CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

1947

Nov. 21
Dec. 13

AND

HARRY E. HUNT.....DEFENDANT.

Crown—Action for return of money paid as subsidy—Commodity Prices Stabilization Corporation—P.C. 7475, August 26, 1942, s. 3(6)—No power in Court to set aside finding and decision.

The action is one to recover from defendant money paid by the Commodity Prices Stabilization Corporation Ltd. to defendant as a subsidy in connection with imported paper used by the defendant in the manufacture of tea bags.

Section 3(6) of P.C. 7475 dated August 26, 1942, provides:

(6) In any case where the Corporation finds, whether as a result of any such report or accounting or otherwise, that a person has received any sum of money by way of subsidy which the Corporation decides would not have been paid if all relevant facts and circumstances had been known at the time of application therefor, such person shall within thirty days from the date of demand in writing by the Corporation, pay to the Corporation such sum of money.

Held: That when the Corporation has made its finding under subsection 3(6) of P.C. 7475 and has made a demand for payment in writing, the amount of the demand is due and payable within thirty days from the date of the demand and the Court has no right to substitute its finding as to whether all relevant facts and circumstances were known to the Corporation for the finding of the Corporation itself, since the Corporation alone has the power to find the facts mentioned therein and the Court has no power to set aside that finding and decision.

INFORMATION exhibited by the Attorney General of Canada to recover from the defendant the sum of $1,073.25 paid to defendant as subsidy.

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

A. J. P. Cameron, K.C., for plaintiff.

C. H. Howard, K.C., for defendant.

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

CAMERON J. now (December 13, 1947) delivered the following judgment:

In these proceedings, the plaintiff seeks to recover from the defendant the sum of $1,073.25, admittedly paid by the Commodity Prices Stabilization Corporation, Ltd. (hereinafter called the Corporation) to the defendant as a subsidy in connection with imported 10-lb. paper, used by the defendant in the manufacture of tea bags. The information exhibited by the Attorney General of Canada on behalf of the plaintiff states in paragraph 1 as follows:

> Under and pursuant to Order in Council P.C. 7475 of the 26th day of August, 1942, particularly section 3, subsection (6) of the said Order, as amended, the Commodity Prices Stabilization Corporation, Limited, duly found, as recorded in formal minute of the Board of Directors of the said Corporation, passed on the 14th day of September, 1945, that Harry E. Hunt, carrying on business in the City of Toronto, in the County of York, as Harry E. Hunt & Company, had received the sum of $1,073 25 by way of subsidy, as defined in the said Order, and amendments thereto, and the said Corporation duly decided as recorded in the said minute, that the said subsidy would not have been paid to the said Harry E. Hunt & Company if all relevant facts had been known at the time of application therefor.

This is followed by an allegation that a demand in writing dated November 20, 1945, was duly made on the defendant by the said Corporation for repayment of the said sum pursuant to the said Order and amendments, and that the defendant had failed to pay the same. At the trial it was admitted by the defendant that such demand for repayment was received by him and that repayment had not been made. Uncontradicted evidence was given establishing the facts set out in paragraph 1 of the information (*supra*).

The defendant denies all liability, acknowledges receipt of the said subsidy, affirms that he was entitled to receive

the same and that he is entitled to retain it in as much as all relative facts were known to the Corporation at the time of application for, and payment of, the said subsidy.

The Corporation was established under the authority conferred upon the Minister of Finance by Order in Council P.C. 9870 of December 17, 1941. Order in Council P.C. 7475, of August 26, 1942, authorized certain regulations concerning the Corporation. By P.C. 5273, of July 26, 1945, a former section 3 (6) was deleted and the following substituted therefor:

(6) In any case where the Corporation finds, whether as a result of any such report or accounting or otherwise, that a person has received any sum of money by way of subsidy which the Corporation decides would not have been paid if all relevant facts and circumstances had been known at the time of application therefor, such person shall within thirty days from the date of demand in writing by the Corporation, pay to the Corporation such sum of money.

It is under the provisions of this subsection that the Corporation proceeded on September 14, 1945, as above set forth. Exhibit 3 is a certified copy of an extract from the minutes of the meeting of the Directors of the Corporation held on that date, certified by the Secretary.

By reason of section 5 (*i*) of P.C. 7475, the certified copy is conclusive evidence that the decision therein recorded was made or taken. In view, therefore, of the provisions of section 3 (6) of P.C. 7475, as amended (*supra*), proof of the finding of the Corporation having been established, and the defendant admitting that a demand for payment was made and not complied with within thirty days, the plaintiff, in my opinion, is entitled to succeed.

