

BETWEEN:

BERNARD RANDOLPH and WORLD
WIDE MAIL SERVICES CORPORA-
TION

SUPPLIANTS;

Ottawa
1965
July 13, 14
July 23

AND

HER MAJESTY THE QUEEN RESPONDENT.

Post Office—Prohibition of postal services—Order of Postmaster General—Whether right to be heard before order made—Whether order of judicial nature—Post Office Act, R.S.C. 1952, c. 212, s. 7.

Crown—Petition of Right—Order of Postmaster General prohibiting mail services—Liability of Crown in damages for tort—Remedies—Post Office Act, R.S.C. 1952, c. 212, ss. 7, 38—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3—Exchequer Court Act, R.S.C. 1952, c. 98, s. 17.

The suppliant, Bernard Randolph, carried on the business in Montreal and elsewhere of selling films, books, photographs, etc. which were mailed for him by the suppliant, World Wide Mail Services Corp., which was in the business of mailing merchandise for customers. On 22 April 1965 Post Office officers temporarily suspended the postal service of the corporation and on 28 April, following an examination of Randolph's merchandise by Post Office officials, the Postmaster General, without affording suppliants an opportunity to be heard, made interim orders under s. 7 of the *Post Office Act*, R.S.C. 1952, c. 212, prohibiting the delivery of mail to or for both suppliants.

By their petitions of right suppliants sought redress for interference with their property rights in mail.

Held, suppliants were entitled to have delivered to them the mail withheld from delivery and to damages.

1. Since the suppliants claimed for interference with property rights only, their claims were restricted to mailable matter sent to them by post, which by s. 38 of the *Post Office Act* becomes the property of the addressee when deposited in a Post Office.
2. Unless the omission to deliver suppliants' mail was justified at law the Crown was liable in damages to the suppliants in tort under s. 3 of the *Crown Liability Act*, S. of C. 1952-53, c. 30, for wrongfully withholding their property.
3. Section 17 of the *Exchequer Court Act*, R.S.C. 1962, c. 98, gives the Court jurisdiction to entertain suppliants' claim for recovery of their mail.
4. The *Post Office Act* contains no implied power to withhold delivery of mail addressed to a person prior to the making of a prohibitory order.
5. The power conferred on the Postmaster General by s. 7 of the *Post Office Act* to make orders prohibiting the delivery of mail to or for a person is of a judicial or quasi-judicial character and there is nothing in the section expressly or impliedly excluding the necessity to afford a person affected by such a prohibitory order an opportunity to be heard before the power is exercised.

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[*Board of Education v. Rice*, [1911] A.C. 179; *Local Government Board v. Arlidge*, [1915] A.C. 120; *Esquimalt and Nanaimo Railway Co. v. Wilson*, (B.C. C.A.), (1921) 59 D.L.R. 577, per Eberts, J.A., at page 590; (P.C.) 61 D.L.R. 1; *Errington v. Minister of Health*, [1935] 1 K.B. 249; *Mantha v. The City of Montreal*, [1939] S.C.R. 458; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, [1947] 1 D.L.R. 721, per Lord Greene at pp. 732-3; *L'Alliance des Professeurs Catholiques de Montréal v. The Labour Relations Board*, [1953] 2 S.C.R. 140; *Ridge v. Baldwin* [1964] A.C. 40; *Rex v. Leman Street Police Station Inspector; Ex parte Venicoff*, [1920] 3 K.B. 72, per Earl of Reading, C.J., at pp. 79-80; *The King v. Nozzema Chemical Company of Canada Ltd.*, [1942] S.C.R. 178; *Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87; *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *Calgary Power Ltd. v. Capithorne*, [1959] S.C.R. 24; *Regina v. Governor of Brixton Prison; Ex parte Soblen*, [1963] 2 Q.B. 243; *Triefus & Co. Ltd. v. Post Office*, [1957] 2 Q.B. 352; *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, per Lord Greene, M.R., at pp. 399 and 405; *Robinson v. Minister of Town and Country Planning*, [1947] 1 K.B. 702; *Rex v. Housing Appeal Tribunal*, [1920] 3 K.B. 334 per Earl of Reading, C.J., at p. 340; *Literary Recreations Ltd. v. Sauvé*, (1932) 58 C.C.C. 385, per Martin J.A. at p. 391; *Rex v. Halliday*, [1917] A.C. 260 and *Liversidge v. Anderson*, [1942] A.C. 206, referred to.]

PETITION OF RIGHT.

Jean-Paul Ste. Marie, Q.C. and Conrad Shatner for suppliants.

Paul Ollivier, Q.C. for respondent.

JACKETT P.:—This is a Petition of Right in respect of mail sent by, or addressed to, the suppliants during a period commencing on Thursday, April 22, 1965, and ending with the filing of the Petition of Right.

Certain facts having been established as follows,

- (a) by paragraph 1 of the Amended Statement of Defence, the Deputy Attorney General of Canada admitted the first four numbered paragraphs of the Petition of Right,
- (b) counsel for the suppliants, in open court, admitted
 - (i) all of sub-paragraph (a) of paragraph 3 of the Amended Statement of Defence except the words "ayant des motifs sérieux de croire que la requérante, World Wide Mail Services Corporation, employait la poste pour des fins défendues par la Loi",
 - (ii) sub-paragraph (b) of the said paragraph 3,

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- (iii) sub-paragraph (c) of the said paragraph 3 subject to his right to challenge the correctness of anything in the memorandum of the Deputy Postmaster General referred to therein or the attachments thereto,
- (iv) paragraph (d) of the said paragraph 3,
- (v) paragraph 4 of the Amended Statement of Defence,
- (vi) sub-paragraph (a) of paragraph 8 of the Amended Statement of Defence,
- (c) by paragraph 9 of the Amended Statement of Defence, the Deputy Attorney General of Canada admitted the allegations in sub-paragraphs (b) and (c) of paragraph 15 of the Petition of Right,

the suppliants offered no evidence at the trial except certain documents which were tendered and accepted as exhibits without objection. It was agreed by both parties that, in the event that it transpires that the suppliants are entitled to damages, the ascertainment of the amount thereof will be the subject of a reference to a judge or some other officer of the Court.

No evidence was adduced on behalf of the Deputy Attorney General of Canada.

Neither party put in evidence the memorandum referred to in sub-paragraph (c) of paragraph 3 of the Amended Statement of Defence or the attachments thereto.

The facts, as established, so far as they are relevant, may be stated briefly as follows:

1. The suppliant Randolph does business in the city and district of Montreal and elsewhere under the registered firm name of "Al Brino Services Reg'd."
2. The corporate suppliant does business in the city and district of Montreal and elsewhere.
3. Randolph's business consists in offering to sell and selling films, books, photographs and similar objects.
4. The corporate suppliant's business consists in sending, by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they ask it so to send.

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5. On Thursday, April 22, 1965, officers of the Post Office Department in Montreal suspended temporarily the postal service of the corporate suppliant for the purpose of an investigation.
6. On Friday, April 23, 1965, the suppliant Randolph, at the request of officers of the Department, agreed to submit to them samples of films, books and photographs that he offered for sale by means of the facilities of the corporate suppliant. These samples were immediately sent to higher officers of the Department in Ottawa with a view to determining whether there were grounds, on the basis of such samples, for recommending to the Postmaster General that he exercise, in respect of the suppliants, the powers conferred upon him by section 7 of the *Post Office Act*, R.S.C. 1952, chapter 212. In the meantime, the corporate suppliant's postal services remained suspended by authority of the Deputy Postmaster General.
7. On Monday, April 26, 1965, the aforesaid samples were seen and examined by the Deputy Postmaster General and two other officers of the Post Office Department.
8. On Wednesday, April 28, 1965, the Deputy Postmaster General wrote a memorandum to the Postmaster General recommending that an interim prohibitory order be made against the suppliants under section 7 of the *Post Office Act* and, on the same day, the Acting Postmaster General signed two documents purporting to be interim orders under that section prohibiting the delivery of mail directed to them or deposited by them in the Post Office. These orders were made without the suppliants having been previously heard and without the suppliants having had any opportunity of objecting thereto or presenting evidence.
9. The mail to which these orders relate, and mail that was not delivered as a result of the action taken by the Montreal Post Office officials on April 22, is detained by officers of the Post Office Department in a safe place.

By virtue of section 38 of the *Post Office Act*, mailable matter, which includes anything that may be legally sent by post, "becomes the property of the person to whom it is addressed when it is deposited in a post office". The suppliant

ants, by virtue of this provision, ceased to have any property in mail sent by them when they deposited it in a post office. On the other hand, all mail addressed to either of them became the property of the suppliant to whom it was addressed when it was deposited in a post office. As counsel for the suppliants made it clear that the Petition of Right is designed only to obtain redress in respect of an alleged interference with property rights in mail, and is not designed to put forward any claim for breach of contract or breach of statutory rights, I am of opinion, and I so hold, that there is no basis for any claim in respect of mail sent by the suppliants during the periods when their mailing rights were in fact interrupted. During the balance of these reasons, I shall be considering the matter from the point of view of mail sent to them.

In so far as the Petition of Right is for damages, it is, in effect, founded upon the *Crown Liability Act*, chapter 30, of the Statutes of 1952-53, section 3 of which makes Her Majesty in right of Canada liable "in tort" for the damages for which, if She were a private person of full age and capacity, She would be liable, in respect of a tort or "un acte préjudiciable" committed by a servant of Her Majesty. In so far as the Petition of Right is for recovery of mail that is the property of one or other of the suppliants, it is based upon section 17 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, which gives this Court jurisdiction, *inter alia*, in cases where property of the subject is in the possession of Her Majesty in right of Canada. Compare section 7 of the *Petition of Right Act*, R.S.C. 1952, chapter 210, and see *Miller v. The King*¹.

Inasmuch as the officials of the Post Office Department, who in my view are servants of the Crown, have deliberately omitted to deliver to the suppliants mailable matter in due course of the operation of the postal service, it is clear that property of the suppliants is in the possession of the Crown and is being wrongfully withheld from them and that a tort or "un acte préjudiciable" has been committed against the suppliants by servants of the Crown, *unless* there is in law some justification for the omission to deliver such mailable matter.

In so far as mail addressed to the corporate suppliant before the Postmaster General made his order in respect of

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¹ [1950] S C R. 168.

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the suppliant on April 28, 1965, is concerned, no justification in law has been suggested to me for failing to deliver it to the suppliant in due course of the operations of the postal service. An argument was addressed to me by counsel for the Deputy Attorney General that a power in post office officials to interrupt a person's mail service and temporarily to detain his mail while they are seeking a decision from the Postmaster General with reference to the exercise of his statutory powers with regard thereto must be implied—although it is admittedly nowhere expressly set out in the statute—to enable such officials to prevent, during such interim period, the carrying on of operations that appear to them to be fraudulent. No authority was cited to me for any such implying of statutory powers to interfere with the property rights and statutory privileges of presumably law-abiding citizens and I reject such argument. The corporate suppliant is therefore entitled to judgment in respect of mail addressed to it that was detained prior to the making of the order on April 28, 1965.

In so far as mail addressed to either of the suppliants after the making of the two orders of April 28, 1965, is concerned, the right of the suppliants depends on the validity of such orders.

Those orders purport to have been made under subsection (1) of section 7 of the *Post Office Act*, which reads as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

(a) is, by means of the mails,

(i) committing or attempting to commit an offence, or

(ii) aiding, counselling or procuring any person to commit an offence, or

(b) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

The attacks on the orders made under section 7 may be summarized as follows:

(a) section 7 of the *Post Office Act* must be so read as to make it a condition precedent to the validity of an interim prohibitory order thereunder against any person that such person has first been given an opportunity

to be heard and to correct or contradict any relevant statement prejudicial to him (hereinafter referred to as "an opportunity to be heard"), and, no such opportunity to be heard having been given to either of the suppliants before these two orders were made, they are nullities;

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(b) regardless of how the *Post Office Act* might otherwise be read, the Court is required by the *Bill of Rights Act* to read section 7 thereof as

(i) not authorizing the abrogation, abridgement, or infringement, of the suppliants' right to the enjoyment of their property except by due process of law (section 1(a)),

and to construe and apply section 7 so as

(ii) not to deprive the suppliants of a fair hearing in accordance with the principle of fundamental justice for the "determination" of their "rights", and

(iii) not to deprive the suppliants, who are charged with criminal offences, of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal,

and, when so read, construed and applied, section 7 does not authorize the orders in the manner in which they were made and they are therefore nullities; and

(c) there was not evidence before the Postmaster General upon which he could have concluded that he had reasonable grounds for believing that either of the suppliants had, by means of the mail, committed or attempted to commit any criminal offence and the said orders were therefore null and void as not having been made within the powers conferred by section 7.

I shall deal first with the contention that the orders are nullities, having regard only to section 7 of the *Post Office Act*, because the Postmaster General did not give the suppliants an opportunity to be heard before he made them.

It is common ground that the orders in question purport to be interim prohibitory orders under section 7 and that they were made without affording to the persons affected any opportunity to be heard.

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It is a general rule that, unless Parliament has, in a particular class of matters, otherwise provided, every person has a right to be heard and to be given a fair opportunity for correcting or contradicting what is alleged against him before an order is made against him. This is a fundamental rule of British justice that is read into statutes conferring power to make decisions¹. It applies not only when the power to make decisions is conferred upon judicial tribunals constituted as such but whenever such a power is conferred upon administrative agencies, Ministers of the Crown or other purely executive authorities. The rule only applies, however, in the absence of any express statutory rule to the contrary, to decision making powers conferred by statute that are of the kind sometimes referred to as being of a judicial or quasi-judicial nature because they are primarily directed to the determination or abrogation of rights of members of the public by application of a statutory rule to the facts of a particular case as determined by the tribunal. In other words, the rule that I am discussing does not apply to decisions that are primarily of an administrative or executive nature in the sense that they are arbitrary because they are made having regard primarily to public policy or expediency considerations² but does apply to decisions as to individual rights arrived at by ascertaining facts and applying some rule or principle of law to them.

Two questions have to be considered, therefore, in determining whether it is a condition precedent to the Minister's

¹ *Board of Education v. Rice*, [1911] A.C. 179; *Local Government Board v. Arlidge*, [1915] A.C. 120; *Esquimalt and Nanaimo Railway Co. v. Wilson*, (B.C. C.A.), (1921) 59 D.L.R. 577, per Eberts, J.A., at page 590; (P.C. 61 D.L.R. 1; *Errington v. Minister of Health*, [1935] 1 K.B. 249; *Mantha v. The City of Montreal*, [1939] S.C.R. 458; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, [1947] 1 D.L.R. 721, per Lord Greene at pages 732-3; *L'Alliance des Professeurs Catholiques de Montréal v. The Labour Relations Board*, [1953] 2 S.C.R. 140; *Ridge v. Baldwin* [1964] A.C. 40.

² *Rex v. Leman Street Police Station Inspector; Ex parte Venicoff*, [1920] 3 K.B. 72, per Earl of Reading, C.J., at pages 79-80; *The King v. Nozema Chemical Company of Canada, Ltd.*, [1942] S.C.R. 178; *Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87; *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *Calgary Power Ltd. v. Capithorne*, [1959] S.C.R. 24; *Regina v. Governor of Brixton Prison; Ex parte Soblen*, [1963] 2 Q.B. 243.

power to make an order under section 7 that he shall have first given to the person affected an opportunity to be heard. They are

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- (a) Is the power conferred by section 7 of the class of statutory judicial or quasi-judicial powers the exercise of which is subject to a condition precedent that an opportunity to be heard has been given to the person affected unless the necessity for such an opportunity has been negated by the statute?
- (b) If the answer to that question is in the affirmative, does section 7 contain an indication that Parliament intended the power conferred by that section to be exercised without the Minister first having given to the person affected an opportunity to be heard?

To answer these two questions, it is necessary to consider all of section 7, which reads as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

- (a) is, by means of the mails,
 (i) committing or attempting to commit an offence, or
 (ii) aiding, counselling or procuring any person to commit an offence, or
 (b) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

(2) Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his last known address informing him of the order and the reasons therefor and notifying him that he may within ten days of the date the registered letter was sent, or such longer period as the Postmaster General may specify in the letter, request that the order be inquired into, and upon receipt within the said ten days or longer period of a written request by the person affected that the order be inquired into, the Postmaster General shall refer the matter, together with the material and evidence considered by him in making the order, to a Board of Review consisting of three persons nominated by the Postmaster General one of whom shall be a member of the legal profession.

(3) The Board of Review shall inquire into the facts and circumstances surrounding the interim prohibitory order and shall give the person affected a reasonable opportunity of appearing before the Board of Review, making representation to the Board and presenting evidence.

(4) The Board of Review has all the powers of a commissioner under Part I of the *Inquiries Act*, and, in addition to the material and evidence referred to the Board by the Postmaster General, may consider such further evidence, oral or written, as it deems advisable.

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(5) Any mail detained by the Postmaster General pursuant to subsection (8) may be delivered to the Board of Review, and, with the consent of the person affected, may be opened and examined by the Board.

(6) The Board of Review shall, after considering the matter referred to it, submit a report with its recommendation to the Postmaster General, together with all evidence and other material that was before the Board, and upon receipt of the report of the Board, the Postmaster General shall reconsider the interim prohibitory order and he may revoke it or declare it to be a final prohibitory order, as he sees fit.

(7) The Postmaster General may revoke an interim or final prohibitory order when he is satisfied that the person affected will not use the mails for any of the purposes described in subsection (1), and the Postmaster General may require an undertaking to that effect from the person affected before revoking the order.

(8) Upon the making of an interim or final prohibitory order and until it is revoked by the Postmaster General,

(a) no postal employee shall without the permission of the Postmaster General

(i) deliver any mail directed to the person affected, or

(ii) accept any mailable matter offered by the person affected for transmission by post,

(b) the Postmaster General may detain or return to the sender any mail directed to the person affected and anything deposited at a post office by the person affected, and

(c) the Postmaster General may declare any mail detained pursuant to paragraph (b) to be undeliverable mail, and any mail so declared to be undeliverable mail shall be dealt with under the regulations relating thereto.

(9) Where no request that an interim prohibitory order be inquired into is received by the Postmaster General within the period mentioned in subsection (2), the order shall, at the expiration of the said period, be deemed to be a final prohibitory order.

By the *Post Office Act*, Parliament provides for the operation, by a government department under the management and control of a Minister of the Crown known as the Postmaster General, of a public utility that is almost as important, if not as essential, to residents of Canada, in their business and domestic lives alike, as are the light, heat and water that are provided by public utilities at the local level. Whether or not any individual person has a right enforceable in the courts to the services provided by the Post Office Department may be subject to debate¹. As a practical or political matter, however, every resident of Canada has a right to avail himself of such services except to the extent that such right is qualified by the provisions of the *Post Office Act*. One such qualification is found in section 7.

¹ Cf. *Triefus & Co. Ltd. v. Post Office*, [1957] 2 Q.B. 352.

The legislative policy is clear. Post Office services are intended to serve the lawful requirements of residents of Canada and are not provided to be used for the commission of crime. The problem was to devise a provision that would give practical effect to that legislative policy. In the ordinary course of events, Post Office officials see only the covers on letters and other mailable matter and the covers do not reveal whether the contents are innocent in character or are part of the implementation of a criminal scheme. It would be futile, therefore, merely to lay down a rule prohibiting the acceptance or delivery of mailable matter that is being used in the carrying out of a crime. Before the commission of a crime can be discovered and established in accordance with normal judicial procedures, the mail will have been used in the manner that it is sought to avoid.

What section 7 does, therefore, in order to effect the parliamentary purpose of diminishing the use of the mails for criminal purposes, is twofold. First, it adopts a rule that, when it has been ascertained that there are reasonable grounds to believe that a person is using the mails for criminal purposes, such person will forfeit the right to use the mails for any purpose, criminal or otherwise, until he abandons his purpose of using the mails for criminal purposes. Secondly, it makes the Postmaster General, who is the Minister of the Crown in immediate control of the postal service, the authority to determine whether circumstances have arisen in any particular case that give rise to the imposition of such a forfeiture of the right to use the mails.

It is to be noted that, from the point of view of the person affected, there are two consequences of such a determination, viz.,

- (a) he cannot use the Post Office for the sending of any mailable matter, while that order is in effect, and
- (b) mailable matter addressed to him, which is his property by virtue of section 38 of the *Post Office Act*, is withheld from him.

Such an order, therefore, not only deprives the person affected of the use of the postal service of Canada that is available to practically all other residents of Canada, but it

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operates to deprive him of the possession of mailable matter that belongs to him and that he would otherwise have in his possession—that is, it deprives him of the enjoyment of a part of his property.

Another comment that should be made on section 7 at this stage is that, unlike the criminal law, which goes on the principle that it is better that some guilty persons should go unpunished than that even one innocent person should be punished, the principle adopted by section 7 is not that it only operates against persons who have been or could be convicted of crime but it operates also against persons in respect of whom there are reasonable grounds for believing that they are engaged in criminal activities even though they may actually, in some cases, be innocent.

While it does not seem that the dividing line between a power to make an administrative or executive decision of such a character that there is no necessity to provide the person affected with an opportunity to be heard and a power to make judicial or quasi-judicial decisions of such a character that it is necessary to provide such an opportunity to be heard has been authoritatively defined with any precision, notwithstanding that the power here is vested in a Minister of the Crown who is primarily an authority with administrative and executive authority, having regard to the fact that the Minister is to apply a rule or principle enunciated by Parliament to the facts of each particular case, and having regard to the fact that the matter is not left to be determined in accordance with his views as to public policy or expediency¹, I am of opinion that the power with which I am concerned is of such a judicial or quasi-judicial character that it cannot validly be exercised until the person affected is afforded an opportunity to be heard unless, upon a fair reading of section 7, the necessity to afford such an opportunity is excluded.

I will, therefore, consider now whether section 7 excludes the necessity of affording the person affected an opportunity to be heard.

That question—that is, whether section 7 says impliedly, what it does not say expressly, that the Postmaster

¹ See *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, per Lord Greene, M.R., at page 399 and at page 405; *Robinson v. Minister of Town and Country Planning*, [1947] 1 K.B. 702.

General may make an interim prohibitory order without giving the person affected an opportunity to be heard—is difficult to answer.

To answer it, one must look at the scheme of the section as a whole. First, the section says that, when the Postmaster General believes certain things he may make an “interim prohibitory order”, which order has the effect of stopping the delivery of mail to the person affected and of stopping him from sending any mail. Next, the Postmaster General is, within five days from making such an order, to send a registered letter to the person affected “at his last known address” (which might suggest that Parliament contemplates that the Postmaster General will not have been in recent communication with him) informing him of the order and the reasons therefor and notifying him that he may within 10 days request that the order be inquired into. Next, if the person affected requests it, there is an inquiry by a board nominated by the Postmaster General during which the person affected is to have a right to appear before the board, make representations and present evidence. If no such inquiry is requested, the interim order automatically becomes final but, if there is an inquiry, the Postmaster General must, upon receipt of the board’s recommendations and the evidence, consider the interim order and revoke it or make it final “as he sees fit”.

Even if it were clear that, if there were no provision for a hearing between the interim and final orders, the Postmaster General would have had to give a person affected an opportunity to be heard before the interim order could be validly made, a question does arise in my mind as to whether the fact that Parliament provided for quite an elaborate inquiry before the interim order becomes final, if the person affected requests it, is a parliamentary indication that the usual right to be heard before an order is made does not exist in relation to the making of the interim order under section 7.

Having regard to the apparent desire of Parliament to reduce to the minimum the use of the mail to commit criminal offences and to the provision for the creation of an inquiry tribunal immediately after the making of an interim order, one might well conclude that it seemed so

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obvious that there was not to be a right to be heard before that order was made that it did not require to be said expressly¹.

On the other hand, it is to be borne in mind that the right to be heard to which the person affected would automatically be entitled, if it is not impliedly excluded, is a much less formal and far reaching type of investigation than that for which section 7 provides. It would be sufficiently accorded to him if he were notified by the Minister what was alleged against him and what action was proposed and were given a reasonable time, which might be quite short in the circumstances, to answer what was said against him by any adequate means, which might be merely a statement in writing sent to the Postmaster General². The importance attached to this quite simple right cannot be exaggerated because an innocent person might be able quite simply to convince the Minister of his innocence and thus avoid the ignominy of having an order made against him and also because, human nature being what it is, it may well be much easier to convince the Minister of the innocence of the person affected before he has made any order than after he has made an order by which he has taken a view against the person affected³.

The power to make the interim order under section 7 is not a decision making power of such a character that the parliamentary objective might well be frustrated if it were conditioned on a prior opportunity to be heard. An obvious example of such a power is the power to detain persons who

¹ But see *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (P.C.), [1947] 1 D.L.R. 721, where the matter under consideration was the validity of a decision by the Minister in respect of which there was no express provision for a prior hearing but from which according to the Privy Council there was an appeal to the Court. (See per Lord Greene at page 730.) Nevertheless, the Privy Council were of the view that the taxpayers had a right to "a fair opportunity of meeting the case against them" when the matter was originally brought before the Minister (See page 733).

² *Rex v. Housing Appeal Tribunal*, [1920] 3 K.B. 334, per Earl of Reading, C.J., at page 340.

³ In the past, it does not seem to have been found inexpedient to have given the person affected an opportunity to be heard. See *Literary Recreations Ltd. v. Sauvé*, (1932) 58 C.C.C. 385, per Martin J.A., at page 391.

are a potential danger to the safety of the state in war time¹. In war time, the possibility of innocent patriotic citizens being incarcerated is obviously one that must be accepted in order to avoid the substantially greater danger to the state involved in potential enemy spies and saboteurs being permitted to operate. An opportunity to be heard would probably avoid the unnecessary detention of some patriotic citizens but it would also completely frustrate the objective of incarcerating the really dangerous persons. In such circumstances, it is not difficult to infer that Parliament did not contemplate the giving of an opportunity to be heard *before* the detention orders are made.

There is no such compelling reason for deducing that Parliament did not contemplate an opportunity to be heard in connection with interim orders under section 7. An opportunity to be heard may, it is true, result in a delay in the imposition of the ban on the user of the mail but the delay need not be long and the ban, when the order is made, will be quite effective.

For the above reasons, I am of opinion that an interim prohibitory order cannot be made under section 7 of the *Post Office Act* without first affording the person affected an opportunity to be heard. As no such opportunity was afforded before the orders of Wednesday, April 28, were made against the suppliants, I am of opinion that such orders were nullities and that each suppliant is therefore entitled to judgment in respect of the mailable matter addressed to such suppliant that was not delivered by virtue of the orders prior to the commencement of these proceedings.

In view of the conclusion that I have reached with regard to the first ground of attack on the orders in question, I am relieved of the necessity of considering the several very difficult questions that arise in dealing with the other grounds of attack.

I have, for the above reasons, concluded that there shall be judgment in favour of each suppliant in respect of mail not delivered to such suppliant in due course of mail

¹ Cf *Rex v. Halliday*, [1917] A.C. 260, and *Liversidge v. Anderson*, [1942] A.C. 206.

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(a) in the case of the suppliant Randolph, during the period from the making of the abortive order on April 28, 1965 to the filing of the Petition of Right herein; and

(b) in the case of the corporate suppliant, during the period from the suspension of its postal service on April 22, 1965 to the filing of the Petition of Right herein;

and that that judgment should be, in each case, that the suppliant is entitled to have the mail in question delivered to him or to it, as the case may be, and is entitled to be paid damages, in respect of the detention thereof, in an amount which must, before the judgment is delivered, be determined upon a reference to the Registrar of this Court or one of the Deputy Registrars designated by him.

Upon application, after the amounts of the damages have been so determined (or upon the suppliants waiving their right to such damages), I shall deliver judgment accordingly.