1968
Mar. 18, 19
Apr. 29

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

AND

RESEARCH-COTTRELL (CANADA) LIMITED and JOY MANUFACTURING COMPANY (CANADA) LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and excise—Imported and domestic fabricated components assembled and erected into precipitators—Whether precipitators "manufactured" in Canada—Customs Tariff, R.S.C. 1952, c. 60, s. 11(1).

In 1961, the respondent company contracted to design, furnish and erect eight electrostatic precipitators at a mining company's plant in Copper Cliff, Ontario. It imported some of the components made in the U.S.A. and these together with other components made in Canada were assembled and erected on its behalf by a third party into precipitators at the plant in question. Alleging that the precipitators were manufactured in Canada, the respondent claimed a drawback of customs duties paid on the importation of the components made in U.S.A. and based its claim on s. 11(1) of the *Customs Tariff*, R.S.C. 1952, c. 60, and drawback items 1056 and 1059 of the Schedule B. The Deputy Minister refused the claim on the ground that the

*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson and Pigeon JJ.

respondent did not perform any manufacturing operation in connection with the precipitators and that, while the precipitators had been erected on its behalf, the components had been fabricated previously. An appeal to the Tariff Board was rejected on the ground that the work carried out at Copper Cliff was assembly and erection rather than manufacture. A further appeal to the Exchequer Court was allowed on the ground that the Board had erred in law. The Deputy Minister appealed to this Court.

Held (Cartwright C.J. and Pigeon J. dissenting): The appeal of the Deputy Minister should be allowed.

Per Fauteux, Martland and Judson JJ.: The Tariff Board did not misdirect itself as to the law. It could not be held, as a matter of law, that what was done on behalf of respondent at the site constituted manufacture by the respondent of eight precipitators. On the facts, it was open to the Board to find, as it did, that the assembly and erection of the fabricated components was not, in this case, manufacture within the meaning of the relevant tariff items.

Per Cartwright C.J. and Pigeon J., *dissenting*: The Exchequer Court rightly held that the Board had erred in law. Assembly is undoubtedly a part of the manufacturing process of any manufactured object made up of several component parts.

Furthermore, the Tariff Board did not find that the precipitators as such had been manufactured prior to importation. It follows that it should have come to the conclusion that they had been manufactured in Canada since, being manufactured objects, they could not have been manufactured elsewhere.

Revenu—Douane et accise—Pièces importées—Pièces fabriquées au pays—Assemblage de dépoussiéreurs—Ont-ils été fabriqués au Canada—Tarif des douanes, S.R.C. 1952, c. 60, art. 11(1).

En 1961, l'intimée Research-Cottrell (Canada) Ltd. s'est engagée à fournir et construire huit dépoussiéreurs électrostatiques à l'usine d'une compagnie minière à Copper Cliff, Ontario. A cette fin, une tierce compagnie a, pour le compte de l'intimée, assemblé des pièces fabriquées aux États-Unis ainsi que d'autres pièces fabriquées au Canada et a installé les dépoussiéreurs à l'usine en question. Alléguant que les appareils avaient été fabriqués au Canada, l'intimée a réclamé un drawback des droits de douane payés lors de l'importation des pièces fabriquées aux États-Unis et a fondé sa réclamation sur l'art. 11(1) du *Tarif des douanes*, S.R.C. 1952, c. 60, et les numéros de drawback 1056 et 1059 de la liste B. Le Sous-Ministre a refusé la réclamation pour le motif que l'intimée n'a fait aucune opération de fabrication et que, bien que les dépoussiéreurs aient été installés pour son compte, les parties constituantes en avaient été fabriquées antérieurement. Un appel à la Commission du tarif a été rejeté pour le motif que le travail qui s'est fait à Copper Cliff était un assemblage et une construction plutôt qu'une fabrication. Un appel subséquent à la Cour de l'Échiquier a été accueilli pour le motif que la Commission avait erré en droit. Le Sous-Ministre en appela à cette Cour.

Arrêt: L'appel du Sous-Ministre doit être accueilli, le Juge en Chef Cartwright et le Juge Pigeon étant dissidents.

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Les Juges Fauteux, Martland et Judson: La Commission du tarif ne s'est pas trompée sur la loi. On ne peut pas conclure en droit que ce qui a été fait sur place pour le compte de l'intimée constituait une fabrication de huit dépoussiéreurs par l'intimée. Sur les faits, la Commission pouvait conclure, comme elle l'a fait, que l'assemblage et l'installation des pièces fabriquées ailleurs n'étaient pas dans le cas présent, une fabrication dans le sens des numéros visés du tarif.

Le Juge en Chef Cartwright et le Juge Pigeon, *dissidents:* La Cour de l'Échiquier a eu raison de conclure que la Commission du tarif avait erré en droit. L'assemblage est indubitablement une partie du processus de fabrication de tout objet fabriqué qui est composé de plusieurs pièces.

De plus, la Commission n'a pas conclu que les dépoussiéreurs comme tels avaient été fabriqués avant leur importation. Il s'ensuit que la Commission aurait dû conclure qu'ils avaient été fabriquées au Canada puisque, s'ils sont des objets manufacturés comme il faut le reconnaître, ils ne peuvent pas avoir été fabriqués ailleurs.

APPEL par le Sous-Ministre d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], accueillant un appel de la Commission du tarif. Appel accueilli, le Juge en Chef Cartwright et le Juge Pigeon étant dissidents.

APPEAL by the Deputy Minister from a judgment of Cattanach J. of the Exchequer Court of Canada[1], allowing an appeal from the Tariff Board. Appeal allowed, Cartwright C.J. and Pigeon J. dissenting.

C. R. O. Munro, Q.C. and *A. M. Garneau,* for the appellant.

G. F. Henderson, Q.C., and *B. A. Crane,* for the respondent, Research-Cottrell (Canada) Ltd.

R. Belfoi, for the respondent, Joy Manufacturing Co.

The judgment of Cartwright C.J. and Pigeon J. was delivered by

PIGEON J. (*dissenting*):—The facts of this case are really quite simple and undisputed. The respondent, Research-Cottrell (Canada) Ltd. in May 1961 contracted with International Nickel Company of Canada Ltd. to "design, furnish and erect" at the latter's plant in Copper

[1] [1967] 2 Ex. C.R. 3.

Cliff, Ontario, for a total cost of $1,000,000 eight electrical precipitators. The precipitators were designed in the United States by respondent's parent company. That company also supplied some of the component parts which were made in the United States. It ordered other parts from United States suppliers and some from Canadian suppliers. The erection was made by a Canadian company under contract for the lump sum of $94,000. The operations performed under that contract with respondent's parent company were said to include "cutting, fitting, welding, wiring, joining, bolting and fabricating".

Respondent claimed drawback of customs duty under Drawback Items 1056 and 1059. The items cover "materials", "when used in the manufacture of articles entitled to entry" under specified tariff items and it was contended that one of these tariff items, namely 410*z*, covered the precipitators in question. Appellant denied the claim for drawback and on an appeal from his decision to the Tariff Board only one question was considered, namely "whether or not the precipitators were 'manufactured' in Canada within the drawback items in issue". The Tariff Board held that:

> The intent of the drawback items 1056 and 1059 is clearly the encouragement of the manufacture in Canada of the goods or articles described in tariff item 410*z* as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.
>
> In referring to the making of blast furnaces, oxygen furnaces, blast furnace stoves, open hearth furnaces and soaking pit furnaces, the word used in drawback item 1044 (now item number 97044-1) is "construction"; similarly, the word used to describe the making of bridges is "construction" in tariff item 460 (now item number 46000-1). Nor do the contracts for the installation of the precipitators use the word "manufacture", rather they use the words "erect" and "install".
>
> In the present case, the Board finds the work carried out at Copper Cliff, Ontario, to be assembly and erection rather than manufacture.

On appeal to the Exchequer Court[1], Cattanach J. held that the Board had erred in law. After pointing out that there was no evidence before the Board upon which it could have concluded that the precipitators were in existence before ultimate assembly and erection, he said:

> In the absence of a finding by the Board either express or implied, that the precipitators had an existence outside Canada, then I am of the

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opinion that a finding that the precipitators were not "manufactured" in Canada because they were merely "assembled and erected" in Canada, is wrong in law. I am of the opinion that the Board erred as a matter of law in concluding, as they did, that if what was done in Canada can properly be described as assembly and erection, it follows that the ultimate article was not manufactured in Canada. Where the article never existed until after the acts performed by the appellant on the site, then in my view, as a matter of law the article must be regarded as having been manufactured in Canada.

This conclusion was challenged essentially on the basis that the word "manufacture" in its ordinary meaning and as used in the relevant legislation does not embrace all the processes by which things come into existence. It was also contended that in the context of the relevant tariff item the word "manufacture" can hardly include mere assembly and erection of equipment which, because of its size, must be imported in pieces and erected at the purchaser's site.

In dealing first with the last mentioned contention it must be said that "assembly" is undoubtedly a part of the manufacturing process of any manufactured object made up of several component parts. The decision of the Tariff Board cannot be supported on the basis that assembly is not a part of the manufacturing process. No such finding was made.

As to the other point, it must be noted that the Tariff Board did not find that the precipitators as such had been manufactured prior to importation. There can be no doubt that in a proper case such a finding could be made and in such case the thing itself would be imported, not the materials for making it, although it might be imported in several pieces. Here the Tariff Board made no such finding. On the contrary, it proceeded to consider in effect whether assembly and erection were of sufficient importance to justify the benefit of the drawback. This is a factor which ought not to enter into consideration on the construction of the tariff item. Unless Parliament sees fit to specify the relative importance of the process carried on in Canada as opposed to the part carried on in producing the imported materials or parts, the only question to be considered in construing the enactment is whether what is done in Canada is substantially a part of the manufacturing process.

From this it follows that, on the basis of its finding of facts, the Tariff Board could not come to the conclusion that the precipitators were not manufactured in Canada unless it could find that they were not manufactured. If they were manufactured they cannot have been manufactured elsewhere, seeing that they were not imported, what was imported was materials and parts used in making them up.

In support of the contention that the precipitators were not manufactured, reference was made to the fact that with reference to furnaces and bridges the word used in the applicable items is "construction" not "manufacture". In my view, this means only that "construction" was considered as the appropriate word to describe the process whereby furnaces and bridges are brought into existence, while "manufacture" was considered the appropriate word for precipitators. Any other view would result in precipitators of such size that they can be shipped whole being considered as manufactured objects and larger precipitators as not manufactured. Nobody would contend that precipitators shipped in one piece are not manufactured items. It is hard to see how larger size articles of the same nature would have to be classified as constructions.

For those reasons I am of the opinion that the appeal fails and should be dismissed with costs.

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

MARTLAND J.:—Under the terms of a sub-contract, dated June 5, 1961, the respondent Research-Cottrell (Canada) Ltd., hereinafter referred to as "Cottrell (Canada)", agreed with The Foundation Company of Canada, Limited, to

> Supply all labour, materials, plant and tools necessary to supply and install "Eight Only Precipitators" on subject project...

The project was the subject-matter of a contract dated March 11, 1961, between The Foundation Company, as contractor, and The International Nickel Company of Canada Limited.

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The sub-contract provided for a price of $1,000,000 to Cottrell (Canada). Each precipitator has an overall height and overall width of approximately 40 feet, and is about 17 feet across the end. The precipitators are known as electrostatic precipitators and their function is to remove solid or liquid particles from gases generated at the International Nickel Company plant at Copper Cliff.

Cottrell (Canada) maintains only a sales office in Canada, in Toronto, the only permanent employees being a manager and his secretary.

The precipitators were designed in the U.S.A. by Research-Cottrell Inc., hereinafter called "Cottrell Inc.", of which Cottrell (Canada) is a wholly owned subsidiary. Cottrell Inc. manufactured in the United States some of the essential components of the precipitators; namely, wire components, the electrical control system and transformers. Some of the components were ordered by Cottrell Inc. from manufacturers and suppliers in the United States. It also selected and ordered other components from manufacturers and suppliers in Canada.

All the various components were shipped to the site of the International Nickel Company plant at Copper Cliff. They were assembled and erected by Noront Steel Construction Co., Ltd., of Sudbury, Ontario, pursuant to an agreement between Noront and Cottrell Inc. dated March 29, 1962, whereby Noront was to "furnish all labor, tools and construction equipment to receive, unload and completely erect eight (8) precipitators." The price was $94,000.

After the contract between Cottrell (Canada) and the Foundation Company had been completed, Cottrell (Canada) claimed a drawback of customs duties paid on the importation of those components of the precipitators which had been supplied from the United States.

The claim was based upon s. 11(1) of the *Customs Tariff*, R.S.C. 1952, c. 60:

> 11. (1) On the materials set forth in Schedule B, when used for consumption in Canada for the purpose specified in that Schedule, there may be paid, out of the Consolidated Revenue Fund, the several rates of drawback of Customs duties set opposite to each item respectively in that Schedule, under regulations by the Governor in Council.

The relevant portions of Schedule B are as follows:

GOODS SUBJECT TO DRAWBACK FOR HOME CONSUMPTION

Item No.	Goods	When Subject to Drawback	Portion of Duty Payable as Drawback
1056	Materials, including all parts, wholly or in chief part of metal, of a class or kind not made in Canada.	When used in the manufacture of goods entitled to entry under tariff items 410*z*	99 p.c.
1059	Materials	When used in the manufacture of articles entitled to entry under tariff items 410*b* and 410*z*, when such articles are used as specified in said items	70 p.c.

The distinction between items 1056 and 1059 is that to fall in item 1056 the materials must be "of a class or kind not made in Canada" whereas that is not a requirement of item 1059.

Tariff item 410*z* appears in Schedule A to the *Customs Tariff*:

GOODS SUBJECT TO DUTY AND FREE GOODS

Tariff Item		British Preferential Tariff	Most-Favoured-Nation Tariff	General Tariff
410*z*	Machinery and apparatus, n.o.p., and parts thereof, for the recovery of solid or liquid particles from flue or other waste gases at metallurgical or industrial plants, not to include motive power, tanks for gas, nor pipes and valves 10½ inches or less in diameter	5 p.c.	10 p.c.	12½ p.c.

The contention of Cottrell (Canada) is that the components of the precipitator obtained from the United States were articles entitled to entry under Item 410*z* and that they had been used in the manufacture of articles entitled to entry under that item within the meaning of Items 1056 and 1059 of Schedule B.

The claim of Cottrell (Canada) for a drawback was refused by the Deputy Minister of National Revenue for Customs and Excise on the ground that Cottrell (Canada) did not perform any manufacturing operation in connec-

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tion with the precipitators and that, while the precipitators were erected on its behalf by Noront, the components had been fabricated previously. Cottrell (Canada) appealed from his decision to the Tariff Board, and the respondent Joy Manufacturing Company (Canada) Limited entered an appearance.

The appeal was rejected by the Tariff Board, for the following reasons:

> The Board adopts the observation of Sir Lyman Duff, C.J.C., in *King v. Vandeweghe Ltd.* 1934 S.C.R. 244:
>
> > The words "produced" and "manufactured" are not words of any very precise meaning and consequently we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.
>
> It will not, for the purposes of this appeal, seek to establish any definition of general application to all cases but rather to declare whether or not the actions performed in this case constituted manufacturing.
>
> The intent of tariff item 410*z* appears to be to benefit metallurgical or industrial plants in their acquisition of a certain type of machinery and apparatus by the imposition of lower rates of customs duties than would be levied were item 410*z* not in the Customs Tariff.
>
> The intent of the drawback items 1056 and 1059 is clearly the encouragement of the manufacture in Canada of the goods or articles described in tariff item 410*z* as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.
>
> In referring to the making of blast furnaces, oxygen furnaces, blast furnace stoves, open hearth furnaces and soaking pit furnaces, the word used in drawback item 1044 (now item number 97044-1) is "construction"; similarly, the word used to describe the making of bridges is "construction" in tariff item 460 (now item number 46000-1). Nor do the contracts for the installation of the precipitators use the word "manufacture", rather they use the words "erect" and "install".
>
> In the present case, the Board finds the work carried out at Copper Cliff, Ontario, to be assembly and erection rather than manufacture.

