Federal Court  Cour fédérale

Date: 20090521

Docket: T-1376-08

Citation: 2009 FC 528

Ottawa, Ontario, May 21, 2009

PRESENT: The Honourable Sean J. Harrington

BETWEEN:

C.B. POWELL LTD.

Applicant

and

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] Is a refusal to make a decision a decision? That is the access to justice question in this judicial review which also brings into issue the jurisdiction of the Federal Court.

[2] Although it did not realize it at the time, C.B. Powell's Customs declarations with respect to bacon bits imported from the United States in 2005 fell short of the mark in two respects. It cited the

broad tariff classification item and the Most Favoured Nation tariff treatment. If the declaration had been correct, no duty was payable. However, a subsequent audit by the Canada Border Services Agency (CBSA) revealed that the bacon bits did not fall within that classification. They were imported in glass jars to which a more specific tariff classification item applied, and which carried a Most Favoured Nation duty of 12.5%. C.B. Powell acknowledged its error but also submitted that it possessed a "certificate of origin" which would have allowed it to import the bacon bits under the United States (NAFTA) tariff. Had it been aware of its tariff classification error, it would have produced the certificate of origin. In that case, there still would have been no duty to pay.

[3] CBSA took the position that it had only re-determined the tariff classification, and not the origin (sometimes called tariff treatment). C.B. Powell paid the duty under protest and appealed to the president of the CBSA as contemplated by s. 60 of the *Customs Act*. It received what is called a "B2-Reject Notification" which said: "Your request is rejected as there was no previous re-determination of origin under section 59 of the *Customs Act*. Therefore there can be no appeal of origin under section 60."

[4] C.B. Powell seeks a declaration from this Court that the Reject Notification was a decision of the President of the CBSA, which may be appealed to the Canadian International Trade Tribunal (CITT) or, in the alternative, an order requiring him to make such a decision.

[5] Although the jurisdiction of the Federal Court to entertain this application is primordial, to better understand that issue it is first necessary to set out the facts in more detail as they fit within the scheme of the *Customs Act.*

THE FACTS

[6] C.B. Powell is a long-time importer, primarily of foodstuffs. It employs a Customs broker who makes declarations on its behalf. In 2005, it had a multitude of importations.

[7] Generally speaking, an importer of goods is required to report and declare, and pay such duty and general sales tax as may be owing. The forms it submits set out what is imported, its value, its tariff treatment, i.e. origin, and the applicable tariff classification item number.

[8] In 2008, the CBSA decided to carry out a customs compliance verification of C.B. Powell's imports for the year 2005. It had a four-year window of opportunity to do so under the Act. It bears mentioning that there is nothing in the record, and the respondents' do not suggest, that its activities were in any way suspect. Indeed, C.B. Powell fared very well in the report. It is a daunting task to select the correct classification item as illustrated by the decision of the Federal Court of Appeal in *Canada Customs and Revenue Agency, et al v. Produits Laitiers Advidia Inc.*, 2006 FCA 41, 346 N.R. 309, as well as by the more recent decision of the Supreme Court in *United Parcel Service Canada Ltd. v. Canada*, 2009 SCC 20. The purpose of the verification was, among other things, to assess the level of compliance with the *Customs Act*, the *Customs Tariff* and other Acts so as to provide client assistance and advice on correct accounting of goods, to enable self-adjustment, if necessary, and to identify areas of potential concern. The review covered a number of areas relating to Customs activities, including tariff classification and tariff treatment. Twenty-five importations were randomly selected for analysis.

[9] As regards tariff classification, the bacon bits were entered under classification item number 16.02.49.90.00. It was confirmed that the product met the requirements for the 16.02 heading. However, at the individual tariff item level there is a distinction between prepared or preserved meat of swine which is packaged in cans or glass jars versus other methods. It was determined that the sample was more appropriately classified under 16.02.49.10.19.

[10] With respect to tariff treatment or country of origin, 11 of the samples were imported under the United States tariff treatment (NAFTA) and the remaining 14 under the Most Favoured Nation tariff. Both were considered preferential tariffs as the report states: “no other preferential tariff treatments were utilized”. The report also stated that the importer must have proof of origin and present same on request for all goods imported under a preferential tariff treatment.

[11] Of the 25 samples, one was held to be imported under an incorrect tariff treatment. T-shirts were fabricated from cotton grown and processed in the United States and imported under the United States’ tariff. However, as they had been assembled into t-shirts in Mexico, the country of origin was entered incorrectly as the goods should have been entered under the Mexican tariff. This did not result in a change of duty.

[12] C.B. Powell had asserted the Most Favoured Nation tariff treatment for the bacon bits. This is not incorrect as the United States is a Most Favoured Nation. However, assuming it had an appropriate certificate of origin, importation under the United States tariff would have been more precise and, as it turns out, more beneficial for the importer, i.e. no duty as opposed to duty of 12.5%.

[13] A draft of the verification report was sent to C.B. Powell for comment before it was formally issued. The company acknowledged the error in the tariff classification but went on to say "when the product was imported, a free-trade certificate was available and on-hand, as verified by your audit". The company alleged hardship as the goods had already been sold with no profit margin included to cover the cost of duty, and as non-revenue amendments of tariff treatment with respect to NAFTA certificates are limited to one year.

[14] The Agency responded that a preferential NAFTA tariff treatment had not been claimed at the time of the accounting of the goods. Indeed, the accompanying Detailed Adjustment Statement (DAS) claims to be a decision under s. 59(1) of the *Customs Act.* More particularly: "This decision represents a re-determination of the tariff classification only. The tariff treatment has not been reviewed and is not being re-determined on this detailed adjustment statement" (my emphasis).

[15] C.B. Powell, through its broker, sought what it called "further re-determination" pursuant to s. 60(1) of the *Customs Act* on the basis that the goods qualify for NAFTA origin treatment. Section 60 contemplates an appeal from a CBSA officer to its President. The Notice of Appeal concluded: "The taxpayer asks that a decision be made by the president under Section 60 as soon as possible so that, if necessary, the taxpayer may appeal the section 60 decision by the President to the CITT."

[16] As aforesaid, C.B. Powell's request, through its broker, was rejected. In a document titled "B-2 Reject Notification," the President took the position that since there had been no previous re-determination of tariff treatment by a CBSA officer under s. 59 of the *Customs Act*, he had no

jurisdiction to initiate a further re-determination. Therefore there could be no appeal of origin under s. 60.

[17] Rather than appeal that rejection to the CITT, C.B. Powell seeks judicial review from this Court.

THE *CUSTOMS ACT*

[18] This application deals with two particular aspects of the Act. Apart from a re-determination initiated by the CBSA, the importer may voluntarily make corrections when it has reason to believe it erred. The CBSA verification report specifically states that it constitutes C.B. Powell's "reason to believe" under s. 32.2 of the Act. However, there are time limits. On the facts of this case the CBSA had four years to re-determine, while C.B. Powell had less time to self-correct. Had the verification taken place earlier, no duty would have been payable.

[19] The second aspect of the *Customs Act* under consideration is the recourse mechanism available to the taxpayer. The Act does not formally contemplate judicial review by the Federal Court. Rather, the re-determination by a CBSA officer may, in turn, be further re-determined by the President, from whom an appeal lies to the CITT, from there to the Federal Court of Appeal on a point of law, and from there, with leave, to the Supreme Court. Furthermore, in any event, the CITT is one of the federal tribunals over which the Federal Court of Appeal, rather than the Federal Court, has original judicial review jurisdiction (*Federal Courts Act*, ss. 18, 18.1 and 28).

[20] Section 58(2) of the *Customs Act* is a default provision. Unless determined by an officer, or corrected by the importer, the origin, tariff classification and value for duty of the imported goods are deemed to be determined as first declared by the importer.

[21] Section 32.2 deals with corrections by the importer. If preferential tariff treatment under a free trade agreement is claimed, the importer has 90 days after having "reason to believe" that the declaration was incorrect to make a correction. When the goods were imported, C.B. Powell did not claim U.S. treatment (NAFTA). Otherwise an incorrect declaration of origin, leaving aside free trade agreements, may be made within four years. The goods were declared as originating in the United States, and the Most Favoured Nation tariff treatment was claimed. This was not incorrect. This brings us to s. 73 and following which deal with abatements and refunds. Section 74(1)(c.1) permits a party to apply for a refund if the goods were imported from a NAFTA country but no claim for preferential tariff treatment thereunder was made when they were accounted for. Section 74(3)(b)(*ii)* requires that the application be made within one year from import.

