Federal Court of Appeal  Cour d'appel fédérale

Date: 20201001

Docket: A-267-19

Citation: 2020 FCA 151

CORAM: **RENNIE J.A.**
GLEASON J.A.
MACTAVISH J.A.

BETWEEN:

NEPTUNE WELLNESS SOLUTIONS

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard by online video conference hosted by the Registry on September 8, 2020.

Judgment delivered at Ottawa, Ontario, on October 1, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal by Neptune Wellness Solutions under subsection 68(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp), from a decision of the Canadian International Trade Tribunal (CITT) (Appeal No. AP-2018-028). In its decision, the CITT dismissed an appeal by Neptune from a re-determination by the President of the Canada Border Services Agency of the tariff classification of goods imported by Neptune.

[2] The goods in question are frozen blocks of Antarctic krill. Krill are small crustaceans prized for their oil, which contains high levels of omega-3 fats. When imported, however, krill have an unpleasant taste and contain sufficiently high levels of fluoride in their shells to pose a safety concern should they be consumed in their imported state. In order to extract the oil, the krill are ground and mixed with acetone. The acetone separates the oil within the krill from the solid portions of the krill, such as the shell. A filtration process then separates the acetone/oil mixture from the solid portions of the krill. The acetone is then evaporated, leaving behind a bright red oil, which is encapsulated in a soft gel prior to sale as a natural health supplement for human consumption.

[3] The issue before the CITT was whether the krill were properly classified under Chapter 3, tariff item 0306.19.00 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36 as determined by the respondent:

Chapter 3	Chapitre 3
Fish and Crustaceans, Molluscs and Other Aquatic Invertebrates	Poissons et crustacés, mollusques et autres invertébrés aquatiques
03.06 Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; smoked crustaceans, whether in shell or not, whether or not cooked before or during the smoking process; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine; flours, meals and pellets of crustaceans, fit for human consumption. …	03.06 Crustacés, même décortiqués, vivants, frais, réfrigérés, congelés, séchés, salés ou en saumure; crustacés, même décortiqués, fumés, même cuits avant ou pendant le fumage; crustacés non décortiqués, cuits à l'eau ou à la vapeur, même réfrigérés, congelés, séchés, salés ou en saumure; farines, poudres et agglomérés sous forme de pellets de crustacés, propres à l'alimentation humaine. …
- Frozen:	- Congelés :
[…]	[…]

0306.19.00 - Other, including flours, meals and pellets of crustaceans, fit for human consumption	0306.19.00 - Autres, y compris les farines, poudres et agglomérés sous forme de pellets de crustacés, propres à l'alimentation humaine

[4] Neptune contended that the krill should have been classified under Chapter 5, tariff item 0511.91.00 as:

05.11 Animal products not elsewhere specified or included; dead animals of Chapter 1 or 3, unfit for human consumption.	05.11 Produits d'origine animale, non dénommés ni compris ailleurs; animaux morts des Chapitres 1 ou 3, impropres à l'alimentation humaine.
[…]	[…]
- Other:	- Autres :
0511.91.00 - - Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3	0511.91.00 - -Produits de poissons ou de crustacés, mollusques ou autres invertébrés aquatiques; animaux morts du Chapitre 3 – Autres

[5] The issue before the CITT distilled to the question of whether the krill, by reason of their state at the point of importation and prior to processing, were excluded from Chapter 3 and consequentially should be classified under Chapter 5.

[6] The CITT commenced its analysis of Chapter 3 by reference to dictionary definitions of "unfit" and "unsuitable", observing that the standard definitions regarding whether something is "fit" or "suitable" contemplate use for an end purpose. Definitions of "unfit" include "not fit, proper or suitable for some purpose or end" and "not adapted to a purpose: unsuitable." Definitions of “unsuitable” include "not fitting or right for a use or purpose: not suitable" (*Oxford English Dictionary*, online ed (Oxford: Oxford University Press, 2020) *sub verbis*

“unfit” and “unsuitable”; *Merriam-Webster Dictionary*, online ed (USA: Merriam-Webster, Incorporated, 2020) *sub verbis* “unfit” and “unsuitable”).

[7] The CITT acknowledged that while krill are imported with the intention of being consumed by humans, they are not fit for direct consumption at the time of importation. However, it accepted the respondent’s argument that because the krill are “fit for human consumption” after processing, they must be “fit for human consumption” at importation. The end purpose or use of the goods did not change, irrespective of the change in form from krill to krill oil.

