BETWEEN:

1954
May 27,
June 17
Aug. 23

CANADIAN HORTICULTURAL COUNCIL, CANADIAN FOOD PROCESSORS ASSOCIATION AND DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANTS,

AND

J. FREEDMAN & SON LIMITED ..... RESPONDENT.

Revenue—Customs Duty—Customs Act, R.S.C. 1952, c. 58, s. 45(1)—Fruit Cocktail, Fruits and Salad—Customs Tariff, R.S.C. 1952, c. 60, Tariff Items 105 f, 105 (g), 106, 711—Applications for leave to appeal from decision of Tariff Board—Leave to appeal a matter of judicial discretion.

The appellants applied for leave to appeal from the declaration of the Tariff Board that the products described as Fruit Cocktail and Fruits for Salad were classifiable under sub-item (d) of Tariff Item 106 of the Customs Tariff.

Held: That in an application under section 45 of the Customs Act the Court or judge before whom the application is made must not only form an opinion on whether there is a question of law involved in the order, finding or declaration of the Tariff Board but also, if in its or his opinion there is such a question, exercise judicial discretion in determining whether, in the circumstances of the case, leave to appeal on such question should be granted or refused.

2. That if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

Applications for leave to appeal under section 45 of the Customs Act.

The applications were heard before the President of the Court at Ottawa.

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J. M. Coyne for appellants Canadian Horticultural Council and Canadian Food Processors Association.

W. R. Jackett Q.C. for Appellant Deputy Minister of National Revenue for Customs and Excise.

G. F. Henderson Q.C. for respondent.

M. E. Corlett for Canadian Importers and Traders Association.

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

THE PRESIDENT now (August 23, 1954) delivered the following judgment:

Two separate applications for leave to appeal from the declaration of the Tariff Board in Appeal No. 314, dated April 28, 1954, were made before me, the first on behalf of the Canadian Horticultural Council and the Canadian Food Processors Association and the second on behalf of the Deputy Minister of National Revenue for Customs and Excise.

The applications were made under section 45 of the Customs Act, R.S.C. 1952, Chapter 58, of which subsection 1 reads as follows:

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

And the question in respect of which leave to appeal was sought was in each case stated as follows:

> Did the Tariff Board err as a matter of law in deciding that the products described as Fruit Cocktail and Fruits for Salad and imported under Ottawa Customs Entry No. 38872 of February 25, 1953, and Montreal Customs Entry No. C-78458 of October 9, 1953, and Montreal Customs Entry No. C-10328 of April 23, 1953, were classifiable under sub-item (*d*) of Tariff Item 106 of the Customs Tariff?

A copy of the declaration of the Tariff Board from which leave to appeal was sought was attached as an exhibit to the affidavit of G. A. Rogers, filed in support of the second application. It is also to be found in the issue of the Canada Gazette, dated May 8, 1954: *vide* Volume 88, page 1556.

It appears from Mr. Hooper's affidavit that the products in issue were all prepared in air-tight cans or other air-tight containers and that the labels on the cans described their respective contents. Thus, the contents of the Del Monte Fruit Cocktail were "diced peaches, diced pears, pineapple tidbits, seedless grapes, halved cherries" with a 40% sugar syrup; those of the Del Monte Fruits for Salad "sliced peaches, sliced pears, halved apricots, pineapple tidbits, whole cherries artificially coloured" with a 40% sugar syrup; those of the Dainty-Mix Fruit Cocktail "diced yellow peaches, diced pears, seedless grapes, pineapple tidbits, halved cherries, the fruit cocktail being "artificially flavoured" and with a 35% sugar syrup; and those of the All Good Fruit Cocktail "diced peaches, diced pears, pineapple tidbits, seedless grapes, halved cherries", the cherries being "artifically coloured red and artifically flavoured" with a 40% sugar syrup.

The Deputy Minister decided that the Del Monte Fruit Cocktail, the Del Monte Fruits for Salad and the All Good Fancy Fruit Cocktail were dutiable under tariff item 106 (a) and that the Dainty-Mix Brand Fruit Cocktail was dutiable under tariff item 105 g. From this decision the respondent herein appealed to the Tariff Board.

It appears from the decision of the Tariff Board that on the hearing before it it was contended for the appellant (the respondent herein) that the products were entitled to entry under tariff item 106 (d), and for the Deputy Minister that they could not properly be classified under tariff item 106 (or any subitem thereof) but must be classified as preserves under tariff item 105 f or as goods not enumerated in the Customs Tariff and, therefore, under tariff item 711.

