Federal Court Cour fédérale

Date: 20180928

Docket: T-1637-17

Citation: 2018 FC 963

Ottawa, Ontario, September 28, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

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

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] Pier 1 Imports (U.S.), Inc. [Pier 1] is a well-known retailer of decorative home furnishings and accessories, with more than 75 stores across Canada. Under the *Customs Act*, RSC 1985, c 1 (2nd suppl) [the Act], Pier 1 must pay duties on the merchandise it imports. In July 2017, the Canadian Border Services Agency [CBSA], which administers the Act, directed Pier 1 to adopt a new method to assess the value for duty of that merchandise. Relying on an agreement it concluded in 2003 with CBSA's predecessor agency, Pier 1 asserts that CBSA is precluded

from doing so. It filed an application for judicial review, seeking a declaratory judgment to that effect.

[2] I am now seized of two motions. The Minister brings a motion to strike the application, on the basis that its subject-matter falls under the exclusive jurisdiction of the Canadian International Trade Tribunal [CITT]. Pier 1 seeks a stay of CBSA’s decision, on the basis that immediate compliance would require it to expend significant resources to set up a reporting mechanism that may, in the end, prove unnecessary.

[3] I allow the Minister’s motion. This Court has no jurisdiction to entertain an application for declaratory judgment on an issue that is squarely within the CITT’s jurisdiction. On the other hand, given that the Federal Court of Appeal, and not our Court, has jurisdiction to review decisions of the CITT, Pier 1’s motion for a stay should have been brought before the Federal Court of Appeal. Hence, I cannot decide this motion and I will order the transfer of the present proceeding to the Federal Court of Appeal, so that it can properly rule on Pier 1’s motion.

I. Background

[4] At its heart, the present dispute concerns the value of the merchandise imported by Pier 1. Determining value is a more complex legal problem than might appear at first blush. To understand the dispute between the parties, it is necessary to explain the basic features of the process set forth in the Act to determine value for duty. It will then be possible to determine who has jurisdiction to deal with various aspects of the dispute.

A. *The Concept of Value and the Customs Act*

[5] We intuitively think that goods have an objective value. Economists, however, warn us that different people may be willing to pay different prices for the same goods, and that there is no objective "value" beyond those prices (see, e.g., Ejan Mackaay and Stéphane Rousseau, *Analyse économique du droit*, 2nd ed., Paris and Montreal, Dalloz and Thémis, 2008, at 109-110). In spite of its elusive nature, the concept of value is frequently used by statutory regimes, in areas as diverse as tax, consumer protection or expropriation.

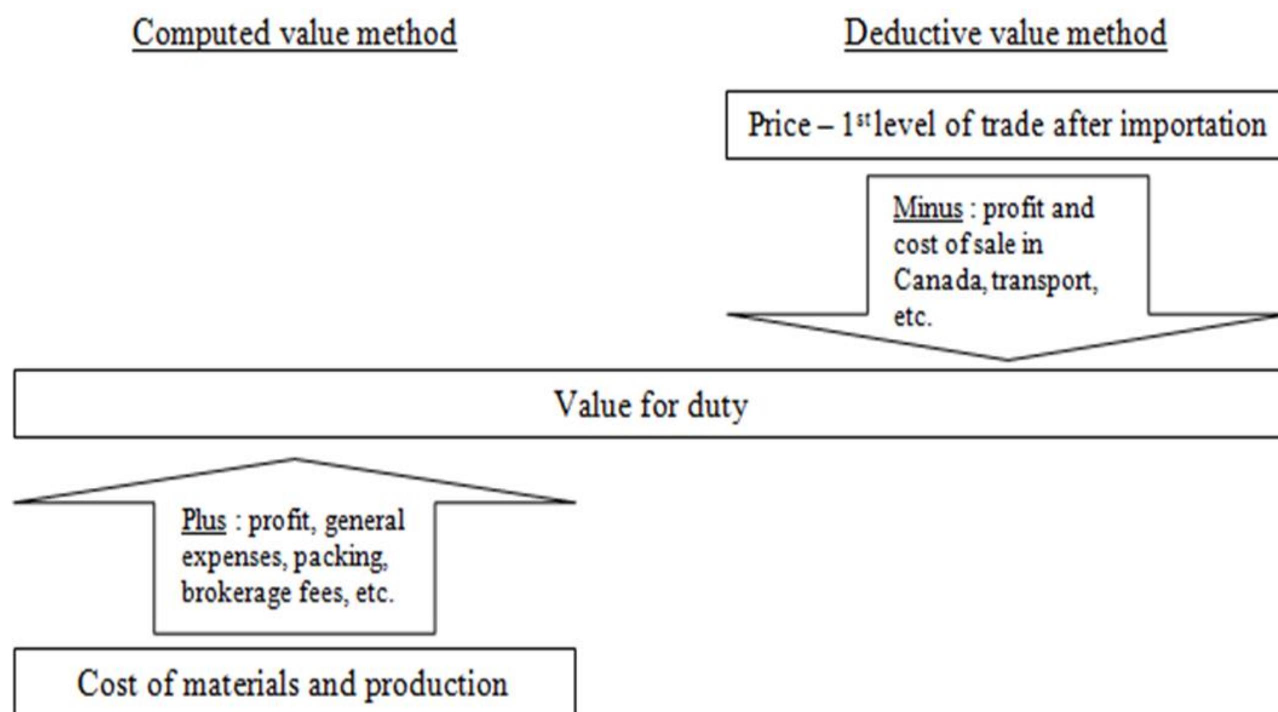
[6] In that vein, a central concept of the *Customs Act* is that of "value for duty." According to section 44, the main method for calculating customs duties is a percentage rate of the value for duty. Perhaps to obviate the inherent vagueness of the concept of value, sections 45 to 53 set out detailed rules for the determination of the value for duty. While I cannot give a detailed account of those rules here, a few basic notions are useful to understand what follows.

[7] Section 48 states that the preferred basis for assessing the value for duty is the transaction method. If the imported goods are sold at the time of their importation in Canada, between a seller and a purchaser who deal at arms' length, the value for duty is the sale price, subject to certain adjustments. However, that method is not always applicable. Thus, the Act provides for a cascade of alternative methods, which are to be used in the order of priority set out in the Act, if the data needed to apply them is available. The assumption is that Parliament considered that the method that comes first is the best approximation of value. It is not necessary to describe all those alternative methods, as only two of them are relevant to this case.

[8] The deductive value method [DVM] is described in section 51 and takes as a starting point the price at which the imported goods are sold "at the first trade level after importation." Deductions are then made from that price, to take into account a number of items such as profits and expenses associated with the sale in Canada, transportation costs in Canada, and so forth.

[9] The computed value method [CVM] is described in section 52 and takes as a starting point the costs of the materials and the production of the imported goods, to which is added an amount reflecting profit and general expenses associated with the sale for export in the country of origin, as well as packing costs, brokerage fees and similar expenses.

[10] Both methods, and indeed all the methods set forth in the Act, are aimed at the same goal: determining the value of the goods at the time of their importation. What distinguishes the DVM and the CVM is their opposite starting points, as illustrated in the following diagram:



[11] In addition, section 53 provides for a "residual method," which consists of the flexible application of any other method based on information available in Canada.

B. *Pier 1's Business Model*

[12] Pier 1 is an American corporation that does business in the United States and Canada. There is no separate Canadian subsidiary set up to conduct business in this country.

[13] As a result, when Pier 1 imports goods in Canada, there is no sale as such, but simply a shipment from distribution centres in the United States to stores in Canada. As a result, the primary valuation method, the transaction method set forth in section 48, is not applicable.

C. *The 2003 Settlement Agreement and the 2004 Audit*

[14] Thus, the question arose as to what valuation method would be applicable to Pier 1's activities. In the early 2000s, the Canada Customs and Revenue Agency [CCRA], which was then in charge of applying the Act, took the position that the DVM was applicable. Pier 1 challenged this determination before the CITT. However, in 2003, before the CITT rendered a decision, Pier 1 and CCRA entered into a settlement agreement. A crucial part of that agreement was CCRA's undertaking to perform a new audit of Pier 1's activities for fiscal year 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 agreement also stated that:

> … 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…

[15] A new audit was performed in 2004. With respect to most of Pier 1's imports, the conclusion of the audit was that a "residual computed method" would be used. That means that none of the methods described in the Act was directly applicable, but that the best solution was a flexible application of the computed value method described in section 52. I will refer to this method as the "flexible CVM." The audit also determined a fixed percentage that would be used as a mark-up to reflect general costs and profit. This percentage was calculated, among other things, on the basis of the mark-up that Pier 1 was charging on its sales to its franchisees in the United States. As those franchisees were at arm's length from Pier 1, that mark-up was thought to be a genuine reflection of market conditions.

D. *The 2017 Audit and the Decision Challenged*

[16] In 2016, CBSA began a new audit of Pier 1's importation activities. The conclusion of that audit was expressed in a letter dated July 10, 2017. CBSA found that Pier 1 possessed the data necessary to apply the DVM. Thus, for the future, CBSA required Pier 1 to adopt the DVM instead of the flexible CVM that it had been applying for over ten years.

[17] In previous correspondence, CBSA also noted that Pier 1 had abandoned the franchisee structure for its American operations. Therefore, the basis on which the mark-up used to apply the flexible CVM was calculated no longer existed. The arm's-length relationship on which the

approximation of a legitimate profit was based had disappeared. As a result, CBSA felt no longer bound by the 2003 settlement agreement.

[18] Pier 1 reacted by bringing an application for judicial review, seeking the following declaration:

> DECLARE that the parties are bound by the "Settlement Agreement" (as defined below) dated October 24, 2003 and that, as a result:
>
> i) the Position [taken by CBSA on July 10, 2017] violates the "Settlement Agreement"; and that
>
> ii) the Minister cannot require Pier 1 to apply the DVM from July 10, 2017 and for the future.

[19] Meanwhile, CBSA reviewed the declarations provided by Pier 1 and, on December 18, 2017, issued detailed adjustment statements (DASs), which, if I understand correctly, constitute a determination made under section 58 of the Act. At the hearing, I was informed that Pier 1 has challenged those DASs according to the process provided in the Act and that the matter is currently before the CBSA President, according to section 60.

II. Motion to Strike

[20] I will deal first with the Minister's motion to strike. Rule 221 of the *Federal Courts Rules*, SOR/98-106, allows a judge to strike a pleading, if it "discloses no reasonable cause of action." While rule 221 applies to actions, the Federal Court of Appeal has recognized that applications for judicial review may also be struck on a preliminary motion: *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 at para 48, [2014] 2 FCR

557 [*JP Morgan*]; *David Bull Laboratories (Canada) Inc. v Pharmacia Inc*., [1995] 1 FC 588 (CA) at 600. However, the test is stringent: an application for judicial review will only be struck if it is "so clearly improper as to be bereft of any possibility of success": *JP Morgan* at para 47.

[21] This includes cases where exclusive jurisdiction is attributed to another adjudicative body. In *JP Morgan*, the Federal Court of Appeal held that an application is fatally flawed, and liable to be struck, where "the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle:" *JP Morgan* at para 66; see also *Canada v Addison & Leyen Ltd*., 2007 SCC 33, [2007] 2 SCR 793. Section 18.5 reads as follows:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[22] The Act provides a multi-step mechanism to challenge customs duty assessments, including issues regarding the determination of value for duty and the choice of valuation method. Section 58 provides for an initial determination of “the origin, tariff classification and value for duty of imported goods” by a customs officer. Section 59 allows for a re-determination by another officer, whereas section 60 gives an importer the right to request a further determination by the CBSA President. To these internal appeals, section 67 adds a right of appeal to the CITT. Lastly, a decision of the CITT may be appealed to the Federal Court of Appeal – not the Federal Court – under section 68.

[23] The provisions governing each level of internal appeal include a privative clause (sections 58(3), 59(6) and 62). Section 62, which deals with redeterminations by the CBSA President, may be quoted as an illustration:

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.

[24] Thus, where a litigant seeks a remedy that could be obtained through the process set forth in the Act, or raises a question that can be addressed through that process, section 18.5 of the *Federal Courts Act* deprives our Court of jurisdiction to hear the matter. Moreover, under basic administrative law principles, this would be considered a situation where an adequate alternative remedy exists, which is a factor that usually weighs against hearing an application for judicial

review (*Harelkin v University of Regina*, [1979] 2 SCR 561; *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 40-45, [2015] 2 SCR 713).

[25] The Federal Court of Appeal discussed the Federal Court's lack of jurisdiction to review decisions made under the Act in *Fritz Marketing Inc. v Canada*, 2009 FCA 62, [2009] 4 FCR 314 [*Fritz*]. In that case, the importer alleged that DASs issued by CBSA were invalid because they were based on evidence obtained in a manner contrary to the *Canadian Charter of Rights and Freedoms*. Speaking for the Court, Justice Sharlow held that the privative clauses mentioned above "deprive the Federal Court of the jurisdiction to set aside a detailed adjustment statement for any reason" (*Fritz* at para 33). She noted that there was no reason why the CITT could not consider the importer's Charter argument and exclude evidence if necessary.

[26] Similar issues were canvassed in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*CB Powell*]. In that case, the importer challenged a decision before the CBSA President, who ruled that there was, in the circumstances, no decision that could be the subject of an appeal. Instead of appealing that ruling to the CITT, the importer sought a declaration from the Federal Court. The Federal Court of Appeal held that the Federal Court had no jurisdiction to issue such a declaration. Justice Stratas wrote:

> The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to various administrative officials and an administrative tribunal, the CITT, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.
>
> (*CB Powell* at para 4)

[27] Pier 1, however, argues that it is not seeking to set aside a DAS, as in *Fritz*. Rather, it is asking this Court to issue a declaration, quoted above, to the effect that the settlement agreement is binding and prevents CBSA from requiring Pier 1 to implement the DVM. What is relevant, however, is the substance of what is claimed, not the form.

[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 DAS 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 CITT 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*, the CITT can consider Charter issues, it is difficult to understand why it could not consider a contract. Generally speaking, adjudicative bodies such as the CITT (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.

[30] To buttress its contention that this Court can issue remedies related to the settlement agreement despite the privative clauses contained in the Act, Pier 1 invokes two cases, which, in my view, are distinguishable. Both cases involved situations where the Federal Court retains jurisdiction to review certain decisions made under the *Income Tax Act*, because these decisions are not assessments falling under the exclusive jurisdiction of the Tax Court of Canada. In the first case, *Canada (National Revenue) v Sifto Canada Corp*, 2014 FCA 140 [*Sifto*], a taxpayer had concluded an agreement with the Canada Revenue Agency with respect to a voluntary disclosure. The taxpayer understood the agreement to mean that the Agency would waive all penalties, but the Agency did otherwise. The Federal Court of Appeal agreed that the Federal Court could hear an application for judicial review of the Agency's refusal to waive penalties. It did so, however, not because an agreement was at issue, but because the relief claimed was not within the Tax Court's jurisdiction:

> …it is equally clear that the Tax Court does not have the jurisdiction to determine whether the Minister properly exercised his or her discretion under subsection 220(3.1) of the *Income Tax Act* when deciding whether or not to waive or cancel a penalty. A challenge to such a decision can be made only by way of an application for judicial review in the Federal Court.
>
> (*Sifto* at para 23)

[31] Indeed, the Court of Appeal specifically mentioned that the Tax Court could apply the agreement between the Agency and the taxpayer when deciding the matters properly before it:

> …if, for example, the appeal requires the Tax Court to determine whether all of the statutory conditions for the imposition of the penalty are met, the Tax Court must do so and is the only Court that has the jurisdiction to do so. The same would be true if the Tax Court determines that the reassessments are not valid in so far as they fail to respect the settlement agreement or the agreement reached by the Canadian and United States taxing authorities under Articles IX and XXVI of the *Canada-United States Tax*

> *Convention (1980)* that determined the transfer price of the rock salt.
>
> (*Sifto* at para 22)

[32] In this case, CBSA and the CITT, like the Tax Court in *Sifto*, may consider the effect of the settlement agreement on matters that fall under their jurisdiction.

[33] Likewise, *Rosenberg v Canada (National Revenue)*, 2015 FC 549, dealt with an application under s. 231.7 of the *Income Tax Act* to force the taxpayer to disclose certain information. The task of deciding such applications is expressly attributed to the Federal Court. Thus, the matter did not fall under the exclusive jurisdiction of the Tax Court.

[34] This manner of allocating jurisdiction may appear inconvenient to Pier 1. Pier 1 might want to be able to ask directly the CITT for a declaration as to the applicable method for calculating the value for duty. But that is not the scheme of the Act. For better or for worse, Pier 1 must follow that process.

[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.

[36] Hence, this application for judicial review will be struck.

III. Motion for a Stay

[37] Striking the application, however, does not end the matter. Relying on section 44 of the *Federal Courts Act*, as interpreted in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Canadian Liberty Net*], Pier 1 asserts that our Court still has jurisdiction to issue a stay of CBSA's decision to require it to use the DVM and brings a motion to that end.

[38] Considering this motion requires me to clarify the source of our Court's jurisdiction to issue a stay – or an injunction – in support of a separate decision-making process. Regrettably for Pier 1, I conclude that with respect to customs duties, only the Federal Court of Appeal has jurisdiction to issue a stay under section 18.2 or an injunction under section 44.

A. *Jurisdiction of the Federal Court to Issue a Stay*

[39] To support this Court's jurisdiction to issue a stay even where it does not have jurisdiction over the merits, Pier 1 relies on the judgment of my colleague Justice Michel Shore in *Danone Inc v Canada (Attorney General)*, 2009 FC 44, [2009] 4 FCR 264. In that case, an importer sought a stay of a CBSA ruling that reclassified certain imported goods, with dramatic consequences on the customs duties payable. My colleague held that the Federal Court did not have jurisdiction to review the ruling, given the dispute resolution process contained in the Act. Nevertheless, based on section 44 of the *Federal Courts Act*, he found that "the Federal Court has residual jurisdiction to grant a free-standing injunction even if the final disposition of a

dispute is left to an administrative decision maker and is not before the Court" (*Danone* at para 35). He noted that Part V.1 of the Act gives the Federal Court "a supervisory role in specific circumstances" (*Danone* at para 37), which would make section 44 applicable. My colleague also noted that the Federal Court of Appeal does not have jurisdiction "before an application for judicial review of a CITT decision has been made" (*Danone* at para 31), so that section 28(3) of the *Federal Courts Act* would not operate so as to oust the Federal Court's jurisdiction.

[40] At the hearing of these motions, I raised the issue of the correctness of the reasoning in *Danone*. At my request, the parties provided me with written submissions on the question.

[41] I am mindful that the principle of judicial comity normally requires me to follow previous decisions of this Court. The scope of that doctrine was described as follows:

> Judicial comity is not the application of the rule of *stare decisis*, but recognition that decisions of the Court should be consistent to the extent possible so as to provide litigants with some predictability. […]
>
> With judicial comity in mind, I have concluded that I should differ from the prior decisions of my colleagues only if I am satisfied that the evidence before me requires it or that I am convinced that the decisions were wrongly decided in that they did not consider some binding authority or relevant statute.
>
> (*Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at paras 34-35, [2007] 1 FCR 107, affirmed by 2007 FCA 199, [2008] 1 FCR 155)

[42] With the greatest respect for my colleague, and after an exhaustive review of the matter, I am unable to agree with him. I have reached the conclusion that the Federal Court of Appeal, not the Federal Court, has jurisdiction to issue the remedy sought by Pier 1. To understand why, it is

necessary to examine the division of jurisdiction between the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and various administrative bodies such as the CITT.

[43] The main function of the Federal Courts is to provide for a comprehensive system of judicial review of federal administrative bodies. The *Federal Courts Act* assigns this jurisdiction to the Federal Court of Appeal or the Federal Court, depending on which administrative body made the decision under review. Section 28 of the *Federal Courts Act* lists 17 decision-makers or categories of decision-makers whose decisions are to be reviewed by the Federal Court of Appeal. All other decisions are reviewed by the Federal Court – whence an appeal lies, of course, to the Federal Court of Appeal.

[44] On its face, this division of jurisdiction is based mainly on the identity of the decision-maker. One must necessarily go back, however, to the legislation conferring jurisdiction on the administrative decision-maker to understand the scope of the matters falling under the jurisdiction of either court. One cannot assume that all litigation related to a specific statute will be handled by a tribunal created by that statute. Indeed, it may happen that a statutory scheme channels most litigation to a decision-maker listed in section 28, while assigning jurisdiction to the Federal Court over certain accessory issues. For example, the CITT has jurisdiction over most of the substantive issues that arise in the application of the Act. Nevertheless, Parts V.1 and V of the Act grant jurisdiction to the Federal Court (and, in some cases, to provincial superior courts as well) over certain collection and enforcement matters.

[45] Tax matters provide a similar example. The bulk of tax litigation pertains to the correctness of tax assessments. This is within the exclusive ken of the Tax Court. However, the *Income Tax Act* explicitly assigns certain matters to the Federal Court, such as issuing orders for the communication of information (as in *Rosenberg*) or implicitly allows for the judicial review by the Federal Court of certain decisions that are not assigned to the Tax Court (such as the waiving of penalties at issue in *Sifto*).

[46] Turning now to jurisdiction over interlocutory matters, the scheme of the *Federal Courts Act* is that the court that has jurisdiction over the merits also has jurisdiction over interlocutory relief. This is spelled out in subsections 28(2) and (3):

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.	(2) Les articles 18 à 18.5 s’appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d’appel fédérale comme si elle y était mentionnée lorsqu’elle est saisie en vertu du paragraphe (1) d’une demande de contrôle judiciaire.
(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.	(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d’appel fédérale.

[47] Section 18.2 allows the Federal Court to issue a stay of the proceedings of a federal board or tribunal when an application for judicial review has been filed. When a matter falls within the

jurisdiction of the Federal Court of Appeal, subsection 28(2) makes it clear that it is the Federal Court of Appeal, not the Federal Court, which may grant a stay under section 18.2. Subsection 28(3), especially its French text, makes this even clearer: an assignment of jurisdiction to the Federal Court of Appeal entirely ousts the jurisdiction of the Federal Court.

[48] Section 44 empowers the Federal Court of Appeal and Federal Court to issue what may conveniently be called a "free-standing injunction." An interlocutory injunction aims at ensuring that a judgment on the merits does not become ineffective because of what takes place during the course of the proceedings. Interlocutory injunctions are normally granted by the court that will hear the merits of the underlying case. However, it is also recognized that a superior court having inherent jurisdiction may grant an interlocutory injunction where the merits of a case will be heard by another decision-maker who cannot issue injunctions (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, [1993] AC 334 (HL)). In this situation, there is no underlying action or application before the superior court, hence the phrase "free-standing injunction."

[49] In *Canadian Liberty Net*, the Supreme Court of Canada extended this logic to the Federal Court, even if it has a statutory, not an inherent jurisdiction. In that case, the merits of the case were before the Canadian Human Rights Tribunal [CHRT]. The Supreme Court noted that "the decisions and operations of the Tribunal are subject to the close scrutiny and control of the Federal Court" (at 659). This triggered the Federal Court's jurisdiction under section 44 to issue a free-standing injunction in aid of the CHRT process. It is important to underline that the Federal Court's supervisory role over the CHRT stems mainly from the fact that it has jurisdiction to review the CHRT's decisions. That jurisdiction flows from the fact that the CHRT

is a “federal board, commission or other tribunal,” as defined in section 2 of the *Federal Courts Act*, and is not mentioned in section 28.

[50] When Parliament named both the Federal Court of Appeal and the Federal Court in section 44, it did not intend to create a concurrent jurisdiction and to let applicants choose the court in which to file their motion. Subsection 28(3) applies to section 44. As a result, when a matter falls within the Federal Court of Appeal’s jurisdiction, the Federal Court simply cannot rely on section 44 to issue interlocutory relief. For example, in *Centre québécois du droit de l’environnement v National Energy Board*, 2015 FC 192, Justice Yves de Montigny, then a member of our Court, held that he had no jurisdiction to issue what was in substance an injunction against the National Energy Board.

[51] Similarly, in the present case, the CITT is listed in section 28 of the *Federal Courts Act* and only the Federal Court of Appeal may review its decisions. The Federal Court has no supervisory role over the CITT. Thus, only the Federal Court of Appeal can issue an injunction with respect to a process that falls under the jurisdiction of the CITT.

[52] It is at this juncture that I must part ways with my colleague’s decision in *Danone*. He said that as long as no application for judicial review has been brought before the Federal Court of Appeal, the Federal Court retains jurisdiction pursuant to section 44. I respectfully disagree. Subsection 28(3) ousts the jurisdiction of the Federal Court as soon as the matter falls within the jurisdiction of the Federal Court of Appeal. There is no requirement that an application have actually been brought before the Federal Court of Appeal. In practice, Pier 1 could have brought

an application before the Federal Court of Appeal for the purposes of obtaining the stay it is now seeking from me, precisely because that stay (or injunction) would be "free-standing."

[53] In *Danone*, my colleague noted that the Federal Court plays a certain supervisory role in the administration of the Act, in particular Part V.1 pertaining to collection. Pier 1 highlighted that some provisions of Part VI, pertaining to seizures, also give a role to the Federal Court. But it is not enough to say that the Federal Court has a supervisory role over certain limited issues in the application of the Act if the subject-matter of the injunction that is sought does not pertain to those limited issues. As I noted above, Parts V.1 and VI of the Act deal with very specific issues and have nothing to do with the assessment of customs duties and the choice of the method to calculate value for duty. The latter issues are exclusively assigned to the CITT, with an appeal to the Federal Court of Appeal. Pursuant to subsection 28(3) of the *Federal Courts Act*, this means that the Federal Court has no jurisdiction.

[54] I would also add that the fact that Pier 1's application focuses on the actions of CBSA instead of a decision of the CITT does not affect this analysis. When a quasi-judicial process falls to be reviewed by one particular court, that jurisdiction must extend not only to the decision made by the tribunal, but also to the conduct of the parties before the tribunal, including the decision to initiate proceedings or the position to be put forward in the course of those proceedings.

[55] Here, Pier 1's application is aimed at the position that CBSA would take in the issuance of DASs, internal appeals and eventual CITT proceedings. It is obvious that in doing so, Pier 1

effectively wants to prevent the CITT from reaching a specific conclusion. If our Court has no jurisdiction over the CITT, it is difficult to understand how it could order CBSA not to take a specific position before the CITT or in processes that would lead to a case before the CITT.

[56] In this connection, I note that the Federal Court of Appeal, in an application to review a decision of the CITT, issued interim relief against the government department that was a party before the CITT: *Canada (Attorney General) v Northrop Grumman Overseas Services Corporation*, 2007 FCA 336. The implication is that the Federal Court would be deprived of jurisdiction to issue a similar order, given subsection 28(3) of the *Federal Courts Act*. While the matter was decided under section 18.2, the same logic would apply to section 44.

[57] A simple way of summarizing the foregoing is to say that the division of jurisdiction in section 44, with respect to interim relief, must be the same as the one that flows from sections 18 and 28, with respect to the merits. If I were to accept Pier 1's arguments, this would mean that our Court could possibly grant interim relief with respect to matters that fall within the jurisdiction of tribunals named in section 28, although we have no subject-matter expertise. Such a result would be illogical.

B. *Merits of the Motion for a Stay*

[58] As I have come to the conclusion that I do not have jurisdiction to issue an injunction or a stay in this matter, it is not necessary for me to analyse the three-part test established in *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

IV. Conclusion and Remedy

[59] To summarize, our Court does not have jurisdiction to hear the merits of Pier 1's application nor its motion for a stay. Accordingly, the Minister's motion to strike is allowed.

[60] I have come to the conclusion, however, that Pier 1's motion for a stay falls within the jurisdiction of the Federal Court of Appeal. The most appropriate disposition, in such a situation, is not to dismiss the motion, but to transfer the proceeding to the Federal Court of Appeal. Rule 49 of the *Federal Courts Rules* was enacted to deal with situations where a proceeding is brought in the wrong court. It reads as follows:

49. If a proceeding has been commenced in the Federal Court of Appeal or the Federal Court, a judge of that court may order that the proceeding be transferred to the other court.	**49**. Lorsqu'une instance a été introduite en Cour d'appel fédérale ou en Cour fédérale, un juge de la cour saisie peut en ordonner le transfert à l'autre cour.

[61] According to rule 47, I may have recourse to rule 49 on my own motion: *Alliedsignal Inc v DuPont Canada Inc*, 1998 CanLII 8013 (FC) at para 6. This is, indeed, the most logical and practical manner of dealing with the present procedural situation. Hence, I will order the transfer of the present file to the Federal Court of Appeal, so that it may rule on Pier 1's motion for a stay.

[62] Pier 1 brought this application before this Court relying in good faith on the decision of my colleague in *Danone*. As I mentioned above, I am unable to agree with that decision. In these circumstances, however, it is fair that Pier 1 not be condemned to pay costs.

ORDER in T-1637-17

THIS COURT ORDERS that:

1. The Minister's motion is allowed and the application for judicial review is struck;

2. 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;

3. No order as to costs.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1637-17
STYLE OF CAUSE:	PIER 1 IMPORTS (U.S.), INC. v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 11, 2018
ORDER AND REASONS:	GRAMMOND J.
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APPEARANCES:

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