Federal Court of Appeal

Cour d'appel fédérale

Date: 20120309

Docket: A-168-11

Citation: 2012 FCA 81

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Appellant

and

MIKE MINER

Respondent

Heard at Ottawa, Ontario, on January 25, 2012.

Judgment delivered at Ottawa, Ontario, on March 9, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a decision of the Canadian International Trade Tribunal (Tribunal or CITT) rendered in the Tribunal File No. AP-2009-080 on the basis of written submissions in connection with an appeal brought by Mr. Miner to the Tribunal under subsection 67(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). The issue the Tribunal was required to decide was whether two hollow wooden tubes detained by the Canada Border Services Agency (CBSA) were properly classified as prohibited weapons under tariff item No. 9898.00.00 of the schedule to the

Customs Tariff, S.C. 1997, c. 36. The Tribunal determined that the goods in issue were not properly classified as prohibited weapons and so it allowed Mr. Miner's appeal.

[2] The issue on this appeal is whether the Tribunal committed any reviewable error in coming to its conclusion that the goods in issue were not prohibited weapons.

Legislative Framework

[3] Subsection 136(1) of the *Customs Tariff* prohibits the importation of goods classified in three tariff items, including tariff item 9898.00.00. Tariff item 9898.00.00 provides:

Firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms, in this tariff item referred to as prohibited goods,	Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions prohibées et éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes automatiques, désignés comme « marchandises prohibées » au présent numéro tarifaire,
[…]	. . .
For the purposes of this tariff item, (a) "firearms" and "weapon" have the same meaning as in section 2 of the *Criminal Code*; (b) "automatic firearm", "licence", "prohibited ammunition", "prohibited device", "prohibited firearm", prohibited weapon, restricted firearm and "restricted weapon" have the same meanings as in subsection 84(1) of the *Criminal Code*. [emphasis added]	Pour l'application du présent numéro tarifaire : a) « arme » et « arme à feu » s'entendent au sens de l'article 2 du *Code criminel*; b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « dispositif prohibé », « munitions prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du *Code criminel*. [Non souligné dans l'original.]

[4] Subsection 84(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 defines a "prohibited weapon" to mean:

"prohibited weapon" means (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon. [emphasis added]	« arme prohibée » a) Couteau dont la lame s'ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche; b) toute arme — qui n'est pas une arme à feu — désignée comme telle par règlement. [Non souligné dans l'original.]

[5] Section 117.15 of the *Criminal Code* authorizes the Governor in Council to make regulations prescribing what is a prohibited weapon. At the relevant time, the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*, SOR/98-462 (Regulations) stated in section 4 that:

The weapons listed in Part 3 of the schedule are prohibited weapons for the purposes of paragraph (*b*) of the definition "prohibited weapon" in subsection 84(1) of the Criminal Code.	Les armes énumérées à la partie 3 de l'annexe sont désignées des armes prohibées pour l'application de l'alinéa *b*) de la définition de « arme prohibée » au paragraphe 84(1) du Code criminel.

[6] Section 12 found in Part 3 of the schedule to the Regulations prohibited:

The device commonly known as "Yaqua Blowgun", being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device.	L'instrument communément appelé « Yaqua Blowgun », soit un tube ou tuyau conçu pour lancer des flèches ou fléchettes par la force du souffle, et tout instrument semblable.

In its reasons the Tribunal refers to this provision as “Former Prohibited Weapons Order, No. 6”.

[7] Paragraph 152(3)(*d*) of the *Customs Act* deals with the burden of proof in proceedings brought under the *Customs Act*. This paragraph states that the burden of proof in any question relating to “the compliance with any of the provisions of this Act or the regulations in respect of any goods lies on the person other than Her Majesty who is a party to the proceedings.” This provision is read with section 12 of the *Customs Tariff* which makes the “provisions of the *Customs Act* apply, with such modification as the circumstances require in respect of the administration and enforcement of the” *Customs Tariff*.

Standard of Review

[8] Central to the appellant’s appeal is its contention that the Tribunal erred in its interpretation and application of the statutory burden of proof articulated in paragraph 152(3)(*d*) of the *Customs Act*. Notwithstanding the guidance provided by the majority of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 with respect to the deference to be given to an administrative tribunal when it interprets its home statute or statutes closely connected to its functions, the appellant submits that the Tribunal’s interpretation and application of the burden of proof attract review on the standard of correctness.

[9] In the present case it is not necessary to decide the applicable standard of review because the Tribunal’s decision is unreasonable and so does not withstand scrutiny on the deferential standard of reasonableness. The respondent did not appear on this appeal. Without the benefit of responding

submissions I decline to deal with the appellant's submissions on the applicability of the correctness standard.

Consideration of the Decision of the Tribunal

[10] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada reminded reviewing courts of the need to show deference when assessing the decisions of specialized administrative tribunals such as the CITT. In the words of Justice Abella, writing for the Court, at paragraph 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[11] That said, a reviewing court is required to intervene where a decision lacks justification, transparency and intelligibility. A reviewing court is to ask if "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the basis of its decision" (*Newfoundland and Labrador Nurses' Union* at paragraph 18, citing *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221).

[12] With that introduction I turn to the relevant provisions of the Regulations and the decision of the Tribunal. For ease of reference, I repeat section 12 of Part 3 of the schedule to the Regulations which prohibits:

The device commonly known as "Yaqua Blowgun", being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device.	L'instrument communément appelé « Yaqua Blowgun », soit un tube ou tuyau conçu pour lancer des flèches ou fléchettes par la force du souffle, et tout instrument semblable.

[13] Early in its analysis, at paragraph 30, the Tribunal set out the requirements of section 12. The Tribunal observed that by virtue of this provision it was required to consider whether the goods in issue were:

a) a "device commonly known as a 'Yaqua Blowgun'";

b) a "tube or pipe designed for the purpose of shooting arrows or darts by the breath";

or

c) "any similar device."

[14] Turning first to whether the goods in issue were devices commonly known as a "Yaqua Blowgun," the Tribunal stated, at paragraph 36, that it had not been "told precisely what a 'Yaqua Blowgun' is or how one functions." In so stating, the Tribunal erred by not having regard to the information provided by Mr. Miner that:

> 26. A Yaqua blowgun refers specifically to blowguns created by the Yaqua tribe of Peru, and colloquially to modern heavy duty blowguns made of metal or other material, which are merely based on blowguns used by the Yaqua tribe. The latter Yaqua blowguns

> are capable of propelling ammunition at much greater force and are thus capable of inflicting very serious harm to humans, and clearly fall within the purview of the applicable statutory restrictions.
>
> 27. A fully functional hunter's blowgun such as those used by the Waorani or the Yaqua are used to hunt small animals such as spider monkeys, which do not weigh more than 25 pounds. […]
>
> 10. The primary hunting tools of the Waorani are the spear and the blowgun, supplemented in modern times with rifles. The blowguns are distinctive in their length and in the manner of their use. Unlike other blowguns used by other aboriginal hunters, the blowguns used by the Waorani are manipulated vertically to attack prey located in trees above the hunter (in contrast with other blowguns, such as the Yaqua blowgun, which are aimed horizontally to their target.) The long length of the Waorani blowgun is functional, in order to allow a hunter to get the extremity of the chamber as close as possible to the prey targeted above him.

[15] Turning next to whether the goods in issue were tubes or pipes designed for the required purpose, the Tribunal wrote at paragraphs 37, 41, 42 and 43 of its reasons that:

> 37. […] As mentioned above, the Tribunal was presented with contradictory arguments on this issue. However, again, without specific evidence, the Tribunal is unable to come to the conclusion that the goods in issue were specifically "designed" for the "purpose" identified in *Former Prohibited Weapons Order, No. 6.;* design and purpose must be proven, not inferred.
>
> […]
>
> 41. The Tribunal understands that Parliament may have been intentionally vague when it adopted *Former Prohibited Weapons Order, No. 6*. If this was Parliament's intention, the result is that the CBSA must adequately demonstrate to the Tribunal that the prohibition of *Former Prohibited Weapons Order, No. 6* should be engaged in these specific circumstances.
>
> 42. Again, the Tribunal cannot, on its own, simply speculate as to whether certain goods in issue have the descriptive and functional characteristics that would engage that provision. In the present case, if the goods in issue ever did have such

