

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A NOVEMBER 29, 2001 DECISION
CONCERNING THE ADJOURNMENT OF AN AGENCY APPLICATION HEARING

BETWEEN:

BC HOT HOUSE FOODS INC.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

GLOBAL GREENHOUSE PRODUCE INC.

INTERVENOR

DECISION

APPEARANCES:

For the
British Columbia Marketing Board

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

For the Appellant

Mr. Israel Chafetz, Counsel

For the Respondent

Ms. Lisa Hynes, Counsel
Mr. Roy Millen, Counsel

For the Intervenor

Mr. Christopher Harvey, QC, Counsel

INTRODUCTION

1. On November 30, 2001, BC Hot House Foods Inc. (“BC Hot House”) appealed to the British Columbia Marketing Board (“BCMB”) from a November 28, 2001 decision of the British Columbia Vegetable Marketing Commission (“Vegetable Commission”) refusing to further adjourn a hearing scheduled to consider an agency application by Global Greenhouse Produce Inc. (“Global”). BC Hot House also filed an application for a stay, but we find it unnecessary to address that application as this decision addresses the substance of the appeal.
2. Given the need for this matter to be heard on an expedited basis, the hearing before the BCMB proceeded by way of telephone conference and based on written submissions provided by the parties.
3. BC Hot House’s appeal from the Vegetable Commission’s November 29, 2001 decision is dismissed. The reasons for our unanimous conclusion are set out below. In providing these reasons, we wish to emphasize that we have reviewed all the written submissions that have been filed with the Panel, and have carefully considered all the oral submissions advanced by the parties through counsel.

BACKGROUND

4. BC Hot House is currently the sole agency for District I (the Lower Mainland), designated under the *Natural Products Marketing (BC) Act*, RSBC 1996, c. 330 (“Act”) and the *British Columbia Vegetable Scheme*, BC Reg. 96/80 (as amended), for the marketing of greenhouse produce. BC Hot House markets the vegetables grown by its 53 greenhouse grower members.
5. In the regulated marketing system, an agency is a human or corporate person who has received regulatory approval to lawfully market a regulated commodity. In the vegetable sector, as in other sectors such as mushrooms, marketing without regulatory approval is illegal. In a typical case, in order to be granted approval as a designated agency, the applicant must be successful at two stages. First the individual commodity board must decide that the applicant ought to be designated as an agency. Second, in such a case, that designation must be approved by the BCMB, as spelled out in s. 10(4) of the *Act*:

10(4) Subject to the approval of the Provincial board, a marketing board may appoint a marketing agency to carry out or perform certain functions or duties for the marketing of a regulated product under its jurisdiction.¹

¹ Where the commodity board decides against an agency application, the process is somewhat different. In such a case, the person refused has a right of appeal to the BCMB. Agency designation may follow if the appellant is successful on such an appeal.

6. In the vegetable sector, the first stage decision is made by the Vegetable Commission, whose General Orders include detailed procedures for the designation of new agencies: ss. 143-151.
7. Global is comprised of four greenhouse growers who currently ship their product through BC Hot House. If Global's application is successful, the result will be the introduction of a second marketing agency operating within BC Hot House's geographic area. Global's application to the Vegetable Commission says that it will not be competing with BC Hot House, but BC Hot House is sceptical of this assertion. The basis for BC Hot House's adjournment application was that it does not have adequate notice of, and has not had sufficient time to prepare for, the question of whether Global will in fact compete with BC Hot House.
8. On October 2, 2001, the Vegetable Commission granted BC Hot House intervenor status on Global's agency application. Global has not taken issue with BC Hot House's standing to file this appeal as a person "aggrieved or dissatisfied" under s. 8(1) of the *Act*.

DECISION

9. The Vegetable Commission has not yet held a hearing or made a decision regarding Global's application. The present appeal by BC Hot House is an interlocutory appeal from the Vegetable Commission's decision refusing to adjourn the hearing.
10. The Vegetable Commission's decision refusing BC Hot House's request to further adjourn Global's hearing was rendered in reasons delivered November 29, 2001. After describing the procedural history of the agency application (which has also been provided to the panel in the parties' submissions), and addressing the other preliminary issues, the Commission dismissed BC Hot House's adjournment request for these reasons:

Hot House has requested that the hearing be adjourned for a period of approximately two and a half months. Global opposes any adjournment and requests that the hearing proceed on December 10, 2001, as scheduled.

The Commission has already adjourned this hearing once, from the original October 9, 2001 date to the current December 10, 2001 start date. The Commission has considered the fact that Global has made a relatively recent amendment to its application. However, the nature of that amendment, the addition of a second marketing agent out of Leamington, Ontario, does not seem to substantially change the nature of the application. Further, the hothouse tomato industry is in a period of crisis and has been for several months, and the Commission is of the view that it must deal with this application expeditiously. Accordingly, the application for an adjournment is denied and the hearing will proceed as scheduled on December 10, 2001.

If during the course of the hearing, it appears that the amendment to the application will materially affect the substance of that application and Hot House's ability to respond to it, the Commission will hear further submissions on the issue. The Commission is prepared to reconsider the need for an adjournment at that time.

11. Even recognizing the BCMB's broad appellate mandate, which is not confined to questions of law, the Panel is generally reluctant to interfere with a commodity board's decisions regarding pre-hearing procedure and management unless those decisions give rise to manifest and incurable unfairness. To do other than exercise restraint in addressing interlocutory procedural matters would only encourage a multiplicity of proceedings, confusion and delay.
12. BC Hot House argues that its right to a fair hearing would be breached by proceeding with a hearing on December 10, 2001. It has placed particular emphasis on the following points, summarized below:
 - I. BC Hot House challenges the veracity of Global's assertion that it intends to supply a European grade tomato not available through BC Hot House. To this end, it requested (October 5, 2001) a list of retailers who offer such tomatoes. When it finally received documents on November 13, 2001, the documents did not include the documents sought on October 5, 2001. Later, on November 20, 2001, Global advised that it was refusing production of the requested documents. On November 29, 2001, the Vegetable Commission directed that Global supply the Vegetable Commission and BC Hot House with documents, by the close of business on December 5, 2001 relating to (a) the existence of a European grading standard; (b) customer lists of XYZ Corp. and Mastronardi Produce Inc.; and (c) the premium pricing received for Dutch tomatoes.
 - II. On October 29, 2001, Vegetable Commission staff advised BC Hot House that Global wished to amend its agency application, and would have 7 days in which to do so, which deadline was later changed to November 12, 2001. BC Hot House was notified of the amendment on November 20, 2001. Global undertook to provide particulars of the amendment by December 3, 2001, which commitment was confirmed by the Vegetable Commission on November 29, 2001 (para. 13).
13. With respect to the points summarized under heading I, BC Hot House says it simply does not have enough time between December 5 and 10 to prepare its case including cross-examination of witnesses. It says that Global is responsible for these delays. It says that there is no urgency from Global's perspective, and that the "state of the industry" is irrelevant because Global says it intends to service clients not part of the present market. Further, BC Hot House asserts that Global's failure to provide documents prevented it from seeking the assistance of an expert or seeking other assistance.
14. If BC Hot House were a defendant in a civil trial, the balance of convenience might well weigh in favour of an adjournment. However, it is extremely important in a case such as this to properly understand the function of the Vegetable Commission and the regulatory context.

15. First, it is important to emphasize that the Vegetable Commission is not here in the role of a passive adjudicator. The Vegetable Commission is a regulator and a policy agency, and is expected to exercise an active and inquisitorial role in considering Global's application – a function far different from a trial judge hearing a civil action. While BC Hot House's participation will of course aid the Vegetable Commission, the Vegetable Commission has an independent responsibility to exercise that function fully and effectively. Under the legislation, the Vegetable Commission is expected to exercise its specialized knowledge, to ask the right questions, and to obtain the necessary information.

16. Second, in deciding whether to add another agency in the vegetable industry, the Vegetable Commission is not being asked to adjudicate a "bipolar" dispute between two private parties. Its decision is more properly understood as a general public policy decision which, like the creation of quota policy, is much more "legislative" than "adjudicative" in nature: *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 FC 427 (CA). This is not to reject BC Hot House's interest as a person whose economic interests may be affected, and who should have an opportunity to be heard with respect to the application. Both the Commission's Consolidated Orders and its October 2, 2001 decision recognize this interest. However, the scope of BC Hot House's procedural fairness rights cannot be regarded as extensive as they would be if it were a defendant in a court process.

17. Third, the Panel agrees with the Vegetable Commission's decision that the recent amendment to add a second marketing agent out of Ontario does not substantially change the application.

18. Fourth, the Panel appreciates that the late receipt of documents will place time pressures on BC Hot House and its counsel with respect to the "European grade tomato" issue. However, the Panel takes the view that, based on the disclosure BC Hot House has already received, and its sophistication, experience and expertise, BC Hot House will be in a position to effectively identify any difficulties in the veracity of claims about European Grade tomatoes. On this point, counsel for BC Hot House submits as follows:

...the market for greenhouse vegetables is well known to BCHHFI and Global is a "newcomer" to the industry. It is this expertise that prompts BCHHFI to question Global's claim that a ready-made market exists for a product BCHHFI does not presently supply (the New Product), and that Global's New Product will not compete with BCHHFI. BCHHFI is *not* aware of the *existence* of the New Product Global intends to market and requires particulars in order to evaluate and respond to Global's application.

19. BC Hot House is in no worse position than the Vegetable Commission itself, which has the responsibility for making this important decision, and which has considered that it is in a position to proceed with the hearing. If BC Hot House is correct, and the notion of a "new product" is a fiction, this will quickly become clear at the hearing, given the knowledge and expertise of the actors. Alternatively, if Global is correct and it is indeed a unique product and market, further expert evidence may

not be necessary given the information that emerges at the hearing. All this said, the Vegetable Commission has already recognized that, if necessary, it can further adjourn the proceeding either because it requires additional information to make a proper decision in the public interest, or because BC Hot House is in fact substantially prejudiced in its ability to respond to critical points.

20. Fifth, any consideration of the extent of a party's procedural fairness rights must take account of emergent circumstances. The Vegetable Commission has identified a crisis in the vegetable industry, and believes that it would be contrary to industry best interests to delay on Global's application. The Panel does not agree with BC Hot House's submission that this crisis is irrelevant to the position of the growers, associated with Global, who are presently caught by the crisis.
21. Finally, it is important to emphasize a point made at the outset: that BCMB intervention in a case such as this is appropriate where there would be manifest and *incurable* unfairness. The regulatory process to which BC Hot House objects is only at stage 1. No decision of the Vegetable Commission would be effective until approved by the BCMB. In the event that the Vegetable Commission recommends agency approval, it will be open to BC Hot House to bring to the BCMB's attention – either by way of appeal or supervisory process – any manifest unfairness in the proceeding that led to key factual or policy errors by the Vegetable Commission. Thus, even if there were procedural unfairness to BC Hot House at this stage, it could be cured at the second level of decision-making.

ORDER

22. For the reasons given above, the appeal is dismissed. Global's agency application will proceed as scheduled on December 10, 2001.

Dated at Victoria, British Columbia, this 5th day of December, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Satwinder Bains, Member

Richard Bullock, Member