

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

Decision Regarding Vancouver Island Produce Inc. Ceasing The Price Pooling Of Russet Potatoes As Ordered By Special Order 11-01, As Amended

COMMISSION PANEL:

George Leroux, Chair
Linda Delli Santi, Member
Tom Reinhart, Member
Doug Gourley, Member
Hugh Reynolds, Member
Tom Demma, Registrar

PETITIONER:

John Walsh,
Echo Valley Farms

RESPONDENTS:

Lloyd Hiebert, President,
Vancouver Island Produce Inc.
Robert Sieffert,
Lazo Tyee Farms Ltd.
James LeGrand,
Comox Valley Farms Ltd.

1 Issue Requiring Decision

1. Price Pooling of russet potatoes for producers shipping through Vancouver Island Produce Inc. (VIP) was ordered by the British Columbia Vegetable Marketing Commission (“the Commission”) in November 2001.
2. Special Order 11-01, which ordered price pooling of russet potatoes by VIP, was amended by the Commission in February 2002, November 2002 and April 2004. Special Order 11-01, as amended remains in force.
3. The Commission understands that VIP has ceased price pooling of russet potatoes in contravention of Special Order 11-01 and the General Order.
4. The Commission is to determine whether a penalty is to be assessed against VIP for taking a unilateral action causing it to be not in compliance with Special Order 11-01.

2 Background

5. Price pooling of russet potatoes at VIP was first ordered by the Commission in November 2001 following investigations by Commission staff and directors.

6. The Commission ordered price pooling so that all producers received similar returns for the total volume of russet potatoes marketed annually. The investigation conducted by the Commission prior to November 2001 indicated that monthly and annual returns experienced by the grower group were variable. Equalization resulted in outcomes where each producer received the same price for russet potatoes marketed.
7. In November 2001 there were 7 producers marketing potatoes through VIP while in November 2007 there were 6 producers actively shipping.
8. During the 2005-2006 crop year VIP marketed a total of 5,068 tons of all varieties and types of potatoes and during the 2006-2007 crop year 3,189 tons were marketed. VIP gears its marketing efforts exclusively to "Island Grown." It does not bring in potatoes from other growing areas, whether BC or elsewhere. When VIP exhausts its local potato supply, typically in the spring, it ends marketing.
9. On January 9, 2007 the directors of VIP passed a motion that VIP would cease pooling russet potatoes effective October 1, 2007. This motion was passed by the VIP directors in attendance. The vote outcome was 3 voting for the motion and 1 against.
10. On or about March 9, 2007, the President of VIP, Lloyd Hiebert, wrote to John Walsh informing that pooling of russet potatoes would cease, effective immediately. The reason given was that John Walsh allegedly packed white potatoes in packaging labeled russet potatoes thereby damaging VIP's reputation with customers and bringing about a disruption to the russet pool. This disruption occurred because the white potatoes marketed as russets would be wrongfully included in the russet pool.
11. On learning of the VIP action to cease the pooling of russet potatoes John Walsh informed the Commission of the VIP decision to discontinue the price pooling of russet potatoes and registered his objection to the cessation of pooling.
12. The Commission worked with VIP and its producers during the late spring of 2007 and throughout the planning and harvesting season for the purpose of finding a resolution to the problems that caused 3 of VIP's producers, who are also directors of VIP, to be opposed to pooling and one to be in favour.
13. The Commission actions included the circulation of correspondence, exchanges of emails and the holding of a telephone conference call.
14. Upon determining that a resolution to the problems surrounding pooling at VIP could not be solved by mediation, the Commission issued notice of Hearing on November 1, 2007 for a Hearing to be held in Nanaimo on November 16, 2007.

3 Hearing

15. Relying on the planted area survey information reported to the Commission by VIP, Messrs Hiebert, LeGrand and Sieffert, three of the 6 potato producers shipping through VIP represent approximately 66% of VIP's 2007-08 potato acreage and 57 % of russet potato acreage area for the same period.

16. John Walsh, who opposes the cessation of russet price pooling by VIP represents 26.5% of VIP's 2007-08 potato acreage and 32% of its russet potato acreage for the same period.
17. Mr. Hiebert informed the Panel that the VIP Board had determined in January 2007 to consider the ceasing of pooling effective October 2007. On March 9, 2007 Mr. Hiebert informed Mr. Walsh that pooling would be terminated effective February 1, 2007. Mr. Hiebert advised Mr. Walsh that the reason for terminating pooling earlier than previously approved by motion of the Board of VIP was that VIP had received a customer complaint that one of its producers, John Walsh, had shipped white potatoes in russet labeled bags.
18. Mr. Walsh informed the Panel that he had indeed packed approximately 5 to 6 tons of white potatoes as russets. Mr. Walsh advised the Panel that he had discussed packing white potatoes in this fashion with the General Manager of VIP, Jaymie Collins, who allegedly said "let's try it and see what happens."
19. Mr. Collins was not present at the Hearing to respond to John Walsh's allegation. The Panel asked Mr. Hiebert why their General Manager did not attend the Hearing. Mr. Hiebert replied the Mr. Collins felt he could not really assist the producers in their dispute over pooling and that "his attendance would likely do more harm than good."
20. The Panel asked why there was opposition to pooling. Mr. LeGrand and Mr. Sieffert informed the Panel that they felt price pooling led to mediocrity, provided no incentive to aim at premium quality or specialty segments, and resulted in high quality producers subsidizing poor quality producers. Mr. Hiebert informed the Panel that pooling resulted in return inequities due to the influence of different freight programs involving VIP customers and the 6 potato producers.
21. The Panel enquired about the freight programs. Mr. Hiebert advised certain VIP customers, the most important being Thrifty's, picked up potatoes at the farmer's warehouse while other customers required delivery to the store or the store's warehouse. What's more, each producer has different routes and customers that they deliver directly. This results in different annual freight costs for each producer. The Commission Special Order 11-01, as amended, excluded freight and consequently freight is not considered when VIP performs pooling calculations.
22. According to Hiebert, LeGrand and Sieffert the crux of the freight argument is that John Walsh is receiving a marketing cost advantage since he markets a significant volume to Thrifty's f.o.b. his warehouse. For sales f.o.b. the customer dock the producer incurs and bears freight costs. Mr. Hiebert informed that Mr. Walsh has a higher proportion of his shipments made to Thrifty's than do other VIP producers.
23. Mr. Hiebert indicated that a possible solution would be to pool freight. This would mean producers delivering direct would receive a credit equivalent to commercial carrier rates when they deliver using their own trucks.

24. Mr. Walsh informed the Panel that shipping to Thrifty's required extra effort and cost. Thrifty's orders include count size packaging and they often over-order. Count sizing requires extra effort and equipment which, of the VIP producers, only John Walsh provides for customers. Product returns incur re-packaging costs. Mr. Walsh also pointed out that all VIP producers shipped to Thrifty's meaning all shared the freight cost advantage if, in fact, there was one.
25. The Panel asked why pooling should be done in VIP. Mr. Walsh informed the Panel that VIP producers focused on Vancouver Island markets. They all sell through the same sales desk, operated by their General Manager, Jaymie Collins. Mr. Collins takes all orders and allocates them to the individual producers. His task of allocation is made more difficult by some customers declining product from certain producers. According to Mr. Walsh, russet potato price pooling is necessary for ensuring that each producer receives a fair share of market returns when all share the same market, customer base and sales desk. In the absence of pooling, there is the possibility that certain producers will be allocated a higher proportion of higher margin accounts or that some producers may not be able to supply certain services, sizes or delivery dates, both which provide the potential for inequities
26. The Panel asked about decision-making and governance at VIP. The Panel was informed that Jaymie Collins was the General Manager and Sales Manager, and he operated from his home office in Courtenay. Karen Crawford is the bookkeeper and operates from her Nanaimo home office. Mr. Collins makes all decisions concerning sales including allocation of orders to individual growers. Lloyd Hiebert is the President of VIP and Messrs. Sieffert, LeGrand and Walsh are directors. The VIP directors meet as required. The last VIP meeting was held in July 2007.
27. In summary, Mr. Hiebert felt that pooling was unnecessary, had never been the intent of VIP since the outset, was an administrative burden, and simply led to conflict among the members of VIP. Mr. Walsh felt that pooling was necessary to equalize between growers on the basis of a single sales desk and shared market and customer base.

4 Other Matters

28. During the Hearing, the Panel addressed the marketing of Kennebec potatoes. By custom and agreement there has been an established Kennebec potato price difference between District I and other districts. VIP did not maintain this difference during the 2006-07 crop year, nor has it respected the customary difference at the start of the 2007-08 crop year.
29. Kennebec potato marketing is geared primarily for customers making fresh cut French fries on the end user's premises.
30. The erosion of the district price differential for Kennebec potatoes has now become a friction point among the storage crop Designated Agencies and has developed into a matter where orderly marketing is being challenged. There is concern that producer returns may be diminished because of inter-agency competition.

5 Commission Findings

31. The Panel was informed that consistent with Special Order 11-01, as amended, on October 1, 2006 VIP commenced with price pooling for the 2006-2007 crop year. Following the January 9, 2007 VIP decision to “remove pooling for the 2007 crop year and that it should be reviewed prior to the 2007 AGM,” Mr. Hiebert informed John Walsh on March 9, 2007 that pooling had been terminated retroactively and retrospectively as of February 1, 2007. No further price pools were conducted after the completion of the January 2007 pool; however, producers did have a supply of russet potatoes that when sold would have been included in subsequent pools.

5.1 Non-Compliance with Special Order 11-01

32. The Commission finds that the end of russet price pooling occurring in February 2007 disadvantaged one if not more VIP russet potato producers. The extent of this disadvantage expressed in monetary terms cannot be accurately quantified nor verified given the information made available to the Panel. Nonetheless, the termination of pooling causes VIP not to be in compliance with Special Order 11-01 and the General Order.

33. The January 9, 2007 motion of VIP directors entertaining the cessation of pooling exceeds the authority sub-delegated to it by the Commission and as such results in a General Order compliance infraction.

5.2 Non-compliance with Labeling

34. The marketing of white potatoes in packaging labeled russet potatoes is inconsistent with good marketing practices and if, in the future, this practice continues it could attract the attention of federal or provincial government regulators overseeing produce grade and labeling.

35. Purposeful mislabeling, whether done by a producer or a producer in coordination with an agency, can cause serious damage to the entire British Columbia storage crop sector.

5.3 Product Quality

36. Other than the admitted one instance of mislabeling when white potatoes were packed into russet bags, which is contrary to section 2 of Part VIII – *Grading and Packing* – of the General Order, there was no evidence provided to the Panel concerning quality differences between the producers. There was the statement that certain customers preferred certain growers and/or product grading that not all growers could provide, and that certain customers declined to receive product from certain growers. Nevertheless, no substantive product quality data or information was provided to the Panel in this regard.

37. Moreover, the absence from the Hearing of the General Manager, who could have shed more light on this aspect of the dispute and actions taken to remedy quality problems, makes it impossible for the Panel to use quality differences in reaching a decision.

5.4 Freight

38. During the Hearing, the Panel was informed that producers had differential freight costs depending upon which VIP customer's orders they are allocated to fill. The contention was raised that Mr. Walsh is the primary beneficiary of orders priced f.o.b. farm warehouse. At the same time, Mr. Walsh is the only VIP producer who can fill Thrifty's count size russet orders.
39. Mr. Heibert provided freight savings estimates pertaining to the number of Thrifty's orders Mr. Walsh filled. Mr. Walsh contends that filling the Thrifty's orders has other attendant costs, such as grading, sizing, and repackaging, which make the freight savings more perceived than real.
40. It is a natural marketing outcome that more Thrifty's orders are serviced by Mr. Walsh compared to other growers due to the services he provides. The Panel had insufficient information to adequately assess whether there was really a freight cost advantage to Mr. Walsh due to, among other things, comparative pricing data, increased costs of servicing Thrifty's, and volumes delivered to Thrifty's by other VIP growers.
41. Price pooling requires reliable and accurate record keeping which can be easily accomplished using a basic accounting system. Freight pooling, however, is a much different matter. VIP producers all ship direct from their farms (i.e. there is no central warehouse). Some orders are picked up by the customer or commercial carriers while others are delivered directly by the producer. The host of delivery options and the variances in deliveries between producers would require additional recordkeeping that would include, among other things, allocations and estimates. The value and reliability of freight pooling would be questionable for VIP's producers.

5.5 Agency Governance

42. VIP has Board meetings and holds an annual meeting. Meetings of directors are infrequent. The Annual General Meeting, which is attended by both potato and greenhouse vegetable producers, is held once a year. The VIP Board is comprised entirely of storage crop producers despite a significant and growing proportion of VIP sales are greenhouse vegetables.
43. The producers appearing before the Panel, being all the directors of VIP, demonstrated neither a thorough nor shared understanding of Agency governance. Matters such as procedures for holding meetings, agendas, recording Board decisions, and their management and fiduciary responsibilities as directors were not clearly communicated to the Panel.

6 Commission Decision

44. The Commission orders that russet price pooling is to continue in effect as at October 1, 2007 and until such time that the Commission orders its end. Accordingly, Special Order 11-01 has force and effect and cannot be altered or amended without a Commission decision. Monthly equalization payments are to be calculated. Equalization funds are to be held "in trust" by VIP until distribution is approved by the Commission.
45. The Commission orders that VIP complete a thorough analysis of all sales by each producer and all payments to each producer for the crop years October 2005 to September 2006 and October 2006 to September 2007. The intent of the analysis is to determine the differences in net grower return exclusive of freight by producer. The analysis is to show, on a monthly basis by producer, shipments by product category (weight), receipts (sales dollars), charges and claims. Product categories are to be separate, at a minimum, varieties, count sizes and grades. Before undertaking the analysis, VIP's accountant assigned to the task is to contact the Commission to discuss the data available and the planned approach to the analysis. This analysis is to be completed and submitted to the Commission by February 20, 2008.
46. Having regard to the mislabeling matter, the Commission determines that the Class I Producer License issued to John Walsh, dba Echo Valley Farms, is immediately cancelled. On the Commission receiving payment in the appropriate amount within 10 days of Mr. Walsh receiving such notice for payment a Class II producer license expiring May 14, 2008 is to be issued. Further, should the appropriate annual Class II license fee not be received by the Commission before the deadline for doing so a Class III annual Producer License expiring May 14, 2008 is to apply and is to be issued on receipt by the Commission of the appropriate annual Class III license fee.
47. Subject to complying with what is set out in section 46, and as provided for in Section 7 of Part IV – *Licensing* – of the General Order, for the May 15, 2008 – May 14, 2009 licensing period John Walsh is to have issued to him a Class II or Class III Producer License.
48. Subject to complying with what is set out in section 46 the next lower class of annual Producer License to be available to Mr. Walsh is one that is to have effect for the May 15, 2009 – May 14, 2010 licensing period.
49. Having regard to the pooling matters, the Commission determines that the annual Class I Designated Agency License issued to VIP is cancelled immediately. On the Commission receiving from VIP the appropriate annual license fee within 10 days of it receiving such notice a Class II Designated Agency license expiring March 1, 2008 is to be issued. Further, should the appropriate annual Class II Designated Agency license fee not be received by the Commission before the deadline for doing so a Class III annual Designated Agency license expiring March 1, 2008 is to apply and be issued on receipt by the Commission of the appropriated annual Class III license fee.

50. Subject to complying with what is set out in section 49 the next lower class of annual Designated Agency License to be available to Vancouver Island Produce Inc. is one that is to have effect for the March 2, 2009 – March 1, 2010 licensing period.
51. The Commission determines that pursuant to Sections 10 - 16 of Part XIV – *Procedures for Designation of Agencies* – of the General Order, an Agency review for the purpose of assessing, among other things, governance, decision making, and recordkeeping of VIP is to occur.

Issued this 9th day of January 2008 at Surrey, British Columbia



George Leroux, Chair
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION