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BETWEEN:

DOMINION ENGINEERING WORKS LIMITED ..... APPELLANT;

AND

A. B. WING LIMITED, CANADIAN ASSOCIATION OF EQUIPMENT DISTRIBUTORS AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE RESPONDENTS.

Revenue—Customs and Excise—Two and a half yard dipper capacity power shovels—Customs Tariff, R.S.C. 1952, c. 60, Tariff items 427, 427(a)—Customs Act, R.S.C. 1952, c. 58, s. 2(2)—Meaning of "class or kind not made in Canada"—No presumption of policy to be read into Tariff Items 427, 427(a)—Expression "of a class or kind not made in Canada" in Tariff Item 427(a) not referable solely to "machinery"—Nominal dipper capacity of power shovels a proper criterion of class or kind of power shovels—Appellant to pay only one set of costs.

In October 1953 the respondent, A. B. Wing Limited, imported a Northwest Power Shovel, crawler-mounted, convertible full revolving, Model 80D, of a 2½ cubic yard dipper capacity. It was entered under Tariff Item 427 of the Customs Tariff, R.S.C. 1952, c. 60, and the Deputy Minister confirmed this classification. The respondent appealed to the Tariff Board which reversed the Deputy Minister's decision and held that the power shovel was properly classifiable under Tariff Item 427*a* of the Customs Tariff. The appellant appealed from the declaration of the Tariff Board on a question of law pursuant to leave, the question being whether the Tariff Board erred, as a matter of law, in holding that the power shovel was properly classifiable for tariff purposes under Tariff Item 427*a*.

Held: That there is no presumption that it is the purpose of Tariff Items 427 and 427*a* to protect Canadian manufacturers against the importation of competitive machinery from foreign countries or that the words "of a class or kind not made in Canada" in Tariff Item 427*a* should be construed in such a way as to afford Canadian manufacturers of power shovels the intended protection in cases where, by reason of closeness in sizes, an imported power shovel would compete in the Canadian market or on the job with a domestic one or, on the other hand, that they should be construed in such a way as to give Canadian users of power shovels the fullest possible opportunity of importing power shovels of the desired capacity under the lower rates of Tariff Item 427*a*.

2. That full effect should be given to each of the Tariff Items 427 and 427*a*. Each must be read fairly and without the distortion of an assumption of policy that one is to over-ride the other.

3. That the expression "of a class or kind not made in Canada" in Tariff Item 427*a* is not referable to the expression "all machinery composed wholly or in part of iron or steel" by itself, but to the whole expression that precedes it, including the words "n.o.p.", and that the question for

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determination by the Tariff Board was not whether the imported power shovel was of a class or kind *of machinery* not made in Canada, but whether it was of a class or kind *of power* shovel not made in Canada.

4. That the nominal dipper capacity of power shovels is a proper criterion to apply to the classification of power shovels even where the difference between them is one of neighbouring capacities and that it was within the competence of the Tariff Board to settle where the line of difference of classes or kinds of power shovels according to the difference in their nominal dipper capacities should be drawn.

5. That the Tariff Board's decision to draw the line where it did was a decision of fact with which this Court has no jurisdiction to interfere.

6. That the appellant will be required to pay only one set of costs.

APPEAL on a question of law from a declaration of the Tariff Board.

The appeal was heard before the President of the Court at Ottawa.

A. Forget, Q.C., for appellant.

J. M. Coyne, for respondent A. B. Wing Limited.

G. F. Henderson, Q.C., for respondent Canadian Association of Equipment Distributors.

W. R. Jackett, Q.C., for respondent Deputy Minister of National Revenue for Customs and Excise.

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

THE PRESIDENT now (March 7, 1956) delivered the following judgment:

This is an appeal on a question of law from the declaration of the Tariff Board in Appeal No. 306, dated May 20, 1954, pursuant to leave to appeal on the following question:

Did the Tariff Board err, as a matter of law, in holding that the crawler-mounted convertible full revolving power shovel imported under Vancouver Entry No. 35748 of 21st September, 1953, is properly classifiable for tariff purposes under Tariff Item 427*a*?

The power shovel in question, described as a Northwest Power Shovel, crawler-mounted, convertible full-revolving, Model 80D, of a 2½ cubic yard dipper capacity, was imported, as stated in the question, by the respondent A. B. Wing Limited, hereinafter simply called the respondent, and entered under Tariff Item 427 of the Customs Tariff, R.S.C. 1952, Chapter 60, with a customs duty of 22½ per cent *ad valorem.* On October 19, 1953, the Deputy Minister of National Revenue for Customs and Excise con-

firmed the classification made by the Vancouver appraiser in conformity with a Departmental Memorandum, Series D No. 51 MCR 152, dated June 3, 1953, reading as follows:

> Pursuant to the provisions of Section Six of the Customs Tariff, Convertible Full Revolving Power Shovels and Cranes with a dipper capacity of from ⅜ cubic yard to 2½ cubic yards, both inclusive, are to be considered as of a class or kind made in Canada. The customary three weeks' notice relative to this ruling does not apply to the sizes ½ cubic yard to 2 cubic yards, both inclusive, as this range has previously been ruled to be of a class or kind made in Canada.

The respondent then appealed to the Tariff Board which reversed the Deputy Minister's decision and held that the power shovel was properly classifiable under Tariff Item 427*a* of the Customs Tariff with a customs duty of 7½ per cent *ad valorem*. It is from this decision that the present appeal on the stated question of law is taken.

It is desirable at the outset to set out the relevant tariff items. Tariff Item 427 reads:

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

and Tariff Item 427*a* reads:

> All machinery composed wholly or in part of iron and steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

I should also note that the *ad valorem* rates of 22½ per cent under Tariff Item 427 and 7½ per cent under Tariff Item 427*a*, to which I have referred, do not appear under the tariff items of the Customs Tariff. They result from the adoption of an international agreement commonly referred to as GATT.

It was agreed before the Tariff Board, and the fact is not disputed, that no crawler-mounted, convertible full-revolving power shovel with a 2½ cubic yard dipper capacity such as that of the imported shovel was made in Canada and that the largest dipper capacity of any power shovel made in Canada was a 2 cubic yards. It was also established that in the trade, both in Canada and in the United States, from which latter country the power shovel in question was imported, power shovels are categorized according to the capacity of the dippers with which they are ordinarily equipped and for the use of which they are primarily designed, and this capacity is commonly described as nominal dipper capacity. The capacity of the dipper is measured by the amount of water that it can hold in one

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scoop. But if the operator of a power shovel categorized as a 2½ cubic yard dipper capacity power shovel should wish to use a 2 cubic yard capacity dipper to handle heavy material or a 3 cubic yard capacity dipper to handle light material this does not change the category of the power shovel: it is a 2½ cubic yard nominal dipper capacity power shovel. And similarly, a 2 cubic yard nominal dipper capacity power shovel does not cease to be such by reason of the fact that a 1½ or 2½ cubic yard capacity dipper may be used with it according to whether the material to be handled is heavy or light. There can, I think, be no doubt that in the trade the standard used in the classification of power shovels in their several categories is that of nominal dipper capacity. They are sold and bought according to their nominal dipper capacity. Manufacturers, dealers and users alike have accepted it as the standard of the categories into which power shovels fall.

The reasoning which led the Tariff Board to its declaration that the imported power shovel is of a class or kind not made in Canada and, therefore, classifiable under Tariff Item 427*a* is clearly put. The Board regarded nominal dipper capacity as the proper term by which to describe the capacity of a power shovel and found as a fact that the trade understands and accepts this standard and bases its categories of power shovels on it. Nominal dipper capacity is the measure which the trade adopts for the classification of power shovels into their various categories. The Board then made the following important statement:

> short of the general adoption of a standard of specifications that might well include other criteria, probably the most practical *single* criterion by which power cranes and shovels can be categorized by makers, buyers, and users is that of so-called "nominal dipper capacity".

From this statement, which was not in dispute, the Board proceeded to its final conclusion. Its manner of doing so is best described in its own words. I set out the following paragraphs in its reasons for its declarations.

> In determining "class or kind" distinctions in the machinery field it appears essential to have regard for the over-all capacity or capability of various machines.
>
> .....
>
> The evidence is to the effect that the sizes actually made in Canada are nominally rated as to dipper capacity from ⅜ cubic yard to 2 cubic yards.
>
> The propriety of using capacity as a criterion in determining classification is so obvious as scarcely to require comment. It would, for example

be, unrealistic to regard power shovels rated as to nominal dipper capacity of 2½ cubic yards as a class of machinery made in Canada if, in fact the largest machines made in Canada were of ½ cubic yard dipper capacity.

The problem of classification on the basis of capacity becomes acute when the precise point of separation into the "class made" and the "class not made" has to be determined. The distinction which must be made is more or less arbitrary.

Where the capacities of machines are established in clearly defined sizes, as is the case with convertible full-revolving power cranes or shovels, the least arbitrary and perhaps therefore 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.

The Tariff Board declared, accordingly, that the imported power shovel was of a class or kind not made in Canada and the only question in this appeal is whether it was in error, as a matter of law, in so declaring.

The issue is of considerable importance. The Court was informed that there are at least 60 tariff items in the Customs Tariff in which the expression "of a class or kind not made in Canada" appears. It may be said generally that where it does appear in a tariff item an article classifiable under such item may be imported into Canada at a lower rate of duty than if it were classifiable under the tariff item in which the expression does not appear. The proper classification of the article is thus of importance from a revenue viewpoint. It is also of importance to manufacturers and users. The expression is not defined in the Act and there is no statement of the test to be applied in determining whether an imported article is of a class or kind not made in Canada or not. The words are general in character, and necessarily so, for it is obvious that it would not have been possible to prescribe a test of general application. What is an appropriate test in any given case must depend on the circumstances.

Before I refer to the argument in support of the appeal I should note that the Departmental Memorandum to which I referred is devoid of legal authority. There was no legal justification for extending the class or kind of power shovels that were made in Canada, namely, shovels with nominal dipper capacities ranging from ⅜ cubic yard to 2 cubic yards, to include power shovels with a nominal dipper capacity of 2½ cubic yards which in fact were not made in Canada.

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Counsel for the appellant assigned a two-fold error to the Tariff Board, one that it had applied a wrong test and the other that it had failed to apply the right one. I summarize his first submission. He did not dispute the propriety of using nominal dipper capacity as a test in determining whether one power shovel is of a different class or kind from that of another but quarreled with the Board for drawing the line of difference where it did, namely, between a 2 cubic yard nominal dipper capacity power shovel and a 2½ cubic yard nominal dipper capacity one, being the next larger size. The only difference between them was that the latter was heavier. To say that it was of a different class or kind was a misconstruction of the tariff items. It was difficult to draw the line precisely and while it must be drawn somewhere the Board had drawn it at the wrong place. If, for example, it had been drawn between 2 and 6 or between 2 and 4 cubic yard nominal dipper capacities no valid objection could have been taken but to draw it between 2 and 2½ cubic yard nominal dipper capacities was erroneous. While difference in size might determine difference in class or kind it does not necessarily do so and cannot do so in the case of neighbouring sizes. There must be something more than the mere difference of one size. Indeed, the difference must be such that the larger power shovel is in fact of a different class or kind of machinery from that of the next smaller one. Nor was the trade classification of power shovels according to their nominal dipper capacities necessarily the classification that the Board should make. When Parliament intended size to be a determining factor it said so in plain terms, which it had not done in the present case. Consequently, since the 2½ cubic yard nominal dipper capacity power shovel, although not made in Canada, was so close in size to the 2 cubic yard nominal dipper capacity one that was made in Canada the Board was in error in declaring that it was of a class or kind not made in Canada.

Counsel then proceeded with his contention that the Board had been in error in failing to apply the proper test. Here he put forward two arguments, which might be termed minor and major submissions. His minor one was that if there was ambiguity in the meaning of the tariff items the

policy dictated by the Act might be taken into account. In this connection he referred to section 2(2) of the Customs Act, R.S.C. 1952, Chapter 58, which reads as follows:

> 2. (2) All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

and his submission was that the construction of the Act must be consonant with its purpose and that since the Board's declaration had the effect of reducing the revenue it defeated the purpose of the Act. In my view, there is no ambiguity of meaning in the tariff items and no merit in this submission.

The major submission was of a different nature. It was contended that one of the obvious prime objects of the Act was the protection of Canadian industry against competing imports, that the tariff items were a device for affording such protection and that where imported machinery competes in the Canadian market or on the job with domestic machinery it cannot properly be said that the imported machinery is of a different class or kind from that of the domestic one. Thus, if purchasers of power shovels would hesitate between importing a $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel and buying a domestic 2 cubic yard nominal dipper capacity one because of their closeness in size to one another they are competitive and this fact indicates that they cannot be of different classes or kinds. If there is a big difference in size between an imported power shovel and a domestic one they would be of different classes or kinds for in such case they would not compete with one another but the reverse would be true if the sizes are close to one another. If there is competition in the Canadian market between the manufacturers of the two shovels referred to Parliament must have intended that the Canadian manufacturers should be protected against the import of the competing shovel and that the term "class or kind" should be construed so broadly as to afford such protection. Whether there is competition in the Canadian market between an imported power shovel and a domestic one is one of the prime factors to be considered in determining whether the imported shovel is of a class or kind

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not made in Canada or not. The Tariff Board did not mention this important criterion and its failure to apply it was erroneous. Put tersely, the contention was that since the imported power shovel was of the size immediately above that of the largest domestic one experience showed that they did compete with one another and counsel urged that once such competition was shown the Canadian manufacturer was entitled by law to the protection of Tariff Item 427. He then proceeded to review the evidence in order to show that the two shovels were in fact similar in function and characteristics and would compete with one another.

There are several reasons for rejecting these submissions. The contention that the Tariff Board erred in failing to apply the test of whether the imported power shovel was competitive with the largest domestic one in determining whether the former was of a class or kind not made in Canada within the meaning of Tariff Item 427*a* was based on an assumed presumption that it is the purpose of the tariff items in question to protect Canadian manufacturers against the importation of competitive machinery from foreign countries and that the words "of a class or kind not made in Canada" in Tariff Item 427*a* should be construed in such a way as to afford Canadian manufacturers of power shovels the intended protection in cases where, by reason of closeness in sizes, an imported power shovel would compete in the Canadian market or on the job with a domestic one. I say categorically that there is no such presumption. It would be just as logical to contend that since the purpose of Tariff Item 427*a*, so far as it relates to power shovels, is to enable Canadian users of power shovels to import them from foreign countries at the lower rate of the tariff item when they cannot obtain shovels of the desired capacity in Canada and since the words "of a class or kind not made in Canada" appear in Tariff Item 427*a*, and not in Tariff Item 427, there is a clear indication that Parliament intended that the words are to be construed in such a way as to give Canadian users of power shovels the fullest possible opportunity of importing power shovels of the desired capacity under the lower rates of Tariff Item 427*a*. The tariff items are not to be thus construed. As full effect must be given to one item as to the other. Each must be read fairly and without the distortion of an assumption of policy that one

is to over-ride the other. The only policy attributable to Parliament is that which it has expressed in the words of the items.

There is a serious error of construction in counsel's contention that before the imported power shovel can be properly classified under Tariff Item 427*a* it must be shown that the difference between its nominal dipper capacity and that of power shovels of a class or kind made in Canada is so great as to put it into a different class or kind *of machinery* from that of Canadian made power shovels. The expression "of a class or kind not made in Canada" in Tariff Item 427*a* is not referable to the expression "all machinery composed wholly or in part of iron or steel" by itself, but to the whole expression that precedes it, including the words "n.o.p.". The Tariff Items 427 and 427*a* are not concerned with machinery composed wholly or in part of iron or steel generally but only with the categories of such machinery that are not otherwise provided for in the Customs Tariff. Obviously, there are many categories of machinery composed wholly or in part of iron or steel that are classifiable under one or other of the items for the reason that they have not been otherwise provided for. It is plain that power shovels constitute one of these categories. They are machinery and are composed wholly or in part of iron or steel and no other provision has been made for them in the Customs Tariff. Thus, every imported power shovel is classifiable under either Tariff Item 427 or under Tariff Item 427*a*. Consequently, in the present case the question for determination by the Tariff Board was not whether the imported power shovel was of a class or kind *of machinery* not made in Canada but whether it was of a class or kind *of power shovel* not made in Canada. This interpretation of the meaning of the expression "of a class or kind not made in Canada" in Tariff Item 427*a* was adopted by the Tariff Board in its declaration in Appeal No. 272, dated March 18, 1953: *vide Canada Gazette,* Vol. 87, page 882, and I accept it, without hesitation, as a correct interpretation. That being so, the Tariff Board's declaration in the present case was a declaration that the imported power shovel was of a class or kind *of power shovel* not made in Canada. This declaration, in my opinion, of necessity imports two findings, one that it was of a different class or

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kind of power shovel from the class or kind of power shovels made in Canada and the other, a resulting one, that it was of a class or kind of power shovel not made in Canada. While I agree that there is no express finding by the Board of such difference in class or kind it is, in my opinion, plainly implied in its declaration.

