Federal Court  Cour fédérale

Date: 20170221

Docket: T-683-16

Citation: 2017 FC 205

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 21, 2017

PRESENT: The Honourable Justice Martineau

BETWEEN:

DISTRIBUTION G.V.A. INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review concerns the applicability of section 1.1 of the schedule to the *Tobacco Act*, S.C. 1997, c. 13 [Act], to the cognac and icewine flavouring additives found in cigars marketed and sold in Canada by the applicant and its retailers under the names “Neos Al’s Cognac Selection,” “Al’s Cognac Collection” and “Honey T Spiral Ice Wine” [disputed products].

[2] The general purpose of the Act is to serve public health. This can be fulfilled only by regulating the manufacture, labelling and sale of tobacco products so as to protect Canadians, particularly young persons, from inducements to use tobacco products (section 4 of the Act). As such, the use of an additive set out in column 1 of the schedule to the Act in the manufacture of a tobacco product set out in column 2 is prohibited (section 5.1 of the Act). It is also prohibited to sell a tobacco product set out in column 2 of the schedule that contains an additive set out in column 1 (section 5.2 of the Act). Lastly, it is prohibited to package – or to sell – a tobacco product set out in column 2 of the schedule to the Act in a manner that suggests, including through illustrations, that it contains an additive set out in column 1 (section 23.1 of the Act).

[3] However, section 1.1 of the schedule to the Act [exception] provides an exception for the following items set out in column 1 (Additive) and column 2 (Tobacco Product):

Column 1	Column 2
1.1 The prohibited additives referred to in item 1, excluding those that impart a flavour that is generally attributed to port, wine, rum or whisky	1.1 Cigars that have a wrapper fitted in spiral form and that weigh more than 1.4 g but not more than 6 g, excluding the weight of any mouthpiece or tip, other than those referred to in item 1
Colonne 1	**Colonne 2**
1.1 Additifs interdits visés à l’article 1, sauf s’ils confèrent un arôme communément attribué au porto, au vin, au rhum ou au whisky	1.1 Cigares qui sont munis d’une cape apposée en hélice et pèsent plus de 1,4 g mais au plus 6 g, sans le poids des embouts, sauf ceux visés à l’article 1

[4] The applicant specializes in the import, distribution and sale of tobacco products in Canada, the United States and Mexico. Among other products, it sells icewine (“Honey T Spiral

Ice Wine") and cognac ("Neos Al's Cognac Selection" and "Al's Cognac Collection") flavoured cigars in packages of 10 or 12 units. The applicant is seeking declaratory relief allowing it to market and distribute the disputed products in Canada on the grounds that they are covered by the exception and consequently comply with section 23.1 of the Act. The respondent, meanwhile, maintains to the Court that the disputed products are not covered by the exception and consequently do not comply with the Act.

[5] The pertinent facts are not in dispute.

[6] In 2009, Parliament amended the Act to limit the manufacture, marketing and sale of certain flavoured tobacco products (with the exception of menthol-flavoured products), notably cigarettes, little cigars and blunt wraps (*Cracking Down on Tobacco Marketing Aimed at Youth Act*, S.C. 2009, c. 27, sections 2, 4, 5, 12 and 17 [2009 amendments]), while stating that the Governor in Council may, by order, amend the schedule by adding, amending or deleting the name or description of an additive or tobacco product (section 9 of the 2009 amendments).

[7] Subsequent to the 2009 amendments, tobacco manufacturers and importers introduced new types of cigars onto the Canadian market that were slightly larger than little cigars (section 2 of the Act) and contained various flavouring additives. The government responded in 2015 by adopting the Order Amending the Schedule to the Tobacco Act [Order], which reinforces the general prohibition found in section 1 of the schedule by amending column 2 to add cigars with a wrapper not fitted in spiral form and cigars with tipping paper.

[8] In January 2016, claiming to be acting under the authority of the Act, inspectors from Health Canada [federal office] demanded that a retailer in British Columbia remove disputed products from its shelves. The applicant submitted formal notice to the federal office to cease putting any form of pressure on its retailers. The federal office announced that it would review the applicant's claims and that no measures would be taken in the interim. However, in March 2016, inspectors went to the applicant's warehouse and seized multiple products on the grounds that they did not comply with the Act. Additional seizures were carried out at other retailers of the applicant during the following weeks. In April 2016, the applicant initiated civil proceedings to challenge the seizures and recover the seized products. It is not necessary to rule on the legality or reasonableness of the federal office's decisions, for the parties came to an agreement under which the federal office allowed the release of the seized products and granted the applicant a grace period during which to sell the seized products. At the same time, the applicant agreed to cease packaging and distributing any additional products bearing the description "icewine" or "cognac" until a final judgment binding the parties could be rendered by the Federal Court pursuant to section 18 of the *Federal Courts Act*, RSC 1985, c. F-7, hence the filing of this application for declaratory relief by the applicant.

[9] This Court must therefore judicially determine the scope of the exception provided in section 1.1 of the schedule to the Act. It is noted that this exception applies to "additives [that] impart a flavour that is generally attributed to port, wine, rum or whisky" (column 1) in relation to "[c]igars that have a wrapper fitted in spiral form and that weigh more than 1.4 g but not more than 6 g, excluding the weight of any mouthpiece or tip" (column 2). It is noted further that the

respondent does not challenge the fact that the applicant's products are as set out in column 2, but challenges that they are covered by column 1 of section 1.1 of the schedule to the Act.

[10] The applicant maintains that, following logical and grammatical interpretation of the text used in column 1, icewine and cognac flavouring additives are also excepted in that both are commonly associated with wine or (in the case of cognac), by extension, whisky. An important exception must be noted in this regard in section 1.1 of the schedule with an aim to "limit the impact of the Order on adult choice" (Regulatory Impact Analysis Statement [RIAS] at page 1639). The applicant argues further that section 23.1 of the Act does not state that the packaging must specifically include the words "port, wine, rum or whisky," but rather that the prohibited additives must not be implied on the packaging. The disputed products comply with the Act in this regard.

[11] For its part, the respondent argues that the choice of the four alcohol flavours specifically targeted by the exception (port, wine, rum and whisky) is the result of a compromise, such that the scope of the exception may not be extended to other alcohol flavours such as icewine or cognac. On one hand, whisky and cognac are two different types of spirits with distinct flavours. On the other, if the word "wine" were meant to include any type of wine, there would have been no need to except "port," which is a fortified and sweetened wine. The word "wine" must therefore be interpreted according to its most common meaning, this being table wine.

[12] The applicant's application for declaratory relief is allowed in part. Having analyzed the arguments submitted by the parties in light of the text of the exception and of the general purpose

of the Act and the Order, the Court rules that cognac flavour is not covered by the exception in section 1.1 of the schedule to the Act, whereas a wine flavour, including icewine, is excepted. A certain number of general observations must be made concerning the Act and the exception.

[13] First, the Court endorses the modern method of interpreting laws in the sense that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26 [*Bell ExpressVu*]). Where the words of a provision are clear, their ordinary meaning prevails (*Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 SCR 3 at para 21 referring to *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para 10). However, in the event of ambiguity in the legislation – when there are "two or more plausible readings, each equally in accordance with the intentions of the statute" – the courts need to resort to external interpretive aids (*Bell ExpressVu* at paras 29-30).

[14] Second, the general purpose of the Order is to "remove the ability of the tobacco industry to market most flavoured cigars that are appealing to youth in Canada," while one of the main objectives of the Act is to protect young persons. This favours a restrictive interpretation of the exception (see, by analogy, *R. v. Seaway Gas & Fuel Ltd.*, 2000 CanLII 2981 (ON CA), [2000] OJ No. 226 at para 33 concerning the *Smoke-Free Ontario Act*.) In this sense, protecting young persons supersedes freedom of manufacturers and importers in the tobacco industry. Additionally, the exception in section 1.1 of the schedule to the Act must be read in conjunction

with the prohibition in section 1 applicable to all additives not otherwise excepted and having flavouring properties or that enhance flavour in the case of a tobacco product set out in column 2 of the schedule.

[15] Third, the word "flavour" is not defined in either the Act or the Order. In general, what is prohibited is any "[a]dditives that have flavouring properties or that enhance flavour" (section 1, column 1) – which, evidently, includes any chemical or natural compound that creates a perception of the taste and smell that a consumer might associate with an alcoholic beverage or other product while smoking a cigarette or cigar. However, the use in section 1.1 of the schedule to the Act of the terms "generally attributed" leaves a certain degree of discretion. The words "a flavour" are not limiting and may include multiple flavours – as long as it is a flavour generally attributed to port, wine, rum or whisky, which are very different types of alcoholic beverages.

[16] Fourth, the choice to except the flavours generally associated with alcoholic beverages set out in section 1.1 of the schedule to the Act is not a coincidence. In fact, the government proposed to prohibit all types of flavoured cigars, including the larger, more expensive, premium cigars. However, this proposal was deemed too broad and ruled out. The government wanted to minimize the impact of a prohibition on the conventional cigar market and avoid unduly limiting choice for adults, who are the most likely to appreciate port-, wine-, rum- and whisky-flavoured cigars that have a wrapper fitted in spiral form and that weigh more than 1.4 g but not more than 6 g (RIAS at pages 1628-1629).

[17] Fifth, in the absence of any apparent ambiguity, the Court must refrain from rewording the exception in section 1.1 of the schedule to the Act to limit the usual scope of the words “port, wine, rum or whisky” listed in column 1. In this case, the words “whisky” and “wine” are clear on their own. Their use in column 1 does not raise any ambiguity when read in conjunction with the words “a flavour that is generally attributed to port, wine, rum or whisky.” The words “whisky” and “wine” are therefore to be interpreted and applied according to their usual and ordinary meaning. Moreover, counsel for the respondent stated at the hearing that the term “whisky” was not limiting and could include any type of “whisky.” In fact, the word “whisky” is a generic noun used to designate a spirit manufactured from distilled malted or unmalted grain. This includes scotch whisky, American whiskey (bourbon) and Canadian whisky (rye whisky). Curiously, the respondent proposes to limit the general scope of the meaning of the word “wine” under the pretext that port is also a type of wine. It follows that according to the respondent, the word “wine” may not include dessert wines, whether Sauternes, icewine or other types of sweet wine.

[18] The Court cannot accept the restrictive interpretation proposed by the respondent. The word “wine” is a generic and inclusive term that cannot be limited to “table wine” as the respondent wrongly claims. It is to be noted that, based on its usual definition, wine is a fermented beverage prepared from grapes or fresh grape juice. Wines may be dry, medium-dry or sweet. They may be red, white or rosé. Wines come in a great number and variety of flavours. They may be classified by their origin (variety), flavour family (fruity, floral, woody, etc.) or chemical similarity (fermentation process). Icewine, meanwhile, is essentially a fermented beverage made from grapes that have been frozen while still on the vine. Additionally, the

reference to the word “port” in section 1.1 of the schedule to the Act is insufficient to create any ambiguity or restrict the general scope of the word “wine.” Icewine does not contain added alcohol. It is not a fortified wine like port.

[19] In fact, if the Court accepted the interpretation proposed by the respondent, it would be required to amend the text of section 1.1 of schedule 1 to the Act. In *Rubin v. Canada (Minister of Transport)* (CA), 1997 CanLII 6385 (FCA), [1998] 2 FC 430, the Court interpreted the scope of the exceptions found in the *Access to Information Act*, RSC 1985, c. A-1. The Federal Court of Appeal stated in this regard at paragraph 24:

> [24] It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations (as paragraph 16(1)(c) is here), then this Court must, given the presence of section 2, choose the interpretation that infringes on the public’s stated right to access to information contained in section 4 of the Act the least.
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> [Emphasis added.]

[20] On the other hand, wine is not a spirit, and its production process is different from that for distilled alcohol such that no analogy may be made by the applicant in relation to cognac. The Court also does not see how the applicant can claim that cognac can be grouped with whisky. Both are certainly spirits (beverages with a high alcohol content), but the analogy ends there. Whisky is made by distilling malted or unmalted grain, whereas cognac is a spirit made by doubly distilling grape juice (must) and ageing it in oak barrels first to create a “vin de

chaudière" (first distillation) and then to transform the vin de chaudière into cognac (with high alcohol content – second distillation).

[21] It is also important to note that, at the time of the consultation process, various stakeholders proposed broadening the range of permitted flavours to include other popular alcohol flavours such as amaretto, Kahlúa and cognac. Some companies proposed providing a general exception for "additives that impart 'generally recognized adult alcoholic beverages.'" Some went so far as to propose including coffee flavour on the basis that coffee is deemed to be an adult-oriented beverage. However, Health Canada, the federal entity responsible for making recommendations to the Governor General, ultimately decided not to incorporate these suggestions into the final Order (RIAS tab 2, pages 1639 and 1642). Had the government wanted to add cognac to the list of excepted flavours under section 1.1 of the schedule to the Act, it would have indicated this clearly. This is not the case here.

[22] In final analysis, the Court concludes that it was the government's intention not to include cognac in the exception in section 1.1 of the schedule despite any analogies that may be made in terms of colour or alcohol content with whisky or even with wine, since cognac is made from grapes. Insofar as cognac is not an alcohol flavour listed in section 1.1 of the schedule to the Act, the applicant may not market or sell the two tobacco products known as "Neos Al's Cognac Selection" and "Al's Cognac Collection," which are packaged to suggest, whether through their name or illustration, that they contain an additive prohibited under the Act (subsection 23.1(2) of the Act).

[23] In conclusion, the Court finds that the cigars marketed and sold in Canada by the applicant and its retailers under the name “Honey T Spiral Ice Wine” are covered by the exception provided in section 1.1 of the schedule to the Act and comply with section 23.1 of the Act. However, the cigars marketed and sold in Canada by the applicant and its retailers under the names “Neos Al’s Cognac Selection” and “Al’s Cognac Collection” are not covered by the exception provided in section 1.1 of the schedule to the Act and do not comply with section 23.1 of the Act.

[24] In view of the divided outcome, no costs are awarded.

JUDGMENT

THE COURT ALLOWS in part the applicant's application for judicial review.

THE COURT FINDS that the cigars marketed and sold in Canada by the applicant and its retailers under the name "Honey T Spiral Ice Wine" are covered by the exception provided in section 1.1 of the schedule to the *Tobacco Act*, S.C. 1997, c. 13 [Act] and comply with section 23.1 of the Act. However, the cigars marketed and sold in Canada by the applicant and its retailers under the names "Neos Al's Cognac Selection" and "Al's Cognac Collection" are not covered by the exception provided in section 1.1 of the schedule to the Act and do not comply with section 23.1 of the Act.

WITHOUT COSTS.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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