Hunt Foods Export Corp. of Canada Ltd et al (*Appellants*) *v.* **Deputy Minister of National Revenue for Customs and Excise** (*Respondent*)

Kerr J.—Ottawa, Sept. 21, Oct. 26, 1970.

Customs—Appeal from Tariff Board—Agreement of parties not binding on Board—Proper classification of products—"Lard product or similar substances", meaning in trade—Whether expert testimony admissible—Customs Act, R.S.C. 1952, c. 58, s. 41(3).

Appellants imported shortening products which apart from being composed of vegetable oils were otherwise similar to a lard compound. The Customs classified the products under tariff item 27700-1 as "hydrogenated oils". Appellants appealed to the Tariff Board under an agreement with the Customs defining the issue as being whether the products should be classified under item 27700-1 as "hydrogenated oils" or under item 1305-1, *viz* "lard compound and similar substances". Expert evidence was heard by the Board as to the meaning in the trade of the expressions quoted. The Board held that the products should be classified under neither item but under item 71100-1 as goods not elsewhere enumerated.

Held on appeal, the products should be classified under item 1305-1 as "similar substances" to "lard compound".

(1) The Tariff Board had the power under s. 41(3) of the *Customs Act* to declare the proper classification of the products notwithstanding the agreement of the parties.

(2) The Tariff Board erred in construing the words "similar substances" in item 1305-1 as excluding every product that contains no animal fat notwithstanding any similarity to a lard compound. The words "similar substances" being ordinary words without special meaning, the Tariff Board should have construed them in their ordinary and popular sense without resort to expert witnesses.

[12] 58 C.C.C. 385.

APPEAL from Tariff Board.

K. E. Eaton for the appellant.

F. J. Dubrule, Q.C., for the respondent.

KERR J.—This is an appeal under section 45 of the *Customs Act* from a declaration of the Tariff Board classifying certain imported products under item 71100-1 of the Customs Tariff. As the appeal is under section 45 it is an appeal "on a question of law".

There were appeals to the Tariff Board from decisions of the respondent as to the classification of the products, and on those appeals the primary facts were placed before the Board by means of an agreed statement of facts, which reads as follows:*

4. The manufacture of each of the products in issue from its various ingredients is a complex process. Each product is composed of hydrogenated soybean and cottonseed oils and additives. The oils must be made suitable for use and this commonly involves refining, bleaching, deodorizing and hydrogenation.

5. Hydrogenation is the means by which the liquid cottonseed and soybean oils are converted to semi-solid, plastic fats suitable for shortening manufacture. In addition, it enhances the stability and improves the colour of the fat.

6. The proportion of hydrogenated oils and additives as measured by weight are as follows:

Hydrogenated Oils	*Additives*
not less than 98%	not more than 2%

7. The additive in the product determines the products recommended use because the additive imparts certain properties to the product which improve its performance when used as recommended. The products in issue have the following recommended uses:

Product	*Recommended Use*
(*a*) MFB	as a shortening for frying and the baking of products such as breads, cookies and cakes
(*b*) KEAP	for institutional and commercial deep-fat frying
(*c*) VELTEX	in cooking where the user wants a high melting vegetable shortening in flake form, for example in icings
(*d*) QUIK-BLEND	designed specifically for the preparation of layer cakes in institutional baking
(*e*) WIP	for use by the institutional baking trade in preparing high stability icings and cream fillings

9. None of the products in issue is a lard compound.

10. The general issue in these appeals is whether the appellants are entitled to have all or any of the imported products classified under Tariff Item 1305-1 or whether they should be classified under Tariff Item 27700-1.

*Some portions of the agreed statement of facts are omitted in this report.—ED.

Additional evidence was adduced before the Tariff Board relating to the manufacture, composition, use and description of the products, which are shortening products used in cooking, frying and baking. The products had been classified by the respondent under Tariff item 27700-1. The appellants contended before the Board that they should be classified under item 1305-1.

Those items, at the times of importation, read as follows:

27700-1 Oils, hydrogenated, blown, dehydrated or sulphonated, not including blown or hydrogenated fish, seal or whale oils.

1305-1 Lard compound and similar substances, n.o.p.

In its decision the Tariff Board referred to the evidence and to the arguments of counsel, agreed with counsel for the appellants that the products "are not hydrogenated oils within the meaning to be attributed to those words in Tariff item 27700-1", and also agreed with counsel for the respondent that the products "are neither lard compounds nor similar substances". The Board rejected the pleas of the appellants and of the respondent and, upon reviewing the tariff items that it considered might be relevant, found that the products do not fall either under item 27700-1 or under item 1305-1; and it classified them under item 71100-1, which reads as follows:

71100-1 All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited.

Before the Tariff Board no reference was made to item 71100-1 nor was there any suggestion that the products should be classified otherwise than under item 1305-1 or item 27700-1 in accordance with the general issue stated in paragraph 10 of the agreed statement of facts.

The first submission by the appellants before this court is that the Tariff Board erred as a matter of law in declaring the proper classification to be under item 71100-1 because:

(1) in doing so the Tariff Board exceeded its jurisdiction having regard to the definition of the issue contained in paragraph 10 of the agreed statement of facts . . .;

(2) in doing so the Tariff Board disregarded express or implied admissions by the Respondent that, if the imported products should not be classified under Tariff item 27700-1 they should be classified under Tariff item 1305-1;

(Paragraph 15 of notice of appeal)

On this point counsel for the appellants argued, in the main, that the function of the Tariff Board was to decide the issue between the parties and that it went outside the issue presented to it and thereby erred in law; that the nature of the proceedings on the appeals to the Board was shaped by the

function of satisfying the onus of proof, and that the onus was for the apellants to demolish the basic fact upon which the classification under item 27700-1 had been made by the respondent; that the appellants had discharged that onus and the Board should, therefore, have decided in their favour and allowed their appeals, and should have classified the products under item 1305-1. In this respect counsel quoted passages from the judgments in *Javex Co. v. Oppenheimer*[1], *Semet-Solvay Co. v. Dep. Min. of Nat. Rev. (Customs and Excise)*[2] and *Johnston v. M.N.R.*[3] However, the facts and issues in the present appeal are not similar or analogous to those in the cases cited and I do not regard the quotations as helpful to the appellants on this first point of their appeal.

The appeals to the Tariff Board were made under section 44(1) of the *Customs Act,* R.S.C. 1952, c. 58. Subsection (3) of that section reads as follows:

> (3) On any appeal under subsection (1), the Tariff Board may make such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare
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> (*a*) what rate of duty is applicable to the specific goods or the class of goods with respect to which the appeal was taken,
>
> (*b*) the value for duty of the specific goods or class of goods, or
>
> (*c*) that such goods are exempt from duty,
>
> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in section 45.

The respondent submits that the *Customs Act* confers jurisdiction on the Tariff Board to make such order or finding as the nature of the matter may require, that is, to determine within which tariff item the products should be classified, and that a general statement of the issue, as understood by the parties, does not restrict that jurisdiction. (Reply to notice of appeal).

Counsel for the respondent argued that the Tariff Board has a statutory duty to make such order or finding as the nature of the matter may require, that if an appellant proves only that goods have been classified wrongly by the Department, it does not necessarily follow that the classification pleaded for by such appellant is the correct classification; that an appellant is not entitled to a declaration that is wrong; and that the Tariff Board had jurisdiction to classify the products correctly and was not limited to the items that the parties advocated[4].

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[1] [1961] S.C.R. 170 at p. 176.
[2] [1959] Ex.C.R. 172 at p. 184.
[3] [1948] S.C.R. 486 at pp. 489-490.
[4] Counsel for the respondent cited the following cases on this point:
The King v. The Assessment Committee of the Metropolitan Borough of Shoreditch [1910] 2 K.B. 859-890.
The Township of Cornwall v. The Ottawa and New York Railway Company and others (1915-16) 52 S.C.R. 466-513.
W. B. Elliott v Dep. Min. of Nat. Rev. for Customs and Excise [1969] 1 Ex.C.R. 67-75.
Crosbie Estate v. Min. of Nat. Rev. 66 D.T.C. 5424-5430.

In my view the position taken by the respondent on this point is well founded. The Tariff Board's jurisdiction was not limited or governed by the agreed statement of facts. The Board had a duty to make such order or finding as the nature of the matter required, and it heard, considered and made an appraisement of the evidence that was adduced, which was part of the case presented by the parties and relevant to the nature of the matter before the Board, *i.e.*, the products and their classification. I have no doubt that the Board has jurisdiction to reject the pleas of the appellants and of the respondent respecting the classification of the products and to declare their proper classification.

The appellants will not succeed on this first ground of appeal.