[8] In support of its conclusion that "fit for human consumption" includes crustaceans that are not immediately ready for consumption, the CITT turned to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*, World Customs Organization, 6th ed., Brussels, 2017 (explanatory notes) for Chapter 3. The explanatory notes state that goods "fit for human consumption" may be presented for immediate (*i.e.* direct) or future (*i.e.* for industrial purposes, canning etc.,) consumption.

[9] The CITT rejected Neptune's argument that the explanatory notes' reference to "industrial purposes" should be limited to those processes which preserve crustaceans as suggested by the words "canning, etc." In particular, the CITT concluded that the inclusion of "etc." indicated that other industrial purposes are possible, including the industrial conversion of krill to oil. It noted that, as a practical matter, all crustaceans that fall within Chapter 3 require some form of processing and preparation prior to consumption, such as cooking, steaming or smoking.

[10] The CITT concluded that the term "fit for human consumption" must be broad enough to include crustaceans imported to undergo a variety of processes, including the oil-extraction process, prior to human consumption. Consequently, heading 03.06 was the proper classification of the goods as they are frozen crustaceans fit for human consumption, and the appropriate tariff item was 0306.10.00, "Frozen: - Other, including flours, meals and pellets of crustaceans, fit for human consumption."

[11] Neptune now appeals to this Court. The thrust of its argument is that the CITT erred in classifying the goods on the basis of their end use, and not on the basis of what they were upon importation: “dead animals of Chapter 1 or 3, unfit for human consumption.” Put otherwise, it erred in the interpretation and application of the words "fit for human consumption". In oral argument before this Court, Neptune abandoned its subsidiary argument that the CITT erred in not limiting the scope of industrial processes to canning.

[12] For the reasons that follow, I would dismiss the appeal.

Appeals on question of law

[13] The decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) fundamentally changed how this Court is to conduct appeals pursuant to a statutory right of appeal. The word *appeal* has been restored to its plain and ordinary meaning and the standard of review applicable in judicial review and its associated principles are no longer to be applied to statutory appeals (at paras. 36-38). The

appellate standards apply (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) and therefore the standard of review on questions of law is correctness (*Vavilov* at para. 37). Prior jurisprudence which applied judicial review criteria must be carefully examined to determine its degree of continued applicability.

[14] Subsection 68(1) of the *Customs Act* grants a statutory right to appeal decisions of the CITT to the Federal Court of Appeal solely on questions of law. This is a circumscribed right to appeal. Further, subsection 67(3) states that judicial review of the CITT tariff classification redetermination appeals are barred from review except to the extent and manner provided in section 68. A question of law must be identified to trigger the Court's appellate jurisdiction.

[15] There may nonetheless be judicial review of questions of fact or mixed fact and law from which a legal issue cannot be extricated by virtue of general principles and section 28 of the *Federal Courts Act*. In *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 this Court held that a privative clause similar to subsection 67(3) of the CITT did not bar review of questions of fact or of mixed fact and law decided by the federal labour boards. The fact that such issues may still be amenable to judicial review in the face of a limited statutory right of appeal was underscored by the Supreme Court of Canada in *Vavilov* at para. 52, where the Court stated:

> […] we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a

> statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.
>
> [Emphasis added]

[16] The Court must examine the specific grounds of appeal to ensure they in fact raise a question of law, and not questions of fact or of mixed fact and law masquerading as questions of law. The challenge lies in those cases where there is an extricable question of law embedded in a question of mixed fact and law. Guidance as to how to discern questions of law from a question of mixed fact and law is found in the decision of this Court in *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 24-28, [2018] 2 F.C.R. 573, where the Court provided examples of what constitutes an extricable question of law embedded in a question of mixed fact and law:

> 26 […] Extricable questions of law/legal standards are best regarded as questions of law of the sort intended by Parliament to be reviewed by this Court under subsection 41(1). In a number of cases, this Court determined appeals where extricable questions of law/legal standards (in addition to other legal and jurisdictional questions) were present:
>
> > • *Canadian National Railway v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264 (F.C.A.) (CN 2010) and *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 363, 383 N.R. 349 (F.C.A.) (CN 2008). What matters fall into certain defined terms in the Act, triggering the revenue cap in the Act? The extricable legal question was the definition of the defined terms in the Act.
> >
> > • *Dreyfus*, above at para. 18. Two issues were raised that involve extricable questions of law, namely statutory interpretation. Does the "evaluation approach," a methodology adopted by the Agency for deciding questions under sections 113-116, deviate from the