An appeal was then taken to the Exchequer Court. The right to appeal to that Court is limited, by s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, as enacted by Statutes of Canada, 1958, c. 26, s. 2(1), to a question of law.

The appeal was allowed. The reason for this decision is stated as follows:

> In the absence of a finding by the Board either express or implied, that the precipitators had an existence outside Canada, then I am of the opinion that a finding that the precipitators were not "manufactured" in

Canada because they were merely "assembled and erected" in Canada, is wrong in law. I am of the opinion that the Board erred as a matter of law in concluding, as they did, that if what was done in Canada can properly be described as assembly and erection, it follows that the ultimate article was not manufactured in Canada. Where the article never existed until after the acts performed by the appellant on the site, then in my view, as a matter of law the article must be regarded as having been manufactured in Canada.

In *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[2], Kellock J., speaking for the Court, said, at p. 498:

> 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.
>
> 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 a nature 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 the 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; *Edwards v. Bairstow,* (1955) 3 All E.R. 48.

The judgment of the Court below has held that the Tariff Board erred in construing the statutory items, because, as a matter of law, where the articles did not exist until after the acts performed at the site, they must be regarded as having been manufactured in Canada. It follows, from this proposition, that in every case, where fabricated parts are assembled in Canada into a whole, the article which then comes into existence must have been manufactured in Canada.

With respect, I am not prepared to accept this broad proposition when considering the meaning of the word "manufacture" in the relevant tariff items under consideration. The assembly of parts may, in certain circumstances, constitute manufacture, but I do not agree that this must be so in all circumstances.

The Tariff Board, in its reasons, stated:

> It will not, for the purposes of this appeal, seek to establish any definition of general application to all cases but rather to declare whether or not the actions performed in this case constituted manufacturing.

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

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For the respondent it was contended that the Tariff Board misdirected itself when it stated the issue to be whether what was done by Cottrell (Canada) constituted manufacture in Canada, and that the only issue was, in the words of the relevant tariff items, "were the materials used in the manufacture of" the precipitators? But the tariff items must be read with s. 11(1) which authorizes drawbacks on materials "when used for consumption in Canada for the purpose specified". In the light of that wording I think it was proper for the Tariff Board to decide whether the action of Cottrell (Canada) constituted manufacture of the precipitators in Canada.

The evidence before the Board showed that the agreement of Cottrell (Canada) with the Foundation Company was to supply and erect eight precipitators. They were designed and all components built or ordered by Cottrell Inc., to be delivered at the site. The erection was done by Noront, by agreement with Cottrell Inc.

In these circumstances I do not think it should be held, as a matter of law, that what Noront did at the site constituted manufacture by Cottrell (Canada) of eight precipitators. On the facts, it was open to the Board to find, as it did, that the assembly and erection of the fabricated components was not, in this case, manufacture within the meaning of the relevant tariff items.

My conclusion is that the Board did not misdirect itself as to the law, and that there was evidence on which its finding of fact could properly be made.

This being so, the appeal should be allowed, and the declaration of the Tariff Board restored, with costs to the appellant as against Cottrell (Canada), in this Court and in the Court below.

Appeal allowed with costs, CARTWRIGHT C.J. *and* PIGEON J. *dissenting.*

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent, Research-Cottrell (Canada) Ltd.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent, Joy Manufacturing Co. (Canada) Ltd.: Herridge, Tolmie, Gray, Coyne & Blair, Ottawa.