1964
Nov. 23-25
Dec. 8

BETWEEN:

SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LTD. ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE, DOMINION BRIDGE LIMITED AND PROVINCIAL ENGINEERING LIMITED ..... RESPONDENTS.

Revenue—Customs and Excise—Burden of proof in relation to Deputy Minister's decision—Deputy Minister to state case in support of his decision at outset of hearing—Limits of class or kind of goods made in Canada—Production of goods in substantial quantities—Effect of Governor-in-Council fixing percentage of normal Canadian consumption—Referral of case to Tariff Board for rehearing—Customs Act R.S.C. 1952, c. 58, s. 45 as amended by S. of C. 1958, c. 26, s. 2(1)—Customs Tariff, R.S.C. 1952, c. 60, ss. 6(9) and (10), 6a(4), and items 427(1) and 427a, as amended by S. of C. 1959, c. 12, s. 4—Order in Council P.C. 1618.

The appellant imported into Canada in parts a custom made electrically driven level luffing jib type travelling crane for use in its dry dock at Saint John, New Brunswick. The crane was far larger and had far greater lifting capacity than any similar crane theretofore made in Canada. The Deputy Minister of National Revenue for Customs and Excise ruled that the crane was one of "a class or kind of shipyard cranes made in Canada by Dominion Bridge Company Limited and Provincial Engineering Limited" and that it was subject to customs duty under item 427(1) of the *Customs Tariff* as "machinery composed wholly or in part of iron or steel, n.o.p.; parts of the foregoing". The appellant had contended that the crane was classifiable under item 427*a* and thus entitled to entry free of duty as "machinery composed wholly or in part of iron or steel, n o p. of a class or kind not made in Canada; complete parts of the foregoing".

On an appeal to the Tariff Board from the Deputy Minister's ruling the Board found that "the capacities of these two jib type travelling gantry cranes (the imported crane and a crane made by Provincial Engineering Limited) are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more". The Board then found that if the class included only these two cranes the production of one crane in Canada was "substantial" within the meaning of s. 6(10) of the *Customs Tariff* and that if the class was enlarged to include cranes of lesser capacity, even as low as 6 tons, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the crane as being of a class or kind made in Canada. The appeal was accordingly dismissed.

On a further appeal to the Exchequer Court

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Held: That as the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact to be resolved on such criteria appearing from the evidence as the Tariff Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, it cannot be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities; or that a finding that the crane in question was one of a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" would be so unreasonable as to be not supportable in law.

2. That as the Board then proceeded to consider, for the purposes of making the finding required by s. 6(10) both the Canadian production of cranes falling within that class and the Canadian production of cranes of a larger class it is not clear that the Board made a finding of the scope of the class of crane made in Canada into which the crane fell and as a final determination of the appeal cannot be reached in the absence of such a finding by the Board, which is the body authorized by law to make it, the matter should be referred back to the Board.

3. That s. 6(10) of the *Customs Tariff* operates, not as a definition of when goods shall be deemed to be of a class or kind made in Canada but rather as a prescription of when they shall not be deemed to be of a class or kind made in Canada.

4. That s. 6(10) of the *Customs Tariff* does not authorize the Governor-in-Council to prescribe that quantities which are not "substantial quantities" within the ordinary meaning of that expression, shall be deemed to be substantial quantities for the purpose of the *Customs Act*.

5. That if in its review of the evidence, the Tariff Board referred to "the 10% of Canadian consumption fixed by Order-in-Council as sufficient to represent 'substantial' production in Canada within the meaning of s. 6(10) of the *Customs Tariff*" as meaning that the effect of the Order-in-Council is that production of 10% of the Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10), they misdirected themselves on a material point of law.

6. That if the Tariff Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) of the *Customs Tariff* such an assumption or finding was erroneous in point of law as being one which if properly instructed as to the law and acting judicially the Board could not reach.

APPEAL from a declaration of the Tariff Board.

The appeal was heard by the Honourable Mr. Justice Thurlow of Ottawa.

E. Neil McKelvey, Q.C. and *K. E. Eaton* for appellant.

D. H. Aylen and *R. A. Wedge* for respondent, Deputy Minister of National Revenue for Customs and Excise.

Andre Forget, Q.C., for respondents, Dominion Bridge Limited and Provincial Engineering Limited.

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The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (December 8, 1964) delivered the following judgment.

