Date: 20061207

Docket: A-285-05

Citation: 2006 FCA 398

CORAM: **DÉCARY J.A.**
NOËL J.A.
NADON J.A.

BETWEEN:

Uniboard Surfaces Inc.

Applicant

and

Kronotex Fussboden GmbH and Co. KG, Stevens-Dufour Inc., Goodfellow Inc., Kronoflooring GmbH, Beijing Kronosenhua Flooring Co., Quality Craft Ltd., Quickstyle Industries Inc., Kaindl Flooring GmbH, Kronospan Luxembourg S.A., Unilin Flooring NV, Torlys Inc., Government of the People's Republic of China, Sichuan Shengda Wooden Products Col. Ltd, Vohringer Wood Product Co. Ltd, Asia Dekor Industries (Shenzhen) Co. Ltd, Shaw Industries Inc., Mohawk Industries Inc., Shanghi Allsun Wood Industry Co. Ltd, Matériaux à Bas Prix, Kronopol Ltd, Lamwood Products (1990) Limited, Akzenta Paneele and Profile GmbH or the Classen Group of Companies, Yekalon Industry, Inc., and Espace Production International (Epi), S.A.

Respondents
and

Attorney General of Canada

Intervener

Heard at Ottawa, Ontario, on November 22, 2006.
Judgment delivered at Ottawa, Ontario, on December 7, 2006.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] The applicant (Uniboard) filed a Notice of Application for judicial review of a tripartite final determination made by the President of the Canada Border Services Agency pursuant to subsections 41(1)(a) and 41(1)(b) of the *Special Import Measures Act* (R.S., 1985, c. S-15) (the Act or SIMA).

[2] The applicant is the only known Canadian manufacturer of laminate flooring. On August 13, 2004, it launched a complaint of dumping and subsidization with the Agency. A lengthy investigation ensued, during which some 360,000 pages of documents were filed. In his final decision made on May 17, 2005, the President determined:

> 1) that the People's Republic of China (China) and France had engaged in dumping;
>
> 2) that China had subsidized laminate flooring destined for Canada; and
>
> 3) that the dumping investigation involving Austria, Belgium, the Federal Republic of Germany and the Republic of Poland (all together, the four European countries) was to be terminated as the margin of dumping of the goods from these countries was insignificant, [viz., it was less than 2% of the export prices].

[3] Even though the applicant, in its Notice of Application, sought to quash or set aside the three determinations made by the President, it only sought relief in its memorandum of fact and law with respect to the third determination, the one relating to the termination of the investigation involving the four European countries. It follows that the findings of the President with respect to the dumping by China and France and the subsidization by China will remain undisturbed whatever the fate of this application.

[4] The applicant attacks the third determination on grounds which pertain on the one hand to procedural fairness and on the second hand to what it describes as legal issues.

Duty of procedural fairness

[5] It is accepted by all counsel that procedural fairness is applicable to SIMA investigations.

[6] It is also accepted by all counsel that the determination of the content of the duty of procedural fairness in any given case is a question of law and is reviewable under the standard of correctness.

[7] The duty of procedural fairness is better described by its objective – which is essentially to ensure that a party is given a meaningful opportunity in a given context to present its case fully and fairly – than by the means through which the objective is to be achieved for the simple reason that those means will depend on an appreciation of the context of the particular statute and the rights affected (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 22). There is no rigid test or formula. There is no list of items to be checked out. The duty, to use the words of a former era, is to ensure fair play in action.

[8] All counsel agree that the content of the duty of procedural fairness is flexible and variable. As might be expected, the debate amongst them is with respect to the place procedural fairness occupies in SIMA investigations on the wide spectrum defined by the case law. At the upper end of the spectrum are full participatory rights (oral hearings, cross-examination of witnesses, etc.). At the lower end are minimal participatory rights (paper hearing, etc.).

[9] The question to be answered, at the end of the exercise, was carefully crafted by Le Dain J. in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 654:

> The question, of course, is what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances.

[10] Much was said, in the written and oral arguments, about whether prejudice is a factor that comes into play when deciding procedural fairness cases. The applicant argues that in light of *Cardinal*, the final determination of the President should be set aside as soon as a breach of the duty of procedural fairness has occurred and the Court should not speculate as to what impact the alleged breach might have had. The respondents argue, in light of *Stevens v. Conservative Party of* Canada, 2005 FCA 383 (leave to appeal denied SCC 3281), that the issue of prejudice should well be in the mind of the Court when it decides to set aside a decision. As is often the case, the solution, here, lies between these two propositions.

[11] *Cardinal* dealt with procedural fairness in the particular context of prison administration. The Court stated, that the content of the duty was a question to be approached with caution in order to avoid unduly burden or obstruct the process by imposing unreasonable or inappropriate procedural requirements. Despite the recommendation of the Segregation Review Board to discontinue the administrative segregation of two prisoners, the Director had decided to continue segregation without affording any hearing to the prisoners. The Court concluded that there had been a breach of the duty of procedural fairness:

> "… because of the serious effect of the Director's decision on the appellants, procedural fairness required that he informs them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him … They were entitled to know why the Director did not intend to act in accordance with the recommendation of the Board and to have an opportunity

> before him to state their case for release into the general population of the institution … [the Director] had a duty to hear and consider what the appellants had to say …" (at page 659).
>
> "These were in my opinion the minimal or essential requirements of procedural fairness in the circumstances … There is nothing to suggest that the requirement of notice and hearing by the Director … would impose an undue burden on prison administration or create a risk to security" (at page 660).

[12] It is in this particular context of a breach of an essential element of the duty of procedural fairness, viz. "the requirement of notice and hearing", that the so-often quoted words of Le Dain J. were pronounced:

> "I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing" (at page 661).

[13] *Cardinal*, I venture to say, is far less dramatic and much more pragmatic than has sometimes been said. There had been no hearing; therefore there was a breach of an essential requirement of the duty of procedural fairness; therefore the decision could not stand. To say that *Cardinal* stands for the proposition that any breach of any requirement of the duty of procedural fairness renders a decision invalid, or that any breach of any procedural rule constitutes a breach of the duty of procedural fairness, or that a court has no discretion to deny the relief sought, is to read the reasons of the Supreme Court of Canada out of context.

[14] An occasion to exercise the judicial discretion to withhold a remedy despite the failure to afford a hearing arose in *Mobil Oil Canada Ltd v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. In that case, as in *Cardinal*, "no full hearing, which could have been

effected in writing", had been afforded (at p. 227). Iacobucci J., for the Court, decided not to grant the remedy sought because to do so would be "impractical" and "nonsensical" in the circumstances as they "involve a particular kind of legal question, viz., one which has an inevitable answer" (at p. 228). He insisted that his decision was "exceptional" and that he "would not wish to apply it broadly". In concluding his reasons, he referred to, and approved, a decision of the Court of Appeal of British Colombia in *R. v. Monopolies and Mergers Commission*, [1986] 1 W.L.R. 763, in which the Court withheld relief in a non-prison context because "good public administration is concerned with substance rather than form" and because the Commission "would have reached and would now reach the same conclusion as did their experienced chairman".

[15] In *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72, the Supreme Court of Canada stated at para. 26, without further analysis or explanation:

> Insofar as the procedures followed may not have precisely complied with those we suggest in *Suresh*, we are satisfied that this did not prejudice him. We conclude that the process accorded to Ahani was consistent with the principles of fundamental justice.
>
> (my emphasis)

[16] In *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227, the Supreme Court of Canada dismissed various complaints of unfairness made by C.P.R. that impugned the hearing process. The Court first held that the notice of the by-law, even though it might have used "an alternate wording [which] might have attracted more people", was sufficient because "what is required is fairness, not perfection" (at para. 46). The Court then found that the revision of the by-law after the hearing and without further hearing did, in the circumstances, meet the requisites of fair process, "particularly when it is bore in mind that the City had a duty to deal with a complex

situation where different interests were at play and the City's ultimate obligation was to act in the interest of the entire public" (at para. 49). Finally, with respect to a complaint that the City had failed to disclose information prior to the public hearing, the Court found that the standard practice of making the documents available through the City Clerk's office prior to, and during, the hearing, constituted sufficient disclosure (at para. 57) and that "the relevance" of some documents alleged by C.P.R. to have prevented it from making a more powerful argument was "tenuous" (at para. 61). The Court concluded that "on balance the procedure followed by the City was appropriately fair and open".

[17] The question of whether the existence of some prejudice can be examined by the court, was squarely addressed in cases where the breach alleged was that of failure to disclose.

[18] In *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, Dickson J., stated as follows, at page 1116:

> **6.** The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. *Kanda v. Government of the Federation of Malaya, supra*, at p. **337.** In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. … We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[19] In *Toshiba Corp. v. Anti-Dumping Tribunal*, (1984), 8 Admin. C.R. 173 (F.C.A.), Hugessen J.A. qualified a Tribunal's practice of not disclosing a preliminary staff report, as "dangerous", but went on to say the following:

> "Upon analysis, however, I am satisfied that everything contained in the preliminary staff report is either a matter of general or public knowledge or is based upon facts and sources which were, in due course, properly brought out at the hearing in such a manner that all the parties to that hearing had a

> full opportunity to test them. Thus, while, in my view, there might have been a technical breach of the rules of natural justice, it can be said with confidence at the end of the day that such breach was minor and inconsequential and that the result of the inquiry would not have been different had such breach not occurred.

[20] MacGuigan J.A. reviewed the case law in *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.* (C.A.), [1991] 3 F.C. 626 . He concluded as follows:

> **26.** The applicant did not, in fact, argue that it was adversely affected by the extra-hearing evidence, but rather that, in dealing with a complaint based on evidence received outside the hearing process, a Court will not inquire into whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. A court was said to be concerned, not with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.
>
> **37.** In my opinion, this review of the case law indicates the fallacy of the applicant's argument. Contrary to its contention that a court will not inquire into the question of prejudice, all of the authorities which focus on the matter show that the question of the possibility of prejudice is the fundamental issue: Kane, Consolidated-Bathurst, Cardinal Insurance, Civic Employees' Union, and Hecla Mining.
>
> (my emphasis)

[21] Relying finally on the decision of Hugessen J.A. in *Schaaf v. Minister of Employment and Immigration*, [1984] 2 F.C. 334 (C.A.), at page 442, MacGuigan J.A. added:

> **41.** "If a final word needs to be said, let it be that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require this Court to set aside a decision … The authorities have all required a real possibility that the result was affected."

[22] To summarize *Kane, Toshiba* and *Canadian Cable Television*: where the breach of the duty of procedural fairness consists of a failure to disclose some evidence, as a general rule the court, in the exercise of its discretion, will intervene if the court is in no position to determine whether the breach might have worked to the disadvantage of the complainant. Conversely, as a general rule, where the court has before it the evidence which was not disclosed at the hearing before the tribunal,

and where the court is satisfied that it is in a position to conclude that there was no prejudice and no possibility or likelihood of prejudice, the court will not intervene.

[23] The recent decision of this Court in *Stevens* dealt, not with a breach of the duty of procedural fairness, but with a breach of a procedural requirement of the statute at issue. The court refused to quash a decision made unlawfully on the basis that in the circumstances of the case, ulterior events had shown that the breach would not in any event have had an impact on the legal outcome of the case.

[24] In my view, all these decisions support the following proposition: in a given context, even though a breach of the duty of procedural fairness or of a statutory requirement has occurred, a court may hold the ultimate view that because of the inconsequential, trivial or mere technical nature of the breach, the relief sought should not be granted.

[25] It should come as no surprise that the concept of prejudice has discreetly made its way into our administrative law. The proliferation of administrative decisions and of tribunal-made procedural rules, the advent of complex inquiries and the filing of sometimes frivolous and abusive judicial challenges have forced the courts to be more vigilant. As a result, courts have attempted to ensure on the one hand that no unreasonable or inappropriate procedural requirements which unduly burden the administrative process are imposed and on the second hand that judicial interventions in the administrative process aim at preventing or correcting real injustices and at putting substance ahead of form.

[26] Returning to L'Heureux-Dubé J. in *Baker*, at para. 21, when determining the content of the duty, "all of the circumstances must be considered". Some factors have been singled out in the case law. The list given in *Baker*, "is not exhaustive" (at para. 28). "Other factors may also be important" (at para. 28). The guiding principle, in any given case, is that the persons affected "should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional, and social context of the decision" (at para. 28).

