

Federal Court



Cour fédérale

**Date: 20100520**

**Docket: T-1533-09**

**Citation: 2010 FC 554**

**Ottawa, Ontario, May 20, 2010**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**LISE A. LEGAL**

**Applicant**

**and**

**CANADA REVENUE AGENCY  
(acting in behalf of THE ATTORNEY GENERAL OF CANADA)**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review by Lise A. Legal (the applicant) of a decision by the Minister of National Revenue (the Minister) dated August 5, 2009, denying the applicant a renewal for a licence to manufacture tobacco products or to dispose of, sell, offer for sale, purchase or possess unpackaged and unstamped raw leaf tobacco or tobacco products, including partially manufactured tobacco under the *Excise Act, 2001*, S.C. 2002 c. 22 (the Excise Act).

Factual Background

[2] In 2005, the applicant and her business partner, Tannis Bullard, created Mother Earth Tobacco, a business located on or near the Long Plain First Nation Reservation in Manitoba.

[3] Mother Earth's business is to manufacture and sale Certified Organic tobacco used in cultural and religious ceremonies by Aboriginal People.

[4] On July 20, 2005, the applicant applied for and was granted a federal licence to manufacture tobacco products under the provisions of the Excise Act.

[5] On October 14, 2005, the applicant acquired provincial licensing pursuant to Manitoba's *Tobacco Tax Act*, C.C.S.M. c. T80 and became a tax collector in the Province of Manitoba. A registration number was also assigned in accordance with the *Retail Sales Tax Act*, C.C.S.M. c. R130.

[6] The applicant failed to file tax returns and failed to remit tax collected for the months of October 2005 through May 2007, thus resulting in the termination of the provincial licence on June 12, 2007.

[7] On June 26, 2007, the applicant was charged under section 11 of the *Tobacco Tax Act* and sections 75(1)(c), 75(2)(c) and 75(3)(c) of the *Tax Administration and Miscellaneous Taxes Act*, C.C.S.M. c. T2.

[8] The applicant's licence issued under the Excise Act was to expire on July 19, 2009. The applicant applied for a renewal of her licence on July 16, 2009.

[9] A review of the application was conducted by Scott Hendrick, Acting Technical Advisor in the Excise Duty, Legislative Policy and Regulatory Affairs Division in the Prairie Region of the Canada Revenue Agency (CRA). Mr. Hendrick recommended that the applicant's licence renewal application be denied for failing to comply with provincial and federal tobacco legislation.

[10] By letter dated August 5, 2009, signed by Doug Arnot, Acting Manager, Excise Duty in the Prairie Region of the CRA who has been delegated by the Minister of National Revenue to make decisions (ss. 9(2), 14 and 23(2) of the Excise Act), the applicant was informed that her renewal application was denied on the grounds that (i) the application was not submitted less than 30 days before the day on which it expired and (ii) she had failed to comply with provincial legislation concerning the taxation or control of tobacco products in regards to sections 2 and 9 of the *Regulations Respecting Excise Licences and Registrations*, SOR/2003-115 (the Regulations).

[11] The applicant filed this application for judicial review on September 11, 2009.

#### Impugned Decision

[12] The impugned decision is the decision made on August 5, 2009 (the Minister's decision) denying the renewal of the applicant's tobacco licence.

Issue

[13] A number of issues were submitted by the applicant in her memorandum of facts and law as well as in oral submission. As per the hearing, the issues can be summarized as follows:

- (1) Was the Minister's decision reasonable?
- (2) Did the Minister fail to observe any of the principles of procedural fairness or natural justice?
- (3) Should any of the constitutional issues raised by the applicant be considered by this Court?

Legislative Framework

[14] The Excise Act governs the taxation and regulation of activities involving the manufacture, possession and sale of tobacco at the federal level.

[15] The *Regulations Respecting Excise Licences and Registrations*, SOR/2003-115, s. 2, s. 9 provide as follows:

Issuance of licence

2. (1) In order to be issued a licence, a person must submit to the Minister a completed application, in the form authorized by the Minister, accompanied by a list of the premises in respect of which the application is being made.

(2) Subject to subsections (3) and (4), an applicant is eligible for a licence, other than a licence issued under section 22 of the Act, if

Délivrance de licences ou d'agrément

2. (1) Quiconque souhaite obtenir une licence ou un agrément présente une demande au ministre sur le formulaire approuvé par lui, accompagné d'une liste des locaux visés par la demande.

(2) Sous réserve des paragraphes (3) et (4), est admissible à une licence ou un agrément, autre que l'agrément délivré en vertu de l'article 22 de la Loi, le demandeur qui

remplit les conditions  
suivantes :

(a) they are not the subject of a receivership in respect of their debts;

a) il ne fait pas l'objet d'une mise sous séquestre à l'égard de ses dettes;

(b) they have not, in the five years immediately before the date of the application,

b) dans les cinq ans précédant la date de la demande :

(i) failed to comply with any Act of Parliament, other than the Act, or of the legislature of a province respecting the taxation of or controls on alcohol or tobacco products or any regulations made under it, or

(i) il n'a pas omis de se conformer à toute loi fédérale, autre que la Loi, ou provinciale — ou à leurs règlements — portant sur la taxation ou la réglementation de l'alcool ou des produits du tabac,

(ii) acted to defraud Her Majesty;

(ii) il n'a pas agi dans le but de frauder Sa Majesté;

(c) in the case of an applicant who is an individual, they

c) dans le cas où il est un particulier, il est :

(i) are at least eighteen years of age, and

(i) âgé d'au moins dix-huit ans,

(ii) have sufficient financial resources to conduct their business in a responsible manner;

(ii) dispose des ressources financières suffisantes pour gérer son entreprise d'une manière responsable;

(...)

...

#### Renewal of licence

#### Renouvellement des licences et agréments

9. (1) In order to have a licence

9. (1) Le titulaire qui souhaite

renewed, a licensee must submit to the Minister a completed renewal application, in the form authorized by the Minister, not less than thirty days before the day on which the licence expires.

faire renouveler sa licence ou son agrément présente une demande de renouvellement au ministre sur le formulaire approuvé par lui, au moins trente jours avant la date d'expiration de la licence ou de l'agrément.

(2) A licensee is eligible to have a licence renewed if they have not ceased to meet the applicable requirements of section 2.

(2) Est admissible au renouvellement de sa licence ou de son agrément le titulaire qui remplit toujours les exigences applicables énoncées à l'article 2.

[16] In accordance with subsection 9(2) of the Excise Act, these powers are delegated to CRA officers who apply the requirements of the Act and the Regulations in determining whether to issue or renew a licence.

#### Standard of Review

[17] The respondent submits that the standard of review that ought to be applied to judicial review of a decision to refuse to renew a licence to manufacture tobacco products is the standard of reasonableness based on the principles articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[18] It is worthy of note that, in accordance with sections 8, 14 (1) (d) and 23 of the Excise Act, the Minister of National Revenue is entitled to a degree of deference from the Court in view of the

fact that he has full and exclusive jurisdiction to determine all matters relating to the decision to amend, suspend, renew, cancel or reinstate a licence under the Excise Act, and its Regulations.

[19] In addition, the respondent submits that there are different levels of deference and in circumstances where ministerial discretion is being exercised based on finding of fact, a very high degree of deference should be accorded.

[20] The Court therefore agrees that the applicable standard of review to the discretionary decisions of the Minister of National Revenue is reasonableness and that a very high degree of deference should be accorded. Indeed, the standard of reasonableness has been held to apply generally to questions of facts, discretion and policy as well as to questions of mixed facts and law where the legal issues cannot easily be separated from the factual issues (*Dunsmuir* at para. 51). In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir* at para. 47).

[21] However, it is well settled that the standard of review pertaining to procedural fairness and natural justice must be determined against the standard of correctness (*Waterman v. Canada (Attorney General)*, 2009 FC 844; [2009] F.C.J. no. 991; *Worthington v. Canada*, 2004 FC 1546, [2004] F.C.J. No. 1879; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

Was the Minister's decision reasonable?

[22] In following the legislative framework, the Minister refused the renewal of the applicant's licence to manufacture tobacco products for two reasons: the applicant did not file her application for renewal within the thirty days prescribed by section 9 of the Regulations and the applicant failed to comply with provincial legislation concerning the taxation of tobacco products as required by paragraph (2)(b)(i) of the Regulations.

[23] The obtaining of a licence is generally considered as a privilege and is accompanied by conditions. In obtaining a licence, a licensee undertakes to comply with those conditions. Under subsection 23(2) of the Excise Act, the Minister is authorized to issue, refuse to issue, amend, suspend, renew, cancel or reinstate any tobacco licence.

[24] Subsection 9 of the Regulations identifies two conditions that must be met before a licence is renewed:

- (1) In order to have a licence renewed, a licensee must submit to the Minister a completed renewal application in the form authorized by the Minister, not less than thirty days before the day on which the licence expires.
- (2) A licensee is eligible to have a licence renewed if they have not ceased to meet the applicable requirements of section 2.

[25] In failing to comply with conditions set forth in section 9 of the Regulations, the licensee is subject to a non-renewal of the licence (see *Genex Communications v. Canada (Attorney General)* (F.C.A.), 2005 FCA 283, [2005] F.C.J. No. 1440).



[26] In the case at bar, the applicant does not dispute the fact that the application for renewal was made on July 16, 2009 and that the licence to manufacture tobacco products was set to expire on July 19, 2009. The application was thus not made more than 30 days before the day on which the licence expires contrary to section 9 of the Regulations.

[27] Secondly, Mr. Hendrick of the CRA contacted a counterpart in Manitoba in order to determine whether the applicant was in compliance with provincial legislation concerning the taxation or control of tobacco products. An email dated May 26, 2009 was sent by Carl Capner, Special Investigator (Manitoba Finance) to Mr. Hendrick informing him that the applicant's dealer licence, granted pursuant to the *Tobacco Tax Act* was suspended two years earlier. A further email dated July 20, 2009 provided the following information:

- The Applicant applied for a Dealer's Licence under the *Tobacco Tax Act* and her licence was processed on October 14, 2005. She was assigned Licence no. 12490. On the same day, the Applicant applied for registration pursuant to the *Retail Sales Tax Act* and was given registration number 835886474. Also on October 14, 2005 Manitoba Finance sent a letter to the Applicant, advising her that her application to be a tax collector was granted and describing her responsibilities.
- On May 24, 2007, the Assistant Deputy Minister of Finance sent a letter to the Applicant advising her that her Tobacco Licence was being cancelled effective June 12, 2007 and providing her with 14 days to send a submission showing why the licence should not be cancelled.
- Subsequent to the Deputy Minister's letter having been sent, the Applicant met with officials from Manitoba Finance. Details of that meeting were not provided to Mr. Hendrick.
- On June 14, 2007, by letter, the Assistant Deputy Minister of Finance advised the Applicant that her Tobacco Licence had been cancelled and that her appointment as a Collector under the *Tobacco Tax Act* was likewise terminated.

(Respondent's Record, p. 98)

[Emphasis added.]

[28] At the hearing before this Court, the applicant did not dispute these facts but argued that some of the evidence on record was not consistent or accurate with her experience. For instance, the applicant alleged that in a similar situation in 2007 a different decision was rendered by the Minister. However, the Court cannot find in the tribunal's record any document or evidence to support the applicant's arguments.

[29] In these circumstances, the Court finds that the legal requirements for licence renewal were not met by the applicant and also finds that the Minister's decision based on an application of the Excise Act and the Regulations is reasonable. The Court cannot read any particular exemption or ambiguity in the Act or the Regulations which could apply to the applicant in the case at bar.

[30] As for the requirements to observe procedural fairness and natural justice, the Court is of the view that they have not been violated. In *Motta v. Canada (Attorney General)*, [2000] F.C.J. No. 27, at para. 12-13, this Court observed that in some cases involving licences, the duty of procedural fairness is fulfilled if an application is evaluated and a decision is made in a manner that is not capricious and that is not influenced by an erroneous finding of fact. In this case, the decision is transparent and provides reasons for the non-renewal of the licence. As mentioned above, the Minister followed the framework prescribed by the Act and the Regulations in making his decision.

[31] Accordingly, the Court believes that sufficient grounds were stated for the decision to refuse the renewal of the manufacturing tobacco licence so that the applicant was in a position to know and understand the reasons why it was refused and to make an application for judicial review.

[32] Lastly, the constitutional issues raised by the applicant lack proper factual foundation and will therefore not be addressed or considered by this Court (*Worthington*).

[33] For all of the reasons above, the decision of the Minister was not unreasonable and it was made in accordance with the rules of procedural fairness. The applicant did not meet her burden of demonstrating that a reviewable error had been made. The Court finds that the decision is reasonable. The outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and in law (*Dunsmuir*). The application for judicial review is therefore dismissed.

[34] I will exercise my discretion in this matter and not award any costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review is dismissed without costs.

“Richard Boivin”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1533-09

**STYLE OF CAUSE:** Lise A. Legal v. Canada Revenue Agency (acting in behalf of the Attorney General of Canada)

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** May 10, 2010

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATED:** May 20, 2010

**APPEARANCES:**

Lise A. Legal	ON HER OWN BEHALF
Tim Doyle	FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

None	
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT