Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20100111

Docket: A-255-09

Citation: 2010 FCA 3

CORAM: **EVANS J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA, THE MINISTER OF AGRICULTURE AND AGRI-FOOD AND CANADA FOOD INSPECTION AGENCY (DIRECTOR, FOOD OR PLANT ORIGIN DIVISION)

Appellants

and

SELECT BRAND DISTRIBUTORS INC. and GERBER PRODUCTS COMPANY

Respondents

and

FOOD PROCESSORS OF CANADA

Intervener

Heard at Ottawa, Ontario, on October 13, 2009.

Judgment delivered at Ottawa, Ontario, on January 11, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: EVANS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] In *Select Brand Distributors v. Canada (Attorney General)* 2009 FC 547, [2009] F.C.J. No. 294, (Reasons)), Mr. Justice Hughes of the Federal Court (the Judge) decided that paragraph 9.1(5)(a) of the *Processed Products Regulations*, C.R.C., c. 291, (the Regulations) is *ultra vires* its enabling legislation, section 32 of the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.) (the Act). In the Judge's view, the Act does not allow the Governor in Council to cloak the

Canadian Food Inspection Agency (the Agency) with a mandate to regulate "normal and usual patterns" in the food industry when it is called upon to deal with an application to test-market certain food products. For reasons which will become apparent, I do not agree and I would allow the appeal from the Judge's decision.

FACTS AND PROCEDURAL HISTORY

[2] Gerber Products Company (Gerber) manufactures and sells baby food. Select Brand Distributors Inc. (Select Brands) is a distributor of various food products and was the applicant for the test market authorization. Because Gerber and Select Brands acted in concert in this matter, a reference to Gerber should be taken as a reference to Gerber and Select Brands, unless the context requires otherwise.

[3] At one time, Gerber had manufacturing facilities in Canada but it closed them in 1990 and supplied the Canadian market with product from its plants in the United States. As a result of an anti-dumping inquiry, special import duties were levied on Gerber products imported into Canada. Following this, Gerber withdrew from the Canadian market. As of 2003, Gerber's baby food products are no longer subject to special import duties.

[4] Baby food is a processed food product and is sold inter-provincially. As a result, it is subject to the Act, and to the Regulations which prescribe the sizes of containers in which baby food may be sold, specifically 4.5 fluid ounces (128 millilitres) and 7.5 fluid ounces (213 millilitres): see the

Regulations, Schedule III, Table III. The Regulations also provide for test marketing of non-complying products:

9.1 (1) The operator of a registered establishment or an importer of food products may apply in writing to the Director for an authorization to test market a food product that does not meet the requirements of these Regulations.	91. (1) L'exploitant d'un établissement agréé ou l'importateur d'un produit alimentaire peut présenter au directeur, par écrit, une demande d'autorisation pour l'essai de mise en marché d'un produit alimentaire qui n'est pas conforme au présent règlement.
. . .	. . .
(5) The Director may issue a written authorization to the operator of a registered establishment or to an importer of food products to test market a food product for a period of up to 24 months where the Director is satisfied, based on information available to the Director, that the test marketing of the food product will not	(5) Le directeur peut accorder par écrit à l'exploitant d'un établissement agréé ou à l'importateur d'un produit alimentaire l'autorisation d'effectuer un essai de mise en marché pendant une période d'au plus 24 mois s'il est convaincu, d'après les renseignements dont il dispose, que l'essai :
(*a*) disrupt the normal or usual trading patterns of the industry;	*a*) ne perturbera pas la structure commerciale habituelle du secteur;
(*b*) confuse or mislead the public; or	*b*) ne créera pas de confusion chez le public ni ne l'induira en erreur;
(*c*) have an adverse affect on public health or safety or on product pricing.	*c*) n'aura pas d'effets néfastes sur le processus de fixation des prix ni sur la santé et la sécurité publiques.

[5] Gerber sells its baby food in the United States in smaller containers than those prescribed by the Regulations. On August 9, 2006, Gerber wrote to the Agency seeking a test market authorization for the sale of its baby food in the same containers as it uses in the United States. In its application, Gerber indicated that it proposed to sell up to 70 million units of baby food in the course of its test

marketing. By letter dated January 29, 2007, the Agency wrote to Gerber's lawyers refusing Gerber's application for test marketing authorization pending further review. This decision, which is referred to as the interim decision, was the subject of an application for judicial review. The material parts of the letter read as follows:

> Further to your letter, we met with yourself and Mr. Kesting on December 19, 2006. At that meeting, we explained that there have been concerns raised by the US Government, importers and Canadian industry which demonstrates that there is a lack of consensus among stakeholders regarding the addition of new container sizes for infant food and its potential impact on the normal and usual trading patterns of the industry. Accordingly, it has been determined that there is a need to further review the potential impact of your proposed request prior to authorizing your Test Market Authorization (TMA).
>
> Therefore, based on the information available to myself, I am not satisfied that a test market of infant food in different container sizes than those presently authorized in Canada would not disrupt the normal or usual patterns of the industry. I regretfully inform you that your request is not granted at this time.
>
> In the interim, I assure you that your application for this TMA will be kept active and will remain under consideration until we review this issue and the concerns of all interested stakeholders.
>
> Reasons, at paragraph 8.

[6] Months passed; Gerber pursued its request for a test market authorization. On November 2, 2007, the Agency wrote to Gerber's lawyers to advise them that the application for a test market authorization was refused. The material parts of that letter are as follows:

> I have reviewed all materials currently in my possession including the consumption of baby food reports in Canada, the import figures and concerns from the Food Processors of Canada, industry and stakeholders, regarding introduction of new container sizes.
>
> There are two container sizes for fruit and vegetable baby food prescribed in the Processed Products Regulations (PPR). In their application on July 13, 2006, your client requested a test market authorization for 70 million units of Gerber 1st and 2nd Foods brands baby food in two new container sizes.
>
> The current total consumption of baby food in Canada is estimated at 80 million units per year (source: excerpt from A C Nielsen Canada, Grocery Manufacturers Share Reports), of which a percentage are fruit and vegetable products, and has not significantly changed over the last couple of

> years. However, the imports of fruit and vegetable baby food have increased considerably, since 2002 (more than 10 times; source Statistics Canada). Currently all companies are trading in Canada in the context of two regulated container sizes. Based on these facts, I am not satisfied that issuing a test market authorization for new container sizes of 70 million units as requested by your client will not disrupt the normal trading patterns pursuant to Section 9.1(5)(a) of the PPR.
>
> Therefore, Select Brand Distributors Inc.'s request for an authorization to test market 70 million units of infant food products packed in 67 ml (2.6 fl. oz.) and 95 ml (3.6 fl. oz.) sizes is refused. This decision concludes the review of Select Brand Distributors Inc.'s test market authorization request.
>
> Reasons, at paragraph 10.

[7] This decision, which is described as the final decision, was also the subject of an application for judicial review. Both applications were heard together and both were disposed of in the decision under appeal.

THE DECISION UNDER APPEAL

[8] After setting out the facts, the Judge began his analysis by reviewing the evidence. He noted that the Agency had not filed an affidavit. It had, instead, filed certified copies of certain documents in the Agency's files which it certified that it had considered in making the decision under review. Since no affidavit was filed, no officer of the Agency was liable to be cross-examined. This apparent reticence on the part of the Agency coloured the Judge's assessment of the evidence and led him to draw certain conclusions as to the evidentiary value of some of the documents which were before him. In short, the Judge concluded that where the Agency's assertions in the decisions under review were not supported by documentation, he considered those assertions unsubstantiated.

[9] As part of the process leading to its application for judicial review, Gerber had made a number of requests under the *Access to Information Act*, R.S.C. 1985, c.A-1 as a result of which it came into possession of certain documents. It produced lengthy affidavits which contained these documents and in which it took positions based on those documents or on the fact of their absence from the documents produced by the Agency. In addition, Gerber's affidavit contained much material which was simply irrelevant.

[10] As a result of his analysis, the Judge came to the following conclusions:

> 1. Gerber's test marketing proposals do not raise any health concerns;
>
> 2. The Agency has no material before it upon which it could draw any conclusions as to what constituted the "normal or usual patterns of the [baby food] industry". For instance, without enumerating all of [the] varying factors, over what period of time is the pattern to be considered, what is the definition of the specific industry, are monopolistic practices to be considered as part of the normal or usual pattern?
>
> 3. To the extent that the industry constituted essentially a monopoly enjoyed by Heinz, the Competition Bureau has serious concerns. That monopoly cannot be said to form a "normal or usual pattern".
>
> 4. The Agency made no effort to seek input from "stakeholders" such as other manufacturing retailers or consumers, and had to hand no information except that from Heinz which company had made a not very subtle threat to reconsider what it called its investment options.
>
> 5. At least six months before the "interim" decision was made the Agency had to hand a draft refusal letter. There is no evidence of a draft acceptance letter.
>
> Reasons, at paragraph 18.

[11] The Judge then addressed the validity of paragraph 9.1(5)(a) of the Regulations. He referred to the Regulatory Impact Statement issued at the time the Regulations were amended to provide for test marketing authorizations. The Judge examined the enabling section of the Act, section 32,

which provides that the Governor in Council may make regulations in relation to various matters, including regulating the marketing of processed food products, collecting information as to the market and allowing exemptions from the requirements otherwise imposed by the Regulations.

[12] The Judge concluded as follows :

> 28 The Act is directed to the provision of food to the Canadian marketplace for its consumption and use. It does not purport to regulate the "patterns" of the marketplace. Such regulation can be found elsewhere such as in the Competition Act, R.S.C. 1985, c.C-34. The Agency has no mandate to regulate "normal and usual" patters in the food industry.
>
> 29 Section 9.1(5)(a) of the Regulations has provided no definition as to what is a "normal or usual" trading pattern nor does any part of those Regulation or Act provide any guidance as to how such patterns are to be determined. This provision is simply outside the scope of the Act.
>
> 30 I find section 9.1(5)(a) of the Regulations to be *ultra vires* as outside the scope of the enabling statute.

[13] Given that both the interim and the final decision were based on the anticipated disruption of the normal or usual trading patterns of the industry should Gerber's test market authorization be granted, the Judge's conclusion meant that neither decision could stand. However, the Judge went on to say that he would have struck the decisions down in any event on the ground that they were unreasonable. The Judge found that the Agency had not established the "normal and usual" patterns of the industry, so that it lacked a baseline against which to assess the effect of the test market authorization. In addition, the Judge found, on the evidence before him, that the Agency's inquiries were "scant and flawed": Reasons, at paragraph 32. Finally, the Judge noted that the Agency appears to have prepared a draft refusal letter several months in advance of the first refusal but no draft acceptance letter. In the Judge's view, the Agency's decisions, both the interim and the final,

were “flawed, lacking transparency and, unreasonable” and should therefore be set aside. Reasons, at paragraph 33.

[14] In conclusion, the Judge addressed the issue of remedies. He noted that the *Federal Courts Act*, R.S.C. 1985, c. F-7 gives the Court the power not only to set aside a decision but also to provide appropriate directions to the decision-maker to whom the decision is returned. In the exercise of that power, the Judge decided as follows:

> 35 I am concerned here with the failure of the Agency to be forthcoming with evidence, to have taken an unreasonably long time in dealing with the matter, and to have based its decision on flawed considerations. The Agency is directed to reconsider the application forthwith and, given that there are no health concerns, allow the application for up to 24 months.

[15] Finally, the Judge found that, in failing to provide evidence, the Agency acted inappropriately and, as a result, awarded Select Brand Distributors and Gerber their costs to be taxed at the middle of Column V.

