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Oct. 23

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BETWEEN:

GENERAL SUPPLY COMPANY OF CANADA LIMITED .... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS and EXCISE, DOMINION HOIST & SHOVEL COMPANY LIMITED and DOMINION RUBBER COMPANY .... RESPONDENTS.

Revenue—Customs and Excise—Goods subject to duty—The Customs Tariff Act, R.S.C. 1927, c. 44, s. 2(2), Schedule A, Tariff items 427, 431 and 438a—The Customs Act, R.S.C. 1927, c. 42 as amended, ss. 2(r) and 50—Tariff Board—Questions of law—Construction of a statutory enactment a question of law—Practice—An application cannot be considered to have been made until date fixed for hearing—Affidavit in support of application to extend time for applying for leave to appeal—Application for leave to appeal from decision of Tariff Board granted.

In 1951 appellant imported from the United States one Model 45 power shovel. The Deputy Minister of National Revenue ruled that it was dutiable under tariff item 427 of the Customs Tariff Act, R.S.C. 1927, c. 44, namely, "all machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof". From that ruling the appellant appealed to the Tariff Board, contending that the imported article was within the term "shovel" in tariff item 431, or that it fell within tariff item 438a as being a conveyance and therefore within the definition of "vehicle" found in s. 2(*r*) of the Customs Act, R.S.C. 1927, c. 42; and further, and inasmuch it was powered by a motor, that it was a motor vehicle. The Tariff Board without giving any reason for its findings held that the shovel at issue was properly classifiable as machinery of iron or steel. An application by the appellant, under the provisions of s. 50 of the Customs Act, as amended, for leave to appeal to this Court from the decision of the Board on a question of law, was granted although it was not heard until after the expiry of thirty days from the date of the decision of the Board, the Court having accepted as a reasonable excuse for the delay the explanation given by appellant.

Held: That an application cannot be considered to have been made until at least the date fixed for its hearing. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified.

2. That an application for leave to extend the time for applying for leave to appeal should be supported by one or more affidavits explaining the reasons for requiring such extension.

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3. That the construction of a statutory enactment is a question of law. *Farmer* v. *Cotton's Trustees* [1915] A.C. 922; *Rogers Majestic Corporation Limited* v. *City of Toronto* [1943] S.C.R. 440; *Delhi* v. *Imperial Leaf Tobacco Company* [1949] O.R. 636 referred to and followed.

4. That in rejecting the appellant's submissions the Tariff Board must have interpreted the words "motor vehicles of all kinds" in tariff item 438a of the Customs Tariff Act as excluding the imported article and the words "conveyance of what kind soever" in s. 2(*r*) of the same act as excluding the somewhat limited conveyor operation performed by the imported article. The tariff items which the Board interpreted in this manner are part of the schedule to the Act and therefore part of the enactment itself. In construing these items the Board was dealing with questions of law, and under s. 50 of the Customs Act, R.S.C. 1927, c. 42, the appellant is given the right to appeal therefrom.

APPLICATION under s. 50 of the Customs Act for leave to appeal from a decision of the Tariff Board.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson for the application.

Errol K. McDougall contra.

G. Douglas McIntyre for the Deputy Minister of National Revenue.

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

CAMERON J. now (October 30, 1952) delivered the following judgment:

This is an application for an Order (*a*) extending the time for applying for leave to appeal to this Court from a decision of the Tariff Board dated September 16, 1952; and (*b*) granting leave to appeal to this Court from the decision of the Board. No one appeared on behalf of the second named respondent, but counsel for the Dominion Rubber Company opposed both applications and counsel for the Deputy Minister of National Revenue held a watching brief only.

The application is brought under the provisions of s. 50 of the Customs Act, R.S.C. 1927, c. 42, as amended, the relevant parts of which are as follows:

50(1) Any of the parties to an appeal under section forty-nine, . . . may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the

making of the order, finding or declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

(2) The appellant under subsection one shall give to the Tariff Board, and to the other parties to the appeal under section forty-nine, seven clear days' notice of his application for leave to appeal, and the Tariff Board and such other parties have the right to be heard by counsel or otherwise upon the application or upon the appeal, or both.

The first point to be determined is whether the application for leave to appeal was, in fact, made within thirty days from the making of the Order and, if not, whether the time should be extended. The decision of the Tariff Board was given orally on September 16, 1952, at the conclusion of the hearing, and the formal Order in writing was also signed on that date. The Notice of Appeal—or as I think it should be called, the Notice of Application for Leave to Appeal—is dated October 10, 1952, and was served on the second and third respondents on October 15. I was not advised as to the date when service was made on the first-named respondent, but will assume that it was served on or before October 15, 1952. It was returnable before this Court on October 23 and was heard on that date. Notice of the application was therefore prepared, served and filed before expiry of thirty days from the date of the decision, but the application did not come on for hearing until after the expiry of that period.

I do not think that an application can be considered to have been made until at least the date fixed for the hearing of the application. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified. Indeed, in the application now before me the opening words are, "Take notice that an application will be made . . ." My opinion, therefore, is that the application for leave to appeal was not "made within thirty days from the making of the Order."

That, however, does not conclude the matter for a very wide power is conferred by the words, "or within such further time as the Court or judge may allow." It is submitted that no substantial reason has been advanced to explain the delay and it is pointed out that at the opening

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of the hearing before the Tariff Board, the agent (not the counsel) for the appellant intimated that he then had instructions to appeal the Board's finding if its decision were not in his favour. It would be advisable, I think, that an application for leave to extend the time should be supported by one or more affidavits explaining the reasons for requiring such extension, but that was not done in this case. However, Mr. Henderson, counsel for the appellant, stated that the typewritten record of the proceedings before the Tariff Board was not available until two weeks after the hearing, that when it was received, the agent, Mr. Hooper, was away from his office, and that immediately upon his return the appeal proceedings were launched. In this case I shall accept that explanation as a reasonable one which accounts for the delay, more particularly as the practice has not heretofore been settled and as it was admitted that the respondents had not been prejudiced in any way. The application to extend the time for applying for leave to appeal will therefore be granted.

S. 50(1) gives leave to appeal to the Court only on a question of law and the next question is whether such a question is involved in this appeal. On February 14, 1951, the appellant imported into Canada from the United States one Model 45 power shovel of ¾ yds. capacity. The Deputy Minister of National Revenue ruled that it was dutiable under Tariff Item 427, namely, "All machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof." From that ruling the appellant appealed to the Tariff Board, contending that it should have been classified either under Tariff Item 431, namely, "Shovels and spades, of iron or steel, n.o.p.," or under Tariff Item 438*a*, which includes "Automobiles and motor vehicles of all kinds, n.o.p." It was also contended that in interpreting the words "motor vehicles of all kinds," consideration should be given to the definition of "vehicle" contained in s. 2(*r*) of the Customs Act, which is as follows:

> (*r*) "Vehicle" means any cart, car, wagon, carriage, barrel, sleigh, air-craft, or other conveyance of what kind soever, whether drawn or propelled by steam, by animals, or by hand or other power, and includes . . ."

Then by s. 2(2) of the Customs Tariff Act, R.S.C. 1927, c. 44 as amended, it is provided:

2(2) The expressions mentioned in section two of the Customs Act, whenever they occur herein or in any Act relating to the Customs, unless the context otherwise requires, have the meaning assigned to them respectively by the said section two; and any power conferred upon the Governor in Council by the Customs Act to transfer dutiable goods to the list of goods which may be imported free of duty or to reduce the rates of duty on dutiable goods is not hereby abrogated or impaired. 1931, c. 30, s. 2.

The points of law on which the appeal is based are set out in the Notice of Application as follows:

(1) Are the words "or other conveyance of what kind soever" appearing in Section 2(*r*) of the said The Customs Act words limited in scope or are they words of enlargement to include anything that conveys and therefore the Power Shovel model 45 constituting the subject matter of the Customs Import Entry herein.

(11) Is the word "shovels" appearing in tariff item 431 of The Customs Tariff Act R.S.C. 1927, c. 44, which reads, "shovels and spades of iron or steel, n.o.p., used in its generic sense and therefore including the Power Shovel model 45 constituting the subject matter of the tariff entry herein or in the restricted sense of a hand shovel.

The decision of the Tariff Board is as follows:

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By General Supply Company of Canada Ltd., Ottawa, from a decision of the Deputy Minister of National Revenue that the Model 45 Power Shovel of ¾ cubic yard capacity imported under Montreal Customs Entry No. Z108570, February 10, 1951, is dutiable under tariff item 427. The appellant claimed the shovel should enter under tariff item 431 or under tariff item 438a as a vehicle as defined by Section 2(*r*) of the Customs Act.

The Power Shovel at issue, Model 45, is not properly classifiable under either tariff item 431 or tariff item 438a, but is properly classifiable as Machinery of Iron or Steel.

It will be noted that the Board gave no reason for its findings, but merely rejected the contention of the appellant that the entry should be classified either under Item 431 or 438(*a*) and found that it was properly classifiable under Item 427.

Is there any question of law involved in that decision? The respondent contends that all that was done by the Board was to consider the evidence as to the nature of the imported article and then to determine that it was neither a shovel nor a conveyance, but rather a machine composed wholly or in part of iron or steel, n.o.p.

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The difficulty that arises in some cases in distinguishing between questions of fact and questions of law was pointed out in *Farmer* v. *Cotton's Trustees* (1). In that case, Lord Parker of Waddington said at p. 932:

> My Lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The question in the present case is whether the facts found by the Commissioners with regard to a block of buildings situate in Princes Street, Edinburgh, and known as the "Windsor Buildings," entitle such buildings to the partial exemption from inhabited house duty provided by sub-s. 1 of the 13th section of the Customs and Inland Revenue Act, 1878. This question can only be determined by putting a construction on the sub-section in question, and, therefore, is one of law, on which the Court of Session had jurisdiction to reverse the determination of the Commissioners. The question before your Lordships is whether the Court of Session was right in so doing.

That and other leading cases were considered in *Rogers-Majestic Corp. Ltd.* v. *City of Toronto* (2), and more recently in the Ontario Court of Appeal in *Delhi* v. *Imperial Leaf Tobacco Co.* (3). In the latter case, Roach, J.A. summarized his opinion at p. 655 as follows:

> From what was said in the Supreme Court of Canada in the *Rogers-Majestic* case and in the House of Lords in the cases there cited and in the *Lysaght* case, it is manifest that in all cases similar to the one at bar two questions of law arise. The first involves the construction of the statute, and the second is the question of evidence or no evidence.

From a consideration of these cases, it appears to be well settled that the construction of a statutory enactment is a question of law.

In the present case the Board has simply declared its findings without making any expressed reference to the statute or giving reasons for its conclusions. It seems to me, however, that these conclusions necessarily involve the construction of certain portions of The Customs Tariff Act. Before the Board could reach the conclusion that the imported article was dutiable under Tariff Item 427 as being "machinery composed wholly or in part of iron or steel, not otherwise provided," it must have been of the opinion that

(1) [1915] A.C. 922. (2) [1943] S.C.R. 440.
(3) [1949] O.R. 636.

it did not fall within any other of the tariff items, and more particularly that it did not fall within either Items 431 or 438a. At the hearing before the Board, the appellant had submitted that the imported article, albeit a power shovel, was within the term "shovel" in Item 431. Obviously, the Board interpreted "shovel" as not including a power shovel. Alternatively, the appellant had submitted that the imported article fell within Item 438a as being a conveyance, and therefore within the definition of "vehicle" found in s. 2(*r*) of the Customs Act; and further, and inasmuch as it was powered by a motor, that it was a motor vehicle. In rejecting that submission, the Board must have interpreted the words "motor vehicles of all kinds" as excluding the imported article, and the words "conveyance of what kind soever" as excluding the somewhat limited conveyor operation performed by the imported article. The sections which they interpreted in this manner are part of the schedule to The Customs Tariff Act and therefore part of the enactment itself.

I am therefore of the opinion that in construing these sections or items they were dealing with questions of law, and that under s. 50 of The Customs Act, the appellant is given the right to appeal therefrom. No question is raised as to the form in which it is proposed that the points of law should be presented to the Court.

The application for leave to appeal will therefore be granted and the questions to be submitted will be as proposed in the Notice of Application for Leave to Appeal. Costs of the application will be costs in the cause.

Judgment accordingly.