87-15
11/13/97

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (B.C.) ACT

AND

IN THE MATTER OF AN APPEAL TO THE BRITISH COLUMBIA MARKETING BOARD FROM THE DECISION OF THE BRITISH COLUMBIA MUSHROOM MARKETING BOARD MADE OCTOBER 29, 1987 CONCERNING PACIFIC FRESH MUSHROOMS INC.

BETWEEN: PACIFIC FRESH MUSHROOMS INC. APPELLANT

AND:

BRITISH COLUMBIA MUSHROOM MARKETING BOARD RESPONDENT

REASONS FOR DECISION

Ralph A. May, Esq. Appearing for the Appellant

A. Harvey Blackmore, Esq. Appearing for the Respondent

John J. L. Hunter, Esq. Appearing for interested party, Fraser Valley Mushrooms Co-operative Association

This matter involves an appeal from the decision of the B.C. Mushroom Marketing Board (the "Mushroom Board") granting an agency licence to Pacific Mushrooms Inc. on certain terms and conditions.

The appellant's application to appeal is contained in a letter dated November 3, 1987 addressed to the B.C. Marketing Board. It states in part:

> "This is an application to appeal the decision of the B.C. Mushroom Marketing Board, Box 1203, Station 'A', Surrey, British Columbia (Mushroom Board) granting an agency licence to Pacific Fresh Mushrooms Inc., 200 - 5611 Cooney Road, Richmond, B.C. on certain terms. The decision is set out in a letter from the B.C. Mushroom Marketing Board to you of October 29, 1987.
>
> This appeal is based on the conditions set for the agency designation. In particular, it concerns the conditions set in paragraph a) ii), b) and e) i)."

At the commencement of these proceedings Mr. Blackmore introduced a motion that the appellant was out of time in making application to appeal. Mr. Blackmore argued that the British Columbia Marketing Board (the "Marketing Board") does not have the jurisdiction to hear this matter because the appeal is based upon a decision actually made on September 10th, 1987 and embodied in a letter dated September 11th, 1987 from Mr. Blackmore to the Marketing Board. Section 11 (1) of the Natural Products Marketing (B.C.) Act (the "Act") states as follows:

> "Where a person is aggrieved or dissatisfied by an order, decision or determination of a marketing board or commission, he may appeal the order, decision or determination to the Provincial board by serving on it, not more than 30 days after he has notice of the order, decision or determination, written notice of his appeal."

Mr. Blackmore argued that the letter of October 29th, 1987 from the Mushroom Board to the Marketing Board was not a decision giving rise to a right of appeal. The decision was actually made on September 10th, 1987 and embodied in the letter of September 11th, 1987. The time for appealing that decision ran from the date when the appellant received the September 11, 1987 letter.

Mr. May argued that the decision of the Mushroom Board was not embodied in the letter of September 11th, 1987. The Mushroom Board purported to decide on September 10th, 1987 to designate Pacific Fresh Mushrooms Inc. as an agency pursuant to the Act but in arriving at that decision, the Board, as it was then constituted, did not realize that their decision was subject to the approval of the Provincial board pursuant to section 12 (4) of the Act.

Section 12 (4) of the Act states as follows:

> "Subject to the approval of the Provincial board, a marketing board may appoint a marketing agency to carry out or perform certain functions or duties for the marketing of a regulated product under its jurisdiction."

If on September 10, 1987 the Mushroom Board did not realize that their decision to appoint the appellant as a marketing agency was subject to the approval of the Provincial board (the same as the Marketing Board referred to herein) then the Mushroom Board's decision was fatally flawed and invalid. It is possible that the Mushroom Board may have made a different decision if it had knowledge that their purported decision was subject to a final approval by the Provincial board. Furthermore Mr. May argued that the decision embodied in the September 11th, 1987 letter from Mr. Blackmore to the Marketing Board was merely a negotiating position put forward by the Mushroom Board. The final decision of the Mushroom Board was to be completed and finalized at a later date after further negotiations with the appellant.

After hearing argument from both Mr. May and Mr. Blackmore and after considering the letter dated September 11th, 1987 from Mr. Blackmore to the Marketing Board, the letter dated October 29th, 1987 from Mr. May to the Marketing Board, the letter of September 23rd, 1987 from Mr. Blackmore to the Marketing Board, the letter of October 1st, 1987 from Mr. May to Mr. Blackmore, the letter of October 29th, 1987 from Mr. Krulitiski to the B.C. Marketing Board and the letter dated October 29th, 1987 from Mr. Blackmore to Mr. May, (all of which are included in Exhibit "A", the document book submitted by Mr. Blackmore)the Marketing Board concludes that the decision of the Mushroom Board, made at its meeting of September 10th, 1987 and set out in its letter of September 11th, 1987 from Mr. Blackmore to the Marketing Board, did not constitute a valid decision. The Mushroom Board was not aware that its decision was subject to

approval by the Provincial board. Mr. Blackmore's letter of September 23rd, 1987 to the Marketing Board confirmed numerous telephone conversations with the Marketing Board to the effect that the Mushroom Board was not aware of its obligation to have the decision approved by the Provincial board. The Mushroom Board may have decided differently if the members of the Board had realized on September 10th, 1987 that their decision was subject to the approval of the Provincial board. The decision of the Mushroom Board represented by the letter of October 29th, 1987 from Mr. Krulitski to the Marketing Board, setting out the terms and conditions of the appellant's agency designation is the pertinent decision for the purpose of this appeal. That decision was made by the Mushroom Board with full knowledge that their decision was subject to approval by the Provincial board.

In the event that the Marketing Board is in error in the above conclusion, it believes that Mr. Blackmore's motion should be dismissed for the following alternative reasons:

1) Mr. Blackmore's letter of September 11th, 1987 specifically states in the last paragraph that the letter did not constitute official notice of the purported decision of the Board.

> "As your office is well aware, there has been no time for reflection and little time to articulate these terms and conditions. It will be necessary to refine them before the applicant is formally notified. However, under the circumstances of the case, a copy of this letter will be telecopiered to the applicant's solicitor forthwith".

The Marketing Board views this as a clear indication that the September 11th, 1987 letter did not constitute formal notice to the appellants of the purported decision or at the very least the last paragraph of Mr. Blackmore's letter may have mislead the appellant into concluding that a formal decision had not been made and that further notice would be forthcoming.

2) The Marketing Board concludes that the wording of the September 11th letter suggested that a final decision had not been made. The September 11th, 1987 letter specifically referred to the necessity to refine and

articulate certain terms and conditions. The September 11th, 1987 letter represented a negotiating position taken by the Mushroom Board with respect to the ongoing negotiations with the appellant. These ongoing negotiations were confirmed by Mr. Blackmore in his letter dated September 23rd, 1987 to the Marketing Board.

> "The dilemmma for the Mushroom Board is whether it is necessary to ask for the approval now while the wording of the terms is yet to be finalized or, whether this Board should delay this request for ten days until the wording has been finalized. The Mushroom Board would much prefer to make the necessary request later when the wording of the terms has been finalized. The applicant has told this Board that it is not in a position to begin its operations immediately. Furthermore, there has been too much haste and pressure to decide put on this Board."

A copy of this letter was sent to Mr. May. This letter supports Mr. May's argument that there were ongoing negotiations and that no final decision had been made by the Mushroom Board with respect to the terms and conditions of the designation of the appellant.

3) In the letter of October 26, 1987 from the Chairman of the Marketing Board to Mr. Krulitski. The Marketing Board approved the Mushroom Board's decision on designation but did not approve the Mushroom Board's decision on the appropriate terms and conditions. Consequently the Mushroom Board went away to contemplate refinement of the terms and conditions.

The October 29th, 1987 letter from Mr. Krulitski to the Marketing Board embodies the decision of the Mushroom Board with respect to the terms and conditions imposed on Pacific Fresh Mushrooms Inc. as an agency. Mr. Blackmore argued that the letter of October 29th, 1987 set out the same matters as set out in the letter of September 11th, 1987. The two decisions were one and the same and the decision of the Mushroom Board should be dated as of September 11th, 1987. The Marketing Board rejects this reasoning because the October 29, 1987 letter sets out terms and conditions after the benefit of ongoing negotiations as evidenced by the letters of September 23rd, 1987 from Mr. Blackmore to the Marketing Board and the letter of October 1st, 1987

from Mr.May to Mr. Blackmore. Furthermore, the Mushroom Board reached its decision in the letter of October 29th, 1987 with the full knowledge that this decision must be approved by the Provincial board. Finally, the decision embodied in the October 29th, 1987 letter was arrived at by a Mushroom Board differently constituted than that of September 11th, 1987. In the intervening time between September 11th, 1987 and October 29th, 1987 one member of the Mushroom Board resigned and a new member was appointed. Therefore the October 29th, 1987 letter constitutes a valid decision of the Mushroom Board separate from the purported decision set out in their letter of September 11th, 1987.

For the above-noted reasons, the British Columbia Marketing Board hereby dismisses Mr. Blackmore's motion.

Chairman

Member

Member

Member