

BETWEEN:

THE BERTON DRESS INCORPORATED

SUPLIANT;

1952
Nov. 4
1953
Feb. 25

AND

HER MAJESTY THE QUEENRESPONDENT.

Crown—Petition of right—The Commodity Prices Stabilization Corporation Limited—P.C. 5518 dated July 16, 1943—"Subsidized goods"—Subsidy repayment upon export of subsidized goods—The Export Permit Branch of the Department of Trade and Commerce—Powers of the Commodity Prices Stabilization Corporation under P.C. 5518 in regard to exported goods.

Pursuant to the provisions of P.C. 5518 dated July 16, 1943, the Commodity Prices Stabilization Corporation, Ltd.—a Crown corporation—issued in March, 1944, a general notice by which certain types of cotton goods were designated as "subsidized goods" and the amount of subsidy repayment upon the export of such goods fixed at 10 per cent of the invoice price. In 1944, 1945 and 1946 suppliant imported certain cotton fabrics which were manufactured into dresses and, desiring to export those, it from time to time made applications to the Export Permit Branch of the Department of Trade and Commerce which acted as the collecting agency of the Corporation, for the necessary export permits. As suppliant had received no subsidy in respect of the imported fabrics, it could have received the export permits, under the notice referred to, by filing with the Export Permit Branch a certificate in form C-21 certifying that the cotton content of such goods had not been subsidized. Suppliant, however, did not follow that procedure but instead paid to the Corporation the stated percentage of the invoice prices thereupon receiving the permits. The C-21 forms were completed and forwarded later with a request for the repayment of \$3,607.43 "paid in respect to repayment of import subsidy in error". The request was refused and the C-21 forms returned because of suppliant's failure to file them at the time of the applications for export permits and of the lateness of its application for a refund. By its petition of right suppliant now seeks to recover the amounts so paid in error.

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Held: That the Commodity Prices Stabilization Corporation's power under P.C. 5518 in regard to exported goods was to recover the actual or designated subsidy which the exporter had received from it. While it is true that specific delegated powers may be enlarged by implied powers reasonably necessary to carry out the duties imposed, it could not in this case be implied that the powers of the Corporation extended to a point enabling it to declare as forfeited monies which had come into its hands through error, mistake or inadvertence, and to which it had no legal right. Under the circumstances of this case any regulation or by-law to that effect would have been *ultra vires*.

2. That the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears. *Metropolitan Asylum District v. Hill* (1881) 6 A.C. 193; *Commissioner of Public Works v. Logan* (1903) A.C. 355 referred to.

PETITION OF RIGHT by suppliant to recover certain amounts allegedly paid in error to a Crown corporation.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson for suppliant.

Paul Dalmé and Luc A. Couture for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (February 25, 1953) delivered the following judgment:

This is a Petition of Right in which the Petitioner seeks to recover from the Respondent the sum of \$3,571.78 paid under the circumstances presently to be mentioned to a Crown corporation—The Commodity Prices Stabilization Corporation, Ltd.

Before setting out the facts of the case, it is advisable to state briefly the nature and duties of the Commodity Prices Stabilization Corporation (hereinafter called the 'Corporation'). It was formed in 1940 for the purpose of assisting in stabilizing the wartime prices of goods to be consumed in Canada, and for such purposes and as agent of the Government of Canada, to pay subsidies, subventions and bonuses, and to buy and sell goods. In 1943 it was considered that the subsidies paid on goods which were later exported, or sold as ships' stores for ships leaving Canada should be recoverable, such goods not being subject to the

maximum prices prescribed by the Wartime Prices and Trade Board Regulations. P.C. 5518 was therefore enacted on July 16, 1943, and thereby it was provided:

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3. The corporation may from time to time, by notice published in Canadian War Orders and Regulations, designate a class or kind of goods as subsidized goods for the purposes of this order and may by a similar notice cancel or vary any such designation; and any goods of a class or kind so designated shall be conclusively presumed to be subsidized goods for the purposes of this order until the designation of such class or kind has been cancelled pursuant to this section.

4. (1) Every person shall, before he exports any subsidized goods from Canada, repay the subsidy involved in such goods by paying to the corporation an amount which is determined by the corporation to be equal thereto; and no person shall export any subsidized goods from Canada until such amount has been paid to the corporation.

(4) Every amount payable under this section shall be determined by the corporation, either by specific determination or by specifying the method of calculation, and every such determination shall be conclusive for all the purposes of this order.

(5) Notice of any determination under this section published in Canadian War Orders and Regulations shall be evidence of such determination.

5. No permit, licence or inspection certificate required by Order in Council P.C. 2448 of the 8th day of April, 1941, or by any other statute or law before any subsidized goods may be exported or taken out of Canada shall be issued until the payments required by this order have been made.

Pursuant to the provisions of that Order in Council, the Corporation from time to time issued various Government Notices in the Canadian War Orders and Regulations. General Notice RS-9 dated March 27, 1944 (Ex. E) was in effect throughout the years 1946 and 1947. By that notice, certain types of cotton goods (including those fabrics imported into Canada by the Respondent) were designated as "subsidized goods" and by Item 1 thereof the amount of subsidy repayment upon the export of such goods was fixed at 10 per cent (later increased to 15 per cent) of the invoice price.

Note A to that General Notice provided:

Note A.—Applicable only to Item 1.

Where the exporter

(1) purchases the cotton entering into the goods being exported and obtains written assurance that the cotton entering into such goods has not been subsidized, or

(2) imports the goods, or the cotton entering into the goods direct and in either case has not received or claimed subsidy, or

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(3) purchases the goods as manufactured goods and obtains written assurance that the cotton entering into such goods has not been subsidized, he may obtain a permit to export such goods without paying the amount required by Item 1 of this notice if the application for such permit is accompanied by a certificate in such form as Commodity Prices Stabilization Corporation Ltd. may approve setting out the circumstances and certifying that the cotton content of such goods has not been subsidized.

The certificate referred to therein and as approved by the Corporation was later known as Form C-21.

Under the provisions of s. 5 of P.C. 5518 (*supra*) the Export Permit Branch of the Dept. of Trade and Commerce (which branch was established by P.C. 2448 dated April 8, 1941, and is filed as Ex. A) was prohibited from issuing an export permit in respect of subsidized goods until the exporter had repaid to the Corporation "the subsidy involved in such goods," by paying to the Corporation "an amount which is determined by the Corporation to be equal thereto." The evidence is that in practice the Export Permit Branch functioned not only as the agency to which the applications for export permits were made, but also as the collecting agency of the Corporation, to receive the amount of the repaid subsidy and to then remit it to the Corporation.

In the years 1944, 1945 and 1946 the Petitioner imported directly from the United States of America certain cotton fabrics, the import entries being set out in Ex. 1. The Petitioner manufactured all of such fabrics into dresses, and it is shown that in respect of such fabrics no subsidy was asked for or received. Desiring to export these dresses to countries outside of Canada, it from time to time made applications to the Export Permit Branch for the necessary export permits. Ex. 3 contains copies of all the relevant applications, all dated between July 31, 1946, and July 16, 1947.

Inasmuch as the Petitioner had received no subsidy in respect of the imported fabrics (all of which, it is admitted, were converted into the dresses later exported) the Petitioner was entitled to adopt the procedure laid down in Note A of Government Notice RS-9 and to file with its application for an export permit the certificate in Form C-21. That form contained space for the particulars of the entry of imported goods and the evidence shows that with that information and the certificate itself, it was the

practice of the Export Permit Branch to accept that evidence as proof that no repayment of subsidy was involved and to issue the permit. At the trial it was admitted that had the Petitioner followed this procedure on each occasion the necessary export permits would have been issued, presumably without payment of any sort.

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The petitioner, however, at the time of each application did not file a C-21 Form but instead computed on the application "the amount of subsidy repayment" on the basis of Government Notice RS-9 (either at 10 or 15 per cent of the invoice price) and paid that amount to the Export Permit Branch as agent for the Corporation, thereupon receiving the necessary permits and later exporting the goods out of Canada. It is admitted that the amounts so paid were transferred by the Export Permit Branch to the Corporation.

The amounts so paid totalled \$3,572.78, that amount, less \$1.00 refunded on December 11, 1946, being the amount now claimed by the Petitioner.

It was not until January, 1948, that the C-21 Forms were completed by the Petitioner. On January 12 its agent, Mr. G. E. Hooper, forwarded to the Export Permit Branch C-21 Forms applicable to each of the export permits it had received, such forms being comprised in Ex. 7, and at the same time requested repayment of \$3,607.43 "paid in respect to repayment of import subsidy in error." It appears that immediately following the receipt of these forms they were processed by the Export Permit Branch and in a series of memoranda addressed to the Corporation, dated January 13, 1948, and initialled by Mr. J. G. McKinnon, the supervisor of the subsidy section, there were supplied details of the "cheque amount," the cheque number, and it was stated that the reason for refund was "subsidy rebate not required on cotton as per attached C-21 Forms." In each case the memorandum was headed "Adjustment of subsidy refund payment—complete."

Within a day or two Mr. McKinnon also completed another form headed "Cheques received from Department of Trade and Commerce—Export Permit Branch, Reference C-680 (Ex. 10)." That exhibit comprises three pages, refers to the serial numbers of each of the permits which

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had been issued to the Petitioner for the goods in question, and in addition to other data again gives the cheque numbers to be used in making the refund, the amount of each cheque, and with the necessary variations again states, "Subsidy rebate not required on cotton as per attached C-21 Forms." The sums under the heading "Amount to be refunded" total the sums now claimed by the Petitioner.

The cheques, however, were never issued. Instead the Petitioner was notified by a letter dated January 17, 1948 (Ex. 6) from Mr. S. W. Laird, Chief Examiner of the Corporation, that the application for refund was refused, and the C-21 Forms were returned. I quote below the essential parts of that letter as it sets out the nature of the Respondent's defence.

We have for acknowledgment a number of Forms C-21 respecting re-payment of subsidies on exported subsidized goods, and requesting a refund of the 10 per cent paid to the Corporation through the Export Permit Branch as required under Government Notice R.S. 9 dated March 28, 1944, as amended.

If you will refer to the above notice, a copy of which is attached, you will note, in order to eliminate the necessity of re-payment of subsidy on exports the applicant was required on making application for an export permit to accompany the same with a certificate in such form as Commodity Prices Stabilization Corporation Limited approved (Form C-21), setting out the circumstances and certifying that the cotton content of the goods had not been subsidized. It appears that you omitted to conform with this part of the regulations and are now requesting the Corporation to refund all payments, and accept Forms C-21 at this late date.

Under the established policy Form C-21 should be filed in accordance with the R.S. notice. However, the Corporation has accepted later filing of the form in a few instances, but in no instance later than four calendar months after the date of the export permit. This of course does not apply where cancellation of the export permit has been granted.

Under the circumstances the Corporation cannot accept Forms C-21 in contravention of the requirements outlined above except in such instances, say within four calendar months of the date of export permit.

Correspondence followed between the parties and under date of January 22, 1948, the Corporation solicitor wrote Mr. Hooper as follows: (Ex. 9)

Your representations were discussed with the officials of the Corporation and it does not appear that any points raised in your letter were not covered in the letter to the Berton Dress Inc.

The refund of subsidy notice No. RS-9 is quite specific in that Form C-21 must accompany the application for an export permit. The Corporation has no authority, at this late date, to accept the belated forms as executed by your clients and to make the refund which would be involved if they were accepted.

AVIS

Une traduction française des Règles et Ordonnances Générales de la Cour de l'Échiquier du Canada, telles qu'amendées à date, sera publiée sous peu. On pourra s'en procurer des exemplaires en s'adressant à l'Imprimeur de la Reine, à Ottawa, et sur paiement de la somme de \$1.00.

NOTICE

A French translation of the General Rules and Orders of the Exchequer Court of Canada, as amended, will be published shortly. Copies may be obtained from the Queen's Printer, Ottawa, upon payment of the sum of \$1.00.

It is contended that the respondent is not bound, and that it has not been the practice of the Corporation, to make refunds of any subsidy repayments made in error after so long a delay and that the Petitioner is estopped from making such a request for repayment because of its alleged failure to comply with the provisions of Government Notice RS-9 as to filing the C-21 Forms at the time of the application for export permits.

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At the trial it was somewhat vaguely suggested that the Petitioner had not proven that there was no subsidy involved in the dresses that were exported. While it was admitted that no subsidy had been paid on the imported cotton fabrics converted into the dresses, it was suggested that there could have been some form of subsidy in other goods which formed part of the dresses. That suggestion is completely disposed of by the evidence of Mr. J. D. C. Mahaffey, former executive vice-president of the Corporation, taken on his examination-for-discovery and read into the record. He stated that the Corporation agent—the Export Permit Branch—had given the Corporation all the information necessary to enable it to conclude that no previous subsidy had been paid on the goods mentioned in the C-21 Forms filed, and that the Petitioner was merely requesting the return of its own money.

From the same evidence and from Mr. Mahaffey's letter of April 28, 1948, to Mr. Hooper (Ex. 13) it is also clear that there were other exporters who had received no subsidy, who proceeded in exactly the same manner as the Petitioner in applying for export permits, and did not file the C-21 Forms but paid to the Corporation the stated percentage of the invoice prices. Later they filed C-21 Forms and received a refund of the amounts so paid. I infer from the evidence that some official of the Corporation made a decision that only applications for refunds which reached it within a period of four months from the date of the related export permit would be favourably considered and that in no case was the application refused when it was received within that time. There is no evidence that any such exporter other than the Petitioner filed its C-21 Forms and applied for a refund after the expiry of the four months' period. There is no evidence whatever that the Corporation itself

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gave formal consideration to the problem of dealing with late filings of C-21 Forms, to applications for refunds in cases such as the instant one, or to the placing of any time limit on such applications. It is frankly admitted that there was in fact no authority for the ruling that applications for refunds which were received within four months would be favourably considered and all others rejected; and that no notice of such ruling was given to interested parties at any time. The door was closed to late comers regardless of the merits of their application. In my opinion, the ruling was made without authority of any sort and is of no effect.

Counsel for the Respondent relies, however, on the provisions of Government Notice RS-9 and Mr. Mahaffey stated in evidence that its provisions constituted the only ground for denying the Petitioner's right to recovery. In so far as that notice is relevant to this case it did two things. It stated the amount of subsidy repayment which must be paid in respect of subsidized goods, before an export permit would be granted (by P.C. 7460 dated December 28, 1945, the Corporation was empowered to vary the times within which such payment was to be made, but I do not think that is of any importance here). I assume that the provision was intended to apply to cases where subsidy in one form or another had in fact been paid. Then by Note A (*supra*) provision was made whereby exporters who had not received subsidy could obtain export permits by filing proof to that effect in the certificate Form C-21. The notice does not state that an exporter who had received no subsidy must comply with the provisions of Note A and file the certificate; nor does it state that if he pays "the amount of subsidy repayment" in order to secure his export permit he is barred from recovery. What it does state is that if the necessary C-21 Certificate is filed with the application for the export permit, that will be accepted as evidence that no subsidy was paid and the export permit will be granted. It was purely a procedural matter designed to facilitate the issue of export permits when no subsidy had been paid.

There is no evidence as to why the Petitioner paid the required "amount of subsidy repayment" when on the facts it could have adopted the procedure set out in Note A.

It could only have been done by inadvertence or error for it is difficult to believe that it would deliberately "repay" something which it had not been paid and which it was under no obligation to pay. It may have acted through a subordinate official who was concerned solely with obtaining the necessary export permits and who had no knowledge as to the applicable regulations or whether any subsidy had in fact been paid. It may have been done in order to expedite the issue of the export permits and to avoid the delay entailed in processing and checking the C-21 Forms. The payments may have been made in the belief that all cotton goods to be exported were within the classes and kinds of goods specified in the notice and without knowledge of the alternative provisions of Note A.

On the merits the Petitioner has made out its case. The Export Permit Branch which normally acted on behalf of the Corporation in these matters was completely satisfied that the application for refund was warranted on the facts and recommended repayment. The Corporation itself admits that upon the export of the goods it was not entitled to receive any amount from the Petitioner and would not have claimed any had the C-21 Forms been then filed. What it has done in effect is to declare as forfeited the moneys it received through an error or inadvertence and to which it had no legal claim. Had valid powers been conferred on it to declare such a forfeiture or to retain the sums it received through error, mistake or inadvertence on the part of an exporter, its right to do so could not be questioned. I have examined P.C. 5518 and the other documents filed and can find no such authority.

The Corporation's power under P.C. 5518 in regard to exported goods was to recover the actual or designated subsidy which the exporter had received from it. While it is true that specific delegated powers may be enlarged by implied powers reasonably necessary to carry out the duties imposed, it could not in this case be implied that the powers of the Corporation extended to a point enabling it to declare as forfeited moneys which had come into its hands through error, mistake or inadvertence, and to which it had no legal right. Any regulation or by-law to that effect would have been *ultra vires*.

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The burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears (*Metropolitan Asylum District v. Hill* (1)). Reference may also be made to *Commissioner of Public Works v. Logan* (2) in which Lord Davey said at p. 363:

But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry Co. v. Windsor and Annapolis Ry. Co.*, 7 App. Cas. 178, at p. 188.

Moreover, the practice of the Corporation in approving all similar applications made within the four months' limit has proven that even in the opinion of the Corporation itself a non-subsidized exporter who did make payment upon export was not barred from later applying for a refund, when he had not filed the C-21 Forms with his application for an export permit. It is true that there was some delay on the part of the Petitioner but that has not prejudiced the Corporation in any way. The Petitioner engaged the services of Mr. Hooper who was well acquainted with the Order in Council governing the Corporation and with its practice. After making a thorough examination of the books and records of the Petitioner for a period extending over two months, he completed the necessary certificates and at once filed them with the Export Permit Branch.

Under these circumstances I am of the opinion that the Petitioner is entitled to succeed.

Some question was raised as to the jurisdiction of this Court to consider a claim of this nature. In my view such jurisdiction is conferred by the provisions of s. 18 of the Exchequer Court Act, R.S.C. 1927, c. 34 as amended.

There will therefore be judgment declaring that the Petitioner is entitled to be paid by the respondent the sum of \$3,571.78 and the costs of these proceedings, after taxation.

Judgment accordingly.

(1) (1881) 6 A.C. 193 at 208.

(2) [1903] A.C. 355.