This is an appeal under s. 45 of the *Customs Act* R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, s. 2(1), from the declaration of the Tariff Board in appeal number 742 by which the Board upheld a ruling of the Deputy Minister that a crane imported by the appellant from Scotland in parts in 1961 and 1962 and erected at the appellant's dry dock at Saint John, New Brunswick, was to be classified under item 427(1) of the *Customs Tariff* R.S.C. 1952, c. 60 as amended by S. of C. 1959, c. 12, s. 4 and thus subjected to customs duty as "machinery composed wholly or in part of iron or steel, n.o.p.; parts of the foregoing.". In its appeal to the Board the position of the appellant was that the crane should be classified under item 427a of the tariff and thus be admitted free of duty as "machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing", and the issue for determination was whether or not the crane was "of a class or kind not made in Canada".

The crane in question is an electrically driven level luffing jib type travelling crane. It was designed for use in the appellant's shipbuilding and ship repairing operations and in particular for use beside the appellant's dry dock which is a very large one measuring 1,000 feet in length and 146 feet in width. The crane too is of respectable size. Its gantry alone rises 100 feet above the rails on which it moves and the total height of the structure is some 300 feet. It weighs 750 long tons. It has a lifting capacity of 75 long tons or 84 short tons at any radius between 50 and 115 feet. At its maximum extension it has a lifting capacity of 20 long tons at 160 feet and it is also equipped with an auxiliary hoist capable of lifting 10 long tons at 170 feet.

The material before the Board indicated that while various types of cranes have from time to time been manufactured in Canada, some of which, notably those of the overhead bridge type, had lifting capacities considerably

in excess of 84 tons and though at least two Canadian manufacturers were at the material time capable of building a crane such as the one in question and were willing to undertake it, no jib type travelling crane of the capacity and dimensions of the crane in question had theretofore been manufactured in Canada. Prior to 1945 a number of electrically driven jib type travelling cranes had been built in Canada for use in shipbuilding and ship repair work some of which had lifting capacities up to 40 tons at a radius of 50 feet. What the capacity of these cranes would have been at radii of 115 and 160 feet does not appear. These cranes did not have the capacity of maintaining the level of the load when luffing. An electrically driven level luffing jib type travelling crane was, however, built in Canada by Provincial Engineering Limited in 1959 and was installed for use in shipbuilding and repair work at Port Weller, Ontario. It has a maximum lifting capacity of 55 tons at a radius of 47 feet which declines to 18 tons at 110 feet and to 5 tons at 115 feet. There was also evidence of the manufacture in Canada by Provincial Engineering Limited of cargo handling level luffing jib type travelling cranes of lifting capacities ranging from 5 to 12 tons. Cargo handling cranes were said to be designed differently from cranes used in shipyards because they operate constantly at maximum capacity and are subject to the effects of metal tiring. Within this group some measure of standardization of capacities is recognized in the industry for cranes of 3 to 5 tons lifting capacity but for greater lifting capacity both cargo handling and shipyard cranes are designed to meet the requirements of the particular customer. For ship construction and repair work as carried out in recent years a minimum lifting capacity of 15 tons would be required. One witness placed this minimum at 25 tons.

The Deputy Minister's ruling as to the classification of the crane in question was communicated in three letters to the appellant. In the first of these, which was dated September 11, 1962, it was stated:

> Your representations have received careful consideration but the Department considers the 75 ton electric travelling level luffing shipyard crane, per specifications submitted, to be of a class or kind made in Canada by Dominion Bridge Company Limited, Montreal and Provincial Engineering Limited, Niagara Falls.

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It is my understanding that these companies have manufactured and supplied cranes over the years for installation in various shipyards in Canada and are still very much interested in building such machines on receipt of firm orders.

In view of the foregoing, I have no alternative other than to rule this crane of a class or kind made in Canada and dutiable under tariff item 427(1), at 10% ad valorem, under the British Preferential Tariff.

This position was reiterated in the second letter which was dated May 22, 1963, and which stated:

> The representations submitted by your General Manager, the late Mr. Kerr, were reviewed at great length. However, I must advise you that the decision of the Deputy Minister is that this crane is of a class or kind made in Canada by Dominion Bridge Company Limited, Montreal, and Provincial Engineering Limited, Niagara Falls.
>
> As I pointed out to your company in my letter of September 11, 1962, these companies have produced cranes of a class or kind to the one imported and are prepared to fulfil orders at the present time on receipt of requests.
>
> Such being the case, the parts of the 75 ton Level Luffing Crane imported under the Saint John entries listed on the attached sheet are dutiable under tariff item 427(1) at 10% ad valorem, under the British Preferential Tariff.

The third letter, written on July 15, 1963, applied to other customs entries and simply referred to the ruling of May 22, 1963.

I pause at this point to say that against the background of general facts with respect to cranes which I have summarized I should have thought that the basis of the Deputy Minister's ruling as expressed in these letters was his assumption or finding that the crane was one of a class or kind of shipyard cranes made in Canada by Dominion Bridge Company Limited and Provincial Engineering Limited. On the appeal from this ruling to the Tariff Board the onus accordingly rested on the appellant to establish that the Deputy Minister's basic assumption was wrong. *Johnston v. M.N.R.*[1]. It was not, however, incumbent on the appellant to establish that the crane was not one of any other conceivable class or kind of cranes made in Canada and while the Deputy Minister, if he saw fit to do so, might have endeavoured to support his ruling on some other basis the onus of establishing such basis would in that event have rested on him rather than on the appellant. In that event as well, if the proceeding was to be fair to the appellant, the Deputy Minister should

[1] [1948] S.C.R. 486.

have been required at the outset to state the case which he proposed to prove in support of his decision. *Vide Minister of National Revenue v. Pillsbury Holdings Limited*[1].

When the appeal came before the Tariff Board evidence was given by several witnesses who were or had been associated with one or the other of the two companies mentioned in the Deputy Minister's letters. This evidence indicated that no jib type travelling cranes with lifting capacity of 15 tons or more had been made by Dominion Bridge Limited, though between 10 and 20 such cranes had been made by a former subsidiary company during the war, and that the only jib type travelling crane with a lifting capacity of 15 tons or more manufactured by Provincial Engineering Limited was the one already mentioned as having been built in 1959 and installed at Port Weller. There was also confidential evidence offered by the Deputy Minister of a survey which he had carried out which, on this aspect of the case, adds nothing of material importance to what the witnesses stated.

In the declaration made by the majority of the members who heard the appeal, the Board, after reviewing the evidence and referring to a contention by counsel for the Deputy Minister that the crane was of a class of "jib type travelling gantry cranes with a lifting capacity of 15 tons or more" expressed its findings as follows:

> In the present case the Board finds that for the purposes of this appeal the capacities of these two jib type travelling gantry cranes are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more.
>
> The evidence of production and consumption, both confidential and public, may be summarized as follows. Were the class or kind to include only these two cranes, the 10 per cent of Canadian consumption fixed by Order in Council as sufficient to represent "substantial" production in Canada within the meaning of subsection (10) of Section 6 of the Customs Tariff would be exceeded; if the class were enlarged to include cranes of lesser capacity, even as low as 6 tons, the evidence reveals that, throughout, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the cranes as being of a class or kind made in Canada.
>
> The Board, therefore, declares that the imported crane is not "of a class or kind not made in Canada".

On the appeal to this Court the Board's declaration was attacked as being, on the principles expounded by Viscount

[1] [1964] C.T.C. 294 at 302; [1965] 1 Ex. C.R. 676.

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Simonds and Lord Radcliffe in *Edwards v. Bairstow*[1], not sustainable in point of law on the material which was before the Board. The case, it was argued, was one in which because of the very substantial differences between the only Canadian made crane even remotely comparable, viz., the Port Weller crane, and the crane in question the true and only reasonable determination open to the Board was that the crane was of a class or kind not made in Canada and as this determination contradicted the conclusion reached by the Board the Board's declaration should be reversed. Two further points argued were that the Board wrongly declined to require the Deputy Minister to give particulars of the limits of the class of cranes made in Canada in which he proposed to contend that the crane in question fell, and that the Board wrongly assumed that the Deputy Minister had found a class of jib type travelling cranes with a lifting capacity of 15 tons or more when the Deputy Minister had not disclosed any such finding.

As the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact—*vide Dominion Engineering Works Ltd. v. D.M.N.R. et al.*[2]—to be resolved on such criteria appearing from the evidence as the Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, I do not think that it can be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities, or that a finding that the crane in question was one of a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" would be so unreasonable as to be not supportable in law. But I have been unable to satisfy myself that the majority of the Board has so found. What the declaration says is that the Board finds that it was not unreasonable for the Deputy Minister to include the crane in such a class and in the following paragraph the majority of the Board proceeds to consider the ratio of Canadian production to Canadian consumption of cranes of that class (which would, of course, be relevant if such a finding had been made) and the ratio of Canadian production to Canadian consumption of a different class which could not be relevant if the finding had been made.

[1] [1955] 3 All E.R 48 at 53 and 57. [2] [1958] S.C.R. 652.

