

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL BY DROOGENDYK HOTHOUSES INC. FROM A DECISION OF  
THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION TO DENY  
AN APPLICATION FOR A PRODUCER-SHIPPER LICENSE

**BETWEEN**

DROOGENDYK HOTHOUSES INC.

**APPELLANT**

**AND:**

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia Farm Industry  
Review Board

Ron Bertrand, Vice Chair

For the Appellant:

Brent Royal, Owner

For the Respondents:

David Taylor, Chair  
Tom Demma, General Manager  
James Shiell, Market Analyst

Date of Hearing

October 30, 2013

Place of Hearing

Abbotsford, British Columbia

## **INTRODUCTION**

1. The appellant, Droogendyk Hothouse Inc. (Droogendyk) is owned by Brent Royal, who is appealing a decision of the British Columbia Vegetable Marketing Commission (VMC) dated September 26, 2013 concerning the granting of a producer-shipper license.
2. The 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 the VMC to regulate the production and marketing of vegetables in British Columbia in accordance with the principles of orderly marketing. Greenhouse tomatoes, peppers and cucumbers are regulated products under the *Scheme* and the VMC's Consolidated General Orders. The General Orders require anyone producing regulated crops to market them through an agency designated by the VMC or have a producer-shipper license allowing them to market directly to retail outlets.
3. Droogendyk is a relatively small greenhouse operation (8127 m<sup>2</sup>) that currently grows sweet bell peppers and markets them through Village Farms Operations Canada Inc. (Village Farms), an agency licensed by the VMC. The appellant applied to the VMC for a producer-shipper license for the 2014 crop year and subsequent years. The appellant also requested a change in the regulated product mix he produced to 2700 m<sup>2</sup> each of cucumbers, peppers and tomatoes. The VMC denied the application for a producer-shipper license for the primary reason that it was inconsistent with sound marketing policy. As secondary reasons, the VMC relied on the fact that what the appellant proposed to grow was no different than what other growers are now producing and its understanding that Village Farms was prepared to adjust the crop mix as a possible means to improve the appellant's gross and net farm income.

## **ISSUE**

4. Did VMC err in their September 26, 2013 decision to deny Droogendyk a producer-shipper license for the 2014 crop year and subsequent years?

## **BACKGROUND**

5. Mr. Royal purchased the Droogendyk operation in 2004. It now consists of two parts, one built in 1991 and the other built by Mr. Royal in 2005. The appellant currently holds a producer license from the VMC for 8127 m<sup>2</sup> of production marketed through Village Farms.
6. Mr. Royal applied to the VMC to change his status from a producer shipping to an agency to a producer-shipper on the basis that this change in status would improve the economic circumstances currently faced by Droogendyk.

7. In its decision, the VMC gave the following reasons for denying the Droogendyk application:
  - a) approval would be inconsistent with the VMC mandate to forge and maintain sound marketing policy;
  - b) approval would lead to all growers experiencing price suppression and income volatility;
  - c) the vegetables that the appellant proposes to grow are no different from what other growers are now producing and are the same as those on offer for sale by their respective marketing agencies; and
  - d) given that the current agency used by the appellant is prepared to adjust the crop mix to help the appellant improve farm income, the VMC does not find that marketing through an agency is unfeasible for the appellant.

### **POSITION OF THE APPELLANT**

8. Mr. Royal argues that the VMC was wrong in its decision as it fails to take into account his personal circumstances. He pointed to a downward trend in vegetable prices since the greenhouse was purchased in 2004 that placed Droogendyk in a difficult financial position. He provided evidence that 2004 returns from one acre of peppers was approximately \$436,000 compared to a low in 2010 of \$391,291 from two acres of peppers. In recent years, the farm has had to rely on government assistance programs to remain viable. Mr. Royal argues that because current returns are not what they were in the past; he needs to look at other options.
9. Mr. Royal testified that he had discussions with a produce manager at a grocery store that lead him to believe that directly shipping vegetables to retail outlets would result in greater returns to the Droogendyk operation.
10. Mr. Royal tendered his business plan for a new producer-shipper operation that he proposes to call Valley Fresh Hothouses Inc. (Valley Fresh) should he be successful in this appeal and be issued a license from the VMC. He says that if successfully implemented, this new business plan will result in greater returns for Droogendyk primarily because there will be no agency and wholesale costs (the farm products will go directly to retailers) and the products from the farm will garner a premium price in the market place because of the fresh nature of the products (the short time and distance between harvest and retail) and the current orientation of some consumers to buy local.
11. In support of his position, Mr. Royal points to Part IV of the General Orders that allow for the licensing of producer-shippers and confirms that Droogendyk could fulfill all the requirements of the General Orders with respect to producer-shippers.
12. Mr. Royal stated that the VMC's reasons for denying his application set out in paragraph 7 above were not valid. He strongly argues that his producer-shipper business plan does accord with sound marketing policy and the amount of

production (8127 m<sup>2</sup>) is not sufficient to cause any price suppression or volatility for others in the industry. His proposed amount of tomato production would be about 0.2%, peppers would be 0.19% and cucumbers would be 0.5% of provincial production for these vegetables.

13. On the sound marketing policy issue, the appellant relied on the evidence of Ben Maljaars, the main author of the business plan and person who would head up the sales and marketing portion of the new business (Valley Fresh) should Droogendyk be successful in this appeal. Mr. Maljaars testified that there is an upward trend in consumers buying local and directly from farms relying in part on the Ministry of Agriculture's We Heart Local program. Because this program is limited to farmers selling directly to consumers, the greenhouse industry in the Fraser Valley cannot participate because there are no licensed producer-shippers in the region.
14. Under cross examination, Mr. Maljaars confirmed that he currently works in construction and has no experience as a sales and marketing manager for greenhouse crops.
15. Mr. Royal alleges that there were conflict of interest issues with respect to the VMC's decision denying him a producer-shipper license. Specifically, Michael Minerva of Village Farms, the agency to which Droogendyk currently ships its products, is a member of the VMC and has a vested interest in maintaining the current marketing agreement between Droogendyk and Village Farms. However, he did state that Mr. Minerva has agreed to end, for a fee of \$100,000, the current agreement if Droogendyk receives a producer-shipper license.
16. Mr. Royal relies on two previous decisions of BCFIRB. In *Bevo Farms Ltd. v. British Columbia Vegetable Marketing Commission*, September 4, 2008 BCFIRB overturned the VMC and issued Bevo an allocation of cucumber production quota. Mr. Royal argues that paragraphs 23, 26, and 28 of the *Bevo* decision are relevant to his application as an example of where BCFIRB found that the VMC placed too much weight on one factor (protecting price) in refusing an application. Mr. Royal also argues that BCFIRB's January 7, 2013 Supervisory Review of the British Columbia Vegetable Marketing Commission Central Vancouver Island Agency Designations is relevant where at paragraph 46 it identifies procedural fairness concerns with how the VMC handled the revocation of a license in that case. In addition, Mr. Royal points to paragraphs 48 and 50 which address conflict of interest issues within the VMC.

## **POSITION OF RESPONDENT**

17. David Taylor, Chair of the VMC, James Shiell, Market Analyst and Tom Demma, General Manager, testified in support of the VMC's decision.
18. The VMC accepts that Droogendyk faces some financial challenges and had provided information on the farm debt mediation program (offered by Agriculture

and Agri-Food Canada). The VMC also encouraged Droogendyk and its agency, Village Farms, to work together to find creative and innovative solutions to the problems faced by Droogendyk.

19. Mr. Demma testified that the current policy of the VMC is to limit the number of agencies so that there are fewer rather than more marketers. In their view, granting a license to Droogendyk may serve as a precedent leading to more small area farms seeking similar accommodation from the VMC. There are currently four non-agency producers in the province; two are organic, one is a conventional greenhouse on Vancouver Island and the other is a conventional farm on the Sunshine Coast. There are no conventional farms over 5,000 m<sup>2</sup> licensed as producer-shippers in the Fraser Valley.
20. Mr. Demma testified that the Droogendyk operation does not meet any of the VMC's criteria for a producer-shipper license, which include being small (less than 5,000 m<sup>2</sup>), growing non-conventional products (organic) and being in more remote areas of the province where there are no licensed marketing agencies already in existence. Mr. Demma stressed that, in the opinion of the VMC, there is no compulsion to issue a producer-shipper license simply because the language of the General Order allows the VMC to do so. If an application does not accord with current VMC policy then the VMC is obliged to dismiss such an application.
21. Mr. Demma also questioned whether changing status from a producer marketing through an agency to a producer-shipper would result in an improvement in the economic situation of the Droogendyk operation. In his view, a change in status may well lead to less revenue and the preferred course of action is for Droogendyk to work with its agency to find some solutions to its financial difficulties.
22. The VMC's market analyst, Mr. Shiell, presented a sensitivity analysis of the financial projections in the appellant's business plan. He disputes the assumption that there would be a price premium for its products if marketed under a producer-shipper arrangement rather than through an agency. He also observed that 2013 was a relatively good price year and that these prices should not be counted on in the future. Therefore, with no price premium and potentially softer prices in the future, Mr. Shiell's opinion is that the appellant's operation may well face continued financial challenges even with a producer-shipper license.
23. Finally, on the conflict of interest issue, Mr. Demma points to VMC's minutes from the meeting where the decision was made to deny Droogendyk a producer-shipper license. The minutes indicate that Mr. Minerva was asked to leave the meeting before the decision was made.

## **ANALYSIS**

24. The VMC, by virtue of the *Scheme*, has the authority to promote, control and regulate in any respect the production, transportation, packing, storage and

marketing of regulated product grown in British Columbia. At issue in this appeal is the VMC's power to license producer-shippers. The appellant does not challenge the legal authority of the VMC to issue such licenses. Rather in this case, the appellant argues that the VMC erred when it found that its application did not accord with sound marketing policy and that the appellant's circumstances did not warrant the issuance of a license.

25. The Scheme provides as follows:

9. No producer-Shipper shall grow and market Greenhouse Vegetable Crops unless he:
  - (a) registers with the Commission;
  - (b) is qualified to and obtains annually the appropriate license from the Commission, and
  - (c) pays to the Commission annually the fees for such licenses as described in Schedule III to these General Orders.

26. The appellant argues that as he is able to comply with the requirements of section 9, the VMC is obliged to issue him a producer-shipper license for his operation.

27. The VMC says that the *Scheme* allows the VMC to develop policies to assist them in implementing the General Orders. This is part of what the VMC sees as good governance. In the case of the producer-shipper license, the VMC's policy (which I observe here is not reduced to writing) is to limit the number of producer-shipper licenses to small operations (less than 5,000 m<sup>2</sup>), non-conventional farms (organic) and farms in regional (outside of the Fraser Valley) locations and to have fewer rather than more marketers of greenhouse vegetables.

### **Application of the General Order**

28. I have considered whether the wording of the General Orders compels the VMC to issue a producer-license to the appellant or whether the VMC in fact has discretion by virtue of the broad powers to regulate the industry found in the *Scheme* to establish policies that set out the criteria or circumstances under which such a license would be issued. I do not accept the appellant's argument that simply by registering with the VMC, obtaining a license and paying a fee, he qualifies to be a producer-shipper. To require the VMC to issue licenses to all persons that apply and pay a fee would result in a complete lack of regulation within the province's greenhouse vegetable industry contrary to the intent of the *NPMA* which is to preserve orderly marketing - sufficient but not overabundant supply.

29. I agree with the VMC that, as the first instance regulator of the vegetable industry, it has the power to establish appropriate policies to govern how they will deal with applications for producer-shipper licenses.

### **Sound Marketing Policy**

30. The next question is to decide whether the VMC policy with respect to producer-

shipper licenses accords with sound marketing policy. The VMC testified as to its policy which, as I observed above, does not form part of the General Orders nor does it appear to be published elsewhere. The VMC says that fewer rather than more marketers is consistent with sound marketing policy. Key to this is central desk sellers that market products from a number of producers. More sellers means more available price lists for wholesalers and retailers to access which in turn weakens the position of producers in the market place and drives prices lower. This is at the core of the VMC's policy to limit the licensing of producer-shippers to small, organic and regional producers.

31. The appellant's position is that Droogendyk will not be competing with other producers because there is a niche market for fresh locally produced product that is not now being met.
32. The evidence before the panel that such a niche market actually exists, that it could be captured by the appellant and that it would lead to an improved financial situation is limited at best. The panel does not put much weight on the testimony of Mr. Maljaars, the lead author of the Droogendyk business plan, given that he is, by his own admission, a construction worker with no experience in sales and marketing of greenhouse vegetables. Mr. Royal testified that he did the market research to establish this niche market. Apart from the reference to a conversation with an unidentified produce manager at a grocery store, there was no testimony before the panel from wholesalers or retailers or anyone else for that matter with expertise in sales and marketing of greenhouse crops to give me an evidentiary basis to determine the validity of the appellant's position.
33. In my view the VMC's policy to restrict the licensing of producer-shippers accords with sound marketing policy. What remains to be considered is whether there are special circumstances particular to this appellant that would warrant granting him the producer-shipper license he seeks.
34. I accept, as did the VMC, that the current financial situation of the appellant is challenging. In fact, Mr. Royal submitted that Droogendyk may go out of business if the appeal is not successful and if he is not issued a producer-shipper license.
35. The VMC's position is that the particular circumstances of a farm cannot cause a change in a policy that they have deemed to be positive for the industry as a whole. The VMC disputes that granting Droogendyk a producer-shipper license would improve the financial circumstances of the farm. Droogendyk has stated that eliminating the middleman and servicing a niche market will result in higher returns. The current marketing agreement between Droogendyk and Valley Farms requires Droogendyk to pay a marketing fee of 8% of the net weekly sales price. Although this amount would not have to be paid if a producer-shipper license was granted, the business plan for Valley Fresh has Mr. Maljaars being hired as Sales and Marketing Manager with a salary of \$80,000 per year. The VMC argues that hiring of a sales and marketing manager will offset any savings from not having to

pay a marketing fee to Valley Farms, an opinion not contradicted by Mr. Royal.

36. The VMC also stated that other agencies market the same products as those proposed to be grown and marketed by Valley Fresh. There is no basis for the assertion that a price premium will be realized by this new entity. As previously stated, there was not sufficient evidence at the hearing to be able to conclude that there are such niche markets with price premiums.
37. Mr. Royal relied on two previous BCFIRB decisions that, in his view, support overturning the VMC decision and issue Droogendyk a producer-shipper license. I find neither decision helpful. In *Bevo*, the panel found that the VMC placed too much weight on one factor (protecting price) to the exclusion of other relevant factors in a situation where what was at issue was local product being displaced by imports. That circumstance does not arise on the evidence before me. I do not find the passage referred to in the supervisory decision of Vancouver Island Agency Designations helpful in that the procedural fairness issue referenced in paragraph 46 does not arise on these facts. I do however agree with the comments in the decision at paragraphs 47-50 with respect to conflicts of interest being something the VMC must manage, given its legislation, in order to function effectively and as indicated above, my conclusion is that the VMC managed the conflict of one of its members appropriately in these circumstances.
38. After a review of the all the evidence and submissions, I am satisfied that the VMC's producer-shipper policy accords with sound marketing policy and that the appellant has not provided sufficient evidence of special circumstances to justify the issuance of a producer-shipper license. I am unable to conclude that the appellant's financial circumstances would be improved if Droogendyk operated as producer-shipper nor is there adequate evidence to support the existence of niche markets with premium prices that can only be served by producer-shippers and not the existing agency structure.

### **Conflict of Interest**

39. The appellant asserted that the VMC was in a position of conflict of interest when it made the decision refusing his producer-shipper license as Mr. Minerva of Village Farms, the agency to which Droogendyk currently ships, is also a member of the VMC. The appellant argues that he had a vested interest in maintaining the current marketing agreement.
40. The VMC Election Policy, approved by BCFIRB, states that the VMC is to be comprised of "up to eight members who are "commercial producers" (as defined in the *Scheme*) elected by the commercial producers". Because the VMC is comprised of individuals with a significant stake in the vegetable industry in British Columbia, there is potential for members to have a personal or financial interest in many of the issues before the VMC. This may result in the appearance of or actual conflict of interest. Therefore it is important for members who have a direct personal or



financial interest in the outcome of a decision to not participate in that decision. In this case, the minutes of the meeting confirm that the member with direct interest in the Doogendyk application did not participate in the decision and there was no evidence that he attempted to influence the outcome.

41. I am satisfied that the VMC acted appropriately in the circumstances and that the conflict of interest allegation does not form a basis to set aside the decision of the VMC.

### **Disclosure of Policies**

42. As I indicated above, the VMC has the authority to establish policies with respect to the matters it regulates such as producer-shipper licenses. However, in this case, the General Orders are silent as to the particular criteria the VMC takes into account when issuing its licenses. I am also not aware of the policy being published and accessible elsewhere. In light of this, it is not surprising that persons like the appellant may not be aware of the policy or the reasons for the policy.
43. BCFIRB strongly advocates for boards and commissions operating under the *NPMA* to exercise good governance, often referred to as operating according to the SAFETI principles. SAFETI is an acronym for making decisions that are strategic, accountable, fair, effective, transparent and inclusive. In this case, the fact that the VMC relied on a policy that does not appear to have been publically communicated is not transparent and could be seen as unfair to the extent that misunderstandings are created. In light of this, I ask the VMC to review their approach to developing and communicating policies, including the policy at issue in this appeal with respect to applications for licenses. If stakeholders are aware of and have ready access to such policy statements, they can be better prepared thereby reducing future misunderstanding and the potential for appeals.

### **ORDER**

44. The appeal is dismissed.
45. There will be no order as to costs.

Dated at Victoria, British Columbia this 14<sup>th</sup> day of November 2013.

### **BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**



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Ron Bertrand, Vice Chair