Counsel for the defendant raised no objections to the validity of section 3 (6) but argued that the Court had power to review the action of the Corporation and that if it were established that all the relevant facts and circumstances were, in fact, known at the time of the application, the Court should decline to direct the return of the subsidy. With that argument I cannot agree. It may be argued that section 3 (6) confers very arbitrary powers on the Corporation. But the subsection, in my view, is clear and unambiguous and it is the duty of the Court to give effect to its plain intent. In my opinion, once the Corporation has made its finding under subsection 3 (6), and has made a demand for payment in writing, the amount of such demand

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is due and payable within thirty days from the date of the demand. The Court has no right, in my view, to substitute its finding as to whether all the relevant facts and circumstances were known to the Corporation, for the finding of the Corporation itself. That is emphasized by the use of the words "in any case where the Corporation *finds*", and "which the Corporation *decides* would not have been paid". The situation would have been otherwise if the section had read, "in the case of any person who has received any sum of money by way of subsidy to which he was not entitled because of non-disclosure of all the relevant facts and circumstances in his application, the same may be recovered by the Corporation"—or words to that effect. But the language of the subsection itself makes it clear that the Corporation alone has the power to find the facts mentioned therein. In my view, the Court has no power to set aside that finding and decision.

But counsel for the plaintiff did not rely solely on the point which I have just discussed. In order to meet the allegations in the statement of defence, he led evidence to establish that had all the relevant facts and circumstances been known at the time of the applications for subsidy, the subsidies would not have been paid.

G. H. Glass, Vice-President and Chief Investigator for the Corporation, gave evidence for the plaintiff. Subsidies were first payable on entries at Customs on or after December 1, 1941, and the defendant's goods were not exempt from subsidy. In all, the defendant made thirteen applications for subsidy as shown in exhibit 4. A summary of these applications (and details of the manner in which they were respectively dealt with by the Corporation) is given in exhibit 5. At the outset, the Corporation had not completed its organization or formulated its policy for payment of subsidies and so it was deemed advisable to pay the subsidies as claimed, subject only to mathematical checking of the amounts claimed by the applicant, to proof that the goods had been entered under their proper customs entry, and that the goods were not exempt from subsidy. It was felt that it would be a hardship on smaller companies to delay subsidy payments unduly. The applicant's first claim for subsidy was made on April 18, 1942, and paid

in full on May 20, 1942. Claims 2 and 3 were made on June 30, 1942, and paid on July 28, 1942, with only minor mathematical adjustments.

In the meantime, the investigators of the Corporation were making their first investigation. It was limited to (i) ascertaining whether the laid-down costs of the goods as shown in the application form were correct and, (ii) establishing the laid-down cost of the applicant's tea bag paper in 1941 to be used as a basic cost. As a result of the first investigation, it was established that the laid-down cost of the paper in 1941 was $1.2068 per lb., and this was accepted by the defendant. However, in processing claim No. 1, it was found by the investigators that the actual laid-down cost of the importations in claim No. 1 somewhat exceeded the figures given by the defendant in his application; and as a result, on June 17, 1942, he was given a credit note of $4.52. Similar minor adjustments were made in respect of claims 2 to 7. In respect of claims 8 and 9 the full amount of the defendant's applications was granted, the last one being dated December 21, 1942.

Towards the end of 1942, and after about nine months' experience, the Corporation was able to give more mature consideration to all the factors involved. What then happened can best be indicated by reference to the evidence of Mr. Glass.

> Then, having made that investigation—and this was all in 1942—by the end of 1942 we were formulating some principles under which we would subsidize importers who were bringing in merchandise to be further manufactured and sold in Canada. And as a result of our experience gained in 1942, early in 1943 we established an investigation procedure which we considered to be in line with the statement of import policy which Mr. Cameron has filed this morning. I might refer to the particular section which we had in mind—and that is 7(*b*)—where it says, to paraphrase it, that the maximum amount of subsidy payable in respect of any eligible goods is the amount by which the laid-down cost of the goods exceeds such other costs as may be appropriate, having regard to the maximum selling price of such goods or of goods made from or with them. So, early in 1943, we developed the procedure which, in our opinion, achieved what we were directed to do in section 7(*b*). We found out at that time in 1943 that in 1941 the applicant's selling price for these tea bags was $2 00 per M. We found out, or investigation in 1943 revealed, that the applicant's selling price of these tea bags during the period of February 1, 1941 to August 14, 1941 was $2 00 per M. On August 15th the selling price was increased to $2 10 per M and on October 1, 1941 the selling price was increased to $2.18 per M, an increase of 9 per cent over the price in effect during February through to August 14th . . . 9 per cent; 18 cents on $2 00. So that the procedure which we established

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at that time was that the basic cost appropriate to the $2.00 selling price was that old figure I gave you, $1.2068. The applicant's normal situation from February 1, 1941 to August 14, 1941 was that he had a cost of $1.2068, and he had a selling price of $2.00. On October 1, 1941, he had a selling price of $2.18, as a result of increasing his price, which was a perfectly legal thing for him to do prior to control. So, in order to leave him in what we considered to be his normal situation, we said, "the basic cost which you can stand is 9 per cent higher than $1.2068", and that figure is $1.3154. So in May, 1943, we then adjusted all these claims on the new basic cost of $1.3154.

In the result, claims 1 to 9 were re-assessed in May, 1943, on the basis of a basic laid-down cost in 1941 of $1.3154 and a maximum selling price of $2.18 per M, instead of $1.2068 per lb. on the basis of a selling price of $2.00 per M. On the new basis, only claims 1 and 2 were entitled to be paid subsidy as shown in exhibit 5. In all other cases no subsidy was payable, or where it amounted to less than $25.00, it was disallowed as no claims under $25.00 were paid. Repayment is now claimed of the difference between the amounts paid to the defendant and the amount of subsidy to which he was entitled on the basis of this re-assessment. No objection is taken to the amount that is so claimed.

Early in 1943 the Corporation established a new investigation procedure which appeared to be consistent with the statement of import policy by the Chairman of the Wartime Prices and Trade Board (exhibit 2), the relevant parts of which are as follows:

7(*b*) The maximum amount of subsidy payable in respect of any eligible goods is the amount by which the laid-down cost of the goods exceeds the laid-down cost of similar goods entered for consumption during the basic period, or at such other time or exceeds such other costs as may be appropriate having regard to the maximum selling price of such goods, or of goods made from or with them.

(*c*) A subsidy shall not be payable if, or shall be less than the aforesaid maximum to the extent that, the increased laid-down cost can reasonably be expected to be borne by the applicant or by subsequent purchasers other than consumers at the retail.

This involved consideration of a new factor not previously used, namely, the maximum selling price in the basic period, i.e. from September 15 to October 14, 1941. This second investigation showed that while the selling price of tea bags had been $2.00 per M (sales tax included) from February 1, 1941 to August 14, 1941, it was increased to $2.10 per M on August 15, 1941, and to $2.18 per M on October 1, 1941, in each case sales tax included. The sale price having

increased by 9 per cent, the Corporation felt that the basic laid-down cost of the paper should be increased by 9 per cent also, thus lessening the difference between the basic laid-down price and the actual laid-down cost of each item shown in the various applications. It is not at all clear as to whether the Corporation in 1942, when it made its first investigation, had knowledge of these changes in sales price in 1941, but it is evident that, even if they had, they were then considered as of no importance and were not taken into consideration. It was only because of the different system adopted early in 1943 that they were considered of importance.

That appears in a further statement of Mr. Glass as follows:

> Q. That clarifies it. What you are telling me now is that it was not due to any lack of facts but rather was due to an entirely different system that you adopted in 1943 that you came along and asked for this money back.
>
> A. That is correct.

Claims 1 to 9 were all made in 1942 and payments or adjustments thereof were made to the defendant on the basis of the first policy adopted by the Corporation. So far as the defendant was concerned, his sales prices in 1941, or any changes therein, were not considered by the Corporation to be of any relevancy in computing his subsidy. Under the policy then being followed by the Corporation, they were not then relevant facts and circumstances. If they had been required, the information was available to the investigators who had access to all the books and records of the defendant. Nothing was kept back by the defendant who acted in good faith throughout. He gave all the information that was requested and on the form of application supplied to him by the Corporation no information was asked for as to his sales prices in 1941. The investigators could have had this information and very possibly may have had it. Had the policy of the Corporation not changed early in 1943, the defendant would not have been re-assessed and would not have been asked for any refund.

Had the subsidies applied for been paid without investigation before any policy was determined, and on the understanding that necessary adjustments would be made when a policy was worked out, it would have been reasonable, I

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think, for one who had been paid a subsidy to rebate part or all of it, once the policy had been established. But here a policy was established in 1942 and on that policy further adjustments to, or settlements of, claims were made in 1942. There can be no question, I think, that the Corporation had power to alter the basis of its policy for payment of subsidy insofar as it had to consider applications thereafter made. As pointed out in the statement of import policy (exhibit 2), payment of subsidies is discretionary and not obligatory and goods could at any time be excluded from subsidy. The amount of the subsidy might be adjusted which, I think, means "varied". Exhibit 2 clearly states that it is effective from February 11, 1943, and by that date all of claims 1 to 9 had been disposed of under the former policy.

How then can it be said that at the time the applications were made, or were considered by the Corporation, all the relevant facts and circumstances were not in the possession of the Corporation? Relevant facts and circumstances must mean all those facts and circumstances which were necessary to give proper and full consideration to the applications under the policy of the Corporation then existing. The evidence of Mr. Glass is clearly that the matter of selling prices in 1941 was not in 1942 a relevant fact or circumstance. It was not considered at all. I cannot find that, by a mere change in policy, that which under the old policy was undoubtedly irrelevant can become relevant to cases already disposed of. I have not been referred to any section of the Order in Council which gives such power to the Corporation. Had the Court power to determine the question as to whether all the relevant facts and circumstances had been known to the Corporation, I should undoubtedly have reached the conclusion that they were so known.

In view, however, of the provisions of section 3 (6) of P.C. 7475, to which I have previously referred, the plaintiff must succeed.

There will, therefore, be judgment declaring that the plaintiff is entitled to be paid by the defendant the sum of $1,073.25 and, if demanded, the taxed costs of the action.

Judgment accordingly.