Federal Court of Appeal

Cour d'appel fédérale

Date: 20210505

Docket: A-312-19

Citation: 2021 FCA 86

CORAM: **NOËL C.J.**
BOIVIN J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents

Heard by online video conference hosted by the Registry on May 5, 2021.

Judgment delivered from the Bench at Ottawa, Ontario, on May 5, 2021

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 5, 2021).

NOËL C.J.

[1] This is an appeal from a judgment of the Federal Court (*per* Mactavish J. as she then was), setting aside the decision of the Complaints and Appeals Office of the Canadian Food Inspection Agency (the Agency) holding that "Product of Israel" labels on wines produced in the West Bank complied with Canadian labelling legislation (2019 FC 1003, [2019] 4 F.C.R. 747).

[2] The Federal Court judge held that the labels were false, misleading and deceptive. She came to this view based on her own analysis of the evidence and the labelling legislation (the relevant provisions as they read at the time of the decision of the Agency are set out in Annex 1). In her view, the decision of the Agency was not reasonable when measured against her analysis. She quashed the decision on this basis and remitted the matter back to the Agency with instructions that it determine how the wines should be labelled.

[3] The issue to be addressed is whether in coming to this conclusion, the Federal Court judge identified the appropriate standard of review and applied it properly.

STANDARD OF REVIEW

[4] After the Federal Court judge rendered her decision in this case, the Supreme Court released its landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]. Given the importance of this decision, the parties were asked by Order of this Court dated October 6, 2020, to provide written submissions on the impact that it might have on this appeal.

[5] In his memorandum of fact and law, Dr. Kattenburg maintained, as he did before the Federal Court judge, that reasonableness was not the applicable standard of review. He argued that the interpretation of the relevant legislation in a manner that reflects international law gives rise to an issue of “central importance to the legal system as a whole”, with the result that correctness was the applicable standard of review (Memorandum of Dr. Kattenburg at para. 46).

[6] During the hearing, Dr. Kattenburg conceded that reasonableness is the applicable standard, and rightly so. If anything, *Vavilov* has reinforced reasonableness as the presumptive standard applicable in this case (*Vavilov* at paras. 59-61). Principles of international law, should they bear on the issue to be decided (see, *e.g.*, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 76-92), are merely part of the context that can inform the interpretation of Canada's labelling legislation (*Vavilov* at para. 114).

<u>APPLICATION OF THE REASONABLENESS STANDARD</u>

[7] We now turn to the question whether the standard of reasonableness was properly applied to the matter before us. Although the Federal Court judge applied this standard in a pre-*Vavilov* context, this Court must stand in the shoes of the Federal Court judge and determine whether she properly applied this standard based on the law as it stands post-*Vavilov*.

[8] *Vavilov* provides fundamental guidance both on the reasonableness standard itself and its proper application. In providing this guidance, the Supreme Court recognized that its decision departs in some key aspects from prior jurisprudence but recognized that certainty in the law had to be measured against the cost of continuing to follow a flawed approach.

[9] Perhaps the most significant development in *Vavilov* is the recognition that when Parliament has created an administrative decision-maker for the specific purpose of administering a legislative scheme, it must be accepted that Parliament also intended that the decision-maker fulfills its mandate and interprets the law applicable to all issues that come

before it (*Vavilov* at para. 24). This recognition of the legitimacy and authority of administrative decision-makers brings with it the corresponding requirement that administrative decision-makers adopt a "culture of justification" and provide a reasoned explanation for the decisions that they make in discharging their statutory mandate (*Vavilov* at para. 14).

[10] In so stating, the Supreme Court made it clear that in conducting a reasonableness review, the court must focus on the decision made and the justification for it (*Vavilov* at para. 83). If the reasons read in conjunction with the record do not make it possible to understand the decision-maker's reasoning on a critical point, the decision fails to meet the standard of reasonableness on that account alone (*Vavilov* at para. 103).

[11] This is precisely what we are faced with in this case. The Agency had to interpret and apply the labelling requirements under the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (FDA) and the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38 (CPLA) and decide whether the labels in issue were false or misleading under subsection 5(1) of the FDA and section 7 of the CPLA.

[12] We know from the record that the position expressed by Global Affairs Canada with respect to the *Canada-Israel Free Trade Agreement*, Can TS 1997 No 49 (CIFTA) played a determinative role in the decision that was reached (the relevant CIFTA legislation as it read at the time of the decision of the Agency is set out in Annex 2). While CIFTA can be informative, we do not know why the Agency concluded that it was determinative of the issue that it was required to decide under its labelling legislation.

[13] In its advice to the Agency, Global Affairs Canada states that the West Bank territory is included under CIFTA because it is a “territory where Israel’s customs laws are applied” (Affidavit of Eric Jeaurond, Appeal Book, Vol. 3, p. 491, para. 34, referring to Article 1.4.1(b) of CIFTA). This language unequivocally covers Israel and the occupied territories, including the West Bank, but does not indicate that the occupied territories are part of Israel. Indeed, in its domestic legislation, Canada equates goods that originate in the territory where “Israel’s customs laws are applied” to goods that originate in “Israel <u>or</u> another CIFTA beneficiary” [our emphasis] (subsection 50(1) of the *Customs Tariff*, S.C. 1997, c. 36; see also the definition of “Israel or another CIFTA beneficiary” in the *Regulations Defining Certain Expressions for the Purposes of the Customs Tariff*, S.O.R./97-62). This distinction between goods that originate in Israel and goods that originate in other CIFTA beneficiaries, for the purpose of determining entitlement for preferential tariff rates under CIFTA, accords with Canada’s official position, which does not recognize that the occupied territories are part of Israel (Government of Canada, “Canadian policy on key issues in the Israeli-Palestinian conflict” (last modified 19 March, 2019), online: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/mena-moan/israeli-palistinian_policy-politique_israelo-palestinien.aspx?lang=eng>).

[14] Needless to say, section B.02.108 of the *Food and Drug Regulations*, C.R.C., c. 870, insofar as it contemplates that the origin of wine products be identified by reference to their “country of origin”, cannot be applied literally when dealing with products that do not originate in a recognized country.

[15] As the Supreme Court explains in *Vavilov* the process of justification, which binds administrative decision-makers, does not necessarily require exhaustive or lengthy reasons and any reasons are to be reviewed in light of the record and submissions made by the parties. But whatever form this takes, where, as here, legislative interpretation is in issue, the administrative decision-maker must demonstrate that its interpretation of the relevant provisions is consistent with their text, context and purpose (*Vavilov* at para. 120 as applied in *Canada (Attorney General) v. Redman*, 2020 FCA 209 at paras. 20-21). Here this demonstration is totally lacking.

[16] While there may be cases where reviewing courts can discern how an administrative decision-maker construed the relevant legislation even though the matter was not explicitly addressed (*Vavilov* at para. 123), this is not such a case. We simply have no idea how the Agency construed its legislation in coming to the conclusion that the labels are compliant, including how it addressed the pivotal issues: false and misleading as to what and from whose eyes and from which perspective is the question whether the labels are false or misleading to be assessed?

[17] *Vavilov* makes it clear that when confronted with the absence of a reasoned explanation, courts should refrain from determining the proper outcome and providing the required justification themselves (*Vavilov* at para. 96). This merely recognizes Parliament's institutional design choice in conferring on administrative decision-makers the task of construing the legislation that they are called upon to apply and applying it to the facts of their case, exercises that call for deference on the part of reviewing courts. It follows that in a post-*Vavilov* context, the Federal Court judge should not have embarked on the Agency's task.

[18] The appropriate remedy is to send the matter back to the Agency so that it can determine the matter for itself. This is not the type of case where this step can be bypassed because the outcome is self-evident (compare *Manitoba Government and General Employees' Union v. The Minister of Finance for the Government*, 2021 MBCA 36 at paras. 104-108). In the course of its reconsideration of the matter, the Agency will want to receive submissions from the affected parties. This would include the complainant Dr. Kattenburg as well as Psagot Winery Ltd. since its labels are in issue. It will also be open to the Agency to receive submissions and determine whether Charter rights and freedoms are relevant to its decision-making, again ensuring that there is a reasoned explanation for its decision.

[19] To be clear, the Agency is not bound by the Federal Court judge's reasons. It will be open to the Agency as the decider of the merits of the labelling issue to come to whatever outcome it thinks appropriate, provided that its interpretation and application of the relevant provisions to the facts in issue can be seen to be reasonable.

DISPOSITION

[20] The appeal will therefore be dismissed and the matter will be remitted to the Agency for reconsideration and redetermination in conformity with these reasons. As no costs were sought, none are awarded.

"Marc Noël"
Chief Justice

ANNEX 1

***Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38.**	***Loi sur l'emballage et l'étiquetage des produits de consommation*, L.R.C. 1985, c. C-38.**
Representations relating to prepackaged products	**Étiquetage contenant des renseignements faux**
7 (1) No dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product.	**7 (1)** Le fournisseur ne peut apposer sur un produit préemballé un étiquetage qui contient de l'information fausse ou trompeuse se rapportant au produit — ou pouvant raisonnablement donner cette impression —, ni vendre, importer ou annoncer un produit préemballé ainsi étiqueté.
Definition of false or misleading representation	**Définition de information fausse ou trompeuse**
(2) For the purposes of this section, false or misleading representation includes	**(2)** Pour l'application du présent article et relativement à un produit préemballé, information fausse ou trompeuse s'entend notamment :
…	[…]
(c) any description or illustration of the … origin … that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.	**c)** de toute description ou illustration de [son] […] origine […] qui peut raisonnablement être jugée de nature à tromper sur l'objet de la description ou de l'illustration.
***Food and Drugs Act*, R.S.C. 1985, c. F-27.**	***Loi sur les aliments et drogues*, L.R.C. 1985, c. F-27.**
Deception, etc., regarding food	**Fraude**
5 (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.	**5 (1)** Il est interdit d'étiqueter, d'emballer, de traiter, de préparer ou de vendre un aliment — ou d'en faire la publicité — de manière fausse, trompeuse ou mensongère ou susceptible de créer une fausse impression quant à sa nature, sa valeur, sa quantité, sa composition, ses avantages ou sa sûreté.

Food labelled or packaged in contravention of regulations

(2) An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

Étiquetage ou emballage non réglementaire

(2) L’aliment qui n’est pas étiqueté ou emballé ainsi que l’exigent les règlements ou dont l’étiquetage ou l’emballage n’est pas conforme aux règlements est réputé contrevenir au paragraphe (1).

***Food and Drug Regulations*, C.R.C., c. 870.**

B.02.108 A clear indication of the country of origin shall be shown on the principal display panel of a wine.

***Règlement sur les aliments et drogues*, C.R.C., c. 870.**

B.02.108 Le pays d’origine doit être clairement indiqué sur l’espace principal de l’étiquette d’un vin.

ANNEX 2

***Canada-Israel Free Trade Agreement*, Can TS 1997 No 49.**

Chapter One – Objectives

Article 1.2: Objective

1 The objective of this Agreement, as elaborated more specifically in its provisions, is to eliminate barriers to trade in, and facilitate the movement of, goods between the territories of the Parties, and thereby to promote conditions of fair competition and increase substantially investment opportunities in the free trade area.

…

Article 1.4: Definitions of General Application

1 For the purposes of this Agreement, unless otherwise specified:

…

(b) with respect to Israel the territory where its customs laws are applied;

***Accord de libre-échange Canada-Israël*, Can TS 1997 No 49.**

Chapitre 1 – Objectifs

Article 1.2 : Objectif

1 L'objectif du présent accord, défini de façon plus précise dans ses dispositions, consiste à éliminer les obstacles au commerce et à faciliter le mouvement des produits entre les territoires des Parties, de manière à favoriser une concurrence équitable et à augmenter substantiellement les possibilités d'investissement dans la zone de libre-échange.

[…]

Article 1.4: Définitions d'application générale

1 Aux fins du présent accord, et sauf stipulation contraire :

[…]

b) dans le cas d'Israël, du territoire auquel s'applique la législation douanière d'Israël.

***Customs Tariff*, S.C. 1997, c. 36.**

Canada–Israel Agreement Tariff

Application of CIAT

50 (1) … goods that originate in Israel or another CIFTA beneficiary are entitled to the Canada–Israel Agreement Tariff rates of customs duty.

***Tarif des douanes*, L.C. 1997, c. 36.**

Tarif de l'Accord Canada–Israël

Application du TACI

50 (1) … les marchandises originaires d'Israël ou d'un autre bénéficiaire de l'ALÉCI bénéficient des taux du tarif de l'Accord Canada–Israël.

***Regulations Defining Certain Expressions for the Purposes of the Customs Tariff*, SOR/97-62.**

Expressions Defined

1 For the purposes of the Customs Tariff, the following expressions are defined.

…

Israel or another CIFTA beneficiary means the territory where the customs laws of Israel are applied and includes the territory where those laws are applied in accordance with Article III of the Protocol on Economic Relations set out in Annex V of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, dated September 28, 1995, as that Protocol is amended from time to time.

***Règlement définissant certaines expressions pour l'application du tarif des douanes*, DORS/97-62.**

Définitions

1 Les expressions suivantes sont définies pour l'application du Tarif des douanes.

[…]

Israël ou autre bénéficiaire de l'ALÉCI Le territoire où est appliquée la législation douanière d'Israël, y compris le territoire où elle est appliquée en conformité avec l'article III du document intitulé *Protocol on Economic Relations*, avec ses modifications successives, figurant à l'annexe V du document intitulé *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, du 28 septembre 1995.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-312-19

(APPEAL FROM A JUDGMENT OF THE HONOURABLE ANNE L. MACTAVISH DATED JULY 29, 2019)

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