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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:

FLETCHER'S LTD. and  
BRITCO EXPORT PACKERS LTD.

APPELLANTS

AND:

BRITISH COLUMBIA HOG MARKETING COMMISSION

RESPONDENT

REASONS FOR DECISION

APPEARANCES:

On behalf of the Appellant: John Hunter, Esq., Counsel;  
Gary MacMillan, President of  
Fletcher's Ltd.

On behalf of the Respondent: K.R. Benson, Esq., Counsel;  
David Craven, Chairman  
Ben Doerksen, Vice-Chairman  
of the Respondent;  
Pete Hill, Director;  
Dave Vander Flier, Manager  
of the Respondent

1. Fletcher's Ltd. ("Fletcher's") and Britco Export Packers Ltd. ("Britco"), the Appellants, by letters dated August 16 and 17, 1984 (copies of which are appended hereto and marked Appendix "A"), appealed to the British Columbia Marketing Board (the "Board") from an order, decision or determination of the British Columbia Hog Marketing Commission (the "Commission").

2. At the outset of the hearing, counsel for the Commission raised a preliminary objection to the jurisdiction of the Board to hear the appeal.

3. The Commission contended that the Appellant had not complied with the 30-day time limit for filing an appeal set down in s. 11(1) of the Natural Products Marketing (BC) Act, R.S.B.C. 1979, c. 296.

4. The Board heard evidence and argument with respect to the preliminary objection and reserved its decision.

5. The appeal was heard on the merits at hearings before the Board in Richmond on September 13, 1984, and September 27, 1984.

6. Upon reflection, the Board is of the view that the preliminary objection must be sustained.

7. While considerable evidence was led on the preliminary objection and on the merits of the appeal, there were certain facts, not seriously in dispute, which are necessary to understanding the issue on appeal before the Board and the basis for the preliminary objection:

(a) Approximately 2/3 of the hogs processed in British Columbia are processed by two packers located in Vancouver, Fletcher's and Intercontinental Packers Ltd. ("Intercontinental"). The significant difference between these two competing firms is that Intercontinental both kills and processes hogs in its facility in Vancouver while Fletcher's processes hogs already killed by its affiliate Britco. Britco operates a killing facility in Langley, which is closer to the hog farmers in the Fraser Valley than Intercontinental's facility in Vancouver.

(b) The Commission was created in 1980 by B.C. Regulation 109/80 to administer the Hog Marketing Scheme, under the supervision of the Board, with the following objects:

- (i) to initiate, support or conduct programs for promoting, stimulating, increasing and improving the economic well-being of persons engaged in the production, processing and marketing of the regulated product (hogs grown in the Province for processing), and
  - (ii) to initiate and carry out programs for regulating, promoting, stimulating, increasing and improving the marketing of the regulated product.
- (c) Britco was established in the spring of 1982 in Langley primarily to serve Fletcher's and, since that time, the Fraser Valley farmers have delivered most of their hogs either to Britco for killing and subsequent processing by Fletcher's, or to Intercontinental in Vancouver.
- (d) Much evidence was led as to the price of hogs paid by processors and the method of setting those prices, but it is sufficient to say at this point simply that those prices were arrived at by a process of negotiation and discussion with the packing industry and several different approaches or formulas for pricing were tried at various times.
- (e) All other things being equal, a hog farmer would likely avoid the expense and time necessary to transport hogs to Intercontinental's facility in Vancouver if he could deliver to a facility close to his farm in Langley - this was at the heart of the "locational advantage" claimed by the Appellant.

- (f) By Order dated April 9, 1984, the B.C. Hog Marketing Commission issued Marketing Order 1/84, which reads as follows:

"Pursuant to the Natural Products Marketing (BC) Act and the British Columbia Hog Marketing Scheme, the British Columbia Hog Marketing Commission orders as follows:

1. The Commission hereby fixes a levy surcharge of \$0.35 per hog on all regulated product which is produced in District 2 and subsequently delivered to a packer or processor located in District 2, and which is also outside the city limits of the City of Vancouver.
  2. The Commission hereby fixes a levy rebate of \$0.65 per hog on all regulated product which is produced in District 2 and subsequently delivered to a packer or processor located in the City of Vancouver."
- (g) Before the passage of this Order, both Fletcher's and its competitor Intercontinental were paying the same price for their hogs under a contract which ran to the middle of June, 1984.
- (h) Subsequently, Fletcher's and the Commission entered into negotiations for a renewal of that contract which was finally signed on August 27, 1984, for a 27-week period commencing on July 30, 1984 and terminating on February 2, 1985.
- (i) Under their renewed contracts, Fletcher's and its competitor Intercontinental pay the same price for hogs.
- (j) By means of the differential levy with a surcharge of \$0.35 and a rebate of \$0.65, the Commission effectively pays \$1.00 less per hog to farmers who deliver hogs to Britco for killing than to Intercontinental.

8. The Appellant argues that Order 1/84, taken together with the decision by the Commission to charge both Fletcher's and its competitor Intercontinental the same price for hogs, as evidenced by their renewed contracts commencing on July 30, 1984, is the source of its aggrievement.

9. The Appellant's letters of appeal dated August 16 and 17, 1984, allege that "the effect is that Fletcher's is forced to subsidize Intercontinental Packers operation" and that "if we understand the Orders correctly, we feel they are discriminatory between processors". Therefore, it is alleged that the Commission has exceeded its powers or not exercised them properly under the legislation.

10. The Respondent, in raising the preliminary objection, says that the source of the Appellant's aggrievement is Order 1/84 dated April 9, 1984, of which the Appellant had notice around the time of its passage, even though formal notice was not given. Therefore, the appeal initiated by letters of August 16 and 17, 1984, is beyond the 30-day time limitation for service of notice of appeal under the Natural Products Marketing (BC) Act.

11. The definition of "notice" as used in s. 11(1) of the Act was brought into issue since the Appellant argued that he was not given a copy of Order 1/84 and so did not have formal notice of it. The Respondent argued that the Appellant, through Fletcher's President, Garry MacMillan, had knowledge of the Order.

12. The Board accepts as correct, for the purposes of the Act, the definition of "notice" set out in Black's Law Dictionary as quoted below:

"Notice - information; ... knowledge of the existence of a fact or state of affairs; ...

Notice is knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all the facts...

Actual Notice - Actual notice has been defined as notice expressly and actually given, and brought home to the party directly. The term "actual notice" however, is generally given a wider meaning as embracing two classes, express and implied; the former includes all knowledge of a degree above that which depends on collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge. In this sense actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry."

13. With this definition in mind, it is necessary to examine the evidence on the preliminary objection in more detail:

(a) Mr. Garry MacMillan, President of Fletcher's, testified that the first time that he actually saw Order 1/84 was when the secretary of the Board mailed a copy to him in response to his appeal letters to the Board.

(b) On cross-examination, Mr. MacMillan said that he learned of the existence of such an Order about a month after the signing of a contract with the Commission in February, 1984 as a result of a farmer saying that there was a game of freight subsidization going on.

- (c) The farmer also said he would get more money for delivery to Intercontinental than to Britco.
- (d) Mr. MacMillan testified that he attended a meeting with Messrs. Craven (Chairman of the Commission), Doerksen (Vice-Chairman of the Commission) and Vander Flier (Manager of the Commission) to discuss Order 1/84 and what he called "discrimination" or "cross-subsidization" and said that he complained of this action.
- (e) Mr. Vander Flier testified that between April 11 and 13, 1984, he spoke to Mr. MacMillan and discussed, among other things, Order 1/84 and why the Commission decided to pass it.
- (f) Mr. Vander Flier said in testimony that a meeting with Messrs. Craven, Doerksen, himself and Mr. MacMillan was held on April 25, 1984, and, although Mr. MacMillan was not given a copy of the Order at that time, because the Commission did not expect it to affect him, differential levies and specific plans to implement them were discussed.
- (g) Mr. Craven confirmed that differential rates or levies were discussed at that meeting as a matter of principle and that the whole Order was discussed since it was so short.
- (h) Mr. MacMillan said that it was his understanding at that time that the Commission had agreed not to subsidize other processors and that more money would be

sought from Intercontinental (Mr. Vander Flier confirmed in his testimony that this was discussed).

14. The Board finds that as a result of discussions with persons in the industry, the Manager of the Commission and the Chairman and Vice-Chairman of the Commission, around the time of passage of Order 1/84, the Appellant had knowledge of the existence of that Order.

15. The Board also finds that the Appellant had knowledge of the contents of that Order in the sense that there was a differential levy imposed which effectively increased the price received by farmers who delivered their hogs to Intercontinental over that received for delivery to Britco.

16. Accepting for the purpose of argument only the Appellant's contention that Order 1/84 has to be taken together with the fact that both Fletcher's and Intercontinental pay the same price for hogs, a question which has concerned the Board is whether the Appellant had notice of the prejudicial effect of the Order at or about the time when it was passed.

17. The Board finds that the Appellant became aware that the differential levy would result in what Mr. MacMillan called "cross-subsidization" between processors at or before the meeting of April 25, 1984.

18. It is the Board's view that the Appellant had sufficient knowledge as of April 25, 1984, to realize that it was potentially dissatisfied or aggrieved by Order 1/84 and, therefore, should have served its notice of appeal within 30 days from that date.



19. Having express notice of differential levies as discussed at the meeting of April 25, 1984, the Appellant is sufficiently knowledgeable to be put upon inquiry as to any further effects upon its operation. Therefore, it is reasonable to assume that it had express or implied knowledge of the adverse affect of Order 1/84 with respect to what Mr. MacMillan called his "locational advantage".

20. A knowledgeable processor would likely realize that the Order would give his competitor some advantage. At the very least, he would be put on inquiry with this knowledge so as, in his own interest, to make further inquiries as to any adverse effects on his business.

21. On the evidence, the Appellant seems to have realized this but refrained from appealing in order to work out something with the Commission by way of negotiated prices as between its competitor and itself, perhaps based upon words of comfort that the Commission would seek a higher price from its competitor.

22. Since the appeal was not brought within the time limitation expressed in the Act, the Board has no jurisdiction to hear the appeal on its merits and, therefore, expresses no opinion on the central issue in this appeal.


23. The Board orders that the appeal of Fletcher's Ltd. and Britco Export Packers Ltd., brought by letters dated August 16 and 17, 1984, is dismissed.


24. During questioning by the Board, the Commission expressed its willingness to meet with all parties interested in this


appeal in order to address the source of the Appellant's agrievement. The Board welcomes this expression of co-operation and notes, particularly, that there is some evidence that assurances of fairness were given to Fletcher's at the meeting of April 25, 1984.

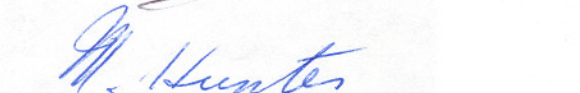
25. Since the appeal has not failed in its entirety, but merely has been dismissed as a technical jurisdictional point, the Board considers it equitable in the circumstances that the whole of the Appellants' deposit shall be returned to the Appellants.

DATED the 7<sup>th</sup> day of November, 1984, in Richmond, British Columbia.

  
C.E. Emery, Chairman

  
N.C. Taylor, Vice-Chairman

  
M. Brun

  
M. Hunter