BETWEEN:

W. J. McCART & COMPANY LIMITED ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1938
Feb. 10.
Nov. 12.

Revenue—Customs Act, R.S.C., 1927, c. 42, as amended by 21 Geo. V, c. 2, s. 4—Value of goods imported into Canada as fixed by the Governor in Council is not to be determined in terms of currency of the country of export.

Held: That s. 43 of the Customs Act, R.S.C., 1927, c. 42, as enacted by 21 Geo. V, c. 2, s. 4, granting the Governor in Council the right to fix the value for duty purposes of certain goods imported into Canada does not authorize the fixing of such value in the terms of the currency of the country of export.

PETITION OF RIGHT by the suppliant claiming a declaration that certain duties collected by the Minister of National Revenue were collected without authority and that the same be returned to suppliant.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

G. G. Plaxton, K.C. and *J. S. Wright* for suppliant.

R. S. Robertson, K.C. and *C. W. Livingston, K.C.* for respondent.

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

THE PRESIDENT, now (November 12, 1938) delivered the following judgment:

The suppliant here is a wholesale deal in fruits and vegetables, carrying on business at Toronto, Ontario, and was an importer of such products from the United States at the time material here. It seeks by this petition of right to recover from the Crown certain sums of money which it paid as customs duties upon certain importations of such classes of goods from the United States, and which payments it alleges were in excess of any properly authorized duties.

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In 1930, s. 43 of the Customs Act was so amended as to read as follows:

(1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

(2) Every order of the Governor in Council authorizing the Minister to fix the value for duty of any class or kind of such goods, and the value thereof so fixed by the Minister by virtue of such authority, shall be published in the next following issue of the *Canada Gazette*.

In September of 1930, and in February and April of 1931, the Governor in Council, by three different Orders in Council, made under the authority of the said section 43 of the Customs Act, authorized the Minister of National Revenue to fix the value for duty of certain mentioned goods, fruits and vegetables. The three Orders in Council were similar in form and one, which I quote for the purpose of illustration, was as follows:

Whereas the Minister of National Revenue reports that carrots are being imported into Canada under such conditions as prejudicially or injuriously to affect the interests of Canadian producers thereof;

Therefore His Excellency the Administrator in Council, on the recommendation of the Minister of National Revenue, and under the authority of section 43 of the Customs Act, chap. 42, R.S.C., 1927, and amendments thereof, is hereby pleased to authorize the Minister of National Revenue to fix the value for duty of the above mentioned product, notwithstanding any other provisions of the Customs Act; the value so fixed to be deemed to be the fair market value thereof.

In pursuance of the authority conferred upon the Minister of National Revenue by such Orders in Council, the Minister proceeded from time to time to fix, in writing, the value for duty of certain named goods, in the case of fruits and vegetables at so many cents per pound, and this would be communicated to customs and excise officers throughout Canada, by what are called "Appraisers' Bulletins" signed by the Commissioner of Customs, or the Assistant Commissioner of Customs. From time to time the Minister would order, in writing, that a value fixed for duty by him on certain named goods would be cancelled on a future date named; this would be done without any authorization of the Governor in Council. Later, and without any renewed authorization of the Governor in Council, the Minister would again fix the value for duty of the

same goods, presuming to act under the authority of one or other of the Orders in Council which I have mentioned.

On November 3, 1931, there was issued to customs and excise officers, at the instance of the Commissioner of Customs, an Appraisers' Bulletin, advising them "that in computing the value for duty of articles upon which the value has been fixed by the Minister, under section 43 of the Customs Act, such values are to be considered as fixed in terms of the currency of the country of export, to be advanced by the amount of the premium at the rate of exchange current at the date of shipment. If the selling price to the purchaser in Canada in the currency of the country of export, or its equivalent in Canadian currency at the rate of exchange current at the date of shipment, is less than the value for duty as computed above, special or dumping duty, is applicable." This Bulletin was not expressed to be issued under the authority of any Order in Council passed under s. 43 of the Customs Act, and it does not appear that the same was authorized by the Minister, at least there is no evidence of any such authorization. The obvious effect of this ruling, when American funds were at a premium, was to add to the duty value of importations from the United States, as fixed by the Minister under s. 43 of the Customs Act. This is illustrated in the Bulletin where it is pointed out that if the fair market value and the selling price in the country of export were $100, and the value fixed by the Minister were $150, and the premium on American funds were 10 per cent, the value for duty would be $150 plus $10 per cent., $165. In the calculation of what is known as the "dumping duty" the matter of the rate of exchange between the importing and the exporting country would be of importance to importers but I do not think any useful purpose would be served by any reference to that phase of the case.

It was the submission of the suppliant that the values for duty fixed by the Minister in his several orders were values fixed in pursuance of s. 43 of the Customs Act, and that the Departmental ruling to the effect that such values were to be considered as fixed in terms of the currency of the country of export, and that the values fixed by the Minister were "to be advanced by the amount of the

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premium at the rate of exchange current at the date of shipment," was in effect the imposition of an additional tax upon importations, unauthorized by the Customs Act or any other Act, or by the Minister of National Revenue, and was an unauthorized ruling of the Commissioner of Customs. The suppliant, being obliged to receive prompt possession of its importations of fruits and vegetables from the United States paid the additional duties exacted by reason of the issue of the Departmental Bulletin in question, now claims that it paid duties in excess of those properly exigible and by its petition seeks to recover back such excess payments on the ground that such Bulletin issued without lawful authority. It was agreed by counsel that if I decided that the addition of the premium in the exchange rate referable here, to the value for duty fixed by the Minister, were unauthorized, then the suppliant would be entitled to recover the sum of $1,449.49, which amount is to be found in an exhibit put in evidence.

More than one point was raised by Mr. Plaxton in his attack against the validity of the imposition of the additional or excess duties paid by his client by virtue of the ruling of the Department of National Revenue that the value for duty fixed by the Minister was to be treated as fixed in the terms of the currency of the country of export, and that the values for duty fixed by the Minister in respect of the suppliant's importations were to be advanced by the amount of the premium on United States funds current at the date of shipment. A very formidable point of attack made at the outset of the case was that, in some instances, the values for duty fixed by the Minister, and cancellations of the same, were not published in the *Canada Gazette*. However, this point was not in the end pressed, because, I assume, Mr. Plaxton was of the view that his legal position was otherwise so strong that he thought it unnecessary to rely upon that ground. I need not therefore pause to discuss that point.

Another point raised by Mr. Plaxton was that once the Minister fixed the value for duty upon the articles or goods specifically mentioned in each Order in Council he was without authority to fix again, at a subsequent date, the duty value of the same articles or goods, after a cancellation of the values fixed by him in the first instance, that

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is to say, that if the Minister once fixed the value for duty of specific articles or goods, under the authority of an Order of the Governor in Council, and later cancelled the same—which was frequently done—it would require the authority of another Order in Council to clothe the Minister with the authority to fix again the value for duty of the same goods. There is much force in such a contention. It is conceivable that at the date when the Minister assumed to fix, for the second or third time, the value for duty of specific goods, the Governor in Council might entertain a different view about the subject-matter from what he did when an Order in Council was passed in respect of the same goods. This ground of attack was met by Mr. Robertson by saying that the Minister once having been given the authority to fix the value for duty of certain named goods that authority stood until the same was appropriately repealed, and that the Minister was free to cancel from time to time any values fixed by him, and to restore the same either modified or unmodified. It will be remembered that the authorization of the Governor in Council to the Minister was not expressed as being applicable to "a class or kind of goods," but to specifically named goods of "a class or kind," that is, certain named vegetables or fruits, not all fruits or vegetables. I am inclined to think that from the practical viewpoint much is to be said for Mr. Robertson's contention, and perhaps it would have been unanswerable if the Orders in Council had been expressed in more general terms. When power is granted to the Governor in Council to authorize a Minister of the Crown to fix the value of imported goods for duty purposes, which in the result is in the nature of a tax, it is imperative that such authorization be very strictly construed. There can be no taxation by the Government of Canada except under the authority of an Act of the Parliament of Canada, but if the Parliament of Canada vests in the Governor in Council the power to authorize a Minister of the Crown to impose a tax in the form of a duty, upon an importer, that authority must be exercised strictly within the limits of the power granted. While I am rather inclined to accept the view advanced by Mr. Plaxton, that the Minister having once exercised his authority to fix the value of specific articles for duty purposes it

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would require fresh authorization from the Governor in Council to fix another value at another period, if the value earlier fixed had been cancelled, yet, I do not propose to express any definite opinion upon the point. I find it difficult to believe that it was ever intended by the legislature to grant to the Governor in Council the power to confer authority upon the Minister to fix the value for duty, to cancel the same, and later to fix another value, without fresh authorization. The point is an extremely difficult one, and it is because it is my view that the case may be disposed of upon another ground that I refrain from expressing any definite opinion upon it.

