Federal Court  Cour fédérale

Date: 20151130

Docket: T-1748-14

Citation: 2015 FC 1330

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 30, 2015

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

TRANSPORT DESGAGNÉS INC.
AND PÉTRO-NAV INC.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Minister of Finance [Minister] under the *Customs Tariff*, SC 1997, c 36 [Tariff], to refuse to recommend to the Governor in Council that customs

duties in the amount of $10,457,540.75 imposed on the importation of three tanker ships be remitted.

II. Facts

[1] Transport Desgagnés Inc. is a company that specializes in the operation of ships that carry liquid bulks and chemical products, as well as break bulks and dry bulks. Pétro-Nav Inc. is a company that specializes in the transportation of chemical and petroleum products by sea. Both companies are part of Groupe Desgagnés.

[2] In the course of its activities, Transport Desgagnés Inc. acquired three tanker ships, the *Pétrolia Desgagnés*, the *Maria Desgagnés* and the *Véga Desgagnés*, on January 12, 1998, March 29, 1999, and July 11, 2001, respectively.

[3] At the time of their acquisition, the ships were subject to customs duties of 25%, as provided in the Tariff. The customs duties applicable to the *Pétrolia Desgagnés* were paid by Transports Desgagnés, while the customs duties for the other two ships were covered by Pétro-Nav Inc.

[4] On October 24, 2009, by an invitation published in the *Canada Gazette*, the government launched a consultation process regarding a proposal to waive the payment of customs duties on future imports of certain types of vessels, including tankers. The government stated that the consultation process would not affect duty remission requests currently under consideration or new requests concerning ships imported before January 1, 2010.

[5] On September 23, 2010, the Governor in Council made the *Ferry-Boats, Tankers and Cargo Vessels Remission Order,* SOR/2010-202 [Order], granting an exemption from customs duties for ferry-boats of a length of 129 metres or more, tankers and cargo vessels imported on or after January 1, 2010. The Order came into force that same day and was published in the *Canada Gazette* on October 13, 2010.

[6] On October 5, 2012, the applicants applied to the Minister for a remission of customs duties with respect to the *Pétrolia Desgagnés*, the *Maria Desgagnés* and the *Véga Desgagnés*.

[7] On July 15, 2014, the respondents received a letter from the Minister advising them that their claim had been denied because the tankers had been imported before January 1, 2010.

III. Background

[8] Before the Order came into force, under section 115 of the Tariff, a party could obtain a remission in respect of customs duties paid on any imported good subject to customs duties.

[9] There was no formal process for dealing with claims received by the Minister; the Minister agreed to consider, on a case-by-case basis, any remission claims made by importers for the types of vessels described in the Order.

[10] The party seeking a remission of the customs duties it had paid had to submit a claim file including a description of the value of the imported good, the amount of the customs duties

paid and the grounds for the claim. The claim was then forwarded to an economist at the Department of Finance, who analyzed it and made a recommendation to the Minister.

[11] The economist's first task was to determine whether similar remission claims had been submitted for recommendation in the past and what the outcome had been, to ensure a just and equitable policy towards claimants. To determine whether a claim was similar, the economist considered the type of vessel in question in the claim, the market in which it was being operated, the type of services rendered using the vessel, and the competing operators, if any. If there was a precedent, it became a determinative factor in the recommendation.

[12] If there was no precedent, a consultation with stakeholders in the marine industry was held to solicit their comments on how the claim should be handled. In addition to the product of these consultations, the economist also examined the claim on the basis of the economic factors applicable to the case at hand: the type of vessel, the planned use, the market served, the tax cost of remitting the customs duties, and the availability of the vessel in the Canadian market.

[13] If the Minister decided to recommend that the Governor in Council remit the duties, the Governor in Council would then decide, by order, to either grant or deny the claim.

IV. Impugned decision

[14] In a letter to the applicants, the Minister noted that a new framework had been set up for remitting customs duties on certain types of vessels, including tankers, subject to the condition that the government would no longer consider any retroactive claims for the remission of

customs duties on the types of vessels described in the framework once it had been implemented.

[15] Given that context, the Minister concluded that the government had to deny the claim because it concerned vessels imported before January 1, 2010.

V. Issues

1. What are the standards of review applicable to the various issues raised?
2. Did the Minister exceed or decline to exercise his jurisdiction in denying the claim made by Transport Desgagnés Inc. and Pétro-Nav Inc.?
3. Did the Minister breach his duties regarding the rules of natural justice and procedural fairness?
4. Was the Minister's decision to deny the claim reasonable?

VI. Positions of the parties

(1) The applicants

[16] The applicants argue that the Minister exceeded his jurisdiction by not working in the field that Parliament assigned to him while claiming to act pursuant to an enabling enactment that did not in fact exist. According to the applicants, the Minister cannot refuse to exercise his jurisdiction by imposing a test that is not provided in the enabling legislation when assessing a claim. Neither the Tariff nor the Order prevents the Minister from exercising his full discretion in respect of vessels imported before January 1, 2010. In the applicants' view, the Minister

could not refuse to exercise his jurisdiction by imposing a test not contemplated in the enabling legislation when assessing the claim. Neither the Tariff nor the Order prevents the Minister from exercising his full discretion with regard to vessels imported before January 1, 2010. The problem is therefore twofold because, on the one hand, the agency declined to exercise its discretion in refusing to consider certain cases on their merits and, on the other hand, exceeded its jurisdiction by adopting [TRANSLATION] "filters" that were inconsistent with the enabling enactment.

[17] The applicants further submit that the Minister breached his duty to act fairly, in three ways: by amending the claim assessment procedure without prior notice, by failing to consider the claim on its merits and by handling the applicants' claim differently from the claim of a competitor with vessels in the same market.

[18] In addition, the Minister acted against their legitimate expectation that the previous policy on remitting customs duties on vessels imported before January 1, 2010 [previous policy] would be maintained, contrary to what had been announced in the invitation dated October 24, 2009. The Minister therefore retroactively and without prior notice changed the assessment procedure for claims for remission of customs duties such that all claims concerning vessels imported before January 1, 2010, would be denied. The applicants therefore had no opportunity to fully present their point of view by making representations regarding the change in procedure. The Minister had at least the minimal obligation to advise the applicants that their claims would be processed under the new policy, thereby giving them the chance to make representations regarding this change. The breach of procedural fairness and the violation of the

applicants' reasonable expectations is particularly significant because the government granted Algoma's remission claim for vessels in direct competition with the ones covered by the claims in issue.

[19] The Minister's decision is arbitrary and unreasonable because it is based on a clear error of law, namely, that the applicants were barred from making their claim after the new framework governing customs duties remissions was implemented, when this was not an intended consequence of the enabling enactment. The long delay before receiving an answer, as well as the financial advantage for competitors, also make the decision unreasonable.

(2) The respondent

[20] The respondent submits that the Minister exercised his jurisdiction by considering the applicants' claim and denying it on the basis of the new framework established in autumn 2010 which provides that only tankers imported into Canada on or after January 1, 2010, qualify for a remission. The Order, published in the *Canada Gazette*, is a regulation of general application with force of law since its coming into force on September 23, 2010. It establishes the conditions for granting a remission of customs duties, thereby limiting the discretion afforded to the Minister under subsection 115(1) of the Tariff. Since the applicants' vessels do not meet these conditions, the Minister was required to deny their claim in order to act within the scope of his jurisdiction. Now that the Order has been made, the Minister can no longer consider claims on a case-by-case basis, as he used to do before the Order. Consequently, the Minister cannot deny a claim that meets the conditions of the Order because of a competitor's objections or for other economic reasons.

[21] In light of the Order, the respondent submits that the only procedural duty owed to the applicants was the opportunity to be heard with respect to the conditions set out in the Order, and this duty was discharged.

[22] In response to the applicants' allegations that the Minister violated the rules of procedural fairness by changing the procedure without prior notice, the respondent notes that the Order is not the product of a change in procedure, but of a change in tariff policy. The applicants should have been aware of the change in policy from the date of the call for comments, October 24, 2009, and could have chosen to make their claim at that time, under the old policy, but they did not do so.

[23] A different policy was applied to the claim made by the applicants' competitor because of the timing of the claims. Algoma Inc., the applicants' direct competitor, made its claim in 2009, before the new framework was implemented, while the applicants made their claim in 2012, two years after the new policy was adopted. The applicants, too, had made a claim (for Transarctik) at the same time as their competitor's claim, in autumn 2009, and had been consulted regarding the outcome of Algoma Inc.'s claim. Both of those claims were processed under the old policy, since the new framework was not yet in force. Once the Order had been made, the applicants could no longer claim a legitimate expectation that their claim would be processed under the old policy. As the new framework affects the relevant criteria when considering a claim on the merits, the doctrine of legitimate expectation does not apply because the protection this doctrine offers is limited to procedural aspects. From that moment on, the

only legitimate expectation was that the claims would be processed in accordance with the Order.

[24] In light of the conditions placed on the remission of customs duties under the Order, the respondent submits that the Minister's decision was entirely reasonable. Moreover, the time taken to make the decision was also reasonable, since it is standard practice for the Minister to combine several recommendations on similar matters in a single memorandum. A change in minister also took place during this period.

[25] Finally, the respondent submits that as the person responsible for tariff policy in Canada, the Minister of Finance was under no obligation whatsoever to maintain any particular tariff policy. In *Emerson Electric Canada Ltd. v Canada (Minister of Revenue)*, [1997] FCJ No 178, the Federal Court recognized that the remission of customs duties is a highly discretionary power in the nature of policy for which the only remedy available with regard to the scope of its exercise is political, not legal. Consequently, the government may make changes to its tariff policy that can affect the interests of certain persons without such changes being illegal.

VII. Analysis

A. What are the standards of review applicable to the various issues raised?

[26] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*], the Supreme Court stated that there can be no doubt that the correctness standard applies to jurisdictional issues.

The same is true for questions of natural justice and procedural fairness (see also: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

[27] Where the question is one of fact, discretion or policy, or one of a tribunal's interpretation of its home statute or statutes closely connected to its function, with which it will have particular familiarity, deference is usually required (*Dunsmuir*, above at paras 53-54).

[28] The Minister's power under section 115 of the Tariff is a discretionary one that is exercised after having thoroughly analyzed the facts presented by the party making the claim for a remission of customs duties. The applicable standard is therefore reasonableness with regard to the merits of the decision.

B. Did the Minister exceed or decline to exercise his jurisdiction in denying the claim made by Transport Desgagnés Inc. and Pétro-Nav Inc.?

[29] The applicants argue that the Minister exceeded his jurisdiction or declined to exercise it because he based his decision on an assessment criterion that they say is illegal, namely, the import date of the vessels. Indeed, neither the Tariff nor the Order specifically addresses the situation of vessels imported before January 1, 2010. Consequently, under section 115of the Tariff, the Minister retains his discretion to consider claims for the remission of customs duties on vessels imported into Canada before January 1, 2010, on their own merits. For the following reasons, I cannot agree with these arguments.

[30] Subsection 115(1) of the Tariff reads as follows:

115. (1) The Governor in Council may, on the recommendation of the Minister or the Minister of Public Safety and Emergency Preparedness, by order, remit duties.	**115**. (1) Sur recommandation du ministre ou du ministre de la Sécurité publique et de la Protection civile, le gouverneur en conseil peut, par décret, remettre des droits.

[31] The Order reads as follows:

Remission	**Remise**
2. Remission of the customs duties paid or payable under the Customs Tariff is granted in respect of ferry-boats of a length of 129 m or more, classified under subheading No. 8901.10 in the List of Tariff Provisions set out in the schedule to the Customs Tariff, tankers classified under subheading No. 8901.20 in that List and cargo vessels.	**2**. Est accordée une remise des droits de douane payés ou à payer aux termes du Tarif des douanes sur les transbordeurs d'une longueur de 129 mètres ou plus classés sous la sous-position 8901.10 de la liste des dispositions tarifaires de l'annexe du Tarif des douanes, sur les bateaux-citernes classés sous la sous-position 8901.20 de cette liste et sur les navires de charge.
Conditions	**Conditions**
3. The remission is granted on the following conditions:	**3**. La remise est accordée aux conditions suivantes :
(*a*) the ferry-boat, tanker or cargo vessel was imported into Canada on or after January 1, 2010;	*a*) le transbordeur, le bateau-citerne ou le navire de charge a été importé au Canada le 1er janvier 2010 ou après cette date;
(*b*) the importer files all evidence that is required by the Canada Border Services Agency to determine eligibility for remission; and	*b*) l'importateur présente sur demande toute preuve requise par l'Agence des services frontaliers du Canada aux fins d'établir le droit à la remise;
(*c*) a claim for remission is made by the importer to the Minister of Public Safety and Emergency Preparedness within two years after the date	*c*) une demande de remise est présentée par l'importateur au ministre de la Sécurité publique et de la Protection civile dans les deux ans

of importation.	suivant la date d'importation.

[32] In my opinion, contrary to what the applicants claim, the Minister is not free to apply two different customs duty remission frameworks based on the vessels' import date. The Order is a legislative instrument made by the Governor in Council. In *Reference re Manitoba Language Rights*, [1992] 1 SCR 212, the Supreme Court stated that the criteria for determining whether an instrument is legislative in nature are as follows:

> [48] To make this determination, the form, content and effect of the instrument in question must be considered:
>
> (a) With respect to form, sufficient connection between the legislature and the instrument is indicative of a legislative nature. This connection is established where the instrument is, pursuant to legislation, enacted by the Government or made subject to the approval of the Government.
>
> (b) With respect to content and effect, the following are indicative of a legislative nature:
>
> (i) The instrument embodies a rule of conduct;
>
> (ii) The instrument has the force of law; and
>
> (iii) The instrument applies to an undetermined number of persons.

[33] The Order meets all these criteria in terms of the form, content and effect of the instrument in question. It is a regulatory instrument of general application that prescribes rules of conduct having force of law, and it applies to an undetermined number of persons.

[34] In exercising the broad discretion conferred upon him, the Governor in Council chose to establish a legislative rule that limits the Minister's discretion to grant a remission.

[35] The Order establishes conditions under which a remission is granted. Tankers that do not meet these conditions therefore cannot be subject to a remission. Since the applicant's tankers were imported before January 1, 2010, they do not meet the first condition under the Order. The Minister was therefore barred from granting a remission.

[36] Now that the Order has been made, the Minister is required to remit customs duties when an importer meets the conditions. He can no longer exercise his discretion to assess claims on a case-by-case basis as he did before (*Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 35). It follows that he could not deny a claim that meets the conditions for other reasons, for example, because a competitor objects. He no longer has the power to grant a remission when a claim does not comply with the Order's conditions.

[37] Where the government implements a new legislative framework as of a certain date, the inevitable result is that the benefits that existed before that date will be modified.

[38] As Chief Justice Blais (then of the Federal Court) noted in *Transport Ronado Inc. v Canada*, 2007 FC 166, our courts have always acknowledged Parliament's inalienable right to enact legislation to modify certain advantages available to taxpayers. The applicants were therefore not entitled to have the previous policy maintained despite a change in the law.

[39] The Minister therefore did not exceed his jurisdiction or refuse to exercise it. On the contrary, he complied with the limits imposed on him by law.

C. Did the Minister breach his duties regarding the rules of natural justice and procedural fairness?

[40] The applicants submit that the Minister violated the rules of natural justice and procedural fairness in three ways: by modifying the procedure followed; by not considering the claim on its merits, contrary to what had been announced; and by applying a procedure to the claim that was distinct from the one applied to a competitor's claim.

[41] First of all, I note that the Minister has not [TRANSLATION] "modified the procedure", but as the respondent points out, the Governor in Council did modify the policy applicable to remission claims. If the Minister no longer conducts case-by-case assessments as he previously did, it is because the Order took that option away from him. From the moment the government published its notice in the *Canada Gazette* on October 24 inviting stakeholders to submit their comments regarding a new customs duties remission framework, the applicants should have expected a change in policy.

[42] The notice mentioned that vessels imported before January 1 were not covered by the consultations and would be assessed on their own merits.

[43] It was open to the applicants to make their claims before the new framework was implemented, as was the case with the claims made by Algoma and Desgagnés Transarctik. The applicants waited until 2012 to file their claim; unfortunately, it was too late because the Order was in force by then. The Minister therefore no longer had the discretion to consider the

precedent set by Algoma because under the new policy, the precedents are no longer considered.

[44] The applicants claim that the Minister's power to make recommendations under section 115 of the Tariff requires a case-by-case assessment that cannot be overridden by the new policy. They had a legitimate expectation that their claims would be handled on the basis of this procedure because in the public notice dated October 24, 2009, the government announced that vessels imported before January 1, 2010, would continue to be assessed on their own merits.

[45] In the applicants' view, the Minister of Finance had at the very least an obligation to advise them that their claims would be handled under the new policy, thereby giving them the opportunity to make representations regarding this change. For the following reasons, I do not share this view.

[46] The doctrine of legitimate expectation has been developed in the case law as an extension of the rules of natural justice and procedural fairness. It has been the subject of countless decisions. It is described in the following terms in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2015] 2 SCR 504:

> 68 Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital*

> *Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a [page 535] substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

[47] More recently, the Supreme Court noted as follows in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94:

> [94] . . . If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

However, this doctrine has its limits. It is procedural in nature and does not create fundamental rights. As Justice Létourneau stated in *Genex Communications Inc. v Canada (Attorney General)*, 2005 FCA 283, "[t]he expectation must not conflict with the public authority's statutory mandate".

[48] In the present case, it is the Governor in Council through his Order who modified the applicable policy. As we have already seen, the Order is legislative in nature. The rules of procedural fairness do not apply to a body that exercises legislative functions (*Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525.

[49] If a legitimate expectation had indeed been created when the invitation was issued on October 24, 2009, the fact remains that such an expectation no longer exists, now that the Order has been made. Moreover, the RIAS (Regulatory Impact Analysis Statement) and the information document published in October 2010 clearly establish that the government no longer accepts claims for the retroactive remission of customs duties concerning specified tankers imported before January 1, 2010.

[50] The RIAS states that the objective of the new framework is to, among other things, "streamline remission procedures for these vessels and eliminate retroactive duty remissions where duties are first paid and then remitted". This explanation is repeated in the section entitled "Rationale":

> This new duty remission framework for the importation of certain vessels will bring certainty and predictability to all stakeholders in the marketplace. With this framework in place, the Government will no longer entertain retroactive duty remission requests (e.g. with respect to vessels imported before January 1, 2010) for the type of vessels covered by the framework.

[51] An RIAS is more than mere commentary. The case law recognizes that an RIAS reveals Parliament's intentions and is a useful interpretation tool. In *Bristol Myers Squibb Co. v Canada*, 2005 SCC 26) at paras 156 to 157, Justice Bastarache stated as follows:

> [156] It has long been established that the usage of admissible extrinsic sources regarding a provision's legislative history and its context of enactment could be examined. I held in *Francis v. Baker*, at para. 35, that "[p]roper statutory interpretation principles therefore require that all evidence of legislative intent be considered, provided that it is relevant and reliable." Consequently, in order to confirm the purpose of the impugned regulation, the intended application of an amendment to the regulation or the meaning of the legislative language, it is useful to examine the RIAS, prepared as part of the regulatory process

> (see Sullivan, at pp. 499-500). McGillis J. in *Merck 1999*, at para. 51, indicated:
>
> > . . . a Regulatory Impact Analysis Statement, which accompanies but does not form part of the regulations, reveals the intention of the government and contains ". . . information as to the purpose and effect of the proposed regulation".
>
> [157] The use of the RIAS to determine both the purpose and the intended application of a regulation has been frequent in this Court and others, and this across a wide range of interpretive settings: see, e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 352-53; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at paras. 63-64; *Merck* 1999, at para. 51; *AstraZeneca*, at para. 23; *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293 (F.C.A.), at para. 10.

[52] The applicants therefore could not expect any other treatment than the one established by the new policy. The only procedural fairness requirement that the Minister had to respect was to consider the applicants' remission claim in accordance with the conditions in force, which he did.

D. Was the Minister's decision to deny the claim reasonable?

[53] As we have seen above, when assessing the claim, the Minister was required to consider the three conditions set out in section 3 of the Order. If any one of the conditions was not met, the Minister could not grant the remission. All three tankers were imported before January 1, 2010. Contrary to what the applicants claim, whether the remission would have been granted under the old policy is a purely hypothetical question, and the Minister did not, as was previously the case, have to consider the so-called precedent set by Algoma because the precedents are no longer considered under the Order. As the authority responsible for tariff

policy in Canada, the Minister of Finance can change a particular tariff policy, which may affect the interests of certain persons without necessarily giving them a right to maintain a previous policy. In light of the Order, the Minister's decision to deny the claim was therefore reasonable.

VIII. Conclusion

[54] The application for judicial review is dismissed. The 2010 Order modified the previously applied tariff policy and lawfully fettered the exercise of the Minister's discretion. As the applicants' claim for the remission of the customs duties did not meet one of the conditions of the Order, it was reasonable for the Minister to refuse to recommend a remission of customs duties.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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