

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY RYAN VANTREIGHT, DBA VANTREIGHT FARMS FROM
A DECISION OF THE BRITISH COLUMBIA VEGETABLE MARKETING
COMMISSION TO DENY AN APPLICATION TO DIRECT MARKET HIS
ORGANIC STORAGE CROPS

BETWEEN

RYAN VANTREIGHT, dba VANTREIGHT FARMS

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Diane Fillmore, Member

For the Appellant:

Ryan Vantreight

For the Respondents:

Tom Demma, General Manager

Intervener

Tom Pollock, General Manager,
Island Vegetable Co-operative
Association

Hearing

By way of written submission

INTRODUCTION

1. The appellant, Ryan Vantreight, dba Vantreight Farms (Vantreight), is appealing a decision of the British Columbia Vegetable Marketing Commission (VMC) dated April 14, 2014, to refuse Vantreight's request to direct market its organic storage crops and not be required to market through a designated agency.
2. VMC is one of the eight commodity boards created under the *Natural Products Marketing (BC) Act (NPMA)* and its regulations. The *British Columbia Vegetable Scheme* (the *Scheme*) authorizes VMC to regulate the production and marketing of vegetables in British Columbia in accordance with the principles of orderly marketing. Pursuant to its powers, VMC has established Consolidated General Orders (General Orders) which spell out the rules under which VMC operates. The storage crops listed in Schedule II of the General Orders are regulated products and subject to the rules established in the General Orders. Section 6 of Part X of the General Orders provides:
 6. The following classes of Producers are not required to market their Regulated Vegetable Production through an Agency or Processor unless otherwise directed by the Commission:
 - (a) All Producers of organically certified Regulated Storage crops with the exception of those producers marketing through Fraserland Organics Inc.
 - (b) All licensed Producer-Shippers of Greenhouse Vegetable Crops.
 - (c) Licensed Producer holding, in aggregate, less than 5,000 m² of Greenhouse Vegetable Production Allocation.
3. Vantreight has an allocation of 3,872 m² for greenhouse vegetables where he grows organic bell peppers. In a January 27, 2014 decision, VMC allowed Vantreight to direct market his organic bell peppers. In the April 14, 2014 decision, VMC denied Vantreight's request to direct market his organic storage crops. Vantreight has traditionally marketed his conventionally-grown (i.e. non-organic) storage crops through Island Vegetable Cooperative Association (IVCA).
4. The appeal was heard by way of written submissions. IVCA participated in the written submission process as an intervener.

ISSUE

5. Did VMC err in its April 14, 2014 decision to deny Vantreight's application to direct market his organic storage crops and to require him to market them through a designated agency?

POSITION OF THE APPELLANT

6. The appellant set out in his submission that he has traditionally marketed the entire farm's regulated storage crops through IVCA, a designated agency. Over the past several years, the farm has changed direction and has greatly reduced the number of

acres of fruits and vegetables grown each year. The appellant is now growing only certified organic food crops in the fields and greenhouse which it markets directly to local retail and wholesale markets as IVCA does not sell organic produce.

7. The appellant argues that, as he is not competing with conventional growers, he should not be required to abide by regulations that were developed for marketing conventional crops. He maintains that certified organic crops should not be viewed the same as conventional crops as the size and scale is not the same, the method of growing is not the same, the pricing is not the same and they are marketed as different products.
8. The appellant accepts that if he were to sell his certified organic crops as conventional crops, he would be subject to the VMC General Orders and would have to market through IVCA.
9. The appellant grows numerous other organic crops that are not regulated and that are marketed through the farm's own sales staff directly to the marketplace. He argues that fragmenting sales and marketing has proven disruptive and confusing to his customers. This complicates the marketing of his crops, leaving him at a disadvantage in the marketplace.
10. The appellant questions the decision to exempt him from marketing through an agency for organic bell peppers but not for organic storage crops. He argues that to remain competitive, he must market all his organic crops himself and not pay levies which would put him on an even playing field with his competitors.
11. The appellant previously grew a conventional cabbage crop on over 20 acres and he has now reduced the acreage to 8 acres of organic cabbage. He checked with IVCA General Manager, Tom Pollock, who agreed that the amount now being grown by the appellant would not impact IVCA.
12. The appellant argues that all of his regulated crops come within the exemptions set out in section 6 of Part X of the VMC General Orders set out above and that he should be able to market his regulated crops himself. Otherwise, he says he is at a disadvantage compared to his competitors and that it is an inconvenience to his business.

POSITION OF RESPONDENT

13. In VMC's minutes of its regular meeting of January 22, 2014 and in its January 27, 2014 letter to the appellant, VMC expressed its concern of how IVCA, the appellant's designated agency, would be affected if the appellant were able to direct market according to the General Order exemption. A decision was deferred in order to obtain further information from IVCA.

14. The Minutes of the VMC April 9, 2014 meeting where the appellant's request was discussed, show that VMC had concerns about setting a precedent; about how certified organic products that have that classification removed prior to entering into marketing channels would be marketed and what the effect would be on the overall marketing environment on Vancouver Island that has been the subject of BC Farm Industry Review Board Supervisory Review decisions. The Minutes also show that VMC believed that the producer interest could be addressed while remaining an agency producer and that the producer should continue to pay the annual producer levy based on the volume of regulated storage crops that are marketed each month. This reasoning was reflected in the April 14, 2014 decision which also indicated that VMC had used information from IVCA in reaching its decision.
15. In its submission, VMC stated that the appellant is the only licensed producer producing for marketing both regulated storage and greenhouse vegetable crops. As a result, VMC had to rely on General Order provisions applying to greenhouse vegetables and those applying to regulated storage crops produced for marketing. In coming to its decision, VMC relied on the portion of section 6, Part X which states that the provisions apply "unless otherwise directed by the Commission".
16. VMC elaborated in its submission on the reasons given in its April 14, 2014 decision. It stated that even if the appellant were allowed to direct market its organic storage crops, it would be required to obtain an annual producer licence and regularly report volume and value of regulated product sales whether sold as certified organic or conventionally grown produce and remit to VMC the annual producer levy. VMC said that by overruling the application for the exemption that a precedent would not be set and the establishment of what is effectively a sole producer agency would be avoided.
17. VMC stated that its primary interest is the regular reporting to it of volume and value information of regulated crops marketed by a producer and concluded that this is best achieved when marketing occurs through an agency because of good record-keeping capacity and the routine remittance of producer levies.

Fraserland Organics Inc.

18. Shelley Harris, on behalf of Fraserland Organics Inc. (Fraserland), an agency designated to handle organic potatoes, provided a letter that VMC submitted in evidence. Ms. Harris says that the market conditions that affect sales of organic potatoes are different than those that affect the traditional conventional potato market in BC. Fraserland believes that the creation of a designated organic agency has met the grower needs well. She says that its growers understand that growers of regulated crops should abide by regulations set forth by VMC and they have not sought an exemption from submitting levies. She also says that her growers support the regulated marketing system and, although recognizing that organic products are unique compared to conventional products, they do not expect to be exempted from paying levies.

INTERVENER ISLAND VEGETABLE COOPERATIVE ASSOCIATION

19. In IVCA's written submission, General Manager Mr. Pollock states that he met with Tom Demma, General Manager of VMC on December 18, 2013 to discuss the decision being appealed.¹ VMC's main concern was whether IVCA would be impacted by the appellant selling its produce outside of IVCA and Mr. Pollock assured Mr. Demma that IVCA already had new growers in place to replace the appellant's tonnage. IVCA agreed with the appellant that, as he was moving into totally organic produce and had already been direct marketing to his clients, it would be less confusing for the clients to direct market all his produce. IVCA maintains that it never indicated to Mr. Demma that the appellant's decision to market his product would create any issues for IVCA.
20. Mr. Pollock says that he was surprised when the VMC, in its original version of the April 14 decision, stated that the decision not to allow the appellant to direct market was based on information given to VMC by IVCA. He immediately contacted Mr. Demma demanding that any reference to IVCA not being supportive of the exemption be removed. As a result, VMC removed the following portion from the April 14th letter, "Since the issuance of the referenced VMC letter (January 27th letter) information has been received by the VMC that has been useful for reaching a decision about VF's request to be exempted from marketing through a designated agency. The information resulted from a meeting that occurred on February 27 involving the VMC General Manager and the Island Vegetable Cooperative Association (IVCA) General Manager." and a revised April 14, 2014 decision letter was issued to the appellant. Mr. Pollock says the real reason for denying the appellant's request was monetary. Mr. Pollock says the "Act" does not require the appellant to market through an agency or VMC and an exemption would level the playing field with all other organic produce competitors.²
21. Mr. Pollock goes on to state that VMC went on to make the "totally ridiculous" decision of refusing to allow another grower to market his cabbage through IVCA due to concerns it would "glut the market", "totally forgetting I (IVCA) had 450 tons of cabbage to replace". He says the VMC's fumbling of that decision resulted in \$500,000 in lost sales. He says that the VMC's role in orderly marketing needs to be reviewed and revised so that it becomes a vehicle for growth as opposed to a liability. He requests that the VMC's decision be overturned and the appellant be granted an exemption from marketing through VMC.

¹ I observe that Mr. Pollock's recollection of the date of the meeting differs from that of the VMC. However, in my view, nothing turns on when the meeting occurred. It is the content of the discussions of the meeting that are important.

² When Mr. Pollock refers to the "Act", I take this as a reference to the *Natural Products Marketing (BC) Act*, the British Columbia Vegetable Marketing Scheme and the Consolidated General Orders.

ANALYSIS

22. The General Orders provide an exemption from marketing organically certified regulated storage crops, with the exception of producers who market through Fraserland, unless otherwise directed by the VMC. As a producer of organically certified regulated storage crops, the appellant qualifies for this exemption unless VMC chooses to exercise its discretion to direct otherwise. Rather than VMC having the discretion to allow the appellant to direct market, the General Orders give VMC the discretion to deny the appellant the exemption to which he would otherwise be entitled. In the absence of VMC exercising its discretion, the General Orders exempt the appellant from the requirement to market his organic storage crops through an agency.
23. If, after having enacted General Orders that expressly allow producers of organic storage crops to be exempt from the requirement of marketing through an agency, VMC decides to exercise its discretion to direct otherwise, it must be able to articulate clear reasons for denying the exemption. VMC must exercise its discretion in a reasonable, transparent and intelligible manner. I turn now to consider the adequacy of VMC's reasons for directing that the appellant market its organic storage crops through a designated agency.
24. In its January 22nd meeting, VMC discussed the appellant's request to direct market its organic storage crops and the only concern identified in the Minutes was that there was insufficient information to know the effect of this request on IVCA, the appellant's traditional marketing agent and other producers marketing through it. The decision was postponed so VMC could meet with IVCA to discuss the matter. In the original letter to the appellant, dated April 14, 2014 communicating the decision to deny the application of the General Orders exemption to the appellant, VMC stated that it had relied on information obtained from IVCA to reach its decision. As Mr. Pollock made clear, IVCA strenuously objected to this reference as it did not accurately reflect the information IVCA provided to VMC. As a result, VMC revised the April 14, 2014 decision letter taking out the reference to its reliance on the IVCA information as a basis for its decision. Surprisingly, in its submission, VMC now maintains that it did not rely on information from IVCA in reaching the April 14, 2014 decision.
25. The Minutes of the April 9, 2014 VMC meeting show that VMC had further concerns about setting a precedent, what would happen if the organic crop was marketed as a conventional crop and what would be the effect on the overall marketing environment on Vancouver Island. These concerns were reflected in the April 14, 2014 decision letter.
26. Looking at these concerns, I do not find the precedent setting argument persuasive given that the rule in the General Orders is that producers of organic storage crops are exempt from marketing through a designated agency "unless otherwise directed" by the VMC. In light of this, how can allowing the appellant's application to direct market as provided in the General Orders be seen as "setting a

precedent”? A VMC decision to exercise its discretion to direct the appellant to market through an agency is the exception to the rule and one that must be made on a principled basis. As well, VMC’s own acknowledgment that the appellant is unique (the only licensed producer producing both regulated storage and greenhouse vegetable crops) would seem to limit the precedential value of any decision relating to the appellant.