On the other hand if this finding of a class has not been made there appears to me to be no finding in the declaration, of the class or kind of cranes in fact made in Canada into which the crane in question falls and in the absence of such a finding to establish the scope of the class or kind I am unable to see how the subsequent problems which arise on s. 6(10) could have been properly resolved.

This brings me to the remaining point argued, that is to say, that the Board erred in law in interpreting and applying s. 6(10) of the *Customs Tariff* as if the manufacture of one crane in Canada was sufficient to meet the requirements of that provision.

The subsection reads as follows:

> 6 (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.

This subsection, since it was first enacted in 1936, has formed part of a section which deals with the imposition of special or dumping duty on imported goods of a class or kind made in Canada which have been purchased abroad for less than their fair market value. The subsection operates, in my opinion, not as a definition of when goods shall be deemed to be of a class or kind made in Canada but rather as a prescription of when they shall not be deemed to be of a class or kind made in Canada. As such the subsection operates along with ss. 6(9) and 6A.(4) to limit the cases in which dumping duty and additional duty on subsidized goods is to apply. There is this difference, however, that while ss. 6(9) and 6A.(4) apply only to the special or additional duties imposed by ss. 6 and 6A. respectively, s.6(10) is of general application throughout the Act and thus applies as well to the ordinary customs duties imposed by the statute. It is, moreover, to be observed that the power conferred on the Governor-in-Council by the portion of the subsection which follows the semicolon is of the same nature and merely authorizes the Governor-in-Council to prescribe that to be substantial for the purposes of the rule in the first part of the subsection, quantities, which might otherwise readily fall within the ordinary meaning of "substantial quantities", must be sufficient to supply a certain

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percentage, which the Governor-in-Council is also authorized to fix, of the normal Canadian consumption. Nowhere, however, does the subsection authorize the Governor-in-Council to prescribe that quantities which are not "substantial quantities" within the ordinary meaning of that expression, shall be deemed to be substantial quantities for the purpose of the Act. Nor does the Order-in-Council P.C. 1618, of July 2, 1936, which provides that

> Articles shall not be deemed to be of a class or kind made or produced in Canada unless a quantity sufficient to supply ten per centum of the normal Canadian consumption of such article is so made or produced.

prescribe or purport to prescribe anything more than the kind of limitation which the section authorizes the Governor-in-Council to prescribe. Two questions therefore arise in applying s. 6(10), the first being whether goods of the class or kind made in Canada are so made in substantial quantities and the second, which arise only if the first is answered affirmatively, whether Canadian production of goods of the class or kind is sufficient to supply ten per centum of normal Canadian consumption thereof.

It will be observed from the paragraphs which I have quoted from the Board's declaration that the Board after purporting to confirm the Deputy Minister in including the crane in question and the Port Weller crane in a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" did not discuss the primary question which arises under s. 6(10) whether at the material time cranes of that class or kind were made in Canada in "substantial quantities" but proceeded at once to the question whether the Canadian production of cranes of that class or kind was equal to 10 per cent. of the Canadian consumption thereof and in the course of its review of the evidence referred to "the 10 per cent of Canadian consumption fixed by Order-in-Council as sufficient to represent 'substantial' production in Canada within the meaning of subsection (10) of Section 6 of the Customs Tariff". If by this the majority of the Board meant, as I think they did, that the effect of the Order-in-Council is that production of 10 per cent. of the Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10) I am, with respect, of the opinion that they misdirected themselves on a material point of law, and that their finding

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therefore cannot stand. On the other hand if the majority of the Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) I would also, with respect, have little difficulty in reaching the conclusion that such an assumption or finding was erroneous in point of law as being one which if properly instructed as to the law and acting judicially the Board could not reach. If therefore it were clear that the majority of the Board found that for the purposes of the *Customs Tariff* the crane in question should be classified as one of a class made in Canada of jib type travelling cranes with a lifting capacity of 15 tons or more I would allow the appeal and substitute for the finding of the Tariff Board a finding that the crane in question was to be classified under item 427a. However, on the wording of the declaration of the majority I am not satisfied that the Board made a finding as to the scope of the class made in Canada and as a final determination of the appeal cannot in my opinion, be reached in the absence of such a finding by the Board, which is the body authorized by law to make it, the proper course is to refer the matter back to the Board.

The appeal will therefore be allowed with costs, the declaration of the Tariff Board will be set aside and the matter will be referred back to the Tariff Board for rehearing.

Judgment accordingly.