Federal Court of Appeal | Cour d'appel fédérale

Date: 20110415

Docket: A-314-10

Citation: 2011 FCA 137

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

C.B. POWELL LIMITED

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Toronto, Ontario, on April 11, 2011.

Judgment delivered at Ottawa, Ontario, on April 15, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
DAWSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110414

Docket: A-314-10

Citation: 2011 FCA 137

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

C.B. POWELL LIMITED

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal of a decision dated August 11, 2010 of the Canadian International Trade Tribunal (appeal nos. AP-2010-007 and AP-2010-008).

[2] In the Tribunal, the appellant sought to appeal duties that were charged on certain imported goods, jars of bacon bits. The Tribunal declined to consider the appeal. It decided that it lacked the jurisdiction to do so. It reached this decision by interpreting the section which defines what may be

appealed to it: subsection 67(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). It then applied its interpretation of subsection 67(1) of the Act to the facts of this case.

[3] For the reasons set out below, the Tribunal's interpretation of subsection 67(1) of the Act and its application of that interpretation to the facts of this case are both reasonable. Therefore, I would dismiss this appeal with costs.

A. The determination of duties payable under the Act

[4] When importers import goods into Canada, duties may be payable under the Act. In Part III of the Act and a number of associated regulations, Parliament has established a comprehensive administrative regime concerning duties.

[5] Under this administrative regime, the liability to pay duties and the amount of duties to be paid depend on three components: (1) the origin of the goods/tariff treatment; (2) the tariff classification; and (3) the value for duty of the imported goods. Upon importation of goods, the importer declares its position concerning these three components. The Canada Border Services Agency (CBSA) can take issue with the importer's position. When the CBSA does so, certain administrative reviews can follow, culminating in an appeal to the Tribunal: see sections 58, 59, 60 and 67 of the Act.

B. What happened in this case

[6] In 2005, the appellant imported certain jars of bacon bits from the United States. It submitted a declaration to the CBSA setting out what it considered to be the origin/tariff treatment, the tariff classification and the value for duty of the bacon bits. In particular, for the origin/tariff treatment, it set out "most favoured nation" tariff treatment.

[7] At the time the appellant submitted the declaration, the CBSA did not question it. In such circumstances, subsection 58(2) of the Act deems the three components set out in the appellant's declaration to be "determined" for the purposes of this administrative regime.

[8] However, under sections 42, 42.01 and 42.1 of the Act, the CBSA can later conduct audits and verifications of the declaration made by the importer. As a result of those audits and verifications, the CBSA can "re-determine" or "further re-determine" any of the three components in the calculation of the duties payable. This power to "re-determine" or "further re-determine" is found in section 59, which provides as follows:

59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may	**59.** (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :
(*a*) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or	*a*) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article

marking determination of any imported goods…; and	58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées…;
(*b*) further re-determine the origin, tariff classification or value for duty of imported goods…on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 ….	*b*) réexaminer l'origine, le classement tarifaire ou la valeur en douane…d'après les résultats de la vérification ou de l'examen visé à l'article 42….
(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.	(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement.

[9] In this case, the CBSA conducted an audit and found that the appellant had chosen the wrong tariff classification for the imported jars of bacon bits. Before issuing a re-determination under section 59 of the Act, the CBSA sought the appellant's views.

[10] The appellant acknowledged its error, but also advised the CBSA that it had also misstated the origin/tariff treatment of the goods. In its view, the jars of bacon bits were eligible for duty-free tariff treatment under the *North American Free Trade Agreement*, 1994 Can. T.S. No. 2, rather than the 12.5 percent duty payable on the reclassification of the goods under most-favoured-nation tariff treatment.

[11] The CBSA issued a re-determination under subsection 59(1) of the Act, correcting the tariff classification number, but leaving the tariff treatment unchanged. Although the CBSA had received the appellant's submissions concerning the origin/treatment of the goods, it declared that it would not re-determine that matter.

[12] The appellant appealed the tariff treatment to the President of the CBSA under subsection 60(1) of the Act. Under that subsection, the President only has the power to hear appeals from re-determinations or further re-determinations:

60. (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.	**60.** (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.

[13] The President rejected the appellant's appeal, holding that he did not have the power to hear it. In his view, since the CBSA had not "re-determined" or "further re-determined" origin/tariff treatment under subsection 59(1), he did not have the power to do so himself under subsection 60(1).

[14] The last step of administrative appeal available to the appellant was to appeal to the Tribunal under subsection 67(1). Subsection 67(1) allows an aggrieved party to appeal from a "decision" of the President under subsection 60(1):

67. (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.	**67.** (1) Toute personne qui s'estime lésée par une décision du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

[15] Did the President make a "decision" in this case? The CBSA thought not. So the appellant sought a declaration from the Federal Court that there was a "decision" under subsection 67(1) of the Act: 2009 FC 528. An appeal to this Court followed.

[16] This Court held that recourse to the Federal Courts was premature: the appellant should have appealed to the Tribunal and let the Tribunal decide whether there was a "decision" under subsection 67(1) of the Act (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61). Therefore, the appellant appealed to the Tribunal under subsection 67(1) of the Act.

C. The Tribunal's decision

[17] The Tribunal decided that the President's holding was not a "decision" under subsection 67(1) of the Act and so it could not hear the appellant's appeal.

[18] In essence, the Tribunal made two distinct findings. It interpreted "decision" in subsection 67(1) of the Act and then it applied its interpretation to the facts of the case before it.

D. Analysis

(1) The standard of review

[19] In my view, the standard of review for both of the Tribunal's findings is the deferential standard of reasonableness.

[20] On the issue of the interpretation of "decision" in section 67(1) of the Act, the appellant submits that the standard of review is correctness. He maintains that the interpretation of subsection 67(1) of the Act is a "jurisdictional question" and that the Supreme Court of Canada has held that the standard of review for such questions is correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 59, [2008] 1 S.C.R. 190. He draws some support from the Tribunal's decision itself, which repeatedly uses the word "jurisdictional" to describe the issue before it.

[21] The appellant's submission cannot be accepted. It is contrary to this Court's seminal decision in *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223 at paragraphs 41-50, [2010] 3 F.C.R. 219. In that case, this Court considered the Supreme Court's observation that "true questions of jurisdiction or *vires*" must be reviewed for correctness. It noted that the Supreme Court did not expressly define this phrase, but the Supreme Court did offer, as its only example, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. At issue in *United Taxi* was whether a municipality was authorized under a statute to enact particular bylaws. That was a fundamental issue of *vires*. On the other hand, the *Public Service Alliance* case concerned a tribunal's interpretation and application of a provision in its home statute. This Court held that that was not a "true question of jurisdiction or *vires*."

[22] The same can be said of the case at bar. The Tribunal's interpretation of "decision" in section 67(1) of the Act is not the sort of matter that attracts correctness review. Rather, it is a matter of statutory interpretation of a statute frequently interpreted by the Tribunal – a statute that may be considered one of its "home statutes." Such a matter is presumptively subject to reasonableness review: *Dunsmuir*, *supra* at paragraphs 54-56. See also the recent decision of the Supreme Court of Canada in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paragraph 36.

(2) Were the Tribunal's two findings reasonable?

[23] To reiterate, the Tribunal made two distinct findings. It interpreted "decision" in subsection 67(1) of the Act and it applied its interpretation to the facts of the case before it.

[24] Under the deferential standard of reasonableness, we must assess whether these two findings fall outside of the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. We can only interfere if the Tribunal has reached an outcome based on an indefensible interpretation or application of Parliament's law.

(a) The Tribunal's interpretation of "decision" in subsection 67(1) of the Act

[25] In my view, the Tribunal's interpretation of "decision" in subsection 67(1) of the Act is not outside the range of possible or acceptable outcomes. It is reasonable.

[26] The Tribunal held that only a "re-determination" or "further re-determination" by the President under subsection 60(1) of one of the three components in the duty calculation could qualify as a "decision."

[27] The Tribunal examined whether its interpretation was "inconsistent with the overall scheme of the statute and, in particular, with the jurisdiction statutorily conferred upon it by Parliament" (at

paragraph 27). It chose an interpretation that was loyal to the plain meaning of the Act: a decision of the President under subsection 60(1) can only be a “re-determination” or “further re-determination” of a decision made by the CBSA under subsection 59(1). The Tribunal was also influenced by paragraph 74(1)(*c.1*), which allows for NAFTA treatment to be given in appropriate circumstances where the importer has failed to claim that treatment in its initial declaration.

[28] In this Court, the appellant suggests that the Tribunal’s decision works considerable unfairness and makes this administrative regime a trap for the unwary. It says that the decision makes this administrative regime insufficiently forgiving if the importer makes mistakes in its declaration. The appellant points to the case at bar where the CBSA under subsection 59(1) adjusted the tariff classification but not the origin/tariff treatment, even though it should be adjusted, resulting in an overpayment of duties. The Tribunal’s decision, it says, leaves the importer unable to appeal the overpayment to the President because the President is not doing a re-determination or a further re-determination. This, the appellant says, means that an onward appeal to the Tribunal is not possible because, under the Tribunal’s interpretation, there is no “decision” before it under subsection 67(1). The appellant says that this is contrary both to the purpose of Part III of the Act (the “calculation of duty”) and this administrative regime – to ensure that importers pay the correct amount of duties, not more.

[29] While I accept that a legislative interpretation that creates results contrary to the purpose of the Act can be an indicator of unreasonableness (*Montreal (City) v. Montreal Port Authority*, 2010 SCC 14 at paragraph 42, [2010] 1 S.C.R. 427), this administrative regime may have other purposes,

such as ensuring administrative efficiency in the handling of the flood of imported goods that arrive at our borders every day. In an administrative regime designed to deal with such a flood, it may be legitimate to require importers to be held to the declarations they make and to limit their ability to launch appeals in order to try to claim a tax treatment that could have been claimed earlier. I note that Parliament's words in sections 58, 59, 60 and 67 of the Act do not give unlimited rights of appeal to importers. This signals that there may be more purposes behind this administrative regime than the appellant suggests.

[30] However, I need not determine the exact purposes behind this administrative regime. Even accepting the appellant's submission that the purpose of Part III of the Act is to ensure that importers pay the correct amount of duties and not overpay, the Tribunal offered a comment in its reasons that substantially lessens the possibility of overpayment. In light of this comment, I cannot accept the appellant's submission that the Tribunal's interpretation of subsection 67(1) is contrary to the purposes of the Act.

[31] The Tribunal's comment concerned situations where the CBSA under subsection 59(1) of the Act or the President of the CBSA under subsection 60(1) of the Act adjusts one component of the calculation but, in the factual circumstances existing in the case, there must have been an implied decision to adjust another component. The Tribunal found that such implied decisions are "re-determinations" or "further re-determinations" under subsections 59(1) and 60(1), and thus "decisions" under subsection 67(1) which can be appealed to the Tribunal. The Tribunal's comment in this regard appears at paragraph 31 of its reasons:

> The Tribunal finds that, in the present appeals, there was in fact no actual re-determination made by a customs officer, pursuant to subsection 59(1) of the Act, of the subsection 58(2) deemed determination in respect of origin. However, such a decision could also conceivably arise by necessary implication as a consequence of other decisions made, thereby providing the basis for a request to the President of the CBSA under subsection 60(1).

[32] The Tribunal's recognition of an implied decision provides the importer with recourse in appropriate circumstances. For example, suppose that the CBSA conducted an audit and then, under subsection 59(1), the CBSA adjusted one of the three components and did not make consequential and necessary changes to other components. In such a case, it would be open to the President of the CBSA, on appeal under subsection 60(1), to find that the CBSA impliedly determined that consequential and necessary changes to other components should not be made. In that circumstance, the President, in looking at those other components, would be "re-determining" the matter. In such a case, there would be a decision by the President that would qualify as a "decision" under subsection 67(1) of the Act that could be appealed to the Tribunal.

[33] No doubt, there may be other situations where the Tribunal will find that implied decisions were made. That, of course, will be for the Tribunal to determine on a case-by-case basis. In developing its own jurisprudence in this area, the Tribunal will need to consider the purposes of Part III of the Act and this administrative regime.

[34] The ability of the importer to argue that an implied decision was made substantially lessens the potential unfairness that the appellant has raised. The Tribunal's interpretation of subsection 67(1), which embraces the possibility of implied decisions, is rationally defensible given the

framework of provisions enacted by Parliament when it set up this administrative regime. On the basis of the deferential standard of reasonableness that must be applied in this case, the Tribunal's interpretation of subsection 67(1) passes muster.

(b) The application of the Tribunal's interpretation to the facts of this case

[35] The Tribunal found that the President did not "re-determine" or "further re-determine" the issue of origin/tariff treatment under subsection 60(1). Further, in its view (at paragraph 39), the President's refusal to consider the origin/tariff treatment issue was correct because the CBSA did not re-determine origin/tariff treatment under subsection 59(1) of the Act:

> [39] Given the absence of a re-determination by a customs officer pursuant to subsection 59(1) of the Act of the subsection 58(2) deemed determination of origin and that such a re-determination could not be said to have arisen by necessary implication from the re-determination of the tariff classification that was actually made, the Tribunal finds that the President of the CBSA was correct in concluding that he has no jurisdiction pursuant to subsection 60(1) to make a decision (i.e. a further re-determination) on the issue of origin.

[36] On this, we see no reviewable error. The above passage shows that the Tribunal was alive to the issue whether there was an implied determination of origin/tariff treatment by the CBSA when it re-determined the tariff classification. The appellant has pointed to nothing in the record that suggests that that finding, essentially factual in nature, was indefensible under the deferential standard of reasonableness review that we are obligated to apply. There was evidence before the Tribunal, some of which it summarized in paragraph 38 of its decision, that could support the

conclusion that there was no implied decision. Under the deferential reasonableness standard, that is sufficient to dismiss this appeal.

[37] Finally, the appellant suggests that the overall result reached by the Tribunal is unreasonable: the appellant is left in a situation where it has paid 12.5% duty on the goods it imported, when, in fact, no duty should have been paid. That is indeed the situation in which the appellant finds itself. But the appellant, alone, is responsible for that. In its initial declaration, the appellant stated a particular origin/tariff treatment for the goods (most favoured nation treatment), but later recognized that there was a better tariff treatment (NAFTA). It tried to change the tariff treatment by using the administrative appeal regime in Part III of the Act. But Parliament's plain words in sections 58, 59, 60 and 67 of the Act, as reasonably interpreted by the Tribunal, do not permit that. Further, Parliament has provided for importers to correct their declarations or pursue other recourses within a certain period of time in certain circumstances: see, for example, sections 32.2 and 74 of the Act. But the appellant did not avail itself of those routes. Therefore, looking at the overall result reached by the Tribunal, I cannot conclude that it is outside of the range of the acceptable or defensible.

[38] Therefore, I would dismiss the appeal, with costs.

"David Stratas"
J.A.

“I agree
John M. Evans J.A.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-314-10
APPEAL FROM A DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED AUGUST 11, 2011	
STYLE OF CAUSE:	C.B. Powell Limited v. President of the Canada Border Services Agency
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 11, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans J.A. Dawson J.A.
DATED:	April 15, 2011

APPEARANCES:

Michael Kaylor	FOR THE APPELLANT
Derek Rasmussen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lapointe Rosenstein Marchand Mélançon, LLP Montreal, Quebec	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT