Date: 20080206

Docket: A-526-06

Citation: 2008 FCA 47

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
RYER J.A.

BETWEEN:

1099065 ONTARIO INC.
(carrying on business as Outer Space Sports)

Appellant

and

Canada (Minister of Public Safety and Emergency Preparedness)

Respondent

Heard at Ottawa, Ontario, on February 6, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on February 6, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
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LÉTOURNEAU J.A.

[1] This is an appeal from a decision of Mactavish J. of the Federal Court of Canada (judge) by which she granted the respondent's motion to dismiss the appellant's application for judicial review.

[2] The judge ruled that the Federal Court did not have jurisdiction to hear the application for judicial review. In the alternative, she found that if the Court has the requisite jurisdiction to hear

and decide the application, she would decline to entertain it in view of the comprehensive scheme established in sections 58 to 68 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) as amended (Act) which provides for an adequate alternate remedy.

[3] For the following reasons, we are of the view that this appeal cannot succeed.

[4] There is no sound basis for the application for judicial review. On August 16, 2006, an officer of the Canada Customs and Revenue Agency, which later became the Canada Border Services Agency (Agency) sent an e-mail to counsel for the appellant proposing dates for an agreed meeting at which a review of a sample good could be made to determine its value for the purpose of fixing the import duties. Counsel for the appellant answered the e-mail with an application for judicial review to review the so-called August 16, 2006 decision. The e-mail reads:

> Good afternoon Jeffery,
>
> I am sorry I missed your call a short while ago. Thank you for accepting the offer to meet and agreeing to Hamilton as the location. As requested I have outlined below a number of dates in which I will be available. I hope you are able to find something that fits with your schedule. If not, please let me know and we will work together to arrange something suitable for everyone.
>
> In attendance at the meeting will also be David Fyfe, Toronto Regional Recourse Officer and Debbie Main, Hamilton Regional Recourse Division Manager. The intent of the meeting will be to review CV sample 65 and match it to the documentation provided with your submission and the latest response. I would like to continue with other CV samples as well if time permits. The intent will be to accurately determine the Customs value which will depend on the proper characterization of the role and status of each of the parties to the transaction.
>
> Available dates in August: 22, 24, 25, 29, 31.
> Available dates in September: 12, 14, 19, 20.
> Available dates in early October: 3, 4, 5.

> Please look at your schedule and let me know your preference. I will make any necessary arrangements from this end after the date is agreed.
>
> Regards,
>
> Teresa Tiberi
> Regional Recourse Officer, Hamilton
> Canada Border Services Agency
>
> [Emphasis added]

[5] The judge expressed serious doubts that the August 16, 2006 e-mail constituted a "decision" subject to judicial review. At paragraphs 20 and 21 of her reasons for judgment she wrote:

> [20] Before addressing the issues identified by the parties, I would further observe that there seems to me to be a real question as to whether there is a "decision", "order" or "matter" in this case, as those terms are used in section 18.1 of the *Federal Courts Act*, that is susceptible to judicial review, even taking into account the broad interpretation of these concepts advocated in cases such as *Markevich v. Canada*, [1999] F.C.J. No. 250, 3 F.C. 28.
>
> [21] That is, I have trouble understanding how a letter proposing a meeting and suggesting dates would qualify as the sort of administrative action that is subject to the supervisory jurisdiction of this Court.

[6] The issue of whether the e-mail letter was a decision was alluded to by the respondent but the respondent's motion to dismiss was not argued on the basis that it was not a decision. Because of that the judge generously assumed that there had been a "decision" made by the Agency. She then proceeded to hear the respondent's arguments on its motion to dismiss.

[7] In response to the present appeal, the respondent submits, as an additional argument to sustain the judgment under appeal, that the e-mail message dated August 16, 2006 was not in fact a

"decision" amenable to judicial review within the meaning of subsection 18.1(1) of the *Federal Courts Act*.

[8] Counsel for the respondent relies upon the decision of the Supreme Court of Canada in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at page 240. The Supreme Court of Canada ruled that in both civil and criminal matters a respondent on appeal may advance any argument in support of the decision provided it is not an "entirely new argument which had not been raised below and in relation to which it might have been necessary to adduce evidence at trial": *ibidem*.

[9] We are satisfied that this simple letter proposing dates for a meeting is not a "decision", "order" or "matter" amenable to judicial review. Counsel for the appellant could have simply ignored the letter or declined the proposal. Nothing else would have ensued from his refusal to retain one of the suggested dates for the meeting. There was nothing compelling or adversely affecting in the impugned letter. In our view, in no way can it be said that the appellant, as required by subsection 18.1(1), was directly affected by the letter so as to give rise to a judicial review proceeding.

[10] In accordance with the *Federal Courts* Rules, the letter was filed in the judicial review proceedings and in the record on appeal. Determining whether it was a decision, an order or a matter within the meaning of section 18.1 does not require additional evidence to be filed. The appellant was invited at the hearing on appeal to make submissions on the issue. His submissions have failed

to convince us that subsection 18.1(1) is engaged by the letter. Our conclusion in this respect is sufficient to dispose of the appeal.

[11] In addition, we see no error in the judge's decision which warrants our intervention.

[12] As Lemieux J. rightly pointed out in *Abbott Laboratories, Ltd. v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 410, 2004 FC 140, endorsed by the judge in the present instance, sections 59 to 68 of the Act contain three privative clauses ensuring that the review of decisions under the Act is conducted according to the process therein which includes a review by the Canadian International Trade Tribunal and, ultimately, an appeal to this Court on a question of law.

[13] It is not necessary for us to decide whether the comprehensive review process set up by the Act has ousted the jurisdiction of the Federal Court of Canada to entertain an application for judicial review. However, we are mindful of the following warning of the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, at paragraph 11:

> Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.
>
> [Emphasis added]

This warning is apposite in this case.

[14] As for her decision to decline to entertain the application for judicial review, we agree with her that the review process under the Act constituted an adequate alternate remedy. This is especially true in view of the appellant's admission before her that all the issues that his client wished to have determined in this case can be addressed through the review process under the Act and that that review process could give it the relief that it seeks by way of judicial review: see paragraphs 35 and 42 of her reasons for judgment.

[15] For these reasons, the appeal will be dismissed with costs.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-526-06
STYLE OF CAUSE:	1099065 Ontario Inc. (carrying on business as Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. SEXTON J.A. RYER J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

APPEARANCES:

Jeffery D. Jenkins	FOR THE APPELLANT
Christopher J. Thiesenhausen	
Derek Rasmussen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jenkins Law Ottawa, Ontario	FOR THE APPELLANT
CJT Barrister Toronto, Ontario	
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT