

Date: 20081121

Docket: T-478-08

Citation: 2008 FC 1304

Ottawa, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PHILIP ANISMAN

Applicant

and

**CANADA BORDER SERVICES AGENCY
and THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Respondents seeking an Order dismissing the underlying application for judicial review on the ground that this Court lacks jurisdiction. The Applicant has challenged the correctness of a decision made by the Canada Border Services Agency (CBSA) to collect a Liquor Control Board of Ontario (LCBO) mark-up of \$537.13 on three bottles of wine he and his wife imported from the United States on January 7, 2007. The Respondents argue that in collecting a mark-up the CBSA was acting as an agent of the LCBO and applying provincial law. The impugned decision, they say, was therefore not one taken by a federal board, commission or other

tribunal as that term is used in s. 18 of the *Federal Courts Act*, R.S., 1985, c. F-7 to define this Court's jurisdiction.

[2] The Applicant has countered the Respondents' motion with a cross-motion arguing that the CBSA was not authorized by federal law to act as an agent of the LCBO. He has also asked that the Court determine the merits of this claim to a refund of the LCBO mark-up and, in effect, he is thereby seeking a form of summary judgment.

[3] I must be mindful of the admonition of the Court of Appeal in *David Bull Laboratories (Can.) v. Pharmacia Inc.*, [1995] 1 F.C. 588, [1995] F.C.J. No. 1629 (C.A.) that a motion to summarily dismiss an application for judicial review is only to be allowed in exceptional circumstances and where the application is bereft of any possibility of success: also see the *John McKellar Charitable Foundation v. Canada (Revenue Agency)*, 2006 FC 733, 46 Admin. L.R. (4th) 249 at paras. 10-14. Where such a motion is brought on the strength of a clearly defined and readily resolvable jurisdictional issue, this Court may, however, be inclined to entertain it.

[4] There is no question that in calculating and collecting the LCBO mark-up on the Applicant's wine, the CBSA was purporting to act as an agent of the LCBO under provincial law. That is the clear intent of s. 3.1 of the *Liquor Control Act*, R.S.O. 1990, c. L. 18 which states:

3.1 The Board may enter into an agreement with the Government of Canada, as represented by the Minister of National Revenue, in relation to liquor referred to in that

3.1 La Régie peut conclure avec le gouvernement du Canada, représenté par le ministre du Revenu national, au sujet des boissons alcooliques qui y sont précisées et qui sont

agreement that is brought into Ontario from any place outside Canada,

introduites en Ontario en provenance d'un endroit situé hors du Canada, un accord qui :

(a) appointing officers, as defined in subsection 2 (1) of the Customs Act (Canada), employed at customs offices located in Ontario, as agents of the Board for the purposes of,

a) désigne à titre de mandataires de la Régie les agents, au sens du paragraphe 2 (1) de la Loi sur les douanes (Canada), qui sont employés dans les bureaux de douane situés en Ontario, aux fins suivantes :

(i) accepting, on behalf of the Board, liquor brought into Ontario,

(i) la réception, pour le compte de la Régie, des boissons alcooliques introduites en Ontario,

(ii) collecting, on behalf of the Board, the mark-up set by the Board from time to time in relation to that liquor,

(ii) la perception, pour le compte de la Régie, de la marge bénéficiaire sur ces boissons alcooliques que fixe de temps à autre la Régie,

(iii) selling and releasing, on behalf of the Board, to the person bringing the liquor into Ontario, on the payment of the mark-up, the liquor in relation to which the mark-up is paid, and

(iii) la vente et la remise, pour le compte de la Régie, à la personne qui introduit les boissons alcooliques en Ontario, sur paiement de la marge bénéficiaire, des boissons alcooliques à l'égard desquelles la marge bénéficiaire est acquittée,

(iv) detaining the

(iv) la retenue des

liquor on behalf of the Board and releasing it to the Board where the mark-up is not paid by the person bringing the liquor into Ontario;

boissons alcooliques pour le compte de la Régie et leur remise à cette dernière lorsque la personne qui les introduit en Ontario n'acquitte pas la marge bénéficiaire;

(b) authorizing, in such circumstances and on such conditions as may be specified in the agreement, the payment, on behalf of the Board, to a person who has paid the mark-up, of a refund of any or all of the mark-up collected in accordance with subclause (a) (ii) and the agreement;

b) autorise, dans les circonstances et aux conditions précisées dans l'accord, le paiement à la personne qui a acquitté la marge bénéficiaire, pour le compte de la Régie, du remboursement total ou partiel de la marge bénéficiaire perçue conformément au sous-alinéa a) (ii) et à l'accord;

(c) requiring, in such manner and at such time or times as may be specified in the agreement, the remittance to the Board of the mark-up collected in accordance with subclause (a) (ii) and the agreement;

c) exige, de la manière et aux moments précisés dans l'accord, la remise à la Régie de la marge bénéficiaire perçue conformément au sous-alinéa a) (ii) et à l'accord;

(d) respecting forms to be used in relation to liquor brought into Ontario; and

d) traite des formules à utiliser pour les boissons alcooliques introduites en Ontario;

(e) respecting any other matter in relation to liquor brought into Ontario.
1992, c. 28, s. 2.

e) traite de toute autre question relative aux boissons alcooliques introduites en Ontario.
1992, chap. 28, art. 2.

In accordance with the above statutory provision, an agreement (Agreement) was reached between the Government of Canada (represented by the Minister of National Revenue) and the LCBO on January 19, 1993. The relevant articles to that Agreement are set out below:

6. The purpose of this Agreement is to confer responsibility on the Minister of National Revenue for the collection, on behalf of the Board, of the markup on a specified quantity of liquor that an individual brings, or causes to be brought, into Ontario from outside Canada.

[...]

8. Where the markup is in accordance with Canada's international obligations and Canada collects the tax imposed on the liquor under Division III of Part IX of the *Excise Tax Act*, Canada will, on behalf of the Board, at its customs offices in Ontario, with respect to the quantity of liquor set out in Annex A that is brought, or caused to be brought, into Ontario by an individual,
 - a) accept the consignment of the liquor from the individual;
 - b) carry out the sale of the liquor from the Board to the individual;
 - c) collect the markup on the liquor;
 - d) detain the liquor, where the markup is not paid;
 - e) release the liquor to the individual upon payment of the markup.

The Board will notify Canada of any change in the quantity of liquor set out in Annex A. Any such change will take effect on the date indicated in the notice, or two calendar weeks after the notice is received, whichever is later.

[...]

11. Canada's responsibilities under article 8 commence on the latest of

- (a) February 1, 1993,
 - (b) the date on which legislation authorizing Canada to carry out the provisions of article 8 comes into force, and
 - (c) the effective date of the by-law.
12. The markup to be collected by Canada will be calculated in accordance with the Board by-law which may be amended from time to time by the Board.

The by-law will be made available to Canada at all times. Canada may disclose such by-law to anyone, at Canada's discretion.

[...]

14. An officer as defined in section 2 of the *Customs Act* is authorized to carry out the provisions of article 8, pursuant to paragraph 3.1(a) of the *Liquor Control Act*.

[5] An LCBO by-law created in accordance with article 12 above provides for a mark-up on the value of any wine imported into Ontario by an individual.

[6] While the Applicant concedes that the CBSA is authorized to act as an agent for the LCBO under provincial law, he contends that there is no equivalent authority under federal law. In the result, he says that the CBSA acted unlawfully and without authority when it demanded and collected a mark-up on his wine.

[7] There are a number of provisions in federal legislation which now authorize federal/provincial agreements of the sort entered into here. The provision that appears to me to be

the most apt is ss. 13(2) of the *Canada Border Services Agency Act*, 2005, c. 38, C-1.4 which provides:

- | | |
|--|--|
| <p>13. (2) The Agency may, for the purposes of carrying out its mandate,</p> <p>(a) enter into an arrangement with a foreign state or an international organization; or</p> <p>(b) enter into an agreement or arrangement with the government of a province, a department or agency of the Government of Canada or any person or organization.</p> | <p>13. (2) The Agency may, for the purposes of carrying out its mandate,</p> <p>(a) enter into an arrangement with a foreign state or an international organization; or</p> <p>(b) enter into an agreement or arrangement with the government of a province, a department or agency of the Government of Canada or any person or organization.</p> |
|--|--|

The above provision is consistent with s. 5 of the CBSA Act which authorizes the CBSA to implement agreements with foreign states, provincial governments or other public bodies performing a function of government either in a foreign state or in Canada to carry out activities, to promote services or to administer a tax or a program. These provisions are sufficient to now authorize the CBSA to enter into a mark-up agreement with the LCBO of the sort that is in issue in this proceeding.

[8] The problem is that it is not entirely clear to me whether in 1993 there was any statutory authority for the federal government to enter into the Agreement as stipulated by Article 11 therein.

It is apparent that the federal government at the time proceeded to execute the Agreement on the strength of s. 7 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*, R.S.C. 1985, c. F-8 (Fiscal Arrangements Act), which provides for federal/provincial agreements for the collection of a tax. Subsequent authority has, however, held that the collection of a provincial mark-up on liquor is not a tax: see *DFS Ventures Inc. v. The Manitoba Liquor Control Commission et al.*, 2001 MBQB 245, 159 Man. R. (2d) 55 at paras. 57 to 61, aff'd., 2003 MBCA 33, 173 Man. R. (2d) 76 (C.A.). As far as I can tell from the supplementary submissions of the parties, there was no other federal statutory authority in place in 1993 to support the Agreement. The current legislative authority would provide sufficient support today but those provisions all appear to post-date the Agreement. It is at least debatable whether the current legislative authority could give life to an agreement executed some years before. That may be the effect of Article 11 of the Agreement which provides that “Canada’s responsibility under article 8 commences on the latest of... (b) the date on which legislation authorizing Canada to carry out the provisions of article 8 comes into force”. That article may be legally sufficient to authorize the Agreement on the strength of s. 5 and s. 13 of the CBSA Act and their statutory antecedents but because neither party addressed this point in their submissions to the Court, I am not prepared to resolve the motions on that basis. In short, I do not accept that the *David Bull* test has been met with respect to this issue.

[9] Because the Applicant has brought a motion effectively seeking judgment on the merits for the return of the monies paid, I will, nevertheless, deal with the issue of whether the CBSA decision

to collect a mark-up from the Applicant falls within the scope of this Court's jurisdiction as fixed by s. 18 of the *Federal Courts Act*. On the undisputed facts of this case, I do not believe that it does.

[10] While federal law provides for the CBSA to act on behalf of Ontario in calculating and collecting a liquor mark-up, it is clear that the statutory foundation for doing so is found in the *Liquor Control Act*, above. That is the statutory source for the collection and remittance activity carried out by the CBSA as agent for the LCBO. That is also the statutory basis for the LCBO to enter into an agreement under which the formula to calculate the mark-up is fixed.

[11] It is obvious that the resolution of the substantive arguments in this case would require this Court to interpret the provisions of provincial law and the relevant contractual instruments that establish and define the right to collect the LCBO mark-up. In my view, it is not the role of this Court to interpret and enforce provincial law all the more so where, as here, neither the Province nor the LCBO is a party to the proceeding. While the Applicant argues that the Province could intervene that is not the point. If the interpretation and application of provincial law is at the root of a proceeding, the Province or its interested agencies should be involved as of right and the appropriate forum for hearing the case on the merits is the Superior Court of the Province. In short, this is not a task which falls within the jurisdictional confines of s. 18 of the *Federal Courts Act*. For this proposition, I rely upon the analysis of Justice Danièle Tremblay-Lamer in *Canadian Restaurant and Foodservices Assn. v. Canadian Dairy Commission*, 2001 FCT 34, 200 F.T.R. 138 at paras. 46-50:

46 As noted at the outset the only issue to be determined is whether or not this Court has jurisdiction to review the exercise of

powers by the CMSMC. Pursuant to subsection 18.1(3) of the Federal Court Act, on application for judicial review, this Court may:

- | | |
|--|--|
| <p>(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</p> | <p>a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;</p> |
| <p>(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</p> | <p>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.</p> |

47 Thus, this Court will have jurisdiction if the CMSMC is a "federal board, commission or other tribunal" as defined by subsection 2(1) of the Federal Court Act:

- | | |
|---|---|
| <p>"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.</p> | <p>"office fédéral" Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.</p> |
|---|---|

48 It is irrelevant for the purpose of determining the jurisdiction of this Court, if the CMSMC exercised policy-making functions or other functions, as stated by the authors Brown and Evans:

In the result, the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown.

49 The words in the definition of "federal board, commission or other tribunal" suggest certain essential components.

50 The body will be within the prima facie jurisdiction of the Federal Court by virtue of it having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament. Further, it is nonetheless excluded from the jurisdiction of the Federal Court by being a body constituted or established by or under a law of a province.

[Footnotes omitted]

Also see *Cree Regional Authority v. Canada (Federal Administrator)*, [1991] 3 F.C. 533, 81 D.L.R. (4th) 659 (C.A.) at para. 34.

[12] I also do not agree with the Applicant that the determination of this Court's jurisdiction over a substantive matter involving only provincial law is particularly nuanced. If as stated in *Canadian Restaurant*, above, the source of a decision-maker's authority is provincial law, that will usually be enough to oust the jurisdiction of this Court whether or not the decision-maker for other purposes is a creature, in whole or in part, of federal law.

Conclusion

[13] The Applicant's argument that the Agreement is not legally valid because it is not supported by federal legislation requires further and better submissions and argument from the parties. That issue and its potential legal ramifications, if any, are the only points which remain in issue on this application. I would add that, even if there was and continues to be an absence of statutory authority for the federal government to act as an agent for the Province in the collection of a liquor mark-up, a question still remains as to whether that would make any difference to the return of the Applicant's money. If the money was lawfully payable to the Province (an assumption that this Court would have to make) the fact that the party collecting it may have lacked the authority to do so may not lead to a financial recovery by the Applicant. This, too, is an issue that the parties have failed to address in argument.

[14] In the result, both the Respondents' motion to dismiss the Applicant's application for judicial review on jurisdictional grounds and the Applicant's motion for judgment are dismissed. Because of the divided success on these motions, there will be no costs awarded to either party.

ORDER

THIS COURT ORDERS that the Respondents' motion and the Applicant's cross-motion are dismissed without costs payable to the either party.

“ R. L. Barnes ”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-478-08

STYLE OF CAUSE: Anisman
v.
CBSA et al.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 16, 2008

**REASONS FOR ORDER
AND ORDER BY:** Mr. Justice Barnes

DATED: November 21, 2008

APPEARANCES:

Mr. Philip Anisman
(416) 363-4200

SELF-REPRESENTED

Mr. Christopher Parke
(416) 973-0065

FOR THE RESPONDENTS

Ms. Maria Vujnovic
(416) 973-3304

SOLICITORS OF RECORD:

Mr. Philip Anisman
Toronto, ON

SELF-REPRESENTED

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENTS