Montreal 1968
Sept. 13
Sept. 20

BETWEEN:

MOUTON PROCESSORS (CANADA) LIMITED ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Taxes not legally payable—Demand for refund—Excise Tax Act, R.S.C. 1952, c. 100, s. 46(6)—Time limitation for application—Whether sums paid under protest and because of coercion.

Prior to June 1951 suppliant paid sums of nearly $338,000 on the demand of the Revenue Department as being due under s. 80A of the *Excise Tax Act* on sheepskins processed and sold as mouton. Following a decision of the Supreme Court of Canada in 1957 that s. 80A did not apply to mouton suppliant applied for a refund and filed a petition of right.

Section 46(6) of the *Excise Tax Act* declares that moneys paid as taxes by mistake of law or fact shall not be refunded unless application is made within two years.

Held, dismissing the claim, suppliant failed to satisfy the onus of establishing that the sums were not paid on account of tax, e.g. that payment was made under protest and because of coercion, i.e. to avoid threatened sanctions.

Premier Mouton Products Inc. v. The Queen [1961] S.C.R. 361; *M. Geller Inc. v. The Queen* [1963] S.C.R. 629, discussed. *Beaver Lamb and Shearling Co. v. The Queen* [1960] S.C.R. 505, referred to.

PETITION OF RIGHT.

John J. Spector, Q.C. for suppliant.

Paul M. Ollivier, Q.C. for respondent.

JACKETT P.:—This is a petition of right to enforce a claim by the suppliant for refund of $339,023.54, being the aggregate of payments claimed to have been made by it to the Crown by reasons of demands made by the Crown for taxes which, according to the position taken by the Department of National Revenue, were imposed by section 80A of the *Excise Tax Act* R.S.C. 1952, c. 100 on sheepskins processed by the suppliant and sold as mouton skins during the period from March 19, 1946, to May 24, 1951.

I might indicate at this stage that the respondent has admitted receiving payments from the suppliant aggregating $338,895.43 during the period from April 1, 1946, to May 18, 1951, and that the suppliant is confining its claim for refund to the amounts so paid.

Before examining the pleadings in more detail, it will be useful to outline at some length the background to the bringing of these proceedings to the extent that it would seem to be beyond controversy.

During the relevant period, i.e. from April 1, 1946, to May 18, 1951, section 80A of the *Excise Tax Act*, as enacted by section 2 of chapter 30 of the Statutes of 1945 and section 2 of chapter 8 of the Statutes of 1950-51, read as follows:[1]

> 80A. (1) There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,
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> (i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer;
>
> or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.
>
> 2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.
>
> 3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made.
>
> 4. The Minister may make regulations for the purpose of determining what constitutes the current market value of furs, and the tax shall be computed upon the value so determined. Such regulations shall be binding upon the owner of the furs as well as upon the dresser or dyer.

From a time prior to 1946, the Department of National Revenue, the department charged by law with the duty of collecting the tax imposed by section 80A, took the position that that section applied to a product known as mouton that was produced by processing certain kinds of sheepskins and, accordingly, that Department insisted upon the persons who did that kind of processing during the period in question in this action complying with all the provisions of the statute and the applicable regulations that applied to a dresser or dyer of furs. They did this by reason of the view that prevailed in the Department that such a person was a dresser or dyer by whom furs had been dressed or dyed.

[1] Prior to September 8, 1950, the rate was 10% and not 15% as indicated in the version of the section quoted.

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In consequence of the Department of National Revenue having taken that position (I will not consider at this point precisely what led to the consequence), the suppliant, as already indicated, paid, during the period April 1, 1946 to May 18, 1951, the aforesaid amount of $338,895.43.[2]

Almost two years after the period in question in April 1953, an action was commenced in this court by the Crown against Universal Fur Dressers and Dyers another processor of mouton, for tax in an amount slightly over $500, which the Crown claimed should have been paid in respect of processing of mouton done from February 2 to February 6, 1953. That action was obviously launched, probably pursuant to an arrangement with the defendant in that action, to settle a dispute as to whether section 80A was applicable to mouton processing. Although I do not recall any admissible evidence to that effect, I am also willing to assume that that action was launched by reason of some mouton producers as a group having challenged the applicability of the tax to their operations. I have no evidence as to when that challenge was first made or as to when the suppliant first became a party to that challenge if it was made prior to the commencement of the action against Universal.

Apparently the suppliant continued, after May 1951 to make payments of the kind already discussed as, on May 15, 1953, Mr. J. J. Spector, Q.C., of Montreal, wrote to the Minister of National Revenue a letter reading, in part, as follows:

> I am instructed by my clients, Mouton Processors (Canada) Limited and Mouton Trading Company Limited, of 2600 Mullins Street, Montreal, Quebec, to make claim for refund in a total sum of $108,149.39, payable as follows:
>
> To Mouton Processors (Canada) Limited and Mouton Trading Company Limited—the sum of $34,234.06
> To Mouton Processors (Canada) Limited—the sum of $73,915.33

[2] It is of interest, but not relevant, to note that, according to the evidence led by the suppliant, the payment was made to the Crown by the suppliant, in each case, only after the suppliant, as processor, had collected the amount of the "tax" from the owner of the processed sheepskin as a condition to the delivery of it to the owner. It was this sequence of events that led the "owner" to claim that it was the person to whom refunds should be made in *M. Geller Inc. et al v. The Queen* [1960] Ex. C.R. 512; [1963] S.C.R. 629.

