Federal Court  Cour fédérale

Date: 20151223

Docket: T-2126-13

Citation: 2015 FC 1243

Ottawa, Ontario, December 23, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PRUDENTIAL STEEL LTD. AND ALGOMA TUBES INC.

Applicants

and

BELL SUPPLY COMPANY

Respondent

and

CANADA BORDER SERVICES AGENCY

Intervener

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons were issued on November 2, 2015)

I. INTRODUCTION

[1] Prudential Steel Ltd. and Algoma Tubes Inc. (the "Applicants") seek judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "Act") of a decision by Senior Program Officer Patrick Mulligan (the "Officer") of the Canada Border Services Agency (the "Agency" or "CBSA"), Anti-Dumping and Countervailing Directorate. In that decision, dated December 9, 2013, the Officer determined that certain seamless casing and tube products originating in China, but processed and finished in Indonesia, and imported to Canada would not be subject to an anti-dumping and countervailing duty because these goods were deemed to originate in Indonesia, not China.

[2] Prudential Steel Ltd. and Algoma Tubes Inc. form part of the domestic Oil Country Tubular Goods ("OCTG") industry, which produces green tube and OCTG in Canada.

[3] Bell Supply Co. (the "Respondent") is an American company based in Gainesville, Texas, which manufactures various materials used in the oil, gas and mining industries. Its product inventory includes OCTG.

[4] The CBSA is an Intervenor pursuant to an Order made on November 13, 2014. The CBSA is responsible for the administration of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 ("SIMA"), which helps to protect Canadian industry from injury caused by the dumping and subsidizing of imported goods. The CBSA imposes duties on dumped and subsidized

imports to offset the price advantage, allowing Canadian industry to compete with the imported goods.

II. BACKGROUND

[5] On July 29, 2013, the Respondent made a request that the CBSA provide an advanced ruling on whether Chinese green tube, originating in China and processed and finished in Indonesia to form OCTG by P.T. Citra Tubindo Tbk. ("Citra Tubindo"), was subject to anti-dumping and countervailing duties when imported into Canada.

[6] The Respondent buys the green tubes in China and engages Citra Tubindo, an arm's length publicly traded company in Indonesia, to process and finish the tubes. This is done by heat-treatment, threading and coupling of the tubes. The tubes are then certified before being imported into Canada. The tubes fall under the category of OCTG. The Respondent retains title to the goods during the processing.

[7] The OCTG produced are American Petroleum Institute ("API") specification 5 CT, grade P110. Specifically, the goods at issue are:

- 2 3/8" 5.95 ft. P110 CT-K6 Tubing
- 2 7/8" 7.90 ft. P110 CT-K6 Tubing
- 4 1/2" 15.10 ft. HC P110 NSCC Casing
- 5 1/2" 20.00 ft. HC P110 NSCC Casing
- 5 1/2" 23.00 ft. HC P110 NSCC Casing

[8] The Respondent's request stated that the heating, testing and certification of the OCTG will be carried out in Indonesia, that the costs incurred in the transformation process are substantial and that the costs exceed the cost of the green tubes semi-finished input.

[9] The Respondent took the position that the goods are Indonesian OCTG and not the goods at issue in the Canadian International Trade Tribunal's ("CITT") Memorandum D15-2-51 entitled *Certain Seamless Carbon or Alloy Steel Oil and Gas Well Casing Originating in or Exported from the People's Republic of China*, and CITT's OCTG findings in Memorandum D15-2-56 entitled *Certain Oil Country Tubular Goods Originating in or Exported from the People's Republic of China.*

[10] Memorandum D15-2-51 was issued on August 29, 2008 after a CITT injury findings decision was issued on March 10, 2008. That decision described the subject goods as follows:

> Seamless carbon or alloy steel oil and gas well casing, whether plain end, beveled, threaded or threaded and coupled, heat-treated or non-heat-treated, meeting American Petroleum Institute (API) specification 5CT, with an outside diameter not exceeding 11.75 inches (298.5 mm), in all grades, including proprietary grades, originating in or exported from the People's Republic of China.

[11] Memorandum D15-2-56 was issued on May 11, 2012, after a CITT injury findings decision was issued on March 23, 2010. In that decision, the subject goods were described as follows:

> oil country tubular goods, made of carbon or alloy steel, welded or seamless, heat treated or non-heat-treated, regardless of end finish, having an outside diameter from 2 3/8 inches to 13 3/9 inches (60.3 mm to 339.7 mm), meeting or supplied to meet American Petroleum Institute (API) specification 5CT or equivalent standard,

> in all grades, excluding drill pipe and excluding seamless casing up to 11 ¾ inches (298.5 mm) in outside diameter, originating in or exported from the People's Republic of China.

[12] The Respondent submitted more information related to its request for an advanced ruling on September 12, 2013. By letter dated October 4, 2013, the Officer asked for further information and the Respondent replied by letter submitted on October 11, 2013.

[13] The Respondent has been party to proceedings involving the same parties and issues before the United States Department of Commerce (DOC). The final decision of the DOC, issued February 7, 2014, determined that seamless unfinished OCTG made in China, and finished in third countries, were within the scope of two previously issued DOC Orders, which found that OCTG from China were subject to anti-dumping and countervailing duties.

III. DECISION UNDER REVEW

[14] In his decision, the Officer advised that, after analysis of the information submitted in support of the request for an advanced ruling, he concluded that the goods that were the subject of the request were products originating in Indonesia and accordingly, were not subject to anti-dumping and countervailing duty upon importation into Canada.

[15] The Officer identified the goods in question as Chinese green tube, shipped to Indonesia and converted into seamless casing and tubing by a process of heat treatment, threading and coupling, and testing. The CBSA stated that green to referred to unfinished pipe that had not

undergone the heat treatment and testing required to allow it to be certified as API 5 CT casing or tubing.

[16] The CBSA requested that before such products are imported, the Respondent provide the Anti-Dumping and Countervailing Directorate with more documents, including the following:

1) the purchase order, commercial invoice and mill certificate relating to the sale of green tube between the Chinese supplier and Bell Supply;

2) the commercial invoice and mill certificate relating to the processing of green tube into finished seamless casing and tubing products by Citra Tubindo; and

3) the commercial invoice issued by Bell Supply to the importer in Canada relating to the sale of finished seamless casing and tubing products.

[17] As well, in his decision, the Officer advised the Respondent that the CBSA reserved the right to contact Citra Tubindo as well as visit its facilities. He advised that the CBSA may verify information at the Respondent's premises, including a review of the green tube purchased in China and the processing of the tube.

[18] The confidential memorandum written by the Officer informs his decision. The Officer described the process used to transform the green tube to OCTG, noting that many processes are involved. He also considered the cost of transforming the green tube. For the seamless casing imports, the cost of the green tube represented XX%, XX%, XX% respectively, of the total

manufacturing cost of the finished product. For the tubing, the green tube cost XX% and XX% respectively.

[19] The Officer outlined the guiding principles for determining the rules of origin, specifically: change in tariff classification, substantial information by *ad valorem* percentage, and substantial information by manufacturing or processing operation.

[20] The Officer found that the goods would be classified under different harmonized system tariff classification levels after processing and finishing. Under the *ad valorem* percentage criterion, XX%, XX% and XX% of the total cost of the seamless casing manufacture went to processing and shipping. For the tubing products, the processing and shipping accounted for XX% and XX% of the total manufacture costs. The Officer concluded that this constitutes a substantial transformation.

[21] The Officer found that heat treatment and other processes involved in transforming the green tubes into finished products was a substantial transformation.

[22] The Officer considered the definition of OCTG in the CITT's decision on seamless casing and noted that, unlike the CITT decision on certain OCTG, green tubes were not included in the product definition. He concluded that the Respondent's seamless casing products did not fall under the product definition in the CITT injury findings on seamless casing from China.

[23] Finally, the Officer considered a past decision of the Anti-Dumping and Countervailing Directorate, which found that green tube purchased in China and processed in Indonesia would not be considered subject goods when imported into Canada. He considered the Statement of Reasons dated November 13, 1998, referred to by the Respondent in its request for the advanced ruling. That decision held that green tubes imported into Canada and processed in Canada would not fall within the definition of subject goods.

[24] The memorandum concluded that the products would be deemed to originate in Indonesia, and stated that the CBSA would take reasonable steps to ensure that the products are of Indonesian origin.

IV. DISCUSSION AND DISPOSITION

[25] The first issue raised in this application is the applicable standard of review.

[26] The second is whether the advanced ruling is amenable to judicial review. If so, did the CBSA commit a reviewable error by failing to follow the previous findings of the CITT. Finally, if the decision is subject to judicial review, did the CBSA breach of procedural fairness by failing to provide notice to all interested parties.

[27] Both the Applicants and the Respondent submit that the decision is reviewable on the standard of reasonableness, relying respectively, upon the decisions in *Uniboard Surfaces Inc. v. Kronotex Fussboden GMBH & Co. FG (F.C.A.)*, [2007] 4 F.C.R. 101 at paragraph 63 and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[28] Breaches of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[29] I agree that the decision, upon the merits, is reviewable on the standard of reasonableness, as applied by the Federal Court of Appeal in *Uniboard*, *supra*; see paragraph 63.

[30] However, in my opinion, the dispositive issues in this application are matters of procedure, the first being whether the decision in question is subject to judicial review. The second determinative procedural issue is the statutory appeal process mandated by the SIMA.

[31] This application was made pursuant to section 18.1 of the Act. Paragraph 18.1(3)(b) is relevant and provides as follows:

18.1 (3) On an application for judicial review, the Federal Court may	18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[32] In *Larny Holdings Ltd. v. Canada (Minister of Health)(T.D.),* [2003] 1 F.C.R. 541 this Court emphasized that a broad range of matters are subject to review pursuant to section 18 of the Act.

[33] However, the Court was equally clear that the scope of matters subject to judicial review under section 18 of the Act does not extend to all decisions, orders, acts or proceedings by federal boards, commissions and tribunals. Rather, it suggested that those decisions and orders that "determine a party's rights" will be subject to judicial review.

[34] At paragraphs 24-25, the Court explains how the decision at issue met that test, as follows:

> The direction sent by the respondents is, in my view, coercive, in that the purpose thereof is to threaten the applicant to immediately stop selling the multi-packs, failing which a charge would be laid and criminal prosecution might be commenced. I have no doubt that what the respondents hoped for was what in fact happened, i.e. that the applicant would stop selling multi-packs so as to avoid criminal prosecution. As I have already indicated, the applicant's decision to stop selling multi-packs has resulted in financial loss.
>
> I am therefore of the view that the letter sent by Mr. Zawilinski is a 'decision, order, act or proceeding' and is reviewable by this Court. I also have no hesitation in concluding that in sending the direction, Mr. Zawilinski was a 'federal board, commission or other tribunal' within the meaning of subsection 2(1) of the Act.

[35] In *Pieters v. Canada (Attorney General)* (2007), 313 F.T.R. 231 at paragraph 68, the Court found that a Final Report and Recommendations of the Public Service Integrity Office did "not determine the Applicant's substantive rights or carry legal consequences as required by the

jurisprudence, and are thus not matters subject to judicial review" and dismissed an application for judicial review.

[36] This issue was discussed in *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue* (1998), 148 F.T.R. 3. That case involved a motion to strike an originating notice of motion, which in turn was seeking an order quashing an advance tax ruling issued by the Department of Revenue. The Court expressed the opinion that the advance tax ruling did not have any meaningful effect on the Applicant's rights and said the following at paragraph 28:

> The advance ruling does not grant or deny a right, nor does it have any legal consequences… It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling.[references omitted]

[37] At paragraph 29, the Court concluded "that the ruling in the letter from Revenue is not a 'decision' within the meaning of section 18.1 of the *Federal Court Act*".

[38] I see no basis to depart from the decision in *Rothmans, supra* and find that the decision in the present case, that is the advanced ruling, is not a "decision" that is subject to judicial review. This conclusion is sufficient to dispose of the within application. However, a brief comment is warranted about the interplay between the statutory appeal process under the SIMA and the availability of judicial review relative to a decision made under that statute.

[39] The Applicants' argument about a breach of procedural fairness is based upon the failure of the CBSA to give them notice of the proceeding giving rise to the advanced ruling. They claim that they are an "interested party" under the SIMA and, as such, they are owed a duty of fairness by an administrative decision-maker unless there is clear statutory language to the contrary, relying on the decision in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at paragraph 38-39.

[40] The Respondent argues that the Applicants have no standing at this stage of the proceeding and are not entitled to notice. There is no requirement under the SIMA that notice be given to the Applicants until the third stage of the SIMA appeals process which is set out in section 61.

[41] In my view, the Applicants' submissions ignore the statutory scheme. Re-determinations and appeals under the SIMA are governed by sections 56 through 62 of that statute. The statutory appeal process permits the Applicants to be heard on appeal to the CITT, pursuant to section 61 of the SIMA. The Applicants would also have an opportunity to participate in an appeal to the Federal Court of Appeal, pursuant to section 62.

[42] An appeal under the SIMA is not available until a determination is made by a customs officer pursuant to section 56 of the SIMA, which provides as follows:

56. (1) Where, subsequent to the making of an order or finding of the Tribunal or an order of the Governor in Council imposing a countervailing duty under section 7, any goods are	56. (1) Lorsque des marchandises sont importées après la date de l'ordonnance ou des conclusions du Tribunal ou celle du décret imposant des droits compensateurs, prévu à

imported into Canada, a determination by a customs Officer	l'article 7, est définitive une décision rendue par un agent des douanes dans les trente jours après déclaration en détail des marchandises aux termes des paragraphes 32(1), (3) ou (5) de la Loi sur les douanes et qui détermine :
(a) as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies,	a) la question de savoir si les marchandises sont de même description que des marchandises auxquelles s'applique l'ordonnance ou les conclusions, ou le décret;
(b) of the normal value of or the amount, if any, of the subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies, and	b) la valeur normale des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions, ou du décret, ou le montant de l'éventuelle subvention qui est octroyée pour elles;
(c) of the export price of or the amount, if any, of the export subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal applies, made within thirty days after they were accounted for under subsection 32(1), (3) or (5) of the Customs Act is final and conclusive.	c) le prix à l'exportation des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions ou le montant de l'éventuelle subvention à l'exportation.

[43] That stage has not yet been reached, since no determination has been made and the appeal process has not been triggered.

[44] According to the decision of the Federal Court of Appeal in *C.B. Powell Limited v. Canada (Border Services Agency)*, [2011] 2 F.C.R. 332 (F.C.A.), a Court should allow a

statutory appeal process to proceed without interruption, unless there are exceptional circumstances.

[45] The Federal Court of Appeal expressed the view that allowing the Court to interfere in the administrative process would be contrary to the intention of Parliament and that few situations would meet that high threshold of "exceptional circumstances".

[46] Further, the Federal Court of Appeal recently affirmed its decision in *C.B. Powell, supra* in *Atomic Energy of Canada Ltd. v. Wilson* (2015), 467 N.R. 201 at paragraph 29-33.

[47] No such determination had been made prior to the commencement of this application.

[48] In effect, the Applicants are seeking judicial review of an interlocutory decision but, as discussed above, that decision is not amenable to judicial review. Further, the statutory appeal process has not yet been exhausted and the Court should not countenance an interruption of that process. Access to this Court upon an application for judicial review would depend upon the nature of the question decided in the statutory appeal process.

[49] Since I have found the decision in issue here is not one that is subject to judicial review, it follows that there was no duty owed to the Applicants that would attract consideration of procedural fairness.

[50] It is not necessary to address the parties' arguments about the reasonableness of the advanced ruling and the application will be dismissed with costs to the Respondent.

[51] The Respondent seeks costs on the basis of Column V of the Tariff B of the *Federal Courts Rules*, SOR/98-106.

[52] The parties can make brief submissions on costs within ten (10) days of this Order unless they otherwise agree on costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs to the Respondent. The parties can make brief submissions on costs within ten (10) days of this Order unless they otherwise agree on costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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