Date: 20080417

Docket: A-468-06

Citation: 2008 FCA 143

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

GRK CANADA LIMITED

Applicant

and

LELAND INDUSTRIES INC., INFASCO DIVISION OF IFASTGROUP AND COMPANY LP, ARROW FASTENERS LTD., CANADIAN FASTENERS IMPORTERS COALITION, SHANGHAI BEN YUAN METAL PRODUCTS CO., LTD., STAR STAINLESS SCREW CO., BOMBARDIER RECREATIONAL PRODUCTS INC., ITW CONSTRUCTION PRODUCTS, CANADIAN TIRE CORPORATION, LIMITED, FLEETWOOD CANADA LTD., THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, GOVERNMENT OF TAIWAN, VELAN INC., DIRECT FASTENERS, WESTLAND STEEL PRODUCTS LTD., TONG HWEI ENTERPRISE CO. LTD., FULLER METRIC PARTS LTD., ENDRIES INTERNATIONAL OF CANADA, NATIONAL SOCKET SCREW, HILTI (CANADA) CORPORATION, VISQUÉ INC.

Respondents

Heard at Toronto, Ontario, on April 15, 2008.

Judgment delivered at Toronto, Ontario, on April 17, 2008.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an application by GRK Canada Limited ("GRK") for judicial review of a decision of the Canadian International Trade Tribunal (CITT) dated September 26, 2006 (Inquiry No. NQ-

2004-005R, “Certain Fasteners”). That decision is the result of a reconsideration ordered by this Court in *GRK Fasteners v. Leland Industries Inc.*, 2006 FCA 118 (GRK No. 1).

[2] In GRK No. 1, this Court considered and dismissed a number of grounds of judicial review of the CITT’s first decision in this matter. However, GRK (then called GRK Fasteners) had also alleged in that proceeding that the CITT had unreasonably refused to grant GRK an exclusion for its patented stainless steel screws and its patented carbon steel screws. GRK argued that its request for exclusion should have been granted on the basis that, because its stainless steel screws and carbon steel screws were patented, no domestic producer had the capacity or right to produce identical screws without a license.

[3] This Court agreed that the CITT had erred in failing to adequately consider the arguments of GRK on this point. The following appears in paragraph 29 of the reasons in GRK No. 1:

> . . . The application of [GRK] Fasteners should be allowed in part, the decision of the Tribunal relative to GRK’s exclusion request for certain patented stainless steel screws should be set aside and the matter remitted to the Tribunal for redetermination with the existing record.

[4] The judgment in GRK No. 1 reads as follows:

> The application is allowed in part with no costs, and the decision of the Tribunal with respect to the exclusion of the patented products is referred back to the Tribunal for redetermination in accordance with the reasons of the Court.

[5] It is not clear why paragraph 29 of the reasons in GRK No. 1 refers to patented stainless steel screws only, and does not mention patented carbon steel screws. However, that is a question that is not properly before this Court.

[6] On March 24, 2006, counsel for GRK Fasteners (not its current counsel) wrote a letter to the Court requesting that paragraph 23 of the reasons be corrected to reflect the fact that GRK had submitted to this Court that it requested the CITT to grant an exclusion for its patented carbon steel screws as well as its patented stainless steel screws. It was in paragraph 23 that the Court summarized the argument of GRK relating to its patents. The specific correction requested by GRK's former counsel was "to insert the words 'and carbon steel' in the second sentence of paragraph 23 of its Reasons following the words 'stainless steel' ".

[7] The letter indicates that a copy had been sent to counsel for the respondent Leland Industries Inc. ("Leland"). Counsel for Leland sent nothing to the Court in response to the letter.

[8] GRK did not file a notice of motion to formalize its request for a correction. Nevertheless, the Court made the correction to paragraph 23 of the reasons as requested by GRK's former counsel. Paragraph 23, as corrected, reads as follows (the added words are underlined):

> [23] In this argument GRK alleges that the foregoing procedural deviations led to unsupportable factual findings on the part of the Tribunal. These alleged errors of fact are said to include the denial of its request for exclusion of certain patented stainless steel and carbon steel screws and its finding of a threat of injury to domestic industry because of dumped stainless steel screws.

[9] There was no request to correct paragraph 29 of the reasons, or to correct the judgment.

[10] In a letter to the CITT dated May 5, 2006, former counsel for GRK brought the corrected reasons in GRK No. 1 to the attention of the CITT and requested that the CITT redetermine GRK's exclusion request in accordance with the corrected reasons.

[11] The CITT rendered its reconsideration decision on September 26, 2006. Upon the reconsideration the CITT, relying on the judgment in GRK No. l and paragraph 29 of the reasons, interpreted the direction of this Court as a direction to reconsider GRK's submissions only in relation to its patented stainless steel screws.

[12] In this application for judicial review, GRK argues that the CITT erred in failing to decide the whole issue remitted by this Court. That argument is premised on the view of GRK that the corrected reasons in GRK No, 1 make it clear that this Court considered both patented stainless steel screws and patented carbon steel screws to be included in the case to be reconsidered.

[13] I am unable to accept GRK's argument on this point. In my view, the CITT was reasonable in relying on the judgment, together with paragraph 29 of the reasons (which was unchanged by the corrections referred to above), as establishing the scope of the case to be reconsidered.

[14] I note that in the letter of March 24, 2006, which requested the corrections to paragraph 23 of the reasons in GRK No. 1, former counsel for GRK expressed the view that the requested

correction “would rectify the inadvertent mistake in the Court’s Reasons and, in turn, Judgment”. He obviously thought that a change to paragraph 23 would have the effect of changing the judgment and the conclusion stated in paragraph 29 of the reasons. It is not clear why he thought so but in any event, the fact that he made that statement in the March 24, 2006 letter did not compel the CITT or this Court to agree with his understanding of the effect of the correction. The fact that counsel for Leland did not respond to the request for the correction does not support the inference that Leland agreed with the understanding of GRK’s former counsel as to the effect of the correction.

[15] GRK also argues that the CITT erred in failing to consider *de novo* all of the material in its original record that was relevant to its exclusion request. GRK argues that if the CITT had looked at all of the relevant material, it would not have refused the requested exclusion, primarily because GRK’s patented stainless steel screws were sold at such a high price compared to all other stainless steel screws sold in Canada, and because approximately 98% of GRK’s products were exported to the United States.

[16] In my view, the only issue before the CITT on the reconsideration was whether the mere existence of the patents was a sufficient basis for granting GRK’s exclusion request. That was the argument that was put to this Court in GRK No. 1, and it was the failure of the CITT to consider that question that caused this Court to remit that aspect of the case to the CITT for reconsideration.

[17] I agree with the submission of Leland that most of the arguments of GRK on the merits of the CITT’s reconsideration decision are really an attempt to relitigate points that were determined in

GRK No. 1 in Leland's favour, in particular the finding of injury. The reconsideration was not intended to revisit the question of injury. It was intended to address only the question of whether the denial of GRK's request for exclusion should be permitted to stand given the CITT's initial failure to properly consider GRK's request for an exclusion for its patented stainless steel screws because they are patented.

[18] On that limited question, the CITT concluded the fact that an imported product is patented does not automatically justify an exclusion. The reason for that conclusion is stated as follows in paragraphs 17 and 18 of the CITT's reconsideration decision:

> 17. […] Even though an imported patented product may have certain features or physical attributes that make it distinct under patent law, a domestically manufactured product may have the same end uses, fulfil most of the same customer needs and compete in the same marketplace with the patented product. Therefore, even if a request for a product exclusion concerns a patented product, the Tribunal still needs to determine whether the circumstances of the case are such that granting the exclusion could cause or threaten to cause injury to the domestic injury. […]
>
> 18. Accordingly, the key question that must be answered by the Tribunal in deciding whether to grant a product exclusion in the case of a patented product is not whether the patented product is unique or if the domestic industry can, without infringing patent law, manufacture this product. Rather, it is whether the domestic industry manufactures or is capable of manufacturing a substitutable product that, while it may not have all the attributes of the patented product, still competes with the patented product and fulfils most of the same customer needs. If these conditions are met, the Tribunal should deny the request for product exclusions, as granting it is likely to lead to injury or threat of injury to the domestic industry.

[19] After stating the relevant principle, the CITT applied that principle on the basis of the evidence it considered relevant, including the evidence of Leland as to its capacity to produce stainless steel screws in the same size and ranges as GRK's patented stainless steel screws, and in a wide variety of head styles and in imperial and metric sizes. The CITT was not satisfied that the patented stainless steel screws for which GRK was seeking an exclusion were so specialized or served such distinct markets that they did not compete with the products of domestic producers.

[20] In my view, given the question that was properly before the CITT, its analysis and conclusions on this point are reasonable. I can detect no error of law or any other error that warrants the intervention of this Court.

Conclusion

[21] I would dismiss this application for judicial review with costs.

"K. Sharlow"

J.A.

"I agree
Gilles Létourneau J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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