BETWEEN:

AKHURST-UBJ MACHINERY LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE and P. B. YATES MACHINE COMPANY LIMITED ..... RESPONDENT.

Ottawa
1966
April 18-20
May 25

Customs Duty—Appeal from Tariff Board—Whether imported machine of "class or kind made in Canada"—Tariff item 427(1)—Planer and matcher used in lumber industry—Whether Board erred in law—Difference between machines dimensional only—Customs Act, R.S.C. 1952, c. 58 s. 45(1).

Appellant imported from the United States a heavy-duty planer and matcher for use in the lumber industry. The Tariff Board determined that the machine was of a class or kind made in Canada by respondent company and therefore subject to a higher duty under Tariff item 427(1). Appellant appealed. Under s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, the appeal was limited to a question of law.

1966

AKHURST-UBJ MACHINERY LTD v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO LTD

The imported machine was designed for feeding speeds up to 1,000 feet per minute although it was very seldom operated at that speed; the domestic machine had a design speed of 500 feet per minute and a maximum operating speed of 550 feet per minute The imported machine employed 16 cutting knives, the domestic machine, although normally equipped with 8 cutting knives, was capable of being equipped with 12 cutting knives The imported machine had a cutting circle of 11¼" compared with a 9" cutting circle for the domestic machine The imported machine had a profiler attached for splitting lumber; the domestic machine was capable of having a profiler attached The imported machine was very much heavier than the domestic machine Both served the same function There were no recognized standards in the trade for classifying planers and matchers.

Held, in view of the similarities of the two machines and the fact that the difference between them was dimensional rather than functional it could not be said that the Tariff Board erred in law in its decision, and the appeal must be dismissed. *Edwards v Bairstow,* [1955] All E R 48 per Lord Radcliffe at p 57, *Canadian Lift Truck Co. v Deputy Minister of National Revenue for Customs and Excise* (1956) 1 D L R (2d) 497, per Kellock J at p 498, *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel, Ltd.* [1965] S C R, 366, per Hall J at pp 369, 371-2-3-4, *John Bertram & Sons Co v. John Inglis Co* (1960) 20 D L R (2d) 577 per Thorson P at pp 582, 584, 585, *Deputy Minister of National Revenue for Customs and Excise et al v Saint John Shipbuilding and Dry Dock Co* [1966] S C R, 196, per Cartwright J, pp 201, 202, discussed

APPEAL from a declaration of the Tariff Board.

R. W. McKimm for appellant.

D. H. Aylen and *B. D. Collins* for respondent, Deputy Minister of National Revenue for Customs and Excise.

G. F. Henderson, Q.C. and *Antoine de L. Panet* for respondent P. B. Yates Machine Co. Ltd.

DUMOULIN J.:—This is an appeal from a Declaration of the Tariff Board, dated March 1, 1965, (including an interim Declaration of the Board, dated April 6, 1964) dismissing the W. A. Akhurst Company's appeal from a decision of the Deputy Minister of National Revenue for Customs and Excise.

Section 45(1) of the *Customs Act,* (R.S.C. 1952, c. 58 and amendments), pursuant to which this procedure is lodged, enacts that:

> 45 (1) Any of the parties to an appeal under section 44, .. may, within sixty days from the making of an order, finding or declaration under subsection (3) of section 44, appeal therefrom to the Exchequer Court of Canada upon any question of law

Under Vancouver entry of January 18, 1963, the appellant firm imported a Model 409 M-1 Heavy Duty Planer

and Matcher manufactured in the United States by the S.A. Woods Machine Company.

Planers and matchers of this kind serve in the lumber industry as a normal part of an over-all production line in dressing, end surfacing, conditioning, printing and grading of lumber for the market.

Paragraph 5 of the Notice of Appeal specifies that:

> 5 The imported machine is designed for speed-feeds, that is, the speed at which it will accept lumber for planing and matching of up to 1000 feet per minute
>
> It has a cutting circle of 11¼ inches and the cylinders contain 16 knives The machine, in addition, has a "Type C Profiler" which is an integral part of the imported machine and is used to split lumber to required size as part of the process of dressing lumber The imported machine weighs approximately 42,700 lbs and costs, excluding duty and taxes, approximately $54,000 00

At the time of importation, the Deputy Minister ruled that this 409 M-1 heavy duty planer-matcher was "a self-contained machine of a class or kind made in Canada by the P. B. Yates Machine Co. Ltd., Hamilton, Ontario. While the imported Planer and Matcher may contain certain features not necessarily found in Canadian built machines, it is, nevertheless, held to be of the same class or kind. Consequently, it is dutiable under Tariff Item 427(1)." This meant a levy of 22½ per centum instead of 7½ p.c., had the departmental decision favoured item 427a applicable to all machinery of a class or kind not made in Canada.

