

1946

*May 7, 8.

*May 20.

UNION PACKING COMPANY LIMITED
(SUPPLIANT)

APPELLANT;

AND

HIS MAJESTY THE KING
(RESPONDENT)

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Contract—Negligence—Bacon Agreement between Canada and the United Kingdom, 1940—Bacon Regulations, Order in Council December 13 and 27, 1939—Bacon Board booking shipment for pork products to be furnished by suppliant—Products delivered at seaboard but no ship available for loading—Products deteriorated from being unattended—Whether Board bound to notify suppliant

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

or put products in cold storage—Whether Bacon Board a servant of the Crown—Validity of claim by Suppliant under section 19 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34.

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Suppliant, carrying on business as meat packers and provisioners, alleged that, on February 28th, 1941, it was notified by the Bacon Board that the latter had booked shipment for pork products on a steamship scheduled to load at Saint John from March 12th to 15th, 1941; that the suppliant proceeded to make arrangements accordingly and so notified the Board; that the products arrived at Saint John on March 11th, 1941 and were delivered at seaboard but no ship was available on which to load them; that the Board did not inspect the products until March 29th, 1941 when it advised the suppliant that some of them were rejected for slime, odour and mould; that the Board, knowing that no ship was available, failed to notify the suppliant and failed to put the products into cold storage until shipping space would be made available; and that on the resale of the rejected products the suppliant suffered loss to an amount of \$4,508.86. Suppliant claimed that the Crown, through the Board, had purchased or requisitioned its property and, alternatively, that it had suffered damages resulting from negligence of the Board. A question of law was set down for disposition before trial of the action as to whether a petition of right lies, assuming the acts or omissions alleged in it to be established. The President of the Exchequer Court of Canada held that the suppliant was not entitled to any of the relief sought in its petition. On appeal to this Court,

Held, reversing the judgment appealed from, that the appellant's claim under section 19 (c) of the *Exchequer Court Act*, "arising out of * * * injury to * * * property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment" might still be valid, even if the Board has no power to purchase or to appropriate. Therefore, the suppliant is entitled to proceed to trial on its petition of right.

APPEAL from the judgment of the President of the Exchequer Court of Canada (1) adjudging that the suppliant is not entitled to any of the relief sought in its petition of right.

Redmond Quain K.C. for the appellant.

F. P. Varcoe K.C. and *D. W. Mundell* for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal by the suppliant, Union Packing Company Limited, from a judgment of the Exchequer Court of Canada declaring that the suppliant is not entitled to any of the relief sought in its petition of right.

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This judgment was delivered upon a question of law set down for argument pursuant to an order made on the application of the suppliant. The question as set forth in that order is as follows:—

In view of the agreement dated the 30th day of October, 1940, between the Governments of the United Kingdom and of Canada for the purchase of Canadian bacon and hams, and in view of Order-in-Council P.C. 4076, dated the 13th day of December, 1939, as amended by P.C. 4353, dated 27th day of December, 1939, and assuming the acts or omissions alleged in the Petition of Right herein to be established, does a Petition of Right lie.

The first argument advanced by the respondent why a negative answer should be given to that question was that a petition of right does not lie against the Crown in this case because the Bacon Board, created by P.C. 4076, (referred to in the question) is not a servant or agent of the Crown but an independent body. The President of the Exchequer Court of Canada decided adversely to the Crown on that argument and on the opening of the appeal before us, Mr. Varcoe announced that he accepted that conclusion and would not seek to support the judgment appealed from on that ground. After disposing of that argument, the President proceeded to discuss the question whether a petition of right lies under the circumstances, and he held it did not. The circumstances, of course, mean the acts or omissions alleged in the petition, and according to the terms of the order granting leave to set down the question of law, these acts or omissions must, for the purpose of the motion, be taken as admitted. The first inquiry must therefore be as to what is so alleged.

The suppliant carries on business as meat packers and provisioners. By a letter of February 5th, 1941, the Bacon Board, set up and acting as a servant and agent of the Crown, notified the suppliant that with respect to the week commencing February 10th, 1941, a put-down to the extent of 160,000 pounds of bacon and other pork products was authorized, and accordingly the suppliant placed into cure bacon and other pork products of the required weight and notified the Board accordingly. Contained in the said products so put into cure were seventy-three boxes of rib backs weighing 42,785 pounds. On February 28th, 1941, the suppliant was notified by the Board that it had booked

shipment for this pork on a steamship scheduled to load at the Port of Saint John from the 12th to 15th March, 1941, and the suppliant proceeded to make arrangements accordingly, and so notified the Board. The product arrived at Saint John on March 11th, 1941, and was delivered at seaboard but no ship was available at that time for the purpose of having the product loaded thereon. The Board did not inspect the product until March 29th, 1941, when it advised the suppliant that the seventy-three boxes of rib backs were rejected for slime, odour and mould. The petition of right then proceeds to allege:—

The Bacon Board on the arrival of the said pork, knowing that no ship was available, failed to notify the suppliant to take care of the said product and failed to take any steps to have the same put into cold storage. The suppliant says that the Bacon Board as the agent and servant of the Crown was negligent in its handling of the said lot of pork products and failed to use reasonable care in that—

(a) When it found that no ship was available as booked it should have taken steps to have the said pork products put into cold storage so that the same would not be damaged or permitted to deteriorate until shipping space was made available, or

(b) It should have immediately notified the suppliant that the shipping space was not available and so have permitted the suppliant to have itself made arrangements for the care of the said pork products.

(c) It permitted the said pork products to remain on hand at Calgary too long a period without arranging for the shipping thereof.

Paragraph 6 alleges that by reason of the said negligence and lack of care, the rib backs became slimy and developed mould, and were rejected, and the suppliant suffered damage in the amount thereafter set out.

Paragraphs 7 and 8 set up alternative claims in the following language:—

7. In the alternative the suppliant says that the Crown took over the complete handling, care and shipping of the said pork products from the time it authorized the same to be put into cure until the said boxes of rib backs were rejected and that the suppliant acted at all times in accordance with the instructions received from the Crown relative thereto and that if any of the said pork deteriorated or was damaged such deterioration or damage was due entirely to the fault of the Crown and that the suppliant is entitled to be paid by the Crown the agreed price or value of such rib backs less any moneys it has received on account thereof from the resale of such rib backs.

8. In the further alternative the suppliant says that the said 73 boxes of rib backs were delivered at seaboard in good condition as agreed and that the suppliant is entitled to be paid therefor at the agreed price from the moneys in the hands of the Crown paid by the United Kingdom Ministry of Food in respect thereof and that the suppliant has sustained

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loss as hereinafter set out by reason of the wrongful return of the said boxes of rib backs. The suppliant says that as against the agreed price owing to it the Crown is entitled to have credited the amount realized from the resale of the said products.

Particulars of the damage and loss sustained by the suppliant are then given, showing a total amount claimed, \$4,508.86. There is another claim for another shipment in which the same allegations are made, the total amount of that claim being \$4,085.89.

Leaving aside for the moment the claim for negligence under section 19 (c) of the *Exchequer Court Act*, the respondent contends that the only claim made by the suppliant is in contract and that no allegation is made that the Board, acting for the Crown, appropriated the rib backs. I am unable to agree with that view as I consider the petition of right alleges facts in paragraphs 7 and 8 and I take it that the President construed the petition of right in the same way. However, he held that the Board has no power to appropriate for the use of the Crown and, therefore, that no claim on that basis could succeed. In that connection he referred to the decision of this Court in the *Chemicals Reference* (1), where it was held that a certain paragraph of the Order in Council there in question was in conflict with section 7 of the *War Measures Act*. As to that, it might be pointed out that, if the Board has power to appropriate the boxes of rib backs or the use thereof, and does so appropriate, section 7 of the *War Measures Act* merely provides that the claim for compensation therefor shall be referred by the Minister of Justice to one of certain courts named therein, or a judge thereof, if "Compensation is to be made therefor and has not been agreed upon." It might appear from the evidence, and in fact is a fair assumption from the petition of right, that the suppliant and the Board had agreed upon the price. In view of the disposition proposed to be made of this appeal, nothing further need be said at this time in connection with the matter and no opinion is expressed as to the correctness of the President's view.

As to the claim in contract, the President held that the Board has no power to purchase and that as a matter of fact any purchase from the suppliant was made by the

United Kingdom Minister of Food and that the sale was made by the suppliant to it. He therefore held that there was no duty owing by the Board to the suppliant to arrange for the care of the rib backs but, on the contrary, that it was the duty of the suppliant to attend to such matters.

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No opinion is expressed on this point because it seems to be clear that the claim under section 19 (c) of the *Exchequer Court Act*, arising out of injury to property, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, might still be valid even if the Board has no power to purchase or to appropriate. At present we do not know what was contained in the instructions from the Board to the suppliant, how the boxes of rib backs were shipped, and what communications passed between the suppliant and the Board.

The appeal should be allowed and in lieu of the judgment a quo there should be an adjudication that the Bacon Board is a servant of the Crown and that the suppliant is entitled to proceed to trial on its petition of right. It should, however, be pointed out that the

arrangements for the delivery at Canadian seaboard ports to the United Kingdom Ministry of Food, of bacon and hams during the period November 17th, 1939, to October 31st, 1940,

referred to in the first recital in P.C. 4076, would not be found in the later agreement between the Ministry of Food and the Canadian Government, dated October 30th, 1940, unless they happen to be the same as in an earlier agreement, nor are they the arrangements referred to in paragraph 2 of the petition of right since they are there stated to have been entered into in the year 1939. The disposition to be made of the costs of the argument on the question of law and this appeal causes some concern. It has been shown that some questions of law were raised by the statement of defence; that an *ex parte* order was made giving leave to have those points of law set down for argument at the sittings to be held in Calgary; that Mr. Justice Robson, sitting as an *ad hoc judge*, struck the case off the list to allow for further consideration since counsel for the Crown took the position that he thought the questions were not merely ones of law but of mixed fact and

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law. The suppliant then served a notice of motion for an order that the following question of law should be set down and disposed of before the trial:—

Whether a cause of action against His Majesty is disclosed in the Petition of Right herein or such other or additional preliminary question of law as is raised by the statement by defence herein.

Upon that motion it was suggested that the agreement of October 30th, 1940, and P.C. 4076 as amended by P.C. 4553, should be considered, and the order was made accordingly. Under all the circumstances, the costs of that application and of the argument on the question of law and of this appeal should be costs in the cause.

Appeal allowed, costs in the cause.

Solicitors for the appellant: *Helman, Mahaffy & Barron.*

Solicitor for the respondent: *F. P. Varcoe.*
