Osgoode Hall Law Journal

Volume 4, Number 2 (September 1966)

Article 18

Deputy Minister of National Revenue v. McMillan and Bloedel (Alberni) Ltd., [1965] S.C.R. 366

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Deputy Minister of National Revenue v. McMillan & Bloedel (Alberni) Ltd., [1965] S.C.R. 366.

CUSTOMS TARIFF — ADMINISTRATIVE LAW IMPLICATIONS OF CLASSIFYING IMPORTED GOODS — QUESTIONS OF FACT AND LAW.

The respondents purchased a Beloit 276-inch newsprint machine with a rated mechanical speed of 2,500 feet per minute. On importation of the machine from Wisconsin, the Port Appraiser classified the machine as being of a class or kind made in Canada and applied Tariff item 427.[1] The respondent requested that the newsprint machine be classified as of a class or kind not made in Canada under Tariff item 427a.[2]

The former item carried a rate of 22½% as compared with 7½%; in monetary terms the difference is some $450,000.

The classification by the Port Appraiser was confirmed by the Dominion Customs Appraiser and by the Deputy Minister of National Revenue. From this decision the respondents appealed to the Tariff Board and subsequently to the Exchequer Court of Canada. The Deputy Minister of National Revenue appealed to the Supreme Court of Canada.

The main issues raised in the Exchequer Court were: first, what was the material time in determining whether the machine was or was not of a class or kind made in Canada; secondly had the Tariff Board *erred in law* in classifying the newsprint machine as it did.

The respondents argued that the material time for the purpose of classification was the date on which the contract to purchase was concluded. It followed, therefore, that although Dominion Engineering Company Limited had subsequently manufactured a similar machine, the mere willingness and ability to manufacture at the date of contracting was irrelevant. To hold otherwise, it was contended, would

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

[2] 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 or the foregoing.

be an error of law.[3] The Supreme Court of Canada, however, decided that the material time was the date on which the goods were imported into Canada. At that date similar machines had been manufactured in Canada.

The Tariff Board has interpreted the meaning of the words "class or kind" as contained in Tariff items 427 and 427a.[5] "Class or kind", it was said, did not refer simply to a species of machinery (e.g. power cranes) but coupled with section 6(10) of the Customs Tariff Act,[6] a section of general application, contemplated a further sub-division into machinery of sufficient similarities. The argument was that since "quantities" implied the counting of pieces of machinery, they must be of sufficient similarity. This, and the theory that the schedules to the Customs Tariff Act[7] are comprehensive and cover all imports, pre-suppose a reasonable degree of narrowness in classification.

Criteria then must be developed to distinguish between goods that appear in the same general category. This is more necessary as all items must be classified on their entry into Canada.

The second objection of the respondent involved this question of classification.

MacMillan & Bloedel contended that the design speed of the machine should be conclusive of its classification as it was not only greater than domestically produced machines but also, and more important, determined the construction and overall design of much of the machine.

The Exchequer Court held that the Tariff Board erred in law by not considering the respondent's contention.[8]

The Tariff Board found that design speed was not commonly recognized as a single measure by which a whole machine could be characterized and therefore cannot be accepted as the criterion of class or kind. The argument rejected here and in the Supreme Court of Canada was based on the decision in *Dominion Engineering Works Ltd. v. D.M.N.R.*[9] where dipper capacity alone (i.e. a single physical characteristic) was held to be conclusive of the classification of steam shovels. Dipper capacity affected all the specifications for the machine and was commonly accepted for purposes of differentiating one machine from another. A related consideration was that dipper

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3 *John Bertram & Sons Co. Ltd. v. John Inglis Co. Ltd.* (1959), 20 D.L.R. (2d) 577 (Ex. Ct.) where it was held that the fact that a domestic manufacturer is willing to make an article is not a criterion of whether it is of a class or kind made in Canada.

4 S.43 Customs Act as amended by 3-4 Eliz. II, c. 32 (1955).

5 1 T.B.R. 90 (Appeal No. 272, March 18, 1953).

6 S.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 . . ."

7 R.S.C. 1952, c. 60.

8 (1964), 43 D.L.R. (2d) 496, at p. 507, *per* Dumoulin J.

9 [1958] S.C.R. 652.

capacity also in large measure determined the application of the machine.

The Supreme Court of Canada rejected the respondent's argument without any difficulty. The Customs Act s. 45, provides for an appeal from the Tariff Board to the Exchequer Court only upon a question of law. The Supreme Court dismissed the appeal on the grounds that the Tariff Board had not erred in law. Hall J., in considering which tariff item applied, said that "the machine in question in this action must fall within one or other of these items according to findings of fact".[10] Authority was found in the *Dominion Engineering* case[11] where Judson J., in considering a similar question stated:

> Where are the errors of 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.
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> This is a task involving a finding of fact and nothing more. . . . I do not think there is any error in the Board's decision but if there were, it could only be one of fact.[12]

In *Edwards v. Bairstow*[13] a finding made in the absence of evidence was an error of law and subject to appeal. Where there is any evidence the courts have consistently resorted to classifying the findings of a tribunal such as the Tariff Board as a question of fact.

Edwards v. Bairstow involved a consideration of whether a certain undertaking was in the nature of a trade. Viscount Simonds stated:

> To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made.[14]

In *D.M.N.R. v. J.M.E. Fortin Inc.*[15] it was said that although the Board might have reached another conclusion, they would not have been irresistibly driven to it. Therefore, the Exchequer Court held that there was no error in law.

In these cases the party challenging the ruling of the Tariff Board alleges that a material consideration has been disregarded and that this constitutes an error in law. As pointed out, only where the decision is perverse or there was no evidence upon which a reasonable

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10 [1965] S.C.R. 366, at p. 373.
11 *Supra*, footnote 9.
12 *Supra*, footnote 9, at p. 656.
13 [1956] A.C. 14.
14 *Ibid.*, at pp. 30-31.
15 [1965] Ex. C.R. 31.

man could arrive at such a conclusion will the courts hold that there is an error in law.

In *Canada Lift Truck Co. Ltd. v. D.M.N.R.*[16] Kellock J. said:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
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> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination.[17]

Therefore, although it appears that there is no doubt that a finding without evidence would constitute an error of law and hence be subject to appeal, there is still some question as to the exact nature of the classifying process. The Exchequer Court in the present case had some difficulty with it. They allowed the appeal. Rand J. in his dissenting judgment in the *Dominion Engineering* case[18] thought that by failing to consider the economic impact of the goods in question on the industry an element material to the decision had been ignored and that an error in law had been made.

Quite apart then from a decision made in the absence of evidence a more fundamental problem is revealed. This is the proper characterization of the process involved in the determination of issues by such tribunals of fact.

The problem is twofold. First, one must properly categorize the findings of such a Board as findings of fact or findings of law. This is significant when, as here, appeals may be taken only on questions of law. Secondly, if there is some ground for saying that the Board's determinations involve questions of law (here it is difficult to distinguish between a misconception as to the interpretation of a statute and the findings) are the courts deliberately deferring to the rulings of the Board?

The courts may consider that the provision of a right of appeal from the decision of such a tribunal (even on questions of law) is too broad and that the proper functioning of the Board is unduly hindered. By treating a particular matter as a matter of fact rather than as a matter of law a right of appeal is removed. Such a policy may indicate a refusal to act based on sound policy judgment.

> "[Q]uestions of law and fact" are not two mutually exclusive kinds of questions, based upon a difference in subject-matter. Matters of law grow downwards into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial

16 (1956), 1 D.L.R. (2d) 497 (S.C.C.).
17 *Ibid.*, at p. 498.
18 *Supra*, footnote 9.

> cleavage at the point where the court chooses to draw the line between public interest and private right.[19]
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> The analysis is further complicated where a word of common meaning is itself used in a statute. In such cases judges are tempted to argue that the application of the word involves a purely factual finding, and is therefore not subject to the judicial control which is appropriate to conclusions of law.[20]

In the instant case a determination between the application of tariff items 427 and 427a is not merely a question of fact; it also entails a legal determination of the ambit of these two categories. The area is far from clear. It would certainly aid matters if the courts would recognize that the tribunals do decide questions of law.

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