Federal Court of Appeal | Cour d'appel fédérale

Date: 20150702

Dockets: A-189-14
A-195-14

Citation: 2015 FCA 157

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

Docket: A-189-14

BETWEEN:

ABB INC. and
CG POWER SYSTEMS CANADA INC.

Applicants

and

HYUNDAI HEAVY INDUSTRIES CO., LTD., HYUNDAI CANADA INC., HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC., REMINGTON SALES CO. and ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-195-14

AND BETWEEN:

HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CANADA INC.

Applicants

and

ABB INC., CG POWER SYSTEMS CANADA INC., REMINGTON SALES CO., HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC., and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on June 23, 2015.

Judgment delivered at Ottawa, Ontario, on July 2, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RYER J.A.
NEAR J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150702

Dockets: A-189-14
A-195-14

Citation: 2015 FCA 157

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

Docket:A-189-14

BETWEEN:

ABB INC. and
CG POWER SYSTEMS CANADA INC.

Applicants

and

HYUNDAI HEAVY INDUSTRIES CO., LTD., HYUNDAI CANADA INC., HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC., and REMINGTON SALES CO. and ATTORNEY GENERAL OF CANADA

Respondents

Docket:A-195-14

AND BETWEEN:

HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CANADA INC.

Applicants

and

ABB INC., CG POWER SYSTEMS CANADA INC., REMINGTON SALES CO., HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC., and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] On March 6, 2014, the President of the Canada Border Services Agency (CBSA) made a final determination of dumping under paragraph 41(1)(*a*) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 [SIMA] in relation to certain power transformers imported from the Republic of Korea.

[2] This was the second time the President had to make such a determination in respect of the relevant power transformers. The first decision, dated October 22, 2012, was the subject of an application for judicial review by Hyundai Heavy Industries Co., Ltd (HHI) and Hyundai Canada Inc. (HC). In the result, this Court set aside this first Final Determination (FD) and referred the matter back to the President for redetermination in accordance with this Court's reasons: *Hyundai Heavy Industries Co., Ltd v. ABB Inc.*, 2013 FCA 284 [*HHI v. ABB*].

[3] The primary issue before our Court in *HHI v. ABB* was the amount of profit that the President used in determining the export price of the power transformers for the purposes of section 25 of SIMA. More particularly, the Applicants contested his inclusion of profit data from ABB Inc. (ABB) and CG Power Systems Canada Inc. (CG) in this calculation on the basis that these parties were manufacturers and, as such, were not at the same or substantially the same level of trade as HC.

[4] Two applications for judicial review were filed in respect of the President's March 6, 2014 redetermination, the New Final Determination of dumping (NFD): ABB and CG filed an application in A-189-14, and HHI and HC filed an application in A-195-14. The applications were heard consecutively.

[5] As the applications involve the same administrative record and concern related issues, I will deal with both of them in these reasons, a copy of which shall be placed in each file (A-189-14 and A-195-14).

[6] For the following reasons, I propose to dismiss both applications.

I. Background

[7] ABB and CG manufacture power transformers in Canada. ABB also sells power transformers that it imports from an associated foreign company. On March 2, 2012, ABB and CG jointly brought a complaint alleging that "Power Transformers originating in or exported from Korea are being dumped into Canada, and have caused and are threatening to cause

material injury to the production in Canada of Like Goods" (A-195-14, A.R. Vol 1, Tab 6, p. 100).

[8] As noted earlier, following an investigation, on October 22, 2012, the President made an affirmative final determination of dumping under paragraph 41(1)(*a*) of SIMA, concluding that HHI's goods had been dumped at a margin of 15.5% (expressed as a percentage of the export price).

[9] On November 20, 2012, the Canadian International Trade Tribunal (CITT) issued a finding under subsection 43(1) of SIMA that this dumping was causing material injury to the Canadian domestic industry.

[10] After this Court set aside the FD in *HHI v. ABB*, the President reopened the investigation and issued the decision under review. In the NFD, the President found that HHI's goods had been dumped at a margin of 9.1% (expressed as a percentage of the export price).

[11] At paragraph 3 of *HHI v. ABB*, this Court explained what constitutes dumping:

> [3] 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.

[12] In this case, the normal value of the goods was determined pursuant to subsection 19(*b*) of SIMA. This value is based on an aggregate of the costs of production, a reasonable amount of

administrative, selling, and other costs, and a reasonable amount for profit. None of the Applicants took issue with the normal value used by the President (nor did they in *HHI v. ABB*). Rather, it is the export price of the goods that is at issue.

[13] In both applications, the parties argue that the President erred in his calculation of the export price using the deductive method set out in section 25 of SIMA. It is therefore worthwhile to define the term "deductive export price" and outline its calculation.

[14] When, as here, the relevant transactions involve an importer affiliated with the exporter and the export price – normally calculated under section 24 of SIMA – is deemed "unreliable" under paragraph 25(1)(*b*) of SIMA, the margin of dumping will be calculated using a deductive export price pursuant to paragraph 25(1)(*c*), (*d*), or (*e*). In this case, the President used paragraph 25(1)(*d*) of SIMA, which applies to goods which are imported for the purpose of assembly, packaging or other further manufacture or for incorporation into other goods in Canada. The parties do not dispute that it was appropriate to do so.

[15] Pursuant to paragraph 25(1)(*d*), the deductive export price is the price of the goods as assembled, packaged or otherwise further manufactured, or of the goods into which the imported goods have been incorporated, less all costs incurred in preparing, shipping, exporting and re-selling the goods to Canada including duties, and, as stipulated at subparagraph 25(1)(*d*)(i), an amount for profit on the sale of the assembled, packaged or otherwise further manufactured goods.

[16] Sections 21 and 22 of the *Special Import Measures Regulations*, SOR/84-927 [SIMR] deal with how to calculate profit for the purpose of subparagraph 25(1)(*d*)(i). Section 21 provides that the expression "an amount for profit" means "the amount of profit that would be made in the ordinary course of trade on the sale of the goods". Subsection 22(*a*), which was applied by the President in the present case, provides that this amount is "the amount of profit that generally results from sales of like goods in Canada by vendors who are at the same or substantially the same trade level" (in French: « au même niveau ou presque du circuit de distribution ») as the importer to arm's length purchasers in Canada; otherwise put, the average profit margin on sales in Canada by such vendors.

[17] In application A-195-14, HHI and HC ask this Court to set aside the President's NFD and direct that a new margin of dumping be calculated on the basis of the existing administrative record (with no further investigation) and on the basis that the "the same or substantially the same trade level" excludes ABB and CG's profit data as Canadian manufacturers of like goods.

[18] In application A-189-14, ABB and CG ask this Court to set aside the President's NFD and direct that a new margin of dumping be calculated based on a deductive export price from which the profit data of HC and HICO America Sales and Technology Inc. [HICO] is excluded, as both are associated with the Korean manufacturer from which they import goods (HICO imports goods from a Korean exporter also found to have dumped power transformers under paragraph 41(1)(*a*) of SIMA in the NFD).

[19] This means that if both applications were allowed, the President would have insufficient data from which to calculate the amount of profit under subparagraph 25(1)(*d*)(i) and therefore have to proceed on the basis of section 29 of SIMA. This section allows the amount for profit to be determined in the manner specified by the Minister.

[20] That said, I will now proceed to examine the issues raised in each application.

II. A-195-14

[21] In their written submissions, HHI and HC allege three grounds of review:

i. That the President failed to comply with this Court's directions in *HHI v. ABB*;

ii. That the President's decision was substantively unreasonable due to other errors in the NFD (see paras. 55-71 of HHI and HC's memorandum); and

iii. That the President breached procedural fairness by ignoring obviously crucial evidence and by demonstrating a reasonable apprehension of bias.

[22] At the hearing, HHI and HC confirmed that they would only be relying on their allegations regarding non-compliance with directions and bias, which they addressed during their oral arguments. I will therefore only deal with those issues.

[23] The parties agree that the President is entitled to deference in respect of questions of mixed fact and law, and generally on questions involving the interpretation of its home statute (SIMA) and the regulations adopted thereunder (SIMR).

[24] I agree that reasonableness applies to questions of mixed fact and law and presumptively applies to questions of law involving the interpretation of the decision-maker's home statute, unless the relevant question falls into one of the categories to which correctness continues to apply: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 54-61; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 30 and 34; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 50. None of these exceptions are relevant here.

[25] The determination of whether, in the context of a particular investigation, particular vendors fall within the same or substantially the same trade level as an importer is a question of mixed fact and law. Even if the interpretation of the words "same or substantially the same trade level" could be considered an extricable question of law, it would fall squarely within the President's expertise in interpreting the SIMA and SIMR.

[26] However, HHI and HC argue that in this case, the correctness standard somehow applies because, as a matter of law, the President was bound to do what he was directed to do by this Court in *HHI v. ABB*.

[27] There is no doubt that in cases where the directions given by the Court are directions as to a question of law, the decision-maker is bound by *stare decisis* to apply the law as found by the Court. On the other hand, when the matter on which the Court directs the decision-maker is one of mixed fact and law, the fact that directions are given cannot modify the standard of review

applicable to such questions if the decision-maker otherwise did what it was directed to do by the Court. This is especially so here, where a new investigation was carried out and the NFD was made on the basis of a different record containing additional profit data.

A. *Compliance with this Court's directions*

[28] HHI and HC submit that the President erred by failing to follow this Court's instructions in *HHI v. ABB*, for the following reasons:

i. He simply re-applied the rationale rejected by this Court, finding that ABB, CG, HC and HICO were at the same level of trade based on their similar selling functions;

ii. He failed to consider the double counting of manufacturing profits in determining whether ABB and CG were at the same level of trade as HC and HHI; and

iii. He failed to exclude ABB and CG's profits in calculating the applicable average profit margin after determining that no adjustment to account for their manufacturing profit was possible under SIMA or SIMR.

[29] In *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C. 529 [*Superior*], this Court adopted a five-step analytical approach to determine whether the decision-maker, in its redetermination decision, had followed the directions of the Court (*Superior* at para. 10). In the prior decision, the Court concluded that the Competition Tribunal had erred in law in its interpretation of section 96 of the *Competition Act*, R.S.C.1985, c. C-34 (*Superior* at paras. 16 and 18) and provided the Competition Tribunal detailed and

somewhat complex instructions as to how to proceed on redetermination. The matter before us is simpler. I will therefore focus on our Court's conclusions and directions and what the President did as a result of those directions.

(1) The Court's conclusions and directions

[30] In the FD, the President gave no explanation for using the profit data of two Canadian manufacturers (ABB and CG), save for two sentences in Appendix 2 of the decision (see para. 12 of *HHI v. ABB*). The Court noted these were essentially excerpted from a passage in the SIMA Handbook.

[31] It is worth reproducing the full passage of the SIMA Handbook quoted by the Court at paragraph 13 of *HHI v. ABB*, for it provides context for the Court's findings:

> Trade Level
>
> In considering the terms "same" or "substantially the same trade level" a firm should not arbitrarily be dismissed from the data base simply because of its designation, i.e. distributor or manufacturer. Rather, care should be taken to examine the functions performed in that industry, particularly those relating to sales and distribution. In most industries, it would be appropriate to utilize data from both manufacturers and importers in that their sales and distribution functions will likely have significant similarities. It is recognized that, in some cases, it may be reasonable for firms at different trade levels to anticipate different profit levels. For instance, a manufacturer who performs its own distribution function, (as opposed to a distributor who purchases from the manufacturer and then resells the goods), could reasonably expect a larger profit margin than a distributor since part of the profit could reasonably be attributed to the manufacturing operation.
>
> Nevertheless, it may still be appropriate to include such a manufacturer and hold that the manufacturer is at substantially the same trade level as a distributor/importer based on the actual functions performed. Companies in Canada are generally considered to be at "substantially the same trade level" when they sell to the same customers and compete directly in the marketplace for

> the same customers. In any case where the above trade level considerations exist, the file should clearly explain the rationale for the decision.
>
> [Emphasis added]

[32] The reasons of this Court in *HHI v. ABB* are, in my view, very much in line with the Handbook, which reflects the approach that has been followed by the CBSA for many years.

[33] The Court set aside the FD because the President had not sufficiently explained why, in this particular case, it would be appropriate to include the two Canadian manufacturers who submitted the complaint in determining the amount of profit of the importer-distributor for which the export price is being determined.

[34] The cursory reference to the fact that these manufacturers sold to the same end-users was found to be insufficient.

[35] As I read *HHI v. ABB*, it was not clear from the record before the Court that care had been taken in determining whether the amount for profit of a company that both manufactures and sells to end-users should be used to determine the amount for profit of a company that only imports and sells to end-users (see para. 17 of *HHI v. ABB*).

[36] The Court also mentions that there was no indication that ABB and CG's profit data had been adjusted to account for the profits attributable to their manufacturing function, nor was any rationale offered for the absence of such an adjustment (see para. 20 of *HHI v. ABB*). Further explanation was required, because on the particular facts before the Court (see para. 22 of *HHI v.*

ABB) it was necessary for the President to at least consider the issue of double-counting manufacturing profits (see para. 21 of *HHI v. ABB*).

[37] However, there is no indication in *HHI v. ABB* as to whether the Court was asked to determine if indeed the statutory scheme allowed for any adjustment to the profit data provided by a party (see para. 20 of *HHI v. ABB*). The Court did not consider what should be done if no adjustment could be made.

[38] The Court therefore directed the President to take care in determining whether or not Canadian manufacturers were at substantially the same level of trade as the subject importer-distributor, and if so, to provide a further explanation in support of this conclusion, given the potential issues identified by the Court.

[39] I do not agree with HHI and HC that this Court directed a specific result in any respect, considering that the President had to re-open the investigation and make a new final determination on the basis of evidence that was different than what was before the Court.

(2) Did the President comply with the Court's directions?

[40] Having carefully examined the record, including the confidential memoranda to which the parties referred, the submissions of the parties to the President, and the NFD itself, I am satisfied that care was indeed taken in determining whether it was appropriate for the President to use the profit data of the Canadian manufacturers in accordance with paragraph 17 of the *HHI v. ABB*.

[41] It is evident that the President found the fact that both Canadian manufacturers were distributing their product themselves to the same end-users as the importer-distributor to be an important consideration. In my view, he could not avoid placing importance on this consideration given the wording of section 22 of SIMR itself, which focuses on the level of trade (in French: « le niveau du circuit de distribution »), i.e. to whom one is selling.

[42] I do not agree with HHI and HC that the President failed to provide the further explanation required by the Court as to why, in this particular case and in the circumstances following the reinvestigation, it was appropriate to include this data.

[43] At paragraphs 78 to 89 of the NFD (and further discussed at pages 25 – 30 of Appendix 2 to the NFD), the President explains, among other things: i) that the power transformer industry in Canada is unique; ii) that the relevant power transformers are capital goods that are acquired through a procurement process by electrical utilities and large industrial customers; iii) that the nature of the power transformers industry is such that there are no independent distributors of large power transformers like those under investigation; iv) that manufacturers do not produce such transformers unless a sale is made (e.g., manufacturers and distributors hold no inventory); and v) that for end-users/purchasers in Canada, all suppliers of power transformers appear to be at the same trade level, as the suppliers are all fully integrated from design and production to delivery, installation, and warranty work.

[44] With respect to the need to make adjustments to the profit of the two Canadian manufacturers included in the calculations, or to at least provide the rationale as to why no such

adjustments were made, the President explains that SIMR does not provide for an adjustment to account for variance in the level of profit expected by vendors that are otherwise at "substantially the same trade level." In contrast, adjustments are permitted in respect of the normal value and only within the parameters of section 9 of SIMR.

[45] The President also explains why, as a matter of principle, the CBSA could not make an adjustment to the amounts for profit actually reported by ABB and CG on their sales of like goods in Canada (para. 87 of the NFD).

[46] The President did consider the allegation of double-counting: see p. 28 of Appendix 2 to the NFD, where he again notes the distinction between the concepts of normal value and export price and the absence of provisions that deal with trade-level variations in respect of the latter.

[47] Finally, the President explains that it is the additional data collected in the second investigation that reduced the amount of profit used to calculate the deductive export price (8.69% as opposed to 12.55%, see para. 89 of the NFD). In fact, it is clear from the record that the additional data upon which the President relied in the NFD materially changed the facts described in paragraph 22 of *HHI v. ABB*.

[48] I also note that the confidential information to which the parties referred during the hearing before us suggests that in this particular industry, the general assumption that a manufacturer-distributor could expect a larger margin of profit than an importer-distributor may not apply. In addition to the wide disparity in the profit margins of the Canadian manufacturers

at issue, the record before us indicates that, in some cases, the profit margin of an importer-distributor could exceed that of a manufacturer-distributor (A-195-14, A.R. Vol 3, Tab 1 at p. 553; A-195-14 Confidential Compendium of the Respondents, Tab 2D).

[49] I am satisfied that the President complied with the Court's directions in *HHI v. ABB*. The President did not just pay lip service to the directions of the Court, nor did he defy its directions (*Superior* at para. 59). I have not been persuaded that, on the record before us and considering the further explanations given by the President, that his trade level determination is unreasonable because he failed to take into account the Court's directions. In fact, considering all of the profit data he used, it appears to me that his methodology smoothed the outliers in the calculation, reaching an outcome that is justifiable on the facts and the law.

B. *Bias*

[50] HHI and HC assert that there is a reasonable apprehension of bias on the part of the President in this file. This is a new issue. It could not have been raised before the President given that it is based on some of his findings in the NFD, as well as comments in some confidential documentation provided to the Applicants thereafter. The Court must thus assess whether there was indeed a breach of procedural fairness that would justify its intervention.

[51] There is no dispute as to the applicable test to determine whether a reasonable apprehension of bias exists. It is whether a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not

decide fairly: *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para. 111 [*S.(R.D.)*]; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para 46.

[52] The Applicants first argue that the President's refusal to follow the Court's directions in *HHI v. ABB*, including his failure to take into account the issue of double-counting of manufacturing profits, evince a closed mind and raises a reasonable apprehension of bias (paras. 86, 97 and 98 of HHI and HC's memorandum, A-195-14 A.R., Vol. 8).

[53] Also, according to HHI and HC, bias is evident from the President's assertion at paragraph 80 of the NFD that the objective of section 22 is to ensure that "the associated importer is earning an amount for profit that is representative of the amount for profit earned in the Canadian market in order to eliminate possible secondary dumping and its injurious effects on Canadian producers." The Applicants note that only the CITT can determine whether or not particular dumping is causing injury to domestic producers (see paragraph 9 above), and that dumping does not necessarily cause injury to domestic producers (paras. 87-90 of HHI and HC's memorandum, A-195-14 A.R., Vol. 8).

[54] HHI and HC also rely on two confidential memoranda which, according to them, further indicate bias. The first is a memorandum sent from the Assistant Director General of the Anti-dumping and Countervailing Directorate of the CBSA to the CBSA's Vice President. Under the heading "Environmental Scan", the Assistant Director makes comments on the expected public reaction to the NFD. The Applicants allege that these comments support the conclusion that the President sought to unlawfully benefit the domestic industry. HHI and HC further submit that

another passage in this memo shows the President's eagerness to defend the NFD – an improperly adversarial attitude (*Canada (Attorney General) v. Quadrini*, 2010 FCA 246 at para. 16; *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at p. 709). Finally, HHI and HC argue that bias is evident from the confidential memorandum by the Assistant Manager of the Anti-dumping and Countervailing Directorate summarising this Court's decision in *HHI v. ABB*.

[55] The onus of establishing a reasonable apprehension of bias lies with the person who alleges it, and the threshold for perceived bias is high (*S.(R.D.)* at paras. 113-14).

[56] Considering that I am satisfied that the President followed the Court's directions and that I have not been persuaded that his determination in respect of the trade level is unreasonable in light of *HHI v. ABB*, it is clear that the main allegations upon which HHI and HC rely cannot support a conclusion of reasonable apprehension of bias.

