

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170829

Docket: A-186-15

Citation: 2017 FCA 173

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

BETWEEN:

**PRUDENTIAL STEEL ULC and
ALGOMA TUBES INC.**

Applicants

and

**BORUSAN MANNESMANN BORU SANAYI VE TICARET
A.S., CHUNG HUNG STEEL CORPORATION, ENERGEX
TUBE, EVRAZ INC. NA CANADA, GVN FUELS
LIMITED/MAHARASHTRA SEAMLESS LTD., HLD
CLARK STEEL PIPE CO., INC., HYUNDAI HYSKO CO.,
LTD., IMCO INTERNATIONAL INC., JINDAL SAW
LIMITED, PANMERIDIAN TUBULAR (USA), SEAH STEEL
CORPORATION, TENSION STEEL INDUSTRIES CO.,
LTD., THAI OIL PIPE CO., LTD., WELDED TUBE OF
CANADA CORP. and the ATTORNEY GENERAL OF
CANADA**

Respondents

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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REASONS FOR JUDGMENT

WEBB J.A.

[1] Prudential Steel ULC and Algoma Tubes Inc. 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 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] Prudential Steel ULC and Algoma Tubes Inc. are Canadian producers of oil country tubular goods. They are in the unusual position of being the applicants in this judicial review related to the Final Determination and also the respondents in relation to the judicial review application of SeAH Steel Corporation in relation to the Final Determination (A-178-15, 2017 FCA 172). The applications were consolidated by an Order dated April 13, 2016.

[3] Although these applications were consolidated separate reasons will be issued for each application as the arguments and the parties are different with Prudential Steel ULC and Algoma Tubes Inc. being applicants in this application and respondents in the other application.

[4] Prudential Steel ULC and Algoma Tubes Inc., in their application for judicial review, state that the application is for judicial review of the Final Determination “published March 3, 2015” and that the “Application is being brought pursuant to section 96.1 (a) [*sic*] of the *Special Import Measures Act*”. Presumably the reference to section 96.1 (a) of SIMA should be to paragraph 96.1(1)(a) of SIMA.

[5] While Prudential Steel ULC and Algoma Tubes Inc. clearly state in their application for judicial review and in the first and last paragraphs of their memorandum of fact and law that this

application is related to the final determination dated March 3, 2015 a copy of the decision dated March 3, 2015 was not included by these parties in their application record. Instead Prudential Steel ULC and Algoma Tubes Inc. included the statement of reasons dated two weeks later on March 18, 2015. It is also clear from their memorandum of fact and law that the issue that is raised in this application for judicial review relates to one paragraph of the statement of reasons – paragraph 45:

[45] Generally, where a green tube undergoes full heat-treatment such that the pipe is upgraded to a higher strength casing or tubing and is end-finished and tested to API specifications in a given country, the CBSA will determine the product to be originating in that country for SIMA purposes.

I. Issue

[6] The first issue that must be determined in relation to this judicial review application is whether or not this Court has the jurisdiction to hear this matter.

II. Analysis

[7] This Court is a statutory court and derives its jurisdiction from the *Federal Courts Act*, R.S.C. 1985, c. F-7, and any other applicable statute. This Court only has the jurisdiction granted to it by statute (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33). Although the Supreme Court of Canada in *Windsor* was referring to the Federal Court, the comments would be equally applicable to this Court which was created by the same statute.

[8] Subsection 28 (1) of the *Federal Courts Act* grants this Court the jurisdiction to hear and determine applications for judicial review made in respect of several federal boards, commissions or other tribunals that are listed in paragraphs (a) to (r), inclusive, of subsection 28(1). However, the President of the CBSA is not included in this list and, therefore, no jurisdiction is granted under subsection 28(1) of the *Federal Courts Act* to hear this application for judicial review.

[9] If this Court is to have jurisdiction to hear and determine this application for judicial review, the jurisdiction must be found elsewhere. In their notice of application for judicial review Prudential Steel ULC and Algoma Tubes Inc. state that this application is being made pursuant to paragraph 96.1 (1) (a) of SIMA. This paragraph provides as follows:

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

(a) a final determination of the President under paragraph 41(1)(a);

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) la décision définitive rendue par le président au titre de l'alinéa 41(1)a);

[10] The jurisdiction that has been granted to this Court under this paragraph is narrow. Jurisdiction is only granted on applications to “review and set aside” a final determination of the President under paragraph 41(1)(a) of SIMA (*Franke Kindred Canada Ltd. v. Gacor Kitchenware (Ningbo) Co. Ltd., et al.*, 2012 FCA 316, [2012] F.C.J. No. 1525).

[11] Paragraph 41(1)(a) of SIMA 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

(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

(i) the goods have been dumped or subsidized, and

(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,

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 follows:

(iii) in the case of dumped goods, specifying the goods to which the determination applies and the margin of dumping of the goods, and

(iv) in the case of subsidized goods,

(A) specifying the goods to which the determination applies,

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) si, au vu des éléments de preuve disponibles, il est convaincu, au sujet des marchandises visées par l'enquête, des faits suivants :

(i) les marchandises ont été sous-évaluées ou subventionnées,

(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,

rend une décision définitive de dumping ou de subventionnement après avoir précisé, pour chacun des exportateurs — visés par l'enquête — des marchandises d'un ou de plusieurs de ces pays :

(iii) dans le cas de marchandises sous-évaluées, les marchandises objet de la décision et leur marge de dumping,

(iv) dans le cas de marchandises subventionnées :

(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)

[12] The determination that is made under this paragraph 41(1)(a) of SIMA is a determination that the goods of a certain country have been dumped. The impugned paragraph of the reasons is not a determination of whether certain goods have been dumped but rather is a general opinion in relation to the determination of the country of origin of certain goods that have been heat-treated and end-finished in another country. There is nothing to suggest, nor do Prudential Steel ULC and Algoma Tubes Inc. suggest, that if this paragraph were to be deleted or changed it could or would affect the Final Determination.

[13] The only remedies that Prudential Steel ULC and Algoma Tubes Inc. seek in relation to the Final Determination in their notice of application are:

- a) An Order declaring that in making the Determination, the CBSA breached the rules of procedural fairness, and/or erred in jurisdiction, in law and/or on issues of mixed fact and law;
- b) An Order referring the Determination back to the CBSA with directions as required by the Court's findings in respect of these submissions [...]

[14] In their memorandum of fact and law Prudential Steel ULC and Algoma Tubes Inc. modified their request for a remedy and indicate that they are seeking the following order:

84. The Applicants respectfully request that this Honourable Court remand the Decision of the CBSA dated March 3, 2015,

- (i) with instructions to apply subsection 30(2) of *SIMA* to all subject goods originating in or exported from a country subject of the CBSA investigation, regardless whether they have been further processed by heat-treatment in a non-subject country [...]

[15] The remedies that this Court may grant in relation to an application for judicial review

brought under paragraph 96.1(1)(a) of *SIMA* are set out in subsection 96.1(6) of *SIMA*:

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

(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.

[16] The remedies that this Court may grant are consistent with the right granted to this Court to hear and determine applications for judicial review under paragraph 96.1(1)(a) of *SIMA*. This Court can only dismiss the application or set aside the Final Determination. If the Final Determination is set aside this Court can refer the matter back to the President with directions but only if the Final Determination is set aside. There is no authority granted to this Court to “remand” a final determination to address comments made in the reasons that would not impact the Final Determination but which may impact the determination of the country of origin of certain goods.

[17] As a result this Court does not have the jurisdiction to address the judicial review application brought by Prudential Steel ULC and Algoma Tubes Inc. and I would dismiss this application 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 A FINAL DETERMINATION OF
DUMPING ON CERTAIN OIL COUNTRY TUBULAR GOODS BY THE
PRESIDENT OF THE CANADA BORDER SERVICES AGENCY, CASE NO.
AD/1404, FILE NO. 4214-43, MARCH 3, 2015**

DOCKET: A-186-15
STYLE OF CAUSE: SEAH STEEL CORPORATION v.
EVRAZ INC. NA CANADA, et al
PLACE OF HEARING: OTTAWA, ONTARIO
DATE OF HEARING: JANUARY 24, 2017
REASONS FOR JUDGMENT BY: WEBB J.A.
CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.
DATED: AUGUST 29, 2017

APPEARANCES:

Geoffrey C. Kubrick FOR THE APPLICANTS

Christopher McLeod FOR THE RESPONDENT
Andrew M. Lanouette EVRAZ INC. NA CANADA

Golsa Ghamari FOR THE RESPONDENT
JINDAL SAW LIMITED

Vincent Routhier FOR THE RESPONDENT
SEAH STEEL CORPORATION

Andrew Gibbs FOR THE RESPONDENT
Sanam Goudarzi THE ATTORNEY GENERAL OF
CANADA

SOLICITORS OF RECORD:

McMillan LLP
Ottawa, Ontario

Bazan Law
Toronto, Ontario

Cassidy Levy Kent (Canada) LLP
Ottawa, Ontario

Golsa Ghamari Professional Corporation
Ottawa, Ontario

DS Lawyers Canada LLP
Montreal, Quebec

Nathalie G. Drouin
Deputy Attorney General of Canada

FOR THE APPLICANTS

FOR THE RESPONDENTS
BORUSAN MANNESMANN
BORU SANAYI VE TICARET A.S.
AND IMCO INTERNATIONAL
INC.

FOR THE RESPONDENT
EVRAZ INC. NA CANADA

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THE ATTORNEY GENERAL OF
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