1965
*Dec. 3
Dec. 20

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

AND

SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and Excise—Crane imported—Whether of a class or kind not made in Canada—Customs Act, R.S.C. 1952, c. 58—Customs Tariff, R.S.C. 1952, c. 60, s. 6(10), tariff items 427(1), 427a—Order-in-Council P.C. 1618 dated July 2, 1936.

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

The respondent company imported into Canada in parts a travelling level luffing jib type gantry crane for use in its dry dock at Saint John, N.B. The evidence showed that at least two Canadian manufacturers were at the relevant time capable of building a crane such as the one in question and were willing to undertake its construction but that no jib type travelling crane of the capacity and dimensions of the crane in question had previously been manufactured in Canada. A similar crane was built in Canada in 1959, but with a much lower lifting capacity. The Deputy Minister ruled that the crane was of a kind or class made in Canada and therefore subject to customs duty under item 427(1) of the *Customs Tariff*, R.S.C. 1952, c. 60. The respondent contended that the crane was classifiable under item 427a and hence entitled to entry free of duty.

By a majority decision, the Tariff Board ruled that the imported crane and the one made in Canada in 1959 were the two members making up a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more, and that the fact that the 1959 crane was made in Canada was sufficient to satisfy the requirements of the opening sentence of s. 6(10) of the *Customs Tariff*. The Exchequer Court held that the Board had erred and referred the matter back to the Tariff Board for a rehearing. The Deputy Minister was granted leave to appeal to this Court and the respondent company cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

In dealing with the matter, the Board was not restricted to the precise grounds on which the Deputy Minister had based his decision. Its task was to decide on the material before it under which item the imported crane should be classified. The Board made the findings necessary to support its declaration and there was no need to refer the matter back to it.

The Board did not err in law in its interpretation of s. 6(10) and P.C. 1618. Their combined effects provide that goods shall not be deemed to be of a class made in Canada unless at least 10 per cent of the normal Canadian consumption is so made. The Board's reasons show that it decided that one-half of the class was made in Canada and that this greatly exceeded the maximum fixed by the combined effect of the statute and order-in-council and rendered it unreasonable to hold that the imported crane was of a class not made in Canada.

The Board decided that the production in Canada of one crane of the class in the last fifteen years was production "in substantial quantities" within the meaning of that phrase as used in s. 6(10). Assuming that this question was one of law, the Board did not err in its answer. One is a substantial portion of two.

The dissenting opinion in the judgment of the Board was that the difference in lifting capacity between the two cranes was so great that the two could not be regarded as belonging to the same class. The view of the majority and that of the minority were both tenable, and the choice between them involved a finding of fact which it was for the Board to make and as to which its decision was not subject to review.

Revenu—Douanes et accise—Grue importée—Est-elle de la classe ou espèce non fabriquée au Canada—Loi sur les Douanes, S.R.C. 1952, c. 58—Tarif des Douanes, S.R.C. 1952, c. 60, art. 6(10), item 427(1), 427a—Arrêté ministériel C.P. 1618 en date du 2 juillet 1936.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

La compagnie intimée importa au Canada par parties une grue portique à flèche et à portée variable pour usage dans sa cale sèche à Saint-Jean, N.-B. La preuve a démontré qu'au moins deux fabricants canadiens étaient en mesure à ce moment-là de construire une telle grue et étaient consentants d'en faire la construction, mais qu'aucune grue roulante à flèche ayant la capacité et les dimensions de la grue en question avait été fabriquée auparavant au Canada. Une grue semblable avait été construite au Canada en 1959, mais elle avait une puissance de levée beaucoup moindre. Le sous-ministre classifia la grue comme étant d'une classe ou espèce fabriquée au Canada et, en conséquence, sujette à des droits de douanes sous le régime de l'item 427(1) du *Tarif des Douanes*, S.R.C. 1952, c. 60. L'intimée a prétendu que la grue devrait être classifiée sous l'item 427a et qu'elle avait droit par conséquent d'entrer en franchise.

Par une décision majoritaire, la Commission du Tarif a jugé que la grue importée et celle fabriquée au Canada en 1959 étaient les deux membres constituant une classe de grues portiques roulantes à flèche ayant une puissance de levée de 15 tonnes ou plus, et que le fait que la grue de 1959 avait été fabriquée au Canada était suffisant pour satisfaire les dispositions de la première phrase de l'art. 6(10) du *Tarif des Douanes*. La Cour de l'Échiquier a jugé que la Commission avait erré et a déféré la question à la Commission du Tarif pour une nouvelle audition. Le sous-ministre a obtenu permission d'appeler devant cette Cour et la compagnie intimée porta contre-appel.

Arrêt: L'appel doit être maintenu et le contra-appel rejeté.

Dans le traitement de la question, la Commission n'était pas restreinte aux motifs précis sur lesquels le sous-ministre avait basé sa décision. Sa tâche était de décider sous quel item la grue importée devait être classifiée en se basant sur les faits qui lui étaient présentés. La Commission est arrivée aux conclusions nécessaires pour supporter sa déclaration et il n'y avait pas lieu de lui déférer la question.

La Commission n'a pas erré en droit dans son interprétation de l'art. 6(10) et du C.P. 1618. Par l'effet combiné de ces deux dispositions il est stipulé que les marchandises ne seront pas censées appartenir à une classe fabriquée au Canada à moins que 10 pour cent de la consommation normale canadienne ne soit ainsi fabriquée. L'opinion émise par la Commission démontre qu'elle a jugé que la moitié de la classe était fabriquée au Canada et que cela excédait grandement le maximum fixé par l'effet combiné du statut et de l'arrêté ministériel, et rendait déraisonnable le point de vue que la grue importée était de la classe non fabriquée au Canada.

La Commission a jugé que la production au Canada d'une grue de la classe, dans les derniers quinze ans, était une production «en quantités importantes» dans le sens que cette phrase est employée dans l'art. 6(10). Assumant que cette question en était une de droit, la Commission n'a pas commis d'erreur dans la réponse. Une grue est une partie importante de deux.

L'opinion dissidente dans le jugement de la Commission était à l'effet que la différence dans la puissance de levée entre les deux grues était tellement grande que les deux grues ne pouvaient pas être considérées comme appartenant à la même classe. Le point de vue de la majorité et celui de la minorité étaient tous deux soutenables, et le choix entre les deux nécessitait une conclusion de fait qui était du domaine de la Commission et dont la décision n'est pas sujette à revision.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

APPEL par la Couronne et contre-appel par l'intimée d'un jugement de Juge Thurlow de la Cour de l'Échiquier du Canada[1] maintenant un appel de la décision de la Commission du Tarif. Appel maintenu et contre-appel rejeté.

APPEAL by the Deputy Minister and cross-appeal by the respondent from a judgment of Thurlow J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Tariff Board. Appeal allowed and cross-appeal dismissed.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the appellant, the Deputy Minister.

A. Forget, Q.C., for the appellants, Dominion Bridge Ltd. and Provincial Engineering Ltd.

E. N. McKelvey, Q.C., and *J. R. Richard*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by my brother Fauteux, from a judgment[1] of Thurlow J. allowing an appeal from a declaration of the Tariff Board made on May 1, 1964, and referring the matter back to the Tariff Board for a re-hearing.

The declaration of the Board upheld a ruling of the Deputy Minister that a crane which the respondent imported in parts from Scotland in 1961 and 1962 and erected at its dry dock at Saint John, New Brunswick, was to be classified under item 427(1) of the *Customs Tariff* and rejected the contention of the respondent that it should be classified under item 427a. It is common ground that the imported parts fall within one or other of these items which read as follows:

427(1) All machinery composed wholly or in part of iron or steel, n.o.p., parts of the foregoing.

427a. 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.

The question which the Board was called upon to determine was whether the crane was of a class or kind not made

[1] [1965] 1 Ex. C.R. 802.

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

Cartwright J.

in Canada. The Board decided that it was not of that class or kind and was therefore subject to duty at the rate of 10 per cent under item 427(1). If the crane had been held to fall within item 427a it would have been admitted free of duty.

