Date: 20090120

Docket: 08-T-71

Citation: 2009 FC 44

Ottawa, Ontario, January 20, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DANONE INC.

Applicant

and

ATTORNEY GENERAL OF CANADA
THE MINISTER OF PUBLIC SAFETY AND
CANADA BORDER SERVICES AGENCY

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

Why is the Applicant before the Court?

[1] Is the DanActive product a Yogourt to be eaten or a health product to be drunk? The crux of the answer is in the mode of consumption by the purchaser; thus, to drink or to eat, that is the question. The answer for all intents and purposes has significant repercussions for the case at bar in respect to the customs duties under analysis; but that is for the government agency in question to answer.

What does the Applicant request of the Court?

[2] This is an application for interlocutory relief, pending this Court's final adjudication on the application for judicial review. The Applicant seeks three Orders:

(a) *De bene esse*, an extension of time to file an application for judicial review of the challenged Canada Border Services Agency (CBSA) orders, pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7;

(b) An interim stay of the application of the 2008 Ruling, pursuant to section 18.2 of the *Federal Courts Act*;

(c) An order pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106 requiring that the version marked "Confidential" of the affidavit sworn December 15, 2008 of Mr. Louis Frenette, President and Chief Executive Officer of the Applicant, Danone Canada Inc. (Danone), be treated as confidential.

[3] At the outset, in preliminary discussion in open Court, the Applicant, however, agreed that the core issue is such that the Applicant actually requests that the 2006 Ruling remain in effect until final disposition in regard to the 2008 Ruling; thus, the Applicant only requests a stay of the 2008 Ruling until final disposition of the matter.

Can the Federal Court acquiesce to the request of the Applicant?

[4] On what basis may the Federal Court entertain the motion put forward by Danone? Certain preliminary issues must be analyzed as it is important to recognize which quasi-judicial or judicial entity has which jurisdiction, and under which circumstances. This is to ensure that what is effected

below is understood within a legislative and jurisprudential framework. The following questions assist in arriving at a conclusion as to the jurisdiction of the Federal Court in this regard:

a. Does the Federal Court have jurisdiction to judicially review the 2008 Ruling, and thereby be enabled to grant an extension of time to file an application for judicial review?

b. What forum has the jurisdiction to issue an interlocutory injunction?

II. Background

The four-year test-marketing plan

[5] Danone Canada Inc. of Boucherville, Quebec, began in 2006 to consider marketing in Canada a product called DanActive. DanActive contains a patented series of bacterial cultures, which Danone claims has been scientifically proven to boost human immune systems when ingested regularly. Currently, Canada does not have a facility capable of producing DanActive.

[6] Before committing considerable sums required to construct a facility capable of producing DanActive in Canada, it decided to first undertake a four year test-marketing plan; during which it would invest considerable sums to market the DanActive brand in Canada to gauge whether there was sufficient demand to invest in such a facility. From the inception of the test marketing plan in 2006, if DanActive showed signs of success in the Canadian market, Danone planned to construct a DanActive production facility at their Boucherville, Quebec, complex beginning in 2010. To carry out this plan, Danone first needed to import DanActive from Danone's Ohio plant, which is the closest facility to Canada capable of producing DanActive.

[7] In 2007, before sales of DanActive began in Canada, Danone met with representatives of the Dairy Farmers of Canada (DFC) and the Quebec dairy industry to inform them that, if the test phase was successful, Danone planned to construct a facility in Canada beginning in 2010. This facility would require the purchase of a significant quantity of Quebec liquid milk, an ingredient in DanActive. These dairy farmer groups were in support of the plan since its success could mean that DanActive would eventually be produced in Canada. They appeared to understand Danone's need to temporarily import from the United States (U.S.) until the test-marketing was successfully completed, acknowledging that this was a necessary step in order for the future benefits to Canadian farmers to be realized.

The 2006 Advance Ruling

[8] Prior to investing considerable sums to introduce DanActive to the Canadian market, the test-marketing plan would only be attempted if the duties applied to DanActive imports from the U.S. would be minimal and would not require quota allocation. If high duties or a quota requirement would be imposed, the cost to bring the product to market would be prohibitive. Therefore, for greater certainty, Danone requested an advance ruling from the CBSA as to the tariff classification that would be applied to DanActive upon its importation.

