annual General Meeting by the Vegetable Commission. They stated that "[w]e feel that a square footage charge is unfair and should revert back to a per box charge".
26. On April 26, 2001, the Vegetable Commission approved the fee structure for the 2001 season comprised of an area based fee of \$0.10 per square foot, an agency fee of \$0.73 per case and a manifest sales fee of \$0.73 per case.

### **Pooling of Sales Appeal**

27. On February 14, 2001, Graeme James wrote to the Vegetable Commission and requested an exemption of his regulated product from pooling through the IVMA. He stated:

[t]he practice of pooling within the IVMA is unfair to myself and many others. Due to geographical locations within the IVMA of the growers, and predominate (sic) poor growing facilities I feel I am unfairly subsidizing these facilities.

28. He made a further request for exemption on February 20, 2001, stating:

Due to the appalling situation with the IVMA I feel compelled to once again request that I be exempted from the IVMA and the commission due to my small square footage of regulated crop. Due to the fact that at least 50% of my total crop is destined for farmers markets this is not an unreasonable request.

29. On March 1, 2001, the Vegetable Commission denied Mr. James' request for an exemption from pooling. Mr. James filed his appeal on March 14, 2001.

### **DECISION**

30. These two appeals arise out a period of unrest and uncertainty within the greenhouse industry. The "honeymoon" period enjoyed by the greenhouse sector for a number of years appears to be over. Producer returns have diminished as more producers have moved into the industry and costs of production have increased. The rising cost of heating fuels has only served to exacerbate the problems.
31. In difficult times, producers look for different ways to increase their returns. In the case of the Appellants, they seek to reduce the fees they pay to the IVMA. In the case of Mr. James, he seeks an exemption from regulation.

### **Agency Fee Structure Appeal**

32. The Appellants argue that the area-based fee structure discriminates against those producers who do not ship the majority of their product through the IVMA. With a per box fee, a producer only pays on that product sold through the IVMA. With an area-based fee, a producer who does not use the IVMA as much pays a disproportionately higher fee when that fee is averaged out on a per box basis.
33. Mr. James argues that using an area-based fee structure, he is required to pay a per box fee of \$1.79 for his beefsteak tomatoes. A producer like IVMA Director Bent Kristensen, who ships most of his product through the IVMA, only pays a per box fee of \$0.90. Mr. James believes this is unfair.

34. The average revenue earned per case using area-based fees is \$1.06. In prior years, the IVMA generated revenue on greenhouse production of tomatoes on a \$1.15 per box fee. Mr. James argues that the restructuring of fees requires smaller growers to pay more of the IVMA's revenue. Larger growers who sell most of their product through the agency have received a rebate at the expense of smaller growers like the Appellants. In the case of Mr. James, he estimates that the restructuring of fees cost him an additional \$221 in fees paid on his tomatoes in 2000. Whereas, on the other hand, Mr. Kristensen saw a reduction in his fees of \$3959.80. Mr. James argues that there has been no net benefit to the IVMA as their funding requirements have remained the same. What has changed is how that revenue is derived.
35. Mr. James also alleges a perception of bias given that Mr. Kristensen, a member of the IVMA Board of Directors, is deriving such a benefit from the restructured fee arrangement.
36. The Vegetable Commission argues that the revised fee structure arises out of a thorough consultative process involving industry, the IVMA and the Vegetable Commission. This process has taken a year and a half. Difficult decisions have been made in an attempt to restore orderly marketing to the Interior greenhouse sector. This change began with Order 1/01 and the requirement that producer proceeds from sales to retail stores be pooled. This order affected all the Appellants by restricting their ability to get premium prices for their regulated product with certain retailers. However, this Order is not under appeal.
37. The Vegetable Commission argues that the IVMA needs to be funded. The Vegetable Commission made a decision that funding should be derived equally between the storage crop and greenhouse industry. The decision to move to an area-based fee was strongly supported by producers. The Vegetable Commission argues that this system is a fair and balanced approach to the unique marketing system established by the IVMA and to the financial requirements of the industry. Eliminating the area-based fee mid-season would create a significant financial hardship for the IVMA and put all producers at risk. The Vegetable Commission maintains that it has put a system of monitoring in place to perform quarterly reviews of the IVMA, including performance to budget, reporting of manifest sales and a comparison of net producer returns. The Vegetable Commission continues to look at what structural changes are necessary to strengthen the industry. The Vegetable Commission urges that this appeal be dismissed in order to allow it to continue with its restructuring process.
38. The IVMA supports the Vegetable Commission in this appeal. It argues that the area-based fee is not inherently bad for small producers. It treats everyone equitably. A producer's per case cost is determined by that producer's business decisions made in their unique circumstances.

39. The IVMA argues that the Interior greenhouse industry needs the support of all major retailers to effectively market peak season production. The IVMA, in turn, needs the assistance and supply of the greenhouse producer members to keep retailer support during times of high demand. Balancing these needs is difficult given the other marketing opportunities available to producers. Producers have a tendency to sell their best product through direct avenues to realise premium prices and sell their remaining product through the IVMA. However, the IVMA has a good core group of producers who support the agency with their product, which in turn helps maintain the customer base.
40. The IVMA argues that the area-based fee structure was put in place to ensure that all producers, who enjoy the benefits and protections of regulated marketing, were contributing to the overhead of the agency. Revision in the fee structure was necessary as producers of root crops were supporting 58% of the IVMA's total operating budget and the greenhouse industry was absorbing an increasing amount of that budget. Given that an internal review also showed that not all producers were reporting their manifest sales and contributing fairly, changes were required. These changes resulted from an extensive consultation process in which greenhouse producers, including many of the Appellants, generally supported area-based fees. The combination area-based and per box fee structure brings fairness to the system.
41. The Panel recognises that the Vegetable Commission has faced considerable challenges over the past few years. They are to be commended for their efforts to bring about stability within the Interior greenhouse industry. The Appellants take issue with the new area-based fee structure and argue that it is unfair. It does not generate more money for the IVMA but rather adjusts where that money comes from. They argue that the smaller producer is subsidising the larger producer. The Panel disagrees.
42. The system imposed by the Vegetable Commission ensures that all producers participate in the funding of the IVMA. Producers who only use the IVMA as a "dumping ground" when they cannot sell their product directly derive significant benefit from the existence of the IVMA. If the IVMA is not adequately funded all year long, it will not be there when those producers need to dispose of surplus product.
43. Given that the Vegetable Commission conducted extensive consultation over a lengthy period of time prior to moving to an area-based fee, and given the apparent support for that decision at the time it was made, it is not appropriate for this Panel to alter the decision.

44. There was an allegation that directors of the IVMA imposed this system to benefit themselves personally. While there has been a significant reduction in fees paid in the case of one director, the Panel does not find any evidence of bias. The evidence demonstrates that many producers were selling illegally and not paying their fees to the IVMA. It is only natural that when more rigour is put in the system and all producers are required to pay for the services they receive, the fees paid by those who have been carrying the agency will go down. This is as a result of math, not bias.
45. While it is evident that the area-based fee does increase the amount of fees paid to the IVMA by the Appellants, the Panel finds that the increase is nominal. The increase in fees is more than offset by the flexibility given to all producers to sell their product through various options created by the Vegetable Commission:
- a) Producer-vendor licence: This licence allows producers to sell regulated product directly to consumers from the farm gate. These sales are not reported nor are any fees paid to the Vegetable Commission or the IVMA.
  - b) Producer licence: This licence allows a producer to sell regulated product at farmers' markets. These sales are not reported nor are any fees paid.
  - c) Off-farm producer-vendor licence: This licence allows a producer to sell produce directly to consumers from an off-farm location. As above, these sales are not reported nor are any fees paid.
  - d) Manifest sales system in Order 1/01: This allows producers to sell regulated product to smaller stores, retail outlets and vegetable stands in District III that are not customers of the IVMA. Manifest sales are reported and a per case fee is paid. The producer price is not pooled with other members of the IVMA.
  - e) Export Exemption: Ordinarily, only an agency can export product. However, where a producer has a demonstrated market in the U.S., and where an exemption would not disrupt orderly marketing, an exemption may be granted. A manifest sales per case fee is paid. Currently two exemptions have been granted to Gerry Steadman and Greg Fernandes. Both producers are Appellants in the area-based fee appeal.
46. It is not possible for this Panel to calculate the benefits to producers of these various creative options developed by the Vegetable Commission. Therefore, it would be inappropriate for us to reduce fees paid by producers without taking into account the whole picture. Accordingly, we are satisfied that in coming to the decision to implement an area-based fee, the Vegetable Commission made a considered and thoughtful decision. The Panel is not prepared to interfere with that decision and the application for a change in agency fee structure is denied.

## **Pooling of Sales Appeal**

47. The Appellant, Graeme James seeks to be exempted from pooling his product through the IVMA. He argues that he should be able to sell his product on its own merit and not be forced to pool with other, sub-standard producers. Mr. James has a new “state-of-the-art” greenhouse facility. He heats his greenhouse and maximises the return on his regulated product by marketing in the premium “shoulder” periods in spring and fall.
48. He argues that many of the greenhouses in the Interior are not heated. They are plastic and wood construction. These greenhouses produce lower quality product, which affects the pool, driving down producer returns. If Mr. James is forced to sell his product in pools with lower quality product, his returns suffer. He argues that given his investment, this is unfair. In addition, he is highly critical of the management of the IVMA. It is not doing its job and is not getting the best producer return. Mr. James also argues that the IVMA has lost credibility with retailers by supplying substandard product. Mr. James seeks to be exempted from pooling so that he alone can be responsible for selling his product. He is satisfied that if he is exempted he can significantly increase his rate of return. This exemption should be retroactive to the beginning of this growing season, as he does not want to wait until the Vegetable Commission Task Force completes its review. He wants the opportunity to survive while the Vegetable Commission sorts out the major issues in the Interior greenhouse industry.
49. The Vegetable Commission opposes Mr. James’ application for an exemption. In support of his application for exemption, Mr. James has attempted to discredit other producers and their facilities arguing that they do not produce product of a consistent quality. When one looks at the actual claims records, the Vegetable Commission argues these assertions are not borne out. In addition, the IVMA has undertaken initiatives to improve quality. As a result of the IVMA hiring its new Sales Manager, there is increased monitoring of grading and quality control at the greenhouse level.
50. The Vegetable Commission argues that in a system of regulated marketing it is not possible to start exempting individual producers from regulation. Either an industry is regulated or it is not. In the case of Mr. James, if his exemption is granted, other producers will very quickly follow. The end result would be a two-tiered system of orderly marketing within the Interior.
51. The IVMA also opposes Mr. James’ application for an exemption. The IVMA pays all greenhouse producers of regulated commodities based on a pooling system. Product is pooled according to grade, size and count. The producer receives the best average pool price for a two-week period.

52. The IVMA has a large customer base. It has regular contact with its customers and offers them a full range of products. When a producer approaches a customer directly, he has only his best interest at heart. He will not expose that customer to the full range of IVMA's products.
53. With respect to quality control, the IVMA concedes there have been problems in the past. However, this issue has not been ignored by the IVMA. It has taken steps to work with producers to overcome quality issues. In addition, their new Sales Manager is now actively checking on quality and grading of product from producer to customer. Random checks of producer facilities and products are also being performed. The IVMA strongly argues against exempting Mr. James from pooling. Such an exemption would be detrimental to the operations of the IVMA and orderly marketing.
54. The Panel understands that an exemption from pooling would give Mr. James the opportunity to increase his returns. However, we are satisfied that an exemption is not in the best interests of the Interior greenhouse industry. Mr. James points to many problems with the pooling system. However, along with the problems, there come many advantages to operating within an orderly marketing system. By virtue of quota, producers know that the number of producers and the amount of production in the Interior and in the Province is controlled. This gives a certain amount of stability to both production and price.
55. However, what Mr. James seeks is the best of both worlds. He wants to be cut loose from the rigours of regulation while keeping other producers bound by those same rules. If the Interior greenhouse industry is to be deregulated, that decision will be made after an appropriate consultative process and a proper vote. Deregulation cannot occur one producer at a time. The effect of such a process would further destabilise the industry, as producers would compete directly with one another for customers.
56. The Appellant seems to use his significant financial investment in the industry as justification for excluding him from regulation. The Panel does not accept this argument. Either an industry is regulated or it is not. Regulation does not work in a piece-meal fashion.
57. Finally, Mr. James has been a greenhouse producer for two years. The greenhouse industry has operated in the Province for decades. Many of the producers whose "sub-standard" operations he criticises are long-time producers with good claims records. It would be most unfair to the greenhouse industry to grant Mr. James an exemption and risk precipitating deregulation generally.

58. The Vegetable Commission is not ignoring these issues. They have them well in hand. They have put a restructuring process in place and are determined to bring about a resolution. It would be unfair to the Vegetable Commission to not respect the expertise and judgement that it brings to these issues. It has been grappling with the Interior greenhouse industry for several years. After reviewing the evidence led during this three-day appeal, this Panel is not prepared to alter the course set by the Vegetable Commission. It should be commended for the time and resources that it has expended in trying to deal with the very difficult issues and challenges facing the Interior greenhouse industry.
59. Accordingly, the application by Mr. James for an exemption from pooling of sales is denied.

**ORDER**

60. The agency fee structure appeal is dismissed.
61. The exemption from pooling of sales appeal is also dismissed.
62. There will be no order as to costs.

Dated at Victoria, British Columbia this 7<sup>th</sup> day of September, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

Christine Elsaesser, Vice Chair

Hamish Bruce, Member

Richard Bullock, Member