Federal Court  Cour fédérale

Date: 20121025

Docket: T-682-11

Citation: 2012 FC 1224

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 25, 2012

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

DESGAGNÉS TRANSARCTIK INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Minister of Finance (the Minister) in which he refused to recommend to the Governor in Council that customs duties be remitted to the applicant for the three vessels it imported into Canada pursuant to subsection 115(1) of the *Customs Tariff*, SC 1997, c 36 (the Tariff). This provision 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.

[2] The Tariff provides that the importation of vessels is subject to a 25% customs duty. However, pursuant to subsection 115(1), importers of vessels may apply for remission of these duties following a two-step decision-making process. First, the importers must submit an application for duty remission to the Minister. The Minister decides whether it is appropriate to recommend remission to the Governor in Council. It is to be noted that, even if the Minister makes the recommendation to the Governor in Council, the latter makes the final decision whether or not to grant the remission.

[3] On August 13, 2009, a representative of the applicant met with two officials from the Department of Finance (the Department) to give them three remission applications regarding the importation of the vessels *M/V Rosaire Desgagnés* (imported in 2007), *M/V Zélada Desgagnés* (imported in 2009) and *M/V Sedna Desgagnés* (imported in 2009) (the applications). The applicant had paid a total of $13,654,800 in customs duties for the importation of these vessels.

[4] On August 14, 2009, after a cursory review of the applications, an official from the Department asked the applicant's representative for further information. On August 24, 2009, the applicant sent a letter to the Department containing the information requested. Upon receipt of this letter, the officials began to analyze the applications.

[5] In analyzing these applications, the officials noted that the vessels in question were primarily used to transport merchandise to the Arctic market and that the applicant's main competitor for these routes was Nunavut Eastern Arctic Shipping (NEAS). In 2000, NEAS had applied for the remission of customs duties for the importation of the *M/V Umiavut*, a vessel that the company wanted to assign to routes to the Arctic market. At that time, the applicant had opposed NEAS' application, and the Minister of the day had refused the application on the basis of that opposition.

[6] Shortly after receiving these applications, the government began consultations on a proposal for a general remission of customs duties on the importation of certain types of vessels beginning January 1, 2010. On October 24, 2009, in Part I of the *Canada Gazette*, the government invited interested parties to submit their views on this proposal. Regardless of the consultations on this project, the government continued its practice of analyzing applications for duty remission on vessels imported prior to January 1, 2010, as stated in the public notice in the *Canada Gazette*.

[7] NEAS was informed of the applications submitted by the applicant on August 13, 2009, and opposed them in writing on August 20, 2009, as well as at a meeting with representatives of the Minister of Finance in December 2009. NEAS expressed the opinion that accepting the applicant's applications would create a situation of unfairness against it and stated that if the applications were accepted, it would, in turn, request customs duty remission for the importation of its vessels.

[8] The Department of Finance did not tell the applicant about NEAS' letter of opposition or the meeting with NEAS.

[9] The Department's officials wrote a memorandum dated April 22, 2010, to the Minister in which they expressed the view that the duty remission requested by the applicant would be unfair to NEAS because of the previous decision concerning its vessel. Consequently, they suggested to the Minister that he not recommend to the Governor in Council that duties be remitted to the applicant. Following this advice, the Minister decided to not recommend to the Governor in Council that the duties paid by the applicant be remitted, and the applicant was informed of this in a timely manner.

[10] On September 23, 2010, after the consultation process mentioned above, the Governor in Council adopted new tariff measures in respect of vessels (SOR/2010-202). She granted the remission of customs duties for certain vessels imported into Canada after January 1, 2010.

[11] On October 1, 2010, the Minister publicly announced the implementation of these new measures, indicating in addition that decisions had been made on all pending duty remission applications. The Minister also published a list of the remission applications that had been granted. The applicant's applications were, however, not on that list.

[12] On the same day, following the Minister's announcement, the respondent maintains that an official verbally informed the applicant, through its representative, of the Minister's decision. The respondent adds that he also told the applicant, verbally, the reasons for the Minister's decision on October 18, 2010. The applicant disputes these facts. Although it acknowledges that its representative telephoned the Department on October 1, 2010, the representative was unable to

reach an official. It maintains that its representative did not speak with the Minister's official until October 14, 2010, about the rejection of the applications.