> These claims for refund are asserted for a period covering the past two years, to wit, May 15th, 1951 to May 15th, 1953, and are based on payments made allegedly under Sections 80A and 105 of the Excise Tax Act and Amendments, Chapter 179, R.S. 1927.
>
> In behalf of my said clients, I assert that these moneys have been paid to the Crown in error and consist of taxes assessed and levied by your officers in connection with sheepskins, which were wrongly defined by your officers to be dressed furs, dyed furs and dressed and dyed furs.
>
> It is asserted, among other reasons, that Section 80A of the said Excise Tax Act does not apply to sheepskins, nor does it cover the various processes used in connection with sheepskins, which are different from and not used in the processing of furs.
>
> This letter will also serve as a notification to you that a like claim is asserted with respect to all future tax payments which might be assessed or levied by you and your officers against my aforesaid clients in connection with sheepskins, and it is understood that any payments of such tax which might be made in the future are made without prejudice to and without admission or waiver of any of my clients' rights.

I have no doubt that this letter was written by reason of some knowledge on the part of the suppliant of the commencement of the test action against Universal Fur Dressers and Dyers to which I have already referred, although I have no actual evidence of the circumstances giving rise to the writing of the letter.

On June 11, 1956, the Supreme Court of Canada delivered judgment in the action of the Crown against Universal Fur Dressers and Dyers, by which it was conclusively determined that the provisions of section 80A did not apply to mouton.

Some time after that decision, the Department made the refunds to the suppliant that were claimed by Mr. Spector's letter of May 15, 1953. Those claims were obviously made as falling within section 46(6) of the *Excise Tax Act*, R.S.C. 1952, c. 100 which read then and still reads as follows:

> (6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

Subsequently, mouton processors other than the suppliant brought proceedings in this court for refund of certain payments made as a result of the position taken by the Department of National Revenue concerning the effect of section 80A, even though a section 105(6) type of application had not been made within two years after such

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payments were made. The judgments in those cases are reported as follows: *Beaver Lamb and Shearling Co. v. The Queen*,[3] *Premier Mouton Products Inc. v. The Queen*,[4] *M. Geller Inc. et al. v. The Queen*[5].

The decision of the Exchequer Court of Canada in the *Premier Mouton Products Inc.* case was handed down on February 23, 1959, and the decision of the Supreme Court of Canada in that case was handed down on March 27, 1961. In that case, the payments in question had been made during the period from March 30, 1950, to January 29, 1952, after Premier Mouton Products Inc. had taken a definite position that it had no liability to make the payments and the Department had insisted that it must nevertheless make the payments or face legal sanctions and pursuant to an arrangement that was then made that all payments should be expressly made "under protest". Indeed, all payments were made by cheques so marked. The decision of this court in that case was that the suppliant was entitled to be repaid the payments so made. This decision was upheld on appeal but for reasons that were somewhat different from those of the judge who delivered the judgment of this court. The reasons of the majority of the judges in the Supreme Court of Canada in that case are set out in the following portions of the judgments of Taschereau J. (as he then was) and of Fauteux J.:

> TASCHEREAU J.—It is first submitted on behalf of the appellant that the respondent is barred from claiming any refund as it failed to make any application in writing within two years after the moneys were paid or overpaid (Section 46, para. 6 of the Act, 1952 R.S.C., c. 100). This section applies, when the payment has been made by mistake of law or fact, but I do not think that such is the case here. The officers of the company were not mistaken as to the law or the facts. They had been in the fur business since many years, and it was in 1950 that they commenced the processing of raw sheepskins.
>
> When they started that business, they immediately received the visit of two inspectors of the Excise Department, with whom they had numerous discussions in the course of which they continuously maintained that mouton was not a fur, and therefore not subject to the tax. After being told that they would be "closed up" if they did not pay, they decided, with the agreement of the inspectors, to pay "under protest". This was done from March 23, 1950, until September 7, 1951, and all the fifty-eight cheques were endorsed "paid under protest" or "tax paid under protest".

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[3] [1958] Ex. C.R. 336; [1960] S.C.R. 505.
[4] [1959] Ex. C.R. 191; [1961] S.C.R. 361.
[5] [1960] Ex. C.R. 512; [1963] S.C.R. 629.

The evidence is clear to me that there was on the part of the officers of the company no error of law. They had the conviction that they did not owe the tax, and their numerous discussions with the departmental officers, and the payments made under protest, negative any suggestion of a mistake of law.

At that time, other firms engaged in the same business as the respondent had contested the validity of this tax and had refused to pay it. A test case was made, and a few years later this Court, in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, 56 D.T.C. 1075, held that the tax was not payable. The respondent's officers were aware of the position taken by the others operating in the same field, and of their refusal to comply with the request of the Department. When the respondent finally decided to pay under protest, I am quite satisfied that it was not because the officers were mistaken as to the law; they were fully aware of their legal position, and had repeatedly set forth their contentions to the Department's officers from the beginning of the discussions in 1950. There being no mistake of law or fact, s. 46(6) does not apply, and therefore the failure by the respondent to give a written notice is not a bar to the present proceedings.

I do not agree with the trial judge who says in his reasons, although he allows the claim, that the respondent paid as a result of a mistake of law. The respondent is not bound by this pronouncement, and is of course entitled to have the judgment upheld for reasons other than those given in the Court below. The true reason why the payments were made under protest, is that the respondent wished to continue its business and feared that if it did not follow the course that it adopted, it would be "closed". Eli Abramson, one of the officers of the respondent says in his evidence:

> Q. What were you told by the officers of the Department with whom you were discussing this?
>
> A. Well, they told me I have to pay the tax. So, I says, 'Why do I have to pay the tax?' They said 'If you don't pay the tax we will close you up, because that is the law, and you must pay the tax!'

This statement is not denied by the two inspectors who were called as witnesses. Instead of seeing their business ruined, which would have been the inevitable result of their refusal to pay this illegal levy, they preferred, as there was no other alternative, to comply with the threatening summons of the inspectors. As Abramson says: "Well, if I have to pay, I feel I am going to pay it under protest". This is what was done, and I am satisfied that the payments made were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure that was exercised is sufficient, I think, to negative the expression of the free will of the respondent's officers, with the result that the alleged agreement to pay the tax has no legal effect and may be avoided. The payment was not made voluntarily to close the transaction. Vide *Maskell v. Horner*, [1915] 3 K.B. 106 at 118, also *Atlee v. Backhouse*, (1838) 3 M. & W. 633, 646, 650; 150 E.R. 1298, *Knutson v. Bourkes Syndicate*, [1941], S.C.R. 419, 3 D.L.R. 593, *The Municipality of the City and County of St. John et al v. Fraser-Brace Overseas Corporation et al*, [1958] S.C.R. 263, 13 D.L.R. (2d) 177. As it was said in *Valpy v. Manley*, (1845), 1 C.B. 594, 602, 603; 135 E.R. 673, the payment was made for the purpose of averting the threatened evil, and

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not with the intention of giving up a right, but with the intention of preserving the right to dispute the legality of the demand. The threats and the payments made under protest support this contention of the respondent. Vide: *The City of London v. London Club Ltd.*, [1952], O.R. 177, 2 D.L.R. 178. Of course, the mere fact that the payment was made "under protest" is not conclusive but, when all the circumstances of the case are considered, it flows that the respondent clearly intended to keep alive its right to recover the sum paid. Vide *supra*.

In Her Majesty the Queen v. Beaver Lamb and Shearling Co. Ltd., [1960] S.C.R. 505, 23 D.L.R. (2d) 513, decided by this Court, the situation was entirely different. The majority of the Court reached the conclusion that the company paid as a result of a compromise and that there was no relation between the agreement that was reached and the threats that had been made. The payment was made voluntarily to prevent all possible litigation, and to bring the matter to an end.

I must add that in the province of Quebec, the law is substantially in harmony with the authorities that I have already cited. The consent to an agreement must be legally and freely given. This is an essential requisite to the validity of a contract. Moreover, I think that art. 998 of the *Civil Code* applies, as the respondent who did not owe any amount to the appellant was unjustly and illegally threatened in order to obtain its consent. Articles 1047 and 1048 of the *Civil Code* do not apply, and are not a bar to respondent's claim. These sections suppose the existence of an error of law or of fact, which does not exist here.

FAUTEUX J.:—It is convenient to say immediately that the claim of respondent is not that it paid these moneys by mistake of either law or fact, but under illegal constraint giving a right of reimbursement. That this is really the true nature of the claim appears from the petition of right. It is therein alleged that from the beginning and throughout the period during which these moneys were exacted, there were, between the officers of the Department of National Revenue and those of the respondent company, numerous discussions in the course of which the latter (i) claimed that no exise tax could be imposed on these sheepskins; (ii) demanded that the officers of the Department alter their illegal attitude; (iii) opposed the payment of such tax which it was "forced" to pay and which it did pay under protest at the suggestion of the officers of the Department. Surely, one who makes such allegations and says that he did pay under protest does not indicate that he was under the impression that he owed the money and that he paid through error. As was said by Taschereau J. in *Bain v. City of Montreal*, (1883), 8 S.C.R. 252, at the bottom of page 285:

> Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reasons to protest at all.

Furthermore, the evidence adduced by respondent is consistent with this view as to the nature of the claim. Indeed the evidence accepted by the trial Judge shows that, to the knowledge of the officers of the Department, other processors in the trade entertained the view that such a tax was not authorized under the Act. It also shows that respondent, who was opposed to its payment, would not

have paid it, as it did under protest, had not its officers been intimidated, threatened by those of the Department, and in fear of the greater evil of having their business closed up.

The trial Judge so found and, in this respect, expresses himself as follows:

> Il n'y a pas de doute qu'elle ne les aurait pas payés si elle n'avait pas été intimidée par les remarques et informations des officiers du Ministère du Revenu National, à l'effet qu'elle devait payer parce que c'était la loi et qu'au cas de refus, elle pourrait voir son entreprise close.

Having said this, the trial Judge continues:

> La preuve m'autorise, je crois, à conclure qu'elle a réellement pensé qu'elle devait payer et que la taxe était exigible; le paiement a donc été fait par erreur. Dans ces circonstances, il est logique de croire que son consentement au paiement a été vicié par les représentants de l'autorité et que les paiements n'ont pas été faits volontairement mais par suite d'erreur et *de crainte d'un mal sérieux.* (The italics are mine).

I agree with the trial Judge that these payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. I must say, however, that I find it difficult to reconcile that conclusion, which is supported by the evidence, with the statement that these payments were made through error. And if the trial Judge really meant that the payments were made through error, in the sense that respondent officers really thought that they owed these moneys to the appellant, I must say, with deference, that such an inference is not supported by the evidence.

The right of respondent to be reimbursed these moneys, which it paid to appellant, involves the consideration of two questions:— (i) Whether, under the general law, there is, in like circumstances, a right to recover moneys paid, and, in the affirmative, (ii) Whether this right to recover, under the general law, is barred, in the present instance, by any of the statutory provisions of the *Excise Tax Act.*

The first question must be decided according to the principles of the Civil Law of the province of Quebec where the facts leading to this litigation took place and where, in particular, these payments were made.

Article 998 of the *Civil Code,* relating to the incidence of constraint as affecting consent, reads as follows:

> If the violence be only legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort consent.

In *Wilson et al. v. The City of Montreal,* (1878), 24 L.C.J. 222, 1 L.N. 242, the Superior Court condemned respondent to repay to appellants moneys it had collected from them under an illegal assessment roll made to defray the costs of certain municipal improvements. These moneys were paid under protest, as evidenced by the receipt obtained from the City and which read:

> Received from the Hon. Charles Wilson, the above amount which he declares he pays under protest and to save the proceedings in execution with which he says he is threatened.

This judgment, being appealed, was confirmed by the Court of Appeal, (1880), 3 L.N. 282.

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In *The Corporation of Quebec v. Caron,* (1866), 10 L C J. 317, the Court of Appeal again confirmed a judgment condemning the City to reimburse a payment made, not by error, but "sciemment" by Caron, under protest The claim of the City was for arrears of water rate and it had, in like cases, the power to shut off the water. The claim, however, was prescribed Caron was threatened, on the one hand, by his tenant, to be sued in damages in the event of a stoppage of water and was threatened, on the other hand, by the City, of a stoppage of water unless payment was made. The Court of Appeal said:

> It is true that there was no physical force employed to compel the payment but there was a moral force employed which compelled the respondent to choose one of two evils, either to pay a debt which he could not by law be forced to pay, or to pay damages which he desired to avoid; in neither case could the payment have been voluntary; it was the effect of moral pressure, and would not have been made without it. It was an influence which took away the voluntary character from the payment and yet which could not be ranked with "crainte et violence". Under these circumstances, this payment was not being voluntary but was made under pressure; the plaintiff's action must stand and the appeal be dismissed.

Baylis v The Mayor of Montreal et al, (1879), 23 L C.J. 301. This was an action brought to recover from the City an amount collected from the appellant for assessment not legally due, the assessment roll, under which the payment was exacted, being a nullity The appellant did not protest or make any reserve when he paid He paid only when compelled to do so by warrant of distress Sir A A. Dorion, C J. said, at the bottom of page 304:

> And it has repeatedly been held that a payment made under such circumstances is not a voluntary payment and did not require that the party making it should pay, under protest, to enable him to recover back what has been illegally claimed from him.

In *Bain v. City of Montreal, supra,* the above decisions are referred to, with virtual approval, by Taschereau J., at page 286, where he makes the following comments as to the significance and necessity, or non necessity, of protest:

> I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accompany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte,* and one made under a threat only of *contrainte,* or through fear.
>
> If there is an actual *contrainte,* a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte,* then, if the party pays before there is an actual *contrainte,* he should pay under protest. *Demolombe* Vol 29 No. 77 seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte.*

Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade, Rép* Vo. *Acquiescement,* Par XIII; *Solon,* 2 Des Nullités, No. 436; *Bédarride* De La Fraude, Vol. 2, No. 609.

Being of opinion that, under the general law, respondent is entitled to be reimbursed of the moneys it paid to appellant, there remains to consider the contention of the Crown that this right is barred under the provisions of s. 105 of the *Excise Tax Act.*

Appellant relies on s 105(6):

> 6. If any person, whether by mistake of law or fact, has paid or over-paid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The French version of s. 105(6) reads:

> (6) Si quelqu'un, par erreur de droit ou de fait, a payé ou a payé en trop à Sa Majesté des deniers dont il a été tenu compte à titre de taxes imposées par la présente loi, ces deniers ne doivent pas être remboursés à moins que demande n'ait été faite par écrit dans les deux ans qui suivent le payement ou le payement en trop de ces deniers.

The two texts make it clear that these provisions apply only where the refund claimed is for moneys paid under a mistake of law or fact. They have no application in this case.

The other provisions of the Act, which may be referred to, are in s 105(5) reading

> 5. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulation made thereunder.

These provisions are also inapplicable to the present case. The refund claimed is not for "taxes imposed by this Act" but for moneys exacted without legal justification

It was further conceded that s. 105 is not exhaustive of the cases where refund may be made. Indeed one would not expect the Act to provide that moneys exacted under threat as a tax not imposed under the Act, may be reimbursed.

On July 16, 1959, Mr. J. J. Spector, Q.C., wrote to the Minister of National Revenue as follows:

> I am instructed by my clients, Mouton Processors (Canada) Limited and Mouton Trading Co Ltd, to claim from The Crown the sum of $337,907 29, being the amount of alleged excise tax paid to Her Majesty by the two said companies, my clients, between October 1st, 1946 and May 19th, 1951, in error of law and fact, under compulsion, duress and protest.
>
> My said clients were constrained by you and the officers of your Department to pay an alleged excise tax on sheepskin processed into

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mouton, which was in fact and in law not due nor exigible. The said payments were not made voluntarily but under the unlawful and urgent compulsion of invoking sanctions of a penal and drastic nature, and the threat of putting my clients out of business if they failed to make such payments to The Crown, notwithstanding that the payments claimed were for a non-existent debt, and the compulsion and threats exercised by the Crown were without justification or cause.

The said sums which my clients were unjustly and illegally constrained and compelled to pay were not in effect taxes in the sense of the law, and were not due to or exigible by Her Majesty, and constituted an unjustified enrichment of the Crown at the expense of my said clients.

The Minister and his officers, it is respectfully submitted, acted illegally in compelling my clients to make payments in the aforesaid amount on the ground that the sheepskin processed into mouton by my said clients were in fact furs, when in fact they were not furs, and did not fall within the ambit of the Excise Tax Act in force when the said payments were so illegally exacted, in accordance with the decision of the Supreme Court of Canada in Her Majesty vs Universal Fur Dressers & Dyers, 1956, S.C.R. 632.

It is further respectfully that the Minister of National Revenue and his officers acted ultra vires of the powers granted by Parliament in the circumstances herein complained of.

The favour of your early remittance of the sum herein claimed is respectfully requested.

That letter was, as appears, written after the decision of the Exchequer Court of Canada in the *Premier Mouton Products Inc.* case, but before the decision of the Supreme Court of Canada in that case.

After the latter decision, on December 19, 1961, these proceedings were launched.

The portion of the petition of right setting out the allegations of fact on which the present claim is based, reads as follows:

4. During the said period the Department of National Revenue, a Department of Your Majesty's Government of Canada, wrongfully and illegally insisted upon exacting and in fact did wrongfully, illegally and without legal justification exact payments from your Suppliant, allegedly under the terms of the Excise Tax Act and its Regulations, which the said Department alleged were imposed on the sheepskins which were processed by your Suppliant and sold as shearlings or as mouton skins;

5. The said sheepskins, processed shearlings or mouton, were not and never were subject to the alleged excise tax which your said Department of National Revenue wrongfully, illegally, and without legal justification exacted from your Suppliant, and in so exacting such payments from your Suppliant the said Department of National Revenue was committing acts ultra vires the powers conferred upon it by Parliament;

6. As a consequence of the wrongful, illegal and relentless pressures exercised by your said Department of National Revenue upon your Suppliant, your Suppliant was compelled and forced to pay as alleged excise tax, during the said period, the sum of $339,023 54 between the relevant dates aforesaid, the whole as appears from a schedule fyled herewith as Suppliant's Exhibit S-1;

7. Your Suppliant, in the course of numerous discussions with the officers of the said Department of National Revenue, both in Montreal and in Ottawa, from the very beginning opposed and continued to oppose the wrongful exaction of the said payments as alleged excise taxes; and similar objections and protests were made by other sheepskin processors in Canada;

8 The Department of National Revenue wrongfully, illegally and persistently took the position, under pain of invoking all legal sanctions provided under the Excise Tax Act, that sheepskin, processed shearling or mouton was fur and as such was subject to the excise tax imposed upon furs, and notwithstanding the numerous and constant objections and protests made by your Suppliant and other processors of sheepskin in Canada, the officers of your Department of National Revenue persisted in their stand until a test case was finally taken in order to obtain a judgment on the matter;

9. The said test case was taken in the form of an Information exhibited by the Deputy Attorney General of Canada in the Exchequer Court of Canada, in which Universal Fur Dressers and Dyers of Toronto was Defendant. Your Majesty was Plaintiff, and said action, bearing No. 72452, was tried before this Honourable Court by the Honourable Justice J C. A. Cameron, who rendered a decision thereon on March 17th, 1954, ordering and adjudging that the Plaintiff is entitled to recover against Defendant the sum of $573.08 as Excise Tax, together with the penalties provided for non-payment by the Excise Tax Act. The said judgment was thereupon appealed to the Supreme Court of Canada, which by unanimous judgment rendered on the 11th day of June, 1956, reversed the judgment a quo, and held that sheepskin, as processed and sold by your Suppliant, was not subject to the said excise tax;

10 The payments which your Suppliant made, as detailed in Exhibit S-1, were paid under protest by your Suppliant alone, and with its own moneys, were exacted without legal justification, were involuntarily paid under duress, coercion and fear, and under the constant, persistent and unlawful threats and constraint on the part of the officers of the Department of National Revenue, that if your Suppliant did not make said payments it would be put out of business, since the Department would invoke all the sanctions provided under the said Excise Tax Act and would, in addition to penal proceedings, obtain judgments and execute same upon the goods, chattels and assets of your Suppliant;

11. The Department of National Revenue sent its officers into the business premises of your Suppliant almost daily to check, verify, levy and collect the alleged excise tax which it wrongfully and illegally insisted on imposing upon your Suppliant's sheepskins, processed as aforesaid, and the forms of law were constantly threatened and used by the said officers for an unjust and illegal cause, to extort payment of the sums herein claimed by coercion and fear, the whole contrary to law;

