

83-01
5/25/83

BRITISH COLUMBIA MARKETING BOARD

BETWEEN:

INTERCONTINENTAL PACKERS LTD.

APPELLANT

AND:

BRITISH COLUMBIA HOG MARKETING COMMISSION,

RESPONDENT

REASONS FOR JUDGMENT

DATE OF HEARING: April 14, 1983

APPEARANCES: D. CAMP and B. COHEN, counsel for the Appellant
L. DUGNAN and E. GOLTKE, counsel for the Respondent

I. Preliminary Objections

1. The issue in this appeal is whether or not the British Columbia Hog Marketing Commission (the "Commission") was engaged in price fixing. At the outset of the appeal, however, counsel for the Commission raised two preliminary objections which must be dealt with before the merits of the appeal are considered. The first objection was that the Notice of Appeal was not filed within the 30 days required by the Natural Products Marketing (BC) Act. Section 11(1) of that Act reads as follows:

"Where a person is aggrieved or dissatisfied by an order, decision or determination of the 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."

2. The original Notice of Appeal was dated January 7, 1983. It reads, in part, as follows:

"This letter will serve as Intercontinental Packers Limited Notice of Appeal under section 11 of the Natural Products (B.C.) Act, the decision of the B.C. Hog Marketing Commission, ... to enact the following;

1. effective January 10, 1983, set an arbitrary pricing formula for hogs marketed in British Columbia. Their formula does not represent the market.
2. withhold from Intercontinental Packers Limited until Intercontinental Packers Limited agrees to pay their unrealistic pricing formula.

..."

3. The second Notice of Appeal dated January 26, 1983 reads, in part, as follows:

"TAKE NOTICE that Intercontinental Packers Ltd. hereby appeals the order, decision or determination of the British Columbia Hog Marketing Commission setting a price formula for British Columbia hogs. Particulars of the appeal are as follows:

1. the pricing formula is in excess of the jurisdiction of the Commission;
2. Alternatively, the pricing formula is arbitrary, unreasonable and contrary to the power of the Commission;

AND FURTHER TAKE NOTICE that Intercontinental Packers Ltd. appeals the order, decision or determination of the British Columbia Hog Marketing Commission in the marketing of hogs since January 10, 1983. Particulars of the appeal are as follows:

1. The marketing of hogs is arbitrary and discriminatory and contrary to the power of the Commission."

4. Counsel for the Commission took the view that the decision being appealed from was embodied in the letter of December 1, 1982 from the Commission to Intercontinental Packers Ltd. (See Appendix "A" to these reasons.) In that letter the Commission proposed a pricing formula which would be used in pricing hogs to all packers in British Columbia to take effect on January 10, 1983. On December 29, 1982 the Appellant sent a letter (see Appendix "B") to the Commission proposing to buy hogs at a price different from that set out in the letter of December 1, 1982. On January 3, 1983 the Commission replied to the Appellant stating that the Appellant's offer in its letter of December 29, 1982 was unacceptable. The Commission stated "our previous pricing formula still stands for your perusal". (See Appendix "C".)

5. The Appellant took the position that the decision or order as embodied in the letter of December 1, 1982 was not finalized until January 3, 1983 which was the time that the Commission refused to sell the Appellant any hogs other than in accordance with the pricing formula proposed in the letter of December 1, 1982.

6. We are of the view that the appeal was brought within time. The Appellant was entitled to treat the December 1 letter as something less than a final decision by the Commission, and it was only until the letter of January 3, 1983 where the Commission made it very clear that the pricing formula in the December 1 letter was to stand, was

there an order to be appealed from. It should be noted that the December 1, 1982 letter uses language suggesting that the pricing formula was either proposed or suggested and not necessarily the only pricing formula that the Marketing Commission would accept. In our view, therefore, this first preliminary objection fails.

7. The second objection taken by the Commission was that this Board could only look to the Notice of Appeal of January 7, 1983 rather than to the second Notice of Appeal of January 26, 1983. In our view this objection is also without merit. It is clear that the first Notice of Appeal was filed by Intercontinental Packers Ltd. itself and the second, or supplementary Notice of Appeal, was prepared by counsel on behalf of Intercontinental Packers Ltd. The second Notice of Appeal simply states in somewhat more detail the grounds of appeal and, in our view, there is nothing objectionable about this.

II. The Merits

8. We turn now to the merits of this appeal. As stated at the outset the issue in this case is whether or not the Commission was engaged in price fixing. It was conceded by counsel for the Commission that the Commission had no power to fix the prices, maximum or minimum, or both, at which hogs may be bought or sold in the Province. That power could have been delegated to it by the Lieutenant Governor

in Council pursuant to section 13 of the Natural Products Marketing (BC) Act, but it was not. The power that the Commission did have, however, can be traced to B.C. Reg. 438/82 and is in the following terms:

"During the period ending at midnight on October 31, 1984, without restricting the generality of subsection (1), the Commission is vested with

(a)

(b) the powers to regulate the time and place at which and to designate the agency through which a regulated product shall be transported or marketed; to determine the manner of distribution; and to determine the charges that may be made for its services by a designated agency."

9. By virtue of B.C. Reg. 551/82, the Commission designated itself as a sole agent "through which the regulated product shall be transported or marketed and shall have the power to determine the manner of distribution and the charges that may be made for its services by resolution." No challenge was made to the validity of this Regulation.

10. With some minor exceptions not significant, it was acknowledged that if a packer in the Province wanted to purchase British Columbia hogs it had to do so through the Commission. In determining to whom hogs would be directed, the Commission considered itself bound to obtain the highest price possible for the hogs on behalf of the producers.

11. It should also be noted that of all the hogs consumed in British Columbia, only 25% are made up of British Columbia hogs. Packers are therefore required (and entitled) to go to other Provinces to buy hogs and, with respect to these hogs, the Commission has no jurisdiction. The pricing formula proposed by the Commission is a reflection of the price of hogs in Edmonton, Winnipeg and Omaha plus an amount to reflect the transportation costs differential.

12. The Commission forwarded a letter to all of the packers in the Province similar to the one of December 1, 1982 to the Appellant proposing the said pricing formula. We heard evidence to the effect that all of the packers in the Province, with the exception of one, the Appellant, agreed to the pricing formula set out in this letter. When the Appellant proposed to buy hogs at a different price (the letter of December 29, 1982) their counter-offer was rejected by the Commission (the letter of January 3, 1983). The Appellant therefore took the view that since it could only buy British Columbia hogs through the Commission pursuant to the proposed pricing formula, the Commission was fixing prices contrary to the Act and Regulations.

13. We are of the view that the Commission was not engaged in price fixing. The Commission was simply proposing a formula which could have been accepted or rejected. If it had been rejected by a number of the packers, the Commission would have been forced to propose a pricing formula which was more suitable to the packers. Given that it was accepted by a number of the packers, then it was only natural, and indeed proper, that the Commission would not direct hogs to a packer who refused to pay that price.

14. It is also important to note that, if at the end of any week, the Commission had a surplus of hogs tendered to it by the producers which it could not sell to the packers at the price set out in the pricing formula, it would revert to a closed bidding system in an effort to sell the remaining hogs. Hence, a packer who was not prepared to buy the hogs at the price set out in the pricing formula, could, if it chose to take the risk, wait until the end of the week to buy the hogs pursuant to the closed bidding system in the hope that the price might be lower.

15. Since the Commission was the sole agent through which hogs would be marketed in the Province, the Commission may be perceived as having an advantage in influencing the price of the said hogs. However, in our view the Commission did not fix the price within the meaning of the Act and the

Regulations. Rather, the price was determined by a number of market forces, principle of which was the price that packers were prepared to pay for the hogs as well as the price of hogs marketed outside of the Province. Admittedly, the proposed pricing formula referred to in the letter of December 1, 1982 may have been perceived by a number of packers to be a non-negotiable price. We wish to make it very clear that the Commission does not have the right to impose a price on the packers in the Province. The packers, therefore, should be aware of their right to negotiate a price with the Commission if they are not prepared to accept the price proposed by the Commission for any particular marketing period.

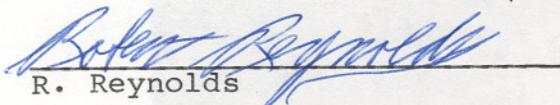
16. In conclusion therefore, we are of the view that the decision of the Commission in proposing a pricing formula set out in its letter of December 1, 1982 was within its jurisdiction. The Commission also acted within its jurisdiction in refusing to direct hogs to the Appellant when the Appellant was not prepared to pay the price calculated pursuant to the price formula when other packers were prepared to do so.

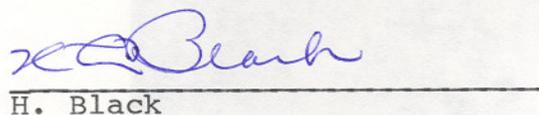
17. At the beginning of the appeal counsel for the Appellant indicated that they wished to proceed with the appeal in two steps. The first was to determine whether the Commission had the jurisdiction to propose a pricing formula and to refuse to direct hogs to the Appellant. If it was held by this Board that the Commission had jurisdiction to propose the said pricing formula and to refuse to direct hogs to the Appellant, then it was the Appellant's intention

to challenge the pricing formula as being arbitrary and unreasonable and otherwise contrary to powers of the Commission. Without expressing any comment on the merits of this latter ground of appeal, the Appellant is entitled to come back before us to present evidence and make submissions with respect to this ground of appeal.

Dated May 25th, 1983.


C. Emery, Chairman


R. Reynolds


H. Black


M. Brun