

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250102

Docket: A-312-23

Citation: 2025 FCA 1

**CORAM: WEBB J.A.
RENNIE J.A.
BIRINGER J.A.**

BETWEEN:

SKECHERS USA CANADA, INC.

Appellant

and

CANADA BORDER SERVICES AGENCY

Respondent

Heard at Toronto, Ontario, on December 19, 2024.

Judgment delivered at Ottawa, Ontario, on January 2, 2025.

REASONS FOR JUDGMENT BY:

BIRINGER J.A.

CONCURRED IN BY:

**WEBB J.A.
RENNIE J.A.**

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] This is an appeal from an order of the Federal Court (*per* Elliott J.) (2023 FC 1455) upholding the decision of Associate Judge Milczynski (2021 FC 879) to grant the Canada Border Service Agency's (CBSA) motion to strike Skechers' notice of application. In the notice of application, Skechers sought judicial review of four CBSA decisions.

[2] The CBSA, in the course of compliance verification under the *Customs Act*, R.S.C 1985, c. 1 (2nd Supp.), issued an interim report. It proposed that Skechers correct its declarations of the value for duty of imported goods to include commissions paid, including for the prior four years. Skechers disputed that the commissions were dutiable and asked in the alternative for the corrections to be made on a going forward basis only. The CBSA denied the request, confirming in its final report that Skechers was required to make the corrections, including for the prior four years, and remit additional duties.

[3] Skechers made three further requests: rescission of the final report, an indefinite extension of the time for making corrections to its declarations, and a waiver or cancellation of penalties and interest pending resolution of the disputed duties. At the time, Skechers had not made corrections to its declarations and the CBSA had not made a re-determination of duties or determined penalties and interest payable. A detailed adjustment statement (DAS) had not yet been issued. The CBSA denied all of the requests.

[4] Skechers sought judicial review of the CBSA's refusals, arguing as it does on this appeal that the CBSA had improperly exercised its discretion. The Associate Judge struck Skechers' notice of application on the grounds that the refusals were not decisions amenable to judicial review and the comprehensive statutory appeal process in the *Customs Act*, which Skechers had yet to pursue, ousted the Court's jurisdiction. The Federal Court Judge on appeal agreed. In my view, the Federal Court made no reviewable error. I am in substantial agreement with the reasons given in both decisions.

[5] The Associate Judge identified the correct legal test to be applied on a motion to strike—that the matter be bereft of any possibility of success—and applied the relevant jurisprudence.

[6] The Associate Judge found, and the Federal Court Judge on appeal confirmed, that the refusals, based on their “essential character”, did not trigger a right to judicial review. I agree.

[7] Skechers did not have a statutory entitlement to be relieved from the assessment of duties and the CBSA did not have the discretion to exempt Skechers from the relevant provisions of the *Customs Act: Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 at paras. 10-11; *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at paras. 28 and 41. Neither section 32.2 (importer correction to a declaration) nor subsection 59(1) (CBSA re-determinations, including of value for duty) is a discretionary provision. Also, Skechers had no statutory right to a rescission of the final report or an indefinite extension of time to correct its declarations.

[8] Skechers claims that its request for a waiver of penalties and interest was made pursuant to subsection 3.3(1), although this was not indicated in the request. Subsection 3.3(1) (waiver or cancellation of penalty or interest) is a discretionary provision. Skechers’ request was for a waiver of all penalties and interest pending resolution of the disputed duties “including any legal proceedings”. Given the blanket and indeterminate nature of Skechers’ requested relief and the context in which the request was made, we see no error warranting the intervention of this Court in the Federal Court’s conclusion regarding this request.

[9] Further, the Associate Judge concluded and the Federal Court Judge on appeal agreed that Skechers' requests related to matters which Parliament intended to be determined within the comprehensive and multi-level re-determination and appeal process established under the *Customs Act*: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R 557 at paras. 49-50; *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 396. The appellant's attempt to bypass this process was fatal to their application for judicial review: *Michaels of Canada, ULC v. Canada (Attorney General)*, 2023 FCA 243 at para. 8 citing *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R 332 at paras. 30-33.

[10] After a re-determination has occurred (under either subsection 59(1) or following a section 32.2 correction), the CBSA issues a detailed adjustment statement reflecting duties, penalties and interest payable. An importer may request a re-determination of the DAS by the President of the CBSA, then appeal that re-determination to the Canadian International Trade Tribunal and finally, to this Court on a question of law. While at the time of its requests Skechers had no immediate right to recourse under the statutory appeal process, this reflects the prematurity of their challenge and not a lack of options provided under the *Customs Act*.

[11] I would dismiss the appeal, with costs to the respondent in the all-inclusive amount of \$4,000.

“Monica Biringer”

J.A.

“I agree.

Wyman W. Webb J.A.”

“I agree.

Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-312-23

STYLE OF CAUSE: SKECHERS USA CANADA, INC.
v. CANADA BORDER
SERVICES AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 19, 2024

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

DATED: JANUARY 2, 2025

APPEARANCES:

Peter Swanstrom
Thang Trieu

FOR THE APPELLANT

Roger Flaim
Zachary Lanys

FOR THE RESPONDENT

SOLICITORS OF RECORD:

KPMG Law LLP
Toronto, Ontario

FOR THE APPELLANT

Shalene Curtis-Micallef
Deputy Attorney General of Canada

FOR THE RESPONDENT