
1958

April 14 & 15

1958

Jun. 10

BETWEEN:

SEMET-SOLVAY COMPANY LIMITED ..APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) AND KAISER STEEL CORPORATION .....RESPONDENTS.

Practice—Tariff Board finding—Motion to extend time of application for leave to appeal therefrom—Customs Act, R.S.C. 1952, c. 58, s. 45(1).

[1] [1930] Ex. C.R. 154.

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Section 45(1) of the Customs Act, R.S.C. 1952, c. 58, provides:

> "any of the parties to an appeal under s. 44 . . . may, upon leave having been obtained from the Exchequer Court or a judge thereof, upon application made within 30 days from the making of the . . . declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law."

The appellant on July 24, 1957 gave notice of an application to be made on August 6, 1957 for: (*a*) Leave to appeal from a decision of the Tariff Board dated June 27, 1957; (*b*) An order extending the time to make the application to August 6, 1957. The applications were heard on the latter date and leave granted subject to the Deputy Minister's right to object to the jurisdiction of the Court to extend the time for making the application after the 30-day period provided by s. 45(1) had elapsed.

On this objection being raised at the hearing of the appeal

Held: That the words "or such further time as the Court or judge may allow" as in s. 45(1) are, on their face, wide enough to embrace the exercise of a discretion by the Court or judge to entertain an application for leave to appeal either before or after the expiry of the 30-day period, and as Parliament has not seen fit to express any limitation as to the time when the discretion may be exercised, no limitation should be held to exist. *Banner v. Johnston,* L.R. 5 H. L. 157 at 170, 172; *Gilbert v. The King,* 38 Can. S.C.R. 207 at 209; and *Stratton v. Burnham,* 41 Can. S.C.R. 410, applied. *Glengarry Election* case, 14 Can. S.C.R. 453, *Quebec Election* case, 14 Can. S.C.R. 434, considered.

Revenue—Customs—Value for duty—Fair market value—Meaning of "under fully competitive conditions" and "under comparable conditions of sale"—Customs Act, R.S.C. 1952, c. 58, s. 35(1).

At the time of the importations in question Section 35(1) of the Customs Act provided:

> "35. (1) Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value of such or the like goods when sold for home consumption in the ordinary course of trade under fully competitive conditions, in like quantities and under comparable conditions of sale at the time when and place whence such goods were exported by the vendor abroad to the purchaser in Canada; or, except as otherwise provided in this Act, the price at which the goods were sold by the vendor abroad to the purchaser in Canada, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada, whichever may be greater."

The appellant exported to Canada foundry coke manufactured in Detroit by a company which sold like foundry coke to users in the Detroit area at $26.50 per ton, delivered, and to users elsewhere in the United States on an f.o.b. Detroit basis at prices ranging from $18.47 to $25.50 per ton, depending on the competition at the point to which the coke was to be shipped. Where the coke was sold to a user in an area wherein competition would not dictate a lower price, the price charged was $25.50 per ton, f.o.b. Detroit. On an appeal against a customs valuation of the coke so exported to Canada at $25.50 per ton, which valuation had been confirmed on review by the

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Deputy Minister of National Revenue for Customs and Excise, the Tariff Board upheld the valuation and in its declaration stated the problem before it as being that of selecting one of many varying prices as the one to be deemed the fair market value.

On further appeal to the Exchequer Court *Held:* That the expression "under comparable conditions of sale" in s. 35(1) connotes a comparison of the conditions of the transaction itself in which the importer acquires the goods sought to be imported with that in which like goods are sold for consumption in the country of origin. It refers to the conditions of the transaction of sale rather than to extraneous considerations which may affect prices.

2. That there was no error in law in the use by the Board of the sales at $25.50 f.o.b. Detroit as sales "under comparable conditions of sale" of the kind described in s. 35(1), as indicative of fair market value.

3. That on the evidence it was also open to the Board to regard such sales as sales "under fully competitive conditions" within the meaning of that expression in s. 35(1).

4. That in determining the fair market value the Board proceeded on an erroneous interpretation of s. 35(1). Its problem was not to select one of many varying prices as the one to be deemed the fair market value but to find as nearly as it could the fair market value from the evidence of prices paid in sales of the kind described in s. 35(1), whether the value so found coincided with one of the prices or not, and its declaration showed that it had proceeded on an erroneous interpretation of s. 35(1) and on too restricted a view of the manner in which the problem of finding fair market value was to be solved, and that the finding of value so made could not be allowed to stand.

Application under s. 45(1) of the *Customs Act* for leave to appeal from a decision of the Tariff Board and for an order extending the time to make the application.

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

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

André Forget, Q.C., for appellant.

D. H. W. Henry, Q.C., for the Deputy Minister of National Revenue (Customs and Excise), respondent.

J. M. Coyne for Kaiser Steel Corporation, respondent.

THURLOW J. now (June 10, 1958) delivered the following judgment:

This is an appeal under s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, by Semet-Solvay Co. Ltd. from the declaration of the Tariff Board dated June 27, 1957 in appeal No. 401. The matter in issue before the Board was the value for

duty of two carloads of foundry coke purchased by Canadian Iron Foundries Ltd. from the appellant and imported into Canada from the United States by Canadian Iron Foundries Ltd. under Three Rivers customs entries No. 8709 and 8715, dated January 18, 1955. By its declaration, the Board affirmed a valuation of $25.50 per ton, which had been confirmed on review by the Deputy Minister of National Revenue for Customs and Excise. In the proceedings before the Board the present appellant, as well as Canadian Iron Foundries Ltd. (which was the appellant before the Board), contended that the value for duty of the coke should be set at $22.52 per ton, which was the price at which it was sold by the appellant to Canadian Iron Foundries Ltd. The present appeal is brought pursuant to leave granted to the appellant by the President of this Court to appeal on the question:

> Did the Tariff Board err as a matter of law in determining $25.50 per ton, U.S. funds, f.o.b. Detroit, as the value for duty of foundry coke imported under Three Rivers entries No. 8709 and 8715, dated January 18, 1955?

When granting leave to appeal on this question, the President also extended the time for making the application for such leave but reserved the right of the Deputy Minister to contest at the hearing of the appeal this Court's jurisdiction so to order upon the ground that the appellant's application was heard more than thirty days after the date of the Tariff Board's declaration. This question was raised and argued at the opening of the hearing of the appeal.

The applicable provision of the *Customs Act* is s. 45(1), which provides as follows:

> 45. (1) Any of the parties to an appeal under section 44, namely,
> (*a*) the person who appealed,
> (*b*) the Deputy Minister, or
> (*c*) any person who entered an appearance with the secretary of the Tariff Board in accordance with subsection (2) of section 44,
> may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the order, finding or declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

In the present case, the Tariff Board's declaration was made on June 27, 1957, and notice of application to extend the time for applying for leave to appeal and for leave to

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appeal was served on July 24, 1957, but it was not returnable nor was the application heard until August 6, 1957. On that day the application came on before the President and was granted, as already mentioned. The contention of counsel for the Deputy Minister was that the Court's jurisdiction to extend the time for applying under s. 45(1) can be exercised only while the thirty-day period is still running and that, once it had expired, the Court no longer had jurisdiction to extend it.

In *Banner v. Johnston*[1] Lord Cairns, in dealing with a similar objection, said at p. 172:

> In truth, my Lords, it is entirely a narrow construction of the word "extended" to say that extension of time must be made within the period of time first allotted. The time may be extended just as well after the three weeks have expired as before. The argument assumes that the Act of Parliament is worded in this way: No appeal shall be brought except within three weeks, unless the Court of Appeal sanctions, within the three weeks, an extension of time to a longer period. But it is not so framed. I think, therefore, that the appeal is altogether in time, having regard to the order that has been made.

It may be noted here that, unlike some of the statutory provisions which were interpreted in cases which were referred to on the argument, of which *Banner v. Johnston* (*supra*) was one, s. 45(1) does not use the words "extend" or "enlarge", and so the argument that an extension or enlargement cannot be made when the period to be extended or enlarged no longer exists does not apply.

In the same case the Lord Chancellor, Lord Hatherley, reached the same conclusion, but on grounds related more to the object of the enactment than to the particular language of it. He said at p. 170:

> Mr. Jessel also rested very much on the course taken in Bankruptcy; but I do not think that turns in any way upon the words of the statute being in the same form as they are here. What we have to look at in substance is this: Is it contrary to the meaning of the word "extend" to give longer time after the original time has passed? Time is not a material with respect to which it may be said that the matter itself having ceased, there is no farther subject to operate upon. Although the time has passed, it may well be that the Legislature intended to say there should be a power in the Court of Appeal to say that it would be reasonable that an additional time should be given. When we think of the difficult subjects that are likely to come before the Courts under the *Winding-up Act* it seems impossible to conceive that the Legislature could have thought

[1] (1871) L.R. 5 H.L. 157.

it desirable to impose a peremptory prohibition against any extension of the time, on a consideration of all the circumstances that may have occurred after the period of three weeks has elapsed.

A similar approach to the problem is evident in the judgment of Davies J. in *Gilbert v. The King*[1]. In that case the statute gave the prisoner a right of appeal to the Supreme Court of Canada on serving notice of appeal "within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof," a provision the language of which is very similar to that of s. 45(1). Davies J. said at p. 209:

> The only question upon which I had any doubt was as to my power to grant the extension after the expiration of the fifteen days. A construction requiring the application to be made within the fifteen days would, in a section such as this dealing with the criminal law and where sometimes, as in the case before me, the prisoner's life is at stake, be a very narrow one and might in many cases which can be conceived of in a country of the extent of the Dominion of Canada, if adopted, defeat the object which Parliament seems to have had in view. I, therefore, felt strongly inclined to adopt the broader construction and to hold that the power of extension is exercisable under the section even after the expiration of the prescribed period.
>
> There are two authorities which seem to be conclusive upon the point. One is that of *Banner v. Johnston,* L.R. 5 H.L. 157, at pages 170 and 172, and the other that of *Vaughan v. Richardson,* 17 Can. S.C.R. 703.

Most of this reasoning would apply with equal force in the present case, and, I think, with even greater force, in view of the requirement of s. 45(2) of the *Customs Act* that there be seven clear days' notice of the hearing of the application and that such notice be served on all parties (of whom there may have been many) to the proceeding before the Tariff Board.

In *Stratton v. Burnham*[2] a similar question arose on the construction of s. 18(1) of the *Controverted Elections Act,* which was as follows:

> Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within ten days after the day on which the petition has been presented, or within the prescribed time, or within such longer time as the court, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents at some place within Canada.

[1] (1907) 38 Can. S.C.R. 207. [2] (1909) 41 Can. S.C.R. 410.

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The Chief Justice, Sir Charles Fitzpatrick, with whom three other judges concurred, said at p. 414:

> It is not doubted that the *service* made in conformity with the order of the 2nd December, 1908, would be valid if this were a civil case, and that order is in my opinion as effective made as it was within the extended period as if made before the expiration of the 10 days allowed for service, if the judge had jurisdiction to grant the extension after the 10 days within which the service should be made had expired, of which I have no doubt. *Gilbert v. The King*, 38 Can. S.C.R. 207, and cases there cited.

A contrary conclusion had been reached, however, in the *Glengarry Election Case*[1], where the problem arose on the construction of ss. 32 and 33 of the *Controverted Elections Act*. Section 32 provided that, except in a special instance, the trial of an election petition should be commenced within six months of the time when such petition was presented and should be proceeded with from day to day until the trial was over, and further that if, at the expiration of three months after the petition was presented, the time for trial had not been fixed, any elector might, on application, be substituted for the petitioner. Section 33(1) was as follows:

> 33. (1) The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary;

Ritchie C. J. and Gwynne J. were of the opinion that the time for commencement of the trial might be enlarged under s. 33(1) after the six months had expired, but Henry, Fournier, and Taschereau JJ. held the contrary view. Henry J. adhered to a view expressed by him in the *Quebec County Election Case*[2], in which he had said at p. 450:

> After the expiration of the prescribed six months during which the legislature has limited the time for the commencement of the trial a judge could not try the case unless he went contrary to the provision of the statute. If, then, he had no jurisdiction as to the trial, if he could not try the merits of the petition, say, three days after the expiration of the prescribed six months, how could he give himself jurisdiction by enlarging the time to a future day? I can find no decision nor any principle upon which such a proposition could be sustained.

