Federal Court of Appeal  Cour d'appel fédérale

Date: 20150316

Docket: A-427-13

Citation: 2015 FCA 72

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

BETWEEN:

RIO TINTO ALCAN INC.

Applicant

and

QUÉBEC SILICON LIMITED PARTNERSHIP, QSIP CANADA ULC, QSIP SALES ULC, ALCOA LTD., ALERIS SPECIFICATION ALLOY PRODUCTS CANADA COMPANY AND UNIFOR

Respondents

Heard at Ottawa, Ontario, on February 24, 2015.

Judgment delivered at Ottawa, Ontario, on March 16, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

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

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REASONS FOR JUDGMENT

RYER J.A.

I. Introduction

[1] This is an application for judicial review by Rio Tinto Alcan Inc. (RTA), pursuant to section 96.1 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (the *SIMA*), challenging a

decision of the Canadian International Trade Tribunal (the Tribunal), dated November 19, 2013 (Inquiry No. NQ-2013-003) and made under subsection 43(1) of the *SIMA*.

[2] The Tribunal determined, pursuant to paragraph 42(1)(*a*) of the *SIMA*, that the dumping and subsidizing of silicon metal of particular specifications and of Chinese origin (the subject goods) have not caused injury but are threatening to cause injury to the domestic industry. The domestic industry was found by the Tribunal to comprise Québec Silicon Limited Partnership (QSLP), QSIP Canada ULC and QSIP Sales ULC (collectively Québec Silicon). As a consequence of this finding, anti-dumping and countervailing duties (the Duties) became payable on the subject goods as of November 20, 2013.

[3] RTA is the largest Canadian importer and end user of the subject goods. Unsatisfied with the Tribunal's decision, it brings this application, in which it asks the Court to set aside the Tribunal's threat of injury finding and substitute a finding of no threat of injury or, alternatively, to remit the matter to the Tribunal for redetermination.

[4] For the reasons that follow, I would dismiss the application.

II. Factual summary

[5] Québec Silicon operates the only facility (the Facility) producing silicon metal in Canada. The Facility is located in Bécancour, Quebec. There were important changes to the ownership and operation of the Facility during the timeframe of the Tribunal's inquiry.

[6] Prior to September 2010, the facility (the Facility) was owned by Bécancour Silicon, Inc. (BSI), a subsidiary of Timminco Limited (Timminco). In August 2010, BSI established QSLP, a limited partnership, and transferred the Facility to it. On October 1, 2010, BSI undertook certain transactions (the Dow Arrangements) whereunder it sold a 49 percent interest in QSLP to a subsidiary of Dow Corning Corporation (Dow) and gave Dow the right to 49 percent of production from the Facility, which Dow then exported to the United States. BSI remained responsible for selling the remaining 51 percent share of QSLP's production.

[7] Around the same time as the Dow Arrangements were made, BSI entered into a long-term export supply arrangement (the Wacker Sales Contract) with a German corporation, Wacker Chemie AG (Wacker).

[8] Québec Silicon and its predecessor, BSI, were export-oriented producers of silicon metal since at least the early 2000s and only a minor proportion of their production was sold in the Canadian market.

[9] In June 2012, in the course of *Companies' Creditors Arrangement Act* proceedings (the *CCAA* Proceedings) resulting from Timminco's financial difficulties at that time, BSI's 51 percent interest in QSLP was purchased by QSIP Canada, which was then a wholly-owned subsidiary of Globe Specialty Metals Inc. (Globe). At that time, Globe was able to renegotiate the Wacker Sales Contract such that the goods to be purchased by Wacker could either be supplied by QSIP Sales, a wholly-owned subsidiary of QSIP Canada, or by Globe out of its United States production.

[10] Unifor is the union representing the employees at the Facility. Commencing in May 2013, these employees were locked out of the Facility (the Lockout). The Lockout was ongoing at the time of the Tribunal's inquiry. Unifor is a respondent in this proceeding and opposes the application.

[11] Québec Silicon filed a complaint with the Canada Border Services Agency (CBSA) concerning the dumping and subsidizing of the subject goods on March 1, 2013. The CBSA issued a preliminary determination of dumping and subsidizing on July 22, 2013, which resulted in the imposition of provisional duties on the subject goods. A final determination of dumping and subsidizing was made by the CBSA on October 21, 2013.

III. Legislative framework

[12] The Tribunal initiated its inquiry under paragraph 42(1)(*a*) of the *SIMA*, which reads as follows:

42. (1) The Tribunal, forthwith after receipt pursuant to subsection 38(3) of a notice of a preliminary determination, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:	42. (1) Dès réception de l'avis de décision provisoire prévu au paragraphe 38(3), le Tribunal fait enquête sur celles parmi les questions suivantes qui sont indiquées dans les circonstances, à savoir :
(*a*) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods	a) si le dumping des marchandises en cause ou leur subventionnement :
(i) has caused injury or retardation or is threatening to cause injury, or	(i) soit a causé un dommage ou un retard ou menace de causer un dommage,

(ii) would have caused injury or retardation except for the fact that provisional duty was imposed in respect of the goods;	(ii) soit aurait causé un dommage ou un retard sans l'application de droits provisoires aux marchandises;

[13] Subsection 2(1) provides the following definitions of "domestic industry", "injury" and "like goods" for the purposes of the *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.
...	[...]
"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 goods;	*b*) à défaut, marchandises dont l'utilisation et les autres caractéristiques sont très proches de celles des marchandises en cause.

[14] In addition, section 37.1 of the *Special Import Measures Regulations*, S.O.R./84-927 (the *SIMR*) sets out the factors that the Tribunal must consider when determining whether the dumping and subsidizing of goods has caused injury or retardation or is threatening to cause injury. Section 37.1 reads as follows:

37.1 (1) For the purposes of determining whether the dumping or subsidizing of any goods has caused injury or retardation, the following factors are prescribed:	37.1 (1) Les facteurs pris en compte pour décider si le dumping ou le subventionnement de marchandises cause un dommage ou un retard sont les suivants :
(*a*) the volume of the dumped or subsidized goods and, in particular, whether there has been 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 des marchandises sous-évaluées ou subventionnées et, plus précisément, s'il y a eu une augmentation marquée 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;
(*b*) the effect of the dumped or subsidized goods on the price of like goods and, in particular, whether the dumped or subsidized goods have significantly	*b*) l'effet des marchandises sous-évaluées ou subventionnées sur le prix des marchandises similaires et, plus particulièrement, si les marchandises sous-évaluées ou subventionnées ont, de façon marquée, mené :
(i) undercut the price of like goods,	(i) soit à la sous-cotation du prix des marchandises similaires,
(ii) depressed the price of like goods, or	(ii) soit à la baisse du prix des marchandises similaires,
(iii) suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred;	(iii) soit à la compression du prix des marchandises similaires en empêchant les augmentations de prix qui par ailleurs se seraient vraisemblablement produites pour ces marchandises;
(*c*) the resulting impact of the dumped or subsidized goods on the state of the domestic industry and, in particular,	*c*) l'incidence des marchandises sous-évaluées ou subventionnées sur la situation de la branche de production

all relevant economic factors and indices that have a bearing on the state of the domestic industry, including

nationale et, plus précisément, tous les facteurs et indices économiques pertinents influant sur cette situation, y compris :

(i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity,

(i) tout déclin réel ou potentiel dans la production, les ventes, la part de marché, les bénéfices, la productivité, le rendement sur capital investi ou l'utilisation de la capacité de la branche de production,

(ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital,

(ii) toute incidence négative réelle ou potentielle sur les liquidités, les stocks, les emplois, les salaires, la croissance ou la capacité de financement,

(ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and

(ii.1) l'importance de la marge de dumping des marchandises ou du montant de subvention octroyé pour celles-ci,

(iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support programme; and

(iii) dans le cas des produits agricoles qui sont subventionnés, y compris tout produit qui est un produit ou une marchandise agricole aux termes d'une loi fédérale ou provinciale, toute augmentation du fardeau subi par un programme de soutien gouvernemental;

(*d*) any other factors that are relevant in the circumstances.

d) tout autre facteur pertinent, compte tenu des circonstances.

(2) For the purposes of determining whether the dumping or subsidizing of any goods is threatening to cause injury, the following factors are prescribed:

(2) Les facteurs pris en compte pour décider si le dumping ou le subventionnement de marchandises menace de causer un dommage sont les suivants :

(*a*) the nature of the subsidy in question and the effects it is likely to have on trade;

a) la nature de la subvention en cause et les répercussions qu'elle aura vraisemblablement sur le commerce;

(*b*) whether there has been a significant rate of increase of dumped

b) s'il y a eu un taux d'augmentation

or subsidized goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped or subsidized goods;

marquée des marchandises sous-évaluées ou subventionnées importées au Canada qui indique qu'il y aura vraisemblablement une augmentation importante des importations au Canada des marchandises sous-évaluées ou subventionnées;

(*c*) whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter, that indicates a likelihood of a substantial increase of dumped or subsidized goods, taking into account the availability of other export markets to absorb any increase;

c) s'il y a une capacité disponible accessible suffisante ou une augmentation imminente et marquée dans la capacité d'un exportateur, laquelle indique qu'il y aura vraisemblablement une augmentation importante du volume des marchandises sous-évaluées ou subventionnées, compte tenu de l'existence d'autres marchés d'exportation pouvant absorber des exportations additionnelles;

(*d*) the potential for product shifting where production facilities that can be used to produce the goods are currently being used to produce other goods;

d) la possibilité d'un changement de production dans le cas où les installations qui peuvent servir à produire les marchandises servent à la production d'autres marchandises;

(*e*) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of the goods;

e) si les marchandises sont importées sur le marché national à des prix qui auront vraisemblablement pour effet de faire baisser ou de comprimer de façon marquée les prix de marchandises similaires et d'accroître la demande en importations additionnelles de ces marchandises;

(*f*) inventories of the goods;

f) les stocks de marchandises;

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

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

(*g*.1) the magnitude of the margin of

g.1) l'importance de la marge de

dumping or amount of subsidy in respect of the dumped or subsidized goods;

dumping des marchandises ou du montant de subvention octroyé pour celles-ci;

(*g*.2) evidence of the imposition of anti-dumping or countervailing measures by the authorities of a country other than Canada in respect of goods of the same description or in respect of similar goods; and

g.2) 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;

(*h*) any other factors that are relevant in the circumstances.

h) tout autre facteur pertinent, compte tenu des circonstances.

(3) For the purpose of determining whether the dumping or subsidizing of any goods has caused injury or retardation, or is threatening to cause injury, the following additional factors are prescribed:

(3) En outre, les facteurs pris en compte pour déterminer si le dumping ou le subventionnement des marchandises cause un dommage ou un retard ou menace de causer un dommage sont les suivants :

(*a*) whether a causal relationship exists between the dumping or subsidizing of the goods and the injury, retardation or threat of injury, on the basis of the factors listed in subsections (1) and (2); and

a) le fait qu'il existe ou non un lien de causalité entre le dumping ou le subventionnement et le dommage, le retard ou la menace de dommage, selon les facteurs énumérés aux paragraphes (1) et (2);

(*b*) whether any factors other than the dumping or subsidizing of the goods have caused injury or retardation or are threatening to cause injury, on the basis of

b) le fait qu'il existe ou non des facteurs, autres que le dumping ou le subventionnement, qui ont causé un dommage ou un retard ou qui menacent de causer un dommage, selon les éléments suivants :

(i) the volumes and prices of imports of like goods that are not dumped or subsidized,

(i) le volume et le prix des importations de marchandises similaires qui ne sont pas sous-évaluées ou subventionnées,

(ii) a contraction in demand for the goods or like goods,

(ii) la contraction de la demande pour les marchandises ou pour des marchandises similaires,

(iii) any change in the pattern of consumption of the goods or like

(iii) tout changement des habitudes de consommation des marchandises ou

goods,	de marchandises similaires,
(iv) trade-restrictive practices of, and competition between, foreign and domestic producers,	(iv) les pratiques commerciales restrictives des producteurs étrangers et nationaux, ainsi que la concurrence qu'ils se livrent,
(v) developments in technology,	(v) les progrès technologiques,
(vi) the export performance and productivity of the domestic industry in respect of like goods, and	(vi) le rendement à l'exportation et la productivité de la branche de production nationale à l'égard de marchandises similaires,
(vii) any other factors that are relevant in the circumstances.	(vii) tout autre facteur pertinent, compte tenu des circonstances.

[15] Lastly, subsection 2(1.5) of the *SIMA* limits the situations in which the Tribunal may find a threat of injury. It reads:

2. (1.5) For the purposes of this Act, the dumping or subsidizing of goods shall not be found to be threatening to cause injury or to cause a threat of injury unless the circumstances in which the dumping or subsidizing of goods would cause injury are clearly foreseen and imminent.	2. (1.5) Pour l'application de la présente loi, pour qu'il puisse être décidé que le dumping ou le subventionnement de marchandises menace de causer un dommage ou cause une menace de dommage, il faut que les circonstances dans lesquelles le dumping ou le subventionnement est susceptible de causer un dommage soient nettement prévues et imminentes.

IV. The Tribunal's decision

Period of inquiry

[16] The Tribunal assessed whether the dumping and subsidizing had caused actual injury over a period of inquiry (POI) running from January 1, 2010 to June 30, 2013. It also considered

two interim periods: January 1 to June 30, 2012 (interim 2012) and January 1 to June 30, 2013 (interim 2013).

Certain elements of the subsection 42(1) inquiry

[17] The Tribunal determined that in conducting its inquiry under subsection 42(1) of the *SIMA* as to whether the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic industry, it was required to make findings with respect to whether the requirements of certain definitions in subsection 2(1) were present, namely "like goods", "domestic industry" and "injury".

Like goods

[18] The Tribunal found that the uses and other characteristics of the silicon metal produced at the Facility closely resembled those of the subject goods. This finding was unchallenged by the parties, who agreed that the subject goods and the silicon metal produced at the Facility were a single class of goods. Accordingly, the Tribunal had no difficulty concluding that the silicon metal produced at the Facility fell within the definition of like goods.

The domestic industry

[19] The Tribunal referred to the definition of domestic industry and found that the injury or threat of injury had to be to domestic producers as a whole or those producers whose production represents a major proportion of the total domestic production of like goods.

[20] The Tribunal concluded that QSLP, QSIP Canada and QSIP Sales, which comprised Québec Silicon, constituted a single corporate group that was responsible for the domestic production and sale of the like goods, either on the domestic merchant market or on export markets.

Background findings

[21] By way of background to its injury and threat of injury analyses, the Tribunal made a number of findings:

a) Prior to 2006, BSI, the predecessor to Québec Silicon, sold most of the production from the Facility in the export market.

b) Since at least 2005, Chinese silicon metal was available for sale in the Canadian market at prices significantly below domestic prices and, since appearing in the domestic market, Chinese silicon metal sales have achieved an increased market share.

c) The financial difficulties of BSI's former owner, Timminco, prompted it to take several steps that it hoped would alleviate these difficulties. First, it undertook to use a meaningful proportion of its production from the Facility to produce another product, solar-grade silicon metal (the Solar-grade Silicon Initiative), but this failed when the market for this product collapsed. Secondly, it entered into the Dow Arrangements under which Dow took its share of the silicon metal produced

at the Facility out of Canada. Finally, it entered into the Wacker Sales Contract for the export of a significant portion of its share of production from the Facility. As a result of the Dow Arrangements and the Wacker Sales Agreement, the vast majority of the production from the Facility was exported.

d) Despite these efforts, Timminco was unable to solve its financial problems and went through the *CCAA* Proceedings, which led to Globe's indirect acquisition of BSI's 51 percent interest in QSLP (through QSIP Canada). At the time of this acquisition, Globe also renegotiated the Wacker Sales Agreement so that Wacker's supply requirements could be fulfilled by QSIP Sales, out of production from the Facility or by Globe itself, out of production from its facilities in the United States. Thereafter, Globe instituted cost-cutting measures at the Facility and began a campaign to increase sales of its share of production from the Facility in the domestic market.

e) On July 1, 2013, China eliminated a 15 percent tax on exports of silicon metal produced in China.

f) As a result of the Lockout, only one of the three furnaces at the Facility remained in operation, with the result that production from the Facility was reduced.

Approach to injury analysis

[22] In undertaking its injury analysis, the Tribunal stated that it was required to consider the factors set forth in subsections 37.1(1) and (3) of the *SIMR*.

[23] The Tribunal found that the vast majority of the domestic industry's production was exported throughout the POI and that only a small share of such production was sold in the domestic merchant market. Nonetheless, following its prior decisions, the Tribunal determined that it would focus its injury analysis on the Canadian merchant market but that the materiality of any injury caused by the dumping and subsidizing would be assessed against the domestic industry's production of like goods as a whole.

"Price cap" argument

[24] The subject goods are used by the RTA in the production of its foundry alloy products. The Tribunal referred to RTA's argument that its inability to sell these products to its customers at any higher price than it was obtaining meant that it was unable to pay any increased prices for the like goods. In essence, the applicant asserted that it needed the low-priced subject goods to be competitive with non-Canadian competitors in the foundry alloy business who were able to purchase the subject goods at low prices from Chinese suppliers.

[25] The Tribunal rejected this argument on the basis that, having regard to its prior decisions, "downstream market conditions" were irrelevant to the subject matter of an inquiry under section 42 of the *SIMA*.

Approach to injury findings

[26] In making its injury findings, the Tribunal considered the factors in subsections 37.1(1) and (3) of the *SIMR*.

Injury findings

[27] The Tribunal concluded that the dumping and subsidizing of the subject goods had not caused injury to the domestic industry. It found that any harm suffered by Québec Silicon between January 2010 and June 2012 was self-inflicted and could not be linked to the dumping and subsidizing of the subject goods. It concluded that Timminco's unsuccessful Solar-grade Silicon Initiative, its unfavourably priced Wacker Sales Contract and its Dow Arrangements left it with little production that could be sold in the domestic merchant market, which by then had almost completely been ceded to imports of the subject goods. This in turn led to a reluctance on the part of potential domestic customers to attempt to purchase silicon metal from BSI. Accordingly, the Tribunal was unable to find that the dumping and subsidizing of the subject goods were a cause of injury to the domestic industry between January 2010 and June 2012.

[28] As for the period after June 2012, the Tribunal found that Globe, after indirectly acquiring its interest in QSLP, effectively "wiped the slate clean" and committed itself to reestablishing Québec Silicon as a domestic supplier. This was evident from the renegotiation of the Wacker Sales Contract, which freed up QSIP Canada's share of production from the Facility for sale in the domestic market. However, when Québec Silicon attempted to negotiate sales with RTA, it was met with the response that its pricing would not be acceptable to RTA unless such

pricing was comparable to that at which RTA could purchase the subject goods. As a result, the Tribunal found that it could not rule out the existence of a causal link between the subject goods and Québec Silicon's losses during the POI. However, due to the limited time period in the POI after Globe entered the picture and the fact that Québec Silicon remained export-oriented during that period, the Tribunal concluded that the injury did not meet the threshold of a material injury as required by the definition of injury in subsection 2(1) of the *SIMA*.

Approach to threat of injury analysis

[29] In undertaking its threat of injury analysis, the Tribunal stated that it was required to consider the factors set forth in subsections 37.1(2) and (3) of the *SIMR*, as well as the foreseen and imminent element in subsection 2(1.5) of the *SIMA*.

[30] The Tribunal then determined that it would assess whether the dumping and subsidizing of the subject goods were threatening to cause injury over the 12 to 18 months following the date of its threat of injury finding (i.e., November 19, 2013).

[31] In considering the factors contained in subsections 37.1(2) and (3) of the *SIMR*, the Tribunal concluded that:

a) There was a significant increase in the volume of imports of the subject goods between 2010 and interim 2013 when considered in light of the size of the Canadian market and the market share that had been gained by the subject goods.

b) Chinese producers had significant excess capacity and would be motivated to increase shipments to Canada and that even a small increase in the volume of imports would likely have a disruptive effect on the domestic industry.

c) Chinese inventories of the subject goods had increased to sizeable levels in anticipation of the removal of the 15 percent Chinese export tax. Moreover, the removal of that tax had led to a reduction of their export prices.

d) In order to get new orders for silicon metal, Québec Silicon would have to reduce its prices to those charged for the subject goods.

e) Even if the volume of Chinese imports did not increase significantly, they would nonetheless result in undercutting and depression of the domestically-priced goods in the 12 to 18 month period under consideration.

f) Major Canadian purchasers of the subject goods have no intention of purchasing increased volumes of like goods in the absence of anti-dumping and countervailing duties.

g) Québec Silicon cannot compete with the low prices of the subject goods and is likely to lose whatever market share it has.

h) An absence of duties on the subject goods will result in significant price undercutting or depression and cause material injury in the form of lost sales, reduced market share and decreased production levels.

[32] The Tribunal concluded that the renegotiation of the Wacker Sales Contract alleviated its concern about Québec Silicon's ability to supply the domestic market. Thus, it found that Québec Silicon's willingness and capacity to supply the domestic market constituted a change in circumstances, between those that existed during the POI and those that are likely to arise in the near future and that this change in circumstances justified the conclusion that the dumping and subsidizing of the subject goods are likely to cause material injury to the domestic industry.

[33] The Tribunal concluded that the dumping and subsidizing of the subject goods have not caused injury but are threatening to cause injury to the domestic industry.

V. Issues

[34] The issues in this application are:

a) Whether the affidavit of Marlin Perkins, filed by Québec Silicon and deposing to certain events that are alleged to have occurred after the date of the Tribunal's decision, should be considered by the Court; and

b) Whether the Tribunal's decision is reasonable.

VI. Standard of Review

[35] In *MAAX Bath Inc. v. Almag Aluminum Inc.*, 2010 FCA 62, [2010] F.C.J. No. 275 at paragraphs 31 to 33, this Court determined, in the context of an injury analysis under subsection 42(1) of the *SIMA*, that the Tribunal's factual findings, interpretations of the *SIMA* and the *SIMR*, and applications of such interpretations to such factual findings, as well as the Tribunal decision resulting therefrom, were matters that should be reviewed on the standard of reasonableness in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R 190.

[36] I see no reason not to use the same standard of review in reviewing the findings of the Tribunal, which were made in the context of a threat of injury analysis under subsection 42(1) of the *SIMA*.

[37] The applicant agrees that the standard of review applicable to the Tribunal's decision is reasonableness. However, in paragraph 54 of its factum, the applicant urges the Court to be "[…] guided by the [WTO] Appellate Body's articulation of the standard of review applicable to a threat of injury determination by an investigating authority" (emphasis added).

[38] With respect, I am of the view that sufficient guidance is available to me from *Dunsmuir* and a number of subsequent cases from the Supreme Court of Canada (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers'*

Association, 2011 SCC 61, [2011] 3 S.C.R. 654; and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895).

[39] At paragraph 47 of *Dunsmuir*, we are taught to test the reasonableness of the articulation of a tribunal's reasons by reference to their "justification, transparency and intelligibility", and to test the decision itself by reference to whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

VII. Analysis

[40] I will consider the reasonableness of the Tribunal's decision before I consider the admissibility of the Marlin Perkins affidavit.

[41] The applicant asserts that the Tribunal's decision was unreasonable and should be overturned because it is based upon a number of errors, each of which is sufficient to justify our intervention. The applicant's factum delineates its arguments in respect of these alleged errors in three categories which, for convenience, I will follow.

Alleged causation analysis errors

[42] The Tribunal's decision included analyses of whether the dumping and subsidizing of the subject goods caused injury and threat of injury to the domestic industry. In conducting these analyses, the Tribunal was provided with a considerable amount of evidence, some of which overlapped.

[43] The Tribunal concluded that it was the low prices at which the subject goods could be purchased from the Chinese suppliers, which resulted in the CBSA's determination of dumping and subsidizing of these goods, that was threatening to cause injury to the domestic industry.

[44] The applicant challenges this causative finding, alleging that the Tribunal made four errors.

[45] The applicant asserts that the Tribunal's causation determination was based upon its erroneous finding that the applicant would have made increased purchases of silicon metal from Québec Silicon if Duties were imposed. In my opinion, the Tribunal did not in fact make such a finding. Rather, paragraph 177 of the Tribunal's reasons indicates only that the Tribunal found that the applicant and Alcoa would not have made any purchases of silicon metal from Québec Silicon for as long as they could continue to purchase the subject goods at the lower prices that were in place prior to the imposition of the Duties. Accordingly, I reject this assertion of a reviewable error on the part of the Tribunal.

[46] The applicant asserts that the Tribunal erred by refusing to consider the price cap evidence as a relevant factor that threatened to cause injury to the domestic industry and thereby erred in failing to consider subparagraph 42(1)(*a*)(ii) of the *SIMA*.

[47] Paragraphs 58 to 65 of the Tribunal's reasons consider the price cap argument. In these paragraphs, the Tribunal described its understanding of this argument, namely, that unless the applicant could continue to acquire the subject goods at prices that excluded Duties, it would be

unable to continue to sell its foundry alloy products, in which the subject goods were an input. This was allegedly the case because the purchasers of the foundry alloy products would not pay any increased, duty-inclusive prices to the applicant for those products because comparable products were otherwise available to such purchasers from non-Canadian suppliers at prices that would not be duty-inclusive.

[48] Before this Court, the applicant asserted that the Tribunal erred by not concluding that it was the price cap, and not the low prices at which the subject goods could be purchased, that was the cause of the threat of injury to the domestic industry.

[49] This assertion continues on to the effect that an imposition of Duties would provide no relief to the domestic industry because the price cap would effectively preclude purchases of like goods if their prices included Duties. Thus, so this assertion goes, it must follow that the price cap, and not the presence of the low-priced subject goods, was the cause of the threat of injury to the domestic industry.

[50] In furtherance of this assertion, the applicant, in paragraph 63 of its factum, stipulates that in the decision entitled *In the matter of: Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or Not, Originating in or Exported from the U.S.A.*, (Secretariat File No. CDA-93-1904-06), the Binational Panel constituted under the *Canada-United States Free Trade Agreement*

> […] held that subparagraph 42(1)(*a*)(ii) of the *SIMA* directs the Tribunal to make inquiry into the likely future deterrent effects of the imposition of Duties.
>
> [Emphasis added]

This paragraph of the applicant's factum then goes on to reproduce the following portion of that decision:

> It is clear that [subparagraph 42(1)(*a*)(ii) of the *SIMA*] authorizes – indeed it directs – an inquiry as to whether the dumped goods are likely to cause material injury. This is clearly a future-looking investigation, and the Tribunal must therefore investigate the plausible motivations of the firms that have dumped goods and the market conditions that will affect their future decisions. Considering that Parliament directed the Tribunal to consider the impact of provisional duties, it is hard to imagine that it intended for the Tribunal to ignore the impact of anti-dumping duties in making determinations as to the future. Thus, it is not unreasonable for the CITT to consider deterrent effects in analyzing whether dumping is "likely to cause material injury".
>
> [Emphasis added]

[51] While the applicant's factum does not specifically so state, I am left with the impression that the applicant is asserting that the Tribunal erred by refusing to obey a requirement in subparagraph 42(1)(*a*)(ii) of the *SIMA* to consider the likely future deterrent effects of the imposition of Duties.

[52] In my view, this assertion is untenable. On its face, subparagraph 42(1)(*a*)(ii) of the *SIMA* contains no such requirement. Additionally, this decision of the Binational Panel does not say what the applicant has stated in its factum.

[53] The argument before the Binational Panel was whether it was an error on the part of the Tribunal to have given *any consideration* to the deterrent effect of the imposition of duties in a threat of injury analysis under subparagraph 42(1)(*a*)(ii) of the *SIMA*. In that case, the Binational Panel concluded that such consideration was *permissible*, not mandatory.

[54] Moreover, as stated in the quote from the Binational Panel's decision that is reproduced above, the consideration that is to be given to the deterrent effects of the imposition of duties by a Tribunal that is undertaking a threat of injury analysis is to their impact upon the *firms that had dumped goods in the domestic market and the market conditions that would affect the future decisions of those persons*. There was no consideration of the effects of the imposition of duties on downstream purchasers of goods that included, as components, the subject goods under consideration in that case.

[55] Accordingly, I am of the view that the error asserted by the applicant in relation to the price cap argument has not been substantiated.

[56] The applicant asserts that the Tribunal erred in stating that provisional duties took effect during the interim 2013 period, which ended on June 30, 2013, when they actually took effect on July 22, 2013 (Tribunal's reasons at paragraph 100). While such an error occurred, it primarily relates to the Tribunal's injury analysis, rather than the threat of injury analysis. Moreover, this error is essentially immaterial to, and does not render unreasonable, the Tribunal's finding that the low prices at which the applicant was able to purchase the subject goods from the Chinese suppliers, as a consequence of the dumping and subsidizing of those goods, were the cause of the threat of injury to the domestic industry.

[57] The applicant asserts that the Tribunal erred by failing to consider the evidence of the Lockout in its threat of injury analysis and by failing to consider the Lockout as a cause of the threatened injury to the domestic industry. It is clear that the Tribunal was aware that the

Lockout commenced in May of 2013, during the last 12 months of the POI that ended in June of 2013. In respect of that latter period, the Tribunal concluded that the dumping and subsidizing caused an injury to the domestic industry, albeit not an injury that was material. In reaching this conclusion, at paragraph 141 of its reasons, the Tribunal found that "other factors", which I would interpret to include the Lockout, were not the cause of the injury suffered by Québec Silicon after June 2012.

[58] In its threat of injury analysis, the Tribunal did not appear to specifically deal with the question of whether the Lockout was an "other factor", as contemplated by subparagraph 37.1(3)(*b*)(iv) of the *SIMR*, that gave rise to a threat of injury to the domestic industry. However, Justice Rothstein of the Supreme Court of Canada, in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paragraph 75, stated that it is important to keep in mind "[…] that a decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses' Union. v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16". As previously noted, the Tribunal did conclude that the threat of injury was caused by the low prices at which the subject goods could be purchased in Canada. Accordingly, I am inclined to the view that the Tribunal may be considered to have implicitly ruled out the Lockout as a cause of the threatened injury.

[59] Additionally, *Newfoundland Nurses* and *Sattva Capital* inform that when reviewing a decision on the standard of reasonableness, it is permissible for the reviewing court to supplement the reasons of the decision-maker having regard to the record before it.

[60] In this respect, I am satisfied that the record contains evidence upon which the Tribunal may reasonably have concluded that the imposition of Duties could have led to an end to the Lockout. Indeed, it may well have been open to the Tribunal to have made a finding that the low prices at which the applicant was able to purchase the subject goods caused not only the threatened injury to the domestic industry but also the Lockout itself. Accordingly, using this evidence to supplement the reasons of the Tribunal, I conclude that the applicant's assertion of a reviewable error in relation to the Tribunal's treatment of the Lockout is unfounded.

Alleged threat of injury analysis errors

[61] In reaching its conclusion that the dumping and subsidizing of the subject goods were threatening to cause injury to the domestic industry, the Tribunal considered the factors contained in subsections 37.1(2) and (3) of the *SIMR*.

[62] The applicant, in paragraphs 70 to 82 of its factum, alleges that this conclusion was unsupportable for a number of reasons, including:

a) a failure to cite evidence,

b) a failure to base the conclusion on affirmative evidence, and

c) basing the finding on speculation and assumptions.

[63] These arguments amount to little more than attempts to persuade the Court to make findings that the Tribunal declined to make. Given the significant level of deference that is owed to the Tribunal in its fact-finding function, I am not persuaded that any of the impugned findings is unreasonable. Moreover, as taught by *Newfoundland Nurses* and *Sattva Capital*, an

administrative tribunal's failure to discuss, in its reasons, each piece of evidence and argument before it to the extent that a complaining party may prefer does not constitute an error that mandates the intervention of the reviewing court.

[64] Finally, the responses to these factual challenges in paragraphs 96 to 121 of the respondents' factum provide cogent refutations of such challenges.

[65] At the hearing, the applicant alleged that the Tribunal erred in considering the impact of the dumping and subsidizing of the subject goods on Québec Silicon's inability to increase its share of sales in the domestic market. According to this assertion, sub-paragraph 37.1(1)(*c*)(i) of the *SIMR* refers to a "decline" in market share and not to an inability to achieve an increased market share. Thus, the applicant asserts, the Tribunal erred in its application of this required factor.

[66] In my view, this assertion is untenable because sub-paragraph 37.1(1)(*c*)(i) of the *SIMR* applies to an injury analysis, not a threat of injury analysis, which was the subject of the Tribunal's focus.

[67] Subsection 37.1(2) of the *SIMR*, which sets out the required factors to be considered in a threat of injury analysis, contains no limitation on the Tribunal's ability to consider whether Québec Silicon would be unable to increase its share of sales in the domestic market and whether any such prospective inability, which was found to be present, was relevant to the Tribunal's determination of whether the dumping and subsidizing of the subject goods threatened to cause

injury to the domestic industry. Accordingly, the Tribunal committed no reviewable error in conducting its threat of injury analysis by considering Québec Silicon's prospective inability to increase its domestic market share.

[68] In my view, the record before the Tribunal contained sufficient evidence to enable it to conclude that the effect of the importation of the subject goods and their sale in the domestic market at prices unaffected by Duties was to cause a threat of injury to the domestic industry. Accordingly, I am not persuaded that in making this finding, the Tribunal made any reviewable error.

Alleged failure to apply the required materiality test

[69] The question of materiality arises in the context of the definition of injury in subsection 2(1) of the *SIMA*, which defines injury, as used in subsection 42(1) of the *SIMA*, as material injury to the domestic industry. That said, there is no statutory definition of materiality and neither party referred the Court to any jurisprudence that enunciated a materiality test.

[70] The applicant asserts that the Tribunal identified the correct test for materiality of the threatened injury but then erred by failing to apply that test.

[71] In its injury analysis, the Tribunal determined that during the applicable portion of the POI after the Globe acquisition, the injury suffered by Québec Silicon was not material. In doing so, it compared Québec Silicon's domestic sales of silicon metal to its total domestic production thereof. When it did so, the Tribunal determined that Québec Silicon's domestic sales constituted

a small percentage of its total domestic production. As a result, the low prices at which the subject goods were sold in Canada could only have adversely affected this small percentage of Québec Silicon's total domestic production that it sold in the domestic market. This led the Tribunal to conclude that the injury to the domestic industry was not material.

[72] In its threat of injury analysis, the Tribunal chose a 12 to 18 month period as the time frame for such analysis. In my view, in considering the materiality of the threatened injury in this period, the Tribunal basically applied the same test as it applied when it considered the issue of materiality in its injury analysis.

[73] However, because it was undertaking a forward-looking analysis, the Tribunal was required to estimate Québec Silicon's domestic sales of silicon metal in the future. In doing so, it determined that largely as a result of Globe's renegotiation of the Wacker Sales Contract, Québec Silicon had a sufficient volume of domestic production to supply the entire Canadian market for silicon metal.

[74] Thus, when comparing the amount that the Tribunal found to be Québec Silicon's projected domestic sales of silicon metal to its entire projected domestic production thereof, the Tribunal must be taken to have concluded that Québec Silicon's projected percentage of domestic sales was considerably larger than its percentage of such sales at the time of its injury analysis. It follows that the large resulting percentage enabled the Tribunal to conclude that the threatened injury resulting from the dumping and subsidizing of the subject goods was material.

[75] Accordingly, I am of the view that the applicant's assertion that the Tribunal did not apply the materiality test required by the definition of injury in subsection 2(1) of the *SIMA* is unfounded. Moreover, given that the application of this test is forward-looking, it was reasonable for the Tribunal to have concluded that future supplies of silicon metal that could be expected to be available to Québec Silicon to sell in the domestic market should be taken into account in assessing the materiality of the injury. Finally, the Tribunal's finding that, in the 12 to 18 month period under consideration, Québec Silicon would, in fact, have sufficiently increased supplies of silicon metal to supply the entire Canadian market was open to it having regard to the record before it. Similarly, the Tribunal must be taken to have concluded that the Lockout would not have had an ongoing negative impact upon Québec Silicon's capacity to produce silicon metal. As such, I reject the applicant's assertion that the Tribunal made a reviewable error in relation to the application of the materiality test.

Alleged foreseen and imminence errors

[76] In a threat of injury analysis, subsection 2(1.5) of the *SIMA* mandates that the dumping and subsidizing of the subject goods cannot be found to be threatening to cause injury unless the circumstances in which such dumping and subsidizing would cause injury are clearly foreseen and imminent.

[77] The applicant does not dispute that the Tribunal made a reasonable interpretation of subsection 2(1.5) of the *SIMA* when it concluded that there must be a change in the circumstances between those that existed during the POI and those that are likely to exist in the future period in respect of which the threat of injury analysis is made.

[78] In applying this test, the Tribunal found that Globe's renegotiation of the Wacker Sales Contract enabled Québec Silicon to use its domestic production that would have otherwise been exported to Wacker to supply the domestic market. The Tribunal then concluded that the ability of Québec Silicon to supply the domestic market out of this freed-up domestic production was a change from the circumstances that existed at the time that it reached its decision in the injury analysis.

[79] The applicant challenges the Tribunal's factual findings with respect to the prospective impact of the renegotiation of the Wacker Sales Contract. More particularly, the applicant asserts that reliance upon this renegotiation could not be a change in circumstances because the changes to the Wacker Sales Contract that gave Globe the right to supply Wacker out of U.S. sources of silicon metal were already in place prior to June 30, 2013, the effective time of the Tribunal's "no injury" finding.

[80] I am not persuaded by this assertion because it ignores the prospective effects of the changes to the Wacker Sales Contract, which, for all practical purposes, would take some time to materialize. It would be unreasonable to suggest that Québec Silicon's capacity to supply the domestic market would in fact be available immediately after Globe's acquisition of the right to supply Wacker out of U.S. sources of silicon metal. Accordingly, in my view, the Tribunal made no reviewable error when it considered the prospective impact of the renegotiation of the Wacker Sales Agreement on Québec Silicon's ability to make significant sales of silicon metal in the domestic market as a basis for its finding that there was a change in the circumstances that existed at the effective time of its "no injury" finding.

[81] The applicant also asserts that the Tribunal's change of circumstances finding is unreasonable because the Tribunal's finding that these changes would have enabled Québec Silicon to supply Canadian demand was made without reference to the Lockout. More particularly, the applicant asserts that there was no evidence before the Tribunal that the Lockout had been or was about to be resolved. I am unable to accept this assertion. There was evidence before the Tribunal from both Mr. Kestenbaum, of Globe, and Mr. Gargiso, of Unifor, to the effect that if the imposition of the Duties were to be upheld, it was reasonable to consider that the Lockout would end.

Conclusion

[82] For these reasons, I conclude that, in making its decision that the dumping and subsidizing of the subject goods are threatening to cause injury to the domestic industry, the Tribunal made no error warranting our intervention and that the Tribunal's decision falls within a range of reasonable and defensible outcomes.

VII. The Perkins affidavit

[83] The conclusions reached in the preceding paragraph make it unnecessary for me to consider the admissibility of the affidavit of Marlin Perkins.

VIII. Disposition

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

"C. Michael Ryer"

J.A.

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

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-427-13
(APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED NOVEMBER 19, 2013 (INQUIRY NO. NQ-2013-003)	
STYLE OF CAUSE:	RIO TINTO ALCAN INC. v. QUÉBEC SILICON LIMITED PARTNERSHIP, QSIP CANADA ULC, QSIP SALES ULC, ALCOA LTD., ALERIS SPECIFICATION ALLOY PRODUCTS CANADA COMPANY AND UNIFOR
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 24, 2015
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	MARCH 16, 2015

APPEARANCES:

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