[27] It would be a mistake, in my view, to routinely attempt to apply to a given process each of the five factors singled out in *Baker*, if only for the reason that they might just not fit a particular context. The importance of the decision, for example, was generally considered in cases where the decision had a direct impact on the individual rights of the person concerned. So interpreted, the factor can be a misleading factor when applied to decisions which do not, properly speaking, affect individual rights. I do not read *Baker* as suggesting that decisions affecting economic rights are by their nature less important than decisions affecting individual rights. It would be conceptually wrong to describe from the outset such decisions as being less important. I would rather start in all cases with the premise that all decisions are equally important for those who are affected by them and then examine how they actually affect the persons concerned. The decision at issue here has important economic consequences which may well end up affecting the daily life of workers, the survival of a trade and the well-being of a whole community. That, surely, militates in favour of some participatory rights in the process even if Parliament was relatively silent in that regard. In the case at bar, however, this important factor is to a large extent neutralized by the influence of three

other factors: the type of investigation at issue, the statutory scheme and the procedural choices of the Agency.

- Type of investigation

[28] We are dealing here with dumping and subsidy investigations made by the President of the Canada Border Services Agency under sections 31 to 41.2 of the *Special Import Measures Act*. The purpose of these investigations is to determine, in accordance with sections 15 to 30.4 of the Act, the normal value of goods, their export price, the margin of dumping, if any, and if so, the amount of subsidy, if any. It is fair to say that the exercise viewed as a whole is complex and technical and requires specialized analysis and calculations of commercial data. The exercise is essentially a fact-finding economical mission in an international trade context.

- Statutory scheme

[29] The investigations are subject to very strict statutory time limits. The President must make a preliminary determination of dumping or subsidizing within 60 to 90 days after the initiation of an investigation (s.38); in exceptional circumstances, and before the expiration of the period of 90 days, the President may extend the period to 135 days (s. 39). The President must make a final determination of dumping or subsidizing within 90 days from the date of the preliminary determination (s. 41). The President has no authority under the Act to extend this final deadline. In the case at bar, the complaint was filed on August 13, 2004. The investigation was initiated by the President on October 4, 2004. The preliminary determination was made 135 days later, on February

16, 2005. The final determination was made 90 days later, on May 17, 2005. The time period allowed by the statute was used up to the last hour.

[30] Apart from a requirement that notices of the initiation of an investigation, of a preliminary determination and of a final determination be given to the parties and published in the Canada Gazette (s. 34(1), 39(2), 41(3)) and that reasons be given for both determinations (s. 38(3), 41(3)), the Act provides little guidance with respect to the manner in which the investigation is to proceed. The only requirements deal with "provision of evidence to the President" (sections 78 and 79) and "disclosure of information" (sections 82 to 88.1).

[31] Subsection 78(1) authorizes the President, by notice in writing, to require a person in Canada to provide evidence "under oath or otherwise". According to subsection 78(4), nothing in section 78 "shall be construed as authorizing the President to require any person to provide evidence orally".

[32] Section 83 grants every party (or its counsel if the information is confidential) "a right, on request, to examine the information [provided to the President] during normal business hours and a right, on payment of the prescribed fee, to be provided with copies of any such information that is in documentary form or that is in any other form in which it may be readily and accurately copied".

[33] Persons who wish some or all of the evidence to be kept confidential must submit a statement designating as confidential the information and submit at the same time a non-confidential

edited version or a non-confidential summary of the information (s. 85). Failure to provide the non-confidential edited version or summary within at most thirty days from the date the person has been informed of his failure will cause the President to ignore that evidence (s. 87(3)).

- The Agency's choice of procedures

a) general practice

[34] The Agency has made public the practice it follows when it initiates an investigation. The document is entitled "Statement of Administrative Practices for the Special Import Measures Act" (June 2004).

[35] The very day an investigation is initiated, the Agency sends a request for information to all known exporters and importers. The request describes in detail the necessary information which must be prepared and submitted. Exporters are allowed 30 days and importers 21 days in which to respond. Extensions may be granted in exceptional circumstances. Information submitted past the time limit may not be considered in the preliminary phase of the investigation.

[36] The preliminary determination is made as much as possible on verified data, but time does not always allow for verification of all the information. The requirement for an on-site visit is at the option of the Agency. Notice is given of on-site visits and the party concerned is advised ahead of time of the material that is to be verified and of the data that must be made available at the time of the visit. A verification exercise is only conducted with the consent of the exporter and only if the

foreign government does not object and if prior assurance is given that the investigators will have complete and full access to all company records that they deem necessary to examine.

[37] If a preliminary determination is made, the Agency's officers, on request, will review with individual exporters the calculations used. Explanations of all calculations together with the reasoning underlying the calculations are given at what is described as a disclosure meeting. Detailed calculations worksheets are provided and discussed. The approach which the Agency plans to use for the final determination is also discussed at that time in general terms. Information and arguments presented orally by parties at the disclosure meeting must be confirmed in writing; otherwise they will not be considered.

[38] In most cases, the investigation leading to the final decision consists of meetings with additional firms not yet visited, verifying new information, revisiting exporters for clarification of details and visiting importers if necessary. Disclosure meetings will be arranged, on request, after the final determination is issued.

b) <u>participatory rights in general</u>

[39] The Agency considers importers, exporters, Canadian producers and the foreign governments to be parties to the investigation. It requests information from them, it makes that information available to other parties, it allows the parties to submit case arguments and it allows the parties to reply to case arguments submitted.

[40] The Agency has established a practice of posting on its website an exhibit listing of all documents submitted by the parties. It has also created the SIMA registry whose task is to process requests made to obtain copies of the material listed on the website.

c) participatory rights in this investigation

[41] An investigation schedule was posted right from the start on the Agency's website. The schedule set out in details the various time limits imposed on the parties throughout the investigation. The following notice is found at the end of the schedule:

> This Investigation Schedule will be updated as necessary. Parties/counsel should monitor the website to inform themselves of changes. Any changes which reduce the time allowed for parties/counsel to submit information or make representations will be communicated directly to parties/counsel.

[42] In the instant case, since the President extended the time limit for the preliminary determination, the Investigation Schedule was amended accordingly. The deadline to submit case arguments was set to March 25, 2005 and later extended to march 30, 2005. The deadline to submit briefs in reply to case arguments submitted by others was originally set to April 1, 2005 and it was eventually extended to April 19, 2005.

[43] In addition, and exceptionally, the Agency disclosed its preliminary calculations related to the final determination beginning on April 15, 2005. The Agency decided to disclose such information since the calculations were now based on verified information and indicated that there would be substantive changes from those reported at the preliminary determination. This approach provided counsel with an opportunity to comment on the results of each exporter as they became available.

Conclusion on the duty of procedural fairness

[44] It flows from the above that the investigation is essentially a paper-investigation that is as distant as it can possibly be from the judicial decision making model and very much remote from the process typically associated with administrative tribunals. I find it quite remarkable that the statute prescribes that a party does not as of right receive the information provided to the President: the party is only entitled, on request, to examine the information at the President's premises and can only obtain copies of the information in a documentary form on payment of a fee. These statutory participatory rights are at the extreme bottom end of the procedural fairness scale.

[45] It also flows from the above that an investigation by the President can end up in certain cases being a race against the clock. This is the express will of Parliament, presumably out of economic necessity. One has to accept that notwithstanding the diligence of the Agency and of all the parties incidents are likely to occur which, in this particular context, will be seen as being inescapably inherent to the process. Investigations of that magnitude (360,000 pages, six countries, three continents, five or six different languages) can simply not be completed within the maximum allotted time (225 days) unless the duty of procedural fairness is set at a low threshold. There can be no legitimate expectation of a higher threshold. Perfection or near-perfection is simply not in sight.

[46] As I understand counsel's arguments with respect to procedural fairness, he complains that he struggled to obtain access to some material, that some documents were produced out of time, that public versions of confidential information were made available too late, that the Agency refused to

abide by the published investigation schedule and that, as a result of the failure to close the record as scheduled, the President "appears to have abandoned all semblance of procedural integrity" and rendered "a decision on the basis of a disordered record and incomplete and unfinished reports".

[47] Some of these allegations are well-founded. Others are not. Some are mere speculations. Counsel did not explain, in his memorandum of fact and law, nor was be able to at the hearing, how the few incidents that actually occurred, in and by themselves or through their cumulative effect, deprived the applicant of a fair hearing in the context of a SIMA investigation.

