Court File No. A-264-22 id#1

FEDERAL COURT OF APPEAL

B E T W E E N:

MICHAELS OF CANADA, ULC

Appellant

- and –

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

December 2, 2022

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Justice Fuhrer of the Federal Court in File No. T-1164-21, dated November 2, 2022 ("**Order**"). The Order granted a motion by the Attorney General of Canada ("**AGC**") to strike the Application for Judicial Review ("**Application**") filed by Michaels of Canada, ULC ("**MoC**") of certain decisions (the "**Decisions at Issue**") made by Officer Michael Creighton (the "**Verification Officer**") of the Canada Border Services Agency ("**CBSA**") in the context of a trade compliance verification final report requiring MoC to self-assess additional duties and taxes on certain previously imported goods under Section 32.2 of the *Customs Act*, RSC 1985, c 1 (2nd Supp) ("***Customs Act***").

THE APPELLANT ASKS that this appeal be allowed, that the Order be set aside, the motion to strike be dismissed, and that an order be granted:

1. finding that Section 18.5 of the *Federal Courts Act* does not preclude judicial review of the Decisions at Issue;

2. finding that the Appellant's Notice of Application is not premature;

3. awarding to the Appellant the costs of this appeal, and the costs of the motion below in which the Order was rendered; and

4. for such further and other relief as counsel may seek on behalf of the Appellant, and as this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

Background

5. Section 32 of the *Customs Act* requires importers to account for goods they import and pay any duties owing on those goods. Duties are calculated based on the "value for duty" of the imported goods, defined in Subsection 2(1) and determined using the methodologies and subject to any required adjustments as set out in Sections 47 to 55.

6. Section 32.2(2) of the *Customs Act* requires importers to self-correct within 90 days of forming a "reason to believe" that their declarations made at the time of accounting for the goods are incorrect. The concept of "reason to believe" is not defined in the *Customs Act*. The obligation to make corrections ends four years after the importer originally accounted for the goods pursuant to Section 32.2(4).

7. Once accepted, corrections filed under Section 32.2(2) are deemed to be re-determinations of the value for duty by the CBSA under Section 59(1)(a) of the *Customs Act*, resulting in the issuance of a notice of a re-determination to the importer, called a "detailed adjustment statement" ("DAS"). The value for duty re-determinations contained in a DAS may be further re-determined by the President of the CBSA under Section 60. The President's Section 60 re-determinations may be appealed to the Canadian International Trade Tribunal ("**CITT**") under Section 67. Section 68 provides that only questions of law in a Section 67 CITT decision may be appealed to the Federal Court of Appeal.

8. An importer can request a National Customs Ruling ("NCR") from the CBSA. The NCR is a written statement from the CBSA that provides guidance to an importer on how to ensure that their declarations of value for duty will be correct. It provides direction from the CBSA as to how the provisions of the *Customs Act* apply to importations based on information provided by the

importer when it makes its request. An NCR is valid until it is either modified or revoked by the CBSA, and may be revoked retroactively if either there was a "misstatement or omission of material facts" in the importer's request for the NCR, or if there was a change in circumstances or the material facts on which the NCR was based and the CBSA was not so notified. Unless and until the NCR is modified or revoked, it is treated by the CBSA as binding on both the CBSA and the importer.

The Application

9. On July 23, 2022, MoC filed the Application seeking relief from certain decisions made in the context of a trade compliance verification requiring MoC to self-assess additional duties and taxes on previously imported goods under Section 32.2 of the *Customs Act*. These decisions were contained, together with other decisions not at issue in the Application, in a Trade Compliance Verification Report dated June 25, 2021 and email correspondence dated June 25, 2021 (collectively, the "**Final Report**") issued by the Verification Officer.

10. In the Final Report the Verification Officer decided that MoC had reason to believe that it had incorrectly declared the value for duty of certain goods. This finding was contrary to an existing NCR that (i) gave MoC reason to believe that it had correctly valued its importations of goods, and (ii) safeguarded MoC from a decision by the CBSA imputing to MoC reason to believe that its customs valuation declarations were incorrect. The specific decisions at issue in the Application concern the Verification Officer's interpretation of the NCR, determination of the "date of specific information" that gave the importer reason to believe, and the temporal scope of reassessments ordered (collectively, the "**Decisions at Issue**").

11. The Verification Officer also made certain other findings related to the calculation of the value for duty of MoC's importations (the "**Value for Duty Decisions**"), which were not at issue in the Application.

12. The errors made by the Verification Officer cannot be remedied under the appeal provisions of the *Customs Act*. The Verification Officer unreasonably interpreted the scope of the NCR narrowly, and capriciously made the erroneous determination that there was a change in material fact in the period following the date of issuance of the NCR. In addition, the Verification Officer imputed reason to believe under Section 32.2 of the *Customs Act* in circumstances that were unreasonable, procedurally unfair, and prejudicial to MoC.

13. On December 23, 2021, the AGC filed a motion to strike the Application on the grounds that (i) the Decision did not "directly affect" MoC, and, as a result, that the Federal Court lacked jurisdiction to judicially review the impugned administrative conduct, and (ii) in the alternative, even if the Court had jurisdiction to review the impugned administrative conduct, the application was nevertheless premature in light of the statutory appeal mechanisms under the *Customs Act*.

The Federal Court Decision

14. On November 2, 2022, Justice Fuhrer issued the Order and the Court's reasons in *Michaels of Canada, ULC v. Attorney General of Canada*, 2022 FC 1498. The Order granted the AGC's motion to strike and consisted of the following five findings:

(a) First, that the AGC had not met its burden as the moving party on a motion to strike to show that MoC is not directly affected by the Final Report within the meaning of Section 18.1 of the *Federal Courts Act*;

(b) Second, that nonetheless the Federal Court's jurisdiction to hear the Application is ousted by the review system set out in the *Customs Act*, pursuant to Section 18.5 of the *Federal Courts Act*;

(c) Third, that the CITT *might* determine if the issue of "reason to believe" is relevant in deciding how far back corrections must be made in exercising its mandate to "determine the validity and correctness of the Detailed Adjustment Statements";

(d) Fourth, that no exceptional circumstances exist that would warrant recourse to the Federal Court; and

(e) Fifth, and in the alternative, that the Application is premature because the CITT *could* consider the novel issues raised by MoC's application, and particularly the Decisions at Issue, in exercising its jurisdiction under Section 67.

15. MoC does not appeal from the first finding, that the AGC has failed to establish that MoC is not directly affected by the Final Report. With respect to the other four findings, however, the Federal Court made several errors of law that form the grounds of this appeal.

16. **First**, the Federal Court erred in determining that Section 18.5 of the *Federal Courts Act* is engaged. Section 18.5 only ousts the judicial review jurisdiction of the Federal Court if Parliament "expressly provides" for an appeal to one of specified bodies (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. Parliament has not expressly provided a mechanism to appeal a

Verification Officer's decisions with respect to "reason to believe" under Section 32.2(2) of the *Customs Act* to any of the bodies specified in Section 18.5.

17. **Second**, even if Section 18.5 of the *Federal Courts Act* is interpreted more expansively, i.e., as ousting the judicial review jurisdiction of the Federal Court if the matter at issue could (one day and after other *de novo* decisions by other administrative decision-makers) be addressed by one of the specified bodies, Section 18.5 is not engaged.

18. The Decisions at Issue are not relevant to the re-determinations of the value for duty of MoC's importations under Sections 59 and 60 of the *Customs Act*, which form the basis of an importer's recourse to the CITT and later, on errors of law, to the Federal Court of Appeal. More specifically, issues related to the interpretation of an existing NCR and the formation or imputation of "reason to believe" relate to the "trigger" for an importer's correction obligation under Section 32.2. They have no bearing on the "decision" contained in a Section 59 re-determination of value for duty, namely the correct calculation of the value for duty of the imported goods. Accordingly, the adjudications and appeals that Parliament has set out in the *Customs Act* do not apply and therefore judicial review by the Federal Court remains available.

19. **Third**, neither the validity nor the correctness of the DASes issued by the CBSA following the Final Report are at issue in the Application, and therefore the Federal Court's judicial review jurisdiction cannot be superseded by the CITT's (eventual) appellate jurisdiction under Section 67 of the *Customs Act*.

20. The issue of validity pertains to the issuance of a DAS in compliance with the procedural provisions of the *Customs Act*. The Application does not complain of a procedural error in the processes leading to the Final Report and the DAS redeterminations. No limitation period or other

issue of validity has been raised. The issue of correctness pertains to whether the re-determinations calculate the values for duty accurately, i.e., in accordance with the valuation methodologies set out in the *Customs Act*. The correct application of these valuation methodologies to MoC's importations is a determination (or re-determination) of the value for duty of the imported goods, and can only be reviewed within the statutory appeal mechanism.

21. By contrast, the Decisions at Issue may only be remedied through judicial review. They are unrelated to the validity or correctness of DASes issued as a consequence of the Final Report. The Verification Officer made a Decision at Issue regarding MOC's "reason to believe" based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. The Verification Officer unreasonably interpreted the scope of the existing NCR narrowly, and made the erroneous Decision at Issue that there was a change in material fact in the period subsequent to the date of issuance of the NCR. This consequently led to another Decision at Issue, the imputation of reason to believe under Section 32.2 of the *Customs Act* in circumstances that were unreasonable, procedurally unfair, and prejudicial to MoC. However, the Decisions at Issue were not procedurally invalid and did not address the calculation of the value for duty; hence they cannot be remedied under the appeal provisions of the *Customs Act*.

22. **Fourth**, the circumstances here are exceptional, warranting recourse to the Federal Court. It is axiomatic that the Value for Duty Decisions and the Decisions at Issue expressed in the Final Report are unrelated. Even if the Verification Officer correctly re-determined the calculation of value for duty, which is not admitted, it would not extinguish MOC's remedial rights to refrain from self-assessing retrospectively, and paying applicable duties and taxes. Its argument that it had positive "reason to believe" on the basis of the existing NCR and therefore should not have been ordered to file retrospective corrections, would survive yet to be adjudicated.

23. The correctness of the Value for Duty Decisions is the sole subject of a (further) re-determination of the value for duty under Section 60 and *de novo* appeal to the CITT under Section 67 of the *Customs Act*. If the Order is not dismissed, it will create a waste of resources and fragmentation. MoC will be forced to seek relief from decision-makers who have no jurisdiction to interpret the NCR or review the Verification Officer's decision to impute reason to believe in the circumstances.

24. Granting the motion to strike, the Federal Court has re-created the same unjust circumstances that plagued the importer in the *Jockey* cases. The Federal Court has precluded access to judicial review by deferring to the CITT the determination of its jurisdiction. The CITT should not be expected to issue a finding on this question if it decides that that questions related to "reason to believe" have no bearing on the issue of whether the value for duty of the goods in issue was correctly re-determined by the CBSA, which is the substantive legal issue it must address in an appeal pursuant to Subsection 67(1) of the *Customs Act*. MoC will have endured excessive delay in pursuit of what is already known based on what the CITT's decision in *Jockey* indicates: that it is not necessary, nor in any way helpful to its lawful exercise of its mandate, that the CITT determine issues related to an importer's "reason to believe" in order to re-determine the correct value for duty of imported goods.

25. **Fifth**, the Federal Court incorrectly determined that the doctrine of exhaustion applies and that the application for judicial review is premature. The doctrine of exhaustion of remedies cannot apply in circumstances where the proposed remedies do not address the impugned administrative conduct.

26. Conduct that falls outside the scope of a Section 59 re-determination cannot be remedied by the statutory remedies that take the Section 59 re-determination as their starting point. To the extent that the Final Report contains administrative conduct that lies outside the scope of the powers granted to a delegated officer under Section 59, judicial review of that conduct is not premature and the Federal Court ought to exercise its jurisdiction to judicially review the Decisions at Issue rather than have struck the Application on a motion.

27. **Sixth**, the Federal Court erred in striking the Notice of Application based on the mere possibility that a subsequent decision maker might decide that it has the jurisdiction to address the Decisions at Issue. The Federal Court held that "[i]n accordance with the principle that a fatal flaw must be obvious, a notice of application **may not be struck as premature** […] **unless the Court is certain that there is recourse elsewhere**, now or later, and that this recourse is adequate and effective" (emphasis added). If there is uncertainty, the Federal Court should not strike a Notice of Application.

28. As a matter of statutory construction, there exists no "certainty" that the recourse currently being sought by MoC would be available elsewhere or later pursuant to the appellate regime of the *Customs Act*. Indeed, it is highly uncertain that the CITT would consider "reason to believe" as even relevant to a determination of the value for duty. The Federal Court did not find otherwise, i.e., that "reason to believe" was relevant; it merely found that the CITT *might* decide *if* it is relevant. The Federal Court concluded that the possibility *was not foreclosed*: "[s]imply because the CITT declined to consider the issue of “reason to believe” in the context of “value for duty” in an earlier instance, does not mean the CITT going forward has foreclosed consideration of issues like those raised here by MoC."

29. MoC's Application raised issues that are novel and have never been tested in jurisprudence under the *Customs Act*, as acknowledged by both the Federal Court in its Order and the AGC in its arguments. On a motion to strike, MoC should not be deprived of the opportunity to present its case based on the mere possibility that an alternative remedy *might* be available. Without prejudice to the grounds of appeal described above that explain why the CITT would not have jurisdiction over the Decisions at Issue, the fact that the CITT *may* decide the issue of "reason to believe" does not sufficiently establish that the Application is so clearly improper as to be bereft of any possibility of success. Accordingly, the Federal Court erred in striking the notice of application.

30. The Appellant relies upon:

(a) *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.));

(b) *Federal Courts Act* (R.S.C., 1985, c. F-7); and

(c) Such further and other grounds as counsel may advise and the Court may permit.

31. The appellant proposes that this appeal be heard in Toronto.

December 2, 2022

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