THE ISSUES

[16] In his Memorandum of Fact and Law, the Attorney General says that “While the CFIA decisions were defensible, the Attorney General does not contest the setting aside of these decisions for the purposes of the appeal.” On the other hand, the Attorney General challenges the finding that paragraph 9.1(5)(a) is *ultra vires* its enabling legislation. He also challenges the direction that the test market authorization should be granted as well as the order as to costs.

[17] As a result, the issues in this appeal are the following:

1. What is the standard of review?
2. Is paragraph 9.1(5)(a) of the Regulations *ultra vires* its enabling legislation?
3. If paragraph 9.1(5)(a) is valid, should the Agency's decisions be set aside on other grounds?
4. Should the Judge's direction to the Agency be set aside?
5. Should the order of costs be varied or set aside?

1- THE STANDARD OF REVIEW

[18] The question of whether or not paragraph 9.1(5)(a) is *ultra vires* its enabling legislation is a pure question of law. In addition, it is not a question which was put to the Agency so that the question of possible deference to its decision on this question simply does not arise. As a result, we have an appeal from the Federal Court to this Court on a pure question of law, with respect to which the standard of review is correctness: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 35 at paragraph 8.

[19] The direction given to the Agency and the costs assessed against the Attorney General are both discretionary decisions which, in the ordinary course, would attract deference, unless the discretion has been exercised upon a mistaken principle.

2- IS PARAGRAPH 9.1(5)(a) OF THE REGULATIONS *ULTRA VIRES* ITS ENABLING LEGISLATION?

[20] Gerber argues that the authority to regulate the marketing of fresh or processed fruit or vegetables is found in paragraph 32(l) of the Act which provides that:

32. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and prescribing anything that is to be prescribed under this Act and, without limiting the generality of the foregoing, may make regulations …	**32.** Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, et notamment : …
(l) regulating or prohibiting the marketing of any fresh or processed fruit or vegetable in import, export or interprovincial trade, including regulations	l) régir ou interdire, relativement aux fruits et légumes frais ou transformés, la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — , et à cet effet :
(i) establishing the terms and conditions governing that marketing,	(i) fixer toutes conditions et modalités liées à cette activité,
…	…
(n) for exempting any person, establishment, agricultural product, class of agricultural products, container or other thing from the application of any or all of the provisions of this Act or the regulations;	(n) exempter toute personne, tout établissement, agréé ou non, tout produit agricole — ou la classe correspondante — , tout contenant ou tout autre objet de l'application totale ou partielle de la présente loi ou de ses règlements;
(o) providing for the collection of market information and statistics, the publication of studies dealing with the marketing of agricultural products and the conduct of surveys on any matter related to this Act or the regulations; and	o) prévoir la collecte de renseignements ou statistiques sur les marchés, la publication d'études sur la commercialisation des produits agricoles et la tenue d'enquêtes ou sondages sur tout aspect touchant à la présente loi et à ses règlements;
…	…

[21] Gerber then focuses on the definition of marketing which appears in section 2 of the Act:

"marketing" means the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural products and any other act necessary to make agricultural products available for consumption or use;	« commercialisation » Les opérations de conditionnement, de promotion et de vente des produits agricoles et toute opération nécessaire à leur offre pour consommation ou utilisation. Y sont assimilés l'acheminement et l'achat de ces produits.

[22] Gerber argues that "marketing" is limited to the preparation and advertisement of agricultural products so that the power to regulate marketing does not extend to regulating the market for fresh and processed agricultural products. The function of regulating the market itself is conferred upon others, such as the Competition Bureau. Thus, the Agency has no mandate to inquire into or to attempt to maintain "the normal and usual trading patterns" of an industry.

[23] According to Gerber, the extent of the Governor in Council's regulation-making power under this heading is limited to matters of health and safety and to consumer protection in relation to advertising. In addition, Gerber argues that the tools provided to the Agency by the legislation do not allow it to make complex determinations regarding trading patterns and market size.

[24] As a result, Gerber argues that the Judge's decision was correct and should be upheld.