[48] There were, admittedly, flaws in the application of the procedural rules set out by the Agency. But these flaws were nothing but incidents inherent to the process and inconsequential in the context of the whole investigation. They constituted at best a breach of some of the procedural rules and in no way can they be said to have breached the requirements of the duty of procedural fairness owed the applicant. The applicant participated in all the phases of the investigation, and its views were sought throughout. Put simply, the applicant had a full opportunity to be heard. Although the hearing was perhaps imperfect, it was nevertheless on balance fair, reasonable and appropriate in the circumstances. To repeat the words of Chief Justice McLachlin in *C.P.R. v. Vancouver (City)*, "what is required is fairness, not perfection" (at para. 46).

[49] The statute provides very little procedural safeguards. The Agency went beyond the requirements of the statute in adopting the rules of procedure applicable to such investigation. In view of the importance of the decisions it makes, the Agency is amply justified and prudent in

proceeding as it does. The Agency devised rules of procedure that are fair, reasonable and appropriate considering the rigid and complex context within which it operates. This Court has made it clear, in *Cougar Aviation Ltd v. Canada (Minister of Public Works and Government Services)*, (2000) 264 N.R. 49 at para. 62 (F.C.A.) and in *Xwave Solutions Inc. v. Canada (Public Works and Government Services)I*, [2003] F.C.J. No. 1089 (C.A.), that procedural choices of tribunals such as the Agency should not be lightly interfered with .

[50] In the end, I have reached the conclusion that the flaws that have occurred during the investigation did not individually or collectively constitute a breach of the duty of procedural fairness.

Legal issues

[51] The applicant raises three legal issues:

> a) the refusal of the President to disclose Verification Reports in alleged violation of the full disclosure requirements of section 83 of the Act;
>
> b) the calculation of transfer prices in related party transactions, which allegedly was not done in accordance with OECD *Transfer Pricing Guidelines* allegedly endorsed by the Agency; and
>
> c) the calculation of the margin of dumping, which allegedly was made in violation of the formula set out in subsection 30.2(1) of the Act.

The verification reports

[52] The first alleged error will be examined on the basis of the standard of correctness because it is closely associated with concerns of procedural fairness and also because it involves the

interpretation of the word “information”, in the Act, with respect to which the Agency has no special expertise. The nature and scope of disclosure under the Act is a matter akin to that in issue in *Canada (Deputy Minister of National Revenue – M.N.R.) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at para. 33), where the Supreme Court of Canada applied the standard of correctness to the construction of the words “sale of goods for export to Canada” and “a condition of the sale of the goods” which were said not to be “scientific or technical” and to be concept “akin to commercial law … traditionally the province of the Courts”.

[53] The verification reports were not disclosed to the applicant during the investigation on the basis that they were not, properly speaking, “information” or “evidence”, but were, rather, internal documents prepared by officers of the Agency for the use of the President. The reports were filed before this Court, on a confidential basis, so as to enable us to determine their true nature.

[54] The reports at issue slightly differ in form from one to another, but in essence they each constitute the result of the audit undertaken by the Agency’s investigators of the written documentation provided to the President by some foreign firms in the course of the investigation. (That written documentation is made available to the applicant and is not at issue here). The reports contain in an Appendix all the documentary evidence that was provided by the firm to the investigators in the course of the auditing process; that documentary evidence is referred to as “Verification Exhibits” and is made available to the applicant. Some reports also contain references to what is reported as having been said or done by employees of the concerned firm during the audit.

[55] In reality, therefore, the only “information” or “evidence” to which the applicant is not given access to is that provided orally in the course of the audit and the summary, description, analysis or interpretation of that oral evidence and of the Verification Exhibits which are made by the investigators in their verification reports.

[56] This is not “information (or “evidence”) provided to the President” within the meaning of sections 78, 82 and 83 of the Act. As noted earlier, we are concerned here with an investigation which is a paper-only investigation. Oral testimony is not contemplated by Parliament or by the Agency’s rules and the totality of the information provided to the President is submitted to him in writing. Even when it comes to comments or arguments by any of the parties, which have been made orally during a “disclosure meeting”, we have seen that they will be ignored by the President unless they are submitted to him in written form without delay.

[57] In the circumstances, reports prepared by investigators on conversations they had with employees of audited firms in the course of the audit cannot be properly described as information provided to the President by the parties within the meaning of the Act. The summary, description, analysis or interpretation by the investigators of the information they receive during the audit are internal documents which need not be disclosed.

The second and third alleged errors: the standard of review

[58] The second and third alleged errors will be examined on the basis of the standard of reasonableness, for the following reasons.

