Federal Court  Cour fédérale

Date: 20101005

Dockets: T-473-10
T-474-10

Citation: 2010 FC 994

BETWEEN:

Docket: T-473-10

MC IMPORTS LTD.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

AND BETWEEN:

Docket: T-474-10

MC IMPORTS LTD.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR JUDGMENT

HUGHES J.

[1] These two applications for judicial review which were heard together, deal with the classification by the Respondent, Canadian Food Inspection Agency (CFIA), of certain fish

products imported into Canada by the Applicant MC Imports Ltd. for resale here. The classification is important as the fee imposed by the Respondent for the inspection of such products varies depending on the classification.

[2] In particular, the Applicant has imported from the Philippines fish products known as Salted Ground Anchovy Balayan, Salted Shrimp Fry, Salted Shrimp Fry-Sautéed Regular, Salted Shrimp Fry-Sautéed Spicy, and Salted Anchovy Monamon all which I will simply refer to as the Products. Originally the CFIA Burnaby, B.C. Office as well as its Mississauga Office had classified such products as "other" which carried with it an inspection fee of $0.010/kg. Subsequently, the CFIA changed that classification to "ready-to-eat" which carries a fee of fifteen times as much, $0.150/kg. The Applicant asks that this reclassification be set aside and that the matter be reconsidered by the CFIA. For the reasons that follow, that is what I will do.

FACTUAL BACKGROUND

[3] The Applicant imports fish products from the Far East for resale in Canada including the Products at issue. These Products have been variously described in the record. I repeat a definition for *Bagoong* appearing in a book by Minerva Olympia entitled "Fermented Fish Products in the Phillippines" at page 132:

> *FISH PASTE (BAGOONG)*
>
> ***Product***
> *Bagoong is the undigested residue of partially hydrolyzed fish or shrimp. It has a salty and slightly cheese-like odor (Figure 1). The characteristics of this product vary depending on the region where it is made and consumed.*

…
Preparation
The fish used for bagoong include anchovies, sardines, herring, silverside, shrimp, slipmouth, freshwater progy, oysters, clams, and other shellfish. The fish are washed thoroughly and drained well. Salt is mixed with the drained samples at varying proportions from 1:3 to 2:7 depending on the bulk of the preparation. The mixture is allowed to ferment for several months or longer until it develops the characteristic flavor and aroma of bagoong.

Bagoong is eaten raw or cooked and is generally used as flavouring or condiment in many traditional recipes. As an appetizer it is sauteed with onions and garlic and served with tomatoes or green mangoes. In rural areas, bagoong is eaten with vegetables, and, especially in the coastal regions, it is often the main source of protein in the diet.

[4] The preparation of a typical Product by the Applicant's supplier is set out in Exhibit G to the affidavit of Mr. Menenses:

STEP	*QUALITY CONTROL PROCEDURE*
Salting of fish at source	*Fresh Fish is mixed with salt at harvest area.*
Receive salted fish at plant	*Salted fish is received at processing plant.*
Adjust salt content	*Salt content of received lot is adjusted to required salt content.*
Ferment	*Salted fish is held in container until fermented.*
Sort	*Extraneous matter is removed.*
Fill in bottles	*Fermented fish is filled into Bottles*

Washing and Drinking	*Check potability of water and cleanliness of draining materials.*
Label / Pack in cartons	*Label manually each glass jar and pack in cartons.*

[5] The Product is shipped, sold and stored (at least until opening) at room temperature.

[6] The Respondent CFIA has the responsibility for inspection and approval for sale in Canada of fish products, including those imported into Canada. Varying fees are imposed for such inspections depending how the product is categorized. The categories and fees are:

Ready-to-eat	*$0.15/kg*
Canned	*$0.02/kg*
Fresh	*$0.01/kg*
Raw mulluscan shellfish	*$0.01/kg*
Other	*$0.01/kg*

[7] Originally the Applicant's Products passed through the CFIA's Burnaby, B.C. Offices and were classified as "other" thus bearing an inspection rate of $0.01/kg. Later these Products passed through the CFIA's Mississauga, Ontario Offices and were originally also classified as "other" but later shipments were classified as "ready-to-eat" bearing a rate of $0.15/kg. The Applicant corresponded with CFIA objecting to the reclassification. In particular the Applicant dealt with a Jason Agius who provided an affidavit in these proceedings. The Applicant, being frustrated in his endeavours to resolve sent an e-mail to another person at CFIA stating:

> *Krista,*
> *Since, I am continually banging my head against Jason Agius door on the RTE issue. Is there some sort of judicial review mechanisim? For, specifically appeal charges and fees to? Does the CFIA have an*

> *appeal mechanism like CCRA to dispute wrong fees or charges…how about issues with specific staff and their ability to assign the fees?*
>
> *CCRA has a tribunal or non biased 3rd party mediator to settle these differences. You repeatedly say speak to Jason, his door and ears are open. Honestly, he keeps coming back with the same answers that are completely wrong! If he's so confused. If all of you are confused, all the more reason to classify it under others. Isn't that what Others is for?*

[8] Agius himself responded to the Applicant by e-mail saying:

> *Hi Alfredo,*
> *I can sympathize with your belief that you believe that your products are not ready to eat. I have extensively reviewed the issue with Program representatives and Fish Inspection staff for different regions and with the information provided to us and referencing CFIA policies and legislation, these products should be classified as Ready to Eat. The CFIA does not have a 3rd party review panel to discuss these types of issues, and these concerns are usually dealt with appeals to the CFIA President, Regional Director or Inspection Manager. All of which are aware of this issue, via the claim that to presented to the Agency. It is also important to note that, he Programs branch of the CFIA establishes the CFIA polices and procedures and the Operations branch (inspection staff) execute them. I should also state that your products fall under the jurisdiction of the Fish Inspection Act and Regulations and you should really be comparing your products to other RTE and non RTE fish products.*
> *If you would like to speak to my Inspection Manager, his name is Kevin Bureau and his telephone number is …. [Emphasis added]*

[9] The Applicant brought two proceedings in the Small Claims Court in his area, the first was dismissed because the Applicant did not appear at a settlement conference. The second was dismissed for lack of jurisdiction. The Applicant then brought an application for judicial review in this Court (08-T-14) which was dismissed as being out of time but without prejudice to the bringing of a timely application (Order April 1, 2008).

[10] Subsequently, the present applications have been brought. There is no objection raised as to timeliness.

ISSUES

[11] The issues raised in this application are three:

1. Are there applications precluded by reason of the provisions of section 10 of the *Fish Inspection Regulations* C.R.C., c. 802?
2. If the applications are not precluded, what is the standard of review to be applied by the Court in reviewing the decisions in question?
3. If the standard of review is reasonableness, were the decisions reasonable, or if the standard is correctness were the decision correct?

ISSUE #1

[12] Are these applications precluded by reasons of the provision of section 10 of the *Fish Inspection Regulations*, C.R.C., c. 802 provides as follows:

10. (1) Where a person interested in a decision of an inspector in respect of any inspection, grading, marking or other matter under Part I of the Act or these Regulations is not satisfied with that decision, the person may, within 30 days after such decision, by notice in writing, appeal the decision to the President of the Agency who shall, subject to section 11, order a reinspection.	*10. (1) Toute personne intéressée qui n'est pas satisfaite de la décision rendue par un inspecteur en matière d'inspection, de classement ou de marquage ou sur toute autre question prévue à la partie I de la Loi ou au présent règlement peut, par un avis écrit, dans les 30 jours qui suivent la décision, en appeler au président de l'Agence qui, sous réserve de l'article 11, ordonne une réinspection.*

(2) Where a reinspection is made pursuant to subsection (1) and the President of the Agency makes a decision as a result thereof, that decision shall be final.	*(2) Lorsqu'une réinspection est faite en application du paragraphe (1) et que le président de l'Agence rend une décision à cet égard, cette décision est finale.*

[13] The jurisprudence, including *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at paragraphs 37 to 40 , *Froom v. Canada (Minister of Justice)*, 2004 FCA 352 per Sharlow J.A. at para. 12 and *Jones v. Canada (Attorney General)*, 2007 FC 386 per Layden-Stevenson J. at paras. 43, 44 and 45 indicates that judicial review, being a discretionary remedy, may be exercised even though other avenues of redress may be afforded by legislation. However, this discretion is to be exercised sparingly and only in unique fact circumstances.

[14] I will exercise my discretion in the circumstances of this case. First, the e-mail from Agius is very confusing. It suggests that the President is already aware of the matter and has already made up his or her mind as to the determination of the matter. Second, the *Regulations*, section 10, uses of the word "may" which suggests that an appeal is not an obligatory route that must be followed. Further, the *Regulations* do not specify which procedure, if any, is to be followed. The Agius e-mail can be interpreted to say that an appeal has, in reality, already been considered.

[15] It would be in the interests of justice to have the matter judicially reviewed to avoid yet another round of possible frustration.

ISSUE #2

[16] If the applications are not precluded, what is the standard of review to be applied by the Court in reviewing the decision in question?

[17] The Applicant has made no submissions as to the standard of review. The Respondent says the standard is reasonableness as referred to in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[18] There is no jurisprudence expressly directed to the CFIA in instances such as the present, however the Respondent asks the Court to consider *Hilbert Honey Co. Ltd. v. Canadian Food Inspection Agency*, 2009 FC 818 as well as *Miel Labonté Inc. v. Canada (Attorney General)*, 2006 FC 195 where standards of reasonableness were applied to CFIA decisions.

[19] I agree with the Respondent, the question here is the appropriate classification of products for the purpose of applying the appropriate level of inspection fees. The question requires a factual interpretation with reference to the appropriate *Regulations*, a matter in which the CFIA has experience. In this regard paragraph 47 of the Supreme Court's decision in *Dunsmuir* is instructive:

> ***47*** *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-*

> *making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

ISSUE #3

[20] If the standard of review is reasonableness, were the decisions reasonable or, if the standard is correctness were the decisions correct?

[21] In the circumstances of the present case I find that the decision of the CFIA to reclassify the Products at issue from "other" to "ready-to-eat" was not reasonable. In particular it was not possessed of the "justification, transparency and intelligibility" required of such a decision by *Dunsmuir* as aforesaid.

[22] The evidence provided by the Respondent is all directed toward an attempt to justify why "ready-to-eat" is the appropriate category for the product. That is not the right question to ask in the circumstances. The right questions are:

1. Why was a change from "other" to "ready-to-eat" made?
2. Of all the categories afforded, which is the most appropriate?

[23] As to the first question, why was a change from "other" to "ready-to-eat" made, the Respondent has provided no real answer. The affidavit of Agius, paragraph 50 says that "*In reality, these products were mistakenly classified as "Other" by the Vancouver office at the outset*." There is no affidavit from a responsible person in the Vancouver office as to whether a mistake was in fact

made or whether the office analyzed the situation and came to a reasonable decision that the Products were truly "other".

[24] The second question is whether the CFIA really made an inquiry as to all the options as to categorization available to it. The category which it now seemingly prefers is "ready-to-eat" is defined in section 2 of the *Regulations*, as amended, 17 December, 1997 as:

"ready-to-eat fish" means any fish, other than canned fish and live shellfish, that does not require preparation except thawing or reheating before consumption; (poisson prêt-à-manger)	*« poisson prêt-à-manger » Poisson, autre que le poisson en conserve et les mollusques vivants, qui n'a pas besoin d'être préparé, sauf décongelé ou réchauffé, avant d'être consommé. (ready-to-eat fish)*

[25] That definition requires an inquiry as to what "*canned fish*" is. That is defined in section 29 of the *Regulations* as:

"can" means any hermetically sealed container; (boîte)	*« boîte » Tout récipient scellé hermétiquement. (can)*
"canned fish" means any fish that is sealed in a can and is sterilized; (conserve de poisson)	*« conserve de poisson » désigne du poisson mis en boîte et stérilisé; (canned fish)*

[26] The Respondent's affiant, Ms. Mar at paragraphs 28 to 30 of her affidavit testifies that the Products are pasteurized in a container and are stored at room temperature. This would appear to meet the definition of "canned fish". The definition of "ready-to-eat" exempts from that category any product categorized as "canned fish" yet the evidence of the Respondent fails to set out whether

any consideration was given to categorizing the Product as “canned fish” and if so what consideration was given and what was the result?

[27] I find that the CFIA decision to categorize the Product as “ready-to-eat” was not transparent or intelligible. It did not say why a change from “other” was made nor did it say what consideration if any, was given to “canned fish”. The decision must be quashed, and sent back for redetermination by other persons to approach the matter with a fresh mind.

CONCLUSIONS AND COSTS

[28] In conclusion I have determined that:

1. The Applicant is not precluded in seeking these judicial reviews.
2. The standard of review is reasonableness.
3. The decisions were unreasonable.

[29] The decisions should be quashed and sent back for redetermination by persons other than those involved in the quashed determinations so that the matter is approached with a fresh mind.

[30] As to costs each party submitted that it should, if it prevails, be awarded costs. Each submitted that the costs, on a full indemnity basis, would be $10,000.00. I am satisfied that only a

partial indemnity as to costs is warranted in particular one half, that is $5,000.00. As a result I will apportion costs and award the Applicant costs in each application T-473-10 and T-474-10 fixed at $2,500.00.

"Roger T. Hughes"
Judge

Toronto, Ontario
October 5, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-473-10 AND T-474-10
STYLE OF CAUSE:	MC IMPORTS LTD. v. CANADIAN FOOD INSPECTION AGENCY AND BETWEEN: MC IMPORTS LTD. v. CANADIAN FOOD INSPECTION AGENCY
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APPEARANCES:

SHAWN M.PHILBERT	FOR THE APPLICANT
MELANIE TOOLSIE WENDY WRIGHT	FOR THE RESPONDENT

SOLICITORS OF RECORD:

SHAWN M.PHILBERT BARRISTER & SOLICITOR MISSISSAUGA, ONTARIO	FOR THE APPLICANT
MYLES J.KIRVAN DEPUTY ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT