Federal Court of Appeal | Cour d'appel fédérale

Date: 20250225

Dockets: A-338-23
A-339-23

Citation: 2025 FCA 45

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
GOYETTE J.A.

Docket: A-338-23

BETWEEN:

BEST BUY CANADA LTD.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Docket: A-339-23

AND BETWEEN:

BEST BUY CANADA LTD.

Applicant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Toronto, Ontario, on February 25, 2025.

Judgment delivered from the Bench at Toronto, Ontario, on February 25, 2025.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on February 25, 2025).

STRATAS J.A.

[1] The appellant/applicant asks this Court to set aside the decision of the Canadian International Trade Tribunal dated November 8, 2023 in file AP-2022-015. It does so by way of an appeal on questions of law under section 68 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) and a separate application for judicial review under subsection 28(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. For the following reasons, we will dismiss both with costs.

A. The statutory appeal

[2] The Tribunal classified certain goods, wine coolers, for tariff purposes. The appellant says that in doing so, the Tribunal erred in law by following an earlier decision of this Court: *Danby Products Limited v. Canada (Border Services Agency)*, 2021 FCA 82, leave dismissed on January 20, 2022 (S.C.C. No. 39755). The appellant urges us to reverse *Danby*. If *Danby* still applies, we must dismiss the appeal.

[3] *Danby* decided the issues in this case, particularly the issues of legislative interpretation. We must follow *Danby* and cannot consider new issues related to legislative interpretation like the presumption of ordinary meaning, unless *Danby* is "manifestly wrong", *i.e.*, it "overlooked a relevant statutory provision, or a case that ought to have been followed" or can be distinguished on its facts: *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *Miller v. Canada*, 2002 FCA 370 at para. 10. We are an intermediate appellate court, not an apex court like the Supreme Court. We can depart from previous decisions only exceptionally when the exacting criteria in *Miller* are met.

[4] In *Danby*, this Court cited portions of *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014). The appellant says this Court did not rely on other portions of the *Sullivan* text, thereby "overlooking an authority". But under *Miller* at para. 10, "overlooking an authority" is a high, rarely met threshold: the fundamental basis of the previous authority must be open to serious question or is incontestably wrong. This promotes stability, a highly prized value: *Canada v. Boloh 1(a)*, 2023 FCA 120 at para. 24.

[5] Here, rather than working within the strictures of *Miller*, the appellant reargues the merits of *Danby*, going deeply into its reasoning, such as how it used the *Sullivan* text or went about legislative interpretation. It does so, just like we are sitting in an appeal from *Danby*. But we do not sit on appeal from other panels: *Ignace v. Canada (Attorney General)*, 2019 FCA 239 at para. 27; *Apotex Inc. v. Eli Lilly Canada Inc.*, 2016 FCA 267, [2017] 3 F.C.R. 145 at para. 2. In this case, if *Danby* is to be reversed, the appellant should seek leave to the Supreme Court.

[6] The appellant says that the evidentiary record in *Danby* was sparse compared to this case, it answered a call in *Danby* for evidence of trade meaning, and so we should revisit *Danby*. But, in a factual finding that binds us, the Tribunal found (at para. 39) that the "padded evidentiary record" was "of the same nature" and only "slightly different" from *Danby*. In its view, the evidence did not "fundamentally [shift] the parameters of the debate" (at para. 38). *Miller* does not allow us to depart from an earlier authority just because it was not prosecuted or decided as well as it might have been: see, *e.g.*, *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 255 D.L.R. (4th) 633 (Ont. C.A.) at para. 113, citing *R. v. Bell* (1977), 75 D.L.R. (3d) 755 (Ont. C.A.) at 761.

[7] The Tribunal, bound by *Danby*, applied it without legal error. We are not persuaded that the Tribunal committed legal error in any other way. Thus, we will dismiss the statutory appeal with costs.

B. The separate judicial review

(1) Can a judicial review be brought in the face of a statutory appeal provision that restricts the grounds the Court can consider?

[8] There are many statutory appeal provisions that restrict an appellant to "questions of law" or "questions of jurisdiction" or impose a leave-to-appeal requirement, or some combination of these things: see, *e.g.*, *Canada Transportation Act*, S.C. 1996, c. 10, s. 41(1); *Broadcasting Act*, S.C. 1991, c. 11, s. 31(2); *Telecommunications Act*, S.C. 1993, c. 38, s. 64(1); *Competition Act*, R.S.C. 1985, c. C-34, ss. 30.24(2) and 34(3); *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 68(1)(c). Can a judicial review be brought in the face of these statutory appeal provisions?

[9] This Court has given two answers to that question:

(1) Statutory appeal provisions that impose restrictions do not prevent a party from bringing a judicial review as of right on any administrative law grounds: see *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161.

(2) Statutory appeal provisions sometimes restrict a court to considering "questions of law" or "questions of jurisdiction" or can require that the appellant obtain leave to appeal. Provided that the restriction furthers "a pressing and valid government

> objective" (legislation normally binding courts) and leaves the judiciary able to decide "whether state action conforms with [the law,] the Constitution, and the requirement of fair and impartial administration of justice", the restriction will be upheld and a separate judicial review disobeying the restriction will be precluded: *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39 at para. 5. While courts can ignore total restrictions on review, such as those contained in a classic privative clause, they cannot ignore partial ones that are valid on the above principles: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, [2021] 3 F.C.R. 294 at paras. 102-103 (and the Supreme Court cases cited therein).

[10] Speaking only for myself, I think the *Best Buy* decision overlooked the controlling authorities mentioned in the preceding paragraph. But multiple majorities of this Court have either approved *Best Buy* or left it in place: see *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93 at paras. 115-117; *BCE Inc. v. Québecor Média Inc.*, 2022 FCA 152 at para. 58; *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Democracy Watch v. Canada (Attorney General)*, 2024 FCA 158. This Court's repeated affirmation of *Best Buy* outweighs the personal views of any individual judge: *Janssen Inc. v. Canada (Attorney General)*, 2021 FCA 137; *Miller*, above. Thus, *Best Buy* is the law in this Court until the Supreme Court says otherwise. The Supreme Court has expressly left open whether *Best Buy* is valid: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191 at para. 50.

[11] But just because *Best Buy* says parties *can* bring a separate application for judicial review doesn't mean they *should*. In fact, in most cases they shouldn't. Why? Just about anything that can be raised in a separate application for judicial review can be raised in a statutory appeal where only "questions of law" can be raised:

- Alleged legal errors by the administrative decision-maker, whether they be found in the Constitution, legislative provisions, common law principles or administrative law principles. This includes questions of law that are extricable from (i.e., taint or dominate) questions of mixed fact and law: Canadian National Railway Company v. Emerson Milling Inc., 2017 FCA 79, [2018] 2 F.C.R. 573; Canadian National Railway Company v. Canada (Transportation Agency), 2016 FCA 266 at para. 22; Neptune Wellness Solutions v. Canada (Border Services Agency), 2020 FCA 151 at para. 15.

- Procedural fairness concerns: *Emerson Milling* at paras. 18-19.

- Sufficiency of reasons or inadequate reasons on a key point: *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at paras. 21-33.

- Errors that seem factual but are really legal errors or failures to follow legal principles governing fact-finding. For example, a decision-maker that wrongly takes judicial notice (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458), wrongly finds facts without any supporting evidence (*Canada (Border Services Agency) v. Danson Décor Inc.*, 2022 FCA 205 at para. 14), wrongly draws a factual inference

> or finds facts contrary to the law of evidence (*e.g.*, *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 and the cases cited therein; *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at para. 6), or wrongly finds facts contrary to a statutory provision (*Walls v. Canada (Attorney General)*, 2022 FCA 47 at para. 41; *Page v. Canada (Attorney General)*, 2023 FCA 169 at para. 79).

[12] Sometimes parties bring applications for judicial review to get the Court to reweigh the evidence. But we never do that under the reasonableness standard: see, *e.g.*, *Pier 1 Imports* at para. 45; and many other authorities.

[13] As for leave-to-appeal requirements in some statutory appeal provisions, they do not stop arguable issues from coming before the Court. Quite the opposite. If the issues are "fairly arguable", we grant leave: *Emerson Milling* at para. 56; *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, 2003 FCA 271, [2003] 4 F.C.R. 558 at para. 17; and on the meaning of "fairly arguable", see *Lukács v. Swoop Inc.*, 2019 FCA 145 at para. 15. No one has a right to bring or prosecute a case that is not "fairly arguable".

[14] Judicial reviews and statutory appeals are the same as far as administrative law remedies are concerned: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 139-142; and with specific regard to s. 52 of the *Federal Courts Act*, see *Cathay Pacific Airways Limited v. Air Miles International Trading B.V.*, 2015 FCA 253 and *Punniamoorthy v. Canada (Minister of Employment and Immigration)* (1994), 113 D.L.R. (4th) 663, 20 Admin. L.R. (2d) 73.

[15] In light of the above, this much is true: rare are the times a party really needs to bring a separate judicial review.

[16] A needless judicial review should never be brought. It subverts judicial economy, burdens the Registry, drives up costs, and undermines simplicity and efficiency in administrative law: *Vavilov* at para. 29; *Pier 1 Imports* at para. 51; *Best Buy* at para. 68. If brought, it should be immediately discontinued: *Federal Courts Rules*, S.O.R./98-106, Rule 165. If not discontinued, a respondent should move to dismiss it. And the Court, on its own motion, can dismiss it too: *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 19-24 and cases cited therein (plenary powers of the Court and Rule 74). If a separate judicial review has been brought and is truly needed, it must be consolidated with the statutory appeal under Rule 105.

(2) Application to this case

[17] Here we have an appeal under a statutory appeal provision and a separate application for judicial review that adopts the submissions made in the appeal, nothing more. The application for judicial review is needless. But the applicant did not have the benefit of these reasons, and its motives were innocent. Thus, in this case, we will not impose any costs consequences.

C. Disposition

[18] Despite the able submissions of both counsel for the appellant/applicant, the appeal and the application will be dismissed with costs. The original of these reasons will be filed in A-338-23 and a copy in A-339-23.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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