

Ottawa, Thursday, December 7, 1995

Appeal No. AP-94-173

IN THE MATTER OF an appeal heard on May 8, 1995, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated July 4, 1994, with respect to a request for re-determination under section 59 of the *Special Import Measures Act*.

**BETWEEN**

**MIDLON FOODS INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**AND**

**CANADIAN MEAT COUNCIL**

**Intervener**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Lyle M. Russell

Lyle M. Russell  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-173**

**MIDLON FOODS INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**and**

**CANADIAN MEAT COUNCIL**

**Intervener**

*This is an appeal under section 61 of the Special Import Measures Act from two decisions of the Deputy Minister of National Revenue confirming an assessment of countervailing duties on Mermaid chopped ham imported into Canada. It was determined that the goods in issue were of the same description as pork-based luncheon meat and were assessed countervailing duties based on the rate applicable to those goods. The Canadian Meat Council, as an intervener, took the position that the goods in issue were of the same description as canned ham under 1.5 kg per can and subject to the countervailing duties applicable to those goods. The issue in this appeal, therefore, is whether the goods in issue are of the same description as either pork-based luncheon meat or canned ham, both of which are subject to a Tribunal finding under the Special Import Measures Act.*

**HELD:** *The appeal is allowed. The Tribunal believes that the goods in issue are not of the same description as the goods to which a Tribunal finding applies. While pork-based luncheon meat can be made from a variety of pork trimmings, chopped ham is made only from the large muscles of the hind leg of a pig, which is the highest-quality meat available from the animal. Chopped ham is composed of larger pieces of meat than luncheon meat and contains no additives, in stark contrast to other Canadian-made luncheon meats. Chopped ham is more expensive than luncheon meat and is packaged in a can of a different shape from that of the less expensive product. The Tribunal believes that chopped ham is perceived in the market as a higher-quality product than canned pork-based luncheon meat and occupies a niche in the market separate from that of luncheon meat.*

*The Tribunal believes that chopped ham is not of the same description as canned ham because canned ham is a different quality product composed of larger pieces of ham and contains less comminuted material than chopped ham. Canned ham is perceived in the market as a premium product that comes at a commensurate price. Furthermore, the Tribunal believes that chopped ham occupies a niche in the market separate from that of canned ham.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: May 8, 1995*  
*Date of Decision: December 7, 1995*

*Tribunal Members:*                    *Arthur B. Trudeau, Presiding Member*  
   *Raynald Guay, Member*  
   *Lyle M. Russell, Member*

*Counsel for the Tribunal:*            *David M. Attwater*

*Clerk of the Tribunal:*                *Anne Jamieson*

*Appearances:*                         *Richard S. Gottlieb, for the appellant*  
   *Anick Pelletier, for the respondent*  
   *G.P. (Patt) MacPherson, for the intervener*

**Appeal No. AP-94-173**

**MIDLON FOODS INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**and**

**CANADIAN MEAT COUNCIL**

**Intervener**

TRIBUNAL:           ARTHUR B. TRUDEAU, Presiding Member  
                            RAYNALD GUAY, Member  
                            LYLE M. RUSSELL, Member

**REASONS FOR DECISION**

On August 7, 1984, the Anti-dumping Tribunal made findings of material injury in respect of subsidized canned ham under 1.5 kg per can, originating in or exported from Denmark and the Netherlands, and canned pork-based luncheon meat containing more than 20 percent by weight of pork, in respect of which a subsidy had been paid directly or indirectly by the European Economic Community.<sup>1</sup> The findings were continued by the Tribunal on March 16, 1990, and again on March 21, 1995.

Pursuant to section 3 of the *Special Import Measures Act*<sup>2</sup> (SIMA), a countervailing duty shall be paid on all subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding that the subsidizing of goods of the same description has caused injury. This is an appeal under section 61 of SIMA from two decisions of the Deputy Minister of National Revenue confirming an assessment of countervailing duties on Mermaid chopped ham imported into Canada under customs invoices dated December 1 and December 29, 1992. It was determined that the goods in issue were of the same description as pork-based luncheon meat and assessed countervailing duties based on the rate applicable to those goods. It is this decision that Midlon Foods Inc. appealed to the Tribunal.

Subsequent to the initiation of the appeal, counsel for the Canadian Meat Council (CMC) requested, pursuant to subsection 61(2) of SIMA, to be heard on the appeal. The CMC took the position that the goods in issue are not of the same description as pork-based luncheon meat. Rather, the goods in issue are of the same description as canned ham under 1.5 kg per can and subject to the countervailing duties applicable to those goods. In response, the appellant filed a notice of motion seeking an order of the Tribunal rejecting the intervention of the CMC. Before considering the motion, the Tribunal solicited submissions from the respondent and the CMC.

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1. The *Special Import Measures Act* (SIMA), *infra*, note 2, was amended by section 115 of the *Customs Tariff* on January 1, 1988, to provide that Governor-in-Council orders, made pursuant to subsection 7(1) of the *Customs Tariff*, be deemed to have been made by the Tribunal under section 43 of SIMA.

2. R.S.C. 1985, c. S-15.

In granting the CMC the right to intervene, the Tribunal stated that the CMC, as an association representing Canadian producers of like goods to those to which an order or finding of the Tribunal applies, may be heard as an intervener on an appeal under section 61 of SIMA. The Tribunal acknowledged that the CMC has a substantial interest in the dispute and that its position would not otherwise be adequately represented without its participation in the proceedings. In addition, the CMC's participation could serve to avoid a multiplicity of proceedings involving the same goods. The Tribunal believed that the CMC's participation would not unduly complicate or delay the proceedings as to be unfair to the original parties.

The issue in this appeal, therefore, is whether the goods in issue are of the same description as either pork-based luncheon meat or canned ham, both of which are subject to a Tribunal finding under SIMA.<sup>3</sup>

Counsel for the appellant called Mr. Wendell Ward, the respondent's expert witness, as the appellant's first witness. Mr. Ward stated that he analyzed some samples of the chopped ham and concluded that it had characteristics similar to those of the luncheon meat that is subject to the Tribunal's finding. For instance, a Health and Welfare guideline requires luncheon meat to have a protein content of 11 percent. Mr. Ward said that his analysis revealed that the samples of chopped ham had a protein content of 10.9 percent. Furthermore, the chopped ham did not meet the description of canned ham provided by the Anti-dumping Tribunal and adopted by this Tribunal. Specifically, the Tribunal described cooked ham as being composed of fairly large chunks of meat, which is not the case with chopped ham.

Counsel for the appellant asked Mr. Ward to identify the various additives that are contained in typical canned luncheon meats. He identified such things as flour, modified starch, modified milk ingredients, soy protein, salt, sugar and monosodium glutamate. Mr. Ward stated, however, that the goods in issue contain no additives.

During cross-examination by counsel for the CMC, Mr. Ward told the Tribunal that he did not determine the pork content of the goods in issue. He assumed, however, that there was more than 20 percent by weight of pork in the samples. He explained to the Tribunal that the only definition of chopped ham is contained in legislation<sup>4</sup> administered by the Department of Agriculture (Agriculture Canada) and that the goods in issue do not meet this definition. To meet this definition, a product must have a protein content of 15 or 16 percent. On further questioning, Mr. Ward explained that he did two tests on the goods in issue. In the first test, he sampled two cans, which had an average total protein content of 10.9 percent. In the second test, he sampled one can, which had a total protein content of 11.9 percent.

Counsel for the CMC introduced Exhibit C-1 through Mr. Ward, which is a meat hygiene directive of Agriculture Canada.<sup>5</sup> Mr. Ward acknowledged that, under the directive, for a product to be labelled "boneless ham," it must contain a minimum of 80 percent by weight of ham in pieces weighing 25 g or more. However, if the product contains less than 80 percent by weight of ham in pieces weighing 25 g or

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3. In its brief, the appellant raised two other issues that were abandoned during the hearing.

4. Mr. Ward did not specify the legislation to which he was referring. However, he was probably referring to the *Meat Inspection Regulations, 1990*, SOR/90-288, May 14, 1990, Canada Gazette Part II, Vol. 124, No. 12 at 2090.

5. Meat Hygiene Directive: 1991-36, "Complete Rewrite of Chapter 7" of the Manual of Procedures, which updates the labelling requirements for meat products, Agriculture Canada, Food Production and Inspection Branch, December 13, 1991.

more, it must be labelled “chopped ham” or “minced ham.” Mr. Ward said that, based on a visual examination, the samples contained no pieces of ham weighing 25 g or more. He acknowledged that, except for the low protein content of the samples, they could be labelled chopped ham.

During cross-examination by counsel for the respondent, Mr. Ward described the goods in issue as consisting of small pieces of meat tied together with an emulsion of finely ground material. He told the Tribunal that the general physical appearance of the samples was similar to other products known as luncheon meat. However, the pieces of meat in the samples were slightly larger than those found in other luncheon meats. Mr. Ward said that the luncheon meat known as “Spam” contains no additives, like the goods in issue.

The appellant’s second witness was Ms. Carol A. Hunt, Vice-President of Midlon Foods Inc. She said that, at the time of importation, the goods in issue cost \$2.99 per can.<sup>6</sup> This compared to a regular price of \$1.49 per can<sup>7</sup> for luncheon meat and \$4.99 per can for canned ham. Exhibit A-4 was introduced through Ms. Hunt which compared and contrasted the three products based on what she claimed were Agriculture Canada regulations.<sup>8</sup>

Ms. Hunt explained that the main difference between luncheon meat and chopped ham is the ingredients allowed in the former product and not in the latter product. For instance, chopped ham may only contain ham,<sup>9</sup> whereas luncheon meat is composed of pork. In addition, luncheon meat may contain such things as fillers, milk, eggs, meat by-products and mechanically separated meat, which chopped ham may not contain. Furthermore, luncheon meat is sold in rectangular cans, while chopped ham is sold in oval cans. She acknowledged that the products are sold in cans of a different size, which would influence the price. Explaining the main difference between chopped ham and canned ham, Ms. Hunt noted that the pieces of meat in the former are smaller and that the product contains more comminuted material. She added that the two products do not compete with each other.

During cross-examination by counsel for the CMC, Ms. Hunt acknowledged that canned ham is also made from the hind leg of a pig. During cross-examination by counsel for the respondent, Ms. Hunt acknowledged that chopped ham could be called luncheon meat. She added, however, that a seller of chopped ham would not want to call it luncheon meat because the latter is considered a lower-quality product.

The appellant’s third witness was Dr. David Brookman, who has been in charge of a food-testing laboratory since 1980. Dr. Brookman explained that, based on a comparison of can form, ingredient list and a visual examination of the goods in issue and five common canned luncheon meats, he concluded that the goods in issue more closely conformed to what is considered chopped ham than what is considered luncheon meat. During cross-examination by counsel for the respondent, Dr. Brookman stated that he determined that the total protein content of the goods in issue averaged 11.23 percent.

In argument, counsel for the appellant reminded the Tribunal that the issue in the appeal is whether the goods in issue are goods of the same description as those to which the findings of the Anti-dumping Tribunal apply. Counsel noted that the evidence of Mr. Ward was merely to the effect that the goods in issue

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6. At 454 g per can.

7. At 340 g per can.

8. Ms. Hunt did not specify the legislation to which she was referring.

9. Ham is made from the hind leg of a pig, whereas pork may be made from any part of the pig.

have characteristics similar to those of luncheon meat. Furthermore, the respondent's decision states that "the 'Mermaid' brand of chopped ham more closely resembles canned luncheon meat than canned ham." Counsel argued that the proper test is not whether chopped ham has characteristics of luncheon meat or more closely resembles luncheon meat. Rather, the proper test is whether chopped ham is of the same description as luncheon meat. He submitted that chopped ham is not of the same description as luncheon meat.

Counsel for the appellant submitted that Mr. Ward's analysis revealed that the goods in issue are clearly distinct from luncheon meat. For instance, chopped ham contains no additives, contrary to a typical luncheon meat. Mr. Ward also acknowledged that, except for the low protein content, the goods in issue could be labelled as chopped ham. The low protein content, counsel argued, is irrelevant in the marketplace. Whether the product meets the labelling requirements for chopped ham should also be irrelevant in the Tribunal's deliberations. Furthermore, a "pork-based" luncheon meat can contain meats other than pork. In contrast, canned ham can only contain ham.

Counsel for the appellant also referred to the testimony of both Ms. Hunt and Dr. Brookman to the effect that chopped ham is not luncheon meat. It is a different product responding to a different price point, of a different quality, occupying a separate market niche and marketed differently. Furthermore, the *Meat Inspection Regulations, 1990*<sup>10</sup> distinguish between chopped ham and luncheon meat. Counsel for the appellant noted that counsel for the CMC has concurred that the goods in issue are not luncheon meat.

In distinguishing chopped ham from canned ham, counsel for the appellant referred to the testimony of Mr. Ward on the composition of the goods in issue. Furthermore, the testimony of Ms. Hunt was to the effect that canned ham occupies a niche in the market separate from that of lower-priced chopped ham.

In addressing some of the issues raised by counsel for the appellant, counsel for the CMC noted that luncheon meat may be made from ham. Furthermore, he submitted that there is no evidence to the effect that chopped ham is marketed differently than luncheon meat.

Counsel for the CMC submitted that there is no product sold in the Canadian market labelled "canned ham."<sup>11</sup> Rather, canned ham is a general term that encompasses both cooked ham and chopped ham. What distinguishes these two products is merely the size of the pieces of ham of which they are composed. The product does not cease to be canned ham simply because the pieces of meat are finely chopped. Though the goods in issue were found not to meet the minimum protein requirement for canned ham, it could be attributed to the small sample sizes used by both Mr. Ward and Dr. Brookman. However, the product is labelled chopped ham.

Counsel for the CMC referred to Exhibit A-4 to illustrate the similarities in composition between canned ham and chopped ham. In addition, the two products are sold in cans of similar shape and size and are sold on a retailer's shelf in close proximity. Counsel added that the lower price of chopped ham is due, in part, to the subsidy payable in respect of that product. In conclusion, counsel submitted that chopped ham falls within the ambit of the goods subject to countervailing duties, however, at the rate applicable to canned ham rather than luncheon meat.

Counsel for the respondent submitted that the issue is not whether the goods in issue are luncheon meat. Rather, the issue is whether they are of the same description as goods to which the Tribunal's finding

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10. *Supra*, note 4.

11. Ms. Hunt testified to this effect.

applies. Counsel referred to the testimony of Mr. Ward to the effect that the goods in issue are of the same description as luncheon meat. For instance, they have the same general appearance and ingredient list as goods sold as luncheon meat.

Counsel for the respondent noted that the Anti-dumping Tribunal indicated that luncheon meat is defined with precision in the Canadian *Food and Drug Regulations*.<sup>12</sup> Referring to the definition of luncheon meat, counsel submitted that it contains three parts: (a) it shall be composed of comminuted and cooked, fresh or preserved meat; (b) it may contain certain ingredients, which include fillers; and (c) it shall have a total protein content of not less than 11 percent. Counsel argued that the goods in issue are composed of comminuted and cooked meat and that they have a total protein content of 11 percent. Though the goods in issue do not contain the added ingredients, such inclusion is discretionary, and their absence will not disqualify them as luncheon meat. It was noted that “Spam,” which is marketed as luncheon meat, does not contain these ingredients either.

Counsel for the respondent added that Ms. Hunt acknowledged that chopped ham could be called luncheon meat; that chopped ham would be located beside luncheon meat in the market; that both products are considered sandwich fillers; that the shape of the can in which the goods are sold is not an essential condition of the goods nor determinative of the nature of the goods; and that at no time did the total meat protein content meet the minimum requirement for chopped ham.

With regard to the arguments made by counsel for the CMC, the Tribunal does not accept that the term “canned ham,” as used by the Anti-dumping Tribunal in its findings of 1984 and by this Tribunal in its reviews of those findings, necessarily encompasses both cooked ham and chopped ham. From a reading of the Anti-dumping Tribunal’s Statement of Reasons in the 1984 decision, it is clear that the term “canned ham” was used to describe the product that Ms. Hunt said was marketed as cooked ham.

In fact, the Tribunal believes that the goods in issue are not of the same description as canned ham. The testimony of Ms. Hunt was to the effect that canned ham is a higher-quality product composed of larger pieces of ham and containing less comminuted material than chopped ham. Canned ham is perceived in the market as a premium product that comes at a commensurate price. The Tribunal believes that chopped ham occupies a niche in the market separate from that of canned ham.

The Tribunal notes that Agriculture Canada’s labelling requirements have distinguished between chopped ham and canned ham (referred to as boneless ham).<sup>13</sup> Furthermore, the *Meat Inspection Regulations, 1990* have distinguished between chopped ham and luncheon meat.<sup>14</sup>

While chopped ham is a product of lower quality than canned ham, the Tribunal believes that it is of a higher quality than luncheon meat. As its description implies, pork-based luncheon meat can be made from any part of a pig. In contrast, chopped ham is made only from the large muscles of the hind leg of a pig, which is the highest quality meat available from the animal.

The appellant’s expert witness, Dr. Brookman, distinguished between chopped ham and pork-based luncheon meat, in part, on a visual inspection and comparison of the goods in issue and five common luncheon meats. That there is a physical difference between the two products is also borne out of the

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12. C.R.C. 1970, c. 870.

13. *Supra*, note 5.

14. *Supra*, note 4.



testimony of Mr. Ward, who said that the pieces of meat in the chopped ham are larger than those contained in luncheon meat. Furthermore, the goods in issue contain no additives, in stark contrast to other Canadian-made luncheon meats.

Ms. Hunt testified that chopped ham is more expensive than luncheon meat. In addition, the can shape of chopped ham is different from that of luncheon meat, while similar to that of the premium product, canned ham. The Tribunal believes that chopped ham is perceived in the market as a higher-quality product than canned pork-based luncheon meat and occupies a niche in the market separate from that of luncheon meat. Based on all these facts, the Tribunal believes that the goods in issue are not of the same description as the pork-based luncheon meat that is subject to the Tribunal's finding.

Accordingly, the appeal is allowed.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Lyle M. Russell  
Lyle M. Russell  
Member