Federal Court Cour fédérale

Date: 20140522

Docket: T-429-12

Citation: 2014 FC 459

Ottawa, Ontario, May 22, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FRANKE KINDRED CANADA LIMITED

Applicant

and

JIANGMEN NEW STAR ENTERPRISE LTD., GUANGZHOU KOMODO KITCHEN TECHNOLOGY CO., LTD., ZHONGSHAN SUPERTE KITCHENWARE CO., LTD., GUANGDONG DONGYUAN KITCHENWARE INDUSTRIAL CO., LTD., GUANGDONG YINGAO KITCHEN UTENSILS CO. LTD., AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, THE MINISTER OF PUBLIC SAFETY

Respondents

<u>JUDGMENT AND REASONS</u>

I. Introduction

[1] The Applicant, Franke Kindred Canada Limited, and Novanni Stainless Inc., are Canadian manufacturers of stainless steel sinks. On September 6, 2011, the companies complained to the Canada Border Services Agency [CBSA] that certain stainless steel sinks imported from China were being dumped and subsidized, causing injury to the Canadian industry.

[2] On January 25, 2012, the CBSA made a preliminary decision of dumping and subsidizing, which established a provisional rate of antidumping and countervailing duties to be applied to stainless steel sinks imported from China from January 25, 2012 to May 24, 2012 (the date of the injury determination by the Canadian International Trade Tribunal [CITT]).

[3] On February 7, 2012, the Applicant requested copies of the calculations and worksheets used by the CBSA to determine the provisional duty rate. On February 10, 2012, the CBSA refused to disclose these documents to the Applicant, which is the underlying application before this Court.

[4] This judgment is in response to the application for judicial review in which Franke Kindred Canada Limited asks the Court to review a decision, dated February 6, 2012, in which the CBSA refused to disclose to the Applicant the internal worksheets and calculations that formed the basis of that preliminary decision.

II. Background

[5] On October 27, 2011, the CBSA initiated an investigation into the Applicant's complaint. On the same day, the CBSA sent a Request for Information [RFI] to all known stainless steel sink importers, exporters, and the Government of China.

[6] Public versions of the RFIs, including any supplemental RFIs, were provided to all parties involved in the matter. Confidential versions were provided to counsel who submitted confidentiality undertakings. The Applicant's counsel received confidential versions of the RFIs. All responses and supplemental responses to the RFIs were also disclosed to all parties, including the Applicant.

III. Decision under Review

[7] In his letter, dated February 10, 2012, the decision-maker, Mr. Rand McNally (Manager, Consumer Products Division, Anti-Dumping and Countervailing Directorate), denied the Applicant's request for disclosure of the CBSA's internal worksheets and calculations on the basis that he could not discuss with the Applicant's counsel how the CBSA considered or treated the confidential information of another party.

IV. Issues

[8] The issues in this case are:

a) Is the Applicant's application for judicial review moot?

b) Did the CBSA violate the Applicant's right to procedural fairness by not disclosing its internal worksheets and calculations?

V. Relevant Legislative Provisions

[9] Sections 82 and 83 of the *Special Import Measures Act*, RSC, 1985, c S-15 [SIMA] are relevant in this matter:

Definition of "information"	Définition de « renseignements »
82. In sections 83 to 87, "information" includes evidence.	82. Pour l'application des articles 83 à 87, sont compris parmi les renseignements les éléments de preuve.
Information to be disclosed	Communication des renseignements
83. Where information is provided to the President for the purposes of any proceedings under this Act, every party to the proceedings has, unless the information is information to which subsection 84(1) applies, a right, on request, to examine the information during normal business hours and a right, on payment of the prescribed fee, to be provided with copies of any such information that is in documentary form or that is in any other form in which it may be readily and accurately copied.	83. Toute partie à une procédure prévue par la présente loi a droit, sur demande, de consulter les renseignements auxquels ne s'applique pas le paragraphe 84(1) et fournis au président dans le cadre de la procédure pendant les heures d'ouverture et a droit, sur paiement des frais prévus par règlement, de s'en faire délivrer des copies si les renseignements sont contenus dans un document ou s'ils sont sous une forme qui permet de les reproduire facilement et avec exactitude.

[10] In *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1359, this Court stated that document disclosure is important for procedural fairness as it gives an applicant an

opportunity to properly respond to a decision-maker's concerns (at para 10) (reference is also made to: *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (CA) and *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809). Questions of this nature are reviewable on the correctness standard (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392; *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539).

VI. Analysis

A. *Is the Applicant's application for judicial review moot?*

[11] It is well established that the doctrine of mootness permits the Court to refuse to decide a case if it only raises a hypothetical or abstract question. The test for mootness was most clearly set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case… [Emphasis added.]

