Federal Court of Appeal Cour d'appel fédérale

**Date: 20190322**

**Docket: A-11-18**

**Citation: 2019 FCA 52**

**CORAM:** **NEAR J.A.**
**RENNIE J.A.**
**LASKIN J.A.**

**BETWEEN:**

**NOVA TUBE INC./NOVA STEEL INC.**

**Applicants**

**and**

**CONARES METAL SUPPLY LTD.,**
**MINISTRY OF THE ECONOMY of the**
**UNITED ARAB EMIRATES, and ATTORNEY**
**GENERAL OF CANADA**

**Respondents**

Heard at Toronto, Ontario, on November 29, 2018.

Judgment delivered at Ottawa, Ontario, on March 22, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

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

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## REASONS FOR JUDGMENT

**LASKIN J.A.**

### I. Overview

[1] In December 2012, the Canadian International Trade Tribunal made a finding that the dumping of carbon steel welded pipe originating in or exported from certain countries in Asia

and the Middle East was threatening to cause injury to the domestic industry. As a result, anti-dumping duty was imposed.

[2] Under the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), a finding of this kind is deemed to have been rescinded after five years, unless the Tribunal has initiated an expiry review of the finding. In this case, the Tribunal was satisfied that an expiry review was warranted, except in relation to the goods of the respondent Conares Metal Supply Ltd., a United Arab Emirates exporter. The Tribunal therefore issued an order stating that it had decided not to initiate an expiry review in relation to exports by Conares.

[3] The applicants, part of the domestic industry, seek judicial review of that order. They submit that unlike the provisions of SIMA authorizing the Tribunal to conduct other types of reviews, the provisions for expiry reviews do not permit the Tribunal to review only a particular portion or aspect of a finding. They recognize that the Tribunal may exclude the goods of a particular exporter from a finding on completion of an expiry review, but contend that the expiry review itself must be of the entire finding. Conares disagrees. It submits that on a reasonable construction the legislation authorizes the Tribunal to exclude particular goods from an expiry review. It also argues that the Tribunal's order is not subject to judicial review in this Court, and that even if it is, and even if this Court determines that the Tribunal had no authority to make the order, there is no practical remedy that the Court can grant, since the Tribunal's finding as against Conares has expired by operation of law and cannot be reinstated.

[4] In the meantime, while this judicial review application was pending, the expiry review has proceeded – other than in relation to exports by Conares. The Tribunal has concluded that rescinding its finding would likely cause material injury to the domestic industry. It has therefore decided to continue its finding – again, other than in relation to exports by Conares.

[5] This application thus raises two main questions, one substantive and one remedial. The first is whether the Tribunal erred in interpreting SIMA's expiry review provisions as entitling it to decide not to initiate an expiry review in relation to exports by Conares. The second, contingent on a "yes" answer to the first, is what remedy the Court can and should grant. The application also raises the preliminary question of whether the Tribunal's order is subject to judicial review in this Court.

[6] Before proceeding further, I should mention that the Attorney General appeared in response to the application for judicial review, but took no position on these questions. Instead, she filed a memorandum of fact and law which merely set out certain considerations that she submitted were relevant, and concluded that "it is not clear entirely whether the expiry mechanism selected was the appropriate mechanism in the circumstances." She also declined the Court's invitation to provide oral argument, but did observe that she considered the applicants' position on the interpretation of the statute to be the better one, and that the remedy question raised concerns. The Court would have appreciated further assistance from the Attorney General. The Department of Finance, which is responsible for the elaboration of SIMA policy and legislation, should have had a view on the meaning of the statute.

[7] For the reasons set out below, I conclude that the Tribunal's order is subject to judicial review. On the first main question, I find that the Tribunal's interpretation of SIMA was unreasonable. In the unusual circumstances of this application I would, however, decline to grant a remedy.

## II. Factual background

### A. *The determination of dumping and finding of injury*

[8] In November 2012, the President of the Canada Border Services Agency made a final determination regarding the dumping of certain carbon steel welded pipe. Among other things, the President found that goods originating in and exported from two countries, Chinese Taipei and the UAE, had been dumped. Certain exporters in these countries, including two Chinese Taipei exporters and Conares, which exported from the UAE, were found to have "insignificant" margins of dumping – a term defined in subsection 2(1) of SIMA to mean a margin of dumping of less than two percent of the export price of the goods. In particular, Conares was determined to have a dumping margin of zero percent. However, the investigation was not terminated against Conares and the two Chinese Taipei exporters because, at the time, subsection 41(1) of SIMA required the CBSA to make dumping determinations on a country-wide basis, and the dumping margins of Chinese Taipei and the UAE were, overall, not insignificant.

[9] In December 2012, the Tribunal made a finding (in Inquiry No. NQ-2012-003) as to the goods to which the CBSA's final determination applied. The Tribunal found that the dumping of certain carbon steel welded pipe originating in or exported from the countries identified by the CBSA, including Chinese Taipei and the UAE, was threatening to cause injury to the domestic industry.

[10] Based on its zero percent dumping margin, Conares requested a producer exclusion from the Tribunal's finding. However, the Tribunal was of the view that an exclusion would be tantamount to providing a "licence to dump," and was accordingly not warranted other than in "the most specific set of circumstances" (at para. 181). The Tribunal further observed that Conares' recourse to shield itself from anti-dumping duty was to maintain its zero percent dumping margin and submit to periodic verification.

B. *The WTO proceedings*

[11] In June 2014, under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-dumping Agreement), Chinese Taipei requested World Trade Organization consultations with Canada in respect of the 2012 anti-dumping measures applied against it. After consultations failed, the WTO Dispute Settlement Body established a panel, which issued a report in December 2016. Among other things, the panel concluded that Canada had acted inconsistently with the Anti-dumping Agreement by failing to immediately terminate the investigation in respect of, and by imposing definitive anti-dumping duties against, exporters from Chinese Taipei with *de minimis* margins of dumping. It also

determined that subsection 41(1) of SIMA was inconsistent with Canada's obligations under the Anti-dumping Agreement in requiring dumping determinations to be made on a country-wide, rather than exporter-specific, basis.

[12] The panel's report was adopted by the WTO's Dispute Settlement Body in January 2017. Canada then entered into an agreement with Chinese Taipei requiring Canada to implement the panel's recommendations by March 25, 2018. As a result, amending legislation was introduced in early 2017 as part of Bill C-44, a budget implementation bill; it was subsequently enacted (S.C. 2017, c. 20), and received royal assent in June 2017. Among other things, it amended SIMA to provide for the termination of investigations and inquiries as against particular exporters with insignificant dumping margins. However, these amendments were not given retroactive effect.

C. *The Ministerial and expiry reviews*

[13] In July 2017, as a result of the WTO panel's report, the Minister of Finance requested under subsection 76.1(1) of SIMA that the CBSA and the Tribunal review, respectively, their determination and finding relating to certain carbon steel welded pipe originating in or exported from Chinese Taipei. On July 28, 2017, while the Ministerial review process was ongoing, the Tribunal gave notice under subsection 76.03(3) of SIMA that the 2012 finding was set to expire on December 10, 2017, and requested submissions from interested parties on whether an expiry review was warranted.

[14] In September 2017, on completion of the Ministerial review of its final determination of dumping, the CBSA decided to continue the final determination with respect to certain carbon steel welded pipe originating in or exported from Chinese Taipei, but terminated the dumping investigation as against the two Chinese Taipei exporters. Although Conares requested that the CBSA consider as part of the Ministerial review its 2012 determination regarding carbon steel pipe originating in or exported from the UAE, so that the CBSA's investigation would also be terminated as against Conares, the CBSA concluded that it was precluded from doing so by the scope of the Minister's request, which was limited to Chinese Taipei.

[15] On December 8, 2017, the Tribunal issued two decisions. First, in its finding and reasons in the Ministerial review (in Inquiry No. NQ-2012-003R), it confirmed its injury finding regarding goods from Chinese Taipei, excluding the goods of the two Chinese Taipei exporters with margins of dumping below two percent. In that proceeding, Conares had requested that its goods be excluded from the 2012 finding. However, like the CBSA, the Tribunal denied this request on the basis that it was limited by the scope of the Minister's request. Second (in Expiry No. LE-2017-003), it issued an order, accompanied by a statement of reasons, in which it concluded that an expiry review was warranted except for goods exported by Conares, and decided not to initiate an expiry review in relation to exports by Conares. That order is the subject of this application for judicial review, which was commenced in January 2018.

[16] In May 2018, while the application was pending, the CBSA issued its expiry review decision. It determined that the expiry of the Tribunal's injury finding would likely result in the continuation or resumption of dumping of certain carbon steel welded pipe. This decision expressly excluded goods exported by Conares.

[17] In October 2018, shortly before this application was heard, the Tribunal issued its order and reasons on the expiry review (Expiry Review No. RR-2017-005). The Tribunal found that the reintroduction of dumped goods into the market could lead to the collapse of the domestic industry. It therefore determined to continue its injury finding. Consistent with its order determining that it would not initiate an expiry review involving the goods of Conares, those goods were not included in the continued finding.

## III. The preliminary issue – Can this Court review the Tribunal's order?

[18] Conares submits that the Tribunal's order deciding not to initiate an expiry review in relation to exports by Conares is not reviewable by this Court. It relies on subsection 96.1(1) of SIMA, which lists the orders and findings of the Tribunal that may be the subject of an application for judicial review to this Court, and on subsections 76.03(4) and (5), which read as follows:

| | |
|---|---|
| **(4)** The Tribunal shall not initiate an expiry review at the request of any person or government unless the person or government satisfies the Tribunal that a review is warranted. | **(4)** Le Tribunal ne procède au réexamen relatif à l'expiration sur demande que si la personne ou le gouvernement le convainc du bien-fondé de celui-ci. |
| **(5)** If the Tribunal decides not to | **(5)** S'il rejette la demande d'examen |

| | |
|---|---|
| initiate an expiry review at the request of a person or government, the Tribunal shall make an order to that effect and give reasons for it, and the Tribunal shall forward a copy of the order and the reasons to that person or government and cause notice of the order to be published in the *Canada Gazette*. | relatif à l'expiration, le Tribunal rend en ce sens une ordonnance motivée, en transmet copie à la personne ou au gouvernement et fait publier un avis dans la *Gazette du Canada*. |

[19] Conares acknowledges that by paragraph 96.1(1)(*d*), the orders subject to judicial review in this Court include an order under subsection 76.03(5). But it argues that a decision as to whether an expiry review is warranted is not made under that provision but under subsection 76.03(4); that a subsection 76.03(5) order merely gives procedural effect to a subsection 76.03(4) decision; and that, although the omission may be a flaw in the legislation, the list in subsection 96.1(1) does not include decisions under subsection 76.03(4).

[20] In my view the Tribunal's order was made under subsection 76.03(5). The Tribunal itself was plainly of that view; its order reads as follows (emphasis added):

> On July 29, 2017, the Canadian International Trade Tribunal issued a notice of expiry of finding seeking submissions on whether it should initiate an expiry review of the above-mentioned finding. The Canadian International Trade Tribunal is satisfied that an expiry review is warranted, except for goods exported from the United Arab Emirates by Conares Metal Supply Ltd. Therefore, pursuant to subsection 76.03(5) of the *Special Import Measures Act*, the Canadian International Trade Tribunal has decided not to initiate an expiry review in relation to such exports by Conares Metal Supply Ltd.

The Tribunal also concluded its reasons (at para. 19) with a statement invoking subsection 76.03(5).

[21] The Tribunal's order gave effect to its "[decision] not to initiate an expiry review" in relation to the goods exported by Conares. It therefore falls squarely within subsection 76.03(5) and is subject to review by this Court.

## IV. The substantive issue – Did the Tribunal err in interpreting SIMA's expiry review provisions as entitling it to decide not to initiate an expiry review in relation to exports by Conares?

### A. *Standard of review*

[22] Both parties submit that the applicable standard on this question is reasonableness. I agree. There is nothing here to rebut the presumption that the interpretation by a tribunal of its home statute is subject to deference on judicial review: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paras. 27-28, 36 Admin. L.R. (6th) 1. This Court has recognized the Tribunal as a highly specialized tribunal whose decisions are entitled to deference: *Essar Steel Algoma Inc. v. Jindal Steel and Power Limited*, 2017 FCA 166 at para. 15, 281 A.C.W.S. (3d) 762, leave to appeal to S.C.C. refused, 2018 CanLII 35649.

[23] In conducting reasonableness review of a tribunal's interpretation of its home statute, the Court applies the "tools of statutory interpretation" to determine whether they reasonably support the tribunal's conclusion: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 108, [2018] 1 S.C.R. 83. Those tools, under the modern approach to statutory interpretation, include the text, context and purpose of the provision: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837; *Williams Lake Indian Band* at para. 108.

[24] The Supreme Court has stated that “[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable”: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38, [2013] 3 S.C.R. 895; see also *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras. 26, 76, [2015] 3 S.C.R. 704.

[25] However, the statutory interpretation process does not always yield a single reasonable answer. Where a legislative provision is capable of more than one reasonable interpretation, and the tribunal has adopted one of them, “the resolution of unclear language in an administrative decision maker’s home statute is usually best left to the decision maker,” and the burden rests on the parties challenging the tribunal’s interpretation “not only to show that [their] competing interpretation is reasonable, but also that the [tribunal’s] interpretation is *unreasonable*”: *McLean* at paras. 32-33, 40-41 (emphasis in original).

B. *The Tribunal’s reasons*

[26] In its reasons, the Tribunal set out both factors that led to its determination that goods exported by Conares should be excluded, and factors that it considered gave it the authority to exclude them.

[27] In the first category was that Conares’ exports were not dumped at the time of the CBSA’s final determination of dumping, but that, as noted above, SIMA then required that dumping determinations be made on a country-wide basis, and goods from the UAE were found to be dumped overall. In addition, the Tribunal saw including the goods of Conares as

inconsistent with the conclusion of the WTO Dispute Settlement Body, also referred to above, that subjecting the goods of an exporter with a zero or *de minimis* margin of dumping to anti-dumping duty constitutes a breach of Canada's obligations under the Anti-dumping Agreement. The goods of Conares, it stated (at para. 15), should never have been subject to the injury finding, and there could be no "reasonable indication that the expiry of the finding [would] likely result in the continued or resumed dumping of Conares' goods given that they were not dumped in the first place."

[28] Before discussing the factors in the second category, the Tribunal noted that the amendments to SIMA to implement the recommendations of the Dispute Settlement Body had not been given retroactive effect. However, it suggested that Conares would have been entitled to seek exclusion through a Ministerial review.

[29] The Tribunal accepted that section 76.03 of SIMA does not expressly contemplate the partial initiation of an expiry review, but stated (at para. 13) that "the *a contrario* implication of the language used in that provision is that the Tribunal is expressly precluded from initiating a review where one is not warranted." In reliance on two decisions of this Court and two Binational Panel decisions (discussed further below), the Tribunal held (at para. 13) that it "has broad discretionary authority to exclude goods from its findings and orders in extraordinary circumstances," and that "the specific context of Conares' exclusion request is one of those extraordinary circumstances." It then referred to the principle of statutory interpretation that legislation will be presumed to conform to international law, and stated (at para. 13) that "where

[the Tribunal] has discretionary authority under SIMA, it must exercise such authority in a manner that is fair and that is consonant with Canada's international trade obligations."

C. *Analysis*

[30] I turn now to the factors – the tools of statutory interpretation – that in my view bear on the interpretation of the words in issue.

(1) Text of section 76.03

[31] The text of section 76.03 supports the applicants' position. As the Tribunal acknowledged in its reasons, section 76.03 does not on its face contemplate the initiation of an expiry review of part of a finding; subsection 76.03(3) states that an expiry review is of "an order or finding" only.

[32] While subsection 76.03(4) provides that the Tribunal shall not initiate an expiry unless it is satisfied that a review is warranted, I see the "*a contrario* implication" of the text of the provision as providing support for the Tribunal's conclusion that is limited at best. Even if the text implies that the Tribunal may not initiate a review where one is not warranted, it does not specify, except by referring to "an order or finding," the scope of the review that the Tribunal may conduct.

(2) Statutory context

[33] The language that Parliament has used in relation to other types of reviews under SIMA provides important statutory context; it also supports the applicants' construction.

[34] SIMA provides for the Tribunal to conduct four types of reviews of orders and findings: expiry reviews under section 76.03 (to determine whether a finding of injury should be maintained), interim reviews under section 76.01 (typically as a result of changes in circumstances), reviews on referral back under section 76.02 (after a decision has been made on judicial review or by a panel), and Ministerial reviews under section 76.1 (after the Dispute Settlement Body of the WTO has made a recommendation or ruling). (The CBSA is also authorized or required to conduct reviews in certain circumstances, but I will focus on those conducted by the Tribunal.)

[35] In providing for each type of review by the Tribunal, SIMA specifically sets out what may be reviewed – including whether the review is to be of the entire order or finding or may include only a part of the order or finding – and what actions the Tribunal may take on completion of the review.

[36] An expiry review may be initiated of "an order or finding" (subsection 76.03(3)). At the conclusion of an expiry review, the Tribunal is to make an order either rescinding the order or finding or "continuing the order or finding, with or without amendment, in respect of goods which it determines that the expiry of the order or finding is likely to result in injury or retardation" (subsection 76.03(12)).

[37] Similarly, a review on referral back covers “the order or finding” (subsections 76.02(1) and (3)). After completing the review, the Tribunal shall either confirm the order or finding or rescind it and “make any other order or finding with respect to the goods to which the order or finding under review applies as the nature of the matter may require” (subsection 76.02(4)).

[38] By contrast, an interim review may be of either “the order or finding” or “any aspect of the order or finding” (subsection 76.01(1), emphasis added). On completion of an interim review of the whole of an order or finding, the Tribunal is to make an order rescinding the order or finding or continuing it with or without amendment, as the circumstances require. Where the review is limited to an aspect of the order or finding, the Tribunal is to “make any order in respect of the order or finding as the circumstances require” (subsection 76.01(5)).

[39] In like manner, a Ministerial review may be requested by the Minister of Finance of “any order or finding […] or any portion of such an order or finding” (paragraph 76.1(1)(*b*), emphasis added). On completion of the review, the Tribunal shall continue the order or finding without amendment, continue it with any amendments that the Tribunal considers necessary, or rescind it and make any other order or finding that it considers necessary (subsection 76.1(2)).

[40] These differences attract the “different words, different meaning” component of the presumption of consistent expression: “[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning”: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at §8.36, quoting *Jabel Image Concepts*

*Inc. v. Canada*, 257 N.R. 193 at para. 12, 2000 CanLII 15319 (F.C.A.). Here, the fact that Parliament has specified that certain reviews may be of a "portion" or an "aspect" of an order or finding, while other reviews may be only in respect of an "order or finding," supports the position that the Tribunal could not reasonably interpret SIMA as entitling it to exclude the goods of Conares in initiating the expiry review.

[41] The applicants also rely on another element of the statutory context. They submit that the Tribunal's interpretation of its powers is contrary to the scheme of the Act, and the bifurcation of responsibility between the CBSA and the Tribunal, because excluding certain goods from an expiry review deprives the CBSA of its responsibility and entitlement to consider whether the expiry of the order or finding is likely to result in the continuation or resumption of dumping or subsidizing of the goods.

[42] In broad terms, SIMA provides for the imposition of duty on dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding that the dumping or subsidizing has caused or is threatening to cause material injury to a domestic industry. The Act divides responsibility between the CBSA (the Act refers to the President of the CBSA rather than the Agency) and the Tribunal. In general, the CBSA determines whether goods have been or are likely to be dumped or subsidized, and the Tribunal determines whether injury has been caused or is threatened.

[43] However, I do not find this element of the applicants' submissions on the statutory context to be persuasive. At the time of the Tribunal's order here, rule 73.2 of the *Canadian*

*International Trade Tribunal Rules*, SOR/91-499, authorized the Tribunal to request the parties to provide information addressing factors relevant to its determination of whether or not to initiate an expiry review, including the likelihood of a continuation or resumption of dumping or subsidizing. The Tribunal had established a body of case law setting out the legal and evidentiary burden on parties seeking to persuade the Tribunal that initiation of an expiry review was warranted. To meet this onus, a requesting party was required to show "a reasonable indication" that the expiry of the finding would likely result in, among other things, continued or resumed dumping: see, for example, *Mattress Innerspring Units*, Expiry No. LE-2013-002, 2014 CanLII 22323 at para. 9 (CITT). The bifurcation of responsibility between the CBSA and the Tribunal is not absolute.

(3) Legislative history

[44] The legislative history also supports a construction of section 76.03 that would preclude expiry reviews of part of a finding.

[45] Before amendments implemented in 1999 (S.C. 1999, c. 12, s. 36), SIMA did not expressly distinguish between expiry and interim reviews. Section 76 of SIMA as enacted (S.C. 1984, c. 25, s. 1) merely authorized the Tribunal, at any time after making an order or finding relating to the imposition of duty, to review "the order or finding" on its own initiative or at the request of the Deputy Minister of National Revenue for Customs and Excise (whose functions were later assumed by the CBSA) or any other person or any government. There was no express authority to review only a portion or an aspect of an order or finding.

[46] Before initiating a review at the request of a person or government, the Tribunal had to be satisfied that the review was warranted. On completion of the review, it was required either to rescind the order or finding or continue it with or without amendment. Apart from the entitlement to request a review, the Deputy Minister was afforded no role in the review process.

[47] In 1996, subcommittees of the House of Commons Standing Committee on Finance and Standing Committee on Foreign Affairs and International Trade undertook a joint review of SIMA. Anthony T. Eyton, then chairman of the Tribunal, was a witness before the subcommittees. He expressed the concern that SIMA did not permit the Tribunal to review only a portion of a finding, and asked for clarification of its authority. His speaking notes included the following passage ("Speaking Notes for Anthony T. Eyton, Chairman, Canadian International Trade Tribunal to the Joint Subcommittee on the Review of the Special Import Measures Act", (27 November 1996) [unpublished] at 6, emphasis added):

> Our experience with applications for interim reviews leads us to believe that clarification regarding our authority to conduct interim reviews with respect to a specific aspect or portion of a finding would also be helpful. For example, if an injury finding was made covering several different subject goods and production in Canada of a like good ceases, <u>the legislation prevents us from reviewing only that portion of the finding, relating to the discrete product. The wording of SIMA suggests that the whole finding and not just the discrete portion, would be put in issue.</u> Frankly speaking, it would not make sense to open up the entire case again in those circumstances.

[48] Mr. Eyton's evidence before the subcommittees included statements to the same effect; he told the subcommittees that it would be "helpful if [the Tribunal] could be given the authority under the legislation to investigate, in a partial way, in the interim review process" (House of Commons, Subcommittee on the Review of the *Special Import Measures Act* of the Standing

Committee on Finance and Subcommittee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade, Evidence of the Subcommittees (27 November 1996) at 1730, online:
https://www.ourcommons.ca/Content/Archives/Committee/352/sima/evidence/08_96-11-27/sima08_blk-e.html).

[49] In their report, the subcommittees stated that they had become aware of "a number of issues related to the implementation of reviews." These included "the need for SIMA to distinguish expressly between interim and expiry reviews" and "the authorization to conduct reviews on a specific aspect of a finding or order." The subcommittees recommended that the provisions of SIMA for the conduct of interim and expiry reviews be reformed in light of these comments (House of Commons, Sub-Committee on the Review of the *Special Import Measures Act* of the Standing Committee on Finance and Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade, "Report on the Special Import Measures Act" (December 1996) at 31-32).

[50] The amendments that followed in 1999 provided separately for interim reviews (in section 76.01), reviews on referral back (in section 76.02), and expiry reviews (in section 76.03). The new interim review provision specified, as it does today, that an interim review may be not only of "the order or finding," but also of "any aspect of the order or finding." By contrast, the other two provisions referred, as they do today, only to reviews, respectively, of "the order or finding" or "an order or finding."

[51] In an article commenting on the amendments, the authors observed (P.M. Saroli and G. Terepolsky, "Changes to Canada's Anti-Dumping and Countervailing Duty Laws for the New Millennium" (2000), 79 Can. Bar Rev. 352 at 360, emphasis added):

> Many of the requests for review received by the CITT deal with a discrete aspect of an order/finding, (e.g., requests for a product or country exclusion). However, there was no explicit authority in the previous SIMA allowing the CITT to limit the scope of an interim review to a specific aspect of an order/finding. Therefore, in order to exclude goods, the CITT felt compelled to review the entire order/finding and decide whether or not to continue it with or without amendment. New paragraph 76.01 (1)(b) provides such authority and obviates the need for the CITT to re-open the entire order/finding in such cases.

[52] There remains no explicit authority in SIMA allowing the Tribunal to limit the scope of an expiry review. The legislative history strongly suggests that this omission was deliberate.

(4) The Tribunal's "extraordinary circumstances" rationale

[53] In setting out the bases for its view that it could exclude certain goods from an expiry review, the Tribunal stated in its reasons (at para. 13) that it "has broad discretionary authority to exclude goods from its findings and orders in extraordinary circumstances." In support of this proposition it cited two decisions of this Court – *Hetex Garn A.G. v. The Anti-dumping Tribunal* (1977), [1978] 2 F.C. 507, 1977 CarswellNat 177 (WL Can) (C.A.), and *Sacilor Aciéries v. Anti-dumping Tribunal* (1985), 60 N.R. 371, 9 C.E.R. 210 (F.C.A.) – and two Binational Panel decisions – *Certain Dumped Integral Horsepower, One Horsepower (1 HP) to Two Hundred Horsepower (200 HP) Inclusive, with Exceptions Originating In or Exported from the United States of America* (11 September 1991), CDA-90-1904-01, online: http://publications.gc.ca/site/eng/9.822424/publication.html, and *Certain Cold-Rolled Steel Sheet*

*Originating in or Exported from the United States of America (Injury)* (13 July 1994), CDA-93-1904-09, online: http://publications.gc.ca/site/eng/9.823375/publication.html. In my view these decisions do not support the broad authority that the Tribunal asserts.

[54] Both *Hetex Garn* and *Sacilor* were applications for judicial review of decisions rendered under the *Anti-dumping Act*, R.S.C. 1970, c. A-15, the predecessor to SIMA. Neither involved an expiry review or any other kind of review. Both concerned the authority of the Anti-dumping Tribunal to make an injury or retardation finding following a preliminary determination of dumping. Subsection 16(3) empowered the Anti-dumping Tribunal to “make such order or finding as the nature of the matter may require,” and to “declare to what goods or description of goods […] the order or finding applies.” Both cases held, interpreting this provision, that the Anti-dumping Tribunal was entitled to “make its order in respect of all or any of the ‘goods to which the preliminary determination ... applies’”: *Hetex Garn* at 508; *Sacilor* at para. 11. The reasons make no reference to “extraordinary circumstances.”

[55] In *Induction Motors*, the Binational Panel relied (at 55) on *Sacilor* and on the Supreme Court’s decision in *Hitachi Ltd. et al. v. Anti-dumping Tribunal et al.*, [1979] 1 S.C.R. 93, 24 N.R. 267, for the proposition that “a decision not to exclude an individual company [from an injury finding] is committed to the discretion of the CITT as it is fact-specific in nature.” The Supreme Court’s one-paragraph reasons in *Hitachi* stated only that “the Anti-dumping Tribunal was empowered by s. 16(3) of the *Anti-dumping Act* to make the finding which was challenged […].”

[56] In *Cold-Rolled Steel*, the Binational Panel recognized (at 54-55) that the decisions in *Hetex Garn* and *Sacilor* were based specifically on subsection 16(3) of the *Anti-dumping Act*, and found a similar statutory source in subsection 43(1) of SIMA for the exercise of a discretion whether to exclude certain producers from an injury finding. Subsection 43(1) authorizes the Tribunal, following a final determination of dumping, to "make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require." The differences between this language and that of subsection 76.03(3) are obvious.

(5) Interpretation consistent with international trade obligations

[57] Canada's international obligations, including obligations in relation to international trade, are relevant in the contextual interpretation of Canadian laws: *B010 v. Canada (Citizenship and Immigration* at para. 47. It is well-established that, where possible, domestic legislation should be interpreted in light of both Canada's international obligations and the underlying principles of international law. This is particularly so when the legislation, like SIMA, was enacted "with a view towards implementing international obligations": *B010* at para. 47, quoting from *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371, 74 D.L.R. (4th) 449.

[58] However, as this Court recently restated in *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, there is an "important counter-weight to these principles – the doctrine of Parliamentary supremacy. An unambiguous provision must be given effect even if it is contrary to Canada's international obligations or international law" (at para. 44, citing, among other authorities, *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 35, [2010] 3 S.C.R. 281).

[59] Here, the Tribunal invoked the principle of consonance with Canada's international obligations in finding (at para. 13) that in section 76.03, "Parliament grants it the authority to determine that an expiry review is not warranted in the case of certain goods if at the outset it considers that there are extraordinary circumstances that warrant the exclusion of such goods from a positive injury finding." It had earlier in its reasons (at para. 10) referred to the holding of the WTO Dispute Settlement Body in the proceeding brought by Chinese Taipei that subjecting the goods of an exporter with a zero or *de minimis* margin of dumping to anti-dumping measures constitutes a breach of Canada's obligations under the Anti-dumping Agreement. It had also gone on to state (at para. 11) that it was "clear from the reasoning adopted by the WTO Panel […] that Conares' exports should not have been subject to the [injury] finding in the first place since they were determined not to be dumped." Article 11.1 of the Anti-dumping Agreement states that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

[60] But this is a case in which Parliament expressly decided not to give the Tribunal the authority it has asserted in reliance on this interpretive principle. In the face, in particular, of the clear language of section 76.03 compared to that of other review provisions, the legislative history, the omission in the legislation and case law of any reference to extraordinary circumstances, and Parliament's choice not to make retroactive the amendments to SIMA to implement Canada's WTO obligations expressly, I see no ambiguity that would justify resort to Canada's international obligations to interpret section 76.03.

D. *Conclusion on the substantive issue*

[61] I am mindful of the necessity to avoid "disguised correctness" review in the form of review for reasonableness: see *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 63-65, 278 A.C.W.S. (3d) 645. However, taking into account all of the factors that I have set out, I see this as a case in which Parliament made a clear choice in enacting section 76.03. The clarity of that choice leaves room for only one reasonable interpretation of the provision – the interpretation that permits the Tribunal to initiate an expiry review only of "an order or finding" as a whole. It follows that the construction adopted by the Tribunal was unreasonable, and that the Tribunal committed reviewable error in excluding the goods of Conares from the expiry review.

V. The remedial issue – What remedy can and should this Court grant?

[62] The remedies that the Court may grant in an application for judicial review of an order of the Tribunal brought under subsection 96.1(1) are set out in subsection 96.1(6) of SIMA. These remedies are more limited than those available in an application for judicial review to this Court under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. There is, for example, no provision for declaratory relief.

[63] Subsection 96.1(6) states:

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| **(6)** On an application under this section, the Federal Court of Appeal may dismiss the application, set aside the final determination, decision, order | **(6)** La cour peut soit rejeter la demande, soit annuler la décision, l'ordonnance ou les conclusions avec ou sans renvoi de l'affaire au président |

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| or finding, or set aside the final determination, decision, order or finding and refer the matter back to the President or the Tribunal, as the case may be, for determination in accordance with such directions as it considers appropriate. | ou au Tribunal, selon le cas, pour qu'il y donne suite selon les instructions qu'elle juge indiquées. |

[64] Remedies on judicial review are discretionary. This principle applies equally to remedies under this provision, as confirmed by its inclusion of the word "may" before the list of potential remedies is set out: see *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 37-38, [2015] 2 S.C.R. 713; *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 42. One important factor to consider in exercising the Court's remedial discretion is whether a remedy would have practical significance: *Robbins v. Canada (Attorney General)*, 2017 FCA 24 at para. 17, 276 A.C.W.S. (3d) 223. Balance of convenience considerations are also relevant: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 52, [2010] 1 S.C.R. 6.

[65] The discretion not to grant a remedy where a tribunal has been found to have acted contrary to law is to be exercised with great care: *MiningWatch Canada* at para. 52; *Hillier* at para. 42. However, this is a case that in my view calls for the exercise of the Court's discretion in this manner. I would therefore decline to grant a remedy. The only option available to the Court under subsection 96.1(6) in these circumstances is to dismiss the application.

[66] I come to the conclusion that no remedy should be granted for a number of reasons. First, the applicants did not seek a stay of the expiry review under section 18.2 or paragraph 50(1)(*b*) of the *Federal Courts Act* pending the disposition of this application: see *Canada (Attorney*

*General) v. Canada (International Trade Tribunal)*, 2006 FCA 395 at paras. 7-12, 357 N.R. 161. Second, the applicants acknowledged that even if the goods of Conares had been included in the expiry review, it was likely that they would have been excluded upon its completion, and they did not challenge the Tribunal's entitlement to exclude the goods at that stage. Third, the expiry review has now been completed, and the goods of Conares have in fact been excluded. As a practical matter the granting of a remedy would therefore likely have no ultimate impact. Fourth, repeating the expiry review with the goods of Conares included (assuming that would be permissible under SIMA) would impose costs not only on the Tribunal but also on third parties to this proceeding: see *MiningWatch* at para. 52. Fifth, even absent a formal remedy, the Tribunal and the Attorney General will have the benefit of the Court's views on the meaning of section 76.03 and the permissible scope of an expiry review.

[67] Finally on the question of remedy, I should note again the submission made by Conares that even if this Court concluded that the Tribunal's order was unreasonable, and even if it was minded to grant a remedy, there is no effective remedy that it could grant, since as a consequence of the Tribunal's order its finding as it related to the goods of Conares has expired by operation of law and cannot be reinstated.

[68] Given my conclusion on remedy, there is no need to address this submission. However, the law appears to be that once an order has been set aside, it is as if the order had never been issued: *Grenon v. Canada (National Revenue)*, 2017 FCA 167 at paras. 20-26, 2017 D.T.C. 5101. Determining how, if at all, this principle would apply in a context such as this one, if the

order of the Tribunal had been set aside, should be left to a case in which the issue requires determination.

## VI. Proposed disposition

[69] I would dismiss the application. In all of the circumstances I would leave the parties to bear their own costs.

"J.B. Laskin"
J.A.

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

"I agree.
Donald J. Rennie J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-11-18 |
| **STYLE OF CAUSE:** | NOVA TUBE INC./NOVA STEEL INC. v. CONARES METAL SUPPLY LTD., MINISTRY OF THE ECONOMY of the UNITED ARAB EMIRATES, and ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 29, 2018 |
| **REASONS FOR JUDGMENT BY:** | LASKIN J.A. |
| **CONCURRED IN BY:** | NEAR J.A.<br>RENNIE J.A. |
| **DATED:** | MARCH 22, 2019 |

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