Apart from the fact that there is no basis for the assumed presumption implied in counsel's contention there is a practical objection to it. It is desirable that the test of whether an imported power shovel should be classified for customs purposes under Tariff Item 427 or Tariff Item 427*a* should be a precise one, for it is clear that the items are exclusive of one another. There is no twilight zone between them. The test suggested by counsel lacks this quality. How could it be determined with the desired precision whether an imported power shovel is competitive with a domestic one? The question answers itself.

But there is a more serious reason for rejecting the appellant's submission. Its whole case rests on the contention that the nominal dipper capacity of an imported power shovel is a criterion for determining that it is of a different class or kind from that of power shovels made in Canada and therefore of a class or kind not made in Canada only if the difference between its nominal dipper capacity and that of the largest power shovel made in Canada is, in fact, such as to put the imported power shovel into a different class or kind of machinery from that of the domestic one, that there cannot be such a difference in the case of an imported power shovel which is of the next larger size than that of the largest domestic one and that the Board's declaration to the contrary was erroneous as a matter of law. In my opinion, this contention is unsound. In the first place, the Tariff Board did not use the mere size of the imported power shovel as the test of its difference. The criterion which it adopted and applied was that of nominal dipper capacity, meaning thereby the over-all capacity of the power shovel, of which size was only one factor. That being so, and the criterion of nominal dipper capacity being accepted as a proper one, I cannot find any valid reason for finding that the Board's declaration was erroneous.

Counsel's contention is really an indirect attack on the declaration of the Tariff Board in Appeal No. 272, but, in a sense, the Board has itself to thank for the situation that led to it. A brief reference to Appeal No. 272 will be in order. There had been representations to the Deputy Minister of National Revenue for Customs and Excise to the effect that the tariff classification of power cranes and shovels on the basis of nominal dipper capacity or type of mounting was *ultra vires* and illegal and that it should be held by the Department that all power cranes and shovels, regardless of nominal dipper capacity, were of a class or kind made in Canada and he had referred these representations to the Tariff Board for its opinion. It was argued before the Board that all power cranes, all power shovels and all convertible power cranes and shovels of the full-revolving type constitute a single and indivisible class or kind of machinery irrespective of variations in nominal dipper capacity, type or mounting, size, weight or any other criterion. The Board disagreed with this contention. It interpreted, as I have already stated, the words "class or kind" in Tariff Items 427 and 427*a* as meaning, in the case before it, class or kind of power crane or power shovel rather than class or kind of machinery and expressed the opinion that power cranes and power shovels could be classified into classes or kinds according to their type of mounting or nominal dipper capacity. Thus nominal dipper capacity was approved as a criterion for the classification of power shovels into various classes or kinds for customs tariff purposes. But the Board concluded its reasons for judgment as follows:

> In so declaring the Board does not suggest that nominal dipper capacity is necessarily the only basis on which power cranes and power shovels could or should be classified; nor that the precise classification presently established by the Department is necessarily correct. It is the Board's opinion, however, that the criterion selected by the Department and made the basis of the ruling at issue is a defensible one.

The Department took comfort from this statement and extended its classification of power shovels of a class or kind made in Canada, which had ranged in nominal dipper capacities from $\frac{1}{2}$ cubic yard to 2 cubic yards, to include power shovels of $\frac{3}{8}$ cubic yard nominal dipper capacity at the lower end of the range and power shovels of $2\frac{1}{2}$ cubic yards nominal dipper capacity at the higher end, although

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there were no power shovels of this capacity made in Canada, and put this extended classification into the Departmental Memorandum to which I have referred. It was from this extended classification that the present respondent appealed to the Tariff Board when it was applied to the power shovel which it had imported. Thus the Board, in declaring, as it did in effect, that the Department's extended classification was erroneous, took up the matter of classification of power shovels according to their nominal dipper capacities from where it had left off in Appeal No. 272.

My reason for saying that counsel for the appellant made an indirect attack on the Tariff Board's declaration in Appeal No. 272 is that while he conceded that the nominal dipper capacity of power shovels is a criterion for classifying them into different classes or kind he contended that this criterion was not applicable where the difference in nominal dipper capacities was only as between neighbouring capacities and sought to establish by reference to the evidence that there was no difference in fact between the imported $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel and the domestic 2 cubic yard nominal dipper capacity one, that they were, therefore, of the same class or kind and that, consequently, the former could not be of a class or kind not made in Canada. He submitted that the Board had not made any finding of fact on the question whether the imported power shovel was different in function and characteristics from the largest domestic one but had automatically adopted the trade's classification without regard to whether the imported shovel and the largest domestic one were, as a matter of fact, different from one another and that this automatic adoption of the trade's classification was erroneous, as a matter of law.

There is no substance in this submission. The Board's declaration follows logically and naturally from its declaration in Appeal No. 272. Its decision that the trade's classification on the basis of nominal dipper capacity is probably the best one to adopt is a further recognition of nominal dipper capacity as a criterion of classification. It is not suggested, and could not validly be contended, that classification on this basis is erroneous, as a matter of law. It was settled by the declaration in Appeal No. 272 that nominal dipper capacity is a proper criterion to apply in the classi-

fication of power shovels. Once it is conceded, as it must be, that this is a proper test for their classification how could it be said that the Board's application of the test in the present case was erroneous, as a matter of law? Since the nominal dipper capacity of power shovels is the standard which the trade, both in Canada and the United States, recognizes as the standard for its placement of power shovels in their various categories and this criterion of classification for customs tariff purposes was adopted by the Board in its declaration in Appeal No. 272, from which no appeal was taken, it is obvious that the line of difference of classes or kinds of power shovels must be drawn at some difference in their nominal dipper capacities. That being so, it was within the competence of the Tariff Board to settle where it should be drawn. Its decision to draw it where it did was, in my opinion, plainly a decision of fact with which this Court has no jurisdiction to interfere. Thus, counsel's charge of error is really a charge of error of fact, which, even if well founded, could not succeed.

But to contend that the Tariff Board drew the line of difference of class or kind where it did without regard to the evidence is wholly unreasonable. All of the evidence to which counsel referred was before the Tariff Board. In my opinion, it is inconceivable that it would have accepted the trade's classification of power shovels into different classes or kinds and made its declaration, accordingly, if it had considered, on the evidence before it, that there was, as a matter of fact, no difference in function or characteristics between the imported $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel, which was not made in Canada, and the class or kind of power shovels that were made in Canada, or even the largest of such domestic power shovels.

In my judgment, there can be no doubt that in the Board's declaration there is implied a finding of fact that the imported power shovel is different in fact from any domestic power shovel. There would, therefore, be no object in following the course suggested by counsel for the appellant that this Court should refer the case back to the Tariff Board for a specific finding whether the imported power shovel is, as a matter of fact, different in function and

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characteristics from the largest domestic one, for it is plain what its finding would be. It could not be different from that which it plainly implied in its declaration.

If there was material before the Tariff Board from which it could reasonably declare that the imported power shovel was of a class or kind not made in Canada its finding should not be disturbed. This view of how the Court should deal with appeals on questions of law from decisions of the Tariff Board has been consistently taken ever since the Court was vested with jurisdiction to entertain such appeals; *vide*, for example, *Deputy Minister of National Revenue for Customs and Excise v. Parke, Davis & Company Limited* (1); *Canadian Lift Truck Company Limited v. Deputy Minister of National Revenue for Customs and Excise* (2). Here there was ample warrant for the Board's declaration. Indeed, in the case of power shovels, it would be difficult to think of a better criterion of difference of class or kind than that of nominal dipper capacity. It is recognized by the trade, manufacturers, dealers and users alike, and I am unable to find any reason for concluding that the Tariff Board was in error in declaring that the imported power shovel was of a different class or kind from that of any power shovel made in Canada, even a 2 cubic yard nominal dipper capacity one, and, therefore, classifiable under Tariff Item 427*a* as being of a class or kind not made in Canada. I have, therefore, no hesitation in answering the question of law in the negative.

There remains only the matter of costs. I had occasion to deal with this subject fully in *The Goodyear Tire and Rubber Company of Canada Limited et al. v. The T. Eaton Co., Limited et al.* (3) and I apply the same principles here. The appellant will be required to pay only one set of costs. These will be payable to the respondent, A. B. Wing Limited. The other respondents will each pay their own costs.

The result is that the appeal herein will be dismissed with costs as stated.

Judgment accordingly.

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(1) [1954] Ex. C.R. 1 at 20. (2) [1954] Ex. C.R. 487 at 498.
(3) [1955] Ex. C.R. 229 at 240.