Date: 2011 05 06
Docket: S-0001-CV 2011000048

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *TOBACCO TAX ACT* OF THE NORTHWEST TERRITORIES, R.S.N.W.T. 1988, c. T-5 AND THE *TOBACCO TAX REGULATIONS* OF THE NORTHWEST TERRITORIES, R.R.N.W.T. 1990, c. T-14

BETWEEN:

SAIGON'S SMOKE SHOP (1994) LTD.

Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES
as represented by the Minister of the Department of Finance

Respondent

Corrected judgment: A corrigendum was issued on May 6, 2011; the corrections have been made to the text and the corrigendum is appended to this judgment.

Appeal from a decision of the Minister of Finance cancelling a Tobacco Retail Dealer's permit pursuant to the *Tobacco Tax Act*.

Heard at Yellowknife, NT on May 2, 2011.

Reasons filed: May 6, 2011.

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant:	Gerard Phillips
Counsel for the Respondent:	Karen Lajoie

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REASONS FOR JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] The Applicant, Saigon's Smoke Shop (1994), appeals from the cancellation of its Tobacco Retail Dealer's permit. The circumstances leading up to the cancellation of the permit are largely undisputed.

[2] The Applicant is a corporation that operates a small shop in Yellowknife. It was issued the permit in January 1996. A great majority of the products sold in the shop are tobacco products. Phuong Le is the owner, officer and director of the corporation.

[3] The *Tobacco Tax Act* (the *Act*) and related *Regulations* provide that holders of a retail permit who wish to acquire tobacco products from a wholesale dealer who is not registered with the Department of Finance must comply with a number of requirements. They must apply for a permit to import the products in the Northwest Territories; they must send payment for the taxes on those products at the same time as they apply for the permit; and within seven days of the importation, they must provide a report to the Minister that includes the shipment invoices and other relevant information. Where products are purchased from a wholesale dealer who is registered with the Department of Finance, these requirements do not apply.

[4] During the Fall of 2010, it came to the attention of Lyle Denny, an auditor employed with the Department of Finance, that More Than Cigars Ltd, an Alberta wholesale dealer of tobacco products, had been selling and shipping cigars to the Applicant.

[5] More Than Cigars Ltd. is not registered with the Department of Finance. Mr. Denny's investigation determined that between April 2007 and October 2010, the Applicant had received 38 shipments of tobacco products from More Than Cigars Ltd. The Applicant did not apply for permits, forward tax monies, or submit reports for any of those shipments.

[6] Mr. Denny and another auditor conducted an inspection at the Applicant's store on February 17, 2011. Ms. Le was present. She confirmed that some of the tobacco products on the premises had been purchased from More Than Cigars Ltd.

[7] The R.C.M.P. were contacted. A total of 820 cigars were seized, on the basis that they had been imported into the Northwest Territories in contravention of the *Act* and *Regulations*.

[8] Section 22.2 of the *Act* provides that the Minister of Finance (the Minister) may, in writing, cancel or suspend a permit in certain circumstances, including when a dealer has failed to comply with the *Act* or the *Regulations*. Pursuant to section 20.2, the Deputy Minister of Finance can exercise this power.

[9] On March 10, 2011, the Department of Finance issued a Notice of Suspension and Cancellation of the Applicant's permit (the Notice). It was hand delivered to Ms. Le on March 11. The Notice was signed by the Deputy Minister of Finance.

[10] The Notice explained the various violations that the Applicant committed. It stated that the permit was suspended, and would be cancelled effective April 19 unless the Applicant showed that all the taxes had in fact been paid before January 31, 2011.

[11] Ms. Le was also given another document, which stated that Applicant owed the government $22,034.99 in taxes, $9,542.28 in interests, and $2,203.50 in penalties in relation to the 38 unlawful shipments of cigars, for a total of $33,780.77.

[12] On April 7, 2011, Ms. Le attended the offices of the Department of Finance and paid the full amount owed in taxes, interests and penalties.

