Federal Court of Appeal | Cour d'appel fédérale

Date: 20170829

Docket: A-178-15

Citation: 2017 FCA 172

CORAM: **WEBB J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

SEAH STEEL CORPORATION

Applicant

and

EVRAZ INC. NA CANADA, ALGOMA TUBES INC., PRUDENTIAL STEEL ULC, WELDED TUBE OF CANADA CORPORATION, ENERGEX TUBE and the ATTORNEY GENERAL OF CANADA

Respondents

PUBLIC REASONS FOR JUDGMENT

Heard at Ottawa, Ontario, on January 24, 2017.

Judgment delivered at Ottawa, Ontario, on August 29, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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PUBLIC REASONS FOR JUDGMENT

WEBB J.A.

[1] SeAH Steel Corporation (SeAH) brought this application for judicial review under paragraph 96.1(1)(*a*) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA) in relation to the Final Determinations of Dumping and Subsidizing Respecting Certain Oil Country Tubular Goods (OCTG) from Chinese Taipei, The Republic of India, The Republic of Indonesia,

The Republic of the Philippines, The Republic of Korea, The Kingdom of Thailand, The Republic of Turkey, Ukraine, and The Socialist Republic of Vietnam dated March 3, 2015 (Case number AD/1404 and file number 4214-43) (the Final Determination).

[2] The President (President) of the Canada Border Services Agency (CBSA) made a preliminary determination of dumping on December 3, 2014. In doing so, the President used a certain amount as the profit for SeAH, an exporter from the Republic of Korea, in calculating the normal value for SeAH. In making the Final Determination, the President used a higher amount for the profit of SeAH in calculating normal value. This change in the amount used for profit of SeAH is the basis of this application for judicial review.

[3] By an Order dated April 13, 2016 this application was consolidated with the judicial review application of Prudential Steel ULC and Algoma Tubes Inc. in relation to the Final Determination (A-186-15, 2017 FCA 173). Although these applications were consolidated separate reasons will be issued for each application as the arguments and the parties are different with SeAH being the applicant in this application and one of the respondents in the other application.

I. Background

[4] Goods imported into Canada are “dumped” (as defined in subsection 2(1) of SIMA) when the normal value of the goods exceeds the export price of such goods. The margin of dumping is defined in subsection 2(1) of SIMA as the difference between these two amounts. The normal value is determined in accordance with the provisions of sections 15 to 23.1 and 30

of SIMA and the export price is determined in accordance with the provisions of sections 24 to 28 and 30 of SIMA. If the normal value or export price cannot be determined in accordance with these provisions, such amount is determined in the manner specified by the Minister of Public Safety and Emergency Preparedness (section 29 of SIMA).

[5] An investigation with respect to the possible dumping of goods is initiated under subsection 31(1) of SIMA by the President on the President's own initiative or following a complaint that satisfies the requirements of subsection 31(2) of SIMA. In general there are two stages of a dumping investigation – a preliminary determination and a final determination – and two components of each determination. The President is responsible for the preliminary and final determinations of the margin of dumping and the goods to which these apply (sections 38 and 41 of SIMA) and the Canadian International Trade Tribunal is responsible for making the preliminary and final determinations of whether the dumping has caused injury or is threatening to cause injury and making any applicable order or finding as provided in sections 37.1, 42 and 43 of SIMA.

[6] The margin of dumping for the purposes of the preliminary and the final determinations of dumping in relation to goods of a particular country (section 30.1 of SIMA), is the weighted average of the amounts as determined for each exporter in accordance with the provisions of section 30.2 of SIMA. If it is impractical to determine the margin of dumping for all goods under consideration, the margin may be determined based on a sample as provided in section 30.3 of SIMA.

[7] SIMA sets out strict time limits within which the amounts must be determined by the President. Under subsection 38(1) of SIMA, the President must make a preliminary determination of dumping within the 30 day period that commences 60 days after the initiation of an investigation under section 31 of SIMA (therefore within 90 days of the commencement of the investigation, unless the President extends the time by 45 days as provided in subsection 39(1) of SIMA for the reasons as set out in that subsection). Within 90 days after the preliminary determination of dumping is made under subsection 38(1) of SIMA, the President must make the final determination of dumping under section 41 of SIMA. Since the President has strict deadlines to meet, the President must be given considerable discretion to determine how best to obtain the necessary information within these relatively short time limits.

[8] The normal value of goods is to be determined based on the price of like goods that are sold to the persons and in the circumstances as set out in section 15 of SIMA. If there are insufficient qualifying sales of like goods, the normal value, subject to section 20 of SIMA, is determined either by using the price at which like goods are sold to other countries or by using the cost of production and adding a reasonable amount for administrative, selling and all other costs and a reasonable amount for profits (section 19 of SIMA).

