

8/1/84

BRITISH COLUMBIA MARKETING BOARD

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

BETWEEN:

LILLOOET GROWERS AND PACKERS LTD.

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

REASONS FOR JUDGMENT

APPEARANCES:

I.J. UDY on behalf of the Appellant

J. HARRIS and R.G. TOWSLEY on behalf of the Respondent

1. Lillooet Growers and Packers Ltd. ("the Appellant") appeals a decision of the British Columbia Vegetable Marketing Commission ("the Commission") to the British Columbia Marketing Board ("the Board").

2. The Appellant was issued a wholesaler licence No. 559 dated August 19, 1983, by the Commission. By letter dated April 30, 1984, a copy of which is set out as Appendix 1 to these Reasons, the Commission advised the Appellant that the wholesaler licence it requested was not to be renewed in 1984. By letter to the Board dated May 15, 1984, for the reasons set out in the Appellant's letter of May 10, 1984, the Appellant has appealed that decision of the Commission.

3. The Appellant testified at the hearing of this appeal in addition to filing a written submission dated June 11, 1984, a copy of which is set out in Appendix 2 to these Reasons.

4. Similarly, the Commission filed a written submission at the appeal, a copy of which (with Exhibits) is set out in Appendix 3 to these Reasons. Its submission was supplemented by evidence given by the Chairman and Secretary-Manager of the Commission, both in examination and in cross-examination. In addition, a representative from the B.C. Coast Vegetable Co-operative Association gave evidence with respect to the production and marketing of carrots in the Lower Mainland.

5. Before presenting the facts which give rise to this appeal, it would be helpful to set forth generally some of the features of the British Columbia Vegetable Scheme established by B.C. Reg. 96/80 as follows:

- (a) the Scheme divides the Province of British Columbia for the purpose of vegetable production and marketing into three districts:
 - (i) first district - generally, the Lower Mainland,
 - (ii) second district - Vancouver Island and the Gulf Islands, and
 - (iii) third district - the rest of the Province.
- (b) the Scheme is for the promotion and regulation in the Province of production, transportation, packing, storage and marketing of regulated products.
- (c) the British Columbia Vegetable Marketing Commission, the present Respondent, is established under the Regulation to administer the Scheme under the supervision of the Board.

6. Further to the B.C. Vegetable Scheme, the Commission has established Orders for carrying out that scheme which are contained in B.C. Reg. 258/80 . For the purpose of the present appeal, it is useful to note that under those Orders:

- (a) No person shall grow, pack, transport, process, store, offer for sale, sell or supply the regulated product unless he registers with the Commission and obtains from the Commission annually an appropriate licence such as:
 - (i) Commission salesman licence
 - (ii) producer licence
 - (iii) processor licence
 - (iv) producer - vendor licence
 - (v) packing house licence
 - (vi) trucker licence
 - (vii) wholesaler licence
- (b) By means of the licencing system, the Commission maintains control over the production, preparation for market, and marketing of regulated products.
- (c) With this licencing system, the Commission ensures that designated marketing agencies such as the B.C. Coast Vegetable Co-operative Association in the first district (i.e. the Lower Mainland) or the Interior Vegetable Marketing Agency ("the I.V.M.A.") in the third district, for example, act as intermediaries between the production sector and the distribution or retailing sectors of the vegetable growing industry.
- (d) For instance, under Order 4(f) of the B.C. Reg. 258/80, "unless specifically permitted by an order, no agency shall permit any producer to, and

no producer shall, directly negotiate sale or terms of sale of any regulated product required by an order of the Commission to be delivered to the agency or its order."

- (e) In other words, the designated agency receives vegetables from the producer, markets them and, after deducting expenses of packing, storing and transport, delivers the proceeds of sale to the producers.
- (f) Under Order 7, wholesalers are restricted to the agency with which they are authorized to do business by the Commission and producers are restricted to selling and delivering the regulated product to an agency or such other person as the agency or the Commission may authorize.
- (g) Finally, under Order 8, the Commission may exempt a person from the prohibitions set out in Order 7.

7. Mr. Irven J. Udy, President of the Appellant, is also president of Sunnymede Agrico Ltd. ("Sunnymede"), a company set up to operate a farm in Lillooet, British Columbia and licenced as a producer.

