1960

Jan. 28, 29
Feb. 1

Dec. 9

BETWEEN:

CAMPBELL SOUP COMPANY LIMITED AND LIBBY, McNEIL & LIBBY OF CANADA LIMITED ... APPELLANTS;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

Revenue—Customs Duty—Appeal on question of law from Tariff Board's decision—Meaning of "apparatus for cooking" when applied to certain food processing equipment—Customs Act, R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, s. 2—Customs Tariff, R.S.C. 1952, c. 60, Schedule A, Tariff Item 443 as amended by S. of C. 1956, c. 36, s. 1—Tariff Board Act, R.S.C. 1952, c. 261, s. 5(9).

The appellants appeal from a declaration of the Tariff Board affirming the Deputy Minister's classification for customs purposes of certain imported food processing equipment as "apparatus for cooking" within the meaning of Item 443 of the *Customs Tariff*, R.S.C. 1952, c. 60 as amended.

The importations in question involve two kinds of units described respectively as a pre-heater and a pressure cooker. Each consists of a chamber or tank equipped with mechanism by which sealed cans may be moved through the tank, and while being so moved, heated by hot water or steam or cooled by water or some other medium, the whole at controlled speeds, temperatures and pressures. The appellant contended that the Board in defining "cooking" as "preparing food for consumption by subjecting it to the application of heat" expanded the dictionary meaning and misdirected itself as to the meaning of "cooking" in Item 443.

Held: That the Tariff Board had correctly concluded that the word "cooking" is not used in Tariff Item 443 in any technical sense and that it should be given its ordinary meaning.

2. That no valid objection could be taken to the Board's definition and such definition did not expand the dictionary meaning of the word "cooking".

3. That the definition set out in the Board's declaration indicates that the Board "was properly instructed in law as to the construction of the statutory item".

4. That there was evidence upon which the Board properly instructed as to the law and acting judicially could reach the conclusion that the equipment in question was in fact apparatus for cooking within the meaning of that expression in Item 443. *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue* [1956] 1 D.L.R (2d) 497 referred to and applied.

APPEAL from a declaration of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

Stuart D. Thom, Q.C. for appellants.

H. D. Aylen for respondent.

THURLOW J. now (December 9, 1960) delivered the following judgment:

This is an appeal pursuant to s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, as enacted by Statutes of Canada, 1958, c. 26, s. 2, from a declaration of the Tariff Board, whereby the Board upheld the classification for customs purposes made by the Deputy Minister of National Revenue for Customs and Excise of certain imported food processing equipment as "apparatus for cooking" within the meaning of Item 443 of the *Customs Tariff*, R.S.C. 1952, c. 60, Under s. 45 of *The Customs Act*, an appeal from the Tariff Board may be taken to this Court only "upon a question of law."

The five importations in question involved three kinds of units known or described respectively as a pre-heater, a pressure cooker and a cooler, the appeal being concerned only with the first two of these. Each of these units consists of a chamber or tank equipped with mechanism by which sealed cans may be moved through the tank, and while being so moved, heated by hot water or steam or cooled by water or some other medium, the whole at controlled speeds, temperatures and pressures.

On April 12, 1956, when the first of the importations in question was made, Item 443 of the *Customs Tariff* read as follows:

> Apparatus designed for cooking or for heating buildings:—
> (1) For coal or wood
> (2) For gas
> (3) For electricity
> (4) n.o.p.

But the item was amended retroactively to March 21, 1956, by Statutes of Canada, 1956, c. 36, and has since read:

> Apparatus, and parts thereof, for cooking or for heating buildings.

The French text of the amended item is:

> Appareils, et leur pièces, destinés à la cuisson, ou au chauffage des bâtiments.

1960

CAMPBELL SOUP CO. LTD. *et al.* *v.* DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE

Thurlow J.

the words «destinés à la cuisson» remaining unchanged from the earlier item.

Item 443 is one of a large group of items entitled "Metals, and manufactures thereof," and in this group the only other items having any likely application are Items 427 and 427*a*, dealing with

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

In making its declaration, the Tariff Board, after stating the problem and summarizing the evidence, said:

> When such a homely word as cooking is used in the tariff without qualification, it is difficult to avoid the conclusion that the legislators intend that it should convey its ordinary and well established meaning unless there appears some clear indication to the contrary—in the context, for example, or in well established commercial usage. In this appeal no such indication is apparent.
>
> In common and ordinary usage, to cook means to prepare food for consumption by subjecting it to the action of heating. On this matter the various dictionaries consulted are in unusually close agreement. For the purposes of Tariff Item 443, then, cooking should be understood to mean preparing food for consumption by subjecting it to the application of heat. There is no question but that the pre-heater and the pressure cooker are produced, advertised, sold and commonly used for applying heat as part of the process of preparing food for human consumption. This being the common and ordinary meaning of cooking, it follows that the pre-heater and pressure cooker are used for cooking. It is equally obvious from the sales literature and from the oral evidence of the appellant that they are commonly referred to as a cooker and also that they do cook.
>
> The Board finds that this equipment is apparatus for cooking within the meaning of Tariff Item 443.

The main contention on behalf of the appellant was that the equipment in question is designed to sterilize food for the purpose of preserving it, that it is not designed for cooking in the sense of preparing food for eating and that any cooking that may occur in the processing of food by this apparatus is merely incidental to the main purpose of sterilizing and is a disadvantage, rather than an advantage, in canning many of the products for which the apparatus can be used, that the Board, in defining "cooking" as "preparing food for consumption by subjecting it to the application of heat", has expanded the dictionary meaning sufficiently to embrace the sterilizing of food by the application of heat to preserve it for consumption, and accordingly has misdirected itself as to the meaning of "cooking" in Item 443.

Counsel for the Deputy Minister contended that what the Board had in mind in defining cooking as "preparing food for consumption by subjecting it to the application of heat" does not differ from the dictionary meaning, that even if this definition is broad enough to include preparing food for consumption by applying heat to sterilize it the determination by the Board of the meaning of "cooking" in Item 443 was a finding of fact and not one of law, that the finding that the equipment in question was apparatus for cooking within the meaning of cooking as so found was also purely a finding of fact, and that since there is no appeal to this Court except on a question of law, the Court was without jurisdiction to review either of such findings. He also submitted that, even if the meaning of "cooking" in Item 443 is not broad enough to include preparing food for consumption by applying heat to sterilize and preserve it, but is limited to preparing food for eating, there is evidence upon which the Board could reach the conclusion that the equipment in question was apparatus for cooking within that sense of the word and that, accordingly, the finding should not be disturbed.

In *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue*[1], Kellock J., referring to the question upon which the appellant had been given leave to appeal, 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.

In my opinion, the Tariff Board has correctly concluded that the word "cooking" is not used in Tariff Item 443 in any technical or special sense and that it should be given its ordinary meaning. I also think that no valid objection

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

1960

CAMPBELL SOUP CO. LTD. *et al.* *v.* DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE

Thurlow J.

can be taken to the Board's definition of the meaning of cooking as "preparing food for consumption by subjecting it to the application of heat."

In *The Shorter Oxford Dictionary*—to which the Board had been referred—among the meanings given for the word "cook" is: "To prepare (food); to make fit for eating by application of heat, as by boiling, baking, roasting, etc." One of the meanings given in the same dictionary for the word "prepare" is "to make ready (food, a meal) for eating."

The Board was also referred to definitions in *Murray's New English Dictionary*, 1893, of the word "cook" as

> 1. To act as cook, to prepare food by the action of heat.
> 2. To prepare or make ready (food); to make fit for eating by due application of heat as by boiling, baking, roasting, broiling, etc.

and of the word "cooked" as "Prepared by heat for eating."

In my opinion, the meanings so expressed would not embrace the application of heat for the mere purpose of sterilizing food, whether it be raw or cooked food to which heat is applied for that mere purpose. But I do not think that the Board, in defining the word "cooking" in Item 443, as "preparing food for consumption by subjecting it to the application of heat," has expanded the dictionary meaning to which they referred. While not every application of heat to food will necessarily be for the purpose of preparing it for eating, in the Board's definition the words "by subjecting it to the application of heat" are governed by and restricted to the purpose of "preparing food for consumption" which, in my opinion, is not different from "preparing (food) for eating." I also think it is manifest both from the transcript of the proceedings and the declaration that the Board was fully aware of the distinction between applying heat for the purpose of cooking food and applying heat for the purpose of sterilizing it. Accordingly, whether the question of what is the common understanding of the word "cooking" is purely a question of fact, as contended by counsel for the Deputy Minister, or purely a question of law, or is a mixed question of fact and law, I am of the opinion that the Board has reached and has set out in its declaration a correct understanding of the meaning of the word in the tariff item and that the definition set out in the declaration indicates that the Board "was properly instructed in law as to the

construction of the statutory item." Nor do I think it can be said that the Board has in fact applied a broader test in the sentence, "There is no question but that the pre-heater and pressure cooker are produced, advertised, sold and commonly used for applying heat as part of the process of preparing food for human consumption," for in this sentence, as well, the expression "applying heat" is limited to the process of "preparing" or making ready food for human consumption, and I do not think the sentence indicates that the Board had in mind the application of heat to food for the mere purpose of keeping it fit for consumption at some future time. It remains, therefore, to consider the second branch of the rule set out in the passage above quoted from the judgment of the Supreme Court in the *Canadian Lift Truck* case, that is to say, whether there was evidence upon which the Board, properly instructed as to the law and acting judicially, could reach the conclusion that the equipment in question was in fact apparatus for cooking.

In approaching this question, there are two matters of a general nature which should be kept in mind. The first is that, when one speaks of evidence on an appeal to the Tariff Board, the expression is not restricted to material which would be called evidence in any strict or technical sense in a court of law, for by s. 5(9) of the *Tariff Board Act*, R.S.C. 1952, c. 261, the Board is authorized to use and act upon information that, in its judgment, is authentic, even though such information may not be under the sanction of an oath or affirmation. The other is that, when an appeal from a decision of the Deputy Minister comes before the Tariff Board, the onus is upon the person appealing to demonstrate that the decision is wrong.

In the present case, on the appeal to the Tariff Board, Mr. Henry C. Vacketta, a food technologist employed by the manufacturers of the equipment in question, gave evidence that the purpose of the equipment was to sterilize, rather than to cook food, and three other witnesses gave evidence indicating that, save in the processing of canned kernel corn by the appellant Libby, McNeill & Libby of Canada Limited, the purpose for which all of the equipment in question in the appeal has been used in Canada has been to sterilize food and that any cooking which has resulted from the application of heat to the food while in the

1960

CAMPBELL SOUP CO. LTD. *et al.* *v.* DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE

Thurlow J.

machines has been unnecessary and in some cases undesirable from the point of view of turning out the most acceptable product. In addition to the processing of kernel corn, the machines in question have been used in processing soups and cream-style corn, both of which products are cooked before being filled into the cans, and in processing canned milk, the cooking of which is unnecessary and undesirable. Had there been nothing more in the evidence, it might well have left the Board with the impression that this equipment was indeed apparatus designed for sterilizing food and not for cooking at all. That, however, was not the case, for the evidence also shows that the apparatus is capable of being used to process, and is used to process, many different products, some of which are not entirely cooked to the state desired for eating before being put into the cans and which can be cooked as well as sterilized by the heat applied in this equipment. There was evidence that vegetables when sold in cans are invariably in a cooked state, a condition which they could not attain from the mere blanching process to which they are subjected before being put into the cans, that some varieties of fruits require cooking, as well as sterilizing, after being put into the cans, and that, in the case of some of these fruits, as well as in the case of pork and beans, the cooking time goes beyond that required to achieve commercial sterilization of the can and its contents. In these cases it is obvious that the apparatus serves the dual purpose of cooking and of sterilizing.

It may also be noted that the evidence does not show clearly the relative importance in commerce of the use of this type of equipment for such fruits and vegetables as compared with the use of the equipment for processing products which are already cooked or which require no cooking, and in this situation, while the Board may have been satisfied that the sterilizing of food is always one of the objects of the machine, it may at the same time have felt unsatisfied that cooking of food in cans was not also an object of equal importance for this machine in the canning industry taken as a whole.

Nor is it a necessary conclusion from the evidence to say that no one would ever purchase this apparatus for cooking. No doubt the cost of the apparatus is much greater than that of the older retort type of equipment, but the newer

type, in providing agitation and consequent basting action, as well as greater speed of heat penetration, offers advantages over the older type of equipment for cooking, as well as for sterilizing.

Moreover, in the course of giving his evidence, Mr. Vacketta produced and the Board received as exhibits a number of advertising pamphlets in which the equipment is pictured and described. In one of these (Exhibit A1), entitled The Sterilmatic Story, after referring to the in-can sterilizing provided by the equipment, the following appears:

> With the in-can method most products require little or no pre-cooking other than blanching. Further the FMC agitating process reduces the sterilization period to a minimum. For products processed by the in-can method, cooking in the home is reduced simply to a matter of heating prior to serving.
>
> Various styles and packs of corn, peas, soups, evaporated milk, fruit, meat, and a wide variety of other mealtime favourites are continuously and automatically processed at speeds unheard of only a few decades ago. All of the wonderful natural flavour, nutrients, colour and texture are protected and preserved. Today's housewives are quickly recognizing the true quality of properly processed canned foods. They want foods that are uniformly cooked with every can processed exactly alike. The quality must last too, for it is important to the housewife that her store of canned foods retains a maximum amount of the original quality and goodness when the can is opened and its contents served.
>
> Sterilmatic continuous pressure cookers and coolers, developed and perfected to assure these end results, have become standard equipment in more and more progressive canneries throughout the land.

The following statements also appear in the same brochure:

> Canned goods, therefore, which have been properly processed under appropriate control measures, come to the consumer with full-bodied, cooked-in flavour and goodness. As a result, all the user should do is "heat and eat" rather than "boil and spoil."
>
> FMC Sterilmatic continuous pressure cookers and coolers are built to take sealed cans from the closing machine and advance them through the shell in a spiral mechanism, subjecting them to steam under pressure which cooks and sterilizes the contents.

There is also reference in the same brochure to the agitation of the food in the can while being processed in the equipment and to the "basting" action provided in the course of the processing.

The following is from Exhibit A2, p. 4:

> The FMC pressure cooker is designed to cook and sterilize various food products in sealed containers—automatically and continuously.

1960

CAMPBELL SOUP CO. LTD. *et al.* *v.* DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE

Thurlow J.

The cans enter the cooker shell direct from the closing machine through a valve which prevents the loss of pressure and steam within the cooker. Cans are indexed into a revolving wheel which is synchronized with the feed mechanism of the valve. They are advanced through the cooker shell by means of the spiral reel mechanism, while being subject to steam which cooks and sterilizes the contents of the can.

On this evidence, in my opinion, it was open to the Board to reach the conclusion that the equipment in question was designed for processing food, that the processing for which the equipment was designed included both sterilizing and cooking, that cooking was no less important an object of the equipment than sterilizing, and that the equipment was accordingly properly classified as "apparatus for cooking" within the meaning of that expression in Item 443. I am accordingly unable to say that there is no evidence sufficient in point of law to sustain their finding or that the Board, properly instructed as to the law and acting judicially, could not reach the conclusion which the Board in fact reached.

It was also submitted that the Board erred in using as evidence that the equipment was designed for cooking, certain expressions in which the word "cooked" and "cooking" appeared in the various advertising pamphlets produced by Mr. Vacketta. The word "cook" and its derivatives, it was said, have a technical or special usage in the canning industry and often refer to sterilizing.

In the declaration, the Board said:

> While the canners distinguish between sterilizing and cooking, they admitted, and indeed it is obvious, that the heat applied in sterilizing occasions certain chemical and physical changes which resemble those that occur in food cooked in an ordinary kitchen.
>
> A witness for the Appellant, familiar with the production and sale of Sterilmatic equipment, introduced sales literature descriptive of his product as Exhibits A-1 and A-2. In this literature a Sterilmatic line is advertised "for every cooking requirement"; the equipment is said to secure "controlled and continuous cooking" and is called "pressure cooker and cooler". These Exhibits also contain the following references: "Every can evenly cooked, and cooked exactly alike"; "Sterilmatic processing avoids loss from over or under-cooked batches"; "Texture, taste, colour and nutrients are preserved as with no other cooking method."
>
> This evidence clearly shows that the pre-heater and pressure cooker are described and offered for sale as equipment for cooking, though the capacity to sterilize is mentioned in several places and is implied by the trade name of the product. The witness explained the use of the word "cook" in the Exhibits by saying that the word had been used with a

broad meaning in earlier days when it was thought that foods were preserved by cooking. Nowadays, he contended, it was proper to distinguish between cooking and sterilization and he referred the Board to a scientific treatise on sterilization, Exhibit A-4.

Assuming for this purpose that the word "cook" has a special usage in the canning industry and is broad enough in that usage to include and to refer to the sterilizing process, I think it is clear from the use in the literature of expressions such as "cooks and sterilizes the contents of the can" that the word is used in the industry to refer to cooking in the ordinary sense as well. And if it be accepted that, in the expressions cited by the Board, the word is not used in its ordinary sense but rather in the broader or special sense said to be common in the industry, in such expressions it appears to me to refer to both cooking in the ordinary sense and to sterilizing as well. The advertising literature leaves me with the impression that, in general, the word "sterilize" is used whenever sterilizing alone is intended, that "cook" is used whenever cooking alone is intended, as well as whenever a single word is desired to refer to both cooking and sterilizing, and that calling the apparatus a cooker, rather than a sterilizer, serves to convey the impression that its purpose is not confined to sterilizing but includes cooking as well. I think, therefore, that the Board was entitled to regard the use of the words "cooked" and "cooking" in such expressions as some evidence that the pre-heater and pressure cooker were in fact designed for cooking in the ordinary sense, whether or not such use of the words in these expressions also indicated that the equipment was also designed to sterilize. I would not therefore conclude from the fact that the Board did so regard these expressions that the Board misdirected itself as to their effect as evidence.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.