Federal Court of Appeal | Cour d'appel fédérale

Date: 20210423

Docket: A-2-20

Citation: 2021 FCA 82

CORAM: **NADON J.A.**
PELLETIER J.A.
LOCKE J.A.

BETWEEN:

DANBY PRODUCTS LIMITED

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard by online video conference hosted by the registry, on April 15, 2021.

Judgment delivered at Ottawa, Ontario, on April 23, 2021.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

[1] Danby Products Limited (Danby) appeals a decision of the Canadian International Trade Tribunal (CITT) concerning the classification of products under the *Customs Tariff*, S.C. 1997, c. 36. Specifically, in the CITT decision (*Cavavin (2000) Inc. v. President of the Canada Border Services Agency*, Appeal No. AP-2017-021 (2019), 24 T.T.R. (2d) 294 (CITT) – the Decision)

the CITT determined that certain wine coolers should be classified as “Refrigerators, household type” under items nos. 8418.21 (“Compression-type”) and 8418.29 (“Other”).

[2] Danby argues that the wine coolers in question should instead have been classified as “Other refrigerating or freezing equipment; heat pumps” under item no. 8418.69 (“Other”), and more specifically item no. 8418.69.90 (“Other”).

[3] Subsection 68(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), provides for the right to appeal a decision of the CITT to this Court “on any question of law.” The parties agree that, since the *Customs Act* provides for an appeal, and since the appeal concerns questions of law, the standard of review is correctness.

[4] I concur. A majority of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), instructed that the presumed standard of review in a judicial review is reasonableness, but acknowledged that there are certain exceptions to this presumption. One of these exceptions is where the legislature has provided for scrutiny of administrative decisions on an appellate basis (*Vavilov* at para. 36). This is such a case. Therefore, the appellate standard of review applies as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on questions of law, and palpable and overriding error on questions of fact or of mixed fact and law where there is no extricable legal principle at issue (*Vavilov* at para. 37). Only the standard of correctness applies in this case because we are concerned only with questions of law.

[5] Central to Danby's argument is that the CITT incorrectly classified the wine coolers in question by failing to accept the meaning of terms within the trade when interpreting the headings and subheadings under item no. 8418 of the *Customs Tariff*. Danby cites paragraphs 4, 7 and 8 of the Agreed Statement of Facts that was before the CITT, which states, among other things, that (i) the wine coolers in question are not designed to store food, (ii) they "are not described in the industry as refrigerators," (iii) they are not marketed as refrigerators, (iv) "[t]hey are not purchased by consumers for food storage," and (v) they are subject to different standards. Danby also cites Canadian Standards Association (CSA) documents that distinguish refrigerators from wine coolers. Danby argues that food storage is an important characteristic of refrigerators, and not of wine coolers.

[6] Danby also cites jurisprudence concerning the meaning of "refrigerator", and jurisprudence concerning the importance of the meaning of terms in the trade when interpreting terms in legislation that is directed to industry. Moreover, Danby notes that even the respondent did not argue for the classification that the CITT arrived at. The respondent argued instead for classification as "Other furniture (chests, cabinets, display counters, showcases and the like) for storage and display, incorporating refrigerating or freezing equipment" under item no. 8418.50.10 ("Refrigerating or refrigerating-freezing type").

[7] There is no doubt that the temperature at which wine is kept in a wine cooler is not cold enough to be safe for food storage. There is also no dispute about the Agreed Statement of Facts, including that the industry does not treat wine coolers as refrigerators.

[8] The CITT's Decision is slightly complicated by the fact that it was considering an issue that it had previously considered (in *Rona Corporation v. President of the Canada Border Services Agency*, Appeal No. AP-2015-021 (2016), 21 T.T.R. (2d) 213 (CITT) (*Rona*)). As a result, the CITT's reasons read like a review of an earlier decision. In the end, however, this is not determinative. The main issue is whether the CITT's determination of the classification of the wine coolers in question was correct.

[9] Danby takes no issue with the CITT's summary of the law applicable to interpretation of terms used in the *Customs Tariff*. At paragraph 48 of the Decision, the CITT stated:

> […] [T]he term "refrigerator" is not defined in the *Customs Tariff*. Therefore the Tribunal applies the modern rule of statutory interpretation which requires that "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The "ordinary meaning" of a provision refers "to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context." It has also been described as the "natural meaning which appears when the provision is simply read through". [Footnotes omitted]

[10] Danby also does not take issue with another important legal principle: the presumption in favour of the ordinary, non-technical meaning of a term. This presumption is discussed in paragraphs 4.7 to 4.9 of Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014). The dispute in this case concerns whether that presumption was rebutted, such that the meaning of "refrigerator" in the trade should have displaced the ordinary meaning.

[11] The CITT considered the context of item no. 8418 of the *Customs Tariff* and found no indication that the term "refrigerator" depended on the type of consumable stored therein. I agree. Item no. 8418 covers "Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading 84.15." In my view, the ordinary meaning of "refrigerator" in this item is found in the definitions cited in *Rona*, and repeated in the Decision. These definitions are from (i) the *Merriam-Webster Collegiate Dictionary* ("something that refrigerates, especially: a room or appliance for keeping food or other items cool"); and (i) the *Canadian Oxford Dictionary* ("a cabinet or room in which food etc. is kept cold"). Both of these definitions mention the cooling of food, but they also both contemplate cooling other items. While the cooling of food may be typical of a refrigerator, it is not required.

[12] Item no. 8418 has seven "first-level" subheadings:

> 8418.10 – Combined refrigerator-freezers, fitted with separate external doors
>
> 8418.2X – Refrigerators, household type
>
> 8418.30 – Freezers of the chest type, not exceeding 800 litres capacity
>
> 8418.40 – Freezers of the upright type, not exceeding 900 litres capacity
>
> 8418.50 – Other furniture (chests, cabinets, display counters, showcases and the like) for storage and display, incorporating refrigerating or freezing equipment
>
> 8418.6X – Other refrigerating or freezing equipment; heat pumps
>
> 8418.9X – Parts

[13] The first four of these headings describe different characteristics and functions of the products contemplated under item no. 8418: (i) combined refrigerator-freezers (with separate external doors), (ii) household-type refrigerators, (iii) chest-type freezers (with a size limit), and (iv) upright freezers (with a size limit). The fifth and sixth headings concern residual categories of "other furniture", and "other refrigerating or freezing equipment; heat pumps". Finally, the last heading concerns parts. Clearly, this last heading does not apply here. With regard to the residual categories, they apply only if the wine coolers in question do not fit within any of the first four categories. Therefore, the question is whether those wine coolers, which are indisputably "Refrigerators, freezers and other refrigerating or freezing equipment" (per item no. 8418), fit under any of the first four headings thereunder. Those headings concern whether the goods are refrigerators or freezers or both, whether they have separate doors, whether they are for household use, and whether they are within a certain size limit. None of these is concerned with whether it is food or another consumable that is to be refrigerated.

[14] The CITT considered CSA standards but was not persuaded that the definitions found therein negated or outweighed the ordinary meaning of terms used in the *Customs Tariff*. I agree. CSA standards have a different purpose from the *Customs Tariff*. Moreover, I am not convinced that the evidence provides any other basis to rebut the presumption in favour of the ordinary meaning of "refrigerator".

[15] Danby relies on the decision of this Court in *Danfoss Manufacturing Ltd. v. Deputy Minister of National Revenue (Customs & Excise)*, [1972] F.C. 798, 1972 CarswellNat 40 (*Danfoss*), for its interpretation of the word "refrigerator", and for the proposition that terms used

in the *Customs Tariff* should be interpreted in context. *Danfoss* did indeed confirm that several types of products that refrigerate were excluded from "refrigerators" (vending machines, farm milk coolers, water drinking fountain coolers, rivet coolers in airplanes and dehumidifiers), but the clear focus in that case was on the use of that term in ordinary parlance (see para. 16). In my view, this case is not a strong authority for the application of a trade meaning over an ordinary meaning.

[16] Danby cites another decision of this Court, *Olympia Floor & Wall Tile Co. v. Deputy Minister of National Revenue for Customs & Excise*, 49 N.R. 66, [1983] F.C.J. No. 814 (*Olympia*), for the proposition that the meaning of a term as used in industry should be applied when interpreting the *Customs Tariff*. The expression in issue there was "earthenware tiles". This Court did indeed apply the industry meaning of this term, but it did so based on the absence of an ordinary, non-technical meaning:

> 13. It seems reasonably clear that, if a term used in the *Customs Tariff* has a particular meaning in a trade, it should be interpreted in that sense. But there are, of course, many words used in the *Customs Tariff* which are quite ordinary words, words used in ordinary conversation in an everyday way; such words are to be read in their ordinary sense.

[17] The Court in *Olympia* then went on to cite another decision (*Hunt Foods Export Corp. of Canada v. Canada (Deputy Minister of National Revenue, Customs and Excise – M.N.R.)*, [1970] Ex. C.R. 828), which applied a meaning in the trade of "lard compound" based on the absence of an ordinary, non-technical meaning of that term.

[18] That is not the case with “refrigerators”. That word may be understood a certain way in the trade, but it also has an ordinary meaning and, as stated above, the presumption is that it is the ordinary meaning that applies. The burden of rebutting that presumption is on Danby.

[19] Danby also cites this Court’s decision in *Denbyware Canada Ltd. v. Canada (Deputy Minister of National Revenue, Customs & Excise)*, [1979] F.C.J. No. 401, [1979] 2 A.C.W.S. 469. At paragraph 2 thereof, this Court stated: “A customs tariff being for commercial usage in respect of the conditions of admission of goods to Canada, the terms used in it should be given the meaning which the term used is generally given in the trade concerned with the production and sale of the goods in question.” There, the term in issue was “porcelaineous stoneware”. However, as with *Olympia*, it does not appear that this term had an ordinary, non-technical meaning. Therefore, this is not a strong authority for the proposition of choosing the trade meaning of a term over the ordinary meaning.

[20] I do not wish to suggest that the ordinary meaning of a term should always apply even where it has a meaning in the industry. But there is a presumption to that effect, and that presumption is not rebutted by the mere fact that the industry meaning of the term in question differs from the ordinary meaning.

[21] Danby argues that the evidence before the CITT demonstrated that the ordinary meaning of “refrigerator” contemplates the storage of food (just like the trade meaning). However, Danby’s argument on this point relies on a survey that Danby submitted, and that the CITT

criticized as biased and having seriously limited persuasiveness. The survey clearly did not convince the CITT, and I have heard no reason to disagree with that conclusion.

[22] I am convinced that, in the context of the *Customs Tariff*, the CITT was correct in finding that the wine coolers in question should be classified as "Refrigerators, household type" under items nos. 8418.21 ("Compression-type") and 8418.29 ("Other"). The ordinary meaning of the word "refrigerator" is broader enough to include wine coolers, and the evidence of the meaning in the industry was not sufficient, in the context of the *Customs Tariff*, to displace the presumption that the ordinary meaning should apply. Finally, there is no dispute that the wine coolers in questions are "household type" in the sense that they are for household use.

[23] I would dismiss the present appeal with costs.

"George R. Locke"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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