Federal Court  Cour fédérale

Date: 20240912

Docket: T-2018-22

Citation: 2024 FC 1435

Ottawa, Ontario, September 12, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

MEYER HOUSEWARES CANADA INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Meyer Housewares Canada Inc., seeks judicial review of a decision by a senior official with the Department of Finance declining to consider further a request for relief from duties the applicant had paid on imported stainless steel parts it uses to manufacture cookware. An April 2021 amendment to the Schedule to the *Customs Tariff*, SC 1997, c 36 had reduced the duty charged on these items to zero but this change did not have retroactive effect.

The applicant therefore sought retroactive relief from the Minister of Finance in relation to duties it had paid prior to the amendment to the Schedule.

[2] The applicant contends that the decision declining to consider the request for relief further was made in breach of the requirements of procedural fairness and that it is unreasonable.

[3] As I explain in the reasons that follow, I agree with the applicant that the decision is unreasonable and the matter must be reconsidered by the Minister. It is therefore not necessary to address the applicant's procedural fairness arguments.

II. BACKGROUND

[4] The applicant manufactures cookware in a plant located in Charlottetown, Prince Edward Island. It acquired the plant in July 2017.

[5] The applicant imports stainless steel parts to use in the manufacturing process. An issue arose between the applicant and the Canada Border Services Agency (CBSA) over how these items should be classified under the *Customs Tariff*. Were they finished goods, in which case they would be subject to a duty of 6.5% of their value, as the CBSA contended, or were they essentially raw materials used in the production of other goods, in which case they should be subject to a duty of 0%, as the applicant contended?

[6] On March 12, 2020, the applicant asked the Department of Finance to grant it relief under section 115 of the *Customs Tariff* from the duties it had been required to pay on these goods. This provision states:

Discretionary relief	**Exonération facultative**
115 (1) The Governor in Council may, on the recommendation of the Minister or the Minister of Public Safety and Emergency Preparedness, by order, remit duties.	**115 (1)** Sur recommandation du ministre ou du ministre de la Sécurité publique et de la Protection civile, le gouverneur en conseil peut, par décret, remettre des droits.
Scope of relief	**Portée de l'exonération**
(2) A remission under subsection (1) may be conditional or unconditional, may be granted in respect of the whole or any portion of the duties and may be granted regardless of whether any liability to pay the duties has arisen.	**(2)** Les remises peuvent être conditionnelles ou absolues, s'appliquer à la totalité ou à une fraction des droits et être accordées peu importe que les droits soient devenus exigibles ou non.
Remission by way of refund	**Remise par remboursement**
(3) If duties have been paid, a remission under subsection (1) shall be made by granting a refund of the duties to be remitted.	**(3)** Dans le cas où les droits ont déjà été payés, la remise est effectuée par remboursement des droits à remettre.

[7] In support of its request for duty relief, the applicant noted that its Charlottetown plant was the sole remaining cookware manufacturer in Canada; the applicant had made significant improvements to the plant since acquiring it in 2017; these improvements were assisted by large loans from the federal government as well as the government of PEI; the applicant had grown its local workforce along with the capacity of the plant; its products were sold in domestic and

international markets; its offshore competitors benefited from lower materials and labour costs; and the duties the applicant was being charged on the materials it had to import into Canada (because there is no domestic supplier) increased the applicant's costs, which in turn affected the competitiveness of its products and the company's profitability.

[8] The applicant specifically requested relief with respect to "raw materials, semi-finished and integral parts of stainless steel used for the manufacture of cookware." It also requested that relief on these items be retroactive to July 17, 2017, the date on which it acquired the Charlottetown plant, and that the duties it had paid on these goods since then be refunded.

[9] While the applicant had sought a remission of duties under section 115 of the *Customs Tariff*, the Minister of Finance responded by undertaking an examination of whether to eliminate the tariffs on the items in question entirely under section 82 of the *Customs Tariff*. This provision provides authority to amend the Schedule to the *Customs Tariff* to give tariff relief for "goods used in the production of other goods."

[10] After a public consultation initiated by the Department of Finance in or around August 2020, on April 23, 2021, an Order-in-Council was issued (PC 2021-318) eliminating customs duties on selected goods used in the production of other goods. In the case of the imported goods of concern to the applicant, the Order amended the Schedule to the *Customs Tariff* by adding a new tariff item (stainless steel parts for use in the manufacture of cookware) that was subject to a duty rate of 0%. The change to the Schedule took effect as of April 23, 2021, the date the Order was registered.

[11] The Regulatory Impact Analysis Statement (RIAS) that accompanied publication of the Order in the *Canada Gazette Part II, Vol 155, No 10* (May 12, 2021), stated that the objective of the Order was "to reduce tariffs on manufacturing inputs to help Canadian manufacturers." By way of background, the RIAS explained:

> This Order responds to requests from companies seeking tariff relief to lower their costs and enhance their competitiveness, at home and abroad. The Department of Finance conducted a due diligence process and consulted with stakeholders to assess impacts on domestic production capacity, including domestic sources of alternative inputs to the imported goods; to ensure that the amendments abide by the intent of section 82 of the *Customs Tariff*; and to ensure that tariff relief would not unduly affect other companies.

[12] I pause here to observe that, while the record before the decision maker could certainly have been clearer in this regard, it was sufficient to establish that, as the only domestic manufacturer of cookware, the applicant was the only Canadian importer of stainless steel parts for use in the manufacture of cookware and, as such, was the only company that would be directly affected by tariff relief in relation to these items. (The Order had also made a change to the Schedule concerning forged wheels for use in the manufacture or production of wheel sets, which may explain the reference to "companies" in the RIAS.)

[13] Meanwhile, in parallel with the request for relief from the Minister of Finance, the applicant continued to engage with the CBSA over the proper classification of some goods it had imported in 2018 and 2019. The CBSA had selected the applicant for a trade compliance verification. When the CBSA concluded in November 2019 that the applicant had incorrectly classified some imports of stainless steel pressed circles, the applicant was required to correct the tariff classification of identical or similar goods it had imported for up to four years prior to the

verification report. The applicant continued to maintain that it had classified goods in some transactions correctly but it appears that it did not contest the CBSA's determinations with respect to other transactions.

[14] Eventually, on March 15, 2021, the CBSA issued Detailed Adjustment Statements for five contested transactions, concluding that the applicant had classified the goods incorrectly as attracting no duties and that, under the correct classification, duties of 6.5% of the value of the goods were owing. On March 18, 2021, the CBSA issued a Notice of Penalty Assessment as a result of the incorrect classifications and imposed a penalty of $3000. As will be seen below, the applicant challenged both of these decisions.

[15] After the Order was registered amending the Schedule to the *Customs Tariff*, on June 15, 2021, legal counsel for the applicant wrote to the Minister of Finance asking that the Order "take effect" as of March 12, 2020 – the date the applicant submitted its original request for relief under section 115 of the *Customs Tariff* – instead of April 23, 2021. The applicant also asked that all duties it had paid in respect of the goods in question between March 12, 2020, and April 22, 2021, be refunded "given that the delay has entirely been caused by the Canadian government." According to the applicant, this amounted to a total of $125,000.

[16] In support of these requests, the applicant cited many of the same considerations it had relied on in its original request for duty relief (see paragraph 7, above). The applicant also suggested that typically it would take six to seven months to process a request for duty relief but in the applicant's case it had taken over a year. While this might be understandable given

everything else the Minister had had to deal with following the onset of the COVID-19 pandemic, the delay had caused the applicant economic hardship because the applicant had continued to bear the financial burden of the tariffs during this time. This had contributed to the difficulties the applicant has competing with imported products and had hampered its efforts to become profitable. In the applicant's view, a tariff should never have been imposed on these goods in the first place since they are not for resale but are only used for manufacturing purposes. According to the applicant, all things considered, to allow the tariff change to take effect as of March 12, 2020, "is not only fair, but basic decency."

[17] On June 16, 2021, counsel for the applicant spoke on the telephone with Yannick Mondy, Director with the International Trade Policy Division of the Department of Finance. (Ms. Mondy was listed as the government contact in the RIAS that accompanied publication of the April 23, 2021, Order. The applicant's letter of June 15, 2021, had been forwarded to her for a reply.) The exact contents of that call are not in evidence on this application; however, it appears that the fact that the applicant was continuing to pursue some outstanding issues with the CBSA was among the things discussed.

[18] As a follow-up to this telephone call, counsel for the applicant provided Ms. Mondy with a copy of the representations it had just submitted to the CBSA. In those representations, the applicant requested a redetermination pursuant to subsection 60(1) of the *Customs Act*, RSC 1985, c 1 (2nd Supp) of CBSA's March 15, 2021, tariff determinations in relation to five shipments of goods (see paragraph 14, above). The applicant also sought redress pursuant to

subsection 129(1) of the *Customs Act* for the penalty that had been imposed because of its alleged errors in the original declarations.

[19] Following the initial telephone contact, a series of emails were exchanged between Ms. Mondy and counsel for the applicant between June 16 and 18, 2021. In summary:

- Counsel for the applicant noted her understanding that Ms. Mondy would be submitting the letter of June 15, 2021, together with a summary of their call on June 16, 2021, to her team at the Department of Finance.

- Counsel for the applicant stated that, in the event that the response to their letter was negative, the applicant would examine the possibility of filing a request for a remission order (as stated in the original French, "*dans l'éventualité où la réponse à notre lettre serait négative, nous examinons la possibilité de déposer un décret de remise*").

- In response, to clarify next steps, Ms. Mondy asked counsel for the applicant to confirm that the amount of $125,000 referred to in the June 15, 2021, letter concerned tariffs paid for goods imported between March 2020 and April 22, 2021, and that these goods would be affected by the appeal to the CBSA.

- Ms. Mondy also pointed out that the June 15, 2021, letter contained little information supporting the estimated amount of duties whose return was being sought. The applicant could provide this information in the future.

- Ms. Mondy also noted that, as had been mentioned in their earlier telephone call, the Department of Finance does not make a recommendation for a remission order on a retroactive basis unless there are exceptional circumstances.

- In response, counsel for the applicant confirmed that the amount of $125,000 related to tariffs paid between March 12, 2020 (the date of the original request for relief) and the change in the tariff on April 23, 2021 (although no supporting details were provided). She also confirmed that the appeal to the CBSA would have an impact on the goods in question.

- Counsel for the applicant requested a follow-up call with Ms. Mondy to confirm counsel's understanding of the next steps and the information Ms. Mondy was requesting.

- Ms. Mondy offered to make herself available for a call the following week. However, there is no evidence in the record that such a call ever took place.

[20] The CBSA appeals were concluded in the summer of 2022. On July 4, 2022, the CBSA issued a decision substantially agreeing with the applicant that the original redetermination by the CBSA was in error, which meant that the applicant did not owe any duties on the five transactions in issue. By a separate CBSA decision dated July 25, 2022, the appeal of the penalty was substantially successful as well, although the applicant was still found liable for a technical contravention of the *Customs Act* for which it received a penalty of $500.

[21] On August 30, 2022, counsel for the applicant wrote to Ms. Mondy to inform her that the CBSA had rendered favourable decisions on the request for redetermination and on the appeal of

the penalty. Counsel provided copies of the two CBSA decisions to Ms. Mondy. Counsel also wrote in material part:

> The present follows our exchanges, which occurred in June 2021 with respect to our client's request for the issuance of a remission order, as further detailed in the attached letter dated June 15, 2021. You had advised us to inform you once we had received a decision from the CBSA in this regard in order to determine whether to grant our client's request.

[22] On September 2, 2022, Ms. Mondy sent an email to counsel for the applicant addressing the applicant's request for relief. She wrote:

> Thank you for sharing with us CBSA's decisions. I trust your client is satisfied with the outcomes.
>
> Regarding the request for retroactivity, as conveyed in a previous discussion last year, this matter has already been decided in the context of considerations and decisions that lead [*sic*] to the Order-in-Council that made a forward-only change to the Customs Tariff rate and that entered into force on April 23, 2021. As such, the department will not further consider this request.
>
> As you know, retroactive relief from tariffs has only been granted in exceptional circumstances with compelling public policy benefits that are not present in this case. Given the precedent and equity issues retroactivity considerations tend to raise for changing tariffs (or to remit them), this forward-only approach is consistent with past amendments to the Tariff Schedule for tariff relief of this nature.
>
> I trust the above answers your request. However, if you have any questions, please do not hesitate to contact me.

[23] The applicant now seeks judicial review of this decision.

III. ANALYSIS

[24] As already noted, the applicant challenges both the fairness of the decision-making process before the Minister and the reasonableness of Ms. Mondy's decision on behalf of the Minister. Since I have concluded that the matter must be reconsidered because the decision under review is unreasonable, it is not necessary to address the applicant's procedural fairness submissions.

[25] The parties agree, as do I, that the merits of Ms. Mondy's decision are to be reviewed on a reasonableness standard. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid*.). The onus is on the applicant to demonstrate that the decision under review is unreasonable. To have the decision set aside on this basis, the applicant must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100).

[26] *Vavilov* held that, in addition to the need for internally coherent reasoning, to be reasonable, a decision "must be justified in relation to the constellation of law and facts that are relevant to the decision" (at para 105). One important element of this context is the history of the proceeding leading to the decision (*Vavilov*, at para 94). Another is the submissions of the affected party or parties. A decision maker's reasons must "meaningfully account for the central

issues and concerns raised by the parties" (*Vavilov*, at para 127). This is because reasons "are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties" (*ibid.*). A decision maker's "failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov*, at para 128).

[27] I would note at the outset that the applicant does not challenge the September 2, 2022, decision in so far as it relates to the effective date of the April 23, 2021, Order amending the Schedule. Rather, the applicant's submissions focussed on the reasonableness of the decision not to consider further its request for a remission order under section 115 of the *Customs Tariff*.

[28] In my view, the September 2, 2022, decision is unreasonable because it fails to engage meaningfully with key issues raised by the applicant.

[29] In fairness to Ms. Mondy, she was presented with something of a moving target. Initially, in the June 15, 2021, letter, the applicant asked that the Order amending the Schedule (which had been issued under section 82 of the *Customs Tariff*) "take effect" as of March 12, 2020. Thus, the applicant appeared to be asking the Minister to recommend to the Governor in Council that the effective date of the Order should be amended to give the change to the Schedule retroactive effect. The letter does not mention any request for a remission order under section 115 of the *Customs Tariff*. The June 16, 2021, email from counsel for the applicant stated that, if the request to change the effective date of the Order was unsuccessful, they would examine the possibility of seeking a remission order (presumably under section 115

of the *Customs Tariff*). This suggested that the applicant had not sought a remission order yet but may well do so in the future, if the effective date of the April 23, 2021, Order was not changed. Then, the August 30, 2022, email from counsel for the applicant characterized the June 15, 2021, letter itself simply as a "request for the issuance of a remission order." There is no mention of any request to change the effective date of the April 23, 2021, Order, which was the sole focus of the original request.

[30] Nevertheless, it cannot be suggested that Ms. Mondy would not have understood the applicant's objective at this stage. Having succeeded in having the tariff eliminated on imports from April 23, 2021, onwards, the applicant now sought the return of duties it had paid in the past in relation to the same goods. Indeed, starting with its March 2020 request, the applicant had consistently sought some form of retroactive relief with respect to duties it had already paid.

[31] I am satisfied that Ms. Mondy would have understood that the decision to make the Order amending the Schedule effective as of the date it was registered did not preclude the applicant from being granted a remission of duties it had paid in the past. While her decision does deal with the two questions at the same time, and in brief compass, it does not conflate them.

[32] Ms. Mondy would also have understood that, as a matter of law, retroactive relief like the applicant was seeking could be granted under section 115 of the *Customs Tariff* but, as a matter of policy, only in exceptional circumstances. She said as much in her June 17, 2021, and September 2, 2022, emails. It is also implicit in the latter email that Ms. Mondy was not satisfied that such circumstances were present in the applicant's case. This is the only discernible reason

for why she had concluded that her department would not consider the applicant's request for relief further. The problem, however, is that one cannot understand why Ms. Mondy was of this view. The applicant's letter of June 15, 2021, had set out a number of circumstances that, according to the applicant, warranted granting the relief it sought. Those circumstances might or might not be sufficient to persuade a reasonable decision maker to grant relief. But, to be reasonable, a decision refusing relief had to say something about why those circumstance were judged insufficient. That did not happen here.

[33] In attempting to defend the reasonableness of the decision, the respondent submits that there was no evidence to support the applicant's contention that the process of amending the Schedule had been adversely affected by the pandemic or that the process had taken unduly long. Put another way, it was an open question whether the applicant had established that it suffered any prejudice warranting relief.

[34] These may well be valid considerations. The difficulty for the respondent is that the September 2, 2022, decision does not mention them. It is not ordinarily appropriate for a reviewing court to "fashion its own reasons in order to buttress the administrative decision" (*Vavilov*, at para 96). As *Vavilov* held, to allow this "would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (at para 96). Likewise, concerns about precedent and equity where retroactive relief is granted, which are mentioned in the decision, required more than just a passing reference for the decision to be transparent, intelligible, and justified.

[35] On a more general level, the respondent properly emphasizes the discretionary nature of decisions under section 115 of the *Customs Act* but this cannot excuse the absence of sufficient reasons for the decision. On the contrary, particularly in areas in which broad discretion is given to administrative decision makers, reasons that justify the outcome in a transparent and intelligible way "shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power" (*Vavilov*, at para 79). Responsive reasons will reassure an affected party that their arguments were considered and that they were treated fairly. This builds confidence in the decision making of public officials (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 13).

[36] Finally, for the sake of completeness, I would note that, at the hearing of this application, the applicant tendered documents announcing the public consultation under section 82 of the *Customs Act.* There is no evidence that these documents were before the decision maker. However, I am prepared to accept them as evidence falling within the general background exception to the usual rule that the evidentiary record on an application for judicial review is limited to that which was before the original decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 42-46). Little turns on them in any event. There is no issue that the public consultation took place. The applicant sought to rely on the documents as circumstantial evidence that it was the only party directly affected by the April 2021 amendment to the Schedule, something that was otherwise not entirely clear on the record. The result of the present application does not turn on this point, although it may well be important when the matter is reconsidered by the Minister.

IV. CONCLUSION

[37] For these reasons, the application for judicial review will be allowed. The decision of September 2, 2022, refusing to consider further the applicant's request for relief will be set aside. The matter will be referred back to the Minister of Finance for a new decision on the applicant's request for a remission order under section 115 of the *Customs Tariff*. The applicant did not request that the matter be put before a different decision maker acting on behalf of the Minister so I leave this issue to be resolved by the parties.

[38] In accordance with the agreement of the parties, the applicant is awarded costs in the all-inclusive amount of $4930.00.

JUDGMENT IN T-2018-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of September 2, 2022, refusing the applicant's request for a remission order under section 115 of the *Customs Tariff* is set aside and the matter is returned to the Minister of Finance for a new decision.
3. Costs are awarded to the applicant in the all-inclusive amount of $4930.00.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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