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BRITISH COLUMBIA MARKETING BOARD

IN THE MATTER OF AN APPEAL PURSUANT TO THE NATURAL PRODUCTS PRODUCTS MARKETING (BC) ACT, R.S.B.S. 1979, C. 296, s. 11

BETWEEN:

ROBIN WOODROW doing business as WOODROW BROS. FARMS

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION,

RESPONDENT

**REASONS FOR JUDGMENT**

APPEARANCES: W. GEORGE MUIR and ROBIN WOODROW on behalf of the Appellant

D. GILMORE, J. MAR and E.B. PRATT for the Respondent

1. Robin Woodrow, doing business as Woodrow Farms ("the Appellant") appeals a decision of the British Columbia Vegetable Commission ("the Commission") to the British Columbia Marketing Board ("the Board").

2. The Notice of Appeal reads as follows:

"MATTER APPEALED FROM

The refusal of the B.C. Vegetable Marketing Commission to renew the packing house licence #383 of Woodrow Bros. Farms to clean, grade, pack and transport, under manifest, potato production from its premises at or near Courtenay, British Columbia.

GROUNDS OF APPEAL

- The B.C. Vegetable Marketing Commission (hereinafter the "Commission") refuses to

exercise its authority under the Natural Products Marketing (B.C.) Act and Regulations thereunder, to renew the licence of Woodrow Bros. Farms (hereinafter the "Applicant") and instead wishes to poll various unnamed Island growers prior to making a decision as to renewal.

- The Commission has indicated that any decision it may make is biased unfavourably against the Applicant by reason of his indication that he would appeal an unfavourable decision to this Commission.

- Delay in renewal of the licence will cause great financial strain on the Applicant, forcing him, without compensation, to transport his product to the Commission's facilities in Nanaimo, British Columbia and further that packing in Nanaimo deprives the Applicant of the benefits of a healthy and economical local market for his product.

- Such further and other grounds as counsel may advise."

3. The Appellant testified at the hearing of this appeal. The Commission filed a written submission at the appeal, a copy of which is set out in Appendix 1 to these Reasons. That submission was supplemented by evidence given by two of the members of the Commission, as well as its Secretary-Manager, both in examination and in cross-examination.

4. The Island Vegetable Co-operative Association ("the Co-operative") operated packing plants in Victoria and in Nanaimo and up until July 1, 1982 in Courtenay. As a result of a commissioned report (the Ferrance Report) the plant at Courtenay was closed because it had been operating

at a loss for several years. In recommending its closure the Ferrance Report also recommended that growers in the Courtenay area be compensated for the transportation costs incurred in transporting their product from the Courtenay area to the nearest packing plant which was in Nanaimo. Although the directors of the Co-operative chose to accept the recommendation to close the Courtenay plant, it did not accept the recommendation with respect to freight compensation.

5. One of the main reasons that Courtenay grown potatoes were needed in Victoria was due to Agriculture Canada's directive that potato production in the Saanich peninsula would have to cease at the end of 1981 as a protective measure to avoid the spread of a disease called "golden nematode".

6. As a result of complaints by the potato producers in the Courtenay area, the largest of whom is the Appellant, the Commission ordered that although a grower was responsible for his transportation costs between Courtenay and Nanaimo that he be compensated for his freight costs when it was necessary to transport his product beyond Nanaimo which, in most if not all cases, would be Victoria. Apparently this decision was ignored or defied by the Co-operative, which led the Commission to take disciplinary action against the Co-operative, which finally complied with its order and all monies owed for freight were paid in 1983.

7. The Appellant produces potatoes on some 250 acres in the Courtenay area. He has been farming on that site since 1968. His gross tonnage averages between 2500 and 3500 tons. The Appellant testified that it costs him approximately $20.00 a ton to ship his potatoes to the Co-operative's packing plant in Nanaimo. This amounts to approximately $60,000.00 in transportation costs per year. The Appellant supplies 30% of the Co-operative's potatoes.

8. The Appellant estimated that the Co-operative charged him approximately $77.00 a ton to have his potatoes washed, graded and marketed at the packing plant in Nanaimo. By contrast he estimated that he could reduce this cost by some $40.00 to $37.00 a ton if his potatoes were washed and graded at his own packing plant. When Mr. Woodrow applied for a loan from the Farm Credit Corporation of Canada he was turned down on the basis that his marketing costs were much too high relative to the end product price received (see letter dated March 30, 1982, Appendix II). His request for financial assistance from the Canadian Imperial Bank of Commerce was also denied until his application from the Farm Credit Corporation of Canada had been approved (see letter dated April 13, 1983, Appendix III). The Appellant testified that if he did not obtain this financing he would very soon be forced out of business.

9. The Appellant sought an licence to operate a packing house as the solution to his financial difficulties. He applied for this licence in October, 1982. On February 1, 1983 a licence was issued to the Appellant by the Commission

under the signature of its Secretary-Manager, E.B. Pratt (Appendix IV).

10. We were advised by the Commission that the Commission had delegated to its secretary-manager the responsibility of issuing licences if applicants met the guidelines laid down by the Commission for the issuance of a particular licence. There did not however appear to be any such guidelines for the issuance of packing house licences except the rather vague one that "that it cannot work a hardship on the majority of growers".

11. It seems that the Commission had in fact passed a motion at its meeting of January 14, 1983 refusing Mr. Woodrow's application for a packing house licence. Mr. E.B. Pratt, the Secretary-Manager of the Commission, was present at that hearing and acknowledged during the appeal that he was aware of this order of the Commission although during the appeal he thought the order was made in December, 1982. Nevertheless, a licence was issued by the Commission to Woodrow Farms under the signature of E.B. Pratt. Mr. Pratt claims that the licence was issued in error, "the decision of the Commission having slipped his mind" (Submissions of Commission, Appendix I). In a letter dated March 24, 1983 from E.B. Pratt to Mr. Woodrow (see Appendix V), Mr. Woodrow was advised by Mr. Pratt that the licence had been issued in error and had therefore been cancelled. In the meantime, between the issuance of the licence and his notification that the licence had been cancelled, Mr. Woodrow had gone to some considerable time and expense to obtain a professional analysis of the

feasibility of setting up an on-farm packing house. Mr. Pratt's explanation as to how the order of the Commission "slipped his mind" was, quite frankly, not very satisfactory.

12. After being told by Mr. Pratt that his licence had been cancelled, Mr. Woodrow was invited by Mr. Pratt to reapply to the Commission for a packing house licence. In the letter of March 24, 1983,(Appendix V), Pratt states:

> "After your re-application for licence the Commission has given very careful consideration in this and felt that it would perhaps be the wisest move to poll the Island Growers to see if they would favour the setting up of a privately owned packing house, which would pack all products grown in the area closest to Courtenay v. Nanaimo. All products so packed would have to be sold to the Island Vegetable Co-op. by manifest.

13. At the hearing of the appeal the Commission indicated that the proposed poll of growers might take place at their forthcoming June general meeting. Although it describes it as "the most practical first step" in its submission (Appendix I) the oral evidence given at the hearing led us to conclude that the Commission would treat the opinion of the growers as virtually determinative. It was also their view that the vote of each grower on the Island was entitled to equal weight irrespective of the size of the grower's farm, its location, type of vegetable produced or the amount of production of any particular grower. It should also be noted that the Appellant was one of the largest potato producers on the Island.

14. The first question that the Board must address is whether or not Mr. Woodrow had in fact been licenced by the Commission to operate a packing house by virtue of the issuance to him of a licence on February 1, 1983. If Mr. Woodrow could be said to have been issued a licence by the Commission then it is clear that the Commission improperly cancelled that licence. Such a licence can only only be cancelled where the licencee has violated an order or direction of the Commission (see B.C. Reg. 258/80, No. 3(c)). It is clear that Mr. Woodrow did not violate any order or direction of the Commission and furthermore the Commission did not comply with procedure set down in B.C. Reg. 258/80 when cancelling a licence.

15. Although we have some doubt as to the correct answer to the question posed, we are inclined to the view that Mr. Woodrow was not issued a licence by the Commission and hence the licence was not cancelled improperly by the Commission. This is not to condone the action of the secretary-manager in issuing the licence dated February 1, 1983. However, whatever rights the Appellant may have against the Commission or the secretary-manager, or both, for this error it is not a matter which need concern this Board.

16. The matter, however, does not end there. This Board is still required to determine whether or not the refusal by the Commission to grant the Appellant a licence to operate this packing house was the correct one. This Board wishes to make it clear at the outset that the Commission's decision whether to issue a licence will not be interfered

with readily. The Board recognizes that primary responsibility for the issuance of licences rests with the Commission and great weight will be attached to the Commission's opinion in this regard. Nevertheless, the Board recognizes that it has the ultimate responsibility in ensuring that the purpose and object of the Natural Products Marketing (BC) Act and Regulations are complied with and if the Commission does not exercise its discretion in accordance with that purpose and object then the Board is under an obligation to step in and vary such orders.

17. In our view the Commission improperly refused to issue a licence to the Appellant to operate a packing house in the Courtenay area. We take strong objection to the Commission's decision to refer the question to the other growers on the Island by means of a poll. Although the Commission may be entitled to seek out the opinions of interested parties, it was apparent from the testimony of the Commission members that the Commission had decided to delegate this decision to the other growers. In our view, this was an improper delegation of its responsibility under the Regulations. It was particularly inappropriate given their knowledge that the Appellant required an expedited decision if he was to continue in business. We are also of the view that the Commission was wrong in concluding that every grower on the Island was entitled to equal say in whether a licence should be issued irrespective of the size of the grower's farm, its location, type of vegetable produced or the amount of production.

18. It might be suggested that the proper solution for

this Board would be to refer the matter back to the Commission to have them decide whether to issue the licence to the Appellant without awaiting the outcome of the proposed poll. In our view this would not be an appropriate course of action. In the first place, the Appellant may be entitled to doubt the impartiality of the Commission at this point. In the letter from E.B. Pratt to the Appellant, dated March 24, 1983, (Appendix V), one finds the following paragraph:

> "A threat to us through Jack Mar that you would take this to the Super Board has little or no affect whatsoever on the decision of the Commission. The Commission is empowered to issue these licences as it sees fit and does so in the best interests of the industry as a whole. Threats such as yours, if anything, colours the Commission's thinking but unfortunately not in your favour."

19. In its Notice of Appeal one of the grounds of appeal was that the Commission had "indicated that any decision it may make is biased unfavourably against the Appellant by reason of his indication that he would appeal an unfavourable decision to this Commission". There is some merit in this ground of appeal.

20. There is another reason not to refer the matter back to the Commission. In its submission before the Board the Commission gave a number of additional reasons why, quite apart from the opinion of the other growers on the Island, (or in the absence of their opinion) the Commission would refuse to issue a licence to the Appellant at this time. We

are entitled, we think, to assume that these same reasons would prevail if the Commission was asked to consider this issue once again. In light of this information, as well as Mr. Woodrow's precarious financial position and the necessity for a prompt decision, the Board is of the view that it would be wrong to refer the matter back to the Commission.

21. One of the reasons that the Commission gave in refusing to issue a licence to the Appellant was the concern that the Union would treat such an operation as being covered by the collective agreement between the Co-operative and the Union by reason of a particular clause in the collective agreement. The Commission conceded that it had not sought and hence did not receive any legal opinion as to whether the Union would be able to assert such a right at the Appellant's operation. Nor did the Commission specifically ask the Union for its views on this matter. In our view the question as to the Union's right to make the Appellant's operation subject to the collective agreement was either not relevant at all to the Commission's determination, or if relevant, was deserving of very little weight. In the first place the Commission was not a party to the collective agreement with the Union. More importantly, whatever right the Union may have at law is a matter to be determined by the Labour Relations Board or the courts. This Board was not provided with enough information to enable it to see the significance of this concern.

22. The Commission also said that the Appellant's potatoes were "sorely needed by the Island Co-operative" as

a second reason for refusing to issue the licence. The Board notes that the Co-operative in Nanaimo has operated at a profit without having received sizeable quantities of potatoes from the Appellant. Moreover, the Commission did not challenge the Appellant's testimony that if he was not given a licence to operate his own packing house he would not receive any financial assistance from the federal government or the bank and would soon be out of business. It is apparent, therefore, that this reason for the refusal to issue a licence is by itself not a very compelling one. Furthermore, the Commission advised us that if the Appellant did go out of business they stated that the Co-operative in Nanaimo would be able to obtain potatoes from other sources, presumably on the mainland.

23. The Commission was also concerned about the reaction of the other growers. They were of the view that if the licence was granted to the Appellant that it would be a matter of days before "a large number of other growers would demand equal treatment and apply for a similar licence". (Appendix I) Our first reaction to this statement is that the Commission would thus have the result of its desired poll. It had stated that if a substantial number of growers approved of the issuance of a licence to the Appellant that it would accordingly grant a licence to the Appellant. Hence it is not apparent to us why this anticipated reaction to the growers would be so troubling.

24. Another objection of the Commission to the issuance of a licence was that it would be detrimental to the smaller growers on the Island and to the Co-operative itself.

Although we are of the view that the Commission should be cognizant of the concerns of the smaller growers we do not believe that their concern should be paramount to the needs of the larger producers whose livelihood depends entirely on potato production. Since the Commission was not going to insist on unanimity from the growers who were polled it is inevitable that some smaller grower would be detrimentally affected by the decision of the majority to approve the licence. Similarly, although the Commission may be justified in its concern for the viability of the Co-operatives on Vancouver Island it seems to us that undue emphasis has been placed on that fact. The Commission must not pursue a policy of having co-operatives at any expense. We have already referred to the very significant differences in the cost of grading and packing should the Appellant operate his own packing plant instead of utilizing the facilities at the packing plant of the Co-operative in Nanaimo. In response to the Appellant's complaint that he cannot break even by delivering his potatoes to the Co-operative the Commission said:

> "We want to go on record with your Board, Mr. Chairman, and assure we know of no grower shipping potatoes at today's price levels who is making money on any load delivered to any designated agency of the Commission." (Appendix I)

The reality is, however, that a grower may be able to make money by operating his own packing house. It seems to us to be quite contrary to the whole purpose and object of the Act and Regulations for the Commission to pursue a policy which results in potato growers not making a profit, particularly when a viable alternative exists which would be more beneficial to both the growers and consumers alike. There

is a certain shortsightedness in the Commission's concern that if a licence was issued to the Appellant other growers may follow suit and this would lead to the demise of the Co-operatives in Nanaimo and Victoria. On the basis of what the Commission has told us it appears to be somewhat inevitable, given the present economic situation, that some producers on the Island will go out of business leaving the Co-operative in no better position. Refusing the Appellant a licence is thus no solution to the perceived problem.

25. The Commission also suggested that price wars between the various packing houses might develop if a licence is issued to the Appellant and others. It however admitted in cross-examination that this was not a direct consequence of the issuance of a licence given that all potatoes on the Island are to be sold at a uniform price. The so-called price wars would only occur if the product was marketed outside the marketing system, in violation of the Regulations, which was not what the Appellant sought to do.

26. The Commission was also concerned that there would be less uniformity of product, grade and service to the market when potatoes were washed and graded at numerous packing houses rather than at co-operative packing houses. The Commission, however, admitted that many products in British Columbia, including potatoes in the Interior region, are washed and graded at individual packing houses and although there might be some variation in uniformity of product it did not appear to be a serious problem. The Commission also conceded that potato quality deteriorates the more the product is handled and that a product is

handled more when it is delivered to the Co-operative than if it was washed and graded at the grower's own packing plant.

27. In conclusion, therefore, we are of the view that the Commission's decision to refuse a licence to the Appellant was not consistent with the purpose and object of the Act and Regulations and thus should be varied. Accordingly, we order the Commission to issue a packing house licence to the Appellant to clean, grade, pack and transport under manifest, potato production from its premises at or near Courtenay, British Columbia to be effective as of the date of this decision. For the present the licence should stipulate that the packing plant is to be used only for the Appellant's own produce.

28. By virtue of B.C. Reg. 258/80, No. 3(b) this licence would expire on May 14, 1983. In the absence of very different (and presently unforeseeable) circumstances between this date and May 14, 1983, the Appellant is entitled to a renewal of this licence. If the Commission does not renew the licence and the circumstances on May 14, 1983 have not significantly changed, the Board would order the Commission to renew the said licence.

29. In accordance with this Board's rules of appeal, the Appellant's deposit of one hundred dollars ($100.00) shall be returned to the Appellant.

**DATED** the 21st day of April, 1983, in Vancouver, British Columbia.

C. EMERY, Chairman

N. TAYLOR

H. BLACK

M. BRUN