Federal Court  Cour fédérale

Date: 20100413

Docket: T-524-09

Citation: 2010 FC 396

Ottawa, Ontario, April 13, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

JOCKEY CANADA COMPANY LIMITED

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Jockey Canada Company Limited (JCC) pursuant to section 18.1 of the *Federal Courts Act* of a decision rendered by the Canada Border Services Agency (CBSA) on March 3, 2009. That decision was in response to a JCC request an earlier October 20, 2008 CBSA instruction letter be rescinded.

[2] The Applicant seeks a writ of *certiorari* quashing the decision, particularly in regard to the finding that, pursuant to section 32.2 of the *Customs Act*, R.S.C. 1985 c. 1 (2nd Supp.) (the *Act*), JCC had "reason to believe" that its valuation method of imported goods in 2005 was incorrect.

[3] I am dismissing this application for judicial review because I conclude the Federal Court does not have jurisdiction to hear this matter for the reasons that follow.

BACKGROUND

[4] JCC is an importer and distributor of Jockey brand apparel in Canada and is located in London, Ontario. Its parent company is Jockey International Inc. (JII) based in Wisconsin, U.S.A.

[5] In the past Jockey International Inc. (JII) sold Jockey brand apparel in Canada by shipping goods to warehouses in Canada then redistributing to retailers. JII paid duties on goods in accordance with a 1991 ruling by CBSA's predecessor agency instructing JII to use the deductive valuation method for determining the value of duty on its imports.

[6] JCC was incorporated in 1996 as a wholly owned subsidiary of JII. JCC imported Jockey brand apparel pursuant to a sales and distribution agreement (the Sales Agreement) with JII. This Sales Agreement provides that JII would sell JCC garments bearing the Jockey Marks manufactured by and for JII, U.S.A. for which JCC would pay JII a specified price.

[7] JCC, as importer to Canada, now paid duty on Jockey imports but continued using the deductive valuation method for determining the value for duty on the imports. At some time prior to

2000, JCC began purchasing goods from JII manufactured by its subsidiaries in Jamaica, Honduras and Costa Rica. JCC paid JII for these Caribbean goods and paid duty using a computed value method. At some time prior to 2005, JCC also began importing goods from JII that were manufactured in Asia. JCC paid the duty for these goods using a transaction method for determining the value for duty on the Asian goods.

[8] On April 18, 2005, the London office of the CBSA informed JCC that it was commencing a value for duty review of JCC under authority of the *Act* and that it required the production of documents for the review of the 2005 duty valuations. This began a process lasting 42 months leading up to the impugned March 3, 2009 CBSA letter that is the subject of this judicial review application.

[9] On October 20, 2008 CBSA issued an instruction letter (the Instruction Letter) and valuation report. The Instruction Letter concluded the three methods used by JCC for the purpose of calculating the value for duty of its imports from the three different sources were incorrect. It added JCC has had "reason to believe" this was the case since 2005. It also stated the letter was a National Customs Ruling binding on JCC unless rescinded. Under the Instruction Letter's "*General Recommendations*" the following was written:

> "Section 32.2 of the Customs Act requires importers to make adjustments to errors made on declarations in respect of the tariff classification, value for duty, or origin of the goods. Under section 32.2, you are responsible for making corrections to the declarations filed from the date that you have "reason to believe" that the declaration is incorrect. Section 32.2 provides you with 90 days within which to file the appropriate corrections. Additional information for the "self-adjustment process" can be found in Memorandum

> D11-6-6. Please note this section does not apply to require or allow a correction that would result in a claim for a refund of duties."
>
> (emphasis added)

DECISION UNDER REVIEW

[10] On November 21, 2008 JCC wrote to the CBSA and requested the Instruction Letter be rescinded submitting among other things that:

a. the value for duty review was conducted in an unfair and prejudicial manner;

b. JCC had "no reason to believe" that any of the methods used to calculated its value for duty were incorrect; and

c. the Instruction Letter was replete with errors.

[11] Following the November 21, 2008 JCC letter, three JCC representatives met on December 16, 2008 in Ottawa with four CBSA officials representing the Trade Programs Directorate. The CBSA undertook to conduct a review. Ms. Kline, Director, Origin and Valuation Division CBSA sent a response on March 3, 2009 advising the Instruction Letter would not be modified.

[12] I paraphrase and emphasize the relevant part of the CBSA's March 3, 2009 response:

a. Lack of Fairness: On review of the length of time it took for verification of goods imported in 2005, the CBSA acknowledged a 19 month period of inactivity by CBSA officials and, as a result, the CBSA was prepared to waive or cancel interest for that period.

b. Reassessment: CBSA's reassessment policy was based on section 59 of the *Act* which provides that CBSA may reassess incorrect declarations and an importer will make corrections in any remaining incorrect declarations not already reassessed pursuant to section 32.2 of the Act.

c. Reason to Believe: The CBSA asserts JCC had reason to believe its value for duty declarations were incorrect. It used the transaction value method for an export sale between JCC and its parent company. The Detailed Adjustment Statements that JCC subsequently provided relate to a computed method in a prior period and do not reflect the valuation method applicable to the operating practices that were found to be in place during the review period and therefore are not relevant. The reason to believe was used to reassess to a maximum four years prior and in all other cases a result of a CBSA verification is that the importer would be required to correct for the prior twelve month fiscal period.

d. Factual Errors or Omissions: The CBSA did not consider there to be any material errors that would affect the ruling.

LEGISLATION

[13] The *Federal Courts Act* provides:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[14] The *Customs Act* provides:

32.2 (1) An importer or owner of goods for which preferential tariff treatment under a free trade agreement has been claimed or any person authorized to account for those goods under paragraph 32(6)(a) or subsection 32(7) shall, within ninety days after the importer, owner or person has reason to believe that a declaration of origin for those goods made under this Act is incorrect, (a) make a correction to the declaration of origin in the prescribed manner and in the prescribed form containing the prescribed information; and (b) pay any amount owing as duties as a result of the correction to the declaration of origin and any interest owing or that may become owing on that amount.	32.2 (1) L'importateur ou le propriétaire de marchandises ayant fait l'objet d'une demande de traitement tarifaire préférentiel découlant d'un accord de libre-échange, ou encore la personne autorisée, sous le régime de l'alinéa 32(6)a) ou du paragraphe 32(7), à effectuer la déclaration en détail ou provisoire des marchandises, qui a des motifs de croire que la déclaration de l'origine de ces marchandises effectuée en application de la présente loi est inexacte doit, dans les quatre-vingt-dix jours suivant sa constatation : a) effectuer une déclaration corrigée conformément aux modalités de présentation et de temps réglementaires et comportant les renseignements réglementaires; b) verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.
(2) Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(a) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in	(2) Sous réserve des règlements pris en vertu du paragraphe (7), l'importateur ou le propriétaire de marchandises ou une personne qui appartient à une catégorie réglementaire de personnes relativement à celles-ci, ou qui est autorisée en application de

subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect,
(a) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and
(b) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.

(3) A correction made under this section is to be treated for the purposes of this Act as if it were a re-determination under paragraph 59(1)(a).

(4) The obligation under this section to make a correction in respect of imported goods ends four years after the goods are accounted for under subsection 32(1), (3) or (5).
…
59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may
(a) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within

(i) four years after the date of the determination, on the basis

l'alinéa 32(6)a) ou du paragraphe 32(7) à effectuer la déclaration en détail ou provisoire des marchandises, ayant des motifs de croire que la déclaration de l'origine de ces marchandises, autre que celle visée au paragraphe (1), la déclaration du classement tarifaire ou celle de la valeur en douane effectuée à l'égard d'une de ces marchandises en application de la présente loi est inexacte est tenue, dans les quatre-vingt-dix jours suivant sa constatation :
a) d'effectuer une correction à la déclaration en la forme et selon les modalités réglementaires et comportant les renseignements réglementaires;
b) de verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.

(3) Pour l'application de la présente loi, la correction de la déclaration faite en application du présent article est assimilée à la révision prévue à l'alinéa 59(1)a).

(4) L'obligation de corriger une déclaration, prévue au présent article, à l'égard de marchandises importées prend fin quatre ans après leur déclaration en détail au titre des paragraphes 32(1), (3) ou (5).
…

of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or

(ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and

(b) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(c.1), (c.11), (e), (f) or (g) that is treated by subsection 74(1.1) as a re-determination under paragraph (a) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (a).