[12] Applying *Borowski* to the case at hand, the Court declines to exercise its discretion and hear this matter. There is no tangible and concrete dispute at issue, nor does it appear that the outcome of this particular matter will have any effect on the Applicant's rights.

[13] Counsel for the Applicant argues that the CBSA's refusal to disclose the internal worksheets and calculations that formed the basis of its preliminary decision deprived the Applicant of the ability to know and understand the information relied upon by the CBSA in determining the final dumping margin and rates of subsidy on the imported stainless steel sinks.

[14] The Court is not convinced that this is the case. A careful review of the record demonstrates that the calculations requested by the Applicant were based largely on unverified data and only used to establish the provisional duty rate to be applied to the importation of the stainless steel sinks pending a final determination by the CITT; a determination which was made within 90 days of the preliminary decision. There is no evidence that the CBSA's final determination was based on these preliminary calculations.

[15] Based on the evidence, rather, the final duty rate, which superseded the preliminary duty rate, was based on a further investigation that established appreciably different margins of dumping and rates of subsidy from those at the preliminary investigation stage.

[16] This Court has recognized and acknowledged that SIMA investigations in the final determination stage are generally much more comprehensive than at the preliminary stage; often consisting of meetings with additional parties, verifying new information, revisiting exporters for clarification of details and visiting importers if necessary; as it was specifically decided by the Federal Court of Appeal in *Uniboard Surfaces Inc v Kronotex Fussboden GmbH*, 2006 FCA 398, [2007] 4 FCR 101 (at para 38). In this Federal Court of Appeal decision, the Court clearly comes to the conclusion that such early information and analysis in the preliminary stage is internal and not subject to disclosure; paragraphs 53 to 57 inclusive must be read to understand the thinking of the Federal Court of Appeal in its pivotal decision thereon. In addition, conversely, time would seldom allow for a verification of all the preparatory initial information at the preliminary determination stage.

[17] Without evidence supporting the Applicant's assertion that the non-disclosure of the calculations and worksheets underlying the preliminary decision affected the protection sought, the Court cannot interfere. The duty rate established by the preliminary calculations has long been superseded by the rate established in the CBSA's final decision, which was favourable to the Applicant.

[18] On cross-examination, the Applicant's former counsel, Ms. Victoria Bazan, stated that the application will serve to change the CBSA's current disclosure practice for future investigations (cross-examination of Victoria Bazan at pp 42-43); however, this has no practical effect on the present matter. The Court considers this matter moot.

B. *Did the CBSA violate the Applicant's right to procedural fairness by not disclosing its internal worksheets and calculations?*

[19] While the above finding is determinative of this application, the Court would add that, even if it had found that a live controversy did still exist between the parties, there has been no breach of procedural fairness.

[20] The Court reminds that in the context of SIMA investigations, participatory rights have been found to be "at the extreme bottom end of the procedural fairness scale" (*Uniboard*, above, at para 44); the SIMA expressly prescribes limited disclosure rights to parties involved in an investigation.

[21] Considering this low threshold, the Court does not find that the duty of fairness in this matter extended to the disclosure of the internal documents prepared by the CBSA officers. As stated by Justice Robert Décary of the Federal Court of Appeal in *Uniboard*, above:

> [57] ... The summary, description, analysis or interpretation by the investigators of the information they receive during the audit are internal documents which need not be disclosed.

[22] The evidence stands uncontested that the Applicant was provided all of the information to which the CBSA had access in rendering its preliminary and final decisions. The Applicant was also given full and fair opportunity to present evidence and submissions relevant to the complaint, and to respond to the evidence before the decision-maker. In the Court's view, the Applicant has not demonstrated a breach of procedural fairness in the CBSA's investigation.

VII. Conclusion

[23] For all of the above reasons, the Application of the Applicant for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application of the Applicant be dismissed on the ground that the Applicant has an adequate alternate remedy and the Application of the Applicant for judicial review be dismissed, without costs (recognizing so little jurisprudence exists in this regard and the parties have therefore agreed with each other in Court to forego a request for costs).

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	FRANKE KINDRED CANADA LIMITED v JIANGMEN NEW STAR ENTERPRISE LTD., GUANGZHOU KOMODO KITCHEN TECHNOLOGY CO., LTD., ZHONGSHAN SUPERTE KITCHENWARE CO., LTD., GUANGDONG DONGYUAN KITCHENWARE INDUSTRIAL CO., LTD., GUANGDONG YINGAO KITCHEN UTENSILS CO. LTD., AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, THE MINISTER OF PUBLIC SAFETY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 5, 2014
JUDGMENT AND REASONS:	SHORE J.
DATED:	MAY 22, 2014

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