[13] On October 8, 2010, the applicant's President and Chief Executive Officer (the CEO) sent a letter to the Minister asking to meet with him to explain why its applications should be allowed and, in the alternative, if they had already been rejected, why the decision should be reconsidered. It was decided to submit this request for reconsideration to the Minister and to not finalize or communicate the written decision to the applicant regarding the applications.

[14] By letter sent to the Minister on November 2, 2010, NEAS again opposed granting the applicant's applications.

[15] The officials reviewed the applicant's letter dated October 8, 2010. They wrote a memorandum dated November 5, 2010, to the Minister, in which they said that they did not see any new information that could change their previous recommendation to reject the applications.

[16] Subsequently, on November 25, 2010, the officials met with the applicant's CEO. He gave them written representations in support of his oral presentation. The officials felt hat the applicant's representations did not change their recommendation and that it was not necessary to change their memorandum of November 5, 2010.

[17] Finally, the Minister decided on the basis of the November 5, 2010, memorandum to maintain his rejection of the applications. The Minister sent the applicant a letter to that effect on March 11, 2011.

[18] In that letter of March 11, 2011, the Minister stated that his rejection of the applications was based on the need to ensure fair and equitable treatment of the owners of vessels working in the same market as the applicant's three vessels and on an effort to comply with previous decisions dealing with the issue of remitting customs duties.

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[19] First, the applicant submits that the Minister's power to recommend to the Governor in Council to remit customs duties is discretionary and thus limited by the requirement of natural justice and procedural fairness. The applicant refers to *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, at paragraph 36 and *Campbell v Attorney General of Canada*, 2006 FC 510, at paragraph 21.

[20] The applicant maintains that even if the affected party' right to be heard gives rise to different requirements according to the circumstances, this Court has established that where an administrative decision is based primarily on extrinsic evidence, the affected party must be informed of the evidence and have the opportunity to respond to it. In this regard, the applicant relies on *Mehta v. Minister of Citizenship and Immigration*, 2003 FC 1073, at paragraphs 8 and 9.

[21] In this case, the applicant argues that it never had the opportunity to present its position fully and fairly because the Minister had not identified the precedent in question as being related to his previous NEAS decision and had not informed the applicant of the details of this precedent. The applicant also submits that the Minister did not tell it about NEAS' repeated opposition or the reasons for that opposition. The applicant states that, since it lacked the necessary information, it was put in a position where none of its representations to the Department could address the factors that led to its applications being rejected.

[22] The applicant submits that the Department did not notify it of the first decision, the underlying reasons or the reconsideration of the applications.

[23] In response to these arguments by the applicant, the respondent maintains that this Court and the Federal Court of Appeal in *Waycobah First Nation v Attorney General of Canada*, 2010 FC 1188, *Waycobah First Nation v Attorney General of Canada*, 2011 FCA 191, established that the Minister's duty of procedural fairness is at the lower end of the scale on an application under subsection 23(2) of the *Financial Administration Act*, RSC 1985, c. F-11. The respondent submits that it should be the same on an application under subsection 115(1) of the Tariff, and I agree because both statutes permit the exceptional remission of duties imposed generally; the wording of these subsections is similar; and the Minister's discretion is even broader under subsection 115(1) of the Tariff than under subsection 23(2) of the *Financial Administration Act*, which reads as follows:

23. (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is	**23.** (2) Sur recommandation du ministre compétent, le Governor in Council peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt

unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

public justifie la remise.

(see also *Germain v Attorney General of Canada*, 2012 FC 768 and *Williams v Minister of National Revenue*, 2011 FC 766).

[24] The respondent also refers to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraphs 21 and 23 to 28, to state that the nature of the procedural fairness rules applicable to a case must be determined by analyzing the following factors:

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision;
5. The decision-maker's choices of procedure should be considered and respected, particularly when the statute gives the decision-maker the ability to choose its own procedures.

[25] The respondent argues that an analysis of these factors shows that the requirements of the duty of fairness that apply to the decision-making process on an application under subsection 115(1) of the Tariff are at the low end of the procedural fairness scale. I concur. As the respondent submits:

1. Remitting duties is an exception to the Tariff's general principle that customs duties are payable on imported goods. The process for making a decision is left to the Minister's complete discretion and is *ad hoc* in nature since the Minister has not limited the decision-making process through a policy or directive;
2. The Tariff does not limit the discretion of ministers or of the Governor in Council to remit customs duties;
3. The amount at issue is significant, but the applicant must have known that it would pay customs duties on its three vessels at the time they were imported;

4. The applicant could not legitimately expect to receive a remission of customs duties because it knew it had successfully opposed the duty remission application by its competitor NEAS in 2000, and the same assessment practice was still in force for vessels imported prior to January 1, 2010;
5. The Minister's choice of procedure for applications under subsection 115(1) of the Tariff should be respected because the Act gives the Minister the ability to choose the applicable procedure.

[26] It is important to indicate that, in this case, the applicant's written representations sent to the respondent on November 25, 2010, show that the applicant knew about NEAS' opposition to its remission applications and that it had the opportunity to make written and oral representations in this regard.

[27] Moreover, the correspondence sent by the applicant to the respondent subsequent to October 1, 2010, has convinced me that the applicant was aware of the Minister's first decision to reject the applications. In addition, I do not accept the applicant's argument that it was not aware of the Minister's decision to reconsider the applications because, in his presentation on November 25, 2010, the applicant's CEO argued before the Department's officials that the applications should be granted.

[28] In all this context, I am of the view that there was no breach of the duty of procedural fairness here.

[29] Second, the applicant contends that the decision in question is unreasonable.

[30] According to *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*], at paragraph 47, reasonableness is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[31] I also adopt the following statements of the Federal Court of Appeal in *Nitschmann et al v Treasury Board*, 2009 FCA 263, at paragraph 9:

> When reviewing for reasonableness, a Court must examine the reasons given for the decision in order to ensure that it contains a rational justification. A decision is rationally justified if it falls within a range of possible, acceptable outcomes which are defensible having regard to the relevant facts and the law (*Dunsmuir*, above, para. 47).

and in *Exeter v Attorney General of Canada*, 2011 FCA 253, 423 NR 262, at paragraph 15:

> Under reasonableness review, the Court is not permitted to make its own decisions and substitute its views on these matters for those of the Tribunal. In particular, the Court is not permitted to redo the Tribunal's findings of fact and exercises of fact-based discretion. Rather, the Court is limited to considering whether the decisions of the Tribunal fall within a range of possible outcomes that are defensible on the facts and the law: *Dunsmuir*, *supra* at paragraph 47. Put another way, the Tribunal is entitled to "a margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir*, *supra* at paragraph 47. As a practical matter, this Court can only interfere where the Tribunal has erred in a fundamental way.

[32] In this case, it is my view that the decision is reasonable. Fairness with a competitor as an explanation for rejecting a customs duties remission application is a serious ground and justifies the Minister's conclusion that the applicant's applications should be rejected. I concur with the respondent that there is nothing illusory about wanting to avoid favouring one competitor over

another in the Arctic market. In addition, since it was relevant for the Minister to take into consideration the applicant's opposition to NEAS' application in 2000, it was also relevant for the Minister to take into consideration NEAS' opposition to the within applications.

[33] The fair treatment of two competitors is therefore a relevant consideration, and the Minister did not err by basing his decision on that factor. Relying on *Keating v Minister of Fisheries and Oceans*, 2002 FCT 1174, 224 FTR 98, the applicant argues that an administrative decision may be set aside where the decision-maker, in making his or her decision, relied on a political consideration instead of relevant considerations. In my view, the *Keating* case is distinguishable from this case. In *Keating*, this Court determined that the Minister's decision should be set aside because the Deputy Minister's remarks gave rise to the apprehension that the application was assessed by taking into consideration potential criticisms from others in the industry. This Court found that the Deputy Minister's comment about criticisms that others in the fishing industry might make was not an appropriate consideration for the purposes of reviewing the applicant's application to the Minister. Unlike that case, in this case, the officials' memoranda did not mention any political consideration for rejecting the applicant's applications.

[34] In the circumstances, there is therefore no basis for me to find that the decision was unreasonable. I have not been persuaded that the respondent made a fundamental error, and I find that his decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above).

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[35] For all these reasons, the application for judicial review is dismissed with costs.

JUDGMENT

The application for judicial review of the decision by the Minister of Finance in which he refused to recommend to the Governor in Council that customs duties be remitted to the applicant for the three vessels it imported into Canada pursuant to subsection 115(1) of the *Customs Tariff*, SC 1997, c 36, is dismissed with costs.

"Yvon Pinard"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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