

JOSEPH MATTON.....SUPPLIANT;

1897.

AND

May 25.

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—Drawback—Materials for ships—Refusal of Minister to grant drawback—Remedy.

By the Customs Act, 1877 (40 Vict. c. 10), section 125, clause 11, it was enacted, *inter alia*, that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, section 11, the Governor in Council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also *The Customs Act*, 1883, s. 230, clause 12, and *The Revised Statutes of Canada*, chapter 32, s. 245 *m.*) By an order of the Governor-General in Council, dated the 15th day of May, 1880, it was provided as follows: "A drawback may be granted and paid by the Minister of Customs on materials used in the construction of ship or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country since the first day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for 9 years, at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th of November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1893."

Held, that a petition of right would not lie upon a refusal by the Controller of Customs to grant a drawback in any particular case.

Semble.—That the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority.

PETITION OF RIGHT for moneys recoverable as Customs drawback.

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 Argument
 of Counsel.

A. R. Angers, Q. C., for the suppliant: The petition is based upon the order in council of 15th November, 1883, (See *Bligh's orders in council* (1). By virtue of that order the suppliant is entitled to drawback on the vessels built by him at Sorel and mentioned in his petition of right. The new regulations, which limit the time for presenting claims, made on the 15th May, 1893, do not affect the suppliant's case because his claim for drawback was made in the month of March of that year. Then again, the regulations of 1893 were made by the Controller of Customs, whereas they could only validly be made by the Minister.

E. L. Newcombe, Q. C. (D. M. J.) for the respondent: The claim to drawback depends upon the provisions of *The Customs Act*, and that Act enables the Governor in Council to issue regulations concerning the drawback. Now, none of the orders in council give an absolute right to drawback, they merely empower the Minister of Customs to pay the drawback, if he sees fit, at a certain rate or upon a certain basis. The orders in council only say "a drawback *may* be granted." They are permissive, merely, and no petition of right will lie to compel the Minister to grant the drawback. *Julius v. Bishop of Oxford* (2); *Cooper v. The Queen* (3); *Kinlock v. Secretary of State for India* (4); *The Interpretation Act* (5).

Furthermore, the *onus* is upon the suppliant to establish his right to drawback by showing that he has paid duty. He has not discharged that burden. The question is not one of bounty, it is one of remission of Customs duties that must have first been paid.

The Solicitor General of Canada, for the respondent: The drawback that comes into question here is a

(1) P. 105.

(3) L. R. 14 Ch. D. 311.

(2) L. R. 5 App. Cas. 214.

(4) L. R. 7 App. Cas. 619.

(5) R. S. C. c. 1.

drawback upon certain materials imported into Canada for use in the construction of a ship; it is not a drawback payable in respect of the ship itself, and that is the way the suppliant has shaped his claim. He cannot bring himself within the operation of *The Customs Act* until he proves that he has paid duty on materials imported for use in constructing a ship, and this he has failed to do. The petition must be dismissed.

Mr. Angers replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 25th, 1897) delivered judgment.

The petition of right in this case is filed to recover the sum of \$301.60 alleged to be due from the Crown to the suppliant as a drawback on materials used in the construction of three vessels built by the suppliant and registered in Canada.

By *The Customs Act*, 1877, (40 Vict. c. 10) sec. 125, clause 11, it was among other things provided that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Victoria, chapter 11, section 11, the Governor in Council was further empowered to make regulations "for granting a certain specific sum in lieu of any such drawback." (See also *The Customs Act*, 1883, s. 230, clause 12, and *The Revised Statutes of Canada*, chapter 32, s. 245 (m).

On the 15th May, 1880, an order in council was passed which provided, among other things, "that a drawback might be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country since

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“ the 1st day of January, 1880, at the rate of seventy
 “ cents per registered ton on iron kneed ships or vessels
 “ classed for nine years, at the rate of sixty-five cents
 “ per registered ton on iron kneed ships or vessels
 “ classed for seven years, and at the rate of fifty-five
 “ cents per registered ton on all ships or vessels not
 “ iron kneed.” By an order in council of the 15th of
 November, 1883, an addition was made to the rates
 stated “ of ten cents per net registered ton on such
 vessels when built and registered subsequent to July
 1st, 1883.” The first of these orders in council was
 passed prior to the amendment of 1881 referred to, and
 the latter thereafter. The regulation embodied therein
 was again approved by His Excellency in Council on
 the 25th day of July, 1888, and appears in Chapter 11
 of *The Consolidated Orders in Council of Canada*, the
 10th section of which is in the following terms:—

“ Sec. 10. A drawback may be granted and paid by
 “ the Minister of Customs on materials used in the
 “ construction of ships or vessels built and registered in
 “ Canada, and built and exported from Canada under
 “ Governor's pass, for sale and registry in any other
 “ country at the rate of 85 cents per registered ton on
 “ iron kneed ships or vessels classed for 9 years, at the
 “ rate of 75 cents per registered ton on iron kneed
 “ ships or vessels classed for 7 years, and at the rate of
 “ 65 cents per registered ton on all ships or vessels
 “ not iron kneed.

“ O. C. May 15th, 1880 ; November 15th, 1883.”

Of the vessels, on the materials used in the building
 of which the drawback is claimed, the “ Arthur P.,” of
 181 tons register, was built at Sorel in 1882 and regis-
 tered at the port of Montreal on the 7th March, 1883 ;
 the “ Saint Joseph,” of 103 tons register, was built at
 Sorel in 1884 and registered at the port of Montreal on
 the 11th of July, 1884 ; and the “ Albina,” of 180 tons

register, was built at Sorel in 1887 and registered at the port of Montreal on the 12th of May, 1887. The declaration on which the claim for a drawback on the materials used in the construction of these vessels was made was declared to on the 25th March, 1893, on forms supplied by the Customs authorities, which bear this heading: "Statement and claim for drawback " on ships' material payable under authority of sec. 10, " chap. 11, Consolidated Orders in Council."

In 1893 there was no Minister of Customs, that office having ceased to exist on the third day of December, 1892, when the Act 50-51 Victoria, chapter 11, *An Act respecting the Department of Customs and the Department of Inland Revenue*, was brought into force by a proclamation of His Excellency the Governor-General.

By the fourth section of that Act it is provided that " whenever by any Act any duty is assigned to, or any " power conferred upon, the Minister of Customs or " the Minister of Inland Revenue, such duty shall be " performed or such power shall be exercised by the " Controller of Customs or the Controller of Inland " Revenue respectively, but any duty or power as- " signed to the Controller of Customs or the Control- " ler of Inland Revenue shall be performed or exer- " cised subject to the supervision and control of the " Minister of Trade and Commerce, or of the Minister " of Finance, as the Governor in Council directs." I have nothing before me to show what direction the Governor in Council has given in this matter, but I have always understood that the "supervision and control" mentioned is exercised by the Minister of Trade and Commerce. On the 15th of May, 1893, the Controller of Customs, without reference, it appears, to the Minister of Trade and Commerce, made certain regulations respecting the drawback on ships' materials,

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which if they were good and applicable to this case would, it is clear, defeat the suppliant's claim. I am of opinion, however, that they are not so applicable. When they were made the claimant had the right to the drawback claimed which he could enforce by his petition, or he had not any such right. If he had not, there is an end of the matter. If he had, the regulation, even if good, would not affect it. But so far as I can see the regulations are in excess of any authority that appears at the time to have been vested in the Controller of Customs. The important fact remains, however, that neither the Controller of Customs nor the Minister of Trade and Commerce has granted the drawback in question to the suppliant.

Passing over some criticisms to which the orders in council relied upon are open, and construing them most favourably to the suppliant, we have so far as their provisions affect this case, in short this: that the Governor in Council exercising a statutory power to make regulations for granting a certain specific sum in lieu of a drawback of the whole or part of the duty paid on articles that have been used in Canadian manufactures, has directed that a drawback may be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada at a rate per registered ton varying from eighty-five cents per ton to sixty-five cents per ton, according to the class or character of the ship or vessel. The suppliant made a claim for this drawback in respect of three vessels that he had built. There is some question as to whether they were vessels to which the regulation was applicable. But for the present it may be assumed that they were vessels of a class and character mentioned in the regulation. At the time when the claim was made there was no Minister of Customs. The Controller of Cus-

oms had, subject to the supervision and control of the Minister of Trade and Commerce, succeeded to the powers and duties vested in or assigned to the Minister of Customs by any Act of Parliament. There was no mention of duties imposed or powers conferred by any regulation or order in council. But passing over that and assuming that the Controller of Customs, subject to the supervision and control of the Minister of Trade and Commerce, was the successor of the Minister of Customs, he has not entertained the claim made. He has not granted the drawback.

Will a petition of right lie to recover the amount thereof? Is it a "claim against the Crown arising under a regulation made by the Governor in Council?"

(1). Is it a claim against the Crown; that is, one that may be maintained against the Crown and for which the Crown is liable to answer in this court?

In the first place it is to be observed that the claim rests upon the regulation, and that the court must take the regulation as it finds it, and may not enlarge it or alter its terms. What does it provide? Not that a drawback shall be granted and paid by the Crown in the cases provided for, but that it may be granted and paid by a minister of the Crown specially designated to exercise the power. The money with which the minister would pay must of course be furnished by the Crown. But it is the minister and not the Crown that is to grant and pay. It was forcibly argued by Mr. Angers that the word "may" in the regulation should under the circumstances be read as "shall." But even if he were right as to that the question would not be concluded. This is not a proceeding against the minister to compel him to perform his duty, or an action against him for a breach of such duty. If it were, the question would arise first as to

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whether or not the regulation had created a duty in a proper case to grant and pay the drawback, and then whether the minister was in any way answerable in this court for the failure to perform such duty. These are questions that I have no occasion at the present to determine. It may not, however, be out of place for me to add that I am inclined to the view that this is not one of the cases in which to the authority given by the use of the word "may" is coupled a legal duty to exercise such authority. The subject dealt with in the regulation is one of the refund or drawback of customs duties. The power conferred upon the minister is similar to that exercisable by the Governor in Council by the 78th section of *The Consolidated Revenue and Audit Act* (1), whereby when he deems it right and conducive to the public good he may remit or refund any duty, toll, forfeiture or penalty. That gives no right to any one to any refund or remission in any particular case. In the same way the regulation does not, it seems probable, confer upon any one a right enforceable at law to the drawback in any particular case. If the minister fails in a proper case to grant and pay the drawback he must answer to the Governor in Council, or to Parliament; but it is a question if he is answerable to any court of law. But that, as has been said, is not the question here. The question is whether a petition will lie against the Crown for the amount of the drawback if in a proper case the minister refuses to exercise the power vested in him, and that question must, it seems to me, be answered in the negative.

Judgment for the respondent, with costs.

Solicitors for the suppliant: *Angers, de Lorimier & Godin.*

Solicitor for the respondent: *E. L. Newcombe.*

(1) R. S. C. c. 29, s. 78.