

Citation: Wagner v. Town of Oliver
2001 BCSC 1254

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Docket: 18372
Registry: Penticton

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**DAVID WAGNER AND KAREN WAGNER
DOING BUSINESS AS CARRIAGE HOUSE WINES**

PLAINTIFFS

AND:

TOWN OF OLIVER

DEFENDANT

SPECIAL CASE - RULE 33

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE METZGER

Counsel for the Plaintiffs:

M.F. Welsh

Counsel for Defendant:

J.G. Johnston

Date and Place of Hearing:

June 1, 2001
Penticton, BC

ISSUES OF LAW:

[1] Does "irrigation purpose" as defined in s. 1 of the **Water Act**, R.S.B.C. 1996, c. 483, as amended, include the use of water for the purposes of frost protection?

STATEMENT OF FACTS:

[2] The plaintiffs, David Wagner and Karen Wagner, are partners in a vineyard and winery doing business as "Carriage House Wines" located at 33010 - 71st Street in Oliver, British Columbia.

[3] The defendant, Town of Oliver, is a Municipality under the **Local Government Act**, R.S.B.C. 1996, c. 323, as amended.

[4] By Letters Patent dated July 10, 1964, the Province of British Columbia incorporated a tract of land into an improvement district pursuant to s. 53 of the **Water Act**. Paragraph 1 of the Letters Patent included the Town of Oliver within the improvement district.

[5] Paragraph 2 of the Letters Patent provided that the improvement district was to be known as the "Southern Okanagan Land Irrigation District" ("SOLID").

[6] Paragraph 3 of the Letters Patent defined the objects of SOLID as follows:

The objects of the improvement district shall be the storage, diversion, pumping, conveyance, measurement, and distribution of water for irrigation purpose and the acquisition, maintenance, and operation of works for such purpose, and all matters incidental thereto.

[7] Paragraph 9 of the Letters Patent provides as follows:

All words and phrases given special meaning in section 2 of the "Water Act" shall, where used herein, be ascribed the meaning given them in the said section, unless the context otherwise requires.

[8] The **Water Act** defines "irrigation purpose" as follows:

"Irrigation purpose" means the beneficial use of water on cultivated land and hay meadows to nourish crops.

[9] By Order in Council No. 1132 dated May 15, 1980, the Letters Patent were amended by striking out s. 3 in its entirety and substituting the following in its place:

The objects of the improvement district shall be the storage, diversion, pumping, conveyance, measurement, and distribution of water for irrigation purposes and the acquisition, maintenance and operation of works for such purpose and the provision of dyking and drainage of land and the construction, acquisition, maintenance and operation of works for these purposes and all things incidental thereto.

[10] By Order of Council No. 1870 dated December 15, 1989, the Province of British Columbia dissolved SOLID effective from December 31, 1989 and transferred all the assets, rights, claims, obligations and liabilities of SOLID to the Town of Osoyoos and the Village of Oliver.

[11] The supply of water by the defendant for irrigation purposes involves the supply of water to agricultural producers for a fee on a per acre basis.

[12] The defendant has never represented to recipients of water supplied by the defendant for irrigation purposes that irrigation purposes includes the use of water for the purposes of frost protection.

[13] The Defendant supplies water to the plaintiffs for irrigation purposes.

[14] The plaintiffs irrigate their vineyard using an overhead irrigation system, with sprinklers located at a distance of 40 feet apart from each other.

[15] Each sprinkler rotates 360 degrees and distributes water for an approximately 40-foot radius.

[16] The plaintiffs use the water supplied by the defendant for irrigation purposes to:

- (a) Provide water to their grape plants to replenish water in the soil necessary for plant survival and growth and to grow and ripen a crop; and
- (b) Provide water for frost protection of the plants in the event of a frost during the growing season.

DECISION:

[17] "Irrigation purpose" as defined in s. 1 of the **Water Act**, R.S.B.C. 1996, c. 483, as amended, does not include the use of water for the purpose of frost protection.

[18] The **Act** defines "irrigation purpose" as follows:

"irrigation purpose" means the beneficial use of water on cultivated land and hay meadows to nourish crops...

A definition that uses the word "means" is exhaustive. See: **Re Yellow Cab Ltd. and Board of Industrial Relations** (1980), 114 D.L.R. (3d) 427 (S.C.C.) at p. 432:

It is significant that the Act employs the word "means" in this definition and not the word "includes" and it follows, in my view, that the definition is to be construed as being exhaustive and that in so far as the Board adopted common law principles defining "employer" which were at variance with the language of the section, there was an error in law.

[19] The **Water Rights Act**, Revised Statutes of Manitoba 1988, c. W80, under definitions states:

"irrigation purposes" means the use of water at a rate of more than 25,000 litres per day for the artificial application to soil to supply moisture essential to plant growth.

Note that the application of the water is to the soil.

[20] In the case of **Cameron County Water Improvement District No. 1 v. FLY**, No. 8518 of the Court of Civil Appeals of Texas, San Antonio, 4 February 1931, in dealing with "water and water courses" stated this at p. 505 of the South Western Reporter, 2nd series:

...that the primary, normal, natural purpose of irrigation projects is to furnish water in arid and semi-arid sections with which to give a sustenance to crops against the effects of draught - in short, to take the place, as nearly as possible, of timely and seasonable rains.

[21] Using the available water to prevent frost on grapes is not "taking the place of a timely and seasonable rain". To use the water for frost protection is to put in jeopardy the rights of others who need the water for normal irrigation purposes of their cultivated land and hay meadows.

[22] **The Dictionary of Canadian Law**, in the 1991 Carswell production, is of no assistance as it defines irrigation purpose by using the definition as set out in the **Water Act**, R.S.B.C. 1979, c. 429, s. 1.

[23] The *Sprinkler Irrigation Handbook*, 7th ed., published by Rainbird Sprinkler Manufacturing Corporation, Glendora, California, defines "irrigation" as follows:

Irrigation is the application of water to the land in lieu of rainfall.

[24] The *Dictionary of Forestry*, published in 1998 by the Society of American Foresters, defines "irrigation" as follows:

Irrigation - the intentional application of water to the soil, usually for the purpose of crop production.

[25] *Black's Agricultural Dictionary*, 1981 ed., defines "irrigation" as follows:

Irrigation - the application of water to soil to provide an adequate supply for crop needs, to increase crop yields, or to aid their establishment.

[26] The *Agriculture Dictionary*, published in 1991, in Canada by Nelson Canada defines "irrigation" as follows:

Irrigation - the artificial application of water to soil for the purpose of increasing plant production.

[27] *Ballentine's Law Dictionary*, 3rd ed. (1969) at 668, defines "irrigation" as follows:

irrigation. The artificial watering of agricultural land in regions where the rainfall is insufficient for crops; application of water to land for the production of crops, whether by channels, by flooding, or merely by sprinkling.

[28] The plaintiffs cite *Babcock v. C.P.R.* (1916), 27 D.L.R. 432 (Alta.C.A.) at 436, wherein the term "irrigable lands" is defined as follows:

...means lands, which by reason of their level, relative to the irrigation works, are capable of having water carried over them from the works by gravity, and which, having regard to the character of the soil and of the climate, will be rendered more productive by means of irrigation properly applied in the growing of crops adapted to the locality...

[29] The plaintiffs ask this court to extrapolate that the purpose of properly irrigating lands is to render them, in the context of their soils and climate, more productive for the growing of crops appropriate to the locality, which would include the purpose of protection from frost.

[30] This court is not prepared to extend the meaning to include frost protection.

[31] I note the *Concise Oxford Dictionary*, 9th ed. (1995), defines "nourish" as follows:

nourish... **1 a** sustain with food, **b** enrich; promote the development of (the soil, etc.).

[32] The plaintiffs argue that "nourish" includes frost protection. I disagree. Frost protection cannot be assumed to be included in the phrase "to nourish crops". There are no Canadian cases on point but the cases and dictionary meanings, set out above, make it clear that "irrigation" and "frost protection" are two separate and distinct acts. Frost protection by sprinkling is only one of many ways to protect a crop.

[33] "Irrigation purpose" as defined in s. 1 of the **Water Act**, R.S.B.C. 1996, c. 483, as amended, does NOT include the use of water for the purpose of frost protection.

"R.W. Metzger, J."

The Honourable Mr. Justice R.W. Metzger