1964
*Dec. 9, 10
1965
March 1

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

AND

MacMILLAN & BLOEDEL (Alberni) LIMITED, THE ONTARIO-MINNESOTA PULP AND PAPER COMPANY LIMITED, E. B. EDDY COMPANY, DOMINION ENGINEERING WORKS LIMITED, JOHN INGLIS COMPANY LIMITED, SPRUCE FALLS PULP & PAPER COMPANY LIMITED RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and Excise—Importation of high-speed newsprint machine—Whether of a class or kind made in Canada—Customs Act, R.S.C. 1952, c. 58—Customs Tariff, R.S.C. 1952, c. 60, tariff items 427, 427a.

The respondent MacMillan & Bloedel Ltd. imported a 276-inch newsprint machine made in the United States, having a rated mechanical speed of 2,500 feet per minute. The respondent stated its intent to purchase by letter dated January 25, 1955, and became committed to purchase on February 1, 1955. The formal contract was dated August 25, 1955, and the machine was shipped in a knock-down condition between November 1956 and the end of June 1957. The machine was classified by the Port Appraiser as being of a class or kind made in Canada and attracting therefore Tariff Item 427 which provides a much higher rate of duty than if it were classified under Tariff Item 427*a* as of a class or kind not made in Canada. The classification under Item 427 was upheld by the Tariff Board, but this decision was reversed by the Exchequer Court. The Crown appealed to this Court.

Held: The appeal should be allowed.

The time for determining tariff classification is at the time of entry into Canada of the goods, and having regard to the language of s. 43 of the *Customs Act*, as amended in 1955 by 3-4 Eliz. II, c. 32, there could be no justification for fixing any other date as the date upon which the duty, if any, was to be determined.

The contention that there was no evidence of newsprint machines being made in Canada prior to the period from November 1956 to the end of June 1957, was untenable. There was ample evidence to support the findings of fact made by the Tariff Board that newsprint machines had been and were being manufactured in Canada in the relevant period, and no error in law was made in arriving at those findings of fact.

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

The argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the machine in question was of a class or kind not made in Canada, could not be sustained. The refusal of the Board to accept design speed as the criterion or determinant of class or kind was a finding of fact, and there was ample evidence before the Board to justify that finding. There being no error in law, that finding should not have been disturbed by the Exchequer Court.

The contention that the decision of the Tariff Board was invalid on the ground that the Board at the time it made it was not properly constituted, could not be upheld. In the absence of evidence to substantiate the allegation that Mr. Leduc was not a vice-chairman at the time of the rendering of the decision, and in the absence of any suggestion that the Board was not properly constituted at the time of the hearing, it must be presumed that the Board was properly constituted throughout at all relevant times.

Revenu—Douanes et accise—Importation d'une machine à grande vitesse pour fabriquer le papier journal—Est-elle d'une classe ou espèce fabriquée au Canada—Loi sur les douanes, S.R.C. 1952, c. 58—Tarif des douanes, S.R.C. 1952, c. 60, item 427, 427a.

L'intimé MacMillan & Bloedel Ltd. importa une machine pour fabriquer le papier journal de 276 pouces faite aux États-Unis et ayant une vitesse normale de 2,500 pieds par minute. L'intimé déclara son intention d'acheter par lettre en date du 25 janvier 1955 et s'engagea définitivement le premier février 1955. Le contrat formel est daté du 25 août 1955 et la machine fut consignée par pièces entre novembre 1956 et la fin de juin 1957. L'appréciateur du port d'entrée classifia la machine comme étant d'une classe ou espèce fabriquée au Canada et tombant alors sous l'item 427 qui prévoit un taux de droits plus élevé que si elle avait été classifiée sous l'item 427*a* comme étant d'une classe ou espèce non fabriquée au Canada. Cette classification sous l'item 427 fut maintenue par la Commission du tarif, mais cette décision fut renversée par la Cour de l'Échiquier. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

La période pour déterminer la classification tarifaire est au moment de l'entrée des marchandises au Canada, et si l'on tient compte du langage de l'art. 43 de la *Loi sur les douanes*, telle qu'amendée en 1955 par 3-4 Eliz. II, c. 32, il n'y a aucune justification pour fixer une autre date comme étant celle durant laquelle les droits à payer doivent être déterminés.

