Federal Court of Appeal | Cour d'appel fédérale

Date: 20231013

Dockets: A-17-22
A-60-22

Citation: 2023 FCA 209

CORAM: **BOIVIN J.A.**
LOCKE J.A.
ROUSSEL J.A.

Docket: A-17-22

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

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

Respondent

Docket: A-60-22

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

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

Respondent

Heard at Montréal, Quebec, on September 13, 2023.

Judgment delivered at Ottawa, Ontario, on October 13, 2023.

REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	LOCKE J.A. ROUSSEL J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The Court is seized of both an appeal pursuant to subsection 68(1) of the *Customs Act*, R.C.S. 1985, c. 1 (2nd Supp.) (A-60-22) and an application for judicial review pursuant to paragraph 28(1)(*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (A-17-22) brought by the Attorney General of Canada (AGC) in connection with an Order of the Canadian International Trade Tribunal (the Tribunal) issued on December 16, 2021 (AP-2019-047). In its Order, the Tribunal concluded that the value for duty (VFD) of Pier 1 Imports U.S. Inc. (Pier 1)'s imported goods should be calculated using a flexible application of the computed value method (FCVM). In coming to this conclusion, the Tribunal reversed an earlier decision of the President of the Canada Border Services Agency (CBSA) that held that the deductive value method (DVM) should apply to calculate the VFD of the imported goods.

[2] For the reasons that follow, both the appeal and the application for judicial review should be dismissed.

II. Background

[3] Pier 1 is an importer of decorative home furnishings and accessories. Prior to the case at issue, Pier 1 and the CBSA were parties to a settlement agreement dating back to 2003 pursuant to which they agreed on the applicable method to calculate the VFD of Pier 1's imported goods.

[4] Subsequently, in 2015, a CBSA audit revealed a material change in Pier 1's business structure. This material change made it impossible for the parties to abide by their settlement agreement regarding the VFD calculation method.

[5] As a result, the CBSA issued seven Detailed Adjustment Statements (DAS) to Pier 1 for the period from March 1, 2014, to August 26, 2017. The CBSA calculated the VFD of the imported goods by using the DVM set forth in subsection 51(2) of the *Customs Act*.

[6] On March 16, 2018, Pier 1 requested a redetermination of the VFD of the DASs by the President of the CBSA pursuant to subsection 60(1) of the *Customs Act*. In its request for redetermination, Pier 1 argued that the DVM should not apply in connection with its imported goods.

[7] On December 27, 2019, the President of the CBSA rejected Pier 1's request and accordingly upheld the CBSA's previous determination with respect to the VFD and the validity of the said DASs.

[8] On March 26, 2020, Pier 1 filed an appeal of the President of the CBSA's re-determination decision before the Tribunal pursuant to subsection 67(1) of the *Customs Act*.

[9] The Tribunal, ruling *de novo*, issued a decision followed by an order in relation to Pier 1's appeal. In a Decision issued on September 2, 2021, the Tribunal found that a flexible application of the computed value method (CVM), the FCVM, was the most appropriate for

valuing Pier 1's imported goods for the relevant period. In that Decision, the Tribunal also requested that the parties prepare additional submissions on the amount of profit and general expenses to be included in the VFD.

[10] After considering additional submissions prepared by the parties, the Tribunal rendered an order on December 16, 2021, which fixed the mark-up percentages of Pier 1's profit and general expenses.

[11] It follows that although the appeal and the application for judicial review before our Court only concern the December 16, 2021 Order, the said Order must be read in light of the September 2, 2021 Decision.

III. Relevant Statutory Provisions

[12] For ease of reference, the relevant provisions of the *Customs Act* include sections 52, 53, 60, 67 and 68. They are reproduced as follows:

Computed value as value for duty	**Valeur imposable fondée sur la valeur reconstituée**
52(1) Subject to subsection 47(3), where the value for duty of goods is not appraised under sections 48 to 51, the value for duty of the goods is the computed value of the goods if it can be determined.	**52(1)** Sous réserve du paragraphe 47(3), la valeur en douane des marchandises, dans le cas où elle n'est pas déterminée par application des articles 48 à 51, est leur valeur reconstituée, si elle peut être déterminée.

Determination of computed value

(2) The computed value of goods being appraised is the aggregate of amounts equal to

(a) subject to subsection (3), the costs, charges and expenses incurred in respect of, or the value of,

(i) materials employed in producing the goods being appraised, and

(ii) the production or other processing of the goods being appraised, determined in the manner prescribed; and

(b) the amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised made by producers in the country of export.

Détermination de la valeur reconstituée

(2) La valeur reconstituée des marchandises à évaluer est la somme des éléments suivants :

a) les coûts et frais supportés à l'égard ou la valeur — déterminés de manière réglementaire :

(i) des matières utilisées dans la production des marchandises à apprécier d'une part,

(ii) des opérations de production ou de transformation des marchandises à apprécier d'autre part;

b) le montant, déterminé de manière réglementaire, de l'ensemble des bénéfices et frais généraux, généralement supportés dans les ventes de marchandises de même nature ou de même espèce que les marchandises à apprécier, effectuées pour l'exportation au Canada par des producteurs qui se trouvent dans le pays d'exportation.

Amounts included

(3) Without limiting the generality of paragraph (2)(a), the costs, charges, expenses and value referred to in that paragraph include:

(a) the costs, charges and expenses referred to in subparagraph 48(5)(a)(ii);

Montants compris

(3) Sont compris parmi les coûts et frais et la valeur mentionnés à l'alinéa (2)a) :

a) les coûts et frais visés au sous-alinéa 48(5)a)(ii);

(b) the value of any of the goods and services referred to in subparagraph 48(5)(a)(iii), determined and apportioned to the goods being appraised as referred to in that subparagraph, whether or not such goods and services have been supplied free of charge or at a reduced cost; and

b) la valeur des marchandises et services visés au sous-alinéa 48(5)a)(iii) déterminée et imputée aux marchandises à apprécier de la manière visée dans ce sous-alinéa, même lorsqu'ils sont fournis sans frais ou à coût réduit;

(c) the costs, charges and expenses incurred by the producer in respect of engineering, development work, art work, design work, plans or sketches undertaken in Canada that were supplied, directly or indirectly, by the purchaser of the goods being appraised for use in connection with the production and sale for export of those goods, apportioned to the goods being appraised as referred to in subparagraph 48(5)(a)(iii).

c) les coûts et frais, supportés par le producteur, des travaux d'ingénierie, d'étude, d'art, d'esthétique industrielle, de plans ou croquis exécutés au Canada et fournis, directement ou indirectement, par l'acheteur des marchandises à apprécier en vue de leur production et de leur vente à l'exportation, imputés à ces marchandises de la manière visée au sous-alinéa 48(5)a)(iii).

Definition of *general expenses*

(4) For the purposes of this section, ***general expenses*** means the direct and indirect costs, charges and expenses of producing and selling goods for export, other than the costs, charges and expenses referred to in paragraph (2)(a) and subsection (3).

Frais généraux

(4) Pour l'application du présent article, les frais généraux sont les coûts et frais directs et indirects de production et de vente des marchandises pour l'exportation, qui ne sont pas visés à l'alinéa (2)a) et au paragraphe (3).

Residual basis of appraisal

53 Where the value for duty of goods is not appraised under sections 48 to 52, it shall be appraised on the basis of

Dernière base de l'appréciation

53 Lorsqu'elle n'est pas déterminée conformément aux articles 48 à 52, la valeur en douane des marchandises se fonde sur les deux éléments suivants :

(a) a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a

a) une valeur obtenue en utilisant celle des méthodes d'appréciation prévues aux articles 48 à 52 qui, appliquée avec suffisamment de

flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and

(b) information available in Canada.

souplesse pour permettre de déterminer une valeur en douane pour les marchandises, comporte plus de règles adaptables au cas que chacune des autres méthodes;

b) les données accessibles au Canada.

Request for re-determination or further re-determination

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.

Demande de révision ou de réexamen

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.

Appeal to the Canadian International Trade Tribunal

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 Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

Appel devant le Tribunal canadien du commerce extérieur

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 Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

…

[…]

Judicial review

(3) On an appeal under subsection (1), the Canadian International Trade

Recours judiciaire

(3) Le Tribunal canadien du commerce extérieur peut statuer sur

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.	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.
Appeal to Federal Court	**Recours devant la Cour d'appel fédérale**
68(1) Any of the parties to an appeal under section 67, namely,	**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.	

IV. The Tribunal's Decision and Order

A. *The September 2, 2021, Decision*

[13] As previously indicated, the September 2, 2021 Decision (the Decision) addressed the issue of the appropriate calculation method in order to ascertain the VFD of Pier 1's imported goods. In addressing this issue, the Tribunal found that neither a strict application of the DVM—

the method advanced by the AGC—or the CVM—the method advanced by Pier 1—was possible. Rather, based on its review of the evidence, the Tribunal concluded that a flexible application of the CVM, the FCVM, was most appropriate as it required the fewest deviations (Decision at para. 45).

[14] In its analysis, the Tribunal used Pier 1's warehouse landed cost as a proxy for the computation required by paragraph 52(2)(*a*) of the *Customs Act*. The Tribunal then proceeded to determine an appropriate mark-up percentage to account for the amount of Pier 1's profit and general expenses as required under paragraph 52(2)(*b*) of the Act.

[15] In so doing, the Tribunal relied on an expert comparability report provided by Pier 1 to determine the appropriate mark-up percentage, to which the CBSA provided a rebuttal expert report. Although the Tribunal ultimately accepted Pier 1's expert evidence, it did not accept that the comparators provided "an accurate depiction" of Pier 1's likely profit, given the fact that Pier 1's operations were more akin to those of a wholesaler than of a distributor (Decision at paras. 48, 52).

[16] On this basis, the Tribunal indicated that additional value adding activities needed to be accounted for to properly determine the general expenses included in the mark-up percentage. Such activities would include "buying, global logistics, inventory planning, product allocation, foreign exchange and related marketing expenses incurred prior [to] goods being shipped to stores" (Decision at para. 47).

[17] The Tribunal accordingly directed the parties to prepare additional submissions "concerning the amounts of general expenses and profit to be used in the mark-up percentage" (Decision at para. 55). It also encouraged the parties to undertake a further analysis of the data contained in the comparability report provided by Pier 1's expert report (Decision at paras. 50–52).

B. *The December 16, 2021, Order*

[18] Following receipt of the parties' additional submissions on the appropriate amount of mark-up percentage as required by paragraph 52(2)(*b*) of the *Customs Act*, the Tribunal issued its December 16, 2021 Order (the Order).

[19] It should be noted that, prior to filing its additional submissions, the CBSA requested permission to submit a fresh expert comparability report in order to determine the mark-up percentage. Pier 1 opposed this request. The Tribunal ultimately denied it, but reserved the right to accept additional expert evidence should the parties' additional submissions prove to be insufficient.

[20] In its additional submissions, Pier 1 accounted for the additional value adding activities identified in the Decision and adjusted its estimate mark-up percentage accordingly. It further submitted that the likely profits of a wholesaler exercising the same activities as Pier 1 would be slightly higher than originally suggested in its expert comparability report.

[21] The CBSA, as part of its additional submissions, argued that a new comparability analysis was necessary to meet the requirement of paragraph 52(2)(*b*) of the *Customs Act*. In doing so, the CBSA did not provide any substantive response to the calculations and mark-up percentage arrived at by Pier 1.

[22] The Tribunal once again rejected the CBSA's assertion that a further expert comparability report was required. It accepted Pier 1's additional submissions and fixed the mark-up percentages accordingly.

[23] The CBSA now appeals and seeks judicial review of the Tribunal Order.

V. Standard of Review

[24] Pursuant to subsection 68(1) of the *Customs Act*, appeals from the Tribunal to this Court are limited to questions of law (*Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151, 328 A.C.W.S. (3d) 510) (*Neptune*); *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171, 328 A.C.W.S. (3d) 511; *Canada (Border Services Agency v. Danson Décor Inc.*, 2022 FCA 205, 2022 CarswellNat 5108 (*Danson*)). As such, the applicable standard in the present case is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[25] As for the application for judicial review, the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*)).

VI. Issues

[26] The appeal raises two issues:

- Did the Tribunal err in its application of the FCVM under subsection 52(2) of the *Customs Act* when determining the VFD of Pier 1's imported goods?
- Did the Tribunal breach procedural fairness by refusing to admit additional expert evidence?

[27] The application for judicial review raises the following issue:

- Is the Tribunal's appraisal of the VFD of Pier 1's imported goods as established in its Order reasonable?

VII. Analysis

A. *Observations Regarding the Concurrent Appeal and Application for Judicial Review*

[28] The present case addresses both an appeal and an application for judicial review brought concurrently. Our Court recently discussed the issue as to whether an application for judicial review can be considered notwithstanding the statutory appeal mechanism contemplated by Parliament in subsection 68(1) of the *Customs Act*.

[29] More specifically, in *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, [2021] F.C.J. No. 848 (*Best Buy*), our Court was unanimous on the disposition of the appeal but split on the question of whether the limitation in section 18.5 of the *Federal Courts Act* excluded applications for judicial review on questions of fact. The minority reasoned that only

the statutory appeal mechanism under subsection 68(1) of the *Customs Act* was available to the parties to review the decision—i.e., only errors of law could be reviewed by our Court (*Best Buy* at paras. 36–61). The majority, however, found that such a complete bar to judicial review would be incompatible with the rule of law. Hence, the majority concluded that both errors were reviewable—errors of law are reviewable under the correctness standard via the statutory appeal mechanism in subsection 68(1) of the *Customs Act*, while errors of fact are reviewable under the reasonableness standard through an application for judicial review (*Best Buy* at paras. 112, 120). Our Court has since confirmed that the ability to bring an application for judicial review in parallel with an appeal, though on limited grounds, has been settled by *Best Buy* (*BCE Inc. v. Québecor Média Inc*., 2022 FCA 152, 2022 A.C.W.S. 5773 at para. 58 (*BCE*)).

[30] The above rulings are binding. The concurrent filing of an appeal and an application for judicial review in the same proceeding nonetheless raises certain practical considerations that will briefly be addressed in conclusion of these reasons.

[31] With that in mind, I will address both the appeal and the application for judicial review filed pursuant to subsection 68(1) of the *Customs Act*.

B. *The Appeal*

(1) Did the Tribunal err in its application of the FCVM under subsection 52(2) of the *Customs Act* when determining the VFD of Pier 1's imported goods?

[32] The *Customs Act* provides that the VFD of imported goods calculated with the CVM is equal to the aggregate amounts of (a) the cost of materials and production of the goods; and (b)

the amount for profit and general expenses of the producer that is generally reflected in comparable sales for export of goods of the same class or kind. The residual valuation method in section 53 of the *Customs Act* allows the use of a proxy to ascertain these values.

[33] The AGC submits that the Tribunal failed to account for the second element of the subsection 52(2) equation—i.e., comparable sales for export. It contends that the Tribunal's findings were made without regard to this statutory requirement as it had rejected all evidence presented on this point.

[34] The AGC's submission fails. The Tribunal, as part of its Decision, engaged in a detailed weighing exercise of the evidence before it. In doing so, it found that the comparators did not capture the wholesaler like "business reality" of Pier 1 (Decision at paras. 47–49):

> [47] To this value Pier 1 should allocate a proportionate amount of the expenses Pier 1 incurs in the process of bringing the goods to market in Canada for sale in its stores. As described in its own testimony, Pier 1 is not simply a distribution company and the Tribunal finds that any value generating activities that occurred prior to importation should be included in the VFD of the goods. These expenses would include those related to buying, global logistics, inventory planning, product allocation, foreign exchange and related marketing expenses incurred prior goods being shipped to stores. The Tribunal finds these expenses reflect the value generated by Pier 1 at the time of importation. With respect to the other home office expenses that have been allocated to the distribution centre in Mr. de Camargo's analysis, the amounts appear to be reasonable.
>
> [48] Concerning Pier 1's suggested allocation for profit, the Tribunal disagrees that the comparators presented provide an accurate depiction of Pier 1's likely profit. Four of the six comparators were in the market of selling home building products, which in the Tribunal's view, do not resemble the product mix or business reality of Pier 1. Similarly, the other two comparators, Hooker Furniture Corporation and Nova Lifestyle, Inc. are primarily distributors of furniture, whereas Pier 1 is primarily in the business of selling home furnishings.
>
> [49] Conversely, the CBSA did not provide a competing benchmarking analysis. In discussing its rebuttal expert report and commentary, the CBSA also admitted

> that the financial data available to it was less than perfect and did not reflect Pier 1's business operations in the United States.

[35] With this caveat, the Tribunal accepted Pier 1's evidence "as it related to the profit and expenses of Pier 1's distribution centres"—i.e., the very requirement of paragraph 52(2)(*b*) (Decision at para. 50). The Tribunal then requested additional submissions from the parties on the comparator evidence that had already been tendered. These additional submissions were required to re-evaluate the comparators in light of the Tribunal's finding that Pier 1's operations closer resembled those of wholesaler than a distributor. The Tribunal later cautioned the parties not to interpret its observation as having the effect of rejecting Pier 1's expert comparability report (Order at para. 20).

[36] In its Order, the Tribunal referred to Pier 1's submissions on five additional value adding activities to include in the arm's length mark-up percentage for profit and general expenses (Order at paras. 9–10). Pier 1 submitted that the likely profits of a wholesaler providing services similar to Pier 1's would be slightly higher than those originally presented in its expert comparability report (Order at para. 11). The Tribunal characterized Pier 1's additional submissions as "reasonable," "thorough," and "fair" (Order at paras. 20, 23).

[37] As this Court recognized in *Danson*, there is no jurisdiction for a reviewing court to interfere with the assessment and weighing of evidence by the Tribunal. In this case, the Tribunal gauged that it had sufficient evidence to calculate the VFD of the imported goods pursuant to the FCVM. It is not the role of this Court to dispute the Tribunal's factual determinations (*Danson* at para. 26):

> [26] On this last point, as already mentioned, I am of the view that this Court has no jurisdiction to review the assessment of the evidence by the Tribunal. Pursuant to subsection 68(1) of the *Customs Act*, only questions of law can be raised before this Court. As such, the ultimate question before us is whether the goods have been processed beyond what is permitted by Chapter 25. There is no doubt that expert evidence, and the decision to accept the testimony of an expert or to prefer the testimony of one expert over another, can affect the construction given to a heading by the Tribunal. Yet, unless the Attorney General can identify an extricable error of law, it is not for this Court to reweigh the evidence in order to determine whether the CITT was correct in classifying the goods as it did: *Keurig* at para. 37.

[38] The reality is that the AGC has not raised an error of law that would warrant the intervention of this Court. Rather, it conflated its disagreement with the Tribunal's factual findings with the misapplication of paragraph 52(2)(*b*) of the *Customs Act*. This argument fails.

(2) Did the Tribunal breach procedural fairness by refusing to admit additional expert evidence?

[39] The AGC contends that it was denied procedural fairness when the Tribunal rejected its request to file new evidence following its Decision. Specifically, the AGC argues that it could not have known the case it had to meet prior to the Tribunal deciding what valuation method should be employed to calculate the VFD of the imported goods.

[40] This argument likewise has no merit. While it may be true that the AGC could not have known the valuation method chosen by the Tribunal prior to the Decision, it was well aware of the fact that Pier 1 had appealed the President of the CBSA's ruling to the Tribunal on the basis of its contention that the appropriate valuation method was the FCVM. At that juncture, the AGC was thus put on notice that there was a possibility that the Tribunal could conclude that the FCVM was the appropriate method of calculation.

[41] The AGC had the burden of demonstrating that there existed a selection of more appropriate comparators than those presented by Pier 1. Specifically, it had the tactical burden of doing so—i.e., to "adduce evidence to refute the evidence on which the appellant relies, for fear of an adverse ruling" (*McGregor v. Canada (Attorney General)*, 2007 FCA 197, 366 N.R. 206 at para. 27). A tactical burden has similarly been described "a matter of common sense" (Sidney N. Lederman, Michelle Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at 127).

[42] In the present circumstances, the AGC had the opportunity to submit its own comparator evidence but it made the tactical decision to only submit a rebuttal report. The denial of a request to submit such comparator evidence so late in the process cannot be characterized as a breach of procedural fairness. As the Supreme Court observed in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R 650 (*VIA Rail*), no procedural unfairness can arise where a party attempts to introduce evidence after a final decision has been made "without […] any reasonable explanation for why such information could not have been available during the proceedings" (*VIA Rail* at para. 237).

[43] A reviewing court has no basis to interfere in an administrative tribunal's decision not to admit any additional evidence after it has given ample opportunity to the parties to do so. As in *Via Rail*, the Tribunal was in the best position to manage its own procedure, especially with regard to the strategic choices of the parties (*Via Rail* at para. 245). There is accordingly no basis to find that the Tribunal has in any way breached the AGC's right to procedural fairness.

[44] The AGC's appeal should accordingly be dismissed with costs.

C. *The Application for Judicial Review*

[45] In its application for judicial review, the AGC contends that the Tribunal's appraisal of the VFD in its Order is unreasonable. Yet, there is an absence of any error on the part of the Tribunal that would justify our intervention on judicial review. The AGC is asking this Court to re-evaluate the evidence that was before the Tribunal and has essentially put forward similar arguments on both its appeal and application for judicial review. The AGC's arguments do not amount to the kind of errors that might lead to a judicial review. Further, in the circumstances of this case, the appeal was adequate to address the appellant's concerns.

[46] It follows that the AGC's application for judicial review should accordingly be dismissed with costs.

VIII. Conclusion

[47] In conclusion, a few additional observations are apposite with respect to concurrent proceedings—appeal and judicial review—where the legislative intent is to limit an appeal to questions of law, as is the case in section 68 of the *Customs Act* (*Vavilov* at paras. 33, 36).

[48] The interaction between a right of appeal and judicial review has recently garnered judicial and academic interest across the country (See *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446, 2022 A.C.W.S. 1702 (leave to appeal to SCC granted, 40348 (9 March 2023))

(*Yatar*); *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Best Buy*; *BCE*; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, [2021] 3 F.C.R. 294 (*Canadian Council for Refugees)*; *Neptune*; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39, 2023 A.C.W.S. 707; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208, 2022 A.C.W.S. 5655; Paul Daly, "Vavilov on the Road" (2022) 35:1 Can. J. Admin. L. & Prac. 1; Paul Daly, "Rights of Appeal: Contracting or Expanding Judicial Review?" (3 October 2023), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2023/10/03/rights-of-appeal-contracting-or-expanding-judicial-review/>; Mark Mancini, "Issue #71: Administrative Law Wrapped, 2022" (18 December 2022), online (blog): *The Sunday Evening Administrative Review* <sear.substack.com/p/issue-71-administrative-law-wrapped>; Mark Mancini, "Issue #45" (19 June 2022), online (blog): *The Sunday Evening Administrative Review* <sear.substack.com/p/issue-45-june-19-2022>; Mark Mancini, "Issue #4" (8 August 2021), online (blog): *The Sunday Evening Administrative Review* <sear.substack.com/p/issue-4-august-8-2021>).

[49] The key issue emerging in this regard, except for *Canadian Council for Refugees* and the *Democracy Watch* cases, does not seem to be whether an application for judicial review remains available to a party concurrent to an appeal. Rather, the genuine issue is to what extent a judicial review application, which is by definition a discretionary remedy, should be entertained when filed concurrently with an appeal that has been expressly limited in scope.

[50] However trite, the duplication of proceedings has an impact on judicial economy (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 70). Recently, the Supreme Court in *Vavilov* reiterated the goal of judicial efficiency in administrative law (*Vavilov* at para. 29). The minority in *Best Buy* foresaw the consequences of the duplication of procedures, noting that the "process would be more burdensome and more complicated than the efficient and timely system of review contemplated by the *Customs Act* alone" (*Best Buy* at para. 68).

[51] The present circumstances are no different. This appeal and application for judicial review followed two sets of procedural requirements but were ultimately heard together (see Rule 301 and following and Rule 337 and following of the *Federal Courts Rules*, S.O.R./98-106). The parties, nonetheless, had to prepare and respond to two memoranda, which contained overlapping arguments. This may be explained by the fact that an application for judicial review must be filed within 30 days, whereas an appeal can be filed within 90 days (see s. 18.1(2) of the *Federal Courts Act* and s. 68(1) of the *Customs Act*). These timeline incongruences resulted in the parties including in their judicial review application memoranda arguments that should have fallen within the purview of the limited right of appeal. Consequently, at the hearing, the arguments were repetitive, or at best, repackaged and articulated differently in the context of either the appeal or the application for judicial review.

[52] The better approach to reflect Parliament's intent and the rule of law might be the more restrictive stance adopted by the Ontario Court of Appeal, which reiterates that "judicial review is always available," but mandates that courts ask themselves whether it is an "appropriate" exercise of their discretion, adding that this is so only in "rare cases" (Yatar at paras. 42, 48).

However, the Ontario Court of Appeal did not expand on the meaning of "rare cases," stating that they should be determined on a "case-by-case basis" (*Yatar* at para. 45). Perhaps because, as a matter of practice, and in the vast majority of cases, the statutory appeal will be sufficient to address the issue at hand, and the judicial review, although available, will be rendered superfluous (*Yatar* at para. 47; *Best Buy* at para. 129).

[53] The original of these reasons will be filed in docket A-60-22 and a copy will be filed in docket A-17-22 to serve as reasons therein.

"Richard Boivin"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-17-22 AND A-60-22
DOCKET:	A-17-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. PIER 1 IMPORTS (U.S.), INC.
AND DOCKET:	A-60-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. PIER 1 IMPORTS (U.S.), INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 13, 2023
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	LOCKE J.A. ROUSSEL J.A.
DATED:	OCTOBER 13, 2023

APPEARANCES:

Louis Sébastien Annie Laflamme Eliane Mandeville Luc Vaillancourt	FOR THE APPLICANT FOR THE APPELLANT
Joel Scheuerman Nicole Lynx Adèle Desgagné Darian Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef	FOR THE APPLICANT
Deputy Attorney General of Canada	FOR THE APPELLANT
DELOITTE LEGAL CANADA LLP Montréal, Quebec	FOR THE RESPONDENT