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12 The aforesaid payments made by your Suppliant were made under constraint and fear, were not prompted by the desire to discharge any legal obligation or to definitely settle any legal claim, were not make *(sic)* of the free will of your Suppliant's officers, were not made voluntarily to close any transaction, were not made with the intention of giving up any right, but said payments were made solely for the purpose of averting a threatened evil, and with the intention of preserving the right to dispute the legality of the demand and to retain its right to recover the sums paid;

13. The said sums so paid do not in law and in fact constitute a tax of any kind or nature whatsoever, and at all relevant times herein no excise tax was leviable or payable by your Suppliant on the sheepskin, shearling or mouton processed and sold by Suppliant; nor did any of the provisions of the Excise Tax Act apply to the payments made by Suppliant herein;

14. Furthermore, Your Majesty is presently illegally and wrongfully benefitting from the said sum claimed herein by which Your Majesty has been unjustifiably enriched, the said sum constituting an "enrichissement sans cause" at law;

15. Due demand for reimbursement has been made upon the said Department of National Revenue to no avail, and the said Department, through its officers, in a letter dated July 22nd, 1959, referred to the Premier Mouton Products case and the Beaver Lamb case, then under appeal, and stated that the claim would be considered when the said appeals had been disposed of, and by letters of September 30th, 1960 and June 19th, 1961, the Department of National Revenue refused to approve any payment of the sums herein claimed to your Suppliant. A final demand for the sum herein claimed was made on November 24th, 1961;

On April 22, 1963, the suppliant was ordered to give particulars of certain of these allegations by an order reading as follows:

UPON A MOTION FOR PARTICULARS made on behalf of the Respondent with respect to those paragraphs in the Petition of Right in which it is alleged that the Department of National Revenue and its officers exercised pressure and made threats in order to compel Suppliant to pay excise tax,

IT IS ORDERED that with respect to Paragraphs 6 and 10 of the Statement of Claim, the Suppliant give specific particulars, as far as is reasonably possible, of the words used insofar as pressure was concerned, and the dates upon which they were used, the qualifications of the officers who made threats, and if possible, to give precise information as to some cases in which they were made.

Pursuant to this order, the suppliant filed particulars reading as follows:

With respect to Paragraphs 6 and 10 of the Statement of Claim:

1. The words used insofar as pressure was concerned were to the following effect:

That if Suppliant did not pay the said sums claimed as excise tax, Suppliant would have to discontinue business; that

the Department would invoke severe sanctions and repetitive penal prosecutions, that it was not the intention to write the Suppliant every day; that the Department would enforce strict compliance; that Summary Convictions Prosecutions would be instituted; that the Department would revoke the Suppliant's Sales Tax and Excise Tax Licenses;

and to the statement made by Suppliant that they could not operate if subjected to daily prosecutions and the drastic actions aforesaid, the answer was to the effect that this was the Suppliant's problem and Suppliant would have to pay notwithstanding.

The Suppliant thereupon said that in order to stay in business payments would be made but under protest, and that the matter would be submitted to the Courts in order to prove to the officers of the Department that they were wrongfully exacting the said payments.

2. The dates upon which words to the foregoing effect were used were between March 19th, 1946 and May 24th, 1951, and particularly on each occasion on which Michael Morris, the Manager of the Suppliant, visited Ottawa to confer with V. C. Nawman, Assistant Deputy Minister, which dates can be established from Departmental records.

3. The pressure was exerted by the several officers and agents of the Department, including the Assistant Deputy Minister, the Collector of Customs and Excise, Montreal, and the several officers of the Department who attended at the premises of the Suppliant regularly in order to supervise and enforce the daily payments claimed as taxes, the letter also stating that said payments must be made on pain of discontinuing business and suffering severe sanctions.

Except for the allegations concerning the *Universal Fur Dressers and Dyers* case and those concerning the letters referred to in paragraph 15 of the petition of right, the statement of defence denied the allegations in the pleading of the suppliant that I have quoted.

Before reviewing the evidence adduced in this case, it would be well to indicate the legal principles that apply, as I understand them.

In the first place, it seems clear that if the payments were made by the suppliant "in the mistaken assumption of paying an excise tax" or "to settle definitely a contested claim" for such a tax, their recovery is barred by reason of the suppliant's failure to comply with section 105(6) of the *Excise Tax Act*. This appears to have been established by the decision of this Court in *M. Geller Inc. et al v. The Queen*[6] dismissing the claim of Nu-Way Lambskin Processors Ltd., which decision seems to have had the implied

[6] [1960] Ex.C.R. 512.

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approval of the Supreme Court of Canada in the same case[7] where Taschereau J., delivering the judgment of the court, said:

> The learned trial judge, [1960] Ex.C.R. 512, 60 D.T.C. 1189, dismissed the Petition of Right of the suppliant Nu-Way Lambskin on the ground that it failed to apply for a refund within the statutory delay. Section 105(6) provides as follows:
>
> > 105(6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

This would appear to apply whether the payments were "prompted by the desire to discharge a legal obligation" or were made "to settle definitely a contested claim". Compare the *Premier Mouton Products Inc.* case, *supra,* per Taschereau J. at page 369.

If, on the other hand, the suppliant, at the time of the payments in question, made it clear to the Department that it took the position that there was no tax payable and was making the payments to avoid threatened sanctions being imposed against it (because such sanctions would outweigh in its judgment the inconvenience of payment) and with a view to having its claim to freedom of liability determined in some appropriate way, then it was not a payment on account of tax at all, but a payment to avoid incurring sanctions under the Act and, that being so, section 105(6) would have no application. This is my understanding of the effect of the *Premier Mouton Products Inc.* case as decided by the Supreme Court of Canada.

Indeed, it may be that, unless payments were accompanied by an express indication that they were made "under protest", they cannot be recovered under the principle in question. This would seem to depend on whether the payments were made in the face of threats of sanctions or in the face of the actual imposition of sanctions. See *Bain v. Montreal*[8] per Taschereau J. at pages 285 *et seq.*, as quoted by Fauteux J. in the *Premier Mouton Products Inc.* case, *supra.* In any event, it is clear that there must be a causal connection between the imposition or threat of sanctions and the making of the payments. See *Beaver*

[7] [1963] S.C.R. 629

[8] 8 S.C.R. 252.

Lamb and Shearling Co. v. The Queen[9] and the reference to that case in the judgment of Taschereau J. in the *Premier Mouton Products Inc.* case, *supra.*

Finally, I should say that, in my view, the suppliant has the onus of establishing the facts necessary to support its claim for reimbursement. In other words, the onus was on the suppliant to establish that the payments in question were *not* made on account of tax.

What I have to decide, therefore, is whether the evidence in this case establishes, on a balance of probability, that all or any of the payments in question were made by the suppliant to the Crown under protest, and under coercion in the sense that I have indicated. If the evidence does establish that in respect of any payments, the suppliant is entitled to judgment for their repayment. If it does not, the petition of right must be dismissed.

Leaving aside for the moment any question as to the admissibility of evidence, the suppliant has failed to establish on a balance of probability, in my view, that the payments were made under protest to avoid the imposition of legal sanctions and has not established that they were not made either as payments of taxes claimed by the Department of National Revenue or in order to effect a final settlement of such claims.

It has been shown that the effective manager of the suppliant's operations during the part of the relevant period that commenced in "early 1947" was one Morris, who has been dead since April 1959, that one Silverberg whose title was that of Sales Manager was, after early 1947, in effect, manager of the suppliant's plant operations, that, during the early part of the relevant period, Mr. Lazarus Philips, Q.C., or the firm of which he was a partner, was the suppliant's legal adviser in connection with the matter, and that, subsequently, Mr. J. J. Spector, Q.C., performed that function. Nothing has been produced, either from the suppliant's files or the files of the Department (of which the suppliant has had full discovery during the course of the trial of this action), to indicate that there was ever any written indication by the suppliant to the Department that it disputed its liability to pay the tax or objected in any way to payment of the tax or that there

[9] [1960] S.C.R. 505.

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was any record of any such position having been taken verbally at any relevant time; and there is no evidence as to why, if any such writing or record ever existed, documentary evidence of it is not available from the suppliant's files. While Mr. Morris was dead at the time of the trial and could not therefore give evidence, neither Mr. Philips nor Mr. Spector, who would presumably have been privy to, or have knowledge of, any such communications if they had been made and who are both alive and well able to give evidence, were produced as witnesses to testify to any such communications. Indeed, there is no evidence whatsoever as to the actual circumstances in which the payments in question were made.

On the other hand, there is the evidence of Mr. Silverberg, who appeared as a witness to give evidence of what he remembered concerning the matters in issue (which took place over seventeen years earlier) and, as he remembered it, he had many discussions (during the years in question after he started to work for the suppliant) with the departmental officer who attended at the plant daily to check the daily reports that the suppliant was required to make, and these discussions always followed a pattern of his maintaining that the tax in question was not payable, and the departmental officer taking the position that according to law it was payable and, if it was not paid, the suppliant's operations would be "closed down". Silverberg says that he took these statements seriously, that he communicated them to Morris, who also took them seriously, and that, as a consequence, as he recalls it, Morris consulted Mr. Philips and went to Ottawa many times to protest to departmental officers about payment of the tax. He also recalls, so he says, that Morris would return from Ottawa and report that he had made such protests to a departmental officer, but they were "adamant" and it might be necessary to sue the government to determine their rights.

It is clear from Mr. Silverberg's evidence that it was Morris' responsibility to make decisions concerning the payment of the tax in question and that Mr. Silverberg's only possible responsibility in connection with the matter, as long as Morris was looking after the matter as he in fact always did, was to pass on to Morris any information that might be relevant to the matter. It seems clear, further,

that Mr. Silverberg was never instructed to discuss the matter with the departmental officer and that the discussions with him were in fact discussions between Silverberg, who had no responsibility concerning payment or non-payment, and the departmental official who had no responsibility for enforcement of payment. In fact, it seems clear that they were conversations of a matter of merely common interest in the same class as the discussions that the same individuals sometimes had about the weather.[10]

Mr. Silverberg also gave evidence about meetings with other mouton processors in June 1947 to discuss what action should be taken about the tax in question.

The other witness called by the suppliant to give evidence concerning the payments in question having been made under protest was Mrs. Elizabeth Rose who was Morris' secretary from early 1948 on. She testified that Morris went to Ottawa during the balance of the period in question to protest payment of the tax, that he wrote letters to the Department protesting payment of the tax, that "He was always paying the tax under protest", that there were meetings in his office of other mouton processors and their lawyers working out some method of fighting the tax, that briefs were prepared and letters written and memoranda put on file as a result of those meetings.

As I had earlier indicated that I intended to do, I have outlined all the evidence, as I understand it, that was

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[10] His evidence reads in part:

A. There was always a discussion about the processing charge, which was open to discussion. But these charges were set between the factory manager and Mr. Morris and myself. He accepted them quite readily. The only discussion of any importance was when he found some tiny, tiny discrepancy that the bookkeeper might have made one way or the other, as little as $1.00 or $2.00 on large amounts of money. A matter of calculation, multiplication, I suppose, but unimportant, I thought. But, he thought it was very important.

Q. But you say that in addition to that, you also discussed the question of the tax liability, generally?

A. The tax what?

Q. The tax liability, the liability to pay that tax?

A. We discussed that many times.

Q. Not every day?

A. No, not every day, it would have been too boresome, but whenever it would come up. There would be occasions when we talked about the weather, besides taxes.

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designed to show protest and compulsion in relation to the payments without drawing any distinction between what in my view was inadmissible and should have been rejected, and what was admissible and relevant.

In the first place, the only evidence of threats is that of the conversations between Silverberg and the departmental officer who checked the daily returns. If there had been some evidence upon which a finding could be made that the statements made by the departmental officer were accepted by Morris as representing a threat of departmental action and that he had taken the "threats" seriously, and had made the payments, when he would not otherwise have made them, by reason of such "threats", I should think that, subject to further enquiry as to the circumstances of the actual payments, there would be a *prima facie* case under the principles applied by the Supreme Court of Canada in the *Premier Mouton Products Inc.* case. There has, however, been no causal connection established between the "threats" in question and the payments of tax, and such "threats" cannot therefore form a basis for a judgment in the suppliant's favour, as appears from the *Beaver Lamb and Shearling Company* decision.

The other question that has to be considered is whether it has been established that the suppliant made it clear to the Department that the payments or some of them were being made under protest by verbal communications from Morris to a departmental official in Ottawa, or by letters written by Morris to the Department. Disregarding evidentiary rules the evidence of Mr. Silverberg and Mrs. Rose is to the effect that Morris did make such protests beginning some time in 1947. That evidence has to be considered in the light of the following circumstances:

(a) there is nothing on the departmental files to show that any such protest was made, while it is clear from the evidence that, in the ordinary course of departmental business, letters from Morris would be there if they had been received and there would be departmental memoranda of verbal protests if any had been made;

(b) no documents have been produced by the suppliant although it is clear from Mrs. Rose's evidence that such documents would be on the suppliant's file in the ordinary course of business if letters had been written or protests had been made verbally—and the suppliant has adduced no evidence to show that the suppliant's documents of that period have been destroyed, lost or were otherwise unavailable;

(c) the suppliant did not tender the evidence of either of the two lawyers who, according to the evidence that was put before the Court, acted

for the suppliant in connection with this tax matter although clearly such evidence could have been brought if it would have been helpful; and

(d) on May 15, 1953, a demand was made on behalf of the suppliant for refund of similar payments for the period from May 15, 1951 to May 15, 1953, the period just before the launching of the test case against Universal Fur Dressers and Dyers, without any suggestion that such payments were made under protest; and at the same time a like claim was asserted in respect of "future tax payments", and it was stated that "any payments of such tax which might be made in the future are made without prejudice to and without admission or waiver of any of my client's rights".

Considering all the evidence in the light of these circumstances, I can only conclude that the balance of probability is that there was no protest by the suppliant against payments of the kind in question prior to the claim that was made in May 1953 by Mr. Spector for the "tax" paid after May 1951. The absence of any evidence by the lawyers concerned, and the absence of any explanation concerning the failure to produce relevant documents, can lead me to no conclusion except that there is no evidence available from those sources that would aid the suppliant's case. It furthermore seems probable that, if the lawyers in question, or either of them, had been consulted on the matter during the period in question, and the suppliant had as a result of advice so obtained decided to make an issue of the matter, there would have been a definite protest and clear-cut evidence of it duly preserved to be available for the present eventuality. The fact that such evidence is not available makes it seem probable to me that there was no decision by the Suppliant during the period in question to make an issue of the matter either because the lawyers were not consulted at that time or because their advice did not persuade the suppliant that it should make an issue of the matter.

On balance, it seems probable to me that Mr. Silverberg and Mrs. Rose, at this late date, are confusing the periods of time during which the events that they recall transpired. It seems probable that it was during the two-year period prior to the commencement of the test case that these events took place. In any event, I cannot conclude on the evidence that the payments during the period in question were made under protest, or that they were made under any compulsion except the normal compulsion that operates on taxpayers generally.

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Having regard to the above conclusions, I need only say that, had I taken time to consider the matter at the time, I would have rejected the evidence as to what Morris told Mr. Silverberg and Mrs. Rose as being inadmissible by reason of the hearsay rule. I have examined the suppliant's authorities on this question and none of them, as I read them, comes close to revealing an exception that would be applicable. I should also have rejected Mrs. Rose's evidence concerning the contents of letters written by Morris in the absence of evidence satisfying the requirements of the best evidence rule by showing that the originals had been lost, or destroyed, or were otherwise unavailable.

There will be judgment declaring that the suppliant is not entitled to any of the relief sought by the petition of right and ordering the suppliant to pay to the respondent the costs of the action.