Federal Court		Cour fédérale

Date: 20100122

Docket: T-1420-09

Citation: 2010 FC 78

Ottawa, Ontario, January 22, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

TOYOTA TSUSHO AMERICA INC.

Applicant

and

CANADA BORDER SERVICES AGENCY
and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion by the Canada Border Services Agency (CBSA) and the Attorney General of Canada (together, the respondents) to strike out a notice of application for judicial review of a purported decision of the CBSA brought by Toyota Tsusho America Inc. (the applicant).

[2] On September 25, 2008, the applicant, through its solicitor, contacted the CBSA in order to know its position on whether Chinese-origin steel plate containing boron (boron steel plate) would be subject to an anti-dumping order on Chinese-origin steel

plate issued by the Canadian International Trade Tribunal (CITT Order) and, therefore, whether anti-dumping duty would be collected should boron steel plate be imported to Canada.

[3] A director of the CBSA verbally advised the applicant that boron steel plate would not be considered to be covered by the CITT Order. Shortly thereafter, the applicant faxed a request to the CBSA for a written confirmation of this position. The CBSA never received the fax, and the applicant eventually repeated its request by e-mail on November 25, 2008.

[4] It seems that in mid-November, certain Canadian steel producers also requested that the CBSA make known its position on the applicability of the CITT Order to boron steel plate, arguing that the CITT Order was applicable.

[5] Without receiving a response to its request, the applicant shipped certain quantities of boron steel plate to Canada, “relying”, as it put it, on the CBSA advice of September 25, 2008.

[6] However, without warning the applicant that it was considering departing from the position it previously took, the CBSA issued, on July 28, 2009, a determination that boron steel plate would be subject to the CITT Order and, accordingly, to the anti-dumping duty (the CBSA Determination).

[7] On November 9, 2009, the CBSA issued Detailed Adjustment Statements claiming anti-dumping duties in respect of the applicant's importations of boron steel plate.

[8] The applicant filed a notice of application for judicial review of the CBSA Determination. The principal relief it seeks is "an Order quashing or setting aside" the CBSA Determination. In the alternative, the applicant seeks orders preventing the CBSA from "implementing" the CBSA Determination, and issuing or implementing a new determination concerning boron steel plate.

[9] As grounds for its application, the applicant alleges various breaches of the CBSA's duty of fairness towards it, such as a failure to notify it that it may reverse the position it allegedly took during the initial conversation with the applicant's counsel on September 25, 2008; a failure to consult it prior to issuing the CBSA Determination; and a failure to act with due dispatch. Underlying these allegations are the applicant's claims that it relied on representations made to its counsel on September 25, 2008; that the CBSA knew of its reliance; and that the CBSA is, therefore, responsible for the costs it has incurred as a result of relying on these representations.

[10] The respondents now seek to have this notice of application struck out.

[11] The Federal Court of Appeal held, in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, [1994] F.C.J. No. 1629, at par. 15 that it (and this Court) may have jurisdiction to strike out a notice of application for judicial review

"which is so clearly improper as to be bereft of any possibility of success." In the same breath, however, it warned that cases where doing so is appropriate "must be very exceptional."

[12] As the Court explained at par. 10 of its decision, the absence of requirements as to precision of pleadings comparable to those applicable to actions make striking out a notice of application riskier than striking out a pleading in an action. Furthermore, while the striking out of a pleading may save the parties and the court a great deal of resources that would otherwise be wasted on futile discovery and trial, given the summary procedure governing applications for judicial review, those savings are not achieved by striking out a notice of such an application. Indeed, as the Federal Court of Appeal pointed out in *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107, [2006] 4 F.C.R. 532, (reversed on other grounds by *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793) at par. 5, "it is generally more efficient for the Court to deal with a preliminary argument at the hearing of the application, rather than on a motion."

[13] Further, on a motion to strike a statement of claim or a defence, "the facts asserted by the applicant must be presumed to be true." (*Addison & Leyen*, supra, par. 6). In addition, as Justice Anne Mactavish held in *Amnesty International Canada v. Canada (National Defence)*, 2007 FC 1147, 287 D.L.R. (4th) 35, by further analogy to the rule which the Supreme Court held (in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 451) to apply to motions to strike out a pleading, "the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document."

[14] The respondents raise three grounds in support of their motion to strike: that there is no “decision” amenable to judicial review**;** in the alternative, that this Court does not have jurisdiction to review the CBSA Determination; or, in the further alternative, that the Court should decline to exercise its jurisdiction because the applicant has an adequate alternate remedy. Without deciding that the CBSA Determination is the sort of administrative action that could be amenable to judicial review, I am, for the following reasons, of the view that, in any case, this Court does not have jurisdiction to review it.

[15] The respondents submit that this Court has no jurisdiction over the application because it is made contrary to the remedial scheme provided by the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (*SIMA*). This allows an importer of goods determined to be of the same description as those subject to an order imposing anti-dumping duties may apply for a re-determination, provided that he has paid all duties owing on the goods (paras. 56(1)(a) and 56(1.01)(a)). He may then request a further re-determination by the President of the CBSA (para. 58(1.1)(a)). The President’s re-determination is subject to an appeal to the Canadian International Trade Tribunal (CITT) (s. 61). Finally, the decision of the CITT can then be appealed, on a question of law, to the Federal Court of Appeal (s. 62).

[16] They rely on this Court’s decision in *Abbott Laboratories Ltd. v. Canada (Minister of National Revenue)*, 2004 FC 140, (2004) 12 Admin. L.R. (4th) 20, which involved a statutory scheme analogous to the one at issue**.** The applicant attempted to have a determination that certain products did not satisfy the NAFTA rules of origin and were, therefore not entitled to a preferential tariff, quashed. Justice François Lemieux

held, at paras. 39-40 that “Parliament wanted the administrative, quasi-judicial and judicial review system to be followed to the exclusion of any other paths of review or appeal,” and that “Parliament's clear intention ousts judicial review by the Federal Court under section 18.1 of the *Federal Court Act*.”

[17] The Federal Court of Appeal recently approved of that decision in *Canada v. Fritz Marketing Inc.*, 2009 FCA 62, (2009) 387 N.R. 331, reversing a decision of this Court quashing certain Detailed Adjustment Statements as based on information obtained in violation of the applicant’s *Charter* rights. Although these cases were decided under the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the similarity of the appeal scheme it sets up and that provided for by the *SIMA* makes them applicable to the present case.

[18] The applicant submits that this Court has jurisdiction over its application for judicial review because it is aimed not at the CBSA Determination itself, but rather at the unfairness of “the process adopted by the CBSA.” According to the applicant, matters related to procedural fairness are outside the scope of the appeal procedures under the SIMA and are, therefore, subject to judicial review. In support of this proposition, it relies on this Court’s decision in *Toshiba International Corp. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, (1994) 81 F.T.R. 161, [1994] F.C.J. No. 998.

[19] Cases on which the respondents rely are not applicable, because the statutory appeal schemes set up by the *Customs Act* differ from those under the *SIMA* in that the wording of the private clause contained in the former enactment is much more explicit

than that of the *SIMA*, suggesting that Parliament did not intend to oust this Court's jurisdiction to review decisions under the latter.

[20] I disagree. In my view, the scheme of re-determinations and appeals provided by the *SIMA* is complete and, in enacting it, Parliament has clearly expressed its intention to oust the jurisdiction of this Court to review decisions taken under the authority of that statute. This scheme parallels that set up by the Customs Act, and the differences in the wording of privative clauses contained in the two enactments are not material. The privative clauses of the *SIMA* (ss. 56(1) and 58(1)), which provide that determinations and re-determinations by customs officers are "final and conclusive," are clear enough. The only way to have such a determination "quashed" or "set aside" is to follow the procedures set out in the *SIMA* itself.

[21] Thus the reasoning of the Federal Court of Appeal in *Fritz Marketing*, *supra*, is applicable to the case at bar. A decision that can be appealed pursuant to the statutory scheme cannot be set aside by this Court "for any reason" (*ibid*., at par. 33; my emphasis). The Federal Court of Appeal specifically rejected the argument that the impugned decision was reviewable by the Federal Court because it was not being challenged on the merits but as a result of violations of procedural rights (see *ibid*., at par. 34). It thus implicitly overruled the *Toshiba International* decision, on which the applicant relies.

[22] In view of the categorical language employed by the Federal Court of Appeal in *Fritz Marketing*, and of the essential similarity between the legislative schemes

applicable to that case and to the one at bar, the applicant's arguments are bereft of any possibility of success.

[23] Finally, I would add that the applicant is wrong to claim that the statutory appeals scheme would leave it unable to make the arguments regarding procedural fairness which it proposes to raise on judicial review. These are all based on allegations that the CBSA failed to give it notice and to consult it even as it was consulting its competitors, and possibly that it was not impartial. But arguing a point is not an end; it is only a means to obtaining a remedy. And the remedy to which the applicant's arguments will lead, if they are successful, would naturally be a new decision, taken after consultation, by an impartial decision-maker. This case is thus similar to *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where a student aggrieved by a decision of the university taken without a hearing applied for a writ of certiorari instead of pursuing an appeal to the university's Senate that was open to him. The majority of the Supreme Court held, at p. 582, that it was a "general principle" that a prerogative writ would not issue to reform an administrative decision taken in breach of the requirements of natural justice if that decision could rather be appealed, and the breach of natural justice, cured on appeal.

[24] In my view, the essential point which the applicant misses is that, like in *Harelkin*, the remedy he is looking for is exactly what the statutory scheme already provides for. A re-determination by the President of the CBSA and an eventual appeal to the CITT would both proceed *de novo*, enabling the applicant to make the submissions it believes the CBSA ought to have asked it for to new decision-makers. In fact, the application for judicial review, were it to proceed and to prove successful, would have been but a

circuitous route to the same result: the CBSA Determination would be set aside, as the applicant requests in its notice of application; but then a new determination would still need to be made, one way or the other, by another decision-maker within the CBSA, subject to the same statutory review scheme of which the applicant seeks to evade the effect.

[25] For these reasons, the motion is granted and the applicant's application for judicial review is dismissed, with costs in accordance with column III of Tariff B.

JUDGMENT

THIS COURT ORDERS:

The motion to strike is granted, and the applicant's application for judicial review dismissed, with costs in accordance with column III of Tariff B.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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