

THE B. V. D. COMPANY LIMITED APPELLANT;

1955

AND

*Jun. 13, 14

*Oct. 4

HER MAJESTY THE QUEEN RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Action to recover subsidies paid by the Commodity Prices Stabilization Corporation—Non-compliance with condition attached to payment—Whether Crown bound by statement of officer—Whether Crown had the right to sue.

The Crown sought a return or reimbursement of "special subsidies" granted by the Commodity Prices Stabilization Corporation, a Crown corporation established under the direction of the Wartime Prices and Trade Board, to the appellant on textiles importations made by it in 1947. The order for these textiles had been placed in May, 1947, but they were not brought into Canada until September and October, 1947. The subsidies were payable subject to all the conditions imposed by the Corporation. The appellant was advised in a letter from an assistant supervising examiner of the Corporation, that the date prior to which the goods had to be invoiced and shipped was December 31, 1947. The goods were not invoiced and shipped at that date. The trial judge maintained the action.

Held: The appeal should be dismissed.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, and Fauteux JJ.

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Per Kerwin C.J., Taschereau and Fauteux JJ.: The statement in the letter of the supervising examiner was a sufficient specification, under the statement of policy of the Board, of the date before which the goods had to be sold in order to qualify for the subsidy.

The supervising examiner had no authority to declare a policy for the Board but in any event there was no policy declared in the letter.

The Corporation was the agent of the Crown and a principal has the right to sue in his own name.

Per Rand and Kellock JJ.: The goods in question came within the requirement of sale on or before December 31, 1947. The letter of the supervising examiner was only a warning that the matter rested within the judgment of the Board and that on goods sold after the specified date the subsidy situation would be precisely what the Board might decide. The writer of the letter had no authority to do more than to indicate what that policy might be.

APPEAL from the judgment of the Exchequer Court of Canada (1), Cameron J., maintaining an action to recover from the appellant subsidies paid by the Commodity Prices Stabilization Corporation.

F. B. Chauvin, Q.C. for the appellant.

R. Ouimet, Q.C. for the respondent.

The judgment of the Chief Justice and of Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal by The B.V.D. Company Limited from a judgment of the Exchequer Court (1) ordering and adjudging that His Majesty the King, as plaintiff (now the respondent, Her Majesty the Queen), was entitled to be paid by the appellant-defendant \$39,126.54 with interest thereon at 5% per annum from February 23, 1950, to the date of judgment. While originally there was some dispute as to the figures, it is admitted that if the respondent is entitled to succeed at all he is entitled to judgment for the amount and interest mentioned.

The Information claimed the \$39,126.54 as a return or reimbursement of subsidies granted the appellant on textile importations made by it. The subsidies were paid to the appellant by a Crown corporation—The Commodity Prices Stabilization Corporation (hereinafter called “the Corporation”)—in respect of the importation of cotton fabrics, the order for which was placed on May 31, 1947, but which were not brought into Canada until late September and October

1947, the earliest date of entry being September 26, 1947. Under a system of price controls in force in Canada, Maximum Price Regulations had been established in 1941 and under the authority of an Order-in-Council the Minister of Finance caused the Corporation to be incorporated "With the intent and for the purpose of facilitating under the direction of the Wartime Prices and Trade Board the control of prices of goods, wares and merchandise in Canada". The position of the Board at all relevant times was well known and there is no dispute as to its powers.

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On February 22, 1947, the Board issued a "STATEMENT OF POLICY ON SUBSIDIES ON IMPORTED TEXTILES". This referred to the Corporation's Form C-28 relating to what has been termed "general subsidies" with which we are not concerned since it is admitted that what were paid to the appellant were "special subsidies" under a statement of policy issued by the Board on September 13, 1947. Prior thereto the Board issued a statement on June 2, 1947, and listed in Schedule I the "goods eligible for subsidy subject to the limitations and conditions set forth in s. 4(a)". The class of importations made by the appellant came within this Schedule. The relevant portions of the statement of policy are as follows:—

1. The payment of subsidies is discretionary, not obligatory; no person has any legal right to an import subsidy or any other subsidy administered by or under direction of the Board. It follows that subsidies shall not be payable, and if already paid may be recovered, on any imports not falling within the conditions of eligibility for import subsidy herein set forth.

3. Eligibility for subsidy within the above classes is limited to those goods listed or described in Schedules I and II hereto when sold in compliance with regulations from time to time made effective by the Board, and subject to the limitations set out elsewhere in this Statement. The Board may from time to time make additions to or deletions from the said Schedules; and goods classified by the Department of National Revenue for Customs purposes under a tariff item not in effect on January 1, 1946, are deemed to be included in Schedule II hereto and are subject to all the limitations applying to that Schedule.

9. (a) *General*: From time to time goods may be made ineligible for subsidy by removal from Schedule I or II hereto or may be made eligible for reduced subsidy, with higher maximum prices or suspension from maximum prices being provided concurrently. In such cases the Corporation is prepared to give consideration to applications for special subsidy protection for such goods entered for consumption at Customs after the effective date of the change in status provided such importations arise

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from firm purchase commitments of reasonable character and amount entered into prior to the date of such change but not prior to December 1, 1941. The special subsidy protection which may be available is designed to assure the importer that he will be subsidized, if subsidy is necessary, on a basis appropriate to the price at which in the opinion of the Board such goods can reasonably be expected to be sold in Canada in the changed circumstances.

This special subsidy protection is subject to the following terms and conditions:

- (i) The importer must file notice of his intention to apply for the special subsidy on goods imported after the date on which existing subsidies on them have been reduced or removed. He must file this notice with the Corporation at Ottawa on a form provided by the Corporation during the 10 days immediately following the date on which such goods are entered for consumption at Customs.
- (ii) The Board will designate a selling price at which in its opinion such goods can reasonably be expected to be sold in Canada under the changed conditions and a corresponding base cost for subsidy purposes. The price so designated will in no case be lower than the maximum price in effect immediately prior to the change in subsidy regulations and will usually be higher.
- (iii) A date or dates before which the goods, or products made from them are to be sold in Canada if the goods are to qualify for special subsidy protection will be specified by the Board.
- (iv) Any subsidy payment under this special protection will be subject to recovery by the Corporation
 - (a) in an appropriate amount in relation to the extent that the actual selling prices of the imported goods or products made from them exceed the prices designated by the Board,

.....

9. (b) *Special note on Goods Covered by Validated C-28 Forms:* For the past several months special subsidy protection similar to that described in Clause (a) of this Section has been provided by the Statement of Policy on Subsidies on Imported Textiles effective February 24th for importations of cotton yarns and fabrics covered by validated C-28 forms. For all purchases covered by properly validated C-28 forms issued on and before May 31, 1947, this special subsidy protection is not subject to the profit limitation described in Clause (c) of paragraph (iv) above. However, on all purchases covered by C-28 forms issued on and after June 2, 1947, the special subsidy protection will be subject to the profit limitation described in that clause. Importers are reminded that to claim the special subsidy protection provided for goods covered by properly validated C-28 forms they must file notice of intention to apply for the special subsidy with the Corporation at Ottawa on Form C-29 during the 10 days immediately following the date on which such goods are entered for consumption at Customs.

The appellant filled in and sent to the Corporation several Forms C-29 referred to in the above statement of policy and stated therein that the date prior to which it would sell the goods was April 30, 1948. In a letter dated October 22,

1947, from an assistant supervising examiner of the Corporation, it was pointed out that the date prior to which the goods had to be invoiced and shipped was December 31, 1947. In my view, this statement in the letter is a sufficient "specification" by the Board under condition (iii) set out in the Board's statement of policy of June 2, 1947.

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The subsidies were payable subject to all the conditions which appear in the statement of June 22, 1947, and if ratification of the specification of the date December 31, 1947, in the letter of October 22, 1947, be necessary, it is to be found in what is now stated. It is clear from the evidence that the date December 31, 1947, had been a matter of consideration for some time and in case there could be any doubt as to the conclusion stated in the last paragraph the Board itself on September 12, 1947, issued a further "Statement of Policy on Import Subsidies" containing the following:—

Referring to the "Statement of Policy on Import Subsidies" effective June 2nd, 1947, as amended, notice is hereby given of the following further amendments to the said statement effective September 15, 1947:

1° Schedule I is hereby deleted.

As explained in the Board's "Notice to Users of Imported Cotton Fabrics", dated September 13, 1947, the statement of policy had the effect of cancelling regular subsidies. The notice reads:—"Effective September 15, 1947, imported cotton fabrics will become ineligible for regular subsidy and price ceilings will be suspended on all cotton goods". While it is not clear, I am inclined to agree with counsel for the respondent that this includes all subsidies, regular and special, notwithstanding the fact that the word "regular" is used in the notice. In any event, on December 18, 1947, the Corporation sent a notice to importers reading in part as follows:—

TO IMPORTERS:—

The Wartime Prices and Trade Board has advised the Corporation that effective at the close of business December 31, 1947, no subsidy will be available on goods made ineligible for subsidy and not invoiced and delivered by the importer on or before that date. The Board has instructed the Corporation to recover the subsidy content in the subsidized imported goods listed below, held in inventory at the time (whether in the same condition as imported, in process or in finished state) by the persons or firms who received regular or special subsidy thereon—

Cotton goods, i.e., goods chiefly by weight of cotton.

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There can be no doubt that the goods in question come within the last line of this notice.

The appellant also takes the position that one sentence in the letter of October 22, 1947, was a holding out by the Corporation, and therefore by the Board, that if there would be a price increase by shirt manufacturers after December 31, 1947, "basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase". In fact, the appellant repaid to the Corporation, or to the respondent, an amount which it calculated was repayable on what it states was its understanding of the meaning of that sentence. It is necessary to set out the whole of this letter:—

We are in receipt of some 12 C. 29 Forms submitted in triplicate by your good selves in which in Section 4 of the Form we note that you have inserted the date April 30, 1948 as the "date prior to which applicant will sell goods". On the covering Advice Form on which you will be designated appropriate Basic Costs for special subsidy purposes to be used on any application for subsidy on our Form C4A to be submitted covering these importations we would advise that we shall show in Section (h) at the bottom of the Advice Form the date December 31, 1947 as the date prior to which the goods must be invoiced and shipped in order to be priced for subsidy purposes at the figure designated in Section (f) of the Advice Form.

At the present time we are able to designate the same basic costs that you have been given by pre-decontrol Price Notifications which take into account the selling price increases effective July 1, 1947. It is evident that such Advice Forms as are issued at the present time on this basis allow you to sell the garments on the same basis of subsidy as that in effect prior to decontrol, so long as the garments are invoiced and shipped prior to December 31, 1947, and that such an agreement will stand irregardless of any adjustments of the Canadian price level for comparable fabrics up to the date of December 31, 1947.

You will appreciate that we are unable to afford subsidy assistance on the same basis as that in effect before September 15, 1947 for any longer period than up to the first of next year, since it is our understanding that no agreement has been entered into with the Wartime Prices and Trade Board by the Shirt Manufacturers to hold the price line at the pre-decontrol level beyond the first of next year. If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.

We have the alternative of holding the Forms C.29 in abeyance until such time as the Canadian market level for the fabric covered is clarified for the first quarter of 1948. However, we feel that you may wish to invoice and ship some of the goods prior to December 31st, 1947 and we advise that upon receipt of the Advice Forms covering the C.29's in question, you are quite free to apply for subsidy on the bases designated on the Advice Forms (showing in Col. J. (a) of our Form C4A the basic cost designated in Section (f) of the Advice Forms) on all garments

invoiced and shipped prior to December 31, 1947. On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy.

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I think the trial judge was quite right in deciding that no supervising examiner of the Corporation had the authority to declare such a policy, and I also agree that in any event it is not open to the construction put forward on behalf of the appellant in view of the last sentence in the letter: "On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy". The date was, of course, December 31, 1947, and this was a clear and unequivocal notice to the appellant that, if it did not ship and invoice the goods prior to December 31, 1947, it would do so at its own risk.

The final point taken by the appellant was that the proceedings should have been instituted in the name of the Corporation instead of in the name of His Majesty. I am inclined to agree with the trial judge that that issue was not raised in the pleadings but without deciding the point on a question of pleading I am satisfied that the plaintiff was entitled to file the Information. The Corporation was his agent. Undoubtedly the allegation in the Information that the subsidies were paid by the Corporation "for and on behalf of His Majesty" was admitted by the statement of defence and a principal has a right to sue in his own name.

The appeal should be dismissed with costs.

The judgment of Rand and Kellock JJ. was delivered by:—

RAND J.:—The information in these proceedings was filed by Her Majesty to recover the amount of certain subsidies paid to the appellants under formulations of the War-time Prices and Trade Board, acting generally by the Commodity Prices Stabilization Corporation Limited, to enable them as importers of cotton goods from the United States to continue their trade at the selling prices fixed by the Dominion Government in the early stages of the war. Admittedly there was no legal right on the part of an importer to demand a subsidy; any payment made was voluntary and on the condition that if ultimately the situation in relation to particular goods became changed

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by reason of policy considerations from time to time enunciated, the Government would be entitled to recover the whole or any part of what had been paid.