8. Mr. Udy testified that it took considerable time and money on the part of Sunnymede and research to get an effective water system that would nourish the production of vegetables in sandy soil in Sunnymede's farm in Lillooet.

9. In the crop years 1980 and 1981, Sunnymede concentrated on growing corn, changing over in 1982 to mainly onions and carrots and, in 1983, these latter crops were grown extensively on about 45 acres. The farm contains about 600 acres with approximately 300 acres being arable with the major area of the farm being mostly in alfalfa. It is located on the site of the old B.C. Electric Research Station.

10. By letter dated November 10, 1980, (see Appendix 3 - Exhibit E) the Commission granted to Sunnymede a packing house licence, Licence No. 151, issued on June 3, 1981. Sunnymede suffered a serious fire which destroyed some of its facilities and did not apply to renew this licence in subsequent years.

11. By letter dated January 27, 1981, (Appendix 3 - Exhibit H), the Commission, through its Secretary-Manager, E.B. Pratt, advised Sunnymede that all products grown in a district must be marketed through the appropriate agency in that district, in the case of Sunnymede located in the third district this was the I.V.M.A.

12. In the spring of 1983, the Appellant, Lillooet Growers and Packers Ltd., applied to the Commission for a Wholesaler Licence.

13. Mr. Udy testified that the Secretary-Manager of the Commission at the time of application for the wholesaler licence, Mr. E.B. Pratt, suggested that a company separate from the producing company, Sunnymede Agrico Ltd., be formed for the purpose of application. Accordingly, the Appellant company was incorporated. This suggestion was to accommodate the Commission rules which effectively restricted producers from marketing their own produce directly to the public, that is, the person who markets the produce must be a different legal entity from the producer.

14. Mr. Towsley, present Secretary-Manager of the Commission, agreed that the Commission advice to producers is to form a separate company for the purposes of operating as a wholesaler, and said the Commission has growers who wholesale through a separate company.

15. Mr. Udy testified that he built a packing facility after receiving a letter from the Commission signed by the Secretary-Manager at that time, Mr. Pratt, saying that if an acceptable packing house was built, the Commission will give a wholesaler licence. It was Mr. Udy's recollection that this letter was dated around March, 1983.

16. On August 13, 1983, an inspection of the facilities maintained by the Appellant was done by the Commission representative and the facilities were found to conform to the requirements of the Commission. (Appendix 3 - Page 2).

17. On August 19, 1983, the Commission issued licence No. 559 to the Appellant under the B.C. Vegetable Marketing Scheme to act as a wholesaler with respect to premises at Sunnymede Farm, Lillooet. The licence restricted the Appellant to doing business "with respect to the purchase of the regulated product only with an agency of the Commission doing business in the (sic) all district" (Appendix 3 - Exhibit I).

18. In September and October, the Appellant shipped approximately 320 tonnes of carrots from the premises of Sunnymede to the Vancouver Market. (Appendix 3 - page 2).

19. These carrots were marketed in the Lower Mainland by Mr. Udy in his capacity as President and by the Secretary of the Appellant.

20. Mr. Udy began to have trouble around this time with the I.V.M.A. and its representatives.

21. The loads of carrots which were sent out on the weekends by backhaul truck to Vancouver, at first did not have manifest numbers. Both the I.V.M.A. and the Commission were concerned but since the I.V.M.A. office was not open on the weekends, the Commission did not feel that it could assist the Appellant. After discussion with Mr. Towsley, Mr. Udy testified that a workable solution was devised with Mr. Towsley being quite willing and cooperative. The manifests of the Appellant were subsequently supplied to the Commission.

22. As part of this arrangement, Lillooet Packers and Growers Ltd. was required to hold to the prices established by the co-operatives, except that it could sell for more but was not able to sell for less. That is, it could not undersell the co-operatives. This was made very clear to the Appellant by the Commission through its agents.

23. Mr. Udy stated that the requirement of Sunnymede billing the Appellant through the I.V.M.A. at Vernon was just a "paper shuffle". He alleged that the Manager of the I.V.M.A. at that time and Mr. Towsley agreed to dispense with that billing requirement. In testimony, Mr. Towsley did not refute that allegation, nor was any representative of the I.V.M.A. called upon to testify by the Commission.

24. The Appellant sent the I.V.M.A. copies of bills of lading on their carrot shipments and paid I.V.M.A.'s commission directly while sending internal reports to the Commission.

25. The Commission acknowledged that its fees and the I.V.M.A. fees were paid although it alleged that it required

repeated phone calls to accomplish this (Appendix 3 - page 3). Mr. Udy, on the other hand, said that he asked for the proper forms for billing from the I.V.M.A. because he had been told that they had to use special I.V.M.A. forms. These were not available. In paying the aforementioned fees, a cheque was made payable to the I.V.M.A. from the Appellant.

26. The Appellant applied for a renewal of its wholesaler licence for 1984/85. By letter dated April 30, 1984, (Appendix 1) the Commission refused to renew that licence "because it was found that it was being used primarily to market your own product and not as a wholesaler buying product from Commission sales agencies".

27. Mr. Udy testified that on the Appellant's initial application for a wholesaler licence, he made it quite clear to the Commission that the licence was to be used to set up a facility in Lillooet to purchase produce from Sunnymede and market it in the Lower Mainland area. The present Secretary-Manager of the Commission acknowledged that most of the conversations with Mr. Udy on this aspect of the issuance of the licence were before he came on the scene. No evidence was available to the Board to controvert Mr. Udy's testimony with respect to the issuance of the original wholesaler licence.

28. The Commission strongly argued that its "Qualifications for Wholesaler Licence from the Commission" (Appendix 3 - Exhibit D) established by Resolution of the Commission in January, 1982 should now apply to the Appellant with full force and vigour in order to demonstrate the Appellant is unqualified to be the holder of a wholesaler licence.

29. With great respect for the able submissions on behalf of the Commission, the Board cannot accept that argument.

30. The Board accepts the position of the Appellant that the Commission was fully aware the Appellant would be primarily selling produce from Sunnymede when they issued a wholesaler licence to the Appellant in 1983.

31. The Board considers it implicit that when the Commission issued that wholesaler licence to the Appellant, the Commission chose to waive a number of those Qualifications contained in its policy statement of January, 1982, which, it must be noted are in the nature of guidelines only.

32. The Appellant waited until it received written confirmation that it was eligible for a wholesaler licence and that the licence would be forthcoming upon completing construction of its facilities before making the investment in new buildings. The Appellant, in good faith, relied upon the conduct and representations of the Commission and arranged its affairs at some expense to market the produce of Sunnymede as a result of that reliance. The result might have been different had the Commission put the Appellant on notice that obtaining the wholesaler licence was conditional upon the Appellant meeting some or all of the Qualifications in its policy statement in the ensuing years. In the result, the Respondent did not give such notice and now seeks to rely upon those conditions for Qualification for a wholesaler licence which it earlier agreed to waive.

33. In the absence of compelling reasons to the contrary, it would be neither fair nor equitable to the Appellant to allow the Commission to withdraw its waiver of the policy statement of January, 1982 with its potentially serious financial consequences to the Appellant and to Sunnymede.

34. The Appellant seriously questioned the capacity of the I.V.M.A. to market its product in the 1984 marketing season stating that the I.V.M.A. has no manager, or sales representative at this time and the directors of I.V.M.A. are new and inexperienced. The urgency of this appeal from the Appellant's point of view is that Sunnymede's crop is planted and growing and it does not want to risk marketing of this crop by entrusting it to an agency which may be inadequate to market it.

35. This fear was not allayed during the testimony before this Board when the Commission Chairman said "hopefully they (I.V.M.A.) will sell its product; if not he can call on buyers".

36. The Board accepts the position of the Appellant that the I.V.M.A. is not properly positioned to adequately handle the selling of the Appellant's produce. The I.V.M.A. has had difficulty in obtaining continuity of management and sales effort which has hindered its success in the marketplace.

37. Testimony indicated the interior market for carrots is relatively small and that the interior market would be unable to accept the total volume of the Appellant's produce. As a result, the Appellant depends heavily upon the Vancouver market.

38. The Board accepts the position of the Appellant that the I.V.M.A. does not currently have sufficient resources to adequately service the Vancouver market in addition to the geographically vast interior market. As a result, the Board does not consider it fair or reasonable to force the Appellant to sell its produce through a marketing agency that is not

adequately equipped to market the Appellant's produce. To force the Appellant to market through the I.V.M.A. could possibly place the Appellant in a position of financial jeopardy.

39. During testimony, it was established that the Commission's marketing agency in the Vancouver area would not handle the Appellant's carrots until such time as its own growers had shipped all of their allotment of production. As a result, the Board agrees with the Appellant that this would not be a viable option for marketing the Appellant's produce in the Vancouver area.

40. The Board rejects the position of the Commission that re-issuing a wholesaler's licence to the Appellant would cause a major disruption in the industry by fractionating the selling effort and reducing producer marketplace bargaining power. In support of this, the Board accepts the testimony of the Appellant that it adhered to the Commission's pricing policy and that it would continue to use the Commission pricing policy in the future. This was not challenged by the Commission.

41. The Board considers the situation where customers are given an opportunity to choose between more than one B.C. source of supply for vegetables as desirable and healthy for the development of the B.C. vegetable industry. During testimony, the Respondent acknowledged that the current system used by the Commission is not perfect and that growers of inferior products may be protected by the co-operative system of the marketing agencies which is a weakness which the co-operatives must address and try to solve.

42. The Commission placed major emphasis in argument on its concerns regarding the impact of carrots from the Lillooet area being sold in the Vancouver market. Traditionally, this market has been served by the growers of the Lower Mainland area who had earned quotas for their produce and who resent a grower from the Interior having a direct access to the Vancouver Market.

43. The Board does not believe it is in the best interest of the vegetable industry to restrict the movement of regulated products from one district to another until such time as all of the regulated product produced in that district, and available for market, is sold. The Appellant stated the Lillooet area has a unique opportunity for the production of quality carrots which can compete effectively with out of Province sources of supply. The Board believes it is in the best interest of the industry as a whole to encourage such production.

44. The Appellant stated its intention to increase the capacity of its storage facilities to 500 or 600 tonnes from 100 tonnes. Such increases in storage capacity would have the effect of increasing the marketing season for B.C. carrots which the Board considers as desirable for the growth of the B.C. industry.

45. Additionally, the Appellant stated its intention to seek out markets in Alberta and Washington State. The Board supports this type of initiative as being a positive force for the growth of the B.C. vegetable industry.

46. The Appellant expressed its intention to continue to work cooperatively with the Commission and the I.V.M.A. and as evidence of that intention, it pointed out that the I.V.M.A. and

Commission fees were paid willingly during the year it held a wholesaler licence. The Board would expect that arrangement to continue.

47. Finally, the Board accepts as reasonable the Appellant's position that it be allowed to continue operation as a wholesaler until such time as a better sales and marketing organization can be developed for the vegetables of the Lillooet area. As solutions for its present marketing problem, the Appellant suggested two possibilities for the future:

- (a) that a cooperative be established in the Lillooet - Lytton area for the packing and marketing of the produce of that area and that it be designated as marketing agency, or
- (b) that the I.V.M.A. develop the necessary expertise and resources so that it becomes an aggressive and effective sales organization in the Vancouver Market area.

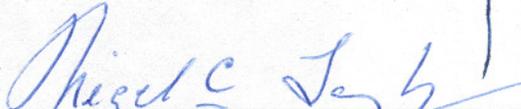
The Board accepts these as being possible alternative solutions for the future.

48. Therefore, the Board orders the Commission to issue to the Appellant a wholesaler licence to expire on the 31st day of March, 1985, on the same terms and conditions as the previous licence No. 559 issued August 19, 1983, except that the Board considers it appropriate and orders that the wholesaler licence issued to the Appellant shall not be limited to doing business as to the purchase of the regulated product only with an agency of the Commission doing business in any district in British Columbia under the scheme.

49. In accordance with the Board's Rules of Appeal, the Appellant's deposit of One Hundred Dollars (\$100.00) shall be returned to the Appellant.

DATED the *1st* day of August, 1984, in Richmond,
British Columbia


C.E. EMERY, CHAIRMAN


N.C. TAYLOR, VICE-CHAIRMAN


H. BLACK


M. HUNTER