[9] On November 17, 2006, CBSA issued Advance Ruling 219663 (2006 Ruling), finding that DanActive would be classified under tariff item 2202.90.49.00, which is, a "beverage containing milk". Under this classification, there is no import tariff quota since DanActive benefits from duty free access as a NAFTA (North American Free Trade Agreement) originating product. Relying on

the fact that the duty imposed on importing DanActive from the U.S. would not be prohibitive, Danone began its test-marketing plan and began to import and sell DanActive in Canada in 2007.

The 2008 Advance Ruling

[10] According to Danone, the test-marketing plan proved successful. Danone spent millions of dollars on the test-marketing plan in 2006 and 2007, and claims that DanActive will break even in 2008 and forecasts it to earn a profit in 2009. Furthermore, Danone projects that sales and profit will continue to rise by significant margins for a number of years after 2009. Danone also claims that retailers enjoy substantial margins on their sales of DanActive, partly because consumers generally do not reduce their purchases of other food when they purchase DanActive: Consumers purchasing DanActive do not consider it a product used for meals or snacks, but rather as a small nutritional supplement. As such, the producers of other products, including dairy products, allegedly, do not suffer as a result.

[11] The encouraging results of the test-marketing plan led Danone to decide to construct the addition to its Boucherville, Quebec plant to allow it to produce DanActive domestically. Danone plans construction to begin in 2010, with completion scheduled for 2011. This new facility would provide a market for new purchases of Quebec milk, and provide new jobs in Boucherville and throughout Canada.

[12] In May, 2008, the CBSA informed Danone that the 2006 Ruling was under review and requested information from Danone. On October 27, 2008, the CBSA sent Danone notice of Advance Ruling 232911 (2008 Ruling). This notice informed Danone that the CBSA was revoking

the 2006 Ruling and replacing it with one classifying DanActive as a “yogourt” under tariff heading 0403.10. The 2008 Ruling becomes effective January 27, 2009.

[13] This new classification imposes an import quota of 330 tonnes. Companies that possess an allocation of this quota may import yogourt from the U.S. duty free. Any imports of DanActive under the 2008 Ruling that do not possess a quota allocation will be assessed a duty of 237.5%, which would impose such a prohibitive cost for DanActive as to preclude it from being sold in Canada.

[14] Danone does not possess any quota for imports because it relied on the 2006 Ruling that assured them that a quota allocation would not be required for DanActive imports. Danone asserts that it will be unable to import any DanActive following the implementation of the 2008 Ruling. Moreover, even if Danone possessed some of the 330 tonnes of quota already allotted, it would not be enough for Danone’s needs, which require substantially more to meet 2009 consumer demand.

III. Analysis

Does the Federal Court have jurisdiction to judicially review the 2008 Ruling, and thereby be enabled to grant an extension of time to file an application for judicial review?

[15] The *Customs Act*, R.S., 1985, c.1 (2nd Supp.) (the Act), provides a comprehensive statutory scheme of review that ousts Federal Court judicial review jurisdiction. In *Abbott Laboratories, Ltd.*

v. Canada (Minister of National Revenue - M.N.R.), 2004 FC 140, 246 F.T.R. 128, Justice François Lemieux found that a comprehensive statutory scheme to review decisions made under the *Customs Act*, expressed Parliament's intention to oust judicial review by the Federal Court:

> [38] … This case may be unique by the presence of three privative clauses in the review structure provided by sections 59 through 68 of the Act. Under those provisions, Ross Le Clair's decisions may be reviewed only through the process of further redetermination by the Commissioner. The Commissioner's redetermination is to be set aside or otherwise dealt with only by the CITT and the CITT's decision may be appealed only on a question of law to the Federal Court of Appeal.
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> [39] I cannot think how Parliament's intention, by enacting this structure, could have been expressed in clearer terms. Parliament wanted the administrative, quasi-judicial and judicial review system to be followed to the exclusion of any other paths of review or appeal. This structure includes bodies with recognized expertise in the subject matter with the Commissioner and the CITT. Moreover, it is the Federal Court of Appeal and not the Federal Court which supervises the CITT in judicial review matters pursuant to paragraph 28(1)(*b*) of the *Federal Court Act*.

[16] As in *Abbott Laboratories*, in the case at bar, there is a comprehensive statutory scheme to review advance rulings and their revocation. It is comprehensive because subsection 60(2) of the Act provides for a review of an advanced ruling made under section 43.1 of the Act. The President of the CBSA, as represented by an appeals officer, under paragraph 60(4)(*b*) of the Act must affirm, revise, or reverse the advance ruling. Section 62 directs that such a decision made by an appeals officer under section 60 of the Act may only be appealed to the Canadian International Trade Tribunal (CITT). Finally, section 68 directs that decisions of the CITT may only be appealed to the Federal Court of Appeal on a question of law.

[17] The comprehensiveness of the statutory scheme is sufficient, under the holding of *Abbott Laboratories*, to oust Federal Court jurisdiction. The fact that Danone has already made an application under subsection 60(2) of the Act to appeal the 2008 Ruling indicates that it has already taken steps to protect its rights. Danone cannot seek to avoid the Act's comprehensive and multi-stage review process by applying for judicial review in this Court (*1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1263, 301 F.T.R. 291, aff'd by *1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 164 A.C.W.S. (3d) 636):

> [36] At the end of the day, it seems that the fundamental basis for OSS' unwillingness to avail itself of the *Customs Act* review process is its reluctance to go through the various levels of review provided for in the legislation, and its desire to have its issues adjudicated now by the Federal Court.
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> [37] With respect, a party's preference as to forum is not sufficient to override the clearly expressed will of Parliament that cases of this nature be determined elsewhere.

To allow the judicial review application in Federal Court would also result in a multiplicity of proceedings.

[18] Even if the statutory scheme is not sufficient to oust the Federal Court's jurisdiction, section 18.5 of the *Federal Courts Act* ousts Federal Court jurisdiction. Section 18.5 ousts Federal Court jurisdiction to the extent an administrative decision may be appealed under a statutory scheme created under an Act of Parliament:

18.5	**18.5**
Despite sections 18 and 18.1, if an Act of Parliament expressly	Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale

provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

As stated above, decisions under section 43.1 of the Act may be reviewed by an appeals officer, whose decision may in turn be reviewed by the CITT. Finally, decisions by the CITT may be reviewed by the Federal Court of Appeal.

[19] Since, in this case, any decision by an appeals officer is appealable under the statutory scheme set out in sections 58-68 of the Act, then section 18.5 of the *Federal Courts Act* operates to oust Federal Court jurisdiction.

What forum has the jurisdiction to issue an interlocutory injunction?

[20] While the Federal Court lacks jurisdiction to review appeal officer's decisions, the Federal Court appears to be the only forum with jurisdiction to issue an interlocutory injunction to stay the implementation of the 2008 Advance Ruling.

CBSA process

[21] Under section 16 of the *Tariff Classification Advance Rulings Regulations*, SOR/2005-256, an officer who makes the modification or revocation of an advance ruling may postpone its effective date for not more than 90 days:

16. (1) An officer shall postpone the effective date of a modification or revocation of an advance ruling for a period not exceeding 90 days where the person to whom the advance ruling was given demonstrates that the person has relied in good faith on that advance ruling to the person's detriment.	**16.** (1) L'agent reporte, d'au plus quatre-vingt-dix jours, la prise d'effet de la modification ou de l'annulation de la décision anticipée dans le cas où le destinataire de celle-ci démontre qu'il s'est fondé de bonne foi, à son détriment, sur la décision.
…	[…]

[22] The officer in this case postponed the effective date of the 2008 Ruling for 90 days, until January 27, 2009. There does not seem to be any other jurisdiction for the CBSA to postpone or stay the implementation of the 2008 Ruling.

[23] According to Memorandum (Memo D11-11-3), the usual process in a situation where an importer disputes an advance ruling is to submit an appeal. Memo D11-11-3 describes the situation most applicable to Danone:

37. Disputing an advance ruling may involve any of the following scenarios:	**37.** La contestation d'une décision anticipée peut correspondre à un des scénarios suivants :
…	[…]
(c) The client has imported goods in accordance with an advance ruling that is in dispute under subsection 60(2) of the Act and has had no subsequent subsection 59(2) notice resulting from adjustment activity. Clients may file a refund application under section 74 of the Act either to obtain a refund after receiving a favourable advance ruling decision or for the CBSA to hold in abeyance pending the dispute outcome.	*c)* Le client a importé des marchandises conformément à une décision anticipée qui est contestée en vertu du paragraphe 60(2) de la *Loi* et n'a pas reçu de notification subséquente en vertu du paragraphe 59(2) découlant d'une activité de rajustement. Le client peut présenter une demande de remboursement en vertu de l'article 74 de la *Loi* pour obtenir un remboursement après avoir reçu une décision anticipée favorable ou pour que l'ASFC laisse l'affaire en suspens en attendant le résultat de la contestation.

[24] While an appeal is pending, an importer should act in accordance with the disputed advance ruling by paying the duties due. As explained in Memo D11-11-3, at paragraphs 49-51, should an importer be successful in the appeal to the appeals officer, the importer is able to claim a refund on all duties paid.

[25] In Danone's case, should the appeals officer not make a decision by January 27, 2009, the effective date of the 2008 Ruling, then Danone must begin paying a 237.5% duty on imports of DanActive. Should Danone later be successful on appeal, it could then apply for a refund pursuant

to section 74 of the Act. Even before the issuance of a decision, however, Danone may still apply for a refund, but ask that the CBSA hold the request in abeyance until the issuance of the appeal decision.

The CITT

[26] Under s.67(1) of the Act, an appeals officer's decision may be appealed to the CITT: Once seized of the appeal, the CITT then has jurisdiction to grant interlocutory relief:

67.	**67.**
…	[…]
(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.	(3) Le Tribunal canadien du commerce extérieur peut statuer sur l'appel prévu au paragraphe (1), selon la nature de l'espèce, par ordonnance, constatation ou déclaration, celles-ci n'étant susceptibles de recours, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 68.

[27] *The Canadian International Trade Tribunal Act*, 1985, c. 47 (4th Supp.) sets out the CITT's duties and functions:

16. The duties and functions of the Tribunal are to	**16.** Le Tribunal a pour mission
…	[…]
(*c*) hear, determine and deal with all appeals that,	*c*) de connaître de tout appel pouvant y être

pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matters related thereto; and	interjeté en vertu de toute autre loi fédérale ou de ses règlements et des questions connexes;
(*d*) exercise and perform such other duties or functions that, pursuant to any other Act of Parliament or regulations thereunder, shall or may be exercised or performed by the Tribunal.	*d*) d'exercer les attributions qui lui sont conférées en vertu de toute autre loi fédérale ou de ses règlements.

[28] The CITT's duties are only engaged upon initiation of an appeal of the appeal officer's decision and not before.

Federal Court of Appeal

[29] Subsection 67(3) of the *Customs Act* requires that appeals of CITT decisions be exclusively reviewed according to section 68 of this Act. Subsection 68(1) allows appeals of CITT decisions to the Federal Court of Appeal. Under subsection 68(2), the Federal Court of Appeal "may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing."

[30] The jurisdiction of the Federal Court of Appeal over appeals from CITT decisions is confirmed by subsection 28(1) of the *Federal Courts Act*:

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	**28** (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]
(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;	*e*) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

[31] The *Federal Courts Act* does not, however, grant the Federal Court of Appeal jurisdiction to issue an interlocutory injunction before an application for judicial review of a CITT decision has been made.

[32] It is only after an appeal officer's decision is made that the Federal Court of Appeal has jurisdiction. Since section 28 of the *Federal Court Act* operates as an exception to section 18 of the *Federal Court Act*, whereby the Federal Court is given exclusive supervisory jurisdiction over all federal boards, commissions and other tribunals, it should be interpreted narrowly. While the Federal Court of Appeal has jurisdiction to judicially review decisions by the CITT, subsection 28(3) of the *Federal Courts Act* ousts Federal Court jurisdiction in the context of an application for judicial review.

[33] In this case, as there is no existing application for judicial review, subsection 28(3) of the *Federal Courts Act* does not operate to deprive the Federal Court of jurisdiction.

Federal Court

[34] While the Federal Court lacks jurisdiction to review an appeal officer's decisions, it does have jurisdiction to issue interlocutory injunctions to stay the implementation of an appeal officer's decision. In *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc*., [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 (QL), the Supreme Court of Canada set out the three requirements to support a finding of jurisdiction in the Federal Court:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

(a) Federal statutory grant of jurisdiction: Section 44 of the *Federal Courts Act*

[35] The Federal Court has residual jurisdiction under section 44 of the *Federal Courts Act* to grant an injunction. In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 78 A.C.W.S. (3d) 705 (more recently, *Canada (Human Rights Commission) v. Winnicki*, 2005 FC 1493, [2006] 3 F.C.R. 446), the majority found that the Federal Court has residual jurisdiction to grant a free-standing injunction even if the final disposition of a dispute is left to an administrative decision-maker and is not before the Court.

[36] Writing for the majority of the Supreme Court of Canada, Justice Michel Bastarache found that the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, did not grant the Human Rights Tribunal the power to issue injunctions. Notwithstanding the lack of a grant of jurisdiction in the

Human Rights Act, Justice Bastarache found that the wording of section 44 of the *Federal Courts Act* indicated that Parliament intended to grant the Federal Court a general administrative jurisdiction over federal tribunals:

> [36] As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.
>
> [37] In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker. As I have noted above, the decisions and operation of the Tribunal are subject to the close scrutiny and control of the Federal Court, including the transformation of the order of the Tribunal into an order of the Federal Court. These powers amount to "other relief" for the purposes of s. 44.

[37] In this case, the *Customs Act* also does not expressly or impliedly grant the Federal Court jurisdiction to issue an interlocutory injunction. As in *Canadian Liberty Net*, the disposition of the appeal is left to an administrative decision-maker, the appeals officer. Moreover, the Federal Court already plays a role under the *Customs Act*. Under Part V.1 of the *Customs Act*, the Federal Court has jurisdiction over recovering payment of debt due under the *Customs Act*. These provisions demonstrate that the Federal Court does have a supervisory role in specific circumstances, which may qualify as the ability to grant "other relief" within the meaning of section 44 of the *Federal Courts Act*.

(b) An existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction

[38] Justice Bastarache set out the requirements of this branch in *Canadian Liberty Net*:

> [43] The requirement that there be valid federal law which nourishes the statutory grant of jurisdiction serves primarily to ensure that federal courts are kept within their constitutionally mandated sphere. As Wilson J. noted in Roberts, supra, the second and third requirements set out in ITO, supra, of a nourishing body of federal law, and its constitutional validity, go hand in hand (at p. 330):
>
> > While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands . . . [Emphasis added.]
>
> The dispute over which jurisdiction is sought must rely principally and essentially on federal law. If the dispute is only tangentially related to any corpus of federal law, then there is a possibility that assuming jurisdiction would take the Federal Court out of its constitutionally mandated role.

[39] Justice Bastarache found that the *Canadian Human Rights Act*, confined as it is to the federal jurisdiction over telephonic means of communication, provided the relevant federal law.

[40] In the present case, the *Customs Act* provides a body of federal law which nourishes the statutory grant of jurisdiction.

(c) The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*

[41] The legislation in question must be validly within the jurisdiction of Parliament. In the *ITO* case, above, the Supreme Court of Canada found that Canadian maritime law and other laws dealing

with navigation and shipping come within section 91(10) of the *Constitution Act, 1867*, thus confirming federal legislative competence.

[42] In this case, the *Customs Act* comes under the "Regulation of Trade and Commerce" clause in subsection 91(2) of the *Constitution Act, 1867*, thus confirming federal legislative competence.

Conclusion on the Federal Court's jurisdiction to issue interlocutory injunctions

[43] The Federal Court does not have jurisdiction to judicially review the 2008 Ruling since there is a comprehensive statutory scheme setting out appeal and review of such decisions. The Federal Court, however, does have jurisdiction to issue an interlocutory injunction pending a decision by the administrative decision-maker.

Should this Court grant an interim stay of the 2008 Ruling?

[44] Given that this Court has jurisdiction to issue an interlocutory injunction, the question remains whether it is appropriate in the circumstances to do so. The test to be applied to determine whether the grant of an interim stay of an order is justified is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17:

(a) Is there a serious question to be tried?

(b) Will the applicant suffer irreparable harm if the interim relief is not granted?