The appellants ask that the declaration of the Board be restored. The respondent cross-appeals and asks for a declaration that the crane be classified under item 427a. None of the parties before us asked that there be a re-hearing by the Board.

The crane in question is a travelling electrically driven level luffing jib type gantry crane.

The Board made the following findings of fact which are supported by the evidence. The imported crane is a travelling monotower, thus described because of a single towerlike base; it has a self-contained power plant; it can negotiate, on its rails, curves as sharp as 500 feet in radius; it is equipped with a level-luffing feature whereby the load carried remains at the same level while the jib of the crane is moved up or down through its vertical arc; it has a high lift of 300 feet; it is equipped with Sta-creep control for accurate and slow movement; it is counterweighted to reduce its power requirement; it has an auxiliary hoist for the more rapid lifting of lesser loads; it weighs over 750 long tons; it has a lifting capacity ranging from 75 long tons, or 84 short tons, at 115 feet to 20 long tons at 160 feet. Cranes of this nature are not produced in large numbers of identical units as are automobiles and many other articles. In part this is due to their great cost and size; in part it is also due to the fact that each purchaser's requirements differ from those of any other. The market is essentially one of construction to well-defined requirements and specifications upon which agreement is reached before construction is begun. To increase lifting capacity or radius of carriage sturdier construction may be necessary but no basic change in the principle of design is required.

The evidence shewed that 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 that at least two Canadian manufacturers were at the relevant time capable of building a crane such as the one in question

and were willing to undertake its construction but that no jib type travelling crane of the capacity and dimensions of the crane in question had previously 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 short tons at a radius of 47 feet which declines to 18 tons at 110 feet and to 5 tons at 115 feet.

The position taken by the Deputy Minister before the Tariff Board, the Exchequer Court and this Court is that the class of which the imported crane is a member is that of jib type travelling gantry cranes with a lifting capacity of 15 tons or more. In the 15 years preceding the date of the hearing before the Board only one crane of that class was made in Canada, the one at Port Weller referred to above, and only one was imported that is the crane in question.

The ruling of the Deputy Minister was set out in a letter to the respondent dated September 11, 1962, reading as follows:

> 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.
>
> 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.

The ruling was reiterated in two subsequent letters.

The reasons of the majority of the Board conclude as follows:

> The lifting capacity of the imported crane therefore exceeds that of the Port Weller crane by 29 short tons or over 50%. This excess is substantial. However in the market of very heavy cranes built only to purchaser's

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

Cartwright J.

specifications there must be breadth in the application of criteria of similarity in the establishment of the class or kind distinction.

In the present case the Board finds that for the purposes of this appeal the capacities of these two jib 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'.

Accordingly, the appeal is dismissed.

Mr. Gerry, who dissented, stated that he agreed with the decision of the majority except as to the last four paragraphs. The gist of his reasons is contained in the following passage:

It seems to me to run directly contrary to the intention of the legislation to classify the imported crane as being of a class or kind made in Canada when it possesses the lifting capacity necessary to perform a task which no jib type travelling gantry crane in fact made in Canada, had anywhere near the capacity to perform.

I am of the opinion that the upper lifting capacity limit of the class or kind deemed to be made in Canada must be determined in the vicinity of the upper limit of lifting capacity of the jib type travelling gantry cranes, in fact made in Canada.

Before considering the reasons of Thurlow J. it will be convenient to set out the wording of s. 6(10) of the *Customs Tariff*, R.S.C. 1952, c. 60, and of P.C. 1618. These read 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.

Order in Council P.C. 1618 of July 2nd, 1936.

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.

After summarizing the facts and the reasons of the majority of the Board, Thurlow J. stated that the first

ground of attack in the Board's declaration was that "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 only reasonable determination open to the Board was that the imported crane was of a class or kind not made in Canada and consequently the Board's finding was not sustainable in point of law on the material which was before it.

Thurlow J., in my opinion correctly, would have rejected this ground of attack for the reasons which he expressed as follows:

> 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.*—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.

However, having said this, the learned Judge continued:

> 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. 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.

