IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Global Greenhouse Produce et al v. B.C. Marketing Board & B.C. Hothouse Foods v. B.C. Vegetable Greenhouse et al,***
2003 BCSC 1508

Date: 20031001
Docket: L021876
Registry: Vancouver

Between:

Global Greenhouse Produce Inc., BC Vegetable Greenhouse I, L.P., South Alder Greenhouses Ltd., Topgro Greenhouses Ltd. and Merom Farms Ltd.

Petitioners

And

British Columbia Marketing Board and British Columbia Vegetable Marketing Commission

Respondents

- and -

Docket: L023157
Registry: Vancouver

Between:

B.C. Hothouse Foods Inc.

Petitioner

And

B.C. Vegetable Greenhouse I, L.P., South Alder Greenhouses Ltd., Topgro Greenhouses Ltd. and Merom Farms Ltd.

Respondents

Before: The Honourable Mr. Justice Drost

Reasons for Judgment

Counsel for Global Greenhouse Produce Inc., B.C. Vegetable Greenhouse I,L.P., South Alder Greenhouses Ltd., Topgro Greenhouses Ltd and Merom Farms Ltd.	C. Harvey, Q.C.
Counsel for the British Columbia Marketing Board:	F.A.V. Falzon
Counsel for the British Columbia Vegetable Marketing Commission:	Ms. L. Hynes
Counsel for Hothouse Foods Inc.	J.P. Taylor, Q.C. and H. McBride
Date and Place of Trial/Hearing:	November 4,5,6,7,8 And 12, 2002 Vancouver, B.C.

Introduction

[1] In these Reasons for Judgment I deal with two applications heard at the same time. Both arise from decisions and directions issued by the British Columbia Marketing Board (the "BCMB") and the British Columbia BCVC (the "BCVC") in relation to the marketing of greenhouse tomatoes in British Columbia and the United States of America.

[2] The first application, brought pursuant to the *Judicial Review Procedures* Act, RSBC 1996, c. 241, by Global Greenhouse Produce Inc. ("Global"), BC Vegetable Greenhouse I, L.P. ("BCVG"), South Alder Greenhouses Ltd. ("South Alder"), Topgro Greenhouses Ltd. ("Topgro") and Merom Farms Ltd. ("Merom") (collectively the "Global Petitioners") challenges the validity of certain decisions and directions made and given by the BCMB and the BCVC with respect to greenhouse grown tomatoes, including the validity of certain levies imposed by the BCVC for the purpose of funding costs incurred by B.C. Hot House Foods Inc. ("Hot House" or "BCHH") in connection with international trade litigation concerning an anti-dumping duty imposed by the Unites States Department of Commerce.

[3] The Global Petitioners seek to have those decisions and directions quashed or, alternatively, orders directing the BCVC to hear and determine certain stated questions with respect to them.

[4] The second application, brought by Hot House, is for the appointment of a single arbitrator to arbitrate a dispute between it and BCVG, South Alder, Topgro and Merom (collectively the "Global Growers") relating to the termination provisions contained in certain

Grower Marketing Agreements ("GMA's") in which each of the Global Growers appointed Hot House as its sole and exclusive agent for marketing its product world-wide, and agreed to deliver to Hot House all the greenhouse vegetables it produced.

[5] In will deal first with the application of the Global Petitioners.

The Regulatory Structure

[6] Before doing so, I think it necessary to set out, in some detail, the regulatory context in which the greenhouse vegetable industry operates in British Columbia.

[7] In this Province, the marketing of vegetables, both greenhouse and field grown, is regulated under the ***Natural Products Marketing (BC) Act***, R.S.B.C. 1996 c. 330 (the "Act"), and the ***British Columbia Vegetable Scheme***, B.C. Reg. 96/80 (as amended) (the "Vegetable Scheme").

[8] The BCMB is an administrative board constituted under the Act. It operates as a general supervisory and policy making body with jurisdiction over several marketing boards and commissions, including the BCVC. It is unique among the many provincial administrative tribunals in that it is also authorized to hear appeals from the decisions of the several marketing boards and commissions over which it exercises supervisory jurisdiction. In other words, the BCMB has overall responsibility for natural products marketing in this province.

[9] In ***Ponich Poultry Farm Ltd. v. British Columbia Marketing Board***, 2002, BCSC 1369, Vickers J. described the BCMB and the role of its members in these words:

> The Provincial Board is a specialized administrative tribunal given wide discretionary powers to carry out its mandate and the policy of the *Act*…[T]he Legislature clearly intended the members of the Provincial Board to have significant knowledge and experience in the complex realm of regulated marketing. The members of the Provincial Board are required to be aware of the intricacies of the subject area, the economic principles that lie at the core of regulated marketing, and the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest.

[10] The BCVC is a regulatory body established under the Vegetable Scheme. Its role is to administer the Scheme under the supervision of the BCMB, and for that purpose it is vested with the powers considered necessary or advisable to enable it to promote, control and regulate, in every respect, the production, transportation, packing, storage and marketing of vegetables, including greenhouse tomatoes. Its powers include the authority to designate, subject to the approval of the BCMD, an agency or agencies through which the regulated vegetable products must be produced, packed, stored, transported or marketed.

Sections 2(2), 3(1), 4(1) and 4(2) of the Vegetable Scheme state that:

> 2(2) The scheme is for the promotion and regulation in the Province of the production, transportation, packing, storage and marketing of the regulated product [earlier defined as "vegetables"].

> 3(1) A commission called the British Columbia Vegetable Marketing Commission is established to administer the scheme under the supervision of the British Columbia Marketing Board.
>
> 4(1) The commission is vested with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product.
>
> 4(2) Without restricting the generality of subsection (1), the commission is vested with the powers described in section 11 of the Act…

[11] The BCVC is also authorized, subject to the approval of the Lieutenant Governor in Council, to exercise any power imposed or conferred on it by or under relevant federal legislation with reference to the marketing of a natural product. In that regard, the ***Agricultural Products Marketing Act***, R.S.C. 1985, c. A-6 (the "APMA") provides, in part, that:

> *Governor in Council may grant authority to provincial boards*
>
> 2(1) The Governor in Council may, by order, grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product in interprovincial and export trade and for those purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of that agricultural product locally within the province.
>
> *Levies and charges*
>
> (2) The Governor in Council may, by order, grant to any board or agency mentioned in subsection (1) authority in relation to the powers that may be granted to the board or

> agency under this Act with respect to the marketing of any agricultural product in interprovincial and export trade,
>
> > (a) to fix, impose and collect levies or charges from persons engaged in the production or marketing of the whole or any part of any agricultural product and for that purpose to classify those persons into groups and fix the levies or charges payable by the members of the different groups in different amounts; and
> >
> > (b) to use the levies or charges for the purposes of the board or agency, including the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of any such agricultural product, and the equalization or adjustment among producers of any agricultural product of moneys realized from the thereof during such period or periods of time as the board or agency may determine.

The Facts

[12] In 1996, Hot House was designated by the BCVC as the sole agent for marketing greenhouse vegetables grown in the Lower Mainland area of British Columbia and on Vancouver Island, known as Districts I and II, respectively. In order to formalize their relationships, Hot House and each of the growers it represented, including the Global Growers, entered into a written Grower Marketing Agreement ("GMA") by which the growers appointed Hot House as their sole and exclusive agent for marketing the grower's product, world-wide, and agreed to deliver all of their product to Hot House.

[13] During the mid 1990's the greenhouse vegetable industry in British Columbia experienced tremendous growth. Several established growers expanded their facilities and many new growers entered the industry. However, commencing in or about 1999, the market for British

Columbia grown greenhouse vegetables softened; supply had increased, as had the costs of production, but prices had weakened. As a result most growers earned a much lower return than they had in previous years.

[14] The situation was exacerbated when, in the year 2000, an American trade action was commenced against Canadian greenhouse tomato producers for injury allegedly caused by dumping. At that time, Hot House was the only designated greenhouse tomato agency exporting its product into the United States. In circumstances that I will discuss later, it was agreed that Hot House would undertake the coordination of the British Columbia industry's response to the complaint.

[15] As a consequence of these events, difficulties arose between Hot House and some of its growers. Notwithstanding that each of them was then party to a GMA, in 2001 the four Global Growers formed Global and, on July 24, 2001, an application was filed with the BCVC for the designation of Global as their marketing agent in place of Hot House.

[16] In support that application Global presented a Business Plan in which it stated, in part:

> Global Greenhouse Produce Inc. has been advised by legal counsel that the Commission has the authority to cancel the Grower Marketing Agreement, even though the Commission is not a named party to the agreement. Legal counsel advises that the Grower Marketing Agreement is not a conventional commercial contract due to the involvement of the Commission and the Commission's ratification of the agreement on an annual basis. The agreement exists at the pleasure of the Commission as a quasi-governmental contract and the commission has the authority to cancel the contract in an effort to reallocate the product. If the Commission did not have this authority, it would fetter the Commission's ability

> to fulfill its mandate, including the reallocation of product when necessary. Therefore, if it is the desire of the Commission to reallocate the product, it can do so.
>
> The principals of Global Greenhouse Produce Inc. assume in the Agency Application that the Commission will use its authority to reallocate the product to render the Grower Marketing Agreement null and void, and Global Greenhouse Produce Inc. hereby formally requests the Commission to do so.

[17] Despite that request, at the hearing the Global Petitioners asked the BCVC not to deal with the GMA issue. They say now that, at the time, they felt that the issue ought not to be addressed until the result of Global's agency application was known. If it was rejected, there would, of course, be no issue to resolve.

