Federal Court  Cour fédérale

Date: 20140224

Docket: T-1024-12

Citation: 2014 FC 175

Ottawa, Ontario, February 24, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DOREL INDUSTRIES INC.

Applicant

and

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decisions of the Canada Border Services Agency ("CBSA") dated April 25, 2012 in which the Respondent, CBSA, refused the drawbacks the Applicant, Dorel Industries ("Dorel"), had claimed on the basis that their futon covers imported from China and exported to the United States remain in the "same condition" and are subject to s 113 of the *Customs Tariff Act*, SC 1997, c 36 ("the *Act*"). The Respondent refused the drawbacks on the basis that the tufting process used on the futon covers disqualifies them from the "Same Condition Status". The Applicant contests this decision as CBSA had previously rendered another

decision on September 14, 2011 declaring that the futon covers have met the "Same Condition Status" as per s 303(6) of the North American Free Trade Agreement ("*NAFTA*").

[2] For the reasons that follow, I have come to the conclusion that this application for judicial review ought to be granted.

Facts

[3] The parties have agreed on the facts, and the following is primarily based on their Agreed Statement of Facts.

[4] The Applicant is a public company which, *inter alia*, imports futon covers from China. Three sides of the cover are closed and the fourth is outfitted with a zipper. In Canada, a mattress is inserted in the cover. The zipper is then closed and by machine, plastic jiffies are punched through the covered futon mattress such that the ends of the plastic jiffies are visible on the two exterior sides (upper and lower) of the covered futon mattress. This process is called "tufting". No sewing is involved. The covered futon mattress is then packaged, together with a metal frame, and exported to the United States.

[5] The Applicant paid custom duty on the imported futon covers. On May 11, 2010, the Applicant requested a Same Condition Process Ruling as provided by s 509 of the *NAFTA* for the futon covers imported from China and submitted to the tufting (jiffying process). This request was allegedly accompanied by five photographs, although this is contested by the Respondent. There is

no suggestion by the Respondent that the Applicant failed to disclose any information when requesting the "Same Condition" ruling.

[6] In two separate claims dated April 29, 2011 and September 6, 2011, the Applicant applied for drawbacks on the said goods based on the "Same Condition Status" of s 303(6) of the *NAFTA*. These claims were for a drawback of the customs duty paid on imported goods between May 1, 2007 and March 22, 2011 and exported between June 1, 2007 and June 30, 2011. On September 14, 2011, the Respondent issued the Same Condition Process Ruling stating that the futon covers for which the ruling had been sought met the "Same Condition Status". The ruling noted that the CBSA "finds this re-packaging of the goods is allowable and has not materially altered the characteristics of the goods. As such, the goods are exported in the "same condition" so full duty relief is available". Following the September 14, 2011 ruling, the Respondent paid, partially, the drawback claims to the Applicant.

[7] The Respondent then initiated an audit of the drawback paid and visited the Applicant's manufacturing facility. The Respondent concluded that the tufting process, as performed by the Applicant, did not in fact qualify for the "same condition" treatment. Accordingly, the Respondent issued a new ruling on February 23, 2012, replacing the ruling of September 14, 2011.

[8] On April 25, 2012, the Respondent issued two decisions under s 114 of the *Act* demanding the return, by the Applicant, of the drawback payments in the amounts paid of $389,912.77 and $79,536.40 together with interest.

The impugned decision

[9] The two decisions being challenged were rendered by the Respondent on April 25, 2012. These decisions do not provide much information, essentially being assessments under the *Act* following the "Same Condition" ruling of February 23, 2012.

[10] In that ruling, CBSA found that the tufting process changes the condition of the goods imported and that the futons exported to the United States are therefore not exempt from duties as they are not "in the same condition" in which they were imported for the purposes of s 89(1) of the *Act*. The rationale underlying this decision is found in the following paragraphs of the letter sent to the Applicant on February 23, 2012:

> The goods in this request are imported futon covers which are subsequently tufted to mattress pads and then zipped closed while in Canada prior to exportation to the United States. The process of tufting permanently attaches the futon cover to the mattress pad. The process of tufting in Canada has materially altered the characteristics of the imported futon covers. Specifically, the act of tufting is more than an incidental operation as it changes the condition of the imported article from being a futon cover to a completed mattress.
>
> With respect to the imported frames, that are subsequently repackaged with the other futon components while in Canada prior to exportation to the United States, we find that this specific process (repackaging the frames) would be considered as a "same condition" process as it has not materially altered the characteristics of the frames.
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> Applicant's Amended Record, pp 53-54.

[11] A further letter sent by the Respondent to counsel for the Applicant on April 13, 2012, is also of interest to understand the February 23, 2012 decision. Responding to submissions made by counsel for the Applicant dated March 15, 2012 objecting to the new ruling, a Senior Program Officer of CBSA wrote:

> On the application for a same condition ruling dated May 11, 2011, Dorel declared that the process included the insertion of a firm fibrous pad into a cover which would then be packaged with a futon frame to form a ready-to-assemble sofa. Our ruling, dated September 14, 2011, approved this repackaging as an allowable process with the caveat that no sewing would be involved.
>
> It was later brought to our attention that an additional process of tufting was being performed. Accordingly, we issued a second ruling on February 23, 2012, to identify tufting as part of production, which is not considered an allowable process as the act of tufting is more than an incidental operation. Tufting is defined as:
>
> "To draw together (a cushion or the like) by passing a thread through at regular intervals, the depressions thus produced being usually ornamented with tufts or buttons."
>
> The process of tufting changes the mattress cover into a completed mattress. The sewing involved is not considered as an allowable process identified in Article 303 of the NAFTA.
>
> Therefore, the CBSA has not changed its position in the ruling dated September 14, 2011, based on the fact that the process of tufting was not mentioned in the original application and that our ruling specifically stated that sewing was not allowed. As you are aware, under section 118 of the Customs Tariff, failure to comply with a condition requires that any relief or remission be repaid.
>
> Applicant's Amended Record, p 69.

Issues

[12] It is worth emphasizing from the outset that this Court is not called upon to determine the legality of the second "Same Condition" ruling of February 23, 2012 on the merit. In other words, this application for judicial review does not challenge the decision whereby CBSA concluded that the tufting operation as performed by the Applicant did not qualify for "Same Condition" status pursuant to s 89(1)(a) of the *Act*.

[13] The only question to be determined in the case at bar is the one identified by the Respondent in its written memorandum of fact and law:

> Does the Same Condition Process Ruling of September 14, 2011 preclude the Respondent from refusing the drawback claim for the futon covers as per the decision of April 25, 2012?

Analysis

[14] There is no doubt that the issuance of a "Same Condition" ruling involves a mixed question of fact and law and must therefore be reviewed on a standard of reasonableness. As previously mentioned, however, this is not the issue in the case at bar. What is at stake is whether the Respondent is estopped from issuing its assessments under s 114 of the *Act* and from reversing a prior "Same Condition" ruling, thereby refusing the drawback claim made by the Applicant on the basis of the first "Same Condition" ruling.

[15] I agree with the Respondent that such an issue goes to the procedural fairness of the decision and must therefore be reviewed on a standard of correctness. The Supreme Court of Canada has made it clear in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 and *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 329, 2009 SCC 12 that issues involving procedural fairness are to be reviewed on the basis of a correctness standard.

[16] The Applicant submits that the doctrine of promissory estoppel prevents the Respondent from demanding the refund of the drawbacks. The Applicant argues that the Respondent was precluded from rejecting the drawback claims because of the September 14, 2011 ruling in which it confirmed that the futon covers that had been through the tufting process qualified for the "Same Condition Status" as described in s 303(6) of the *NAFTA*.

[17] I agree with the Respondent that the requirements for the promissory estoppel common law doctrine are not met in the case at bar. These requirements are most explicitly spelled out in *Maracle v Travellers Indemnnity Co of Canada*, [1991] 2 SCR 50, a decision upon which both parties relied in their submissions. In that case, Justice Sopinka stated (at para 13):

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. …

[18] In the case at bar, the Applicant cannot seriously contend that he relied on the September 14, 2011 ruling when he chose to import the futon covers or subsequently re-export them. The futon covers had all been imported by July 5, 2011 and almost entirely re-exported by September 14, 2011. As a result, the Applicant did not rely or act upon any representation by the Respondent when he imported or exported the goods on which duties are now claimed. Therefore, the Applicant cannot rely on the principles of promissory estoppel to contest the legality of the April 25, 2012 decisions demanding the return of the drawback payments already made.