It is, I think, desirable to set out the several tariff items referred to. They appear in the Customs Tariff, R.S.C. 1952, Chapter 60, as follows:

105 f Jellies, jams, marmalades, preserves, fruit, butters and condensed mincemeats.

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105(*g*) Fruits and peels, crystallized, glacé, candied or drained; cherries and other fruits of crème de menthe, maraschino or other flavour.

106 Fruits, prepared, in air-tight cans or other air-tight containers, the weight of the containers to be included in the weight for duty:—

(*a*) Peaches
(*b*) Apricots and pears
(*c*) Pineapples
(*d*) N.o.p.

711 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.

In each case the rate of duty under the applicable heading is set out.

The Tariff Board, after referring to the contentions made before it, concluded its decision with the following statements:

It is our opinion that the final subitem (*d*) of tariff item 106, reading "N.o.p.", covers and must be deemed to have been intended to cover, such fruits, prepared, in air-tight cans or other air-tight containers, as are not separately named in subitems (*a*), (*b*) or (*c*) of the said tariff item 106. Subitems (*a*), (*b*) and (*c*) of tariff item 106 do not restrict the general coverage of tariff item 106 but simply provide, at appropriate rates of duty, for certain products within the general coverage.

The four mixed fruits under appeal are "Fruits, prepared, in air-tight cans or other air-tight containers". They are not provided for under the subitems (*a*), (*b*) or (*c*) and hence must be classified under subitem (*d*).

Accordingly, the appeal is allowed and the four products at issue are declared to be properly classifiable for duty purposes under tariff item 106 (*d*) at the rate of duty appertaining thereto.

It was from this declaration that the two applications for leave to appeal were made to me.

On the hearing of the first application on May 27, 1954, I was of the opinion that there was a question of law involved in the declaration of the Tariff Board. I thereupon stopped counsel for the applicant and called on counsel for the respondent. He objected to leave to appeal being granted on grounds which I shall summarize briefly. He submitted that if the construction of words in the items of the Customs Tariff was always a question of law, as appeared from the decisions of Cameron J. in *General Supply Co. Ltd.* v. *Deputy Minister of National Revenue, Customs and Excise,*

et al (1) and *Deputy Minister of National Revenue for Customs and Excise* v. *Rediffusion Inc.* (2), then it would follow that almost every decision of the Tariff Board involved a question of law, that if leave to appeal were to be granted in every case where a question of law was involved it would follow that leave would be granted in almost every case, that, in view of the language used in section 45 of the Customs Act, Parliament could not have intended such a situation, that, consequently, the applicant for leave to appeal must show not only that there is a question of law involved but also that there is some sound reason for granting leave to appeal on such question, that it was established by the Supreme Court of Canada in *The Royal Templars of Temperance* v. *Hargrove* (3) that in a case which raises no question of public importance and the judgment appealed from appears to be sound an application for leave to appeal should be refused, that these grounds for refusing leave existed in the present case and that, accordingly, leave to appeal should be refused.

After hearing counsel for the appellant Canadian Horticultural Council and also counsel for the appellant Deputy Minister as well as counsel for Canadian Importers and Traders Association, who opposed the application, I delivered judgment orally stating that while there was a question of law involved in the decision of the Tariff Board I agreed with the submission of counsel for the respondent that some sound reason must be shown for granting leave to appeal, that it had been decided in *The Royal Templars of Temperance* case *(supra)* that if there was no question of public importance and the decision appealed from appeared well founded leave to appeal should be refused, that it was not necessary to decide whether there was a question of public importance in view of my opinion that the decision appealed from appeared to be well founded and that for this reason I refused leave to appeal.

On the same date, on the application of counsel for the Deputy Minister of National Revenue for Customs and Excise, I granted an extension of time within which an application for leave to appeal might be made on his behalf

(1) [1953] Ex. C.R. 185. (2) [1953] Ex. C.R. 221.
(3) (1901) 31 Can. S.C.R. 385.

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and this application came before me on June 17, 1954, with the same counsel appearing as had appeared on the first application.

Counsel for the respondent objected to argument being heard and submitted, pursuant to a notice of motion to that effect, that the application should be dismissed, urging that its subject matter was *res judicata* by reason of my decision on the first application and that I was bound by it. It was my view that the importance of the questions involved warranted further argument and that the application should be considered on its merits, saving to the respondent, if it should be necessary, whatever rights, if any, it might have to judgment dismissing the application on the ground that its subject matter was *res judicata*. On that basis the argument proceeded *de novo* and several questions of interest and importance were raised.

