Federal Court  Cour fédérale

Date: 20150113

Docket: T-917-13

Citation: 2015 FC 47

Montréal, Quebec, January 13, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

SOFINA FOODS INC., JANES FAMILY FOODS LTD. and LILYDALE INC.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background and facts

[1] This is an application for judicial review concerning a decision by the Minister of International Trade (the Minister) with regard to the allocation of the right to import chickens and chicken products into Canada. Pursuant to international agreements, Canada permits the import of a certain amount of chicken each year, being 7.5% of the previous year's domestic production. Beyond that amount, prohibitive tariff rates apply. That amount is allocated each

year between a number of players in the market. The impugned decision in this present application concerns the allocations sought by two of the Applicants, Lilydale Inc. (Lilydale) and Janes Family Foods Ltd. (Janes) in 2013. Each of them had received allocations in 2012 and in previous years. Decisions concerning such allocations are made by the Minister through the Department of Foreign Affairs and International Trade (DFAIT) pursuant to the *Import Allocation Regulations*, SOR 95-36, under the *Export and Import Permits Act*, RSC 1985, c E-19 (the *EIPA*).

[2] In 2010, the third Applicant, Sofina Foods Inc. (Sofina), acquired Lilydale. Then in March 2012, the Minister was informed that Sofina intended to acquire Janes. This acquisition would put Lilydale and Janes under common ownership. When Sofina/Lilydale and Janes inquired as to whether the proposed acquisition would affect their respective allocations, DFAIT advised that, based on the information it had received, Lilydale and Janes would be considered to be related and would therefore be entitled to only a single allocation, not the two separate allocations that had previously been granted.

[3] Of relevance to this issue is the *Notice to Importers - Chicken and Chicken Products (Items 96 to 104 on the Import Control List)*, Serial No. 815 (Notice 815) which concerned the 2013 calendar year and which replaced another notice of the same name having Serial No. 792 (Notice 792) which concerned 2012. Paragraph 4.10 of Notice 815 provides that applicants are eligible for only one allocation; and paragraph 10.1 provides that "where two or more applicants are considered to be related, they shall normally be eligible for only one allocation." This policy

of limiting related applicants to a single allocation is sometimes referred to as the Affiliation Policy.

[4] Despite the feedback received from DFAIT, Sofina proceeded with the acquisition of Janes. It also indicated to DFAIT that it disagreed that one of its companies' allocations should be lost, and requested to be heard on the issue. A meeting between representatives of Sofina and DFAIT took place on April 17, 2012. The issue was whether the Affiliation Policy should apply, or if the exception implied by the word "normally" in paragraph 10.1 of Notice 215 should apply.

[5] Though no change was made to the two allocations that had already been granted to the Applicants for 2012, the Minister decided, following a recommendation from DFAIT, "to maintain the decision previously communicated which is to allow Sofina to apply for only one import allocation" in 2013 and beyond. This decision was communicated by a letter dated November 1, 2012, from DFAIT to Sofina (the First Decision). Reasons in support of the First Decision were provided in a second letter, dated November 8, 2012. The substantive portion of that letter reads as follows:

> In broad terms, you should be aware that one of the objectives of the allocation policy is to allocate the quota as widely as possible. In part, this has the effect of counterbalancing the increasing concentration of the domestic market; in part, it restrains the creation of oligopoly rents and, to some extent, minimizes anti-competitive behaviour. The affiliation policy, whereby two or more related or affiliated applicants are normally eligible for only one import allocation, is one of the primary policy tools for keeping the chicken tariff quota as widely accessible as possible.

[6] On December 14, 2012, the Applicants' counsel requested that the First Decision be reconsidered and that the parties meet to discuss alternative proposals. The requested meeting took place on January 16, 2013. At that meeting, DFAIT indicated that reconsideration of the First Decision was possible on the basis of new information. On February 25, 2013, the Applicants' counsel submitted a 13-page letter to DFAIT providing further facts and submissions in support of its request for separate allocations for each of Lilydale and Janes.

[7] After review of the February 25, 2013 letter, DFAIT concluded that there was no basis for asking the Minister to reconsider the First Decision since the Applicants had not made a sufficient case to prompt DFAIT to alter its recommendation to the Minister. A Memorandum of Information (which attached the Applicants' 13-page letter) was prepared for the Minister indicating that DFAIT intended to inform the Applicants' counsel that the facts and arguments in its submission "are either not new or are not considerations that warrant reconsideration." The Minister approved this communication and a letter to that effect was sent on April 23, 2013 (the Second Decision).

[8] The present application for judicial review was initiated by a Notice of Application filed on May 23, 2013 in respect of:

> a decision by [DFAIT] dated April 23, 2013 (the "Second Decision") by which decision DFAIT refused to permit [the Minister] to reconsider his earlier refusal to continue chicken tariff quota allocations historically granted to [Janes] and [Lilydale] after those two companies became affiliates (the "First Decision"); and the matter of the administration and management by DFAIT of tariff rate quota allocations held by affiliates.

[9] Therefore, the Applicants clearly challenge the Second Decision. The Applicants also seek to have the First Decision reviewed as part of the review of the Second Decision, and to have both decisions set aside and the issue remitted to the Minister for redetermination based on factors dictated by regulation, including "the potential impact of the issuance of the import allocation […] on the applicable Canadian agro-industrial sector."

II. Issues

[10] The Applicants raise four principal issues:

1. Whether the reasoning in the First Decision was unsupported by the facts or the analysis. Specifically, the Applicants appear to be concerned that the First Decision reached a conclusion that the Affiliation Policy should apply without having considered whether there would be any effects on the Canadian chicken market from Janes and Lilydale each having a separate quota allocation.
2. Whether the Minister failed to consider a relevant factor in making his decision, principally "the potential impact of the issuance of the import allocation […] on the applicable Canadian agro-industrial sector."
3. Whether the Minister fettered his discretion by applying the Affiliation Policy.
4. Whether DFAIT breached the obligation of fairness it owed to the Applicants by not submitting their request for reconsideration of the First Decision to the Minister.

[11] For its part, the Respondent argues that there is an important distinction to be drawn between the First Decision and the Second Decision, and that only the Second Decision has been

properly put in issue in the present application. Essentially, the Respondent argues that the real debate is whether the decision not to reconsider the First Decision should be set aside, and that the substance of the First Decision (not to grant an exception to the Affiliation Policy) is not up for debate. Therefore, the final issue is:

5. Whether the First Decision is properly in dispute.

III. Statutory, regulatory and policy context

[12] Paragraphs 5(1)(a) and 5(1)(e) of the *EIPA* provide as follows:

Import control list of goods	**Liste des marchandises d'importation contrôlée**
5. (1) The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which the Governor in Council deems it necessary to control for any of the following purposes:	**5.** (1) Le gouverneur en conseil peut dresser la liste des marchandises d'importation contrôlée comprenant les articles dont, à son avis, il est nécessaire de contrôler l'importation pour l'une des fins suivantes :
(*a*) to ensure, in accordance with the needs of Canada, the best possible supply and distribution of an article that is scarce in world markets or in Canada or is subject to governmental controls in the countries of origin or to allocation by intergovernmental arrangement;	*a*) assurer, selon les besoins du Canada, le meilleur approvisionnement et la meilleure distribution possibles d'un article rare sur les marchés mondiaux ou canadien ou soumis à des régies gouvernementales dans les pays d'origine ou à une répartition par accord intergouvernemental;
[…]	[…]
(*e*) to implement an intergovernmental arrangement or commitment; […]	*e*) mettre en œuvre un accord ou un engagement intergouvernemental;

[13] Chickens are included in the Import Control List referred to in subsection 5(1) of the *EIPA*. Subsections 6.2(1) and 6.2(2) of the *EIPA* provide as follows:

Determination of quantities **6.2** (1) Where any goods have been included on the Import Control List for the purpose of implementing an intergovernmental arrangement or commitment, the Minister may determine import access quantities, or the basis for calculating them, for the purposes of subsection (2) and section 8.3 of this Act and for the purposes of the *Customs Tariff*.	**Établissement de quantités** **6.2** (1) En cas d'inscription de marchandises sur la liste des marchandises d'importation contrôlée aux fins de la mise en œuvre d'un accord ou d'un engagement intergouvernemental, le ministre peut, pour l'application du paragraphe (2), de l'article 8.3 et du *Tarif des douanes*, déterminer la quantité de marchandises visée par le régime d'accès en cause, ou établir des critères à cet effet.
Allocation method (2) Where the Minister has determined a quantity of goods under subsection (1), the Minister may […] (*b*) issue an allocation to any resident of Canada who applies for the allocation, subject to the regulations and any terms and conditions the Minister may specify in the allocation.	**Allocation de quotas** (2) Lorsqu'il a déterminé la quantité des marchandises en application du paragraphe (1), le ministre peut : […] *b*) délivrer une autorisation d'importation à tout résident du Canada qui en fait la demande, sous réserve des conditions qui y sont énoncées et des règlements.

[14] Paragraph 12(a.1) of the *EIPA* provides for regulations respecting the considerations relevant to granting import allocations:

Regulations **12.** The Governor in Council may make regulations […] (*a.1*) respecting the considerations that the Minister must take into account when deciding	**Règlements** **12.** Le gouverneur en conseil peut, par règlement : […] *a.1*) prévoir les facteurs à prendre en compte par le ministre pour la délivrance et le transfert des autorisations

whether to issue an import allocation or export allocation or consent to its transfer;	d'importation ou d'exportation;

[15] Section 6 of the *Import Allocation Regulations* deals with these considerations:

CONSIDERATIONS FOR ISSUANCE OR TRANSFER OF AN IMPORT ALLOCATION	**FACTEURS À PRENDRE EN COMPTE POUR LA DÉLIVRANCE D'UNE AUTORISATION D'IMPORTATION OU DE TRANSFERT**
6. The Minister shall take the following considerations into account when deciding whether to issue an import allocation or whether to consent to a transfer:	**6.** Le ministre prend en compte les facteurs suivants avant de décider de délivrer une autorisation d'importation ou d'en autoriser le transfert :
[…]	[…]
(*b*) the potential impact of the issuance of the import allocation or the transfer on the applicable Canadian agro-industrial sector;	*b*) les répercussions possibles de la délivrance ou du transfert de l'autorisation d'importation sur le secteur agro-industriel canadien visé;
[…]	[…]
(*d*) the applicant's involvement in the applicable Canadian agro-industrial sector, including the production or distribution of like goods, during the 12-month period preceding the period in respect of which the import allocation or transfer is to apply;	*d*) la participation du requérant au secteur agro-industriel canadien visé, y compris la production ou la distribution de marchandises similaires, durant les 12 mois qui précèdent la période à laquelle s'appliquera l'autorisation d'importation ou le transfert;
(*e*) whether the applicant, or another person on their behalf, has applied for an import allocation or a transfer, and whether or not the applicant, or another person on their behalf, has been issued an import allocation or has had a transfer consented to, in respect of like goods for the period, or part of the period, in respect of which	*e*) le cas échéant, le fait qu'une demande d'autorisation d'importation ou de transfert a été présentée par le requérant ou en son nom, et le fait qu'une autorisation d'importation ou de transfert a été obtenue ou non par lui ou en son nom, à l'égard de marchandises similaires pour la période, ou toute partie de

the import allocation or transfer is to apply; and	celle-ci, à laquelle s'appliquera l'autorisation d'importation ou le transfert;
(*f*) whether the import allocation holder has furnished false or misleading information in connection with any reports required by the Act or the regulations made under the Act or by any condition of an import allocation or import permit during the 12-month period preceding the period in respect of which the import allocation or transfer is to apply.	*f*) le cas échéant, le fait que le détenteur de l'autorisation d'importation a communiqué, durant les 12 mois qui précèdent la période à laquelle s'appliquera l'autorisation d'importation ou le transfert, des renseignements faux ou trompeurs relativement à tout rapport exigé en vertu de la Loi ou de ses règlements d'application ou selon les conditions régissant toute autorisation d'importation ou licence d'importation.
[Emphasis added.]	