[19] An advanced ruling certificate is generally provided prior to any transaction being undertaken. If a party takes whatever action it takes and then requests such a ruling, it is no more an "advanced" ruling. Indeed, a reading of s 509 of the *NAFTA*, pursuant to which such rulings are issued, clearly states that the issuance of a written advanced ruling certificate should be provided "prior to the importation of a good into its territory, to an importer in its territory or an exporter (…) in the territory of another Party". This is clearly not what the Applicant did in the case at bar. If he

was concerned about the tariff classification of the futon covers, he would have waited to receive the advanced ruling certificate before importing and exporting the goods in dispute.

[20] The Applicant further claims that s 114 of the *Act* has a temporal aspect and that the eligibility for a drawback is conditional on the Applicant having a "Same Condition" ruling at the time of the payment of the drawbacks. Section 114 reads as follows:

Overpayment of refund or drawback	Restitution
114. (1) If a refund or drawback is granted under section 110 or 113 to a person who is not eligible for the refund or drawback or in an amount exceeding the amount for which the person is eligible, that person shall pay to Her Majesty in right of Canada, on the day that the refund or drawback is received, (a) any amount for which the person is not eligible; and (b) any interest granted under section 127 on the amount referred to in paragraph (*a*).	114. (1) En cas d'octroi du remboursement ou du drawback prévu aux articles 110 ou 113 à une personne qui n'y est pas admissible, en tout ou en partie, cette personne est tenue, dès réception du remboursement ou du drawback, de payer à Sa Majesté du chef du Canada la somme à laquelle elle n'a pas droit et les intérêts reçus sur celle-ci en application de l'article 127.
Debt to Her Majesty	Créance de Sa Majesté
(2) An amount referred to in subsection (1), while it remains unpaid, is deemed to be a debt owing to Her Majesty in right of Canada under the *Customs Act*.	(2) Toute somme visée au paragraphe (1) qui demeure impayée est réputée, pour l'application de la *Loi sur les douanes*, une créance de Sa Majesté du chef du Canada au titre de cette loi.

[21] I agree with the Applicant that s 114 cannot apply if, at the time the refund or drawback is made, the person to whom it is made was eligible for same. The purpose of that provision is essentially to allow for Her Majesty in Right of Canada to recover any amount of money mistakenly paid to a person who was not entitled to a refund or drawback. This is quite different from the situation in which the Applicant found himself in the case at bar. At the time the drawback refunds were made, the Applicant was entitled to those payments as his two duty drawback claims had been approved. Accordingly, I find that s 114 would not apply in the present case.

[22] This is not to say that the Respondent cannot revise its decisions. It most certainly may do so, not as a result of s 114 of the *Act*, but pursuant to s 90, which states as follows:

Certificate	Certificat
90. (1) Subject to regulations made under paragraph 99(e), the Minister of Public Safety and Emergency Preparedness may issue a numbered certificate to a person of a prescribed class referred to in section 89.	90. (1) Le ministre de la Sécurité publique et de la Protection civile peut, sous réserve des règlements visés à l'alinéa 99e), délivrer un certificat numéroté à une personne appartenant à l'une des catégories réglementaires énumérées à l'article 89.
Amendment, suspension, etc., of certificate	Modification du certificat
(2) The Minister of Public Safety and Emergency Preparedness may, subject to regulations made under paragraph 99(e), amend, suspend, renew, cancel or reinstate a certificate issued under subsection (1).	(2) Le ministre de la Sécurité publique et de la Protection civile peut, sous réserve des règlements visés à l'alinéa 99e), modifier, suspendre, renouveler, annuler ou rétablir le certificat.
Release of goods	Dédouanement des marchandises

(3) Goods in respect of which relief is granted under section 89 may be released without payment of the duties relieved under that section if the number of the certificate issued under subsection (1) is disclosed when the goods are accounted for under section 32 of the *Customs Act* and the certificate is in force at that time.	(3) Les marchandises faisant l'objet de l'exonération prévue à l'article 89 peuvent être dédouanées sans le paiement des droits visés par l'exonération, si le numéro indiqué sur le certificat est présenté au moment de la déclaration en détail exigée par l'article 32 de la *Loi sur les douanes* et si le certificat est valide à cette date.

[23] The Minister of Public Safety and Emergency Preparedness is undoubtedly entitled to change a ruling and is not bound by its previous decisions. However, in the absence of a clear indication that Parliament intended to give the Minister the power to withdraw retroactively a certificate granting relief of duties that has validly been issued, I am unable to agree with the Respondent that it may now reassess the Applicant under a second "Same Condition" ruling purporting to modify the first one.

[24] It may have been different had the Applicant made false representations or concealed relevant information that could have materially affected the first decision. Despite some suggestions in the Record that Dorel did not disclose the process of tufting, it was clearly not the case. A Detailed Adjustment Statement dated March 14, 2011 issued by the Respondent clearly refers to tufted futon covers, and was provided to the Senior Program Officer who made the first ruling. The Respondent also issued an internal memorandum dated May 27, 2010 which clearly recognized the presence of the tufting. At the hearing, counsel for the Respondent acknowledged that no misrepresentation was made on behalf of Dorel, and that the second ruling can only be the result of a new interpretation, contrary to what was stated in the April 13, 2012 letter (see para 11, above)

[25] It could have been argued (although it was not), that paragraph 90(2) of the Act, by using the word "cancel", allows the Minister to void a certificate *ab initio* and to replace it with a new certificate which shall, for all intents and purposes, be applied as if it had been issued as of September 14, 2011. Such an interpretation, however, would run against the time-honoured presumption of statutory interpretation that Parliament does not intend to confer a power on subordinate authorities to make regulations or orders that are retroactive: *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Ottawa: LexisNexis, 2002), at 546. It would take much more explicit and categorical language than that found in s 90 of the *Act* to displace this rule of legislative construction. Commenting on that section, Justice Blais (as he then was) wrote as follows in *Dominion Sample Ltd v Canada (Customs and Revenue Agency)*, 2003 FC 1244:

> [62] Parliament cannot have intended such an interpretation. If it had intended for the cancellation of the certificate to be retroactive, without the holder having done anything to bring about the cancellation, Parliament would no doubt have provided explicit provisions to give retroactive effect.
>
> (…)
>
> [66] In the case at bar (…), a financial advantage was obtained with the full knowledge and consent of the Crown. The Minister may, as the *Customs Tariff* provides, cancel the certificate. He may not, however, absent clear authority to the contrary, retroactively charge the importer-exporter for duties which had previously been remitted under a valid certificate, and where both parties were content that the conditions for the certificate were being fulfilled.

[26] Indeed, the *Act* does provide, in other provisions, for the possibility of an order made by the Governor in Council to have a retroactive effect. Section 14(3) allows the Governor in Council to give retroactive effect to an order amending the schedule to reduce a rate of customs duty on goods

imported from a country. Section 82 of the *Act* is even more telling of Parliament's knowledge of that cardinal rule of statutory interpretation:

Amendment of List of Tariff Provisions and the "F" Staging List	Modification des taux
82. (1) The Governor in Council may, on the recommendation of the Minister, by order, amend the List of Tariff Provisions and the "F" Staging List in respect of goods used in the production of other goods or the provision of services, subject to any conditions and for any period that may be set out in the order.	82. (1) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, modifier la liste des dispositions tarifaires et le tableau des échelonnements en ce qui concerne les marchandises utilisées pour la production d'autres marchandises ou la fourniture de services, sous réserve, le cas échéant, des conditions ou de la durée d'application précisées dans le décret.
Repeal or amendment	Modification ou abrogation
(2) At any time before the expiration of an order made under subsection (1), the Governor in Council may, on the recommendation of the Minister, by subsequent order, repeal or amend the order subject to any conditions and for any period that may be set out in the subsequent order.	(2) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, modifier ou abroger, avant son expiration, un décret pris en application du paragraphe (1) et fixer les conditions ou la durée d'application de la modification ou de l'abrogation.
(…)	(…)
Retroactivity	Rétroactivité des décrets
(4) An order made under subsection (1) or (2) may, if it so provides, be retroactive and have effect in respect of a period before it is made, but no such order may have effect in	(4) Les décrets pris en application des paragraphes (1) ou (2) peuvent, s'ils comportent une disposition en ce sens, avoir un effet rétroactif et s'appliquer à une période

respect of a period before this section comes into force.	antérieure à la date de leur prise, mais non antérieure à la date d'entrée en vigueur du présent article.
(…)	(…)

[27] If Parliament had intended to confer on the Minister the power to cancel a certificate not only for the future but also for the past, it could have said so as explicitly as it did in those other sections of the *Act*. In the absence of such clear language, it is to be presumed that Parliament did not intend to give the Minister that power to reverse a certificate retroactively.

[28] For all of the foregoing reasons, I am therefore of the view that the decisions of the Respondent dated April 25, 2012 whereby the Applicant was reassessed and ordered to return the drawback payments he had previously received were not only unreasonable, but also incorrect in law. Accordingly, this application for judicial review is granted, with costs in favour of the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted, with costs in favour of the Applicant.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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