

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160429

Docket: A-32-15

Citation: 2016 FCA 135

**CORAM: DAWSON J.A.
NEAR J.A.
DE MONTIGNY J.A.**

BETWEEN:

BSH HOME APPLIANCES LTD.

Appellant

and

**THE PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY**

Respondent

Heard at Ottawa, Ontario, on April 20, 2016

Judgment delivered at Ottawa, Ontario, on April 29, 2016.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**NEAR J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] For reasons reported as Appeal No. AP-2013-057, the Canadian International Trade Tribunal found that the goods in issue, seven models of Bosch washers and dryers, were not entitled to duty-free treatment under tariff item No. 9979.00.00 because they were not goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities.

[2] Tariff item No. 9979.00.00 provides:

Goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and articles and materials for use in such goods.

[3] On this appeal from the decision of the Tribunal the appellant advances a number of asserted errors on the part of the Tribunal.

[4] The appellant first argues that the Tribunal's interpretation of tariff item No. 9979.00.00 is "without justification" and unreasonable because, by having regard to standards set out in the *Americans with Disabilities Act* (ADA), the Tribunal adopted a test not authorized by law. More specifically, the appellant submits that the Tribunal erred when it adopted a test that led it to compare the specific design characteristics of the goods against the ADA accessibility standards.

[5] I disagree. The Tribunal referred to the ADA standards because the appellant's Manager-Technical Services gave evidence, and the appellant submitted that the standards were relevant to the Tribunal's assessment of the design characteristics of the goods (reasons, at paragraph 56). The reasons of the Tribunal demonstrate that it was not substituting the ADA standards for the "specifically designed" test mandated by the Tariff. Instead, the Tribunal accepted the appellant's evidence and submission that the ADA standards, as generally recognized accessibility standards, were relevant for the "purposes of the present appeal" when assessing the design characteristics of the goods (reasons, at paragraph 56).

[6] The appellant has not shown that it was unreasonable for the Tribunal to view as relevant standards intended to ensure household items are accessible and usable by individuals with disabilities.

[7] Next, the appellant argues that the Tribunal made a palpable and overriding error when it drew the inference that, without a pedestal, the goods were not ADA compliant “in relation to lower door height, high forward reach and high side reach” (reasons, paragraph 67). The appellant acknowledges that without a pedestal the goods fail the lower door height standard, but submits that the goods do not fail the other two standards.

[8] Assuming, without deciding, that the Tribunal erred in its interpretation of the high forward reach and high side reach standards, this does not render its decision unreasonable. Without the pedestal the lower door height standard was not met. Accordingly, even if the other two standards were satisfied, one of the ADA standards was not satisfied and the goods were not ADA compliant. Therefore, any incorrect inference drawn by the Tribunal did not undermine its analysis that the goods were not ADA compliant.

[9] Moreover, subsection 68(1) of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) restricts appeals from the Tribunal to this Court to appeals on any question of law. The drawing of an unsound inference is not an error of law.

[10] The appellant also argues that the Tribunal fettered its discretion by interpreting the “specifically designed” test as being solely dependent on compliance with the relevant ADA standards.

[11] Again, I disagree. A decision-maker entitled to exercise discretion in the course of its duties fetters its discretion when it creates a standard practice and adheres to that practice instead of approaching each exercise of discretion on a case-by-case basis, having regard to the relevant evidence. In the present case, the Tribunal did not base its decision on a standard practice without considering the facts of the case. It was the appellant who submitted to the Tribunal that the ADA standards were relevant. As noted above, the Tribunal was explicit that it accepted the ADA standards as only relevant for “the purposes of the present appeal”.

[12] Further, the Tribunal rejected without reference to the ADA standards, the appellant’s argument that the goods were designed to assist visually impaired persons. This argument was dismissed on the basis that there was insufficient supporting evidence. This demonstrates that the Tribunal did not equate the ADA standards with the “specifically designed” test.

[13] The appellant next argues that the Tribunal erred by not stating whether all relevant ADA standards must be met, or whether compliance with a single standard was sufficient. However, the appellant relied on full, not partial, compliance with the relevant ADA standards as the basis of its claim (see paragraphs 34 to 36 of the appellant’s brief before the Tribunal and the direct examination of the appellant’s Manager- Technical Services at pages 448 to 452 of the appeal

book). Once the appellant failed to demonstrate full compliance, the Tribunal was not required to consider partial compliance.

[14] In any event, the standard that was not adhered to in this case, the lower height requirement, was an important and relevant factor for the Tribunal because it affects the ability of disabled persons in wheelchairs to use the goods. Failing this standard is a relevant factor when determining whether the goods were “goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities”.

[15] Finally, the appellant submits that the Tribunal failed to consider evidence of design features it acknowledged accommodated persons with disabilities, and gave no reasons for this failure.

[16] I disagree that the Tribunal so erred. To the extent the Tribunal did not address any particular design feature in its reasons, the jurisprudence is well-settled that an administrative decision-maker need not address every argument raised by the parties (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraphs 16 and 25).

[17] In sum, the Tribunal's reasons are transparent and intelligible and justified on the record before it. The decision falls within the range of possible acceptable outcomes which are defensible in the light of the evidence and the law.

[18] It follows that I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree
D.G. Near J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**AN APPEAL FURTHER TO A DECISION OF THE CANADIAN INTERNATIONAL
TRADE TRIBUNAL DATED OCTOBER 27, 2014, UNDER APPEAL NO.: AP-2013-057.**

DOCKET: A-32-15

STYLE OF CAUSE: BSH HOME APPLIANCES LTD. v.
THE PRESIDENT OF THE
CANADA BORDER SERVICES
AGENCY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 20, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

DATED: APRIL 29, 2016

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