The communication to the trade of the bases proposed was by means of "Statements of Policy" and beginning with that made on November 25, 1946 there followed various modifications and restatements issued in the months of January, February, June, July, September and December of 1947. The scheme devised provided for a general subsidy on listed commodities, among them cotton goods, for the purposes of the computation of which the Board fixed a basic cost related to actual cost and to the controlled sale price of the products. The actual cost might of course be equal to or greater than that price and with the basic cost so related, the subsidy enabled the trade, in a broad sense, to maintain a supply deemed reasonably required by the country's economy.

Application for leave to import was made on what was known as Form C-28 and in them the quantity, the cost price, the date before which the goods would be imported and the limit date within which they would be sold were set out, and the approval given was limited to what was shown. It was required that the purchase order should be placed within a specified number of days from the receipt of the advice note of approval. Upon the entry of the goods in Customs, they became "eligible" for subsidy and notice of their arrival must have been given within ten days. At first the subsidies were not computed until after the goods had been sold, but this was found to be inconvenient and the practice changed. Thereafter, following importation, application could at once be made.

The applications for importation of the goods in question under Form C-28 were made prior to May 31, 1947. Throughout the first six months of that year the administration had been looking to the withdrawal of both controls and subsidies, and on June 2 a general statement was issued restating the position of the Board toward the rapidly changing conditions. It contained one clause of special significance. It foresaw from time to time the removal of goods from the schedule of those eligible for subsidy and declared that in cases where the entry at customs was made after the date of any change relating to eligibility for the

general or for a reduced subsidy, application for what was called "special subsidy" would be given consideration provided firm purchase commitments had been made prior to the changes. The following sentence expresses the purpose in view:—

The special subsidy protection which may be available is designed to assure the importer that he will be subsidized, if subsidy is necessary, on a basis appropriate to the price at which, in the opinion of the Board, such goods can reasonably be expected to be sold in Canada in the changed circumstances.

By a notice given by the Board on September 12, Schedule I, annexed to the statement of June 2, which listed cotton goods, was deleted as of September 15, 1947; this was followed on September 13 by a notice to importers of cotton fabrics which dealt with "the recovery of subsidy in inventories". It declared that "effective September 15, 1947, imported cotton fabrics will become ineligible for regular subsidy, and price ceilings will be suspended on all cotton goods." The effect of this was that on cotton goods entered in customs on or after September 15 the regular subsidy was no longer available. Obviously, however, goods imported prior to that time pursuant to applications made under Form C-28 did not lose their eligibility which continued until a limit of time for sale had been declared.

On the other hand, as in the case of the goods with which we are concerned and which were entered after September 15 although ordered prior thereto, since subsidy was not available under Form C-28 new applications became necessary under Form C-29 to be made within ten days of the customs entry. From time to time they were accordingly made and the amount of subsidies referable to the goods covered by them was paid before the end of the year. The recovery of part of that amount is now sought here.

Under date of December 18, 1947, the Corporation issued a notice to importers upon the interpretation of which the controversy before us largely hinges. The opening paragraph reads:—

The Wartime Prices and Trade Board has advised the Corporation that effective at the close of business December 31, 1947, no subsidy will be available on goods made ineligible for subsidy and not invoiced and delivered by the importer on or before that date. The Board has instructed the Corporation to recover the subsidy content in the subsidized imported

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goods listed below, held in inventory at the time (whether in the same condition as imported, in process or in finished state) by the persons or firms who received regular or special subsidy thereon—

Cotton goods, i.e., goods chiefly by weight of cotton . . .

Mr. Chauvin strenuously contends that his goods had not, prior to that date, been “made ineligible for subsidy”, and that consequently he did not come within the requirement of sale on or before December 31, 1947. Strictly speaking, and if we give the same meaning to each use of the word “subsidy”, it is a contradiction in terms to speak of a subsidy payable on goods “made ineligible for subsidy”. Goods could be made ineligible either by specifying a date on or before which they must be imported as was done on September 13, or on or before which they must be disposed of as in the notice we are dealing with. To give the sentence intelligibility, therefore, we must look to the prior statements of policy in the light of which and the developing modifications, that final communication was made.

In the notice of September 13 it was stated that as it was desirable to stabilize cotton prices at existing levels, the Board was prepared to forego the recovery of subsidy in inventories as at the date of decontrol (September 15) provided the existing ceiling prices were not increased until the inventories of subsidized fabrics had been exhausted; and that being the case in relation to cotton fabrics, it announced that the Corporation would seek to recover subsidy in inventories only in cases where and to the extent that the prices were increased after decontrol. Up to December 31 the prices on fabrics were not altered, and consequently the period for the allowance of regular subsidies continued to that date.

The appellant having made application after September 15 for subsidy on Form C-29, the goods received by it after that date were in fact eligible for subsidy. When the statement of December 18 was issued, the subsidy available generally was related both to goods imported prior to September 15 under Form C-28 but as yet unsold, and to goods imported after that date under Form C-29. In the one case it was “regular” and in the other “special”.

In the light of these circumstances, then, the meaning of the first sentence of the notice of December 18 becomes clear. “Goods made ineligible for subsidy” refers to goods removed from Schedule I and declared ineligible when

imported on or after September 15 by the notice of September 13. But the expression "no subsidy will be available" refers obviously both to regular subsidy on goods imported before September 15 and special subsidy on certain goods importer thereafter. In both cases, then, it was declared that the goods must be invoiced and delivered by the importer on or before December 31.

That is confirmed beyond controversy by the second sentence where it states that the Board has instructed the Corporation to recover the subsidy contained "in the subsidized imported goods" held in inventory on December 31 by the persons or firms "who receive regular or special subsidy thereon". There is further confirmation of this by the supplementary note of December 27 which extends the date December 31, 1947 to January 31, 1948 but declares that the change does not in any way affect Form C-29. This means that as to goods carrying special subsidy the date December 31 remains. The notice, therefore, expressly applies to the goods here in question.

Against this is raised certain advice contained in a letter to the company dated October 22 and signed by Shaver, Assistant Supervising Examiner of the Corporation. After acknowledging receipt of some twelve Forms C-29, he calls attention to the fact that the date "prior to which the applicant will sell the goods" is entered on the applications as April 30, 1948. He indicates that on the advice form to be returned the date within which the goods must be sold will be shown as December 31, 1947. Then he proceeds:—

You will appreciate that we are unable to afford subsidy assistance on the same basis as that in effect before September 15, 1947 for any longer period than up to the first of next year, since it is our understanding that no agreement has been entered into with the Wartime Prices and Trade Board by the Shirt Manufacturers to hold the price line at the pre-decontrol level beyond the first of next year. If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.

We have the alternative of holding the forms C.29 in abeyance until such time as the Canadian market level for the fabric covered is clarified for the first quarter of 1948. However, we feel that you may wish to invoice and ship some of the goods prior to December 31, 1947 and we advise that upon receipt of the Advice Forms covering the C.29's in question, you are quite free to apply for subsidy on the bases designated on the Advice Forms (showing in Col. J(a) of our Form C4A the basic cost designated in Section (f) of the Advice Forms) on all garments invoiced

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and shipped prior to December 31st, 1947. On any garments invoiced and shipped subsequently to that date we shall have to await clarification of the Board's policy.

It is urged that in reliance upon this language the goods imported were not disposed of before the end of the year as they might have been, and that it results in depriving the company of the subsidy benefit which it could have earned. That basis could operate only as an estoppel by promise; whether or not such a legal device can, in any circumstances, be raised against the Crown, I have no doubt that the present circumstances do not admit of it. The last sentence of the letter gives warning that the matter lies within the judgment of the Board and that on goods sold after the specified date the subsidy situation will be precisely what the Board may decide. That was simply stating the known fact and the determination of the Board was contained in the statement of December 18. The absolute administrative power over these matters was committed to the Board; the justification was the emergency; the object of the administration was to be achieved by fair dealing with those affected by it. The prescriptions and conditions from time to time laid down were not hard and fast rules; they enunciated provisional bases which, in an administrative manner, would guide the Board. Shaver had no authority in the admitted absence of a declaration by the Board to do more than to indicate what the policy might be. The condition of the subsidy, as already observed, was that recovery could be made when resulting from rulings of the Board. The meaning of the ruling made in respect of the matters in controversy, that of December 18, is not open to doubt, and the ground for the recovery is established.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walker, Martineau, Chauvin, Walker & Allison.*

Solicitor for the respondent: *Roger Ouimet.*