Federal Court  Cour fédérale

Date: 20200326

Docket: T-1662-19

Citation: 2020 FC 430

Ottawa, Ontario, March 26, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

HUSTEEL CO. LTD

Applicant

and

ATTORNEY GENERAL OF CANADA, EVRAZ INC. NA CANADA, CANADIAN NATIONAL STEEL CORPORATION, ALGOMA TUBES INC., and PRUDENTIAL STEEL ULC

Respondents

ORDER AND REASONS

[1] This is a motion by the Attorney General of Canada to strike an application for judicial review made by Husteel Co., Ltd. [Husteel] in respect of a decision by the Canada Border Services Agency [CBSA] under the *Special Import Measures Act*, RSC 1985, c S-15 [*SIMA*].

[2] The respondents contend that the decision under review is not a reviewable administrative action under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*].

Alternatively, they say section 18.5 of the *FCA* ousts this Court's jurisdiction because the *SIMA* contains an appeal scheme which constitutes an adequate alternative remedy.

I. Background

[3] Under the *SIMA*, the CBSA and the Canadian International Trade Tribunal [CITT] are jointly responsible to prevent two unfair trading practices under international trade rules: namely, dumping and subsidizing. This matter concerns the dumping of steel line pipes exported from South Korea.

[4] Dumping refers to the trading practice by which foreign manufacturers sell their products in Canada for less than the price at which they sell the same products in their home country. The CBSA determines if there has been dumping of goods; while the CITT determines if the dumping has injured, or threatens to injure, Canadian producers of like goods. When the CITT finds that Canadian producers have been harmed, or are threatened with harm, the CBSA levies anti-dumping duties on imported goods to raise unfairly low prices back to fair levels.

[5] Evraz Inc. NA Canada and Canadian National Steel Corporation [collectively, Evraz] is a Canadian producer of carbon and alloy steel line pipe. In April 2017, Evraz filed a written complaint under the *SIMA* concerning the dumping of imports of line pipe from South Korea. Evraz alleged this dumping had caused injury to Canadian manufacturers of like goods.

[6] The CBSA's Trade and Anti-dumping Programs Directorate investigated Evraz's complaint and, in early December 2017, issued a final determination that line pipe originating in

or exported from South Korea, including line pipe manufactured by Husteel, had been dumped in the Canadian market.

[7] Following the CBSA's final determination, the CITT undertook an injury inquiry under the *SIMA*. In January 2018, the CITT found that the dumping of line pipe originating in, or exported from, South Korea had caused injury to the domestic industry [the Injury Finding]. Because of the Injury Finding, producers of line pipe in Canada became entitled under the *SIMA* to anti-dumping protection from South Korean line pipe.

[8] To enforce the Injury Finding, the CBSA determines the amount of duties to apply. It calculates the amount of the duty by determining the amount by which the imported goods fall below their "normal values". To assess normal values, the CBSA depends on information supplied by importers, exporters, and manufacturers, such as information about selling prices, production costs, administrative fees, and other factors. The CBSA arrives at a figure for the "export price" of the goods (the price at which the goods are sold to Canadian importers, less shipping and insurance costs) and the normal value. The difference, known as the margin of dumping, determines the amount of the duty. In circumstances where the CBSA considers that a company has not given sufficient information to calculate normal values, the amount of duty is set by way of a Ministerial specification under subsection 29(1) of the *SIMA*.

[9] Under paragraph 56(1)(b) of the *SIMA*, the normal value is determined at the time of importation. However, the CBSA has a policy of issuing "prospective normal values" to co-

operative exporters. As time passes, the CBSA updates these prospective normal values through "normal value re-investigations" and "normal value reviews".

[10] As part of its enforcement of the Injury Finding, the CBSA initiated Normal Value Review LP2-2018-UP1 [the Review] in early September 2018 to update the normal value and export prices of line pipe exported by Husteel from South Korea to Canada. The Review resulted in a Notice of Conclusion of Review dated September 10, 2019 [the Review Decision]. The CBSA determined that the information Husteel supplied was not sufficiently accurate or reliable to be used for the purposes of normal values. The CBSA decided that the normal values previously issued to Husteel were no longer effective and that the normal value for goods subject to the Review would be determined in accordance with a Ministerial specification based on the export price of the goods advanced by 88.1%. The prior normal value was 4.1%.

[11] In a notice of application filed August 10, 2019 (amended on January 15, 2020), Husteel seeks judicial review of the Review Decision. Husteel seeks an order declaring that the CBSA policy and practice of conducting normal value reviews and self-initiated prospective adjustments of normal values, irrespective of any importations of goods into Canada, is *ultra vires*, and that the CBSA acted without jurisdiction and beyond its jurisdiction in conducting the Review. In the alternative, Husteel seeks an order setting aside the Review Decision and referring the matter back to the CBSA for redetermination.

II. The Parties' Submissions

A. *The Attorney General's Submissions*

[12] The Attorney General says the Review Decision has no legal effect and therefore is not a justiciable decision under section 18.1 of the *FCA*. According to the Attorney General, the normal values arrived at by the CBSA in the Review Decision are only presumptive values that have no legal effect until goods are imported and anti-dumping duties assessed against the goods.

[13] In any event, even if this Court has jurisdiction, in the Attorney General's view Husteel has an adequate alternative remedy under sections 56 to 62 of the *SIMA* which allows an importer to challenge CBSA decisions in relation to anti-dumping duties assessed on imported goods. According to the Attorney General, the issues raised, and the relief sought by Husteel in this case must be addressed through the statutory scheme. The Attorney General says the application for judicial review is devoid of any chance of success and must be struck.

[14] Algoma Tubes Inc. and Prudential Steel Inc., and Evraz, reiterate the Attorney General's submissions.

B. *Husteel's Submissions*

[15] Husteel contests the Attorney General's arguments. Husteel says the respondents have not met the extremely high threshold for striking an application for judicial review. Husteel opposes the characterization of the Review Decision as not being an administrative action that

affects its legal rights, imposes legal obligations, or causes prejudicial effects. In Husteel's view, this Court's jurisdiction is not ousted by section 18.5 of the *FCA* and it does not have an adequate alternative remedy.

[16] According to Husteel, judicial review is open to a wide range of administrative actions and not simply decisions or orders. Husteel claims the Review Decision is an administrative action because it affects its legal rights, imposes legal obligations, or causes prejudicial effects. Husteel notes that the normal value review was not a voluntary process because it was liable to face a punitive Ministerial specification of duties if it did not supply sufficient information to the CBSA.

[17] Husteel says the Review Decision had an immediate effect in law and in fact since its goods were liable to dumping duties. Husteel further says it had to price its goods appropriately or face duties, pricing it out of the Canadian market. In Husteel's view, the Review Decision had a very real and concrete impact on how it could export its goods to Canada.

[18] According to Husteel, the *SIMA* appeal scheme does not apply to normal value reviews since it only applies to specific determinations and re-determinations. Husteel claims it does not have an alternative remedy because only an importer of record can challenge a determination of dumping. In any event, in Husteel's view the appeal scheme cannot provide the relief it seeks in its application for judicial review which challenges the CBSA's jurisdiction to conduct normal value reviews and its procedural conduct.

III. Analysis

A. *The Test for a Motion to Strike*

[19] There is no Federal Courts rule dealing with the striking of an application for judicial review. It is well established though that the Court can dismiss an application in a summary way in exceptional cases (*Marcel Colomb First Nation v Colomb*, 2016 FC 1270, at para 143).

[20] The Federal Court has the power to dismiss an application for judicial review by way of a preliminary motion if the application is so clearly improper as to be bereft of any possibility of success (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, at para 47 [*JP Morgan*]).

[21] The test on a motion to strike an application is a stringent one and the facts are to be taken as pleaded. When so taken, the question then is whether it is "plain and obvious" that the application must fail (*Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 15; *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 64).

[22] The Court must read the application with a view to understanding its real essence and gain "a realistic appreciation" of its "essential character" by reading it holistically and practically without fastening onto matters of form (*JP Morgan*, at paras 49-50).

[23] If an application for judicial review does not state a matter within the Federal Court's jurisdiction, it is appropriate to strike it out. Where an application for judicial review fails to affect

legal rights, impose legal obligations, or cause prejudicial effects, it is not amenable to judicial review under section 18.1 of the *FCA* (*Air Canada v Toronto Port Authority*, 2011 FCA 347, at para 29).

[24] It is appropriate to strike an application where an adequate, effective recourse exists elsewhere, and there are no exceptional circumstances warranting the Court's intervention (*JP Morgan*, at paras 84 and 85; *C.B. Powell Ltd. v. Canada*, 2010 FCA 61, at paras 30, 31 and 33).

B. *The Review Decision is not Justiciable under section 18.1 of the FCA*

[25] I agree with the respondents that the Review Decision is not a decision amenable to judicial review under section 18.1 of the *FCA* because it has no legal effects. The issuing of prospective normal values through a normal value review is not an assessment of a duty. A normal value review is a preliminary step in the administrative process that may eventually lead to an assessment of anti-dumping duties when goods are imported into Canada.

[26] A normal value review is akin to a re-investigation. The CBSA's Memorandum D14-1-8: Re-investigation and Normal Value Review Policy – Special Import Measures Act (SIMA) shows that a re-investigation is conducted with respect to all exporters of goods originating in or exported from a country or countries covered by an order of the CITT; whereas a normal value review is conducted with respect to a single exporter subject to a CITT order.

[27] This Court has considered re-investigations by the CBSA in *GRK Fasteners v Canada (Attorney General)*, 2011 FC 198 [*GRK*], and *Prudential Steel ULC v Canada (Attorney General)*, 2015 FC 1077 [*Prudential*].

[28] In *GRK*, Justice O'Reilly determined that a re-investigation by the CBSA could not be judicially reviewed:

> [24] … I must conclude that the CBSA's re-investigation is not amenable to judicial review. A re-investigation by definition is a preliminary step in the process that may lead to an assessment of duty. A re-investigation may lead to a determination or re-determination that may be appealed to the CITT, and to the Federal Court of Appeal.
>
> [25] On the facts here, the impact of the re-investigation on GRK is uncertain, and certainly not immediate. These circumstances … suggest that permitting judicial review of a re-investigation would be inappropriate. It would clearly run afoul of the policy considerations cited by Justice Stratas in *Powell*, above.
>
> [26] Should it transpire that the duty arrived at under the re-investigation is imposed on GRK, it can seek a re-determination. And from there it can appeal to the CITT and the Federal Court of Appeal. A remedy in the form of judicial review at this early stage of the process set out in *SIMA* would disrupt and distort the remedial scheme Parliament enacted.

[29] In *Prudential*, the applicants sought an interlocutory order staying the CBSA's announced re-investigation about certain goods. As part of his analysis, Justice Hughes remarked:

> [36] … one must distinguish between a re-investigation which is in the nature of an inquiry process, and a re-determination which is a decision that may result from that inquiry process. The inquiry process does not affect legal rights or impose legal obligations on [*sic*, or] cause prejudice; those results only come about when a determinative [*sic*] or re-determination is made. This case is similar to that of the *Toronto Port Authority* case where the

> Authority issued certain bulletins to the effect that it was going to initiate a process for awarding "slots" at the Toronto Island Airport. Stratas J.A. (concurred in by Létourneau and Dawson JJ.A.) wrote in *Air Canada v Toronto Port Authority*, 2011 FCA 347 …
>
> > 28. The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
> >
> > 29. One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: ... [citations omitted].
> >
> > 30. The decided cases offer many illustrations of this situation: e.g., *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (an official's letter proposing dates for a meeting); *Philipps v. Canada (Librarian and Archivist)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).
>
> [37] Directly on point is the decision of O'Reilly J. of this Court in *GRK Fasteners v Attorney General of Canada*, 2011 FC 198 [quotation omitted], …
>
> [38] Therefore, I conclude that this Court does not have jurisdiction under sections 18 or 18.1 of the *Federal Courts Act* to grant relief in respect of the re-investigation.

[30] Although Husteel complains that the Review Decision priced its goods out of the Canadian market and affected the way it does business, this is not a legal effect or consequence such that the Review Decision is an administrative action reviewable under section 18.1 of the

FCA. The Review Decision only purported to prospectively determine the normal value to be used to determine the amount of duties payable on Husteel's goods. It was a decision not amenable to judicial review (*Prudential Steel Ltd v Bell Supply Company*, 2016 FCA 282).

[31] Husteel's application for judicial review of the Review Decision must, therefore, be struck out in its entirety, without leave to amend, because this Court lacks jurisdiction under section 18.1 of the *FCA* to grant the requested relief. Given this conclusion, it is unnecessary to consider whether Husteel has an adequate alternative remedy under the *SIMA*. The Review Decision is only a prospective assessment; the normal value will be assessed and only have legal effect once Husteel's goods are imported into Canada.

IV. Conclusion

[32] Husteel's application for judicial review of the Review Decision is struck out in its entirety, without leave to amend.

[33] Costs in the lump sum amount of $5,600.00 (inclusive of any taxes or disbursements) are awarded to the respondents collectively, to be shared equally amongst them.

[34] The respondents Algoma Tubes Inc. and Prudential Steel ULC are awarded costs in the amount of $450.00 (inclusive of any taxes or disbursements) and Evraz Inc. NA Canada and Canadian National Steel Corporation are awarded costs of $450.00 (inclusive of any taxes or disbursements) for the motions adding them as respondents.

JUDGMENT in T-1662-19

THIS COURT'S JUDGMENT is that:

1. The Motion by the Respondent, Attorney General of Canada, is granted. The Applicant's Notice of Application for Judicial Review is struck out in its entirety, without leave to amend, and the Application is dismissed.
2. The Applicant shall pay to the Respondents costs of $5,600.00 (inclusive of any taxes or disbursements), to be shared equally amongst them.
3. The Respondents Algoma Tubes Inc. and Prudential Steel ULC are awarded costs in the amount of $450.00 (inclusive of any taxes or disbursements) and Evraz Inc. NA Canada and Canadian National Steel Corporation are awarded costs of $450.00 (inclusive of any taxes or disbursements) for the motions adding them as respondents.
4. Costs shall be paid within 30 days of the date of this Order.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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