IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM BRITISH COLUMBIA VEGETABLE MARKETING
COMMISSION ORDER 10/03(a)

BETWEEN:

BC VEGETABLE GREENHOUSE I, L.P.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC HOT HOUSE FOODS INC.

INTERVENOR

DECISION: COSTS

APPEARANCES:

For the British Columbia Farm Industry Review Board	Richard Bullock, Chair Christine J. Elsaesser, Vice Chair Joseph Truscott, Member
For the Appellant	Christopher Harvey, Q.C., Counsel
For the Respondent	Maria Morellato, Counsel Roy Millen, Counsel
For the Intervenor	James P. Taylor, Q.C., Counsel

INTRODUCTION

1. This decision addresses costs applications made by the British Columbia Vegetable Marketing Commission (the "Commission") and BC Hot House Foods Inc. (BC Hot House) against BC Vegetable Greenhouse I, L.P. ("BC Vegetable").

2. The costs applications arise out an appeal commenced October 31, 2003 by BC Vegetable against Order 10/03(a), issued by the Commission on October 7, 2003. Order 10/03(a) requires BC Vegetable to remit to the Commission $376,642 in outstanding levies.

3. On September 2, 2004, the British Columbia Farm Industry Review Board (the "Provincial board") exercised its authority under what was then s. 8(8.3) of the *Natural Products Marketing (BC) Act*, RSBC 1996, c. 330 ("*NPMA*")[1], and dismissed several of BC Vegetable's grounds of appeal as being either devoid of merit (as being based on a patently wrong characterisation of the Commission's order) or an abuse of the Provincial board's processes (as already having been decided by Drost J. in other litigation)[2]. Of the two grounds of appeal that were not dismissed, BC Vegetable abandoned one of those grounds on November 9, 2004. BC Vegetable withdrew the remaining ground on January 11, 2005, less than a week prior to the hearing scheduled to address that ground.

4. On January 14, 2005, a Panel of the Provincial board wrote to the parties and ordered the appeal dismissed.[3] The final paragraph in the Panel's January 14, 2005 letter stated as follows:

> …the appeal is ordered dismissed. If the parties wish to address the matter of costs of the appeal, including the interlocutory proceedings to date, they may contact Mr. Collins at the Provincial board office to set a hearing date or request a schedule for written submissions.

5. The Commission now applies to recoup legal costs incurred in this appeal, through an order of special costs. BC Hot House also seeks to be awarded a portion of its actual reasonable legal costs incurred with respect to the entire appeal, including costs incurred and now effectively thrown away by BC Vegetable's withdrawal of its appeal.

6. BC Hot House summarises the costs incurred by the Commission and BC Hot House with respect to the following:

---

[1] Section 8(8.3) of the *NPMA* provided: "On the request of a party to an appeal, the Provincial board may dismiss an appeal as frivolous, vexatious or trivial."

[2] *Global Greenhouse Produce Inc., BC Vegetable Greenhouse I, L.P. and others v. British Columbia Marketing Board and British Columbia Vegetable Marketing Commission*, 2003 BCSC 1508.

[3] The requirement to order a withdrawn appeal dismissed arises from section 17 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which section was made applicable to Provincial board appeals by virtue of s. 8.1(1) of the *NPMA*, which came into force December 3, 2004: B.C. Reg. 516/04.

a. Preparing for and participating in the November 20, 2003 pre-hearing conference.

b. Preparing submissions in support of the applications by the Commission and BC Hot House to dismiss the appeal pursuant to s. 8(8.3) of the *NPMA.*

c. Participating in October 14, 2004 and November 2, 2004 pre-hearing conferences addressing hearing dates and evidentiary matters respecting the two remaining issues.

d. Responding to BC Vegetable's November 2004 application for further disclosure of documents, which application the Panel determined on December 10, 2004, which decision also addressed the scope of appeal and the length of hearing.

e. Responding to BC Vegetable's December 15, 2004 application to adjourn the remaining issue on appeal, which application the Panel dismissed on December 23, 2004.

f. Preparing for the January 17, 2005 hearing scheduled for the remaining issue on appeal, which issue BC Vegetable withdrew on January 11, 2005.

DECISION

Authority to Award Costs

7. Before we decide whether the Commission and BC Hot House should receive an order for payment of the costs they request, we must consider the source and scope of our legal authority to make such an order. Administrative tribunals have no inherent power to award costs. The power to award costs must be found either expressly or by necessary implication in the tribunal's enabling statute: see *Re National Energy Board Act (Can)*, [1986] 3 FC 275 (CA).

8. This question is more complex than it might otherwise be. On December 3, 2004, after all other grounds of appeal had been dismissed or withdrawn and one issue remained, the Provincial board's former costs power (s. 8(11)) was repealed and replaced by a new costs power incorporated by reference from s. 47 of the *Administrative Tribunals Act* ("*ATA*").

9. The first question arising is therefore which costs power applies.

The former section: s. 8(11) of the *NPMA*

10. Section 8(11) of the *NPMA* was the costs power in effect between October 31, 2003 (the date BC Vegetable filed its appeal) and December 3, 2004 (when one issue on appeal remained). Section 8(11) was to be read with s. 8(9):

> (9) On hearing an appeal under subsection (1), the Provincial board may do any of the following:

(a) make an order confirming, reversing or varying the order, decision or determination under appeal;

(b) refer the matter back to the marketing board or commission with or without directions;

(c) make another order it considers appropriate in the circumstances.

…

(11) In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board

(a) of another party to the appeal, or

(b) of the Provincial board, payable to the Minister of Finance and Corporate Relations.

11. Section 8(11) was considered by the BC Supreme Court in *British Columbia (Broiler Hatching Egg Commission) v. Reid*, [1996] BCJ No. 2619 (SC). The Court held that the Provincial board's jurisdiction to award costs was not affected by the absence of "prescribed limits" contemplated in that subsection. At paragraph 13, the Court stated:

> I find that the clear intention of the Legislature in enacting s. 11(9) of the Act was to empower the Board to calculate and grant the actual costs of a party to the appeal proceedings. The language in s. 8(3) which empowers the Lieutenant Governor in Council to establish a tariff is permissive. The fact that the Lieutenant Governor has not formulated "prescribed limits" cannot render the section ineffective. The term "actual costs" is sufficiently described so as to be ascertainable without reference to a tariff setting out "prescribed limits." In my opinion, the creation of a tariff is not an essential prerequisite to the power of the Board to award costs in appropriate circumstances.

The present section: s. 47 of the *ATA*

12. On December 3, 2004, consequential amendments to the *ATA* were proclaimed, repealing s. 8(11) of the *NPMA* and adding s. 8.1 of the *NPMA*:

> 8.1 (1) For the purposes of an appeal under section 8 of this Act, sections 11 to 20, 22, 24 to 26, 31 to 33, 34 (3) and (4), 35 to 42, 47, 49 to 52, 55 and 60 of the *Administrative Tribunals Act* apply to the Provincial board.

13. Section 47 of the *ATA* provides:

> 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
>
> (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
>
> (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

Transitional principles

14. Neither the *NPMA* nor *ATA* contains transitional provisions to guide the Provincial board in determining which costs power applies to appeals not finally concluded on December 3, 2004. We therefore turn to the relevant case law.

15. The question whether a "former" vs. "present" costs regime applies to judicial or regulatory proceedings that were at various stages of completion when the costs regime changed has been addressed in several cases. The cases are not entirely consistent about whether or when a costs power should be characterised as being "procedural" or "substantive". However, the case outcomes consistently support the position that because the right to costs is determined or determinable at the time the final decision is rendered, the applicable law of costs is the law in effect when that decision is rendered, regardless of when the actual costs were incurred: *Broekman Ten Brink v. Block Bros. Realty Ltd.*, [1985] BCJ No. 1179 (SC); *Meyer v. Chou*, [1985] BCJ No. 1568 (SC); *Kleena Kleene Gold Mines v. S.W. Syndicate*, [1986] BCJ No. 2054 (SC); *Shea v. Miller*, [1971] 1 OR 199 (CA); *Re Kanerva and Ontario Association of Architects* (1986), 32 DLR (4th) 150 (Ont. HCJ); *MM v. JB*, [2001] AJ No. 1175 (PC); *CBC Pension Plan (Trustee of) v. BF Realty Holdings Ltd.* [2002] OJ No. 4313 (CA).[4] The only exception appears to be where a broad costs power is repealed after a hearing is completed and while a decision is under reserve, in which case, reflecting the law in s. 35(c) of the *Interpretation Act*, the former costs power will apply: *West Kootenay Power & Light Co.*, [1985] BCJ No. 1830 (CA).

16. Applying the law to this case, s. 47 of the *ATA* is clearly the relevant costs power; it was the section in force when we made our final order dismissing the appeal.

Application of s. 47 of the *ATA* to this case

17. For convenience of reference, s. 47 provides:

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;

[4] *Laye v. College of Psychologists of BC*, [1998] BCJ No. 2689 (CA) should also be noted, where the Court stated that, as a general rule, the relevant date is the date that the *assessment* takes place. This would reinforce the position that section 47 of the *ATA* would apply on the facts here.

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

18. The following points arise from the language of s. 47:

- Orders for payment of costs are discretionary.
- Orders for payment of costs are capable of extending in favour of or against what the *ATA* separately describes as "parties" and "intervenors".
- Orders for payment of costs as between parties and intervenors are limited to part of the costs incurred in connection with an application.
- Orders may require payment of actual costs, but only the actual costs of the tribunal, and only where the tribunal considers that a party's conduct has been "improper, vexatious, frivolous or abusive".

19. Of special note in the wording of ss. 47(1) (a), (b) and (c) is the power to make an order for the payment of costs *in connection with an application*. The italicised words emphasise that an application for costs will encompass the entirety of the progress of a matter before the tribunal, whatever its ultimate outcome.

20. BC Vegetable, however, argues that s. 47 must be read with s. 1 of the *ATA*, where "application" includes an appeal, a review or a complaint but excludes *any interim or preliminary matter* or an application to the court. BC Vegetable submits that the *ATA* definition of "application", which extends to the Provincial board by virtue of s. 3.1 of the *NPMA*, bars the Commission and BC Hot House from being granted their costs on this appeal. BC Vegetable argues that the phrase "interim or preliminary matter" should be broadly construed to encompass all interlocutory steps taken after an appeal is filed, and submits that considered together, ss. 1 and 47 mean that only *actual* hearing costs on the merits of the appeal may be ordered payable to another party or to the tribunal. The result of BC Vegetable's position is that if an appeal is withdrawn prior to hearing as was done here, no costs whatsoever can be granted despite significant and reasonable expenses incurred by the parties, despite the conduct of the party who ultimately withdraws the appeal, and despite the fact that an appeal may be withdrawn at the 11th hour, resulting in significant costs thrown away.

21. Did the Legislature really intend to deprive parties and intervenors of the ability to seek an order for costs in respect of any interlocutory step taken in any of the more than 20 tribunal statutes to which the *ATA* applies, regardless of the complexity and expense attendant on those steps and despite the conduct of a party within that process?

22. BC Vegetable has not attempted to explain or provide a rationale for such a result, nor is it required to do so if the legislation is unequivocal and admits of only one meaning. But where legislation is not unequivocal, an interpretation that avoids such an absurdity is to be preferred. As noted the Supreme Court of Canada in *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28 at para. 46:

> As affirmed by this Court in *Rizzo Shoes*, *supra*, at para. 27, "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences." Further, an interpretation may be viewed as absurd where it is incompatible with other provisions or with the object of the legislative enactment: see P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 456. Professor R. Sullivan similarly notes that "[a]n interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme is likely to be labelled absurd": see *Sullivan and Driedger on the Construction of Statutes[*ital] (4th ed. 2002), at pp. 243-44.

23. In our view, the legislation does not support BC Vegetable's submission. Even if we accept BC Vegetable's position that "interim or preliminary matters" refer to any and all interlocutory proceedings in an appeal, we do not agree that the *ATA* forbids administrative tribunals from making costs orders at the end of the day respecting the entire appeal proceeding. Costs powers are, in their very nature and purpose, designed to allow a party to claim some degree of indemnity for all costs incurred in legal proceedings, which proceedings necessarily include interlocutory applications and other interim procedural steps. A statutory reference to "costs" refers to legal costs: *Shpak v. Institute of Chartered Accountants of British Columbia*, [2003] BCJ No. 514 (CA). In this context, unless the relevant statutory language allows for no other interpretation, the legislator should not be taken to have created an unprecedented and frankly bizarre costs power that would exclude costs for pre-hearing matters, and that would allow a party to avoid such costs by withdrawing its appeal at the 11th hour. In addition to creating injustice, this would undermine the purpose of an administrative reform statute intended to enable and clarify the powers of the numerous administrative tribunals to which it applies.

24. BC Vegetable's interpretation does not only cause absurd results; it fails to give meaning to the clear and repeated language in s. 47(1) that costs may be awarded "in connection with" an appeal. The words "in connection with" cannot be limited to the merits of the appeal hearing itself. That is not only because of the breadth of the words used ("in connection with"), but also because s. 47(1) specifically makes costs available on all applications, and this necessarily has to include applications that may be withdrawn or otherwise resolved without a hearing. Obviously, there is nothing "clear and unequivocal" about BC Vegetable's position when definition of "application" is read with all the language and in the context of s. 47(1). There is an obvious ambiguity that needs to be resolved in a fashion that best respects legislative intent and prevents absurd results.

25. In our view, the most reasonable way to interpret the legislative language is to hold that the definition of "application" prevents costs orders being made on a

fragmented and piecemeal basis during or within any specific interlocutory step of an appeal. However, s. 47(1) allows an order for payment of costs of the entire appeal at the conclusion of the appeal, whether that appeal has been heard on the merits or whether, as here, it has been dismissed under s. 17 of the *ATA* following the appeal's withdrawal. In our view, these provisions are best interpreted to mean that an order for payment of costs "in connection with the application" can be made only when the application itself is concluded and the costs can be ascertained. This construction avoids absurdity, gives meaning to all the statutory provisions and ensures that the costs power achieves its purpose of ensuring the ability to grant indemnification (where appropriate) for the appeal upon its conclusion. This construction also enhances administrative tribunal efficiency by ensuring that tribunals are not confronted with discrete interlocutory or interim costs applications.

26. This conclusion makes it unnecessary for us to address and resolve the submission that the phrase "interim and preliminary matters" cannot in any event encompass interlocutory applications such as were dealt with in this case. The Commission has rightly pointed out that BC Vegetable's position equating "interim and preliminary" with interlocutory is very difficult to reconcile with other sections of the *ATA*, notably s. 11(2)(k) in the context of the other interlocutory matters addressed in s. 11(2), as well as ss. 21, 32, 33, 39, 41, 42[5]. This said, there are other indications in the *ATA* that the phrase "interim and preliminary matters" was indeed intended to encompass at least some meaningful interlocutory proceedings that can lead to decisions: see *ATA*, ss. 26(9), 36, 56(1) and 61(1). As noted above, we have been able to resolve the issue before us without having to resolve the precise meaning of the phrase "interim and preliminary" matters as it is used throughout the *ATA*. Given the implications of that question for other tribunals and other powers, we think it wise to leave that question for a day when it must be decided.

Principles governing orders for payment of costs under s. 47

27. Orders for payment of costs under s. 47 are discretionary. As between the parties, orders for payment are limited to "part of" the costs of the other party or intervenor in connection with the application. The reference to "part of" the costs of another party or intervenor reflects the principles on which the Supreme Court Rules operate where costs are awarded on a party and party basis.

28. The Commission and BC Hot House seek special costs. As noted in *Fullerton v. Matsqui (District)* (1992), 74 BCLR (2d) 311 (CA), while party and party costs are

[5] For example, the tribunals to which s. 21 applies (notice of hearing by publication) would obviously need to be in a position to publish notice of interlocutory hearings as well as final ones. A party to an interlocutory application was obviously intended to have the right to counsel (s. 32) and the right to apply to adjourn that application (s. 39). A tribunal should have the ability to allow intervenors to participate in an interlocutory proceeding, as for example where the media applies to intervene where a publication ban is sought (ss. 33, 41, 42).

designed to indemnify (in part), special costs may be awarded on a higher scale as a penalty or deterrent for certain conduct. The leading BC case with respect to special costs is *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] BCJ No. 2486 (CA). In *Garcia*, at para. 17, the Court of Appeal held that for special costs to be ordered, the conduct of the party against whom such costs are sought must be "reprehensible":

> …the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of costs.