[25] In my view, this analysis, which the Judge accepted, fails to take account of the context in which paragraph 9.1(5)(a) is situated. The modern rule of statutory interpretation is 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: see *Rizzo v. Rizzo's Shoes Ltd*. (Re), [1998] 1 S.C.R. 27 at paragraph 21.

[26] As the Judge pointed out, the Act allows the Governor in Council to make regulations governing the marketing of agricultural products. But it also allows the Governor in Council to make regulations exempting any person from the application of the Act or of the Regulations made under the Act: subsection 9.1(5) of the Regulations provides for such an exemption.

[27] The Regulations contain a series of detailed requirements which manufacturers and distributors must respect. Those requirements include such matters as grades and standards (Part 1.1), packing (Part 3), marking (Part 4) and others not relevant to this analysis. In order to allow some flexibility for new products, Part 1.2 of the Regulations (which contains only section 9.1) provides for the authorization of test marketing of products which do not meet one or more of the requirements imposed by the Regulations.

[28] Subsection 9.1(5) contains three limitations on the power of the Agency (more precisely, the Director) to grant exemptions in the form of test market authorizations. The limitations are that the Agency must be satisfied that the test marketing authorization:

- will not disrupt the normal and usual trading patterns of the industry;
- will not confuse or mislead the public; or
- will not have an adverse effect on public health, safety or on product pricing.

[29] Since Gerber has not attacked the Governor in Council's power to enact limitations with respect to misleading the public, public safety or product pricing, I assume that it is conceded that the power to make regulations regarding exemptions carries with it the power to set the conditions upon which exemptions can be granted. The question is simply whether the condition as to trading patterns is implied in the power to exempt manufacturers from compliance with the Regulations.

[30] Exempting a manufacturer from the duty to comply with a regulatory standard creates an opportunity for unfair competition. The manufacturer who benefits from the exemption may be able to exploit it to obtain a first-to-market advantage over other manufacturers who must comply with the regulatory standard, and thus to obtain market share at their expense. The purpose of test marketing is to see if there is a market for a product; it is not to create such a market nor to displace other actors in the market. It is intended to be a test of the market's response to a given product.

[31] In that context, I read the reference to "normal and usual trading patterns" as a reference to the status quo in relation to market share and product pricing. The question which the Agency must answer in deciding whether to grant a test market authorization is whether the requested test market authorization, if granted, is likely to disrupt the status quo. If, after a successful test marketing campaign, the Regulations are changed to accommodate a new product, the impact of that product on the market thereafter is not the Agency's concern. The Agency's only concern, in terms of normal and usual trading patterns, is in connection with a proposed test marketing authorization.

[32] This is a far narrower question than the one on which the Judge purported to rule when he stated that "The CFIA has no mandate to regulate 'normal and usual' patterns in the food industry.": Reasons, at paragraph 28. As noted, the issue is not the regulation of the "normal and usual" patterns in the market; the issue is the Agency's power to refuse test market authorizations which will disrupt the "normal and usual" patterns of trade in the industry.

[33] In my view, a condition preventing test authorizations from being used to gain an unfair market advantage is similar in kind to the condition found at paragraph 9.1(5)(c) which requires that a test market authorization not interfere with prices. Parliament clearly contemplated that the Agency could consider economic and market factors when deciding whether to allow a test marketing authorization.

[34] For those reasons, I find that paragraph 9.1(5)(a) is not *ultra vires* section 32 of the Act.

3- IF PARAGRAPH 9.1(5)(a) IS VALID, SHOULD THE AGENCY'S DECISIONS BE SET ASIDE ON OTHER GROUNDS?

[35] Even though he concluded that the decisions should be set aside because paragraph 9.1(5)(a) was *ultra vires*, the Judge went on to conclude that, even if he had come to the opposite conclusion, he would still have set the Agency's decision aside as unreasonable.

[36] The Judge reasoned that, on the evidence, the Agency had not established the "normal and usual trading patterns" in the industry and therefore was not in a position to assess the impact of the proposed test marketing authorization. Further, the Judge decided that the Agency's external

consultations were “scant and flawed.” He notes that the Agency appears to have prepared a refusal letter, but not an acceptance letter, several months in advance of the first refusal decision.

[37] Since the Attorney General has conceded that the decisions are to be set aside for purposes of the appeal on the basis of procedural fairness, I need only consider the alternate grounds for setting the decisions aside which raise issues other than procedural fairness, specifically whether the Agency was bound to establish the “normal and usual patterns of trade” in the industry, prior to determining whether Gerber’s test marketing authorization would disrupt those patterns of trade.

[38] It will be recalled that in the final decision, the Agency wrote:

> The current total consumption of baby food in Canada is estimated at 80 million units per year (source: excerpt from A C Nielsen Canada, Grocery Manufacturers Share Reports), of which a percentage are fruit and vegetable products, and has not significantly changed over the last couple of years. However, the imports of fruit and vegetable baby food have increased considerably, since 2002 (more than 10 times; source Statistics Canada). Currently all companies are trading in Canada in the context of two regulated container sizes. Based on these facts, I am not satisfied that issuing a test market authorization for new container sizes of 70 million units as requested by your client will not disrupt the normal trading patterns pursuant to Section 9.1(5)(a) of the PPR.
>
> Reasons, at paragraph 10.

[39] In his discussion of the evidence, in the early part of his Reasons, the Judge considered the consequences of the failure of the Attorney General to file the affidavit of an Agency representative:

> Therefore there is no evidence to contradict what Klauser [Gerber’s affiant] has said in his affidavits save as may appear in his cross-examination. I was not directed to any such contradiction. Further when the Agency has made statements in the letters which are the decision at issue, which statements cannot be substantiated with reference to the documents provided, I must assume that there is no substantiation for those statements.

Reasons, at paragraph 19.

[40] In my view, this aspect of the Judge's reasons reveals a significant misconception, namely that it was for the Attorney General to prove the facts to support the Agency's decision. The Judge approached the task before him as though it were the trial of an issue: would the issuance of Gerber's test market authorization disrupt the normal and usual patterns of trade in the baby food industry?

[41] The difficulty is that the standard of review of a decision of an administrative tribunal on a question of fact, or mixed fact and law, is whether or not the decision is reasonable, having regard to the material which was before the decision-maker.

[42] In the present case, the final refusal letter referred to two sources of information with respect to the market for baby food: an AC Nielsen report, and Statistics Canada. That was the information before the Agency.

[43] In his second affidavit, Mr. Klauser takes issue with the probative value of these reports to which, he adds, Gerber was not given the opportunity to respond. The latter allegation may well underlie the Attorney General's conclusion that the decision should be remitted to the Agency for reconsideration. But it was an error for the Judge to transform the question of whether the Agency's decision was reasonable, having regard to the material before it, into a question as to whether, in the judicial review application, the Attorney General had proved the facts contained in the two reports upon which the Agency relied.

[44] An application for judicial review of a decision of an administrative tribunal is not a trial *de novo*, before the reviewing court, of the question which was before the administrative tribunal. The stance adopted by the Judge in this case may well be appropriate where an application for judicial review requires the Court to function as the primary fact finder, such as is the case in an application for prohibition under the *Patented Medicines (Notice of Compliance) Regulations* SOR/93-133. But where the tribunal is the primary fact finder, and has rendered its decision, the reviewing court cannot retry the question which was before the tribunal on the strength of a record which may not correspond with the record which was before the tribunal itself.

[45] This is not to say that questions of fact are beyond a reviewing court's reach. A tribunal's factual conclusions are subject to review under paragraph 18.1(4)(d) of the Federal Courts Act where there is no evidence upon which the tribunal could have come to the conclusion it did. But this does not impose on the party seeking uphold the tribunal decision the burden of tendering evidence to show that the facts relied upon by the tribunal, or that the tribunal's own conclusions of fact, are true.

[46] The duty of fairness requires a tribunal to allow parties to know the case which must be met and to respond to it. Where the duty of disclosure discloses reliance on facts which a party challenges, the factual dispute should be resolved using the tribunal's process. Where a tribunal has not accorded a party the right to challenge the factual basis of its decision, the party's remedy is not to attempt to prove the error of the tribunal's factual conclusions before the court, but to seek, by

way of an application for judicial review, a fresh hearing so that it can know and challenge the evidence relied on by the tribunal. In this case, the approach taken by Gerber persuaded the Judge to adopt the role of primary fact-finder, a role which was not his to assume.

[47] As a result, the Judge erred in reasoning that the material upon which the Agency relied was unsubstantiated and therefore could not support the Agency's decision. The issue was whether the Agency's decision was reasonable, having regard to the material before it. Since the matter is to be returned to the Agency, I refrain from expressing an opinion on that question as the Agency will be called upon to address its mind to it once again.

4- SHOULD THE JUDGE'S DIRECTION TO THE AGENCY BE SET ASIDE?

[48] Having regard to the comments which I have just made, it is apparent that it is not for the Judge to assume the role of deciding whether Gerber's test market authorization ought to be granted. If there were lapses with regard to the Agency's obligations with respect to procedural fairness, those can be remedied when the matter is reconsidered. The Judge's direction to the Agency ought to be set aside.

[49] Since the Attorney General concedes that the Agency's decisions should be set aside, on the ground of a breach of procedural fairness, it would be odd for the Court to insist that they should stand.

5- SHOULD THE ORDER OF COSTS BE VARIED OR SET ASIDE?

[50] An order for costs is discretionary and should only be interfered with if the judge has made an error in principle or if the order is plainly wrong: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* 2007 SCC 2, [2007] 1 S.C.R. 38 at paragraph 49.

[51] In this case, the Judge's decision on costs was largely influenced by his view of the propriety of the Agency's conduct in not filing an affidavit. The Judge was correct to find that the Agency did not proceed as it should have. Rather than filing an affidavit with the relevant documents attached as exhibits, the Attorney General filed the certificates of two Agency officials attesting that the attached documents were considered in the final decision.

[52] There is no provision in the *Federal Courts Rules*, SOR/98-106, for the production of a certified copy of a tribunal record, as there is, for example, at Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR9/93-22. For purposes of comparison, I reproduce the two provisions side by side:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested. (2) An applicant may include a request under subsection (1) in its notice of application. (3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other	17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order: (*a*) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor, (*b*) all papers relevant to the matter that are in the possession or control of the tribunal, (*c*) any affidavits, or other documents filed during any such hearing, and (*d*) a transcript, if any, of any oral

parties.

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit
(*a*) a certified copy of the requested material to the Registry and to the party making the request; or
(*b*) where the material cannot be reproduced, the original material to the Registry

testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;
b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,
c) les affidavits et autres documents déposés lors de l'audition,
d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,
dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[53] There are a number of differences between the two rules. In the case of the *Federal Courts Rules,* a party only has the right to request that the tribunal produce those documents which are not in its possession. Subject to Rule 318(2), the tribunal must send a certified copy of the requested documents to the requesting party and to the registry. Rule 318(2), which I have not reproduced, allows a tribunal to object to a request for production. On the other hand, the production process under the *Federal Courts Immigration and Refugee Protection Rules* is triggered by the order granting the applicant leave to commence an application for judicial review. The Immigration and Refugee Protection Board certifies the entire record and sends a copy to both parties and to the registry. There is no procedure for objections to production.

[54] It is clear that the drafters of the *Federal Courts Rules* did not intend to provide for the transmittal of the entire tribunal record to the registry and to the parties. Had they intended to so, they would have said so, as they did in the *Federal Courts Immigration and Refugee Protection Rules*. Furthermore, the Federal Courts Rules governing the contents of the application record have to be sufficiently general to accommodate the diversity of circumstances and tribunals to which Part V of the Rules applies. The contents of the application record in an application to quash a tribunal decision will not necessarily be the same as the contents of the application record in an application for prohibition. In other words, the rules in Part V are intended to provide a framework which is to be adapted to the circumstances of the application before the Court.

[55] In the present case, the Agency, as advised by the Attorney General, did not comply with Gerber's request for production of documents which, it must be said in passing, vastly exceeded the

scope of Rule 317: see *Maax Bath Inc. v. Almag Aluminum Inc*., 2009 FCA 204, [2009] F.C.J. No. 725 at paragraph 15. Instead, it took it upon itself to certify certain documents as having been considered in the making of the final decision, and purported to treat those documents as its application record.

[56] While it has been held that the respondent in an application for judicial review is not required to produce any evidence (*Sosiak v. Canada (Attorney General)* 2003 FCA 205, [2003] F.C.J. No. 715), it has repeatedly been held by this Court that if the respondent does tender evidence, it must do so by way of affidavit: *IBM Canada Ltd. v. Canada (Deputy Minister of Revenue, Customs and Excise)*, [1992] 1 F.C. 663 at paras. 15-16 (*IBM Canada*), *Quebec Port Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60 (F.C.A.) at paragraph 10 (*Quebec Port Terminals*), *Wang v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 165 (C.A.) (*Wang*). The rationale for this rule was succinctly stated in *Wang*, *supra*, where Mahoney J.A. said, at paragraph 10: “There is no justice in according one witness to the proceeding an opportunity to present evidence in a manner that precludes it being tested by cross-examination.” The practice followed by the Attorney General in this case did not comply with the Rules or with this Court’s jurisprudence.

[57] Some controversy has arisen because of the apparently conflicting decisions of judges of this Court, sitting as motions judges, on this issue. In *Canada (Attorney General) v. Lacey*, 2008 FCA 242, [2008] F.C.J No. 1221, Sharlow J.A., referring to the terms of Rules 306 and 309(2), rejected an application for an extension of time to file an application record which purported to

contain a tribunal record but no affidavit. In *Canada (Attorney General) v. Vold, Jones and Vold Auction Co*., 2009 FCA 192, [2009] F.C.J. No. 715, Létourneau J.A. took the position that a tribunal record which had been filed with the registry was already before the Court and therefore could be included in a party's application record without the necessity of an affidavit. With respect, this begs the question of how the tribunal record came to be filed in the registry in the first place. A tribunal whose decision is under review cannot simply forward its record to the registry on its own motion. The dicta of Mahoney J.A. in *Wang*, quoted above, about fairness between the parties apply to these circumstances. In any event, it is not necessary for me to choose between the decisions of my colleagues, as the issue was settled by this Court in *IBM Canada*, *Quebec Port Terminals* and *Wang*, cited above.

[58] The Attorney General did not comply with the Federal Courts Rules and with the jurisprudence of this Court. Had I found against him on this appeal, I would not have been inclined to interfere with the Judge's exercise of his discretion to award Gerber increased costs. However, since I would allow the appeal, the costs of the appeal and costs in the court below should follow the result, making the issue of increased costs moot.

CONCLUSION

[59] I would therefore allow the appeal and set aside the order of the Judge declaring paragraph 9.1(5)(a) of the *Processsed Food Regulations ultra vires* the *Canada Agricultural Products Act.* With the consent of the Attorney General, I would set aside the decisions of the Acting Director of the Canada Food Inspection Agency and remit the matter to him for re-determination according to law and on the basis that paragraph 9.1(5)(a) of the *Processed Food Regulations* is *intra vires* its enabling legislation. Since the operative decision is the final decision, the interim decision is moot and need not be reconsidered by the Director.

[60] The Attorney General is entitled to his costs in this Court and in the Federal Court.

"J.D. Denis Pelletier"
J.A.

“I agree.
John M. Evans J.A.”

“I agree.
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-255-09
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA et al and SELECT BRAND DISTRIBUTORS INC.et al and FOOD PROCESSORS OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 13, 2009
REASONS FOR JUDGMENT BY:	Pelletier J.A.
CONCURRED IN BY:	Evans J.A. Trudel J.A,
DATED:	January 11, 2010

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