

BETWEEN:

UNION PACKING COMPANY LIM-
ITED

} SUPPLIANT,

1943
Jun. 8
1945
Dec. 21

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of right—Contract—Negligence—Bacon Agreement between Canada and the United Kingdom, dated October 31, 1940—Bacon Regulations, Order in Council P.C. 4076, dated December 13, 1939, as amended by Order in Council P.C. 4353, dated December 27, 1939—Bacon Board a servant of the Crown—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19 (c)—Not intended by Bacon Agreement or Bacon Regulations that Crown should purchase or acquire bacon or pork products from Canadian packers and sell them to United Kingdom Government—Bacon Board under no duty towards packers to take care of pork products on their arrival at seaboard ports—Delay in arrival of ocean steamer one of the risks to be borne by the packer.

Suppliant alleged that on February 28, 1941, it was notified by the Bacon Board that it had booked shipment for pork products on a steamship scheduled to loa dat Saint John from March 12 to 15, 1941; that it made arrangements for delivery of said products to make connections with the said steamship and notified the Bacon Board accordingly; that said products arrived at Saint John on March 11, 1941, and were delivered at seaboard but no ship was available on which to load them, that the Bacon Board did not inspect the said products until March 29, 1941, on which date it advised the suppliant that some of them were rejected; that the Bacon Board, knowing that no ship was available, failed to notify the suppliant and failed to put the products into cold storage; and that on the resale of the rejected products the suppliant suffered loss. Similar allegations were made with regard to a second shipment.

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Suppliant claimed that the Crown, through the Bacon Board, had purchased or requisitioned its property and, alternatively, that it had suffered damage resulting from negligence of the Bacon Board. A question of law was set down for disposition before trial of the action as to whether a petition of right lies.

Held: That the question whether a body performing functions of a public nature is a servant or agent of the Crown or is a separate individual entity depends mainly upon whether it has discretionary powers of its own, which it can exercise independently, without consulting any representative of the Crown.

2. That the Bacon Board is a servant of the Crown.
3. That it was never contemplated or intended either by the bacon agreement or by the Bacon Regulations that the Crown in the right of Canada should purchase or otherwise acquire ownership of bacon or pork products from Canadian packers or producers and then in turn sell them to the United Kingdom Government.
4. That the function of the Bacon Board was to regulate the marketing and export of bacon and other pork products by packers but not to become itself a dealer in them.
5. That the Crown never made any contract with the suppliant for the purchase of any bacon or pork products from it and never requisitioned or took over its property.
6. That there was no duty on the part of the Bacon Board towards the suppliant to take care of its pork products on their arrival at Saint John or to inspect them immediately on such arrival or to notify the suppliant that a ship was not available.
7. That the risk of delay in the arrival of an ocean steamer was one that might normally be expected in wartime and fell upon the suppliant as the owner of the products.

PETITION OF RIGHT. Argument on question of law whether, assuming the acts or omissions alleged to be established, the petition of right lies.

The argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

R. Quain K.C. for suppliant.

R. Forsyth K.C. for respondent.

The acts or omissions alleged and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (December 21, 1945) delivered the following judgment:

The suppliant, a meat packer with its head office in Calgary, Alberta, claims \$8,594.75 and interest thereon as the amount of its loss in connection with two shipments of pork products made by it from Calgary in 1941.

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After the commencement of the war the Governments of Canada and the United Kingdom agreed on arrangements for the delivery, at Canadian seaports, to the United Kingdom Ministry of Food of Canadian bacons and hams during the period November 17, 1939, to October 31, 1940. A further arrangement was made for the period from November 1, 1940, to October 31, 1941, by an agreement, dated October 30, 1940. By Order in Council P.C. 4076, dated December 13, 1939, "Regulations respecting the marketing and export of bacon and other pork products", known as the Bacon Regulations, were made and established, by which a Board, called the Bacon Board, was created and given certain powers. This Order in Council was amended by Order in Council P.C. 4353, dated December 27, 1939, by which the powers conferred upon the Bacon Board by paragraph 4 (1) of Order in Council P.C. 4076 were made "subject to the approval of the Minister", the Minister in question being the Minister of Agriculture.

The suppliant alleges that on February 5, 1941, the Bacon Board notified it that a put down of 160,000 pounds of bacon and other pork products was authorized for the week commencing February 10, 1941; that it placed this amount into cure, including 73 boxes of rib backs, and notified the Bacon Board accordingly; that on February 28, 1941, it was notified by the Bacon Board that it had booked shipment for this pork on a steamship scheduled to load at the Port of Saint John from March 12 to 15, 1941; that it made arrangements for delivery of the said product to make connections with the said steamship and notified the Bacon Board accordingly; that the said product arrived at Saint John on March 11, 1941, and was delivered at seaboard but no ship was available on which to load it; that the Bacon Board did not inspect the said products until March 29, 1941, on which date it advised the suppliant that the 73 boxes of rib backs

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were rejected for slime, odour and some mould; that the Bacon Board on the arrival of the said pork, knowing that no ship was available, failed to notify it to take care of the said product and failed to take any steps to have it put into cold storage; and that on the resale of the 73 boxes of rib backs after their rejection the suppliant suffered a loss of \$4,508.86. Similar allegations with particulars of the relevant dates are made with regard to the second shipment, out of which 54 boxes of rib backs were rejected, with a loss to the suppliant on their resale of \$4,085.89.

On the application of the suppliant an order was made in chambers to have the following question of law set down and disposed of before the trial of the action:

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.

and argument was heard on this question, the agreement and the Orders in Council referred to being filed as exhibits.

I should first deal with the contention for the respondent that a petition of right does not lie against the Crown in this case on the ground that the Bacon Board is not a servant or agent of the Crown but an independent body. The latest decision bearing on this question is the judgment of the Court of Appeal of Manitoba in *Oatway v. Canadian Wheat Board* (1), where it was held by a majority of the court that the Canadian Wheat Board, although incorporated by statute and having capacity to contract and to sue and be sued in the name of the Board, was a servant of the Crown and that the action brought against the Board was not maintainable. An appeal to the Supreme Court of Canada was quashed on grounds that need not here be considered, but it should be noted that on the allowance of the motion to quash Rinfret C.J. made it clear that the Supreme Court of Canada expressed no opinion upon the judgment of the majority of the Court of Appeal (2). The report containing the said judgment is a valuable source of reference to the many authorities that

(1) (1945) 52 M.R. 283.

(2) (1945) S.C.R. 204 at 215.

might be consulted, but it will, I think, be sufficient to refer only to a few of them in which the test to be applied in determining the question is indicated.

In *Fox v. Government of Newfoundland* (1) it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of the various boards of education in Newfoundland were not debts or claims due to the Crown or to the Government or revenues of Newfoundland. At page 672, Sir Richard Couch said:

The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

This statement was approved by the Judicial Committee in *Metropolitan Meat Industry Board v. Sheedy* (2). In that case the Meat Industry Act, 1915, of New South Wales provided for the maintenance and control of slaughterhouses, cattle sale yards and meat markets in Sydney and the adjoining district, and established the Board to administer the Act. The Board had wide powers which it exercised at its discretion and money received by the Board was not paid into the general funds of the State, but to its own fund. The question for determination was whether a debt due to the Board was a debt due to the Crown, and it was held that it was not. Viscount Haldane stated the reason for such holding, at page 905, in the following terms:

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

(1) (1898) A.C. 667.

(2) (1927) A.C. 899.

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It is, I think, clear from these authorities that the question whether a body performing functions of a public nature is a servant or agent of the Crown or is a separate independent entity depends mainly upon whether it has discretionary powers of its own, which it can exercise independently, without consulting any representative of the Crown.

This test was applied by the Supreme Court of Canada in *City of Halifax v. Halifax Harbour Commissioners* (1). There the question was whether the Halifax Harbour Commissioners who occupied the Crown property of Halifax Harbour were assessable for business tax as an "occupier" within section 357 (1) of the Halifax City Charter (1931). Duff C.J., delivering the judgment of the Court, pointed out that in the exercise of all their powers the Harbour Commissioners were subject to the control of the Crown, carefully scrutinized in detail the nature of their powers and duties, summarized the controls and supervision to which they were subject and concluded that the Commissioners were performing Government services and were occupying the property in question for the Crown. He distinguished the facts in the case from those in *Fox v. Government of Newfoundland* (*supra*) and *Metropolitan Meat Industry Board v. Sheedy* (*supra*).

This leads to an examination of the position of the Bacon Board as set out in the Orders in Council. The members of the Board are appointed by the Governor in Council, hold office during pleasure and have their salaries or remuneration fixed by the Governor in Council. If a member is unable to perform his duties the Minister may appoint temporarily a substitute. The Board cannot appoint any officers, clerks or other persons or fix their remuneration except subject to the approval of the Governor in Council. Paragraph 4 (1) of Order in Council P.C. 4076 gave the Board certain powers, but the amending Order in Council P.C. 4353 made every one of these powers subject to the approval of the Minister, so that the Board cannot exercise any of such powers independently of the Government or without consulting the Minister. Moreover, the Board has no funds of its own; it may requisition cheques to be drawn against the Bacon Export Fund, but only with the

approval of the Minister. The expenses of the Board are met out of moneys provided by Parliament, but expenditures even for this purpose are subject to the Minister's approval. The Bacon Export Fund is a special account in the Consolidated Revenue Fund to which the Minister of Finance must credit all moneys received from the United Kingdom Ministry of Food for the purchase of bacon and other pork products and only the Minister of Finance may make payments out of this Fund. The records of the Board are subject to inspection by the Minister of Finance, and it must report to the Minister of Agriculture as and when required to do so by him. It seems perfectly clear to me from the Orders in Council that the Bacon Board is purely a Government board performing specific services for the Government and responsible to it for its actions. It falls far short of having the free discretionary powers that are necessary to independence. It is no more independent than a Government department. It is quite a different kind of body from that dealt with in *Metropolitan Meat Industry Board v. Sheedy (supra)*. In my opinion, the Bacon Board is clearly a servant of the Crown, and, if the suppliant had any cause of action, it acted properly in bringing a petition of right against the Crown rather than instituting an action against the Bacon Board.

But whether a petition of right lies under the circumstances alleged is, of course, a different matter. Counsel for the suppliant contended that its claim was, primarily, a contractual one based on a contract for the purchase by the Crown of the suppliant's products made between it and the Crown through the agency of the Bacon Board; secondarily, a claim for compensation on the ground that the Crown through the Bacon Board had requisitioned and taken over its property; and, thirdly, a claim for damages resulting from the negligence of the Bacon Board, while acting as a servant of the Crown. The first two claims are made under section 18 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads as follows:

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction

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in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

and the third under section 19 (c), as amended in 1938, which provides:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

- (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Before the claims can be dealt with it is necessary to ascertain the purpose and scheme of the Bacon Regulations. They became necessary because of the arrangements between the Governments of Canada and the United Kingdom for the delivery to the United Kingdom Ministry of Food of bacon and other pork products. The arrangement is set out in a document called "Heads of Agreement for Purchase of Canadian Bacon". Paragraph 1 sets out, *inter alia*, that the Ministry of Food undertakes to purchase from the Canadian Government, through the Bacon Board, and the Canadian Bacon Board undertakes to supply a stated average weekly minimum of Canadian bacon and hams; that the Ministry accepts responsibility for providing ships for ocean transport and that all payments will be made by the Ministry to the Canadian Bacon Board in Canadian funds at the Bank of Canada. Paragraph 2 sets out the prices that are to apply for the various classes of products. Paragraph 3 deals with weighing and shrinkage. By paragraph 4 it is provided that Canadian Government grading certificates will be accepted as evidence of quality and that the Canadian Government will maintain a suitable staff of qualified graders in Canada. Paragraph 5 (a) dealing with claims reads as follows:

- 5 (a) In the event of the Ministry of Food deciding that a claim against the Packers is justified, notice of claim has to be given within five days of final discharge of the steamer carrying the product in all cases except inherent faults, such as, broken legs, burst veins, abscesses, excessive fatness, etc. It is agreed that such cases may be dealt with within a reasonable time.

This obviously refers to claims in respect of products actually received on board steamer and it is significant that claims against packers, and not against the Canadian Government, are contemplated. Paragraph 6 pro-

vides that the Canadian Bacon Board will be responsible for storing the bacon and hams in good condition in suitable stores at suitable temperatures in Canada and will be responsible for placing the bacon and hams on board as ships are made available. Paragraph 7 reads:

7. All bacon and hams shall, in respect of fire or other loss or damage, be at the risk of the Sellers until it is placed f.o.b. ocean steamer.

The word "sellers" is in the plural and must, I think, be read as meaning Canadian packers. Then paragraph (8) is headed "Private Contracts" and provides:

8. The Ministry of Food undertakes not to purchase any bacon and hams from Canada except from the Canadian Government.

This agreement is an informal memorandum of the broad arrangements made between the Governments of Canada and the United Kingdom to meet the needs of the United Kingdom in the matter of bacon and pork products and should be regarded as such rather than as a contract with specific enforceable obligations. In any event, it is no part of the law of Canada except in so far as it is incorporated in the Order in Council, and it is the Order in Council that governs.

Counsel for the suppliant, in support of his contentions that the Crown in the right of Canada had acquired the suppliant's bacon and pork products by purchase or requisition and, therefore, owed the suppliant money in respect thereof, relied strongly upon the terms in the agreement, contained in paragraphs 1 and 8, that the Ministry of Food undertakes to purchase its bacon and ham requirements from the Canadian Government and from no one else in Canada and argued that in consequence of these terms it was contemplated that the Canadian Government should itself acquire the products.

I have come to the conclusion that it was never contemplated or intended either by the bacon agreement or by the Bacon Regulations that the Crown in the right of Canada should purchase or otherwise acquire ownership of bacon or pork products from Canadian packers or producers and then in turn sell them to the United Kingdom Government. In my opinion, all that was meant by the terms in the agreement on which counsel for the suppliant relied was that the Ministry of Food would make its pur-

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chases of Canadian bacon and hams only through the Canadian Bacon Board, and not otherwise, but this did not make the Bacon Board the seller of the products. The packers were the sellers and the owners of the products until they were delivered on board steamer, and then the title to the products passed to the United Kingdom. The Bacon Board was a marketing and export controller, but not a vendor in its own right or in that of the Crown. This is borne out by the recitals of Order in Council P.C. 4076. It recites the making of the arrangements between the two Governments and then states:

That it will therefore be necessary, in order to insure that regular and sufficient supplies will be available for export as required and that satisfactory prices will be paid to hog producers, to control the marketing of bacon and other pork products and to store bacon or other pork products during seasons of heavy hog marketing to supplement supplies of seasons of light hog marketing;

The Bacon Regulations are called "Regulations respecting the marketing and export of bacon and other pork products". The title aptly describes their purpose. They were intended to assist in the fulfilment of the purposes of the agreement; there was to be a control of the marketing and export of the products so that there would be a regular, steady and sufficient flow of them from Canadian packers and producers to the United Kingdom to meet its needs.

The powers conferred upon the Bacon Board support the view that its function was to regulate the marketing and export of bacon and other pork products by packers and that it was not to become itself a dealer in them. The very first power conferred upon the Board makes this abundantly clear. Paragraph 4 (1) (a) reads:

4. (1) The Board shall have power subject to the approval of the Minister

(a) to regulate the export of bacon and other pork products to Great Britain pursuant to the agreement made between the Governments of Canada and the United Kingdom and to that end to arrange with or require any packer to ship and deliver bacon or other pork products of the quantity and quality specified in such arrangement or requirement to the United Kingdom Ministry of Food at seaboard ports in Canada.

The Bacon Board regulates exports; it is not itself an exporter. It has power to arrange with or require a packer to ship and deliver bacon or other pork products but the

delivery is to be made by the packer, not to itself, but to the United Kingdom Ministry of Food at seaboard ports in Canada; the packer is the exporter. In my opinion, paragraph 4 (1) (a) is conclusive against the suppliant's contention. The words used in it are not those one would expect if it were intended that the Canadian Government should itself first acquire the pork products and then sell them to the United Kingdom. Nowhere in the Bacon Regulations is any power given to the Bacon Board to acquire, either by purchase or otherwise, the ownership of any pork products. If it had been intended that it should do so it is inconceivable that the power of such acquisition should not have been conferred in express terms.

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The price arrangements also bear out the same view. By paragraph 4 (1) (c) the Bacon Board has power to determine the prices which shall be paid to packers for products delivered in accordance with requirements of the Board but it is made the duty and responsibility of the Board

to ensure that the prices to be paid to the packers and all other expenditures or liabilities incurred or to be incurred in respect of such bacon and other pork products delivered as aforesaid (administrative expenses of the Board excepted) shall be fully covered by and met out of the amount to be paid by the Government of the United Kingdom under the agreement aforesaid:

The prices are fixed in relation to the prices arranged with the United Kingdom Government and are to be met "out of" the amount paid by it. This is part of the regulation of marketing undertaken by the Canadian Government. It does not itself become a trader in bacon or pork products.

The arrangements relating to payment are likewise inconsistent with the view that the Canadian Government is to buy pork products from Canadian packers and sell them to the United Kingdom Government. Section 5 of the Bacon Regulations provides that there shall be a special account in the Consolidated Revenue Fund called the Bacon Export Fund to which the Minister of Finance shall credit all moneys received from the United Kingdom Ministry of Food for the purchase of bacon and other pork products. This is a statutory fund. Then it is further provided that the Minister of Finance, on the requisition of the Bacon Board, shall pay out of this fund and "to the extent only"

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of the Fund sums necessary to compensate packers for the deliveries made by them. From these provisions it is clear that the Canadian Government acts as paying agent for the United Kingdom Ministry of Food. Instead of paying the packers who have delivered pork products to it separately and individually, the Ministry of Food pays lump sums to the Canadian Government which are credited to the Bacon Export Fund and the Minister of Finance makes payments out of this fund for the Ministry of Food to the packers according to their entitlement, on the requisition of the Bacon Board. No such arrangements would be necessary if the Canadian Government had become itself the owner of the products. It would then be obliged to pay for them either their purchase price if they had been purchased or their value if they had been acquired by requisition, regardless of whether it had received anything from the United Kingdom or not. Under the regulations the prices to be paid depend upon those agreed upon between the two governments and the Canadian Government makes distribution to the packers only out of moneys received from the United Kingdom and not otherwise; it does not assume any independent obligation of its own to pay for any pork products. Under this arrangement the packer remains the owner of the pork products until they are delivered on board steamer and it is not until then that their ownership changes hands and passes to the United Kingdom Government. That this was intended is clear from paragraphs 5 and 7 of the agreement by which the United Kingdom preserves its right to make claims against the packers in respect of products delivered on board steamer and it is provided that the sellers, who cannot be other than the packers, shall take all the risks of loss until the products are placed on board such steamer.

In my opinion, the Crown never made any contract with the suppliant, through the Bacon Board or otherwise, for the purchase of any bacon or pork products from it and its contractual claim completely fails. Nor has it any claim for compensation on the ground that the Crown acquired its products by requisition. The provisions as to requirement of delivery are necessary only in the event of shortage of supply and have no application in the present case. Moreover, it was not competent for the Bacon Board to requisition

tion or take over any pork products at the prices fixed by the Bacon Regulations. If the regulations purport to give the Board any such power, they are to that extent *ultra vires*, as indicated by the *Chemicals Regulations Reference* (1). But, as a matter of fact, the Crown never requisitioned or took over the suppliant's property. All that the Bacon Board did was to notify the suppliant first that a certain put down of bacon and other pork products was authorized and later that it had booked shipment for the products in a steamship that was scheduled to load between certain dates. These notifications were given by the Board in the course of its marketing and export regulations and were in no sense a requisition or taking over of the suppliant's property. The suppliant remained the owner of the pork products and they were at its risk until delivered on board the United Kingdom ocean steamer. The claims of the suppliant under section 18 of the Exchequer Court have, in my opinion, no foundation whatever.

Nor am I able to find any foundation for the suppliant's claim based on negligence on the part of the Bacon Board, even if it is assumed that it is an officer or servant of the Crown within the meaning of section 19 (c) of the Exchequer Court Act. It is alleged in the petition that the Bacon Board, as the agent and servant of the Crown, was negligent in handling the pork products and failed to use reasonable care in that when it found that no ship was available it should have taken steps to have them put into cold storage or should have notified the suppliant that shipping space was not available and so have permitted it to make arrangements itself for their care. On the argument counsel for the suppliant contended that the Crown, through the Bacon Board, was bound to take care of the products and see that they did not go bad; that it owed a duty to inspect and take care of them as soon as they arrived at Saint John; and that the damage to the suppliant was the result of the Bacon Board's failure to inspect and notify.

There was, in my opinion, no duty on the part of the Bacon Board towards the suppliant to take care of its pork products on their arrival at Saint John. It is true

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that under paragraph 6 of the agreement the Bacon Board is to be responsible for storing bacon and hams in good condition in suitable stores at suitable temperatures in Canada and for placing them on board as ships are made available, but this responsibility towards the United Kingdom is assumed by the Bacon Board as part of its control of marketing, and refers, I think, to a situation where storage becomes necessary in a period of heavy marketing to make up for periods of light marketing in order that deliveries may be maintained in a continuous and regular flow. There is no such situation in the present case. Paragraph 6 of the agreement must be read in the light of the Bacon Regulations and the provisions therein relating to storage. Paragraph 4 (1) (b) gives the board power to require any packer to store pork for future curing and delivery to satisfy future requirements of the United Kingdom Ministry of Food and paragraph 4 (1) (c) provides for the price to be paid for pork so stored plus carrying and storage charges as approved by the Board. These provisions have no application to the present case. The suppliant was not required to store and its products were not taken into storage. The facts alleged do not bring the case within any of the provisions of the Bacon Regulations relating to storage. It is not alleged that the Board instructed the suppliant to deliver any pork products to it, or that, after the products arrived at Saint John, the suppliant delivered them to the Board or the Board took delivery of them. Nor is there any suggestion that either the Bacon Board or the suppliant intended that the products should be taken into store by the Bacon Board on their arrival at Saint John. In fact, quite the contrary is the case, namely, that it was intended that they should be loaded directly on board the United Kingdom steamer immediately on their arrival. This is borne out by the suppliant's own allegation that arrangements were made for delivery of the products at seaboard so as to make connections with the steamship that was scheduled to load between certain dates. The case falls outside the provisions relating to storage and there is no duty of storage apart from them. Nowhere in the Bacon Regulations can I find any provision imposing any duty on the Bacon Board to take care of pork products shipped under such circumstances as exist in the present case.

Paragraph 7 of the agreement makes it clear that all bacon and hams shall be at the risk of the sellers until placed f.o.b. ocean steamer and it seems to me that it was the duty of the suppliant to make its own arrangements for the care of its own products from the time they left Calgary up to the time they could be loaded on a United Kingdom ship. Before the suppliant can hold the Crown responsible for negligence on the part of the Bacon Board in failing to take care of its products on their arrival at Saint John, it must be able to show a duty on the part of the Board to take such care. I cannot find any such duty imposed upon the Board by the agreement or the Bacon Regulations, and there is no such duty apart from them.

Nor was there any duty on the part of the Board to inspect the suppliant's products immediately on their arrival at Saint John. The duty of inspection was owing, not to the suppliant, but to the United Kingdom Ministry of Food, for it will be remembered that under the agreement Canadian government grading certificates are to be accepted as evidence of quality. The Bacon Board is the inspecting agent for the United Kingdom Ministry of Food. It is obvious that if the duty of inspection is to be properly performed, the inspection should be made immediately before loading. The suppliant had no right to have its products inspected any earlier since it carried the risks up to the time of actual loading on board steamer. It is not a case of the suppliant having a right to inspection and suffering loss through delay therein. Power to inspect and reject was given to the Board by the Bacon Regulations and the suppliant had to submit to inspection when it was most properly done. Delay in the inspection was, no doubt, due to delay in the arrival of a steamship. There was no object in inspecting until there was a steamer available to take the products. Shipping was the responsibility of the United Kingdom, not of the Crown in the right of Canada or of the Bacon Board. I am unable to find any cause of action by the suppliant due to failure by the Bacon Board to inspect its products before it did.

Nor can I see any duty on the part of the Board to notify the suppliant that a ship was not available to load

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its products. All that the Bacon Board did as export regulator was to notify the suppliant that it had booked shipment for the products on a steamship scheduled to load at Saint John between certain dates. There could be no guarantee that such steamship would arrive as scheduled and the possibility that it would not be there on schedule was a contingency as well known to the suppliant as to the Bacon Board. The Board had performed its function as a regulator of exports when it notified the suppliant as it did, and was not under any duty to notify the suppliant of delay in the arrival of the steamship.

In my judgment, if the suppliant suffered loss through deterioration in its products between their arrival in Saint John and their inspection by the Bacon Board, such loss was due, not to any breach of duty or negligence on the part of the Bacon Board, but to delay in the arrival of a steamship. For such delay the Bacon Board was not responsible. The risk of such delay was one that might normally be expected in war time and it was a risk, just like any other risk in the course of transit, that fell upon the suppliant as the owner of the products. If it did not guard against such risk, the resulting loss, like any other loss prior to the products being placed f.o.b. United Kingdom ocean steamer, is due to its own failure to make arrangements for the care of its own products, and must be borne by it; it has no right to impose such loss on anyone else.

In my opinion, the suppliant has not satisfied the onus cast upon it by section 19 (c) of the Exchequer Court Act, and fails on this ground as well as on the others.

The result is that the question of law before the Court is answered in the negative.

In view of the such answer, there is no object in proceeding with the trial of the issues of fact herein for the answer to the question of law disposes of the suppliant's claims, even if all the acts or omissions alleged in the petition are proved. The judgment of the Court is, therefore, that the suppliant is not entitled to any of the relief sought in its petition of right, and that the respondent is entitled to costs; these will include costs of motions and other proceedings herein previously reserved.

Judgment accordingly.