

BRITISH COLUMBIA MARKETING BOARD

BETWEEN:

R.H. MacDONALD & SONS LTD.

APPELLANT

AND:

BRITISH COLUMBIA TREE FRUIT MARKETING BOARD

RESPONDENT

Appearance: Joseph T. Hattori, Esq. for the Appellant
John A. Swanson, Esq. for the Respondent
Michael Bishop, Esq. for B.C. Tree Fruits
Limited

1. The Appellant, R.H. MacDonald & Sons Ltd., applied on February 24, 1983 to the British Columbia Tree Fruit Marketing Board (the "Tree Fruit Board") for a licence to export tree fruit to the United States and all off-shore markets.

2. On March 15th, 1983, the Tree Fruit Board refused to issue the Appellant the export licence. In a letter dated March 22, 1983 from the Chairman of the Tree Fruit Board, the Appellant was advised that the Tree Fruit Board had refused to issue the export licence "as it would not be in the best interests of the growers at that time."

3. On April 12, 1983, the Appellant appealed to the British Columbia Marketing Board (the "Board") pursuant to s. 11 of the Natural Products Marketing (BC) Act.

4. The hearing of the appeal required 8 days. The Board heard testimony from many witnesses on behalf of both the Appellant and the Respondent. In addition, evidence was received in the form of letters and affidavits from various

individuals who were asked to express an opinion respecting the matter before the Board. The Board is satisfied that the issues properly arising from the appeal have been thoroughly identified and presented by each side.

5. It should also be noted that B.C. Tree Fruits Limited (the "Agency") had, upon its application, been granted the status of an interested person pursuant to s. 6(8) of the Natural Products Marketing (BC) Act Regulations, B.C. Reg. 328/75 which enabled it to participate as a party in the appeal. Although the Agency had filed an initial submission which gave an overview of the issues on the appeal and appeared by counsel at one day of the hearing, the Agency advised the Board that it would not be participating as a party in the proceeding.

6. The issue in this appeal is whether the Appellant should be issued a licence to export tree fruit to the United States and the off-shore market. The jurisdiction of this Board to entertain this appeal and decide the question before it was affirmed by the British Columbia Supreme Court: British Columbia Tree Fruit Marketing Board v. R.H. MacDonald & Sons (British Columbia Supreme Court, July 15, 1983).

7. In approaching this appeal the Board considers that the paramount consideration is whether the issuance of an export licence to the Appellant would be in the best interests of the tree fruit industry in British Columbia as a whole. The Board recognizes the difficulty inherent in attempting to answer that question. The industry is made

up of many players which include the growers, packers, shippers and as well, those involved in the wholesale and retail trade. Each of these performs a vital role in the industry. Although, to a certain extent the viability of one group or individual may depend upon the viability of another, there are also situations where this interdependence or mutuality of interest does not exist. Circumstances will therefore arise where a decision needs to be made which may be good or better for one group than for another, although every effort has to be made to balance and compromise the competing interests in order to have, on the whole, a vital industry. In the final analysis, the Board feels that it is the interests of the grower which must override. Agricultural Marketing legislation in this Province, as well as every other Province and in the federal sphere, was primarily intended to address the problems faced by growers. What the Board wishes to emphasize is that its decision cannot simply turn on whether the issuance of an export licence will benefit the Appellant. If the issuance of a licence will be overly detrimental to the industry as a whole, and particularly the growers, then no licence should be issued.

8. In deciding this appeal, as any other, the Board will be very slow to substitute its opinion for that of the Tree Fruit Board. The Board recognizes that the Tree Fruit Board has been delegated the specific responsibility to regulate the tree fruit industry. The Tree Fruit Board deals with the industry on a day-to-day basis and can be expected to have a keen understanding of its problems and

the solutions to the same. This appeal, although it raises issues of fact and laws, involves primarily a question of opinion and judgment. Notwithstanding the deference that the Board will pay to the opinion of the Tree Fruit Board, the Board must and will vary an order of the Tree Fruit Board where it is persuaded that the said order is not consistent with the interests of the industry as a whole and the growers in particular.

9. Although the appeal raises the immediate question of whether the Appellant should be granted an export licence, it really involves something far more important and fundamental. Since 1939 British Columbia apples have been marketed through a single desk selling agency. In 1974 the principle of central selling was abandoned insofar as sales within British Columbia and the rest of Canada was concerned. Up until the present, the practice of central selling in the export market (being the United States and the rest of the world) has prevailed. If the Appellant is granted an export licence there will no longer be an exclusive central selling system in British Columbia for the sale of B.C. apples in the export market.

10. After reviewing the evidence presented and the submissions made by counsel for both parties the Board has reached a number of general conclusions. They are as follows:

- (a) The tree fruit growers in British Columbia are in desperate financial straits. Few are recovering their cost of production. It was said that all the growers are going broke, some more quickly than others.

- (b) The cause of the growers' economic situation cannot be attributed to only one factor and, as such, it is not easy to discern the exact impact of a given factor. There are many factors in addition to the marketing system that affect the growers' viability.
- (c) There is a shortage of high quality B.C. apples available for sale in the export market. The growers are having difficulty improving quality because the returns they receive are insufficient to produce a higher quality apple.
- (d) The business environment in which tree fruits are sold has changed over the past several decades in response, in part, to technological changes in storage facilities, transportation, communication and data processing. The benefits from these changes are available to a broad range of organizations and are not restricted to only large centralized selling organizations. In addition, at the packing house level, changes in both economies of scale and technology have had a major impact on reducing the number of packing houses. This trend may continue. As a result, the Board concluded that it should not place major emphasis on Dean E.D. MacPhee's Royal Commission Report completed in 1958 and instead should review the evidence in the current business setting.

- (e) The existing selling system is having increasing difficulty in controlling sales outside of the marketing system. The Board views this as a market signal indicating a lack of responsiveness to producer needs by the existing central selling system. The success of a central selling system depends upon a commitment of all of the growers. The evidence would suggest that there is not such commitment, and, the Board would agree with one of the Respondent's witnesses who said "you cannot legislate commitment".
- (f) The existing physical capacity of controlled atmosphere ("C.A.") storage and conventional cold storage would not be affected by a change in marketing strategy. The Board, therefore, concluded that the benefits to the industry of C.A. storage and planned marketing from storage are not exclusive to the central selling system. The Board also concluded good business judgment would be the major factor governing the use of C.A. storage by the various packing houses in the industry.
- (g) When evaluating the Respondent's concern regarding the unfair advantage to the Appellant of the "umbrella effect" created by the current central selling system, the Board concluded alternative systems would be developed by the industry to ensure a fair and equitable distribution of costs and benefits.

11. The Board accepts the argument of the Appellant that modest increases in the number of sellers in the market place will benefit the industry as a whole by increasing the variety of approaches to marketing and increasing market penetration.

12. The Board accepts the position of the Appellant regarding its need to have access to export markets. Since the Appellant's crop includes a high proportion of red delicious apples, the Board does not believe the Appellant should be restricted to sales within Canada if it accepts responsibility to market its crop.

13. The Board accepts the Appellant's position that the use of brokers for export sales would be a viable option for them. Additionally, the Board believes the use of a brokerage system may improve overall industry market returns.

14. The Board accepts the Appellant's submission that the complicated decision-making networks inherent in the central selling system tend to unnecessarily suppress important business communication and feed-back. By having the packing house fully in control of the combined functions of marketing, pooling, and product quality, the Board believes the industry will become more successful and responsive to marketplace needs.

15. The Board accepts the Respondent's position that to compete in some markets the exporters must be large enough to provide market impact for their product or panelists will turn to other exporters. The Board believes, therefore, that B.C. Tree Fruits Limited have a continuing and important role to play in servicing large domestic and export buyers. B.C. Tree Fruits Limited have developed the necessary expertise to service the needs of these buyers. Exporters do need to be able to assure large volume importers that they have a consistent supply and are able to supply on a yearly basis. The Board is satisfied that the use of exclusive agents for sales to the United Kingdom and Tiawan is currently in the best interests of the growers generally. The Board was impressed by the evidence called by the Respondent in this regard and was not persuaded by the Appellant that it should be allowed to export into those markets.

16. The Board does not accept the Respondent's position that overall industry market returns will be severely depressed once the single desk selling system is changed. The evidence provided indicates that B.C. apple sales in the export markets are sufficiently small that they do not have a measurable impact on world apple prices. Additionally, the evidence indicates world prices for apples are basically set by the economic laws of supply and demand. Since B.C. produces apple varieties that are produced in other areas of North America and the world, B.C. producers are not able to corner the market and must be responsive to their

competition and the demands of their customers. That being the case, the impact of an additional seller of apples from B.C., in many of the world markets, would not likely result in a major downward shift in prices for B.C. apples. Furthermore, the impact of additional sellers of a limited supply of B.C. premium apples could likely force prices upward improving returns to the growers. The evidence provided indicates that the supply of apples from B.C., suitable for export, is limited and falls short of demand, and that some B.C. apples are of a quality and type that demand premium prices on the world market. Additional exporters may result in delivery of new markets and new buyers who will be competing for the B.C. apples by offering the highest possible price. Additionally, considerable evidence was presented suggesting quality and service play the major role in determining if an export sale will take place.

17. The Board does not concur with the Respondent's suggestion that a central selling organization is required to effectively deal with foreign and domestic governments. The Board feels this function could likely be handled equally well by a producer's association or by an industry committee comprised of export marketers.

18. The Board finds it difficult to reconcile a system of central selling in the export market with a system of decentralized selling in the domestic market which includes all of Canada. Indeed one of the Respondent's own witnesses was of the view that the different approaches to marketing the fruit was not reconcilable. The Board therefore cannot conclude that an erosion of the central selling principle is inherently or necessarily contrary to the grower interest when that system does not exist for the rest of Canada.

19. The Board finds, that however well intended, the Tree Fruit Board's decision to deny R.H. MacDonald & Sons Ltd. a licence is not in the best interest of the industry as a whole. In the present economic environment, the Board does not believe it wise for the Tree Fruit Board to rely on only one export marketing organization. The various buyers in the marketplace do not all respond the same to a given marketing approach or style. Some buyers prefer one approach while other buyers prefer a different approach. In addition, many buyers prefer a choice. The Tree Fruit Board must consciously weigh the potential risk to the industry of having only one export sales organization. Given the vastness and diversity of the world market, and as well its competitiveness, the Board does not feel that, on balance, the benefits achieved by an exclusive central selling system for export sales are sufficient to compensate for the risk it creates for the industry. The Board feels that it would be more desirable for several effective export marketing organizations to develop in B.C. It also believes this would reduce risk to the industry and improve effectiveness which will ultimately benefit the grower.

20. The Board has therefore decided to vary the decision of the Tree Fruit Board and issue an export licence to the Appellant on the following conditions:

- (a) R.H. MacDonald receive an export licence for a period of two years with review after one year by the Board to evaluate performance.
- (b) R.H. MacDonald be excluded from selling into the United Kingdom and Tiawan markets during this two year period.
- (c) the licence be limited to fruit packed by R.H. MacDonald.

21. Resulting from this decision, the B.C. Tree Fruit Marketing Board will need to make the necessary amendments to their regulations to provide for the smooth functioning of a selling system with more than one exporter of B.C. fruit.

22. The Board does not consider this decision as a signal to the Tree Fruit Board that all applications for export licences should be approved. The Board is in favour of an orderly change in the marketing structure for tree fruits and is of the view that a modest number of export licences would benefit the industry as a whole. The Board would expect the Tree Fruit Board to closely review its industry marketing strategy and explore in depth the question of the optimum number of export licences keeping in mind the important need for the Province to be a reliable supplier for servicing large and continuing contracts for fruit. When conducting this review, the Board would expect the Tree Fruit Board to contact a broad range of industry leaders and discuss with them this issue and solicit their ideas. It is for the Tree Fruit Board and ultimately the Board to determine what, if any, other applicants should be entitled to an export licence. The Board would expect any such licence to be issued on the same limited and experimental basis as the one to the Appellant.

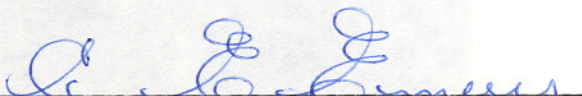
23. The Board feels it important that the Tree Fruit Board institute this change in a way which will prevent an antagonistic climate from developing within the industry.

24. The Board does not feel the granting of an export licence to R.H. MacDonald necessarily precludes the sale of fruit from R.H. MacDonald by B.C. Tree Fruits Limited, or conversely, by R.H. MacDonald for fruit from B.C. Tree Fruits Limited if it is mutually beneficial.


25. The Board is indebted to the parties their counsel and their witnesses for their contribution, cooperation and assistance in this matter.

26. Pursuant to s. 6(4) of the Natural Products Marketing (BC) Act Regulation, the Board considers it to be equitable to return to the Appellant \$75.00 of the \$100.00 deposit paid as a condition of bringing this appeal.

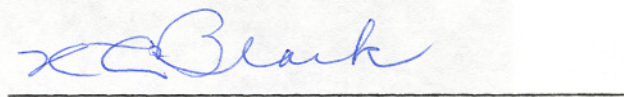
DATED the ^{15th} day of February, 1984, in the City of Victoria, British Columbia.



C.E. Emery, Chairman



E.M. Brun



H.L. Black