[13] The Applicant now seeks to have the decision to cancel the permit rescinded.

B) STANDARD OF REVIEW

[14] This appeal is governed by section 22.3 of the *Act*, which reads as follows:

> 22.3. (1) a dealer who is dissatisfied with a cancellation or suspension made under section 22.2 may, within 30 days after the date on which a copy of the cancellation or suspension was served, appeal to a judge of the Supreme Court and the judge may
>
> (a) receive evidence on questions of facts; and
> (b) make any order varying, confirming or rescinding the cancellation or suspension made under section 22.2
>
> (2) The evidence referred to in paragraph (1)(a) shall be received by oral examination by the judge, by affidavit or by deposition taken before an examiner or commissioner.
>
> (3) Where an appeal is made under subsection (1), a judge of the Supreme Court may, on application, order that the cancellation or suspension shall have no effect pending the hearing of the appeal.

[15] Where the decision of an administrative decision maker is challenged by way of statutory appeal or judicial review, the first step is usually to determine the applicable standard of review.

[16] The Applicant argues that a standard of review analysis is not required in this case because the appeal powers set out in the *Act* are so broadly defined that they

demonstrate an intent by the Legislature to have the Court hold a trial into the issue. This, the Applicant says, means that the original decision has virtually no relevance, beyond the fact that it was made.

[17] I disagree with that submission. The requirement for a standard of review analysis when dealing with a challenge to an administrative decision has been recognized in the jurisprudence for some time. This is so, even when the statute provides for a statutory right of appeal:

> The Supreme Court of Canada, in a series of recent cases, has clearly stated that in any case where the court is called upon to review a decision by a statutory decision-maker, whether it is by way of an application for judicial review or a statutory right of appeal, the court must begin by determining the standard of review by applying a pragmatic and functional approach.
>
> *Inuvik Housing Authority* v. *Kendi* 2005 NWTSC 46, at para. 16.

[18] In *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, the Supreme Court of Canada revisited and refined the principles that apply in judicial reviews, but did not remove the requirement for a standard of review analysis.

[19] There are two standards of review: reasonableness and correctness. The standard of review analysis is contextual, and requires consideration of (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of the enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. *Dunsmuir* v. *New Brunswick*, *supra*, at para. 64.

[20] The standard of review analysis involves two steps:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> *Dunsmuir* v. *New Brunswick*, *supra*, at para. 62.

[21] Counsel have not brought to my attention any case that has determined what the standard of review is on an appeal brought under section 22.3 of the *Act*. I

must, therefore, determine what the standard of review is, based on the factors set out at Paragraph 19.

[22] Here, there is no privative clause. On the contrary, there is a very broad right of appeal. The *Act* contemplates evidence being adduced at the appeal, there is no requirement for the decision-maker to file a record, and the Court has the discretion to vary, confirm or rescind the decision to cancel the permit. Such a broad appeal right tends to suggest that little deference should be shown to the original decision.

[23] But that is not determinative, as illustrated by *Inuvik Housing Authority* v. *Kendi*. That case involved an appeal of the rental officer's decision, under the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5. The appeal provisions in that statute provide that the Court can receive evidence, and that it has the power to vary, confirm or rescind the rental officer's decision. This is quite similar to the appeal process that applies in this case. Vertes J. recognized that this type of appeal right tends to indicate that little deference should be shown to the original decision. Yet, after having examined the other factors, he concluded that the applicable standard of review was one of reasonableness *Inuvik Housing Authority* v. *Kendi*, *supra*, at paras 16-28.

[24] The same is true in this case. The appeal provisions are not determinative of the standard of review. I must examine the other factors.

[25] The purpose of the administrative decision-making body, as determined by the interpretation of the enabling legislation, is the next factor to consider. The purpose of the *Act*, quite simply, is to create a tightly regulated framework for the tobacco industry. The Minister of Finance is accorded broad powers within the framework of that *Act*, including the power to refuse to issue permits (s. 22.1) and the power to suspend and cancel permits (s. 22.2) in certain circumstances. These powers are framed in a general manner and the statute does not set down criteria for the exercise of discretion. This suggests a legislative intent to give the Minister broad powers to maintain the integrity of the legislative scheme and enforce compliance. It suggests that deference must be shown to his decision.

[26] The third factor relates to the expertise of the administrative body. If an administrative tribunal has a high degree of expertise or specialization, this militates in favour of a more deferential standard of review. But even where specific expertise is not required, the fact that an administrative decision maker is called upon to apply the legislation frequently means that he or she will inevitably acquire

a certain level of expertise on the subject-matter. *Inuvik Housing Authority* v. *Kendi*, *supra*, at para.23.

[27] Overall, the administration of this scheme depends on enforcing compliance with specific requirements set out in the statute. I do not think that any particular expertise is required to determine that a requirement of the *Act* has not been complied with. But I recognize that the Minister, being responsible for the issuance, suspension and cancellation of permits, is well versed in how the legislative scheme operates, and aware of the compliance issues that arise. In that sense, the Minister has a high level of familiarity and working knowledge about the general operation of this statutory scheme. This too suggests that some deference is owed to his decisions.

[28] Finally, the nature of the question at issue must be considered. In this case, the question at issue is whether the permit should have been cancelled. At issue is what type of administrative penalty is appropriate to sanction a violation of the *Act*. The *Act* does not set out any criteria to guide the exercise of the Minister's discretion in determining what the sanction should be. The Minister's familiarity with how the legislative scheme operates places him in an advantageous position to weigh the various factors at play and decide what the sanction ought to be. This too suggests that a deferential standard is appropriate.

[29] The Applicant argues that the manner in which the appeal provision is worded necessarily means that no deference should be extended decision appealed from. I disagree. The Legislature has created a mechanism for administrative decision-making in this area. It does not make sense that it would intend this mechanism to be completely disregarded by virtue of an appeal having been filed. A similar argument was made in *Inuvik Housing Authority* v. *Kendi*, and was rejected.

[30] Based on my analysis of the factors to be considered, I conclude that a decision by the Minister to suspend or cancel a permit is to be reviewed, on appeal, on a standard of reasonableness. However, this deferential approach may be tempered, in some cases, where evidence is adduced on the appeal. To the extent that the *Act* contemplates the Court receiving evidence that may not have been before the Minister, it must have contemplated that the Court would consider this evidence and whether it should impact the outcome of the appeal. In some cases, this may result in an intervention by the Court even if the decision made by the Minister, was, at the time it was made, not unreasonable.

[31] Finally, I agree with the Respondent that if issues of natural justice arise, those must be reviewed on a standard of correctness.

C) ANALYSIS OF THE MERITS OF THE APPEAL

[32] For the purposes of my analysis, I will refer to the decision to cancel the permit as "the Minister's decision", even though in this case the Notice was actually signed by the Deputy Minister.

[33] The Respondent's position is that the Minister's decision to cancel the permit, while severe, was reasonable, because the matter involved serious and repeated violations of the *Act* over a period of time. The Respondent also takes the position that no issues of natural justice arise in this matter.

1. Procedural fairness

[34] I disagree with the Respondent that no issues of natural justice arise. In my view, the process that was followed in this case is flawed from a procedural fairness perspective.

[35] The Notice delivered to Ms. Le on March 11 reads as follows:

> March 10, 2011
>
> Dear Ms. Le:
>
> **Suspension and Cancellation of Tobacco Retail Dealer's Permit RS-024**
> **Saigon's Smoke Shop (1994) Ltd. (also known as Saigon's Smoke Shop)**
>
> Tobacco Retail dealer's Permit RS-024 issued to Saigon's Smoke Shop (1994) Ltd. is hereby suspended for failure to comply with Subsections 5(1), 5(2) and 5(8) of the *Tobacco Tax Act* (NWT) and Section 6 of the *Tobacco Tax Act Regulations* (NWT). The suspension is effective immediately upon delivery of this notice, and will remain in effect until April 18, 2011.
>
> No sales of tobacco products may be made while this suspension is in effect.
>
> Invoice copies received from the Government of Alberta from April 2007 to October 2010 indicate Saigon's Smoke Shop was [sic] purchased Tobacco products from More Than Cigars LTD of Alberta. More Than Cigars LTD is not a registered wholesaler in the Northwest Territories. Thirty Eight purchases were made from April, 2007 to September 2010. The invoices indicate that the tobacco products were billed to and shipped to Saigon's Smoke Shop 5010-50

> Street in Yellowknife, NT. The invoices were C.O.D. and a memo on the invoices states "This Product is Sold Provincial Tobacco Tax Out".
>
> On February 17, 2011, it was noted during an inspection at the Saigon's Smoke Shop location at 5010-50 Street in Yellowknife, NT that a number of products listed on the invoices were being sold. When queried, Phuong Le (Manager) confirmed that the purchases were made from More Than Cigars LTD.
>
> Subsection 5(1) of the *Tobacco Tax Act* requires a person who imports tobacco to apply for an import permit. Subsection 5(2) requires that the application for an Import Permit be accompanied by a payment of an amount equal to the tax payable on the tobacco the applicant intends to import. Subsection 5(8) requires the person importing the tobacco, within seven days of the import, to report the import to the Minister and supply the Minister with the invoice and all other pertinent information.
>
> Section 6 of the *Tobacco Tax Act* Regulations requires a retail dealer who purchases tobacco from a person other than a wholesale dealer holding a permit under the Act to, within 20 days of the purchase, prepare a report that gives the particulars of the purchase and forward to the Minister the report with taxes due with respect to the tobacco.
>
> No import permit were applied for, no reports were forwarded, and no payments with respect to Northwest Territories tobacco tax were remitted.
>
> Permit RS-24 will be permanently cancelled on April 19, 2011 unless proof can be provided to the Taxation Section of the Department of Finance that all Tobacco Tax due to the Government of the Northwest Territories for purchased made prior to January 1, 2011, was remitted prior to January 31, 2011.
>
> Subsection 22.3(1) of the *Tobacco Tax Act* provides for the appeal of this suspension to a judge of the Supreme Court within 30 days of the date that this notice is served.

[36] The Notice deals with both the suspension of the permit and its cancellation. Both issues appear to have been dealt with in the same way and at the same time.

[37] The immediate suspension of a permit, when violations to the *Act* are discovered, is one thing. The cancellation of the permit is another. These steps, in my view, engage different considerations from a procedural fairness point of view.

[38] Public decision makers have a duty to act fairly in coming to a decision that could affect the rights, privileges and interests of an individual. What is required

to comply with this duty will vary depending on the context of each case. *Dunsmuir* v. *New Brunswick*, *supra*, at para.79.

[39] The Respondent acknowledges this, but argues that this duty was complied with because Ms. Le was provided an opportunity to "correct the record" and provide information that would show she had in fact paid the taxes prior to January 31, 2011. There are two problems with this argument. The first one is that this opportunity was meaningless in the context of this case because when the Notice was issued, it was already fairly clear that she had not paid those taxes and not complied with the other requirements of the *Act*. So she was given an opportunity to do something that, by all accounts, the Minister knew she could not possibly do.

[40] The second, more serious problem, is that this opportunity given to Ms. Le only related to defending the allegation that she had failed to pay taxes. What was more important, in the context of this case, was what the consequences of those violations would be. On that issue, she had absolutely no opportunity to be heard before the decision was made. And this was a decision that had the potential of having immediate and severe consequences on her business.

[41] For example, Ms. Le did not have an opportunity to explain that she has difficulties with the English language; she had no opportunity to explain that cancelling her permit meant putting her out of business, and removing the primary source of support for her and her family for the last 15 years; she had no opportunity to demonstrate her remorse and willingness to pay everything that was owed in taxes, interests, and penalties; she had no opportunity to provide any explanation at all to the Minister about the circumstances that led to these violations, or provide any other information that might have an impact on the decision.

[42] I accept the Respondent's submission that the tobacco industry is highly regulated, and for very good reason. I also accept that those who engage in this area of activity have a responsibility to inform themselves about the various rules and requirements that govern it. But that does not relieve public decision makers to act fairly in coming to decisions that have significant consequences for those involved. In my view, the Minister ought to have given the Applicant some opportunity to make representations about penalty before deciding that the most severe administrative penalty available would be imposed. The failure to do so constituted a breach of procedural fairness which warrants this Court's intervention.

2. Failure to articulate reasons

[43] A further problem with the Notice, in my view, is that it fails to articulates the basis for the decision to cancel the permit.

[44] The Notice sets out what the Applicant's obligations were pursuant to the statutory scheme, and how it failed to comply with them. It also explains that the permit is suspended and what the immediate consequences of that suspension are. The reasons for the Minister concluding that there were violations are very clearly set out. However, no reasons are given by the Minister for deciding that the consequence of those violations will be the cancellation of the permit.

[45] In *Dunsmuir*, the Supreme Court of Canada explained what is encompassed in the concept of reasonableness:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir v. *New Brunswick*, *supra*, at para. 47.

[46] This is consistent with what the Supreme Court had said in earlier cases about the importance for administrative decision-makers to provide reasons, and how that requirement tied into the reasonableness of a decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that would reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be reasonable and a reviewing court must not interfere. (...) This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

Law Society of New Brunswick v. *Ryan* [2003]1 S.C.R. 247, at para.55.

[47] Therefore, this Court's inquiry into the reasonableness of an administrative decision is concerned not simply with the outcome, but also with the reasons given by the decision maker for having arrived at that outcome. Here, no such reasons are articulated.

[48] The *Act* does not provide for automatic suspensions or cancellations of permits once a violation is established. Instead, it gives the Minister the discretion to decide which of the administrative sanctions available under the *Act* should be applied. Once a violation is established, the Minister has a number of courses of actions available to him.

[49] Such a broad discretion comes with a corresponding responsibility to explain why one course of action is chosen as opposed to another. Because no reasons were provided here, the Applicant does not know why the Minister's discretion was exercised in the manner that it was. And neither does this Court.

[50] The Respondent refers to a recent decision of this Court in support for the proposition that public officials must not be restrained from exercising their statutory powers:

> There is irreparable harm to the public interest when a public authority such as the Minister is restrained from exercising its statutory authority powers in a case like this where there has not (yet) been any finding of wrong-doing or error by the public authority
>
> *Arctic Grocers* v. *HTMQ* 2011 NWTSC 12, at para. 10.

[51] In that case, much like in this one, the applicant's tobacco permit was suspended because of alleged violations of the *Act.* The applicant filed an appeal to this Court. The applicant then applied to have the suspension of the permit stayed pending the hearing of the appeal; it was seeking, in effect, the reinstatement of its permit pending the determination of the merits of the appeal. The comments quoted above were made in the context of the analysis of the balance of convenience, one of the criteria to be applied on an application to stay a decision pending appeal.

[52] I agree with the general proposition that administrative bodies should not be restrained from carrying out their statutory authority, and that their decisions must not lightly be interfered with. That is entirely consistent with my finding that the standard of review that applies to the Minister's decision is a deferential one. But

as I already noted, the inquiry into the reasonableness of a decision requires the examination of the reasons articulated for making that decision. And in the absence of such reasons, a decision cannot be found to be reasonable.

[53] I conclude that the failure to articulate reasons for cancelling the permit is another reason that justifies this Court's intervention

3. Relief

[54] Having concluded that this Court's intervention is warranted, the next question is what relief should be granted. Section 22.3 contemplates a confirmation, a variation or a rescision of the Minister's decision. Neither party is asking that the matter be remitted to the Minister for further consideration, so I need not address whether this is also an option available to this Court on an appeal brought under this provision.

[55] This Court has three options: confirm the Minister's decision, rescind the decision (which is what the Applicant seeks), or vary the decision by rescinding the cancellation and imposing a further period of suspension. In making that decision, the evidence adduced on the appeal must be taken into account.

[56] The imposition of any penalty requires an examination of the seriousness of the violation, as well as any aggravating or mitigating circumstances.

[57] It is aggravating that there were repeated violations of several requirements of the *Act* and *Regulations*, over an extended period of time. A very significant amount of taxes owed to the government would have gone unpaid had Mr. Denny not discovered these violations. Penalties that are imposed in such cases have to reinforce the notion that those who engage in this type of activity have the onus of ensuring that they comply with all the requirements, and that they must make inquiries when they are uncertain about what those requirements are.

[58] However, one can conceive of more egregious circumstances than those that arose here. While there were several violations, the Applicant is not a recidivist, having been sanctioned in the past and having committed further violations. Ms. Le's failure to properly understand and inquire into the rules, whether it was because of language difficulty, her limited formal education, or her own negligence, is not an excuse, but there is nothing to contradict her evidence that these were unintentional breaches of the *Act*, and that all these violations essentially flowed from the same mistake that was repeated over time.

[59] Ms. Le expressed remorse once she realized what she had done. She cooperated with the authorities, and ultimately paid everything that was owed, which was a significant amount of money. Arguably this was self-interested, as she was trying to get her permit back. But the fact remains that there were financial consequences to her, and the business, arising from this.

[60] In addition, as a result of this matter, the Applicant has not been able to operate a significant part of its business since March 11; some of its inventory was seized; and it has to devote resources to challenge the Minister's decision before this Court. So there have been very real consequences to the Applicant arising from this matter.

[61] Under all of those circumstances, I am of the view that the relief sought by the Applicant is appropriate and that the cancellation of the permit should be rescinded. I am also of the view that it is not necessary to impose a further period of suspension, given the mitigating factors I have referred to, and the fact that the Applicant has already faced a significant penalty for the violations to the *Act*.

[62] For those reasons, the Application is allowed, and the cancellation of the permit is rescinded.

[63] The Respondent sought this Court's direction as to the disposition of the products seized following the inspection that took place on February 17. The Respondent did not articulate a basis for this Court's jurisdiction to address this issue in the context of an appeal under brought under section 22.3. If the Respondent wishes to provide further written submissions as to the Court's jurisdiction to make any order with respect to those items, the Respondent has leave to do so within 30 days of the filing of these Reasons. The Applicant's counsel indicated at the hearing that the Applicant is not seeking the return of the products. Under the circumstances, it may be that the matter can be resolved without an Order being issued.

"L.A. Charbonneau"
L.A. Charbonneau
J.S.C.

Dated this 6th day of May, 2011.

Counsel for the Applicant:	Gerard Phillips
Counsel for the Respondent:	Karen Lajoie

Corrigendum of the Reasons for Judgment

of

The Honourable Justice L.A. Charbonneau

1. Paragraph 9, on the first line it reads:

   On March 10, 2010, ...

   Should read:

   On March 10, 2011, ...

2. Paragraph 49, on the third line it reads:

   ...provided here, the Applicant does know why the Minister's discretion...

   Should read:

   ...provided here, the Applicant does not know why the Minister's discretion...

3. Paragraph 50, on the second line it reads:

   ...proposition that public officials must be restrained...

   Should read:

   ...proposition that public officials must not be restrained...

S-0001-CV 2011000048

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