Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090303

Docket: A-361-08

Citation: 2009 FCA 62

CORAM: **DESJARDINS J.A.**
NADON J.A.
SHARLOW J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

FRITZ MARKETING INC.

Respondent

Heard at Ottawa, Ontario, on January 21, 2009.

Judgment delivered at Ottawa, Ontario, on March 3, 2009.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DESJARDINS J.A.
NADON J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This case raises an issue as to whether the Federal Court has the jurisdiction to set aside a Detailed Adjustment Statement issued by the Canada Border Services Agency pursuant to the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). If there is jurisdiction, the question is whether the Detailed Adjustment Statements in issue in this case should be set aside on the basis that they were issued in reliance on information obtained upon the execution of a search warrant that was found in subsequent criminal proceedings to have violated section 8 of the *Canadian Charter of Rights and Freedoms*. The reasons for the order under appeal are reported as *Fritz Marketing Inc. v. Canada*, 2008 FC 703, 329 F.T.R. 221, 174 C.R.R. (2d) 74.

Statutory Framework

[2] To understand the issues that arise in this case, it is necessary to understand certain elements of the scheme of the *Customs Act* relating to the determination and collection of import duties. The Canada Border Services Agency (the "Agency") is responsible for the administration of this statutory scheme.

[3] Import duties are determined 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 imported goods as determined under sections 10 and 11 of 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* (sections 44 to 72.1). In this case, the only element of the computation in issue is the value for duty, which is the net cost of the imported goods.

[4] An importer of goods into Canada is required to report the importation pursuant to Part II of the *Customs Act* (sections 11 to 43). Section 32 of the *Customs Act* requires the importer to account for the goods in the prescribed manner and pay the required duties.

[5] The Agency has the authority under subsection 58(1) of the *Customs Act* to determine the value for duty of imported goods. However, if that determination is not made by the Agency, the determination is deemed by subsection 58(2) to be as declared by the importer. Thus, in the absence of an initial determination by the Agency of the value for duty of imported goods, the importer's declaration is treated as the Agency's determination.

[6] Pursuant to subsection 32.2(2) of the *Customs Act*, an importer who has reason to believe that its declaration of the value for duty is incorrect must submit a correction within a specified time and pay any resulting deficiency in the duties payable. Subsection 32(3) provides that, for the purposes of the *Customs Act*, such a correction is treated as a re-determination by the Agency under paragraph 59(1)(*a*) of the *Customs Act*. The duty to make corrections expires after four years (subsection 32.2(4) of the *Customs Act*).

[7] Pursuant to paragraph 59(1)(*a*) of the *Customs Act*, the Agency may make a re-determination of the value for duty of imported goods, but it must do so within four years after the date of the initial determination. Further re-determinations are permitted under paragraph 59(1)(*b*), subject in some cases to further time limits.

[8] Subsection 59(2) of the *Customs Act* provides that an importer is entitled to notice of any determination under subsection 58(1) or any re-determination under subsection 59(1). The form of notification is the "Detailed Adjustment Statement" (also called a "DAS"). If the determination or re-determination changes the amount of the duties payable, the importer must pay the deficiency or is entitled to a refund, as the case may be. For example, the Detailed Adjustment Statements in issue in this case are notices to the importer of goods that the Agency has determined that the value for duty of certain goods is higher than the amount declared by the importer, and that the duties payable under the *Customs Act* are increased accordingly.

[9] An importer who receives a Detailed Adjustment Statement may request the President of the Agency to make a further determination pursuant to section 60. The request must be made within a stipulated time limit, which may be extended by the President or, in certain circumstances, by the Canadian International Trade Tribunal ("CITT") (sections 60.1 and 60.2). Pursuant to section 61 of the *Customs Act*, the President of the Agency has the authority to make a further re-determination, subject to certain conditions that are not relevant to this appeal.

[10] Pursuant to section 67 of the *Customs Act*, an appeal lies to the CITT from a decision of the President on a section 60 request, or a re-determination by the President under section 60 or section 61. A further appeal lies to the Federal Court of Appeal pursuant to section 68 of the *Customs Act*.

[11] The statutory scheme relating to determinations and re-determinations under sections 58 to 61 of the *Customs Act* contains three privative clauses. They read as follows:

58. (3) A determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 59 to 61.	**58**. (3) La détermination faite en vertu du présent article n'est susceptible de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 59 à 61.
[…]	[…]
59. (6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.	**59**. (6) La révision ou le réexamen fait en vertu du présent article ne sont susceptibles de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.

[…]	[…]
62. A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.	**62**. La révision ou le réexamen prévu aux articles 60 ou 61 n'est susceptible de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 67.

FACTS

[12] The basic facts are not in dispute and are set out fully in the reasons of Justice Hughes. For the purposes of this appeal, only a summary is necessary.

[13] The respondent Fritz Marketing Inc. ("Fritz") is an importer of goods from China. Fritz has been engaged in four separate proceedings relating to 21 import transactions between October 2002 and June 2003: (1) criminal proceedings in the Ontario Court of Justice, (2) civil proceedings culminating in an appeal to the CITT, (3) an application in the Ontario Superior Court of Justice, and (4) the Federal Court application that led to this appeal.

[14] All of these proceedings have their roots in certain events in the spring of 2002, when an employee of Fritz informed an employee of the Agency that Fritz appeared to be following a practice of systematically underreporting the value for duty of its imported goods by 50%. In June of 2002, an Agency investigator interviewed the informant and made notes of his information. The investigator compared his notes to information in the Agency's database, and concluded that there were a number of transactions in which Fritz's declared duty for value of certain imported goods was 50% of the invoiced value of the same goods.

(1) The Criminal Proceedings

[15] The investigator applied to a Justice of the Peace for a search warrant, which turned out to be the first formal step leading to the criminal proceedings against Fritz. The warrant was granted on June 16, 2003 and was executed the next day. The documents seized pursuant to that warrant were relied on to lay criminal charges against Fritz in the fall of 2004. The 21 import transactions in issue in this case were the transactions covered by the charges.

[16] At some point, probably early in 2006, the Agency sought and obtained an order for the production of documents pursuant to section 487.012 of the *Criminal Code*, R.S.C. 1985, c. C-46, relying on substantially the same information as the search warrant. The production order was issued by a Justice of the Peace on February 10, 2006.

[17] Fritz applied to the Ontario Court of Justice (it is not clear exactly when) for an order setting aside the search warrant and requiring the return of the seized documents on the basis that the search and seizure violated section 8 of the Charter. That application was heard by Justice Cowan in early August, 2006. In a decision issued August 31, 2006, Justice Cowan granted the application and made the following order:

> As a result, I find that there is a section 8 violation of the *Charter Rights* of the Applicants. I am in doubt as to whether I have the jurisdiction to quash the warrant but can fashion a remedy under section 24(2) that the evidence seized pursuant to the warrant is excluded and the items seized be returned forthwith to the Applicants.

[18] This order deprived the Crown of the evidence it needed to pursue the criminal charges against Fritz. As a result, all charges were dropped.

[19] The Crown did not return the seized documents or destroy them, which led Fritz to apply to Justice Cowan for further relief. On October 11, 2006, Justice Cowan made the following order:

> So as to give full effect to my Order of August 31, 2006, I am further ordering that the Attorney General of Canada and all government agencies instructing them in this case return to the applicants all copies of documents seized from the applicants in whatever form, or in the alternative destroy all copies of records in whatever form. In the case of computer files where destruction is not possible, they are to be overwritten until they cannot be read or recovered.
>
> Then these agencies shall provide the Attorney General and the Attorney General shall file with the Applicants' counsel an undertaking that this has been done.

[20] The Crown complied with that order.

(2) The Civil Proceedings in the CITT

[21] In the summer of 2005, a lawyer acting for Fritz became aware that the Agency was in the process of issuing Detailed Adjustment Statements to give effect to its conclusion that Fritz had deliberately undervalued the value for duty of the goods in the import transactions in issue in the criminal proceedings. Fritz's lawyer concluded that corrections should be filed pursuant to subsection 32.2(2) of the *Customs Act* in relation to those transactions. Those corrections were filed on August 8, 2005. The stated reason for the corrections was:

> VOLUNTARY AMEND. ERROR IN DETERMINING VALUE FOR DUTY, SHOULD BE BASED ON SELLING PRICE, LESS DISCOUNT/FREIGHT CHARGES BUT INCL. DUTIABLE PACKING/MISC. EXPENSES, CCI, INVOICE, LETTER FROM VENDOR ENCLOSED.

[22] On August 24, 2005, the Agency issued to Fritz 21 Detailed Adjustment Statements pursuant to subsection 59(1) of the *Customs Act*. Each Detailed Adjustment Statement reflected one of the import transactions in issue in the criminal proceedings. Those 21 Detailed Adjustment Statements are the subject of this appeal.

[23] It is undisputed that although the Detailed Adjustment Statements were issued in response to the corrections filed by Fritz, they were based on information obtained as a result of the execution of the search warrant. (Whether the Agency could or would have obtained that information without the warrant is a disputed factual point on which I express no opinion.)

[24] Fritz applied to the President of the Agency pursuant to section 60 of the *Customs Act* for a further re-determination of the Detailed Adjustment Statements, but without success. On August 23, 2006, Fritz appealed the Detailed Adjustment Statements to the CITT pursuant to section 67 of the *Customs Act*. Fritz subsequently filed with the CITT all of the invoices relating to the transactions covered by the Detailed Adjustment Statements. The CITT has apparently stayed the appeal pending the outcome of this case. That is where the civil appeal proceedings in the CITT now stand.

(3) Application in the Ontario Superior Court of Justice

[25] At some point early in 2007, Fritz applied to the Ontario Superior Court of Justice for an order quashing the production order that had been issued by the Justice of the Peace on February 10, 2006 and the Detailed Adjustment Statements.

[26] On July 7, 2007, Justice Corbett quashed the production order on the basis that it necessarily fell with the search warrant. However, he refused to quash the Detailed Adjustment Statements because he concluded that he did not have the jurisdiction to do so. He noted that the parties had argued before him that the CITT did have the jurisdiction to grant a Charter remedy. He expressed no opinion on that point, but concluded that the Federal Court had the jurisdiction to quash the Detailed Adjustment Statements.

(4) The Federal Court Proceedings

[27] At some point (it is not clear when), Fritz asked the Agency to cancel the Detailed Adjustment Statements on the basis that they were based on unlawfully obtained evidence. The Agency refused to do so.

[28] In September of 2007, Fritz applied to the Federal Court for an order setting aside the Detailed Adjustment Statements because they were issued on the basis of information obtained in breach of section 8 of the Charter. Justice Hughes granted that application by order dated June 5, 2008. The Crown has appealed that decision.

ANALYSIS

[29] The issue of the jurisdiction of the Federal Court in this matter was raised by this Court. At the Court's request, the parties made oral submissions on this point at the hearing of the appeal. The issue arises because Justice Hughes made an order setting aside the Detailed Adjustment Statements issued to Fritz pursuant to subsection 59(1), even though subsection 59(6) says that a determination

under subsection 59(1) is not to be set aside except as provided by the statutory scheme. I reproduce subsection 59(6) here for ease of reference (my emphasis):

59. (6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.	**59**. (6) La révision ou le réexamen fait en vertu du présent article ne sont susceptibles de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.

[30] Both parties argued in the Federal Court and in this Court that the Federal Court has the jurisdiction to set aside the Detailed Adjustment Statements. They relied primarily on *Rolls Wood Group (Repairs and Overhauls) Ltd. v. Minister of National Revenue* (2001) 199 F.T.R. 64 (F.C.T.D.). In that case, a judge of the Federal Court quashed "the decision contained in a Detailed Adjustment Statement" on the basis that the officer who issued it was not authorized to do so because of an invalid delegation of authority. The reasons do not indicate whether the judge in *Rolls Wood* was referred to subsection 58(3), 59(6) or section 62 of the *Customs Act*.

[31] The jurisdiction of the Federal Court in relation to Detailed Adjustment Statements was considered more recently in *Abbott Laboratories, Ltd. v. Canada (Minister of National Revenue)*, 2004 FC 140. In that case, Justice Lemieux concluded that, by virtue of the scheme of the *Customs Act* that includes the privative clauses quoted above, Parliament had ousted the jurisdiction of the Federal Court to quash a Detailed Adjustment Statement (see paragraph 40 of his reasons). In the alternative, he would have declined jurisdiction on the basis of the existence of an adequate statutory remedy.

[32] The decision of Justice Lemieux was followed by Justice Mactavish in *1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1263 (confirmed on appeal, 2008 FCA 47), and by Justice Shore in *Danone Canada Inc. v. Canada (Attorney General)*, 2009 FC 44 (at paragraph 19). Justice Shore went on to conclude that the Federal Court nevertheless has jurisdiction to order a stay of an advance ruling by the Agency (an appeal and cross-appeal of that case are pending).

[33] I agree with Justice Lemieux that subsection 59(6) of the *Customs Act* deprives the Federal Court of the jurisdiction to set aside a Detailed Adjustment Statement for any reason. In my view, *Rolls Wood* was not correctly decided. It follows that the order under appeal cannot stand.

[34] I appreciate that in the Federal Court application, the Detailed Adjustment Statements were not being challenged on the merits, but rather on the basis that the Agency should not have issued them using information subsequently found to have been obtained in breach of section 8 of the *Charter*. Indeed, the issue as framed by the parties, and as adopted by Justice Hughes, was a challenge to the decision of the Agency to refuse to cancel the Detailed Adjustment Statements when asked to do so after Justice Cowan concluded that section 8 of the *Charter* had been breached.

[35] However, in my view the parties and Justice Hughes mischaracterized the question. To accept their characterization would be to accept a semantic exercise. Any challenge to a Detailed Adjustment Statement could be characterized as a challenge to the decision of the Agency not to cancel it, as long as the Agency refuses to cancel it when asked.

[36] In my view, the fundamental issue in this case is and should be the admissibility of the impugned evidence in the proceedings before the CITT, which is the tribunal that has the mandate to determine the validity and correctness of the Detailed Adjustment Statements. No one has suggested that the CITT lacks the jurisdiction to exclude evidence on *Charter* grounds if it is persuaded that such a remedy is appropriate. No one has referred the Court to any jurisprudence suggesting that the CITT cannot exclude evidence on that basis.

[37] I have not ignored the argument that the rules of the CITT appear not to permit an amendment to a notice of appeal filed under section 67 of the *Customs Act*. I am not sure of the relevance of this argument, since the notice of appeal states no grounds of appeal but is simply a letter stating that an appeal is being commenced and listing the particulars of the Detailed Adjustment Statements sought to be appealed (Appeal Book, Volume 2, pages 321-2). However, I understand this argument to reflect the concern of Fritz that it may face procedural difficulties in putting its *Charter* issues before the CITT. Indeed, depending upon what has actually been done in the CITT proceedings to this point in time, the CITT may well consider it to be too late to raise those *Charter* issues. If that is the outcome, it would be the unfortunate result of the litigation strategy chosen by Fritz.

[38] However, that outcome is not a certainty. The Court was referred to nothing in the CITT rules or the jurisprudence that would preclude the appellant in a section 67 appeal from bringing a motion to the CITT to set aside the Detailed Adjustments Statements on the basis that the Agency

cannot support them except on the basis of illegally obtained evidence. It is also open to Fritz to contact the CITT to determine whether a more appropriate procedure can be devised.

[39] I would add that if the *Charter* issues are properly raised before the CITT, the CITT must consider those issues *de novo*, based on the record before it. The CITT is not bound by the decision of Justice Hughes or any of his conclusions, including his conclusion that "but for the illegal search and seizure of documents, the Agency would not have made any inquiry into or re-assessment of the Applicant's situation in respect of duties owing", his conclusion that "the Agency would never have made such an investigation in the absence of its illegal activity", or his conclusion that this case is similar to *O'Neill Motors Ltd. v. Canada*, [1998] 4 F.C. 180 (F.C.A.) (reasons of Justice Hughes, paragraphs 8 and 16).

[40] Similarly, nothing Justice Cowan said in his two decisions in the criminal proceedings involving Fritz, and nothing Justice Corbett said in his later decision relating to the application to quash the Detailed Adjustment Statements, can be construed as a decision as to the admissibility of the impugned evidence in the CITT proceedings. Justice Cowan and Justice Corbett were speaking, and were entitled only to speak, in relation to the proceedings that were before them.

[41] For these reasons, I would allow this appeal with costs. I would set aside the order under appeal for want of jurisdiction and, making the order that should have been made by the Federal Court, I would dismiss with costs the application of Fritz Marketing Inc. to set aside the Detailed Adjustment Statements issued to it on August 24, 2005.

"K. Sharlow"
J.A.

"I concur.
Alice Desjardins J.A."

"I agree.
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Alexandre Kaufman	FOR THE APPELLANT
Alan D. Gold	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Alan D. Gold Professional Corporation Toronto, Ontario	FOR THE RESPONDENT