Federal Court of Appeal | Cour d'appel fédérale

Date: 20221201

Docket: A-450-19

Citation: 2022 FCA 205

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Appellant

and

DANSON DÉCOR INC.

Respondent

Heard by online video conference hosted by the Registry on October 6, 2022.

Judgment delivered at Ottawa, Ontario, on December 1, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of the Canadian International Trade Tribunal (the Tribunal or CITT), rendered on September 6, 2019 (with reasons issued on September 25, 2019), whereby the Tribunal found that natural rocks harvested from a riverbed in China should properly be classified as mineral products, more particularly as "pebbles […] of a kind commonly used for concrete aggregates, for road metalling or for railway or other ballast" as

described by the terms of heading 25.17 of the Schedule to the *Customs Tariff*, S.C. 1997, c. 36 (the Act): *Danson Décor Inc. v. President of the Canadian Border Services Agency*, 2019 CarswellNat 14493 (Tribunal Decision). In coming to this conclusion, the Tribunal reversed an earlier decision of the President of the Canada Border Services Agency (CBSA) pursuant to which the goods were classified under tariff item 6802.99.00 as "other worked monumental or building stone (except slate) and articles thereof, other than goods of heading 68.01".

[2] At issue in this appeal is whether the Tribunal erred by classifying the goods without due regard to the tariff classification rules of interpretation and without supporting evidence, and if the Tribunal erred by expanding the scope of the provisions applicable to mineral products.

[3] For the reasons that follow, I am of the view that this appeal should be dismissed.

I. Facts

[4] There is no dispute between the parties with respect to the fact that the goods in issue consist of various types of natural river rocks obtained from a riverbed. All of the goods are washed, sifted and sorted by size and colour. They are then polished by tumbling in a rotating drum-like, motor-driven apparatus and packaged in small bags that weigh from 0.4 to 0.8 kilograms, and then imported from China. The goods are used for different decorative purposes as well as for arts and crafts.

[5] Although previous shipments of the goods imported by the respondent Danson Décor Inc. (Danson) were declared for tariff purposes under tariff heading 25.17, the CBSA undertook a compliance audit pursuant to section 59 of the *Customs Act* (R.S.C. 1985, c. 1 (2nd Supp.)). The CBSA determined that these goods should instead be classified under tariff heading 68.02. As a consequence, the CBSA retroactively adjusted the duties payable by Danson (from 0% to 6.5%) on several years of previous shipments of river rocks.

[6] Danson appealed that decision and contended that "polishing" is a treatment included within the scope of heading 25.17, that the goods fall squarely within heading 25.17 because they are pebbles, and that they fall outside the scope of Chapter 68 because they are "materials", not "articles of stone" as covered by Chapter 68. The CBSA countered that the goods are excluded from Chapter 25 because "polishing" is not specifically listed as a permitted process within the notes to Chapter 25. The CITT ultimately agreed with Danson.

II. The impugned decision

[7] To classify the river rocks as mineral products, the Tribunal had first to determine whether "polished" by tumbling in a rotating drum is included within the meaning of the terms "levigated" or "ground", which are two of the permitted processes for the classification of mineral products in Chapter 25 of the Schedule to the Act. The Tribunal found that the expert evidence tendered by a metallurgical engineer on behalf of the CBSA with respect to the meaning of "levigate" was not relevant, since the scientific discipline most relevant to the goods is geology. As there was no evidence as to whether this process is known within that discipline,

the Tribunal relied on general dictionary definitions for the word “levigate” which include “to make smooth, polish”.

[8] The Tribunal then considered the correspondence between Danson and its Chinese supplier and found that it was admissible hearsay evidence as it met the criteria of reliability and necessity. On that basis, it concluded that the rocks were polished and smoothed as a result of being tumbled in a drum-like, motor-driven apparatus that rotates about a cylindrical axis. It further found that for goods to be subjected to “processing beyond” what is permitted by Chapter 25, the processing had to be more than “purely mechanical” and result in “some inherent transformation or conversion of the product” (Tribunal Decision at para. 133). In its view, such was not the case here:

> 134. The tumbling of the rocks in a rotating drum is a purely mechanical process. It does not cause any modification to the chemical or crystalline structure of the rocks or to their inherent properties. The photographs tendered by Danson show the products as “rocks” before they are fed into the drum of the tumbling apparatus and as “rocks” after they emerge. It is conceded that the goods are “rocks” at the time of importation.

[9] In the alternative, the Tribunal also considered the Chapter 68 classification proposed by the CBSA and, focusing on the wording of heading 68.02 and its explanatory notes, concluded that the additional processing to bring stones within its ambit must be such that it converts them to “worked stones”:

> 143. As such, in order to be both excluded from Charter 25 and properly classified within Chapter 68 requires “processing” that comprises human intercession in the form of the application of artistic or artisanal skills, workmanship or craftsmanship associated with the professions of stone mason or sculptor. Those characteristics are not found in the processing carried out by Danson’s Chinese supplier. The rocks are not hand-polished, and the “polishing” of the rocks arises from the purely mechanical and random movement of the rocks as they tumble within the drum. The random movement of the rocks within a motor-driven drum

> is not akin to the judgment, workmanship or skill that would be exercised by an artisan such as a stonemason or sculptor when "working" stone.

[10] The Tribunal therefore concluded that the goods were not excluded from Chapter 25 and were properly classified under heading 25.17, more precisely under tariff item 2517.10.00.

III. Issues

[11] The parties agree that the issues on this appeal can be formulated in the following way:

A. Did the Tribunal err in law by classifying the polished river rocks in a provision of the Act contrary to the tariff classification rules on interpretation, and without any supporting evidence?

B. Did the Tribunal err in law by unduly expanding the scope of provisions of the Act applicable to mineral products?

IV. Analysis

[12] There is no doubt that when legislatures provide statutory mechanisms for appealing administrative decisions before courts, the appellate standard of review applies. This is one of the clearest cases where the presumption of reasonableness review is rebutted: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 36-49 [*Vavilov*].

[13] Consequently, appeals filed pursuant to subsection 68(1) of the *Customs Act* such as this one are no longer subject to review based on administrative law standards, but rather on appellate

standards. I am thus of the view that the assessment of the evidence, and in particular the expert evidence, is beyond the jurisdiction of this Court sitting on appeal of the Tribunal. Since subsection 68(1) grants a statutory right to appeal decisions of the CITT to this Court solely on questions of law, the applicable standard of review is correctness: *Vavilov* at para. 37. The first issue, therefore, is to examine the grounds of appeal to determine whether they do raise a question of law. As this Court noted in *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151, [2020] CarswellNat 4287 (at para. 16), it is not always easy to identify an extricable question of law when it is embedded in a question of mixed fact and law. In order to determine whether an appeal undertaken pursuant to subsection 68(1) of the *Customs Act* raises an extricable question of law, the Court must strive to identify the "essential character" or "true substance" of the appeal and the best way to do this is to look at the notice of appeal and, if necessary, to the appellant's memorandum of fact and law: *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171, [2020] CarswellNat 4332 at para. 37; *Keurig Canada Inc. v. Canada (Border Services Agency)*, 2022 FCA 100, [2022] CarswellNat 1814 at para. 17 [*Keurig*].

[14] In the case at bar, it is very clear from the notice of appeal and from the appellant's factum that the substance of what is being raised is best characterized as an issue of law and revolves around the proper interpretation of the Schedule to the Act, and more particularly the interpretation of headings 25.17 and 68.02. Indeed, much of the arguments turn on the various processes to which goods can be subjected without being excluded from Chapter 25, and on the distinction between "polishing" and "levigating", which is clearly a question of law. As for the alleged absence of any supporting evidence, it has often been characterized as an error of law:

see *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, [2021] CarswellNat 2923, at para. 25. I will therefore review the decision of the CITT on the correctness standard.

A. *Did the Tribunal err in law by classifying the polished river rocks in a provision of the Act contrary to the tariff classification rules on interpretation, and without any supporting evidence?*

[15] Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System* (Can. T.S. 1998 No. 38), which has been implemented through the List of Tariff Provisions set out in the Schedule to the Act. This list provides for the classification of goods imported into Canada and determines the tariff to which they will be subjected. Each imported good is classified according to an eight-digit number, representing a chapter (first two digits), a heading (first four digits), a subheading (first six digits) and a tariff item (all eight digits).

[16] Pursuant to subsection 10(1) of the Act, the classification of goods is determined, unless otherwise provided, in accordance with the *General Rules for the Interpretation of the Harmonized System* and the *Canadian Rules* set out in the Schedule. Section 11 of the Act further provides that "regard shall be had" to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* published and amended from time to time by the World Customs Organization. Unlike the Harmonized System and the General Rules, the Explanatory Notes are not binding but should nevertheless "be at least considered" in determining the classification of goods imported into Canada: *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII), [2016] 2 S.C.R. 80 at para. 8.

[17] The classification exercise starts with Rule 1 of the General Rules, according to which the classification of goods shall initially be determined with reference only to the headings within a chapter, as well as any applicable Section or Chapter Notes. In some cases, Rule 1 will be sufficient to conclusively determine the classification of the good and there will be no need to resort to the other General Rules. If the application of Rule 1 does not lead to the classification of a good under a single heading, resort will be had to the other rules in a hierarchical order. The only other relevant rule of the General Rules for our purposes is Rule 6, which directs that once goods are classified under a heading, their classification in a subheading be similarly determined according to the terms of the subheadings, any related subheading notes and the General Rules.

[18] In the case at bar, the Tribunal had to determine whether the goods imported by Danson should be classified under heading 25.17 as "pebbles (…) of a kind commonly used for concrete aggregates for road metalling or for railway or other ballast", or under heading 68.02 as "worked monumental or building stone". Since the parties had apparently agreed that natural river rocks are "stones", the Tribunal seems to have taken for granted that they fall, *prima facie*, within the title of Chapter 25 ("salt; sulphur; earths and stone; plastering materials, lime and cement"), itself within Section V ("mineral products"). Considering that Note 1(a) to Chapter 68 specifically excludes goods of Chapter 25, and no corresponding exclusionary notes can be found in Chapter 25, the Tribunal then concluded that the classification exercise had to begin with a consideration of the provisions of Chapter 25 and focused on the characteristics of the goods to determine if they should be included or excluded from the parameters of Chapter 25 and its headings.

[19] The appellant claims that the Tribunal erred in doing so, and failed to give effect to Rule 1 pursuant to which the terms of a heading are paramount, because it paid no attention to the full terms of heading 25.17. In the appellant's submission, it is not sufficient for natural river rocks to be considered as "pebbles", they must also be "of a kind commonly used for concrete aggregates, for road metalling or for railway or other ballast". Yet, argues the appellant, the Tribunal did not turn its mind to that part of the description of the goods, and there was no supporting evidence allowing it to find that the goods meet that part of the definition.

[20] There are two problems with that submission. First, I can find no trace of such an argument either in the CBSA's brief or in its oral representations before the Tribunal. The representations made by the appellant before the Tribunal were exclusively focused on the processes to which the goods were subjected and whether the polished stones imported by Danson were worked beyond the processes provided for in Chapter 25. An administrative decision-maker, or, for that matter, a trial court, cannot be faulted for not addressing an argument that was not made by a party, and new arguments will not generally be entertained on appeal.

[21] Second, and maybe more importantly, heading 25.17 does not say that the pebbles will fit the description only if they are used for concrete aggregates, road metalling or railway or other ballast, but instead, heading 25.17 captures all stones "of a kind commonly used" for those purposes. There is no doubt that river rocks, when bought in bulk, would normally be used for the types of purposes listed in heading 25.17. This does not detract from the fact that they can also be sold and used for other purposes, such as in arts and crafts.

[22] I agree that it would have been best for the Tribunal to address that issue and to look at the entire description of the goods enumerated in heading 25.17. I am nevertheless prepared to accept that the goods at issue properly fell, *prima facie*, within the title of Chapter 25 and that the relevant heading within that Chapter was heading 25.17. I note, parenthetically, that the parties apparently agreed that heading 25.17 was the relevant heading within Chapter 25 (Tribunal Decision at para. 105). On that basis, and in the absence of any submission to the effect that the river rocks at issue could be used for purposes other than those listed in heading 25.17, I do not think that supporting evidence was required for the Tribunal's conclusion that this was the relevant heading within Chapter 25.

B. *Did the Tribunal err in law by unduly expanding the scope of provisions of the Act applicable to mineral products?*

[23] The relevant aspects of the notes to Chapter 25 provide that Chapter 25 covers certain mineral products, such as stones, that can undergo specific processes, but that cannot be processed beyond these processes. Note 1 to Chapter 25 reads as follows (the Explanatory Notes use almost identical language to describe the permitted processes for mineral products):

> Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.

[24] It is clear that at the time of importation, the washing and sorting of the rocks did not exclude them from the headings of Chapter 25 as these processes are specifically listed as

permissible in Note 1 to Chapter 25. More contentious is the interpretation of the verb "levigated" and whether the polishing of the rocks occurs from a process of levigation (or any other acceptable process) or is rather a process in itself that is beyond the scope of Chapter 25. Based on its review of the evidence and on its interpretation of Note 1 to Chapter 25, the Tribunal came to the conclusion that the polishing of the rocks is not a process beyond what is permitted by Chapter 25.

[25] The Attorney General submits that the Tribunal's interpretation of the permitted processes for the classification of mineral products in Chapter 25 is contrary to the modern approach to statutory interpretation and the meaning of these terms in the mining industry. More particularly, the Attorney General argues that the term "polished" is not one of the specific processes listed in Note 1, and that it cannot be the result of an oversight since that same term is expressly included in the permitted processes in Note 4 which expands on the permitted process for specific goods covered by heading 25.30. The Attorney General further contends that the Tribunal erred in rejecting the testimony of the engineer in mineral processing to assist in interpreting "levigated" and "ground", on the basis that the scientific discipline most relevant to the goods is geology, and not metallurgy.

[26] On this last point, as already mentioned, I am of the view that this Court has no jurisdiction to review the assessment of the evidence by the Tribunal. Pursuant to subsection 68(1) of the *Customs Act*, only questions of law can be raised before this Court. As such, the ultimate question before us is whether the goods have been processed beyond what is permitted by Chapter 25. There is no doubt that expert evidence, and the decision to accept the testimony

of an expert or to prefer the testimony of one expert over another, can affect the construction given to a heading by the Tribunal. Yet, unless the Attorney General can identify an extricable error of law, it is not for this Court to reweigh the evidence in order to determine whether the CITT was correct in classifying the goods as it did: *Keurig* at para. 37.

[27] Even if I were prepared to accept, for the sake of argument, that the Tribunal erred in concluding that geology was the scientific discipline most relevant to the goods, as opposed to metallurgy, it would still not amount to an error of law. Nor do I find any inconsistency rising to the level of an error of law in recognizing as an expert the senior engineer in mineral processing tendered by the appellant, and finding that the process of levigation described by that expert was of minimal to no relevance. As conceded by the appellant, the Tribunal did not qualify the senior engineer's field of expertise, and it was certainly open to the Tribunal to conclude that his testimony was of little help.

[28] In the absence of relevant expert evidence as to what the term "levigation" means, the Tribunal considered the general dictionary definitions of that term and found that some of those definitions include "to make smooth, polish". It then looked at the information received by Danson from its supplier, and concluded on that basis that the polishing of the rocks resulted from a purely mechanical process. Indeed, the appellant does not dispute that the rock surfaces appear to be smoothed as a result of being tumbled in a drum-like, motor-driven apparatus. The Tribunal acknowledged that Danson's evidence could have been more detailed, but nevertheless accepted that it was sufficient to enable it to make reasonable inferences and draw conclusions concerning the processing of the goods. Once again, not only are these findings of a factual

nature that the Tribunal could properly make and that were supported by the evidence, but more importantly, they are beyond the scope of this appeal.

[29] I accept that it would have been best for the Tribunal to deal with the use of the word "polished" as a permitted process in the context of Note 4 to Chapter 25. I am of the view, however, that the failure to advert to this textual argument does not fatally undermine its reasoning. Far from unduly broadening the scope of Chapter 25, I find that the purposive interpretation given to Note 1 of Chapter 25 accurately reflects the scope of Chapter 25. I agree with the Tribunal that the common characteristic of the processes listed in Note 1 of Chapter 25 is their physical or mechanical nature. When compared with the processes which operate to exclude goods from Chapter 25 ("roasted, calcined, obtained by mixing"), it is clear that the acceptable processes differ from them because they do not result in some inherent transformation of the product, nor do they cause any modification to the chemical structure of the rocks or to their inherent properties. The rocks that are imported are clearly not inherently transformed or modified; they are basically the same rocks before and after being fed into the drum of the tumbling apparatus.

[30] Finally, another contextual factor to be considered is the alternative heading under which the goods could arguably be classified, namely heading 68.02. The explanatory notes to that heading state that it covers "stone in the forms produced by the stone mason, sculptor, etc.". It is clear from the evidence that there is no such human intercession with respect to the goods at issue here. Furthermore, the notes add that stone which has not been further processed than "mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring

by sawing" fall within Chapter 25. In my view, the operations carried out by Danson's Chinese supplier do not go beyond the simple processes to which Chapter 25 is restricted. As noted by the Tribunal, the rocks are not hand-polished or handled in any methodical way, but rather subjected to a crude mechanical process that requires no judgment or artistic skill. Therefore, I agree with the Tribunal that the rocks imported by Danson have not been "worked" to the extent that they should be classified as "worked monumental stone" for the purposes of heading 68.02.

[31] In light of the foregoing, I have not been convinced that the Tribunal erred in classifying the goods under heading 25.17. Not only are the goods not excluded from Chapter 25, but there is no other alternative as they clearly do not fall under heading 68.02. As the goods are eligible for classification within heading 25.17, there is no disagreement that the only applicable subheading is 2517.10.00. Accordingly, the appeal should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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