Court File No.: A-39-16

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Applicant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY
CANADIAN TRANSPORTATION AGENCY
(MOTION TO STRIKE)

August 29, 2016

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A. Overview

1. The following is in Reply to the Applicant's responding submissions with respect to the Respondent Canadian Transportation Agency (Agency)'s motion to strike the application as being moot.

2. The application for judicial review was filed prior to the Agency's decision being made and sought to prevent the Agency from making a decision the Applicant claimed the Agency did not have jurisdiction to make. Now that the decision has been made and is the subject matter of an appeal, the application for judicial review is moot.

3. Even if the appeal is allowed and the case is remitted to the Agency for redetermination, the Court could, in its decision allowing the appeal, provide the Agency with whatever direction the Court considers appropriate. A Declaration that the Agency may not issue a particular decision would serve no valid purpose.

4. Moreover, the Court should decline to intervene in the way suggested by the Applicant in his response to the motion. Parliament has chosen to have the Agency determine certain questions and therefore the Court should defer to the Agency rather than intervene on an interlocutory basis.

B. Evidence on a motion to strike

5. No evidence should be lead on a motion to strike. One exception to the rule is where the basis of the motion to strike is that the issue has become moot. The Agency acknowledged this rule in the motion to strike and argued that the intervening events including the issuance of the Agency's decision and the appeal were properly admissible.

Agency's Memorandum of Fact and Law, para. 38
Agency's Motion record, Tab 3.

6. The Applicant has raised numerous complaints about the application for judicial review and the manner in which it has proceeded. This includes complaints about the Agency's conduct in this proceeding. The Applicant has not explained how this evidence is relevant nor has he explained how it would be admissible on a motion to strike. It is submitted that this evidence should not considered in determining whether the application for judicial review should be struck as moot.

C. The application is moot

7. The Applicant concedes that if the appeal in A-242-16 is dismissed, the within application becomes moot.

Applicant's Written representations, para. 33
Responding Motion Record, Tab 2

8. However, the Applicant maintains that the granting of the appeal would not necessarily render the remedies being sought on the application moot. The Applicant makes reference to an "objective" on the part of the Agency to exempt resellers from the requirement to of holding a licence. The Applicant states that the thrust of the application is that what the Agency is seeking to do requires legislative amendments. Presumably, the purpose of the application is to prevent the Agency from issuing a decision which the Applicant maintains that the Agency has no jurisdiction to make.

Applicant's Written Representations, paras. 27 and 33
Responding Motion Record, Tab 2

9. Since the filing of the application of judicial review, the Agency has issued its decision. Therefore, the decision which the Applicant states that the Agency intends to make, has now been made, and is the subject of an appeal. Whatever "objective" the Agency may or may not have is no longer an issue as the actual decision has been issued. The application for judicial review is therefore moot.

10. Even if the appeal is allowed, and the matter remitted to the Agency for redetermination, the Court has the authority to provide to the Agency whatever directions the Court considers appropriate. The appeal of the Agency's decision therefore renders the application for judicial review moot, or, at a minimum, redundant and duplicative.

11. Now that the matter is the subject of an appeal, the Applicant has failed to identify a valid purpose that the application for judicial review would serve. The Court should decline to intervene as the Applicant suggests and issue a Declaration in this proceeding as to what types of decisions the Agency can or cannot make when the matter is remitted for redetermination. Parliament has established an administrative process for determinations under the *Canada Transportation Act* and allowing the Courts to become involved in this administrative process before it is completed would inject an alien element into Parliament's design.

> ***Canada (Border Services Agency) v. C.B. Powell Limited*,**
> **2010 FCA 61 (CanLII) at para. 28**
> **Moving Party's Reply, Tab 1**

12. Stratas J.A. stated in *Canada (Border Services Agency) v. C.B. Powell Limited, supra,* that where there is an administrative process in place, the Courts should not intervene by means of interlocutory judicial reviews.

> *The principle of judicial non-interference with ongoing administrative processes*
>
> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v.*

Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (CanLII) at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (CanLII) at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14 (CanLII); *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 (CanLII) at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 (CanLII) at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 (CanLII) at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 (CanLII) at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 1993 CanLII 3430 (ON SCDC), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 1995 CanLII 1305 (BC CA), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 1991 CanLII 7126 (ON SC), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like

judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 at paragraph 48.

***Canada (Border Services Agency) v. C.B. Powell Limited*,**
Ibid. at paras 30-32
Moving Party's Reply, Tab 1

13. The Applicant argues that the application for judicial review may not be moot as the appeal may be allowed and on redetermination the Agency may continue to pursue an "objective" of exempting resellers from the requirement to have a licence, thus necessitating the Court's pre-emptive intervention. However, to accept the Applicant's argument that the application is not moot in this regard would require the Court to agree that it may be appropriate to entertain an interlocutory or premature judicial review application. It is submitted that the Court should decline to accept that it should intervene in this fashion, and that the existence of an appeal and the Court's ability to remit the matter back to the Agency with Directions renders the application moot.

D. *Lukacs v. Porter Airlines Inc. et al*

14. The Applicant relies on the decision in another proceeding he pursued against Porter Airlines Inc. in support of the alternative argument that the application for judicial review should be stayed pending disposition of the appeal. However, this case supports the argument that the application for judicial review should be struck as being moot.

Applicant's Written Representations, paras. 33-35
Responding Motion Record, Tab 2

15. In *Lukacs v. Porter Airlines Inc. et al,* 2013 FCA 169 (CanLII) the Applicant was challenging an interlocutory decision of the Agency. A single Member of the Agency issued a decision extending the time for Porter Airlines Inc. ("Porter") to file its answer to the application. The Applicant filed a motion asking that at least two members of the Agency review the decision to extend time and order that the Member who made the order recuse or disqualify himself. The Member dismissed the motion and the Applicant appealed to this Court. The Agency thereafter issued its final decision in respect of the Applicant's complaint. It was then argued that as a result of the Agency issuing a final decision in the matter, the appeal from the interlocutory decision was moot.

> ***Lukacs v. Porter Airlines Inc.*, 2013 FCA 169 (CanLII)**
> **Moving Party's Reply, Tab 2**

16. The Applicant argued in that case, as he argues here, that the proceeding was not moot. However this Court disagreed and found that "[a]fter the issuance of the final decision no practical purpose would be served by considering the validity" of the interlocutory decision.

> ***Lukacs v. Porter Airlines Inc.*, *supra*, at para 9**
> **Moving Party's Reply, Tab 2**

17. Here, the Applicant does not challenge an interlocutory decision but instead seeks to challenge a decision before it is made. As in the Applicant's case in *Porter Airlines,* once the Agency's final decision was made, and, in this case, leave to appeal this decision was granted, the application for judicial review became moot.

18. It should be noted that the Applicant's application for judicial review in A-386-12, which was kept in abeyance, was with respect to Agency's procedure to hear certain matters with one Member. In the decision to place the application in abeyance pending the outcome of the related appeal, the Court noted that it was doubtful that the procedure was open to the Applicant. In other words the Court questioned whether judicial review of the Agency's procedures was a proper means of challenging it. Similarly, here, it is questionable whether judicial review of a decision before it is made, or, as the Applicant frames it, judicial review of the Agency's "objective", is available at law, especially where leave to appeal the actual decision is subsequently granted. The questionable basis for the application for judicial review supports the argument that it is now moot given the pending appeal.

Order dated November 30, 2012, in A-386-12
Responding Motion Record, Tab 5

19. After the Applicant's appeal of the Agency's interlocutory decision was dismissed as being moot, the Applicant discontinued the application for judicial review in A-386-12 conceding that it, too, was moot.

Entry dated July 12, 2013
Court docket for A-386-12

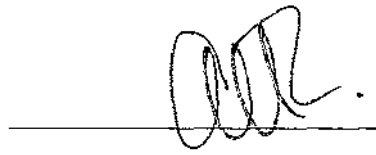
E. Conclusion

20. The Applicant has failed to identify any valid practical purpose that would be served by allowing the application for judicial review to proceed. Since leave to appeal the Agency's actual decision has been granted by this Court, the application for judicial review of the Agency's alleged intended decision is moot.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Gatineau, in the

Province of Quebec, this 29th day of August, 2016.