The above declaration was appealed to the Tariff Board members who, on April 6, 1964, issued a somewhat inconclusive report of which the gist reads:

> In the light of the evidence, the Board has concluded that the imported planer-matcher belongs in the class or kind of planer-matchers capable of having installed in them not less than 12 cutting-knives, with a profiler incorporated therein or with provision for the attachment of a profiler, with a board capacity of not less than 6 inches by 15 inches, either motor-driven or belt-driven
>
> The Board orders that the matter be referred back to the Deputy Minister for his determination as to whether the class or kind of planer-matcher adjudged above is or is not made or produced in Canada having regard to the requirements of subsection 10 of section 6 of the Customs Tariff

I had as well point out here the identity of the "class or kind" outlined in paragraph 6 of the Board's finding, *supra*, with the description of the machine manufactured by respondent P.B. Yates Machine Co. Ltd., as alleged in paragraph 7 of the latter's Reply to the Notice of Appeal.

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

Egged on by this broad "hint" of the Tariff Board, it hardly needs saying that the Deputy Minister did not alter his initial opinion but imprinted it with additional directness and accuracy in these terms:

> Planer-Matchers coming within the "class or kind" category established by the Tariff Board are made in Canada by the P.B. Yates Machine Company Limited, Hamilton, Ontario. An investigation has shown that, during the relevant period, sufficient machines were produced in Canada to comply with the statutory requirements necessary to justify ruling the imported machine to be of a class or kind made in Canada. Accordingly, it is the decision of the Deputy Minister that the imported Model 409 M-1 15" x 6" Heavy Duty Motorized Planer and Matcher with profiler is of a class or kind made in Canada.

In turn, this determination of July 29, 1964, was referred anew to the Tariff Board, but in a more restricted form as agreed upon by the parties on January 29, 1965. The purport of the agreement was that:

> . . . if the class or kind defined by the Board in the sixth paragraph of its declaration dated April 6th, 1964, as that in which the goods imported fall, was intended by the Board to include the machines described and referred to in the evidence as P.B. Yates Machine Company Limited A-62 machines, then the class or kind of machines defined by the Board was made in Canada in substantial quantities and to the extent of ten per cent of Canadian consumption at all times relevant to this appeal ... [which should], in those circumstances, be dismissed.

Conversely, the alternative answer would favour the appellant company.

Subsequently, after a brief hearing, the Board, on March 1, 1965, held the imported machine to be "properly classified in tariff item 427 (1)", or, otherwise said, of a class or kind made in Canada.

Such was the sequence of proceedings. I must now advert to a sufficient recital of the conflicting points of fact and law adduced by the litigants in their written pleas.

Paragraphs 6 and 7 of the Notice of Appeal urge that:

> 6. There is only one Canadian firm which alleges it is a manufacturer of Planers and Matchers, the Respondent, P.B. Yates Machine Co., Ltd., and the largest machine sold by that Company is known as the Yates A62. That machine is designed for feeding speeds of 500 feet per minute, is normally equipped with a 9" cutting circle with 8 knives, weighs less than 21,000 lbs. and costs approximately one half of the cost of the imported machine, excluding duty and taxes.
>
> 7. The Yates A62 machine is virtually the same machine as the Yates A62 Planer and Matcher produced by the parent Company of the S.A. Woods Machine Company, Yates-American Machine Company of the United States, and the said Yates-American sells the basic component parts to P. B. Yates Machine Co. Ltd. for The Yates A62 machine alleged to be manufactured by that Respondent. The Yates A62 machine and smaller machines are used generally in smaller lumber mills in Eastern

Canada, and are not competitive in the market place with the Heavy Duty Planers and Matchers in question which are used largely in the large West Coast lumbering operations.

The principal co-respondent, P. B. Yates Machine Co. Ltd., devoted four paragraphs of its Reply to deny the appellant's factual claims.

However tedious it may seem I deem it advisable, in technical matters, to quote at length rather than attempt a summarization.

There now follow the respondent company's counter-explanations.

6. Machines similar to the one in issue have been made in Canada, in large numbers, for many years, by the Respondent P.B. Yates Company Limited (hereinafter called the Respondent Yates). The Respondent Yates manufactures a wide range of planing and matching machines, the largest of which is known as Model A62. This model has a maximum effective speed of 500 linear feet per minute, which varies as do all such machines according to the type of lumber used and the finish desired.

7. The machine manufactured by the Respondent Yates is capable of having installed in it 12 cutting knives, has provision therein for the attachment of a profiler, may be either motor-driven or belt-driven and has a board capacity of 15 inches by 8 inches.

8. The machine manufactured by the Respondent Yates performs the same function and operation and fulfills the same requirements in planing mills operations in Canada as the machine imported by the Appellant and by reason of this it competes directly with the machine in issue imported by the Appellant.

9. The machine in issue (ie. Model 409 M-1) embodies no unique design features or significant innovations and it operates on well known principles common to other machines in Canada. It represents no technical advance over planers and matchers built in Canada and is used for purposes similar to those which other Canadian made planers and matchers are used.

Mention should now be made that this firm's Sales Manager, Lloyd J. Blackburn, testified it had severed all corporate connections with Yates-American in 1946, although it continued using "the Yates-American literature to promote and sell P. B. Yates machines"; (cf. transcript, p. 253).

Since an appeal to this Court lies only on a question of law, the Akhurst Machinery Ltd. purported to submit four such reasons in support of its actual procedure; they are: (*a*) a complete lack of any competitive element between the imported Model 409 M-1 and the Yates A62 or any other planer-matcher supposedly made in Canada; (*b*) the Tariff Board's omission to compare the imported machinery with that of local fabrication when determining whether or not both "could be said to be of the same class or kind"; (*c*)

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

the Board's reliance upon allegations concerning the number of knives the domestic planer-matcher could hold, unsubstantiated by proof of a like machine having ever been manufactured here; (*d*) the absence of evidence vindicating the Board's finding which, had the facts adduced received a proper interpretation, should have entertained the opposite conclusion.

Both of the respondents were satisfied with retorting there was ample evidence before the Tariff Board to support its declaration and, therefore, that no error in law had ensued.

After these lengthy yet unavoidable particulars, there now begins the exacting obligation of determining whether the case gives rise to a question of law, the essential condition of this Court's jurisdiction.

There is no dearth of juridical directives concerning the nature of a question of law and how it should be dealt with. Among the most recent pronouncements on this score, one issued from the House of Lords, another from the Supreme Court of Canada.

In the English case of *Edwards* v. *Bairstow*[1], Lord Radcliffe said:

> When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume there has been some misconception of the law, and that this has been responsible for the determination.

Mr. Justice Kellock (as he then was) reasserted those well known tenets *in re*: *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[2] when, speaking for the Supreme Court, he expressed the unanimous opinion in these terms:

> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter 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 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 under the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow* referred to.

[1] [1955] All E.R. 48 at 57. [2] (1956) 1 D.L.R. (2d) 497 at 498.

If this legal interpretation commands a wide consensus, it would appear, at least so I venture to think, that the views taken by the Courts, when differentiating the categories of goods that should be considered of a class or kind made or not in Canada, adhere to no set pattern. Nor would it prove an easy task to single out criteria applicable to all cases, each constituting a distinctive issue to be adjudged in the light of its particular circumstances.

However, some assistance is afforded by subsection (9) of section 6 of the *Customs Tariff Act* (1952, R.S.C. c. 60) which provides that:

(9) For the purposes of this section, goods may be deemed to be of a class or kind not made or produced in Canada where *similar goods* (emphasis mine) of Canadian production are not offered for sale to the ordinary agencies of wholesale or retail distribution or are not offered to all purchasers on equal terms under like conditions, having regard to the custom and usage of the trade.

Subsection (10) adds this complement:

(10) For the purposes of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to provide a certain percentage of the normal Canadian consumption and may fix such percentages.

Of the two preceding paragraphs, the former, especially, considers similarity between cognate kinds of goods as an indication of sufficient significance to warrant a conclusion. Accordingly, my investigation narrows down to a search for the material presence of this factor in those planer-matchers at issue, the imported 409 M-1 and the Canadian Yates A-62.

In order to diminish the risk of ambiguity, I will, as an initial precaution, cite a few dictionary definitions of the adjective "similar" and analogous terms currently assimilated with it.

In the Shorter Oxford Dictionary, *verbo* "Similar", we find:

2. Having a marked resemblance or likeness; of a like nature or kind.

Webster's 3rd New International Dictionary says:

1. Having characteristics in common.

Absolute identity of meaning existing between the English adjective "similar" and its French translation "similaire", one may safely refer to a lexicon widely acclaimed though the most recent of its class, Robert's

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

Dictionnaire alphabétique et analytique de la langue française (1964), wherein we read this:

"Similaire": qui est à peu près de même nature, de même ordre.

Analogy of class or kind ("nature" in French) would, then, produce similarity.

The transcribed record of evidence heard by the Tariff Board reveals, as customary in most cases of this nature, contradictions possibly more apparent than real, which, at all events, demand a careful scrutiny to ascertain if a person, actually the Board, "properly instructed as to the law and acting judicially could have reached the particular determination" appealed from.

Three witnesses were called on appellant's behalf, the first of whom was Harold Weldon Akhurst, President of W.A. Akhurst Machinery Company, Ltd. To the following questions put by Mr. Corcoran, a Board member:

> . . . did I understand you to say that no matter what the capacity of the machine was in lineal feet per minute the cylinder would revolve at the same speed?

he replied:

> If it is a direct motorized machine, yes.
>
> MR. CORCORAN: The cylinders are not speeded up for the higher capacity machine?
>
> MR. AKHURST: No; they are constant at 3,450 rpm. That is universal no matter whether it is a Yates-American motorized machine, a P.B. Yates motorized machine, or a Newman, or anyone else—any of these machines which are made in North America.
>
> MR. McKIMM (for appellant): What is speeded up to give you increased production?
>
> MR. AKHURST: They increase the number of knives in the cylinders; and then the sideheads usually follow on with a corresponding number of knives. Therefore, as you put more knives into the cylinders it means you have to increase the diameter of that cylinder. Otherwise, as you put all these various slots in the cylinders to accommodate the knives the cylinders would be too weak.
>
> Another factor which comes into it is that as you get into these higher speed machines, by getting a bigger diameter cylinder it gives more sweep to the knives, so that those knife marks which you notice in that sample flatten out more. If you have a little cylinder those knives are coming round and are just hitting at that bottom spot. But as you get into the bigger knife it gives more sweep to the knife and you have a higher peripheral tip speed to your knife to accommodate the extra feed rate. So that as we go into the higher speed machines you have to get into more knives first, and the more knives require larger cutting circles.
>
> Yates-American, and I think it is the same with P.B. Yates on their A-62, they will supply a 12 knife cylinder on their nine inch cutting circle cylinders. But as far as Yates-American are concerned, they specify that it has to be only a 25 degree knife angle. We do get into different knife angles depending on whether the lumber to be dressed

is to be green lumber or dry lumber, and so on. Out on the coast, generally in most installations they like to have about a 30 degree knife angle. So Yates-American specify that it has to be a 25 degree knife angle.

We have some drawings which show various cutter-heads.

(cf. Official Report, p. 39, from line 18 to line 5 on page 41.)

These explanations led the Tariff Board to mention, in its April 6, 1964, decision, that: "The number of knives appears to be an important specification and this varies from as low as four knives to as many as 16 knives in those machines on which advertising brochures were submitted to the Board". Those brochures are exhibits A-3, A-4, A-5, A-7, A-10, D-6, Y-1, Y-2 (confidential) and Y-3.

Appellant's counsel, Mr. R. W. McKimm, next asked the witness if "...the trade (has) accepted standards of numbers of knife cuts per inch which they will accept for various types of wood?"

MR. AKHURST: Not that I know of, no. There is no definite standard laid down that I know of. As I say, this is only a guide. The circumference—that is the cutting circle—of the head has a definite bearing. If you just have a small cylinder the knife marks will get very much more pronounced at high rates of feed than if you have a big cylinder with a big sweep on it.

Then at page 51, from lines 2 to 23:

MR. McKIMM: In the trade is there any recognized standard by which planers and matchers are characterized?

MR. AKHURST: No, there is not any definite understanding, although I think if you asked any experienced planing mill operator what he considered a heavy duty planer-matcher, he would be thinking in terms of a machine which would be capable of consistently running at better than 500 feet per minute.

MR. McKIMM: What number of knives would he be thinking of?

MR. AKHURST: To do a proper job at that rate, you should at least have twelve knives.

MR McKIMM: Twelve to sixteen?

MR. AKHURST: Yes, at least twelve.

Right now, it is worthwhile noting the appellant's agreement that:

a) no trade standards exist as to any definite number of knife cuts;

b) Again no trade or custom usages are set up for the technical classification of planers and matchers;

c) A minimum of twelve knives would suffice "to do a proper job at that rate", namely, a consistent run "at better than 500 feet per minute";

d) Inferentially, the witness would range in the class of heavy planers and matchers a machine having "at least twelve knives".

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

Mr. G. H. Glass, who presided at the hearing in his capacity of First Vice-Chairman of the Tariff Board, asked:

> Just to get that so that I understand it correctly, this machine which you imported, the 409 M-1, has 16 knives, has it?
>
> MR. AKHURST: That is correct, sir.
>
> THE CHAIRMAN: And it says on the back of exhibit A-3 that its production speed is up to 1000 lineal feet per minute. So that if you take exhibit A-9, the back page, and you follow the 1000 feet per minute across to under 16 knives, you get 4½ knife cuts per inch?
>
> MR. AKHURST: Yes, sir. (cf. report, p. 46).
>
> THE CHAIRMAN: Which is fewer than any of the recommended knife cuts?
>
> MR. AKHURST: Yes, but as I explained this is qualified by the fact that with the bigger diameter cylinders you get more sweep on your knives. If you had only a nine inch cutting circle, and if it was possible to crowd 16 knives into that, the knife marks would be more pronounced on a small diameter cylinder than when you get into a large cylinder. Admittedly, 1000 feet a minute is really pushing it as far as—(report, p. 47)

An untimely interruption by the Chairman cut short the deponent's answer, and we must go to line 19, page 47, to find its normal ending, which I quote:

> ...although this machine is capable of 1000 feet a minute, it does not necessarily mean that they are running up to that full capacity. But it is possible to do so.

What precedes might qualify this advertised top speed of 1000 linear feet a minute as the ultimate velocity or the maximum speed resorted to at intervals only, not consistently, to ease some excessive business pressure. Yet, such a capacity would still be, on occasions, a relative advantage, if not an uninterrupted one utilizable throughout the run of milling operations.

Notwithstanding these reservations, Akhurst definitely believes that the 409 M-1 "is capable of producing up to double the A-62" (cf. pp. 50-51).

Asked how an A-62 compares in electric motor power with the 409 M-1, Akhurst answers:

> The normal power with the A-62 is up to about 70 horsepower on the top head, whereas on the 409 the standard is 125 horsepower. (report, pp. 55-56)

Mr. George Wehring, of Beloit, Wisconsin, Sales Manager of Yates-American since 1949, and also of S. A. Woods Ltd. which became associated with the first named company in August, 1961, was the second witness. Mr. Wehring merely said that most 409-M planer-matchers were sold on the American west Coast (report, p. 141) and set the cost per unit at approximately $79,000, profiler included, while

the price of an A-62 with a double profiler attached, but not of the "C" type, would be $36,000.

This does not quite tally with the assertion made in paragraph 5 of the Appeal Notice, where a 409 M, with 16 knives, is priced at about $54,000. Nor does the $36,000 alleged by Wehring to be the cost of an A-62 equipment agree with the confidential exhibit Y-2, a letter, dated February 14, 1964, to the Chairman of the Tariff Board, signed by J. L. Blackburn, Sales Manager of the Canadian P. B. Yates Machine Company. It suffices to say the information thus conveyed approximates the figure mentioned in the Notice of Appeal as the price of the imported planer-matcher.

