Ottawa 1966

Dec. 12, 13

BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

AND

STEPHENS-ADAMSON MFG. CO. OF CANADA LIMITED ..... RESPONDENT;

AND

CANADIAN SKF COMPANY LTD., and FISCHER BEARING MFG. LTD. ..... INTERVENANTS.

Customs duty—Appeal from Tariff Board—Classification of imported goods—Whether of class or kind made in Canada—Submission of agreed issue to Board—Whether Board applied tests of competitiveness and of degree—Customs Act, R.S.C. 1952, c. 58, ss. 44(3), 45(am. 1958, c. 26)—Customs Tariff R.S.C. 1952, c. 60, ss. 6(9). 6(10)—Items 427b(2) and 427b(3).

Respondent imported large sizes of a type of ball bearing possessing characteristics *a* and *b*. Only small sizes of this type of ball bearing possessing characteristics *a* and *b* were manufactured in Canada in substantial quantities. Large size bearings of the type in question possessing neither of the characteristics *a* or *b* were made in Canada in substantial quantities. The Deputy Minister classified all ball bearings of the type in question as being a single class or kind made in Canada and dutiable under Customs Tariff Item 427b(3). An appeal was taken to the Tariff Board on an agreed issue, *viz* whether large size ball bearings of the type in question possessing both characteristics *a* and *b* were a different class or kind from large size ball bearings of the same type not having characteristics *a* and *b*. The Board allowed the importer's appeal, deciding that while the characteristic *a* was not significant ball bearings with the characteristic *b* were designed for use under conditions that would render impractical ball bearings not possessing characteristic *b* and accordingly that the former were a different class. The Deputy Minister appealed to this court on the ground that the Board's decision was based on a test of competitiveness. The intervenants attacked the Board's decision as being bad in law on the ground that the point of distinction adopted was one of degree and not of kind.

Held, both attacks failed.

Dominion Engineering Works Ltd. v. A. B. Wing Ltd., et al [1958] S.C.R. 652 distinguished; *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue,* [1956] 1 D.L.R. (2d) 497 referred to.

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v.
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APPEAL from Tariff Board.

D. H. Aylen and *S. A. Hynes* for appellant.

John M. Coyne, Q. C. for respondent.

John D. Richard for intervenants.

JACKETT P. (Orally):—This is an appeal from a decision of the Tariff Board under section 44 of the *Customs Act*, R.S.C. 1952, chapter 58, disposing of an appeal by the respondent from three decisions of the appellant classifying certain goods imported by the respondent as being not "of a class or kind not made in Canada" and therefore as falling within Item 427b(3) of the *Customs Tariff* instead of Item 427b(2).

The goods in question are described as single row radial ball bearings with spherical outer races and extended inner races and with outside diameters from 3.75 inches up to 7.5 inches. (The word "race" is used in this context interchangeably with the word "ring"; single row radial ball bearings with spherical outer rings are to be contrasted with single row radial ball bearings with cyclindrical outer rings which are sometimes referred to as "standard" single row radial ball bearings.) The appellant classified the goods in question as falling within Item 427b(3), which reads:

> 427b(3) "Ball and roller bearings, n.o p.; parts thereof"

and not within Item 427b(2), which reads:

> 427b(2) "Ball and roller bearings of a class or kind not made in Canada, n.o.p.; parts thereof"

Item 427b(2) must be read with subsection (10) of section 6 of the *Customs Tariff*, R.S.C. 1952, chapter 60, which reads as follows:

> (10) For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages.

The sole issue between the parties is whether the imported goods are "of a class or kind not made in Canada". The Deputy Minister has classified all single row radial ball bearings in a range of size up to 7.5 inches outside diam-

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eter, with certain immaterial exceptions, as a single class or kind for the purpose of Item 427b(2). The respondent in effect claimed that the appropriate classification called for two distinctions, *viz.*:

(a) between single row radial ball bearings, with extended inner race and spherical outer race, and single row radial ball bearings that possessed neither of those two characteristics; and also

(b) between single row radial ball bearings with extended inner race and spherical outer race in sizes up to 3.75 inches O. D. (hereinafter referred to as the "smaller sizes") and the same ball bearings in sizes over 3.75 inches O. D. up to and including 7.5 inches O. D. (hereinafter referred to as the larger sizes).

It is common ground that bearings with extended inner race and spherical outer race in the smaller sizes are made in Canada in substantial quantities and that the same bearings in the larger sizes are not manufactured in Canada. It is also common ground that single row radial ball bearings not possessing the charactristics of an extended inner race and spherical outer race are made in Canada in substantial quantities in the larger sizes.

The parties entered into an agreement as to the facts for the purposes of the appeal to the Tariff Board and, by such agreement, stated the "issue" to be decided by the Board as follows:

> 6. The issue is whether single row radial ball bearings possessing the characteristics of an extended inner race and a spherical outer race in sizes from 3.75" O.D. to 7 5" O.D. for use in pillow blocks, are of a different class or kind from single row radial ball bearings in sizes over 3 75" O D. to 7.5" O.D. which do not have an extended inner race and a spherical outer race.

While, therefore, the respondent was in effect asking the Board to decide that single row radial ball bearings that

(a) had an extended inner race,

(b) had a spherical outer race, and

(c) were of the larger sizes,

constituted a separate class or kind for the purposes of Item 427b(2), the hearing before the Board was, quite properly, having regard to the issue so agreed upon by the parties, directed toward the question whether, from the

point of view of such a classification, the possession by single row radial ball bearings of an extended inner race and a spherical outer race made them significantly different from single row radial ball bearings that did not have such characteristics.

The Board decided that, as far as the extended inner ring is concerned, this was merely one of a number of different ways of affixing bearings to shafts and found that "a bearing with an extended inner ring is not, for that reason, of a different class or kind than a standard single row radial ball bearing".

"On the other hand", the Board found "that single row radial bearings with spherical outer rings for purposes of alignment are, by design, intended to be used under conditions and in circumstances that would render impractical the use of standard single row radial ball bearings, that is, single row radial ball bearings with cylindrical outer rings".

The Board's decision was, therefore:

> Accordingly, the Board declares that single row radial ball bearings with spherical outer rings are not of the same class or kind as single row radial ball bearings with cylindrical outer rings; accordingly, to this extent, the appeal is allowed.

Before considering the attacks upon the Board's decision, it is necessary to consider what the effect of the decision is. It must be remembered that the appeal was from a classification of goods by the appellant under the *Customs Tariff*. The Board's powers in disposing of an appeal under the *Customs Act* are found in subsection (3) of section 44, which reads as follows:

> (3) On any appeal under subsection (1), the Tariff Board may make such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare
>
> (*a*) what rate of duty is applicable to the specific goods or the class of goods with respect to which the appeal was taken,
>
> (*b*) the value for duty of the specific goods or class of goods, or
>
> (*c*) that such goods are exempt from duty,
>
> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in section 45.

The Board was thereby authorized to make "such order or finding as the nature of the matter may require". Ordinarily, it might be expected that, in a classification appeal, the Board would make an order or finding as to exactly how the goods in question are to be classified, which

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would be another way of deciding "what rate of duty is applicable to the specific goods" or "that such goods are exempt from duty". On the other hand, when the parties agree on a statement of the issue to be decided by the Board, it might well be sufficient for the Board to decide that issue and let the matter go back to the Deputy Minister for him to work out the consequences of that decision.

Reading the decision in this case with the issue agreed upon by the parties, which I repeat at this point,

> 6. The issue is whether single row radial ball bearings possessing the characteristics of an extended inner race and a spherical outer race in sizes from 3.75" O D. to 7.5" O D., for use in pillow blocks, are of a different class or kind from single row radial ball bearings in sizes over 3.75" O.D. to 7.5" O.D. which do not have an extended inner race and a spherical outer race.[1]

It will be seen that the Board has answered the question contained therein in the affirmative. The Board has said that single row radial ball bearings with spherical outer rings are not of the same class or kind as single row radial ball bearings with cylindrical outer rings. It follows that single row radial ball bearings in the larger sizes that have not only spherical outer rings but also extended inner races are of a different class or kind from single row radial ball bearings in the larger sizes that have neither of those two characteristics. This is a case where the larger class does include the smaller.

I am of opinion, therefore, that the Board's decision must be read as answering the issue agreed upon in the affirmative and may also be read, therefore, as classifying the imported goods in question under Item 427b(2). This latter view is subject to the question whether the Board intended to make a finding that single row radial ball bearings of the larger sizes having spherical outer races—as contrasted with single row radial ball bearings of the larger sizes having both spherical outer races and extended inner races—are not made in Canada in substantial quantities.

It may well be that, on the record before the Board, the question as to whether the larger sizes of single row radial ball bearings having spherical outer races are made in

[1] It became clear during the hearing that the words "for use in pillow blocks" were of no special significance.

Canada in substantial quantities is still open,[1] inasmuch as the agreement as to facts did not deal with this question although it did establish that the theoretically narrower class of the larger sizes of single row radial ball bearings having both spherical outer rows and extended inner races are not made in Canada in substantial quantities. If this was the way in which the Board appreciated the matter, it may well have been the Board's intention to refer the matter back to the appellant to deal only with this narrow question.

There is, in my view, some ambiguity as to whether the Board's decision should be regarded as

(a) an order that the goods in question be classified under Item 427b(2), or

(b) a decision that the issue agreed upon by the parties is decided in the affirmative and a reference back to the Deputy Minister to reclassify in the light of the way in which the Board reached that decision.

As there has been no attack on the Board's decision on the ground that the Board could not validly classify the goods in question under Item 427b(2) because there was no evidence upon which the Board could find that single row radial ball bearings of the larger sizes having spherical outer races are not made in Canada in substantial quantities, there is no necessity for me to decide whether the Board's decision amounts to such a classification or whether the other possible meaning should be given to the Board's decision.

I come now to the attacks that have been made upon the Board's decision.

In this connection, it must be borne in mind that the appeal is under section 45 of the *Customs Act* as amended

[1] Paragraph 4 of the Agreement as to Facts establishes that single row radial ball bearings with extended inner race and spherical outer race in sizes from 3.75" O.D. to 7 5" O.D. are not manufactured in Canada. Theoretically it is possible, notwithstanding that admission, that single row radial ball bearings in such sizes having spherical outer race but no extended inner race are made in Canada in substantial quantities. This is the one question that, as it seems to me, can be regarded as open for consideration by the Deputy Minister notwithstanding the Board's decision.

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by chapter 26 of the Statutes of 1958, and that the appeal is therefore an appeal upon a "question of law" only. This Court has not power to grant the appellant relief unless

(a) the Board erred in reaching its decision by applying an erroneous principle of law, or

(b) the Board made a finding of fact that cannot be supported by the evidence.

Counsel for the appellant attacked the Board's decision on the ground that the finding that single row radial ball bearings with spherical outer rings are not therefore of the same class or kind as those with cylindrical outer rings was based on a finding that, "for practical purposes, they are not interchangeable"; that the evidence shows that they are interchangeable technically although use of the cylindrical outer rings is more expensive in certain particular applications and that it is, therefore, a test of competitiveness that the Board is applying; and, that a test of competitiveness is unacceptable in law having regard to the decision of the Supreme Court of Canada in *Dominion Engineering Works Ltd. v. A. B. Wing Ltd., et al.*[1] I reject this submission because, in my view, the basis of the Board's finding is contained in the second last paragraph of the Board's declaration, which reads,

> On the other hand, the Board finds that single row radial ball bearings with spherical outer rings for purposes of alignment are, by design, intended to be used under conditions and in circumstances which would render impractical the use of standard single row radial ball bearings, that is, single row radial ball bearings with cylindrical outer rings.

and is amply supported by the evidence. I also reject it as giving an effect to the *Dominion Engineering* decision which, in my view, that decision will not bear. That decision rejected an attack on a decision of the Board in which the contention was that the Board was wrong in law in not applying a test of competitiveness. The decision does not, in my view, establish that competitiveness cannot be a criterion in the solution of a class or kind problem under the *Customs Tariff*.

The attack by counsel for the intervenants was based upon the decision by the Supreme Court of Canada in

[1] [1958] S.C.R. 652.

Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue[1] where reference was made to subsection (9) of section 6 of the *Customs Tariff*, R. S. C. 1952, chapter 60, which reads:

> (9) For the purposes of this section, goods may be deemed to be of a class or kind not made or produced in Canada where similar goods of Canadian production are not offered for sale to the ordinary agencies of wholesale or retail distribution or are not offered to all purchasers on equal terms under like conditions, having regard to the custom and usage of trade.

Based upon this reference, an ingenious attempt was made to persuade me to conclude that the Board's decision in this case was wrong in law because the point of distinction adopted was one of degree and not of kind. I am of opinion that the Board's finding in this case was, in effect, that the difference in question was such a difference in degree as to become a difference in kind, that that finding was one of fact and that I cannot therefore interfere with it.

[1] [1956] 1 D.L.R. (2d) 497.