Taschereau J., however, with whom Fournier J. concurred on this point, rested his interpretation on what he considered the policy or object for which the statute was passed, that is to say, to eliminate delay in the trial of election

[1] (1888) 14 Can. S.C.R. 453. [2] 14 Can. S.C.R. 434.

petitions in view of the public interest involved in having the representation of the constituency settled as expeditiously as possible. He was of the opinion that the power to enlarge the time for the commencement of the trial given by s. 33(1) could not be exercised after the time limited by the previous section had expired and that to hold otherwise would be to render the six months' limitation fixed by s. 33(2) of no effect. The judgment appears to have turned on the object and, to a lesser extent, on the wording of the particular provisions and, though there was a difference of opinion as to the result, I do not think that it varies in principle from *Banner v. Johnston* (*supra*) or the later cases in the Supreme Court of Canada to which I have already referred.

In *General Supply Co. Ltd. v. Deputy Minister of National Revenue*[1] Cameron J. granted leave to appeal under the section of the *Customs Act*, R.S.C. 1927, c. 42, corresponding with s. 45(1) of the present statute on an application made after the thirty-day period had expired, but the precise point now raised does not appear to have been argued. Cameron J. said at p. 187:

> I do not think that an application can be considered to have been made until at least the date fixed for the hearing of the application. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified. Indeed, in the application now before me the opening words are, "Take notice that an application will be made . . ." My opinion, therefore, is that the application for leave to appeal was not "made within thirty days from the making of the Order."
>
> That, however, does not conclude the matter for a very wide power is conferred by the words, "or within such further time as the Court or judge may allow." It is submitted that no substantial reason has been advanced to explain the delay and it is pointed out that at the opening of the hearing before the Tariff Board, the agent (not the counsel) for the appellant intimated that he then had instructions to appeal the Board's finding if its decision were not in his favour. It would be advisable, I think, that an application for leave to extend the time should be supported by one or more affidavits explaining the reasons for requiring such extension, but that was not done in this case. However, Mr. Henderson, counsel for the appellant, stated that the typewritten record of the proceedings before the Tardiff Board was not available until two weeks after the hearing, that when it was received, the agent, Mr. Hooper, was away from his office, and that immediately upon his return the appeal proceedings were launched. In this case I shall accept that explanation as a reasonable one which accounts for the delay, more particularly as

[1] [1953] Ex. C.R. 185.

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the practice has not heretoforce been settled and as it was admitted that the respondents had not been prejudiced in any way. The application to extend the time for applying for leave to appeal will therefore be granted.

The main consideration urged in favour of the suggested limitation was the great, indeed the national importance, from the point of view of the revenue and from the point of view of those engaged in trade, of having questions of the kind on which appeals to the Tariff Board may be made, relating as they do to matters such as value for duty and tariff classifications, rendered certain as expeditiously as possible. These are, no doubt, matters of great importance, but they are equally cogent as reasons why there should be no appeal at all, and in my opinion they should not be allowed to prevail over what I think is the manifest object of s. 45(1), namely to give a right of appeal, notwithstanding such considerations, from the judgments of the Tariff Board in the circumstances and under the conditions set forth in the language of that subsection. One of the conditions is that leave to take such appeal must have been obtained on an application made within thirty days "or within such further time as the Court or judge may allow." As I read this provision, it simply means that the application is to be made within thirty days or such longer time as the Court or judge, in its or his discretion, regards as appropriate in the particular case. It clearly contemplates that more than thirty days will be appropriate in some cases and gives the Court or judge an unfettered discretion to allow the application to be made within a longer time. The words used in the subsection are, on their face, wide enough to embrace the exercise of such discretion either before or after the expiry of the thirty-day period, and as Parliament has not seen fit to express any limitation as to the time when the discretion may be exercised I do not think any such limitation should be held to exist. In my opinion, neither the language nor the object of s. 45 requires the suggested limitation and further time may in appropriate cases be allowed on an application made after the thirty-day period has expired. I therefore rule that the Court had jurisdiction to grant the extension and to hear the appeal.

Turning now to the question on which the appeal is taken, at the time of the importations in question s. 35(1) of the *Customs Act,* on the interpretation of which the problem depends, read as follows:

35. (1) Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value of such or the like goods when sold for home consumption in the ordinary course of trade under fully competitive conditions, in like quantities and under comparable conditions of sale at the time when and place whence such goods were exported by the vendor abroad to the purchaser in Canada; or, except as otherwise provided in this Act, the price at which the goods were sold by the vendor abroad to the purchaser in Canada, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada, whichever may be greater.

It will be observed that under this section the value for duty is defined as the fair market value of like goods when sold in sales of a particular kind or, except as otherwise provided in the Act, the price at which the goods sought to be imported were sold to the Canadian importer, whichever may be greater. It was, accordingly, incumbent on the persons administering the Act to ascertain the fair market value as indicated by sales of the kind mentioned and, subject to the alternative provision of s. 35(1), to adopt such fair market value as the value for duty.

The facts are not in dispute. Semet-Solvay Co. Ltd., the appellant, is a Canadian subsidiary of Allied Chemical and Dye Corporation, a United States corporation which manufactures and sells furnace coke at Detroit. The latter corporation carries on its business of manufacturing and selling the coke under the name "Semet-Solvay Division, Allied Chemical and Dye Corporation," and for convenience I shall hereafter refer to the parent company as "Semet-Solvay". The two carloads of coke in question were acquired by the appellant from Semet-Solvay, f.o.b. that company's coke ovens at Detroit, pursuant to a standing contractual arrangement between them and were sold by the appellant to Canadian Iron Foundries Ltd., f.o.b. the same point, under a contract of sale resulting from a purchase order issued by Canadian Iron Foundries Ltd. at Montreal and accepted by the appellant at Toronto. This contract provided, among other things, that delivery should be f.o.b. Detroit and that payment of the purchase price

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at $22.52 per ton was to be made, net cash, by the 15th of the month following shipment. The shipping dates, as shown on the invoices, were January 14 and 15, 1955.

Semet-Solvay is the largest producer of foundry coke in the United States and the only producer of it in the vicinity of Detroit. The bulk of the coke so produced is sold to customers for consumption in the United States, but some of it is sold to the appellant which, is turn, re-sells it to Canadian customers. Approximately fifteen per cent of the coke produced by Semet-Solvay is sold to consumers in what was referred to as the Detroit switching area, an area comprising the city of Detroit and its immediate vicinity, and approximately twenty per cent in an area near Detroit which was referred to in the evidence as the Detroit base area. This area extended from the northern boundary of Ohio to Lake Huron and for some distance west of Detroit and included Flint, Saginaw, Pontiac and other places where consumers of considerable quantities of foundry coke were located. In these two areas Semet-Solvay enjoyed a competitive advantage over other producers of foundry coke, arising from its position within the area as well as its greater productive capacity. Because of this, competitors set their prices for foundry coke to customers within these areas by reference to the prices charged by Semet-Solvay. Their price to such a customer would not be the same as the price charged to a customer near their coke ovens but would be such amount as would enable the customer in the Detroit base area or the Detroit switching area to pay for it and have it carried to his plant at a total cost not exceeding what he would have to pay for Semet-Solvay coke and freight on it to his plant. Despite Semet-Solvay's advantage, however, in the Detroit areas, its sales accounted for only slightly in excess of fifty per cent of the coke purchased by customers in the Detroit base area. The remainder of the coke produced by Semet-Solvay, excluding, of course, what was sold to the appellant for export, was sold to customers in the states of New York, Pennsylvania, Indiana, Illinois, and Wisconsin.

At the material time Semet-Solvay sold foundry coke to customers in the Detroit switching area on a delivered basis at $26.50 per ton. This was said to net Semet-Solvay

just under $25.50 per ton for the coke, the other dollar being the average cost of delivering it to the customers' plants. To customers within the Detroit base area and, for that matter, to customers anywhere where competition did not dictate a lower price, the price per ton was $25.50, f.o.b. Detroit. To customers outside the Detroit switching area and the Detroit base area, where competition from other producers rendered it necessary Semet-Solvay sold coke at a price which would enable the customer to pay for it and have it carried to his plant at a total cost not exceeding what he would be obliged to pay for other coke and freight on it to his plant. Considerably more than half of the coke produced by Semet-Solvay was sold to customers whose plants were beyond the Detroit switching area and the Detroit base area and, so far as the evidence shows, save for coke destined for Windsor and Toronto the prices were all below $25.50 and ranged from $18.47 to to customers in Reading, Pennsylvania to $22.75 to customers in Syracuse, New York. Sales of coke by Semet-Solvay to such customers were always made on an f.o.b. Detroit basis and on terms of payment and general contractual conditions similar to those on which the appellant sold to its Canadian customers. The contract forms in use by both the appellant and Semet-Solvay contained a condition that the acknowledgment of the order constituted the entire agreement between the parties and that there were no understandings, representations, or warranties of any kind, express or implied, not expressly set forth therein. On its face this excluded as part of the contract any contractual obligation upon the buyer requiring him to have the coke transported to his plant, but from the point of view of maintaining its price to its Detroit customers, as well as to customers in places where the price was higher, Semet-Solvay was much concerned with the destination of coke sold to its distant customers. It would not quote a price except for a particular destination, and it would not sell again to a customer who, after obtaining coke f.o.b. Detroit, changed its destination to a place where the price to customers of Semet-Solvay was higher. In practice, coke sold at prices set for particular destinations was carried to such destinations and, while the purchaser was in a legal position to divert a shipment immediately after the coke

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had been loaded at Detroit and the contract of carriage made and thus to incur such sanctions as Semet-Solvay might impose, in the ordinary and normal course of business the problem rarely arose. Of the various destinations for which prices lower than $25.50 were charged, the largest amount of coke sold was to customers in Buffalo, New York, which accounted for about four per cent of Semet-Solvay's output. There was no change in Semet-Solvay's prices for coke to any of its customers in the United States during January, 1955.

The price at which the coke in question in this appeal was sold to Canadian Iron Foundries Ltd. was set by the same formula as that used by Semet-Solvay in dealing with its customers beyond the Detroit areas. There was a competing manufacturer of coke in Montreal, whose price was $26.10. Freight per ton from Montreal to Three Rivers would bring the cost of such coke at Three Rivers to $29.00. To meet this competition, the appellant set a price of $22.52 which, with freight of $6.30 from Detroit to Three Rivers, and exchange of 18 cents, made the cost to the consumer the same as it would have had to pay for Montreal coke.

The question for determination in the proceeding before the Tariff Board was what, on these undisputed facts, was the value for duty of the two carloads of coke imported under the entries in question. Subject always to the alternative provision of s. 35(1), the answer to this question depended on the answer to the further question, what was the fair market value of foundry coke as indicated by sales made in Detroit in January, 1955 in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale of foundry coke in like quantities for consumption in the United States? On this question the onus of showing a fair market value different from that estimated by the appraiser and confirmed by the Minister, in my opinion, rested on the appellant, and the Board could properly take the position that the value as so estimated should not be disturbed unless the Board was

satisfied by a preponderance of evidence that such estimate was wrong. In its declaration, the Board, after reviewing the evidence, said:

> Wherever in Section 35, as above quoted, reference is made to "fair market value", the phraseology is precise and plain: "*the* fair market value". There can be no inference from these words other than that Parliament contemplated the existence of *one* fair market value—and one only. Yet the evidence in the case at issue establishes beyond any doubt whatsoever that for Semet-Solvay foundry coke in the Detroit area on the date of the export to Three Rivers there were many fair market values, f.o.b. ovens, Detroit. Counsel for the Crown—defending the deputy Minister's determination on the basis of the "list price" of $25.50—said in argument: "The evidence here makes it quite clear that there are many what might be termed fair market prices". No rule of construction, no application of the principle that the words of the statute should be given their common and ordinary meaning, can bring the facts of this transaction into harmony with what was the obvious intent of the legislators as regards "fair market value". Faced, therefore, with a situation where, to his knowledge, there existed varying prices, f.o.b. ovens, Detroit—any one of which might be deemed to be the fair market value of the coke seeking entry—the deputy Minister determined the proper one to be the price cited in the so-called "Detroit list price", viz.: $25.50 per ton. The Board, in turn, confronted with the problem of selecting *one* of many varying prices as the one to be deemed to be the fair market value, finds in the abundant evidence before it no sound reason for rejecting the figure of $25.50 determined by the deputy Minister, and, equally, no sound reason for selecting any other value as being, in the circumstances, the fair market value, or the value for duty.
>
> Accordingly, the Appeal is dismissed.

On the present appeal, the question for determination differs from that which was before the Board. Here the question is not, what was the value for duty, but, did the Tariff Board err as a matter of law in reaching its conclusion that the value for duty of the coke in question was $25.50 per ton?

In *Canadian Lift Truck v. Deputy Minister of National Revenue*[1] Kellock J., in discussing a question similar in form to that in the present 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

[1] [1956] 1 D.L.R. 497.

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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 appellant contended that the Board erred in selecting the Detroit base area price as the fair market value because sales to customers in that area were not affected by conditions of sale comparable with those affecting the export sale in question. In particular, it was argued that the presence of competition from the Montreal producer affected the price which a purchaser in Three Rivers would pay, that the Detroit base area price was not dictated by competition from the Montreal producer or from any local producers and, accordingly, the sales to Detroit base area customers were not under comparable conditions of sale. The sales to customers in the United States, outside the Detroit base area, however, were, it was submitted, at prices dictated by comparable, though not identical conditions of sale. In my opinion, the expression "under comparable conditions of sale" in s. 35(1) connotes a comparison of the conditions of the transaction itself in which the Canadian importer acquires the goods sought to be imported into Canada with the transactions in which like goods are sold for consumption in the country of origin, the purpose being to ensure that what the purchaser who buys for consumption in the country of origin receives for his money is comparable with what the Canadian importer receives for his, and I do not think that the expression refers to market conditions affecting prices. If it does refer to the market conditions, I think it is obvious that situations in which the subsection can be applied will be rare, if not entirely non-existent. The expression is not "comparable market conditions" but "comparable conditions of sale," and as I interpret it the reference is to the conditions of the transactions of sale rather than to extraneous considerations which may affect prices. Here the conditions as to delivery f.o.b. Detroit and payment by the 15th of the month following shipment, as well as the other terms of the contract, were readily comparable, and I can see no

error in law in the use by the Board of the Detroit base area sales as sales under comparable conditions of sale of the kind described in s. 35(1) as indicative of fair market value.

The appellant also contended that the Board erred in treating the Detroit base area sales as sales under fully competitive conditions within the meaning of that expression in s. 35(1) because Semet-Solvay enjoyed what was referred to as a competitive advantage in marketing its coke in the Detroit base area. As has been mentioned, this advantage arose from Semet-Solvay's location in the area, which enabled it to give service to its customers more expeditiously than its competitors could give and because of its greater productive capacity. It was said that the word "fully" must be given some meaning and that it contemplated conditions such as Semet-Solvay faced when it was compelled to reduce its price to meet competition in destinations where other producers exercised more control on the price. I disagree with this contention. In principle, I see no reason for holding that conditions were not fully competitive simply because competition was even sharper elsewhere. In the circumstances disclosed and particularly in the light of the evidence that, despite its advantage, Semet-Solvay supplied only slightly in excess of fifty per cent of the coke consumed in the Detroit base area, I think it was clearly open to the Board to regard the Detroit base area sales as sales under fully competitive conditions.

The situation, as I view it, is one in which, on the uncontradicted evidence, the sales both to customers in the Detroit base area and to customers in the United States beyond the Detroit base area and the Detroit switching area were all sales of the kind referred to in s. 35(1). They were all sales of like goods for home consumption, that is in the United States, in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale. They were all sales at Detroit and the prices paid in them prevailed throughout the material time. The prices, however, ranged from $25.50 down to $18.47 despite the fact that in each case the sale was a sale of coke f.o.b. Detroit and on the same contractual terms. It was the Board's problem to determine the fair market value

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of foundry coke at Detroit as indicated by these sales. But, as I see it, while the fair market value may well have been the same as one of these prices, it was not necessarily one of them but rather that amount which, in the judgment of the Board, most nearly represented the fair market value, having regard to the several prices with the volume of sales made at each of them individually and in groups and the varying weight to be attached to each of them as indications of fair market value in view of such volume and any special circumstances or features influencing the vendor to sell or the purchaser to buy at each of such prices.

The expression "fair market value" has been defined in different ways, depending generally on the subject matter which the person seeking to define it had in mind. Because of this, suggested definitions of fair market value, for example, of real estate, are not of assistance in a matter of this kind. But, in my opinion, the discussion of the meaning of the expression in *Untermyer Estate v. Attorney-General for British Columbia*[1] is useful as a guide to the meaning of the expression in s. 35(1). There prices of shares of a certain company on different stock exchanges ranged at the material time from 2.08 bid and 2.11 asked to 2.27 bid and 2.30 asked, and a commissioner appointed to determine the fair market value made a finding that it was $2.00 per share. This the appellant contended was too high. There was no cross-appeal in the Supreme Court of Canada. Mignault J., in delivering the unanimous judgment of the court, affirming this finding, said at p. 91:

> We were favoured by counsel with several suggested definitions of the words "fair market value." The dominant word here is evidently "value," in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least potent of which is what may be called the investment value created

[1] [1929] S.C.R. 84.

by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

There are, of course, many differences between the situation in the *Untermyer* case and the present one which would make it readily distinguishable. In particular, it must be observed that here the statute directs that fair market value be ascertained by particular kinds of sales and thereby excludes from consideration sales which are not of the kind described, such as, for example, the sales by the appellant to its Canadian customers. But it will be observed that in the passage quoted the learned judge treats the market prices not as the *fair market value* but as the best test or, as I think, the best evidence of fair market value, and I am of the opinion that this is how in the present case the prices paid in the several sales of coke f.o.b. Detroit for consumption in the United States should be regarded in determining fair market value under s. 35(1) from sales of the kind therein described.

In my opinion, each group of sales having the characteristics referred to in s. 35(1) afforded some indication of the fair market value of coke when sold at the material time and place in sales of the kind mentioned in s. 35(1), but in my view it was open to the Board to treat them as not being all of equal weight as indications of the fair market value of coke when so sold. Sales at some prices were made in greater volume than others. Some were affected by weaker competition than others, and some were made in circumstances which might be regarded as depreciative of their weight as indications of fair market value. On such evidence, it was, in my opinion, open to the Board, in making its finding of fair market value, to adopt any of these prices which, in its opinion, represented the fair market value, but it was, in my opinion, also open to the Board to consider that no one of those prices represented exactly the fair market value as indicated by such sales as a whole, and to adopt such other amount within the range of prices disclosed by the evidence as it thought more nearly represented the fair market value. It is obvious

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that, on the evidence, the fair market value as indicated by such sales lay somewhere within the range of prices from $18.47 to $25.50 per ton, these being prices charged by the same vendor in selling like goods on the same terms. The problem would have been much the same had there been several vendors selling coke at Detroit, each at a single price but each at a price differing from the other vendors. Now, the Board by its finding has adopted as the fair market value one of the prices within the range above mentioned and, as I see it, this finding is not open to attack on the ground that it is contrary to the evidence. But, on the other hand, I think it is apparent on the face of the Board's declaration that the Board considered it had no course but to adopt one of the prices as the fair market value. It said:

> The Board, in turn, confronted with the problem of selecting *one* of many varying prices as the one to be deemed to be the fair market value, finds in the abundant evidence before it no sound reason for rejecting the figure of $25.50 determined by the deputy Minister, and, equally, no sound reason for selecting any other value as being, in these circumstances, the fair market value, or the value for duty.

With respect, I am of the opinion that, in adopting this approach to the problem before it, the Board proceeded on an erroneous interpretation of s. 35(1) and on much too restricted a view of the manner in which the problem before it was to be solved. In my opinion, the Board was not faced with the problem of selecting one of the varying prices but with the problem of finding the fair market value from the evidence of prices paid in sales of the kind described in that subsection.

There remains the question whether or not this error, which I regard as one of law, vitiates the Board's finding. In *Edwards v. Bairstow*[1] Lord Radcliffe put the matter thus at p. 56:

> The field so marked out is a wide one, and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the commissioners, special or general, to the effect that a trade does or does not exist is not "erroneous in point of law"; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being

[1] [1955] 3 All E.R. 48

upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular.

The present situation is, in my opinion, one of the kind referred to in the last sentence of the passage quoted. While the value as found would, on the evidence, be warranted, in my opinion the Board's declaration shows that that finding was made by the application of what I conceive to be an erroneous test and one that, in my opinion, unduly circumscribed the power and function of the Board to find the fair market value as nearly as it could from the evidence before it of sales of the kind described in s. 35(1). It may well be that the finding would have been the same had the Board interpreted its function as I think it should have been interpreted, but on the evidence as a whole I cannot conclude that it would necessarily have been the same. It follows that the finding cannot stand and that the question on which the appeal is taken must be answered in the affirmative.

The appeal will be allowed and the matter referred back to the Tariff Board for re-hearing. The appellant is entitled to its costs in this Court to be taxed and paid by the Deputy Minister.

Judgment accordingly.