Mr. Jack Horth, of Rockford, Illinois, a locality 18 miles from the plant site at Beloit, holds the position, since 1961, of Chief Engineer of the associated Yates-American and S. A. Woods machine companies. His lengthy testimony is frequently a repetition in more technical language and also, occasionally, with more detailed information, of Mr. Akhurst's evidence.

At the start of his examination (report, p. 147) Horth points out that: "As has already been brought out in the evidence, the two machines are quite different in both weight and production capabilities. The 409 is approximately twice the weight and has approximately twice the productive output per operating hour". The basic ground of appeal consists in this greater productive output, all other factors only tending to support, so it seems, this alleged mechanical superiority.

Another repetitious way of stressing the matter is to express it in terms of feed speed, as reported on pages 148, bottom line (30), and 149, lines 1 to 25; quotation:

MR. McKIMM (for appellant): What is the maximum feed speed recommended for the 409?

MR. HORTH: The 409 is approximately 1000 feet per minute feed speed.

MR. McKIMM: And for the A-62?

MR. HORTH: the A-62 is 450 to 500. Five hundred feet per minute is generally what we consider is the design limit.

THE CHAIRMAN: This is feeding what?

MR. HORTH: That would be feeding any type of lumber, even two by fours, which is the smallest. We would consider the design limit to be about 500 feet per minute.

THE CHAIRMAN: And in the other one 1000 feet per minute.

MR. HORTH: Yes.

MR. McKIMM: By that I take it you do not recommend that everything be run at 1000 feet per minute?

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

MR. HORTH: No, we do not, although the customer would be perfectly within his rights to expect that, and that is why when a sales inquiry comes in for one of these machines, we scrutinize it very closely before the machine is itemized and sent to production in the shop, to make sure that we have adequate horsepower and adequate material strength in some of the components to withstand these rates of feeds and speeds—

The appellant company's chief engineer subsequently proceeded to compare the respective resistance to functional stress, wear and tear of the equipment at issue; I am now quoting from the official report, page 150, line 19 to page 151, line 19:

The 409-415 series machines are built to stand these quite normally incurred operational shocks without damage to the framing or the gearing, or the shafts and drives within the machine, at speeds, in the case of the 415, up to 750 feet per minute, and in the 409 up to 1000 feet per minute. Whereas in the A-62 series machines, were you to drive the thing beyond 500 feet per minute and incur some of these impacts and shocks which would occur from lap-ups or breaking of the lumber in the machine, it might do substantial damage to the frame and to the engine and mechanism of the machine.

MR. McKIMM: Have you had any experience of persons driving an A-62 beyond the recommended speed limit?

MR. HORTH: Yes, we have.

MR. McKIMM: What has been the result of that?

MR. HORTH: The result has been that within about three years time practically all the major components of the machine have been rebuilt and replaced, including new yokes, new cams for the feed rolls and so on. The machine definitely will not give normal life expectancy above 500 feet per minute.

That is a matter of experience. You could go into classical engineering perhaps and try to prove that these conclusions are wrong, but these machines have been out in the field now, machines of this basic type, and we feel it is a marvelous proving ground, and that is the conclusion we have come to as to operational performance limits.

Under cross-examination by Mr. G. E. Hooper, acting for the respondent P. B. Yates Machine Company, the witness reveals his sources of information regarding the thousand feet per minute speed of the 409 M-1 planer-matcher. It emanates from sales or servicemen's reports, and not from "completely detailed local type records". As the deponent remarks: "We merely have the information again in the form of information from our rates or serviceman's reports that this machine has been operating at that speed...They indicate that the machine was operating at that speed for a substantial portion of an operating shift;" (report, p. 197).

Without in the least detracting from the weight of Mr. Horth's evidence, nevertheless, it is not in complete accord with that of his company's president, Mr. H. W. Akhurst,

who, in his replies to Mr. McKimm and Mr. Corcoran, second vice-chairman of the Board, was by no means so positive. To Mr. McKimm's question, (page 33, lines 13 to 19):

> —well, Mr. Akhurst, when you say up to 1000 feet a minute, I take it the 1000 feet is the top speed you are running at under optimum conditions with the right kind of wood?

the witness answers:

> Yes, that is right. That is what the manufacturer considers his machine is capable of doing on certain types of wood;

and, (page 69, lines 19 to 22) when asked by Mr. Corcoran:

> Would they actually be running this machine at 1000 feet per minute?

Akhurst guardedly says:

> Very seldom, but it is capable of doing it if they have to.

One witness only, Lloyd F. Blackburn, testified on behalf of the P. B. Yates Machine Company (of Canada), of which he is the Sales Division Manager. He shares Mr. Akhurst's opinion that there is no single criterion by which planer-matchers with profilers are classified by users in Canada (report, p. 217).

A long discussion ensues about the respective production yield, the feed and speed rates of both machines. Starting at page 219, line 21, of the report, it covers some thirty pages and it seems hardly possible to avoid giving abundant excerpts:

MR. CORCORAN: Mr. Blackburn, if a customer asks you for a machine which would have the capacity of planing and matching at the rate of a thousand feet per minute, what machine would you recommend to him?

