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April 16.

CANADA CEMENT CO., LTD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Customs Act and Regulations—Tariff—Drawbacks—Discretion of Minister—Right of Court to revise—Interpretation—Constitutional law.

Suppliants imported coal into Canada and paid duty thereon and used the same in the manufacture of cement. In the course of such manufacture the coal is used for heating purposes and, when consumed, leaves about 12 per cent of ash which unavoidably remains and mixes with the cement. The cement so manufactured by the suppliants, having been exported, they claimed, under section 288 of the Customs Act and regulations made thereunder, a drawback upon this 12 per cent of the coal in ashes embodied in the cement so exported.

Held, that, upon a proper construction of section 288, as the article imported was coal, and as it was only such of the ash thereof as unavoidably remained in the cement, which was exported as part of the latter, said ash was not "such materials" within the intent and meaning of paragraph 2 of subparagraph (*a*) of the Regulations, upon which a drawback may be allowed on exporting the cement, and that suppliants' claim was unfounded.

2. That with the authority given by the use of the word "may" in section 288 of the Customs Act (R.S. 1906, c. 48) and in the Regulations made thereunder, to allow a drawback, on exportation of goods which have been imported into Canada, equal to the duty paid thereon, less certain deductions and under certain conditions therein mentioned, is not coupled the legal duty to exercise such authority. That whether such a drawback should be paid is entirely left to the discretion of the Minister who, should he fail in a proper case to grant such drawbacks, is answerable to council or Parliament, but not to a court of law.

PETITION OF RIGHT to recover from the Crown the sum of $808.15 for drawbacks on duties paid upon coal imported into Canada.

March 27, 28, 29, 1923.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

George Montgomery, K.C. and *C. R. McKenzie* for suppliant.

A. R. Holden, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (April 16, 1923) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $808.15, as representing a drawback on duties paid by them upon imported coal used in the manufacture of cement; contending that 87½ per cent of the coal was consumed as fuel in such manufacture, leaving 12½

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per cent of ashes which, it is claimed, was wrought into the cement so manufactured by them in Canada and exported to the United States.

The claim rests primarily upon section 288 of the Customs Act (R.S.C. 1906, ch. 48) which reads as follows:

288. The Governor in Council may, under regulations made for that purpose, allow, on the exportation of goods which have been imported into Canada, and on which a duty of Customs has been paid, a drawback equal to the duty so paid with such deductions therefrom as is provided in such regulations.

2. In cases mentioned in such regulations, and subject to such provisions as are therein made, such drawback, or a specific sum in lieu thereof, may be allowed on duty paid goods manufactured or wrought in Canada into goods exported therefrom.

3. The period within which such drawback may be allowed, after the time when the duty was paid, shall be limited in such regulations.

This section was amended in 1914 by 4-5 Geo. V, ch. 25, whereby section 288a was added thereto providing for drawbacks on exported goods manufactured of pig iron.

The orders in council formulating the regulations governing drawbacks, pursuant to the provisions of section 288 of the Customs Act, have been filed as exhibits Nos. 7 and 8.

These two orders in council or regulations are of the same import, with, however, some inconsiderable differences, having no practical bearing upon the present controversy.

The determining clauses in exhibit No. 8, read as follows:

1. When imported materials on which duties have been paid are used, wrought into or attached to any article manufactured or produced in Canada, there may be allowed on the exportation of such articles beyond the limits of Canada a drawback of ninety-nine per cent of the duties paid on the materials used, wrought into or attached to the articles exported; provided that when both imported and domestic materials of the same class are used in the manufacture of the articles exported such drawback shall not be computed on a greater quantity of materials than entered into the exported goods; provided, further, that such drawbacks shall not be paid unless the duty has been paid on the materials so used as aforesaid within three years of the date of the exportation of the Canadian article, nor unless the claims as presented at any one time aggregate ten dollars.

2. The drawback on articles manufactured or produced in Canada and exported therefrom may be paid to the manufacturer, producer, or exporter, subject to the following conditions, viz:—

(*a*) The quantity of such materials used, and the amount of duties paid thereon, shall be ascertained (unless a specific sum has been authorized as drawback payable);

(*b*) Satisfactory evidence shall be furnished in respect of the manufacture or production of such articles in Canada and their exportation therefrom.

3. Upon the exportation of any article entitled to drawback, export entries, in triplicate, in the usual form (with the words "subject to drawback" marked on the face of the entry) shall be filed with the Collector of Customs at the port of exit from Canada, naming the conveyance by which, and the country or place to which the article is to be exported and fully describing the kind and quantity thereof and also the marks and numbers on the packages.

4. The claim for drawback shall be verified under oath, before a Collector of Customs, or Justice of the Peace, to the satisfaction of the Minister of Customs and Inland Revenue, in such form as he shall prescribe. The Minister of Customs and Inland Revenue may also require in any case, the production of such further evidence, in addition to the usual averments, as he deems necessary to establish the *bona fides* of the claim.

In addition to the above, reference may be had to subsection (*e*) of section 286 of the Customs Act which also provides for the granting of drawbacks.

The respondent filed of record a document admitting: 1st. That the cement referred to in the suppliants' six exhibits was exported; and 2nd, That the coal in respect of which drawback is claimed was imported.

Dealing first exclusively with the facts of the case, it appears that the suppliants imported coal for fuel, for heating purposes in the manufacture of cement.

The process of manufacturing cement by the suppliants will be readily understood by reference to exhibit No. 10 which shows the general arrangement of their 150-foot cement kiln.

Limestone and clay are the two principal ingredients required for the making of cement and constitute what is called the raw-mix, after having been dried and ground into an impalpable powder. This material is fed in the raw-mix bin and runs down by the conveyor and feed pipe into the cylinder—placed on a slight slope or grade towards the coal bin. The cylinder is rotated at a slow speed of probably two revolutions a minute, and this revolving movement works the raw material towards the coal bin, towards the clinkering zone, which extends from 25 to 35 feet from the other end and where the material comes to heat under a temperature of between 2,600° and 2,800° F., when it turns into a liquid state, a plastic condition, the rocks coming to clinkers.

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On the other hand, the pulverized coal is introduced at the other extremity of the coal bin, and is fed in through an 8-in. pipe with air pressure, probably 6 or 7 ounces. The coal which is thus introduced into the centre of the kiln, immediately ignites as it comes in and as the volatile matter and the carbon are burnt—generating the heat necessary to bind the raw-mix—the other component parts, the ashes, remain, come in contact with the raw-mix and form part of the clinkers, adhering more specially to the outside of the same, as contended by some chemists heard as witnesses.

The clinkers come out at the end of the cylinder and are afterwards mixed with gypsum and ground to an impalpable powder, thus producing what is called Portland cement.

The principal constituents found in the raw-mix of limestone and clay are silica, alumina and iron oxide; and as the ashes remain in the cement, after the volatile matter and carbon of the coal are burnt, it is contended that these ashes supply some silica, alumina and oxide of iron, and that, the result, if they did not have these ashes supplying such material, they would have to correct their raw-mix accordingly to obtain the same result.

Be that as it may, it would however appear, under a true analysis of the function of coal in manufacturing cement, that it was primarily imported and used for fuel and heating in their process of manufacturing; and that while the raw-mix (which, but for the ashes, it is contended would have to be adjusted), is composed of rock costing about 50 cents a ton and clay costing between $1 and $1.25 a ton, while coal costs up to $15 a ton, it seems to satisfy the sane economic consideration of the matter, and obviously determines that coal was not imported for the ingredients contained in its ashes, which constitute the residue of the coal, after being burnt and used as fuel and for heating purposes in the manufacture of cement.

The heating required in the manufacturing of cement could have been procured either by coal, wood, gas, oil or any other fuel. Ash is not properly speaking a desirable ingredient in the manufacture of cement,—coal having been used for heating the cement, the ashes unavoidably

remained in the cement and made it less pure as a Portland cement, being a disadvantage which cannot be avoided in such cases.

It is contended, and it was admitted by the respondent for the purposes of this case, that the coal in question had an ash content of 12½ per cent on an average, without admitting that any of these ashes went into the cement. The evidence further discloses that some of the ashes affected by the draft and moving gas are lost and go through the stack,—perhaps 3 per cent of the whole mix.

Still considering this claim for drawback outside of its forensic aspect and exclusively upon the facts, there can be no doubt that the imported coal was consumed in the manufacture of cement and that the claim made now is upon the 12½ per cent of ashes which remained after the coal was burnt. Ashes are what is termed mineral and non-combustible matters.

However, the fallacy in the suppliants' contention lies in the fact that it was coal,—a fuel required to heat their raw-mix—which was imported; and that it is its ashes which, in the process of manufacturing, finds its way into the cement, and is afterwards exported.

The duty has been paid on coal, not on ashes that may be found into it. The duty was not paid upon the silica, alumina and iron oxide in either the coal or the ashes. Moreover, there is no coal, *qua* coal, exported with the cement. There is no duty upon ashes.

Before the drawback can be ascertained, it is provided, under paragraph 2, subparagraph (*a*) of the Regulation above referred to, that "The quantity of such materials used" upon the exported article must be ascertained before fixing the drawbacks. In the present case, upon inquiry, it must be found that in the exported cement there was no "such materials"; there was no coal, which *qua* coal only was subject to duty.

The substance of the claim is neither meritorious nor reasonable, and challenges common sense.

Placing a proper construction upon section 288 of the Customs Act, guided by section 15 of the Interpretation Act, the conclusion must be arrived at that the suppliants' claim is not well founded. The legislator never contem-

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plated a claim such as the one set up in the present case, and there is no reason why one should depart from the general and plain meaning of the wording of the Act, for the convenience of a case, to extend to it a meaning which to every one would appear so strained as to amount almost to an absurdity.

Now the claim, upon its legal aspect, rests both upon the Statute and the Regulations. In both of them the language is permissive and facultative; it imports that the Crown is to exercise its discretion in paying or withholding the payment of the drawback. Nowhere do we find the word *shall;* the word *may* is used all through and there is no reason why it should be read otherwise than under its primary meaning. Under subsection 24 of section 34 of the Interpretation Act we find that, in every Act, unless the context otherwise requires, "shall" is to be construed as imperative and "may" as permissive, and I fail to see in the context of section 288 and in the Regulations above cited, anything that would induce any one to depart from such meaning. The claim is too distant and too remote.

In the case of *McHugh* v. *Union Bank* (1) Lord Moulton, speaking upon a similar enactment, says:

> It is true that (as is customary in interpretation clauses) these subsections are prefaced by the words "unless the context otherwise requires," but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may." The court is bound to assume that the legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may." The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their Lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.
>
> This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must." In the light of those decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the

(1) [1913] A.C. 299, at p. 314.

effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

Therefore, the principle disclosed in the case of *Matton* v. *The Queen* (1) will be accepted in the present case. The present claim is not one in which to the authority given by the use of the word "may" is coupled a legal duty to exercise such authority, and that the granting of a drawback is an absolute discretionary matter left to the Minister of Customs.

Section 288 of the Customs Act states that

> the Governor in Council, . . . allow, . . . a drawback under Regulations made for that purpose.

This would seem primarily to vest the discretion with the Governor in Council and finally that the Executive, by the Regulations, vested this discretionary power in the Minister.

Then section 1 of the Regulations states when the drawback may be allowed. Section 2 thereof provides that the drawback on articles manufactured in Canada and exported therefrom may be paid subject to the condition of establishing the quantity of such material used and the amount of duties paid thereon.

Upon the latter point it has been found that coal was the article imported and that in the cement exported there is no "such material"; coal, *qua* coal, has disappeared, has been burnt; there is no coal exported with the cement. No coal returned to the United States from where it was originally imported. The material exported is not in the same condition or nature as when imported. There was no coal, *qua* coal, wrought into the cement, there was ash. The coal had been all burnt in the cement, not wrought in it. The duty was paid on commercial coal and no part of the duty, in the sense of the statute, was paid upon ashes.

If "sawn board, planks and deals" (Tariff item 505) had been imported into Canada and potash made with the ashes of this burnt material, could it be reasonably contended that Parliament intended that the duty paid on the importation of such lumber should be paid back, in the way of a drawback, under section 288, when the potash is exported? Stating the case is answering it, and there can

(1) [1897] 5 Ex. C.R. 401 at 408.

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hardly be any difference in principle with the present controversy. The value, if any, of the ashes is very negligible. Would it not come within the legal maxim of *de minimis non curat lex?*

Moreover, if the drawback on the cement were to be paid under the measure of comparative value of the coal when imported and the value of the ashes in the exported cement, the conclusion would obviously be that that coal, as fuel and for heating purposes was worth, say $15. This value of the coal " as fuel and for heating purposes " having gone, the value upon which the duty was paid, there remained no part of the value represented by the ashes and there could be no refund, no drawback.

Pursuing the reading of the Regulations, we find, under paragraph 4 thereof that the claim must be verified to the satisfaction of the Minister, in such form as he may prescribe and moreover that

> The Minister of Customs and Inland Revenue may also require in any case, the production of such further evidence, in addition to the usual averments, as he deems necessary to establish the *bona fides* of the claim.

And I find that this language clearly and conclusively indicates and establishes that the question of paying or refusing to pay drawbacks, under the present circumstances, is entirely left to the discretion of the Minister; and if he fails in a proper case to grant and pay the drawbacks, he must answer to the Governor in Council or to Parliament; but he is not answerable therefor in a court of law. *Hereford Ry. Co.* v. *The Queen* (1); *Julius* v. *Bishop of Oxford* (2); *Matton* v. *The Queen* (ubi supra.)

Therefore I have come to the conclusion that a Petition of Right will not lie for the payment of drawbacks if, in a proper case, the Minister refuses to exercise the power vested in him; and it is accordingly ordered, adjudged and declared that the suppliants are not entitled to the relief sought by their Petition of Right.

Judgment accordingly.

Solicitors for suppliants: *Brown, Montgomery & McMichael.*

Solicitors for respondent: *Meredith, Holden, Hague, Shaughnessy & Heward.*

(1) [1894] 24 S.C.R. 1. (2) [1880] 5 A.C. 214, at p. 223.