The second ground of appeal, as set forth in the notice of appeal, is that

(3) the Board misconstrued the statutory language of Tariff item 1305-1 in finding that "the imported products are neither lard compounds nor similar substances";

(4) the Tariff Board acted without evidence in coming to its decision that the imported products are properly classifiable under Tariff item 71100-1; and

(5) no person, properly instructed as to the law and acting judicially, on the basis of the material before the Tariff Board, could have reached the determination that the products in question are properly classified under Tariff item 71100-1.

In that respect the respondent submitted in the reply to the notice of appeal that there was evidence before the Tariff Board on which it could find that the products were properly classified under item 71101-1 rather than under item 1305-1 or 27700-1. The respondent further submitted that if this court should find that the products should not be classified under any of the said items, the proper classification would be under item 22005-1, which reads as follows:

> 22005-1 Chemical preparations, compounded of more than one substance, n.o.p.:—When dry, or liquid containing not more than two and one-half per centum of proof spirit.

The construction of the tariff items is a question of law.

The appellants contend that the Tariff Board misconstrued the words "lard compound and similar substances", particularly the words "similar substances".

In its decision the Tariff Board said:

> Counsel for the respondent contended that the imported goods were not similar substances to lard compounds as provided for in tariff item 1305-1.
>
> It was agreed that lard compound must contain some lard. However, there was no evidence or discussion as to the percentage of lard required to be present. It would not seem reasonable to call a product, consisting of one pound of lard and one ton of hydrogenated vegetable oils, a lard compound. In the opinion

> of the Board, a product of which lard formed more than 50 per cent by weight might reasonably be considered a lard compound: one might even consider a product of which lard formed the greatest percentage, by weight, to be a lard compound. Lard is the rendered fat of the hog; the rendered fat of ruminant animals is known as tallow. Counsel for the respondent argued that a similar substance to a lard compound would be one in which tallow replaced the lard component but that a product which contained no animal fat whatever, such as the imported goods, would not be a similar substance to a lard compound.
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> The Board agrees with counsel for the respondent that the imported products are neither lard compounds nor similar substances.

As I understand its decision the Board there agreed with the argument of counsel for the respondent that a "similar substance" to a lard compound is one in which tallow replaces the lard component, but that a product that contains no animal fat whatever is not a similar substance to a lard compound. The Board was giving a construction to item 1305-1 that excludes from its scope every product that contains no animal fat, notwithstanding any similarity to a lard compound; and as the products in question contain no animal fat they do not come within item 1305-1 as so construed.

The words "similar substances" are indefinite except in relation to the words "lard compound". We must, therefore, first look to the meaning of "lard compound" as used in item 1305-1. This expression is not defined in the Customs Tariff, or in any statute in *pari materia* so far as I am aware. It describes an article of commerce and is not, I think, an expression in common speech, except by persons who manufacture, sell or deal in the article. I think that it was open to the Tariff Board to determine the sense in which the expression is used in the mouths of those persons and to construe it, as used in item 1305-1, in that sense. In my opinion, the Board did not err in law in agreeing that a "lard compound" must contain some lard.

[*His Lordship reviewed the evidence which included the testimony of several expert witnesses and continued as follows:*]

The Tariff Board properly sought to ascertain from the experts to what extent and in what way the products in issue are similar to or dissimilar from lard compounds, as the latter are known in the trade. The experts were competent to give evidence in that respect. But the words "similar substances" in item 1305-1 are ordinary words that have no technical or special meaning, and it was for the Tariff Board to construe them in their ordinary and popular sense. It was not for the witnesses to define them or give a meaning to them.

In my opinion, the Tariff Board erred in law in construing "similar substances" in item 1305-1 as limited to those in which tallow replaces the lard

component and as excluding every product that contains no animal fat, notwithstanding any similarity to a lard compound. In my opinion the words are sufficiently wide to include products that are similar to a lard compound, as the products in issue are, in function, use, appearance, melting point, hardness, solidity at various temperatures, stability, flavour, odour and colour.

I agree that the words hydrogenated oils are used in item 27700-1 with the meaning they have in the trade and that they do not include the products in issue. These products are made from such oils but in their final form they are plastic or flakes, not liquid, and are in other respects also very different from what is sold and known in the trade as hydrogenated oils, such as the bulk liquid oils delivered in tank cars by Lever Brothers and Proctor & Gamble.

I find that the products in issue, MFB, Keap, Quik-Blend, Wip and Veltex, are "similar products" to a "lard compound" within the meaning of tariff item 1305-1, and are properly classifiable under that item.

The appeal will be allowed and the appellants will be entitled to recover their costs, to be taxed.