

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231214

Docket: A-264-22

Citation: 2023 FCA 243

**CORAM: BOIVIN J.A.
LASKIN J.A.
ROUSSEL J.A.**

BETWEEN:

MICHAELS OF CANADA, ULC

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on December 14, 2023.
Judgment delivered from the Bench at Toronto, Ontario, on December 14, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

BOIVIN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 14, 2022).

BOIVIN J.A.

[1] This is an appeal from an Order of Fuhrer J. of the Federal Court (the motion judge), dated November 2, 2022 (2022 FC 1498), striking out the Notice of Application filed by the appellant, Michaels of Canada, ULC (Michaels), on the ground that the Federal Court lacks jurisdiction to judicially review a final report issued by the Canada Border Services Agency (CBSA) in the context of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp). The motion judge

found that the Federal Court lacked jurisdiction to hear Michaels application or alternatively, that the doctrine of exhaustion barred the application.

[2] An order made on a motion to strike is of a discretionary nature. To intervene, this Court must detect an error of law or a palpable and overriding error on a question of fact or of mixed fact and law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[3] The appellant contends that the motion judge erred in determining that the application was premature and that the Federal Court's jurisdiction was ousted by the administrative review system envisaged by Parliament in the Act.

[4] We disagree.

[5] The motion judge identified the correct legal test to be applied on a motion to strike—the absence of any prospect of success—and applied the relevant jurisprudence.

[6] We are of the view that the motion judge did not err in finding that Michaels' application is premature due to its failure to avail itself of the multiple levels of administrative review provided for in the Act. We also are not persuaded that the administrative decision-maker—*i.e.*, the President of the CBSA or the CITT—cannot address and determine the issues raised by Michaels. More particularly, we remain unconvinced that *Jockey Canada Company v. President of the CBSA*, 2012 CanLII 85177 (AP-2011-008) (CITT) and other cases referred to by the appellant in oral argument stand for the proposition that the CITT has definitively foreclosed

consideration of issues akin to the ones raised by Michaels because they would allegedly fall outside of the scope of the statutory appeals. Further, in this case, there are no exceptional circumstances that meet the high threshold for bypassing the administrative process intended by Parliament (*C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paras 4, 28–29, 33, 39–40, 45 (*C.B. Powell*)).

[7] Ultimately, we agree with the respondent that the review process under the Act will result in a decision to maintain the additional imposition of duties on Michaels' imports or not. If the President of the CBSA—or the CITT on appeal—decides that no additional duties should have been imposed, the dispute will effectively be resolved and Michaels will obtain the relief it seeks. The appellant must thus pursue the debate in the administrative forum.

[8] The failure to exhaust an adequate alternative remedy is a fatal flaw to an application for judicial review (*C.B. Powell* at paras 30–33; *Skechers USA Canada Inc. v. Canada (Border Services Agency)*, 2023 FC 1455 at paras 26–28). Given our conclusion on prematurity, we consider it unnecessary to comment on the other issues raised.

[9] Despite able submissions by counsel, the appeal will be dismissed with costs to the respondent, in the all-inclusive amount of \$4,000.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-264-22

STYLE OF CAUSE: MICHAELS OF CANADA, ULC
v. ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: DECEMBER 14, 2023

**REASONS FOR JUDGMENT OF THE COURT
BY:** BOIVIN J.A.
LASKIN J.A.
ROUSSEL J.A.

DELIVERED FROM THE BENCH BY: BOIVIN J.A.

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