29. In *Shpak v. Institute of Chartered Accountants of British Columbia*, 2003 BCCA 149 at para. 56, the Court of Appeal stated that a tribunal will have jurisdiction to award special costs unless the enabling legislation provides to the contrary:

> The effect of *Ridley* and *Roberts* is not to incorporate Rule 57 *per se* into the administrative tribunal's constituent statute or Rules, but to clarify that, where the provisions for costs in the constituent statute, or Rules properly passed pursuant to the statute, do not indicate otherwise, the provisions of Rule 57 will govern the tribunal's award of costs. In those cases, Rule 57 will define the nature of the costs available, including special costs. The court's power to award special costs under Rule 57 translates, by analogy, into the tribunal's power to award special costs under the tribunal's constituent statute. As Mr. Justice Goldie stated, when the Legislature grants a general power to award costs, it is taken to intend that the power granted is the usual power exercisable by the courts with respect to costs under Rule 57.

30. In our opinion, s. 47 authorises a tribunal to award special costs provided that no such order shall provide 100% indemnity to the party seeking costs.[6]

Analysis and application of principles to present appeal

31. We turn now to consider whether we should exercise our discretion to make an order for payment of special costs on the particular facts of this case.

32. As a matter of discretion under the *NPMA*, the Provincial board has been inclined to avoid a policy of automatically awarding costs to the "winner". Instead, our approach has been to award costs only in special circumstances.[7] The enactment of s. 47 has not changed the way in which we would exercise our discretion. Today, where the conduct of a party has been improper, vexatious, frivolous or abusive, we are able not only to award costs as between the parties, but also the actual costs of the Provincial board. In this case, we must look at the conduct of BC Vegetable throughout this appeal and determine whether an award of costs is warranted and if so, at what level.

---

[6] The Courts have noted that special costs will rarely amount to full indemnity: see *Shpak*, at para. 36, citing *Roberts v. College of Dental Surgeons of British Columbia*, 1999 BCCA 103.

[7] See BCFIRB "Appeal Awarding of Costs Policy", June 28, 1996, updated November 1, 2003.

33. We turn to the history of this appeal which goes back to a 2001 trade dispute with the U.S. tomato industry, and a Commission levy order (Order 08/01) issued to pay the legal fees and expenses incurred by BC Hot House in defending this action on behalf of BC's greenhouse growers. As a result of numerous issues and concerns raised by several greenhouse growers (including BC Vegetable), the Provincial board undertook a supervisory review in the spring and summer of 2002. In its September 2002 supervisory decision, the Provincial board ordered the Commission to issue a further levy order, which resulted in Order 09/02 to recover further legal fees and expenses incurred by BC Hot House in defending the trade action. BC Vegetable (along with other greenhouse growers) sought judicial review of the Provincial board's decision and the two levy orders, seeking to have the levy orders set aside.

34. The application for judicial review was dismissed by Mr. Justice Drost in October 2003. The Commission then issued Order10/03(a) ordering BC Vegetable to pay $376,642 (the amount outstanding on Orders 08/01 and 09/02, without interest). BC Vegetable simultaneously appealed Mr. Justice Drost's decision to the Court of Appeal (which appeal is to be heard in September 2005) and appealed Order 10/03(a) to the Provincial board.

35. BC Vegetable's appeal to the Provincial board sought to raise a number of issues dismissed by Mr. Justice Drost. The Commission and BC Hot House prepared lengthy written submissions seeking to have the appeal summarily dismissed. BC Vegetable opposed the application and the Provincial board released its 10-page decision dated September 2, 2004 dispensing with all but two grounds of the appeal as "either devoid of merit (as being based on a patently wrong characterisation of the nature of Order 10/03(a)) or an abuse of the Provincial board's processes (as having already been decided by Drost J.)". The remaining issues, relating to the jurisdiction of the Commission and the computation of the levies, were set down for hearing. The issue of costs was left to the conclusion of the appeal.

36. The next issue argued before the Provincial board related to disclosure of documents. BC Vegetable took the position that it had not been provided with a host of documents necessary for its appeal. BC Vegetable took the position that it could not perfect a stay application without the documents sought. On November 26, 2004, the Provincial board conducted a one-day hearing on BC Vegetable's application for further disclosure of documents relating to thirteen different areas. The Panel was on the whole satisfied with the extensive disclosure of documents by the Commission and ordered disclosure of a few documents to clarify sources of disclosed documents or the dates certain documents were prepared.