[16] Also relevant to the statutory, regulatory and policy context of this application are the Notices to Importers referred to in paragraph 3 above. As indicated in its preamble, Notice 815 sets out the policies and practices pertaining to the administration of the tariff rate quota for chickens and chicken products, including allocation. Paragraphs 4.10 and 10.1 read as follows:

> **4.10.** Applicants are eligible for only one allocation, except for individual processor applicants that are eligible for an allocation under both the traditional group or processor pool and the non-ICL group.
>
> […]
>
> **10.1.** Except as per sections 4.10 and 8.6, where two or more applicants are considered to be related, they shall normally be eligible for only one allocation. Applicants for an allocation are required to provide a list of related persons. Applicants should consult Appendix 11 for the definition of related persons as it applies for the purpose of this Notice.

[17] With regard to paragraph 4.10, the exception provided for therein does not apply in the present case. With regard to paragraph 10.1, there is no dispute that Janes and Lilydale are related persons as contemplated in Notice 815.

IV. Analysis

A. *Standard of Review*

[18] The Applicants acknowledge that the standard of review in respect of the first three issues in dispute (whether the Minister's reasoning is unsupported; whether a relevant factor was not considered; and whether the Minister fettered his discretion) is reasonableness.

[19] For its part, the Respondent acknowledges that the fourth issue (whether DFAIT breached an obligation of fairness owed to Sofina) should be reviewed on a standard of correctness.

[20] Accordingly, there does not appear to be any dispute as to the applicable standard of review. I agree with the parties' positions on standard of review.

B. *Issue 1: Whether the reasoning in the First Decision was unsupported by the facts or the analysis*

[21] The Applicants argue, correctly, that a reasonable decision must be supported by the facts in evidence. That is not disputed. The Applicants further argue that the decision to apply the Affiliation Policy was made without any supporting evidence as to whether there would be any

anti-competitive effects from Janes and Lilydale each having a separate quota allocation. The Applicants argue, therefore, that the First Decision was lacking the required factual support. This argument requires some explanation.

[22] The Applicants assert, and it appears to be acknowledged, that DFAIT did not conduct any analysis of immediate direct competition implications on the market from the acquisition by Sofina of Janes, and Sofina thereafter having control of companies having two separate quota allocations. DFAIT appears to have been more concerned with the wider effect on the market if, following the granting of the Applicants' request for an exception to the Affiliation Policy, further such requests were to be made by other market players in similar situations. The Respondent argues that, based on past experience, such further requests could be expected, and that, based on the precedent of granting the exception in the present case, it would be difficult to deny similar requests by others in the future. The Respondent argues that the cumulative effect on the market of repeatedly granting such requests has been considered and would result in reduced competition.

[23] The Applicants argue that this slippery slope reasoning is inappropriate. They submit that, by virtue of paragraph 6(b) of the *Import Allocation Regulations*, the Minister's concern should be the potential impact of the particular allocation decision in issue (whether Lilydale and Janes should each receive an allocation), not the broader effect of other allocation decisions that might be made in the future. I disagree.

[24] In my view, the Respondent's approach is reasonable. As indicated in the November 8, 2012 letter providing reasons for the First Decision, "one of the objectives of the allocation policy is to allocate the quota as widely as possible," and the Affiliation Policy is one of the primary policy tools for achieving that objective. This objective would likely prove to be elusive if the Minister were not permitted to consider longer term market implications when asked to grant an exception to the Affiliation Policy. It might be that no single case will have a measurable negative impact on market competition, but the Minister was well placed to conclude that (i) other similar requests would likely follow if the Applicants' request had been granted; (ii) some such similar requests would have to be granted for the sake of consistency; and (iii) the accumulated effect of granting such requests would have a negative impact on competition in the market.

[25] Both sides have cited the decision in *7687567 Canada Inc. v Canada (Foreign Affairs and International Trade Canada)*, 2013 FC 1191 (*Flavio*). This case concerned a denial of a chicken quota allocation based on the Affiliation Policy. The Applicant cites *Flavio* because it set aside the impugned decision on the basis that the Minister had simply applied the Affiliation Policy without considering the exception contemplated therein. The Respondent argues that *Flavio* is distinguishable because the impugned decision in that case treated the Affiliation Policy as binding, stating explicitly that the request for allocation in that case could not be considered in view of the Affiliation Policy. I prefer the argument of the Respondent as regards *Flavio*. In the present case, the Applicants' request for an exception to the Affiliation Policy was considered and, though a decision was made not to grant an exception in this case, the possibility of such an exception was acknowledged.

