

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230217

Docket: A-458-19

Citation: 2023 FCA 37

**CORAM: PELLETIER J.A.
WOODS J.A.
ROUSSEL J.A.**

BETWEEN:

B. ERICKSON MANUFACTURING LTD.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard by online video conference hosted by the registry on September 15, 2022.

Judgment delivered at Ottawa, Ontario, on February 17, 2023.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**PELLETIER J.A.
ROUSSEL J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

I. Overview

[1] B. Erickson Manufacturing Ltd. appeals from a decision of the Canadian International Trade Tribunal (Tribunal) concerning the appropriate tariff classification of certain imported

goods (*B. Erickson Manufacturing Ltd. v. Canada (Border Services Agency, President)*, Appeal No. AP-2018-051).

[2] The goods at issue are various models of ratchet tie-down straps, consisting of a textile strap, vinyl-coated metal hooks, and a ratchet handle. The straps are used to hold down loads, such as to a trailer, in order to keep the objects secure and stationary.

[3] The Tribunal rejected the appellant's submission that the appropriate classification is under tariff item no. 8479.89.90 as "machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter" (Schedule to *Customs Tariff*, S.C. 1997, c. 36). Instead, the Tribunal agreed with the respondent that the goods are properly classified under tariff item no. 8205.70.90 as "clamps and the like".

[4] In my view, the appeal should be dismissed.

II. Tribunal decision

[5] The main issue before the Tribunal was whether the goods are properly classified under heading 82.05 or heading 84.79.

[6] The Tribunal first considered the interplay between the two headings (reasons at paras. 34-35). Relying on an explanatory note to heading 84.79, the Tribunal concluded that heading 84.79 has a residual nature and does not apply to articles covered more specifically by a heading

in any other Chapter of the Nomenclature. The Tribunal then determined that articles in heading 82.05, including articles that are “vices, clamps and the like”, are more specific than articles in heading 84.79. The Tribunal therefore decided that if the goods at issue are covered by heading 82.05, it is unnecessary to consider heading 84.79.

[7] The Tribunal then turned to whether the goods are covered by heading 82.05 as “clamps and the like”. It determined that the goods are like a clamp because they share the primary essential characteristic of a clamp: “they hold or compress objects together” (reasons at para. 43). In this regard, the Tribunal agreed with two prior Tribunal decisions which considered very similar goods: *Canadian Tire Corporation Ltd. v. Canada (Border Services Agency, President)*, AP-2011-024 and *Kinedyne Canada Limited v. Canada (Border Services Agency, President)*, AP-2012-058.

[8] Finally, the Tribunal determined that the goods are not classifiable under heading 83.08. This finding has not been appealed.

[9] On this basis, the Tribunal determined that the goods at issue are properly classified under heading 82.05.

III. Nature of the appeal and standard of review

[10] This is a statutory appeal brought under s. 68(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). This provision permits an appeal from the Tribunal decision to this Court on a question of law.

[11] The appellant submits that several errors of law were made. The standard of review to be applied is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37.

IV. Applicable legal framework

[12] The applicable legal framework was described in detail by the Tribunal in its reasons at paragraphs 11-25 (See also *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 at paras. 3-8). The salient principles are summarized below.

[13] Pursuant to s. 10(1) of the *Customs Tariff*, the classification of imported goods is generally to be determined by the General Rules for the Interpretation of the Harmonized System (General Rules). The General Rules are set out in the Schedule to the *Customs Tariff*.

[14] Importantly, Rule 1 of the General Rules provides that the classification of goods is determined in accordance with the headings in the tariff, and any relative section or chapter notes

and, provided such headings or notes do not otherwise require, according to the other rules. The provisions referred to in Rule 1 are also set out in the Schedule to the *Customs Tariff*.

[15] Under s. 11 of the *Customs Tariff*, regard must be had to *Explanatory Notes to the Harmonized Commodity Description and Coding System* published by the World Customs Organization.

[16] The headings, notes and explanatory notes relevant to this appeal are set out below.

[17] Heading 82.05 is situated in Chapter 82 of Section XV. It provides:

SECTION XV

BASE METALS
AND ARTICLES OF BASE METAL

...

Chapter 82

TOOLS, IMPLEMENTS, CUTLERY, SPOONS
AND FORKS, OF BASE METAL; PARTS THEREOF
OF BASE METAL

...

82.05 Hand tools (including glaziers' diamonds), not elsewhere specified or included; blow lamps; vices, clamps and the like, other than accessories for and parts of, machine tools; anvils; portable forges; hand or pedal-operated grinding wheels with frameworks.

[Emphasis added]

[18] Note 1(f) below is a section note to Section XV:

1. This Section does not cover:

...

- (f) Articles of Section XVI (machinery, mechanical appliances and electrical goods);

[19] Heading 84.79 is situated in Chapter 84 of Section XVI. It provides:

SECTION XVI

MACHINERY AND MECHANICAL APPLIANCES;
ELECTRICAL EQUIPMENT; PARTS THEREOF;
SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE
AND SOUND RECORDERS AND REPRODUCERS, AND PARTS
AND ACCESSORIES OF SUCH ARTICLES

Chapter 84

NUCLEAR REACTORS, BOILERS, MACHINERY
AND MECHANICAL APPLIANCES; PARTS THEREOF

...

84.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

[20] Note 1(k) below is a section note to Section XVI:

1. This Section does not cover:

...

- (k) Articles of Chapter 82 or 83;

[21] The explanatory notes to heading 84.79 provide in part:

This heading is restricted to machinery having individual functions, which:

...

- (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.

V. Analysis

A. *Was it proper for the Tribunal to ignore section notes?*

[22] Before considering the parties' submissions, I would comment briefly concerning an issue raised by the respondent before the Tribunal. The Tribunal did not discuss this issue and neither party raised it in this appeal.

[23] Before the Tribunal, the respondent submitted that the interplay of two section notes to Sections XV and XVI determine the priority between heading 82.05 and heading 84.79 (reasons at paragraph 32). The first, note 1(f) to Section XV, excludes from Section XV articles that are in Section XVI. The second, note 1(k) to Section XVI, excludes from Section XVI articles that are in Chapters 82 and 83.

[24] The respondent argues that the interplay of these notes results in priority to heading 82.05 over heading 84.79. By their terms, the section notes provide priorities between Sections XV and XVI. If both notes are applied together, Chapters 82 and 83 take priority over Section XVI, and Section XVI takes priority over other Chapters in Section XV.

[25] The Tribunal did not discuss this submission even though Rule 1 requires that section notes be applied. If the respondent's submission before the Tribunal is correct, the explanatory note to heading 84.79 that was applied by the Tribunal has no application.

[26] If the issue could affect the outcome in the appeal, this Court would have to consider it. However, as it turns out it does not affect the outcome. Accordingly, I will refrain from commenting further as it is unnecessary to do so.

[27] I now turn to the appellant's submissions.

B. *Did the Tribunal err in law in applying an explanatory note to heading 84.79?*

[28] The explanatory notes to heading 84.79 provide, among other things, that heading 84.79 does not apply to articles that are "covered more specifically by a heading in any other Chapter of the Nomenclature." The Tribunal applied this note and concluded that heading 82.05 was more specific than heading 84.79.

[29] This Court has determined that explanatory notes should be respected "unless there is a sound reason to do otherwise": *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, 319 N.R. 299 at para. 13; see also *Canada (Attorney General) v. Mattel Canada Inc.*, 2021 FCA 162 at para. 22.

[30] The appellant submits that the Tribunal erred in law in applying the explanatory note because it is inconsistent with the terms of heading 84.79. The appellant's submission is reproduced below from its memorandum of fact and law:

23. The *Explanatory Note* is in fact patently incorrect, as heading 84.79 expressly limits the “residual” aspect of the heading to *other headings of Chapter 84*, and *not* the entire Nomenclature:

Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

[31] The question is whether the explanatory note is inconsistent with heading 84.79. The plain meaning of heading 84.79 does not support the appellant’s submission. The heading provides that it is residual to other headings in the same Chapter. It does not state that it is residual only to that Chapter.

[32] The remaining question is whether the appellant’s submission is supported by a contextual or purposive interpretation of heading 84.79. The appellant has not provided a good reason why this would be the case, and in my view it is not the case.

[33] The appellant relies on Rule 1 and suggests that it directs that the classification “must initially be determined with reference only to the headings within a chapter, as well as any applicable Section or Chapter Notes”. I agree that Rule 1 should be applied first, but this does not mean that Rule 1 forecloses the application of an explanatory note that addresses priority between heading 84.79 and headings of other Chapters.

[34] I conclude that the explanatory note is not inconsistent with heading 84.79.

C. *Did the Tribunal err by not applying heading 84.79 in accordance with Kinedyne and foreign decisions?*

[35] The appellant suggests that the Tribunal erred by not adopting other decisions in which similar goods were classified under heading 84.79. The appellant refers to *Kinedyne* and certain United States classification determinations.

[36] With respect to the United States decisions, while worthy of consideration, they are not binding in Canada. The decisions are brief and do not provide much guidance on the issues raised by the appellant. For example, they do not discuss heading 82.05. The Tribunal was correct not to simply adopt the conclusion in these decisions.

[37] As for *Kinedyne*, the appellant points out that in one part of this decision the Tribunal found that goods similar to the appellant's were classified under heading 84.79 and not heading 82.05. For clarity, I would explain that in other parts of *Kinedyne*, the Tribunal found that other similar goods were not described in heading 84.79 and were classified under heading 82.05.

[38] With respect to the part of *Kinedyne* that is relevant to this submission, which classified goods under heading 84.79, the decision had to consider the interplay between heading 84.79 and heading 82.05. *Kinedyne* did not approach the issue in the same way as the Tribunal in this case, which was to determine priority by applying an explanatory note.

[39] In *Kinedyne*, the Tribunal began its analysis by determining whether the goods were *prima facie* classifiable under heading 84.79. It found that they were. Second, the Tribunal

determined that it was unnecessary to consider heading 82.05. This finding was based on an interpretation of the section notes discussed above. The Tribunal reasoned that note 1(f) to Section XV and note 1(k) to Section XVI, read together, provide that heading 84.79 and heading 82.05 are mutually exclusive. As found by the Tribunal, because of this mutual exclusivity “*prima facie* classification in [heading 84.79] precludes their *prima facie* classification in [heading 82.05]” (*Kinedyne* at para. 63).

[40] In the decision under appeal, the Tribunal was correct not to adopt this reasoning. Even if *Kinedyne* is correct that the section notes provide for mutual exclusivity, this does not determine the priority between the headings. The Tribunal in *Kinedyne* failed to consider which heading takes priority and failed to describe why it considered heading 84.79 first. It is not necessary to consider this further.

D. *Did the Tribunal err in law by determining that the goods were like a clamp?*

[41] The appellant submits that the Tribunal made errors of law in deciding that the goods at issue were like a clamp.

[42] First, the appellant submits that the Tribunal erred in rejecting its evidence and basing its decision on erroneous considerations. I disagree.

[43] In its analysis, the Tribunal first considered what makes an article like a clamp.

[44] As mentioned earlier, the Tribunal found that an article is like a clamp if it holds or compresses objects together. In reaching this conclusion, the Tribunal did not embark on a fresh analysis and simply agreed with the conclusions in *Kinedyne* and *Canadian Tire*. In my view, it was unnecessary for the Tribunal to repeat the entire analysis from the prior decisions. It was sufficient to rely on the earlier cases which applied dictionary definitions of the word “clamp” to determine its meaning and its essential characteristics. The Tribunal made no error of law in doing so, and in rejecting the evidence of the appellant to the extent that it was inconsistent with this approach.

[45] After arriving at a meaning of “like a clamp”, the Tribunal applied this meaning to the facts of the case. Based on the appellant’s evidence, the Tribunal concluded that the goods at issue were like a clamp because they hold or compress an item. No error of law was made in this determination.

[46] Lastly, the appellant submits that an explanatory note provides that heading 82.05 is not applicable in this case. The submission is set out below from the appellant’s memorandum of fact and law:

41. The Explanatory Notes support the classification of the ratchet ties under heading 84.79 and not under heading 82.05, as determined by the Tribunal in *Kinedyne*:

...load binders are not hand tools used independently in the hand to do work, but are rather in the nature of cargo control equipment, a view that is consistent with the trucking industry’s own characterization of same and the distinction that it draws between the two.⁵⁹

⁵⁹ *Kinedyne*, supra n 48 at para 67.

[47] This submission relies on paragraph 67 of *Kinedyne*. However, this paragraph is irrelevant to this appeal because it addresses an entirely different issue. The issue discussed in paragraph 67 was whether certain goods were “hand tools” as that term is used in heading 82.05. Since this issue was not raised in this case, the Tribunal did not err by failing to apply the explanatory note referred to the excerpt from *Kinedyne* above.

[48] Accordingly, the appellant has not shown that the Tribunal erred in law by concluding that the goods were like a clamp.

VI. Conclusion

[49] For the reasons above, I would dismiss the appeal with costs.

"Judith Woods"

J.A.

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

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-458-19

STYLE OF CAUSE: B. ERICKSON
MANUFACTURING LTD. v.
PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY

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ROUSSEL J.A.

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