

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY BEVO FARMS LTD. FROM A DECISION OF THE
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION TO DENY AN
ALLOCATION REQUEST

BETWEEN

BEVO FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

GREENHOUSE GROWN FOODS, INC.
VILLAGE FARMS OPERATIONS CANADA, INC.

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Richard Bullock, Chair
Sandi Ulmi, Member
Ron Bertrand, Member

For the Appellant:

Leo Benne, Vice President and
General Manager
John Hoekstra, Controller

For the Respondents:

George Leroux, Chair
Tom Demma, General Manager

Interveners:

John Newell, Director,
Greenhouse Grown Foods, Inc.

Village Farms Operations Canada,
Inc., by written submission

Date of Hearing

August 28, 2008

Place of Hearing

Surrey, British Columbia

INTRODUCTION

1. The Appellant, Bevo Farms Ltd. (Bevo Farms) is appealing a decision of the British Columbia Vegetable Marketing Commission (the Commission) dated July 25, 2008, concerning the allocation of cucumber production.
2. The Commission is one of the eight marketing boards created under the *Natural Products Marketing (BC) Act (NPMA)* and its regulations. The *British Columbia Vegetable Scheme* (the *Scheme*) authorizes the Commission to regulate the production and marketing of vegetables in BC in accordance with the principles of orderly marketing. Greenhouse cucumbers are a regulated product under the *Scheme* and the Commission's Consolidated General Orders. Persons producing greenhouse cucumbers and marketing them through a designated agency must have production allocation quota issued by the Commission.
3. Bevo Farms is a large greenhouse operation with excess capacity and staff in the months of September to February. In an effort to maximize the use of this excess space and staff, Bevo Farms applied to the Commission for an allocation of production quota for 19,560 m² to produce long English and mini-cucumbers for the six month period from September to February, a time when conventional cucumber crops are declining and imports are entering the market. The Commission conducted a hearing and in its decision of July 25, 2008 denied the application. The Commission released its full decision dismissing the application on August 22, 2008.
4. Bevo Farms filed an appeal of the Commission decision to the British Columbia Farm Industry Review Board (BCFIRB). The appeal hearing was expedited at the request of the appellant and with the cooperation of all parties involved. A one day hearing was conducted on August 28, 2008. Given that the appellant, if successful on its appeal, needs to begin planting immediately, the panel committed to the parties to provide its decision as soon as possible. For this reason, the panel wishes to expressly note that it has carefully considered all of the evidence and submissions referred to by the parties, even though we do not intend to refer to all of it in the course of this somewhat abbreviated decision.

ISSUE

5. Did the Commission err in not approving Bevo Farms' application for 19,560 m² of new greenhouse cucumber production allocation?

BACKGROUND

6. Bevo Farms began operating in 1988 on two and one-half acres propagating greenhouse vegetable plants and field crops. It now consists of 34 acres of greenhouse, fully lit, with a concrete floor. The business is comprised of 50%

bedding plant production sold locally and into Washington State with the balance of the business comprised of greenhouse vegetable plant propagation.

7. Production quota gives a grower the right to grow regulated product on a specified area. Bevo Farms applied for 19,560 m² or approximately 5 acres of production quota greenhouse space. Historically, the Commission allocates production quota on an annual basis and not for a lesser period. The peak growing time for cucumbers is from March to August with the growing year broken into quarters – Q1, January to March; Q2, April to June; Q3, July to September, and Q4, October to December. Growers must market their products through a designated agency licenced by the Commission. In this case, Bevo Farms' application was sponsored by Greenhouse Grown Foods Inc. (GGFI) – a designated agency licenced by the Commission.
8. In its decision, the Commission gave the following reasons for dismissing Bevo Farms' application:
 - a) prices and returns experienced by BC producers in 2008 when combined with what has occurred the past two years indicates this is the third straight year of declining cucumber prices;
 - b) this year [2008] cucumber prices were extremely poor during the March-June period and any additional supply coming forward in the latter part of 2008 holds the prospect for lowering customarily higher Q3 and Q4 prices that established growers rely upon for averaging up earlier experienced low returns;
 - c) cucumber prices are highly elastic with small supply changes causing rapid and material price changes;
 - d) failure to obtain a high grading percentage of marketable product destined for export markets can prove to be disruptive to local markets because the lesser grade product increases local supply with attendant negative outcomes; and
 - e) Mexican imports typically return to BC in Q4; there have been significant increases in this supply over the past three years; and there is no reason to expect that Mexican cucumber supply in Q4 will be lower than in prior years.

POSITION OF THE INTERVENERS

Greenhouse Grown Foods Inc.:

9. GGFI was granted full intervener status by BCFIRB on August 20, 2008. As a designated agency under the *Scheme*, it is authorized to market greenhouse tomatoes, peppers and cucumbers produced by licenced growers. As the sponsoring agency, GGFI supports Bevo Farms' application for cucumber quota production allocation. John Newell, of GGFI stated that Bevo Farms is a qualified grower capable of producing high quality product which would meet export standards. In his view, Bevo Farms' proposed fall production of long English cucumbers fits well with the seasonal decline in local production. Further, its proposed mini-cucumber production is a benefit as there is never enough mini-cucumber production to satisfy the market. Mr. Newell noted that there are no objections to

Bevo Farms' plan to grow mini-cucumber, rather the objections are to the long English cucumber production in Q3 and Q4.

10. GGFI noted that BC cucumber production has decreased over the past three years while imports from Mexico and the US continue to increase. GGFI observes that there is a premium for BC product and his company would like to be able to supply BC product year round.

Village Farms Operations Canada, Inc.:

11. Village Farms Operations Canada, Inc. (VF) applied for intervener status and made a written submission to BCFIRB on August 27, 2008. Due to its late receipt, the panel considered the application at the outset of the hearing. Although the appellant opposed the application on the grounds that it could not question VF on its position, the panel granted limited intervener status to VF on the basis that it was an interested party. However, the fact that the appellant was deprived of its opportunity to question VF was a factor taken into account by the panel when considering the appropriate weight to be placed on the submission.
12. VF supports the Commission's decision maintaining that there is an oversupply of long English cucumbers in the North American market resulting in depressed prices. It states that new allocation should be demand driven and claims there is no demand for this additional product. While the application is for an "off-peak" period, there will be significant overlap periods when pricing is at its lowest level and when there is significant volume of Mexican cucumbers in the market, placing downward pressure on BC grown product.

DECISION

13. The thrust of the appellant's argument is that the Commission erred in not granting its application for cucumber production for the months of September to February. The appellant argues that the Commission did not properly take into account the following factors:
 - a) it is a highly experienced, quality grower and will produce a high quality product that will meet export standards;
 - b) local produce and production should be encouraged instead of allowing foreign suppliers to enter the local market;
 - c) it is in the best interests of the industry to maintain local supply year round and further, the proposed production schedule would complement local production rather than compete with it as local production decreases significantly from Q3 to Q4;
 - d) any impact on the market or pricing would be small as it would be producing less than 18% of US and Mexican imports during Q3 and Q4 and 6% of all imports into Canada during this period;
 - e) other cucumber growers are competitors and are attempting to stop new

people from entering the business. Their arguments that increased supply might decrease price are not a given; in any event this is a threat in any business;

- f) the Commission has no authority or regulatory control over the increasing Mexican and US imports;

14. The Chair of the Commission, George Leroux, maintains that this appeal raises larger policy questions than the issue under appeal. He submits that the principle question to be answered is the weight to be given to competing growers and marketers given such factors such as imports, competition among agencies, and government policies around local supply for local markets, innovation, and market share. Mr. Leroux accepts however, that to focus only on net grower income would result in a shrinking industry.
15. The Commission's position is that it has encouraged new entrants and has approved the vast majority of applications in the recent past. It has also encouraged innovation by approving mini-cucumber production. The Commission accepts that Bevo Farms is a qualified greenhouse grower capable of producing high quality, safe greenhouse vegetables and that it is financially able to produce the crop. The Commission also acknowledges that GGFI is a capable marketer that consistently outperforms other agencies.
16. John Slater, a cucumber grower and member of the Commission for 10 years chaired the Commission panel that dismissed Bevo Farms' application. Mr. Slater was candid about the challenges faced by Commission as it represents all growers and their interests. He stated that the three main criteria considered by the Commission in denying the application were market conditions, the need to protect growers and the sponsoring agency's plan to sell the product. The Commission panel worked with the three criteria with a goal to making a balanced decision based on principles, not strictly on rules. It had a fair and informed decision-making process involving consultation with the industry.
17. Mr. Slater conceded that the preservation of the market and growers' net income was the overriding criteria in the decision to deny Bevo Farms' application. The Commission was implored by growers to look at net returns as the market has been very difficult for cucumber growers. He stated that traditionally, prices are higher in Q3 and Q4 and growers use this period to average up their prices. The Commission acknowledged the growers' view that there is high "elasticity" in the price of cucumbers¹. The Commission introduced graphs in an attempt to illustrate this point. While Mr. Slater agreed that the graphs were not consistent, he pointed to a trend that prices increase in the fall as production declines suggesting that an increase in volume would decrease prices. He stated that for this reason, growers are concerned that any additional product on the market will lower prices during this crucial time period.

¹ This means that a small increase in supply can lead to a significant decrease in price.

18. A further consideration relied on by the Commission panel in turning down the application was its partial nature (i.e. for a six month period). The Commission does not issue partial allocations; thus there is a concern from other growers that Bevo Farms could continue to produce year round putting surplus long English cucumbers on the market in peak times and potentially affecting the price.
19. The panel has carefully considered the evidence of the parties at the hearing and the Commission's reasons for not approving the application. We accept that the Commission has a difficult job in weighing the many competing interests to make a balanced and fair decision. The Commission's primary reason for denying Bevo Farms' application was its desire to maintain the long English cucumber price in Q3 and Q4 for existing growers as the higher returns in these two quarters allow "averaging up" of returns. The Commission has accepted grower concerns that the highly "elastic" nature of cucumber price makes it vulnerable to relatively small changes in supply.
20. After reviewing the evidence and submissions, the panel has concluded that the Commission erred in the weight given to the criteria of protecting grower price. Although grower price is an important factor, from the evidence received the panel concludes that cucumber pricing is very difficult to predict. A significant amount of time at the hearing was spent viewing graphs that apparently showed this "elasticity". However, in the view of the panel, these graphs were inconclusive. While the panel accepts that the historical trend may be towards "elastic" prices, the evidence was somewhat contradictory. Bevo Farms debates the claim of high "elasticity" and used the Commission's graphs to demonstrate that in at least one instance more supply did not result in lower prices. In District 1, in Q4 of 2005, although there was an increase in supply compared to a year earlier, there was also a corresponding increase in price. Bevo Farms also pointed to the fact that while BC production was down in 2007, pricing was also down, showing that the relationship between price and volume is not always predictable.
21. On this point, we found the evidence of the Commission's witness, Maureen Sheehan, Senior Director of Marketing for Hot House Foods Inc. (Hot House) compelling. She stated that "it is impossible to predict the price of cucumbers". Her evidence was that cucumber prices vary more than any other crop. With up to four crops a year and the potential for large volumes to come on the market at the same time, there can be huge volatility in price. In addition, most cucumbers are consumed locally, unlike peppers and tomatoes that are exported to a larger extent.
22. Given the uncertainty and volatility, the panel is not satisfied that the financial position of the existing growers would necessarily be compromised by the entry of Bevo Farms' cucumber production for Q3 and Q4. The panel accepts the evidence that Bevo Farms is an experienced grower that can be expected to produce a high quality product suitable for export. We also accept that GGFI is competent to

market this product at this time of year despite the entry of Mexican imports into the marketplace. We also agree with GGFI that consumers tend to prefer local product and may pay a premium for it.

23. Where faced with conflicting evidence, the panel prefers the evidence of Mr. Newell of GGFI to that of competing agencies and growers who are direct competitors. With respect to the objections received from the two agencies, the panel appreciated the candor of Ms. Sheehan who, although opposed to the application, indicated that had Bevo Farms come to her agency with its production she would have supported the application. While it may be true that any agency would have taken the production, Mr. Newell indicated that as a significant grower of cucumbers on his own farms, if he thought that Bevo Farms' production would cause a significant price drop, he would not have accepted the added production. In fact, what Bevo Farms' production does is allow his agency to service customers for a greater portion of the year and therefore strengthen its position against Mexican and American imports. As a result, the panel concludes that the major objection to Bevo Farms' application was driven more by a desire to limit competition rather than prevent "elasticity" of price.
24. A further factor relied on by the Commission for turning down Bevo's application was its partial nature. Although Bevo Farms sought to produce from September to February, the Commission maintains that it only allocates quota for a full year. The panel does not accept that the Commission can only issue annual production allocations. The *Scheme* vests the Commission with the power to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product. The Commission has been vested with all the powers found in section 11 of the *NPMA*. Specifically, section 11(a) and (b) provides the Commission with the powers:
 - (a) to regulate the time and place at which and to designate the agency through which a regulated product must be produced, packed, stored, transported or marketed;
 - (b) to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be transported, produced, packed, stored or marketed by a person at any time;
25. The Commission, as the regulator of the vegetable industry, has broad powers to regulate the place and time at which regulated product can be produced and distributed. The fact that to date it has chosen to licence production on an annual basis does not mean that it lacks the authority to do otherwise. In fact, issuing licences on a temporary basis or for a limited timeframe allows the Commission to respond with a more flexible yet controlled approach to innovative production strategies.
26. The panel agrees with the Commission that this hearing raises the broader question of the criteria to be used to evaluate production applications and the appropriate weight to be placed on each criterion. However, in this case we believe the

Commission focused too much on protection of grower price at the expense of the broader policy considerations. Based on the evidence heard, we are not convinced that approving this application would necessarily impact growers given the time frame that the product will come onto the market. Furthermore the panel believes there are broader issues which must be considered including the interest of the overall BC greenhouse industry in the long-term.

27. Mr. Slater and Mr. Leroux both referred to the need for the Commission to consider government policy. The Panel agrees. In 2004, the Minister of Agriculture, Fisheries and Food (the “Minister”) issued the *2004 Regulated Marketing Economic Policy*, the purpose of which was to encourage responsiveness by boards and commissions to the needs of the industry, including accommodations to growers, processors and agencies who pursue innovative market opportunities and attempt to capture regional and national markets to add strength and stability for a regulated industry. More recently, the Minister issued the *BC Agriculture Plan* which has a major focus on promoting access to safe, locally produced food for all British Columbians reflecting BC’s reputation for environmental sustainability and healthy living.
28. In light of the above, the panel has determined that the decision of the Commission to deny Bevo Farms’ application placed too much weight on protecting the price for existing growers. Factors which deserve more weight are Bevo Farms’ ability to supply the market with BC product at a time when imports are predominant, to produce innovative products such as mini-cucumbers, and to preserve markets for local production which might otherwise be lost to imports. The panel is of the opinion that the public would be better served by having local product in the BC market place whenever possible rather than simply allowing Mexican or US product to fill the shelves. Given that once a customer is lost it is often difficult to regain it, it is preferable not to lose a market in the first place. Further, we are mindful that the Commission has no ability to control imports. Having local product available provides choices for British Columbians.
29. For these reasons, the panel has determined that the Commission erred in its decision to refuse the application of Bevo Farms. Accordingly, the appeal is granted.
30. The question falls as to the appropriate remedy. Section 8(9) of the *NPMA* allows BCFIRB to make an order it considers appropriate in the circumstances where it concludes that a commodity board has erred as a matter of fair and sound marketing policy. In this case and as stated above, the panel has determined that the Commission placed too much weight on the desire to protect grower price and too little weight on the broader policy considerations and as such erred in not approving Bevo Farms’ application. In other circumstances, the panel may have referred this matter back to the Commission for reconsideration. However, in the circumstances of this case and due to the time constraints on the grower, the panel makes the order set out below.

ORDER

- 31. The appeal is granted.
- 32. The Commission is ordered to issue a production allocation to Bevo Farms for 19,560 m² of cucumber production allocation to produce long English and mini-cucumber for the six month period from September 2008 to February 2009 with subsequent renewal at the discretion of the Commission.
- 33. There will be no order as to costs.

Dated at Victoria, British Columbia this 4th day of September 2008.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(original signed by)

Richard Bullock, Panel Chair

Sandi Ulmi, Member

Ron Bertrand, Member