> proper interpretation of the sections? Did the Agency fail to consider matters that the statute requires it to consider?
>
> • *Canadian National Railway v. Richardson International Ltd.*, 2015 FCA 180, 476 N.R. 83 (F.C.A.). Do the facts of the case constitute a "line of railway" and a "connection" for the purposes of triggering the carrier's interswitching obligations? The extricable question of law was the meaning of these terms.
>
> • *Canadian National Railway v. Viterra Inc.*, 2017 FCA 6 (F.C.A.). On the facts, were the obligations of the carrier under section 113 triggered? Was the carrier's rationing methodology a confidential contract under subsection 113(4) of the Act?

[17] More recently, in *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140 at paras. 49-51, the Court noted that a question of law may also be factually infused, as in the case of procedural fairness. In all cases, it is the true substance of the question on appeal that governs, and not the form by which it is expressed. Examination of the notice of appeal and the memoranda of fact and law assist in determining the essential character of the issue.

[18] Applying the guidance of these decisions, the issues in this appeal engage extricable questions of law. They concern the interpretation of heading 03.06 of the schedule to the *Customs Tariff*, and in particular, the scope of the words "fit for human consumption". As questions of law, the appropriate standard of review is correctness.

Did the CITT err in defining "fit for human consumption"?

[19] The substance of the appellant's argument is that goods are not to be classified on the basis of their end use or what they will become (*J. Cheese Inc. v. President CBSA*, AP-2015-011 at para. 55 (*J. Cheese Inc.*); and *CE Franklin Ltd. v. President CBSA*, AP-2010-066 at para. 34).

As such, the appellant alleges that it was an error of law for the CITT to infer that because the goods are "fit for human consumption" after processing, they must be "fit for human consumption" before processing. To the appellant, the change required to convert the krill into krill oil does not just change the "form of the goods", as found by the CITT; it changes the goods themselves. In Neptune's view, only the krill oil, a completely distinct good, is ever "fit for human consumption". Therefore, the subject goods, the krill, are never "fit for human consumption".

[20] Although the appellant points to these decisions for the proposition that goods are to be classified based on what they are when imported, and not on what they will become, they are not apposite.

[21] In the cases relied on by the appellant, the question at issue was whether to classify unfinished goods under a tariff item that corresponded to what they were upon importation, or to classify them according to what they would become shortly after importation. The question the CITT had to answer to decide this was whether the unfinished goods were recognizable or identifiable as the finished product, or not (*J. Cheese Inc.* at para. 55). In this situation, the appropriate analogy would be whether the krill are identifiable as krill oil, in which case they should be imported under a tariff item appropriate for krill oil. That, however, is not the choice, as presented by the parties, here.

[22] There is a further problem with the appellant's argument. It is not sustainable in light of the interpretative principles and methodology set forth in the decision by the Supreme Court of

Canada in *Canada (Attorney General) v. Igloo Vikski*, 2016 SCC 38 at paras. 4-7, [2016] 2 S.C.R. 80 (*Igloo Vikski*).

[23] The interpretation of the *Customs Tariff* is conducted according to an established methodology and hierarchy. Subsection 10(1) of the *Customs Tariff* directs that the classification of imported goods is to occur according to the General Rules and the Canadian Rules. Rule 1 of the General Rules dictates that the classification of goods should initially be determined only with reference to the headings within a chapter, including its terms, any chapter or heading notes, and any relevant explanatory notes. Only if the goods, pursuant to the Rule, fit the heading, can consideration move on to the subheading.

[24] However, if no heading, using Rule 1, applies, then the CITT can consider Rules 2-5, in order. Rule 2 states that goods presented in their incomplete form can be imported under their completed form's heading and tariff classification. Therefore, if a specific good has no tariff item under which it classifies "as-is", the CITT can look to the tariff item of its final form and classify it as such (*Igloo Vikski* at paras. 4-7, 20, 23-27).

[25] While not binding, the explanatory notes are to be given "due consideration" unless there is good reason not to do so (*Igloo Vikski* at para. 8; *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at para. 13). Here, the CITT applied Rule 1. It interpreted the heading and turned to the explanatory notes as confirmation of its conclusion. There is no error in this methodology, as applied by the Tribunal.