[59] The fact that Parliament, in section 96.1 of the Act, has allowed judicial review of a President's actions made in a procedural or substantive context points to more deference.

[60] The questions of whether the President properly tested transfer prices and properly calculated the margins of dumping draw on the President's expertise in international trade matters. These issues are technical and the statute, in subsections 19(a) and 19(b), confers some discretion on the President. Were courts to become mired in all the minutia of detail informing a margin of dumping calculation, it is sure that they would not see the light of the day beneath the volumes of evidence that would assuredly be produced – as they were in this case – on judicial review. This factor points to more, and considerable, deference.

[61] The purpose of legislation factor is a neutral factor. While there is, maybe, some polycentric elements in the decision made by the President, he is not asked to make pronouncements on policy nor to balance the rights of competing economic factors. He is asked in the end to calculate dumping in a manner that conforms with the Act.

[62] Finally, the questions at issue are not purely legal issues, notwithstanding the applicant's efforts to characterize them as such. Determining transfer pricing is essentially fact specific, requiring first an investigation into whether a corporation actually sells to related companies and, if so, on what basis are transaction prices established. Similarly, the question of how dumping is determined, is essentially a mathematical calculation using data collected by the President. While

these questions contain legal elements, the emphasis is largely factual. More deference is warranted.

[63] In the end, after balancing the four factors singled out by the Supreme Court of Canada, I reach the conclusion that the standard of review lays somewhere between the reasonableness standard and the patently unreasonableness standard. As I prefer to err on the side of caution, I will adopt the reasonableness standard.

Calculation of related party transaction prices

[64] The applicant has provided no example, no law, and no evidence to support its claim that related party transactions were accounted for improperly by the President. Its argument is based on a microscopic reading of one part of one sentence in the President's reasons, at para. 62, and on a misapprehension of what the President actually said in that sentence.

[65] According to section 2, the definition section of the Act, normal value means "normal value determined in accordance with sections 15 to 23 and 29 and 30". In this case, normal values were determined primarily under sections 15 and 19. Section 19 gives the President wide discretion as to which of the two methods prescribed by the Act should be used in a given case to determine the normal value of the goods. The method prescribed in subsection 19(b) leads to the normal value of the goods being determined as "the aggregate of (i) the cost production of the goods, (ii) a reasonable amount for administrative, selling and all other costs, and (iii) a reasonable amount for profits". The applicant alleges that the President did not include items (ii) and (iii) in the

calculation. The evidence simply does not support the allegation. Furthermore, the President referred to "the total cost of the product", which encompasses the three items described above, and not, as suggested by the applicant, solely to "the cost production".

[66] The applicant also alleges that the President erred in refusing to have the transfer prices between related parties tested in accordance with OECD *Transfer Pricing Guidelines*. It was reasonably open to the President to find, as he did, that these guidelines did not pertain to domestic transfer prices between related companies, were primarily aimed at minimizing conflicts between tax administrations and were not binding on the Agency.

Calculation of the margin of dumping

[67] The third and final alleged error is with respect to the President's interpretation of subsection 30.2(1) of the Act. That subsection reads as follow:

30.2 (1) Subject to subsection (2), the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.	**30.2** (1) Sous réserve du paragraphe (2), la marge de dumping relative à des marchandises d'un exportateur donné est égale à zéro ou, s'il est positif, au résultat obtenu en retranchant la moyenne pondérée du prix à l'exportation des marchandises de la moyenne pondérée de la valeur normale des marchandises.

[68] The applicant, essentially, argues that the President erred in making "a significant departure from established practice in respect of the calculation of margins of dumping", i.e., to use the very words of the President, "in discontinuing the Agency's practice of zeroing for purpose of determining a margin of dumping for an exporter".

[69] A change of policy, in and by itself, is not an error unless it offends the enabling statute. Indeed, policies are rarely written in stone and it is very much within the realm of administrative tribunals to set them out and, when the need arises, to adapt them to new realities.

[70] I will not comment on the previous policy. The only question the Court must answer is whether it is reasonable to interpret subsection 30.2(1) of the Act as allowing the Agency, where determining a margin of dumping for an exporter, to take into consideration export sales that reveal no dumping (because their price is equal to or greater than the home-market sales price), a practice which will often result in a reduction of the overall margin of dumping found for that exporter.

[71] I see nothing in the language of subsection 30.2(1) which prevents taking into account all export sales price in order to determine the margins of dumping. Quite to the contrary, and the French text is perhaps even clearer in this regard, the method used is comparing the weighted average export price of the goods with their weighted average normal value. Average weighting, in my view, calls for an examination of all the relevant export sales made during the relevant period, even those that show no dumping. The reference to "zero" in the subsection would be useless if, as argued by counsel, only sales that show evidence of dumping were to be considered.

[72] Some of the export sales may be at the same price as the home-market sales, some at a higher price and other at a lower price, with the result, respectively, of having a neutral effect on the margin of dumping, of reducing the margin of dumping and of increasing the margin of dumping. In order to account for the possibility that the average weighting of all the export sales result in a

negative integer, the Act provides that a negative result be zeroed after the final weighted dumping margin has been established. In other words, zeroing does not occur on a transaction by transaction basis; it is only applied after the weighted margin of dumping is calculated.

[73] In the end, the final calculation will result either in zero or in a positive number. When it results in a positive number, that number becomes the margin of dumping and if it is less than two per cent of the export price, it will be deemed by section 2 of the Act to be "insignificant". The President then has the duty, under section 35, to terminate the investigation.

[74] This approach is consistent with recent decisions of the World Trade Organization appellate body (see *Appellate Body Report,* European Communities – Anti-Dumping Duties on Imports of Cotton-type bed liners from India, WT/DS 141/AB/R (March 2001), *Appellate Body Report,* United States—Final dumping determination on softwood lumber from Canada, WT/DS 264/AB/R (August 2004) and *Appellate Body Report,* United States – Final dumping determination on softwood lumber from Canada, WT/DS 264/AB/RW (August 15, 2006). While these decisions are not binding on this Court and dealt with provisions of international agreements which are not literally similar to those found in the Canadian statute, it is not unreasonable for the Agency, nor for this Court, to take them into consideration.

[75] As the new approach adopted by the Agency is consistent with both the Canadian statute and international agreements to which Canada is a party, it can hardly be qualified as unreasonable.

Disposition

[76] For the above reasons, I would dismiss this application insofar as the People's Republic of China, Sichuan Shengda Wooden Products Col. Ltd and Asia Dekor Industries (Shenzhen) Co. Ltd are concerned, without costs.

[77] I would quash the application insofar as the other Chinese and the French exporters are concerned.

[78] I would dismiss the application with respect to all other respondents.

[79] I would grant costs to the respondents who have filed a memorandum of fact and law, it being understood that there will be one set of costs when various respondents were represented by the same counsel.

"Robert Décary"
J.A.

"I agree
Marc Noël J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-285-05
STYLE OF CAUSE:	UNIBOARD SURFACES INC. v. KRONOTEX FUSSBODEN GMBH AND CO. KG, STEVENS-DUFOUR INC., GOODFELLOW INC., KRONOFLOORING GMBH, BEIJING KRONOSENHUA FLOORING CO., QUALITY CRAFT LTD., QUICKSTYLE INDUSTRIES INC., KAINDL FLOORING GMBH, KRONOSPAN LUXEMBOURG SA, UNILIN FLOORING NV, TORLYS INC., WYERHAEUSER COMPANY LIMITED, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, SICHUAN SHENGDA WOODEN PRODUCTS CO. LTD., VOHRINGER WOOD PRODUCTS CO. LTD., ASIA DEKOR INDUSTRIES (SHENZHEN) CO. LTD., SHAW INDUSTRIES INC., MOHAWK INDUSTRIES INC., SHANGHI ALLSUN WOOD INDUSTRY CO. LTD, MATÉRIAUX A BAS PRIX, KRONOPOL LTD., LAMWOOD PRODUCTS (1990) LIMITED, AKZENTA PANEELE AND PROFILE GMBH OR THE CLASSEN GROUP OF COMPANIES, YEKALON INDUSTRY INC.,

	ESAPACE PRODUCTION INTERNATIONAL (EPI), S.A. AND TARKETT INC.
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	November 22, 2006
REASONS FOR JUDGMENT BY:	DÉCARY J.A.
CONCURRED IN BY:	NOËL J.A. NADON J.A.
DATED:	December 7, 2006

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