MR. BLACKBURN: I don't have a machine that will plane at a thousand feet a minute.

MR. CORCORAN: When you said that you had machines on the west coast which are planing and matching at higher rates—I take it that would be higher feed rates? (p. 220).

MR. BLACKBURN: Yes.

MR. CORCORAN:—than the 409 M-1? Or what did you mean by that answer?

MR. BLACKBURN: Based on information we had received, or production reports, the lumber being run at Squamish indicated a sustained yield feed rate of approximately 350 feet per minute, whereas we have reports of our own machines feeding in excess of 500 feet per minute on sustained yield.

Page 221, from line 6:

MR. HOOPER: (for P B. Yates of Canada): You told Mr. Corcoran that your records show that an A-62 has operated over a certain period at 550 feet?

MR. BLACKBURN: That is right.

MR. HOOPER: What period of time would that cover?

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

MR. BLACKBURN: Usually we estimate it over a 22-day operating period.

MR. HOOPER: How long has the company been running at that speed—over a period of years?

MR. BLACKBURN: We do know of one particular case where they have run at that speed and the company has been doing that for the last seven years.

MR. HOOPER: Do some Canadian planing mills have the output of two planer-matchers feeding into one line for grading, etc?

MR. BLACKBURN: Oh, yes, definitely.

MR. HOOPER: What is the Canadian content in the A-62, the A-20-12 and the A-20 at this time?

MR. BLACKBURN: 100%.

Cross-examination by Mr. McKimm did not perceptibly shake the witness' previous assertions that, for all practical needs, an A-62 Canadian made planer-matcher is an acceptable counterpart of the imported 409 M-1.

I am now quoting from page 243:

MR. McKIMM: Didn't you say in your examination in chief that when you get a request for a quotation on a machine they tell you what they want to do with the machine, how much they want to produce?

MR. BLACKBURN: They usually tell you how much material they want to produce per month, or per year; but I have never heard them saying that they wanted their machine to produce so much per minute.

MR. McKIMM: When they tell you they want to produce so many million board feet of lumber per year, you work it down from that and decide whether or not they need a machine which will produce at 500 feet or 300 feet per minute?

MR. BLACKBURN: Yes.

MR. McKIMM: And you recommend the machine which will actually do the job for them?

MR. BLACKBURN: Yes.

MR. McKIMM: If they come along and said they wanted so many million board feet in a year's production—such and such a number—and it turned out that what they would have to operate on in a normal 2-shift basis—eight hours per shift, or a normal week—was 100 feet a minute, would you try to sell them the A-62?

MR. BLACKBURN: No; not unless they indicated to me that they might want to increase their production at a later date.

(Page 245, line 18, to page 246, line 14):

MR. McKIMM: If the same company came along and said "We have to produce at 850 per minute," I take it that it would not be fair to offer them a machine that could produce not more than 500 feet? They wouldn't be interested.

MR. BLACKBURN: I would offer them the A-20.

MR. McKIMM: To produce the 850 feet per minute?

MR. BLACKBURN: Are they going to produce the 850 feet per minute?

MR. McKIMM: That is what they say.

MR. BLACKBURN: This is what they say, but is that what actually it would work out to as a calculation?

MR. McKIMM: Let us assume that it is.

MR. BLACKBURN: Actually, in our installations there are only short runs at sustained yield; so therefore I can only guess at what might be the case in the United States.

MR. McKIMM: Let us assume that this was so, that the evidence was that they would run at 850 feet per minute.

MR. BLACKBURN: No; the only thing I can say is that the evidence is hearsay. I have never seen, and I don't know of any person who [has] ever seen, a machine running at 800 to a thousand feet per minute unless on a sustained yield basis.

Finally, the witness does not deny listening to Horth's declaration that "he had heard of installations" on the west coast where machines operated at 800 feet per minute, but questions its reliability because "...I have never seen it and I have never talked to anyone who has ever seen one in operation". (report, p. 247, at top). The cross-examining lawyer pursues his probing (same page, lines 5 to 30):

MR. McKIMM: But if somebody, in fact, asked for this I take it, then, that in those circumstances the 409 and the A-62 just don't compete? One can do it; the other one can't do it?

MR. BLACKBURN: Again I will have to say it is hearsay.

MR. McKIMM: But this would be a fair statement on that assumption?

MR. BLACKBURN: If those assumptions are correct I would say that would be a fair statement.

MR. CORCORAN: Can we make one more assumption? If someone asked for a machine that would have to produce at the rate of a thousand feet per minute would you offer him an A-62?

MR. BLACKBURN: If they came to us and said they had to have a thousand feet per minute it is quite likely that I would; it is quite likely that I would.

THE CHAIRMAN: If I remember aright, Mr. Blackburn, you mentioned that there were one or two installations where your A-62 was operating consistently at 500 feet per minute?

MR. BLACKBURN: Yes.

THE CHAIRMAN: Was that right? You said that this morning in your evidence?

MR. BLACKBURN: I know of one operating—of an A-62 operating—at 550 feet per minute consistently.

So much for the evidential chapter of this appeal. I shall now review most of the precedents cited.

The Supreme Court of Canada reversed the undersigned's decision in *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel, Ltd.*[1], a matter bearing a close resemblance to the instant one. The relevant facts, recited by Mr. Justice Hall, are hereunder reproduced from pages 369 and 371 of the Canada Law Reports:

> The appeal relates to a Beloit 276 inch newsprint machine made by Beloit Iron Works of Beloit, Wisconsin, having a rated mechanical speed of 2,500 feet per minute. The respondent MacMillan & Bloedel stated its intent to purchase the newspaper machine from Beloit Iron

[1] [1965] S.C.R. 366 at 369, 371, 372, 373, 374.

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

Works by letter dated January 25, 1955. (p. 371) The newsprint machine so imported is composed of iron or steel and is a large and complex piece of machinery composed of many parts. It was built to the specifications of the purchaser and cost approximately $3,000,000.

...MacMillan and Bloedel took the position that the design speed of the newsprint machine in question should have been taken by the Tariff Board as the determinant factor in arriving at a finding as to whether or not the said newsprint machine was of a class or kind not made in Canada and it argued that the Tariff Board had erred in law in not so finding.

This latter determination had decided that: (cf. p. 374)

However, as appears from the evidence, design speed indicates only one of the primary determinants of the construction and mechanical capabilities of the machine and it is not universally, or even commonly, recognized as a single measure by which the whole machine may be characterized when it is being bought, sold or advertised. *We do not accept design speed as the criterion or determinant of class or kind.*

(emphasis not in text)

Such an enunciation, unanimously approved by the Supreme Court as constituting a finding of fact, is of particular importance in the instant case, similarly based upon the design speeds of the 409 M-1 and A-62 planers of 1000 and 550 linear feet per minute respectively.

The Supreme Court's endorsation of the aforesaid tenet, in a matter scarcely distinguishable from the actual suit, might warrant this appeal's dismissal without further comments. Nevertheless, as indicated previously, I will inquire into the legal significance attached to certain other factors by our highest tribunal.

Returning to Mr. Justice Hall's notes of judgment *in re*: *Deputy Minister of National Revenue v. MacMillan & Bloedel, Ltd.*, the learned Judge wrote:

> On the main argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the said newsprint machine was of a class or kind not made in Canada, the respondent MacMillan and Bloedel relied strongly on the judgment of Judson J. in *Dominion Engineering Works Limited v. Deputy Minister of National Revenue*[1].

This suit is more widely known under the abbreviated form of "*The A.B. Wing Case*". The facts are reported thus in the latter decision:

> The respondent (Wing) Co. imported a power shovel of a nominal dipper capacity of 2½ cubic yards. It is undisputed that such a shovel was not made in Canada at the date of import, but that those ranging from ½ cubic yards to 2 cubic yards were made in Canada

[1] [1958] S.C.R. 652 at 653, 654, 656.

at the time. The customs appraiser entered the shovel under tariff item 427 of the Act and the Deputy Minister confirmed the classification. The Tariff Board reversed the Deputy Minister's decision and classified the shovel under 427a, which carries a much lower rate of duty, as being of a "class or kind not made in Canada".

This classification under item 427a was confirmed by the Exchequer Court, hence a final and unsuccessful appeal (Rand J., dissenting) to the Supreme Court of Canada.

Albeit the decision in the A. B. Wing affair favoured the importer, it laid down certain transcendant directions of general applicability, quite apart from the issue's eventual outcome, such as the value of accepted trade classifications and the relative worthlessness of "potential or actual competitive standards".

In this line of thought, Mr. Justice Judson spoke thus for the majority (p. 654:)

> It is undisputed that power shovels with a nominal dipper capacity of two and a half cubic yards or more were not made in Canada at the date of import. On the other hand, power shovels with a nominal dipper capacity ranging from one-half cubic yard to two cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacity was generally understood and accepted by the trade in both Canada and the United States *and was probably the most practical single standard according to which these implements could be classified.*

(Italics mine throughout these notes.)

We have seen, *supra,* that both Messrs. Akhurst (report, p. 51) and Blackburn (p. 217) admit the absence of recognized standards by which planer-matchers are characterized, so that in this instance "probably the most practical single standard according to which these implements could be classified" was admittedly missing. Now, this undisputed lack of an accepted classification norm could be a worthwhile retort to the appellant's complaint that the Tariff Board failed to properly classify the imported 409 M-1. Classification was necessarily achieved by means other than a recourse to established trade usages.

> The task of the Board [continues Mr. Justice Judson] was to classify a piece of machinery—to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. *It is not an error in law to reject the classification by potential or actual competitive standards* and to prefer classification according to a generally accepted trade classification based on size and capacity. *I do not think there is any error in the Board's decision but, if there were, it could only be one of fact.*

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

Mr. Justice Thorson, late President of this Court, expressed an analogous view of the classifying duty and of the competitive function criterion *in re*: *John Bertram & Sons Co. Ltd. v. John Inglis Co. Ltd.*[1]. The learned Judge wrote:

> While of course, the objective or purpose of the classification is to determine under what Tariff Item the article directed to be classified comes, the Act does not define the basis for the classification. The words "of a class or kind not made in Canada" are general terms appearing frequently in the Customs Tariff *and it is not possible to lay down any single criterion of general application.*

Competition relied upon by counsel as a significant test is dubiously spoken of, on page 584, in these terms:

> The next attack was really an economic complaint. The cloak under which the assumed error of law was placed was that the Board had failed to use the criterion of competitive function...Even if the criterion of competitive function should be accepted as a criterion of whether an article should be classified of a class or kind made in Canada or not made in Canada...,

the permissible inference, I believe, points to a negative conclusion or, at least, to a disparaging opinion of the competitive factor.

Even though some traces of hesitation might be detected in the Tariff Board's handling of the matter, it would be encompassed within factual, and in nowise legal, limitations, therefore an erroneous finding, had any occurred, would still remain one of fact.

Appellant's counsel, at the hearing, insisted on the difference in cost, that of the imported 409 M-1 being twice that of the Canadian A-62. This claim is doubtful; we know the price of an A-62 planer, with 12 cutting knives and a double profiler, dwarfs to nothingness the difference between both machines (cf. ex. Y-2 confidential), custom duties excluded. On the other hand, an argument of this nature carries little weight since it also essentially is one of fact.

I would add that *in re*: *Canadian Lift Truck Co. Ltd. v. D.M.N.R.* (*supra*), Mr. Justice Kellock, then of the Supreme Court, dealt rather summarily with a selfsame argument; he merely said:

> The question to my mind is, however, as to whether or not such a situation is sufficient to constitute the imported machine as being of a "class or kind" not made in Canada.

[1] (1960) 20 D.L.R. (2d) 577 at 582, 584, 585.

Altogether in line with several points of the issue at bar, the latest Supreme Court decision, that of *Deputy Minister of National Revenue for Customs and Excise et al v. Saint John Shipbuilding and Dry Dock Co. Ltd.*,[1] pronounced December 20, 1965, affirmed a majority conclusion of the Tariff Board, which I cite in part:

> The lifting capacity of the imported crane therefore exceeds that of the Port Weller crane (of Canadian manufacture) by 29 short tons or over 50%. This excess is substantial. However, in the market of very heavy cranes built only to purchasers' specifications there must be breadth in the application of criteria of similarity in the establishment of the class or kind distinction.
>
> In the present case the Board finds that for the purposes of this appeal the capacities of these two jib travelling gantry cranes are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more.
>
> ....
>
> The Board, therefore, declares that the imported crane is not "of a class or kind not made in Canada".

Mr. Justice Cartwright who delivered the judgment for the Court reached this finding:

> I have already quoted from the reasons of Mr. Gerry (the dissenting member of the Tariff Board) the ground on which he disagreed with the majority. In his opinion the difference in lifting capacity between the Port Weller crane and the imported crane was so great that the two could not be regarded as belonging to the same class. The difference is large and is accentuated if expressed in terms of "overturning moment" instead of maximum lifting capacity but it is *dimensional rather than functional.* On this point it appears to me that the view of the majority and that of the minority were both tenable and that the *choice between them involved a finding of fact which it was for the Board to make* and as to which its decision is not subject to review.

It can be asserted that in the latter case as in the actual one, the discussion raised similar comparisons of size, weight and productive output of machinery differing in lifting capacity or in design speed, yet this disparity did not, according to the Supreme Court, transgress the limits of a question of fact.

Several pages back, the matter of similarity was suggested as a likely touchstone in keeping with the language of section 6, subsection 9, of the *Customs Tariff Act.*

When winnowed to its ultimate gist, the evidence, here, shows that:

1. the domestic A-62 planer-matcher is capable of having installed in it no less than 12 cutting knives, with

[1] [1966] S.C.R. 196.

1966

AKHURST-UBJ MACHINERY LTD. v. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND P. B. YATES MACHINE CO. LTD.

Dumoulin J.

double profiler attached; it may be considered as of the heavy duty class, and pushed up to a design speed of 550 feet per minute, consistently, for a 22-day shift;

2. the imported 409 M-1 can rotate at 1000 feet a minute in optimum conditions, on certain types of lumber, and, though capable of such speed, it "very seldom" runs at that extreme velocity.

Otherwise put, the A-62 is susceptible of achieving better than 500 feet a minute, while the 409 M-1 infrequently attains its exceptional maximum.

Whatever difference persists may be likened, for all practical intents, to something "dimensional rather than functional" and does not exceed the realm of technical fact.

There is, I believe, sufficient proof that "a person, properly instructed as to the law and acting judicially, could have reached the particular determination" arrived at by the Tariff Board.

The problem of "substantial quantities" does not arise, both parties having agreed that "...if the class or kind defined by the Board...was intended...to include the machines described and referred to in the evidence as P. B. Yates Machine Company Limited A-62 machines, then the class or kind of machines so defined by the Board was made in Canada in substantial quantities and to the extent of ten per cent of Canadian consumption at all times relevant to this appeal".

For all the reasons above, I do not hesitate to answer negatively the question of law and to declare the imported planer, because of its similarity with the comparable machines of local fabrication, to be of "a class or kind made in Canada", and, therefore, dutiable under Tariff Item 427 (1).

Consequently, the appeal herein is dismissed with costs; the appellant, however, will be liable for only one set of costs and these payable to the respondent P. B. Yates Machine Company Limited.