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ADDITIONAL AUTHORITIES

Tab	Case
1	*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII)
2	*Lukacs v. Porter Airlines Inc.*, 2013 FCA 169 (CanLII)

TAB 1

Date: 20100223

Docket: A-245-09

Citation: 2010 FCA 61

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA

Appellants

and

C.B. POWELL LIMITED

Respondent

Heard at Montreal, Quebec, on February 2, 2010.

Judgment delivered at Ottawa, Ontario, on February 23, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

Federal Court of Appeal		Cour d'appel fédérale

Date: 20100223

Docket: A-245-09

Citation: 2010 FCA 61

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA

Appellants

and

C.B. POWELL LIMITED

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The respondent, C.B. Powell Limited, imported bacon bits into Canada. The Canada Border Services Agency ("CBSA") assessed certain duties on the bacon bits. C.B. Powell disagreed with the CBSA's assessment. So, pursuing its rights under subsection 60(1) of the *Customs Act*, R.S.,

1985, c. 1 (2nd Supp.), C.B. Powell asked the President of the Canada Border Services Agency to rule on the matter.

[2] The President of the CBSA ruled that he did not have jurisdiction to decide the matter. Under subsection 67(1) of the Act, "decisions" of the President can be appealed to the Canadian International Trade Tribunal ("CITT"). But C.B. Powell did not follow that route. Instead, it brought a judicial review in the Federal Court, essentially seeking the advice of that court about whether there was a "decision" that could be appealed under subsection 67(1) of the Act. It asked for a declaration to that effect. Harrington J. of the Federal Court granted that declaration: 2009 FC 528. The Crown appeals to this Court, arguing that the President of the CBSA was correct in deciding that he did not have jurisdiction to decide the matter and so there was no "decision" that could be appealed to the CITT under subsection 67(1) of the Act.

[3] In my view, the appeal must be allowed.

[4] 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.

[5] In this case, C.B. Powell's recourse against the President's ruling is to pursue an appeal to the CITT under subsection 67(1) of the Act. It is for the CITT to interpret the word "decision" in subsection 67(1) and decide whether it has jurisdiction to consider C.B. Powell's appeal in these circumstances and, if so, to decide the appeal on its merits. When the CITT completes that task, the administrative process under the Act will be exhausted. Only at that point can an aggrieved party pursue a judicial review to this Court under subsection 28(1)(*e*) of the *Federal Courts Act*, R.S., 1985, c. F-7.

B. The facts

[6] I shall describe what happened in this particular case by examining each step in the administrative process of adjudications and appeals under the Act.

The customs form

[7] Under the Customs Act, an importer of goods, such as C.B. Powell, must report and declare and pay such duty and sales taxes as may be owing. It does so by submitting a form. Among other things, the importer declares the value of the imported goods, specifies a particular tariff treatment, and states a particular tariff classification number.

[8] In this case, C.B. Powell imported bacon bits from the United States in 2005. On the form, it declared the value of the bacon bits, specified Most Favoured Nation tariff treatment and entered a particular classification number.

Going beyond the form

[9] When the goods are imported, the CBSA can go beyond the form and determine the origin, tariff classification and value for duty of the goods. This is set out in subsection 58(1):

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).	**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).

[10] However, where the CBSA receives the form and does not immediately go beyond it, the origin, tariff classification and value for duty of the goods are deemed to be determined by what was entered on the form. This is set out in subsection 58(2):

(2) If the origin, tariff classification and value for duty 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).	(2) Pour l'application de la présente loi, l'origine, le 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).

[11] In this case, the CBSA did not go behind the form, and so the entries of C.B. Powell were taken as declared.

The audit and the re-determination

[12] However, under sections 42, 42.01 and 42.1 of the Act, the CBSA can conduct audits and verifications of the forms. The findings from those audits and verifications can cause it to "re-determine the origin, tariff classification or value for duty of imported goods" under section 59 of the Act. The relevant portions of section 59 are as follows:

59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may	**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*) 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...; and	*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...;
(*b*) further re-determine the origin, tariff classification or value for duty of imported goods...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	*b*) réexaminer l'origine, le classement tarifaire ou la valeur en douane...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....
(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-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.	(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 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.

[13] In this case, in 2008, the CBSA audited the form submitted for the bacon bits. It discovered a mistake: C.B. Powell had entered the wrong classification number on the form. Before issuing a re-determination under section 59, it invited C.B. Powell to examine the matter.

C.B. Powell's examination

[14] C.B. Powell accepted that the classification number it had entered was wrong. But it discovered a further mistake.

[15] C.B. Powell discovered that it should have claimed NAFTA treatment with no duty, rather than Most Favoured Nation treatment with 12.5% duty. Under subparagraph 74(3)(*b*)(ii) of the Act, such a mistake can be corrected within one year. But three years had elapsed.

[16] Nevertheless, C.B. Powell advised the CBSA of the mistaken tariff treatment. After all, the CBSA was correcting the mistaken classification number under section 59, so, in C.B. Powell's view, the CBSA could also correct the mistaken tariff treatment.

The section 59 re-determination

[17] The CBSA issued its section 59 re-determination. It corrected only the classification number. It left unchanged the tariff treatment, with its 12.5% duty:

> This decision represents a re-determination of the tariff classification only. The tariff treatment has not been reviewed and is not being re-determined on this detailed adjustment statement.

C.B. Powell takes the matter further

[18] C.B. Powell pursued its rights under subsection 60(1) of the Act and asked the President of the CBSA to conduct a re-determination of the tariff treatment (known as "tariff origin" under the Act). Subsection 60(1) provides as follows:

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

The ruling of the President of the CBSA

[19] The President of the CBSA declined to look at the matter. In his view, he could act under subsection 60(1) only if there had been an earlier determination of tariff treatment by the CBSA. This is because subsection 60(1) uses the words "re-determination" and "further re-determination." In his view, since the CBSA had not determined tariff treatment earlier, there was nothing for him to "redetermine" or "further redetermine" under subsection 60(1).

Section 67 of the Act

[20] Section 67(1) of the Act provides for a further administrative appeal from the President of the CBSA to the CITT:

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

[21] However, C.B. Powell proceeded immediately to Federal Court by way of judicial review, rather than pursuing an appeal to the CITT.

The judicial review in the Federal Court

[22] In the Federal Court, C.B. Powell sought "an order" (in reality a declaration) that a decision had been made under subsection 60(1) and so there was an appeal available to it under subsection 67(1). In case the Federal Court found that no decision had been made under subsection 60(1), C.B. Powell alternatively sought an order of mandamus that would force the President to make a decision under subsection 60(1).

[23] The Crown took the position that, on the facts of this case, no re-determination was possible under subsection 60(1). As a result, there was no decision that could be judicially reviewed, nor could the Federal Court order any decision to be made under subsection 60(1).

[24] In the Federal Court, both parties were content to have the court decide these issues. No one took the position that the Federal Court should decline jurisdiction. No one took the position that the CITT should deal with the matter by way of appeal under subsection 67(1). However, just in case, the parties did agree that the time limits for an appeal to the CITT would not apply, pending judicial determination.

The judgment of the Federal Court

[25] The Federal Court granted the application for judicial review and declared that the president's decision is "a negative decision…to which an application lies to the Canadian International Trade Tribunal pursuant to s. 60.2…".

[26] I assume that the reference to subsection 60.2 is a typographical error, as that subsection deals with applications to the CITT for an extension of time to appeal to the President of the CBSA. It is clear from the reasoning of the Federal Court that it found that an appeal to the CITT was available and, as noted above, subsection 67(1) is the relevant provision.

[27] In reaching this result, the Federal Court engaged in a thorough review of the case law. It found that *Mueller Canada Inc. v. Canada (Minister of National Revenue-M.N.R.)* (1993), 70

F.T.R. 197 governed the outcome of the application. In *Mueller*, Rouleau J. held that a so-called "non-decision" or refusal to exercise jurisdiction could be appealed to the CITT.

C. Analysis

Parliament has established an administrative process to be followed

[28] Under the Act, Parliament has established an administrative process of adjudications and appeals in this area. This administrative process consists of initial CBSA decisions or deemed assessments under section 58, further determinations by CBSA officials under section 59, additional determinations by the President of the CBSA under section 60 and appeals to the CITT under subsection 67(1). The courts are no part of this. Allowing the courts to become involved in this administrative process before it is completed would inject an alien element into Parliament's design.

[29] In addition to designing an administrative process without courts, Parliament, for good measure, has gone further and has forbidden any judicial interference. At every stage of this administrative process, in subsections 58(3), 59(6) and 62, Parliament has specified that the only permissible reviews, re-determinations or appeals are found in the administrative process described in the Act:

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

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.	d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.
...	[...]
62. A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.	**62.** La révision ou le réexamen prévu aux articles 60 ou 61 n'est susceptible de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 67.

The principle of judicial non-interference with ongoing administrative processes

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v.*

Vancouver Stock Exchange (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R.

(4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

Customs Act decisions in this area

[34] The general principle against judicial interference with ongoing administrative processes has already been applied a number of times to the *Customs Act* regime that is in issue in this appeal.

[35] The court below appropriately cited *Mueller*, *supra*, for the proposition that so-called "non-decisions" or refusals to exercise jurisdiction under this statutory regime were "decisions" that could be appealed to the CITT.

[36] The court below also appropriately cited *Her Majesty the Queen v. Fritz Marketing Inc.*, 2009 FCA 62. The issue in *Fritz Marketing* was whether the Federal Court, on judicial review, should set aside a CBSA determination made under section 59 of the Act because it was based on evidence that was obtained contrary to s. 8 of the Charter. Sharlow J.A., writing for this Court, stated (at paragraph 33) that the validity of the section 59 determination, including the Charter issue, should have been pursued under the administrative process set out in the Act.

[37] In this case, the court below was very mindful of these authorities and others to similar effect. However, it wondered whether the situation was different because the President's ruling was a "jurisdictional" determination. For example, it did not see *Fritz Marketing* as being necessarily determinative of the issues in this case because it did not concern "jurisdictional facts" (at paragraph

33). Further, it noted that the parties did not cite any authorities of this Court concerning a decision of the President made "on jurisdictional grounds" (at paragraph 34).

[38] The CITT has also wondered about its ability to hear an appeal under subsection 67(1) from "non-decisions" or "jurisdictional" determinations by the President of the CBSA under subsection 60(1): see *Vilico Optical Inc. v. Canada (Deputy Minister of National Revenue – M.N.R.),* [1996] C.I.T.T. No. 33 (Q.L.). As the court below observed (at paragraph 36), the CITT has been leaving it to the Federal Court to deal with "non-decisions" or "jurisdictional" determinations.

"Jurisdictional" grounds and "jurisdictional" determinations

[39] When "jurisdictional" grounds are present or where "jurisdictional" determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a "jurisdictional" issue, by itself, an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed?

[40] In my view, the answer to these questions are negative. An affirmative answer would resurrect an approach discarded long ago.

[41] Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as "preliminary questions" that went to "jurisdiction": see, *e.g.*, *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. By labelling

tribunal rulings as "jurisdictional," courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.

[42] Over thirty years ago, that approach was discarded: *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), "The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." Recently, the Supreme Court again commented on the old discarded approach, disparaging it as "a highly formalistic, artificial 'jurisdiction' test that could easily be manipulated": *Dunsmuir*, *supra*, at paragraph 43. Quite simply, the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.

[43] The inappropriateness of this labelling approach is well-illustrated by the ruling of the President of the CBSA in this case. In his ruling, the President considered his "jurisdiction." He did this by interpreting the words of subsection 60(1), determining the nature of C.B. Powell's request for a ruling, and deciding whether C.B. Powell's request fell within the scope of the subsection, as interpreted. These are questions of law, questions of fact and questions of mixed fact and law, respectively.

[44] But these are exactly the same questions that the President of the CBSA normally considers. For example, when deciding upon the tariff classification that ought to apply to particular imported goods under subsection 60(1), the President must determine the nature of the imported goods, what

classifications are legally available, and, finally, what classifications ought to apply to these goods. These are, respectively, determinations of questions of fact, law and mixed fact and law. Calling one ruling "jurisdictional" and the other not, when they are both really the same type of ruling, is, in reality, result-oriented labelling.

[45] It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see *e.g.*, *Matsqui Indian Band*, *supra*; *Greater Moncton International Airport Authority*, *supra* at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.C. 452 (T.D.) at paragraphs 12 and 13; *Delmas*, *supra*; *Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).

[46] I conclude, then, that applying the "jurisdictional" label to the ruling of the President of the CBSA under subsection 60(1) of the Act in this case changes nothing. In particular, applying the "jurisdictional" label to the President's ruling did not permit C.B. Powell to proceed to Federal Court, bypassing the remainder of the administrative process, namely the appeal to the CITT under subsection 67(1) of the Act.

What should happen in this case

[47] It follows that if C.B. Powell wishes to have recourse against the ruling of the President of the CBSA, it should pursue an appeal to the CITT under subsection 67(1). It is not for the Federal Court or this Court to interpret the word "decision" in subsection 67(1) and determine whether the CITT can hear C.B. Powell's appeal. That is the task of the CITT when an appeal is brought to it under subsection 67(1).

[48] According to the court below (at paragraph 36), the CITT believes, based on its reading of *Mueller*, *supra*, that only the Federal Court can rule that a "non-decision" or "jurisdictional decision" is a "decision" under subsection 67(1) of the Act. Further, the CITT believes, based on its reading of *Mueller*, that only "decisions on the merits" can be appealed to the CITT under subsection 67(1) of the Act: *Vilico*, *supra* at paragraph 11.

[49] I do not read *Mueller* as supporting either of these beliefs. Further, *Mueller* was decided on an application for judicial review that was brought prematurely – before the parties had exhausted the administrative process of adjudications and appeals under the Act. Under that administrative process, it was not the task of the Federal Court in *Mueller* to interpret the word "decision" in subsection 67(1) of the Act. It was the CITT's task. Under subsection 67(1), the CITT alone is to interpret the word "decision" and decide whether it can hear an appeal. After the CITT has done that and has ruled on any appeal properly before it, an aggrieved party can ask this Court to review the CITT's decision by way of an application for judicial review under s. 28(1)(e) of the *Federal Courts Act*.

[50] In this case, if an appeal is brought to it, the CITT should interpret the word "decision" in subsection 67(1) of the Act without regard to what was said in *Mueller*. After doing so, the CITT might decide that the ruling of the President of the CBSA in this case was a "decision"; if so, it will go on to decide C.B. Powell's appeal on the merits. Alternatively, the CITT might decide that the ruling of the President of the CBSA was not a "decision"; if so, it will decline to hear C.B. Powell's appeal on the merits. Either way, the CITT's decision, accompanied by meaningful reasons for decision, will mark the end of the administrative process of adjudications and appeals under the Act. At that point, an aggrieved party will be able to come to this Court and ask it to review the CITT's decision under s. 28(1)(e) of the *Federal Courts Act*.

[51] It follows from the foregoing analysis that the court below in this case should have dismissed C.B. Powell's application for judicial review as premature. The normal rule against judicial interference with ongoing administrative processes applies in this case, with full force. The record does not disclose any exceptional circumstances that would permit early recourse to the Federal Court, nor did the parties contend that there are any. Judicial involvement in the ongoing administrative process under the Act is not warranted at this time.

D. Conclusion

[52] Therefore, I would allow the appeal, set aside the judgment of the Federal Court and dismiss C.B. Powell's application for judicial review. As neither party objected to the jurisdiction of the

Federal Court to determine the judicial review, I would order that there be no costs both here and below.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-245-09
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE SEAN J. HARRINGTON DATED MAY 21, 2009, NO. T-1376-08	
STYLE OF CAUSE:	The President of the Canada Border Services Agency and the Attorney General of Canada v. C.B. Powell Limited
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 2, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Nadon J.A. Evans J.A.
DATED:	February 23, 2010

APPEARANCES:

Jacques Savary	FOR THE APPELLANTS
Michael D. Kaylor	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANTS
Lapointe Rosenstein LLP Montreal, Quebec	FOR THE RESPONDENT

TAB 2

Federal Court of Appeal | Cour d'appel fédérale

Date: 20130625

Docket: A-460-12

Citation: 2013 FCA 169

CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and PORTER AIRLINES INC.

Respondents

Heard at Halifax, Nova Scotia, on June 25, 2013.

Judgment delivered from the Bench at Halifax, Nova Scotia, on June 25, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130625

Docket: A-460-12

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CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and PORTER AIRLINES INC.

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, Nova Scotia, on June 25, 2013)

DAWSON J.A.

[1] The appellant, Mr. Lukács, appeals from an interlocutory decision of the Canada Transportation Agency. This Court granted leave to appeal the issue of whether the Agency erred in law by rendering an interlocutory decision without a quorum of at least two members of the Agency.

[2] A preliminary issue was raised by the respondent Porter Airlines Inc.: is the appeal moot and, if so, should this Court exercise its discretion to hear the appeal?

[3] The mootness issue arises on the following facts. The appellant filed a complaint with the Agency in respect of Porter's International Tariff Rule 18, which relates to its liability for damages and expenses caused due to flight delays or cancellations. In response, Porter sought a 60 day extension in which to file its answer. The appellant opposed Porter's request for an extension and sought an order staying the impugned tariff pending adjudication of his complaint. A single member of the Agency granted a 30 day extension to Porter and refused the appellant's request for a stay (LET-C-A-92-2012).

[4] The appellant then filed a motion asking that at least two members of the Agency review the legal status of LET-C-A-92-2012 (on the ground that it was decided by a single member of the Agency) and order that Chairman Hare, who made the impugned order, recuse or disqualify himself. In LET-C-A-126-2012 Chairman Hare dismissed the motion. This is the decision under appeal.

[5] After this Court granted leave to appeal the interlocutory decision, the Agency issued its final decision in respect of the appellant's complaint. A portion of Porter's International Tariff Rule 18 was disallowed by the Agency. This decision was made by two members of the Agency, including Chairman Hare. No application was made for leave to appeal this decision.

[6] The appellant argues that the present appeal is not moot because the result of the appeal will affect the validity of both the final decision and also another proceeding before the Agency.

[7] We disagree. The Agency has rendered its final decision and there was no application for leave to appeal that decision. The order under appeal in large part considered the propriety of the previous order that granted an extension to Porter to file its answer and refused to stay the impugned tariff while the complaint was adjudicated. After the issuance of the final decision no practical purpose would be served by considering the validity of the extension and stay refusal.

[8] Chairman Hare's refusal in the decision under appeal to recuse himself is not relevant to the validity of the final decision. That decision was never challenged by the appellant and an appeal from the Chairman's interlocutory refusal to recuse himself cannot be used to collaterally attack the Agency's final decision.

[9] The fact that the issue of the validity of decisions made by one member may remain live in other cases before the Agency does not prevent that issue from being moot between these parties.

[10] Having found the appeal to be moot, it is necessary to consider whether we should exercise our discretion to hear this appeal, notwithstanding its mootness. The relevant factors to be considered are:

1. Is there a continued adversarial relationship?
2. Do concerns over judicial economy trump the potential impact of the decision under appeal?
3. Will the exercise of discretion be seen as an intrusion into the legislative branch?

[11] We agree that there is a continued adversarial relationship between the parties. Written memoranda have been filed and the parties are ready to argue the underlying appeal if it is not dismissed for mootness. In our view, however, the determinative factor is concern over judicial economy.

[12] The Agency's internal policy under which the decision in issue was made by a single member has been rescinded. An amendment to the Canada Transportation Agency General Rules which provides for a single member quorum is pending. These factors militate against considering the moot question of the validity of the interlocutory decision under appeal.

[13] The appellant argues that the pending amendments to the General Rules are invalid. In our view this raises a new legal issue that could raise new legal arguments by the respondents that are outside the scope of the issue on which leave was granted. The Agency seeks to uphold the internal policy as a valid exercise of the Chairman's authority under section 13 of the *Canada Transportation Act*, S.C.1996, c.10 (Act). The validity of the proposed rules would appear to depend upon whether the rules are instruments that fall within subsection 36(1) of the Act, which requires regulations made by the Agency to be approved by the Governor-in-Council. This is an issue that does not arise on the facts of this case. Therefore, we express no opinion upon the issue.

[14] Accordingly, in the exercise of our discretion we decline to consider the appeal.

[15] The Agency filed its own motion to dismiss the appeal on the ground of mootness. It is unnecessary for us to address either the merits or the appropriateness of the decision-maker bringing such a motion.

[16] Accordingly, despite the very articulate submissions of the appellant, the appeal will be dismissed without costs.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-460-12
(APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED AUGUST 9, 2012)	
STYLE OF CAUSE:	Gábor Lukács v. Canadian Transportation Agency and Porter Airlines Inc.
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 25, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	SHARLOW, DAWSON AND STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	DAWSON J.A.

APPEARANCES:

Gábor Lukács	ON HIS OWN BEHALF
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