

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160503

Docket: A-185-15

Citation: 2016 FCA 137

**CORAM: NOËL C.J.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

PRUDENTIAL STEEL ULC and ALGOMA TUBES INC.

Applicants

and

**BOLY PIPE CO., LTD., ENERGEX TUBE, EVRAZ INC. NA CANADA,
GOVERNMENT OF THE UKRAINE, INTERPIPE UKRAINE LTD.,
NORTH AMERICAN INTERPIPE, INC., KINGDOM OF THAILAND,
THAI OIL PIPE CO., LTD., WELDED TUBE OF CANADA CORP., AND
THE ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on May 3, 2016.
Judgment delivered from the Bench at Ottawa, Ontario, on May 3, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 3, 2016).

TRUDEL J.A.

[1] The applicants, Prudential Steel ULC and Algoma Tubes Inc., are Canadian producers of oil country tubular goods (OCTG). They are applying for judicial review of the President of the Canada Border Services Agency (CBSA)'s decision to terminate an investigation pursuant to the

Special Import Measures Act, R.S.C. 1985, c. S-15 (Act) with respect to the subsidizing of OCTG originating in or exported from the Republic of the Philippines, and the Kingdom of Thailand (Thailand), and Ukraine. The President's Statement of Reasons, dated March 18, 2015, also addresses other related decisions that are not the subject of this application.

[2] On the eve of the hearing, the applicants communicated their intention to abandon all relief against the Ukrainian exporters Interpipe Ukraine LTD and North American Interpipe, Inc., who had submitted a memorandum of fact and law on the merits of the application. They appeared at the hearing to make representations only on the issue of costs. As a result, the applicants informed the Court that the hearing would proceed on the basis of the arguments submitted for relief against Thailand and the non-cooperating exporters from that country.

[3] The applicants alleged three errors that, in their view, warrant this Court's intervention. These errors relate to: non-consideration of subsidies provided by the government of the People's Republic of China on green tube imported into Thailand for further processing before export to Canada; the determination by the President that Thailand was a developing country for the purposes of the Act; and the President's choice of methodology to determine the amount of subsidy received by Thailand's non-cooperating exporters.

[4] The applicants, as the respondents do, assert that the standard of review applicable to the first and third issues is reasonableness. We agree: the CBSA is a highly specialized body and the decision of its President was made pursuant to a statute with which the CBSA is closely related. In our view, the factors outlined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.

190, clearly point to review on a standard of reasonableness. As far as the second issue is concerned (whether Thailand is a developing country), they assert that the President committed a jurisdictional error. We do not believe that this alleged error raises a true jurisdictional question such as to mandate a review under the standard of correctness.

I. Thailand was reasonably determined to be a developing country

[5] First, the applicants argued that the President erred in his determination that Thailand was a developing country for the purposes of the Act. Pursuant to Canada's international obligations under the *Agreement on Subsidies and Countervailing Measures being part of Annex IA to the Agreement Establishing the World Trade Organization*, Marrakesh, 1867 U.N.T.S. 3 (SCM Agreement), an investigation into subsidizing must be terminated if the amount of subsidy is calculated to be less than 2% of the goods' value, whereas the ordinary threshold under the Act to terminate an investigation is 1%.

[6] Neither the Act nor the SCM Agreement provides any explicit guidance as to what constitutes a developing country. Here the President relied on the *Development Assistance Committee List of Aid Recipients* (DAC list) published by the Organization for Economic Co-operation and Development. Because Thailand was included on the DAC list, it was treated as a developing country for the purposes of the investigation.

[7] The applicants have not persuaded us that it was unreasonable to rely on the DAC list, or that the President's different use of the list in a subsequent, unrelated investigation (*Statement of Reasons Concerning the initiation of investigations into the dumping and subsidizing of Certain*

Carbon and Alloy Steel Line Pipe Originating in or Exported from the People's Republic of China dated September 11, 2015, at paragraph 116) demonstrate that the President's conclusion was unreasonable in this case.

[8] We also agree with the Attorney General of Canada (Canada)'s and Thailand's submissions that the *General Preferential Tariff Withdrawal Order* (2013 GPT Review), SOR/2013-161, by which entitlement to the General Preferential Tariff was withdrawn from Thailand, is not relevant to the determination whether Thailand is a developing country for the purposes of a subsidy investigation under the Act. Even under the assumption that the withdrawal order indicates that Thailand is no longer a developing country, it suffices to note that the order only took effect after the dates that were considered for the purpose of the investigation, and is of no import to the present application.

II. Chinese subsidies on input materials

[9] The applicants argue that in its investigation, the CBSA should have considered subsidies provided by the government of the People's Republic of China on green tube imported into countries named in the investigation for further processing before export to Canada.

[10] We agree with the respondents Canada and Thailand that it was reasonable not to consider subsidies provided by the government of China on input material processed in the named countries. A determination under section 41 of the Act is to be made only "in relation to the goods of that country or countries in respect of which the investigation is made". The subject goods were defined for the purposes of the investigation as "originating in or exported from" the

named countries, which excluded China (President's Statement of Reasons at paragraph 32). It follows that, for the purposes of a subsidy investigation into goods exported to Canada, upstream subsidies on inputs provided by any country other than those named in the investigation fall outside its scope.

[11] In support of their argument, the applicants cited *Ideal Roofing Company Limited v. Havelock Metal Products Inc.*, AP-2013-008 and AP-2013-009 (CITT), a decision wherein the Canadian International Trade Tribunal affirmed that goods may continue to be within the scope of an investigation notwithstanding that they pass through an intermediary country instead of being imported directly into Canada. In our view, this does not extend to upstream subsidies provided by countries outside the investigation.

III. Methodology to determine amount of subsidy

[12] Finally, the applicants argue that the President erred in his choice of methodology by which to determine the amount of subsidy received by exporters who did not provide sufficient information, and that the methodology applied to Vietnam for non-cooperating exporters, which would result in higher amounts of subsidy, should have been applied in respect of all non-cooperating parties.

[13] We agree with Thailand that it was open to the President to specify different methodologies in light of the information that was available in respect of exporters in different countries. For Thailand, there was sufficient information from one exporter, which was taken into account to determine an amount for the others. Determining an amount of subsidy for the

exporters located in Vietnam required a different methodology because neither the Vietnamese government nor any Vietnamese exporter provided sufficient information.

[14] Having disallowed all of the applicants' arguments, their application for judicial review will be dismissed with three sets of costs calculated at the mid-range of Column III of Tariff B.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CANADA CORP., AND THE
ATTORNEY GENERAL OF
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TRUDEL J.A.

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