[18] On August 14, 2001, the BCVC imposed an extraordinary levy, for the 2001 season, on all greenhouse tomatoes produced in Districts I and II for the purpose of funding expenses associated with the trade dispute, and Hot House was directed to deduct the levy in a certain manner.

[19] In October 2001, a preliminary tariff against the Canadian product was imposed by the U.S. Department of Commerce.

[20] On December 12, 2001, the BCVC held an industry meeting to consider a request by Hot House for a further levy order to fund a further $1,500,000 in legal and other costs associated with the U.S. trade dispute. Robert Toews, representing Global and (as I understand it) all of the Global Growers, argued that the BCVC lacked statutory authority to impose the levy, and provided the Commission with a portion of their solicitor's legal opinion to that effect. After hearing submissions from Hot

House and other interested producers, the BCVC refused to authorize the collection of an additional levy at that time.

[21] On December 17, 2001 the BCVC recommended to the BCMB that agency status be granted to Global. Its recommendation was confirmed in written reasons, dated January 7, 2002, in which the Commission stated, in part, that:

> …
>
> 25. The Commission has been dealing with the issues facing BCHH and the hothouse tomato industry for some time….
>
> 26. The problems in the industry continued during 2001, when an anti-dumping complaint was filed by certain U.S. greenhouse producers against the Canadian tomato industry. Approximately 80% of BCHH's greenhouse tomato production is sold into the United States, making an anti-dumping finding very significant for BCHH and for B.C. producers of greenhouse tomatoes….
> …
>
> 29. …between December 10 – 14, 2001, the Commission heard this agency application. The 2001 crop season has now ended, and it is anticipated that Global's operations as an agency, if its designation is ultimately granted, would begin with shipments in 2002.
>
> 30. The background outlined above forms part of the regulatory context in which the industry is currently operating and upon which this decision must ultimately be made. These are challenging times for this industry. The industry is facing significant and unprecedented anti-dumping duties and certain growers have, warranted or not, lost confidence in BCHH's ability to market their product. Global's agency application has been presented to the Panel as an alternative for producers of greenhouse vegetables in the province and as a possible means of dealing with some of the outstanding issues in the industry.

31. BCHH is currently the sole designated marketing agency for regulated greenhouse vegetables in Districts I & II. Hot House and its tomato producers have been going through a difficult financial period of late, largely as a result of the significant preliminary duty impose upon it by the U.S. Department of Commerce….It was clear from the evidence presented to the Panel that at least some growers remain largely dissatisfied with the manner in which BCHH has been operating as a marketing agent, and that these growers wish to have an alternative….Simply put, they do not want to do business with BCHH any longer and they seek the opportunity to market their product more effectively. They may or may not succeed in this regard, but they want to try.

…

33. The Panel has also considered the impact of a second agency designation on the industry as a whole at this time. Concerns were expressed to the Panel that the existence of a second seller of B.C. product would result in price erosion in the market place. The Panel recognizes that Globals (sic) proposed marketing plan will result in additional access to markets and enhanced sales opportunities. The Global application attempts to deal with these issues by committing to market the product outside BCHH's traditional markets of western Canada and the I-5 Corridor. BCHH expressed doubt that any such commitment would be effective.

…

35. In the result, the Panel has concluded that, in light of the circumstances in which the hothouse industry is currently operating it is an appropriate time to provide producers with an alternative to marketing product through BCHH….

…

39. Overall, therefore, the Panel has concluded that the circumstances in which the hothouse industry, and in particular the tomato industry, currently finds itself has crated

the need for a second agency. Global appears to be in a good position to provide that alternative, and the Panel is prepared to give them the opportunity to do so.

Decision of the Panel

40. After considering all of the evidence and arguments placed before it at the hearing in this matter, the Panel has decided to recommend approval of Global's application to be designated as an agency for the marketing of regulated greenhouse tomatoes and peppers produced in District I, providing certain conditions are met; specifically, the Panel is of the view that Global's agency designation must be subject to the following terms:

…

(b) All regulated greenhouse vegetables produced and packed by Global and its associated growers that are marketed within North America must be marketed to customers located outside western Canada (defined as British Columbia, Alberta, Saskatchewan and Manitoba) and outside the region known as the "I-5 corridor" in the United States. The exact demarcation lines for the "I-5 corridor" should be determined in consultation with Global and Hot House, and will be the subject of a further direction from the Commission.

…

42. The Commission's decision with respect to the Global agency application will not affect the terms of existing Grower Marketing Agreements between BCHH and producers of greenhouse vegetable products ("GMAs"). Any existing GMA must be determined in accordance with its terms, unless the parties to the GMA reach another agreement.

[22] By letter dated January 18, 2002, Mr. Ross Husdon, Chair of the BCMB, informed the BCVC and the interested parties that a Panel had

met, heard submissions and assessed the Commission's recommendation, both as to its process and its substance. He advised that the Panel was satisfied that the BCVC's decision and the conditions attached to it were sound and appropriate as a matter of marketing policy and that, subject to the terms and conditions established by the BCVC, the designation of Global as an agency was approved.

[23] That left Hot House as the marketing agent for approximately 50 British Columbia greenhouse vegetable growers.

[24] On January 25, 2002, counsel for Hot House wrote to the BCVC requesting a hearing to deal with outstanding "implementation and compliance issues". Global objected, suggesting that those issues were essentially "housekeeping matters" and were best settled directly between the parties with the assistance of the BCVC's general manager, if necessary.

[25] However, on March 12, 2002, Global's solicitor wrote to the BCVC advising that the Growers and Hot House had met but were unable to reach agreement regarding the existing GMAs. "Accordingly", he said:

> …each GMA falls within the Commission's decision that the GMA be determined in accordance with its terms. This appears to us to require further action by the Commission since it is an implied term of each GMA that the GMA is subject to the lawful exercise of the commission's authority under the governing legislation. (*Money's Mushrooms v. BC Marketing Board* [2001] B.C.J. No. 1412, para. 25/100). On behalf of our clients we request that the Commission now exercise its authority to terminate (or approve the termination of) each of the relevant GMA's so as to accord with the Commission's present policy of allowing our clients to market their products through Global. This requires a termination of the GMA's by the Commission since otherwise,

> in following the direction given by the Commission on January 7, 2002, our clients would be in breach of their respective GMA's and liable to an injunction and damages.

[26] Upon receiving a copy of that letter, counsel for Hot House wrote to the BCVC advising that:

> …it is our position that the Commission's authority under the governing legislation does not extend to the power to set aside, terminate or otherwise vary an existing commercial agreement between a grower and a designated marketing agency.
>
> Moreover, even if the Commission did have the authority to terminate or set aside these GMAs, the commission has already decided it would not do so. …
>
> Having said this, we would welcome the participation of the commission strictly as a mediator between B.C. Hothouse (sic) and these growers to resolve issues relating to the termination of these GMAs in accordance with their terms. …

[27] The Global Petitioners' solicitor did not agree that the BCVC lacked jurisdiction to terminate or otherwise vary the GMAs, or that it had already ruled against doing so. However, in a letter to the BCVC dated March 20, 2002 he stated, in part:

> As to the suggestion of mediation, our clients are in favour of it provided that:
>
> (a) BC Hot House Foods Inc. ("Hot House") is willing to contemplate a termination of the GMAs without resort to the liquidated damages clause; and
>
> (b) it is understood that the request to the Commission for a hearing will be adjudicated if the mediation is unsuccessful.
>
> If Hot House is not willing to accept the foregoing, there is no point in mediation, and we should proceed directly to a hearing before the Commission.

[28] By letter dated March 21, 2002, counsel for Hot House advised the BCVC that:

> I see no purpose in arguing with Mr. Jackson about the GMA. You have the parties' positions in the letters of March 12 and 14, 2002. Presumably the commission will proceed to schedule a hearing if it thinks this is required in the circumstances.

[29] On March 12, 2002, representatives of the Global Petitioners, and other interested parties, met with Mr. Husdon. In a follow-up letter (incorrectly dated November 7, 2001, but delivered on March 14, 2002), they made the following requests:

> Based on the problems facing our industry, which require the ultimate in terms of flexibility to be resolved, compounded by the inability of the Commission to properly address issues as they arise in our current environment, we hereby request that the BC Marketing Board conduct a supervisory Review of the Commission and to suspend the Commission's regulatory powers until such time as the review has been completed. After the supervisory Review has been completed, we request that the BC Marketing Board deregulate the British Columbia Greenhouse Vegetable Industry from both a production and marketing perspective. Contemporaneously with deregulation, we request that the BC Marketing Board cancel all the GMA's which we were compelled to sign with Hot House.

[30] By letter dated March 24, 2002, Mr. Husdon informed Globals' president that, while the matter of deregulation falls within the purview of Lieutenant Governor in Council, not the BCMB, the BCMB wanted to work with all parties to ensure an efficient and prosperous greenhouse vegetable industry.

[31] On April 2, 2002, Mr. Husdon wrote to Hot House and Global advising that the BCMB and the BCVC had initiated a process to resolve the various "serious issues" facing the greenhouse vegetable industry. He confirmed that all interested parties had discussed the resolution process, agreed to participate, and that it was to be completed by April 30, 2002.

[32] In the final paragraph of that letter he stated:

> The BCMB looks forward to working with the parties to resolve these issues. The decision by the US to eliminate the duty on tomatoes imported from Canada creates a much more favourable environment for the industry to resolve these issues. However, all parties should be aware that failure to reach resolutions may result in a BCMB Order or Directive to conclude matters.

[33] The proposed resolution process was not successful. In a letter dated May 6, 2002, Mr. Husdon summarized the "serious issues" facing the industry (insofar as they are relevant to this application) as being:

> 1. How the "I-5 corridor" restriction imposed by the BCVC as a term of Global's agency designation should be defined, and for what period of time that condition should continue;
>
> 2. Whether the BCVC should impose a levy on all greenhouse tomato producers located in Districts I & II for the purpose of paying the costs incurred in the defence of the United States anti-dumping complaint, and the filing of the Canadian anti-dumping complaint, involving tomatoes.
>
> 3. Whether Global should be required to pay a share of such levies, and if so, under what formula should the levies be collected?

> 4. Whether an order should be made authorizing Global to conduct operations in a fashion that would be contrary to the terms of the Growers GMAs with Hot House and, if so, what the terms of at any such order should be.

[34] With respect to the proposed resolution process, he advised the interested parties that:

> As you are aware, the BCMB initiated this process by striking a supervisory panel with participation primarily by the writer, as Chair, and designed to encourage clarification of issues, discussion and agreement. During this process, there was consensus on some of the issues, but since it was a condition by all parties that there must be agreement on all issues, no agreement was reached. As such, the final paragraph of my April 2, 2002 letter will now be implemented.

[35] Mr. Husdon then advised them that the BCMB supervisory panel was satisfied that it was not in the best interests of the BCVC to allow the resolution of the issues to drift, or to be addressed piecemeal through individual appeals, supervisory requests and applications to the BCVC and that it had been determined that:

> 1. The BCMB would receive formal written submissions from the parties with respect to each issue;
>
> 2. The BCVC would consider those submissions and provide the BCMB with its recommendation for a resolution that is in the best interests of the vegetable industry;
>
> 3. The parties would then have an opportunity to comment on the BCVC's recommendations;

4. The BCMB would then consider the positions of all of the parties and issue a supervisory decision and accompanying directions in order to resolve the matters; and that

5. The process he described was subject to the BCMB's right, at any time, to convene to hear oral evidence and submissions in the event it considered it necessary to do so in order to reach a proper decision.

[36] Finally, Mr. Husdon asked the parties whether they had any objection to the members of the existing supervisory panel continuing to act in that capacity.

[37] On May 10, 2002, Global's President wrote to Mr. Husdon advising that Global had no objection to the existing supervisory panel acting as the supervisory panel for the purpose of issuing a supervisory decision and direction with respect to the outstanding issues summarized in his letter of May 6, 2002.

[38] On May 31, 2002, Mr. Husdon advised the interested parties that once the matter was before the BCVC, the BCVC would be free to obtain from the parties such additional written and/or oral information as it deemed necessary before arriving at its recommendation.

[39] On June 5, 2002, a letter the BCVC sent a letter to the parties advising that each of their submissions would be circulated to the other parties, and that they would each have an opportunity to respond.

[40] On June 7, 2002, Global's solicitor wrote to the BCMB asking that the supervisory review process described in Mr. Husdon's letter of

May 6, 2002 be amended, and that the levy and GMA issues be dealt with at a full hearing of the BCMB if any one of the parties requested such a hearing within 10 days of receipt of the BCVC's recommendations to the Board. He set out his reasons for making that request, one of which was that the "supervisory process" undertaken by the BCMB pursuant to its May 6, 2002 letter would have an adverse impact on the appeal rights available to the parties. He submitted that a decision of the BCVC could normally be appealed to the BCMB and from there (under either the Act or, more generally, pursuant to the *Judicial Review Procedure Act*) to this court. The current process, he said, having been taken outside of the application procedures found in the Act, would leave only an appeal under the *Judicial Review Procedure Act*.

[41] On June 10, 2002, Mr. Husdon replied. He advised that the supervisory panel was not prepared to "bind itself procedurally" to the suggested process. He gave reasons for that decision, the most significant, in my view, being that, in the panel's opinion, the best interests of the BC greenhouse vegetable industry, its growers and agents, "demands a final and comprehensive resolution as soon as reasonably possible."

[42] Mr. Husdon went on to observe that:

> From the outset in this process, the Panel has made it clear that it seeks to ensure that the parties have a fair and effective opportunity to be heard as part of the process. However, in establishing its procedure, the Panel has also recognized that, subject to the fundamental requirements of procedural fairness, it is master of its own procedure. Contrary to Mr. Jackson's submission, which seems to equate the word "hearing" with an oral hearing, the law is clear that

a full and fair hearing can take place in the absence of the full panoply of procedural rights that exist in a civil trial.

[43] Mr. Husdon then summarized the " supervisory process" and said:

> This process ensured that each party will have at least three opportunities to provide evidence and submissions in respect to each issue, and furthermore confers discretion on both the BCVC and the BC Marketing Board to proceed with oral submissions in the event they consider this to be necessary based on the information and submissions before us. … Unless and until we are satisfied that there are specific and definable issues that can only be resolved through an oral hearing, we are not prepared to procedurally fetter the supervisory process in the legalistic manner suggested by counsel for the respondents. …
>
> Mr. Jackson's letter makes reference to the fact that this process does not allow for a detailed evidentiary record to be produced. We disagree. They have been and continue to be free to submit whatever evidentiary material they see fit by way of documents, expert reports and affidavits. If the parties consider it advisable, the Panel will receive evidentiary material from them to support a submission regarding the BCVC's recommendations to the Panel. Further, if the parties satisfy us that it is necessary for there to be oral evidence or cross-examination (beyond the record created before the BCVC) either generally or on particular key points, we will consider the request at that time. But for the reasons outlined above we are not prepared to do so now.

[44] On June 11, 2002, Global's solicitor replied to Mr. Husdon stating that:

> …The review process described in the letter is totally unacceptable. Accordingly, Global hereby withdraws from the review process commenced by the BC Marketing Board under its letter of May 6, 2002.

> We have been instructed to immediately make application to the British Columbia Supreme Court for an appropriate remedy, and will be taking steps in that regard at the earliest possible opportunity.

[45] On June 13, 2002, Mr. Husdon wrote to Global's solicitor. He acknowledged Global's decision to withdraw, but advised that the process would continue in its absence.

[46] On July 5, 2002 Baker J. heard the application for an interlocutory injunction restraining the Board and BCVC from proceeding with the review process. Madam Justice Baker refused the application. In oral reasons given that day she stated, in part, that:

> …it will rarely be in the public interest to restrain a public body from carrying out its statutory mandate until there has been a judicial determination that it is acting outside its jurisdiction. At worst, if the petitioners are correct, there will be delay and added expense in having to revisit these issues before the commission and on the series of appeals. In My view, that does not outweigh the public interest in allowing these specialized tribunals to proceed in a manner they have deemed most likely to bring about a desirable result until they have concluded the process. After that, there can be a full judicial review on the merits of the issues raised in the petition, and, if desired, raised by the decisions reached by the Board.

[47] On July 23, 2002, the BCVC issued its recommendations to the Marketing Board. In the introductory portion of its report it noted that, despite numerous written invitations to make submissions, Global had declined to participate in the process set out in Mr. Husdon's letter of May 6, 2002.

[48] With respect to the "I-5 corridor" issue the BCVC stated that:

26. The "I-5 Corridor" is a term of art within the industry which refers to more than the three states through which the I-5 Highway runs. The purpose of the marketing condition limiting Global[`s]…ability to market in the "I-5 Corridor" was to ensure that the existence of new sellers gave rise to enhanced sales opportunities for B.C. greenhouse product, rather than simply having the new sellers focus their attention on markets already being served by B.C. greenhouse vegetable producers. The western United States, not surprisingly, has been a target market for Hot House and for B.C. producers for a number of years.

27. The basis for the Global agency application, in particular, was Global's ability to create <u>new</u> markets for B.C. product, primarily in Eastern Canada and the Eastern United States. Global urged the Commission to grant them an agency on the basis that they would displace product currently being imported into those areas from Europe with their high quality greenhouse produce. Having a second agency focus on markets already served by B.C. producers would not have created new market opportunities, may not have been in the best interests of the industry as a whole, and was not the business proposal behind the agency application.

…

29. Accordingly, the "Commission is of the view that the "I-5 Corridor", as that term is used in the marketing conditions, should take into account the normal distribution centre for greenhouse vegetables on the west Coast of the United States, whether such distribution is being carried on by Hot House or anyone else who would sell into that area. That distribution system covers seven States: Washington, Oregon, California, Idaho, Utah, Nevada and Arizona.

…

31. With respect to timing of the marketing exemption, the commission recommends that the conditions remain in place until December 31, 2003…. This should give Hot House and

its associated producers enough time to adjust their marketing plans and strategies to account for the existence of additional sellers of B.C. greenhouse vegetable products.

Recommendation of the Commission

> 32. The Commission recommends that the "I-5 Corridor", for the purposes of the marketing corridor conditions attached to the Global agency designation…be defined to include seven States: Washington, Oregon, California, Idaho, Utah, Nevada and Arizona. These seven States represent the normal distribution system for greenhouse vegetable products on the West Coast of the United States.
>
> 33. The Commission further recommends that the marketing conditions remain in place until December 31, 2003, at which time it will be lifted from the Global agency….

[49] Then, following a lengthy review of the circumstances surrounding the anti-dumping trade disputes between the American and Canadian greenhouse tomato industries which began in 2001 and gave rise to Levy Order 08/01, the BCVC recommended that:

> 48. …all greenhouse tomato producers in Districts I and II share proportionately, in paying for the remaining costs associated with associated with the defence of the trade dispute in the U.S. and the prosecution of the trade dispute before the Canadian International Trade Tribunal. The Commission further recommends that the payments by tomato producers should be shared on a square metre of production basis. Specifically, the Commission recommends that the levy be paid in four monthly instalments beginning August 1, 2002. The levy for the first three instalments should be set at $0.50 per square metre. The amount of the final payment (on November 1, 2002) will be determined following completion of a Commission audit (described below).

[50] Finally, as to whether an order should be made authorizing Global to conduct operations in a fashion that would be contrary to the terms of the GMA's between the Global Growers and Hot House, the BCVC recommended that:

> 68. With respect to the GMA issue, the Commission recommends that no further action be taken by the BCMB or the Commission on the basis of the currently available information. The Commission recommends that the parties be encouraged to exercise their rights under the contracts and proceed to arbitration or to court action.
>
> 69. With respect to the need for a hearing and additional evidence on the point, if the BCMB accepts the Commission's recommendation on this issue, then the Commission is of the view that no hearing is likely required. If the BCMB, on the other hand, decides to consider the validity of the alleged breaches of contract, then the BCMB may wish to consider whether additional evidence on those points would be necessary to fully inform its decision.

[51] On July 25, 2002, Mr. Husdon wrote to the solicitors for the parties inviting them to provide written evidence and make written submissions in response to the BCVC's recommendations. He also advised them that:

> The parties' submissions must address the substance of any of the Commission's recommendations to which they object, and may address, with rationale, the question whether the BCMB should convene an oral hearing on any or all of the issues addressed by the Vegetable commission.

[52] In response to that invitation, written submissions were made on behalf of both Global and Hot House.

[53] On August 8, 2002, the Governor General in Council issued SOR/202-309 pursuant to the provisions of the ***Agricultural Products Marketing Act***. The Order in Council is entitled "***Order Amending the British Columbia Vegetable Order"*** and it added a new section to the Vegetable Order which authorized Commodity Board (i.e., the BCVC) to fix, impose and collect levies or charges from persons who are engaged in

the production or marketing of whole vegetables, and to use such charges or levies for:

> …the purposes of the Commodity Board, including the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of any vegetables and the equalization or adjustments among vegetable producers of moneys realized from the sale of vegetables during any period or periods of time that the Commodity Board may determine.

[54] On September 11, 2002, the BCMB issued a report concerning the supervisory review it had undertaken with respect to the issues defined in its letter of May 6, 2002. That report contains the decisions and directions which are the subject of the Global Petitioners' application.

[55] With respect to the I-5 Corridor issue, the BCMB directed the BCVC to amend Global's existing agency approval conditions so as to define the I-5 corridor as reflected at paragraph 32 of the BCVC's recommendation namely that, for the purposes of the marketing corridor conditions attached to the Global agency designation, the "I-5 corridor" be defined to include seven States: Washington, Oregon, California, Idaho, Utah, Nevada and Arizona.

[56] With respect to the Grower Marketing Agreements, the BCMB noted that the GMA issue had not been directly argued at the Global agency hearing, and that the BCVC's decision not to relieve the Growers of their contractual obligations had not been appealed. The report went on to state that the Growers were sophisticated parties who had made a considered business decision to enter an industry they knew well and that they understood the effect of the agreements they had signed. The

BCMB held that Global had not satisfied it that there were special circumstances warranting regulatory relief from the GMAs.

[57] With respect to the levies for legal expenses, the BCMB noted that Global had not appealed the BCVC's Levy Order 08/01. It then held that the BCVC had authority to issue that Levy Order as well as the additional Levy Order 09/02 and went on to state that:

> …the real question is the marketing policy question whether the levy should be issued at all, and if so, whether it ought to be shared proportionately among tomato growers based on production areas in the year 2001 rather than 2000.
>
> The Panel has no hesitation in concluding that the additional levy should be issued. In light of the American trade action, it would have been irresponsible for the BC industry not to retain counsel, and it is only fair that the costs of that defence be shared by the entire tomato industry.

[58] The BCMB then directed the BCVC to impose a levy requiring all greenhouse tomato producers in Districts I and II to share proportionately in paying for the remaining costs associated with the defence of the trade dispute and gave further directions to the Commission as to how the levy was to be structured.

[59] As a result of that direction, on September 18, 2002, the BCVC issued Levy Order 09/02 imposing each producer of greenhouse tomatoes in Districts I and II a further levy "for the purposes of funding outstanding costs associated with the defence of a trade dispute in the United States and the prosecution of a trade dispute before the Canadian Internation Trade Tribunal in the matter of greenhouse tomatoes".

The Relief Sought by the Petitioners

[60] The Global Petitioners ask for the following relief:

> 1. An order quashing the decision and directions of the BCMB made on September 11, 2002;
>
> 2. An order quashing the condition set by the BCVC in paragraph 40(b) of its agency application decision given in writing on January 7, 2002;
>
> 3. Alternatively, an order directing the BCVC to hear and determine according to law the question whether the regulation of marketing in the United States of America, as set out in the condition contained in paragraph 40(b) of its said decision, should remain as part of the said condition and, if so, the duration of the said condition and the exact demarcation lines for the "I- 5 corridor";
>
> 4. An order declaring that the BCVC has no federal or provincial authority to impose and collect a levy on vegetable growers in British Columbia for the purpose of funding costs, including costs incurred by an agency or any entity other than the BCVC, associated with international trade litigation;
>
> 5. An order quashing Levy Order 08/01 passed by the BCVC on August 14, 2001 and promulgated on August 15, 2001;
>
> 6. An order quashing Levy Order 09/02 passed by the BCVC on September 18, 2002; and
>
> 7. an Order directing the BCVC to hear and determine the application made by the petitioners on March 12, 2002 concerning the termination of the GMAs.

[61] Hot House seeks an order appointing a single arbitrator to arbitrate a dispute between it and the Global Growers arising as a result of the alleged termination by them of their respective GMA's.

The Issues

[62] The claims advanced by the Global Petitioners fall into three broad categories:

> A. Those that may be described as "process issues", in which they challenge the supervisory process by which (they allege) the BCMB "usurped" the decision-making function of the BCVC;
>
> B. Those relating to their claim that the I-5 corridor restriction recommended by the BCVC in paragraph 40(b) of its Agency Application Decision of January 7, 2002, and confirmed, with variations, by the decision of the BCMB on September 11, 2002, should be quashed;
>
> C. Those relating to the validity of the levies imposed by the BCVC for the purpose of paying expenses incurred by Hot House in connection with the international trade litigation.

[63] The issues identified by the Global Petitioners as arising in the first category are:

> 1. Whether the September 11, 2002 decision of the BCMB should be quashed;
>
> 2. Whether the BCVC should be directed to hear and determine according to law the question whether the regulation of marketing in the United States of America as set out in the condition contained in paragraph 40(b) of its decision of January 7, 2002 should remain as part of that decision and, if so, the duration of the said condition and the exact demarcation lines for the "I-5 corridor";
>
> 3. Whether the BCVC should be directed to hear and determine, according to law, the application by BCVG,

> South Alder, Topgro and Merom made on March 12, 2002, concerning the termination of the GMAs.

[64] The next two issues, as stated by the Global Petitioners, relate to the designation and definition of the "I-5 corridor". They are:

> 4. Whether the BCVC or the BCMB has statutory authority to prohibit Global from marketing its products in a defined region with the United States of America;
>
> 5. Whether the condition set by the Vegetable Commission in paragraph 40(b) of its January 7, 2002 decision and confirmed with variations by the BCMB on September 11, 2002, should be quashed.

[65] The final issues relate to the validity of levies imposed by the BCVC for the purpose of paying the expenses incurred by Hot House in connection with the "international trade litigation". They are:

> 6. Whether Levy Order 08/01, passed by the BCVC on August 14, 2001, should be quashed; and
>
> 7. Whether Levy Order 09/02 passed by the BCVC on September 18, 2002, should be quashed.

[66] The key issue raised by Hot House's application is whether, as the Global Growers assert, the effect of the BCVC's granting of agency status to Global was to terminate or set aside Article 3(c) of the GMA's.

Discussion and Conclusions

[67] I will deal first with the issues raised by the Global Petitioners' application, with the exception of those relating to their application for an order directing the BCVC to hear and determine their March 12, 2002 request concerning the termination of the GMA's. It will be more

convenient to deal with those issues when I come to Hot House's application for the appointment of an arbitrator.

The Scope of Judicial Review

[68] First, I must note that the settled approach to the construction of regulated marketing legislation was articulated for the Court by McIntyre J. in ***Maple Lodge Farms Ltd. v. Canada****,* [1982] 2 S.C.R. where, at p. 7, he stated that:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the Court should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

[69] The merits of the policy decisions under consideration are not amenable to review: see ***Delight v. British Columbia Egg Marketing Board*** (1991), 84 D.L.R (4^{th}) 518 (B.C.C.A.) at pp 534-35, and ***Truong Mushroom Farm Ltd. v. British Columbia (Mushroom Marketing Board)***, [1999] B.C.J. No. 1079 (S.C.) where, at paragraph 47, Boyle J. stated:

> There are economic, social, political and, perhaps, moral and philosophical issues underlying the function of all marketing boards. The have long been debated. They - like the meaning of life - are not questions for the court. They are for the legislature.

[70] Furthermore, findings of fact made by the administrative authority must be accepted as conclusive unless they cannot be

supported by the evidence before it: ***Lester (W.W.) (1978) Ltd. et al v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, local 740*** (1990), 76 D.L.R. (4th) 389 at pp. 418-19 (S.C.C.). As I stated in ***Anning v. British Columbia (Minister of Energy and Mines)***, [2002] B.C.J. No. 1320, at para.96:

> [T]he role of this Court on judicial review is not to re-weigh the evidence that was before the decision-maker, nor is it to set aside a decision on the basis that certain information was not considered that might have been considered.