37. During the course of the November 26, 2004 hearing, and as a result of statements made by Counsel for the Commission and its General Manager that the Commission had not maintained a trust account in which levies were held for

remittance to BC Hot House, Counsel for BC Vegetable sought to adjourn his application to take instructions from his client on how to proceed in the face of this information. Counsel for the Commission and BC Hot House strenuously objected; both maintained that this information was not new, and had been the subject of discussions at pre-hearing conferences held between the parties, and had been previously disclosed in an affidavit of General Manager Murray Driediger. The request for an adjournment was denied. BC Vegetable also sought document disclosure relating to levy orders enacted against another greenhouse grower in 2004. This request was found to be not relevant to the issues on appeal and as such was dismissed.

38. The Provincial board also heard submissions on the scope of the appeal. Once again, BC Vegetable sought to re-argue issues that had been disposed of by Mr. Justice Drost in his decision and also dispensed with by the Provincial board in its September 2, 2004 decision. The Panel once again had to state the issues on appeal:

> 22. This appeal relates to whether the quantum set out in Order10/03(a) is correct. The issue relating to the alleged unfairness associated with using the production from 2001 to calculate the levy for a trade dispute flowing from 2000 production is not properly under appeal. The Panel agrees with the submissions of both the Vegetable Commission and BC Hot House that this issue was dispensed with. First by the Provincial board in its September 11, 2002 supervisory decision, and then by Drost J. on the judicial review application. This issue cannot be argued on appeal under the guise of an attack on the quantum of the levy assessed under Order 10/03(a). Any attempt by the Appellant to try and reargue issues which have been dealt with in other forums or in preceding decisions of the Provincial board will not be permitted.
>
> 23. The issues the Panel is prepared to hear evidence and argument on are as follows:
>
> a) Did the Vegetable Commission make an error in calculating the levy under Order 08/01 (which related to the kilograms of BC Vegetable's production of nine categories of tomatoes in 2001);
>
> b) Did the Vegetable Commission make an error in calculating the levy under Order 09/02 (which for the first three instalments is $0.50 per square metre of BC Vegetable's greenhouse tomato quota allocated by the Vegetable Commission for the 2001 crop season); and
>
> c) Did the Vegetable Commission make an error in calculating the levy under Order 09/02 (which for the final instalment was calculated after a final audit disclosing the balance owed to BC Hot House)?
>
> 24. The levy assessed against Houweling in 2002 is to be distributed among all producers who contributed to the trade dispute through payment of the original levy. As such, it is not relevant to the issues on this appeal regarding whether the original levy as assessed against BC Vegetable was properly calculated.

39. The decision went on to comment on the time set aside for hearing. Given the way this matter had proceeded to date, *ten* days had originally been set aside. This was reduced to three days but the Panel advised that given the narrowness of the issues, two days would be adequate for the hearing.

40. BC Vegetable filed a judicial review application with respect to this decision and on December 15, 2004, sought an adjournment of the appeal "to avoid a multiplicity of proceedings". This application was heard by written submission. The Panel, in its December 23, 2004 decision on the adjournment application, stated:

> While BC Vegetable raises many interesting issues on the desire to avoid a multiplicity of proceedings and inconsistent decisions, the fact remains that there is a long outstanding appeal before the Provincial board. *The history of this matter has been tortuous.* Levy Order 08/01 was issued August 14, 2001 and Levy Order 09/02 was issued September 18, 2002. The Levy Orders were issued to compensate BC Hot House for legal fees and expenses incurred to fight an anti-dumping trade dispute with the US. BC Vegetable challenged the validity of these levies in Supreme Court and lost; it awaits its day in the Court of Appeal, as is its right.
>
> However, there has been no stay of the Levy Orders and BC Vegetable's obligations under these Orders continue. Having chosen to pursue its remedies with the Provincial board, fairness dictates that this appeal proceeds as scheduled.
>
> *The fact that BC Vegetable has decided to appeal an interlocutory decision of the Provincial board made with respect to this appeal should not be allowed to delay matters further. I find that there is prejudice to the Vegetable Commission and BC Hot House in not proceeding with the appeal as scheduled. Significant sums of money are owed by BC Vegetable yet to date, nothing has been paid.* This is despite the fact that with respect to Levy Order 08/01 the amount of levy owed is a simple mathematical calculation based on gross revenue of each type of crop sold. For Levy Order 09/02, the amount of levy owed for the first three instalments was assessed at the equally simple calculation of $0.50 times the square metre of green house quota allocated by the Vegetable Commission. The fourth instalment, which results from the balance owed following an audit, would appear to raise questions of calculation.
>
> It is in the interests of all parties to have a final determination with respect to the issues on appeal and as such, the hearing will proceed as scheduled on January 17, 2005. [emphasis added]

41. On January 11, 2005, BC Vegetable discontinued its appeal. The Provincial board issued its order dismissing the appeal in accordance with the *ATA* and the *NPMA* and advised the parties that if they wished to address the matter of costs of the appeal, including the interlocutory proceedings to date, to contact the Provincial board office.

42. So that is the history which has led to the requests by the Commission and BC Hot House for an order for costs. Without any hesitation, the Panel finds that the circumstances here are exceptional and an award of costs is warranted. To describe this appeal as tortuous is an understatement. BC Vegetable filed an appeal, the majority of whose grounds were devoid of merit and an abuse of the Provincial board's process. Later, BC Vegetable sought to again raise issues which had been previously decided. The appeal, at its root, raised a very straightforward question as to the calculation of the quantum of the levy order. Yet the conduct of BC Vegetable has complicated the issues and delayed resolution of the appeal. The fact that BC Vegetable ultimately abandoned its appeal on the issue of quantum of the levy orders, suggests strongly that there was never any real quantum issue on this appeal and that BC Vegetable utilised the

Provincial board's processes to delay payment. That the appeal was ultimately withdrawn on the eve of the hearing resulted in significant costs being thrown away. In our view, these circumstances, which exposed the other parties to considerable unnecessary cost, satisfy the test for special costs.

43. BC Vegetable maintains that the Commission "is the author of its own misfortune" because it passed Order 10/03(a) instead of using ss. 15 and 17 of the *NPMA* to enforce the levy orders. This argument is without merit. It seeks to deflect attention from BC Vegetable's conduct of the appeal. Even if the Commission should (or could) have utilised ss. 15 and 17 of the *NPMA*, a point we do not address here given that it was raised by BC Vegetable then abandoned, that does not excuse BC Vegetable's conduct in raising frivolous grounds of appeal, abusing the Provincial board's process and making what could have been a straightforward appeal unduly complicated: *Blackmore v. The Owners, Strata Plan VR-274* 2004 BCSC 1121.

44. We now turn to the issue of the scale of costs. The Commission has set out a number of cases in support of the proposition that special costs are awarded to indemnify a party that has suffered as a consequence of another party. Conduct worthy of sanction includes making a simple matter unduly complicated, unnecessarily lengthening a proceeding, pursuing endless applications and appeals, continually raising the same issues unsuccessfully and conducting the proceedings in a manner which is vexatious and an abuse of process. Given that all the above apply to the conduct of BC Vegetable, the Panel finds that an order for special costs is appropriate in these circumstances.

45. Accordingly, the Panel orders the BC Vegetable pay to the Commission and BC Hot House 75% of their actual legal fees and disbursements in connection with the appeal filed by BC Vegetable in this matter on October 31, 2003, and in particular:

a) preparation and attendance at pre-hearing conferences;
b) the application for summary dismissal;
c) the application for disclosure of documents;
d) the application for adjournment;
e) hearing costs thrown away in preparation for the January 17, 2005 hearing;
f) submissions relating to the form of order of dismissal; and
g) the application for costs.

46. While the Panel could have done so under s. 47(1)(c) of the *ATA*, we have in our discretion decided not to make an order that BC Vegetable pay the Provincial board's costs.

47. Counsel in these proceedings are very experienced, and we fully expect that care will therefore be taken in preparing the Bill of Costs on the above terms to exclude

those matters which fall within the jurisdiction of the Supreme Court of British Columbia and the Court of Appeal.

48. Counsel for the Commission and BC Hot House are to prepare their Bills of Costs in accordance with the above directions and submit them to the Provincial board no later than 14 days from date of receipt of this decision.

49. BC Vegetable is to provide the Provincial board with its submissions as to the Bills of Costs of the Commission and BC Hot House no later than seven days following its receipt of those Bills of Costs.

50. If necessary, the Provincial board will conduct a hearing to review the Bills of Costs and then issue a final order as to the costs payable to each party.

Dated at Victoria, British Columbia, this 20th day of May 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

Christine J. Elsaesser
Vice Chair