Federal Court of Appeal | Cour d'appel fédérale

Date: 20180802

Docket: A-102-17

Citation: 2018 FCA 146

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DISTRIBUTION G.V.A. INC.

Respondent

Heard at Montréal, Quebec, on February 13, 2018.

Judgment delivered at Ottawa, Ontario, on August 2, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] As part of its efforts to reduce smoking, Canada amended the *Tobacco Act*, S.C. 1997, c. 13 (the Act) in 2015 to prohibit the addition of flavouring additives to certain cigarette-like cigar products (cigarillos) which were popular with young Canadians. The Act provides an exception for additives which were used in traditional products favoured by adults, specifically additives

which impart a flavour that is generally attributed to port, wine, rum or whisky. The Act also prohibits packaging these products in a way which suggests that they contain prohibited additives.

[2] The respondent, Distribution G.V.A. Inc. (GVA), is an importer and distributor of tobacco products. It imported and marketed cigars bearing the names “Neos Al’s Cognac Selection”, “Al’s Cognac Collection” and “Honey T Spiral Ice Wine”. Between March 9, 2016 and April 27, 2016, Health Canada inspectors took steps to have these products removed from retailers’ shelves in various Canadian cities on the basis that they violated the packaging restrictions in the Act. GVA attempted to persuade the authorities that its cigarillos complied with the Act, but when these efforts proved unsuccessful, it brought an application for judicial review seeking a declaration that the packaging of its products did not suggest that they contained prohibited additives and that “Ice Wine” and “Cognac” flavours are not prohibited by the Act.

[3] In a decision reported as 2017 FC 205 (Reasons), the Federal Court declared that the cigarillos packaged and sold as “Neos Al’s Cognac Selection” and “Al’s Cognac Collection” were non-compliant, but that those sold as “Honey T Spiral Ice Wine” fell within the exceptions set out in the Act governing the manufacture, sale and packaging of cigarillos. The Attorney General appeals from the decision insofar as it permits the use of “Honey T Spiral Ice Wine” in the packaging and sale of cigarillos.

[4] For the reasons set out below, I would dismiss the appeal.

II. THE LEGISLATIVE FRAMEWORK

[5] The purpose of the Act is set out in section 4:

4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,	4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :
(a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;	a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;	b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter;
(c) to protect the health of young persons by restricting access to tobacco products; and	c) de protéger la santé des jeunes par la limitation de l'accès au tabac;
(d) to enhance public awareness of the health hazards of using tobacco products.	d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

[6] The Act seeks to achieve its purpose by various means, including a prohibition on the use of additives in the manufacture and sale of tobacco products:

5.1 (1) No person shall use an additive set out in column 1 of the schedule in the manufacture of a tobacco product set out in column 2.	5.1 (1) Il est interdit d'utiliser un additif visé à la colonne 1 de l'annexe dans la fabrication d'un produit du tabac visé à la colonne 2.
5.2 (1) No person shall sell a tobacco product set out in column 2 of the schedule that contains an additive set	5.2 (1) Il est interdit de vendre un produit du tabac visé à la colonne 2 de l'annexe qui contient un additif

out in column 1.	visé à la colonne 1.

[7] The Schedule to the Act has two columns. Column 1 identifies prohibited additives, as well as certain additives which are excepted from the general prohibition, while column 2 identifies the products in which use of the additives in column 1 is forbidden by section 5.1 of the Act. Item 1 of column 1 prohibits the use of additives that "have flavouring properties or that enhance flavour," subject to certain exceptions, none of which are relevant here. The issue in this litigation is the interpretation and application of Item 1.1 of Column 1 which provides as follows:

1.1 The prohibited additives referred to in Item 1, excluding those that impart a flavour that is generally attributed to port, wine, rum or whisky.	1.1 Additifs interdits visés à l'article 1, sauf s'ils confèrent un arôme communément attribué au porto, au vin, au rhum ou au whisky.

[8] Sections 5.1, 5.2 and the Schedule deal with the manufacture and sale of tobacco products. The packaging of those products is dealt with at section 23.1 of the Act :

23.1 (1) No person shall package a tobacco product set out in column 2 of the schedule in a manner that suggests, including through illustrations, that it contains an additive set out in column 1.	23.1 (1) Il est interdit d'emballer un produit du tabac visé à la colonne 2 de l'annexe d'une manière qui donne à penser, notamment en raison d'illustrations, qu'il contient un additif visé à la colonne 1.
(2) No person shall sell a tobacco product set out in column 2 of the schedule that is packaged in a manner prohibited by subsection (1).	(2) Il est interdit de vendre un produit du tabac visé à la colonne 2 de l'annexe s'il est ainsi emballé.

[9] The Health Canada inspectors who took action against the sale of GVA's cigars did so in reliance on section 23.1: see Appeal Book, pages 33, 44, 101, 103 105.

III. THE FEDERAL COURT DECISION

[10] After brief introductory comments, the Federal Court stated its conclusion that cognac-flavoured additives are not included in the exemption for whisky-flavoured additives found in Item 1.1 while the ice wine-flavoured additive is included within the exemption for wine-flavoured additives: Reasons at para. 12.

[11] In arriving at its conclusion, the Federal Court explained that it subscribed to the modern theory of statutory interpretation according to which the courts must give effect to the grammatical and ordinary sense of the words of the statute, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27, 154 D.L.R. (4th) 193.

[12] The Federal Court also noted Parliament's stated intention of protecting youth, which suggested a narrow interpretation of the exceptions to the general prohibition on the use of flavouring additives: Reasons at para. 14. To that extent, the legislature's intention of protecting youth limited the rights of the manufacturers and sellers of tobacco products.

[13] At paragraph 15 of its reasons, the Court pointed out that the Act did not define the word "flavour". The Act prohibits the use of additives that add or enhance flavour, subject to the exception for additives which impart flavours generally attributed to port, wine, rum or whisky. The Court reasoned that references to "a flavour" and "generally attributed" in Item 1.1 of the Schedule leave room for different flavours so long as they are of a kind which would be

associated with ("generally attributed to") port, wine, rum and whisky. These flavours were present in full-size cigars that were on the market prior to the introduction of flavoured cigarillos that proved to be popular with young people. The exception for these four types of flavours is intended to limit the interference with the choices of adults in the traditional cigar market: Reasons at para. 16.

[14] The Federal Court held that in the absence of ambiguity, it should not limit the usual scope of the words "port, wine, rum or whisky": Reasons at para. 17. It found that "wine" and "whisky" are generic terms which include a number of different kinds of beverages. By way of example, it pointed to the existence of scotch, bourbon and Canadian (rye) whiskies which are all covered by the term "whisky" despite the variations in their tastes.

[15] On the other hand, the Court noted the Attorney General's position that wine should be interpreted more restrictively, given the presence of "port" in the list of permitted flavours. According to the Attorney General, this suggests that "wine" should be interpreted so as to exclude dessert wines such as Sauternes, ice wines or other sweet wines: Reasons at para. 17.

[16] The Court rejected this interpretation, pointing out that "wine" is not limited to table wines. It found that, in current usage, wine is a beverage prepared by fermenting grapes or grape juice. Wine can be categorized in many ways including colour, vintage, grape variety and degree of sweetness, among others. Ice wine is simply wine made from grapes which have been allowed to freeze on the vine. On the other hand, port is a fermented beverage to which alcohol is added, resulting in a fortified wine. The Court pointed out that nothing is added to ice wine.

[17] Applying the same approach to cognac, the Court rejected the contention that it fell within the term “whisky”. While both whisky and cognac are produced by distillation, whisky is made using grain while cognac is made by distilling wine.

[18] In the end, the Federal Court declared that GVA’s “Honey T Spiral Ice Wine” cigars did not contravene Item 1.1 of the Schedule and section 23.1 but that its “Neos Al’s Cognac Selection” and “Al’s Cognac Collection” cigars did: Reasons at para. 23.

IV. ISSUES

[19] The issues in the appeal can be stated as follows:

1- What is the standard of review of the Federal Court’s decision?

2- What is permitted by section 23.1?

V. ANALYSIS

1- What is the standard of review of the Federal Court’s decision?

[20] As can be seen from the brief sketch of the facts set out above, this case is about GVA’S desire to obtain relief from Health Canada’s interference with the sale of its tobacco products. The unusual feature of this case is GVA’s choice of remedy. Typically, a party in the shoes of GVA would proceed by way of judicial review, seeking an order setting aside Health Canada’s enforcement action. GVA’s decision to proceed by way of declaration rather than judicial review may have its roots in procedural considerations, *i.e.* a number of distinct enforcement actions, each with its own 30 day limitation, rather than in a desire to gain a tactical advantage.