[57] None of the other allegations described above meet the high threshold described above. Each is premised on a selective and acontextual reading of the relevant documents and draws improper inferences from these documents.

C. *Conclusion*

[58] In light of the foregoing, in my view, this application should be dismissed with costs.

III. A-189-14

[59] ABB and CG raise two grounds of review. First, they allege that the President erred in his calculation of the deductive export price by using the profit data of HC and HICO. Second, they allege that the President erred in failing to find targeted dumping. Both issues involve questions of mixed fact and law and are subject to the standard of reasonableness. Here again, even if the interpretation of section 22 of SIMR could be considered an extricable question of law, it is not disputed that this would also be reviewed on the reasonableness standard.

[60] As a preliminary argument, HHI and HC assert that ABB and CG are barred by *issue estoppel* and *stare decisis* from raising the arguments listed above because *HHI v. ABB* is a prior, final judicial decision involving the same issues and ABB and CG failed to contest the FD on the bases they now raise.

[61] Although this preliminary argument was discussed at length at the hearing, and such considerations are indeed important to avoid a series of judicial reviews dealing with arguments that should have been raised at the earliest opportunity, I do not find it appropriate to decide this application on the basis of a finality doctrine, as it is clear that in any event neither of the applicants' arguments can succeed on the merits. Indeed, I agree with HHI and HC that ABB and CG have not shown that the President made a reviewable error in rejecting their arguments on those issues.

A. *Calculation of the deductive export price*

[62] Having relied heavily on the SIMA Handbook in the context of file A-195-14 in support of the President's inclusion of their profits in his calculation of the deductive export price, ABB and CG candidly acknowledged that their argument in this application, as described in their memorandum, runs very clearly against the practice followed for many years by the CBSA and described in the SIMA Handbook at section 5.10.2.3. The Handbook expressly indicates that "information from the importer for whom export price is being determined should be included", as well as "information from firms importing from related exporters."

[63] At the hearing, ABB and CG confirmed that they only take issue with the inclusion of HC and HICO's profit data because of the special circumstances here, where the profit data of HC and HICO takes on a greater importance in the overall calculation of the average profit margin of vendors at the same or substantially the same trade level. It is thus a special case where the SIMA Handbook should not be followed. They note that this would be especially crucial if this Court were to exclude profit data from ABB and CG as requested in file A-195-14.

[64] ABB and CG say that in such circumstances, the fact that HC and HICO do not have an arm's-length relationship with the exporter (and thus do not purchase goods in the ordinary course of trade) and that the export prices for the goods they imported were deemed unreliable under paragraph 25(1)(*b*), it would contrary to the purpose of section 25 of SIMA to include profit data from these importers through section 22 of SIMR. In fact, according to ABB and CG, this would promote, rather than deter, hidden dumping.

[65] The President refers to this issue at pages 25 to 27 of Appendix 2 to the NFD under the general title "Methodology Used to Determine the Amount for Profit for Purposes of Section 25 Export Price Calculations", where he also deals with HHI and HC's argument that manufacturer-distributor data should not be considered.

[66] Indeed, although based on a different rationale, ABB and CG's argument mirrors the argument by HHI and HC in file A-195-14, instead taking issue with vendors at the opposite end of the spectrum of what could constitute "substantially the same trade level."

[67] In fact, in my view this reinforces the propriety of the methodology set out in SIMA Handbook. The Handbook notes that the amount for profit calculated pursuant to section 22 of SIMR will not be "a precise figure that can be established conclusively", considering that there will be variance in the actual profits of each individual vendor and that the level of profit may fluctuate greatly. Thus, the Handbook suggests that a representative profit is best obtained from as broad a data base as possible, adopting a liberal interpretation of the "same and substantially the same trade level" (A.R. Vol. 1, p. 129). One must also not lose sight of the fact that the President must make his final determination within a very limited time frame. Using this practical approach appears to ensure that the average figure will not favour one party or another.

[68] Although the applicants argue otherwise, in my view, the language of SIMA and SIMR further supports the propriety of the President's methodology. Section 22 of SIMR focuses on the profits made on sales to "purchasers in Canada who are not associated with the vendor." There is no requirement to consider prior transactions. Paragraph 25(1)(*b*) of SIMA deals with

the unreliability of the export price (the price at which HC and HICO purchased their power transformers). Again, this is quite different than the price at which HC and HICO sold their transformers to non-associated Canadian purchasers.

[69] I have not been persuaded that the President's interpretation of section 22 of SIMR and his decision to use the profit data of HC and HICO is unreasonable.

B. *Targeted dumping*

[70] ABB and CG assert that the President's failure to find targeted dumping was unreasonable because he provided either no explanation, or provided an insufficient explanation for declining to apply subsection 30.2(2) of SIMA to determine the margin of dumping when there is evidence targeted dumping, which the applicants submit is the case. I cannot agree.

[71] Targeted dumping occurs when exporters sell goods at below the normal value to a subset of purchasers, regions, or for a subset of time periods. The magnitude of such dumping is therefore disguised by the remaining sales.

[72] The issue of targeted dumping raised in ABB and CG's complaint was re-examined in the course of the reconsideration process. It was noted that the power transformer industry is unique and that this type of power transformer can vary greatly in size and value, and that even within the same size of power transformer there can be significant variations in costs depending on the customer's requirements. After a new targeted dumping analysis was conducted, the CBSA

concluded that there was no evidence of targeted dumping: see the memo summarising this Court's decision in *HHI v. ABB* at A.R. Vol 6, Tab 8O.

[73] The margin of dumping is generally calculated, as it was in this case, under subsection 30.2(1) of SIMA. This subsection provides that subject to subsection 30.2(2), the margin of dumping is the greater of either zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods. Subsection 30.2(2) provides a method by which the President may calculate the margin of dumping in the event of targeted dumping.

[74] The President is not mandated to apply subsection 30.2(2). Rather, he may do so if, in his opinion, significant variations in price exist. This last determination is a highly fact-intensive exercise. Although variations in individual transaction prices were identified, they were not viewed as significant, nor was the President satisfied that they constituted evidence of targeted dumping (see p. 31 of Appendix 2 to the NFD). Subsection 30.2(2) was not engaged.

[75] I agree with HHI and HC that, in fact, what ABB and CG presently ask the Court to do is to reweigh the evidence. That is not this Court's role on the applicable standard of review. This is especially so when one considers that even if some significant variation in price existed, the President may nonetheless have found it more appropriate to calculate the margin of dumping under subsection 30.2(1). I have not been persuaded that the President committed any reviewable errors in failing to find that targeted dumping was present.

C. *Conclusion*

[76] I therefore propose to dismiss this application with costs.

"Johanne Gauthier"

J.A.

“I agree”
Ryer, J.A.

“I agree”
D.G. Near

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF A JUDGMENT OF THE Federal Court of Appeal DATED December 6, 2013, NO. A-487-12

DOCKET:	A-189-14
STYLE OF CAUSE:	ABB INC. and CG POWER SYSTEMS CANADA INC. v. HYUNDAI HEAVY INDUSTRIES CO., LTD., et al
AND DOCKET:	A-195-14
STYLE OF CAUSE:	HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CANADA INC. v. ABB INC. et al
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 23, 2015
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	RYER J.A. NEAR J.A.
DATED:	JULY 2, 2015

APPEARANCES:

Mr. Christopher Kent Mr. Christopher McLeod	FOR THE APPLICANTS ABB Inc. and CG Power Systems Canada Inc.
Mr. Darrel H. Pearson Mr. George W.H. Reid	FOR THE RESPONDENTS Hyundai Heavy Industries Co., Ltd. and Hyundai Canada Inc.
Mr. Andrew Gibbs Mr. Kirk Shannon	FOR THE RESPONDENT Attorney General of Canada

SOLICITORS OF RECORD:

Cassidy Levy Kent (Canada) LLP Ottawa, Ontario	FOR THE APPLICANTS ABB Inc. and CG Power Systems Canada Inc.
Bennett Jones LLP Toronto, Ontario	FOR THE RESPONDENTS Hyundai Heavy Industries Co., Ltd. and Hyundai Canada Inc.
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT Attorney General of Canada