Federal Court of Appeal  Cour d'appel fédérale

**Date: 20130110**

**Docket: A-336-12**

**Citation: 2013 FCA 3**

**CORAM:** **NOËL J.A.**
**DAWSON J.A.**
**GAUTHIER J.A.**

**BETWEEN:**

**THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY**

**Appellant**

**and**

**LEVOLOR HOME FASHIONS CANADA**

**Respondent**

**and**

**REGAL IDEAS INC.**

**Respondent**

Heard at Ottawa, Ontario, on January 8, 2013.

Judgment delivered at Ottawa, Ontario, on January 10, 2013.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DAWSON J.A.
GAUTHIER J.A.

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## REASONS FOR JUDGMENT

**NOËL J.A.**

[1] This is an appeal pursuant to section 62 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA) from a decision of the Canadian International Trade Tribunal (CITT), AP-2011-015, [2012] C.I.T.T. No. 78, wherein the majority of the three member panel held that an Exclusion

pertaining to aluminum extrusions applied to goods imported by the respondent Levolor Home Fashions Canada. The dissenting member would have come to the opposite conclusion.

[2] The Exclusion in question was granted by the CITT in an earlier decision (*Aluminum Extrusions* (17 March 2009), NQ-2008-003, [2009] C.I.T.T. No. 56 at iii, as follows:

> Aluminum extrusions produced from a 6063 alloy type with a T5 temper designation, having a length of 3.66 m, with a powder coat finish, which is certified to meet the American Architectural Manufacturers Association [AAMA] AAMA 2603 standard, "Voluntary Specification, Performance Requirements and Test Procedures for Pigmented Organic Coatings on Aluminum Extrusions and Panels", for use as head rails and bottom rails in fabric window shades and blinds where the fabric has a cross-sectional honeycomb or "cellular" construction.
>
> [My emphasis]

[3] The issue in this appeal turns on the meaning of the emphasized words. The majority held that the Exclusion extends to goods which are certified to meet the AAMA standard even if the certification does not emanate from the AAMA itself. In the alternative, it held that if the certificate had to be issued by the AAMA, it could validly be obtained and produced post-importation as occurred in this case. The dissenting member gave extensive reasons supporting the opposite view.

[4] The appellant recognizes that the question raised on appeal is one of law – indeed subsection 62(1) of the SIMA only allows an appeal to be taken on a question of law – and concedes that the applicable standard of review is that of reasonableness (*Owen & Co. v. Globe Spring & Cushion Co.*, 2010 FCA 288 at para.4).

[5] In support of its appeal, the appellant essentially urges us to adopt the decision of the dissenting member on the basis that it reflects the "correct" view (memorandum of the appellant at para. 26).

[6] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court explained how the standard of reasonableness is to be applied (at para. 47):

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [This approach was reiterated in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 13 and 16 to 18.]

[7] This standard when applied to questions of law marks a definite break with the classic role that has traditionally belonged to courts of appeal. Indeed, we are not called upon to determine which of the two conflicting opinions expressed by the members of the CITT is the correct one nor for that matter are we called upon to determine which reflects the better – *i.e.* more reasonable – view. So long as the majority opinion can be shown to come within the above described range of possible acceptable outcomes, the decision must be upheld.

[8] In this respect, the majority members clearly articulated the basis for their conclusion. They explained that the Exclusion does not require that the extrusion be certified "by the AAMA", but only that it meet the AAMA standard (reasons at paras. 20 to 22):

> 20. A plain reading of the Exclusion does not require an importer to present a certificate from the AAMA at the time of importation; however, the position taken by the CBSA [Canada Border Services Agency] in this case would require the [CITT] to read such a requirement into the Exclusion, which, as a matter of law, it cannot do.
>
> 21. Indeed, when the [CITT] has intended to make the production of a certificate at the time of importation a condition *sine qua non* to claim the benefit of an exclusion, it has said so explicitly, and in precise detail, as it did in *Refined Sugar* in the following manner:
>
> > 9. Organic sugar meeting the requirements of the Canadian General Standards Board standard No. CAN/CGSB-32.310-99 (Organic Agriculture), the U.S. *Federal Organic Foods Production Act of 1990* or any rules adopted under that act, or the European Union EN2092/94 (Organic Regulation), where it is *accompanied by a transaction certificate* affirming compliance with the standard *signed* by an ISO Guide 65 accredited certifying authority. [emphasis added]
>
> 22. In contrast to the requirements in *Refined Sugar*, the Exclusion simply requires that the goods meet the Standard, but does not specify the evidence necessary to prove that the goods meet the Standard or when to provide such evidence.

[9] The majority went on to explain that the documents produced – *i.e.* the Product Data Sheet and the attestation issued by the foreign manufacturer – could satisfy the requirement (reasons at para. 24). Indeed, the evidence showed that the goods in issue were in fact compliant with the AAMA standard (reasons at para. 27). The majority further explained that even if the Exclusion was read as requiring that the certification be made by the AAMA, there is nothing in the language of

the Exclusion that would prohibit this certificate from being obtained and produced post-importation, as was done in this case (reasons at paras. 28 and 29).

[10] While the Exclusion is capable of being given a different construction, the reasoning of the majority for giving effect to it on the facts of this case has not been shown to be unreasonable.

[11] I would dismiss the appeal with costs in favour of both respondents.

"Marc Noël"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Gauthier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-336-12 |
| **STYLE OF CAUSE:** | President of the Canada Border Services Agency and Levolor Home Fashions Canada and Regal Ideas Inc. |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | January 8, 2013 |
| **REASONS FOR JUDGMENT BY:** | Noël J.A. |
| **CONCURRED IN BY:** | Dawson J.A.<br>Gauthier J.A. |
| **DATED:** | January 10, 2013 |

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| | |
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