

1965
*Dec. 9
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HER MAJESTY THE QUEENAPPELLANT;

AND

BERNARD RANDOLPH and WORLD }
WIDE MAIL SERVICES CORPORA- } RESPONDENTS.
TION }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Crown—Petition of right—Interim order suspending postal service—
Whether party affected entitled to be heard before order made—
Post Office Act, R.S.C. 1952, c. 212, ss. 7, 40—Crown Liability Act,
1952-53 (Can.), c. 30—Canadian Bill of Rights, 1960 (Can.), c. 44,
s. 2(e).*

On April 22, 1965, the postal service of the corporate respondent, whose business consisted in sending by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they asked it so to send, was temporarily suspended by the Post Office Department for the purpose of an investigation. Samples of the material which the other respondent offered for sale by means of the facilities of the corporate respondent were submitted to the Department for inspection. On April 28, 1965, the postal service of both respondents was suspended by interim orders signed by the Acting Postmaster General, pursuant to s. 7 of the *Post Office Act*, R.S.C. 1952, c. 212. These orders were made without the respondents having been previously heard and without having had any opportunity to object or present a defence. The Exchequer Court granted the respondents' petition of right and declared that the interim orders were invalid. The Crown appealed to this Court.

Held: The appeal should be allowed.

The two interim prohibitory orders were validly made. Section 7 of the *Post Office Act* authorizes the making of an interim prohibitory order without prior notice to the party affected. It would be inconsistent with the terms of the section to hold that before making an interim order the Postmaster General must hold a hearing. If such were the case, the hearing prescribed by s. 7(2) would be an unnecessary repetition. The maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(e) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44. Section 7(1) enables the Postmaster General to act swiftly in performing the duty of protecting the public, while s. 7(2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.

The corporate respondent was not entitled to have the mail detained during the six-day period, before the interim order was made, delivered to it. Once the order was made, to deliver the mail accumulated during that period would have been to disobey the order.

Any claim for damages for the detention of the corporate respondent's mail during that six-day period was precluded by the terms of s. 40 of

* PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

the *Post Office Act*, a special statutory provision which would constitute an exception to the general terms of the *Crown Liability Act*, 1952-53 (Can.), c. 30.

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Couronne—Pétition de droit—Ordre provisoire suspendant le service postal—La personne concernée a-t-elle le droit d'être entendue avant que l'ordre soit émis—Loi sur les Postes, S.R.C. 1952, c. 212, arts. 7, 40—Loi sur la Responsabilité de la Couronne, 1952-1953 (Can.), c. 30—Loi sur la Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 2(e).

Le 22 avril 1965, le service postal de la corporation intimée, dont le commerce consistait à envoyer par la poste, au nom de ses clients, toutes les marchandises, documents, correspondance et autres effets que ces derniers lui demandaient d'adresser ainsi, a été temporairement suspendu par le Ministère des Postes pour fins d'enquête. Des échantillons du matériel que l'autre intimé offrait en vente par l'entremise de la corporation intimée ont été remis au Ministère pour être soumis à un examen. Le 28 avril 1965, sous l'autorité de l'art. 7 de la *Loi sur les Postes*, S.R.C. 1952, c. 212, le service postal des deux intimés a été suspendu par un ordre provisoire signé par le Ministre agissant comme Ministre des Postes. Ces ordres ont été rendus sans que les intimés aient été préalablement entendus et sans qu'ils aient eu l'opportunité de s'y objecter ou de présenter une défense. La Cour de l'Échiquier a accordé la pétition de droit des intimés et a déclaré que les ordres provisoires étaient invalides. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

Les deux ordres prohibitifs provisoires ont été valablement émis. L'article 7 de la *Loi sur les Postes* autorise l'émission d'un ordre prohibitif provisoire sans avis préalable à la personne concernée. Ce ne serait pas consistant avec les termes de l'article que de dire que le Ministre des Postes doit tenir une audience avant d'émettre un ordre provisoire. Si tel était le cas, l'audience prescrite par l'art. 7(2) serait une répétition non nécessaire. La maxime *audi alteram partem* réfère à l'émission de décisions affectant les droits des parties et qui de leur nature sont définitives, et ceci est vrai aussi pour ce qui concerne l'art. 2(e) de la *Loi sur la Déclaration canadienne des droits*, 1960 (Can.), c. 44. L'article 7(1) permet au Ministre des Postes d'agir rapidement dans l'exécution de son devoir de protéger le public, alors que l'art. 7(2) protège la personne concernée en lui conférant le droit à une audition avant que tout ordre émis contre elle devienne définitif.

La corporation intimée n'avait pas droit à la livraison du courrier qui avait été retenu durant la période de six jours qui s'est écoulée avant que l'ordre provisoire soit émis. Une fois que l'ordre a été émis, la livraison du courrier accumulé durant cette période serait une désobéissance à l'ordre.

En vertu des termes de l'art. 40 de la *Loi sur les Postes*, une disposition statutaire spéciale constituant une exception aux termes généraux de la *Loi sur la Responsabilité de la Couronne*, 1952-1953 (Can.), c. 30, aucune réclamation pour dommages résultant de la rétention du courrier de la corporation intimée durant cette période de six jours ne peut être entretenue.

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APPEL de la Couronne d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada, accordant une pétition de droit. Appel maintenu.

APPEAL by the Crown from a judgment of Jackett P. of the Exchequer Court of Canada, granting a petition of right. Appeal allowed.

Paul Ollivier, Q.C., for the appellant.

Jean-Paul Ste-Marie, Q.C., and *Conrad Shatner*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the President of the Exchequer Court declaring the respondent Randolph entitled to have delivered to him the mail not delivered to him in due course of mail during the period from April 28, 1965, to the filing of the Petition of Right, making a similar declaration in favour of the other respondent covering the period from April 22, 1965 to the filing of the Petition, and declaring each respondent entitled to be paid damages in respect of the detention of the aforesaid mail and directing a reference to assess the damages.

No oral testimony was given at the trial. From the pleadings and statements made by counsel the learned President found the facts, so far as relevant, to be as follows.

1. The suppliant Randolph does business in the city and district of Montreal and elsewhere under the registered firm name of 'Al Brino Services Reg'd.'

2. The corporate suppliant does business in the city and district of Montreal and elsewhere.

3. Randolph's business consists in offering to sell and selling films, books, photographs and similar objects.

4. The corporate suppliant's business consists in sending by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they ask it so to send.

5. On Thursday, April 22, 1965, officers of the Post Office Department in Montreal suspended temporarily the postal service of the corporate suppliant for the purpose of an investigation.

6. On Friday, April 23, 1965, the suppliant Randolph, at the request of officers of the Department, agreed to submit to them samples of films, books and photographs that he offered for sale by means of the facilities of the corporate suppliant. These samples were immediately sent to higher

officers of the Department in Ottawa with a view to determining whether there were grounds, on the basis of such samples, for recommending to the Postmaster General that he exercise, in respect of the suppliants, the powers conferred upon him by section 7 of the *Post Office Act*, R.S.C. 1952, chapter 212. In the meantime, the corporate suppliant's postal services remained suspended by authority of the Deputy Postmaster General.

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7. On Monday, April 26, 1965, the aforesaid samples were seen and examined by the Deputy Postmaster General and two other officers of the Post Office Department.

8. On Wednesday, April 28, 1965, the Deputy Postmaster General wrote a memorandum to the Postmaster General recommending that an interim prohibitory order be made against the suppliants under section 7 of the *Post Office Act* and, on the same day, the Acting Postmaster General signed two documents purporting to be interim orders under that section prohibiting the delivery of mail directed to them or deposited by them in the Post Office. These orders were made without the suppliants having been previously heard and without the suppliants having had any opportunity of objecting thereto or presenting evidence.

9. The mail to which these orders relate, and mail that was not delivered as a result of the action taken by the Montreal Post Office officials on April 22, is detained by officers of the Post Office Department in a safe place.

Section 7 of the *Post Office Act* is as follows:

7. (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.

(2) Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his last known address informing him of the order and the reasons therefor and notifying him that he may within ten days of the date the registered letter was sent, or such longer period as the Postmaster General may specify in the letter, request that the order be inquired into, and upon receipt within the said ten days or longer period of a written request by the person affected that the order be inquired into, the Postmaster General shall refer the matter, together with the material and evidence considered by him in making the order, to a Board of Review consisting of three persons nominated by the Postmaster General one of whom shall be a member of the legal profession.

(3) The Board of Review shall inquire into the facts and circumstances surrounding the interim prohibitory order and shall give the person affected a reasonable opportunity of appearing before the Board of Review, making representation to the Board and presenting evidence.

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(4) The Board of Review has all the powers of a commissioner under Part I of the *Inquiries Act*, and, in addition to the material and evidence referred to the Board by the Postmaster General, may consider such further evidence, oral or written, as it deems advisable.

(5) Any mail detained by the Postmaster General pursuant to subsection (8) may be delivered to the Board of Review, and, with the consent of the person affected, may be opened and examined by the Board.

(6) The Board of Review shall, after considering the matter referred to it, submit a report with its recommendation to the Postmaster General, together with all evidence and other material that was before the Board and upon receipt of the report of the Board, the Postmaster General shall reconsider the interim prohibitory order and he may revoke it or declare it to be a final prohibitory order, as he sees fit.

(7) The Postmaster General may revoke an interim or final prohibitory order when he is satisfied that the person affected will not use the mails for any of the purposes described in subsection (1), and the Postmaster General may require an undertaking to that effect from the person affected before revoking the order.

(8) Upon the making of an interim or final prohibitory order and until it is revoked by the Postmaster General,

(a) no postal employee shall without the permission of the Postmaster General

(i) deliver any mail directed to the person affected, or

(ii) accept any mailable matter offered by the person affected for transmission by post,

(b) the Postmaster General may detain or return to the sender any mail directed to the person affected and anything deposited at a post office by the person affected, and

(c) the Postmaster General may declare any mail detained pursuant to paragraph (b) to be undeliverable mail, and any mail so declared to be undeliverable mail shall be dealt with under the regulations relating thereto.

(9) Where no request that an interim prohibitory order be inquired into is received by the Postmaster General within the period mentioned in subsection (2), the order shall, at the expiration of the said period, be deemed to be a final prohibitory order.

The interim prohibitory order made in respect of the respondent World Wide Mail Services Corporation reads as follows:

IN THE MATTER OF SECTION 7 OF THE POST OFFICE ACT INTERIM PROHIBITORY ORDER

Whereas I have reasonable grounds to believe and do believe that the Company hereinafter named is by means of the mails, committing or attempting to commit offences, namely offences under Section 323 of the Criminal Code and offences under Section 324 of the Criminal Code.

I, therefore, by virtue of the authority vested in me under the provisions of Section 7 of the Post Office Act, prohibit the delivery of all mail directed to World Wide Mail Service Corp. 265 Craig Street West, Room 205, Montreal, Quebec, or directed to it by any other

name at any other address, or deposited by the said World Wide Mail Service Corp. in a Post Office.

The particulars of the said offences are as follows:

Section 323 Criminal Code—by deceit, falsehood and other fraudulent means, defrauding or attempting to defraud the public of money by misrepresenting the character of motion picture films, books and photographs offered for sale.

Section 324 Criminal Code—making use of the mails for the purpose of transmitting circulars devised and intended to deceive or defraud the public or obtain money under false pretences by misrepresenting the character of motion picture films, books and photographs offered for sale.

Dated at Ottawa, Ontario, this 28th day of April, 1965.

(Sgd.) J. R. Nicholson

Acting Postmaster General.

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The interim prohibitory order made in respect of the respondent Randolph is similarly worded and bears the same date.

On April 30, 1965, a registered letter was sent to each of the respondents in compliance with the provisions of subs. (2) of s. 7. It is said in the Statement of Defence that the respondents requested that the interim prohibitory orders be inquired into and that the Postmaster General referred the matter to a Board of Review but that the Board has not proceeded with the inquiry pending the disposition of the Petition of Right.

The learned President was of opinion that, while his action is primarily the exercise of an administrative and executive authority, the Postmaster General when deciding whether or not to issue an interim prohibitory order is under a duty to act judicially so that the maxim *audi alteram partem* is applicable and his failure to give the respondents an opportunity to be heard before issuing the interim orders was fatal to their validity.

I do not find it necessary to decide the exact nature of the authority which the Postmaster General was exercising because it appears to me that on its true construction s. 7 of the *Post Office Act* authorizes the making of an interim prohibitory order without prior notice to the party affected. There is no doubt that Parliament has the power to abrogate or modify the application of the maxim *audi alteram partem*. In s. 7 it has not abrogated it. Rather it has provided that before any final prohibitory order is made, the party affected shall have notice and a right to an expeditious hearing and has defined the procedure to be

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Cartwright J. followed. It would, in my opinion, be inconsistent with the scheme of the section to hold that before making an interim order the Postmaster General must hold a hearing. If such a duty existed it would be a duty to notify the party affected of what was alleged against him and to give him a reasonable opportunity to answer. If this were done the hearing prescribed by subs. (2) would be an unnecessary repetition. Generally speaking the maxim *audi alteram partem* has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2 (e) of the *Canadian Bill of Rights* upon which the respondents relied.

The following passage in Broom's Legal Maxims, 10th ed., at p. 117 is in point:

Although cases may be found in the books of decisions under particular statutes which at first might seem to conflict with the maxim, it will be found on consideration that they are not inconsistent with it, for the rule, which is one of elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard.

The main object of s. 7 is to enable the Postmaster General to take prompt action to prevent the use of the mails for the purpose of defrauding the public or other criminal activity. That purpose might well be defeated if he could take action only after notice and a hearing. Sub-section (1) enables him to act swiftly in performing the duty of protecting the public while subs. (2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.

In my opinion, the two interim prohibitory orders in question were validly made.

Two subsidiary questions remain. The first is as follows. The mail of the corporate respondent was admittedly detained during the period from April 22, 1965, to April 28, 1965. The learned President was of opinion that even if the orders made on April 28, 1965, were valid the corporate respondent was entitled to have the mail detained during that period delivered to it. I am unable to agree with this view. The order of April 28, 1965, in regard to the corporate respondent has already been quoted. By its terms the delivery of all mail addressed to that respondent was prohibited. Its operation was not restricted to mail posted on or after the day of the making of the order. Once the order

was made, to deliver the mail accumulated during the period mentioned would have been to disobey the order.

The second subsidiary question is whether the corporate respondent is entitled to damages for the detention of its mail during the six day period. The claim for such damages is against Her Majesty and would seem to be precluded by the terms of s. 40 of the *Post Office Act* which reads as follows:

40. Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

This is a special statutory provision which would constitute an exception to the general terms of the *Crown Liability Act*. For this reason I am of opinion that this claim for damages cannot be sustained.

I would allow the appeal with costs, set aside the judgment of the Exchequer Court and direct that judgment be entered dismissing the Petition of Right with costs.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondents: J. P. Ste.-Marie, Montreal.

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