[71] In other words, this court is concerned only with the jurisdiction of the BCMB and the BCVC to make the orders and give the directions they did, and its paramount to duty is to give full effect to the intention of the legislature.

The Process Issues

[72] The Global Petitioners submit that the BCMB's decision of September 11, 2002 should be quashed because the procedure it followed, and the decisions and directions it made, are inconsistent with the powers delegated to it by the Act. They say that the Act clearly provides that the BCVC, not the BCMB, is the original decision-maker, and that the BCMB's supervisory powers do not allow it to take over the original jurisdiction of the Commission.

[73] They submit that, whatever the extent of the BCMB's supervisory powers may be, they do not entitle it to alter the legislative scheme and deprive a citizen of his or her right to a decision from the BCVC, an administrative appeal to the BCMB in accordance with section 8 of the Act, as well as the right to a further appeal to this Court pursuant

to section 9 of the Act. They say that the "take over" by the BCMB of the decision-making and adjudicative role of the BCVC was a "novel adjudication process", one that is clearly inconsistent with the process contemplated by the Act for adjudication, decision and appeal.

[74] Supported by the BCVC, the BCMB submits that it would be contrary to the language, history and purpose of its supervisory power to construe the Act in such a fashion as to prevent it from giving policy direction to commodity marketing boards where it concludes that it is necessary and in the public interest. Such a power, the BCMB says, is a "fundamental feature of the legislative scheme."

[75] I do not consider it necessary to review the extensive and detailed submissions made with respect to the history, nature and extent of the BCMB's supervisory power, but I do think it appropriate to make specific reference to those provisions of the Act whereby the BCMB (referred to therein as the "Provincial board") was constituted and its powers established:

> 2 (1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.
>
> (2) The Lieutenant Governor in Council may
>
> (a) establish, amend and revoke schemes for the promotion, control and regulation in British Columbia of the production, transportation, packing, storage and marketing of natural products,

(b) constitute marketing boards and commissions to administer the schemes, and

(c) vest in those boards and commissions powers considered necessary or advisable to enable them effectively to promote, control and regulate the production, transportation, packing, storage and marketing of natural products in British Columbia and to prohibit all or part of the production, transportation, packing, storage and marketing.

(3) A scheme may relate to all or part of British Columbia and may relate to one or more natural products or to a grade or class of product.

3 (1) For the purposes of this Act, the Lieutenant Governor in Council may constitute the British Columbia Marketing Board…

…

(5) The Provincial board

(a) has general supervision over all marketing boards or commissions constituted under this Act.

…

5 With the approval of the Lieutenant Governor in Council, the Provincial board and every marketing board or commission may perform a function or duty and exercise a power imposed or conferred on it by or under the federal Act [defined as the *Agricultural Products Marketing Act* (Canada), the *Farm Products Agencies Act* (Canada) or the *Canadian Dairy Commission Act* (Canada), or any of them], with reference to the marketing of a natural product.

8 (1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal…

…

(8.2) The Provincial board may order that an order, decision or determination of a marketing board or commission that is under appeal is stayed pending the outcome of the appeal.

(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.

9 (1) If a person, marketing board or commission is aggrieved or dissatisfied by an order or referral of the Provincial board under section 8(9), the person, marketing board or commission may appeal the order or referral on a question of law to the Supreme Court if the appeal is commenced within 30 days of being served with a copy of the order or referral.

(2) On hearing an appeal under subsection (1), the Supreme Court may do one or more of the following:

(a) make an order confirming, reversing or varying the order or referral of the Provincial board;

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

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

(3) An appeal from a decision of the Supreme Court under subsection (2) lies to the Court of Appeal with leave of a justice of the Court of Appeal.

10 (1) In accordance with section 2, the Lieutenant Governor in Council may provide for the establishment of a marketing board to administer, under the supervision of the Provincial board, regulations for the marketing of a regulated product.

11 (1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

(a) to regulate the time and place at which and to designate the agency through which a regulated product must be produced, packed, stored, transported or marketed;

…

(o) to set and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission

(i) to carry out the purposes of the scheme,

(ii) to pay the expenses of the marketing board or commission,

(iii) to pay costs and losses incurred in marketing a regulated product,

(iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and

(v) to set aside reserves for the purposes referred to in this paragraph;

…

> (q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of a regulated product, and to amend or revoke them;

[76] Earlier, when outlining the regulatory structure in this province, I set out certain relevant provisions of B.C. Reg. 96/80 (which established the Vegetable Scheme), including s. 3(1) which stipulates that the BCVC is to administer the scheme "under the supervision of the British Columbia Marketing Board". In ***New Brunswick Telephone Co. v. Kenny et al.*** (1988), 55 D.L.R. (4th) 711, the New Brunswick Court of Appeal considered the meaning of s.5(1) of the Public Utilities Act of that province which provided that " the Board shall have general supervision of all public utilities" and the court held that:

> The phrase "general supervision" is not defined in the Act nor does it appear to have been the subject of any reported case. The words should therefore be given their ordinary meaning in the context of the mandate given to the Board by the Act, i.e., "to investigate", "to examine", "to inquire", " to oversee", "to direct".

[77] By definition, a "supervisor" is one having authority over others (Black's Law Dictionary (1999), 7th ed.). In this case the BCMB has general supervision over all marketing boards or commissions constituted under the Act and, in my view, sections 11(1) and 11(2) of the Act clearly illustrate the legislature's intent that the Marketing Board is to be the ultimate decision maker in this area, and that it be a pro-active, rather than a passive, regulatory body.

[78] I find that, in addition to the authority to amend, vary or cancel orders or rulings made by subordinate marketing boards or

commissions, that general supervisory authority gives it the power, where it deems it appropriate, to give policy directions to those marketing boards or commissions in order to ensure that they take the action that the BCMB, as their supervisor, considers necessary and in the public interest.

[79] For those reasons, I find that the extent of the BCMB's intervention in this case fell within the scope of its supervisory mandate and that the supervisory decisions and directions set forth in its report of September 11, 2002, were validly made and given.

The I-5 Corridor Issue

[80] Reference to the "I-5 corridor" first appeared in the marketing plan which formed part of Global's agency application to the BCVC. When he appeared before the BCVC on the hearing of Global's application, Global's Treasurer, Mr. Robert John Toews, advised the Commission that:

> What we as Global tried to do when we drafted this document, we tried to figure out a way that we did not compete with the other agency and there are a couple of – a number of items that we agreed upon. Number one, we do not want to market into the I-5 corridor or Western Canada. Almost 60 percent of the tomatoes sold by BC Hot House Food are marketed in this area. They've developed a market over many years, they have their relationships, and that's fine. So we, in our business plan, talk about marketing the Midwest and the eastern part of the country. Its going to cost us more freight, but we think it's the responsible thing to do.

[81] In paragraph 40(b) of its January 7, 2002 decision, the BCVC recommended to the BCMB that Global's agency designation be subject to the condition that:

> All regulated greenhouse vegetables produced and packed by Global and its associated growers that are marketed within North American must be marketed to customers located outside western Canada (defined as British Columbia, Alberta, Saskatchewan and Manitoba) and outside the region known as the "I-5 corridor" in the Unites States. The exact demarcation lines for the "I-5 corridor" should be determined in consultation with Global and Hot House, and will be the subject of further direction from the Commission.

[82] In its July 23, 2002 recommendation to the BCMB, after noting that the geographic restriction was originally proposed by Global, the BCVC stated, in paragraphs 26, 27, 29, 30 and 31, that:

> 26. The "I-5 Corridor" is a term of art within the industry which refers to more than the three states through which the I-5 Highway runs. The purpose of the marketing condition limiting Global[`s] ability to market into the "I-5 Corridor" was to ensure that the existence of new sellers gave rise to enhanced sales opportunities for B.C. greenhouse product, rather than simply having the new sellers focus their attention on markets already being served by B.C. greenhouse vegetable producers. The western United States, not surprisingly, has been a target market for Hot House and for B.C. producers for a number of years.
>
> 27. The basis for the Global agency application, in particular, was Global's ability to create <u>new</u> markets for B.C. product, primarily in Eastern Canada and the Eastern United States. Global urged the Commission to grant them an agency on the basis that they would displace proiduce currently being imported into those areas from Europe with their high quality greenhouse produce. Having a second agency focus on markets already served by B.C. producers would not have created new market opportunities, may not have been in the best interests of the industry as a whole, and was not the business proposal behind the agency application.
>
> …

> 29. Accordingly, the Commission is of the view that the "I-5 Corridor", as that term is used in the marketing conditions, should take into account the normal distribution centre for greenhouse vegetables on the West Coast of the United States, whether that distribution is being carried out by Hot House or anyone else who would sell into that area. That distribution system covers seven states: Washington, Oregon, California, Idaho, Utah, Nevada and Arizona.
>
> 30. This definition takes into account the fact that the central buying offices for two of the major customers on the West Coast of the United States are in Phoenix, Arizona and Boise, Idaho.
>
> 31. With respect to timing of the marketing exemption, the Commission recommends that the conditions remain in place until December 31, 2003…. This should give Hot House and its associated producers enough time to adjust their marketing plans and strategies to account for the existence of additional sellers of B.C. greenhouse vegetable products.

[83] In paragraphs 32 and 33 the BCVC recommended that, for purposes of the marketing corridor conditions attached to the Global agency designation, the "I-5 Corridor" be defined as including States of Washington, Oregon, California, Idaho, Utah, Nevada and Arizona, and that the marketing conditions remain in place until December 31, 2003.

[84] Following its consideration of the BCVC's recommendation, the BCMB stated in its September 11, 2002 decision that:

> In our opinion, the BCVC acted properly in imposing a condition that holds a party to its honour regarding its business plan…If [Global's] real intent was to compete with BC Hot House, [it] could, and should, have said so. [It] did not. In fact, [its] commitments to the BCVC, made less than one year ago, are clear and unequivocal. Global has never appealed the I-5 condition attached to their approval, even though the BCVC's reference to the "exact demarcation lines"

> would necessarily have to have been taken as referring to something other than the 3 states through which the highway runs, a point which is clear in Global's March 14, 2002 complaint letter to the BCMB….
>
> In our view, the BCVC's definition of the I-5 corridor is entirely consistent with the business plans announced by Global.... Indeed, it arguably gives Global a greater marketing area than reflected in its business plan, which refers to the "Midwest" and the "eastern part of the country". Moreover, it gives Global had a potentially very significant windfall since effective 2003, Global will have unfettered access to all of the I-5 corridor, including the coastal states….

[85] The BCMB then directed the BCVC to amend Global's existing agency approval conditions so as to define the I-5 corridor as set out in the BCVC's recommendation, and that the condition expire effective December 31, 2003

[86] The first argument advanced by the Global Petitioners is that the decision of the BCMB should be quashed and the entire I-5 corridor restriction eliminated because it amounts to the illegal regulation of marketing within a foreign country. They submit that the condition purports to render legal an arrangement restricting trade and commerce within the United States of America that would otherwise be contrary to the laws of that country, specifically its anti-trust laws, and is therefore beyond the authority of the BCMB or the BCVC.

[87] In paragraphs 11 and 12 of an affidavit sworn October 10, 2002, Mr. Robert Toews deposed that:

> 11. Our intention at the agency hearing, when referring to the "I-5 corridor", was to refer to the three US states through which the I-5 highway runs. It was also our stated intention

> to submit to the restriction for one year only, to give a transition period for BC Hot House….
>
> 12. The Board, in its Decision, has extended the I-5 restriction for another year. This is a significant hardship for us. Also we feel uncomfortable participating in a compulsory division of the US market. We have been advised that this is illegal under US anti-trust law (assuming, as we do, that the Commission has no authority to regulate marketing in the US) and we do not want to participate in it any further.
>
> (emphasis added)

[88] At this hearing, the Global Petitioners tendered in evidence the affidavit of Anthony C. Epstein sworn October 30, 2002. Mr. Epstein is a lawyer practicing in Washington D.C. with the firm of Steptoe & Johnson LLP. He specializes in the field of antitrust law, and in his affidavit Mr. Epstein expresses his opinion with respect to the following question:

> Would it be contrary to U.S. law if two private marketing entities selling products (tomatoes) directly or through sub-agents within the U.S. entered into an agreement or arrangement whereby the tomatoes originating with one of the entities shall have access to customers anywhere in the U.S. but products originating with the other entity must not be supplied to customers within any of the seven western states of the U.S.?

[89] One of the facts that Mr. Epstein was asked to assume for the purpose of his opinion was that the British Columbia BCVC had stipulated that the "I-5 corridor" consists of Washington, Oregon and California (and possibly Idaho, Utah, Nevada and Arizona, as well).

[90] In paragraph 6 of his affidavit Mr. Epstein opined that:

> 6. In my opinion, under U.S. federal antitrust law, it would be illegal *per se* for two competing private marketing entities to agree

> not to compete in any part of the U.S. I note that each state and the District of Columbia has its own antitrust laws which generally parallel the U.S. antitrust laws and are at least as strict.

[91] In paragraphs 7 and 9, Mr. Epstein deposes that:

> 7. Section 1 of the *Sherman Act*, 15 U.S.C. 1, prohibits agreements between competitors that unreasonable restrain trade in any line of commerce in any section of the United States. The same applies to agreements among all types of entities, including marketing associations….
>
> …
>
> 9. The U.S. antitrust laws do not give competing suppliers of tomatoes the right to agree to limit the choice of customers within seven western U.S. states – or any other part of the United States. Because the illegality of market division agreements is so clearly established, marketing entities that enter into any such agreement would face a risk of criminal prosecution….

[92] The BCMB and the BCVC object to the admission of Mr. Epstein's affidavit and the final sentence of paragraph 12 of Mr. Toews' affidavit. They submit that this court should, in its equitable discretion, refuse to consider the argument advanced by the Global Growers as to the alleged illegality of the condition for two reasons:

> 1. That the Global Petitioners are in the wrong forum. They say that the factual question whether the geographical conditions breach U.S. law, and the marketing policy implications thereof, are for the BCMB not the court; and
>
> 2. That the Global Petitioners failed to exercise their statutory remedies, either by appealing the imposition of the

I-5 conditions to the BCMB, or by raising the present evidence and argument as part of the supervisory process.

[93] As an alternative to their position concerning the admissibility of Mr. Epstein's opinion and Mr. Toews evidence, the BCVC tendered in evidence the opinion of another U.S. attorney, Mr. David A. Donohoe, on what Mr. Murray Driediger, the General Manager of the BCVC, described in an affidavit sworn October 30, 2002 as "the broader issue of the legality under U.S. antitrust laws of territorial limitations imposed by the Commission on marketing entities."

[94] Mr. Donohoe is also a specialist in antitrust law, and has been a member of the American Bar Association's Antitrust Section for 35 years, and his opinion is contained in a letter from Akin Gump Strauss Hauer & Feld LLP dated October 30, 2002. In it, Mr. Donohoe states, in part:

> You have asked our opinion as to the legality under United States antitrust laws of the British Columbia Vegetable Marketing Commission's ("BCVMC") actions concerning the creation of a hothouse tomato marketing agency, Global Greenhouse Produce, Inc. ("Global")….Specifically, your enquiry focuses on territorial limitations imposed as conditions to the granting of export licenses.
>
> …The opinion from Anthony Epstein of the law firm Steptoe & Johnson, contains an analysis of the U.S. antitrust consequences of two private parties entering into a naked horizontal territorial division. We believe that the Steptoe & Johnson opinion is correct (and is consistent with our analysis below) based on the limited hypothetical facts it addresses. But because it does not address the legality of regulatory orders issued by a sovereign state and the conduct of firms complying with such orders, it does not change the conclusion in our January 2 letter or the conclusions below. In particular, we strongly disagree with the implication that a Canadian firm would ever be held criminally liable in the United

> States for obeying a regulatory order issued by an arm of the Canadian government.
>
> …
>
> …because of BCVMC's status as a provincial regulatory body, it is our conclusion that BCVMC's issuance of regulatory orders limiting the United States territories into which competitors can sell does not violate the U.S. antitrust laws. At your request, we have also considered whether the producers and agencies may have antitrust exposure for complying with such regulatory orders. Our conclusion is that they would have several strong defences to any claims of antitrust violations.
>
> …
>
> **Conclusion**
>
> The effects in the United States of the proposed export license limitations would provide a basis for United States courts to exercise antitrust jurisdiction over BCVMC and the producers and agencies. BCVMC, however, is clearly protected and against antitrust liability by the foreign Sovereign Immunities Act. As to the potential liability of producers and agencies, our view is that their compliance with BCVMC regulatory commands in the form of export limitations would be protected by the Act of State doctrine and the Foreign Sovereign Compulsion doctrine.

[95] In answer to the argument by the BCMB and the BCVC that the Global Petitioners had failed to exercise their statutory remedies and should not be permitted to advance the "illegality" argument at this time, in paragraph 10 of his October 10, 2002 affidavit Mr. Robert Toews deposed that:

> 10. In paragraph 40(b) of its decision the Commission directed that the exact demarcation of "the region known as the I-5 corridor" should be determined "in consultation with Global and Hot House, and will be the subject of a further direction from the Commission". Notwithstanding this, there

> was no further hearing by the Commission because the Board took over the decision-making role. This deprived us of the opportunity to bring evidence before the Commission to clarify, if need be: (a) the meaning of the Business Plan which we had submitted to the Commission and upon which our agency application was granted; (b) our statements to the Commission with respect to the I-5 corridor and (c) the financial and marketing effect of a broader or narrower scope geographically, or a shorter or longer time duration, of the I-5 restriction. These issues are critically important to our business.

[96] However, the evidence shows that the findings of fact and recommendation made by the BCVC (and adopted by the BCMB) with respect to the I-5 corridor were made after Global had been given several opportunities to adduce evidence and make submissions on the point. Having failed to adduce the disputed evidence at that time, the Global Petitioners cannot now challenge those findings of fact unless they are unsupported by the evidence that was before the BCVC and the BCMB: see ***Lester (W.W.) (1978) ltd. et al. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*** (supra) and ***Anning v. British Columbia (Minister of Energy and Mines)***, (supra).

[97] In my opinion, the findings of fact made by the BCVC and the BCMB with respect to the geographical boundaries of the "I-5 corridor" for the purposes of the trading restriction were fully supported by the evidence before them, and I find that the opinions contained in Mr. Epstein's affidavit, the letter from Akin Gump Strauss Hauer & Feld LLP dated October 30, 2002, and the final sentence of paragraph 12 in Mr. Toews affidavit are all inadmissible for the purposes of this judicial review.

[98] If I have erred in reaching that conclusion, I also find that the Global Petitioners have failed to establish that the "I-5 corridor" restriction is contrary to U.S. law. The question answered by Mr. Epstein presupposes that "two private marketing entities…entered into and agreement or arrangement…". That is not the case here. To paraphrase Mr. Donohoe's words, the proper questions in this case are:

> 1. Does the BCVC face U.S. antitrust liability as a result of its regulatory order prescribing areas in the United States into which Global is not permitted to market; and
>
> 2. Does Global face U.S. antitrust liability by complying with the BCVC's regulatory order.

[99] I accept Donohoe's opinion that neither the BCVC or Global would be liable to U.S. antitrust prosecution.

[100] Next, the Global Petitioners submit that even if the trade and commerce power contained s. 91(2) of the ***Constitution Act, 1867*** is broad enough to enable the Parliament of Canada to regulate the marketing of products within a foreign country, it is clear that the federal powers delegated to the BCVC are limited to "interprovincial and export trade". They say that the phrase "export trade" does not encompass internal trade in the U.S.A. and that, while the BCVC clearly has jurisdiction to determine the quantity and quality of B.C. grown product that may cross the border into the U.S.A., its jurisdiction stops at the border. In support of that argument they cite several authorities for the proposition that the free flow of commerce is a recognized legal right and can only be interfered with where there is clear and unambiguous statutory authority to do so.

[101] In this case, there can be no doubt that such clear and unambiguous authority exists. As noted above, in s. 4(1) of the ***British Columbia Vegetable Scheme*** the BCVC is given the power, in the Province, to promote, control and regulate "in any respect" the production and marketing of vegetables. In ***B.C. Chicken Marketing Board v. Hallmark Poultry et al.*** October 1, 2002, Vancouver Registry Docket No. L023090 Tysoe J. considered the effect of s. 4.01 of the British Columbia Chicken Marketing Scheme which provides that the B.C. Chicken Marketing Board shall have the power within the Province to "promote, regulate and control in any and all respects…the production…and marketing…of the regulated product…". He held that the common law right to trade freely had been taken away by the clear language of that section. The same conclusion must apply with regard to the effect of s. 4(1) of the British Columbia Vegetable Scheme.

[102] In my opinion, the "I-5 corridor" condition contained in paragraph 40(b) of the BCVC's decision does not constitute extraterritorial regulation of trade. It does not purport to regulate the conduct of anyone other than Global, and the mere fact that its implementation has impact outside of Canada does not mean that it has extraterritorial effect: see ***The Interpretation of Legislation in Canada***, 3rd ed. (Carswell: Toronto, 2000) at p. 204).

[103] For that matter, even if the condition has an "extraterritorial reach", provincial legislation may validly regulate persons within the province. Global is an agency carrying on business in British Columbia and any enforcement action deemed necessary would take place here.

[104] If I have erred in concluding that the "I-5 corridor" condition does not amount to extraterritorial regulation, I find that it is within the jurisdiction of the BCVC to do that. The authority to regulate the marketing of vegetables destines for interprovincial or export trade has been delegated to the BCVC by s. 2(1) of the ***Agricultural Products Marketing Act***, R.S.C. 1985, c. A-6, in which the Parliament of Canada authorized the Governor in council to grant authority to the BCVC to regulate the marketing of agricultural products in interprovincial and export trade:

> …and for those purposes to exercise all or any powers like the powers exercisable …in relation to the marketing of that agricultural product locally within the province.

[105] The jurisdiction to exercise those powers at power was accepted in s. 3 of the ***British Columbia Vegetable Order***, SOR/81-49 which states that:

> 3. The Commodity Board [by definition the BCVC] is authorized to regulate the marketing of vegetables in interprovincial and export trade and for such purposes may, by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that proince under the Act and the Plan.

[106] Accordingly, I find that for those several reasons, the imposition of the "I-5 corridor" condition is within the jurisdiction of the BCVC.

The Levies

[107] As noted above, on August 14, 2001, the BCVC issued Levy Order 08/01 which imposed a levy, for the 2001 season, on all greenhouse tomatoes produced in Districts I and II for the purpose of funding expenses associated with the trade dispute with the United States. However, on December 12, 2001, the BCVC rejected the request by Hot House that a further levy be imposed to cover additional costs. On August 8, 2002, the federal government issued SOR/2002-309 authorizing the imposition and use by the BCVC of levies for its purposes.

[108] The costs relating to the trade dispute were incurred by Hot House, not by the BCVC. Hot House's 2001 financial statements confirm that the legal fees to be covered by the levy were accounted for as an expense and a contingent liability. And the purpose of the levy was clearly stated: to raise funds to pay the expenses of Hot House relating to the international trade dispute.

[109] In its September 11, 2002 Supervisory Review decision the BCMB stated that:

> The Panel is of the view that the BCVC has authority to issue the additional levy, and that the real question is the marketing policy question whether the levy should be issued at all, and if so, whether it ought to be shared proportionately among tomato growers based on production areas in the year 2001 rather than 2000.
>
> The Panel has no hesitation in concluding that the additional levy should be issued. In light of the American trade action, it would have been a irresponsible for the BC industry not to retain counsel, and it is only fair that the costs of that defence the shared by the entire tomato industry…. As to the policy question of how the levy orders (sic) should be shared, we conclude that it should be shared

proportionately to production areas according to production acreage during the 2001 crop season.

[110] The Marketing Board then issued the following directions:

> 1. The Panel directs the BCVC to impose a levy requiring that all greenhouse tomato producers in Districts I and II share proportionately, in paying for the remaining costs associated with the defence of the trade dispute in the US and the prosecution of the trade dispute before the Canadian International Trade Tribunal.
>
> 2. The panel directs the BCVC to structure the levy so that it is shared that by producers proportionately according to a square metre of production basis during the 2001 crop season and that it be paid in four monthly installments beginning November 1, 2002. The levy for the first three installments shall be set at $.50 per square metre. The amount of the final payment (February 1, 2002) will be determined following the completion of the BCVC audit.

[111] In response to that direction, on September 18, 2002, the BCVC issued Levy Order 09/02 which imposed a levy on all producers of greenhouse tomatoes in Districts I and II "for purposes of funding outstanding costs associated with the United States trade dispute and the prosecution of a trade dispute before the Canadian International Trade Tribunal in the matter of greenhouse tomatoes".

[112] The Global Petitioners dispute the validity of both of the levies imposed by the BCVC. They seek an order quashing Levy Order 08/01 on the basis that the Commission lacked the requisite federal legislative authority to impose such a levy. They submit that a levy for the purpose of funding costs associated with an international trade dispute falls outside provincial power and within federal power over trade and commerce. They seek an order quashing Levy Order 09/02 for the

reason that the Commission lacked the requisite federal authority to impose a retrospective levy for the purpose of paying costs incurred "by an agency of the Commission."

[113] With regard to Levy Order, 08/01, they submit that, as the stated purpose of the levy was "to fund expenses associated with the trade dispute with the United States", an international dispute, it fell outside the then existing provincial powers, and was therefore unconstitutional. In this regard, they point to the fact that, in August 2002, the Governor in Council amended the British Columbia Vegetable Order giving the BCVC specific authority to fix levies for its own purposes.

[114] As to Levy Order, 09/02, the Global Petitioners say that the question is one of statutory interpretation: that is, whether a federal levy power acquired by the BCVC on August 8, 2002, one which has none of the wording used to indicate a retrospective intent, can be used for the purpose of relieving Hot House of a debt incurred in 2001.

[115] In short, the Global Petitioners say that:

a) Prior to August 8, 2002 (the effective date of the Order Amending the British Columbia Vegetable Order, SOR/2002-309) the BCVC lacked the requisite federal legislative authority to impose any levy for the purpose of funding costs; and

b) After August 8, 2002, the BCVC lacked the requisite legislative authority to impose a levy with retrospective effect, and in particular, one levied for the purpose of paying costs incurred by a third party.

[116] Earlier, I referred to the evidence concerning the industry meeting held by the BCVC on December 12, 2001, at which time it rejected Hot House's request for the imposition of a second levy. The Global Growers say that, as a result, they conducted their business affairs and made financial commitments on the understanding that their 2001 production was not subject to being levied to pay for Hot House's legal fees. Moreover, they submit that they had a "substantive right", during 2001, to be free of liability for Hot House's legal fees; that they had a defence to any levy order, a defence that they asserted on December 12, 2001, and that for them to be deprived of that defence by subsequent legislation, the legislation must contain express wording indicating that the levy could be raised for purposes pre-dating the legislation.

[117] The Global Petitioners say that, if valid, the levy orders will completely alter the basis for the financial planning they made in late 2001 and early 2002 for the 2002 crop year and beyond, and that to give retrospective effect to the August 20, 2002 amendment to the British Columbia Vegetable Order would seriously impinge on decisions they made after the BCVC rejected Hot House's request, in December 2001, for an additional levy. They say that from that date on they believed that those costs would have to be borne by Hot House and made their financial projections and commitments accordingly.

[118] Moreover, they say that the wording of the SOR/2002-309 indicates *prospective* application. It allows levies on persons who "are" engaged in the production or marketing of vegetables, not those who "were" so engaged. They say, however, that Levy Order 09/02 imposes a levy based on a grower's acreage during 2001 and, if valid, would

therefore apply even to those who were no longer in the industry as at August 8, 2002.

[119] The validity of Levy Order 08/01 was not in issue when the BCMB conducted its supervisory review and thus the BCMB has not ruled on the interpretation of that Order. For that reason, the BCMB and the BCVC submit that, having failed to exercise their statutory right to appeal the imposition of that Levy Order, the Global Petitioners should not be permitted to challenge its validity before this court.

[120] However, it seems to me that situation with respect to Levy Order 08/01 differs from that concerning the "I-5 corridor" restriction where the Global Petitioners failed to present before the BCVC and the BCMB evidence that they had, or might reasonably have obtained, or to appeal from the findings made with respect to that issue. Concerning the levy issue, they informed the BCMB, by letter dated August 7, 2002, that it was not until after the appeal period had elapsed that they "discovered" that the levy was made "without authority".

[121] In other words, the BCMB was aware of the Global Petitioners' position and I therefore think it appropriate to consider the argument on its merits.

[122] The BCVC, supported by the BCMB, submits that at all material times it had jurisdiction to impose and collect levies on greenhouse tomato growers. It says that its authority to do so is clear on a plain reading of its provincial and federal enabling legislation.

[123] As I earlier noted, the BCVC has, subject to the supervision of the BCMB, virtually unlimited powers to regulate and make orders with

respect to the production and marketing of vegetables in British Columbia. It is also authorized, by federal legislation, to regulate in a similar manner vegetables destined for export or interprovincial trade. In particular, it is authorized to set and collect levies or charges from designated persons, and to use those levies or charges, amongst other things, to carry out the purposes of the scheme, and to pay its expenses.

[124] The BCVC submits that its "purposes" include handling and coordinating the response to or prosecution of trade disputes on behalf of the various commodity groups that it regulates. It says that these are industry issues and that its actions with regard to such disputes are within its mandate.

[125] However, the Global Petitioners argue that, while s. 2(2) of the APMA (supra) authorized the Governor in Council to grant to provincial regulatory agencies such as the BCVC authority to impose and collect levies for their purposes, no such authorization appeared in the ***British Columbia Vegetable Order*** until August 8, 2002, when SOR2002-309 was enacted. Therefore, they say, Levy Order 08/01 was unconstitutional.

[126] In my opinion, such an interpretation would be inaccurate, as well as incompatible with the purpose of the legislation. I have concluded that:

> a) as Laskin C.J.C. explained in ***Reference Re Agricultural Products Marketing Act and Two Other Acts*** (1978) 84 D.L.R. (3d) 257, s. 2(2) of the APMA was enacted in 1957 to address a difficulty created by the decision of the Supreme Court of Canada in ***Reference re: The Farm Products Marketing Act***, (1957), 7 D.L.R. (2d) 257;

b) s. 2(2) was enacted to permit the delegation of federal authority to provincial agencies to impose levies for certain specific enumerated purposes, and was not intended to apply to the imposition of levies generally;

c) the imposition of levies for the purpose of funding regulatory schemes continued to fall within the general grant of federal authority contained in s. 2(1) of the APMA (supra); and

d) in the context of these proceedings, s. 2(2) of the APMA is redundant and of no effect.

[127] On the evidence (in particular that contained in the affidavits sworn by Murray Driediger, General Manager of the BCVC, on October 24, 2002, Thomas Brocklehurst, an associate with the firm of solicitors representing Hot House in these proceedings, on July 4, 2002, and Steve Fane, a director of Hot House, on October 10, 2002) I find that:

a) Over the past twenty years, the BCVC has been involved in several trade actions involving regulated vegetables grown in British Columbia, and the Commission often coordinated the efforts of marketing agencies and producers in prosecuting or defending such trade disputes;

b) Since 1984, in some 14 separate trade actions involving the regulated vegetable industry, the B.C. growers have funded the costs of the trade action and the BCVC, after consulting with them, approved a levy or levies sufficient to cover such costs.

c) The only difference between this case and the prior 14 instances is that Hot House coordinated the position of the B.C. industry, rather than the BCVC. The reasons for that were that Hot House was named as a Respondent in the U.S. anti-dumping proceeding and, unlike the previous instances, Hot House was then the sole marketing agency for all of the affected growers, including the Global Growers.

d) Mr. Driediger discussed with Hot House and the U.S. Department of Commerce the possibility of Hot House coordinating the industry's response, and that procedure was accepted. A steering committee, including Mr. Driediger, several greenhouse tomato growers and a senior management representative of Hot House, was formed for the purpose of providing strategic planning and giving direction to Hot House with respect to the conduct of the action.

e) The BCVC followed its usual practice and consulted with greenhouse growers prior to imposing the levies to fund the costs associated with the trade dispute.

[128] In light of those facts and the circumstances of this case, I have concluded that the expenses, although incurred by Hot House, were incurred for the purposes of the BCVC, and that the broad grant of authority contained in s. 3 of the ***British Columbia Vegetable Order***, when combined with the powers conferred on it by the Scheme and the Act, clothes the BCVC with authority to impose and collect the levies in issue in these proceedings.

[129] On the question of retrospectivity, I agree that a levy order is obviously prejudicial to the rights and financial interests of those it affects and, as such, a presumption against retrospectivity applies: ***Angus v. Sun Alliance Insurance Co.***[1988] 2 S.C.R 256. However, as I understand the law, an enactment operates retrospectively when it provides that it shall be deemed to have come into effect on a date prior to its enactment or provides that it is to be operative with respect to transactions occurring prior to its enactment: ***Gustavson Drilling (1964) Ltd. v. Minister of National*** Revenue, [1977] 1 S.C.R. 271.

[130] That is not the case with respect to Levy Order 09/02. Notwithstanding that amount of the levy imposed is to be calculated, in

part, on the basis of the square metres of greenhouse tomato quota allocated by the BCVC for the 2001 crop season, the levy is to be paid in the future.

The Hot House Application

[131] As noted earlier, each of the Global Growers entered into a GMA wherein they appointed Hot House as their sole and exclusive agent for the marketing of their product and agreed to deliver all their product to Hot House. Each GMA also contained the following provisions with respect to its termination:

> 8. TERMINATION
>
> Either party may terminate this Agreement:
>
> (a) for any reason, upon at least two (2) years prior written notice to the other party or a specified date agreed upon by both parties if less than two (2) years of prior written notice is given;
>
> …
>
> 9. EARLY TERMINATION AND CEASING PRODUCTION
>
> (a) The Grower may terminate this Agreement upon less than two (2) years prior written notice where the Grower pays to [Hot House] an amount equal to $6.25 per square meter of Product production area owned or controlled by the Grower. The Grower and [Hot House] agree that this amount represents a genuine pre-estimate of the damages suffered by [Hot House] as a result of the early termination of this Agreement by the Grower and is not a penalty.

[132] Each GMA also provides that any controversy arising out of the Agreement shall be resolved in accordance with paragraph 17 thereof which stipulates that if the parties are unable to resolve the dispute themselves or by mediation:

> …any Party may thereafter refer the matter to a single arbitrator appointed by a Judge of the Supreme Court of British Columbia upon application of any party.

[133] The Global Growers have refused to meet with Hot House. They did not respond to a request for mediation, nor did they agree to the appointment of a single arbitrator. Their position is that the GMA's are subject to the regulatory authority of the BCVC, and that the sole and exclusive agency provisions of the GMA's were varied or rendered unenforceable by the January 7, 2002 decision of the BCVC.

[134] The Global Growers seek a declaration that the BCVC hear and determine the application they made on March 12, 2002 concerning the termination of the GMA's. They say that the GMA's were "imposed" on them by the BCVC and that, having "relieved" them of the contractual obligation to market their product exclusively through Hot House by approving the appointment of Global, the Commission has an obligation to hear and determine their request.

[135] I do not accept the Global Growers' assertion that the GMA's were "imposed" upon them by the BCVC. Nor do I accept the assertion that the Commission "relieved" the Global Growers of their contractual obligations. In fact, the BCVC considered the request that they be relieved of those obligations and, in paragraph 42 of its written decision dated January 7, 2002, stated:

> The Commission's decision with respect to the Global agency application will not affect the terms of existing Grower Marketing Agreements between Hot House and producers of greenhouse vegetable products ("GMAs"). Any existing GMA must be determined in accordance with its terms, unless the parties to the GMA reach another agreement.

[136] In connection with the BCMB's supervisory review the BCVC again considered the Global Growers' request and, in its recommendations dated July 23, 2002, stated:

> 68. With respect to the GMA issue, the Commission recommends that no further action be taken by the BCMB or the Commission on the basis of the currently available information. The Commission recommends that the parties be encouraged to exercise their rights under the contracts and proceed to arbitration or to court action.
>
> 69. With respect to the need for a hearing and additional evidence on the point, if the BCMB accepts the Commission's recommendation on this issue, then the Commission is of the view that no hearing is likely required. If the BCMB, on the other hand, decides to consider the validity of the alleged breaches of contract, then the BCMB may wish to consider whether additional evidence on those points would be necessary to fully inform its decision.

[137] The BCMB accepted the BCVC's recommendations concerning the GMAs and, in its decision of September 11, 2002, held that the Growers had not satisfied it that:

> …their reasons for leaving BC Hot House were such a special circumstance that warranted regulatory relief from the grower marketing agreement. The parties will recognize that the purpose of the termination provisions in such an agreement is to provide relief from the loss of a supplier. As the BCVC

rightly concluded, the parties should be left to their private remedies to resolve their ongoing dispute.

[138] Both regulatory bodies have considered and rejected the Global Growers argument and I see no reason to make the declaration sought by them.

Disposition

[139] Hot House is entitled to the relief it seeks, that is, the appointment of a single arbitrator. If the parties are unable to settle on the identity of that person, further submissions may be made.

[140] As will be apparent from the above, all of the relief sought by the Global Petitioners is refused.

[141] Costs will follow the event.

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Mr. Justice Drost