> characteristics, there is no evidence on file, as to whether the characteristics were present at the time of importation, which is the moment at which the goods in issue must be assessed.
>
> 43. In the absence of such evidence, the Tribunal is of the view that it cannot endorse unsubstantiated allegations or argument to the effect that the goods in issue meet the legal requirements of the legislation prohibiting their importation into Canada. To do so would be speculative. [emphasis added]

[16] In this analysis the Tribunal failed to have regard to the following information provided by Mr. Miner about the original design and purpose of at least one of the two goods in issue:

i) The larger of the two tubes was a used and discarded Waorani blowgun for hunting.

ii) One of the primary hunting tools of the Waorani is the blowgun which shoots darts dipped in poison.

If the CITT had concerns at whether the information provided by either party required substantiation it was free to require any party to furnish further information (Rule 25.1 *Canadian International Trade Tribunal Rules*, SOR/91-499).

[17] Moreover, faced with this evidence as to the original purpose and use of the larger of the two tubes, the Tribunal erred by placing the onus upon the CBSA to demonstrate whether at the time of importation the goods were tubes or pipes designed for the purpose of shooting arrows or darts by the breath.

[18] With respect to the final element contained in section 12, whether the goods in issue were "any similar device," at paragraph 40 of its reasons the Tribunal wrote:

> As to the third requirement of *Former Prohibited Weapons Order, No. 6*, namely, whether the goods in issue are "any similar device", the Tribunal comes to the conclusion that it cannot determine similarity in comparison to the reference device (the "Yaqua Blowgun"), as that reference device has not been clearly identified. Indeed, in this matter, without specific evidence at hand, the Tribunal is unable to determine whether the goods in issue bear any similarity to a "Yaqua Blowgun", as claimed by the CBSA. [emphasis added]

[19] Again, the Tribunal failed to have regard to the information before it about the Yaqua Blowgun.

[20] The Tribunal then physically examined the goods in issue in order to "evaluate if they were in fact covered by the specific legislation." At paragraphs 47 and 48 the Tribunal wrote:

> 47. From this inspection, the Tribunal was able to observe that the larger device effectively appeared straight from the outside. However, an inspection of its bore revealed a distinct curvature that was significant enough to obstruct, at least partially, a clear line of sight through the inside of the device from one end to the other. No noticeable curvature could be observed in the smaller device. In addition, the bores of both devices appeared to be partially congested by what seemed to be grit and/or mould and/or cob webbing and/or some other foreign material of unascertainable consistency or resistance. Finally, the walls of the bores of both devices appeared rough, cracked and splintered.
>
> 48. In the absence of any evidence (expert or otherwise) on the operability of these devices (such as a forensic laboratory report of actual testing of the goods in issue), and because they present the various defect described above, such as the warp, partially obstructed bores, or rough or cracked bore walls, the Tribunal comes to the conclusion that, on the balance of probabilities, it is indeterminate whether the goods in issue are capable of allowing a projectile like an arrow or a dart to be blown through them. [emphasis added]

[21] The Tribunal's analysis again failed to properly consider the burden of proof articulated in paragraph 152(3)(*d*) of the *Customs Act*. Mr. Miner bore the onus of establishing that the goods in issue were not prohibited weapons. Given the evidence about the provenance of the larger of the

two hollow wooden tube it was up to Mr. Miner to establish that the goods were, at the time of importation, incapable of allowing an arrow or dart to be shot. If the evidence was indeterminate on this point Mr. Miner failed to meet his onus.

[22] As explained above, in reaching its decision that the goods were not properly classified under tariff item No. 9898.00.00 as prohibited weapons, the Tribunal ignored relevant evidence and, contrary to paragraph 152(3)(*d*) of the *Customs Act*, imposed the burden of proof on the CBSA. By virtue of this, its decision is unreasonable.

[23] For these reasons, I would allow the appeal, set aside the decision of the CITT and refer the matter back to the CITT for redetermination in a manner consistent with these reasons.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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