[22] As mentioned above, the recourse mechanism under the *Customs Act*, being a series of re-determinations and appeals, is one in which the Federal Court plays no part. The process was recently reviewed by Madam Justice Sharlow in another factual context in the Federal Court of Appeal's decision in *Her Majesty the Queen v. Fritz Marketing Inc.*, 2009 FCA 62.

[23] The respondents treat the B-2 Reject Notification notice as a "non-decision". The President was of the view that the re-determination had been limited to tariff classification, and not tariff treatment. Since the CBSA did not contest C.B. Powell's original determination of the tariff

treatment, an appeal did not lie to him under s. 60 of the Act. One cannot request a re-determination or a further re-determination of origin, if there had been no determination by CBSA in the first place. The determination was the determination made by C.B. Powell itself in its Customs declaration forms, and it is out of time to make a correction.

JURISDICTION OF THE FEDERAL COURT AND ANALYSIS

[24] Without the benefit of precedent, I would have tended to the view that this Court does not have jurisdiction to entertain C.B. Powell's claim. In my opinion, the Rejection Notice on behalf of the President of the CBSA was in fact and in law a decision under s. 60 of the *Customs Act*, and the only available recourse would be an appeal to the CITT. If it, in turn, like the President of the CBSA, were of the view that the rejection was not a decision which could be appealed to it, the recourse would be an appeal to the Federal Court of Appeal, as an issue of jurisdiction is a point of law.

[25] The DAS which stated that the tariff treatment had not been reviewed and was not being re-determined is not, on its face, in accord with the Verification Report which clearly stated that both tariff classification and tariff treatment for 25 importations were being reviewed. By segregating the tariff classification and the tariff treatment for the bacon bits, the CBSA created a "jurisdictional fact", which in turn led to the President's position that he did not have jurisdiction to re-determine tariff treatment because it was a condition precedent thereto that there have been a previous determination or re-determination by a Customs official.

[26] Furthermore, based on past decisions, C.B. Powell had every reason to believe that an appeal to the CITT would be a wasted effort as it would hold it had no jurisdiction to declare a "non-decision" a decision or to order the President to make one.

[27] Given the elaborate recourse mechanism set out in the Act, I do not consider that Parliament intended that a taxpayer could be denied access to justice by the artificial creation of jurisdictional facts.

[28] Courts themselves have often used "jurisdictional facts" to engage in what is now considered premature interference with the activities of federal boards and tribunals. A prime example is the decision of the Supreme Court in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. The *Human Rights Code* (Ontario) provided that no person be denied occupancy of any self-contained dwelling unit because of race, creed, colour, nationality, ancestry or place of origin. The Court held that the premises in question were not a self-contained dwelling unit and so the Board had no power to deal with the alleged discrimination. With the subsequent development of the pragmatic and functional approach to judicial review, the concept of jurisdictional facts has more or less fallen by the wayside. As Mr. Justice Evans said in *Air Canada v. Lorenz*, [2000] 1 F.C. 494 at paragraph 13:

> As a general rule it is much more difficult nowadays for a litigant to persuade a court to intervene before the applicant has exhausted the available administrative remedies than it was when *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 was decided.

[29] That case followed on the heels of his decision in *Zündel v. Canada (Attorney General)*, [1999] 4 F.C. 289 in which he stated at paragraph 44: "…the authoritativeness of *Bell* has been

severely eroded, if not totally destroyed, by the revolution in the law of judicial review of administrative action that started with the decision of the Supreme Court of Canada in Canadian *Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227." See also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 82 Admin. L.R. (4th) 1, at paragraph 45.

[30] The decision of the Supreme Court in *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, stands for the proposition that the power of a Superior Court to intervene before the recourse provisions in a statute have run their course is not completely ousted if the recourse is not to an independent decision-maker. Even if that could be said of the appeal to the president of the CBSA, the same does not hold true on an appeal to the CITT, which has the added advantage of being far more specialized in this domain than the courts themselves. Furthermore, if there is recourse, that recourse is to the Federal Court of Appeal either on a point of law in accordance with the *Customs Act* or by way of judicial review in accordance with s. 28 of the *Federal Courts Act*.

[31] By way of analogy, the notion of "jurisdictional facts" has plagued the review mechanism set out in the *Canada Pension Plan*, particularly appeals from the Review Tribunal to the Pension Appeals Board, contingent on whether or not there were "new facts". It had been held by the Court of Appeal in a number of cases, including *Kent v. Canada (Attorney General)*, 2004 FCA 420, 328 N.R. 161, that the Pension Appeals Board could not consider an appeal from a decision of the Review Tribunal that there were no "new facts", as its jurisdiction was limited to appeals on the merits. Consequently, by default the challenge had to be by way of an application to this Court pursuant to ss. 18 and 18.1 of the *Federal Courts Act*.

[32] However, in *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297, 368 N.R. 306, the Court, speaking through Mr. Justice Létourneau, held that cases such as *Kent* were no longer good law. As I understand it, paragraph 20 of *Mazzotta* stands for the proposition that a refusal is in itself a decision subject to the review mechanism set out in the governing statute:

> With respect, I think that this conclusion does not reflect both the factual and legal reality. When a Review Tribunal, or for that matter the Minister, dismisses a demand under subsection 84(2) to rescind an earlier decision, it both legally and factually renders a decision. There is in such a case no less a decision rendered than if it decides to allow the demand and proceeds to rescind or vary its earlier decision. The decision to dismiss the demand to rescind or vary is a decision made under subsection 84(2). Subsection 83(1) clearly gives in this case a right of appeal to the PAB when it states that a party, dissatisfied with a decision of a Review Tribunal made under subsection 84(2), may apply for leave to appeal that decision to the PAB. It does not matter whether the Review Tribunal accepts the demand for reconsideration and proceeds to rescind its earlier decision on the basis that there is new material evidence, or refuses the demand for reconsideration because there is no new evidence or there is new evidence which is not material and maintains its earlier decision. In both cases, a decision is rendered under subsection 84(2) and, I believe, is appealable.

Nevertheless, Madam Justice Layden-Stevenson found on the vagaries of that statute that the jurisdiction of this Court was not completely ousted (*Kiefer v. Canada (Attorney General)*, 2008 FC 786, 330 F.T.R. 242, at paragraph 10).

[33] The more recent decision of the Federal Court of Appeal in *Fritz Marketing Inc.*, above, deals with this Court's jurisdiction under the *Customs Act*, but not on jurisdictional facts. The issue was whether the Federal Court had jurisdiction to set aside a Detailed Adjustment Statement. After setting out the facts of that particular case, the privative clauses and the recourse mechanisms under the *Customs Act*, Madam Justice Sharlow stated at paragraph 33 that s. 59(6) of the *Customs Act*

deprives the Federal Court of jurisdiction to set aside such a statement for any reason. The fundamental issue was the admissibility of evidence which had been impugned. The CITT has jurisdiction to exclude evidence on *Charter* grounds, if appropriate.

[34] However, the parties were unable to draw my attention to any decision of the Federal Court of Appeal specifically dealing with the aftermath of a decision of the President of the CBSA to reject a request for re-determination on jurisdictional grounds. On the other hand, there is a 1993 decision of this Court directly on point – *Mueller Canada Inc. v. Canada (Minister of National Revenue – M.N.R.)*, 70 F.T.R. 197. In that case, the Deputy Minister, who then had had the functions of the President of the CBSA, refused a further re-determination on the grounds that the original request had been rejected "…without decision and cannot be further processed." Mr. Justice Rouleau stated the issue as follows:

> This latter decision effectively precluded further recourse by the applicant to the CITT or the Federal Court of Appeal, accordingly a motion was brought in this Court seeking a declaration that the section 63 rejection was a decision and therefore subject to the appeal provisions of the Act; or, in the alternative, an order in the nature of mandamus compelling the Deputy Minister to issue such a decision […]

[35] He held that the rejection was a disguised decision on the merits:

> Furthermore, by characterizing these decisions as "no decisions" rather than negative decisions, the respondents have thwarted the applicant's rights of appeal under sections 60 and 63, rights which are specifically conferred in section 72.1 and the applicant's only recourse was to this Court. Again I do not think that this is what Parliament intended given the fact that the CITT is specifically empowered to deal with these technical matters.

Consequently, he declared the non-decision was a decision which could be appealed to the CITT.

[36] The CITT seems, however, to have taken the position, based on *Mueller*, above, that it is only the Federal Court which has jurisdiction to hold that a "non-decision" is in law a decision, or if no decision was rendered, to compel the President to render one. (*In the Matter of a Preliminary Issue of Jurisdiction in various appeals filed under s. 67 of the Customs Act*", including *Vilico Optical Inc.*, (7 May 1996), AP-94-365, rendered in 1996 and *Chicago Rawhide Products Canada Ltd. v. The Deputy Minister of National Revenue*, (21 December 2000), AP-97-133.)

[37] The one case which does not quite fit in is *Editions Gallery Ltd. v. President of the Canada Border Service Agency*, (26 July 2006), AP-2005-017. In that case the Tribunal considered that the DAS in question included a re-determination of origin which confirmed the original Most Favoured Nation determination. In this case, however, the DAS goes out of its way to purport to say that there was no such re-determination, contrary to what is suggested in the Verification Report.

[38] Judicial comity dictates that I should follow *Mueller*. Although the principle of *stare decisis* is commonly thought of as requiring a trial judge to follow decisions of the Court of Appeal and the Supreme Court, since the very purpose of rendering public decisions is to provide for certainty and predictability in the law, it is also preferable that a judge of the same court follow what has been previously decided by another judge of that same court. Nevertheless, one is not bound by such a decision if one cannot agree with the reasoning. Even though *stare decisis* was probably more deeply entrenched in 1947 than it is today, I consider the following words of Lord Goddard C.J. in *Police Authority for Huddersfield v. Watson*, [1947] 1 K.B. 842 at 848 to be most helpful:

> …. I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always

> follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court.

[39] In *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 341, 324 F.T.R. 133, Madam Justice Dawson set out circumstances which would justify a refusal to follow a prior decision of the same court:

> A judge of this Court, as a matter of judicial comity, should follow a prior decision made by another judge of this Court unless satisfied that: (a) subsequent decisions have affected the validity of the prior decision; (b) the prior decision failed to consider some binding precedent or relevant statute; or (c) the prior decision was unconsidered; that is, made without an opportunity to fully consult authority. If any of those circumstances are found to exist, a judge may depart from the prior decision, provided that clear reasons are given for the departure and, in the immigration context, an opportunity to settle the law is afforded to the Federal Court of Appeal by way of a certified question. See: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at page 591 (B.C.C.A.), and *Ziyadah v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 152 (T.D.).

[40] Mr. Justice Rouleau's decision was completely in line with the law as it was in 1993, and I am not certain that the subsequent decisions which I have cited have affected its validity. It has now served for many years as the basis of this Court's jurisdiction. Furthermore, as this is not an immigration case in which leave is required by way of a serious question of general importance, the respondents may appeal as of right.

[41] C.B. Powell also submits that in a request pursuant to s. 60, it was entitled to offer security rather than pay the duty. It provided a bond which was rejected, not on the basis of insufficiency,

but rather that since s. 60 did not apply, the CBSA was unable to accept security in lieu of payment. It argues that there is an important distinction between payment and security in that s. 73 and following, which deal with abatements and refunds, have no application to security. It should not be in the position of seeking a refund. It should be seeking a surrender of security. This is an interesting point which the CITT may wish to consider.

ORDER

IT IS HEREBY DECLARED THAT:

1. The Canada Border Services Agency "B-2 Reject Notification", dated 7 August 2008, is a negative decision of the President of the Canadian Border Services Agency under ss. 60(4) and (5) of the *Customs Act* to which an application lies to the Canadian International Trade Tribunal pursuant to s. 60.2 of the said Act.
2. The applicant shall have its costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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