[21] But whether it realized it or not, GVA's choice of remedy has consequences. It is apparent from a reading of the Federal Court's reasons that it did not consider itself engaged in judicial review, which meant that it did not address the issue of the standard of review. Everyone, including counsel for the Attorney General, proceeded on the basis that the object of the exercise in which they were engaged was to have the Court provide its interpretation of the Act and the Schedule. On the other hand, if GVA had decided to proceed by judicial review, the question of standard of review would have arisen and the Federal Court would have been required to decide whether reasonableness or correctness was the correct standard.

[22] In proceeding as it did, GVA bootstrapped itself past the standard of review analysis and imposed a correctness analysis on Health Canada when, as will be seen, the latter would have had the benefit of a reasonableness review had the matter proceeded as an application for judicial review. The issue which this raises is whether a party can, by its choice of remedy, choose the level of scrutiny (standard of review) to which an administrative decision-maker will be held.

[23] In principle and on the basis of this Court's jurisprudence, the answer is no. Accepting that a party can impose a correctness review simply by proceeding by way of declaration would effectively undo decades of administrative law jurisprudence in this Court and in the Supreme Court of Canada to the effect that where Parliament has entrusted the administration of a statutory scheme to an administrative decision-maker, that decision-maker's interpretation of the statutory scheme is entitled to deference: see *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 236, 97 D.L.R. (3d) 417; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1084, 1086, 95 N.R. 161; *Canada Post Corp. v. Pollard* (1993), [1994] 1 F.C. 652 at

para. 17, 109 D.L.R. (4th) 272; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; *Cairns v. B.L.E.*, 2001 FCA 133 at para. 38, [2001] 4 F.C. 139; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*); *Canada (Minister of Citizenship and Immigration) v. Singh*, 2016 FCA 96 at paras. 23-26, 397 D.L.R. (4th) 353; *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3 at para. 78, 417 D.L.R. (4th) 195; *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 at paras. 43-77.

[24] This Court has previously held that the form of a party's proceeding is not determinative of the Court's analysis of the issue raised by the proceeding. In *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 (*Schmidt*), this Court found that an application for a declaration that the Attorney General was not properly applying the *Charter* review provisions of the *Canadian Bill of Rights* and the Department of Justice Act "was in effect a judicial review of the interpretation of the examination provisions by the Minister, the Clerk of the Privy Council and the Deputy Minister": see *Schmidt* at paragraph 20. As a result, the issue of standard of review arose. The Court found that the presumption of reasonableness which applies when an administrative decision-maker is interpreting its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34, [2011] 3 S.C.R. 654 (*Alberta Teachers*)) was not rebutted: see *Schmidt* at paragraph 23.

[25] In my view, this is the situation in the case before us. GVA's proceeding, though framed as an application for a declaration, is in substance a judicial review of Health Canada's

enforcement action and by extension, its interpretation of the Act. As a result, it is necessary to address the standard of review.

[26] The standard of review in appeals from Federal Court decisions on judicial review amounts to asking whether the Court correctly identified the standard of review and, if so, whether it applied it correctly. In effect, the appellate court steps into the shoes of the reviewing court: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247, [2012] 1 S.C.R. 23; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46, [2013] 2 S.C.R. 559.

[27] In this case, the Act is not Health Canada's "home" statute but it is one with which it has particular familiarity since it is responsible for its enforcement. To that extent, the presumption of reasonableness review articulated in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 19 to 22, [2013] 3 S.C.R. 895 (*McLean*) and more recently in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, applies unless the question in issue falls within one of the exceptions to reasonableness review set out at paragraphs 58 to 61 of *Dunsmuir*. These exceptions include questions with respect to the division of powers under the Constitution Act, 1867, true questions of vires or jurisdiction, questions of law of central importance outside the tribunal's special expertise and questions regarding the jurisdictional lines between two or more competing specialized tribunals. The questions in issue here do not fall into any of these exceptions so that the standard of reasonableness applies.

[28] As was the case in *Alberta Teachers*, the decision in this case is implicit in the sense that the decision maker did not articulate reasons for taking the position it did. It simply asserted non-compliance with s. 23.1 of the Act: see Appeal Book at 46. To that extent, a reviewing court cannot pay respectful attention to the reasons given by the decision maker because there are no reasons. In cases of this nature, the reviewing court must examine the record to determine if there is a reasonable basis upon which the decision maker could have decided as it did. If so, the Court must not interfere: *Alberta Teachers* at paras 52–53.

[29] However, a Court may not delve unbounded into the record. As Justice Rennie put it in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431 at paragraph 11, 16 Imm. L.R. (4th) 267:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. […] *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

The Supreme Court agreed with this statement in *Delta Air Lines Inc. v. Lukàcs*, 2018 SCC 2 at paragraph 28, 416 D.L.R. (4th) 579. Thus, while there is inevitably some supposition in the exercise of completing reasons, the basis for a reasonable decision should readily appear from the record.

[30] In this case, there were no "dots on the page" because neither were there reasons, nor was there any evidence in the record, capable of explaining the basis for Health Canada's decision.

2- What is permitted by section 23.1?

[31] Section 23.1 of the Act deals with the packaging and sale of packaged tobacco products. For ease of reference, I reproduce it once more:

23.1 (1) No person shall package a tobacco product set out in column 2 of the schedule in a manner that suggests, including through illustrations, that it contains an additive set out in column 1.	23.1 (1) Il est interdit d'emballer un produit du tabac visé à la colonne 2 de l'annexe d'une manière qui donne à penser, notamment en raison d'illustrations, qu'il contient un additif visé à la colonne 1.
(2) No person shall sell a tobacco product set out in column 2 of the schedule that is packaged in a manner prohibited by subsection (1).	(2) Il est interdit de vendre un produit du tabac visé à la colonne 2 de l'annexe s'il est ainsi emballé.

[32] Column 1 of the Schedule lists or describes both prohibited and permitted additives. In addition, it refers to these additives either by name or by the effect which they have on the flavour of the product. For example, the opening words of Item 1 of column 1 refer to "[a]dditives that have flavouring properties or that enhance flavour including […]" This is followed by a list of 18 additives to which the prohibition does not apply and which are identified by name rather than by their flavouring properties. Item 1.1 adds another group of permitted additives, defined by the effect they produce rather than by name. The point to be retained is that column 1 is not limited to prohibited additives.

[33] On its face, subsection 23.1(1) prohibits the use of packaging which suggests that the enclosed tobacco product contains any of the additives "set out" in column 1. The words "set out" generally mean "included" or "referred to". One possible interpretation of this subsection is that the legislation is intended to prohibit the packaging of tobacco products in a way which suggests that they contain <u>any</u> of the additives contained in the Schedule. Another is that Parliament intended to ban only packaging which suggests the presence of <u>prohibited</u> additives.

In the course of its enforcement activities, and before this Court, Canada's representatives have proceeded on the basis of the second interpretation.

[34] Subsection 23.1(2) prohibits the sale of tobacco products in packaging which does not comply with subsection 23.1(1).

[35] When interpreting section 23.1 in the context of the Act as a whole, one must take into account the fact that Parliament would not take the trouble to identify exceptions to the general prohibition in the opening words of Items 1 and 1.1 if it intended to ban the use of all flavour enhancing additives. Parliament does not speak in vain: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 142, [2002] 2 S.C.R. 336; *R. v. Daoust*, 2004 SCC 6 at para. 52, [2004] 1 S.C.R. 217 (*Daoust*). Parliament's intention may have been more focussed than the words it used might suggest.

[36] Some assistance in deciding which interpretation of subsection 23.1 is to be preferred is found by referring to the French version of the legislation. It refers to "un additif visé à la colonne 1." The word "visé" is the past participle of the verb "viser" which *Harrap's Standard French and English Dictionary* 1980, translates as "to aim" in both the literal sense (as in regards to a weapon) or the figurative sense (as with respect to a goal or directing one's attention). The phrase "un additif visé à la colonne 1" can be understood to mean "an additive targeted in column 1". Viewed in this sense, section 23.1 would not apply to the additives which are excluded from the general prohibition found in the opening words of Items 1 and 1.1.

[37] In this case, the English version of the statute, though unambiguous on its face, contains an ambiguity. The French version suggests a narrower meaning than the literal sense of the English version.

[38] In *Daoust* at paragraph 29 , the Supreme Court discussed one of the principles to be considered in the construction of bilingual statutes:

> If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 669; *Pfizer Co. v. Deputy Minister of National Revenue For Customs and Excise*, [1977] 1 S.C.R. 456, at pp. 464-65. Professor Côté illustrates this point as follows, at p. 327:
>
> > There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

[39] In this case, the narrower construction of section 23.1 prohibits only packaging which suggests the use of a prohibited additive. Both parties have proceeded on the basis that this is the case and, on the basis of this analysis, I agree with them.

[40] Although it is not necessary to resolve this issue in this case, I note that the English version of item 1.1 in column 1 of the Schedule refers to additives “that impart a flavour” while the French version refers to additives « conférant un arôme ». The casual reader might well conclude that the English version refers to the sense of taste while the French version refers to the sense of smell, an important distinction. I have no doubt that both the regulator and the regulated would benefit from clearer drafting.

[41] I turn now to the question of whether the use of packaging which refers to ice wine is packaging "that suggests, including through illustrations, that it contains a [prohibited] additive set out in column 1."

[42] Since tobacco smoke has its own flavour and aroma, it is a reasonable inference that in order to import a flavour of an alcoholic beverage to tobacco, the use of an additive is required. Given the general prohibition on the use of additives that enhance or impart flavour in tobacco, it would normally be for the manufacturer who uses an additive to bring itself within the exceptions to the general prohibition: *Kisana v. Canada (Minister of Citizenship & Immigration)*, 2009 FCA 189 at para. 45, 392 N.R. 163, *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 at para. 40, 414 D.L.R. (4th) 165. GVA does this by arguing that ice wine comes within the exception for "flavour commonly attributed to […] wine". To be more precise and to bring itself within the statutory language, GVA must be taken to argue that an additive which imparts the flavour of ice wine comes within the exception for "flavour commonly attributed to […] wine".

[43] This argument depends upon the definitions of the words used, specifically that wine is a broad term that includes ice wine. It is not an argument based upon flavours since there is no evidence as to the flavour of the cigarillos other than their packaging. The fact that, in this case, "wine" is preceded by the qualifier "ice" is, in the absence of evidence to the contrary, of no more significance than the use of qualifiers such as "red", "white", "dry", "table", "French", "California", "unoaked", or many other adjectives used to describe wine.

[44] The decision maker, Health Canada, has not answered this argument since it has not explained its decision. Counsel for the Attorney General has attempted to fill that void by arguing that, given the presence of "port" in the group of commonly attributed flavours, and since port is a kind of wine, the normal rules of construction would suggest that not every wine is included in the "wine" category. More specifically, the Attorney General argues that sweet wines are port-like and should therefore be excluded from the "wine" category.

[45] It is at this point that the absence of a factual record becomes an issue. To the extent that the Attorney General seeks to draw distinctions between various classes of wine, she cannot rely on facts which are not in the record. The distinction between port and wine rests upon the assertion that "wine" is a dry wine like table wine and that the presence of "port" in the list of enumerated flavours excludes sweet wines or dessert wines from "wine", even though there is nothing in the record that would establish that port is invariably sweet. The Federal Court drew a distinction between port and wine based upon their means of production. With respect, the Federal Court did not have before it the evidence which would permit it to draw such a distinction. However, the fact that it did shows that there may well be distinctions to be drawn on the basis of on something other than the degree of sweetness of a wine.

[46] These are not matters to which the doctrine of judicial notice applies. That doctrine was summarized by the Supreme Court in *R. v. Find*, 2001 SCC 32 at paragraph 48, [2001] 1 S.C.R. 863, per McLachlin C.J.:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take

> judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy […]

[47] In this case, the grounds for distinction are neither so notorious as to be beyond debate nor capable of immediate and accurate demonstrable by reference to an unimpeachable source.

[48] Similarly, an argument that a purposive construction of the Schedule would limit the scope of the permitted flavours so as to avoid drawing youth into tobacco use by packaging which is particularly attractive to youth must fail in the absence of evidence as to what is particularly attractive to youth. More particularly, such an argument should be supported by evidence as to why a flavour such as ice wine would be more attractive to youth than a flavour such as that attributed to, say, red wine.

[49] An unreasonable decision is one for which there is no evidence: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at para. 73, [2015] 2 S.C.R. 789; *Canadian Pacific Railway v. Canadian Transportation Agency*, 2015 FCA 1 at para. 42, 466 N.R. 132.

[50] In the end result, I am of the view that Health Canada's decision to have GVA's "Honey T Spiral Ice Wine" removed from retailers' shelves was unreasonable because there was no evidence to support its conclusion that packaging which displayed the name "Honey T Spiral Ice Wine" suggested, including through illustrations, that it contains a prohibited additive set out in column 1 of the Schedule.

[51] I wish to emphasize that this decision does not imply any view on the merits of the Health Canada's position. Whether the flavour of GVA's "Honey T Spiral Ice Wine" would be generally attributed to wine remains an open question. This decision deals only with packaging and turns on the absence of evidence in support of Health Canada's position

[52] I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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