1957
*Jun. 6
Dec. 19

1958
**May 5, 6
Oct. 7

DOMINION ENGINEERING WORKS LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE), THE CANADIAN ASSOCIATION OF EQUIPMENT DISTRIBUTORS, A. B. WING LIMITED .....RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs and excise—Importation of power shovel with 2½ cubic yard dipper capacity—Whether of a "class or kind not made in Canada"—Customs Tariff, R.S.C. 1952, c. 60, tariff items 427, 427a—The Customs Act, R.S.C. 1952, c. 58.

The respondent, W. Co., imported a power shovel of a nominal dipper capacity of 2½ cubic yards. It is undisputed that such a shovel was not made in Canada at the date of import, but that those ranging from

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Nolan JJ.
**PRESENT: Taschereau, Rand, Fauteux, Martland and Judson JJ.

½ cubic yard to 2 cubic yards were made in Canada at that time. The customs appraiser entered the shovel under tariff item 427 of the Act and the Deputy Minister confirmed the classification. The Tariff Board reversed the Deputy Minister's decision and classified the shovel under item 427*a*, which carries a much lower rate of duty, as being of a "class or kind not made in Canada". The appellant, a Canadian manufacturer of power shovels and cranes and who had intervened as an interested party before the Tariff Board, appealed to the Exchequer Court on the question whether the Tariff Board had erred in law. The classification under item 427*a* was confirmed by the Exchequer Court.

Held (Rand J. dissenting): The appeal should be dismissed. The power shovel was properly classified under item 427*a*.

Per Taschereau, Fauteux, Martland and Judson JJ.: The Board was right in coming to a conclusion that the shovel was of a class or kind not made in Canada. There was ample evidence in support of its conclusion, no application of any wrong principle and no failure to apply a principle that should have been applied. It is not an error in law to reject a classification by potential or actual competitive standards and to prefer, as the Board did, a classification according to a generally accepted trade classification based on size and capacity.

Section 2(2) of the *Customs Act* had no application to the facts of this case.

Per Rand J., *dissenting*: Both the Board and the Exchequer Court misinterpreted the legislation and ignored an element material to their decision. Tariff items 427 and 427*a*, as well as many other items and provisions in the *Customs Act*, establish that the purpose of the legislation is not only to serve as a means of revenue but also to provide a margin of protection to Canadian manufacturers. That purpose can be shown only in one way, by the determination on evidence whether or not in Canada there is an actual competition between any of the machines differently designated. This purpose and its relevancy to the issue were not referred to by the Board and were categorically rejected by the Exchequer Court. Their conclusions were therefore vitiated by this error in law.

APPEAL from a judgment of Thorson P.[1] in the Exchequer Court of Canada, affirming a decision of the Tariff Board. (Subsequent to the hearing of June 6, 1957, the Court ordered a rehearing.) Appeal dismissed, Rand J. dissenting.

A. Forget, Q.C., and *Joan Clark*, for the appellant.

R. W. McKimm, for the respondent, the Deputy Minister of National Revenue.

G. F. Henderson, Q.C., and *R. H. McKercher*, for the respondent, Canadian Association of Equipment Distributors.

J. M. Coyne, for the respondent, A. B. Wing Limited.

[1] [1956] Ex. C.R. 379.

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The judgment of Taschereau, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—The question in this appeal is whether a certain power shovel, described as having a nominal dipper capacity of two and a half cubic yards, is dutiable under tariff item 427*a* of schedule "A" of the *Customs Tariff* as being of a class or kind not made in Canada. If it is, it is dutiable at the rate of $7\frac{1}{2}$ per cent. instead of $22\frac{1}{2}$ per cent. which it would have to bear if it came within item 427 of schedule "A". The machine was imported by the respondent A. B. Wing Limited at Vancouver. The customs appraiser there entered it under item 427 with a duty of $22\frac{1}{2}$ per cent. This action was confirmed by the Deputy Minister of National Revenue for Customs and Excise. The respondent A. B. Wing Limited then appealed from the decision of the Deputy Minister to the Tariff Board where the appellant, Dominion Engineering Works Limited, a Canadian manufacturer of power shovels and cranes, intervened as an interested party, as did the Canadian Association of Equipment Distributors. The Board ruled that the power shovel was of a class or kind not made in Canada. Dominion Engineering Works Limited then obtained leave from the Exchequer Court pursuant to s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, to appeal upon a question which, in the opinion of that Court, was a question of law. The question was:

> Did the Tariff Board err, as a matter of law, in holding that the crawler-mounted convertible full-revolving power shovel imported under Vancouver Entry No. 35748 of 21st September, 1953, is properly classifiable for Tariff purposes under Tariff Item 427*a*?

The Exchequer Court[1] dismissed the appeal and confirmed the decision of the Tariff Board. Dominion Engineering Works Limited now appeals to this Court.

It is undisputed that power shovels with a nominal dipper capacity of two and a half cubic yards or more were not made in Canada at the date of import. On the other hand, power shovels with a nominal dipper capacity ranging from one-half cubic yard to two cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacity was generally understood and accepted by the trade in both

[1] [1956] Ex. C.R. 379.

Canada and the United States, and was probably the most practical single standard according to which these implements could be classified. "Nominal dipper capacity" defines a class of power shovel having certain specifications which indicate the work it is capable of doing. It defines the over-all capacity and performance of a machine and implies more than a mere difference in size. The submission made by the appellant and by the Crown before the Board was that since machines ranging in size up to a nominal dipper capacity of two cubic yards were made in Canada, the machine next larger in size could not, by reason only of the difference in size, be of a different class or kind. The Board held that where the capacities of machines are established in clearly defined sizes, "the least arbitrary and perhaps therefore the best line of demarcation is in accordance with those sizes which are, in fact, made in Canada as opposed to those sizes which are not".

The Exchequer Court held that there was no error on the part of the Tariff Board in its acceptance of the trade classification of power shovels into different classes or kinds; that the Board's finding was a finding of fact; that the two and a half cubic yard shovel was different in fact from the two cubic yard shovel and that there was material before the Tariff Board upon which it could reasonably declare that the imported shovel was of a class or kind not made in Canada. My opinion is the same as that of the Exchequer Court, that the Tariff Board came to the correct conclusion.

The appellant repeats the same argument before us, namely, that classification according to recognized trade sizes is incorrect and that the Board and the Exchequer Court should have considered whether the imported shovel entered into competition with domestic production; that they should have found that the two and a half cubic yard size was competitive in some respects with the two cubic yard size, and that if it was competitive with something made in Canada, it could not be described as being of a class or kind not made in Canada. It scarcely needed the evidence of experts to tell the Board that with two power shovels so close in size, there must be a certain amount of overlapping of possible function. The smaller machine can work in places where the larger machine might be used, but there would not, of course, be precisely the same performance by the two machines. To this extent it is correct to

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say that the two machines are competitive, but the same theory would apply to any of these machines in varying degrees, for all machines designed for mechanical excavation are capable of entering into competition in some degree. I do not know how any Board called upon to classify machinery of this type could do so by adopting the standard of potential competition. The Board heard evidence directed to the question whether these two machines were competitive, interchangeable or equivalent to such a degree as to outweigh the choice of classification by size. It did not adopt the trade classification automatically and without regard to the other evidence. It had before it evidence of comparative capacity, the weight of the machines, the comparative uses and performance of the two machines and the circumstances in which one machine would be used in preference to another, and with this evidence before it, concluded that the two and a half cubic yard shovel was of a class or kind not made in Canada.

Where are the errors in law asserted by the appellant in this case? I have already stated that in my opinion there was ample evidence before the Board to justify the finding made. This is not a case of a finding being made in the absence of evidence. Further, I am totally unable to discover that in making this classification the Board applied the wrong principle or failed to apply a principle that it should have applied. The task of the Board was to classify a piece of machinery—to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. It is not error in law to reject the classification by potential or actual competitive standards and to prefer classification according to a generally accepted trade classification based on size and capacity. I do not think there is any error in the Board's decision but if there were, it could only be one of fact.

I agree with the learned President of the Exchequer Court that s. 2(2) of the *Customs Act* has no application to the facts of this case. This is the section which provides that

> All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

The appellant's contention was that this section should be applied because more revenue would be obtained and more protection afforded to domestic manufacturers if the power shovel in question here were classified under item 427 instead of item 427*a*. I can see no room for the application of such a principle in this case. Items 427 and 427*a* are plain and unambiguous. The two are to be read together. Item 427 covers all machinery composed wholly or in part of iron or steel, n.o.p. Item 427*a* comprises all machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada. The machine in question here must fall within one or the other of these items according to findings of fact and it is impossible to hold that Parliament, by virtue of s. 2(2) of the *Customs Act*, intends greater weight to be given to one item than the other or to compel a classification under item 427 in preference to item 427*a*.

The appellant has failed to bring his case within the definition of error in law as formulated by this Court in *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs & Excise*[1], and I would dismiss the appeal with costs. The order for costs should provide for one set of costs only to be paid to the respondent A. B. Wing Limited. The other respondents should bear their own costs.

RAND J. (dissenting):—The issue in this appeal is whether what is described as a crawler-mounted, convertible, full-revolving power shovel with a nominal dipper capacity of $2\frac{1}{2}$ cubic yards, imported from the United States, is subject to customs duty under item 427 or item 427*a* of the tariff. Those items are:

Item 427	All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof	10 p.c. $27\frac{1}{2}$ p.c. 35 p.c.
	(GATT	$22\frac{1}{2}$ p.c.)
427*a*	All 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.	Free $27\frac{1}{2}$ p.c. 35 p.c.
	(GATT	$7\frac{1}{2}$ p.c.)

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

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The issue depends on whether a machine of a nominal dipper capacity of $2\frac{1}{2}$ cubic yards so imported and not made in Canada is of a class or kind made in Canada vis-à-vis a 2 cubic yard machine so made.

These machines have as their primary function excavation by means of a shovel involving digging, lifting, swinging and dumping, the material of the soil. As can at once be foreseen, they may be built on an ascending scale of size, weight, reach and other features, each aggregate having an effective capacity for work depending upon the total conditions in which it is carried on.

In the United States a Standard of categories has been set up by the manufacturing industry and approved by the Administration of Standards by which, for the purposes of furnishing information of the grouped characteristics of the categories to prospective purchasers, the machines are classified. The symbol used to distinguish the groups is the "nominal dipper capacity" indicated in these reasons by the letters n.d.c. Nominal capacities run, in size, from $\frac{1}{4}$ of a cubic yard to 3 cubic yards and upwards. Those of $\frac{3}{8}$, $\frac{1}{2}$, $\frac{5}{8}$, $\frac{3}{4}$, 1, $1\frac{1}{4}$, $1\frac{1}{2}$, 2 and $2\frac{1}{2}$ yards are in the United States called the "commercial sizes" and are included in the Standard, while those of 3 yards and over are treated as for use in special situations or undertakings. The "nominal" figures I take to represent the mathematical capacity of the dipper which would be attached to a machine bought by reference to its "nominal capacity". In other words, the mathematical capacities are used to designate machines with an aggregate of specifications brought within more or less understood degrees of dimensional ranges.

Each group has its ideal conditions in which the greatest functional performance can be obtained, but obviously these optimum conditions would seldom be met. The effective utility of the machines may be specific or general, and their performance depends on the site of work to be done, its nature, the kind of material to be excavated, the conditions surrounding the excavation such as freedom of action for the boom and dipper, the extent of the lift, the width or depth of cut, the swing required for dumping and other features. The material may be rock, gravel, clay, light soil, etc., all more or less significant to the performance; the excavation may be deep, shallow or narrow, in the latter

case hampering the swing and dumping. The distance for disposing of the material and the means and conditions under which it is to be done are likewise to be taken into account. In short, from a purely mechanical or physical point of view the machine is that which in the whole of the particular circumstances and conditions is most suitable for the purposes of the person undertaking work; its operational utility, as it is said, is then substantially integrated with what is to be done.

These are operating considerations. Equally important are economic factors: the cost of the machine, the expenses involved in transportation to, from and about work, operational expense related to the rate of performance, the number of men to be employed, the difficulties of handling heavier machines as contrasted with those of lighter weight; these must likewise be brought under examination and their impact on the operating characteristics mentioned is inevitably influential and may be controlling. For example, the larger and heavier machine will lift a greater quantity or weight of material in one bite of the shovel, but a cheaper machine with a smaller dipper may take less time for each shovel swing and tend to reduce the handicap in size. The exhibits show that for excavating moist loam or light sandy clay a 2 yds. machine with a dumping swing of 45 degrees takes 17 seconds for each shovel cycle, against 18 for a $2\frac{1}{2}$ yds. size; with 180 degrees, the figures are 30 against 32; for common earth, at 135 degrees, 29 against 31, and for 180 degrees, 34 against 36. The difference of 2 seconds is maintained in excavating hard tough clay with the similar angles of swing. These items illustrate the refinements in economic factors pertinent to the total judgment of machine utility.

The Standard, as its principal purpose, furnishes a definite meaning for the symbols used and those who subscribe to it voluntarily undertake to use the terms agreed upon only with the connotations so ascribed to them. When a person orders a $1\frac{1}{2}$ yds. nominal dipper capacity machine, he has in mind the general specifications which that symbol indicates. The dimensions of individual parts or members of the machine in any case may, of course, be varied, but in such a case notice of that fact is given. The Standard has no official standing among the manufacturers in this

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country, and although it may be that they observe roughly the same dimensional aggregates indicated by the symbols there is no sufficient evidence to show that it has become such an established and understood practice as to amount to representation that such and such characteristics of Canadian-built machines are indicated by the particular symbol employed.

Moreover, different sizes of dippers, among other interchangeable parts, may be used on any machine: a 2 yds. n.d.c. unit can be equipped with a $2\frac{1}{2}$ yds. capacity dipper. The standard dimensions in many cases overlap: the length of the boom on a 2 yds. machine is from 22 feet to 25 feet, $2\frac{1}{2}$ yds., from 25 feet to 26 feet; the handle on the 2 yds. runs from 17 feet to 19 feet, on the $2\frac{1}{2}$, 18 to 19 feet; the maximum cutting height on a 2 yds. is 26 feet to 30 feet, on a $2\frac{1}{2}$ yds., 28 feet to 35 feet; the maximum cutting radius 33 feet to 36 feet, against 35 feet to 38 feet. The weights parallel the increases of dipper capacity, but the differences as factors in utility can be counterbalanced so as to overlap by the scale of outrigging used. The figures shown are related to normally favourable conditions of operation.

A further consideration to be taken into account is that of continuity of use. On page 6 of the statement of the Standard the following language is used:

> Regardless of the economy of a new and modern excavator, tailored to the correct size for current work, sufficient work must be in sight to pay off the capital investment, and good prospects for future work (or resale) must be available to convert the investment into profits and return of capital for future replacement equipment.

One machine may be most suitable for a particular case but that case may never recur. General use means utility in more or less continuous work or with the least idleness of the machine. Purchased by a contractor, it will ordinarily be for his general purposes; one job which would completely consume a machine is conceivable but would be a rare event. In industrially and commercially advanced and complicated countries with giant works and undertakings, such as the United States, operations may become specialized in terms of machine dimensions and the type will vary in different countries and in different parts of the same country. In Canada that is well exemplified: the machines in question are convertible into cranes and, for that purpose as well as for excavation, face the differences of physical and

economic conditions from British Columbia to Newfoundland, such as the topography and soil of the prairies and, say, of northern Quebec. There may be a clear differentiation of ordinary and effective use between a $\frac{3}{8}$ yd. n.d.c. and a 2 or $2\frac{1}{2}$ yds. n.d.c. machine; a contractor, confining himself to excavating basements for moderately priced dwellings, could probably meet his requirements most effectively and economically with a $\frac{3}{8}$ yd. n.d.c. unit which for the general purposes of a large scale works contractor would be of no use whatever; conversely, the use for dwelling basement work of a 2 yds. n.d.c. machine might be both inefficient and uneconomic. But when we come to the utility distinction between a 2 yds. n.d.c. and one of $2\frac{1}{2}$ yds. capacity a wholly different situation may be present.

The inference from all this is that the so-called standard classification is one in which there is no absolute functional disparateness between some of the classes specified; as we approach those of approximate dimensions the choice between one and another may depend on considerations other than, or in addition to, those of ideal mechanical utility; the cost economics may determine that choice and this question then arises: by what means is the judgment of a purchaser on all these factors to be determined by a tribunal?

For this we are remitted to an examination of the language of the tariff items. The first, 427, establishes the normal duty on machinery applicable to the machine here; it assumes that in the marketing of such machines ordinary competitive conditions prevail. Item 427*a* contemplates a different situation, that in which the machinery imported is of a "class or kind not made in Canada". Two features of the language of these items to be examined are the words "class or kind" and the purpose of the legislation; and it will be convenient to consider the words first.

I can have little doubt that all of these machines from the lowest rating to the highest are, in a broad sense, of the same "kind". Their function is the same, the mechanical operation by which they perform work is the same, and the different units vary only in the more or less accidental characteristics which they embody. Their basic components are crawler-mounting, convertibility, full revolving means, front end operating equipment, and power operation. With

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these as foundation characteristics, the differences between, say, a 2 yds. and a $2\frac{1}{2}$ yds. n.d.c. machine from then on can be said to be dimensional, not functional.

But that does not exhaust the enquiry. The word "class" sharpens the distinction to be observed between what is made in Canada and what not, even though of the same general kind. In the dimensional spectrum scaled from $\frac{1}{4}$ yd. to 3 yds. n.d.c. and beyond, overlapping in dimensions, utility and performance is not seriously in dispute. This progressive series in immediate continuity presents no means in itself of differentiating competitive utility so to enable us to classify the machine within the meaning of the item. If, in the trade, these so-called nominal dipper capacities represented distinct and discrete functional utilities either in character or volume of performance, without practicable interchangeability in use or of mechanical parts, and in material conditions of a society in which high specialization in machine requirements had been reached, it would be not unreasonable to say that a practical basis of determining the class under the item was present which satisfied the purpose of the legislation whatever it might be.

But that simple state of things is not present, and resort is necessary to the purpose of the special provision of item 427*a*. Of that I am bound to say I have no doubt. Reading the two items together, 427 serves not only as a revenue means but also to provide a margin of protection to Canadian manufactures. On no other ground does the introduction of item 427*a* appear to me to make sense. Before the Tariff Board it was remarked that the purpose of these items in juxtaposition was doubtful, to which I can only reply that if there is any other purpose apart from revenue than protection, it has not been mentioned nor am I able to imagine it; any benefit in a lower duty to the Canadian consumer disappears when a similar Canadian machine is available; and a dumping duty would be absurd if only prices to the consumer were being considered. In fact it was argued before us that protection was the purpose and that the Tariff Board had taken it into account; but that view of the purpose and its relevance to the issue was

categorically rejected by the President of the Exchequer Court and there is not a syllable of reference to it in the decision of the Board. With the greatest respect to both the Board and to the President I am driven to hold that the customs items in question, as well as many other items and provisions in the *Customs Act,* including that against dumping foreign products into the country, establish the contrary. A court I think shuts its eyes to realities in refusing to recognize that fact.

In the setting of all the considerations that come into play in the purchase of these machines, that purpose can be shown only in one way, by the determination on evidence whether or not in Canada there is an actual competition between any of the machines differently designated. If there is, that fact must be regarded as a material, if not a determining, factor in allocating the machine to the one item or the other; if there is not, the issue falls. I think both the Board and the President misinterpreted the legislation, that they have in the circumstances ignored an element material to their decision, and that this involved an error of law which vitiated their conclusions.

The test to be applied may present some difficulty and require some delicacy of judgment in its application. It may be stated in this manner: assuming, as an inference from evidence, that a certain number of $2\frac{1}{2}$ yds. units would be imported under item 427*a*, could 10 per cent. of that number, by reason of effective competition if brought in under item 427, be supplied by 2 yds. units made in Canada? To put it in another form, would the difference between the duties under the two items, in at least 10 per cent. of commercial transactions in which a $2\frac{1}{2}$ yds. machine would be a competing unit, be the effective factor in determining the sale of the Canadian 2 yds. product in preference to that of the imported $2\frac{1}{2}$ yds. product? If so, the imported machine is within a "class" made in this country and is chargeable with duty under item 427.

I would allow the appeal and remit the matter to the Tariff Board to be reconsidered and if necessary reheard in the light of the interpretation of the items so formulated. The appellant should have a single set of costs in the Court

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of Exchequer and this Court against the respondents The Canadian Association of Equipment Distributors and A. B. Wing Limited; apart from that no costs should be awarded.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitors for the appellant: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

Solicitor for the respondent, the Deputy Minister of National Revenue: W. R. Jackett, Ottawa.

Solicitors for the respondent, A. B. Wing Limited: Herridge, Tolmie, Gray, Coyne & Blair, Ottawa.

Solicitors for the respondent, Canadian Association of Equipment Distributors: Gowling, MacTavish, Osborne & Henderson, Ottawa.