

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION CONCERNING AN EXEMPTION FROM
MARKETING THROUGH A DESIGNATED AGENCY

BETWEEN:

WINDSET GREENHOUSES (LADNER) LTD. and
WINDSET GREENHOUSES LIMITED PARTNERSHIP LTD.

APPELLANTS

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC HOT HOUSE FOODS INC.

INTERVENOR

DECISION

APPEARANCES:

For the
British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Mr. Hamish Bruce, Member
Ms. Satwinder Bains, Member
Mr. Richard Bullock, Member

For the Appellants

Mr. Darrell Roberts, Q.C., Counsel

For the Respondent

Ms. Lisa Hynes, Counsel

For the Intervenor

Mr. Jim Taylor, Q.C., Counsel

Date of Hearing

March 1, 2002

Place of Hearing

Surrey, British Columbia

INTRODUCTION:

1. On November 28, 2001, the Appellants, Windset Greenhouses (Ladner) Ltd. and Windset Greenhouses Limited Partnership Ltd. (“Windset”) applied to the British Columbia Vegetable Marketing Commission (the “Vegetable Commission”) for an exemption from marketing greenhouse tomatoes through BC Hot House Foods Inc. (“BC Hot House”).
2. On January 7-8, 2002, the Vegetable Commission held a 2-day hearing with respect to Windset’s exemption application.
3. On January 14, 2002, the Vegetable Commission issued its decision. The Vegetable Commission exempted Windset from the requirement to market its regulated greenhouse tomatoes through an agency designated by the Vegetable Commission for the 2002 crop season. This exemption is subject to review in October 2002, and is also subject to certain conditions.
4. On January 16, 2002, Windset appealed the decision of the Vegetable Commission, taking issue with the conditions upon which the exemption was granted. BC Hot House was granted intervenor status on the appeal.
5. As a result of a mediation process entered into between Windset, BC Hot House and the Vegetable Commission, the parties were able to resolve all but one issue regarding those conditions.
6. On March 1, 2002, the British Columbia Marketing Board (the “BCMB”) heard Windset’s appeal with respect to the remaining issue. Given concerns raised by the Vegetable Commission regarding the sensitivity of certain evidence it received *in camera* and contained in the transcript of its proceedings, and the sensitivity of some of the evidence of Mr. Murray Driediger, General Manager of the Vegetable Commission, the BCMB’s hearing was conducted *in camera*.

ISSUE:

7. Windset seeks the following order:
 1. The condition contained in paragraph 40(c) of the Vegetable Commission’s Revised Decision and Findings dated February 27, 2002, which provides:

All Campari TOV produced by Windset in the 2002 crop year, must be marketed through BC Hot House, unless the Commission is advised by BC Hot House that it does not require any or all of that production.
- be deleted.

2. Alternatively, that condition 40(c) above be replaced by the following:

Windset will make available Campari TOV to BC Hot House through Mastronardi or its other agents in year 2002 to enable BC Hot House to service its customers until such time as BC Hot House develops another source of Campari production, this condition to be reviewed at the end of year 2002.

FACTS

8. Windset's application for exemption from marketing through BC Hot House arises in the context of a preliminary determination by the US Department of Commerce (the "DOC") that Canada had been selling greenhouse tomatoes at less than fair value during the period of investigation (January 1, 2000 through December 31, 2000).
9. As a result of its investigations, the DOC imposed preliminary duties against exporters of greenhouse tomatoes from Canada. BC Hot House, then the sole designated agency through which greenhouse tomatoes in District I and II (the Lower Mainland and Vancouver Island) of British Columbia were marketed, was assessed a preliminary duty of 33.95%. The preliminary duties assessed against four exporters in Ontario ranged from a low end of 0%, 2.45% and 5.54% to a high of 23.17%. One of these exporters, Mastronardi Produce Ltd. ("Mastronardi") out of Leamington, Ontario was assessed a preliminary duty of 5.54%.
10. In its application for an exemption before the Vegetable Commission, Windset proposed to use Mastronardi as its marketing agent if its application was granted.
11. Windset is a greenhouse operation run by the Newell family. They have been in the greenhouse business since 1996. Windset is the largest producer of tomatoes on the vine ("TOV") in British Columbia. Their greenhouse operation covers 45 acres in Delta. All of their tomato production is TOV with approximately 16% of the production being Campari tomatoes, a smaller variety of TOV with limited production in BC. Campari TOV are a premium product.
12. In support of its application before the Vegetable Commission, Windset relied on the evidence of Steven and John Newell. In addition, Windset relied upon a legal opinion from the Washington, D.C. firm of Hogan & Hartson, Counsel to BC Hot House. This opinion, contained in an October 31, 2001 letter to BC Hot House, comments on the likelihood of greenhouse tomato growers in British Columbia being able to obtain an independent duty calculation from that assessed against BC Hot House. As a tomato grower shipping to BC Hot House, Windset received a copy of this opinion.

13. At the Vegetable Commission hearing, BC Hot House intervened and opposed Windset's exemption application. It was of the view that granting such an exemption would be detrimental and lead to fragmentation of the British Columbia greenhouse tomato industry. BC Hot House was also concerned that granting Windset's exemption would undermine the Campari TOV program developed by BC Hot House growers over the last 4-5 years. Campari TOV represents a significant proportion of BC Hot House's sales to Costco. The Campari TOV program also benefits BC Hot House growers who do not have quota to produce Campari as BC Hot House supplies Costco with peppers and cucumbers as well. BC Hot House argued that preserving Campari TOV sales was critical to maintaining its Costco account.
14. On February 20, 2002, and after the release of the Vegetable Commission's decision on Windset's application, the DOC issued its final duties. BC Hot House's duty dropped from 33.95% to 18.21%. Mastronardi's duty increased from 5.54% to 14.89%. Of the other three Ontario exporters, two saw their duties marginally increase, 0% to 1.53% and 2.45% to 3.85%, while one saw a significant decrease from 23.17% to 1.86%. The All Others category (Canadian greenhouse tomato exporters not specifically named) dropped from 24.04% to 16.22%.

ARGUMENT OF APPELLANTS

15. Windset argues that the purpose behind it seeking an exemption from marketing greenhouse tomatoes through BC Hot House was to achieve independence from BC Hot House in the hope of obtaining an independent calculation of duties by the DOC.
16. In this appeal, as in its earlier exemption application, Windset argues that it must be allowed to control its own pricing and costs if it hopes to manage its risk independent of any other grower. By doing so, it hopes to increase the chance that any cash deposits payable into trust now on account of the duties will be refunded by the DOC in 2004. Windset estimates that by the end of 2003, it will have deposited approximately \$10,000,000 in duties. It wishes to take all necessary steps to ensure that it receive as much of this deposit back as possible.
17. As in its application before the Vegetable Commission, Windset argues that it has followed the legal advice provided by Hogan & Hartson and taken steps to sever its corporate affiliation with BC Hot House. Through its exemption application, Windset seeks to establish an independent channel for marketing its produce through or in an agency relationship with Mastronardi.

18. Windset argues that the Vegetable Commission's requirement (at paragraph 40(c)) that Campari TOV produced by Windset in the 2002 crop year be marketed through BC Hot House runs completely contrary to, and completely undermines, the Vegetable Commission's exemption Order. Further, Windset argues that such a condition is unnecessary if its purpose is to provide an assured supply to BC Hot House until other growers step in and provide that supply.
19. Windset argues that it is inconsistent for the Vegetable Commission to recognize that in order for Windset to be its own entity it must be substantially independent of BC Hot House in 2002, then turn around and tell Windset to sell Campari TOV through BC Hot House in 2002. The argument is twofold. First, requiring Windset to sell what may be a substantial volume of its production through BC Hot House increases the risk that the DOC would find Windset affiliated with BC Hot House despite Windset's attempts to sever formal ties. Second, the prospect of the DOC conducting the desired administrative review of Windset increases if it is one of the larger exporters of greenhouse tomatoes. (The desirability results from the chance that through such a review Windset could end up with a significantly lower individual duty similar to what was achieved by the three Ontario exporters referred to in paragraphs 9 and 14 above.) If Windset is required to market a significant percentage of its tomatoes through BC Hot House, its chance of seeing a significant return of the \$10,000,000 deposited into trust diminishes.
20. The thrust of Windset's argument is that it wants to control its own risk. As long as Windset is affiliated with BC Hot House, it will be affiliated with other growers with their own risks. In Windset's view, this is untenable.
21. Windset proposes two options which it argues would allow it to manage its risk:
 1. A buy/sell arrangement where Windset assumes no potential anti-dumping liability; or
 2. Direct shipment to Canada and the US where it can control its potential risk.
22. Windset argues that it is prepared to enter into a buy/sell arrangement with BC Hot House whereby BC Hot House purchases product directly from Windset at its Costco rate (with handling fees to be negotiated). With such an agreement, BC Hot House would assume responsibility for all duties. Alternatively, Windset proposes to ship directly to BC Hot House's customer (Costco) either in Canada or the US. Even though it pays duties, through direct shipment Windset would be in control of its potential risk.

23. Windset argues that there is no reason why either of the above two options should not be satisfactory. If the issue is who pays the deposits should BC Hot House choose to sell the purchased Campari TOV in the United States, then it is appropriate for BC Hot House to provide such deposits just as if they had purchased Campari TOV from any other source. If the issue is supplying the market, Windset can do that through direct shipment.
24. In summary, Windset argues that the condition imposed in paragraph 40(c) is not necessary. The exemption granted is completely taken away by such a condition. This is a fundamental error committed by the Vegetable Commission and as such should be struck out completely or redrawn in the language proposed by Windset (see Issue above).

ARGUMENT OF THE RESPONDENT

25. The Vegetable Commission argues that its decision must be looked at in its entirety. The conditions imposed on Windset are not inconsistent with the decision as a whole nor do the conditions undermine the decision to exempt Windset. The conditions are an integral part of the decision and cannot be separated from it. The Vegetable Commission applied the principles that it has traditionally applied in such exemption applications:
 30. In considering exemption applications in the past, the Commission has considered the impact the exemption may have on orderly marketing and the returns to other producers within the sector. The Commission has considered whether the exemption in question would benefit the applicant without creating an undue negative impact on orderly marketing within the relevant sector. Windset's application has been considered in light of these principles, the current situation facing the hothouse tomato industry, and the Commission's knowledge of that industry.
26. The Vegetable Commission considered the reasons put forward by Windset in support of their exemption application and considered the impact of the Hogan & Hartson legal opinion. It was fully aware that the legal opinion was the basis of Windset's application and that separation from BC Hot House's operations in the hopes of receiving an independent calculation of duties was the basis for its exemption application. However, the Vegetable Commission also had to consider the impact of such an exemption on the rest of the greenhouse tomato industry. In particular, it considered any potential detrimental impact on the other greenhouse tomato growers in the Province and on the Campari TOV program at BC Hot House. The Vegetable Commission points to the balancing of interests it undertook before arriving at its decision, set out in paragraphs 35 through 38:

35. The Commission is concerned about the sustainability of the industry. We also note Windset's success in achieving an independent cost assessment is less than certain. The Commission appreciates, however, the difficult position in which Windset finds itself given the current trade dispute and understands Windset's desire to manage its business in such a way as to, hopefully, minimize the impact of that dispute. Accordingly, the Commission has considered certain factors in assessing whether the exemption application would have an undue negative impact on orderly marketing of hothouse tomatoes.
 36. After receiving Windset's exemption application, the Commission invited any other grower of hothouse tomatoes who wished to make a similar application to do so by December 7, 2001. Except ADJ Greenhouses, which is primarily a producer of peppers, no other tomato grower came forward to make such application. Further, Windset has made a commitment to ensure its product is marketed outside the traditional BC Hot House markets of Western Canada and the I-5 corridor.
 37. In addition, one of the primary concerns of the Commission in assessing the impact of an exemption on the industry as a whole is the effect it may have on the BC Hot House Campari program. That program is essential for BC Hot House and its growers. It is a large part of BC Hot House's relationship with one of its major customers, and it provides the tomato industry as a whole with a high value product at a time when that is most needed. Any exemption granted by this Commission would have to take the maintenance of this program into account. Undue interference with that program would be, in the Commission's view, unacceptable.
 38. Given these factors, the Commission is prepared to grant Windset's exemption application, subject to the conditions outlined below. In the absence of any one of these factors, the Commission's decision may well have been different. The Commission has no desire to see any further uncertainty in the hothouse industry at this time, and expects that, with the designation of Global as an agency and the granting of this exemption, the rest of the industry will remain as is for the upcoming 2002 crop season. The industry as a whole must get on with the business of managing its export programs, as well as the regular business of producing and marketing greenhouse products.
27. The Vegetable Commission argues that the condition imposed in paragraph 40(c) is not inconsistent with the granting of an exemption. The Vegetable Commission crafted the condition to protect the rest of the industry. The decision was not merely to grant an exemption but to grant an exemption in such a way that would provide benefits to Windset without undue negative impact on the rest of the industry.

28. The Vegetable Commission argues that even with the condition, only 16% of Windset's production (its Campari TOV production) is affected by the condition and will be marketed through BC Hot House for the 2002 season or until such time as BC Hot House no longer needs the production. The legal opinion of Hogan & Hartson leaves open the debate around what type of arrangement would result in Windset being found affiliated with BC Hot House. The Vegetable Commission cautions the Panel on making any decision based on legal opinions, including Mr. Newell's verbal account of legal opinions he has received. It is impossible at this juncture to determine whether the marketing of 16% of a company's production for a season (or part of a season) will result in that company being found to be an affiliate of an exporter. Further, the Vegetable Commission argues that the Hogan & Hartson opinion does not deal specifically with the issues before the Panel. It does not comment on the effect of a buy/sell arrangement or the other options proposed by Mr. Newell.
29. In any event, the Vegetable Commission argues that at the time it came to its decision it knew of the Hogan & Hartson opinion and took it into account in crafting its exemption order and conditions. Accordingly, the Vegetable Commission submits that Windset's appeal should be dismissed. Alternatively, if the Panel is of the view that the condition should be removed, the entire matter of Windset's exemption application should be remitted to the Vegetable Commission for a further consideration. The removal of what the Vegetable Commission considers a fundamental condition from its exemption order would represent a substantial change in circumstances.

ARGUMENT OF INTERVENOR

30. BC Hot House argues that Windset's application involves a series of uncertainties. At the time of the application before the Vegetable Commission, BC Hot House had been assessed duties of 33% and Mastronardi's duties were 5.5%. Subsequent to the Vegetable Commission decision, BC Hot House duties are now 18% and Mastronardi's duties are 15%. Had that been the evidence before the Vegetable Commission, who knows how their decision would have been different?
31. With respect to the legal opinions on which Windset relies, BC Hot House submits that Mr. Newell's evidence on US trade law is suspect. It is a normal human reaction to recall events, in this case legal advice, favourable to oneself. Further, Mr. Newell's evidence was unclear as to whether he had ever received a legal opinion in writing, despite a reported expenditure of \$150,000 US on legal fees. Without an opinion in writing, BC Hot House argues that it is prejudiced in its efforts to test this evidence.

32. Mr. Newell, relying on the Hogan & Hartson legal opinion, stated that the reason for Windset seeking an exemption and pursuing this appeal was the desire to improve the chance of managing better and avoiding risk. However, as paraphrased by Counsel for BC Hot House, the opinion states:

We don't think BC growers will be eligible with the exception of growers who can demonstrate they did not meet the test of corporate affiliation with BC Hot House during the period of investigation. (2000 growing season)

33. BC Hot House argues that during the period of investigation, Windset was a shareholder in BC Hot House supplying tomatoes through BC Hot House. Indeed Windset has done so exclusively up until the date of this appeal. Thus, BC Hot House argues that on Windset's own legal opinion, it is doubtful that it would be successful in arguing non-affiliation.
34. BC Hot House points to Mr. Newell's own words likening his dealings with the American trade process to dealing with a "Banana Republic". BC Hot House argues that if indeed the US is protectionist, after going through a lengthy investigation to determine that Canadian exporters have been guilty of dumping product, it is unreasonable to expect that the US would let BC Hot House growers walk based on non-affiliation. Why would they turn over a new leaf at this stage?
35. BC Hot House also takes issue with Windset's proposed options based in part on US legal opinions received by Mr. Newell. To effect separation, he proposes two deals, characterized by BC Hot House as follows:
- a) Direct Marketing - let me have your customer for a year
 - b) Buy/sell agreement - let me sell you my tomatoes and let your growers pay the tariffs
36. With respect to Windset's offers to direct market to BC Hot House customers or alternatively to enter into a buy/sell agreement, BC Hot House argues these arrangements are wholly inadequate. The direct market offer amounts to selling directly to a major BC Hot House customer. This would be injurious to BC Hot House's long term relationship with that customer (Costco). The buy/sell arrangement is also unsatisfactory. In Mr. Newell's evidence, his original position was that Windset would sell product to BC Hot House at the Costco price. On cross-examination, he conceded that he might negotiate direct expenses. However, he clearly insists that Windset would not carry any responsibility with respect to duties. BC Hot House argues that it is unfair to saddle other growers with Windset's share of the duty and thus, take on Windset's share of the risk.

37. BC Hot House disagrees with Windset's characterization that as it is BC Hot House's decision to sell product to the US, it alone should bear the duty. BC Hot House argues that as 95% of all Campari TOV product is sold to American markets, it is a fallacy to suggest that servicing this market is BC Hot House's decision. Windset's production is required by BC Hot House for this market.
38. BC Hot House summarises Windset's argument as it thinks it can do better on its own. That may be the case, however BC Hot House argues that allowing Windset the opportunity to do better, should not be at the expense of the rest of the industry. Asking BC Hot House growers who were responsible for developing the Costco Campari TOV program to bear Windset's downstream risk of duties, is simply unfair.
39. Finally, BC Hot House argues that the condition set out in paragraph 40(c) should be maintained. Windset should be required to market its Campari TOV through BC Hot House until that production can be supplied by another grower. In turn, Windset will not be asked to assume any more risk than other growers for BC Hot House but nor will it be asked to assume less.

REPLY OF APPELLANTS

40. In response to the submissions of BC Hot House, Windset argues:
 - a) The level of the duty assessed against Windset is largely irrelevant. Windset will be required to pay a deposit. Its best chance of getting that deposit back will be through controlling its own pricing and costs and thus, managing its own risk.
 - b) If the Vegetable Commission is concerned with managing Campari TOV and thus, managing the account at Costco, that account can be managed just as well by supplying the Campari TOV on a direct buy/sell agreement or through some other mechanism where that product is not supplied through BC Hot House.
 - c) Finally, Windset maintains that it does not want the Costco West contract. It simply wants an exemption order as granted. If BC Hot House requires Campari TOV until other growers are able to meet the demand, Windset is prepared to provide it as long as it is not affiliated. The problem with paragraph 40(c) is that it maintains an affiliation. Campari TOV may only represent 16% of Windset's production but there is ample evidence in the Hogan & Hartson legal opinion that affiliation in one area carries with it a high risk of total affiliation.

DECISION

41. The Appellants, Windset, have brought an appeal pursuant to s.8(1) of the *Natural Products Marketing (BC) Act*, RSBC 1996 c. 330 (the “Act”). The Appellants right of appeal under s.8(1) is not confined to legal questions. Persons aggrieved or dissatisfied by a commodity board’s decision may make arguments that the commodity board under appeal erred in fact, law, discretion or policy.
42. In this instance, the decision of the Vegetable Commission at issue is a decision regarding sound marketing policy in the vegetable industry, and was arrived at as a result of a full hearing. The Appellants and the Intervenor were both represented by experienced Counsel who presented their respective positions before the Vegetable Commission. It is clear from its decision that the Vegetable Commission weighed the evidence it heard in conjunction with its own expertise in the marketing of vegetables in the Province of British Columbia. The Vegetable Commission’s Findings and Decision sets out its rationale for granting the exemption on certain conditions.
43. Before this Panel, the Appellants argued that the Vegetable Commission erred in granting an exemption subject to a condition, which in its view undermined the grant of an exemption. The Appellants relied on the evidence before the Vegetable Commission, including the Hogan & Hartson legal opinion. In addition, the Appellants relied on the evidence of Mr. Steven Newell. In addition to giving evidence regarding the Windset operations in general and the impact of the duties imposed by the DOC, the Panel allowed Mr. Newell to testify regarding certain legal advice he had been given with respect to trade issues. It was evident based on Mr. Newell’s cross-examination that these legal opinions have not yet been reduced to writing.
44. It was Mr. Newell’s evidence, supported by his interpretation of the legal advice that he has received, that Windset must pursue an independent course if it hopes to be found non-affiliated with BC Hot House and receive its own independent investigation and its own duty.

45. The Panel heard Mr. Newell's evidence. However, we are sensitive to the issue raised by both the Vegetable Commission and BC Hot House regarding what weight can be accorded to Mr. Newell's interpretation of legal advice that he may have received. We have reviewed the Appeal Record, the Decision of the Vegetable Commission dated January 14, 2002 and the Amended Decision dated February 27, 2002. We were provided a copy of the DOC's February 19, 2002 Determination and a copy of the transcript of the January 7-8, 2002 proceedings before the Vegetable Commission. It should be noted that the evidence contained in this transcript was not referred to at any great length by any of the parties to the proceedings. The Panel was referred to the evidence of Mr. Kevin Doran (Vice President Sales Marketing & Logistics for BC Hot House) regarding the significance of the Campari TOV to maintaining BC Hothouse's relationship with Costco. In addition, Mr. Doran testified about the importance of the Costco account generally to BC Hot House growers.
46. After considering the evidence before us on appeal and the foregoing information submitted by the parties, the Panel is not satisfied that the Vegetable Commission was wrong in its decision to exempt Windset on certain conditions. The Vegetable Commission carried out a very careful analysis of the issues before it. It has the benefit of prior experience in dealing with trade disputes and the benefit of hearing from a number of witnesses, which were not called to appear before this Panel. It entered into a careful weighing of the various interests and came to a decision. This Panel is not prepared to say that the Vegetable Commission was wrong in the decision that it came to.
47. Although the Appellants takes issue with the decision of the Vegetable Commission, they have failed to persuade the Panel that the Vegetable Commission erred in its appreciation of the evidence, in its articulation of sound marketing policy or in fashioning a consistent and coherent remedy. The evidence does not demonstrate that the Vegetable Commission improperly exercised its discretion in granting an exemption on certain conditions. Further, the options proposed by the Appellants do not adequately deal with the concerns expressed by the Vegetable Commission and BC Hot House of the potential impact on the approximately 50 other BC Hot House growers.
48. Accordingly, this appeal is dismissed.
49. There will be no order as to costs.

Dated at Victoria, British Columbia, this 11th day of March, 2002.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Hamish Bruce, Member

Satwinder Bains, Member

Richard Bullock, Member