La proposition qu'il n'y avait aucune preuve que des machines pour fabriquer le papier journal étaient fabriquées au Canada avant la période entre novembre 1956 et la fin de juin 1957, n'est pas soutenable. Il y avait d'abondantes preuves pour supporter les conclusions de fait

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE *v.* MACMILLAN & BLOEDEL (ALBERNI) LTD. *et al.*

de la Commission du tarif que de telles machines avaient été et étaient fabriquées au Canada durant la période pertinente, et aucune erreur de droit n'a été faite pour arriver à ces conclusions de fait.

L'argument que la Commission du tarif a erré en droit en refusant de prendre la vitesse prévue comme étant le facteur décisif pour décider la question de savoir si la machine était d'une classe ou espèce non fabriquée au Canada, ne peut pas être soutenu. Le refus de la Commission d'accepter la vitesse prévue comme le critère ou déterminant de la classe ou espèce était une conclusion de fait, et il y avait d'abondantes preuves devant la Commission pour justifier cette conclusion. Comme il n'y avait aucune erreur en droit, cette conclusion n'aurait pas dû être mise de côté par la Cour de l'Échiquier.

La proposition que la décision de la Commission du tarif était invalide pour le motif que la Commission n'était pas validement constituée lorsqu'elle rendit cette décision, ne peut pas être maintenue. En l'absence de preuve pour justifier l'allégué que monsieur Leduc n'était pas vice-président lorsque la décision fut rendue, et en l'absence de toute suggestion que la Commission n'était pas validement constituée lors de l'audition, on doit présumer que la Commission était validement constituée durant la période pertinente.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier, maintenant un appel de la décision de la Commission du tarif. Appel maintenu.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada, allowing an appeal from a decision of the Tariff Board. Appeal allowed.

R. W. McKimm and *N. A. Chalmers,* for the appellant.

G. F. Henderson, Q.C., and *J. D. Richard,* for the respondent MacMillan & Bloedel (Alberni) Ltd.

J. B. Gillespie, for the respondent Ontario-Minnesota Pulp and Paper Co. Ltd.

A. Forget, Q.C., for Dominion Engineering Works Ltd.

The judgment of the Court was delivered by

HALL J.:—This is an appeal by the Deputy Minister of National Revenue for Customs and Excise from the judgment of the Honourable Mr. Justice Dumoulin of the Exchequer Court of Canada dated January 18, 1963, allowing

an appeal from a declaration made by the Tariff Board and dated April 29, 1959.

The appeal relates to a Beloit 276 inch newsprint machine made by Beloit Iron Works of Beloit, Wisconsin, having a rated mechanical speed of 2,500 feet per minute. The respondent MacMillan & Bloedel stated its intent to purchase the newspaper machine from Beloit Iron Works by letter dated January 25, 1955. The said respondent became committed to purchase the newsprint machine on February 1, 1955. The formal contract was dated August 25, 1955. The newsprint machine was shipped to the said respondent in Canada from Beloit Iron Works in a knocked-down condition during the period from November 26, 1956 to June 24, 1957.

The Port Appraiser classified the newsprint machine as being of a class or kind made in Canada and applied Tariff Item 427 which provided for a rate of duty of $22\frac{1}{2}\%$. The said respondent requested that the newsprint machine be classified as of a class or kind not made in Canada and that Tariff Item 427*a* be applied. Tariff Item 427*a* provides for a rate of duty of $7\frac{1}{2}\%$. The classification of the Port Appraiser was affirmed by the Dominion Customs Appraiser. MacMillan & Bloedel requested the Deputy Minister of National Revenue for Customs and Excise to reconsider the classification made by the Dominion Customs Appraiser. The Deputy Minister on June 14, 1957 affirmed the classification made by the Dominion Customs Appraiser. It is from this decision that the said respondent appealed to the Tariff Board.

