

2/21/84

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

BETWEEN:

SKYACRES TURKEY RANCHES LTD. and ANNE TIMMERMAN

APPELLANTS

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

REASONS FOR JUDGMENT

Appearances: Bruce I. Cohen and Richard C. Baker on behalf for the Appellant

Robert F. Hungerford and Wendy D. Piggott for the Respondent

1. Skyacres Turkey Ranches Ltd. and Anne Timmerman (the "Appellants") appealed a decision of the British Columbia Turkey Marketing Board (the "Turkey Board") to the British Columbia Marketing Board (the "Board").

2. The Notice of Appeal dated December 2nd, 1983 states as follows:

"The Appellant is aggrieved and dissatisfied by an order, decision or determination of the British Columbia Turkey Marketing Board (the "Board") as set out in Board Order 8/83, dated December 1, 1983.

Particulars of the matter appealed from are as follows:

1. By Board Order 7/83, the Board designated Pan Ready Poultry (1980) as the agency through which 5,000 heavy hens and 5,000 heavy toms placed July 26, 1983 and produced by the Appellants shall be processed and marketed.

2. By Board Order 8/83 (the "Order"), the Board ordered that effective December 1, 1983 and until further order, Pan Ready Poultry (1980) Ltd. may deduct, from the prices set out in Pricing Order No. 110 of the Board or any subsequent pricing order, the plant levy of 11 cents per kilogram at present made in the case of each grower shipping to Pan Ready Poultry (1980) Ltd.
3. The Order allows Pan Ready Poultry (1980) Ltd. to deduct a plant levy of 11 cents per kilogram from the minimum price for the turkeys referred to in Board Order 7/83 pursuant to Board Pricing Order 110.
4. The Appellants are aggrieved and dissatisfied by the Order and appeal against it for the following reasons:
  - (a) the Order is inconsistent with and contrary to the provisions and purposes of the Natural Products Marketing (BC) Act, the British Columbia Turkey Marketing Scheme and Board General Orders, 1983 and as such is in excess of the jurisdiction of the Board and should be struck down as ultra vires;
  - (b) the Order is unfair, arbitrary, discriminatory and founded on bias and accordingly should be struck down as contrary to the principles of natural justice and based on incorrect principles;
  - (c) the Order requires the Appellants to market the turkeys on terms and at prices which will work particular hardship on the Appellants and accordingly should be struck down as manifestly unreasonable and unjust."

3. Order No. 7 of the B.C. Turkey Marketing Board provides that:

"The British Columbia Turkey Marketing Board hereby designates Pan Ready Poultry (1980) Ltd. as the agency through which 5,000 heavy hens and 5,000 heavy toms placed July 26, 1983 and produced by Anne Timmerman and/or Skyacres Turkey Ranches Ltd. shall be processed and marketed."

4. Order 8/83 was addressed to all Mainland turkey producers including the Appellants and provided that:

"The British Columbia Turkey Marketing Board hereby orders that, effective 1 December, 1983 and until further order, Pan Ready Poultry (1980) Ltd. may deduct, from the prices set out in Pricing Order No. 110 of the British Columbia Turkey Marketing Board or any subsequent pricing order, the plant levy of 11 cents per kilogram and present made in the case of each grower shipping to Pan Ready Poultry (1980) Ltd."

5. The Appellants had filed a Notice of Appeal dated November 16, 1983, and had followed this by an Amended Notice of Appeal. At the hearing of the matter, the Appellants restricted themselves to the Notice of Appeal dated December 2, 1983.

6. According to the testimony of Mr. Dudley Brooks for the Appellants, each of the Appellants possess a licenced production unit for turkeys. They produce their turkeys on the same farm operation in Wonnock, B.C. The joint business has operated as a family business since 1963 and has been profitable in the past but is at present operating at a loss. The Appellants had been shipping their birds to the Panco Poultry Processing Plant until the latter closed in December of 1982. There are two other plants which are close enough to the Appellants' operation to be available to process the Appellants' turkeys. They are: Scotts Poultry on Vancouver Island; and the Pan Ready Poultry Plant.

7. Of central focus in this appeal is the deductions of a plant levy from the price set by the Turkey Board in their Pricing Orders. In order to understand the function of this plant levy, it is necessary to review the history of the Pan Ready plant.

8. The Pan Ready Plant has a long history of financial difficulties and government intervention. Canada Packers Ltd. originally owned the plant and sold it in the 1960's to Maplewood Poultry Processers. Maplewood was experiencing financial difficulties in 1980 and a receiver was appointed. A potential sale of the operation to Panco Poultry, which in turn was owned by Cargill Grain Ltd., was not approved by the Foreign Investment Review Agency. Maplewood was eventually sold to Scotts Poultry Cooperative Association in 1980 and both federal and provincial government financing was involved. In July or August, 1981, Scotts Poultry sold the plant to a group of turkey growers and it became the property of Pan Ready Poultry (1980) Ltd. Pan Ready Poultry (1980) Ltd. obtained direct loans and loan guarantees from government.

9. The operation of Pan Ready Poultry (1980) Ltd. remains a marginal one as it requires a higher volume of turkeys to be truly profitable. A reality of the industry is that turkeys cannot be shipped very far before processing and so a local processor is required. Yet even with the almost total (excepting the Appellants) participation of the producers in the Province, the operation remains a marginal one.

10. Originally, all but eight of the Mainland producers became shareholders of Pan Ready Poultry (1980) Ltd. Eventually, six of the eight joined the Pan Ready operation. The Appellants remained the only Mainland producers independent of the Pan Ready operation. The Appellants have consistently refused to join the ownership and operation of the plant in order to avoid the financial obligations and difficulties that the plant has had.

11. Beginning in the fall of 1981, an amount called the "plant levy" has been deducted by Pan Ready from the price to be paid to the producers. The testimony of Mr. Meikle, for the Respondent, made it clear that the amount of the plant levy was established by the Pan Ready Board of Directors based upon projections for the forthcoming year. It is equally clear that the amount of the plant levy is used to finance both losses on current operations as well as the long-term capital problems of the company.

12. The producer-shareholders of Pan Ready agreed to pay the plant levy. The company originally agreed to issue preferred shares in return for the deduction of the plant levy. As it is clear that these preferred shares would not have any worth if issued, the shares have not, to the present, been issued.

13. As a result of the Panco Poultry Plant closure, the Appellants had to find a plant where their birds could be processed. Initially, they attempted to set up their own processing plant along with the other six producers who had not signed on with Pan Ready. This option was not pursued to completion. Another option was to sell to the Scotts Poultry Plant on Vancouver Island. For this to occur, transport approval from the Turkey Board was required. After a hearing, the Turkey Board refused such approval and ordered the Appellants to process their turkeys through the Pan Ready Plant. The Pan Ready Plant refused to process the turkeys

unless the plant levy was deducted. As the Appellants' turkeys were well past the time when they should be killed, the Appellants, under protest, delivered their birds to Pan Ready.

14. The Turkey Board then revoked their decision of November 10th, 1983 by letter dated November 25th, 1983, but remade the decision in Order 7/83 dated December 1, 1983. In addition, they designated Pan Ready to be the processor for all Mainland turkeys (Order 9/83) and purported to authorize the deduction of the plant levy by Pan Ready (Order 8/83). Thus, the Appellants are left in the ongoing position of having to process their turkeys through Pan Ready and pay the plant levy. It should be noted at this point, that the designation of Pan Ready Poultry (1980) Ltd. as a marketing agency must be approved by the Board before it is effective pursuant to s. 12(4) of the Natural Products Marketing (BC) Act.

15. Mr. Cohen, for the Appellants, made three arguments:

- (1) that Pan Ready Poultry (1980) Ltd. was required to make full payment for all turkeys delivered to it, and "full payment" precluded the deduction of levies;
- (2) the specific power to collect a plant levy such as that contained in Order 8/83, may be granted to the Turkey Board under s. 13(1)(k) of the Natural Products Marketing (BC) Act. This power has not been expressly delegated to the Turkey Board under B.C. Regulation 174/66. He, therefore, argued that the Board could not make use of its general power to make orders when this specific order had been expressly

mentioned in the Act and not provided to the Board by Regulation. As a result, the Turkey Board was without jurisdiction to make the "plant levy";

- (3) alternatively, if the plant levy is valid, then the imposition of it upon the Appellants is unfair as it requires the Appellants to provide monies to support the capital purchase of a company in which they have no interest. The Appellants are being forced to do that which they have contractually chosen not to do.

17. Robert Hungerford, for the Respondent, argued that the Turkey Board was given jurisdiction to make Order 8/83 under the general powers given by the Turkey Board. Specifically, he relied upon:

- (1) s. 13(1)(a) of the Act as delegated to the Board in s. 4.01(a) of B.C. Reg. 174/66;
- (2) the general powers given in the introductory portion of s. 4.01 of B.C. Reg. 174/66 when viewed with the provisions of ss. 2.01 and 2.02 of B.C. Reg. 174/66;
- (3) subsection (n) of s. 4.01 of B.C. Reg. 175/66.

These sections are set out at Page 12 of this Judgment.

18. Regarding the Appellants' first argument, the Turkey Board took the position that s. 4 of B.C. Reg. 104/78 relied upon by the Appellants, was ultra vires as it exceeded the jurisdiction given in s. 3(2)(c) of the Agricultural Produce Grading Act, R.S.B.C. 1979, c. 11.

19. Regarding the Appellants' first argument, the Appellants relied upon:

(1) section 4 of B.C. Reg. 104/78 -

"The holder of a licence to purchased live poultry shall make full payment to the producer or his assignee within 14 days after the date of delivery for each lot of poultry purchased."

(2) section 5(6) of B.C. Reg. 61/83 -

"Each agency shall make full payment to the grower or his assignee within 14 days after the date of receipt of the related product."

The Board does not have jurisdiction to determine whether the Regulation is intra vires or ultra vires. The Board will accordingly presume that the Regulation is intra vires unless a Court of competent jurisdiction rules otherwise.

20. Section 4.01(i) of the Turkey Board Scheme gives the Turkey Board the power to fix prices and they have done so in Pricing Order No. 110 dated November 10th, 1983. We consider this order as designating the price to be paid to the producer at the farm gate less the normal levies deducted for the Turkey Board for its ordinary requirements. Such levies were freely acknowledged by the Appellants as being legitimate charges. It is accordingly unnecessary to comment any further on the scope and extent of s. 5(6) of B.C. Reg. 61/83.



21. The Appellant bases his point regarding the lack of jurisdiction of the Turkey Board upon the use of the term "plant levy" used in Order 8/83. The terms "levy" or "levies" are used in a number of places in the Regulations to provide for licence fees, fees for service, and federal levies, for example see B.C. Reg. 61/83, s. 8. These references refer to charges which may be made to support the various levels of Boards charged with the administration and implementation of the Act and Regulations. The only place where the word "levy" is used where it could refer to charges that may be used for purposes other than above is in s. 13(1)(k) of the Act.

22. Before considering s. 13(1)(k) of the Act, a preliminary point arises as to whether the Turkey Board may take into account the language which forms part of a private agreement. The Turkey Board is entitled, under the Act and Regulations, to take in a wide variety of information in making its decisions. Under s. 4.01(h) of B.C. Reg. 174/66 the Turkey Board has the authority to "require full information relating to the production, transportation, processing, packing, storing, and marketing of the regulated product from all persons engaged therein, and to require periodic returns to be made by such persons, and to inspect the books and premises of such persons". A contract between a producer and the major processor of turkeys in the Province "relates to the production ... processing ... and marketing of the regulated product ...". It would be unreasonable to allow them to require such information if it was not to be used in making its determinations. Therefore, the language used in this type of private agreement is the sort of information the Board is entitled to make use of.

23. There was evidence at the hearing that, although Mr. Brooks may not have been served a current copy of the contract specifying the term "plant levy", he knew that such a levy was being charged to those persons who delivered their produce to Pan Ready Poultry and that the maintenance of a low plant levy was a concern of the Turkey Board. Thus, it cannot be said that he was not informed of the case he had to meet.

24. The next question to be decided is whether the Turkey Board has the jurisdiction to order such a "plant levy". The first question is whether the Act, s. 13(1)(k), authorizes the Lieutenant Governor in Council to delegate the power to make a plant levy to a marketing board.

"13.(1)(k) To fix and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and to fix the levies and charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the Commission;

- (i) to carry out the purposes of the scheme;
- (ii) to pay the expenses of the marketing board or commission;
- (iii) to pay costs and losses incurred in marketing a regulated product;
- (iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine; and
- (v) to set aside reserves for the purposes referred to in this paragraph;"

25. "Levy" is defined as:

- "to assess; raise; execute; exact; tax; collect; gather; take up; seize" in Blacks Law Dictionary, 5th Edition, and
- the "action of levy in assessment duty or tax" in the Shorter Oxford Dictionary.

"Production" is defined as

- "process or act of producing" in Blacks Law Dictionary, and
- "to bring forth, bring into being or existence ... the action of producing" in the Shorter Oxford Dictionary.

"Marketing" is defined in s. 1 of the Act to "include producing, buying, selling, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person".

26. It is clear from the Act and the above definitions that the plant levy is a levy or charge fixed from designated persons engaged in the production or marketing of a regulated product and that the plant levy is being used to pay costs or losses incurred in marketing a regulated product. The authority to make a plant levy is thus contained in s. 13(1)(k). However, subsection (k) does not appear in the list of enumerated powers delegated by the Lieutenant Governor in Council to the Turkey Board in B.C. Reg. 174/66. Subsection (a) to (j) of s. 13(1) of the Act are delegated in that Regulation, as are subsections (l) and (m). Subsection (k), as well as subsections (n) to (r), do not appear in B.C. Reg. 174/66. The question then becomes whether the wide powers relied upon by the Respondent Turkey Board can take the place of the omitted subsection (k).

27. The Turkey Board relies upon:

(1) the broad scope given to the intention and purpose of the turkey marketing scheme,

"2.01. The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage, and marketing of the regulated product within the Province, including the prohibition of such production, transportation, processing, packing, storage, and marketing in whole or in part."

(2) the broad general authorities given to the Board,

"4.01. The Board shall have authority within the Province to promote, regulate, and control in any and all respects, to the extent of the powers of the Province, the production, transportation, processing, packing, storing, and marketing, or any of them of the regulated product, including the prohibition of such production, transportation, processing, packing, storing, and marketing, or any of them in whole or in part, and shall have authority necessary or useful in the exercise of the authorities hereinbefore or hereinafter enumerated, and without the generality thereof shall have the following authority:

- (a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be produced, processed, packed, stored, or marketed;
- (b) to determine the manner of distribution, the quality, grade, or class of regulated product that shall be transported, produced, processed, packed, stored, or marketed by any person at any time;
- (c) to prohibit the production, transportation, processing, packing, storage, or marketing of any grade, quality, or class of any regulated product; and

- (d) to determine the charges that may be made for its services by any designated agency;  
...
- (n) to make such orders, rules, and regulations as are deemed by the Board necessary or advisable to promote, control, and regulate effectively the production, transportation, processing, packing, storage, or marketing of the regulated product and to amend or revoke the same;..."

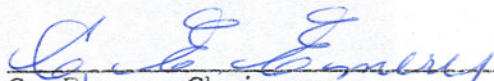
28. There is no question that these provisions are wide enough to encompass the power to make Order 8/83. However, the question remains whether they can overcome the omission of a specific power in the enumeration of the delegated powers, that is, subsection (k). The main conflict is between the wide scope given to the Turkey Board in the above sections and the omission of a few powers from a list which the draftsman must be taken to have examined when he drafted the regulation. It could be stated that the omission was only a result of inadvertence or accident or alternatively, s. 13(1)(k) is only additional to the general power given and does not exclude reliance upon the general power. On the other hand, the sections mentioned of the class of possible powers which the Lieutenant Governor may delegate, may be regarded as silently excluding the other sections not mentioned. This assertion relies upon a finding that the Lieutenant Governor in Council consciously intended to omit subsection (k).

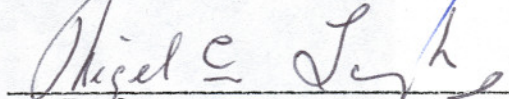
29. On balance, we find that it was the conscious intention of the Lieutenant Governor in Council to omit to grant the power enumerated in s. 13(1)(k) and that consequently the Turkey Board has no authority to make Order 8/83.


30. We would also accept the Appellants' third argument that the plant levy unfairly requires the Appellants to provide money to support the capital problems of Pan Ready and to finance the purchase of Pan Ready by the producers. Order 8/83 requires the Appellants to market their turkeys on terms which unjustly and unfairly impose a particular hardship upon them. Were it not for our finding that the Board lacks the authority to make Order 8/83, we would order that Order 8/83 be varied to exclude its application to any of the production of the Appellants delivered to Pan Ready.


31. The appeal is allowed.

DATED the 21<sup>st</sup> day of February, 1984 in Richmond, British Columbia.

  
 C. Emery, Chairman

  
 N. Taylor

  
 H. Black

  
 M. Brun