

**BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION**

**Decision Regarding**

**Conditional Applications by B.C. Vegetable I Limited Partnership and SunSelect Produce (Holdings) Inc. to Transfer Tomato Production Allocation and to Change a portion of the Tomato Production Allocation to Long English Cucumbers**

**COMMISSION PANEL:**

George Leroux, Chair  
Doug Gourley, Member  
John Savage, Member  
Robert Spetifore, Member  
Peter Guichon, Member  
Tom Demma, Registrar

**APPLICANT:**

SunSelect Producer (Holdings) Inc.  
("SunSelect")

**AGENCY:**

B.C. Hot House Foods Inc.  
("Hot House")  
Greenhouse Grown Foods Inc. ("GGFI")  
Country Fresh Produce Inc. ("Country Fresh")

**INTERVENER:**

Stephen Lam, Evergrow Greenhouses Ltd. ("Evergrow")

**1 Issues Requiring Decision**

1. The Commission is to decide to approve or deny the transfer of B.C. Vegetable I Limited Partnership's (BC Veg) 165,312 m<sup>2</sup> of tomato Production Allocation to SunSelect or its designate.
2. The Commission is to decide to approve or deny the change of 10 acres (41,328 m<sup>2</sup>) of the tomato Production Allocation to Long English cucumber Production Allocation for the 2007 crop year.
3. The Commission is to decide to approve or deny the deferral and preservation of the subject tomato Production Allocation that is not utilized in 2007.
4. The preceding decisions have been requested by SunSelect "on a conditional basis, that is, conditional upon the completion of the purchase and sale of the greenhouse facilities by SunSelect from the Receiver pursuant to court order."<sup>1</sup>

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<sup>1</sup> Letter from SunSelect Produce (Holdings) Inc. – February 26, 2007.

## **2 Background**

5. On February 26, 2007 SunSelect made conditional applications for:
  - a. the transfer of B.C. Veg's tomato Production Allocation to SunSelect Produce (Delta) Limited Partnership;
  - b. the transfer of 61,992 m<sup>2</sup> of tomato Production Allocation to Long English cucumber Production Allocation for production in 2007;<sup>2</sup> and,
  - c. the deferral and preservation of any Production Allocation not used by SunSelect in 2007.
6. Also on February 26, 2007, BC Veg separately made application to defer and preserve its Greenhouse Production Allocation.
7. BC Veg is currently in receivership. The Receiver is seeking to sell the assets of BC Veg which include greenhouse facilities and land at 10250 Hornby Drive in Delta.
8. BC Veg is assigned 165,312 m<sup>2</sup> of tomato Production Allocation and is a major shareholder in Global Greenhouse Produce Inc. (Global), a licensed Designated Agency authorized to market greenhouse tomatoes and greenhouse Peppers.
9. BC Veg is not in compliance with the Commission Orders. BC Veg owes unpaid levies to the Commission.
10. To address one part of SunSelect's conditional application, the change of Production Allocation from tomatoes to cucumbers, the Commission, as is its normal procedure, sought comment from other Agencies concerning the proposed change for 2007. This request to the Agencies resulted in the Commission determining to hold a Hearing to further examine the question.
11. The Chair of the Commission constituted a Panel of Members not having a direct financial or other interest in the question before the Hearing.
12. A Hearing was held on March 22, 2007 at the Commission offices in Surrey.

## **3 The Hearing**

13. The question before the Hearing was related to the change of 61,992 m<sup>2</sup> of tomato Production Allocation to Long English cucumbers for 2007 and thereafter.

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<sup>2</sup> The original request was for 15 acres (61,992 m<sup>2</sup>) and this was subsequently amended, verbally at the Hearing, to 10 acres (41,328 m<sup>2</sup>).

14. Global sponsored the application and was not present at the Hearing. Hot House, GGFI and Country Fresh, all licensed Designated Agencies, attend the Hearing to register their concerns and opposition. Evergrow applied for, and was granted, intervener status at the Hearing.
15. Certain portions of the Hearing were held in camera to provide SunSelect and the Agencies the opportunity to provide additional sensitive competitive information to assist the Panel in its determination.

### 3.1 SunSelect's Position

16. SunSelect is seeking to purchase the assets of BC Veg from the Receiver, subject to court approval of its proposal. One part of the transaction involves obtaining conditional approval from the Commission for the change of 41,328 m<sup>2</sup> of BC Veg's tomato Production Allocation to long English cucumbers.
17. SunSelect plans to produce the three (3) main greenhouse vegetable crops between its existing Aldergrove facility and the acquired facility in Delta. SunSelect is currently a producer of greenhouse peppers, and will add tomatoes and cucumbers when it expands its total acreage. SunSelect presented evidence that it had the skills, resources and go to market plan to produce and market quality, food safe, cucumbers.
18. SunSelect also plans to become a shareholder in Global and to market its greenhouse vegetables through this Agency. SunSelect's marketing plan is to contract exclusively with Oppenheimer to market its production. Oppenheimer appeared at the Hearing in support of SunSelect and presented its view of the greenhouse vegetable market, with particular reference to opportunities in the cucumber segment, together with its plan for marketing the increased production planned by SunSelect.
19. SunSelect's plan for 2007 is to produce one cucumber crop on 10 acres (41,328 m<sup>2</sup>) rather than the typical three (3) crops produced in most B.C. cucumber houses each year. This crop would be marketed in the August to November timeframe. SunSelect plans to produce 10 acres (41,328 m<sup>2</sup>) of beefsteak tomatoes. The remaining 20 acres (82,656 m<sup>2</sup>) of the facility will be unused in 2007. SunSelect also plans to make certain upgrades to the facility over 2007 and 2008.
20. SunSelect's position is that an additional 10 acres of cucumbers in 2007 is insignificant in the North American market context, and therefore it would not have any disruptive market impact nor would it negatively impact B.C. cucumber growers' net returns. This position was supported by market analysis presented by Oppenheimer, SunSelect's chosen market channel. Specifically, Oppenheimer stated that more cucumbers were needed by it for 2007 programs, and that a portion of this increased requirement had only come to light in February 2007. If Oppenheimer is unsuccessful in obtaining an increased supply it will have to short customer requirements which would have a negative impact on market growth and the credibility of BC suppliers to serve important markets in the U.S.

21. SunSelect countered the statements regarding possible lower prices from the increased supply by stating that it was in Oppenheimer's interest to ensure growers supplying it were well treated and received adequate returns to sustain their business. Accordingly, the request for additional cucumber production in 2007 was very carefully considered in light of existing Oppenheimer's contract requirements.
22. SunSelect is planning to finalize a purchase proposal with the Receiver-Manager that can be put before the Court for approval. SunSelect seeks to have conditional approvals from the Commission as part of its proposal. In the event that SunSelect is unsuccessful in acquiring the facility, the conditional approvals would terminate.

### 3.2 Hot House Foods Inc.'s Position

23. Hot House informed the Commission that it opposes the Applicant's request for two reasons. Firstly, the applicant is not the licensed holder of the Production Allocation. Secondly, the proposed timing of cucumber production will put additional product on the market when field supplies are heavy in the market and prices are traditionally low. This will negatively impact the net grower return of all existing B.C. cucumber producers.
24. Hot House stated that it has made its 2007 marketing plans for cucumbers on the basis of what it understood to be the local supply for 2007. Any increased supply in the local market during the late summer due to non-exportability would have a serious impact on net grower returns of Hot House's producers.

### 3.3 Country Fresh Produce Inc.'s Position.

25. Country Fresh raised two (2) concerns for the increased 2007 production. First, acceptance of long English cucumbers in the U.S. market has been slow to develop despite a number of marketers, including Oppenheimer, doing a good job to develop the segment. Secondly, non-exportability generally occurs at some point in a crop's life cycle resulting in the product only being salable in the Canadian market which can have a devastating impact on net grower returns.
26. Country Fresh is presently a supplier of cucumbers to Oppenheimer. The cucumber producers in Country Fresh believed they had an arrangement with Oppenheimer that they would be provided the first opportunity to meet the marketer's expanded requirements. Country Fresh was not aware of any formal requests by Oppenheimer for increased cucumber production for 2007.
27. Country Fresh found itself in the awkward position of opposing the increased production for its exclusive marketer, Oppenheimer. Country Fresh and SunSelect both advised that there had been some discussions concerning SunSelect shipping through the Country Fresh Agency but that these discussions did not result in any agreements.

#### 3.4 Greenhouse Grown Foods Inc.

28. Greenhouse Grown (GGFI) stated that SunSelect's application for additional cucumber acreage for 2007 is a threat to B.C. producers for several reasons.
29. GGFI stated that the timing of production would be difficult for other producers who depend on the latter part of the year to make a return. Cucumbers are more regionally sensitive than tomatoes or peppers since they are more susceptible to product deterioration when shipped long distances, particularly in summer. Therefore, increased local supplies have a larger impact in the case of cucumbers than tomatoes or peppers.
30. GGFI stated that market penetration by long English cucumbers is much better developed in Canada than the U.S. In GGFI's experience, retailer interest is not the same as consumer demand. As a result, any extra product, whether from lack of consumer uptake or temporary periods of non-exportability will end up in the local market resulting in downward price pressure.
31. GGFI is concerned for cucumber growers' returns, particularly in light of the past two years and the low light levels year to date which has resulted in lower production compared to prior years. GGFI pointed out that when a large producer substantially increased cucumber production in B.C. in 2005, the returns received by growers that year were very poor and resulted in losses.
32. GGFI noted that there is an inconsistency with SunSelect applying with Global sponsorship when the Country Fresh Agency had represented itself at the Agency Hearings in 2005 to be the Agency that would bring together growers to supply Oppenheimer. In GGFI's opinion, if SunSelect is successful shipping exclusively to Oppenheimer through Global the situation will result in dysfunctional competition among producers as potentially witnessed by Country Fresh opposing SunSelect's application for additional cucumber area for 2007.

#### 3.5 Intervener - Stephan Lam – Evergrow Greenhouses Ltd.

33. Mr. Lam expressed concern about increasing supply of Long English cucumbers in early to mid-August. In Mr. Lam's experience, growing cucumbers during the hotter summer periods often results in growers having to utilize crop protection chemicals that result in the product being non-exportable for a period of time. This leads to local market disruption and lower prices. Mr. Lam expressed concern that the Applicant has experience producing greenhouse bell peppers, but not so for Long English cucumbers.
34. Mr. Lam shared with the Hearing his returns from cucumbers in 2005 and 2006. He advised that such returns were not adequate to sustain his business, and questioned how additional local area could be approved in light of producers' inadequate returns.

## 4 Commission Findings

### 4.1 The Conditional Approval Question

35. The matter before the Commission involves a non-compliant licensed Producer (BC Veg) being in receivership and a potential purchaser (SunSelect) of the non-complaint Producer's assets seeking conditional approvals from the Commission to secure its regulatory approvals prior to acquiring the assets.
36. If a greenhouse gets in financial difficulty and goes through some form of court supervised reorganization, there will be pressure on the Commission to provide interested parties comfort that they will be licensed and authorized to produce according to a plan.
37. If the Commission provides such conditional approval it is put in the position of assessing a prospective purchaser's plans and capabilities a priori. While this is not unlike the process of issuing new Production Allocation for new construction, it has one significant difference.
38. When a person seeks to build a new facility or expand an existing facility, they develop their plans without the sort of competition that can arise among potential buyers seeking to purchase an existing facility, particularly in a receivership or other form of court supervised disposal. Accordingly, by providing conditional approval to one party rather than a blanket approval for all prospective purchasers, the Commission could be providing the approved party an advantage over other parties.
39. The Commission could decline to provide any a priori approvals, thereby putting all prospective purchasers on the same footing. This would have the effect of putting the successful purchaser at some risk of not being authorized to produce as it planned, thereby potentially impacting the price of the fixed assets.
40. Alternatively, the Commission could provide a blanket approval to all prospective purchasers. In simple terms this could be an a priori approval to transfer the existing Production Allocation to the successful purchaser. This a priori blanket approval would, in itself, be straightforward and fair for all parties.
41. The General Order<sup>3</sup> provides that the Production Allocation is assigned to a Person<sup>4</sup> rather than a facility. Since the sale of assets separates the Person from the facility, the

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<sup>3</sup> See Part XVIII of the General Order – Procedures for Assigning Production Allocations for Greenhouse Crops – All Districts.

<sup>4</sup> In Part I, Section 5 of the General Order, Person is defined as including “an individual, firm, partnership, corporation, association, sole proprietorship, or any other entity specified by the Commission.

Commission approves the transfer from one Person to another separately from the assets.

42. In this case, the Person, BC Veg, is not in compliance with the Commission. If a transfer was approved, whether before or at the time of the facility sale, the Commission would be approving a transfer to facilitate a sale for a Person who owes the Commission, and therefore all growers in the province, a considerable amount of money. Unless and until the Commission receives the full payment of all outstanding amounts owed to it by BC Veg, it will decline to authorize the transfer of the assigned Production Allocation held by BC Veg. This puts any potential acquirer of the fixed assets in the position of either paying the amounts owing by BC Veg to secure the transfer of the Production Allocation or applying for new Production Allocation.<sup>5</sup>
43. Typically new Production Allocation is assigned to a Producer planning to build new facilities or expand existing facilities. The lead times in these cases are normally 18+ months providing all parties the opportunity to adapt and respond to the new capacity and changing market relationships. If SunSelect or any other potential acquirer of the facility applied for new Production Allocation for the BC Veg facilities, and sought to have part or all of the facility in operation for 2007, the same questions concerning crop mix and impact on existing producers would arise as in the case of a Production Allocation transfer.

#### 4.2 The Cucumber Question

44. With the Commission's denial to transfer BC Veg's Production Allocation unless and until the Commission receives the amounts owing to it from BC Veg, the question of conditional approval to change a portion of this Production Allocation from tomatoes to cucumbers need not, in some respects, be addressed. Nevertheless, should SunSelect or any other party seek to acquire the fixed assets of BC Veg and apply for new Production Allocation as part of the acquisition, the question of product mix might once again arise.
45. The facility has been used to produce tomatoes, but could, according to SunSelect, be readily adapted for cucumbers and peppers as well. SunSelect wishes to produce long English cucumbers in a portion of the facility in the latter half of 2007. At the time of the Hearing it is already late March and B.C. production and marketing of cucumbers is well into the annual crop cycle which involves, among other things, interplanting and up to three (3) crops per facility each year. SunSelect is targeting the third (3<sup>rd</sup>) crop timeframe. Typically cucumber prices reach a low point in August when field supply is abundant, and then rise to attractive levels in the fall.
46. Cucumbers produced in BC have a complicating factor when compared with tomatoes or peppers. At certain times producers utilize crop protection chemicals that are not

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<sup>5</sup> See Part XVIII, Section 8 – 11 of the General Order.

- authorized in the U.S. This results in the output being non-exportable for a period of time. The product is then marketed in the Canadian market until production from the facility is once again exportable. If a number of producers are non-exportable at the same time, prices in the Canadian market can drop precipitously. Moreover, as presented by GGFI, cucumbers can be more difficult to transport long distances resulting in a greater regional dynamic to cucumber markets than to tomato or pepper markets.
47. If only a small amount of the local production was non-exportable at any one time, it would be possible for marketers to shift volumes around and supply the local markets in a manner that would not cause disruption. However, if the local marketers failed to cooperate, or were aggressively competitive with one another, one Agency might be impacted disproportionately and unfairly due to the non-exportability of producers serving other Agencies. The Commission is aware of competitive issues between certain Agencies / Marketers, and some which specifically involve SunSelect, Oppenheimer, Country Fresh and Hot House.
48. The Commission is supportive of initiatives to expand the market and serve growing demand. There is some agreement among the Agencies that the cucumber market is underdeveloped and could deliver growth for producers and marketers. This attractiveness has been apparent for a number of years but adoption of long English cucumbers by U.S. consumers has been slow. SunSelect has reason to believe that adoption and penetration may accelerate in the coming year or two, and it wishes to have a part in serving the increased demand. This does not, however, over-ride or set aside the concerns for local market disruption that could occur if SunSelect's proposed production were to become non-exportable for a period of time.
49. The Commission agrees with SunSelect that 10 acres is a relatively modest amount of production in the North American context. Nevertheless, due to the non-exportability potential an additional 10 acres in the late summer / early fall there could be a material impact on net grower returns of all B.C. cucumber producers. Among the ways such an impact could be mitigated would be to decline the additional production for 2007 or to apply certain restrictions limiting the amount of SunSelect production that could be sold in Western Canada regardless of exportability.
50. Imposing shipment restrictions could pose some challenges since SunSelect proposes to market exclusively to Oppenheimer through Global rather than Country Fresh. No information was provided by SunSelect or Oppenheimer concerning how SunSelect's cucumbers would be pooled or not with other cucumber suppliers to Oppenheimer through Country Fresh. Moreover, the Commission has had difficulties with SunSelect / Oppenheimer in the past two (2) years getting adequate response and information concerning SunSelect's pepper shipments as well as the sharing of market information, allegedly due to competitive concerns between Oppenheimer and other B.C. marketers. These are matters that would have to be discussed and resolved prior to any consideration of new Production Allocation that would be intended for shipment by SunSelect exclusively to Oppenheimer through any Agency.

## 5 Commission Decision

51. The application by BC Veg and SunSelect to transfer 165,312 m2 of tomato Production Allocation from BC Veg to SunSelect is denied.
52. The application for conditional approval to shift 41,328 m2 of the above noted tomato Production Allocation to 41,328m2 of Long English cucumbers is denied.
53. The Commission makes no decision concerning the deferral and preservation of the above noted Production Allocation unused by SunSelect in 2007 since the transfer is denied.



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George Leroux, Chair

The decision date is April 2, 2007