1959
Jan. 22
June 2

BETWEEN:

DORR-OLIVER LONG LIMITED .....APPELLANT;

AND

SHERRITT GORDON MINES LIMITED ..... } RESPONDENT.

Revenue—Customs duty—Appeal on question of law from Tariff Board declaration—Whether parts of Eimco filter classifiable under tariff item 410p or 410w—Customs Tariff, R.S.C. 1952, c. 60, Schedule A as amended by S. of C. 1955, c. 51, s. 2 and S. of C. 1956, c. 36, s. 1—Tariff Board not bound by rules of evidence.

The appellant by leave appealed to this Court from a declaration of the Tariff Board on the question: "Did the Tariff Board err as a matter of law in declaring that certain parts . . . Eimco filters imported by Sherritt Gordon Mines Ltd. . . . were classifiable under Tariff Item 410*p* as enacted by S. of C. 1955, c. 51, rather than under Tariff Item 410*w* as enacted by S. of C. 1956, c. 36?"

Tariff Item 410*p* provides for the entry free from duty of "Sundry articles of metal for use exclusively in metallurgical operations, namely . . . apparatus for chemical conversion, extraction, reduction or recovery, n.o.p."

Tariff Item 410*w* provides for payment of duty on "Machinery, n.o.p. for use in the concentration or separation of ores, metals or minerals, namely; . . . filters . . . ."

The respondent operates a mine at Lynn Lake, Man., where ore recovered therefrom is by a mechanical process reduced to concentrates and then shipped to the respondent's plant at Fort Saskatchewan, Alta. where after the concentrates are treated by a new process of chemical conversion, extraction, reduction or recovery, involving the use of natural gas, pure nickel, cobalt and copper are obtained.

The imported articles in dispute were destined for use in the Fort Saskatchewan plant. The appellant conceded at the hearing of the appeal that the determining factor to be considered in determining the applicability of item 410*p* or 410*w* was the process in which the disputed articles of machinery were to be used, rather than the particular function they were to perform.

Held: That since it was conceded that the words "chemical conversion, extraction, reduction or recovery" taken textually from item 410*p* accurately describes the process at Fort Saskatchewan, this item applies and the declaration of the Tariff Board should be affirmed.

2. That the two processes, the one at Lynn Lake admittedly mechanical, and that at Fort Saskatchewan chemical, are two distinct processes, the former falling into the field of mining and the latter into that of metallurgy.

3. That the expressions "concentration and separation" and "apparatus for chemical conversion, extraction or recovery" are words of art, each applicable to the machinery and operations envisaged in the tariff item in which it appears.

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4. That the words "concentration and separation" are descriptive of mining but not of metallurgical operations as the legislature made abundantly clear when by S. of C. 1955, c. 51 of the *Customs Tariff* the words "for use exclusively in mining and metallurgical operations" as previously appeared in 410*p* were changed to read "for use exclusively in metallurgical operations".

5. That the Tariff Board is not bound by rules of evidence and can accept and act on information that in its judgment is authentic otherwise than under the sanction of an oath or affirmation. Thus the Board could accept the written statement or declaration of counsel quoting from his brief filed with the Board that "the goods which are the subject of this appeal are for use exclusively in metallurgical operations."

APPEAL under the Customs Act from a decision of the Tariff Board.

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

M. H. Fyfe, Q.C. and *W. L. Moore, Q.C.* for appellant.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondent.

G. T. Gregory for the Deputy Minister of National Revenue for Customs and Excise.

KEARNEY J. now (June 2, 1959) delivered the following judgment:

This is an appeal from a declaration of the Tariff Board, dated March 10, 1958, reversing a decision of the Deputy Minister of National Revenue for Customs and Excise, dated July 11, 1957, wherein he determined that certain parts for Eimco filters imported by Sherritt Gordon Mines Limited were classifiable under tariff item 410*w* instead of under item 410*p*, as claimed by the importer.

The appellant intervened in the proceedings before the Tariff Board and obtained leave, by judgment of Dumoulin J., dated April 9, 1958, to take the present appeal to this court on the following question of law:

Did the Tariff Board err as a matter of law in declaring that certain parts (disc sectors and Hy-flo valve assembly) for Eimco filters imported by Sherritt Gordon Mines Limited under Edmonton customs entries No. 7239 (May 1, 1956) and No. 18125 (June 15, 1956) as amended by No. 27546 (July 25, 1956) were classifiable under Tariff Item 410*p* as enacted by S.C. 1955, ch. 51, rather than under Tariff Item 410*w* as enacted by S.C. 1956, ch. 36?

