CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

1952
Jan. 28, 29

1953
Dec. 23

AND

PARKE, DAVIS & COMPANY LIMITED ..... RESPONDENT.

Revenue—Customs Duty—Customs Act, R.S.C. 1927, c. 42, ss. 49(1), 49(2), 49(3)—Customs Tariff, R.S.C. 1927, c. 44, item 206a—The Tariff Board Act, S. of C. 1931, c. 55, ss. 3(8), 4, 5(2), 5(7), 5(8), 9—Whether question is one of law dependent on opinion of Court or judge—Leave to appeal restricted to questions arising out of finding or order of Tariff Board—Meaning of "biological products" in Tariff Item 206a—Words in Customs Tariff to receive ordinary meaning unless context requires technical meaning—Court not to interfere with decision of Tariff Board if reasonably made.

The Tariff Board on an appeal from a decision of the Deputy Minister of National Revenue for Customs and Excise decided that two importations of Penicillin S-R made at Windsor in June 1949 were exempt from duty by virtue of Tariff Item 206a of the Customs Tariff and the Deputy Minister after obtaining leave appealed from the Tariff Board's decision on certain specified questions.

Held: That section 49(3) of the Customs Act required that the court or judge in granting leave to appeal should specify the question which in its or his opinion was a question of law and on which the appeal was permitted.

2. That the jurisdiction of the Court to entertain an appeal from a decision of the Tariff Board depends not on whether a question is actually a question of law but on whether it is so in the opinion of the Court or judge hearing the application for leave to appeal.

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3. That leave to appeal from a decision of the Tariff Board upon any question which in the opinion of the Court or judge is a question of law should not be granted unless the question arises out of the finding or order of the Tariff Board.

4. That the Tariff Board was right in its opinion that no person other than the appellant importer and the Deputy Minister had any status to appear before the Board or submit evidence in the appeal and that it could not legally consider evidence submitted by persons other than the parties to the appeal even though such persons should claim to have an interest in the decision of the appeal.

5. That, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.

6. That if there was material before the Tariff Board from which it could reasonably decide as it did this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it.

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

The appeal was heard before the President of the Court at Ottawa.

W. R. Jackett Q.C. for appellant.

L. A. Kelley Q.C. and *W. Meredith* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (December 23, 1953) delivered the following judgment:

This is an appeal on certain specified questions from the decision of the Tariff Board, dated November 29, 1949, that two lots of a substance called Penicillin S-R, imported by the respondent from the United States at Windsor under entries No. 16407-A, June 23, 1949, and No. 17043-A, June 28, 1949, were exempt from duty by virtue of Tariff Item 206*a* of the Customs Tariff, R.S.C. 1927, chapter 44, as amended by section 4 of chapter 31 of the Statutes of Canada, 1936, which, so far as relevant, read as follows:

206*a*. Biological products, animal or vegetable, n.o.p., for parenteral administration in the diagnosis or treatment of diseases of man, when manufactured under license of the Department of Pensions and National Health under regulations prescribed by the Food and Drugs Act; . . .

On their importation the two lots of Penicillin S-R were entered free of duty under Tariff Item 206*a* but the Collector of Customs at Windsor requested that the entries be amended to make them dutiable at 20 per cent ad valorem and the respondent, under protest, paid the amount of Customs duty at this rate. The Deputy Minister then reviewed the appraisal and confirmed it by a letter addressed to the respondent, dated July 15, 1949. This was a decision, on the advice of the Department of National Health and Welfare, that antibiotics, including penicillin, were not considered as biological products and that penicillin was classified under Tariff Item 711.

From this decision the respondent appealed to the Tariff Board under section 49(1) of the Customs Act, R.S.C. 1927, chapter 42, as enacted by section 5 of chapter 41 of the Statutes of Canada, 1948, which read as follows:

49. (1) An importer may, by notice in writing filed with the Secretary of the Board, within sixty days of the decision, appeal to the Tariff Board from any decision of the Deputy Minister

(i) as to tariff classification or value for duty;

(ii) under subsection three of section forty-seven; or

(iii) as to whether any drawback of Customs duties is payable under section twelve of the *Customs Tariff* or as to the rate of drawback so payable.

And section 49(2) provided:

(2) On any such appeal the Tariff Board may make any such order, or finding of fact, as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare

(i) the rate of duty that shall be applicable to the class of goods respecting which appeal has been made, or applicable to the specific goods only;

(ii) the value for duty of the class of goods or of the specific goods; or

(iii) that such goods are exempt from duty; and any such order, finding or declaration of the Board shall have force and effect as if the same had been sanctioned by statute, unless appeal be taken as hereinafter provided.

By a majority decision the Tariff Board allowed the respondent's appeal and the appellant thereupon applied before me for leave to appeal to this Court under section 49(3) of the Customs Act which then read as follows:

49. (3) An importer or the Deputy Minister may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof upon application made within thirty days after the making of the finding or

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order sought to be appealed (or within such further time as the court or judge may allow), appeal to the said court upon any question which in the opinion of the said Court or judge is a question of law.

It was my opinion that section 49(3) required that the court or judge in granting leave to appeal should specify the question which in its or his opinion was a question of law and on which the appeal was permitted. Accordingly, on December 29, 1949, I gave leave to the appellant to appeal to this Court from the decision of the Tariff Board on what, in my opinion, was a question of law, which I specified as follows:

> Did the Tariff Board err as a matter of law in deciding that Penicillin S-R, imported under Windsor entries numbers 16407-A, June 23, 1949, and 17043-A, June 28, 1949, is exempt from duty by virtue of Customs Tariff item 206*a*?

For convenience I shall refer to this as Question 1.

Subsequently, the matter became more complicated. After the Tariff Board's decision had been rendered Mr. H. B. McKinnon, the Chairman of the Tariff Board, signed a certificate, dated December 29, 1949, that the Board made its decision "without considering material submitted by persons claiming to be interested other than the Appellant and the Deputy Minister of National Revenue for the reason that the Board was of opinion that no persons other than the Appellant or the Deputy Minister of National Revenue have any status to appear before the Board or submit evidence in the appeal and was further of opinion that it could not legally consider evidence submitted by persons other than the Appellant or Deputy Minister of National Revenue even though such persons should claim to have an interest in the decision of the appeal." On the strength of this certificate counsel for the appellant made a further application before me for leave to appeal on three other questions and on January 10, 1950, I gave the appellant leave to appeal on two other questions which, in my opinion at that time, were questions of law. These two questions, which I shall refer to as Question 2 and Question 3, were stated in the following terms:

> 2. Is the Tariff Board by law precluded, on an appeal under subsection (1) of section 49 of the Customs Act, from receiving evidence submitted by persons claiming to have an interest other than the Appellant or the Deputy Minister of National Revenue for Customs and Excise?

3. If not, should the Board consider material submitted by such persons as it is satisfied have an interest (after giving the Appellant and the Deputy Minister of National Revenue for Customs and Excise an opportunity of answering such material) and then decide the appeal after considering all the material before it?

I might add, although it has only an indirect bearing on the issue herein, that subsequently, on March 7, 1950, applications were made before me on behalf of Ayerst, McKenna & Harrison Limited and Merck & Company Limited, both Canadian manufacturers of penicillin, for an order adding them as appellants in this appeal on the ground that they had an interest in the decision of the Tariff Board or, in the alternative, permitting them to intervene or to appear and be heard. I reserved my decision on these applications. Then Parliament intervened with statutory amendments. Section 3 of chapter 13 of the Statutes of Canada, 1950, amended sections 49 and 50 of the Customs Act, as enacted in 1948, and section 4 of chapter 14 of the Statutes of Canada amended Tariff Item 206*a* by striking out the term "biological products" and substituting an enumeration of several specific substances, which did not include penicillin or its derivatives. After these amendments had come into effect the two applicants ceased to have any interest in the Tariff Board's decision, since it could no longer affect them, and, on December 21, 1951, with leave, they withdrew their applications.

It was properly conceded that the 1950 amendments were not relevant to the questions involved in this appeal, but they greatly lessen its importance since they nullify the effect of the Tariff Board's decision on future importation of Penicillin S-R, if it should stand in the event of the appeal herein being dismissed, so that, in substance, the dispute is now reduced to the dollars and cents question whether the respondent should have been required to pay the amount of customs duty which it paid under protest.

This is the first appeal to this Court under the Customs Act and certain observations of a general nature may be in order. The right of appeal conferred by the Act is a limited one. In the first place, leave to appeal must be obtained from this Court or a judge thereof. Moreover, the appeal for which leave may be obtained is confined to "any question which in the opinion of the court or judge is a question of law". This language permits possible anomalous results

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since the jurisdiction of the Court to entertain an appeal is made to depend not on whether a question is actually a question of law but on whether in the opinion of the court or judge it is so. That being the case, it is quite possible, through an erroneous opinion of the court or judge that a particular question is a question of law, that the Court will find itself vested with jurisdiction to entertain an appeal on what is actually a question of fact. Conversely, if the court or judge is erroneously of the opinion that the question in issue is not a question of law, the Court will have no jurisdiction to entertain an appeal, although the question is actually one of law. Whether such eventualities were contemplated when the legislation was enacted may be the subject of speculation but that they might result from the language of the enactment does not appear to admit of doubt.

Moreover, the jurisdiction of the Court is restricted. It has no power, under the legislation in effect prior to the 1950 amendments, which do not apply to this case, to refer the question before it back to the Board for re-hearing or further consideration or to render the decision which, in its opinion, the Board should have given. All that it may do is to dismiss or allow the appeal on the question or questions before it with whatever consequences such action may imply.

I now come to the specified questions and shall deal first with Questions 2 and 3. Put briefly, the argument for the appellant was that under section 49(2) of the Customs Act any order, finding or declaration of the Tariff Board on the appeal to it "shall have force and effect as if the same had been sanctioned by statute, unless appeal be taken as hereinafter provided", that persons interested in the decision other than the appealing importer were, therefore, entitled to be heard and that since the Board did not hear them because it thought, as a matter of law, that it was precluded from so doing it had not proceeded as the law required and its decision was, therefore, a nullity. Since I gave leave to appeal on these two questions I have, on further consideration of the matter, come to the conclusion that I ought not to have done so. It will be recalled that the questions arose not out of any decision, finding or order of the Board but out of the Chairman's certificate, dated

December 29, 1949, a month after the decision of the Board. The matters stated in it were not, so far as I have been able to ascertain, mentioned in the course of the hearing before the Board or in its decision. But section 49(3) of the Customs Act contemplates that the question on which leave to appeal to this Court may be given shall be a question arising out of "the finding or order sought to be appealed". That being so, there was no finding or order of the Board out of which the questions now under discussion could arise and the application for leave to appeal should have been dismissed on that ground.

Moreover, the question whether the Board should have considered material submitted by persons other than the parties to the appeal before it is appropriate to proceedings where the remedy would be by way of mandamus, but this Court has no supervisory jurisdiction over the Tariff Board by way of mandamus or otherwise beyond the limited appellate jurisdiction to which I have referred. And I have already mentioned the fact that it has no power to refer any question back to the Board.

There is a further anomaly. If the argument that the Board's decision was a nullity were accepted it would follow, as a matter of course, that leave to appeal on Question 1 should not have been granted for there would then have been no decision to appeal from.

Under the circumstances, I find myself in a quandry for the reason that if I acted in error in granting leave to appeal on Questions 2 and 3 there is no jurisdiction in this Court to correct the error by setting aside the order for leave to appeal granted by me. On the other hand, if the leave was properly granted the questions should be dealt with. In this difficult situation I have concluded, notwithstanding my present opinion, that the best course for me to follow is to deal with the questions as if they were validly before the Court.

In support of his contention that the Board should have considered material submitted by persons other than the parties to the appeal before it counsel for the appellant submitted that when Parliament confers jurisdiction on a statutory authority already in existence and makes no provision for the manner in which it shall be exercised there is an implication that the statutory authority should exercise

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its new jurisdiction in accordance with its ordinary procedure: *vide Local Government Board* v. *Arlidge* (1) where Viscount Haldane L.C., speaking of the duties of the Local Government Board said:

> The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure.

Counsel relied upon this statement. He urged that the Tariff Board was constituted originally to conduct investigations, that in conducting its inquiries it heard persons claiming to be interested and that it should do likewise in hearing appeals from a decision of the Deputy Minister. Counsel went on to argue that it should be presumed that when Parliament entrusted the Board with appeals under section 49 of the Customs Act and gave its decisions statutory effect it was intended that it should conduct the appeals according to the same procedure as that which it followed in conducting its inquiries. The contention, in effect, was that the Board should deal with the appeals in the same way as if they were inquiries.

This submission strikes me as astounding and I reject it. In my opinion, it runs counter to section 49(1) of the Customs Act which gave an individual right of appeal to an importer in respect of whose importation the Deputy Minister had made a decision. The right of appeal did not belong to any one else. The fact that Parliament saw fit to give statutory effect to the Board's decision does not affect the matter. That did not detract from the right conferred on the importer or extend it to other persons who claimed to be interested. In my opinion, the appealing importer had the right to have his appeal considered and determined without being affected by representations from other persons, who might be business competitors or otherwise adverse in interest and might "gang up", so to speak, against him. I am, therefore, of the opinion that the Tariff Board was right in the opinion expressed by its Chairman in his certificate.

Moreover, the submission that it was intended that the Board should deal with appeals as if they were inquiries runs counter to the scheme of the applicable legislation. Originally, The Tariff Board Act, Statutes of Canada, 1931,

(1) [1915] A.C. 120 at 133.

chapter 55, was divided into two parts and the Tariff Board was given two separate functions. In Part I its constitution was set out and certain duties relating to inquiries were assigned to it. In Part II it was substituted for the former Board of Customs under the Customs Act and given its powers, functions and duties. The scheme of the Act was considered by the Supreme Court of Canada in the *Reference Concerning The Jurisdiction of the Tariff Board of Canada* (1). There Rinfret J., as he then was, in delivering the judgment of the Court, dealt first with the inquiry provisions of the Act under Part I and then went on to discuss Part II which he said, at page 542, "deals with a different subject altogether". There were amendments of The Tariff Board Act in 1933 and 1940 but these did not change its scheme. The first substantial amendments did not come until 1948. By chapter 70 of the Statutes of 1948 Part II of The Tariff Board Act, which had assigned and transferred the powers, functions and duties of the former Board of Customs to the Tariff Board, was repealed and by chapter 41 of the Statutes of 1948 provision was made by section 49 of the Customs Act for an appeal by an importer to the Tariff Board from a decision of the Deputy Minister and a limited appeal by leave either by the importer or the Deputy Minister to this Court from the decision of the Tariff Board, the particulars of which have been set out. These amendments did not alter the fact that there was still a clear division of the legislative scheme, although it was now no longer embodied in one Act, into two parts, one having to do with inquiries which remained unchanged and the other concerned with the new appellate functions. Thus, the statement of Rinfret J. in the *Tariff Board Act Reference* (*supra*), to which I have referred, is just as applicable to the appeal sections of the scheme as it was to Part II of The Tariff Board Act, namely, that they deal with a different subject altogether from the sections relating to inquiries.

There are several indications in the legislation, apart from section 49(1) of the Customs Act, that it was not intended that the Board should deal with the appeals

(1) [1934] S.C.R. 539.

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entrusted to it in the same way as it dealt with inquiries. For example, section 5(2) of The Tariff Board Act provides:

> 5. (2) The Board shall give reasonable opportunity to persons who may not have been summoned, to appear before them and give evidence upon oath or solemn affirmation as aforesaid, on any matter relevant to an inquiry then being held by the Board.

This provision is specifically referable to an inquiry and not appropriate to an appeal under section 49 of the Customs Act and no attempt was made to make it applicable. Furthermore, subsections (7) and (8) of section 5 provide how many members of the Board shall have power to conduct certain inquiries but when the new appellate jurisdiction was vested in the Board subsection (8) was added to section 3 of the Act as follows:

> 3. (8) With respect to an appeal to the Board under the provisions of the *Customs Act* or the *Excise Tax Act,* two members, including the Chairman, or in his absence the Vice-Chairman, may exercise the powers of the board.

It is significant that this amendment was made not to section 5, which relates to inquiries, but to section 3. Then there is the further difference that when the 1948 amendments were made to The Tariff Board Act section 9 provided as follows:

> 9. The Board shall cause its decisions in any case brought before it under the *Customs Act* or *Excise Tax Act* to be published forthwith in the *Canada Gazette.*

whereas the requirements in the case of inquiries are otherwise. In such cases, under section 4, which was not altered in 1948, the Board is required to report to the Minister or the Governor-in-Council. These various considerations negative the submission of counsel for the appellant.

I, therefore, find that the Board was right in its opinion that no persons other than the appellant importer and the Deputy Minister had any status to appear before the Board or submit evidence in the appeal and that it could not legally consider evidence submitted by persons other than the parties to the appeal even though such persons should claim to have an interest in the decision of the appeal. That being so, and on the assumption that I should deal with the questions, I answer Question 2 in the affirmative. This makes it unnecessary to answer Question 3 but if any answer is required it is in the negative. For these reasons, I dismiss the appeal on Questions 2 and 3.

I now come to the appeal on Question 1. This involves matters of considerable difficulty. The issue before the Tariff Board was whether Penicillin S-R, the subject of the two importations in question, was a biological product within the meaning of Tariff Item 206*a* and exempt from duty by virtue of it. It was urged that the onus was on the appealing importer, the respondent herein, to show that the requirements of the item had been met. Thus it was necessary, in the first place, to show that Penicillin S-R was a biological product. This was the main issue. It is obvious, of course, that the term "biological products" is a term of wide import. But it is equally clear that it was not intended that Tariff Item 206*a* should cover all substances that might come within its wide meaning for it limited the category of biological products that were exempt from customs duty to those that met the two conditions specified in it. The first of these was that the biological product was "for parenteral administration in the diagnosis or treatment of diseases of man", that is to say, for administration by injection. There was no dispute that Penicillin S-R met this condition. But there was a difference of opinion on whether the second condition had been complied with. This was that the biological product should have been manufactured under license of the Department of National Health and Welfare (the successor of the Department of Pensions and National Health referred to in the item) under regulations prescribed by the Food and Drugs Act. It was established that the Penicillin S-R in question had been manufactured by Charles Pfizer and Company of Brooklyn, New York, under License No. 503, issued by the Department of National Health and Welfare. This license did not refer to Penicillin S-R specifically under that name but did so under the name "Procaine Penicillin and Buffered Crystalline Penicillin for Aqueous Injection". While the facts of the issue of the license and the manufacture of the Penicillin S-R under it were not disputed it was contended that this condition meant that in order that a biological product should be admissible under Tariff Item 206*a* it must be shown that it was licensed to be manufactured as a biological product and that since Penicillin S-R had not been so licensed it was not admissible under it. This was the main argument before the Board. There is a simple

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answer to it. Tariff Item 206*a* does not say that the biological product must have been licensed to be manufactured as a biological product. It was a sufficient compliance with the condition that it had been manufactured, as Penicillin S-R was, under a valid license. Thus, if Penicillin S-R was a biological product, both conditions for its admissibility under Tariff Item 206*a* were met, leaving only the question whether it was a biological product.

This was a difficult matter to decide. There were really two questions involved, the first being the meaning of the term "biological products" and the second whether Penicillin S-R was a biological product within such meaning.

The first main contention for the appellant was that the term must be read in the light of the Regulations under the Food and Drugs Act referred to in the item. These were made by Order in Council 123/1852, dated August 16, 1934, and are set out in the Canada Gazette, Volume 68, Part I, in a Supplement, dated September 29, 1934. Division II B of these Regulations is headed "Regulations for the Licensing, Manufacture and Sale of Drugs listed in Parts II and III, Schedule B of the Food and Drugs Act, R.S. 1927, hereinafter referred to as Biological Products" and paragraph 11 of the General Requirements of these Regulations provides as follows:

> 11. For the purpose of these regulations, viruses, serums, toxins, antitoxins, and analogous products intended for use by parenteral administration and applicable to the prevention or treatment of diseases of man, shall be referred to as biological products and defined as follows:

Then follow definitions of the specified substances, virus, serum, toxin, antitoxin and analogous products. The argument in support of the contention was that in 1936, when the term "biological products" first appeared in the Customs Tariff in Tariff Item 206*a*, it did not have a generally known meaning. It was stated that at that time it had not appeared in any dictionary, that it was not in the New English Dictionary, Volume 1, or in the Shorter Oxford English Dictionary, Volume 1 (first published in 1933), or in Webster's New International Dictionary of 1909, as revised on January 1, 1927, and that its first appearance in a dictionary was in Webster's New International Dictionary, Second Edition, in 1942. It was further urged that, while in 1936 there was no dictionary definition of the term and, consequently, no generally known meaning, there was

a statutory definition of it in 1934 in the Food and Drugs Act Regulations referred to and that that was the only definition of the term that was then known. On that basis, the submission was made that it ought to be assumed that Parliament had that statutory definition in mind when it used the term in Tariff Item 206*a* in 1936, particularly in view of the fact that in the item Parliament specifically referred to the very regulations in which the statutory definition had appeared, and that the term should be interpreted accordingly.

There are several reasons for rejecting this submission. The first is that counsel was mistaken in stating that the term "biological products" did not have a generally known meaning in 1936 and that its earliest dictionary definition was in 1942. The fact is that it appeared in 1934 in Webster's New International Dictionary, Second Edition, which was first published in 1934 after more than ten years of preparation. The reason for the mistake is, no doubt, due to the fact that the 1934 print of the Second Edition of Webster's New International Dictionary was not in the Supreme Court Library and only a later print of it was available there. But the 1934 print is in the Parliamentary Library and I was able to consult it there. In this 1934 print there is a full definition of the term "biological product" as follows:

> *Pharm.* A complex substance, preparation, or agent, of organic origin, depending for its action on the processes effecting immunity, and used esp. in diagnosis and treatment of disease, as a vaccine or pollen extract; also, any such complex product (whether of organic or synthetic origin) obtained or standardized by biological methods or assay, as arsphenamine, pituitary extract, or insulin; a biological.

In the same 1934 print the term "biological" was defined as:

> 1. Of or pertaining to biology or to life and living things; pertaining to or characteristic of the processes of life (hence sometimes practically synonymous with *physiological*).
>
> 2. Used in, or produced by, practical application of biology; as, biological methods, products, or supplies.

and when "biological" was used as a noun it meant: "*Pharm.* A biological product." In the same 1934 print there were definitions of "biological assay", "biological method", "biological supplies" and other terms relating to biology. This term was itself extensively defined but it is sufficient to describe it as "the science of life; the branch of knowledge which treats of living organisms." It is plain

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from the fullness of the definition of "biological products" and the broad scope of use of the word "biological" in its various associations that these words were generally known for some time prior to 1934. Consequently, the argument that the term "biological products" must be read in the light of the so-called statutory definition of it in the 1934 Food and Drugs Act Regulations because it was the only definition known in 1936 collapses. The fact is that in 1936 it had a generally known and defined meaning and there was no need to resort to the so-called definition in the Regulations.

Moreover, there was no definition of the term "biological products" in the said Regulations. There was no attempt to set out its meaning. All that was done was to say that certain specified substances, which were themselves separately defined, should be referred to as biological products but the list of such substances did not purport to exhaust the category of biological products.

And it should also be noted that the specific substances were to be referred to as biological products "for the purpose of these regulations". There was nothing in either the Regulations or Tariff Item 206*a* to indicate or suggest that the term "biological products" should, for the purposes of the Customs Tariff, be restricted to include only the specific substances mentioned in the Regulations. If that had been intended the specific substances would have been enumerated in the Tariff Item in the same way as in the Regulations or some other indication to that effect would have been given.

Furthermore, it ought not to be assumed, in the absence of clear terms to that effect, that it was intended that the question whether a substance was or was not exempt from duty under an item of the Customs Tariff should depend on regulations made under some other Act such as the Food and Drugs Act for that would, in effect, remove the administration of the item from the Customs authorities and vest it in the authorities charged with the administration of the Food and Drugs Act. If that had been intended Parliament would not have used the general term "biological products" by itself but would have qualified it and used some other term, such as "biological products as

defined in regulations prescribed by the Food and Drugs Act". But Parliament did not place any such limitation on the meaning of the term.

Accordingly, I am of the opinion that it was erroneous to look to the Food and Drugs Act Regulations for the meaning of the term "biological products" in Tariff Item 206*a* and I, therefore, find it unnecessary to review the changes made in these Regulations from time to time.

It is, I think, sound to say that, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning. Here it is plain that Tariff Item 206*a* was concerned with substances of a pharmaceutical nature. Consequently, the term "biological products" must be regarded as a technical term and read with the meaning it would have to persons in the pharmaceutical industry. In that field it had in 1936, and for some time previously, a generally known meaning of wide import, namely, the dictionary meaning which I have cited. In my judgment, that is the meaning that should be given to it in Tariff Item 206*a*.

While its meaning was generally known to persons in the pharmaceutical industry the limits of its ambit were not fixed. Consequently, the fact that penicillin was not known commercially until about 1940, although known to scientists previously, did not exclude it from being a biological product within the meaning of Tariff Item 206*a*. Section 10 of the Interpretation Act, R.S.C. 1927, chapter 1, provides that the law shall be considered as always speaking, from which it follows that words used in an enactment may, as the years go by, apply, without any change in their meaning, to things that were not known at the time they were first used. And so it was with Penicillin S-R, if, when it became known, it was a "biological product" within the meaning which the term had in 1936.

I now come to the second question, namely, whether Penicillin S-R was a biological product within the meaning of the term as used in Tariff Item 206*a*. This was a matter of controversy. I shall first deal with the opinion evidence on whether penicillin was a biological product. On this question the Board had assistance from several sources. I

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need not enumerate all of them. The most important witness for the respondent was Dr. F. D. S. Stimpert, the director of biological research in the biological laboratories of the respondent. He said that the biological research division of the respondent was engaged in the investigation and development of biological products pertaining to the prevention and treatment of infectious diseases, which investigations particularly included the study of the characteristics and production of substances produced by the growth of micro-organisms, the study of penicillin and other antibiotics being a major activity, and then made the following statement:

> Products commonly recognized in the pharmaceutical industry as "biological products" have certain common characteristics, namely:
>
> (*a*) They have their source and origin in micro-organisms, such as mold, fungi, bacteria and viruses.
>
> (*b*) They are produced by the growth of such micro-organisms.
>
> (*c*) They have a tendency to lose potency under storage.

And then said:

> Penicillin possesses all of the above characteristics and is therefore considered a biological product.

Then Dr. Stimpert stated that he had reviewed the definition of "biological product" as found in Webster's New International Dictionary, Second Edition, Unabridged, and read it into the record. He did not state the date of the print he referred to and counsel assumed that it was in 1942. Whether that was so or not, the fact is that the definition to which he referred was in exactly the same words as those of the definition in the 1934 print of the dictionary, which I have cited. After Dr. Stimpert read the definition he made the following statement:

> in my opinion penicillin is a biological product within the meaning of this definition.

Counsel for the appellant strongly criticized this statement on the ground that Dr. Stimpert did not state which part of the dictionary definition penicillin fell within. While there is ground for this criticism it does not dispose of the opinion for even if it were shown that penicillin was not a complex substance of the kind referred to in the first part of the definition it might be a complex substance of the kind referred to in the second part.

Then Dr. Stimpert referred to antibiotics. Here I should mention the fact that while it was disputed before the Board that penicillin was a biological product it was agreed that it was an antibiotic. On the controversial subject whether an antibiotic is a biological product Dr. Stimpert gave his opinion. He stated that it had been his experience in the biological field that antibiotics, since their origin, had been regrouped with biological products, particularly in the state of biologics or products arising from bacterial or micro-organism growth. He reviewed the development of the term "antibiotic", which came into use in 1940 and 1941, especially with the introduction of penicillin as a chemotherapeutic agent, and said that the accepted definition of an antibiotic was one given by Dr. Waksman and published in 1947 in a scientific journal called Mycologia, Volume 39, No. 5, at page 568, as follows:

> An antibiotic is a chemical substance, produced by micro-organisms, which has the capacity to inhibit the growth of and even to destroy bacteria and other micro-organisms. The action of an antibiotic against micro-organisms is selective in nature, some organisms being affected and others not at all or only to a limited degree; each antibiotic is thus characterized by a specific anti-microbial spectrum. The selective action of an antibiotic is also manifested against microbial vs. host cells. Antibiotics vary greatly in their physical and chemical properties and in their toxicity to animals. Because of these characteristics, some antibiotics have remarkable chemotherapeutic potentialities and can be used for the control of various microbial infections in man and in animals.

He then gave his opinion as follows:

> Serious analysis of these definitions and of the literature I have quoted, and my experience, prompt me to say it is my opinion that penicillin, as an antibiotic as defined, would come under the scope of a biological product.

Then Mr. F. E. Willson, a pharmaceutical chemist employed by the respondent, agreed with Dr. Stimpert.

There was also a statement by J. H. Kane, the director of the biochemical research and production division of the "Charles Pfizer organization" in Brooklyn, as follows:

> It is of course possible to give special and limited meanings to the term "biological product" for specific purposes but these two words standing alone mean to those trained in this field any product which is (1) produced as a result of the growth processes of micro-organisms which would include molds such as those which are employed in the production of penicillin, (2) assayed by biological methods, and (3) employed primarily in the treatment of diseases.

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This statement closes with the following conclusion:

> Penicillin unquestionably meets all three of these fundamental criteria,

The only contrary opinion before the Board was that of the Department of National Health and Welfare, as expressed by Mr. A. Papineau-Couture, one of its officers that penicillin was an antibiotic but was not considered a biological product. No experts other than Mr. Papineau-Couture were called on behalf of the Deputy Minister. The case against the admission of Penicillin S-R consisted of this opinion and the contention that since penicillin was not licensed to be manufactured as a biological product it was not admissible under Tariff Item 206*a*.

There was thus ample material before the Board from which it could reasonably consider that penicillin was a "biological product". But, according to counsel for the appellant, that did not conclude the matter. It was argued that even if penicillin was a biological product it did not follow that Penicillin S-R was, that there was no evidence before the Board on how Penicillin S-R was manufactured or produced and that it was not shown that it had its source and origin in micro-organisms or that it was produced by the growth of micro-organisms or that it was used as a vaccine or a pollen extract or that it otherwise came within the definition of biological product. It was also urged that such evidence as there was indicated that Penicillin S-R was a different substance from penicillin. It was described as a procaine and buffered crystalline penicillin and it was said that this meant that it was a salt resulting from the reaction of procaine on penicillin and, therefore, a derivative of it and different from it. The fact that it was buffered was said to make it a manufactured product rather than a biological product. This opinion commended itself to the dissenting member of the Board who drew on his own knowledge as a chemist—which, with respect, he had no right to do—to come to his dissenting opinion. Basically, the argument was that the appealing importer had failed to discharge the onus cast upon it of showing that Penicillin S-R was a biological product. There was a general criticism that the experts had spoken in general

terms about penicillin whereas the substance which the Board had to deal with was Penicillin S-R, not penicillin, and there was nothing to show that what was said about penicillin was applicable to Penicillin S-R.

This criticism is not well founded. It is clear from the transcript of the proceedings before the Board that there was no doubt in the minds of the parties and the witnesses that penicillin included Penicillin S-R and that when the former was referred to the reference applied to the latter. For example, Mr. Papineau-Couture said that there were various kinds of penicillin and proceeded to enumerate them. In his enumeration he placed "procaine penicillin and buffered crystalline penicillin for aqueous injection", the proper name by which Penicillin S-R was described in License 503. Moreover, Order in Council P.C. 5090, dated November 5, 1948, which enacted amended Regulations for licensing manufacturers to operate registered establishments for the manufacture of injectable antibiotics and injectable preparations containing antibiotics made it clear that penicillin included its salts and derivatives. Paragraph 20 provided:

> 20. Penicillin shall be an antibiotic as defined in paragraph 1 and shall be one or more of the antibiotic substances produced during the growth of fungi such as *Penicillium notatum, Penicillium chrysogenum,* and the salts and derivatives of such substances. The proper name shall be that specified in the license.

Then paragraphs 27 to 32 deal with crystalline penicillin as a kind of penicillin and paragraphs 38 to 42 refer to procaine penicillin as a kind of penicillin. And there was no doubt in Dr. Stimpert's mind that he was being called upon to give his opinion on whether Penicillin S-R was a biological product and that he considered it a kind of penicillin. The following extract from the transcript is important:

> Mr. KELLEY: Doctor, you are familiar with the question before this Board which I think we can limit to whether or not penicillin S-R is a biological.
>
> Dr. STIMPERT: Yes.
>
> The CHAIRMAN: Do you mind if I ask the Doctor what "S-R" means?
>
> Dr. STIMPERT: The two terms are "soluble" and "repository", which term is used for the action of penicillin. It is a combination of two crystal sizes of penicillin.
>
> The CHAIRMAN: The reason I ask this is to provide for any dispute over the kind of penicillin.
>
> Mr. KELLEY: This is the penicillin we are restricted to

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In my opinion, this completely disposes of the appellant's criticism. Instead of constantly repeating the term Penicillin S-R everyone spoke of it as penicillin but Penicillin S-R was clearly in their minds. Thus everything that was said of penicillin must be considered as having been said of Penicillin S-R.

This brings me to my conclusion. The issue in this appeal is not whether Penicillin S-R was actually a biological product within the meaning of Tariff Item 206*a* but whether the Tariff Board erred as a mater of law in deciding that it was and, therefore, exempt from duty by virtue of it. If there was material before the Board from which it could reasonably decide as it did this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. Moreover, the decision of the Board might not have been the same if the case before it on behalf of the Deputy Minister had been put differently. Whether penicillin is a biological product within the dictionary definition I have cited, either under the first part or under the second, appears to be a matter of controversy but this was not developed as it might have been. The persons presenting the Deputy Minister's case seem to have been so beset with the idea that Penicillin S-R could not be admitted as a biological product under Tariff Item 206*a* because it was not licensed to be manufactured as a biological product and because the officers administering the Food and Drugs Act classed it as an antibiotic and, consequently, not a biological product that they did not bring convincing expert opinion in support of the contention that Penicillin S-R was not a biological product before the Board. The preponderance of expert opinion was thus strongly in favor of the appealing importer's position.

Consequently, I am satisfied that the majority of the Board, on the material before it, acted reasonably in deciding that Penicillin S-R was a biological product within the meaning of Tariff Item 206*a* and exempt from duty by virtue of it. Indeed, it is difficult to see how, on such material, it could have decided otherwise.

I am, therefore, of the opinion, without attempting to decide positively whether Penicillin S-R was a biological product or not, that the Tariff Board did not err as a matter of law in deciding as it did. That being so, the answer to Question 1 is in the negative.

It follows that the appeal herein must be dismissed with costs.

Judgment accordingly.