Federal Court  Cour fédérale

Date: 20140206

Docket: T-1807-12

Citation: 2014 FC 130

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 6, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GESTION J.F.-HOULE INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Gestion J.F.-Houle Inc., is raising a complaint with respect to two assessments issued under the *Customs Tariff*, SC 1997, c 36. The two assessments are the subject of an application for judicial review pursuant to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, RSC (1985), c F-7. The paragraph reads as follows:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1** (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

Facts

[2] Given that the facts of the two assessments proceed from different incidents but are essentially similar with respect to their constituent elements, and that the issues that arise are identical, judgment is hereby rendered for the two applications for judicial review. I will briefly focus on the facts in both cases and then address the common issues.

[3] In both cases, the impugned decision was rendered on June 18, 2012, by an officer of the Canada Border Services Agency (CBSA). In both cases, substantial customs duties were assessed.

[4] On September 16, 2011, the applicant applied for relief from customs duties that would otherwise be payable regarding the importation of chicken. On September 22, 2011, the said relief was granted and a certificate was issued under section 90 of the *Customs Tariff*.

[5] The first importation (docket T-1807-12) occurred regarding the purchase of 40,000 pounds of chicken at a cost of $52,800 from River Valley Trading, a company in Arizona. Those goods had to be minimally processed before being exported. It appears that they were going to be exported to Colombia, Jamaica, Barbados, Aruba and St. Kitts. The transporter, Reliance Transport, was responsible for transporting the goods from the United States to Canada. It is not disputed that the

goods crossed the Canadian border. It seems that the goods never reached their destination and that they were stolen during transport, but on Canadian soil.

[6] The applicant reported the theft of the chicken on December 1, 2011, to the Régie inter-municipale de police Richelieu-Saint-Laurent.

[7] However, the said theft was never disclosed to the CBSA. It was only in May 2012 that a CBSA representative who was visiting the applicant's offices was able to determine that the granting of the relief from the customs duties was no longer valid because the imported chicken could not be exported.

[8] On June 18, 2012, the assessment was issued for a total amount of $145,877.23, broken down as follows: $135,771.13 in custom duties, $9,514.88 in GST and $591.22 in interest.

[9] In docket T-1808-12, the applicant proceeded under the same application for relief from customs duties but, this time, 34,000 pounds of chicken was purchased on April 26, 2012. That chicken was from Marshville, North Carolina, and was apparently bought from the company Service alimentaire Desco Inc. The transport needed to be provided by a different company, Deisel Transport. Once again, it is not disputed that the chicken crossed the border but, in an unfortunate turn of events, that delivery was also stolen. The theft purportedly took place on April 27, 2012, and it does not seem to have been reported to the police. Instead, the applicant filed a claim with its insurers.

[10] In this case, as in the previous one, the findings that the goods could not be exported were made in May 2012 and the notice of assessment was completed on June 18, 2012. This time, the assessment was in the amount of $116,117.05, broken down as follows: $108,512.46 in customs duties and $7,604.59 in GST.

[11] The record shows that the applicant received $56,901.30 as an indemnity from its insurers on February 3, 2012; regarding the theft in April 2012, the insurer paid $150,000 on August 1, 2012.

[12] Based on these ultimately rather similar facts, the applicant raised the same issues.

Issues

[13] The applicant suggested two issues. Are the thefts of the goods on December 1, 2011, and April 27, 2012, situations that are subject to section 118 of the *Customs Tariff* and did the CBSA err by issuing assessments on June 18, 2012? Strictly speaking, those two issues are really one. If section 118 of the *Customs Tariff* applies, the assessments issued are invalid. Therefore, the issue is whether section 118 applies in this case.

Standard of review

[14] Surprisingly, the respondent refuses to discuss the standard of review that would apply in this case. The respondent merely states that, regardless of the standard, the CBSA's decision was well founded both in fact and in law.

[15] As expected, the applicant argues that the correctness standard applies in this case. To do so, it relies on the pre-*Dunsmuir* jurisprudence.

[16] Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, (*Dunsmuir*) the case law on judicial review has clearly tended to favour the reasonableness standard. As such, paragraph 51 of the decision reads as follows:

> [51] . . . As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

A little later, the Court stated the following in paragraph 54:

> [54] . . . Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: [citations omitted]. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: . . .

[17] Very recently, in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, the Supreme Court of Canada clearly stayed the course. The following is stated in paragraphs 21 and 22:

> [21] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54). Recently, in an attempt to further simplify matters, this Court held that an administrative decision maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation

> subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).
>
> [22] The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions — even when they involve the interpretation of a home statute — warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16). The appellant follows both these routes in urging us to accept a correctness standard. I propose to deal with her second argument first as it can be dispensed with quickly.

The Court then focussed on demonstrating that the interpretation of the law applied on a daily basis by the B.C. Securities Commission had to be reviewed on the reasonableness standard.

[18] In fact, since *Dunsmuir*, the Supreme Court has established four broad categories of legislation that must be reviewed on the correctness standard. First, questions regarding the division of powers between Parliament and the provinces must be reviewed on the correctness standard. Second, administrative bodies must be correct in their determinations of true questions of jurisdiction or *vires*. Third, the correctness standard applies to questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". Lastly, a correct decision is needed for questions regarding the jurisdictional lines between two or more competing specialized tribunals.

[19] As will be discussed, the interpretation to be given to section 118 does not fall under any of the four categories listed in *Dunsmuir* at paragraphs 58 to 61. Since *Dunsmuir*, the Court has

established a fifth category in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283. It is unnecessary to elaborate because it does not correspond to the facts in this case. I would therefore be inclined to see the need to review the decision in this case on the reasonableness standard.

[20] Unfortunately, the matter has not been pleaded on this basis before this Court, which could not benefit from the parties' perspectives. The respondent merely concedes, so to speak, that the standard would be correctness given that, in his opinion, the decision that was made was correct. That is perhaps short-sighted, but that is the respondent's decision. Because I found that the text in section 118 is not ambiguous and that the position adopted by the respondent can only be correct, it is therefore unnecessary to formally determine the standard of review in this case. In the circumstances, I prefer to be cautious and not go beyond what the parties submitted. A matter in which the issue must be resolved and in which the parties submitted developed arguments would be more appropriate.

Analysis

[21] The *Customs Act*, RSC (1985), c 1 (2nd Supp.), establishes the general principle that "[i]mported goods are charged with duties thereon from the time of importation thereof until such time as the duties are paid or the charge is otherwise removed" (subsection 17(1)).

[22] The *Customs Tariff* provides the opportunity for imported goods to be exempted from the payment of duties. In this case, the applicant availed itself of paragraph 89(1)(*b*) of the *Customs Tariff* to benefit from that relief:

89. (1) Subject to subsection (2), section 95 and any regulations made under section 99, if an application for relief is made within the prescribed time, in accordance with subsection (4), by a person of a prescribed class, relief may be granted from the payment of duties that would but for this section be payable in respect of imported goods that are

. . .

(*b*) released, processed in Canada and subsequently exported;

89. (1) Sous réserve du paragraphe (2), de l'article 95 et des règlements visés à l'article 99 et sur demande présentée dans le délai réglementaire en conformité avec le paragraphe (4) par une personne appartenant à une catégorie réglementaire, des marchandises importées peuvent, dans les cas suivants, être exonérées, une fois dédouanées, des droits qui, sans le présent article, seraient exigibles :

[. . .]

b) elles sont transformées au Canada et ultérieurement exportées;

The Minister of Public Safety and Emergency Preparedness may issue a certificate to a person who will have benefited from the relief (section 90, *Customs Tariff*).

[23] It is clear that the applicant could not, in either case under review, satisfy the condition in paragraph 89(1)(*b*). Even though the chicken was imported, it was not processed in Canada and could not be subsequently exported. The law stipulates what happens when a condition to which relief is subject is not complied with. Section 118 of the *Customs Tariff* therefore applies. I reproduce subsection 1 of that section:

118. (1) If relief from, or remission of, duties is granted under this Act, other than under section 92, or if remission of duties is granted under section 23 of the *Financial Administration Act* and a condition to which the relief or remission is subject is not complied with, the person who did not comply with the condition shall, within 90 days or such other period as may be prescribed after the day of the failure to comply,

(*a*) report the failure to comply to an officer at a customs office; and

118. (1) Si, en cas d'exonération ou de remise accordée en application de la présente loi, sauf l'article 92, ou de remise accordée en application de l'article 23 de la *Loi sur la gestion des finances publiques*, une condition de l'exonération ou de la remise n'est pas observée, la personne défaillante est tenue, dans les quatre-vingt-dix jours ou dans le délai réglementaire suivant le moment de l'inobservation, de :

a) déclarer celle-ci à un agent d'un bureau de douane;

(*b*) pay to Her Majesty in right of Canada an amount equal to the amount of the duties in respect of which the relief or remission was granted, unless that person can provide evidence satisfactory to the Minister of Public Safety and Emergency Preparedness that

(i) at the time of the failure to comply with the condition, a refund or drawback would otherwise have been granted if duties had been paid, or
(ii) the goods in respect of which the relief or remission was granted qualify in some other manner for relief or remission under this Act or the *Financial Administration Act*.

b) payer à Sa Majesté du chef du Canada les droits faisant l'objet de l'exonération ou de la remise, sauf si elle peut produire avec sa déclaration les justificatifs, que le ministre de la Sécurité publique et de la Protection civile juge convaincants, pour établir un des faits suivants :

(i) au moment de l'inobservation de la condition, un drawback ou un remboursement aurait été accordé si les droits avaient été payés,
(ii) les marchandises sont admissibles à un autre titre à l'exonération ou à la remise prévue par la présente loi ou à la remise prévue par la *Loi sur la gestion des finances publiques*.

[24] The applicant tried to establish that section 118 confers discretion that was allegedly exercised wrongly. If it is true that some discretion exists in section 118, it does not lie where the applicant would like it to. As such, the applicant put the following phrases together to argue that the Minister had broad discretion: "satisfactory to the Minister of Public Safety and Emergency Preparedness" and "goods . . . qualify in some other manner for relief or remission under . . . the *Financial Administration Act*". That discretion should have been exercised in favour of the applicant because common sense must prevail in this type of decision and the applicant, even though it was the owner of the chicken, never had physical control over it. How is one liable for taxes on goods that have disappeared?

[25] In my opinion, that argument is based on a misreading of section 118. That section simply sets out that, if there is relief from taxes, or remission of taxes or penalties under section 23 of the *Financial Administration Act*, but that a condition to which the relief/remission is subject is not complied with, it follows that duty is owing. That is the situation of the applicant.

[26] Section 118 also provides that the amount is not payable if the goods may otherwise be exempted or the subject of a remission set out in the *Financial Administration Act*. To qualify for the exemptions, it is up to the applicant to "provide evidence satisfactory to the Minister". However, nothing like that was done. The applicant did not submit that the goods in respect of which the relief or remission was granted qualify in some other manner for relief under the *Customs Tariff* or remission under the *Financial Administration Act*. It instead puts forward the argument that the law cannot be construed to have such a draconian effect.

[27] In my view, it is perhaps a draconian effect, but it is indeed the purpose of the law. Essentially, the legislation places risks on importers. Thus, if there is no relief program, duty is owing upon importation. Someone who imports goods without such a relief program would pay duty and if the shipment was destroyed, redresss cannot be had against the Crown. This rule is set out in subsection 23(7) of the *Financial Administration Act*, RSC (1985), c F-11, which reads as follows:

23. (7) No tax paid to Her Majesty on any goods shall be remitted by reasons only that, after the payment of the tax and after release from the control of customs or excise officers, the goods were lost or destroyed.	**23.** (7) Il n'est pas fait remise des taxes payées sur des marchandises du seul fait de leur perte ou de leur destruction après le paiement et après leur enlèvement sur dédouanement ou congé.

[28] It seems that two conclusions must be drawn from subsection 23(7): taxes on goods are owing and they cannot be remitted if the goods are subsequently lost or destroyed.

[29] It is not surprising that the situation is symmetrical for relief. Section 118 of the *Customs Tariff* stipulates that tax is owing when a condition is not complied with. Here, the exportation condition could not be met. The result is that the applicant should have reported, within 90 days, that the condition could not be met due to the theft, and made the payment to Her Majesty in right of Canada.

[30] The applicant could avail itself of only two exceptions in respect of which it should have provided evidence satisfactory to the Minister. In the matter of qualifying "in some other manner" for relief, no such allegation was made, much less any satisfactory evidence submitted. In the matter of a remission set out in the *Financial Administration Act*, subsection 23(7) of that act is a formidable obstacle. Not only was no request for remission made under subsection 23(2), but the remission seems prohibited by subsection 23(7).

[31] In my view, the attempt under section 118 was doomed to fail. The Minister cannot find that there was convincing evidence when none was provided. That was the case here and the measure of discretion that can be found in the words "satisfactory evidence" could not be exercised because no evidence was provided. Moreover, the remission under the *Financial Administration Act* was not a valid avenue because of the nullifying obstacle of subsection 23(7) in this case.

[32] As such, the applications for judicial review in dockets T-1807-12 and T-1808-12 must be dismissed with costs. The parties agreed that costs fixed at $1,750 would be appropriate. I see no reason in exercising the discretion conferred by Rule 400 of the *Federal Courts Rules* to distance

myself from that recommendation that applied regardless of the outcome. Therefore, costs in the total amount of $1,750 for the two cases are ordered against the applicant.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review of the decision by the Canada Border Services Agency dated June 18, 2012, is dismissed. Costs on the basis of a single total amount of one thousand seven hundred and fifty dollars ($1,750), inclusive of disbursements, in dockets T-1807-12 and T-1808-12 are ordered against the applicant.

"Yvan Roy"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1807-12
STYLE OF CAUSE:	GESTION J.F.-HOULE INC. and ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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