The two tariff items in issue read as follows:

Tariff Item		*British Preferential Tariff*	*Most Favoured Nation Tariff*	*General Tariff*
410*p*	Sundry articles of metal as follows, for use exclusively in metallurgical operations, namely: furnaces for the smelting of ores; converting apparatus for metallurgical processes in metals; apparatus for chemical conversion, extraction, reduction or recovery, n.o.p.; machinery for the extraction of precious metals by the chlorination or cyanide processes, not including pumps, vacuum pumps or compressors, blast furnace blowing engines for the production of pig iron; parts of the foregoing	Free	Free	Free
410*w*	Machinery, n.o.p., for use in the concentration or separation of ores, metals or minerals, namely; Flotation machines, flotation cells, oil feeders and reagent feeders for flotation machines and flotation cells, pumps, vibrating and impact screens, jigs, filters, magnetic separators and magnetic pulleys; parts of all the foregoing	5 p.c.	7½ p.c.	20 p.c.

The Tariff Board, by a single declaration, dealt with four appeals, Nos. 441, 449, 451 and 461, collectively. All these appeals concern the import of articles destined for use in the refining or metallurgical operations carried on in the respondent's plant at Fort Saskatchewan (near Edmonton), Alberta. Here we are concerned solely with appeal No. 451, and only to the extent of two articles mentioned therein, namely, parts for Eimco filters.

The following few salient facts will serve, I think, to place the issue in proper perspective. The respondent's mine is located at Lynn Lake in northern Manitoba. It is primarily a nickel mine but it produces also cobalt and copper ore. After five years of research and experimentation involving the expenditure of some two and a half million dollars, the respondent developed and patented, for the purpose of treating its own concentrates, a new technique known as an ammonia pressure leaching reduction process based on the use of hydrogen sulphite derived from natural gas. The respondent's plant, which is located in an area where natural

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gas is available in abundance, was ready in 1955 to receive the required machinery including the imports in issue. The operations involved in ore concentrations, all of which are of a mechanical nature, are carried on at Lynn Lake, and the resulting concentrates are shipped to Fort Saskatchewan, one thousand miles away by rail.

The Deputy Minister did not choose to appeal the declaration of the Tariff Board but was represented by Mr. G. T. Gregory who held a watching brief only and took no part in the argument before me.

The appellant concedes that the board did not misdirect itself by considering that the determining factor in the applicability of item 410*w* or 410*p* was the process in which the articles of machinery are being used instead of the particular function they perform; that total absence of evidence may constitute a question of law while sufficiency of evidence is a question of fact; and that the operations at Fort Saskatchewan were accurately described by the board as a process of chemical conversion, extraction, reduction or recovery.

The appellant submits that, if a separation of metals, ores or minerals occurred at Fort Saskatchewan, item 410*w* applied. It conceded that, insofar as separation of metals or ores is concerned, it had no case since there was evidence before the board that ores and metals do not as such exist when reduced to a solution through chemical action. The appellant added that it could not find that anybody had ever applied his mind to the possibility of a separation of minerals taking place at Fort Saskatchewan, or that there was any evidence that such a separation did not occur, and from this it concluded that tariff item 410*w*, wherein filters are specifically mentioned, overrides item 410*p* and must be held to apply.

I do not think that the record warrants the foregoing broad statements in view of the following:

> The Acting Chairman: I have only one question. If I understood you correctly, in all your experience you have never seen filters used to separate either minerals or metals—always restricting my question to metallurgy? I think the question was asked by Mr. McKimm.
>
> Mr. Knight: The filter in itself does not separate one metal or one mineral from another.

The Acting Chairman: And in your experience you never saw one used for that purpose?

Mr. Knight: No, sir.

While from one point of view, as previously stated, the process in which the filter is used is more significant than its function, nevertheless the above testimony describing its operations is important because it constitutes some evidence that a separation of minerals does not take place. This being so, I consider that this submission fails for the same reason as applies to separation of metals or ores, namely, that it resolves itself into a question of fact and does not give rise to a point of law.

It is not surprising that the respondent made no attempt to separate the insolubles filtered off at Fort Saskatchewan because they consist of minerals such as silica and other worthless residue of dross or gangue, which remain after the dressing of the ore at the mine.

Later, in his argument in reply, counsel for the appellant conceded that the filter used at Fort Saskatchewan did not separate minerals from one another, and he resorted to the following broader submission: what must be considered, he said, is the all over process from the point where the concentrates arrive from Lynn Lake and are put in at one end of the machines until they come out at the other in the form of pure nickel, cobalt and copper; that operation is one where minerals are being separated and, in the course of that process, the filter is used and "that process is a process for separating minerals." I think this submission likewise fails. Since it is conceded that the words "chemical conversion, extraction, reduction or recovery," which are taken textually from item 410*p*, accurately describe the process at Fort Saskatchewan, in my view it is this item which applies.

Apart from the foregoing, there are other reasons which, in my opinion, justify the declaration of the Tariff Board. I do not think it is material whether or not a separation of minerals occurred at Fort Saskatchewan, but what matters is when it occurred, assuming it did, because the important point to determine is the dividing line between two processes, one admittedly mechanical and the other chemical. I think that the operations at Lynn Lake fall in the

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field of mining and those at Fort Saskatchewan come under metallurgy. It is well recognized, particularly in the mining world, that these two processes are distinct, and regarding the demarcation line between them, the following is found under "Metallurgy," sub-title "Where Metallurgy Begins," p. 307, v. 15, *Encyclopedia Britannica* 1954:

> Beginning with the quarry or mine, it is difficult to determine where the province of mining ends and that of metallurgy begins.

At p. 880, v. 16 (*supra*), it is stated:

> Ore dressing may be defined as mechanical concentration whereby valuable minerals in an ore are separated from worthless impurities or gangue, and is distinguished from metallurgy which employs chemical methods for recovering metals and metallic compounds from rich ores or from the concentrated products of the ore dresser.

I think such accidents of geography and geology as the remoteness of the chemical plant from the mine and its basic need for natural gas, as well as the fact that we are dealing with the exploitation of a new process, make the problem less difficult than if both processes were carried out in the same locality as the mine. I do not consider it necessary to make any finding on this point but I would be inclined to agree that, if further mechanical filtration took place at Fort Saskatchewan before chemical conversion began, then item 410*w* might well apply. It is admitted, however, that before the Eimco filter is used the concentrates have already been chemically treated by ammonia, air and water, and the components to be recovered reduced to a state of solution, after which the filter is used to run off the worthless insoluble minerals. Furthermore, according to the evidence, although the fluid while passing through the Eimco filter undergoes no chemical change, it or its equivalent is a necessary device for use in the chemical process and forms an integral part of the machinery required therefor because, if the insolubles were not removed, it would mean the difference between profitable and unprofitable refining operations.

I think the expressions "concentration and separation" and "apparatus for chemical conversion, extraction or recovery" are words of art, each applicable to the machinery and operations envisaged in the tariff item in which it

appears. A different context and different physical circumstances might well justify a finding that an apparatus for chemical conversion, etc., was in a sense machinery used in concentration or separation.

In this connection the appellant referred to *International Nickel Co. v. Corporation of the Township of Waters*[1], where the problem was to decide whether or not certain buildings in the town of Coppercliff should be classified as concentrators and thus fall within the exemption from taxation provided under s. 33(4) of *The Assessment Act*, R.S.O. 1950, c. 24. In the above case Roach J.A. cited with approval the following statement made by Meredith C.J.O. in the similar case of *McIntyre Porcupine Mines Ltd. v. Morgan*[2]:

> The proper conclusion upon the evidence is, I think, that the word (concentrators) has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found.

In my opinion, the language of the tariff items does not lend itself to the description "colloquial expression" and is of a decidedly technical nature. Since s-s. *p* and s-s. *w* are separate parts of the same tariff item 410, which are worded differently and refer to two kinds of uses, I think that the two sub-sections are mutually exclusive and contemplate the same piece of machinery being treated differently for customs duty purposes. In the present case, if the words "concentration or separation" of item 410*w* were held to be synonymous with "apparatus for chemical conversion, etc." of item 410*p*, the latter item would in my view become meaningless, as none of the several sundry articles of metal used exclusively in the metallurgical operations at Fort Saskatchewan could be admitted free of customs duties. I think the words "concentration and separation" are descriptive of mining but not of metallurgical operations, and that the legislature made this abundantly clear when, by S. of C. 1955, c. 51 of the *Customs Tariff*, the words "for use exclusively in mining and metallurgical operations," as previously appeared in item 410*p*, were changed to read "for use exclusively in metallurgical operations."

[1] [1958] O.R. 168. [2] (1921) 49 O.L.R. 214.

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Two subsidiary arguments advanced by counsel for the appellant were that, in his opinion and subject to correction, there was no proof that filter parts were made of metal, or of their exclusive use, and consequently item 410*p* was inapplicable.

There was some evidence before the board that the filter parts were made of metal. Photographs filed as exhibit A-8a show sectors described as metal and corrugated metal sectors. In addition, the invoice dated April 18, 1956, attached to customs entry No. 7239, exhibit No. A-2k, describes the articles imported as steel disc sectors for Eimco filters.

The Tariff Board is not bound by rules of evidence and can accept and act on information that, in its judgment, is authentic otherwise than under the sanction of an oath or affirmation. (*Vide* s. 5(9) and (13) of the *Tariff Board Act,* R.S.C. 1952, c. 261.) Regarding proof of exclusive use, the Tariff Board can accept the written statement or declaration of counsel, and at p. 50 of the transcript we have the following statement by Mr. Hooper while acting on behalf of the respondent and quoting from his brief, which had been filed with the board:

> In paragraph 10 above (of the brief) we claim ..... that the goods which are the subject of this appeal are for use exclusively in metallurgical operations.

This statement was never challenged. Moreover, the *Customs Act,* R.S.C. 1952, c. 58, s. 105(1), requires that goods claimed to be exempt from duty shall in the entry thereof be set forth in the words by which they are described to be free in the Act. The customs entry in the present case reveals that in the importers' declaration free entry was claimed by reference to item 410*p,* without reciting all its provisions which include exclusive use. Since the goods were admitted to the country, this description by reference apparently was accepted as sufficient compliance with the Act and constitutes at least presumptive proof of exclusive use.

For the above reasons I consider that the declaration of the Tariff Board should be affirmed and the present appeal dismissed with costs.

Judgment accordingly.