Federal Court of Appeal | Cour d'appel fédérale

Date: 20220519

Dockets: A-197-20
A-196-20
A-200-20

Citation: 2022 FCA 89

CORAM: **STRATAS J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

Docket: A-197-20

BETWEEN:

ALGOMA TUBES INC., PRUDENTIAL STEEL ULC, TENARIS GLOBAL SERVICES (CANADA) INC. AND HYDRIL CANADIAN COMPANY LP (COLLECTIVELY "TENARIS CANADA")

Applicants

and

HYUNDAI STEEL COMPANY, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş., EVRAZ INC. NA CANADA, WELDED TUBE OF CANADA CORPORATION and ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-196-20

AND BETWEEN:

EVRAZ INC. NA CANADA and WELDED TUBE OF CANADA CORPORATION

Applicants

and

HYUNDAI STEEL COMPANY, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş., ALGOMA TUBES INC., PRUDENTIAL STEEL ULC, HYDRIL CANADIAN COMPANY LP and ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-200-20

AND BETWEEN:

ALGOMA STEEL INC.

Applicant

and

ATTORNEY GENERAL OF CANADA and HYUNDAI STEEL COMPANY

Respondents

Heard by online video conference hosted by the Registry on May 19, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on May 19, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220519

Dockets: A-197-20
A-196-20
A-200-20

Citation: 2022 FCA 89

CORAM: **STRATAS J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

Docket: A-197-20

BETWEEN:

ALGOMA TUBES INC., PRUDENTIAL STEEL ULC, TENARIS GLOBAL SERVICES (CANADA) INC. AND HYDRIL CANADIAN COMPANY LP (COLLECTIVELY "TENARIS CANADA")

Applicants

and

HYUNDAI STEEL COMPANY, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş., EVRAZ INC. NA CANADA, WELDED TUBE OF CANADA CORPORATION and ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-196-20

AND BETWEEN:

EVRAZ INC. NA CANADA
and WELDED TUBE OF CANADA CORPORATION

Applicants

and

HYUNDAI STEEL COMPANY, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş., ALGOMA TUBES INC., PRUDENTIAL STEEL ULC, HYDRIL CANADIAN COMPANY LP, and ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-200-20

AND BETWEEN:

ALGOMA STEEL INC.

Applicant

and

ATTORNEY GENERAL OF CANADA and HYUNDAI STEEL COMPANY

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 19, 2022).

STRATAS J.A.

[1] In 2014 and 2015, the President of the Canada Border Services Agency made final determinations of dumping under the *Special Import Measures Act*, R.S.C. 1985, c. S-15. Under subsection 41(1) of the Act as it stood at the time, all exporters in a country were subject to a

final determination of dumping unless the dumping investigation was terminated for the country as a whole.

[2] In the view of the World Trade Organization Dispute Settlement Body ("Dispute Settlement Body"), subsection 41(1) and related provisions were contrary to international trade rules. As a result, Canada amended the Act to provide for the termination of a dumping investigation for any individual exporter with an insignificant margin of dumping. This amendment, without more, did not automatically apply to past final determinations: *Budget Implementation Act, 2017, No. 1*, S.C. 2017, c. 20; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52.

[3] However, section 76.1 of the Act creates an exception. It allows the Minister of Finance to request the President to review past decisions or a portion of past decisions having regard to rulings and recommendations of the Dispute Settlement Body. In such a review, the earlier decision may be continued, modified or rescinded as the President or the Tribunal "considers necessary"—broad words of discretion on the part of the President.

[4] In 2020, acting under section 76.1 of the Act, the Minister requested the President to review the 2014 and 2015 determinations of dumping, having regard to the ruling made by the Dispute Settlement Body. The Minister's request was quite specific. This tends to support the President's view that he was not to conduct, in effect, a hearing *de novo* or to re-examine issues that are, in his view, not necessitated by the changes wrought by the rulings or recommendations of the Dispute Settlement Body.

[5] The applicants, Algoma Steel Inc. and Evraz Inc. NA Canada submitted to the President that, as part of the section 76.1 review, the evidentiary record of the original final determination should be reopened and new methodologies added later to the Act and the Regulations should be applied.

[6] The President rejected this submission. The review requested by the Minister was to be conducted on the basis of the original record and the President was not to recalculate the margins of dumping determined in the original investigations. As a result, the President terminated the investigations.

[7] Since the original determination, Hyundai Steel Company became the successor in interest to Hyundai Hysco Co., Ltd. Thus, the President applied his ruling to Hyundai Steel Company, among others.

[8] In this Court, the applicants apply for judicial review to quash the President's decision. All accept that reasonableness is the standard of review on the substantive aspects of the President's decision. While the standard of review for procedural fairness is in doubt in the jurisprudence of this Court, the dominant view is that we are to assess whether the administrative proceedings were procedurally fair without any deference.

[9] In our view, the applications must be dismissed. The President's decision was reasonable and procedurally fair. Broadly speaking, we are of the view that all of the respondents in their

memoranda of fact and law are substantially correct in their submissions concerning the purpose and effect of section 76.1 and the reasonableness of the President's decision.

[10] The President reasonably interpreted the Minister's request as authorizing a review of only a portion of the original determinations. After all, section 76.1 expressly authorizes the Minister to request a review of only a portion of a determination "having regard to a recommendation or ruling" of the Dispute Resolution Body—nothing else—and only to the extent necessary having regard to that recommendation or ruling. From the President's reasons, read in light of the record, it is evident to us that the President was coming from this view of section 76.1. Here, the President's review concerned only specific exporters identified by the Minister and only with respect to the recommendations and rulings of the Dispute Resolution Body concerning the termination of investigations in respect of individual exporters with *de minimis* margins of dumping.

[11] The President considered the results of the original investigation to assess whether the relevant exporters had insignificant margins of dumping and came to a conclusion available on the evidence.

[12] Under the Minister's request, the President was neither required nor authorized to review the final determinations with respect to other individual exporters or to examine other issues. In our view, recalculating margins of dumping or conducting a *de novo* investigation would have been unreasonable because it would have gone beyond the scope of the section 76.1 review and the Minister's request, reasonably construed.

[13] It was open to the President to find that section 76.1 is a limited-purpose, limited-review provision: to enable Canada to bring certain trade measures into alignment with rulings and recommendations of the Dispute Settlement Body and to address past decisions that do not align with those rulings and recommendations. It does nothing more. We consider the President's decision to have implicitly accepted this view of the meaning of section 76.1, a meaning reasonably evident from the Act's text, context and purpose. In particular, we agree with the Attorney General's submission at paragraph 49 of its memorandum of fact and law that section 76.1 "was not intended as a lever to pry open aspects of a past decision distinct from the rulings and recommendations of the [Dispute Settlement Body] that the review seeks to address".

[14] Evraz Inc. NA Canada submits that the transitional provisions which change the legislation operated to make new substantive provisions of the Act apply to the President's determination. Thus, it says, the President was required to go further than he did in his re-examination. We disagree. Section 76.1, as the President implicitly interpreted it, precludes the effect of the transitional provisions that Evraz urges upon us. The limited-purpose nature of section 76.1 stands on its own and is not substantively broadened by the transitional provisions. In other words, the transitional provisions do not transform section 76.1 into something closer to a full reconsideration provision. To reiterate, on the reasonable view of section 76.1 adopted by the President, it only deals with changes wrought by the rulings and recommendations of the Dispute Settlement Body and as directed by the Minister, nothing else.

[15] The reasonableness of the President's decision is buttressed by an appreciation of the nature of the original determination under subsection 41(1) of the Act. As this Court recognized

in *JFE Steel Corporation v. Evraz Inc. NA Canada*, 2018 FCA 111 at para. 49 and *Angang Steel Company Limited v. Canada (Border Services Agency)*, 2020 FCA 67, [2020] 3 F.C.R. 179 at paras. 25-26, under the original version of subsection 41(1) the specification of the margin of dumping for an exporter and the ultimate final determination decision are distinct, severable steps in the decision-making process. A section 76.1 review can permissibly focus on one of these steps and not on the other, especially if, as here, the rulings and recommendations of the Dispute Settlement Body relate only to one of the two.

[16] The reasonableness of the decision is also buttressed by the practical problems that would arise if the matter were reopened beyond the request of the Minister and new methodologies were applied. In this regard, we substantially agree with the Attorney General's submissions at paragraphs 57-60 of his memorandum of fact and law. We also substantially agree with the Attorney General's submissions on the retroactive or retrospective application of law at paragraphs 64-76 of his memorandum of fact and law.

[17] Many of the applicants' submissions pick at particular aspects of the President's reasons. In our view, they focus on alleged flaws and shortcomings that are merely superficial or peripheral to the merits of the decision. In our view, the President's reasons provide the parties and this Court with sufficient justification to understand the central basis of the decision and why the main submissions to the contrary were rejected and, thus, were reasonable: *Canada (Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1.

[18] The President's decision to consider the corporate succession of Hyundai Hysco Co., Ltd. was reasonable, especially in light of the scope and purpose of this particular section 76.1 review. Under the review, the President had to make a decision with respect to this particular exporter. Evidence that the exporter no longer existed but had a successor was relevant and necessary to the review, and was essential to the final disposition of the matter the Minister referred to the President.

[19] Finally, we find no breach of procedural fairness. Although there was a delay in providing the parties with access to the confidential record, the President ultimately provided it to the parties. To assist the parties, the President granted them a two-week extension of time. If the parties needed a longer extension of time, they could have requested it. Absent such a request—and in oral submissions counsel confirmed no request was made—parties cannot raise the matter in a judicial review: *Irving Shipbuilding Inc. v. Canada* (*A.G.*), 2009 FCA 116, [2010] 2 F.C.R. 488; *Re the Human Rights Tribunal and Atomic Energy Canada*, [1986] 1 F.C. 103 at 107, 110-111 (C.A.); *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68. On this record, we see no breaches of procedural fairness and, here again, on this point we substantially agree with the submissions of the respondents in their memoranda of fact and law.

[20] Therefore, we will dismiss the applications for judicial review with costs. The original of these reasons will be placed in file A-197-20 and a copy of these reasons will be placed in files A-196-20 and A-200-20.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-197-20, A-196-20 AND A-200-20

JUDICIAL REVIEW OF THE DECISION OF THE CANADA BORDER SERVICES AGENCY DATED AUGUST 7, 2020, NOs. 4214-41 AD/1402 and 4214-43 AD/1404

DOCKET:	A-197-20
STYLE OF CAUSE:	ALGOMA TUBES *et al.* v. HYUNDAI STEEL COMPANY *et al.*
AND DOCKET:	A-196-20
STYLE OF CAUSE:	EVRAZ INC. NA CANADA *et al.* v. HYUNDAI STEEL COMPANY *et al.*
AND DOCKET:	A-200-20
STYLE OF CAUSE:	ALGOMA STEEL INC. v. ATTORNEY GENERAL OF CANADA *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MAY 19, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. BOIVIN J.A. DE MONTIGNY J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

Jonathan O'Hara Timothy Cullen	FOR THE APPLICANT, TENARIS CANADA
Christopher J. Kent Andrew Lanouette Jordan Lebold	FOR THE APPLICANTS, EVRAZ INC. NA CANADA AND WELDED TUBE OF CANADA CORPORATION
Benjamin Mills Benjamin P. Bedard	FOR THE APPLICANT, ALGOMA STEEL INC.
George W.H. Reid Ethan Gordon Quentin Vander Schueren	FOR THE RESPONDENT, HYUNDAI STEEL COMPANY
Victoria Bazan Devin Doyle	FOR THE RESPONDENT, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş.
Adrian Johnston	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

McMillan LLP Ottawa, Ontario	FOR THE APPLICANT, TENARIS CANADA
Cassidy Levy Kent LLP Ottawa, Ontario	FOR THE APPLICANTS, EVRAZ INC. NA CANADA AND WELDED TUBE OF CANADA CORPORATION
Conlin Bedard LLP Ottawa, Ontario	FOR THE APPLICANT, ALGOMA STEEL INC.
Bennett Jones LLP Toronto, Ontario	FOR THE RESPONDENT, HYUNDAI STEEL COMPANY
Aitken Klee LLP Ottawa, Ontario	FOR THE RESPONDENT, BORUSAN MANNESMANN BORU SANAYI VE TIÇARET A.Ş.
Bazan Law	

Toronto, Ontario

A. François Daigle
Deputy Attorney General of Canada

FOR THE RESPONDENT,
ATTORNEY GENERAL OF CANADA