Federal Court of Appeal | Cour d'appel fédérale

Date: 20191018

Docket: A-324-18

Citation: 2019 FCA 258

CORAM: **DAWSON J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

PIER 1 IMPORTS (U.S.), INC.

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on October 7, 2019.

Judgment delivered at Ottawa, Ontario, on October 18, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] An importer of goods into Canada is required by Part II of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) to report the importation to customs officials (section 12). Section 32 of the *Customs Act* requires the importer to account for imported goods in the prescribed manner and to pay the required import duties.

[2] Import duties are calculated on the basis of a formula that takes into account a number of elements, including the origin of the imported goods, the tariff classification of the goods as determined pursuant to the *Customs Tariff*, S.C. 1997, c. 36 and the value for duty of the imported goods as determined under Part III of the *Customs Act*.

[3] On this appeal only one element of that formula is relevant: the value for duty of certain goods. This appeal arises in the following context.

[4] The appellant, Pier 1 Imports (U.S.), Inc., is an importer and retailer of home furnishings and accessories.

[5] In May 2000, the agency that then administered the *Customs Act* conducted an audit of Pier 1 with respect to the value for duty of the goods it imported into Canada. The audit led to an appeal by Pier 1 to the Canadian International Trade Tribunal concerning the appropriate method of calculating the value for duty. Before the Canadian International Trade Tribunal decided the appeal, the parties entered into a settlement agreement. The relevant portions of the settlement agreement are as follows:

> 3. The [Canada Customs and Revenue Agency (CCRA)] will conduct with diligence a customs review/audit in cooperation with Pier 1 in relation to the fiscal year beginning March 3, 2002 in order to establish an appropriate method for the valuation for duty of the Goods imported for sale into Canada by Pier 1 for that particular year and for the future. The process will be conducted by a different team of CCRA auditors than that which completed the audit giving rise to the Appeal;
>
> 4. In connection with paragraph 3 above, the parties each desire to find a valuation method, other than the deductive method and preferably the computed value if applicable, by which the value for duty of Pier 1's goods may be ascertained from the period beginning March 3, 2002. In the event that the deductive or a modified or residual deductive method of valuation becomes the

> only viable means of determining the value for duty of Pier 1's goods the CCRA agrees that it will not deny expenses incurred in connection with the sale in Canada of the goods being valued solely on the basis that the expenses were paid to a non-Canadian entity; and …
>
> (underlining added)

[6] In accordance with the settlement agreement, after a fresh audit, a Customs Valuation Report was issued which established that Pier 1 was not required to utilize the deductive valuation method, and could instead apply a modified version of the computed value method. These methods are sometimes referred to by the acronyms "DVM" and "CVM".

[7] Since the issuance of the Customs Valuation Report, Pier 1 has calculated and reported the value for duty of its imported goods using the modified version of the computed value method.

[8] In 2015, Pier 1 was selected for a new trade compliance verification. Throughout the verification audit Pier 1 maintained that the Canada Border Services Agency (the agency that now administers the *Customs Act*) was bound by the settlement agreement. Pier 1 stated that, as a result, the deductive valuation method could not be applied to its imported goods.

[9] During the verification audit the CBSA found that after the settlement agreement was executed Pier 1's commercial practices had changed. The CBSA concluded in its Final Report that this change resulted in the computed value method no longer being the appropriate valuation method so that, going forward from July 10, 2017, the deductive valuation method is the

appropriate valuation method. Subsequently, the CBSA issued detailed adjustment statements determining the value for duty of imported goods pursuant to section 58 of the *Customs Act*.

[10] Pier 1, as it was entitled to do, requested relief in the form of self-adjustment requests. Pier 1's requests for such relief were denied by the CBSA.

[11] This entitled Pier 1 to ask for an administrative review under subsection 60(1) of the *Customs Act*, which it did. If dissatisfied with the result of this review (which appears to be pending), Pier 1 may appeal to the Canadian International Trade Tribunal under subsection 67(1) of the *Customs Act*.

[12] Additionally, Pier 1 filed an application for judicial review in the Federal Court in which it sought declaratory relief to the effect that the parties are bound by the settlement agreement, that CBSA's position that the deductive valuation method should be used in future violates the settlement agreement and that Pier 1 cannot be required to apply the deductive valuation method from July 10, 2017, going forward. Pier 1 also moved for an "interim and interlocutory order" barring the CBSA from requiring Pier 1 to employ the deductive value method pending the hearing and final disposition of Pier 1's application for judicial review.

[13] The Minister of Public Safety and Emergency Preparedness moved for an order striking the application for judicial review on the ground that the subject matter of the application falls within the exclusive jurisdiction of the Canadian International Trade Tribunal. This motion was heard by the Federal Court together with Pier 1's motion for a stay of the CBSA's decision.

[14] For reasons cited 2018 FC 963, the Federal Court allowed the motion brought by the Minister and struck out the application for judicial review on the ground that the Federal Court lacked jurisdiction. The Federal Court also ordered that the "present proceeding is transferred to the Federal Court of Appeal in order for that Court to consider Pier 1's motion for a stay".

[15] Pier 1 now appeals from the order of the Federal Court which struck its application for judicial review. It also continues to seek an order staying the determination by the CBSA that goods imported into Canada by Pier 1 should be valued pursuant to the deductive value method.

[16] The request for a stay raises a procedural issue, one determined by a Judge of this Court on an interlocutory basis. The Judge concluded, correctly in my view, that the Federal Court erred by ordering that the motion for a stay be transferred to this Court. This is so because this Court has previously determined that a motion is not "a proceeding" that can be transferred pursuant to Rule 49 of the *Federal Courts Rules* (*Gholipour v. Canada (Attorney General)*, 2017 FCA 99, at paragraph 8). As well, once the application for judicial review was struck, there was no extant proceeding to transfer.

[17] This said, as a practical matter, and consistent with the principle set out in Rule 3, the Judge ordered that the motion for a stay be heard by this Court at the same time it heard the appeal from the order striking the application for judicial review.

[18] Accordingly, the issues before the Court are:

1. Did the Federal Court err by concluding that it did not have jurisdiction over the application?

2. How should the Court dispose of the motion for a stay?

Did the Federal Court err by concluding that it did not have jurisdiction over the application?

[19] Section 18.5 of the *Federal Courts Act* provides that decisions of boards, commissions or tribunals are not subject to judicial review whenever an Act of Parliament provides that such decisions may be appealed to, amongst other listed entities, this Court. It follows that an application for judicial review brought in the Federal Court is fatally flawed, and liable to be struck out, if the Federal Court is precluded by section 18.5 from hearing the application (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557, at paragraph 66).

[20] After reviewing the decision of this Court in *JP Morgan*, the Federal Court began its analysis by correctly directing itself to the test for striking an application for judicial review on a preliminary basis, noting that the test is a stringent one (reasons, paragraph 20).

[21] Thereafter, the Court reviewed the legislative mechanisms available to challenge assessments of customs duty (reasons, paragraphs 22 and 23). The Federal Court noted the submission of Pier 1 that it was not seeking to challenge the detailed adjustment statements issued by the CBSA assessing duties. Rather, Pier 1 submitted that it sought declaratory relief

that would prevent the CBSA from requiring Pier 1 to implement the deductive valuation method (reasons, paragraph 27).

[22] The Federal Court then reasoned:

> [28] It is obvious that the aim of Pier 1's application for judicial review is to establish which method must be used to calculate the value for duty of the goods it imports. Even if the wording of the declarations sought refers to the 2003 settlement agreement, that agreement pertained to the choice of method. The choice of method is squarely within the jurisdiction of the dispute resolution mechanisms set forth in the Act. The declarations that Pier 1 wants this Court to issue would effectively determine the outcome of proceedings governed by the Act. They would amount to a direction regarding the basis on which a [detailed adjustment statement] can be established. They are an attempt to restrain determinations to be made under the Act, contrary to the privative clauses of sections 58(3), 59(6) and 62.
>
> [29] Moreover, there is nothing preventing the CBSA President or the [Canadian International Trade Tribunal] from considering the effect of the settlement agreement on the choice of method for the calculation of the value for duty. If, as the Federal Court of Appeal decided in [*Fritz Marketing Inc. v. Canada*, 2009 FCA 62, [2009] 4 F.C.R. 314] the [Canadian International Trade Tribunal] can consider Charter issues, it is difficult to understand why it could not consider a contract. Generally speaking, adjudicative bodies such as the [Canadian International Trade Tribunal] (and the CBSA President exercising the powers under section 60 of the Act) may consider any legal question that is necessary to determine the issue that falls under their jurisdiction.
>
> …
>
> [35] Pier 1 also argues that an application should not be struck on motion unless the lack of jurisdiction is "clear" or "certain" (*JP Morgan* at para 91). But I have come to the conclusion that our Court lacks jurisdiction. The statutory scheme and the authorities that I have referred to leave me with no doubt. This is not a case where jurisdiction (or the availability of an alternate adequate remedy) depends on complex findings of fact or speculation as to future events. Moreover, as a matter of judicial economy, it makes no sense to allow an application to go forward where the Court does not have jurisdiction to entertain it.
>
> (underlining added)

On this basis the Court ordered that the application be struck out.

[23] On this appeal, Pier 1 asserts a number of errors on the part of the Federal Court. It submits that the Court erred by:

i. Misapprehending the facts and the remedy sought by Pier 1;

ii. Concluding that the Canadian International Trade Tribunal has jurisdiction to hear Pier 1's claim;

iii. Concluding that the privative clauses found in the *Customs Act* deprive the Federal Court of jurisdiction; and

iv. Proceeding on a wrong principle of law by ignoring the jurisprudence of this Court to the effect that a motion to strike should be granted only in the clearest of cases.

[24] In my view, Pier 1 has failed to demonstrate any error on the part of the Federal Court that warrants intervention. I reach this conclusion for the following reasons.

[25] I begin by rejecting the notion that the Federal Court erred in principle by ignoring the jurisprudence of this Court to the effect that a motion to strike should be granted only in the clearest of cases and by failing to consider whether it would be preferable to defer to the "trial judge" in order to allow the parties to complete their evidence and arguments. Pier 1 argues that the "full evidentiary record presented at trial [*sic*] will be of assistance to the trial judge [*sic*] in assessing the CBSA's conduct and in ascertaining the scope of the Settlement Agreement." (memorandum of fact and law, paragraph 58). The Federal Court expressly directed itself to the stringency of the test to be applied on a motion to strike (reasons, paragraph 20).

[26] While Pier 1 complains that the Federal Court ignored the direction of this Court in *Apotex Inc. v. Canada (Governor in Council)* 2007 FCA 374, 370 N.R. 336, at paragraph 16, that a notice of application should only be struck out where it is "so clearly improper as to be bereft of any chance of success", this is the same test articulated in *JP Morgan* (at paragraph 47) and the test applied by the Federal Court (reasons, paragraph 20).

[27] As to the appropriateness of not allowing the issue of jurisdiction to be considered by the Court at the time it decided the application for judicial review, at paragraph 35 of its reasons the Court noted that this is not a case where jurisdiction depended "on complex findings of fact or speculation as to future events." so as to make it advisable to defer consideration of the issue of jurisdiction. I agree. There was no reason to defer consideration of the issue of jurisdiction.

[28] I also reject the notion that the Federal Court misapprehended either the facts or the remedy sought by Pier 1.

[29] Pier 1 argues that the Federal Court's error is demonstrated at paragraph 27 of its reasons (set out above). At paragraph 27, the Federal Court omitted the words "from July 10, 2017" contained in Pier 1's notice of application. Pier 1 sought a declaration that the Minister could not compel use of the deductive valuation method "from July 17, 2017 and for the future". The significance of this omission, Pier 1 argues, is that the Federal Court failed to appreciate that Pier 1's position was that the settlement agreement precluded the CBSA from forcing Pier 1 to "*immediately* change its valuation method until it has been definitively determined that the [deductive valuation method] has become the 'only viable' one." (memorandum of fact and law,

paragraph 30, emphasis in the original). Pier 1 submits that what it sought in its application is a temporary stay of CBSA's decision to require the immediate implementation of the deductive valuation method.

[30] In my respectful view, Pier 1's submission is contradicted by the language of its notice of application for judicial review.

[31] The notice of application describes the decision under review to be a matter raised by the CBSA:

> … by way of [a] letter dated July 10, 2017, and confirmed by way of further correspondence on October 5, 2017, whereby the CBSA held that, from July 10, 2017 and for the future, the Applicant […] must use the "deductive value method" (the "DVM") described in section 51 of the Customs Act […] to determine the value for duty of its goods imported to Canada …
>
> (underlining added, emphasis removed)

[32] The relief sought by Pier 1 includes a declaration that "the Minister cannot require Pier 1 to apply the [deductive valuation method] from July 10, 2017 and for the future".

[33] Nothing in the notice of application specifies that the relief requested is only for the period from July 10, 2017 until a final determination is made about the appropriateness of the deductive valuation method. To the contrary, the application speaks of "from July 10, 2017 and for the future" and seeks a declaration that "for the future" the Minister cannot require Pier 1 to use the deductive valuation method.

[34] Contrary to Pier 1's submission, the Federal Court's conclusion that the aim of Pier 1's application is to establish which method must be used to calculate the value for duty is amply supported by the notice of application. To illustrate, the grounds for the application include the following:

> 17. On July 10, 2017 (as confirmed on October 5, 2017) the CBSA stated its Position whereby, all future imports, goods imported by Pier 1 to Canada shall be valued using the DVM.
>
> 18. The basis for the CBSA's conclusions in the Position are [*sic*] incorrect because the Settlement Agreement is a valid contract and is binding on the CBSA.
>
> 19. As such, the CBSA cannot require Pier 1 to apply the DVM to its imports since the CVM or a modified version thereof continues to be an appropriate method of valuing such imports to Canada.
>
> …
>
> 22. Moreover, the nature of Pier 1's commercial operations, including its import of goods to Canada, are such that applying the DVM is [*sic*] a practical impossibility, rendering the CVM (or a modified version thereof) is the most appropriate and applicable method for valuing Pier 1's imports to Canada.
>
> …
>
> 25. The order sought by Pier 1 should be granted for the following reasons:
>
> (a) the CBSA has failed to abide by the terms of the Settlement Agreement, which is a valid and binding contract that requires the CBSA to first seek to apply any other method of valuing Pier 1's imports to Canada before requiring Pier 1 to apply the DVM; and
>
> (b) the DVM is clearly not the only viable method to determine the value for duty of Pier 1's imports to Canada because the modified CVM has been successfully applied by Pier 1 since at least 1999, and the CBSA continued to apply it for the Verification Period up until July 10, 2017.
>
> …
>
> 26. The applicable standard of review in this case is correctness.

[35] The grounds relied upon by Pier 1 show that Pier 1 requests permanent relief as to the valuation method to be applied to its imported goods.

[36] Finally on this point, during oral argument Pier 1's counsel referred to the record of the oral hearing before the Federal Court to submit that Pier 1 was seeking a temporary stay of the requirement that it immediately implement the deductive valuation method. None of the passages referenced by counsel establish any palpable and overriding misapprehension by the Federal Court about the relief sought by Pier 1.

[37] I also reject Pier 1's submissions that the Federal Court erred by concluding that the Canadian International Trade Tribunal has jurisdiction to hear Pier 1's claim and that, as a consequence of this finding, further erred by finding that section 18.5 of the *Federal Courts Act* ousted the jurisdiction of the Federal Court.

[38] Pier 1's submission is premised on its assertion that what is at issue in its application is the conduct of the CBSA. While Pier 1 concedes that the Canadian International Trade Tribunal is the only proper forum to determine the propriety of the detailed adjustment statements, it says that as a statutory tribunal the Canadian International Trade Tribunal "is not empowered to take into consideration or to control the CBSA's conduct" (memorandum of fact and law, paragraph 43, footnotes omitted).

[39] Again, however, a review of Pier 1's notice of application does not support the submission that the conduct of the CBSA is at issue. What is at issue is the proper method to

value the goods imported by Pier 1. Once the application is correctly characterized, the Federal Court was correct in concluding that section 18.5 of the *Federal Courts Act* deprives it of jurisdiction.

[40] To the extent that the settlement agreement is relevant to the issue of valuation, a point on which I express no view, the Canadian International Trade Tribunal possesses jurisdiction and ample power to interpret the settlement agreement (subsection 67(1) of the *Customs Act*; *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp), sections 16 and 17).

[41] It follows that I would dismiss the appeal from the order striking Pier 1's notice of application.

How should this Court dispose of the motion for a stay?

[42] Section 44 of the *Federal Courts Act* confers jurisdiction on the Federal Court and this Court to grant injunctive relief against federal boards, commissions and tribunals. In the view of the Federal Court it was appropriate to transfer the motion for a stay to this Court because Pier 1's application "is aimed at the position that CBSA would take in the issuance of [detailed adjustment statements] internal appeals and eventual [Canadian International Trade Tribunal] proceedings." (reasons, paragraph 55) and, pursuant to paragraph 28(1)(*e*) of the *Federal Courts Act*, this Court exercises supervisory jurisdiction over the Canadian International Trade Tribunal.

[43] The difficulty, however, is that no proceedings are currently before the Canadian International Trade Tribunal with respect to this dispute and it is not certain that any proceeding

will be commenced. Nor does any proceeding exist either in this Court or the Federal Court that would support a motion for interim or interlocutory relief. In this circumstance, I see no basis on which the Court can or should issue injunctive relief as a court of first instance.

[44] It follows that I would dismiss the motion for a stay.

Conclusion

[45] For these reasons I would dismiss the appeal with costs, and would dismiss the motion for a stay.

"Eleanor R. Dawson"
J.A.

"I agree.
D. G. Near J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Joel Scheuerman Lauzanne Bernard Normand	FOR THE APPELLANT
Louis Sébastien	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BCF LLP Montréal, Québec	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT