Federal Court of Appeal | Cour d'appel fédérale

Date: 20240530

Docket: A-165-22

Citation: 2024 FCA 101

CORAM: **BOIVIN J.A.**
WOODS J.A.
BIRINGER J.A.

BETWEEN:

CHAROEN POKPHAND FOODS CANADA INC.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Toronto, Ontario, on May 27, 2024.
Judgment delivered at Toronto, Ontario, on May 30, 2024.

REASONS FOR JUDGMENT BY: BOIVIN J.A.
CONCURRED IN BY: WOODS J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] This is an appeal pursuant to subsection 68(1) of the *Customs Act*, R.S.C. 1985, c. 1, 2nd Supp. (*Customs Act*), from a decision of the Canadian International Trade Tribunal (the Tribunal) issued on May 17, 2022 (AP-2021-008) (the Decision), in which the Tribunal found that the goods in issue, Charoen Pokphand Authentic Asia™ Hand-Wrapped Shrimp Wonton

Soups, were properly classified as “stuffed pasta, whether or not cooked or otherwise prepared” in accordance with tariff item No. 1902.20.00 of the Schedule to the *Customs Tariff,* S.C. 1997, c. 36 (the Act).

[2] More particularly, the goods in issue are described as being a package of six frozen, sealed containers of 145 grams each. Each container consists of five wontons, stuffed with cooked shrimp, which are placed in a block of frozen liquid soup concentrate (Decision at para. 5). The goods require the addition of water and subsequent heating in order to be ready for consumption.

[3] Before this Court, Charoen Pokphand Foods Canada Inc. (the appellant), contends that the Tribunal committed numerous errors of law and that had these errors not been committed, the Tribunal would have classified the goods in issue under tariff item No. 2104.10.00 as “soups and broths and preparations therefor.”

[4] For the reasons that follow, I would dismiss the appeal and maintain the Tribunal’s classification.

II. The CITT Decision

[5] The Tribunal, applying Rule 1 of the *General Rules for the Interpretation of the Harmonized System* (the Rules) found in the Schedule to the Act, began its analysis with heading 21.04 (soups and broths and preparations therefor) as per exclusion (b) contained in the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (Explanatory

Notes) to heading 19.02 (Decision at paras 36–37). After examining the Explanatory Notes to heading 21.04, the Tribunal concluded that the goods in issue could not be classified under heading 21.04 as (i) they required the addition of water before consumption, meaning they could not be classified as "soups…ready for consumption after heating" under subcategory (2) of the Explanatory Notes (Decision at para. 41) and (ii) they did not meet the definition of "preparations for soups" under subcategory (1) of the Explanatory Notes since the wontons are a "distinct component" and are not blended with the frozen soup concentrate (Decision at paras 43–44).

[6] As part of its analysis, the Tribunal noted that the World Customs Organization (WCO) Harmonized System (HS) Committee reached a similar conclusion in regard to identical goods, which led to the adoption of the following WCO Classification Opinion for subheading 1902.20: "[p]reparation consisting of pasta stuffed with shrimps (wontons) and soup concentrate. The preparation is frozen and put up in a plastic bowl for retail sale. Before consumption, after adding water, it has to be re-heated in a microwave oven" (Decision at paras 47–56).

[7] The Tribunal nonetheless proceeded with its own analysis, as it did not subscribe to the HC Committee's application of Rules 1 and 6. Having established that Rule 1 alone did not permit the classification of the goods in issue, and that Rules 2(a), 2(b) and 3(a) were inapplicable or non-determinative, the Tribunal went on to consider Rule 3(b) (Decision at paras 74–79). Given that the goods in issue consisted of two separate components, the soup concentrate and the wontons, the Tribunal proceeded to an analysis of the goods' essential character. In light of the fact that the wontons formed a larger proportion of the goods in issue

(by bulk, quantity, weight and value), the Tribunal concluded that the "stuffed pasta" component dictated the goods' essential character (Decision at paras 80–84). Particularly, it noted that the soup concentrate portion of the goods was "mainly a medium facilitating the preparation of the wontons prior to consumption" (Decision at para. 82).

