IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A SEPTEMBER 30, 2005 DECISION CONCERNING GREENHOUSE QUOTA TRANSFERS AND THE ALLOCATION OF 2006 MINI-CUCUMBER PRODUCTION

BETWEEN:

GLENWOOD VALLEY FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC HOT HOUSE FOODS INC.
EVERGROW GREENHOUSE LTD.

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Barbara Buchanan, Member, Panel Chair Christine J. Elsaesser, Vice Chair Wayne Wickens, Member
For the Appellant	Tom Reinhart, Glenwood Valley Farms Ltd. Kevin Doran, Country Fresh Produce Inc.
For the Respondent	George Leroux, Chair Tom Demma, General Manager
For the Intervenor	Dawn Gray, Vice President Sales & Marketing, BC Hot House Foods Inc.
Evergrow Greenhouse Ltd.	Stephen Lam, Director
Place of Hearing	Richmond, B.C.
Date of Hearing	November 10, 2005

INTRODUCTION

1. The Appellant Glenwood Valley Farms Ltd. ("Glenwood") is appealing the September 30, 2005 decision of the British Columbia Vegetable Marketing Commission (the "Commission") with respect to the allocation of mini-cucumber quota for 2006.

2. Glenwood is a greenhouse grower and since 2003, all of its mini-cucumbers have been marketed through BC Hot House Foods Inc. ("BC Hot House"). With the exception of two small exempted mini-cucumber producers, Glenwood was the only supplier of mini-cucumbers. Mini-cucumbers are a specialty product that initially enjoyed a price premium however that premium has declined in 2005.

3. In 2005, Glenwood decided to stop shipping its mini-cucumbers through BC Hot House and transferred to a new agency, Country Fresh Produce Inc. ("Country Fresh") for the 2006 crop year. As a result of Glenwood's decision to move to a new agency, the issue arose as to how to allocate the 2006 mini-cucumber production.

4. Prior to July 15 each year, the Commission undertakes a planning process to determine how greenhouse crops will be transferred and allocated within the industry for the upcoming year. As part of this process, producers notify their agency whether they intend to transfer some of their current quota from one crop to another. For the 2006 crop year, the Commission received quota transfer applications for mini-cucumbers which if accepted would have resulted in a 93% increase in production. The Commission contacted the two exempted producers (one of which Evergrow Greenhouse Ltd. ("Evergrow") was an Intervenor in this appeal), BC Hot House, Country Fresh and Glenwood and advised that the Commission would hold a hearing to receive written and oral evidence from the interested parties as to how mini-cucumbers should be allocated. It is the Commission's Decision concerning 2006 Greenhouse Quota Transfers dated September 30, 2005 which is the subject of this appeal.

5. In its Decision, the Commission made the following orders:

    a) the total volume of mini-cucumber production was set at 14,598 m^2;
    b) if either BC Hot House or Country Fresh demonstrated a demand for additional volume in 2006 that request would be dealt with by an in-season transfer;
    c) the two exempted producers, Evergrow and Mahli Farms were given the option to continue at their exempted levels (2098 m^2 and 500 m^2 respectively) and be ineligible for future increases in allocation or alternatively, forego their exempted status and produce mini-cucumbers for BC Hot House;
    d) BC Hot House was allocated 7000 m^2 plus the 2598 m^2 allocated to Evergrow and Mahli Farms;

e) Evergrow and Mahli Farms were given a first right of refusal to produce the 7000 m^2, failing which Hot House Growers Inc. ("HHGI") – another grower shipping to BC Hot House – was given the opportunity to produce the 7000 m^2 of mini-cucumber quota.
f) Country Fresh was allocated 5000 m^2 of mini-cucumbers for 2006 with the remainder of the 5000 m^2 allocated for 2005 reverting to Long English cucumbers.

6. Given that Evergrow and Mahli opted to maintain their exempted status, HHGI received the 7000 m^2 of mini-cucumber quota.

7. The appeal was heard on November 10, 2005. BC Hot House intervened in support of the Commission's Decision. Evergrow intervened but did not support either party.

8. After the hearing, but prior to rendering its decision, we drew to the attention of the parties the fact that George Leroux, Chair of the Commission, had been retained by the Provincial board to work on the Specialty Review in the supply managed commodities (which did not relate to vegetable production). We noted that it was simply through oversight that this issue was not raised earlier in the process, and we gave the parties an opportunity to make submissions if they believed that the relationship between Mr. Leroux and the Provincial board on this other matter gave rise to any apprehension of bias on the part of the panel in respect of this appeal. The Appellant advised that it had no concern. We received no response from any of the other parties and have proceeded on the basis that there is no perception of bias on the part of the panel arising out of the contractual relationship the Provincial board had entered into with Mr. Leroux in respect of the Specialty Review.

ISSUES

9. Did the Commission follow sound marketing policy when it allocated 2006 mini-cucumber quota in accordance with its September 30, 2005 Decision?

DECISION

10. The facts are not in dispute. Rather the Appellant takes issue with the Commission's Decision on a number of grounds. Given that the background to this appeal is very clearly laid out in that Decision, the Panel will not repeat that here. Instead we will deal with the grounds raised by the Appellant.

11. Four of the Appellant's grounds take issue with policy concerns and these are dealt with collectively. The Appellant argues that the Commission (1) has no clear policy regarding the rights of producers versus agencies in respect of production allocation in a multi-agency environment; (2) attempts at any such policy should not involve a sensitive, niche market crop such as mini-cucumbers; (3) has no effective policy to deal with exemptions for emerging specialty crops; and (4)

failed to define a policy that relates to grower production allocation when there is a change of agency.

12. The Panel agrees with the Commission that as the 2006 allocation hearing raised the issue of transition from a single desk to a multi-agency system, it was appropriate to consider what new policies were necessary to facilitate that process. The Panel finds no flaw in using the hearing process to assist in the development of policy. As for the application of policies to specialty or niche crops, the Panel does not agree with the Appellant's submission that allocation policies should not apply to specialty niche crops as a matter of principle. The real question which needs to be addressed is whether there is flaw in the actual policy allocating specialty crops. That issue will be dealt with later.

13. The next ground of appeal is (5) that in coming to its Decision, the Commission ignored Part XVIII sub Part c, para. 14 of its General Orders which states:

> As the development of specialty crops is an important component of industry expansion, and requires additional development costs and risks by both Producers and agencies, the Commission will give first consideration for Quota transfers or allocation to those undertaking these risks until total Quota exceeds 80,000 square meters.

14. The Appellant argues that this section has direct application to their production. As Glenwood was involved in the development of the mini-cucumber market, it understood that it was first in line for all production up until 80,000 m^2. When Glenwood made the decision to expand mini-cucumber production, it did so believing that it would be given first consideration ahead of all other producers. In the Appellant's view, the effect of the Commission's Decision is to ignore Part XVIII and give production that is rightfully Glenwood's to HHGI.

15. The Commission maintains that it was mindful of Part XVIII when it made its Decision. It argues that this section clearly contemplates shared costs and working together between an agency and its producers. Further, the section speaks to "first consideration" and not a right of first refusal which seems to be what the Appellant contemplated. The Commission argues that this section has more application between competing producers in a single agency than in the situation found here where a producer moves to a competitor agency. The Commission argues that it is unreasonable that the agency which worked with the producer to develop a market should be left to source up to 80,000 m^2 of product from a competitor. Rather, such a decision requires the Commission to look at the broader market and the needs of the different stakeholders. While the Commission accepts that the Appellant should have priority in producing Country Fresh's needs, it maintains that it is not reasonable that it have the same priority to produce BC Hot House's needs as well.

16. The Panel has considered the express wording of Part XVIII and agrees with the Commission. This section speaks to "costs and risks" incurred by producers and agencies and gives "first consideration for Quota transfers or allocation to those undertaking the risk". In this circumstance, the uncontroverted evidence was that

both the Appellant and BC Hot House worked together to develop the mini-cucumber market. While in a single agency system it could be seen appropriate that the developing producer be given some security over its market, this section does not directly speak to the circumstance here. It is left with the Commission as part of its authority to regulate the industry to consider what are the appropriate policy rules for the transfer of a specialty producer to a competing agency. The Panel finds that the Commission did not violate either its spirit or its express wording in its Decision regarding mini-cucumber allocation. Whether the Commission was right in the policy rules it developed is another question which we will address later.

17. The next ground of appeal (6) is that the Commission erred by taking production allocation away from the Appellant and giving it to (1) two exempt, Class II growers who chose not to suffer the expense and risk of developing a mini-cucumber program through an agency, and/or (2) HHGI, a grower with absolutely no stake or investment in the category.

18. The Commission maintains that it has not taken any production away from the Appellant. The Appellant can still grow the same number of m^2 of production; what has changed is the mix of products grown on that area. That mix of products is determined by the agency's needs and not the Commission. As for the two exempt producers, the Commission accepted that they had incurred expense and risk in developing their direct markets and recognised this by giving the exempted producers priority rights to new mini-cucumber production sought by BC Hot House. As for HHGI, the Commission argues that as a member of BC Hot House, HHGI shared in a portion of the market development costs of the mini-cucumber market.

19. The Panel understands that what has transpired is this. The Appellant made a decision to transfer agencies. At the time of transfer, the Appellant was producing 10,000 m^2 of mini-cucumbers for BC Hot House. The new agency (Country Fresh) wanted to market 9700 m^2 of mini-cucumbers. However, BC Hot House still professed a need for almost 12,000 m^2 of mini-cucumbers. From the evidence, Country Fresh and BC Hot House have essentially the same customer list; we are not talking about new customers here. Country Fresh is taking a run at BC Hot House's customers. Faced with these facts, the Commission determined that if the Appellant and BC Hot House could not come to a commercial agreement between them then fairness dictated that the 2006 allocation be divided in some fashion between the two agencies. At the hearing, both agencies conceded that the global amount sought of 24,298 m^2 of mini-cucumbers was excessive. BC Hot House agreed that 7-8,000 m^2 would satisfy its needs. Country Fresh agreed 5-7000 m^2 would satisfy its market needs. Faced with these revised requests, the Commission made the policy decision that it was unfair to force BC Hot House to rely on a competitor agency for its supply of mini-cucumbers and if the exempted producers did not wish to lose exempted status and produce BC Hot House's requirements, the appropriate course was to allow a new producer to grow this product. The

Panel finds this to be sound marketing policy. It follows then that the Panel does not agree that the Appellant was owed the entire 2006 mini-cucumber allocation (less the exempted production).

20. The Appellant's next ground of appeal (7) is that the 2006 mini-cucumber allocation (14,598 m^2) exceeds market requirements and will have a negative impact on grower returns. The Appellant points to the erosion in price (losses of $5.00 per case) that already occurred in 2005 following BC Hot House's request and the Commission's granting of a mid-year increase in mini-cucumber allocation from 4,700 to 10,000 m^2. The initial requests for 2006 were a 93% increase again over 2005 production volumes. The Appellant argues that these volumes bear no relation to market demands and were "politically motivated" or bravado on the part of the agencies. The Appellant argues that it is the grower that suffers the brunt of the loss when the market declines. As agencies bill everything back to the grower, they bear little if any of the risk. Further, the Appellant argues that the Commission placed too much weight in its Decision on two factors. The first is the impact of non-exportability[1] during part of 2005. The second factor related to quality issues as an explanation for the 2005 price decline. Given that few mini-cucumbers are exported that in and of itself does not explain the surplus. With respect to quality, BC Hot Houses own records show little if any changes in mini-cucumber credits during the time of price decline in 2005. The Appellant argues that rather than non-exportability or quality issues, the obvious explanation for price decline in 2005 was the increase in production. As a result, the allocation ultimately set by the Commission for 2006 (14,598 m^2) is again too high and will result in further price pressure.

21. On this point, the Panel agrees with the submissions of the Commission that it is entitled to rely on the requests of the agencies as an indication of market demand. Both agencies testified at the Commission's hearing that there were two major wholesalers planning to offer mini-cucumber programs in 2006. At the hearing, the agencies revised their requests from a low of 14, 598 $m^2$to a high of 17,598 m^2. The Commission argues that it took the conservative number and if the agencies requests exceed market demand, there can be a mid season adjustment (just like occurred in 2005) should that prove necessary. The Panel accepts that based on the evidence heard by the Commission at its hearing, there was a basis in fact for the increases sought. We accept the Commission's allocation as a compromise demonstrating an appropriate weighing of the relevant facts and an exercise of sound marketing policy.
22. The Appellant's next ground of appeal (8) is that the Decision contains errors and omissions. These are referred to above in paragraph 20 and include the reference to the period of non-exportability which was shorter than the 11 weeks noted in the Decision and the reference to quality concerns. The Appellant argues that the issue of exportability is a "red herring" as there is a limited US market for mini-

[1] Non-exportability refers to a situation that arises when BC growers must use a pesticide not approved for use in the US which results in that product not being exportable into the US market.

cucumbers therefore losing the ability to export mini-cucumbers into the US does not create a surplus. Similarly, the Commission's reliance on quality concerns of Appellant's production as an explanation for lower prices is also flawed. The real reason for lower returns for mini-cucumbers is over-supply related to the mid-season adjustment in 2005.

23. For its part, the Commission denies that it misunderstood the impact of non-exportability on grower returns. The allocation of mini-cucumbers was more than doubled mid year in 2005 and there were certain periods of time when BC cucumbers could not be exported into the US. This inability to export resulted in supply imbalances in BC causing agencies to source product from other regions to fill export requirements and forcing BC product into the domestic market. The Commission concedes that the extent of the impact is unknown. However, should agencies follow through with their plans to continue promoting mini-cucumbers in the US market, demand will grow and exportability may be an issue from time to time.

24. The Panel accepts the Commission's submissions on this point. To the extent that there may be errors in the Decision, these errors are not material to the Decision made with respect to the allocation. The Commission may have overstated the impact of non-exportability and quality issues as an explanation for the 2005 price decline. However, the Commission is entitled to rely on the assertions of the agencies that they intend to aggressively pursue the US market. It is these assertions that are the basis of the Commission's Decision to increase the 2006 allocation.

25. The Appellant's next ground of appeal (9) is that it has been wrongfully penalised by the Decision to reduce its production allocation and as a result has suffered substantial financial harm. The Panel accepts the Appellant's evidence that it will suffer a significant financial impact given that the effect of the Decision is that it will be producing approximately half of the mini-cucumbers that it did in 2005 and the replacement crop of Long English cucumbers has significantly lower producer returns. However, the financial impact felt by the Appellant is a direct result of its decision to change agencies. It had opportunities to negotiate with BC Hot House to supply their mini-cucumber requirements but no deal was ever made. Perhaps negotiation failed due to a misunderstanding by the Appellant as to the security of its position as the only mini-cucumber producer (apart from the exempted producers). It is difficult to say. At the hearing of this appeal, the Appellant was still open to a negotiated solution with BC Hot House. However, not surprisingly BC Hot House has a grower willing to produce mini-cucumbers for them and as such has no real desire to negotiate any further.

26. The Appellant's final ground of appeal (10) is the lack of clear policy has resulted in serious erosion of the credibility of the Commission and the British Columbia Vegetable Scheme in the greenhouse sector. Based on our conclusions above, the Panel accepts that the 2006 allocation for mini-cucumbers was based on sound

marketing policy arrived at through a fair and transparent hearing process where all parties had an opportunity to be heard. The Commission recognised that in the move from a single desk agency to a multi-agency environment, new policies would need to be developed to deal with transfer of producers between agencies. The Commission's policy decisions ultimately made both in terms of the allocation for 2006 and how that allocation should be divided are upheld.

ORDER

27. The appeal is dismissed.

28. There will be no order as to costs.

Dated at Victoria, British Columbia, this 12th day of December 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(original signed by):

Barbara Buchanan, Panel Chair
Christine J. Elsaesser, Vice Chair
Wayne Wickens, Member