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Dear Sirs:

BC GREENHOUSE VEGETABLE INDUSTRY SUPERVISORY REVIEW

I. Introduction

The *Natural Products Marketing (BC) Act* (the *Act*) explicitly confers on the British Columbia Marketing Board (BCMB) a general supervisory power over all boards and commissions constituted under the *Act*. The BCMB's supervisory power is outlined in ss. 3(5)(a), 10(1), 12(1) of the *Act*. This power is reinforced in s. 4 of the *Natural Products Marketing (BC) Act* Regulations, which make specific reference to the BCMB's supervisory role in relation to boards, commissions and their agencies. The BCMB's supervisory role is further reinforced, in the context of the vegetable industry, by s. 3(1) of the *British Columbia Vegetable Scheme* (the *Scheme*). That section establishes the British Columbia Vegetable Marketing Commission (Vegetable Commission) to administer the *Scheme* "under the supervision of the British Columbia Marketing Board".

Unlike a statutory appeal role, which is necessarily reactive and depends on a person choosing to exercise a right of appeal from a decision, order or determination of a commodity board or commission, supervision enables the supervisor to be proactive. Supervision, if it is to be meaningful, does not limit itself to merely sit, wait and subsequently adjudicate if a dispute emerges. Supervision enables the supervisor to review, to oversee and, where deemed necessary and appropriate, to give to direction to

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those being supervised in relation to the proper means and ends of their assigned tasks. Supervision is not supervision if it does not include the power to direct the person being supervised, or to collect information in a fashion that, while fair, is more flexible than a formal adjudicative process.

The supervisory power is, and has always been, a feature of the BCMB's statutory jurisdiction in relation to the subordinate commodity boards. However, this feature was given renewed emphasis in 1974 when it was enshrined for the first time in the *Act* itself. Consistent with the reality that legislators may confer multiple functions on administrative tribunals in order to carry out legislative policy, the Legislature in 1974 conferred supervisory and appellate roles on the BCMB. It is thus incorrect to think of the BCMB as simply an appeal board. The BCMB's supervisory power is no less important than the appeal power and is not to be minimized. Consistent with ss. 2(1) and 3(1) of the *Act*, the BCMB's supervisory role is inextricably linked with the BCMB's purposes, and the purposes of the *Act* itself. It has enabled the BCMB to review any matter related to regulated marketing and to give direction to commodity boards, in a proactive fashion, regarding emerging issues and conflicts within the commodity industries, ranging from the specific to the systemic. In some cases, the matters will have been addressed, or partly addressed, by the administering commodity boards or commissions in one fashion or another. In other matters, there are pressing issues that the commodity boards or commissions have omitted to address, and in respect of which BCMB direction has been required.

The BCMB's effective and meaningful supervisory function has been essential to ensuring that the regulated marketing system operates in a fair and orderly fashion and achieves the purposes of the *Act*. This purpose could not be served simply by relying on the appeal power, or by subtracting from it any matter that could potentially go to appeal (which would leave virtually nothing). That the supervisory power has been couched as one of *general* supervision over commodity boards and commissions only reinforces the clear legislative intent to ensure there are no legalistic constraints on the scope of the regulated marketing matters the BCMB can consider in its supervisory capacity.

In practice, the decisions to undertake formal supervisory reviews and to issue directions have always reflected a measure of Board restraint. At the same time, it has been critically important, where those reviews have taken place – as they have in recent years in relation to the mushroom sector, the chicken sector, the egg sector and the turkey sector - that the Legislature has granted the BCMB the power to address any matter within the purposes of the *Act* in an appropriate fashion to ensure that serious problems are solved effectively and finally within the regulatory scheme. Experience confirms the wisdom of the Legislature that BCMB general supervision over commodity boards is an essential statutory tool for ensuring effective management of the dynamic, complex and often distinctive economic sectors that comprise regulated marketing.

II. The greenhouse vegetable industry

The greenhouse vegetable industry has grown rapidly over the past few years and now represents an important sector of the agriculture industry and is a significant contributor to the British Columbia economy. Most of the growth in the industry has occurred through the development of export markets in the United States and has been the result of very large investments on the part of a number of individual companies.

The evolution of BC Hothouse Foods Inc (BC Hot House) from a producer-owned cooperative to a private company owned by producer shareholders and the move to establish a second agency, is similar to the changes that have taken place in other regulated industries. The BCMB has supported and, in some instances, has directed the establishment of multiple agencies to ensure that growers have access to choice and to allow the industry to grow to meet its full potential.

The Vegetable Commission has announced that a review of the regulation covering the greenhouse vegetable industry will be held this fall. The Minister of Agriculture Food and Fisheries is also conducting a review of the regulated marketing system and will be examining the regulatory requirements of the various regulated industries. These reviews are important and the BCMB anticipates that they will establish the level of regulation for this industry along with an orderly transition process.