(c) Which party will suffer the greater harm by virtue of the granting or refusal to grant the interim relief pending a decision on the merits (the "balance of convenience")?

(a) Serious Question

[45] In an application for an interim stay, there is a low threshold to be met by an applicant to demonstrate that there is a sufficiently serious question to be tried in the underlying issue. In *TPG Technology Consulting Ltd. v. Canada (Minister of Public Works and Government Services)*, 2007 FCA 219, 367 N.R. 47, the Federal Court of Appeal referred to *RJR-MacDonald* to explain the nature of the serious question inquiry:

> [7] … there is a low threshold with respect to the determination of whether there is a serious issue to be tried and that if a preliminary assessment, and not a prolonged examination, of the merits of the issue reveals that it is neither frivolous nor vexatious, then the motions judge should proceed to consider the other two elements of the test.

[46] Justice Pierre Blais, then of the Federal Court, in *Remo Imports Ltd. v. Jaguar Cars Ltd. (c.o.b. Jaguar Canada)*, 2006 FC 188, 47 C.P.R. (4th) 135, further clarified:

> [7] […] It is not the job of the Court at this early stage of the proceedings to evaluate the merits of the issue but to establish, upon review of the record and submissions of parties, that the issue is not frivolous or vexatious

[47] Danone argues that the 2008 Ruling will impose significant damage because Danone acted upon the specific assurance that it could rely on the 2006 Ruling. Furthermore, Danone argues that CBSA has refused to provide detailed reasons for the revocation and imposition of the new 2008 Ruling.

[48] Danone asserts that there are indications that the 2008 Ruling may have been the result of bias, improper influence, and/or ill-informed decision-making. These assertions, according to Danone, may be mainly based on a November 26, 2008 meeting with CBSA where it was explained

to Danone that the review was commenced as a result of "complaints" about DanActive imports, received from unnamed "industry" complainants (Affidavit of Louis Frenette, Applicant's Motion Record at p. 9). The fact that "industry" complainants would have known the details of the 2006 Ruling is troubling to Danone since Danone claims that all information regarding this ruling was to have been kept confidential. Danone alleges that CBSA disclosed its confidential information. Danone, thereby claims, that the above issues "clearly disclose" a number of serious legal questions.

[49] Under section 12 of the *Tariff Classification Advance Rulings Regulations*, SOR/2005-256 (TCARR), an officer may modify or revoke an advance ruling under certain grounds:

12. An officer may modify or revoke an advance ruling given in respect of goods	**12.** L'agent peut modifier ou annuler la décision anticipée dans les cas suivants :
(*a*) if the advance ruling is based on an error of fact or in the tariff classification of the goods;	*a*) la décision est fondée soit sur une erreur de fait, soit sur une erreur dans le classement tarifaire des marchandises;
(*b*) to conform with a decision of a Canadian court or tribunal or a change in the laws of Canada;	*b*) la décision doit se conformer à la décision d'un tribunal canadien ou à une modification législative au Canada;
(*c*) if there is a change in the material facts or circumstances on which the advance ruling is based; or	*c*) les faits ou circonstances essentiels sur lesquels est fondée la décision changent;
(*d*) if the Commissioner revises an advance ruling under paragraph 60(4)(*b*) of the Act.	*d*) le commissaire modifie la décision anticipée en application de l'alinéa 60(4)*b*) de la Loi.

[50] Moreover, under section 7 of the TCARR, an officer shall provide the reasons for an advance ruling.

[51] In its reasons, the 2008 Ruling invokes an error in tariff classification of the goods. The 2008 Ruling states as its reasons, that, "[u]n examen détaillé du SRT#219663 [2006 Ruling], boisson probiotique Danactive, émis le 16 novembre 2006, sous la sous-position SH 2202.90, a déterminé que ce classement est inexact" (Applicant's Motion Record at p.34). It continues, "[u]ne analyse en laboratoire a établi que le produit en question est du yoghourt liquide. Le yoghourt est prévu sous la position 04.03 […]."

[52] The 2008 Ruling goes on to explain the misclassification that led to the revocation of the 2006 Ruling. The 2008 Ruling quotes the tariff definition of yogourt under classification 04.03, then shows through the explanatory notes of chapters 22 and 4 how DanActive was never meant to be classified under 22.02:

> La Note explicative du Chapitre 22 énonce : « Ne sont pas compris dans ce Chapitre : a) Les produits laitiers liquides du Chapitre 4. » La Note explicative de la position 22.02 énonce : « Sont exclus de la présente position : a) le yoghourt à l'état liquide et les autres laits et crèmes fermentés ou acidifiés, additionnés de cacao, de fruits ou d'aromatisants (n^{o} 04.03). »
>
> La Note explicative de la position 04.03 énonce : « les produits de la présente position peuvent se présenter à l'état liquide, pâteux ou solide (y compris congelé) et être concentrés (…) ou conservées (…). Les produits de la présente position peuvent être additionnés de sucre ou d'autres édulcorants, d'aromatisants, de fruits (y compris les pulpes et confitures) ou de cacao.

[53] Danone claims that CBSA has refused to release their laboratory analysis of DanActive that led to its reclassification as a liquid yogourt. CBSA has cited this laboratory analysis as the basis for

its 2008 Ruling. CBSA's refusal to disclose this laboratory analysis to Danone constitutes a failure to provide adequate reasoning for its decision, thus raising a serious legal question.

Conclusion on Serious Question

[54] On a motion for interlocutory injunction, the Court does not have to decide on the merits of the legal argument, but merely whether there is one for serious consideration. In this case, the lack of disclosure of the laboratory results upon which the CBSA based its 2008 Ruling raises a serious legal question of whether the 2008 Ruling provided adequate reasons.

(a) Irreparable Harm

[55] In *RJR-MacDonald*, the Supreme Court of Canada explained the "irreparable harm" test as follows:

> [58] At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[56] Permanent market loss or irrevocable damage to business reputation could be considered irreparable harm (*RJR-MacDonald*, above, at para. 59; reference is also made to *TPG Technology*, above, at para. 23). Moreover, a product's relatively abrupt removal from the market is likely to "permanently tarnish" the relationship between the manufacturer and its clients (*Remo Imports*, above, at para. 19).

[57] The imposition of the 2008 Ruling by CBSA on January 27, 2009 will cause a number of permanent and irreversible effects on Danone that cannot be remedied even in the event of a ruling in its favour. Due to the prohibitive cost of importation, which will subject DanActive to a 237.5% duty, the implementation of the 2008 Ruling will force Danone to cease sales of DanActive once existing supplies are exhausted.

[58] First, ceasing sales of DanActive during the test-marketing plan will destroy the customer loyalty that has been growing. Competitors would take up the market position, profitability and client-attachment which Danone has earned.

[59] Second, considerable investments undertaken to build the brand would be permanently lost, as Danone would be unable to capitalize on the projected 2009 profits. Danone has invested millions of dollars in market studies, marketing, distribution, listing fees and regulatory approvals in order to bring DanActive to Canada as part of its test-marketing plan. Losses were naturally expected in the early years, but profits were projected to rise as marketing initiatives yielded sales growth. After breaking even in 2008, DanActive was projected to return a profit in 2009. Part of this profit would be then used to recoup the earlier losses. Without being able to market DanActive in 2009, Danone would effectively not be able to recoup these millions of dollars of investments. Even if Danone is ultimately successful on its appeal of the 2008 Ruling, these profits will be lost.

[60] Finally, the abrupt withdrawal from the market of DanActive will cause permanent damage to Danone’s market for its other products as well as its reputation with food retailers. According to

Danone, 80% of Danone's products are sold by three major retailers. These retailers are satisfied with DanActive, as it yields a substantial profit margin for them. For manufacturers in the food industry, maintaining strong relationships with the retailers who directly provide their products to consumers, are essential to drive sales.

(b) Balance of Convenience

[61] The Federal Court of Appeal, in *Turbo Resources Ltd. v. Petro Canada Inc.*, [1989] 2 F.C. 451, 13 A.C.W.S. (3d) 371 (C.A.), explained that where there is doubt as to whether or not irreparable harm will be visited upon the Applicant, the analysis of which party would be more inconvenienced by the issuance of a stay, or lack thereof, can be a factor. This aspect of the test may include several factors, varying in each case. Two such factors include whether the interim stay preserves the status quo and whether it would be in the public interest to grant the interim stay. Whether the interest of the public, both of society in general and of particular identifiable groups, would be better served by either the granting or denial of an interim stay is also considered in weighing the balance of convenience.

[62] As outlined above, the implementation of the 2008 Ruling on January 27, 2009 has the potential to cause irreparable harm to Danone. Conversely, granting the stay will maintain the status quo. The 2006 Ruling has been in operation for the last two years, thus, the status quo for an interim period, does not tilt the balance in favour of the Respondent(s). Furthermore, no threats to public health, safety, or well-being are alleged to result from the application of the 2006 Ruling.

[63] A significant matter of public interest is the potential loss of jobs as a result of the ruling's imposition. Danone claims that even if the 2008 Ruling is eventually set aside, the cessation of DanActive sales after January 27, 2009 would require Danone to reduce its sales and marketing staff in light of the loss of one of its most heavily promoted products. The Danone facility in Ohio from which DanActive is presently imported will have reduced staffing demands as the result of the loss of a major market; thus, both countries would suffer job losses in the present economic market. Finally, the planned project to construct a new production facility in Boucherville, Quebec, will be cancelled. This would represent a lost opportunity to create construction and maintenance jobs, as well as new permanent jobs in manufacturing, sales, and distribution at a critical juncture. Moreover, the building of the new production facility has the potential to source liquid milk from Quebec farmers; and, thus lend job security to that industry as well.

Should this Court order that the Danone's President and CEO's confidential affidavit be treated as confidential?

[64] The disclosure of certain portions of Mr. Frenette's affidavit, in support of this motion, contain confidential business information and proprietary information. The disclosure of these may cause serious financial and non-financial harm to Danone; therefore, the confidential version of Mr. Frenette's affidavit is to be treated as confidential pursuant to Rule 151 of the *Federal Courts Rules*.

IV. Conclusion

[65] The confidential version of the above-stated affidavit is to be treated as such.

[66] For the purpose of the core matter at issue, within the jurisdiction of the Federal Court, subsequent to the above analysis, the Court has the jurisdiction to consider the application for a stay of the 2008 Ruling; thus, on the basis of the *RJR-MacDonald* test, the Court grants the stay until the issue is fully disposed of at every level of all jurisdictions concerned. Therefore, the 2006 Ruling remains in effect prior to any final disposition of the matter.

ORDER

THIS COURT ORDERS that

(a) the confidential version of Mr. Frenette's Affidavit be treated as confidential pursuant to Rule 151 of the Federal Courts Rules;

(b) a stay be granted as specified in the Conclusion.

OBITER

Further considerations for all three prongs of the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, test, subsequent to oral and written submissions in the Court room

Recognizing the separation of powers, it is for the executive branch of government to consider, in an in-depth manner, the policy repercussions within the current economic climate that ensue from a micro to a macro level.

Economic

- Danone Canada employs 500 people in its facilities in Boucherville, Quebec and has annual revenues in Canada of $500 million;
- As part of its four year test-marketing plan, Danone invested millions of dollars marketing the DanActive brand in Canada to gauge whether there was sufficient demand to invest in a facility capable of producing DanActive in Canada;
- According to Danone, DanActive broke even in 2008 and is projected to turn a profit in 2009;

- According to Danone, it plans to begin construction of a facility in Boucherville, Quebec, capable of producing DanActive. Danone plans for this facility to open in 2010, providing new jobs for the region;
- Danone also claims that it plans to source all the liquid dairy product needed to produce DanActive from within Canada;
- The cessation of DanActive exports from Danone's Ohio production facility may mean the downsizing of production operations there and the loss of jobs, both in Canada and the U.S., thus recognizing that the matter has repercussions for the two NAFTA neighbours.

Social and Political

- The imposition of a 237.5% tariff may be counter-productive if the 2008 Ruling is changed in an eventual decision. The fact that the 2008 Ruling may result in job losses in the U.S., as well as Canada, warrants, in and of itself, an in-depth analysis;
- Recognizing the situation of the rural areas of Quebec, if, it is as it appears to be from documents submitted to the Court, then supporting the local provincial dairy farmers and industry is a factor to be taken into account, whatever the ultimate executive branch decision may be on further analysis.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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