I turn therefore to what is the most important aspect of the case, that is, whether s. 43 of the Customs Act, or the Orders in Council, clothed the Minister with power to make any order or direction to the effect that the values for duty fixed by him were to be considered as fixed in terms of the currency of the country of export. Sec. 43 of the Customs Act, and the Orders in Council, are silent altogether upon the question of the appreciation of the currency of the country of export, or, of the event that the rate of exchange between the exporting country and Canada, was adverse to the latter. The Customs Act, and I think the Customs Tariff Act, had already provided for the case where the currency of the country of export was substantially depreciated, and one can readily understand the reason for such a provision. At the time of the enactment of s. 43 the American dollar and the Canadian dollar were substantially on a parity, and it was only after England went off the gold standard that the American dollar became appreciated in terms of the Canadian dollar, the premium, if I remember correctly, sometimes reaching over 20 per cent, which of itself would substantially add to the cost of any dutiable goods purchased in the United States for export to Canada. That situation or state of facts could hardly "prejudicially or injuriously" affect the interests of Canadian producers, in the sense contemplated by s. 43 of the Customs Act. Sec. 43 being silent about the question of appreciated currency in the country of export, the Orders in Council being equally silent, the Customs Act having provided for the event of depreciated currency in the country of export, I have no difficulty in

reaching the conclusion that it was never intended by s. 43 to empower the Governor in Council to authorize the Minister to direct that in fixing the duty value of certain imported goods, such values were to be treated as being fixed in terms of the currency of the country of export.

It is plain, I think, that s. 43 was designed to meet the contingency of unfavourable marketing conditions in Canada for certain domestic products, a situation that was calculated "prejudicially or injuriously to affect the interest of Canadian producers or manufacturers," and that section was intended to give to the Minister, if and when authorized by the Governor in Council, the arbitrary power of fixing the value for duty of imported goods of the same class, if the contingency feared, occurred or was likely to occur. If he exercised that authority by fixing a value or values that would be the end of his authorization, and to that he could not add. The values fixed by the Minister, were, I think, expressed in terms of Canadian currency, and nothing else, in my opinion, was ever contemplated. It is utterly untenable, I think, to say that the values fixed by the Minister were to be considered as fixed in terms of the currency of the country of export. I see no ground for thinking that the legislature ever intended to give power to the Governor in Council, or to the Minister, or to any one, to expand the authority expressed in s. 43, contemplated by the legislature. There does not seem to be any authority for saying that the value fixed for duty, by the Minister, was to be treated as fixed in the terms of the currency of the country of export, when the rate of exchange was adverse to Canada. It is very significant that there is no mention whatever of the appreciation or depreciation of any currency, in any of the Orders in Council, and one may assume that this was not accidental, but rather due to a strict observance of the language of s. 43 of the Customs Act.

There is nothing in the record of this case to indicate, so far as I can find, that the Minister ever directed or approved of any Appraisers' Bulletin instructing customs and excise officers that the value of any goods fixed by the Minister under s. 43 was "to be advanced by the amount of the premium at the rate of exchange current at the date of shipment." I am bound to assume upon the

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evidence before me that the Minister never made such a direction, or ever approved of the Appraisers' Bulletin issued in this connection, to customs and excise officers. That the Commissioner of Customs could not impose taxation, or advance the value of goods fixed by the Minister under s. 43, or deal in any way with the subject of appreciated currency in exporting countries, without legislative authority, is too elementary for serious discussion. And my attention has not been called to any authority bestowing such a power upon the Commissioner of Customs.

The remaining question for decision is whether or not the suppliant complied with the requirements of s. 125 of the Customs Act. That section provides that "although any duty of customs has been overpaid, or although, after any duty of customs has been charged and paid, it appears or is judicially established that the same was charged under an erroneous construction of the law, no such overcharge shall be returned after the expiration of three years from the date of such payment, unless application for payment has been previously made." The suppliant, I think, through its authorized customs broker, made claims, orally and in writing, for a refund of the alleged excess of duties paid upon the goods in question. And in fact some refunds were made to the suppliant, and to others, I understand. There came a time, however, when the National Revenue Department definitely decided to make no further refunds in respect of such cases as this, and accordingly the customs authorities at Toronto declined even to receive any formal application for a refund. The suppliant's customs broker, I am quite satisfied, promptly made oral claims in respect of every importation in which the alleged excess duty was paid, and he attempted to lodge with the customs authorities at Toronto a written claim in respect of each importation and payment, in the form usual in such cases, but their reception was declined, which one can quite understand the customs authorities at Toronto doing, in view of the decision of the Department of National Revenue not to entertain any further claims of such a character. The written and formal claims to refunds, were, physically offered to the customs authorities at Toronto, perhaps not wholly complete, but they would at the moment have been made complete, if it had not been

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intimated that they would not in any event be received or entertained. I do not think there is any substance in the contention of the Crown to the contrary upon this point.

There will therefore be judgment for the suppliant in the sum of $1,449.49, and costs will follow the event.

Judgment accordingly.