

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180621

Docket: A-328-17

Citation: 2018 FCA 122

**CORAM: STRATAS J.A.
NEAR J.A.
LASKIN J.A.**

BETWEEN:

ELKEM AS

Applicant

and

**QUEBEC SILICON LIMITED PARTNERSHIP, QSIP CANADA
ULC, KINGDOM OF NORWAY, WACKER CHEMICALS
NORWAY AS, and ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on June 21, 2018.
Order delivered from the Bench at Ottawa, Ontario, on June 21, 2018.

REASONS FOR ORDER OF THE COURT BY:

LASKIN J.A.

Federal Court of Appeal



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REASONS FOR ORDER OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on June 21, 2018)

LASKIN J.A.

[1] In this application for judicial review, Elkem AS seeks to set aside the final determination of subsidizing made by the President of the Canadian Border Services Agency in October 2017. The final determination was made under paragraph 41(1)(b) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15, in respect of certain silicon metal originating in or exported from the

Kingdom of Norway. Under the Act, once a final determination of subsidizing is made, the CBSA is authorized to impose countervailing duty on subsidized imports if the Canadian International Trade Tribunal determines that the subsidizing is causing or is threatening to cause injury to domestic industry. Conversely, if the CITT makes a “no injury” finding, subsection 47(1) of the Act provides (with limited exceptions) that all proceedings under the Act respecting the subsidizing are terminated.

[2] In November 2017, the CITT made a “no injury” finding. In December 2017, the respondents Quebec Silicon Limited Partnership and QSIP Canada ULC commenced an application for judicial review of this finding in this Court. However, in May 2018, they filed a notice of discontinuance of their application.

[3] The Attorney General of Canada now moves to dismiss Elkem’s application for judicial review. She submits that in light of the discontinuance of the application challenging the “no injury” finding and the termination of proceedings effected by subsection 47(1) of the Act, this Court no longer has jurisdiction to hear the application. She says in the alternative that the application is now moot and that, based on the well-known factors set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-363, this Court should not exercise its discretion to hear a moot application. In response, Elkem submits that subsection 47(1) does not deprive the Court of jurisdiction, and that, applying the *Borowski* factors, this is a proper case for the exercise of the discretion to hear a moot application.

[4] As this Court did in analogous circumstances in *Sunezco International Inc. v. Deputy Minister of National Revenue (Customs & Excise)*, [1994] F.C.J. No. 637, 1994 CarswellNat 2288, we assume without deciding that subsection 47(1) does not deprive the Court of jurisdiction to hear Elkem's application. However, as Elkem acknowledges, the application is now moot.

[5] Having taken into account all of the *Borowski* factors, we are not satisfied that we should exercise our discretion to hear the application despite its mootness. Among other things, we note that in submitting that the final determination will affect its legal rights, Elkem relies on its possible impact in other proceedings that have not been and may not ever be brought.

[6] Therefore, the motion will be granted with costs. The application will be dismissed, but only after the issue of costs of the application is determined.

[7] We are not inclined to determine those costs at this time. The respondents to the application, other than the Attorney General, declined to appear on this motion but may well wish to speak to the issue of costs. We will remain seized of the application for the purpose of determining the issue of the costs of the application. On this issue, the parties may file informal letters with the Judicial Administrator on the following basis: respondents within five days, applicant five days after that, and any reply two days after that.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-328-17

**(APPLICATION FROM A DECISION OF THE PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY DATED OCTOBER 3, 2017 INVESTIGATION
NUMBER SM2 2017 IN)**

STYLE OF CAUSE:

ELKEM AS v. QUEBEC SILICON LIMITED
PARTNERSHIP, QSIP CANADA ULC,
KINGDOM OF NORWAY, WACKER
CHEMICALS NORWAY AS, AND
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING:

Ottawa, Ontario

DATE OF HEARING:

JUNE 21, 2018

**REASONS FOR JUDGMENT OF THE
COURT BY:**

STRATAS J.A.
NEAR J.A.
LASKIN J.A.

DELIVERED FROM THE BENCH BY:

LASKIN J.A.

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