Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110817

Docket: A-42-10

Citation: 2011 FCA 238

Present: **SHARLOW J.A.**
PELLETIER J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

TOYOTA TSUSHO AMERICA INC.

Appellant

and

CANADA BORDER SERVICES AGENCY
and ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 17, 2011.

REASONS FOR ORDER BY: SHARLOW J.A.

CONCURRED IN BY: PELLETIER J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant Toyota Tsusho America Inc. ("Toyota") has filed a motion for an order under Rule 399(2)(*a*), SOR/98-106, setting aside the judgment that dismissed its appeal. For the reasons that follow, I have concluded that this motion must be dismissed.

[2] On July 28, 2009, the Canada Border Services Agency (the "CBSA") issued a determination that certain Chinese origin boron steel plate shipped to Canada by Toyota would be subject to an anti-dumping order issued by the Canadian International Trade Tribunal (the "CITT"). Toyota filed

an application for judicial review in the Federal Court in respect of that determination, seeking an order setting aside the CBSA determination or prohibiting the CBSA from implementing the determination. As a practical matter, Toyota was seeking to be relieved of its legal obligation to pay anti-dumping duties, assuming it is finally determined that such an obligation arises on the facts.

[3] The application for judicial review was based on a number of grounds. Toyota argued that the CBSA was bound by an earlier assurance given to Toyota by a CBSA official that the steel plate in issue would not be subject to anti-dumping duties. Toyota also argued that in issuing the July 28, 2009 determination, the CBSA failed to observe principles of natural justice and procedural fairness. That argument is based on Toyota's allegation that because the CBSA knew that Toyota was relying on the earlier assurance in deciding to ship its product to Canada, the CBSA could not issue a contrary determination without giving Toyota timely notice of its intention to do so.

[4] The Crown filed a motion in the Federal Court for an order quashing the application for judicial review. Justice Tremblay-Lamer concluded that the statutory provisions governing the appeal of a determination of the CBSA deprive the Federal Court of the jurisdiction to set aside such a determination. On that basis, she granted the motion to strike (2010 FC 78).

[5] Toyota appealed the decision of the Federal Court. That appeal was dismissed on October 12, 2010 for reasons rendered orally (2010 FCA 262). The Court's analysis is reflected in paragraphs 2 and 3 of those reasons, which read as follows:

> [2] Toyota claims that it made the shipment in reliance on an oral communication from a CBSA official that the anti-dumping order would not apply to boron steel

> plate. Justice Tremblay-Lamer concluded that, even if that oral communication was made and relied upon as Toyota alleged, the subsequent CBSA determination was subject to the statutory appeal scheme in the *Special Import Measures Act*, R.S.C. 1985, c. S-15 ("SIMA"), which effectively excluded the jurisdiction of the Federal Court to entertain an application for judicial review of the determination. That conclusion was based on an analysis of the relevant provisions of SIMA, as well as a line of cases that includes *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 SCR 793, *Abbott Laboratories Ltd. v. Canada (Minister of National Revenue)*, 2004 FC 140, and *Fritz Marketing Inc. v. Canada (F.C.A.)*, 2009 FCA 62, [2009] 4 F.C.R. 314.
>
> [3] Toyota argues that this conclusion is based on one or more errors of law. We do not consider it necessary to discuss the grounds of appeal in any detail. Despite the able written and oral submissions of counsel for Toyota, we have not been persuaded that Justice Tremblay-Lamer's conclusion is based on an error of law or any other error warranting the intervention of this Court. On the contrary, we agree with her conclusion, substantially for the reasons she gave. Specifically, we are not persuaded that the arguments sought to be raised by Toyota in its judicial review application cannot be adjudicated within the statutory appeal process, if not by the CBSA or its President, then by the CITT.

Toyota did not apply for leave to appeal to the Supreme Court of Canada.

[6] Toyota has appealed the July 28, 2009 determination of the CBSA to the CITT. In March of 2011, Toyota filed a motion in relation to the CITT appeal seeking a determination as to whether the CITT would entertain arguments to the effect that in issuing the determination under appeal, the CBSA had breached the rules of natural justice and procedural fairness. The CITT issued an order on March 27, 2011 stating that, in the context of the statutory appeal before it, it had no jurisdiction to consider issues of natural justice and procedural fairness relating to the manner in which the CBSA's decision was reached. Toyota has not brought an application for judicial review of the CITT's order.

[7] Before this Court is a motion by Toyota for an order pursuant to Rule 399(2)(*a*) reversing the judgment that dismissed its appeal and put an end to its application for judicial review of the July 28, 2009 determination of the CBSA. Toyota also seeks, as ancillary relief, an order staying the application for judicial review in the Federal Court pending the disposition of Toyota's appeal to the CITT of the CBSA determination. The respondents oppose the motion.

[8] Rule 399(2)(a) reads as follows:

399. (2) On motion, the Court may set aside or vary an order (*a*) by reason of a matter that arose or was discovered subsequent to the making of the order…	**399.** (2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants : *a*) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue […].

[9] In this case, the alleged new matter is the CITT order of March 27, 2011. I summarize Toyota's reasoning as follows. Toyota's appeal was dismissed because the Court assumed that the CITT has and would exercise the jurisdiction to consider Toyota's argument that CBSA breached the rules of natural justice and procedural fairness in issuing its July 28, 2009 determination. The CITT has now conclusively stated that it does not have the jurisdiction to set aside the CBSA determination on that basis. That statement by the CITT justifies a reversal of the Court's decision and a reinstatement of its application for judicial review.

[10] In a motion to set aside a judgment under Rule 399(2)(*a*), the new matter upon which the applicant relies must be something that would have a determining influence on the decision in

question: *Ayangma v. Canada*, 2003 FCA 382, at paragraph 2. Toyota's motion is based on the premise that its appeal would have been allowed if Toyota had established at the hearing of the appeal that the CITT does not have the jurisdiction to set aside a CBSA determination on the basis that it was issued in breach of the rules of natural justice and procedural fairness on the part of the CBSA. In my view, that premise is unfounded. As Justice Tremblay-Lamer correctly observed in paragraph 21 of her reasons in this case, the principle in *Fritz Marketing* establishes that no such limitation on the jurisdiction of the CITT gives the Federal Court the jurisdiction to set aside a CBSA determination that is appealable to the CITT.

[11] For these reasons, I would dismiss with costs Toyota's motion to vary the judgment.

"K. Sharlow"

J.A.

"I agree
J.D. Denis Pelletier"

"I agree
Carolyn Layden-Stevenson"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-42-10
STYLE OF CAUSE:	Toyota Tsusho America Inc. v. Canada Border Services Agency and Attorney General of Canada

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
CONCURRED IN BY:	PELLETIER J.A. LAYDEN-STEVENSON J.A.
DATED:	August 17, 2011

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