Regulation is a powerful tool for the industry - for both growers and marketers - to use to assist them to develop the market potential. However, the level of regulation must be balanced with the need to ensure that businesses can operate efficiently and effectively in a competitive market place. If there is a decision to reduce or relax industry regulation it is important that this be done in a well-conceived manner that does not cause undue industry instability and ensures that producer interests are protected during transition.

III. The present review

As we have made clear in our correspondence dated April 2, 2002, May 6, 2002 and June 10, 2002, the BCMB has been and remains of the view that the four inter-related issues stated below, which issues continue to divide key parties and create dysfunction in the greenhouse vegetable industry, warrant supervisory review and direction to the Vegetable Commission by the BCMB. These issues were set out as follows in our May 6, 2002 letter:

1. Should Windset Greenhouses (Ladner) Ltd. (Windset) continue to be exempted from the Vegetable Commission's requirement that it market through a designated agency; or, should Windset apply for a designated agency; or, should Windset apply as a sub-agency of either BC Hot House Foods Inc (BC Hot House) or Global Greenhouse Produce Inc (Global)?
2. In the original applications to the Vegetable Commission by Global and Windset, a marketing corridor condition was approved that required Global and Windset to market outside of the I-5 corridor in the US and outside of western Canada.

What should the "I-5" corridor be defined as, and for what duration should this condition continue?

3. Should the Vegetable Commission impose a levy on all greenhouse tomato producers located in Districts I and II for the purpose of paying the costs incurred in the defence of the American anti-dumping complaint, and the filing of the Canadian anti-dumping complaint, involving tomatoes? Should Global and/or Windset also be required to pay a share of these levies, and if so, under what formula should these levies be collected?
4. Should an order be made authorizing Global and/or Windset to conduct operations in a fashion that would be contrary to the terms of each party's Grower Marketing Agreement with BC Hot House? If so, what should be the terms of any such order?

The process we have undertaken to review these issues has been set out in our letters of April 2, 2002, May 6, 2002, May 22, 2002, May 31, 2002, June 10, 2002, June 13, 2002, July 25, 2002, August 9, 2002.

By way of summary, it will suffice to observe that the BCMB's April 2, 2002 "issue resolution" letter followed Global's March 14, 2002 fax requesting drastic BCMB supervisory intervention to address "the problems facing our industry" in light of what Global alleged was "the inability of the Vegetable Commission to properly address issues as they arise in our current environment". By this time, Global - which had received agency status on January 18, 2002 following a positive determination by the Vegetable Commission and BCMB approval under s. 12(4) of the *Act* - had been operating for only two months. During this time, Global had been unable to resolve with BC Hot House a series of implementation issues arising from the approval of its agency status. Global had earlier referred to these as "housekeeping matters" (letter of January 30, 2002) in response to BC Hot House's earlier suggestion that the Vegetable Commission convene a hearing addressing these implementation and compliance issues (letter of January 25, 2002).

Global's request for BCMB supervisory intervention, and the BCMB's independent assessment of the obvious dysfunction in which the valuable British Columbia greenhouse vegetable industry found itself, even after the successful outcome of the trade dispute, led the Panel to make it abundantly clear to the parties from the outset of the April 2, 2002 issues resolution process that if they could not find an acceptable common ground to resolve issues with the BCMB's assistance, the BCMB reserved the right to issue necessary directives or orders:

The BCMB looks forward to working with the parties to resolve these issues. The decision by the US to eliminate the duty on tomatoes imported from Canada creates a much more favourable environment for the industry to resolve these issues. However, all parties should be aware that failure to reach resolution may result in a BCMB Order or Directive to conclude matters.

Regrettably, the parties' discussions did not provide a resolution. As a result, on May 6, 2002 the BCMB established the present process whereby (1) the parties would have the opportunity to be heard in relation to each of the issues; (2) the Vegetable Commission would make a recommendation to the BCMB; (3) the parties would have an opportunity to be heard in relation to the Vegetable Commission's recommendation; and (4) the BCMB would make a decision. These steps were all subject to the BCMB's discretion to require oral evidence to be heard if it concluded that this was necessary as a matter of fairness or to obtain necessary information. Our May 22, 2002 letter, written after consultation with the parties, confirmed that the first stage of the process was scheduled to complete on May 31, 2002 (at which time Windset provided a submission), but was subsequently extended to June 10, 2002 after an extension request from counsel for Global.

It was not until June 7, 2002 – 5 weeks after the BCMB had established its process and after the BCMB had granted Global's extension request – that Global and Windset instructed their legal counsel to write to the BCMB seeking a right to an oral hearing on the levy issue and the GMA issue, referring to this as the "full hearing option". On June 10, 2002, the Panel wrote the parties a detailed letter advising that it would consider whether to hold an oral hearing, but was not prepared to make that decision in advance of receiving the first set of submissions.

On June 11, 2002, Global suddenly announced that it would boycott the supervisory process, and Windset followed suit, demanding that the May 31, 2002 submission filed on its behalf be returned. Global and Windset then instructed their respective legal counsel to seek interlocutory injunctions prohibiting the BCMB's supervisory review from proceeding, which applications were dismissed by the Supreme Court on July 5, 2002. The Court recognized that "[t]he matters involved in this dispute are long-standing, complex and significant" and emphasized "the public interest in allowing these specialized tribunals to proceed in a manner they have deemed most likely to bring about a desirable result", after which the parties would be free to seek judicial review of the BCMB's decision.

IV. The Vegetable Commission's recommendations

On July 23, 2002, the Vegetable Commission issued its recommendations, in accordance with step two of the May 6, 2002 process we established. The Vegetable Commission advised that in advance of making its recommendations, it gave the parties numerous written invitations to make submissions on the matters in issue. Only BC Hot House responded.

The Vegetable Commission's recommendations are 15 pages in length. They set out both the Vegetable Commission's recommendations and the reasons for the recommendations. While the Vegetable Commission's reasons will be discussed further below, the recommendations, as set out its July 23, 2002 letter and its subsequent August 19, 2002 letter, are as follows:

1. That Windset's existing exemption terminate at the start of the 2003 crop season, and that it either market its product through one of established agencies (such choice to be known in the industry) or its own agency if approval is granted pursuant to the agency application recently filed by Greenhouse Grown Foods Inc on July 26, 2002 with the Vegetable Commission.
2. That the condition restricting Global and Windset from marketing in the "I-5 corridor" be eliminated effective December 31, 2003, and that until that time the corridor should be defined as the states of Washington, Oregon, California, Idaho, Utah, Nevada and Arizona.
3. That subject to the audit process described in the Vegetable Commission's recommendation, all greenhouse tomato producers in Districts I and II share proportionately, on a square metre of production basis as of 2001, in paying the remaining costs associated with the defence of the trade dispute in the US and the prosecution of the trade dispute before the Canadian International Trade Tribunal.
4. That neither the Vegetable Commission nor the BCMB take any action to interfere with the terms of the Grower Marketing Agreements, and that any disputes in relation to those agreements remain between the parties to exercise such private rights as available under the contracts.

The Vegetable Commission's recommendations have been the subject of written submissions and responses from the parties. On July 24, 2002, counsel for Windset wrote to the BCMB responding to various paragraphs contained in the Vegetable Commission's recommendations. On July 25, 2002, the Panel specifically invited all parties to make any additional submissions no later than August 7, 2002. The Panel subsequently received written submissions on behalf of BC Hot House (July 26, 2002, August 7 and 8, 2002), Windset (July 30, 2002), Global (August 7, 2002) and the Vegetable Commission (August 19, 2002).

V. Decision

By way of general introduction, we wish to make clear that we have given all these issues extensive, careful and independent consideration. We have carefully considered the Vegetable Commission's recommendations, and all the submissions that have been made to us, even if they are not referred to in these reasons. For convenience, we intend to address them in a slightly different order than they were set out in the Vegetable Commission's recommendations.

1. Windset exemption

The Vegetable Commission's recommendation is that Windset's existing exemption be terminated effective the start of the 2003 crop season. The Vegetable Commission's rationale for its recommendation on this issue is sound and persuasive. The basis for Windset's application, and the Vegetable Commission's exemption decision, were inextricably linked with the American Department of Commerce (DOC) investigation and

administrative review process, all of which were resolved in British Columbia's favour in April, 2002. The time-limited and circumstance-limited nature of the exemption request is made clear in Windset legal counsel's November 28, 2001 letter to the Vegetable Commission in support of the exemption:

Windset ... seeks an exemption from marketing through an agency designated by the BC Vegetable Marketing Commission from the present to the conclusion of the DOC investigation and administrative review process....

... the only way Windset will survive the administrative review process, and come out with a return of the funds deposited pursuant to the anti-dumping levy, is to market independently of BCHH.

This is the basis on which the Vegetable Commission considered the exemption application, and this is the basis on which the Vegetable Commission granted Windset the exemption, with a condition that its exemption be reviewed annually commencing in October, 2002: see Vegetable Commission Decision dated February 27, 2002: paragraphs 11, 12 and 29. As the underpinning of the exemption application and decision no longer exists, the Vegetable Commission recommends that Windset's exemption cease at the end of this crop year.

Windset disputes that the underpinning of its exemption application has ceased to exist. It says that it expected the trade issues to take longer to resolve and that its concern was always the more general interest in managing its own risks in light of its target market being in the United States. On this point, Windset tenders American legal opinions stating that there is always a possibility of future trade disputes.

We can not accept Windset's position. The mere possibility of future trade disputes – cannot be allowed to dictate our public policy. Public policy at present is that the British Columbia vegetable industry, and the interests of orderly marketing and price stability for the producers who comprise that industry, are best served by regulation and designated agencies. While there is a legitimate marketing policy question regarding the number of designated agencies that are desirable in the public interest, designated agencies, and the requirement to market through them, remains fundamental to the manner in which the vegetable industry operates. Exemptions from that principle are exceptional, as the Vegetable Commission's Windset decision makes apparent. As has been pointed out, to accept Windset's desire for an ongoing exemption to address the possibility of future trade action by the United States would apply to every producer and would undermine the very fabric of a regulatory structure that has, for most of its life, brought stability, growth and prosperity to the British Columbia industry.

Deregulation issues are profound and complex, and they affect everyone in the industry. They should not be resolved by commodity boards granting individual exemptions based on the possibility of US trade action. They should be made directly by Government, in consultation with industry stakeholders and regulators. At this time, the proper forum for Windset to pursue any aspirations to market its product independently of BC Hot House or Global is through the agency application it tendered through Greenhouse Grown

Foods Inc (GGFI) in late July, 2002. We will not prejudge the outcome of that application here. We point out only that the Vegetable Commission should consider that application with reasonable dispatch in order to take account of the practical business realities and contractual arrangements Windset has put in place over the past year. It is also important for both BC Hot House and Global that this issue be resolved as quickly as possible so that they can establish effective business plans for the 2003 marketing season.

Directions:

1. The Vegetable Commission is directed to terminate Windset's exemption effective at the start of the 2003 crop season.
2. The Vegetable Commission is directed to make its determination regarding whether GGFI should receive agency approval no later than November 15, 2002.

2. Levy for legal expenses

The Vegetable Commission has recommended that, subject to the audit process described in its recommendation, all greenhouse tomato producers in Districts I and II share proportionately, on a square metre of production basis as of 2001, in paying the remaining costs associated with the defence of the trade dispute in the US and the prosecution of the trade dispute before the Canadian International Trade Tribunal. The reference to "remaining costs" reflects that the Vegetable Commission has already passed a levy order (Interim Order 08/01) for \$2.5 million for this purpose, which order was not appealed to the BCMB but which is the subject of Petitions filed by Global and Windset in June, 2002. However, additional funds are required in order to pay the remaining bills.

The Vegetable Commission held an industry meeting in December, 2001 to decide whether to impose additional levies to fund what was then the next phase of the defence. The Vegetable Commission did not do so at the time, it appears, because the Vegetable Commission was dealing with a number of issues flowing from the deterioration between Global, Windset and BC Hot House, including Windset's exemption application and Global's agency application, all of which were before the Vegetable Commission at the time.

The Vegetable Commission submits that a levy should now be imposed. It says this in light of the approach taken to similar disputes in the past where growers in the affected industry have shared the costs equally regardless of whether they were shareholders of the agencies involved, and in light of the fact that every greenhouse tomato producer benefited from the removal of the duties. The Vegetable Commission states that "If some of those growers now, or at any time, refuse to pay a share of the expenses incurred to achieve such results, they will have an unfair competitive advantage over those growers who do pay". The Vegetable Commission points out that when the legal defence was first initiated, an industry ballot was taken, and producers representing 94.25% of the

tomato production area agreed that it should be funded by tomato producers, not other sectors. The Vegetable Commission concludes:

The Vegetable Commission sees no reason why the funding for this trade dispute should be any different from others that have occurred in recent decades. The industry as a whole benefited from the legal and other services rendered to the industry in defending the dispute, and in the Vegetable Commission's view, it is only fair that the industry as a whole should bear the cost of those services.

Windset and Global say that any additional levy would be illegal, and that in any event, they should not have to pay a bill for services that worked against their interests and failed to properly manage the costs of the defence. They state that they retained their own counsel, and paid their own legal bills. They challenge the proportional share aspect of the levy on year 2001 production areas rather than the year 2000 production areas, the latter having been significantly lower for both Global and Windset. Global points out that non-shareholders of BC Hot House never agreed to pay such costs for 2001, or if any dumping margin was assessed against BC Hot House in the final calculation. It says that the BC industry as a whole did not benefit from the BC legal defence; it benefited from the Ontario calculations, which affected the overall assessment of injury by Canada. It says that any proposed levy also fails to differentiate between the defence of the US action, and the commencement of the Canadian action against the US field tomato industry.

BC Hot House emphasizes the total cost of \$4.7 million versus the \$4 million it estimated, and that the "cost surprise" was based on the unexpectedly rapid pace of the proceedings. BC Hot House states that these costs had very positive results for everyone in the industry, and that even non-shareholders participated on an industry steering committee with regard to the defence after Global and Windset ended their marketing relationship with BC Hot House. BC Hot House points out that Windset's principal actively participated on the committee, and thereby incurred expense, all of which was invited and expected.

The Vegetable Commission states that it has the authority to impose the levy, and states that BC Hot House did not act against the interests of Windset and Global in its responses to the DOC. The Vegetable Commission states that neither Global nor Windset has ever questioned the decision to base the levy order on 2001 production areas, and states that the Vegetable Commission has determined that the expense of the trade dispute should be borne by those actively engaged in industry.

The Panel is of the view that the Vegetable Commission has authority to issue the additional levy, and that the real question is the marketing policy question whether the levy should be issued at all, and if so, whether it ought to be shared proportionately among tomato growers based on production areas in the year 2001 rather than 2000.

The Panel has no hesitation in concluding that the additional levy should be issued. In light of the American trade action, it would have been irresponsible for the BC industry not to retain counsel, and it is only fair that the costs of that defence be shared by the

entire tomato industry. Global and Windset were invited to participate on the steering committee. Global and Windset have offered no meaningful evidence to show that the defence took positions to undermine them, and even if we accept the position that the Ontario dumping margins influenced the final decision, this is a long way from demonstrating that the BC defence was so irrelevant and ineffective as not to warrant a shared levy order, and a long way from second guessing the wisdom of the second trade action being initiated in order to protect British Columbia's interests. As to the policy question of how the levy orders should be shared, we conclude that it should be shared proportionate to production areas according to production acreage during the 2001 crop season.

Directions:

1. The Panel directs the Vegetable Commission to impose a levy requiring that all greenhouse tomato producers in Districts I and II share proportionately, in paying for the remaining costs associated with the defence of the trade dispute in the US and the prosecution of the trade dispute before the Canadian International Trade Tribunal.
2. The Panel directs the Vegetable Commission to structure the levy so that it is shared by producers proportionately according to a square metre of production basis during the 2001 crop season and that it be paid in four monthly installments beginning November 1, 2002. The levy for first three installments shall be set at \$.50 per square metre. The amount of the final payment (February 1, 2002) will be determined following the completion of a Vegetable Commission audit.
3. In light of the \$700,000 difference between the pre-estimate of legal expenses and the actual final cost, the Vegetable Commission is directed to (a) audit all legal bills in order to ensure, among other things, that all expenses claimed are specifically with regard to the trade dispute and not related to the general management and operation of BC Hot House; and (b) disclose the results of the audit of those costs to all parties prior to the final levy payment being assessed.

3. The "I-5" corridor

When, in early 2002, Global received agency status and Windset was granted an exemption from marketing through an agency, both their approvals contained the condition that all regulated product marketed by them within North America be marketed to customers outside Western Canada and outside the region known as the "I-5 corridor" in the United States.

At the time, it granted the approvals, the Vegetable Commission stated that the exact demarcation lines for the I-5 corridor should be determined in consultation with the parties and BC Hot House, and would be the subject of "further direction from the Vegetable Commission".

In the weeks and months that followed the Global agency decision and the Windset exemption decision, no common resolution was reached on the “exact demarcation” of the I-5 corridor. It was also apparent that, from Global’s point of view as reflected in its March 14, 2002 fax to the BCMB, its discussions with the Vegetable Commission caused such concern that, rather than invite “further direction from the Vegetable Commission”, Global requested BCMB supervisory intervention to fend off what it termed these “highly restrictive and unnecessary conditions”, whose audit and enforcement by the Vegetable Commission “is fatal to Global and Windset’s marketing plans”.

The lack of resolution on this issue, Global’s stated lack of confidence in the Vegetable Commission, the increasingly poisonous relationships within the vegetable industry (including but not limited to Global’s March 14, 2002 fax and the emotional July 4, 2002 meeting which led to the resignation of a member of the Vegetable Commission), the systemic policy question raised, the relationship of that question to the other issues raised by the parties and the necessity for a prompt and flexible dispute resolution process, led to the conclusion that this was a proper matter for BCMB supervisory review and direction to the Vegetable Commission.

The condition that Global and Windset stay out of the I-5 corridor originated from the business plans presented by those parties to the Vegetable Commission that if it allowed them break away from BC Hot House, they would not engage in destructive competition by encroaching on BC Hot House’s markets. Instead, they stated that they intended to build new markets. In this regard, the principal of Global, Mr Toews, made this statement to the Vegetable Commission on December 10, 2001 in his evidence in support of an agency application:

What we at Global tried to do when we drafted this document, we tried to figure out a way that we did not compete with the other agency and there are a couple of – a number of items that we agreed upon. Number one, we do not want to market into the I-5 corridor or Western Canada. Almost 60 percent of the tomatoes sold by BC Hot House Food are marketed in this area. They’ve developed a market over many years, they have their relationships, and that’s fine. So we, in our business plan, talk about marketing the Midwest and eastern part of the country. It’s going to cost us some more freight, but we think it’s the responsible thing to do.

Similarly, Mr Steven Newell, a principal of Windset, made this statement to the Vegetable Commission in January, 2002, in evidence:

- Q. In your marketing through Masternardi is it intended in any way to compete with BC Hot House producers?
- A. Absolutely not. It’s in our best interests to ensure that prices are good for everybody. What we all need is price buoyancy. That’s our intention.

Thus, it is important to note that the Vegetable Commission’s I-5 condition was not a condition of its invention. It was a condition designed to reflected the promises, undertakings and business plans placed before it by Global and Windset that they had no

intention of engaging in a price war with BC Hot House to the detriment of all producers, and instead intended to encourage "price buoyancy" by marketing in new markets. In this context, the Vegetable Commission has stated as follows:

The "I-5 Corridor" is a term of art within the industry which refers to more than the three states through which the I-5 highway runs. The purpose of the marketing condition limiting Global and Windset's ability to market into the "I-5 Corridor" was to ensure that the existence of new sellers gave rise to enhanced sales opportunities for BC greenhouse product, rather than simply having new sellers focus their attention on markets already being served by BC greenhouse vegetable producers. The western United States has, not surprisingly, been a target market for BC Hot House and for BC producers for a number of years....

Accordingly, the Vegetable Commission is of the view that the "I-5 Corridor", as that term is used in the marketing conditions, should take into account the normal distribution centre for greenhouse vegetables on the West Coast of the United States, whether such distribution is being carried out by Hot House or anyone else who would sell into that area. That distribution system covers seven States: Washington, Oregon, California, Idaho, Utah, Nevada and Arizona.

However, the Vegetable Commission has also made the significant recommendation that the I-5 corridor limitation remain in place only for the next 15 months, to the end of 2003. At that time, Global would be free to adjust its marketing plan to market in BC Hot House's traditional markets. At the same time, this planning period would give BC Hot House and its associated producers a proper transitional period to adjust their marketing plans and strategies to account for the reduction in volume and the existence of additional sellers.

As stated earlier, as the industry moves to a more open forum with more than one agency it is important that this transition be handled in a manner that protects the interests of producers, and allows BC Hot House to make the necessary adjustments to account for the loss of production volume. Windset and Global have both challenged the Vegetable Commission's authority to have imposed the condition, but at the same time insist that the Vegetable Commission decide the I-5 question at a hearing where they can call evidence and have their appeal rights to the BCMB under ss. 8 and 9 of the Act. On the jurisdiction point, Global and Windset have given no basis for their assertion that there is no jurisdiction for these conditions. Nor have the parties convinced us that the BCMB supervisory power is to be suspended or inapplicable or that the BCMB should remain passive - despite a compelling need for such intervention - simply because a party prefers the appeal procedures to the supervisory procedures, the latter still being subject to the duty of fairness even if they are not as elaborate as the appeal procedures. To accept such an approach would be to accept that the supervisory power is less important than, or must be diminished by, potential for an appeal. Such a proposition has no legitimate basis on a proper understanding of the *Act*, and would undermine its proper functioning.

Windset and Global also challenge the Vegetable Commission's statement that the "I-5 Corridor" is a term of art and that it refers to anything other than the three coastal states through which the highway runs. Windset goes on to say that it "reluctantly agreed" to the condition in order to secure its exemption application.

In our opinion, the Vegetable Commission acted properly in imposing a condition that holds a party to its honour regarding its business plan. Global and Windset are sophisticated parties. If their real intent and desire was to compete with BC Hot House, they could, and should, have said so. They did not. In fact, their commitments to the Vegetable Commission, made less than one year ago, are clear and unequivocal. Global has never appealed the I-5 condition attached to their approval, even though the Vegetable Commission's reference to the "exact demarcation lines" would necessarily have to have been taken as referring to something other than the 3 states through which the highway runs, a point which is clear in Global's March 14, 2002 complaint letter to the BCMB. Windset did not appeal the I-5 conditions, but did give notice that they intended to pursue removal of the I-5 condition on the annual review of the exemption.

In our view, the Vegetable Commission's definition of the I-5 corridor is entirely consistent with the business plans announced by Global and Windset. Indeed, it arguably gives Global a greater marketing area than reflected in its business plan, which refers to the "Midwest" and the "eastern part of the country". Moreover, it gives Global a potentially very significant windfall since effective 2003, Global will have unfettered access to all of the I-5 corridor, including the coastal states. In the submissions before us, neither Global nor Windset argued that, as a matter of policy, we should lift the restriction as it applies to those three states.

Having made these points, we also acknowledge the wisdom of the Vegetable Commission's decision that these restrictions should, despite the undertakings of Global and Windset, come to an end. In recent years, this Board's regulated marketing decisions have shown less concern with identifying geographical market areas, and more concern with the fundamental interests of ensuring that agencies are reputable and allowing them to conduct their businesses and find their opportunities where they can, provided those activities will not clearly damage industry and producer stability.

Given the state and history of the greenhouse vegetable industry, and in light of the business plans of Global and Windset, it would in our view be too much too soon to lift those restrictions immediately. In our view that giving the industry a transitional period to prepare for what will be at least two unrestricted sellers is a wise and prudent measure to take the vegetable industry to the next stage of its development.

The BCMB has stated there is a need to determine the level of regulation required in the greenhouse vegetable industry and the elimination of marketing restrictions such as the I-5 corridor conditions is an important step in this process. Given the compelling reasons put forward by the Vegetable Commission and given the sworn testimony by Global and Windset that they intended to market in geographical areas outside of the traditional BC Hot House market, the BCMB accepts the Vegetable Commission's recommendations.

Directions:

- 1 The Panel directs the Vegetable Commission to amend Global's existing agency approval conditions, and Windset's exemption approval conditions, so as to define the I-5 corridor as reflected at paragraph 32 of the Vegetable Commission's recommendation.
- 2 The Panel further directs that the condition in respect of Global's agency application shall expire effective December 31, 2003.

4. The Grower Marketing Agreements

Windset and Global producers (BC Vegetable Greenhouse I, LP, South Alder Greenhouses Ltd., Topgro Greenhouses Ltd. and Merom Farms Ltd.) are each signatories to grower marketing agreements with BC Hot House. The Vegetable Commission approved these agreements, but is not a party to them. As stated by the Vegetable Commission:

...the Vegetable Commission reiterates that although it has, in recent years, required that marketing arrangements between growers and agencies be reduced to writing, it has not been directly involved in the negotiation of the commercial terms of those agreements. The Vegetable Commission's primary concerns in approving any such agreement are that it is consistent with the regulatory scheme and orders of the Vegetable Commission and that it does not raise any general industry concerns. In 1996, at the time the current BCHH Grower Marketing Agreement was negotiated between the Company and the Growers Association, no such industry concerns were raised with the Vegetable Commission by any producer.

The Vegetable Commission's General Orders require such agreements as a condition of a producer and an agency engaging in a marketing relationship. The Vegetable Commission's General Orders further specify where a person is seeking a special order such as an exemption, they should not expect such an order to be applied to abrogate an existing contractual obligation unless there are special circumstances. The Vegetable Commission's policy is not to lightly interfere with the settled expectations created by contracts. Such a policy is not unique to the vegetable industry.

A term of the contracts that is of particular concern to the parties here is that term which provides that, where a grower seeks to terminate an agreement on less than two years notice, they are required to pay the agency (in this case, BC Hot House) the amount, representing a genuine pre-estimate of damages, of \$6.25 per square metre of the product production area.

It is noteworthy that when they sought their respective agency and exemption approvals in 2002, neither Global nor Windset requested the Vegetable Commission to also relieve them from these contractual terms. In fact, at the Windset hearing, counsel for Windset made the following submission in response to an argument against its exemption that had been raised by BC Hot House:

The grower marketing agreement is a private agreement. The Vegetable Commission's not a party to that agreement and Windset has not given notice or has, I should say, given notice of the termination of the agreement by reason of the breaches by BC Hot House and which Windset believes are, are a basis for termination of the agreement, but whether that's so will be determined between Windset and the other parties to the agreement. The agreement itself does not grant jurisdiction to this Vegetable Commission and cannot be used as a basis, in my submission, for not favourably considering the application for an exemption. [emphasis added]

This is a significant statement by counsel for Windset, which contradicts its more recent position (as well as the position of Global) that the agreement that it signed, and which was found by the Vegetable Commission from a regulatory perspective to be a fair agreement, is not really an agreement.

The same point was addressed at the Windset hearing itself:

THE CHAIR:are you expecting the Vegetable Commission to have any part in, in resolving a dispute between you and BC Hot House over the Grower Marketing Agreement? I mean do we have any responsibility in this matter at all and will we have any, as far as you're concerned?

MR ROBERTS: If you permit me to answer that as counsel, the answer to that is no, none.

In its reasons granting the Windset exemption application, the Vegetable Commission stated:

The Vegetable Commission's decision with respect to this exemption application will not affect the terms of the grower marketing agreement between BC Hot House and Windset. The grower marketing agreement must be determined in accordance with its terms, unless the parties to the grower marketing agreement reach some other arrangement or receive an order or determination from a competent authority.

At the Global agency hearing, the GMA issue was not directly argued before the Vegetable Commission. However, in its reasons for recommending agency approval, the Vegetable Commission explicitly stated, consistent with its policy:

The Vegetable Commission's decision with respect to the Global agency application will not affect the terms of existing grower marketing agreements between producers of greenhouse vegetable products ("GMAs"). Any existing GMA must be determined in accordance with its terms, unless the parties to the GMA reach another agreement.

Both these Vegetable Commission statements make abundantly clear that in granting the respective approvals for exemption and agency, the Vegetable Commission made a conscious policy decision not to go further and also relieve Windset and the Global

producers from the contractual consequences of terminating their relationship with BC Hot House. If those parties had some other basis in law for ending or limiting their obligations under that contract, they could pursue their arguments elsewhere. But the Vegetable Commission did not think it appropriate, on the facts here, as a matter of sound marketing policy to grant the exceptional regulatory order of terminating a contract that Windset and Global's growers signed when they were granted the benefits of entering the vegetable industry. Global and Windset were advised by experienced counsel, with whom they had a full opportunity to consider the implications of the Vegetable Commission's decision on this issue. Neither Windset nor the Global growers appealed this Vegetable Commission decision. Their suggestion in submissions that the Vegetable Commission's exemption and approval decision should be taken as having implicitly cancelled the contracts is simply inconsistent with reality, and in Windset's case, with its own position before the Vegetable Commission.

The Vegetable Commission has advised that, since making its decisions, both Windset and the Global shareholders have requested hearings before the Vegetable Commission for orders terminating the GMAs based on allegations that Hot House has breached the terms of those GMAs. It will be recalled (above) that the Vegetable Commission Chair raised this very issue with counsel for Windset, who responded in categorical terms that Windset saw this as a private matter between the parties to the private agreement.

In this context, the Vegetable Commission recommends that the BCMB take no action and the parties be left to resolve the dispute according to their contractual and common law remedies:

Each of the parties to the GMA is a sophisticated commercial enterprise. They entered into GMAs when they decided to enter the greenhouse vegetable industry. As has been mentioned previously, in the case of at least two of the producers, they entered into the GMA before the industry was even regulated. The parties were all aware of the terms of the GMA when they entered into marketing arrangements with BC Hot House, including the termination provisions and the dispute resolution provisions. If the parties now wish to challenge the commercial reasonableness of the termination provisions, or if they wish to allege that Hot House has breached the terms of the GMA, they may do so by taking advantage of the dispute resolution processes to which they agreed under the contract. They may also seek relief from the courts. They are not without a remedy.

Despite its position at the hearing only six months ago, Windset now argues that it is wrong to at once grant a producer an exemption and at the same time leave them with the consequences of a contractual breach if the producer acts on the exemption. Windset states that if the clause is not seen as automatically expunged, then the Vegetable Commission must hold a hearing in respect of it.

As to the latter point, there is no outstanding decision for the Vegetable Commission to make on this point. It has held its hearing and made its decision. Neither Global nor Windset appealed. The fact the BCMB is now examining this issue in its supervisory

capacity has in fact given Global and Windset an additional opportunity to seek regulatory action on this issue that it would not otherwise have had.

As to the former submission, the question whether the designation of a new agency or the grant of an exemption ought to also relieve a party from the consequences of a contract, is not as simple or one-sided a matter as suggested in Windset's submission, particularly given the unique history and circumstances of the vegetable industry. When a grower, particularly a major grower, leaves an agency that has historically operated as single desk seller, the leaving causes major disruption, cost and the potential for lost contracts. The lost capacity and necessary adjustment period adversely affects all remaining producers whose interests must also be considered by the regulator.

The Panel agrees with the Vegetable Commission that Global and Windset are sophisticated parties who made considered business decisions to enter an industry they understood well and in that context they understood and signed the agreements. When they made the business decision to leave, they knew about the contractual terms and did not consider it appropriate even to ask to have those terms removed at the time they sought their respective approvals and exemptions.

Neither Global nor Windset has satisfied us that their reasons for leaving BC Hot House were such a special circumstance that warranted regulatory relief from the grower marketing agreement. The parties will recognize that the purpose of the termination provisions in such an agreement is to provide relief from the loss of a supplier. As the Vegetable Commission rightly concluded, the parties should be left to their private remedies to resolve their ongoing dispute.

VI. Conclusion

Having issued our supervisory decision, the Panel implores the parties to make another concerted attempt to engage in mediation to resolve their dispute in a business-like fashion that will benefit both themselves and the entire industry. Despite the decision we have made in this case, the Panel remains prepared to revisit issues we have decided in this matter should the parties present the Panel with a common proposal that resolves these inter-related issues in a fashion that is mutually satisfactory to them and not contrary to the public interest. Whether their interests are better served by more litigation is, of course, for them to decide.

(Original signed by):

Ross Husdon
Panel Chair

cc: List on page 18

cc: The Honourable John van Dongen
Minister of Agriculture, Food and Fisheries
Gord Macatee, Deputy Minister
Ministry of Agriculture, Food and Fisheries
Andrew P Jackson
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