[26] It should be noted that an important aspect of the decision in *Flavio* was the inadequacy of reasons provided in support of the impugned decision. That issue does not apply in the present case, the Applicants having acknowledged that the adequacy of the reasons is not in issue. It should also be noted that the Applicants have acknowledged that the Affiliation Policy itself is not attacked in the present case. That was also the case in *Flavio*, where the Court stated at para 72:

> […] it is perfectly legitimate for a public administrative agency to use rules, or non-legally binding instruments, for guidance in exercising its discretion. Such guidelines allow the agency in question to deal with a specific problem proactively and help applicants affected by that problem predict how the agency will likely deal with it […].

[27] The Applicant argues that there is nothing in the applicable statute or regulations, or even in Notice 815, suggesting that an objective of the Allocation Policy is to allocate the quota as widely as possible. It is true that none of these specifically refers to this objective. But at the same time there is also nothing that prohibits such an objective, or even suggests a prohibition. Moreover, Jean-Philippe Brassard indicated in his affidavit that the process of allocating quota, including the objective of granting allocations as widely as possible, has been developed over decades in consultation with various players in the market. In my view, the Respondent was entitled to adopt this objective in an effort to comply with the objects of the *EIPA*, among them "to ensure […] the best possible supply and distribution of an article that is […] subject to […] allocation by intergovernmental arrangement" (paragraph 5(1)(a) of the *EIPA*).

[28] The Applicants argue that the denial of one of the two allocations that were previously held by Lilydale and Janes actually had the effect of reducing the number of market players and

therefore limiting competition. Again, in my view, this argument focuses unduly on the short-term effect of the decision, without giving reasonable consideration to its longer term market implications.

C. *Issue 2: Whether the Minister failed to consider a relevant factor in making his decision*

[29] The Applicants rely on paragraph 6(b) of the *Import Allocation Regulations* to argue that, in making his decision, the Minister was obliged to consider "the potential impact of the issuance of the import allocation […] on the applicable Canadian agro-industrial sector." As mentioned in discussion of Issue 1, the Applicants read the phrase "the issuance of the import allocation" as referring only to the requested allocation in issue. The Applicants argue that, in the absence of any consideration of anti-competitive effects of this specific requested allocation, the Minister has failed to consider this obligatory factor.

[30] My view on this issue is similar to that on whether the Minister's decision was properly supported. The requirement to consider the potential impact of the allocation does not limit the Minister to considering the allocation in isolation. It is clear that consideration was given to the longer term consequences of granting an exception to the Affiliation Policy in this case. In my view, that approach was permissible and reasonable.

D. *Issue 3: Whether the Minister fettered his discretion by applying the Affiliation Policy*

[31] The Applicants assert that, in applying the Affiliation Policy, the Respondent has treated that policy as binding law, and thereby fettered the Minister's discretion. The Applicants cite

multiple authorities in support of the principle that a decision maker may not fetter its discretion in this way: i.e. *Island Timberlands LP v Canada (Minister of Foreign Affairs)*, 2009 FC 258, at para 27; *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR. 2; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 53-54. The Applicants note that, in deciding not to grant an exception to the Affiliation Policy in this case, the Minister's main concern was the precedent that would be set and the need for consistency in assessing future requests for allocations. Noting that no exception of the kind sought in this case has ever been granted, the Applicants assert that the Minister is not open to an exception to the Affiliation Policy and has therefore improperly fettered his discretion.

[32] As discussed in relation to Issue 1, the *Flavio* decision involved the application of the Affiliation Policy such that the requested allocation in that case was not even considered. The Court ruled in that case that the Minister, by relying solely on the policy and refusing to consider an exception, had improperly failed to exercise his discretion. The present case is distinguishable. Here, the Minister recognized that an exception to the policy was possible and did give consideration to whether such an exception should be granted (see DFAIT's Memorandum for Action dated August 7, 2012 and its Memorandum for Information dated April 10, 2013). It appears to me that the Respondent would have been prepared to grant the requested exception if it had been satisfied that doing so would not have anti-competitive effects on the market, even taking the longer term view.

[33] The Applicants argue that, since the Respondent's concern was always with the long-term consequences of granting an exception, the consideration given was whether the policy was

justified, not whether an exception should be granted in this particular case. As I indicated in discussion of Issue 1, the Minister was entitled to consider the longer term consequences of granting an exception to the Affiliation Policy. Otherwise, it would likely be difficult for the Minister to achieve the objectives of the *EIPA*. The Respondent also points out that a partial exception was granted in that the two allocations that had been granted to Lilydale and Janes for 2012 were not withdrawn.

[34] In *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198, Justice Evans made two statements that are relevant to this issue. Firstly, at para 60, he stated:

> The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.

[35] Secondly, at para 74, he noted that where such a guideline or other soft law technique expressly permits exceptions (as is the case for the Affiliation Policy), the Court should be slow to conclude that decision makers will regard themselves as bound to follow the normal policy.

[36] The real issue comes down to whether the Minister reasonably considered whether the Affiliation Policy should be followed in this case. For the reasons discussed above, it is my view that he did.

E. *Issue 4: Whether DFAIT breached the obligation of fairness it owed to the Applicants*

[37] As indicated above, the Respondent indicated to the Applicants in January 2013 that reconsideration of the First Decision was possible on the basis of new information. Following review of the Applicants' 13-page letter in February 2013, DFAIT concluded that there were no substantial new facts or arguments to justify reconsideration, and informed the Minister that it intended to so advise the Applicants. Though this suggests that the matter was not submitted for reconsideration by the Minister, a Memorandum for Information was provided to the Minister describing the background of the matter, attaching the Applicants' letter, and explaining DFAIT's reasons for not seeking reconsideration. The Minister approved the proposed communication to the Applicants.

[38] The Applicants assert that, based on representations by DFAIT, they had a legitimate expectation that the First Decision would be reconsidered by the Minister, and that such reconsideration would not be stopped at DFAIT. The Applicants argue that this legitimate expectation was not met, and that this amounts to a breach of the duty of fairness owed to them.

[39] The Applicants argue that their legitimate expectation did not include a requirement that there be new facts or arguments before the First Decision could be reconsidered. The Applicants argue that this requirement was added later. In support of this argument, the Applicants refer to the Affidavit of Solène Murphy, an articling student with the Applicants' counsel who attended the January 16, 2013 meeting with DFAIT. Having read Ms. Murphy's affidavit (including paragraphs 10 and 13, to which counsel directed my attention), as well as her notes of the meeting, I am not satisfied that the Applicants had a legitimate expectation that the matter would be reconsidered in the absence of new facts or arguments. Based on my review of the evidence,

DFAIT did not undertake to submit the matter for reconsideration even if new facts or arguments were absent.

[40] In order to establish a legitimate expectation, DFAIT's representations had to be clear, unambiguous and unqualified: *Canada (Attorney General) v Mavi*, 2011 SCC 30, at para 68. I am not satisfied that the fine line the Applicants seek to draw in this case (reconsideration even in the absence of new facts as arguments) was stated so clearly by DFAIT.

[41] I am also not satisfied that the Applicants had a legitimate expectation that the matter would be put to the Minister for reconsideration, as opposed to DFAIT deciding internally that it was not necessary to put the matter to the Minister and simply informing the Minister of DFAIT's view. Furthermore, I see no reason to disagree with the Respondent's argument that representatives of DFAIT act as delegates of the Minister and therefore their decision is a decision of the Minister: paragraph 24(2)(d) of the *Interpretation Act*, RSC 1985, c I-21.

[42] In any case, DFAIT did submit a Memorandum of Information to the Minister. In my view, there is no significant difference between DFAIT submitting a Memorandum of Information indicating that the matter does not warrant reconsideration, and submitting a Memorandum for Action recommending that the original decision be maintained (per the document that was drafted by DFAIT but never finalized). In either case, the Minister looks to DFAIT to propose a course of action, DFAIT makes a proposal, and the Minister decides whether to agree. There is nothing to suggest that the Second Decision would have been different

if DFAIT had submitted a Memorandum for Action rather than a Memorandum of Information. In fact, everything I have seen suggests that the result would have been the same.

[43] The Applicants argue also that the Respondent even acknowledged that Sofina's February 2013 submission for reconsideration did have new information; but that the new information was insufficient to prompt a reconsideration of the First Decision. In my view, this distinction is insignificant. DFAIT indicated that reconsideration was to be based on new information, and I take it as implicit that such new information had to meet a threshold of relevance in order to warrant reconsideration. Moreover, DFAIT is well placed to make that assessment of relevance.

[44] For the foregoing reasons, I conclude that the Applicants were not denied procedural fairness in respect of their request for reconsideration of the First Decision. In addition, I have seen nothing to suggest that the decision not to reconsider suffered from any of the alleged errors cited by the Applicants in relation to the First Decision.

F. *Issue 5: Whether the First Decision is properly in issue*

[45] As alluded to above, the Respondent argues that the First Decision was never properly put in issue. The Respondent notes that the Notice of Application that commenced the present application indicated that this judicial review concerns the Second Decision. The Respondent also argues that the Second Decision (which deals with a request for reconsideration) is quite distinct from the First Decision (which concerns allocation of quota). For the reasons set out

below, I agree with the Respondent that the First Decision was never properly put in issue and therefore is not now subject to judicial review.

[46] I preface my analysis of this issue by acknowledging that my conclusion on this issue makes my analysis of Issues 1, 2 and 3 unnecessary. However, I have decided to address all of these issues in the interest of completeness.

[47] The First Decision was communicated on November 1, 2012, and reasons were provided on November 8, 2012. Section 18.1 of the *Federal Courts Act* provides for a 30-day limit for seeking judicial review of the First Decision. Beyond that deadline, the Applicants would have been required to make a motion for an extension of the deadline. The merits of such an extension could have been discussed at the hearing of the motion. No such motion was made.

[48] The Applicants did not even raise the issue of reconsideration until after the 30-day limit for judicial review of the First Decision had passed. Therefore, it does not appear that the Applicants can even reasonably argue that their inquiring as to the possibility of reconsideration was in time to keep the First Decision in issue. As the Respondent notes, the record of the First Decision is not even in evidence in the present application because it was not properly put in issue. That absence alone would be reason enough for caution in considering whether to assess the propriety of the First Decision.

[49] The Applicants refer to the decision of Justice Rothstein in *Soimu v Canada (Secretary of State)* (1994), 83 FTR 285 (FCTD) (*Soimu*) to argue that putting the Second Decision in issue

inherently also puts the First Decision in issue. However, the facts of the present case are easily distinguishable from those in *Soimu*. Firstly, the request for reconsideration in *Soimu* was made within the time for seeking review of the original decision. Therefore, the propriety of that original decision was at least put in issue within the prescribed time. The second important distinction is that, in the present case, the Second Decision was to not reconsider the First Decision. However, in *Soimu*, the original decision was reconsidered and, upon reconsideration, the original decision was maintained. Accordingly, the issues relevant to the reconsideration in *Soimu* included those in the original decision.

[50] In addition, it is well understood that when a tribunal's reconsideration decision is reviewed, the Court should not look at the decision sought to be reconsidered: *Canadian Airport Workers Union v Garda Security Screening Inc.*, 2013 FCA 106 at para 3.

V. Conclusion

[51] This application for judicial review concerns the Second Decision (not to reconsider the First Decision). The First Decision itself was not properly put in issue both because the Notice of Application did not challenge the First Decision, and because the time for doing so had expired prior to the filing of the Notice of Application.

[52] Even if the First Decision had been properly put in issue, I am not satisfied that any of the issues raised by the Applicants in respect of the First Decision has merit. Specifically, I am not satisfied that the First Decision (i) is unsupported, (ii) was made following a failure to consider a relevant factor, or (iii) is based on a fettering of discretion.

[53] I am also not satisfied that the Second Decision should be set aside either on the issue of procedural fairness or as a matter of substance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The present application for judicial review is dismissed with costs.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-917-13
STYLE OF CAUSE:	SOFINA FOODS INC., JANES FAMILY FOODS LTD. AND LILYDALE INC. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 24, 2014
JUDGMENT AND REASONS:	LOCKE J.
DATED:	JANUARY 13, 2015

APPEARANCES:

Mr. Nicholas McHaffie Mr. Fabio Pozzobon Mr. Alex Sarabura	FOR THE APPLICANTS
Ms. Michelle Kellam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stikeman Elliott LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT