

Ottawa
1965
Dec. 9
Dec. 14

BETWEEN:

JOHN PINKER SUPPLIANT;

AND

HER MAJESTY THE QUEEN RESPONDENT.

Crown—Petition of Right—Post Office—Prohibition of mail—Interim prohibitory order—Post Office Act, R.S.C. c. 212, s. 7—Right to be heard—Sufficiency of information supplied—Interlocutory injunction—Right to issue—Whether proceeding properly directed against Crown.

By petition of right filed on November 24th, 1965 suppliant sought to restrain the Postmaster General from issuing an interim prohibitory order under section 7 of the *Post Office Act* prohibiting the delivery of mail to the suppliant without informing him of the charges against him and giving him the right to defend himself. On December 6th the Deputy Postmaster General informed the suppliant by letter of the charges against him, *viz* misrepresenting by advertisement the nature of photographs sent through the mail and of sending obscene photographs through the mail, both being offences under the Criminal Code; and suppliant was given 48 hours to answer the charges. Suppliant answered the accusation by mail and applied for an interlocutory injunction pending judgment on his petition.

Held, the application for an interlocutory injunction should be dismissed for the following reasons:

1. It had not been established that the suppliant had not been afforded a sufficient opportunity to be heard with respect to the charge of misrepresentation and the questions whether or not the conditions existed under which an interim prohibitory order might be issued and whether the order should issue were for the Postmaster General rather than for the court to decide. *Randolph et al. v. The Queen* [1966] Ex. C.R. 157 referred to.
2. An order by the court that an interim prohibitory order should not issue until final disposition of the petition of right would involve a declaration that the Crown is in the interim in some way bound by law to restrain the Postmaster General from exercising the authority given to him by statute, and there is no legal foundation for such a declaration.
3. The proceeding was misconceived. While the right of a person not to have an interim prohibitory order issued against him without statutory authority might conceivably be enforced by a proceeding directed against the official proposing to do the act, effect could not be given to such a right by a proceeding by petition of right against the Crown.

APPLICATION for interlocutory injunction.

J. P. Ste. Marie, Q.C. for suppliant.

P. M. Ollivier, Q.C. for respondent.

THURLOW J.:—This was an application for:

an order granting an interlocutory injunction recommending to Respondent that the Postmaster General of Canada refrain from issuing, against suppliant, an interim prohibitory order as defined in the *Canada Post*

Office Act, until final judgment has been rendered on suppliant's Petition of Right.

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At the conclusion of the hearing I indicated that the application would be refused and that I would file a memorandum of my reasons.

The proceeding was begun on November 24th, 1965 by a Petition of Right which alleges *inter alia* that the suppliant has been advised by an official of the Post Office Department that unless he signs a document promising not to use the mails for certain purposes an interim prohibitory order will be issued against him by the Postmaster General of Canada and that he has been denied information as to the grounds for such an order. The Petition concludes with a prayer that the Court:

- (a) RECOMMEND to Respondent that the Postmaster General of Canada refrain from issuing against suppliant an interim prohibitory order, as defined in the Post Office Act of Canada, until and unless suppliant has been made legally and officially aware of the accusations borne against him, and has had the right, the opportunity and the time to defend himself;

The notice of application for interlocutory relief was filed on the same day.

Subsequently, by a letter dated December 3rd, 1965 and delivered on December 6th, 1965, the Deputy Postmaster General informed the suppliant that he had seen a copy of an advertisement, (a photo copy of which was enclosed) which the suppliant sends through the mails, offering for sale films, photographs and books and he went on to say:

On the basis of that advertisement and of the samples of the films which you remitted to our officials in Montreal as being the films which, on your own admission, you actually sell to the public, which films have been screened by officers of this Department, I have reasonable grounds to believe and I do believe that your advertisement substantially misrepresents the true character of these films and that consequently your activities in relation to the sale of these films to the public, through the mails, constitute offences contrary to the provisions of Sections 323 and 324 of the Criminal Code.

I have also seen photographs, photocopies enclosed, which you forwarded through the mails to one Lindsay C. Brooke, 115 North 15th, La Grange, Kentucky, U.S.A., in an envelope, photocopy also enclosed, postmarked "Montreal, 6 P.M.-8XI 65, Quebec" and bearing the return address "5992, 2nd Avenue, Rosemount, Montreal, P.Q.", which photographs were so forwarded as the result of an order sent to you by mail at your above mentioned business address by the sender, Lindsay C. Brooke. I have reasonable grounds to believe and I do believe that these photographs are obscene in character and that your use of the mails for the purpose of transmitting or delivering these photographs constitutes an offence contrary to Section 153 of the Criminal Code.

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In a final paragraph the letter notified the suppliant that the Deputy Postmaster General intended to issue pursuant to s. 7 of the *Post Office Act* an interim prohibitory order against the suppliant unless within forty-eight hours from the time of delivery of the letter he forwarded his representations in writing showing cause or evidence why the order should not issue.

On December 8th, the suppliant in reply forwarded a five-page letter purporting to be verified under oath stating a number of objections to and arguments against the issue of such an order and in particular denying the commission of any fraud in the carrying on of his business and further denying that he sent to Lindsay C. Brooke the photographs referred to by the Deputy Postmaster General. That the photographs were obscene is not disputed.

The samples of films referred to in the Deputy Postmaster General's letter as having been remitted by the suppliant to an official of the Department in Montreal were not produced on the hearing of the application and there is no evidence of what they showed.

Section 7(1) of the *Post Office Act*¹ provides as follows:

(1) Whenever the Postmaster General believes on reasonable grounds that any person

(a) is, by means of the mails,

(i) committing or attempting to commit an offence, or

(ii) aiding, counselling or procuring any person to commit an offence, or

(b) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

In *Bernard Randolph et al. v. The Queen*² the President of this Court decided that an interim prohibitory order cannot be made under this provision without first affording the person affected an opportunity to be heard but, in discussing the nature of the opportunity to which the person to be affected would be entitled, he said at p. 19 of his judgment:

On the other hand, it is to be borne in mind that the right to be heard to which the person affected would automatically be entitled, if it is not impliedly excluded, is a much less formal and far reaching type of investigation than that for which section 7 provides. It would be

¹ R.S.C. 1952, c. 212.

² [1966] Ex.C.R. 157.

sufficiently accorded to him if he were notified by the Minister what was alleged against him and what action was proposed and were given a reasonable time, which might be quite short in the circumstances, to answer what was said against him by any adequate means, which might be merely a statement in writing sent to the Postmaster General.

On the basis of the material before me, I see no reason to think that the suppliant has not had the opportunity to which he was entitled with respect to the allegation of misrepresentation contained in the Deputy Postmaster General's letter. Having stated the charge and the evidence relied on as establishing it and having given the suppliant an opportunity to state and establish his answer, it does not appear to me that there has been any denial of an opportunity to be heard of the kind indicated by the President in the passage which I have quoted. The opportunity to be heard having been afforded to the suppliant the decision as to whether or not the conditions under which an interim order may be issued exist and whether the order should issue is not one for the Court but under the statute is to be made by the Postmaster General. It was submitted that the Postmaster General would not be entitled to regard as reasonable grounds under the statute matters which could not properly constitute such grounds but as already indicated the films are not before the Court and even if, contrary to my opinion, such a point could be considered on an application such as this, the materials for reaching a conclusion on it are not before me. On this ground alone, therefore, the application must fail on the merits.

I should add, however, that with respect to the other charge in the Deputy Postmaster General's letter, the suppliant was not advised as to any evidence which may be available to the Minister to indicate that the suppliant sent the photographs in question to Lindsay C. Brooke and counsel for the Crown conceded that on the basis of the judgment in the *Randolph* case the Postmaster General would not be in a position to make an interim order based on this incident without informing the suppliant as to what such evidence was and giving him an opportunity to state his position with respect thereto.

In the course of argument counsel for the suppliant conceded that the Court is not in a position to make an order restraining the Crown but he submitted that the Court could, nevertheless, deal with the motion by deciding

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and declaring "what is right to be done"¹ between the Crown and the suppliant. However, to decide that as between the suppliant and the Crown no interim prohibitory order should issue until the final disposition of the Petition of Right appears to me to involve as an incident a declaration that the Crown is in the interim in some way bound by law to restrain the Postmaster General from exercising the authority given to him by the statute. I know of no legal foundation for such a declaration. Accordingly even accepting the suppliant's analysis of the nature of the Court's function in a proceeding by Petition of Right it seems plain to me that his application cannot be granted.

Finally, it appears to me that the proceeding is misconceived. It may be that prohibition would lie if the Postmaster General proposed to issue an interim prohibitory order in circumstances in which the statute does not authorize it, but, whether prohibition would lie or not, it seems to me that any proceeding taken to enforce the right of a person not to have an interim prohibitory order issued against him without statutory authority must necessarily be a proceeding against the official proposing to do the act which is alleged to be beyond his authority. I do not see how the right of a person likely to be affected by such an act can be raised and given effect to by a proceeding by Petition of Right against the Crown.

The application is dismissed with costs.

¹ *Vide Dominion Building Corporation v. R.*, [1933] A.C. 533. *Miller v. The King* [1950] S.C.R. 168 at 175 per Kellock J.