[8] Consequently, the Tribunal classified the goods in issue as "stuffed pasta, whether or not cooked or otherwise prepared" in accordance with tariff item No. 1902.20.00 of the Schedule to the Act.

III. Standard of Review

[9] It is trite law that pursuant to subsection 68(1) of the *Customs Act*, this Court can only examine questions of law on appeal from a decision of the Tribunal (see *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209 at para. 24; *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171 at paras 29–31 (*Impex*); *Keurig Canada Inc. v. Canada (Border Services Agency)*, 2022 FCA 100 at paras 15–16 (*Keurig*)). Accordingly, the correctness standard articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, applies.

IV. Analysis

[10] The appellant alleges that the Tribunal made a number of errors and frames the issues as raising questions of law (Appellant's Memorandum of Fact and Law at para. 30). However, I am of the view that the appellant has failed to raise any errors of law. Indeed, the issues raised by the appellant are questions of fact or mixed fact and law from which no legal question can be

extricated, and are therefore not captured by the right of appeal contained in subsection 68(1) of the *Customs Act*.

[11] Also, the issues as raised and argued by the parties in their written and oral submissions, are intertwined and repetitive. For the sake of clarity, they are best framed as follows: (1) did the Tribunal err in law in its analytical approach to the Rules; (2) did the Tribunal err in law in its analysis of the "essential character" of the goods in issue; and (3) did the Tribunal err in law in its consideration of the expert evidence?

[12] The first issue raised by the appellant relates to the analytical framework applied by the Tribunal, *i.e.* its application of the Rules. The appellant argues that the Tribunal erred by finding that Rule 1 was insufficient to dispose of the classification and, in the alternative, that the Tribunal erred in law by refusing to apply Rule 2(a) to classify the goods in issue.

[13] It is recalled that the Rules have been described as a hierarchy, meaning that Rule 1 is paramount and that subsequent Rules are only applied if the application of a previous Rule is inconclusive (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 at paras 7, 29).

[14] In the appellant's view, Rule 1, if properly applied, would have been sufficient to dispose of the classification of the goods in issue. During the hearing, the appellant strongly urged the Court to find that the goods in issue were "soup" or "preparations therefor" and, as such, should be classified under heading 21.04. However, the Tribunal found that the goods in issue could not,

as a whole, be classified solely with reference to Rule 1, as the distinct components of the goods in issue were *prima facie* classifiable under different headings, *i.e.* heading 19.02 (pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared) and heading 21.04 (soups and broths and preparations therefor) (Decision at para. 65). Specifically, the appellant challenges the Tribunal's finding that the goods in issue do not constitute "preparations therefor" within the meaning of heading 21.04 and alleges that the Tribunal erred in law by not distinguishing *Anderson Watts Ltd.*, 2019 CanLII 110939 (AP-2018-003) (*Anderson Watts*), a decision involving the interpretation of the term "preparations therefor" in the context of goods such as "Instant Noodles" and "Noodles in a Cup". In *Anderson Watts*, the Tribunal held that goods consisting of "multiple edible components intended to be used and packaged together" (in that case, powdered soup base and dry instant noodles) do not constitute preparations within the meaning of heading 21.04 due to their non-blended nature (*Anderson Watts* at paras 40–42).

[15] Although the interpretation of provisions of the Schedule to the Act can be a question of law (*Impex* at paras 29–42), "the actual application of the provisions to a set of facts is more likely to be a matter of mixed fact and law" (*Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 at para. 24 (dissenting reasons with no disagreement from the majority on that point) (*Best Buy*)). Here, the appellant is taking issue with the Tribunal's application of the analytical framework and the *Anderson Watts* decision. Contrary to what the appellant alleges, the Tribunal's determination that the goods were not classifiable pursuant to Rule 1 is a question of mixed fact and law. The Tribunal clearly identified and followed the applicable framework for Rule 1 (Decision at paras 24, 38–46). Further, the Tribunal was entitled to consider and rely on its precedent in *Anderson Watts*. More importantly, the appellant is disagreeing with the

evidentiary finding of the Tribunal that "the wontons remain a distinct component and do not form part of the frozen soup concentrate" and "[t]he wontons are not 'blended' into the soup concentrate" (Decision at para. 44). In doing so, the appellant is urging this Court to reassess and reweigh the evidence. This is not our role.

[16] Still, under the Tribunal's Rule 1 analysis, the appellant alleges that the Tribunal incorrectly applied the Explanatory Note to heading 21.04. The Explanatory Notes provide for two subcategories of "soups, broths and preparations therefor": 1) "preparations for soups or broths requiring only the addition of water, milk, etc." and 2) "soups and broths ready for consumption after heating." As indicated above, the Tribunal made a finding that the goods in issue did not fall within either subcategory. The appellant contends that the Tribunal should have found that the goods in issue could fit within the first subcategory, and alternatively, disagrees with the Tribunal's treatment of the subcategories as exhaustive rather than inclusive. The appellant is in disagreement with the Tribunal's finding and I remain unconvinced by the appellant's arguments that the Tribunal erred in law in its determination.

[17] In the alternative to its Rule 1 arguments, the appellant also challenges the Tribunal's finding that Rule 2(a) does not assist in the classification of the goods. Rule 2(a) applies to unfinished goods. The Tribunal made a factual finding that the goods in issue are "imported… ready for retail sale" (Decision at para. 76). The Court cannot interfere with this finding on appeal. Further, I note that pursuant to Explanatory Note III on incomplete or unfinished articles, Rule 2(a) will generally not apply to Section IV goods, such as the goods in issue (Respondent's Memorandum of Fact and Law at para. 29).

[18] The second issue raised by the appellant relates to the application of Rule 3(b) and the method used by the Tribunal to determine the "essential character" of the goods in issue. Rule 3(b) provides that goods made up of two different components are classified under the tariff of the component that gives them their essential character. Essentially, the appellant disputes the fact that the Tribunal placed greater emphasis on the relative weight of the goods' components, *i.e.* wontons and soup concentrate, as opposed to the marketing and advertising of the goods in issue to determine their essential character. In other words, the appellant seems to imply that the marketing of the goods as a "soup" is determinative to the Tribunal's determination of essential character.

[19] I disagree.

[20] The essential character of a good is always assessed on a case-by-case basis (Explanatory Note VIII to Rule 3(b)). The determination requires the assessment and weighing of evidence, a question heavily infused with factual determinations. For instance, in this case, the expert evidence before the Tribunal demonstrated that the goods in issue contain 76 percent shrimp wontons and 24 percent soup concentrate by weight, whereas the product labelling and literature demonstrated that the goods contain 55 to 60 percent shrimp wontons and 40 to 55 percent soup concentrate (Decision at para. 81). The Tribunal concluded, after considering the relative weight and other factors (Decision at para. 83), that the essential character of the goods in issue was imparted by the stuffed pasta component (Heading 19.02). Absent an egregiously incorrect and unsupported finding of fact, our Court cannot review factual findings in the context of an appeal

pursuant to subsection 68(1) of the *Customs Act* (see *Keurig* at paras 17–19; *Best Buy* at para. 25; *Canada (Border Services Agency) v. Danson Décor Inc.*, 2022 FCA 205 at para. 26).

[21] The final issue raised by the appellant concerns the Tribunal's failure to give proper regard to the testimony of the respondent's expert witness who provided some evidence that the goods in issue were advertised and sold as soup. The appellant alleges that this evidence was compelling enough for the Tribunal to depart from the WCO Classification Opinion with which it agreed in result only. However, the Tribunal was clear that "the evidence on file does not provide any 'sound reason' to justify diverging from the HS Committee's ultimate classification" (Decision at para. 72). Our intervention is not warranted.

[22] I would dismiss the appeal with costs and I would amend the style of cause in the manner the respondent requested. The style of cause on this document and on the judgment of this Court in file A-165-22 reflect the amendment.

"Richard Boivin"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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