[26] The plain and ordinary meaning of the words “fit for human consumption” and “unsuitable” contemplate an end use. The words engage consideration of what the goods might become. They contemplate processes that render the goods useful for consumption. Their plain and ordinary meaning is confirmed by the dictionary definitions.

[27] This interpretation is reinforced by the explanatory notes, which provide that “fit for human consumption” includes goods that are “dead, presented for direct consumption, or for industrial purposes (canning, etc.), for spawning, for aquaria, etc.” This wording is a clear indication that the CITT is to consider the purpose of the goods and their eventual use in selecting the correct classification. This is precisely what the CITT did. It found that the krill undergo an industrial process to extract the oil and that the oil is then consumed. As such, the krill were “fit for human consumption".

[28] The appellant’s argument essentially substitutes a test of “ready for consumption” at the point of importation in preference to the prescribed test of whether they are “fit” for consumption, in whatever form that may take. This interpretation would exclude virtually all crustaceans, very few of which are ready for consumption at the point of importation. This result would be contrary to the overall purpose of the broadly drafted classification, which intends to capture most crustaceans and most forms of preparation for human consumption.

[29] Reading the tariff heading as a whole, as we must, the words “fit for human consumption” obviously contemplate all forms of crustaceans and all manners of preparation. Cooking, smoking, steaming, boiling, in brine, and salting all relate to processes that render the

crustaceans fit for consumption. The provision is broadly drafted; to paraphrase, it covers crustaceans “whether in shell or not”, “whether or not cooked”, and “whether or not chilled”. The consideration of fitness for consumption applies to every item, regardless of how they are rendered fit for consumption. Each item, however, is separated by a semicolon. The existence of these semicolons is the basis of the appellant’s second argument, which I will now address.

Error in interpretation of the heading- the semicolon

[30] The appellant argues that the CITT made an error in law by ignoring the semicolons in heading 03.06. It contends that the presence of the semicolons in the heading separate "Frozen: - Other, including flours, meals and pellets of crustaceans, fit for human consumption" from the preceding elements of the list. As I best understand the argument, the semicolons detach or unhook the consideration of fitness for human consumption from the preceding portion of the text. Only "Frozen: - Other, including flours, meals and pellets of crustaceans" must be fit for human consumption.

[31] The appellant is correct that the CITT did not consider the semicolon, but the appellant cannot articulate why this is of any consequence. The argument simply does not help the appellant.

[32] As Professor Sullivan notes, in many respects, reading a statute is no different than reading any other text. The reader draws on “the same lexicon, the same rules of grammar and punctuation and the same store of cultural values and assumptions.” The words of a statute are to

be read in their plain and ordinary sense and the rules of grammar and punctuation are engaged (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at §8.1). With respect to the use of the semicolon, *Fowler's Dictionary of Modern English Usage*, 4th ed. (Oxford: Oxford University Press, 2015) *sub verbo* "semicolon") observes:

> The semicolon is the least confidently used of the regular punctuation marks in ordinary writing, and the one least in evidence to anyone riffling through the pages of a modern novel. But it is extremely useful, used in moderation. Its main role is to mark a grammatical separation that is stronger in effect than a comma but less strong than a full stop. Normally the two parts of a sentence divided by a semicolon balance or complement each other as distinct from leading from one to the other, in which case a COLON is usually more suitable.

[33] There is nothing in the rules governing the correct use of the semicolon that assists the appellant.

[34] In any event, as a practical matter, the krill are not in the form of "flours, meals and pellets of crustaceans" when imported. The krill are frozen, which fits within the scope of the first element of the list in heading 03.06: "Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine." They also fit within the residual tariff item of "Frozen: - Other, including flours, meals and pellets of crustaceans, fit for human consumption." Regardless of the semicolons, the krill are caught by the classification of heading 03.06.

[35] Interpretation of the semicolon to confine fitness for consumption to only goods that follow the final semicolon would also render the entire provision nonsensical. Why would crustaceans be cooked, steamed, chilled, smoked, brined or salted if it were not to render them fit for human consumption?

[36] In sum, the conclusion that the krill, at importation, are fit for human consumption is based on an interpretation of the words in the heading, the tariff item and its applicable notes, consistent with the methodology of *Igloo Vikski*. This is a correct interpretation of the *Customs Tariff* items at issue.

[37] I would dismiss the appeal with costs, which, by the agreement of the parties, are fixed at $1,500.00.

"Donald J. Rennie"
J.A.

“I agree.
Mary J.L. Gleason J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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