[9] In this case, as noted above, the President calculated the normal value for SeAH under paragraph 19(*b*) of SIMA by adding to the cost of production for SeAH, certain amounts including a reasonable amount for profit. The amount used for profit in making the final determination of dumping was greater than the amount used in making the preliminary determination of dumping.

[10] The only dispute in this application for judicial review is the amount used for profit for SeAH in the Final Determination. The dispute arises because the President determined that a higher amount should be used for profit for certain oil country tubular goods (OCTG) with "Premium or Proprietary connections". These are "higher-end threading and coupling of the pipes" (paragraph 37 of the Reasons).

II. Issues

[11] The issues are:

a) did the President breach the duty of procedural fairness; and

b) has SeAH satisfied its onus of establishing that the Final Determination should be set aside?

III. Standard of Review

[12] The standard of review for questions of procedural fairness is correctness and the standard of review for the President's Final Determination is reasonableness (*Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG, et al.*, 2006 FCA 398 at paras. 6, 58-60, 359 N.R. 84).

IV. Analysis

[13] SeAH submitted an affidavit of Véronique Leroux with various exhibits. SeAH argued that it was submitting this affidavit and the exhibits in support of its argument related to procedural fairness. The portion of the affidavit and exhibits to which the Attorney General

objects are the portions dealing with the re-investigation by the President which was conducted after the Final Determination. The only issue raised by the Attorney General was the admissibility of the references to the re-investigation and the admissibility of the related documents.

[14] Following the final determination of dumping, the President initiated a re-investigation of the normal values and export prices for at least some of the goods under consideration. Following the re-investigation, the amount used for profit for SeAH was closer to the amount used in the preliminary determination of dumping (although still slightly more). In its memorandum of fact and law, SeAH notes that "there was no dispute following the CBSA's conclusion of the Re-investigation".

[15] I agree with the Attorney General that the portion of the affidavit and the exhibits in dispute do not go to the issue of whether there was any breach of procedural fairness. The conclusions reached by the President following any subsequent re-investigation do not assist in determining whether there was any breach of procedural fairness by the President in relation to the Final Determination. As a result these documents are not admissible in this application for judicial review in relation to the procedural fairness issue.

[16] With respect to the issue of procedural fairness, Evraz Inc. NA Canada made submissions to the President prior to the Final Determination that not all line pipe was the same and that premium connection OCTG should not necessarily result in the same amount of profit as non-premium OCTG. SeAH had the opportunity to respond to this submission and, therefore, there

was no breach of procedural fairness. Simply being able, with more detailed submissions, to later demonstrate that there is not a profit differential, does not mean that SeAH was denied procedural fairness. There was nothing to indicate that SeAH could not have made the more detailed submissions in response to the submissions of Evraz Inc. NA Canada.

[17] The submission by SeAH that it had no issue following the redetermination of the normal value for SeAH by the President, does raise the issue of what remedy SeAH is seeking in this application for judicial review as there was no indication that adjusting the normal value for SeAH as part of the re-investigation would or could have had any impact on the Final Determination that the subject goods of the Republic of Korea were being dumped.

[18] The remedies that this Court may grant are limited by the provisions of SIMA. In particular paragraph 96.1(1)(*a*) and subsection 96.1(6) of SIMA provide that:

96.1 (1) Subject to section 77.012 or 77.12, an application may be made to the Federal Court of Appeal to review and set aside	96.1 (1) Sous réserve des articles 77.012 et 77.12, une demande de révision et d'annulation peut être présentée à la Cour d'appel fédérale relativement aux décisions, ordonnances ou conclusions suivantes:
(*a*) a final determination of the President under paragraph 41(1)(a);	*a*) la décision définitive rendue par le président au titre de l'alinéa 41(1)a);
[…]	[…]
96.1(6) On an application under this section, the Federal Court of Appeal may dismiss the application, set aside the final determination, decision, order or finding, or set aside the final determination, decision, order or finding and refer the matter back to the President or the Tribunal, as the	96.1(6) La cour peut soit rejeter la demande, soit annuler la décision, l'ordonnance ou les conclusions avec ou sans renvoi de l'affaire au président ou au Tribunal, selon le cas, pour qu'il y donne suite selon les instructions qu'elle juge indiquées.

> case may be, for determination in accordance with such directions as it considers appropriate.

[19] Therefore, this Court can only dismiss the application or set aside the final determination made by the President. If the final determination is set aside, this Court could refer the matter back to the President for redetermination in accordance with such directions as may be appropriate but the matter can only be referred back if the final determination is set aside.

[20] The final determination in issue is the final determination made by the President under paragraph 41(1)(*a*) of SIMA. This paragraph provides that:

41(1) Within ninety days after making a preliminary determination under subsection 38(1) in respect of goods of a country or countries, the President shall	41(1) Dans les quatre-vingt-dix jours suivant sa décision rendue en vertu du paragraphe 38(1) au sujet de marchandises d'un ou de plusieurs pays, le président, selon le cas :
(*a*) if, on the available evidence, the President is satisfied, in relation to the goods of that country or countries in respect of which the investigation is made, that	*a*) si, au vu des éléments de preuve disponibles, il est convaincu, au sujet des marchandises visées par l'enquête, des faits suivants :
(i) the goods have been dumped or subsidized, and	(i) les marchandises ont été sous-évaluées ou subventionnées,
(ii) the margin of dumping of, or the amount of subsidy on, the goods of that country or of any of those countries is not insignificant,	(ii) la marge de dumping ou le montant de subvention octroyé, relativement aux marchandises d'un ou de plusieurs de ces pays, n'est pas minimal,
make a final determination of dumping or subsidizing with respect to the goods after specifying, in relation to each exporter of goods of that country or countries in respect of which the investigation is made as	rend une décision définitive de dumping ou de subventionnement après avoir précisé, pour chacun des exportateurs — visés par l'enquête — des marchandises

follows:	d'un ou de plusieurs de ces pays :
(iii) in the case of dumped goods, specifying the goods to which the determination applies and the margin of dumping of the goods, and	(iii) dans le cas de marchandises sous-évaluées, les marchandises objet de la décision et leur marge de dumping,
(iv) in the case of subsidized goods,	(iv) dans le cas de marchandises subventionnées :
(A) specifying the goods to which the determination applies,	(A) les marchandises objet de la décision,
(B) specifying the amount of subsidy on the goods, and	(B) le montant de subvention octroyée pour elles,
(C) subject to subsection (2), where the whole or any part of the subsidy on the goods is a prohibited subsidy, specifying the amount of the prohibited subsidy on the goods; […]	(C) sous réserve du paragraphe (2), le montant, s'il y a lieu, de la subvention prohibée octroyée pour elles; […]
(emphasis added)	(soulignement ajouté)

[21] The final determination under this paragraph is made in relation to goods of a certain *country*, not goods of a certain *company*. The Final Determination was not that SeAH was dumping but rather it was that goods from certain countries (the Republic of Korea and 8 other countries) were dumped and the margin of dumping was not insignificant. Although the margin of dumping calculated for each company was used to determine whether the margin of dumping for each country was not insignificant, the final determination is only made with respect to the particular country. This is clear from section 41 of SIMA and from the wording of the Final Determination which only identifies the countries. In the Final Determination, after describing

the goods under consideration (including the particular countries of origin or export), the Vice-President, Programs Branch stated that:

> Pursuant to paragraph 41(1)(a) of the Special Import Measures Act, and as authorized by the President of the Canada Border Services Agency, I hereby make a final determination of dumping in respect of certain oil country tubular goods originating in or exported from Chinese Taipei, the Republic of India, the Republic of Indonesia, the Republic of the Philippines, the Republic of Korea, the Kingdom of Thailand, the Republic of Turkey, Ukraine and the Socialist Republic of Vietnam.
>
> […]
>
> I hereby determine that the above mentioned goods have been dumped and that the margin of dumping on the goods is not insignificant.

[22] The Final Determination addresses the two issues identified in section 41 of SIMA – whether certain goods of a particular country have been dumped and whether the margin of dumping is not insignificant. The Final Determination was made after the margin of dumping for each exporter was specified. These margins of dumping for the various exporters form the basis for the Final Determination but the Final Determination is made in relation to the countries, not the individual exporters. SeAH was not the only Korean exporter of the subject goods.

[23] The Final Determination also does not address the particular duty that would be imposed if the goods of that country are imported into Canada. The anti-dumping duty imposed by either section 3 or 5 of SIMA is the actual margin of dumping of the imported goods. This margin of dumping is determined by the person identified in section 55 or 56 of SIMA, with the rights to request a re-determination as set out in sections 56 to 59 of SIMA and a further right of appeal to the Canadian International Trade Tribunal as set out in section 61 of SIMA. There is also a right

of appeal to this Court, on a question of law, from an order of the Canadian International Trade Tribunal.

[24] The letter to SeAH dated March 3, 2015 notifying SeAH of the Final Determination included Appendix 1 which sets out the various margins of dumping determined for each company. In the Note to this Appendix it is stated that:

> NOTE: The margins of dumping reported in the table above are the margins determined by the CBSA for purposes of the final determination of dumping. These margins do not reflect the amount of anti-dumping duty to be levied on future importations of dumped goods. In the event of an injury finding by the Tribunal, normal values and amounts of subsidy have been provided to the exporters which provided sufficient information for future shipments to Canada and these normal values and amounts of subsidy would come into effect the day after an injury finding. Information regarding normal values of the subject goods and amount of subsidy should be obtained from the exporter.
>
> […]

[25] The margins of dumping as determined for the Final Determination only have a limited role under SIMA – to determine whether the margin of dumping of goods of a particular country is not insignificant. Insignificant is defined in section 2 of SIMA as "a margin of dumping that is less than two per cent of the export price of the goods". Therefore, in order to be successful in this application, SeAH would have to demonstrate that not only was the President's determination that a different amount should be used for profit for the sale of different OCTG unreasonable but also that failing to use the lower amount for profit as proposed by SeAH would result in the President's finding that the margin of dumping for goods exported from the Republic of Korea was not insignificant was unreasonable. Otherwise, there would be no basis for setting aside the Final Determination.

[26] It its memorandum of fact and law SeAH submitted that:

> 8. The use of this correct methodology would have resulted in an appreciably lower margin of dumping applicable to SeAH's exports than was calculated by the President in the Final Determination.

[27] This statement indicates that even with the revised profit amount, there would still be a margin of dumping for SeAH. If there would still be a margin of dumping for SeAH, it is far from clear how this change in the profit amount could result in the Final Determination that the subject goods of the Republic of Korea were being dumped and that the margin of dumping was not insignificant being found to be unreasonable.

[28] The Attorney General, in her memorandum of fact and law, submitted that even if the margin of dumping for SeAH were zero, the margin of dumping for the goods from the Republic of Korea would still not be insignificant. The Attorney General noted that the detailed calculations of the CBSA related to the determinations of the margins of dumping were not part of the record that was before this Court.

[29] The amount to be used for the margin of dumping for the Final Determination in relation to a particular country is set out in section 30.1 of SIMA, which provides in part:

30.1 For the purposes of […] subparagraph 41(1)(*a*)(ii) […], the margin of dumping in relation to goods of a particular country is the weighted average of the margins of dumping determined in accordance with section 30.2.	30.1 Pour l'application […] du sous-alinéa 41(1)*a*)(ii) […], la marge de dumping relative à des marchandises d'un pays donné est égale à la moyenne pondérée des marges de dumping établies conformément à l'article 30.2.

[30] Therefore the margin of dumping for the final determination of dumping under subparagraph 41(1)(*a*)(ii) of SIMA for goods of a particular country is the weighted average of the amounts determined under section 30.2. Subsection 30.2(1) of SIMA provides that:

30.2(1) Subject to subsection (2), the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.	30.2(1) Sous réserve du paragraphe (2), la marge de dumping relative à des marchandises d'un exportateur donné est égale à zéro ou, s'il est positif, au résultat obtenu en retranchant la moyenne pondérée du prix à l'exportation des marchandises de la moyenne pondérée de la valeur normale des marchandises.

[31] For each particular exporter the margin of dumping cannot be less than zero. As a result, even if the weighted average export price exceeds the weighted average normal value for a particular exporter from a particular country, such negative result cannot be used to offset a positive amount determined for another exporter from that same country.

[32] In this case, three companies (including SeAH) were identified as exporters of the OCTG in question from the Republic of Korea. All of other exporters of these goods from the Republic of Korea were pooled together and identified as "Others".

[33] The other exporters accounted for approximately [redacted] of the particular goods that were exported from the Republic of Korea. These exporters were assigned a margin of dumping of 37.4% (which SeAH did not challenge). The three companies that were identified could not be assigned a margin of dumping of less than zero. As a result, it is far from clear on what basis the President's Final Determination that the margin of dumping for goods exported from the

Republic of Korea was 2% or more (and hence not insignificant) was unreasonable regardless of the amounts used as the margin of dumping for the three identified companies.

[34] In effect, SeAH is asking this Court to adjust an amount used for profit for SeAH in the Final Determination without showing how this revised amount could or would change the Final Determination that goods exported from the Republic of Korea were being dumped and that the margin of dumping was 2% or more. This is not a remedy that is contemplated by SIMA. The only remedies that can be granted are to either dismiss the application or set aside the Final Determination. Since there is no basis to set aside the Final Determination made with respect to the Republic of Korea, this application would have to be dismissed.

[35] As a result I would dismiss this application for judicial review, with costs.

"Wyman W. Webb"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF AN AMOUNT OF PROFITS DETERMINATION MADE BY THE CANADA BORDER SERVICES AGENCY, CASE NO. AD/1404, FILE NO. 4214-43, MARCH 3, 2015

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