

Suit Number 88-01-04722

IN THE COURT OF QUEEN'S BENCH

BETWEEN:

HER MAJESTY THE QUEEN,

Informant,

- and -

SHELL CANADA PRODUCTS LIMITED,

Accused.

Decision given orally by His Lordship Justice D. Kennedy, in Courtroom 120, at the Law Courts Building, in the City of Winnipeg, in the Province of Manitoba, on Monday, the 27th day of February, A. D. 1989.

APPEARANCES:

Mr. D. Frayer	On behalf of the Informant
Mr. P. Forsyth	On behalf of the Accused

MONIQUE L. SHORE
Official Court Reporter
(Computer-Assisted Transcription)

1 Monday, February 27th, 1989 at 9:34 a.m.

2
3 THE COURT: Mr. Forsyth, you're obviously here
4 representing ...

5 MR. FORSYTH: Yes. Mr. Morphy and Mr. Thomson are
unavoidably involved in a trial in Toronto and asked me to
stand in this morning.

8 THE COURT: All right.

9 This is the matter involving the Queen v Shell
10 Canada Products Limited, and that company is charged that
11 between the 1st of July 1986 and the 31st of July 1986 it did
12 unlawfully, by acts occurring in the City of Winnipeg, in the
13 Province of Manitoba directly or indirectly by agreement,
14 threat, promise or like means attempt to influence upward or
15 discourage the reduction of, the price at which Regatta
16 Investments Limited, being a person engaged in business in
17 Canada, supplied or offered to supply or advertise a product,
18 to wit: gasoline, contrary to Section 38(1)(a) of the Act
19 and did thereby commit an offence for which penalty is
20 provided under Section 38(8) of the Act.

21 There can be no doubt that price fixing is the
22 commonly understood prohibition under the section I have just
23 read, and especially as it relates to the sale of gasoline.
24 It touches virtually all citizens given our dependency upon
25 petroleum products. The Competition Act, which prohibits

1 interfering with market forces affecting prices, is therefore
2 of utmost importance and seriousness.

3 Large corporations, other than by the promotion of
4 its own product, are not allowed to influence the upward
5 pricing of its product or to discourage the downward pricing
6 of its goods by agreement, threat, promise or like means.

7 Care must be taken, however, to ensure that open,
8 fair and legitimate corporate measures in the promotion of
9 its products are not construed as means of unfairly
10 manipulating or influencing or suppressing, for that matter,
11 the normal market forces affecting the prices of goods. It
12 is within this context that the facts of this case must be
13 viewed.

14 The prohibition set under the Competition Act is
15 limited to interference with prices in defined circumstances
16 and the two areas in contention in this case are: Did Shell
17 directly or indirectly attempt to influence upward or
18 discourage the downward reduction of gasoline prices charged
19 by Regatta Investments Limited -- I'll refer afterwards to
20 Regatta as the Jet Car Wash -- and if they did so, did it do
21 so by means of a threat.

22 There are other averments contained in the
23 information, but they are not in question or are they
24 challenged.

25 The facts of this case are therefore as follows:

1 Jet Car Wash was acquired by Regatta Investments Limited in
 2 January of 1985. The owner of Regatta Investments Limited was
 3 a man by the name of Mr. Les Brent who was an accountant and
 4 an owner of other varied business enterprises, although Mr.
 5 Brent had had no previous experience in the car wash or gas
 6 bar business.

7 Mr. Brent testified, and his evidence was not
 8 refuted, that he had a very favourable lease back arrangement
 9 with Shell, yielding approximately \$3,000 per month. The
 10 head lease with Shell Canada however contained the following
 11 clause referred to at Paragraph 7 governing termination. 7

12 (1) (a) of that head lease says:

13 "Shell may terminate this lease at
 14 any time upon 30 days' notice."

15 Or under subsection (b):

16 "Shell may terminate this lease at any
 17 time upon 10 days' notice if
 18 (i) the use of the premises for the
 19 retail sale of any automotive fuel is
 20 prevented or substantially impaired or
 21 (ii) any default of Lessor is not
 22 cured within a reasonable period after
 23 notice."

24 That particular head lease is found as Exhibit 5 in these
 25 proceedings.

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The time Regatta Investments Limited purchased Jet Car Wash, it obtained its gasoline products on consignment from Shell and, accordingly, priced its gasoline at the pumps in accordance with Shell Canada's direction.

Shell had different types of categories of dealerships. There were four in all, but they basically break down into dealers who were on a salary or commission basis; that is, where the station was effectively managed by Shell Canada Products Limited, and the second category were those of independent dealers who leased their premises to Shell and received its gasoline on a consignment basis. Jet Car Wash fell into the latter category and initially charged prices which were set by Shell.

In April of 1986, Shell Canada changed its pricing system from a consignment relationship to a rack pricing system. The effect of this change to a rack pricing system was to charge the lease operators, such as the Jet Car Wash, for the product upon delivery. While Shell Canada would provide certain financing, the result to Mr. Brent was that his business was required to pay approximately \$30,000 to fill his gasoline storage tanks; but, on the other hand, as a result of the rack pricing system, he was free to set his own prices.

The new pricing system was explained to the various Shell dealers at a meeting on April the 7th, 1986 at

1 the Westin Hotel. Representing the Jet Car Wash at this
 2 meeting were its assistant manager, Mr. Mark Poot, and
 3 Regatta Investments Limited's accountant and a friend of Mr.
 4 Brent, a man by the name of Mr. Ron Martens.

5 Both men testified that at the meeting there was
 6 some confusion in what Shell was telling its dealers, and
 7 despite being asked, the Shell representatives, according to
 8 Poot and Martens, were not clear on what effect a price war
 9 might have upon Jet Car Wash.

10 Messieurs Ron Benson and Mr. Bruce Lettner, both
 11 representatives of Shell Canada, testified that the position
 12 of Shell was made quite clear at the meeting, and that in the
 13 event of a price war Shell would support a profit margin to
 14 the dealers, although it would be on a reduced basis. Mr.
 15 Benson testified that the question was asked by a Mr. Tom
 16 Hutchinson, who was a major dealer, and in response he gave a
 17 full explanation of Shell's position; namely, in the event of
 18 a price war, the cost would be adjusted and the Shell dealers
 19 would not lose. In other words, there would remain a profit
 20 margin in favour of the dealers that would be supported by
 21 Shell.

22 Messieurs Poot and Martens reported on that
 23 meeting that same evening to Mr. Brent, and on a subsequent
 24 occasion, Mr. Lettner met with the other assistant manager of
 25 the Jet Car Wash, Doreen Zachar, and advised her as to the

1 effect of the new rack pricing system.

2 There is no doubt in my mind that the management
3 of Jet Car Wash following the meeting of April the 7th and,
4 certainly Doreen Zachar following her meeting with Mr.
5 Lettner, that they knew that the independent dealers such as
6 the Jet Car Wash had the autonomy to set their own prices
7 either up or down.

8 Consistent with this understanding, the management
9 of Jet Car Wash, along with Mr. Brent and Mr. Martens, met in
10 the latter part of June to consider means of increasing its
11 revenue in the event of prolonged inclement weather. Jet Car
12 Wash was a full service car wash located some distance off of
13 Portage Avenue and therefore did not conveniently attract
14 traffic to its gas pumps, except when, for the most part, its
15 customers desired a car wash.

16 To entice business on rainy days when the car wash
17 was not being used, the management and owner decided to lower
18 the price until the weather changed.

19 Shell, on the other hand, had also erected a two
20 pole sign on Portage Avenue with a display insert showing the
21 price of gas which provided ample notice to Portage Avenue
22 motorists of the gas prices being charged.

23 The decision to experiment with prices was made
24 jointly between Mr. Brent, who is a certified general
25 accountant, and the company's accountant, Mr. Ron Martens,

1 both of whom were experienced businessmen, albeit not for any
length of time in the gas bar/car wash operation.

2 The central issue in this case arose when the
3 assistant manager Doreen Zachar, who had met and discussed
4 on previous occasions the company's operation with Mr.
5 Lettner, decided, as she was authorized to do following the
6 June meeting, to reduce the price of gas by two cents,
7 because the weather had been rainy and the car wash was not
attracting its usual business.

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10 Approximately an hour after she had reduced the
11 price, she received a call from a Shell representative who
12 asked what the gas prices were. Doreen Zachar wondered
13 whether there was something wrong and a Shell representativ
14 replied something to the effect that he was not sure. He
15 responded that he did not really know but that Mr. Bruce
16 Lettner was away on holidays. Miss Zachar testified that
17 given that state of uncertainty she panicked because she
18 thought she had done something wrong.

19 It's important to assess this conversation in
20 light of the change to rack pricing and the rights of an
21 independent operator to raise or lower his prices according
22 to his best business judgment.

23 Miss Zachar reported the telephone call to Mr.
24 Brent but the price was not changed at that time. Miss
25 Zachar testified further that she received a telephone call

1 from Mr. Lettner about 2:30 in the afternoon. She commented,
 2 and I quote her to the effect, Wow, was he mad. She also
 3 testified that his voice was abrupt and he used short words
 and his manner of speech was completely different from former
 experience she had with him when he was always polite and
 congenial.

Miss Zachar referred to notes which she had made
 8 at the time of the conversation. She had advised Mr. Lettner
 9 that the prices were reduced as an experiment. She testified
 10 that she was told by Mr. Lettner that the lower price was
 11 detrimental, that Shell was concerned that we could start a
 12 price war and he told her to put up the prices by 5 p.m.
 13 Miss Zachar testified that she did put up the price from 43.4
 14 cents to 45.4 cents, matching the service station across the
 15 street, which was also a full service station. Miss Zachar
 16 testified further that because of the way Mr. Lettner spoke
 17 on the telephone, she was kind of intimidated.

18 On the following Monday, July the 14th, she raised
 19 the price by a further four tenths of a cent to its regular
 20 price of 45.8 cents. Miss Zachar said that she received a
 21 telephone call from Mr. Lettner again that morning at 8:04,
 22 and I'm impressed by the detail that she has of that call.
 23 She says that she was told that the prices should go up or
 24 Shell would be ticked off.

25 Mr. Lettner phoned back later that same morning

1 and asked once again if Jet Car Wash prices had gone back up
 2 and she told him they had. Miss Zachar again described Mr.
 3 Lettner's tone of voice as being rude.

There are, however, discrepancies in Miss Zachar's
 testimony. She stated that she did not telephone Mr. Brent
 6 following the call in the afternoon, where Mr. Brent said and
 7 testified that she had. Miss Zachar also testified that the
 8 event occurred on Thursday, July the 10th, whereas I'm
 9 persuaded from the evidence of Mr. Benson and Mr. Lettner
 10 that it most likely occurred on Friday, July the 11th.

11 Miss Zachar testified that the price was put up at
 12 the end of the day because the experiment had not worked and
 13 she had not told Mr. Lettner on Monday morning that she had
 14 already put the price up when he called.

15 These discrepancies, in my view, do not detract
 16 from the overall nature of the event. Mr. Lettner had no
 17 recollection of the telephone calls that he placed to Miss
 18 Zachar on Monday, but he did not deny that he may have made
 19 them. His response was to say that the words that she
 20 claimed he used he does not ordinarily use. I am, however,
 21 persuaded, as I have indicated, that her recollection of the
 22 event and those phone calls is the more reliable.

23 Of equal significance is the fact that in a
 24 telephone call with Mr. Lettner on July the 15th, Mr. Brent's
 25 recorded notes in point form relating to that conversation, a

1 conversation which Mr. Lettner confirmed and admits, in
 2 general terms, related to the same subject matter which Mr.
 3 Brent had made note of. Mr. Brent testified that Mr. Lettner
 4 advised him that Ron Benson had called to get the price of
 5 gas back up.

6 The evidence does not support the fact that Mr.
 7 Benson called Mr. Lettner, but clearly Mr. Benson had
 8 telephoned his office, on the morning that he noticed the
 9 prices were reduced, to make inquiries, and while it is
 10 speculation, it is quite possible that Mr. Benson's call to
 11 the office was in some way communicated to Mr. Lettner. The
 12 call, in any event, clearly related to the price at which Jet
 13 Car Wash was selling its gas.

14 Mr. Brent also said that according to Mr. Lettner
 15 his business was acting irresponsibly and it would affect
 16 some 30 other independent dealers. Mr. Lettner confirmed
 17 that there was discussion to the effect that other
 18 independent dealers would be affected by a price war, and the
 19 remainder of the conversation related to the fact that the
 20 independents could set their own prices.

21 Lettner mentioned Jet Car Wash could increase the
 22 price of gas since gas sales were secondary to the car wash.
 23 It was reported that Mr. Benson wanted Jet Car Wash's price
 24 at full service, and discussion was held with respect to the
 25 experiment, it being Mr. Lettner's comment that the

1 consequences of the experiment to the street prices were
2 great in the sense of serious.

3 These comments, even if said in friendly tones to
4 someone dependent upon Shell for the continuation of a
5 lucrative lease, were strong comments. Mr. Benson testified
6 he was afraid of offending Shell and therefore jeopardizing
7 his valuable lease relationship.

8 In assessing all of the evidence, I cannot be led
9 to any other conclusion but that the Shell representatives in
10 their conversations with both Miss Sachar and Mr. Brent,
11 within the time frames that are alleged, were attempting to
12 influence upward and then, in accordance with the
13 conversation of July 15th, discourage the reduction of the
14 Jet Car Wash prices.

15 Influencing the price only becomes an offence
16 however if it is done by one of the means set forth in the
17 section in the facts of this case, that is, by means of a
18 threat.

19 In ordinary language, the word threat is easily
20 understood. It is an urged course of action which carries
21 with it some sanction or penalty if not carried out. It is a
22 form of intimidation, fulmination, harassment or warning
23 which carries with it some form of penalty. This general
24 notion is not inconsistent with the definitions referred to
25 by defence counsel.

Counsel on behalf of the Accused argues that the conduct of Mr. Lettner amounted to nothing more than business counselling, and if that were all it was, the Crown had not proven its case.

Mr. Lettner made the telephone calls to Doreen Zachar while he was on holidays, and while many persons perform duties responsibly, even during their holiday period, the fact that Mr. Lettner pursued this matter while he was on holidays as opposed to letting his replacement attend to it does suggest to me an urgency, which I have no doubt was reflected in his manner of speaking to Miss Zachar.

Having taken notes of the conversation, I have no reason to doubt Doreen Zachar's evidence, and for the same reason, the reliability of Mr. Brent's evidence based upon the notes of which he made of his conversation as also the more reliable evidence. It would not be illogical to conclude that an assistant manager speaking to someone in authority from Shell Canada Products Limited, the supplier of all of the products sold by the Jet Car Wash, might fear alienating that company and somehow prejudice a relationship if she had done something wrong.

In the legal sense then, Doreen Zachar was threatened by Mr. Lettner.

One might ask why would it be necessary for Shell to respond immediately to a reduction in price when its lease

1 operators had previously been told that they were free to set
 2 prices up or down. Why would Mr. Lettner not telephone Mr.
 3 Brent immediately instead of Shell representatives placing
 three or four telephone calls in a short space of time to the
 assistant manager.

6 In speaking to Mr. Brent and using such
 7 terminology as acting irresponsibly and telling him to get
 8 the price back up in the face of Mr. Brent having a
 9 favourable but easily terminable lease cannot be construed as
 anything other than a threat within the meaning of the
 11 Competition Act.

12 The Crown has equally satisfied me based upon the
 13 documents referred to that it was clearly in Shell's
 14 corporate interest to avoid any price war.

15 Both Lettner and Benson were aware of the
 16 references in Exhibit 10 which explains the implications of
 17 rack pricing system to the dealer and provides ample
 18 corporate motive to ensure independent dealers do not
 19 instigate price wars. These references say at page 163 of
 20 Exhibit 10, and I quote them:

1 "Similarly in order to administer the
 2 current price support system in
 3 automotive, we have found it necessary
 to rely upon dealers' assessment of
 competitive pricing. At the same time,

dealers have relatively fixed unit margins and stand to gain by dropping pump prices. This obvious conflict of interests has undoubtedly resulted from time to time in dealer initiated price wars in which the only casualty is the supplier - Shell."

9 If on the strength of information contained at
10 page 164 of the same exhibit, which outlines in its heading
11 "A New Pricing System - Why Change" and makes reference to a
12 return of the dealers to an independent businessman role, and
13 again to respect the faith and dealer judgment in making
14 sound pricing systems, if that were so, why was it necessary
15 to interfere at all with the business judgment of Jet Car
16 Wash and, in particular, the business judgment of Mr. Brent
17 and Mr. Martens in respect of the experiment that was
18 performed.

19 If the foregoing statements are correct, why the
20 need to counsel independent businessmen and reject any respect
21 and faith in dealer judgment in making sound pricing
22 decisions. To bring to management attention the implication
23 of lowering prices may be informative in some circumstances,
24 but in the context of this case, based upon these factual
25 circumstances, Shell Canada Products Limited went about it in
violation of the section and are guilty of contravening the

1 section.

2 There will be a conviction as a result.

3 Mr. Forsyth?

4 MR. FORSYTH: My Lord, Mr. Morphy telexed me on
5 Friday and asked that this matter be set over to a date
6 hopefully to be agreed upon with my learned friend for
7 sentencing, and he has indicated that he would be available
8 to come to Winnipeg during the week of March 13th or between
9 April 4th and and 6th, 1989.

10 THE COURT: March 13th or when, did you say?

11 MR. FORSYTH: April 4th -- between April 4th and
12 6th; 4th, 5th and 6th.

13 THE COURT: Well, I think March the 13th may be
14 all right, if that's suitable. Did you say it was?

15 MR. FORSYTH: I assume that's a Monday, My Lord.

16 THE COURT: Yes, it is. I would like to set it
17 for that date, and again, we might set it at 9:30.

18 I don't have my -- could you check with Mrs.
19 Fleming and find out whether or not I'm available on March
20 the 13th?

21 MR. FORSYTH: My Lord, my learned friend has just
22 indicated he doesn't have his diary available this morning,
23 but if there is a problem with that date, perhaps Mr. Prayer
24 and Mr. Morphy could review it.

25 THE COURT: Yes, I'm just wanting to make sure

1 that I'm not out of town or something that week as well. It
2 may be that we could work out another day.

THE CLERK: You're available that morning, My
Lord.

5 THE COURT: We'll set it then. If there is a
6 problem, you could contact myself, Mr. Prayer, and then you
7 could contact Mr. Morphy. If that is convenient to all, we
will just leave it at March 13th.

MR. PRAYER: Very well, My Lord. I don't think
10 there will be a problem.

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12 (WHEREUPON COURT ADJOURNED AT 9:58 A.M.)

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I, MONIQUE L. SHORE, being a duly sworn court reporter, in and for the Province of Manitoba, do hereby swear that the foregoing pages of printed matter, numbered 1 to 17, are a true and accurate transcript of the proceedings at the time and place set out herein as taken by me in stenotype and produced under my direction by means of computer-assisted transcription.

Monique L. Shore

MONIQUE L. SHORE
Official Court Reporter