…

(6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1)

59. (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :

a) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :

(i) dans les quatre années suivant la date de la détermination, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

(ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

b) réexaminer l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue

and sections 60 and 61. (emphasis added)	à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1) c.1), c.11), e), f) ou g) qui est assimilé, conformément au paragraphe 74(1.1), à une révision au titre de l'alinéa a), soit d'une correction effectuée en application de l'article 32.2 qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa a). … (6) La révision ou le réexamen fait en vertu du présent article ne sont susceptibles de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.

ISSUES

[15] The Applicant and Respondent present a variety of issues to be considered in this application. I see the issues on a more fundamental plane. In my view the substantive issues in this judicial review are better characterized as:

a. Is the Applicant precluded from applying for judicial review either by section 18.5 of the *Federal Courts Act* or by the alternative mechanism for a remedy in the *Act*?

b. Is there a basis for the CBSA to conclude the Applicant had "reason to believe" in 2005 that its valuations for duty were erroneous?

c. Did the delay in the review of the duty on the 2005 imports occasion a breach of natural justice or procedural fairness?

ANALYSIS

[16] The Applicant seeks an order quashing the CBSA's finding JCC had "reason to believe" it was improperly valuing its imported goods since 2005 as well as other remedies in conjunction with or in alternative to quashing that decision.

[17] Section 18(1) of the *Federal Courts Act* provides the Federal Court has exclusive jurisdiction to hear any application for relief of the kind the Applicant seeks against any federal board, commission or other tribunal. Section 18.1 provides that an application for judicial review may be made by anyone directly affected by the matter in respect of which relief is sought. Section 18.5 limits the scope of these two sections. It reads:

> 18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the…Federal Court of Appeal…from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.
>
> (emphasis added)

[18] Turning to the *Customs Act*, section 32.2 requires the importer to correct its declaration of origin and declaration of value for duty where the importer "has reason to believe" the declaration is incorrect. Subsection 32.2(3) deems that corrections under this section are to be treated as re-determination under paragraph 59(1)(a).

[19] Section 59(1)(a) of the *Act* provides for re-determination of the valuation for duty by CBSA officers.

[20] Where the officer's re-determination is disputed, the *Act* provides for re-determination by the President of the CBSA (sections 60, 61), for an appeal of the President's decision to the CITT (subsection 67(1)), and, finally, an appeal of the CITT decision on a question of law to the Federal Court of Appeal (subsection 68). This process is protected by three privative clauses, namely sections 62, 67(3), and 72.1.

[21] In *Abbott Laboratories, Limited and Abbot Laboratories International v. Canada (Minister of National Revenue)* 2004 FC 140 (*Abbot Laboratories*) Justice François Lemieux held:

> I cannot think how Parliament's intention, by enacting this structure, could have been expressed in clearer terms. Parliament wanted the administrative, quasi-judicial and judicial review system to be followed to the exclusion of any other paths of review or appeal. This structure includes bodies with recognized expertise in the subject matter with the Commissioner and the CITT. Moreover, it is the Federal Court of Appeal and not the Federal Court which supervises the CITT in judicial review matters pursuant to paragraph 28(1)(b) of the Federal Court Act.
>
> As I see it, Parliament's clear intention ousts judicial review by the Federal Court under section 18.1 of the Federal Court Act and this intention also removes the necessity for this Court to test whether the prescribed review route provides for an adequate alternative remedy.

I agree with Justice Lemieux.

[22] In *1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness) (Outer Space Sports)*, 2006 FC 1263, aff'd 2008 FCA 47, Madam Justice Anne Mactavish also agreed with Justice Lemieux's finding in *Abbot Laboratories* that the

comprehensive review mechanism in the *Act* deprived the Federal Court of jurisdiction and similarly ruled in the application before her.

[23] Justice Mactavish went on to consider in the alternative whether the review scheme in the *Act* provided the applicant with an adequate alternative remedy such that the Court ought to decline the application for judicial review. She noted Justice Lemeiux found the complexities of the review under the *Act* did not mean an adequate alternate remedy was not provided. She took note that the applicant had initiated review under the *Act*. In result she further declined to exercise jurisdiction on the basis that an adequate alternative remedy existed. On appeal, the Federal Court of Appeal affirmed Justice Mactavish's findings on both points.

[24] Finally, the Federal Court of Appeal considered the effect of section 32.2 of the *Act* in *Fritz Marketing Inc. v. Canada (Fritz Marketing Inc.)* 2009 FCA 62. Justice Karen Sharlow first reviewed the same statutory provisions that are relevant in this case. Her review is comprehensive and bears repeating:

> 5. The Agency has the authority under subsection 58(1) of the Customs Act to determine the value for duty of imported goods. However, if that determination is not made by the Agency, the determination is deemed by subsection 58(2) to be as declared by the importer. Thus, in the absence of an initial determination by the Agency of the value for duty of imported goods, the importer's declaration is treated as the Agency's determination.
>
> 6. Pursuant to subsection 32.2(2) of the Customs Act, an importer who has reason to believe that its declaration of the value for duty is incorrect must submit a correction within a specified time and pay any resulting deficiency in the duties payable. Subsection 32(3) provides that, for the purposes of the Customs Act, such a correction is treated as a re-determination by the Agency under paragraph 59(1)(a) of the Customs

> Act. The duty to make corrections expires after four years (subsection 32.2(4) of the Customs Act).
>
> 7. Pursuant to paragraph 59(1)(a) of the Customs Act, the Agency may make a re-determination of the value for duty of imported goods, but it must do so within four years after the date of the initial determination. Further re-determinations are permitted under paragraph 59(1)(b), subject in some cases to further time limits.
>
> …
>
> 9. An importer who receives a Detailed Adjustment Statement may request the President of the Agency to make a further determination pursuant to section 60. The request must be made within a stipulated time limit, which may be extended by the President or, in certain circumstances, by the Canadian International Trade Tribunal ("CITT") (sections 60.1 and 60.2). Pursuant to section 61 of the Customs Act, the President of the Agency has the authority to make a further re-determination, subject to certain conditions that are not relevant to this appeal.
>
> 10. Pursuant to section 67 of the Customs Act, an appeal lies to the CITT from a decision of the President on a section 60 request, or a re-determination by the President under section 60 or section 61. A further appeal lies to the Federal Court of Appeal pursuant to section 68 of the Customs Act.
>
> (emphasis added)

[25] Justice Sharlow considered the issue of the Federal Court's jurisdiction to set aside a CBSA Detailed Adjustment Statement. The question arose because, in issuing the Detailed Adjustment Statement, the CBSA relied on information obtained as a result of a breach of section 8 of the *Charter of Rights and Freedoms.* The issue was framed by the parties and the Federal Court as a challenge to the CBSA decision refusing to cancel the Detailed Adjustment Statement when asked to do so.

[26] Justice Sharlow held the issue in *Fritz Marketing Inc.* had been mischaracterized. She stated at para. 36:

> In my view, the fundamental issue in this case is and should be the admissibility of the impugned evidence in the proceedings before the CITT, which is the tribunal that has the mandate to determine the validity and correctness of the Detailed Adjustment Statements.

[27] Keeping in mind the forgoing jurisprudence, I turn to the matter before me.

[28] The Applicant has proceeded with this application because the CBSA has refused to rescind the Instruction Letter which arose after a re-determination by an officer under section 59. The officer's re-determination of the duty valuations engages, in my view, section 32.2.

[29] The issue in this proceeding is the differing views the CBSA and the Applicant have on whether there is "reason to believe" the Applicant knew in 2005 the methods of valuation of duty it was using were incorrect. If so, it would need to revise its duty valuations in compliance with section 32.2 of the *Act*. This, in turn, engages section 59(1)(a) and the re-determination and appeal mechanisms set forth in sections 59 – 68. This issue falls in line with the characterization applied by the Federal Court of Appeal in *Fritz Marketing Inc.*

[30] I am of the view this is a matter for the President of the CBSA and if unresolved for appeal to the CITT, the specialized tribunal designated by Parliament to resolve such issues. Judicial review from the CITT is only to the Federal Court of Appeal as provided in section 28(1)(e) of the

Federal Courts Acts. Since there is a right of appeal of a decision of the CITT to the Federal Court of Appeal, section 18.5 of the *Federal Courts Act* is engaged.

CONCLUSION

[31] I conclude the Federal Court does not have jurisdiction to hear this matter. In the alternative, I would follow Justice Mactavish in *Outer Space Sports* and decline to entertain the application for judicial review because the review process in the *Act* constitutes an adequate alternate remedy.

[32] Having come to above conclusion, I need not address the remaining issues.

[33] I dismiss the application for judicial review.

[34] Costs are awarded to the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondent.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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