The appeal to the Exchequer Court from the declaration of the Tariff Board was upon the following grounds:

7. The imported newsprint machine was not of a class or kind made in Canada, and the imported mechanical differential drive was not of a class or kind made in Canada.

8. The Tariff Board failed to make any positive findings of fact with regard to the classification of newsprint machines for customs purposes or to make a determination as to which classes or kinds of newsprint machines were made in Canada. In the alternative, if the Tariff Board included all newsprint machines in a single class it clearly

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE v. MACMILLAN & BLOEDEL (ALBERNI) LTD. *et al.*

Hall J.

erred in law in failing to define the class or kind with a reasonable degree of narrowness as required by law.

9. The imported newsprint machine differed in physical characteristics in capacity and in other respects from machines made in Canada prior to the material time to such a degree that it could not be classified as a machine of a class or kind made in Canada. Only one newsprint machine has been made in Canada at any time which might, in any view of the case, be regarded as similar to the imported machine. Such machine was not made in Canada prior to any time material to these proceedings and in the alternative if it was made in Canada prior to a material time, one newsprint machine could not constitute "substantial quantities" within the meaning of section 6 of the said Customs Tariff.

10. The Tariff Board erred in law in concluding that ability to manufacture in Canada a class or kind of newsprint machine without unreasonable delay after such newsprint machine of such class or kind had been made outside Canada constitutes the making of a newsprint machine of that class or kind in Canada.

11. Willingness or ability to manufacture a newsprint machine of a particular class or kind does not constitute manufacture in Canada of a newsprint machine of that class or kind.

12. The expression class or kind as found in tariff items 427 and 427*a* must be considered with a reasonable degree of narrowness in that only similar machines must be considered in a determination that a particular machine is of the same class or kind of machine.

13. The Tariff Board erred in not classifying the imported newsprint machine under tariff item 427*a*.

14. The Tariff Board gave no reasons to justify the conclusion reached as to the classification of the imported machine.

15. That which purports to be a decision of the Tariff Board was not delivered in accordance with section 3 of the said The Tariff Board Act.

16. The Tariff Board erred in failing to separately classify calendar rolls imported by the Appellant under Tariff Item 447*a* rather than Tariff Item 427 having regard to the fact that calendar rolls are dealt with in item 447*a* and are therefore more specifically defined in that item rather than in the basket item 427, and further in respect to the calendar rolls the Tariff Board failed to make any finding of factor or give any reasons to justify the conclusion reached.

17. The mechanical differential drive imported by the Appellant constitutes machinery in its own right and accordingly the Tariff Board erred in not considering such mechanical differential drive as a class or kind of machinery not made in Canada and therefore classifiable under tariff item 427*a*.

The Tariff Items in question read as follows:

427. All machinery composed wholly or in part of iron or steel, n.o.p.; and complete parts thereof.

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.

The newsprint machine so imported is composed of iron or steel and is a large and complex piece of machinery composed of many parts. It was built to the specifications of the purchaser and cost approximately $3,000,000.

Although the Notice of Appeal to the Exchequer Court referred specifically to the calendar rolls and the differential drive (Grounds 16 and 17), these grounds were not argued in this Court nor referred to in the respondents' factum.

The respondent MacMillan & Bloedel took the position that the design speed of the newsprint machine in question should have been taken by the Tariff Board as the determining factor in arriving at a finding as to whether or not the said newsprint machine was of a class or kind not made in Canada and it argued that the Tariff Board had erred in law in not so finding.

It was also urged on behalf of the said respondent that there was in fact no evidence that newsprint machines of the size or speed of the one imported were being made in Canada at any time material to the time when MacMillan & Bloedel contracted to purchase the newsprint machine in question and on the question of the relevant time urged that the date for the determination of the rights of the parties should be taken as the date that said respondent entered into the formal contract to purchase, namely, August 25, 1955. This latter point can, I believe, be disposed of by a reference to s. 43 of the *Customs Act*, as amended by 3-4 Eliz. II, c. 32, (1955), which appears to say very clearly that the time for determining tariff classification is at the time of entry into Canada of the goods subject to duty, and having regard to the language of this section there can be no justification for fixing any other date as the date upon which the duty, if any, is to be determined.

The contention that there was no evidence of newsprint machines being made in Canada prior to the period from November 26, 1956 to June 24, 1957, is untenable. There was considerable evidence upon which the Tariff Board

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE v. MACMILLAN & BLOEDEL (ALBERNI) LTD. *et al.*

Hall J.

could find that newsprint machines had been and were being manufactured in Canada in the relevant period and in particular there was the evidence that Dominion Engineering Company Limited had, during the period from December 5, 1955 and November 29, 1956, made in Canada and delivered to Powell River Company Limited a newsprint machine known as Powell River No. 9 which had a design speed of 2,500 feet per minute, and there was evidence that John Inglis Company Limited in the years 1954 and 1955 had rebuilt in Canada a number of newsprint machines upgrading those machines from design speeds of 1,800 feet per minute or less to design speeds of up to 2,500 feet per minute.

There was accordingly, in my opinion, ample evidence to support the findings of fact in this regard made by the Tariff Board and no error in law was made in arriving at those findings of fact.

On the main argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the said newsprint machine was of a class or kind not made in Canada, the respondent MacMillan & Bloedel relied strongly on the judgment of Judson J. in *Dominion Engineering Works Limited* v. *Deputy Minister of National Revenue*[1]. In that case a company known as A. B. Wing Limited had imported into Canada a certain power shovel described as having a nominal dipper capacity of $2\frac{1}{2}$ cubic yards. It was undisputed that power shovels with a nominal dipper capacity of $2\frac{1}{2}$ cubic yards or more were not made in Canada at the date of import. Power shovels with a nominal dipper ranging from $\frac{1}{2}$ cubic yard to 2 cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacities was generally understood and accepted by the trade in both 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 de-

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

fines the over-all capacity and performance of the machine and implies more than a mere difference in size. The submission made by the Deputy Minister of National Revenue in the *Dominion Engineering* case was that since machines ranging in size up to a nominal dipper capacity of 2 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 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."

Judson J. went on to point out that the Board's finding was one of fact and that the Board had 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 and further that the Board did not adopt the trade classification automatically and without regard to the other evidence. Judson J. emphasized that it was not a case of a finding being made in the absence of evidence.

Items 427 and 427*a* of the *Customs Tariff* are, as Judson J. points out, plain and unambiguous. Item 427 covers all machinery composed wholly or in part of iron or steel, n.o.p. Item 427*a* covers 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 in this action must fall within one or the other of these items according to findings of fact. The Tariff Board had been asked to hold that the newsprint machine in question in these proceedings, because it had a rated mechanical speed of 2,500 feet per minute, came within Item 427*a* as being of a class or kind not made in Canada, and MacMillan & Bloedel urged that this item of design speed should be the determining factor in classifying whether the newsprint machine in question came under Item 427 or 427*a*. The Tariff Board dealt with that submission as follows:

> Evidence was presented to show, in considerable detail, the differences between machines rated at 2,000 feet per minute and more recently produced machines rated at 2,500 feet per minute. Some of

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE
v.
MACMILLAN & BLOEDEL (ALBERNI) LTD. *et al.*

Hall J.

these differences, such as the use of a vacum transfer, a longer fourdrinier, more driers, a headbox designed to withstand higher pressure, and certain differences in the frames, bearings and rolls, are associated with the increase in design speed. Others, in the opinion of one of the Department's witnesses, are improvements which make for greater efficiency or convenience at any speed.

Design speed does appear in all the detailed specifications entered as exhibits; it does define one of the important characteristics of a newsprint machine; and it does convey information with respect to the construction and, given the width, the size and mechanical capacity of the machine. There is no overlapping of design speeds, though the design speed of one very wide machine described in the evidence is midway between 2,000 feet per minute and 2,500 feet per minute. However, as appears from the evidence, design speed indicates only one of the primary determinants of the construction and mechanical capabilities of the machine and it is not universally, or even commonly, recognized as a single measure by which the whole machine may be characterized when it is being bought, sold or advertised. We do not accept design speed as the criterion or determinant of class or kind.

This is a finding of fact and, in my opinion, there was ample evidence before the Board to justify the finding it made. It is not a case of finding having been made in the absence of evidence. I adopt the language of Judson J. in the *Dominion Engineering* case where at p. 656 he says:

> 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.

In my view, Dumoulin J. erred in concluding that the Tariff Board was in error in not finding that the newsprint machine in question was machinery of a class or kind not made in Canada. The finding of the Tariff Board, being one of fact and there being no error in law, should not have been disturbed.

The respondent MacMillan & Bloedel, in its Notice of Appeal to the Exchequer Court, raised a question as to the validity of the decision of the Board as follows:

That which purports to be a decision of the Tariff Board was not delivered in accordance with section 3 of the Tariff Board Act.

Subsections (1), (2) and (8) of s. 3 of the *Tariff Board Act* were amended by 4-5 Eliz. II, c. 15, to read as follows:

3. (1) There shall be a Board, to be called the Tariff Board, consisting of five members appointed by the Governor in Council.

(2) The Governor in Council shall appoint one of the members to be Chairman and two members to be Vice-Chairmen; and at sessions of the Board the Chairman shall preside and in his absence one of the Vice-Chairmen.

(8) With respect to an appeal to the Board under the provisions of the *Customs Act* or the *Excise Tax Act* three members, including the Chairman or in his absence one of the Vice-Chairmen, may exercise the powers of the Board.

and a new subsec. (9) was added reading

(9) A vacancy on the Board does not impair the right of the remaining members to act.

It was argued before the Exchequer Court but not decided by Dumoulin J. that the decision of the Tariff Board was invalid on the ground that the Board at the time it made its decision was not properly constituted. It was alleged that there was no Vice-Chairman at the time of rendering the decision and that Mr. Leduc's appointment as Vice-Chairman had expired after the hearing but before the decision was made and that his reappointment to the Tariff Board was as a member and not as a Vice-Chairman. It was not suggested that the Board was not properly constituted at the time of the hearing. The record of the proceedings as contained in the case of appeal shows that the hearing commenced February 17, 1959, before Francois J. Leduc, Esq., Vice-Chairman, G. A. Elliott, Member, F. L. Corcoran, Member and J. C. Leslie, Secretary. The decision of the Tariff Board is contained in its declaration dated April 29, 1959, and is signed by J. C. Leslie as Secretary. There is no evidence in the case on appeal to substantiate the allegation that Mr. Francois Leduc was not a

1965

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE v. MACMILLAN & BLOEDEL (ALBERNI) LTD. *et al.*

Hall J.

Vice-Chairman at the time of the rendering of the decision. In the absence of such evidence, it must be presumed that the Board was properly constituted throughout at all relevant times. See *Brunet v. The King*[1].

The appeal should accordingly be allowed with costs throughout, and it is declared that duty is payable under Tariff Item No. 427.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent, MacMillan & Bloedel (Alberni) Ltd.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent, Ontario-Minnesota Pulp & Paper Ltd.: Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.

Solicitors for Dominion Engineering Works Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

[1] (1918), 57 S.C.R. 83 at 114, 30 C.C.C. 10, 42 D.L.R. 405.