27. The second concern articulated by VMC relates to the negative impact caused if organic crops are marketed as conventional. The appellant indicated that he is aware that any crop marketed as conventional would not come under the exemption and would have to be marketed through a designated agency. I would anticipate that this issue would arise for any organic producer who is direct marketing organic vegetables and, in the absence of any evidence of the appellant’s unwillingness to comply with this regulation, I do not see this as support for VMC’s exercise of discretion in this case.
28. As far as the concern about the effect on overall marketing on Vancouver Island, it is difficult to assess this statement in the absence of any evidence. While VMC asserts that the conventional market would be “fractured” if the appellant marketed organic crops as conventional crops and that allowing the appellant to direct market his organic crop would cause “an irreparable rent in the fabric of Vancouver Island regulated marketing”, there was no evidence offered in support of these very dramatic positions. The only party intervening and possibly the party most likely to be impacted by the decision, supports the appellant in his application. The VMC does not point to any other producers who are or have the potential to be negatively impacted by this decision.
29. VMC also asserts that its decision serves to maintain orderly marketing; that the decision provides flexibility to the appellant and that the decision is principled based. However, beyond making these statements, it does not offer any rationale or basis in support of these positions. As the first instance regulator, VMC needs to be able to articulate why a particular exercise of discretion is justified. If VMC cannot do this in a meaningful way, the appellant is entitled to the exemption created in Part X of the General Orders.
30. In its April 14, 2014 decision, VMC concluded that the appellant’s aims and goals could be accomplished through the designated agency. However, there is no explanation of how this was to be accomplished. The appellant’s main reason for wanting to direct market is to provide consistency to customers purchasing both regulated and unregulated organic produce. He maintains that fragmenting sales and marketing is disruptive and confusing to his customers and leaves him at a disadvantage in the marketplace. This position is also supported by IVCA. In the absence of an explanation from VMC, I do not see how the concerns of the appellant could be accomplished if he is required to market through a designated agency.

31. VMC, in its submission, states that even if the appellant were allowed to direct market, it would be required to obtain an annual producer licence and pay annual levies. I agree with this submission and will deal with it further when I address the appellant's request for an exemption from paying levies below.
32. The VMC submission states that by refusing the request for an exemption, VMC avoids the effective establishment of a sole producer agency. I am confused by this statement as it seems to contradict the purpose behind the exemption in section 6 of Part X of the General Orders in the first place. If producers are not required to market through an agency or processor, those producers would be direct marketing the crops effectively as a sole producer agency.
33. VMC has acknowledged that its prime interest is the regular reporting of volume and value information of regulated crops marketed by the producer. It concludes this is best achieved through the use of a designated agency because of good record keeping capacity and the routine remittance of producer levies. First, there is no evidence before me that the appellant cannot do this directly and, secondly, the General Orders contemplate this situation by providing an exemption for producers of organically certified regulated storage crops from marketing through an agency or processor.
34. In summary, I conclude that VMC has not provided coherent, supportable reasons for the exercise of its discretion denying the application of the Part X exemption to the appellant for his regulated organic storage crops. I find VMC's reasons difficult to understand especially given the fact that the General Orders provide for the very exemption the appellant seeks. For the above reasons, I find VMC has not properly exercised its discretion. I, therefore, allow the appeal to the extent that appellant can market his regulated organic storage crops in accordance with the exemption provided in Part X, section 6(a) of the General Orders.
35. However, for the reasons that follow I am not prepared to exempt the appellant from the obligation under Part III of the General Orders to pay levies.
36. The appellant, if he is exempted from marketing through an agency, has sought as a remedy that he not be required to pay annual producer levies. He maintains that this would put him on a level playing field with other organic growers. However, he has provided neither a rationale for why the request should be ordered nor any evidence of other producers of regulated organic vegetables who do not pay levies.
37. VMC has pointed out that the General Orders require *all* persons producing or marketing regulated vegetables to pay established levies or service fees to VMC unless exempted by VMC. The appellant did not request VMC grant an exemption from paying levies independent of its request for an exemption under section 6 of Part X and as such VMC has not directly addressed the issue of a levy exemption. However, VMC's decision of January 27th allowing direct marketing of the appellant's greenhouse bell peppers expressly had as a condition that the appellant pay the required annual greenhouse producer levies. In its submission, and in

response to the appellant's request for a levy exemption as a remedy on this appeal, VMC relies on the General Order requirement to pay levies stating that it expects the appellant to pay the specified levies.

38. Without any evidence from the appellant supporting its request to be exempt from paying levies and with VMC's clear statement that it has not exempted the appellant from paying levies, I can find no basis for exempting the appellant from paying levies. The General Orders require producers to pay levies on the production of regulated crop unless an exemption is granted and, without an exemption from VMC, which it has the sole discretion to grant, the appellant falls within the class required to pay levies. While it may be appropriate at some time for VMC to examine the services and benefits it provides to organic producers who direct market and determine whether levies should be adjusted accordingly, that is not a basis upon which I would exempt the appellant from paying levies.

ORDER

39. The appeal is allowed. The appellant can market his organic storage crops in accordance with the exemption provided in Part X, section 6(a) of the General Orders.
40. The appellant is not exempted from payment of levies under Part III of the General Orders.
41. There will be no order as to costs.

Dated at Victoria, British Columbia this 8th day of October, 2014.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Diane Fillmore, Presiding Member