

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***BC Vegetable Greenhouse I, L.P. et al v.
British Columbia Marketing Board,***
2005 BCCA 476

Date: 20050923

Docket: CA031329

Between:

**BC Vegetable Greenhouse I, L.P., South Alder Greenhouses Ltd., and
Merom Farms Ltd.**

Appellants

**British Columbia Marketing Board and
British Columbia Vegetable Marketing Commission**

Respondents

And

Topgro Greenhouses Ltd.

Respondent

- and -

Between:

B.C. Hothouse Foods Inc.

Respondent

And

**BC Vegetable Greenhouse I, L.P., South Alder Greenhouses Ltd., and
Merom Farms Ltd.**

Appellants

And

Topgro Greenhouses Ltd.

Respondent

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Braidwood

Oral Reasons for Judgment

C.H. Harvey, Q.C.	Counsel for the Appellants
J.P. Taylor, Q.C. and M.G. Hulstein	Counsel for the Respondent B.C. Hothouse Foods Inc.
F.A.V. Falzon	Counsel for the Respondent B.C. Marketing Board
M. Morellato and R.W. Millen	Counsel for B.C. Vegetable Marketing Commission
Place and Dates:	Vancouver, British Columbia September 21, 22 and 23, 2005

[1] **NEWBURY J.A.:** We have received very lengthy – perhaps too lengthy – submissions over three days in these appeals from Mr. Justice Drost's orders dated October 1, 2003. His reasons are indexed as 2003 BCSC 1508 and I do not propose to rehearse them since it is doubtful they will be of interest to persons other than the parties and other sophisticated persons in the industry. Nor do I intend to describe the many, many cases and statutes to which we were referred, since I do not view the appeals as turning on law which is in doubt. Rather, it turns on the applicability of clear rules to facts that are not in dispute. I propose simply to state in my words the conclusions I have reached without citing a great deal of law, and without deciding issues that are not required to be decided to dispose of the appeals. Counsel may be disappointed in this, but the upside for them is perhaps that the arguments may be made again another day.

[2] My conclusions are as follows.

(1) Whether or not the Commission had the authority to affect or cancel or vary the GMAs, and in particular the covenant of exclusive dealing, it did not purport or intend to do so. It left the question of the effect, if any, of the "Agency Decision" (as defined in the appellant's factum) on the GMAs to be determined in accordance with their terms. This disposition was upheld, as it were, by the Board.

(2) Mr. Harvey and Mr. Taylor have agreed that since we have received full argument on the point, this court should decide the issue rather than leaving it to be argued again before arbitrator under the GMAs. In my view, the Agency Decision did not "render unenforceable" the covenants in those agreements requiring the appellants to market exclusively through Hot House. I say this accepting Mr. Harvey's argument that it is unlikely Hot House could have obtain injunctive relief against Global's marketing activities. That is not determinative of the issue. For one thing, as Mr. Taylor notes, none of the appellants were parties to Global's agency application. But more importantly, there is no doctrine of law short of the law of frustration of contract or illegality which have the effect of somehow rendering a term in a private law contract "inoperative". This is not a situation where a statute requires the appellants to do one thing but a contract prohibits that thing. The Agency Decision gave the Global shareholders the right to market tomatoes outside the territory of Western Canada and the I-5 corridor. Indirectly, this gave the appellants a "right or option" (as Mr. Harvey acknowledged) to sell tomatoes to Global for that market. But the Commission did so subject to the express understanding, as I have already noted, that "any existing GMA must be determined in accordance with its terms unless the parties to the GMA reach another agreement".

(3) Equally important, the appellants were under no compulsion to market through Global. Thus they were not required by the new decision to breach their existing new contracts. If Hot House seeks damages under the GMAs, that will not defeat the marketing policy of the Commission as alleged. It will only make it more expensive for the appellants for a two-year period. It follows in

my view that the dispute as to the effect of the appellants' alleged breach of the GMAs stands to be determined by the arbitrator under those agreements. I therefore see no error in the trial judge's conclusion on this point and would dismiss this aspect of the appeal.

(4) Turning next to the levy question, I am of the view that an order distributing the costs and expenses associated with the U.S. anti-dumping investigation does not invade the trade and commerce power of the federal government. The question of course is the object or purpose of the provincial scheme. Incidental effects on markets outside the province are not fatal if the pith and substance remain of provincial concern. The order must be looked at for this purpose in the context of the whole scheme, not in isolation. Looking at it this way, I conclude that order 08/01 was constitutionally valid. Its object or purpose was to deal with the costs of a legal endeavour undertaken to benefit B.C. producers.

(5) The appellants also question whether there was statutory authority to make the two levy orders, 08/01 dated August 15/01 and 09/02 dated September 18/02. (In between these dates, of course, the federal government amended the B.C. Vegetable order to add a new section 4 referring to levies.) I believe there was such authority in s. 11(1)(o) of the **Natural Products Marketing Act** (B.C.) R.S.B.C. 1996, c. 330, either subparagraph (i) or (ii) or both. This power was conferred on the Commission by s. 4(2) and perhaps 4(1) of the Vegetable Scheme, B.C. Reg. 96/80.

(6) If I am wrong on the *vires* issue, then the federal order SOR 81-49 entitled "B.C. Vegetable Order" effectively gives the Commission for federal purposes "all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within the province and the provincial plan." In the result, this aspect of the second appeal must also fail.

(7) The final issue was that of retrospectivity. I cannot agree with Mr. Harvey that the second levy order is retrospective. (As to meaning of "retrospective" and "retroactive" legislation, reference may be made to Mr. Justice Lambert's dissenting reasons in **Johnstone v. Wright** 2002 BCCA 406 (later adopted by a five-person panel of this court in **Wiest v. Middelkamp** (2002), 1 B.C.L.R. (4th) 328) (BCCA), and to my judgment in **B.C. Hydro and Power Authority v. B.C. Environmental Appeal Board** 2003 BCCA 436, 229 DLR (4th) 1, later overturned on a different point by the Supreme Court of Canada.) In my view, the levy order did not "look to the past and attach new consequences to a completed transaction" (*per* Driedger, 2nd ed., **Construction of Statutes**, at 186). Producers of tomatoes in the 2002 year had the levy imposed on them in that year. No books had to be "reopened". The allocation of the levies was based on production in the previous year, but this was merely a method of calculating the fair allocation. It did not mean that a person who had produced in 2001 but not in 2002 became liable for the levy. The charge was exacted from current production and became a debt due in 2002. It did not interfere with a vested right or change the consequences of a completed transaction.

[3] In the result I would also dismiss this final aspect of the appeal.

[4] **RYAN J.A.:** I agree. The appeals are dismissed.

[5] **BRAIDWOOD J.A.:** I agree.

"The Honourable Madam Justice Newbury"

Correction: 8 November 2005

The list of Counsel has been corrected and should read as follows:

C.H. Harvey, Q.C.

Counsel for the Appellants

J.P. Taylor, Q.C. and
M.G. Hulstein

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Marketing Board

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