Federal Court of Appeal | Cour d'appel fédérale

Date: 20160108

Docket: A-42-14

Citation: 2016 FCA 2

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

CANADIAN TIRE CORPORATION, LIMITED

Applicant

and

KOOLATRON CORPORATION

Respondent

Heard at Toronto, Ontario, on October 1, 2015.

Judgment delivered at Ottawa, Ontario, on January 8, 2016.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GAUTHIER J.A.
CONCURRING REASONS BY: WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160108

Docket: A-42-14

Citation: 2016 FCA 2

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

CANADIAN TIRE CORPORATION, LIMITED

Applicant

and

KOOLATRON CORPORATION

Respondent

PUBLIC REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] Canadian Tire Corporation, Ltd. (Canadian Tire) seeks judicial review of the Canadian International Trade Tribunal (the Tribunal) decision (Expiry Review No. RR-2012-004) in which it continued a finding concerning dumping and subsidizing of thermoelectric containers from the People's Republic of China (China). Essentially, the applicant requests that this Court set aside

the decision of the Tribunal on the basis that it is not founded in evidence. For the reasons below, I would dismiss the application.

II. Background

[2] The *Special Import Measures Act*, RSC 1985, c S-15 (*SIMA*) governs Canada's anti-dumping and countervailing duties regime. *SIMA* is designed to protect Canadian domestic manufacturers from material injury caused by the dumping and subsidizing of imported goods by authorizing, under certain conditions, for special trade-restrictive duties to be imposed. Under section 2(1) of *SIMA*, a "dumped" good means that the normal value of the good exceeds the export price thereof, and a "subsidized good" is a good for which a subsidy is paid by a country other than Canada, and a good disposed of by a country other than Canada for less than fair market value.

[3] The Canada Border Services Agency (the CBSA) and the Tribunal are jointly responsible for administering *SIMA*. The CBSA is responsible for determining whether goods being imported into Canada are dumped or subsidized, and the Tribunal is responsible for determining whether the dumping or subsidizing is causing "injury or retardation" to domestic production of goods of the same description (*SIMA*, s 3(1)).

[4] The products at issue in this application for judicial review are thermoelectric containers that provide cooling and/or warming with the use of a passive heat sink and a thermoelectric module, excluding liquid dispensers, originating in or exported from China. There are four main types of thermoelectric containers: those for travel, whether for consumer or commercial use,

those exclusively for home use, those for retail display, and those used as wine coolers. These are known as the "subject goods" (Expiry Review at para. 1). On May 15, 2008, following a complaint filed by Koolatron Corporation (Koolatron), the President of the CBSA initiated investigations into whether the subject goods had been dumped and subsidized, pursuant to section 31 of *SIMA*. On August 13, 2008, the CBSA issued the preliminary determination that the subject goods had been dumped and subsidized, that the margin of dumping and the amount of subsidy were not insignificant and that the volumes of dumped and subsidized goods were not negligible.

[5] On August 14, 2008, the Tribunal issued a notice of commencement of inquiry under section 42(1) of *SIMA* (Inquiry No. NQ-2008-002) (Inquiry). On December 11, 2008, the Tribunal made a finding pursuant to *SIMA* section 43(1) that the dumping and subsidizing of the subject goods had caused injury to the domestic industry. As a result, anti-dumping and countervailing duties were imposed.

[6] Pursuant to section 76.03(10) of *SIMA*, the Tribunal is required to conduct an expiry review after five years to determine whether the expiry of the finding in respect of the subject goods is likely to result in injury or retardation. The Tribunal makes an order either rescinding the finding if it determines that its expiry is unlikely to result in injury, or continuing the finding, with or without amendment, if it determines that its expiry is likely to result in injury (Expiry Review at para. 11). The Tribunal conducted its expiry review into the subject goods with a period of review from January 1, 2010 to June 30, 2013. In its order and reasons dated December

9, 2013, the Tribunal continued its finding in respect of the subject goods pursuant to paragraph 76.03(12)(*b*) of *SIMA*. As a result, the duties remain in place for an additional five years.

[7] The respondent in this matter is Koolatron, a Brantford, Ontario-based company which manufactures thermoelectric containers for travel, home, retail, and wine cooler use. Koolatron is the only major Canadian manufacturer of thermoelectric containers (like goods), and filed the original complaint in 2008. Canadian Tire is the dominant market player in Canadian thermoelectric container sales for travel. It is not active in the home, retail, or wine thermoelectric container markets. Canadian Tire formerly purchased its thermoelectric containers from Koolatron, but in 2007, Canadian Tire changed suppliers, and now sources its thermoelectric containers exclusively from Mobicool International Ltd (Mobicool). Mobicool's thermoelectric containers qualify as subject goods.

[8] The Tribunal's task in the expiry review was to determine whether the expiry of the finding in respect of the subject goods was likely to result in injury or retardation (Expiry Review at para. 10). The Tribunal examined the Chinese market and found that growth in Chinese household spending had contributed to an increase in demand for thermoelectric containers (Expiry Review at paras. 33-36). The Tribunal also determined that the production volume of thermoelectric containers and excess capacity of the manufacturers of such containers in China was considerably larger than in Canada (Expiry Review at para. 52). Domestically, the Tribunal held that like goods continued to compete directly with imported goods (Expiry Review at para. 38). It held that were its finding to expire, there was likely to be a significant increase in

the volume of imports of the subject goods both in absolute and relative terms (Expiry Review at para. 62).

[9] The Tribunal next considered whether the dumping and/or subsidizing of the subject goods was likely to significantly undercut the prices of the like goods, depress those prices, or suppress them by preventing price increases that would likely have otherwise occurred. The Tribunal anticipated that in absence of the finding, the intense price-based competition among big box retailers, coupled with sustained competition from U.S. imports, would likely exert significant downward pressure on the prices of like goods (Expiry Review at para. 71). It also held that Koolatron would experience price suppression, as the significantly depressed prices for like goods would prevent Koolatron from passing on future increases to production costs (Expiry Review at para. 75). The Tribunal held that there would likely be a material deterioration of Koolatron's performance if the finding were allowed to expire (Expiry Review at para. 91).

[10] Before this Court, the applicant submits that the Tribunal erred in three ways: first, by not basing its finding on positive evidence; second, by basing its decision on unreasonable findings of facts and inferences; and third, by failing to allow the applicant certain procedural fairness entitlements. The respondent's position is that the applicant's first two arguments amount to a disagreement with the manner in which the Tribunal assessed the evidence and do not identify any reviewable errors that warrant intervention. It submits that the applicant's third complaint stands at odds with what the record discloses actually took place at the proceeding.

III. Issues

1) Did the Tribunal err by not basing its findings on positive evidence?

2) Did the Tribunal base its decision on unreasonable findings of fact or on inferences not supported by sufficient evidence?

3) Did the Tribunal err by breaching certain procedural fairness entitlements owed to the applicant?

IV. Standard of Review

[11] The standard of review framework to be followed is that of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[12] Canadian Tire submits that its first argument—that the Tribunal did not base its findings on positive evidence—is a question of law, and that accordingly, the standard of review is correctness. It relies on *Infasco Division of Ifastgroupe & Co LP v. Canada (International Trade Tribunal)*, 2006 FCA 130 at paras 3-4, 347 N.R. 111 [*Infasco*], in which this Court held that the Tribunal's decision should not stand if it did not apply the correct test for causation under section 42(1) of *SIMA*. I do not agree that *Infasco* is helpful to the applicant. In *Infasco*, the question was whether the Tribunal had applied the proper test; not whether it had applied the test properly. In *Owen & Co v. Globe Spring & Cushion Co*, 2010 FCA 288, 414 N.R. 114, Layden-Stevenson J.A. (as she was then) held: "The tribunal is highly specialized and is entitled to significant deference. Only questions related to its jurisdiction are reviewed on a standard of correctness. All other questions attract a standard of reasonableness" (at para. 4; see also *Canadian Sugar Institute v. Canada*, 2012 FCA 163 at para. 2, [2012] F.C.J No. 668). Pursuant to *Owen & Co*, the standard of review for the first issue is reasonableness.

[13] The parties agree that the standard of review on the second issue, as to whether the Tribunal's findings were based on unreasonable findings of fact or on inferences not supported by the evidence, is reasonableness. I share that view.

[14] The applicant argues that the standard of review on the third issue is correctness, because it deals with procedural fairness issues. The respondent agrees that the standard of review is correctness, but argues that a degree of deference is nonetheless warranted, based on Stratas J.A.'s statement in *Bergeron v. Canada (AG)*, 2015 FCA 160, 255 A.C.W.S. (3d) 955 that this Court review procedural fairness issues in a manner that is "respectful of the [decision-maker's] choices" with a "degree of deference" (at para. 69, citing Re: Sound v. Fitness Industry Council of Canada, 2014 FCA 48 at para. 42, 455 N.R. 87). While I agree that procedural issues generally attract considerable deference, I do not agree that this is so when the issue involves a breach of procedural fairness.

V. Analysis

(1) Did the Tribunal err by not basing its findings on positive evidence?

[15] In order to succeed, the applicant must show that the Tribunal did not rely on positive evidence in arriving at its findings. In large measure, the applicant is asking the Court to re-weigh the evidence considered by the Tribunal and determine that either the positive evidence before it was completely lacking or sufficiently weak to warrant the intervention of the Court.

[16] The applicant argues the evidence relied upon by the Tribunal for the total production of the subject goods in China was weak and inconclusive, based on the fact that no Chinese manufacturers filled out the questionnaire sent to them by the Tribunal and because the Tribunal extrapolated China's total production volume from the information of two companies. However:

- The unchallenged evidence filed by the respondent confirmed that the total production capabilities of just Mobicool and Fuxin was 2.74 million units (Expiry Review at para. 51; Public Applicant's Record (AR), Vol. II, Tab 12 at 617, 620, Exhibit RR-2012-004-A-0 Vol. 11). At the hearing, the applicant submitted that the Tribunal had been too vague as to whether the production information that was relied on concerned refrigerators or travel coolers. The respondent replied that even if the Tribunal was to take account of only a part of the total production capacity (so as to isolate units deemed to be refrigerators), the production capacity of Chinese manufacturers remained overwhelming. I agree with the respondent that the Tribunal's finding of fact was open to it on the evidentiary record.

- The evidence of Mobicool and Fuxin's production capacities meant to the Tribunal that the capacity of these two manufacturers alone was 14 times the size of the Canadian domestic industry (Expiry Review at para. 52).

- In addition, the Tribunal received unchallenged evidence that there are between 15 and 20 Chinese manufacturers of the subject goods (Expiry Review at para. 50).

[17] In my view, the applicant's assertion that there was no evidence or that the evidence was so weak that it could not conclude that there existed within China a substantial amount of capacity to produce the subject goods is without any merit.

[18] The applicant also argues that the Tribunal's findings with respect to excess capacity in the Chinese market and the ability of Chinese producers to export to foreign markets was similarly lacking. However, there was evidence before the Tribunal in these regards. In particular:

- There was evidence concerning the willingness of Chinese producers to price aggressively and sell the subject goods in foreign markets at prices significantly lower than in China (Expiry review at para. 55; Confidential AR, Vol. II, Tab 13 at 671, 677-688, Exhibit RR-2012-004-A-04 (protected) Vol. 12).

- Further, there was evidence that just 40 to 50 percent of Fuxin's production is consumed by the domestic market (Public Hearing transcript, October 15, 2013, Public AR, Vol I, Tab 9 at p. 151).

- In addition, there was evidence that between the first half of 2007 and the first half of 2008, the volume of imports of the subject goods virtually eliminated the like goods from the domestic market (Expiry review at para. 59).

- There was evidence that Salton, a distributor of Chinese thermoelectric containers, would consider re-importing the subject goods were the 2008 finding rescinded (Expiry review at para. 57).

- Finally, the Tribunal heard evidence that Mobicool had been exporting thermoelectric containers from China to the applicant in Canada prior to and following the 2008 finding.

[19] This evidence supports the Tribunal's findings that there was excess capacity in China that the Chinese domestic market would not consume and that this excess was available for export to foreign markets. Further, the evidence supports the conclusion that such exports had been made in the past and were likely to be made in the future and that such exports would be priced in amounts significantly lower than the domestic prices in China.

[20] In my view, the applicant's assertion that there was no evidence or that the evidence was too weak on these points is also without merit.

[21] Finally with respect to Issue 1, the applicant argues that the Tribunal made contradictory findings about the relationship between growth and consumption, with no explanation. In particular, it argues that the Tribunal erred by finding that the expected drop in China's overall growth rate would result in a corresponding drop in wine consumption and automobile usage, while thermoelectric container demand would remain strong in Canada if its growth rate slowed. The following pieces of evidence were relied on by the Tribunal to make these findings:

- The Tribunal received unchallenged evidence that following decades of strong economic growth in China, household spending had increased, with wine consumption and automobile ownership increasing substantially in recent years (Expiry Review at para. 36; Public AR, Vol. II, Tab 14 at 707-714, Exhibit RR-2012-004-15.01, Vol. 3; Public AR, Vol. II, Tab 14 at 716-717, Exhibit RR-2014-015.01A, Vol. 3B).

- The Tribunal received unchallenged evidence that Chinese growth was expected to continue to slow or remain flat (Expiry Review at para. 35).

- The Tribunal heard evidence from the Koolatron representative explaining why interest in like goods was likely to remain strong in Canada even in an economic recession. This evidence included the fact that Canadians are travelling more by car in the face of rising airline costs, and the fact that like goods are useful for cross-border shopping in the U.S. (Expiry Review at para. 41; Public AR, Vol. I, Tab 9 at 184-185, Transcript of the Public Hearing of the 2013 Expiry Review Decision).

[22] In my view, this evidence is sufficient to ground the Tribunal's finding on the likely relationship between growth and consumption in Canada and China. The applicant's assertion that there was no evidence or that the evidence was too weak on these points is without merit.

(2) Did the Tribunal base its decision on unreasonable findings of fact or on inferences not supported by sufficient evidence?

[23] The applicant lists several instances of what it feels are examples of the Tribunal making unreasonable inferences and assumptions, and of failing to rely on the evidence before it. Overall, I find that the Tribunal's decision was thorough and demonstrated that it had considered the record. In many instances cited by the applicant, the Tribunal considered the applicant's evidence, but disagreed with the conclusions that could be drawn from that evidence. I agree with the respondent that the points Canadian Tire raises in this regard go to the weight or emphasis the Tribunal gave to certain pieces of evidence over others. The Tribunal is experienced at weighing evidence of market conditions in various countries and their effects on domestic goods. The evidence the Tribunal favoured and the weight it accorded is an exercise of discretion and not reviewable unless it falls outside of a range of acceptable outcomes. I agree with the respondent that the Tribunal's findings of fact and inferences were reasonable.

[24] With respect to the Tribunal's assessment of the likely performance of the domestic industry and the likely impact of the dumped subject goods on the domestic industry, the applicant argues that the Tribunal's finding that Koolatron would lose market share in Canada if the finding expired was unreasonable and not supported by evidence. It claims that the Tribunal did not take into account the fact that Canadian Tire had recently terminated its relationship with Koolatron in the lead-up to the Tribunal's 2008 finding, which was an important reason Koolatron experienced financial difficulties in 2007. However, the Tribunal explicitly considered the fact that Canadian Tire switched its business from Koolatron to Mobicool in 2007, and acknowledged Canadian Tire's argument that Koolatron's previous injury was a "one-off" event because it lost the account (Expiry Review at para. 94). Despite this, the Tribunal concluded that given the competitive dynamics of the retail market for thermoelectric containers, other retailers,

some of whom are Koolatron customers, would return to importing the subject goods at low prices to try to regain their share of the market and improve their margins, and as a result, Koolatron remained vulnerable (Expiry Review at para. 94).

[25] The applicant also argues that Koolatron's expansion into the U.S. demonstrates its ability to successfully compete with Chinese and U.S. suppliers without any anti-dumping or countervailing duties on Chinese thermoelectric containers. It made this argument before the Tribunal, and the Tribunal explicitly considered it (Expiry Review at para. 88). The Tribunal went on to provide two evidence-based reasons for why Canada and the U.S operate as separate paradigms and cannot be compared (Expiry Review at para. 89). The Tribunal also found that Canadian Tire provided no clear evidence other than oral assertions for why Koolatron's success in the U.S. demonstrates that it is no longer vulnerable in Canada (Expiry Review at para. 90). I find that the Tribunal's finding on this point is reasonable, and based on sufficient evidence.

[26] Further, the applicant argues that the Tribunal failed to focus on the near to medium term when assessing the likelihood of injury. The Tribunal allegedly did not consider that at the time of the expiry review, the applicant had already placed its orders for 2014, and hence was effectively bound to purchase its thermoelectric containers from Mobicool for at least 15 months following the 2013 hearing. First, I note that the Tribunal was cognizant of the fact "that the focus should be on circumstances that can reasonably be expected to exist in the near to medium term, which is generally considered to be 18 to 24 months from the expiry of a finding or an order" (Expiry Review at para. 30). Second, the applicant's argument that it was bound to purchase from Mobicool is in fact contradicted by the testimony of its own witness.

[REDACTED] (Confidential AR, Vol. I, Tab 10 at 253). Third, the Tribunal noted that the applicant engages in *annual* reviews of its product lines and that it has no written agreement with Mobicool (Expiry Review at para. 72).

[27] With respect to the Tribunal's assessment of whether the resumed dumping of the subject goods was likely to significantly undercut, depress or suppress the prices of the like goods, the applicant argues, among other things, that the Tribunal overemphasized the importance of pricing for the applicant. This was allegedly evidenced when the Tribunal determined that the applicant could appropriate to itself the "margin space" that the elimination of countervailing duties would create, in an effort to realize higher margins. In my view, it was open to the Tribunal to conclude as it did. Indeed, the applicant's witness clearly stated that price points and margins *are* two considerations—albeit of many—that the applicant takes into account, and that price points can be important (Expiry review at paras. 67, 72; Public AR, Vol. I, Tab 9 at p. 207).

[28] In a related vein, the applicant argues that the Tribunal failed to adequately consider the importance of non-price factors to its purchase decisions. It is true that the Tribunal heard evidence that price is not the *only* aspect considered by the applicant when sourcing its products. Nevertheless, the Tribunal's conclusion that price points are important to the applicant does not negate the importance of non-price factors in the applicant's purchase decisions.

[29] In sum, I conclude that the Tribunal adequately considered the evidence before it, and that its conclusions were reasonable.

(3) Did the Tribunal err by breaching certain procedural fairness entitlements owed to the applicant?

[30] Canadian Tire makes three procedural arguments. First, it argues the Tribunal made a procedural error by not using its powers to subpoena Chinese producers pursuant to section 20(1) of the Tribunal's Rules. I do not agree that this was a reviewable error. It is clear that the Chinese producers invited to participate did not wish to do so. I also note that nothing prevented the applicant from presenting evidence from Mobicool. In any event, in order for this Court to arrive at a conclusion that the Tribunal made a procedural error by not issuing subpoenas, it would first have to conclude that the evidence before the Tribunal on the Chinese thermoelectric container market was insufficient. The Tribunal made no such finding, and did not indicate in its expiry review that it found the record as to Chinese producers was inadequate.

[31] The applicant also has the power to request that the Tribunal issue subpoenas under section 20(1) of the Tribunal's Rules. It was open to Canadian Tire to request that the Tribunal issue subpoenas if it felt that more evidence was required, and there is no evidence on the record that it did so. Given that the applicant has this power, this issue would have been more appropriately raised before the Tribunal at the time of the hearing, while the Tribunal was hearing evidence, and not on judicial review (*Johnson v. Canada (AG)*, 2011 FCA 76 at para. 25, 414 N.R. 321).

[32] Canadian Tire also argued that the Tribunal refused its request for a Mobicool representative to participate as a witness. The transcript of the hearing shows that this is factually inaccurate. Canadian Tire explicitly stated that it did *not* want the Mobicool representative to

serve as a witness. Rather, it wanted the representative to be available to the Canadian Tire witness to assist in answering questions. The Tribunal rejected the applicant's request on the basis that it would allow the Mobicool representative to indirectly testify without being subject to cross-examination (Expiry Review at para. 29). I find no error in this decision.

[33] The applicant's third procedural argument is that the hearing was unreasonably compressed and that this served to further minimize the scope of the record before the Tribunal. I do not accept this argument. The parties submitted a large portion of their evidence through written witness statements, which were adopted at the hearing. In addition, if Canadian Tire felt that it needed more time at the hearing, it could have raised this issue before the Tribunal. It did not do so. In fact, counsel for the applicant stated during the expiry review hearing, and upon completing his cross-examination of the respondent's witness, that "[t]hose [were] all [his] questions". Confidential AR, Vol. I, Tab 10 at 249). The same principle from *Johnson v. Canada* referenced above applies here: Canadian Tire may not raise an issue of procedural fairness here that it could have raised, and failed to raise, before the Tribunal.

VI. Conclusion

[34] For the foregoing reasons, I would dismiss the application with costs.

"David G. Near"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Wyman W. Webb J.A."

Appendix 1
Legislative Framework

Special Import Measures Act
Section 2(1) provides the statutory definitions for *SIMA*:

"domestic industry" means, other than for the purposes of section 31 and subject to subsection (1.1), the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, "domestic industry" may be interpreted as meaning the rest of those domestic producers;	« branche de production nationale » Sauf pour l'application de l'article 31 et sous réserve du paragraphe (1.1), l'ensemble des producteurs nationaux de marchandises similaires ou les producteurs nationaux dont la production totale de marchandises similaires constitue une proportion majeure de la production collective nationale des marchandises similaires. Peut toutefois en être exclu le producteur national qui est lié à un exportateur ou à un importateur de marchandises sous-évaluées ou subventionnées, ou qui est lui-même un importateur de telles marchandises.
"dumped", in relation to any goods, means that the normal value of the goods exceeds the export price thereof;	« sous-évalué » Qualificatif de marchandises dont la valeur normale est supérieure à leur prix à l'exportation.
…	[…]
"injury" means material injury to a domestic industry;	« dommage » Le dommage sensible causé à une branche de production nationale.
…	[…]
"like goods", in relation to any other goods, means	« marchandises similaires » Selon le cas :
(a) goods that are identical in all respects to the other goods, or	a) marchandises identiques aux marchandises en cause;
(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other	b) à défaut, marchandises dont l'utilisation et les autres caractéristiques sont très proches de celles des marchandises en cause.

goods;

…

[…]

"subsidized goods" means

« marchandises subventionnées » Les marchandises suivantes :

(a) goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of which a subsidy has been or will be paid, granted, authorized or otherwise provided, directly or indirectly, by the government of a country other than Canada, and

a) celles qui, à un stade quelconque de leur production ou de leur commercialisation, ou lors de leur transport, de leur exportation ou de leur importation, ont bénéficié ou bénéficieront, directement ou indirectement, d'une subvention de la part du gouvernement d'un pays étranger;

(b) goods that are disposed of by the government of a country other than Canada for less than fair market value,

b) celles qui sont écoulées par un gouvernement d'un pays étranger à un prix inférieur à leur juste valeur marchande,

and includes any goods in which, or in the production, manufacture, growth, processing or the like of which, goods described in paragraph (a) or (b) are incorporated, consumed, used or otherwise employed;

en outre, celles dans la production ou la fabrication desquelles entrent, se consomment ou sont autrement utilisées les marchandises visées à l'alinéa a) ou b).

"subsidy" means

« subvention »

(a) a financial contribution by a government of a country other than Canada in any of the circumstances outlined in subsection (1.6) that confers a benefit to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, but does not include the amount of any duty or internal tax imposed by the government of the country of origin or country of export on

a) Toute contribution financière du gouvernement d'un pays étranger faite dans les circonstances exposées au paragraphe (1.6) qui confère un avantage aux personnes se livrant à la production ou à la commercialisation, à un stade quelconque, ou au transport de marchandises données, ou à leur exportation ou importation. La présente définition exclut le montant des droits ou des taxes internes imposés par le gouvernement du pays d'origine ou d'exportation :

(i) goods that, because of their exportation from the country of export or country of origin, have been

(i) sur des marchandises qui, en raison de leur exportation du pays d'exportation ou d'origine, en ont été

exempted or have been or will be relieved by means of remission, refund or drawback,	exonérées ou en ont été ou en seront libérées par remise, remboursement ou drawback,
(ii) energy, fuel, oil and catalysts that are used or consumed in the production of exported goods and that have been exempted or have been or will be relieved by means of remission, refund or drawback, or	(ii) sur l'énergie, les combustibles, l'huile et les catalyseurs utilisés ou consommés dans le cadre de la production de marchandises exportées et qui en ont été exonérés ou en ont été ou en seront libérés par remise, remboursement ou drawback,
(iii) goods incorporated into exported goods and that have been exempted or have been or will be relieved by means of remission, refund or drawback, or	(iii) sur des marchandises qui entrent dans la fabrication de marchandises exportées et qui en ont été exonérées ou en ont été ou en seront libérées par remise, remboursement ou drawback;
(b) any form of income or price support within the meaning of Article XVI of the General Agreement on Tariffs and Trade, 1994, being part of Annex 1A to the WTO Agreement, that confers a benefit;	b) toute forme de soutien du revenu ou des prix, au sens de l'article XVI de l'Accord général sur les tarifs douaniers et le commerce de 1994 figurant à l'annexe 1A de l'Accord sur l'OMC, qui confère un avantage
…	[…]

The Tribunal conducts expiry reviews pursuant to section 76.03 of *SIMA*:

76.03 (1) If the Tribunal has not initiated an expiry review under subsection (3) with respect to an order or finding described in any of sections 3 to 6 before the expiry of five years after whichever of the following days is applicable, the order or finding is deemed to have been rescinded as of the expiry of the five years:	76.03 (1) À défaut de réexamen relatif à l'expiration aux termes du paragraphe (3), l'ordonnance ou les conclusions sont réputées annulées à l'expiration de cinq ans suivant :
(a) if no order continuing the order or finding has been made under paragraph (12)(b), the day on which the order or finding was made; and	a) la date de l'ordonnance ou des conclusions, si aucune ordonnance de prorogation n'a été rendue en vertu de l'alinéa (12)b);
(b) if one or more orders continuing the order or finding have been made under paragraph (12)(b), the day on	b) la date de la dernière ordonnance de prorogation, dans les autres cas.

which the last order was made.

…

(6) If the Tribunal decides to initiate an expiry review, it shall without delay

(a) cause notice of the Tribunal's decision to be given to

(i) the President, and

(ii) all other persons and governments specified in the rules of the Tribunal;

(b) provide the President with a copy of the administrative record on which it based its decision to initiate a review under subsection (3); and

(c) cause to be published in the Canada Gazette notice of initiation of the review that includes the information set out in the rules of the Tribunal.

(7) If the Tribunal decides to initiate an expiry review, the President shall

(a) within one hundred and twenty days after receiving notice under subparagraph (6)(a)(i), determine whether the expiry of the order or finding in respect of goods of a country or countries is likely to result in the continuation or resumption of dumping or subsidizing of the goods; and

(b) provide the Tribunal with notice of the determination without delay after making it.

[…]

(6) Lorsque le Tribunal décide de procéder au réexamen relatif à l'expiration, il doit sans délai :

a) fournir un avis de la décision au président et à toute autre personne ou à un gouvernement que peuvent préciser ses règles;

b) fournir au président copie du dossier administratif sur lequel il a fondé sa décision de procéder au réexamen;

c) faire paraître dans la Gazette du Canada un avis de réexamen qui renferme les renseignements mentionnés dans les règles du Tribunal.

(7) Lorsque le Tribunal décide de procéder au réexamen relatif à l'expiration, le président :

a) dans les cent vingt jours de la réception de l'avis prévu à l'alinéa (6)a), décide si l'expiration de l'ordonnance ou des conclusions concernant les marchandises d'un ou de plusieurs pays causera vraisemblablement la poursuite ou la reprise du dumping ou du subventionnement des marchandises;

b) avise sans délai le Tribunal de sa décision.

…

(9) If the President determines that the expiry of the order or finding in respect of any goods is likely to result in a continuation or resumption of dumping or subsidizing, the President shall without delay provide the Tribunal with any information and material with respect to the matter that is required under the rules of the Tribunal.

(10) If the President makes a determination described in subsection (9), the Tribunal shall determine whether the expiry of the order or finding in respect of the goods referred to in that subsection is likely to result in injury or retardation.

(11) For the purpose of subsection (10), the Tribunal shall make an assessment of the cumulative effect of the dumping or subsidizing of goods to which the determination of the President described in subsection (9) applies that are imported into Canada from more than one country if the Tribunal is satisfied that an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the order or finding applies that are imported into Canada from any of those countries and

(a) goods to which the order or finding applies that are imported into Canada from any other of those countries; or

(b) like goods of domestic producers.

(12) The Tribunal shall make an order

[…]

(9) Dans le cas contraire, le président fournit sans délai au Tribunal tous les renseignements et pièces qu'exigent les règles de celui-ci.

(10) Sur décision prise par le président au titre du paragraphe (9), le Tribunal décide si l'expiration de l'ordonnance ou des conclusions à l'égard de ces marchandises causera vraisemblablement un dommage ou un retard.

(11) Pour l'application du paragraphe (10), le Tribunal évalue les effets cumulatifs du dumping ou du subventionnement des marchandises importées au Canada en provenance de plus d'un pays et visées par la décision prise par le président au titre du paragraphe (9), s'il est convaincu qu'une telle évaluation est indiquée, compte tenu des conditions de concurrence entre les marchandises visées par l'ordonnance ou les conclusions et importées au Canada d'un de ces pays, et :

a) soit celles visées par l'ordonnance ou les conclusions et importées au Canada en provenance d'un autre de ces pays;

b) soit celles similaires des producteurs nationaux.

(12) Le Tribunal rend une ordonnance

	en vue :
(a) rescinding the order or finding in respect of goods (i) referred to in subsection (8), or (ii) in respect of which it determines that the expiry of the order or finding is unlikely to result in injury or retardation; or	a) soit d'annuler l'ordonnance ou les conclusions à l'égard des marchandises visées au paragraphe (8) ou de celles pour lesquelles l'expiration de l'ordonnance ou des conclusions ne causera vraisemblablement pas de dommage ou de retard;
(b) continuing the order or finding, with or without amendment, in respect of goods which it determines that the expiry of the order or finding is likely to result in injury or retardation.	b) soit de proroger l'ordonnance ou les conclusions avec ou sans modifications à l'égard des marchandises pour lesquelles l'expiration de l'ordonnance ou des conclusions causera vraisemblablement un dommage ou un retard.

Special Import Measures Regulations
Section 37.2(2) of the *Regulations* lists the factors the Tribunal may consider in an expiry review:

(2) In making a determination under subsection 76.03(10) of the Act, the Tribunal may consider	(2) Pour prendre la décision visée au paragraphe 76.03(10) de la Loi, le Tribunal peut prendre en compte les facteurs suivants :
(a) the likely volume of the dumped or subsidized goods if the order or finding is allowed to expire, and, in particular, whether there is likely to be a significant increase in the volume of imports of the dumped or subsidized goods, either in absolute terms or relative to the production or consumption of like goods;	a) le volume probable des marchandises sous-évaluées ou subventionnées advenant l'expiration de l'ordonnance ou des conclusions, et tout particulièrement le fait qu'une augmentation importante du volume des importations des marchandises sous-évaluées ou subventionnées, soit en quantité absolue, soit par rapport à la production ou à la consommation de marchandises similaires, est vraisemblable ou non;
(b) the likely prices of the dumped or subsidized goods if the order or finding is allowed to expire and their effect on the prices of like goods, and,	b) les prix probables des marchandises sous-évaluées ou subventionnées advenant l'expiration de l'ordonnance ou des conclusions et leur incidence

in particular, whether the dumping or subsidizing of goods is likely to significantly undercut the prices of like goods, depress those prices, or suppress them by preventing increases in those prices that would likely have otherwise occurred;

sur les prix de marchandises similaires, et tout particulièrement le fait que le dumping ou le subventionnement entraînera vraisemblablement ou non, de façon marquée, soit la sous-cotation des prix des marchandises similaires, soit la baisse de ces prix, soit la compression de ceux-ci en empêchant les augmentations de prix qui autrement se seraient vraisemblablement produites pour ces marchandises;

(c) the likely performance of the domestic industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits;

c) le rendement probable de la branche de production nationale, compte tenu de son rendement récent, y compris les tendances de la production, de l'utilisation de la capacité, des niveaux d'emploi, des prix, des ventes, des stocks, de la part de marché, des exportations et des bénéfices;

(d) the likely performance of the foreign industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits;

d) le rendement probable de la branche de production étrangère, compte tenu de son rendement récent, y compris les tendances de la production, de l'utilisation de la capacité, des niveaux d'emploi, des prix, des ventes, des stocks, de la part de marché, des exportations et des bénéfices;

(e) the likely impact of the dumped or subsidized goods on domestic industry if the order or finding is allowed to expire, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital;

e) l'incidence probable des marchandises sous-évaluées ou subventionnées sur la branche de production nationale advenant l'expiration de l'ordonnance ou des conclusions, eu égard à l'ensemble des facteurs et indices économiques pertinents, y compris tout déclin potentiel de la production, des ventes, de la part de marché, des bénéfices, de la productivité, du rendement du capital investi ou de l'utilisation de la capacité de la production, ainsi que toute incidence négative potentielle sur les liquidités, les stocks, les

emplois, les salaires, la croissance ou la capacité de financement;

(f) the potential for the foreign producers to produce the goods in facilities that are currently used to produce other goods;

f) la possibilité pour les producteurs étrangers de produire les marchandises dans des installations servant actuellement à la production d'autres marchandises;

(g) the potential negative effects of the dumped or subsidized goods on existing development and production efforts, including efforts to produce a derivative or more advanced version of like goods;

g) l'incidence négative potentielle des marchandises sous-évaluées ou subventionnées sur les efforts déployés pour le développement et la production, y compris ceux déployés pour produire une version modifiée ou améliorée de marchandises similaires;

(h) evidence of the imposition of anti-dumping or countervailing measures by the authorities in a country other than Canada in respect of goods of the same description or in respect of similar goods;

h) la preuve de l'imposition de mesures antidumping ou compensatoires par les autorités d'un pays autre que le Canada sur des marchandises de même description ou des marchandises semblables;

(i) whether measures taken by the authorities in a country other than Canada are likely to cause a diversion of the dumped or subsidized goods into Canada;

i) le fait que les mesures prises par les autorités d'un pays autre que le Canada causeront vraisemblablement ou non une réaffectation au Canada des marchandises sous-évaluées ou subventionnées;

(j) any changes in market conditions domestically or internationally, including changes in the supply of and demand for the goods, as well as any changes in trends and in sources of imports into Canada; and

j) tout changement des conditions du marché à l'échelle nationale et internationale, y compris les variations de l'offre et de la demande des marchandises, ainsi que tout changement des tendances et des sources des importations au Canada;

(k) any other factor pertaining to the current or likely behaviour or state of the domestic or international economy, market for goods or industry as a whole or in relation to individual producers, exporters, brokers or traders.

k) tout autre facteur relatif au comportement ou à l'état actuel ou probable, à l'échelle nationale ou internationale, de l'économie, du marché des marchandises ou de la branche de production dans son ensemble ou à l'égard d'un producteur, d'un exportateur, d'un

courtier ou d'un négociant en particulier.

Canadian International Trade Tribunal Rules

Section 20(1) authorizes the Tribunal to issue subpoenas by its own initiative or at the request of a party:

20. (1) The Tribunal may, on its own initiative or at the request of any party, summon before it by subpoena any person to attend a hearing and require that person to give evidence on oath or affirmation and to produce documents or other things.	**20.** (1) Le Tribunal peut, de son propre chef ou à la demande d'une partie, assigner une personne à comparaître à une audience et requérir qu'elle dépose sous serment ou affirmation solennelle et produise des documents ou autres objets.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPLICATION FOR A JUDICIAL REVIEW OF THE DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED DECEMBER 9, 2013, INQUIRY NO. NQ-2008-002.

DOCKET:	A-42-14
STYLE OF CAUSE:	CANADIAN TIRE CORPORATION, LIMITED v. KOOLATRON CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 1, 2015
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GAUTHIER J.A.
CONCURRING REASONS BY:	WEBB J.A.
DATED:	JANUARY 8, 2016

APPEARANCES:

Riyaz Dattu Sonja Pavic	FOR THE APPLICANT
Jayson W. Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Toronto, Ontario	FOR THE APPLICANT
Thomas Law P.C. Toronto, Ontario	FOR THE RESPONDENT