The passage in the reasons of the Board referred to by the learned Judge has already been quoted. While its wording may not be altogether free from ambiguity I am satisfied that there are implicit in it the findings (i) that the imported crane and the Port Weller crane are the two members making up a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more, and (ii) that the fact that the Port Weller crane was made in Canada was sufficient to satisfy the requirements of the opening sentence of s. 6(10). I do not think these findings

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

CartwrightJ.

are vitiated because the Board went on to say that the same result would follow if it adopted another definition of the class or because the letter from the Deputy Minister, quoted above, did not define the class in the same terms as did the Board. In dealing with the matter the Board was not restricted to the precise grounds on which the Deputy Minister had based his decision. Its task was to decide on the material before it under which item the imported crane should be classified.

It follows from what I have said that, in my opinion, the Board made the findings necessary to support its declaration and there is no need to refer the matter back to it. There remains the question whether in reaching its decision the Board erred in law. Thurlow J. was of opinion that the Board had so erred in two respects.

After quoting from the passage in the decision of the majority of the Board which has been set out above, the learned Judge continued:

> 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 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.

As to the first of these suggested errors, with respect, I do not think that the Board erred in law in its interpretation of s. 6(10) and P.C. 1618. It will be observed that s. 6(10) empowers the Governor in Council to provide that the quantity of a class of goods made in Canada in order to be regarded as substantial shall be sufficient to supply a percentage, fixed by His Excellency, of the normal Canadian consumption. I agree with the submission of Mr. Forget that the effect of this is to enable the Governor in Council to define the expression "substantial quantities" used in the subsection. From this it follows that the combined effect of s. 6(10) and P.C. 1618 is to require s. 6(10) to be applied as if it read:

> 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 quantities sufficient to supply ten per centum of the normal Canadian consumption of such goods.

It is true that this enactment is expressed in negative form. It provides that goods shall not be deemed to be of a class made in Canada unless at least ten per centum of the normal Canadian consumption is so made. It does not provide that if more than ten per centum is so made the goods shall of necessity be deemed to be of a class made in Canada. It might perhaps be error in law if the Board was of opinion that in the present case the production in Canada of one of the two cranes making up the class was not substantial production but considered itself bound by law to decide that it was; but I do not read the reasons of the Board as holding this. It appears to me that these reasons read as a whole shew that the Board decided that one half of the class it was considering was made in Canada and that this greatly exceeded the minimum fixed by the combined effect of the statute and Order-in-Council and rendered it unreasonable to hold that the imported crane was of a class not made in Canada.

As to the second suggested error, it is my opinion that the Board did decide that the production in Canada of one crane of the class in the last fifteen years was production "in substantial quantities" within the meaning of that phrase as used in s. 6(10). The word "substantial" as used in the subsection is a relative term. The question is whether the production in Canada during the relevant period was substantial in relation to the total Canadian consumption during that period. It in fact represented fifty per cent of that total. I incline to agree with Mr. Munro's submission that this was a question of fact for the Board to decide, but assuming that the question is one of law I do not think that the Board erred in its answer. One is a substantial portion of two.

I have already quoted from the reasons of Mr. Gerry the ground on which he disagreed with the majority. In his opinion the difference in lifting capacity between the Port Weller crane and the imported crane was so great that the two could not be regarded as belonging to the same class. The difference is large and is accentuated if expressed in terms of "overturning moment" instead of maximum lifting

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, *et al.* *v.* SAINT JOHN SHIP-BUILDING AND DRY DOCK CO. LTD.

CartwrightJ.

capacity but it is dimensional rather than functional. On this point it appears to me that the view of the majority and that of the minority were both tenable and that the choice between them involved a finding of fact which it was for the Board to make and as to which its decision is not subject to review.

I would allow the appeal, dismiss the cross-appeal and restore the declaration of the Tariff Board. The appellant the Deputy Minister of National Revenue for Customs and Excise will recover his costs in this Court and in the Exchequer Court from the respondent. There will be no order in either Court as to the costs of the other appellants.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitor for the appellant, The Deputy Minister: E. A. Driedger, Ottawa.

Solicitors for the appellants, Dominion Bridge Ltd. and Provincial Engineering Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the respondent: McKelvey, Macaulay, Machum & Fairweather, Saint John.