The first was whether any question of law was involved in the Tariff Board's declaration. It was contended by counsel for the respondent that no question of law was involved in the meaning of the word "fruits" in Tariff Item 106, that it was a common word and that its meaning was a question of fact. In support of this view he relied on the decision of the House of Lords in *Girls' Public Day School Trust* v. *Ereautl* (1) that the term "public school", as used in Schedule A of the Income Tax Act, 1918, was not a term of art and that the question of its common understanding was a question of fact for the Commissioners. But counsel for the Deputy Minister did not put his argument on the basis that the meaning of the word "fruits" *per se* was a question of law. It was the meaning of the whole Tariff Item that was involved. While there is much to be said for the contention of counsel for the respondent that the meaning of common words is a question of fact rather than of law I am of the opinion that a question of law was involved in the Tariff Board's declaration in this case.

That being so, counsel for the respondent objected to the granting of leave in this case for reasons similar to those which he had advanced on the first application. In doing so he broke new ground. Previously, the judge hearing an application for leave to appeal from a decision of the Tariff

(1) [1931] A.C. 12.

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Board was concerned only with the formulation of an opinion whether there was a question of law involved in the order, finding or declaration sought to be appealed from. If, in his opinion, there was such a question leave to appeal on it was granted as a matter of course. There was no enquiry whether the question of law was such as to warrant the granting of leave to appeal. I must confess that until counsel for the respondent raised the question on the first application the judges of this Court did not consider it. In my opinion, they must hereafter do so. This was conceded by counsel for the Deputy Minister. It now seems obvious that section 45 of the Customs Act does not give a right of appeal merely because in the opinion of the Court or judge there is a question of law involved in the order, finding or declaration of the Tariff Board. The right of appeal is dependent on leave to appeal being granted. This connotes the exercise of judicial discretion in determining whether leave should be granted, even although a question of law is involved: *vide Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1); *In re Ontario Sugar Co. McKinnon's Case* (2). Consequently, on an application under section 45 of the Customs Act the Court or judge before whom the application is made must not only form an opinion on whether there is a question of law involved in the order, finding or declaration of the Tariff Board but also, if in its or his opinion there is such a question, exercise judicial discretion in determining whether, in the circumstances of the case, leave to appeal on such question should be granted or refused. Since the exercise of this discretion may seriously affect the extent of such right of appeal as is now conferred by section 45 of the Customs Act it is desirable to consider, as far as it may be possible to do so, the principles to be applied in such exercise.

While, of course, there are no direct decisions on the question there is guidance in decisions of the Supreme Court of Canada on applications for leave or special leave to appeal to it. It is natural that these should more clearly indicate the circumstances in which leave should be refused than those in which it should be granted. Indeed, it is recognized that it would not be possible to define the cir-

(1) (1904) 35 Can. S.C.R. 197 at 200.

(2) (1911) 44 Can. S.C.R. 659 at 662.

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cumstances in which leave should be granted. This was clearly stated by Nesbitt J. in *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1), where he said:

> In applications to this court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and any attempt to formulate any such rule might, therefore, prove misleading. The court may indicate certain particulars the absence of which will have a strong influence in inducing it to refuse leave, but it by no means follows that leave will be given in all cases where these features occur.

Then Nesbitt J. indicated some of the circumstances in which leave to appeal might be granted, as follows:

> Where, however, the case involves matters of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be given.

In *Calgary & Edmonton Land Co.* v. *Attorney General of Alberta* (2) special leave to appeal was granted because of the magnitude of the interests involved. And in *In re Hotel Dunlop Ltd.; Quinn* v. *Guernsey* (3) Anglin C.J. allowed special leave to appeal because of the general importance of the questions involved and the doubt involved in the conflicting judgments below.

But the decisions are fairly consistent in deciding when leave to appeal should be refused. For example, in *Fisher* v. *Fisher* (4) it was held that under the circumstances disclosed it did not appear that the questions at issue in the case were of sufficient importance to justify the court in making an order granting special leave to appeal. And in *The Royal Templars of Temperance* v. *Hargrove (supra)* Sir Henry Strong C.J. stated that if a case raises no question of public importance and the judgment appealed from appears to be sound an application for leave to appeal should be refused. In *Lake Erie and Detroit River Rway. Co.* v. *Marsh (supra)* Nesbitt J. went further. After referring to the difficulty involved in any attempt to define the circumstances in which leave to appeal should be granted he pointed out that even although a case is of great public

(1) (1904) 35 Can. S.C.R. 197 at 199.
(2) (1911) 45 Can. S.C.R. 170.
(3) [1927] S.C.R. 134.
(4) (1898) 28 Can. S.C.R. 494.

interest and raises important questions of law it does not follow automatically that leave to appeal will be granted. There may be an overriding consideration to be taken into account, namely, that the judgment appealed from is plainly right. This very important statement is put in the following terms, at page 200:

> If a case is of great public interest and raises important questions of law and, yet, the judgment is plainly right, no leave should be granted.

In *In re Ontario Sugar Co. McKinnon's Case* (1) Anglin J. refused leave to appeal on the ground that he saw no reason to doubt the correctness of the judgment against which it was sought to appeal and, later, that it seemed to him to be plainly right and, still later, that the proposed appeal raised no question of public importance. In *Schaefer* v. *The King* (2) Anglin J. refused special leave to inscribe an appeal on the ground that the judgment appealed from was so clearly right that an appeal from it would be hopeless. In *Riley* v. *Curtis's and Harvey and Apedaile* (3) Mignault J. refused leave to appeal on the ground that no important principle of law nor the construction of a public act nor any question of public interest was involved. And in *Canadian Credit Men's Trust Association Ltd.* v. *Hoffar Ltd.* (4) Mignault J. refused leave to appeal from a judgment which in his opinion was clearly right on the ground that the applicant for leave would not have a fairly arguable case to submit to the Court.

It was urged by counsel for the Deputy Minister that in applications for leave to appeal under section 45 of the Customs Act a somewhat different view should be taken of the judicial discretion to be exercised. The submission, put shortly, was that in such cases it could not be said that no question of public importance was involved since customs cases, involving as they do the public revenue and in some cases international trade, are always of public importance, that, consequently, leave to appeal should ordinarily be granted, that the requirement of leave was intended only to operate as a brake on frivolous or improper appeals and that all that was necessary for the granting of leave was that the question of law should be one of substance and seriously arguable.

(1) (1911) 44 Can. S.C.R. 659.
(2) (1919) 58 Can. S.C.R. 43.
(3) (1919) 59 Can. S.C.R. 206.
(4) [1929] S.C.R. 180.

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Counsel then contended that there was a seriously arguable question of law in the present case and, in effect, proceeded with his submission that the declaration of the Tariff Board was wrong. Substantially, his argument was that the use of the word "fruits" in Tariff Item 106 rather than the word "fruit" showed an intention to deal with individual fruits, each in its own juice with sugar, such as peaches in subsection (a), pears or apricots in subsection (b) and pineapples in subsection (c), that, consequently, subsection (d) was intended to cover only individual fruits, not otherwise provided for in subsections (a), (b) and (c), and was not intended to cover mixed pieces of various fruits in the mixed juices of such several fruits and that, consequently, the fruit cocktail and fruits for salad in issue, not being individual fruits, were wrongly classified under Tariff Item 106 (d).

While it may be conceded that since an item in the Customs Tariff is involved leave to appeal should not be refused on the ground that no question of public importance is involved, I am of the view that, as in the case of applications for leave or special leave to appeal to the Supreme Court of Canada, it is not possible to lay down specific and all-embracing rules for the granting of leave to appeal under section 45 of the Customs Act. But I see no reason why the grounds for refusing leave to appeal should not be similar to those taken by the Supreme Court of Canada in dealing with applications for leave to appeal to it. Consequently, in my opinion, if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

In my judgment, that is the situation in the present case. I am unable to accept the argument that the use of the word "fruits" in Tariff Item 106 instead of the word "fruit" had the effect submitted for it of excluding from the ambit of the Item mixed fruits such as the products in issue. The selection of the plural rather than the singular might easily have been an accident of draftsmanship. Moreover, I see no

reason for doubting the correctness of the Tariff Board's decision. Indeed, in my opinion, it appears sound and right and should be accepted as final.

Leave to appeal is, therefore, refused in the second application as it was in the first.

In view of this conclusion it is unnecessary to deal with the question whether the subject matter of the second application was *res judicata* by reason of my refusal of leave in the first application.

These reasons for judgment, being to the same effect as those given orally in refusing leave to appeal on the first application, are as applicable to such refusal as to the refusal in the second application.

In each case the refusal of leave is with costs to the successful parties as against the applicant for leave.

Judgment accordingly.

N.B. An appeal from the above decision to the Supreme Court of Canada was quashed by order of the Court on October 18, 1954.