

Date: 20080218

Docket: T-382-06

Citation: 2008 FC 203

Toronto, Ontario, February 18, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SPIKE MARKS INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of seven decisions issued by the President of the Canada Border Services Agency (the CBSA) dated February 3, 2006 pursuant to subsection 60(4) of the *Customs Act*, R.S.C. 1985, c. C-1 (collectively, the “re-determination”). Seven separate applications were made to the Federal Court, but they were consolidated under this file number in an order issued May 10, 2006 by Prothonotary Tabib.

[2] The applicant requests:

- (a) a declaration that the re-determination (and any prior decision made under the *Customs Act*) is invalid and unlawful insofar as it purports to assess excise duties and additional duties on imports of cigars by the applicant;
- (b) an order in the nature of a writ of *certiorari* quashing or setting aside the re-determination (and any prior decision made under the *Customs Act*) insofar as it purports to assess excise duties and additional duties on imports of cigars by the applicant; and
- (c) costs.

[3] The respondent requests:

- (a) that this application for judicial review be dismissed; and
- (b) costs.

Background

[4] The applicant imports goods from the United States of America, including the goods at issue in this application, specifically flavoured cigars which are imported in individual plastic containers. At the time of importation of the goods into Canada, the applicant classified the cigars under tariff item 2402.10.00 and the plastic containers separately under tariff item 3923.10.90.

[5] On February 22, 2005, the CBSA gave written notice to the applicant that it would be conducting a compliance verification review of its importations for the period of January 1 to

December 31, 2004. The applicant received the verification report dated May 16, 2005, which determined that the applicant had improperly classified the cigars and the plastic containers under the *Customs Tariff*, S.C 1997, c.-36, as separate tariff items instead of as one single tariff item under number 2402.10.00.90. The verification report further instructed the applicant to file amended entries by August 19, 2005, for all similar transaction with the same error for the period of September 1, 2001 to May 16, 2005. The applicant did so.

[6] On May 24 and June 2, 2005, the CBSA issued seven detailed adjustment statements (the DASs). These seven DASs notified the applicant that the cigars and plastic containers had indeed been reclassified. The DASs also indicated the amount of the excise and additional duties imposed under sections 42 and 43 of the *Excise Act, 2001*, S.C. 2002, c.-22 as a result of the reclassification. On June 27, 2005, the applicant paid the outstanding amount of the seven DASs.

[7] On August 18, 2005, pursuant to subsection 60(1) of the *Customs Act*, the applicant appealed the DASs to the President of the CBSA. On November 21, 2005, the CBSA regional recourse officer (the recourse officer) issued a preliminary decision upholding the seven DASs. Following this preliminary decision, the applicant made further submissions to the CBSA. The parties met on December 20, 2005 wherein the applicant's representatives advised the CBSA that they agreed with the reclassification, but disagreed with the calculation of the excise and additional duties.

[8] On February 3, 2006, the President of the CBSA issued seven re-determinations upholding the reclassification of the cigars and plastic containers as a single unit and the assessment of duties as per the recourse officer's November 21, 2005 preliminary decision. In upholding the assessment of the excised and additional duties, the President of the CBSA relied on the reasons of the recourse officer's preliminary decision dated November 21, 2005, specifically the CBSA's interpretation of the meaning of the term "duty-paid value" in sections 2 of the *Excise Act*, 2001. It is ultimately the interpretation of this term that caused the imposition of further duties on the applicant and is the subject of this application for judicial review.

[9] On March 3, 2006, the applicant filed seven applications for judicial review of the seven re-determinations. These seven applications were consolidated into the within application (T-382-06).

[10] On May 2, 2006, pursuant to section 67 of the *Customs Act*, the applicant filed an appeal with the Canadian International Trade Tribunal (the CITT). The applicant then moved immediately for a dismissal of its own appeal on the grounds that the CITT lacked jurisdiction to hear the appeal as it dealt with the CBSA's authority to assess excise and additional duties under the *Excise Act*, 2001.

[11] In light of this appeal, this application for judicial review was stayed by order dated August 31, 2006, pending the outcome of the applicant's appeal to the CITT.

[12] On October 31, 2006, the CITT issued its decision in *Spike Marks Inc. v. Canada Border Services Agency*, [2006] C.I.T.T. No. 113 (the CITT decision) granting the applicant's motion to dismiss the appeal on the basis of a lack of jurisdiction to consider "the methodology for assessing and calculating volume/based excised duty and additional duty under the *Excise Act, 2001*".

[13] In light of the CITT's decision, this application for judicial review was resumed. This application deals with the judicial review of the re-determinations issued by the President of the CBSA affirming the recourse officer's preliminary decision dated November 21, 2005.

Board's Reasons for Decision

[14] In seven notices of re-determination dated February 3, 2006, the president of the CBSA upheld the recourse officer's assessment of the duties owing dated November 21, 2005. At issue in this application, is the interpretation of the definition of "duty-paid value" in section 2 of the *Excise Act, 2001* as its interpretation provides in part the formula for quantifying the duties on imported cigars.

[15] While the decision under judicial review is that of the President of the CBSA, it essentially adopted the reasons of the recourse officer dated November 21, 2005. The recourse officer reproduced the definition of "duty-paid value" in the *Excise Act, 2001*:

"duty-paid value" means

- (a) in respect of imported cigars, the value of the cigars as it would be determined for the purpose of calculating an *ad valorem* duty on

the cigars in accordance with the *Customs Act*, whether or not the cigars are subject to *ad valorem* duty, plus the amount of any duty imposed on the cigars under section 42 of this Act and section 20 of the *Customs Tariff*; and

(b) in respect of imported cigars that, when imported, are contained in containers or otherwise prepared for sale, the total of the value of the cigars as determined in accordance with paragraph (a) and the value similarly determined of the container in which they are contained.

[16] The recourse officer explained that paragraph (b) applied in the case of the applicant's cigar imports.

[17] The recourse officer then went on to explain that the CBSA's interpretation of the reference to paragraph (a) in paragraph (b) was such that you have to take the entire value determined in paragraph (a) and inject it into paragraph (b) and then add the value similarly determined of the container in which the cigars were contained. The recourse officer noted:

The phrase "the value of the cigars as it would be determined for the purpose of calculating an *ad valorem* duty on the cigars in accordance with the *Customs Act*, whether or not the cigars are subject to *ad valorem* duty" clearly directs us to use the transaction value to arrive at our value for the cigars.

[18] The recourse officer went on to say that this interpretation was confirmed by section 46 and subsection 47(1) of the *Customs Act*. Section 46 provides that "the value for duty of imported goods shall be determined in accordance with sections 47 to 55." Subsection 47(1) provides "the value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48." The wording of the definition of "duty-paid value", which

provides how to obtain the duty-paid value and not simply just the value, continues with the following wording “plus the amount of any duty imposed on the cigars under section 42 of this Act and section 20 of the *Customs Tariff*.” Therefore, the recourse officer determined that the correct calculation was the total value derived in paragraph (a), and the value similarly determined of the container in which they are contained.

Issues

[19] The applicant submitted the following issues for consideration:

1. What is proper standard of review of the re-determination by the CBSA?
2. Whether the CBSA exceeded its jurisdiction by assessing excise and additional duties under the *Excise Act, 2001*.
3. In the alternative, should the Court decide that the CBSA has jurisdiction to assess excise and additional duties under the *Excise Act, 2001*, whether its calculation of the excise and additional duties was correct?

[20] The respondent raised the following issue for consideration:

1. Does this Court have jurisdiction to hear this application for judicial review?

[21] I would rephrase the issues as follows:

1. Does this Court have jurisdiction to hear this application for judicial review?
2. What is the appropriate standard of review?
3. Did the CBSA exceed its jurisdiction by assessing excise and additional duties under the *Excise Act, 2001*?
4. If the President of the CBSA did not exceed their jurisdiction in interpreting sections 42 and 43 of the *Excise Act, 2001* then did they incorrectly interpret these sections?

Applicant's Submissions

[22] The thrust of the applicant's argument is that the CBSA exceeded its jurisdiction by engaging in the statutory interpretation of certain sections of the *Excise Act, 2001*. In the alternative, the applicant submitted that the CSBA committed a reviewable error of law in their interpretation of the *Excise Act, 2001*.

[23] The applicant submitted the appropriate standard of review is correctness. The applicant submitted that the Supreme Court of Canada in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, found that the *Customs Act* contained a partial privative clause. With regards to the nature of the questions at issue, the applicant submitted that both the issue of jurisdiction and the issue of interpretation of the relevant statutory sections were questions of law, and as such, a high level of deference is owed. As for the expertise of the CBSA, the

applicant argued that neither questions of jurisdiction, nor questions of statutory interpretation were within the CBSA's expertise of determining origin, tariff classification, or calculation of value for duty.

[24] The applicant then provided submissions as to the question of jurisdiction. The applicant submitted the CBSA's jurisdiction is limited to (i) making determinations regarding origin, tariff classification, and value for duty of imported products; and (ii) assessing and collection of customs duties owing. The applicant submitted that there is a significant difference between the mere collection of duties owing and the interpretation of provisions of the *Excise Act, 2001*, collecting falls within the jurisdiction of the CBSA, while assessing does not.

[25] The applicant further submitted that even if the CBSA did have jurisdiction, it wrongly interpreted the meaning of "duty-paid value". The applicant submitted that whereas the CBSA's interpretation of "duty-paid value" includes duties imposed under section 42 of the *Excise Act, 2001* and section 20 of the *Customs Tariff*, a correct interpretation does not. The applicant argued that the CBSA's interpretation of "duty-paid value" is flawed because:

- a) it is inconsistent with a plain reading of the definition itself;
- b) it is inconsistent with a similar reading of other definitions in the same section of the *Excise Act, 2001*, which also cannot logically be cumulative; and
- c) the official French definition in the same Act of "valeur à l'acquitte" does not use the conjunction "et" (and) between the two meanings and as such, the CBSA's interpretation is inconsistent with a plain reading of this definition.

[26] The applicant noted that if this Court finds, as it should, that there are two possible valid interpretations of the meaning “duty-paid value”, then there is a presumption in favour of the applicant *qua* taxpayer. The applicant submitted that although the principle of strict interpretation of tax legislation has given way to a modern approach that is contextual and purposive, a residual presumption in favour of the taxpayer remains in cases of ambiguity (see *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715).

[27] Finally, the applicant addressed the issue of available appeal routes. The applicant submitted that there are theoretically two appeal routes available. Firstly, an appeal to the CITT is possible if the determination at issue is under the *Customs Act*. However, the applicant submitted that the CITT has already confirmed that it lacks jurisdiction to hear the appeal because the issue is not one of a determination under the *Customs Act*. The applicant submitted that if this is a determination under the *Excise Act, 2001*, then an appeal lies to the Minister of National Revenue. The applicant submitted that if this is the appropriate appeal route, then this confirms that the assessment of additional duties is beyond the jurisdiction of the CBSA in the first place.

Respondent’s Submissions

[28] The respondent submitted that this Court lacks jurisdiction to hear this case. The respondent argued that the *Customs Act* provides a comprehensive recourse scheme to persons affected by a re-determination or further re-determination made pursuant to section 60 of the Act. The respondent

noted that this appeal route culminates to an appeal to the CITT and thus, Parliament clearly intended to oust judicial review under section 18.1 of the *Federal Court Act*, R.S.C. 1985, C. F-7. The respondent noted that in the present case, the CITT has dismissed the applicant's appeal on the grounds of a lack of jurisdiction, but argued that this decision is based upon the specific manner in which the applicant framed its appeal before the CITT. Specifically, the applicant had claimed that they did not take issue with the classification of the goods at issue. Furthermore, the respondent submitted that the applicant argued before the CITT that to decide the issue would deprive them of their appeal route under the *Excise Act, 2001*, which culminates to an appeal to the Tax Court of Canada. The respondent argued that this is simply not the case as the duties at issue are imposed under the *Customs Act* and as such, these appeal mechanisms under the *Excise Act, 2001* are not available to the applicant. The respondent also noted that the matter was dealt with before the CITT as a preliminary motion, without the benefit of oral argument.

[29] The respondent then went on to address the appropriate standard of review. With regards to the presence of a privative clause, the respondent submitted that a re-determination or further re-determination made by the president of the CBSA pursuant to section 60 of the *Customs Act*, is not subject to be restrained, prohibited, removed or otherwise dealt with except by way of an appeal to the CITT. Thus, a high level of deference is owed by a reviewing court. As to the expertise of the CBSA, the respondent submitted that the calculation of duties and taxes on imported goods is a matter falling squarely within the expertise of the CBSA. The respondent submitted that sections 59 to 68 of the Act establish a comprehensive statutory scheme governing recourse in respect of re-determinations issued by the CBSA and as such, a significant amount of deference is owed. The

respondent submitted that as re-determinations are highly fact specific deference is warranted. The respondent concluded that with respect to the question of jurisdiction, the appropriate standard of review is correctness. With respect to the issue of calculation of duties, the applicable standard of review is patent unreasonableness, or in the alternative, reasonableness.

[30] The respondent submitted that the legislation makes it clear that the CBSA has jurisdiction to issue re-determinations regarding the excise and additional duties owing on goods. The respondent submitted that the legislative scheme is as follows. Section 44 of the *Excise Act, 2001* provides that duties imposed under sections 42 and 43 of the *Excise Act, 2001* shall be paid and collected under the *Customs Act*. Duties imposed under the *Customs Act* are collected by CBSA officers. Therefore, the CBSA is responsible for the collection of all duties and taxes on imported tobacco products. The respondent also relied on the overall function of the *Customs Act* and *Excise Act, 2001* to illustrate that the duties at issue here are indeed customs duties and not excise duties. Specifically, the respondent noted that while the *Excise Act, 2001* deals with the formula for calculating duties on imported tobacco, it primarily deals with the scheme used to control domestic tobacco, (ie. a licensing program). Simply put, while the calculation formula for duties on imported tobacco is found in the *Excise Act, 2001*, the actual collection and payment of these duties is under the *Customs Act*, and not the *Excise Act, 2001*. The respondent further submitted that the difference between the functions of the two acts is even more apparent if we look at the appeal mechanisms. The appeal route in the *Excise Act, 2001* is only available to amounts “payable” under the *Excise Act, 2001* and therefore the applicant cannot avail themselves to this process. The respondent submitted that in short, domestic tobacco products are dealt with under the *Excise Act, 2001* while

imported goods, including imported tobacco products, fall within the scheme of the *Customs Act*. Thus, the collection of the duties at issue was squarely within the jurisdiction of the CBSA and as such, there exists no reviewable error of jurisdiction.

[31] With regards to the applicant's submission that the CBSA wrongly interpreted "duty-paid value", the respondent submitted that the CBSA correctly applied the calculation method set out in the definition of "duty-paid value". The respondent submitted that an examination of the plain wording of the definition of "duty-paid value" provides that under paragraph (b) (which the parties agree is the applicable paragraph), the "duty-paid value" of cigars imported in plastic containers is based on the total value of the cigars as determined in paragraph (a), plus the value similarly determined for the containers. As paragraph (a) includes the value of the cigars plus the section 42 duty, the section 42 duty must be included in the calculation of the "duty-paid value" for the purposes of paragraph (b). The respondent also submitted that the modern approach to statutory interpretation is that the words of an act are to be read in their entire context and in their grammatical and ordinary sense keeping in mind the entire scheme, the purpose of the act and Parliament's intent (see *Rizzo & Rizzo Shoes Ltd. Re.*, [1998] 1 S.C.R. 27 at paragraph 21). The respondent further submitted that the applicant's referral to a residual presumption in favour of the taxpayer only applies in exceptional cases where the ordinary principles of statutory interpretation cannot resolve the issue. The present case is not one of those cases since the meaning of "duty-paid value" is clear from a plain reading of the definition itself.

Analysis and Decision

[32] As the respondent raised a question regarding the jurisdiction of this Court to hear the present case, I will first address this issue.

[33] **Issue 3**

Does this Court have jurisdiction to hear this application for judicial review?

The respondent submitted that the Federal Court lacks jurisdiction to hear this case as the applicant has a statutory right of appeal to the CITT. The applicant submitted that as evidenced by the CITT's decision dated October 31, 2006, the CITT does not have the jurisdiction to hear the issues raised in this case.

[34] Section 18.1 of the *Federal Courts Act* provides anyone directly affected by a decision the opportunity to apply to this Court for an application of judicial review in respect of the decision of a federal board, commission, and tribunal. However, section 18.5 precludes judicial review by the Federal Court in respect of a decision of a federal board where there already exists a statutory right of appeal to an enumerated body. Subsection 28(2) extends the limitation proscribed in section 18.5 to decisions of federal boards that are subject to the supervisory jurisdiction of the Federal Court of Appeal. The CITT is one of the federal boards enumerated in subsection 28(2). Thus, it must now be determined whether or not in the case before the Court, the applicant has a right to appeal to the CITT.

[35] I begin by looking at the legislative mechanism for appeals in the *Customs Act*. Subsection 60(1) of the *Customs Act* provides:

60.(1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.

[36] Essentially, a person who has received notice under subsection 59(2) may make a request to the President of the CBSA for a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The President then takes one of the actions listed in subsection 60(4) and gives notice to the person who made the request as per subsection 60(5). If an applicant is not satisfied with the decision of the President made under section 60, they may further appeal that decision to the Canadian International Trade Tribunal pursuant to subsection 67(1) of the Act:

67.(1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

[37] The language used in these sections appears to indicate that the appeal procedure outlined above is available to the applicant; a decision was rendered by the President of the CBSA under subsection 60(1), and thus subsection 67(1) was activated.

[38] While procedurally it appears that the applicant has a right of appeal to the CITT, it was argued by the applicant that the CITT has no jurisdiction over the substance of the questions at issue. The jurisdiction of the CITT can be found in its enabling statute, the *Canadian International Trade Tribunal Act*, R.S., 1985, c. 47 (4th Supp.). Sections 16 and 17 deal with the powers, duties and functions of the CITT. The relevant subsection for the purpose of this case is subsection 16(c) which states:

16. The duties and functions of the Tribunal are to

c) hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matters related thereto; and . . .

[39] It is clear that the appeal mechanism provided in subsection 67(1) of the *Customs Act* meets the necessary criteria to fall within the jurisdiction of the CITT under subsection 16(c). The words “and all matters related thereto” appear to indicate that the CITT has a broad jurisdiction when it comes to appeals. I do note, however, that the CITT’s jurisdiction is limited in that under subsection 67(1) of the *Customs Act* only decisions from the President of the CBSA’s regarding the re-determination of origin, tariff classification, value for duty or marking can be appealed. That is to say that the subject matter of appeals to the CITT is limited to the re-determination of origin, tariff classification, value for duty or marking under subsection 67(1) of the *Customs Act*. Thus, the remaining issue is whether or not the issues raised by the applicant are in relation to the re-determination of the value for duty by the President of the CBSA.

[40] The applicant submitted that the issues raised are not in relation to the re-determination of the value for duty by the President of the CBSA, but yet are questions of statutory interpretation. Furthermore, the applicant submitted that the duties in question are excise duties proscribed by sections 42 and 43 of the *Excise Act, 2001* and as such, the right to appeal under subsection 67(1) of the *Customs Act* does not apply to the applicant. I do not accept these arguments.

[41] In relation to the submission that this is not an issue of re-determination of value for duty, I find that it is unrealistic for the applicant to claim that they are not taking issue with the re-determination of the value for duty. Whether a party is challenging the amount the value for duty is valued at or the procedure for calculating that amount, they are nonetheless challenging the re-determination of the duty for value. In my opinion, the amount and the procedure for reaching that amount are interrelated; the distinction alleged by the applicant is artificial. When the President of the CBSA approves an amount such as the duty for value, it is implicit that they are also approving the method of calculation used to derive that amount. The CITT has jurisdiction to decide questions of law, such as the interpretation of a certain section, in relation to the re-determination of a value for duty (*Mattel*, above). These decisions of law are then reviewable by the Federal Court of Appeal on a standard of correctness (*Mattel*, above).

[42] As for whether or not these duties are excise duties and thus not eligible to be appealed to the CITT, I am also not convinced that this is the case. While the method for calculating these duties is found in sections 42 and 43 of the *Excise Act, 2001*, the entire scheme governing their determination, re-determination, appeal, collection and payment is governed by the *Customs Act*.

[43] Section 2 of the *Customs Act* reads:

“duties” means any duties or taxes levied or imposed on imported goods under the *Customs Tariff*, the *Excise Act, 2001*, the *Excise Tax Act*, the *Special Import Measures Act* or any other Act of Parliament, but, for the purposes of subsection 3(1), paragraphs 59(3)(b) and 65(1)(b), sections 69 and 73 and subsections 74(1), 75(2) and 76(1), does not include taxes imposed under Part IX of the *Excise Tax Act*; [emphasis added]

Furthermore, section 44 of the *Excise Act, 2001* reads:

44. The duties imposed under sections 42 and 43 on imported raw leaf tobacco and tobacco products shall be paid and collected under the *Customs Act*, and interest and penalties shall be imposed, calculated, paid and collected under that Act, as if the duties were a duty levied under section 20 of the *Customs Tariff*, and, for those purposes, the *Customs Act* applies with any modifications that the circumstances require. [emphasis added]

[44] These sections make it clear that while the method for determining the amount of value for duty is found in sections 42 and 43 of the *Excise Act*, these duties are customs duties. These duties are assessed by customs officers under the *Customs Act* and these assessments are subject to re-determinations under section 60 of the *Customs Act*.

[45] Having found that the applicant is taking issue with the re-determination of the value for duty made by the President of the CBSA under section 60, it follows that the CITT has jurisdiction and as such, the applicant has a statutory right of appeal under section 18.5 of the *Federal Courts Act*, therefore barring judicial review by this Court.

[46] In a decision dated October 31, 2006, the CITT granted a motion by the applicant to dismiss their appeal on the basis that the CITT lacked the necessary jurisdiction to decide the issues raised. I think it is necessary to note the following observations with respect to the CITT's decision.

[47] Firstly, in its decision, the CITT found that the applicant was not challenging the re-determination of the value for duty, but yet the procedure provided in sections 42 and 43 of the *Excise Act, 2001* which stipulate how to calculate the value for duty. In *Tran v. Canada (National Revenue for Customs and Excise)*, [1990] C.I.T.T. No. 37, the CITT in assessing whether or not a procedure was correctly followed for determining the appropriate exchange rate stated:

On the final issue of exchange rate, the Tribunal finds that customs officials followed the correct procedures, as outlined in the Currency Exchange for Customs Valuation Regulations, in determining the value for duty and, accordingly, used the correct rate of exchange.

[48] This would indicate that in the past, the CITT has found it within their jurisdiction to make findings as to whether or not the correct procedure and calculation were followed to derive a certain value.

[49] Secondly, I think it is necessary to address the concern expressed by the CITT in their decision that to hear the appeal would be to deny the applicant the appeal mechanisms in sections 195 to 205 of the *Excise Act, 2001*. The appeal scheme provided in these sections is only triggered once the Minister has made an assessment of the duties payable under section 188 of the *Excise Act, 2001*. Section 188 limits the Minister's assessment power to duties payable under the *Excise Act, 2001*:

188. (1) The Minister may assess

(a) the duty payable by a person for a fiscal month of the person; and

(b) subject to section 190, interest and any other amount payable by a person under this Act. [emphasis added]

[50] As already discussed, section 44 of the *Excise Act, 2001* provides that the duties imposed under sections 42 and 43 of the *Excise Act, 2001* (which are the issue of this judicial review) are to be paid and collected under the *Customs Act*. Therefore, it appears that the applicant would not have been able to avail itself of the appeal mechanisms provided in the *Excise Act, 2001* and the CITT's concerns were unwarranted.

[51] On a third and final note, the motion before the CITT was heard as a preliminary motion and did not have the benefit that this Court has in hearing oral arguments on the merits of the case.

[52] In my opinion, the applicant does have a statutory right of appeal to the CITT.

Consequently, this Court's jurisdiction under section 18.1 of the *Federal Courts Act* is ousted via section 18.5 and subsection 28(2).

[53] As a result of this finding, the application for judicial review must be dismissed with costs to the respondent.

[54] Because of my finding on this issue, I will not deal with the remaining issues.

JUDGMENT

[55] **IT IS ORDERED that** the application for judicial review is dismissed with costs to the respondent.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Customs Act*, R.S.C. 1985, c. C-1:

<p>2.(1) In this Act,</p> <p>"duties" means any duties or taxes levied or imposed on imported goods under the Customs Tariff, the Excise Act, 2001, the Excise Tax Act, the Special Import Measures Act or any other Act of Parliament, but, for the purposes of subsection 3(1), paragraphs 59(3)(b) and 65(1)(b), sections 69 and 73 and subsections 74(1), 75(2) and 76(1), does not include taxes imposed under Part IX of the Excise Tax Act;</p> <p>58.(1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, may determine the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).</p> <p>(2) If the origin, tariff classification and value for duty</p>	<p>2.(1) Les définitions qui suivent s'appliquent à la présente loi.</p> <p>«droits » Les droits ou taxes imposés, en vertu de la Loi de 2001 sur l'accise, de la Loi sur la taxe d'accise, de la Loi sur les mesures spéciales d'importation, du Tarif des douanes ou de toute autre loi fédérale, sur les marchandises importées. En sont exclues, pour l'application du paragraphe 3(1), des alinéas 59(3)b) et 65(1)b), des articles 69 et 73 et des paragraphes 74(1), 75(2) et 76(1), les taxes imposées en vertu de la partie IX de la Loi sur la taxe d'accise.</p> <p>58.(1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut déterminer l'origine, le classement tarifaire et la valeur en douane des marchandises importées au plus tard au moment de leur déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).</p> <p>(2) Pour l'application de la présente loi, l'origine, le</p>
---	---

of imported goods are not determined under subsection (1), the origin, tariff classification and value for duty of the goods are deemed to be determined, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(a). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).

(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.

59.(1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may

(a) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within

classement tarifaire et la valeur en douane des marchandises importées qui n'ont pas été déterminés conformément au paragraphe (1) sont considérés comme ayant été déterminés selon les énonciations portées par l'auteur de la déclaration en détail en la forme réglementaire sous le régime de l'alinéa 32(1)a). Cette détermination est réputée avoir été faite au moment de la déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).

(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.(1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut:

a) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants:

(i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or

(i) dans les quatre années suivant la date de la détermination, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

(ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and

(ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

(b) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(c.1), (c.11), (e), (f) or (g) that is treated by subsection 74(1.1) as a re-determination under paragraph (a) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (a).

b) réexaminer l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1) c.1), c.11), e), f) ou g) qui est assimilé, conformément au paragraphe 74(1.1), à une révision au titre de l'alinéa a), soit d'une correction effectuée en application de l'article 32.2 qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa a).

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-

(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes

<p>determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.</p>	<p>57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement.</p>
<p>(3) Every prescribed person who is given notice of a determination, re-determination or further re-determination under subsection (2) shall, in accordance with that decision,</p>	<p>(3) Les personnes visées par règlement qui ont été avisées de la décision, de la détermination, de la révision ou du réexamen en application du paragraphe (2) doivent, en conformité avec la décision, la détermination, la révision ou le réexamen, selon le cas:</p>
<p>(a) pay any amount owing, or additional amount owing, as the case may be, as duties in respect of the goods or, if a request is made under section 60, pay that amount or give security satisfactory to the Minister in respect of that amount and any interest owing or that may become owing on that amount; or</p>	<p>a) soit verser tous droits ou tout complément de droits échus sur les marchandises ou, dans le cas où une demande est présentée en application de l'article 60, soit verser ces droits ou compléments de droits, soit donner la garantie, jugée satisfaisante par le ministre, du versement de ceux-ci et des intérêts échus ou à échoir sur ceux-ci;</p>
<p>(b) be given a refund of any duties, or a refund of any duties and interest paid (other than interest that was paid because duties were not paid when required by subsection 32(5) or section 33), in excess of the duties owing in respect of the goods.</p>	<p>b) soit recevoir le remboursement de tout excédent de droits ou de tout excédent de droits et d'intérêts — sauf les intérêts payés en raison du non-paiement de droits dans le délai prévu au paragraphe 32(5) ou à l'article 33 — versé sur les marchandises.</p>

(4) Any amount owing by or to a person under subsection (3) or 66(3) in respect of goods, other than an amount in respect of which security is given, is payable immediately, whether or not a request is made under section 60.

(4) Les sommes qu'une personne doit ou qui lui sont dues en application des paragraphes (3) ou 66(3) sur les marchandises, à l'exception des sommes pour lesquelles une garantie a été donnée, sont à payer sans délai, même si une demande a été présentée en vertu de l'article 60.

(5) For the purposes of paragraph (3)(a), the amount owing as duties in respect of goods under subsection (3) as a result of a determination made under subsection 58(1) does not include any amount owing as duties in respect of the goods under section 32 or 33.

(5) Pour l'application de l'alinéa (3)a), le montant de droits dû sur les marchandises en application du paragraphe (3) à la suite de la détermination faite en vertu du paragraphe 58(1) ne comprend pas un montant dû sur celles-ci en application des articles 32 ou 33.

(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.

(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.

60.(1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in

60.(1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le

respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.

(2) A person may request a review of an advance ruling made under section 43.1 within ninety days after it is given to the person.

(3) A request under this section must be made to the President in the prescribed form and manner, with the prescribed information.

(4) On receipt of a request under this section, the President shall, without delay,

(a) re-determine or further re-determine the origin, tariff classification or value for duty;

(b) affirm, revise or reverse the advance ruling; or

(c) re-determine or further re-determine the marking determination.

(5) The President shall without delay give notice of a decision made under subsection (4), including the rationale on which

réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.

(2) Toute personne qui a reçu une décision anticipée prise en application de l'article 43.1 peut, dans les quatre-vingt-dix jours suivant la notification de la décision anticipée, en demander la révision.

(3) La demande prévue au présent article est présentée au président en la forme et selon les modalités réglementaires et avec les renseignements réglementaires.

(4) Sur réception de la demande prévue au présent article, le président procède sans délai à l'une des interventions suivantes:

a) la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane;

b) la confirmation, la modification ou l'annulation de la décision anticipée;

c) la révision ou le réexamen de la décision sur la conformité des marques.

(5) Le président donne avis au demandeur, sans délai, de la décision qu'il a prise en application du paragraphe (4),

the decision is made, to the person who made the request.

motifs à l'appui.

61.(1) The President may

61.(1) Le président peut procéder:

(a) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods

a) à la révision ou au réexamen de l'origine, du classement tarifaire ou de la valeur en douane des marchandises importées:

(i) at any time after a re-determination or further re-determination is made under paragraph 60(4)(a), but before an appeal is heard under section 67, on the recommendation of the Attorney General of Canada, if the re-determination or further re-determination would reduce duties payable on the goods,

(i) à tout moment après la révision ou le réexamen visé à l'alinéa 60(4)a), mais avant l'audition de l'appel prévu à l'article 67, sur recommandation du procureur général du Canada, dans les cas où la révision ou le réexamen réduirait les droits exigibles sur les marchandises,

(ii) at any time, if the person who accounted for the goods under subsection 32(1), (3) or (5) fails to comply with any provision of this Act or the regulations or commits an offence under this Act in respect of the goods, and

(ii) à tout moment, si la personne qui a déclaré en détail les marchandises en cause, en application des paragraphes 32(1), (3) ou (5), ne s'est pas conformée à la présente loi ou à ses règlements, ou a enfreint les dispositions de la présente loi applicables aux marchandises,

(iii) at any time, if the re-determination or further re-determination would give effect to a decision of the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada made in respect of the goods;

(iii) à tout moment, dans le cas où la révision ou le réexamen donnerait effet à une décision du Tribunal canadien du commerce extérieur, de la Cour d'appel fédérale ou de la Cour suprême du Canada rendue au sujet des marchandises;

- | | |
|--|--|
| (b) re-determine or further re-determine the marking determination of imported goods | b) à la révision ou au réexamen de la décision sur la conformité des marques des marchandises importées: |
| (i) within four years after the date the determination was made under section 57.01, if the Minister considers it advisable to make the re-determination, | (i) dans les quatre années suivant la date de la prise de la décision en vertu de l'article 57.01, si le ministre l'estime indiqué, |
| (ii) at any time, if the person who is given notice of a marking determination under section 57.01 or of a re-determination under paragraph 59(1)(a) fails to comply with any provision of this Act or the regulations or commits an offence under this Act in respect of the goods, | (ii) à tout moment, si le destinataire de l'avis de la décision prise sur la conformité des marques en application de l'article 57.01 ou d'une révision faite en vertu de l'alinéa 59(1)a ne s'est pas conformé à la présente loi ou à ses règlements, ou a enfreint les dispositions de la présente loi applicables aux marchandises, |
| (iii) at any time, if the re-determination or further re-determination would give effect to a decision made in respect of the goods by the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada, and | (iii) à tout moment, dans le cas où la révision ou le réexamen donnerait effet à une décision du Tribunal canadien du commerce extérieur, de la Cour d'appel fédérale ou de la Cour suprême du Canada rendue au sujet des marchandises, |
| (iv) at any time after a re-determination is made under paragraph 60(4)(c), but before an appeal is heard under section 67, on the recommendation of the Attorney General of Canada; and | (iv) à tout moment après la révision visée à l'alinéa 60(4)c), mais avant l'audition de l'appel prévu à l'article 67, sur recommandation du procureur général du Canada; |
| (c) re-determine or further re-determine the origin, tariff classification or value for duty | c) à la révision ou au réexamen de l'origine, du classement tarifaire ou de la valeur en |

of imported goods (in this paragraph referred to as the “subsequent goods”), at any time, if the re-determination or further re-determination would give effect, in respect of the subsequent goods, to a decision of the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada, or of the President under subparagraph (a)(i),

douane des marchandises importées, à tout moment, dans le cas où la révision ou le réexamen donnerait effet, pour ce qui est des marchandises en cause, à une décision du Tribunal canadien du commerce extérieur, de la Cour d’appel fédérale ou de la Cour suprême du Canada, ou du président en application du sous-alinéa a)(i):

(i) that relates to the origin or tariff classification of other like goods imported by the same importer or owner on or before the date of importation of the subsequent goods, or

(i) qui porte sur l’origine ou le classement tarifaire d’autres marchandises semblables importées par le même importateur ou propriétaire le jour de l’importation des marchandises en cause ou antérieurement,

(ii) that relates to the manner of determining the value for duty of other goods previously imported by the same importer or owner on or before the date of importation of the subsequent goods.

(ii) qui porte sur le mode de détermination de la valeur en douane d’autres marchandises importées par le même importateur ou propriétaire le jour de l’importation des marchandises en cause ou antérieurement.

(2) If the President makes a re-determination or further re-determination under this section, the President shall without delay give notice of that decision, including the rationale on which the decision is made, to the prescribed persons.

(2) Le président qui procède à une révision ou à un réexamen en application du présent article donne sans délai avis de sa décision, motifs à l’appui, aux personnes visées par règlement.

67.(1) A person aggrieved by a decision of the President made

67.(1) Toute personne qui s’estime lésée par une décision

under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

(2) Before making a decision under this section, the Canadian International Trade Tribunal shall provide for a hearing and shall publish a notice thereof in the Canada Gazette at least twenty-one days prior to the day of the hearing, and any person who, on or before the day of the hearing, enters an appearance with the Secretary of the Canadian International Trade Tribunal may be heard on the appeal.

(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

68.(1) Any of the parties to an appeal under section 67, namely,

du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

(2) Avant de se prononcer sur l'appel prévu par le présent article, le Tribunal canadien du commerce extérieur tient une audience sur préavis d'au moins vingt et un jours publié dans la Gazette du Canada, et toute personne peut être entendue à l'appel si, au plus tard le jour de l'audience, elle a remis un acte de comparution au secrétaire de ce Tribunal.

(3) Le Tribunal canadien du commerce extérieur peut statuer sur l'appel prévu au paragraphe (1), selon la nature de l'espèce, par ordonnance, constatation ou déclaration, celles-ci n'étant susceptibles de recours, 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 68.

68.(1) La décision sur l'appel prévu à l'article 67 est, dans les quatre-vingt-dix jours suivant la

date où elle est rendue, susceptible de recours devant la Cour d'appel fédérale sur tout point de droit, de la part de toute partie à l'appel, à savoir:

- | | |
|---|--|
| (a) the person who appealed, | a) l'appelant; |
| (b) the President, or | b) le président; |
| (c) any person who entered an appearance in accordance with subsection 67(2), | c) quiconque a remis l'acte de comparution visé au paragraphe 67(2). |

may, within ninety days after the date a decision is made under section 67, appeal therefrom to the Federal Court of Appeal on any question of law.

- | | |
|---|---|
| (2) The Federal Court of Appeal may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing. | (2) La Cour d'appel fédérale peut statuer sur le recours, selon la nature de l'espèce, par ordonnance ou constatation, ou renvoyer l'affaire au Tribunal canadien du commerce extérieur pour une nouvelle audience. |
|---|---|

The *Excise Act, 2001*, S.C. 2002, c.22 :

- | | |
|---|--|
| 2. The definitions in this section apply in this Act. | 2. Les définitions qui suivent s'appliquent à la présente loi. |
|---|--|

"duty-paid value" means	«valeur à l'acquitté »
-------------------------	------------------------

- | | |
|---|--|
| (a) in respect of imported cigars, the value of the cigars as it would be determined for the purpose of calculating an ad valorem duty on the cigars in accordance with the Customs | a) En ce qui concerne les cigares importés, leur valeur telle qu'elle serait déterminée pour le calcul d'un droit ad valorem sur les cigares conformément à la Loi sur les |
|---|--|

Act, whether or not the cigars are subject to ad valorem duty, plus the amount of any duty imposed on the cigars under section 42 of this Act and section 20 of the Customs Tariff; and

(b) in respect of imported cigars that, when imported, are contained in containers or otherwise prepared for sale, the total of the value of the cigars as determined in accordance with paragraph (a) and the value similarly determined of the container in which they are contained.

42.(1) Duty is imposed on tobacco products manufactured in Canada or imported and on imported raw leaf tobacco at the rates set out in Schedule 1 and is payable

(a) in the case of tobacco products manufactured in Canada, by the tobacco licensee who manufactured the tobacco products, at the time they are packaged; and

(b) in the case of imported tobacco products or raw leaf tobacco, by the importer, owner or other person who is liable under the Customs Act to pay duty levied under section 20 of the Customs Tariff or who would be liable to pay that duty on the tobacco or products if they were subject to that duty.

douanes, qu'ils soient ou non sujets à un tel droit, plus les droits afférents imposés en vertu de l'article 42 de la présente loi et de l'article 20 du Tarif des douanes;

b) en ce qui concerne les cigares importés qui, au moment de leur importation, se trouvent dans des contenants ou sont autrement préparés pour la vente, la somme de leur valeur, déterminée selon l'alinéa a), et de la valeur, déterminée de façon analogue, du contenant les renfermant.

42.(1) Un droit sur les produits du tabac fabriqués au Canada ou importés et sur le tabac en feuilles importé est imposé aux taux figurant à l'annexe 1 et est exigible:

a) dans le cas de produits du tabac fabriqués au Canada, du titulaire de licence de tabac qui les a fabriqués, au moment de leur emballage;

b) dans le cas de produits du tabac ou de tabac en feuilles importés, de l'importateur, du propriétaire ou d'une autre personne qui est tenue, aux termes de la Loi sur les douanes, de payer les droits perçus en vertu de l'article 20 du Tarif des douanes ou qui serait tenue de payer ces droits sur les produits ou le tabac s'ils

y étaient assujettis.

(2) The following rules apply to partially manufactured tobacco that is imported by a tobacco licensee for further manufacture:

(2) Les règles suivantes s'appliquent au tabac partiellement fabriqué qu'un titulaire de licence de tabac importe pour une étape ultérieure de fabrication:

(a) for the purposes of this Act, the tobacco is deemed to be manufactured in Canada by the licensee; and

a) pour l'application de la présente loi, le tabac est réputé être fabriqué au Canada par le titulaire de licence;

(b) paragraph (1)(a) applies to the tobacco and paragraph (1)(b) and section 44 do not apply.

b) l'alinéa (1)a s'applique au tabac, mais l'alinéa (1)b et l'article 44 ne s'y appliquent pas.

43. In addition to the duty imposed under section 42, duty is imposed on cigars at the rates set out in Schedule 2 and is payable

43. Est imposé aux taux figurant à l'annexe 2, en plus du droit imposé en vertu de l'article 42, un droit sur les cigares qui sont fabriqués et vendus au Canada ou importés. Ce droit est exigible:

(a) in the case of cigars manufactured and sold in Canada, by the tobacco licensee who manufactured the cigars, at the time of their delivery to a purchaser; and

a) dans le cas de cigares fabriqués et vendus au Canada, du titulaire de licence de tabac qui les a fabriqués, au moment de leur livraison à l'acheteur;

(b) in the case of imported cigars, by the importer, owner or other person who is liable under the Customs Act to pay duty levied under section 20 of the Customs Tariff or who would be liable to pay that duty on the cigars if they were subject to that duty.

b) dans le cas de cigares importés, de l'importateur, du propriétaire ou d'une autre personne qui est tenue, aux termes de la Loi sur les douanes, de payer les droits perçus en vertu de l'article 20 du Tarif des douanes ou qui serait tenue de payer ces droits sur les cigares s'ils y étaient

assujettis.

44. The duties imposed under sections 42 and 43 on imported raw leaf tobacco and tobacco products shall be paid and collected under the Customs Act, and interest and penalties shall be imposed, calculated, paid and collected under that Act, as if the duties were a duty levied under section 20 of the Customs Tariff, and, for those purposes, the Customs Act applies with any modifications that the circumstances require.

44. Les droits imposés en vertu des articles 42 et 43 sur les produits du tabac et le tabac en feuilles importés sont payés et perçus aux termes de la Loi sur les douanes. Des intérêts et pénalités sont imposés, calculés, payés et perçus aux termes de cette loi comme si les droits étaient des droits perçus en vertu de l'article 20 du Tarif des douanes. À ces fins, la Loi sur les douanes s'applique, avec les adaptations nécessaires.

188.(1) The Minister may assess

188.(1) Le ministre peut établir une cotisation pour déterminer:

(a) the duty payable by a person for a fiscal month of the person; and

a) les droits exigibles d'une personne pour un mois d'exercice;

(b) subject to section 190, interest and any other amount payable by a person under this Act.

b) sous réserve de l'article 190, les intérêts et autres sommes exigibles d'une personne en application de la présente loi.

...

...

195.(1) Any person who has been assessed and who objects to the assessment may, within 90 days after the date of the notice of the assessment, file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.

195.(1) La personne qui fait opposition à la cotisation établie à son égard peut, dans les quatre-vingt-dix jours suivant la date de l'avis de cotisation, présenter au ministre un avis d'opposition, en la forme et selon les modalités autorisées par celui-ci, exposant les motifs de son opposition et tous les faits pertinents.

...

...

198.(1) Subject to subsection (2), a person who has filed a notice of objection to an assessment may appeal to the Tax Court to have the assessment vacated or a reassessment made after

(a) the Minister has confirmed the assessment or has reassessed; or

(b) 180 days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed.

(2) No appeal under subsection (1) may be instituted after the expiry of 90 days after notice that the Minister has reassessed or confirmed the assessment is sent to the person under subsection 195(10).

(3) The Tax Court may, on any terms that it sees fit, authorize a person who has instituted an appeal in respect of a matter to amend the appeal to include any further assessment in respect of the matter that the person is entitled under this section to appeal.

198.(1) Sous réserve du paragraphe (2), la personne qui a produit un avis d'opposition à une cotisation peut interjeter appel à la Cour de l'impôt pour faire annuler la cotisation ou en faire établir une nouvelle lorsque, selon le cas:

a) la cotisation est confirmée par le ministre ou une nouvelle cotisation est établie;

b) un délai de cent quatre-vingts jours suivant la production de l'avis a expiré sans que le ministre ait notifié la personne du fait qu'il a annulé ou confirmé la cotisation ou procédé à une nouvelle cotisation.

(2) Nul appel ne peut être interjeté après l'expiration d'un délai de quatre-vingt-dix jours suivant l'envoi à la personne, aux termes du paragraphe 195(10), d'un avis portant que le ministre a confirmé la cotisation ou procédé à une nouvelle cotisation.

(3) La Cour de l'impôt peut, de la manière qu'elle estime indiquée, autoriser une personne ayant interjeté appel sur une question à modifier l'appel de façon à ce qu'il porte sur toute cotisation ultérieure concernant la question qui peut faire l'objet d'un appel en vertu du présent article.

The *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47:

- | | |
|---|---|
| <p>16. The duties and functions of the Tribunal are to</p> <p>(a) conduct inquiries and report on matters referred to the Tribunal for inquiry by the Governor in Council or the Minister under this Act;</p> <p>(a.1) conduct mid-term reviews under section 19.02 and report on the reviews;</p> <p>(b) consider complaints and extension requests filed with the Tribunal by domestic producers of like or directly competitive goods under this Act and, where appropriate, conduct inquiries into the complaints and extension requests and report on them;</p> <p>(b.1) receive complaints, conduct inquiries and make determinations under sections 30.1 to 30.19;</p> <p>(c) hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matters related thereto; and</p> <p>(d) exercise and perform such other duties or functions that, pursuant to any other Act of Parliament or regulations thereunder, shall or may be exercised or performed by the Tribunal.</p> | <p>16. Le Tribunal a pour mission:</p> <p>a) d'enquêter et de faire rapport sur les questions dont le saisit, en application de la présente loi, le gouverneur en conseil ou le ministre;</p> <p>a.1) de procéder aux examens visés à l'article 19.02 et faire rapport sur ceux-ci;</p> <p>b) d'étudier les plaintes et les demandes de prorogation déposées sous le régime de la présente loi par les producteurs nationaux de marchandises similaires ou directement concurrentes et, s'il y a lieu, d'enquêter et de faire rapport à leur égard;</p> <p>b.1) de recevoir des plaintes, procéder à des enquêtes et prendre des décisions dans le cadre des articles 30.1 à 30.19;</p> <p>c) de connaître de tout appel pouvant y être interjeté en vertu de toute autre loi fédérale ou de ses règlements et des questions connexes;</p> <p>d) d'exercer les attributions qui lui sont conférées en vertu de toute autre loi fédérale ou de ses règlements.</p> |
|---|---|

The *Federal Courts Act*, R.S.C. 1985, C. F-7:

18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(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

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such

18.1(1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut:

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;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime

directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.
(5) If the sole ground for relief	(5) La Cour fédérale peut

established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

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

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

to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

28.(1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

28.(1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants:

...

...

(e) the Canadian International Trade Tribunal established by the Canadian International Trade Tribunal Act;

e) le Tribunal canadien du commerce extérieur constitué par la Loi sur le Tribunal canadien du commerce extérieur;

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-382-06

STYLE OF CAUSE: SPIKE MARKS INC.
- and -
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 12, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: February 18, 2008

APPEARANCES:

Brenda C. Swick
Kristian Brabander

FOR THE APPLICANT

Michael Roach

FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP
Ottawa, Ontario

FOR THE APPLICANT

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

FOR THE RESPONDENT