Federal Court of Appeal | Cour d'appel fédérale

Date: 20131206

Docket: A-487-12

Citation: 2013 FCA 284

CORAM: **MAINVILLE J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

HYUNDAI HEAVY INDUSTRIES CO., LTD and HYUNDAI CANADA INC.

Applicants

and

ABB INC., CG POWER SYSTEMS CANADA INC., REMINGTON SALES CO., HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC. and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on November 5, 2013.

Judgment delivered at Ottawa, Ontario, on December 6, 2013.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] On October 22, 2012 the President of the Canada Border Services Agency made a final determination of dumping under paragraph 41(1)(*a*) of the *Special Import Measures Act*, RSC 1985,

c. S-15 (*SIMA*). This determination was made in relation to certain power transformers (Power Transformers) which are described in paragraph 26 of the decision of the President as follows:

> Liquid dielectric transformers having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete, originating in or exported from the Republic of Korea.

This is an application made under section 96.1 of *SIMA* for judicial review of this decision. In particular the issues raised in the application for judicial review relate to the determination of the export price by the President.

[2] The parties in this application did not agree on the standard of review. However, as set out in the analysis below, nothing in this application turns on the standard of review. There is consequently no need to address this issue further. Indeed, I would reach the same conclusion regardless of whether the standard of review is reasonableness or correctness.

[3] Goods imported into Canada are "dumped" (as defined in subsection 2(1) of *SIMA*) when the normal value of the goods exceeds the export price of such goods. The margin of dumping is defined in subsection 2(1) of *SIMA* as the difference between these two amounts. The normal value is determined in accordance with the provisions of sections 15 to 23.1 and 30 of *SIMA* and the export price is determined in accordance with the provisions of sections 24 to 28 and 30 of *SIMA*. If the normal value or export price cannot be determined in accordance with these provisions, such amount is determined in the manner specified by the Minister of Public Safety and Emergency Preparedness (section 29 of *SIMA*).

[4] Hyundai Heavy Industries Co., Ltd. (HHI) produces and sells Power Transformers in the Republic of Korea and also exports Power Transformers to Canada. The importers of these goods are Hyundai Canada Inc. (HC) and Remington Sales Co.

[5] In paragraph 71 of the decision of the President, it is noted that:

> The subject goods produced by HHI are also custom-made, produced to the specific needs of each of its customers and therefore, there are no domestic sales of like goods. As such, it was not possible to determine normal values pursuant to section 15 of SIMA based on domestic sales of like goods. Normal values were, however, determined pursuant to paragraph 19(*b*) of SIMA, based on an aggregate of the cost of production, a reasonable amount for administrative, selling and other costs, and a reasonable amount for profits.

[6] The Applicants do not raise any issues in relation to the determination of the normal value by the President.

[7] The issue in this application is related to the determination of the export price by the President. Section 24 of *SIMA* provides that the export price is the lesser of the exporter's sale price (subject to certain adjustments) of the goods and the importer's purchase price (subject to certain adjustments) of those goods. If the President determines that this amount is unreliable for the reasons as set out in paragraph 25(1)(*b*) of *SIMA*, the export price is to be determined as provided in paragraphs 25(1)(*c*), (*d*), or (*e*) of *SIMA*. In this case the President found that the export price determined under section 24 of *SIMA* was unreliable and therefore applied the provisions of paragraph 25(1)(*d*) of *SIMA* to calculate the export price. The Applicants do not challenge the finding that the export price as determined under section 24 of *SIMA* was unreliable, nor do they submit that paragraph 25(1)(*d*) of *SIMA* was not the correct paragraph to use to calculate the export price.

[8] Under paragraph 25(1)(*d*) of *SIMA*, the export price is determined by deducting from the price at which the importer sells the goods in question to a person who is not associated with the importer, certain amounts as set out in subparagraphs 25(1)(*d*)(i) to (v) of *SIMA*. The only item in dispute in this application is the amount determined for profit for the purposes of subparagraph 25(1)(*d*)(i) of *SIMA*. This subparagraph provides that the following amount is to be deducted from the selling price of the goods in question:

> (i) an amount for profit on the sale of the assembled, packaged or otherwise further manufactured goods or of the goods into which the imported goods have been incorporated.

[9] Sections 21 and 22 of the *Special Import Measures Regulations*, SOR/84-927 provide directions to assist the President in determining this amount for profit. These sections provide that:

21. For the purpose of subparagraph 25(1)(*d*)(i) of the Act, the expression "an amount for profit", in relation to any assembled, packaged or otherwise further manufactured goods or any goods into which imported goods have been incorporated, means the amount of profit that would be made in the ordinary course of trade on the sale of the goods.	**21**. Pour l'application du sous-alinéa 25(1)*d*)(i) de la Loi, « un montant pour les bénéfices » s'entend d'un montant égal aux bénéfices qui seraient réalisés dans le cours ordinaire des affaires lors de la vente des marchandises montées, conditionnées ou ayant fait l'objet d'une étape ultérieure de fabrication, ou des marchandises dans la fabrication desquelles des marchandises importées ont été incorporées.
22. For the purposes of sections 20 and 21, the amount of profit that would be made in the ordinary course of trade on the sale of the goods is:	**22.** Pour l'application des articles 20 et 21, le montant des bénéfices réalisés lors de la vente des marchandises dans le cours ordinaire des affaires est, selon le cas :
(*a*) the amount of profit that generally results from sales of like goods in Canada by vendors who are at the same or substantially the same trade level as the importer to purchasers in Canada	*a*) le montant des bénéfices qui découlent généralement de la vente de marchandises similaires au Canada par des vendeurs se situant au même niveau ou presque du circuit de distribution

who are not associated with those vendors;	que l'importateur, à des acheteurs se trouvant au Canada et qui ne sont pas associés à ces vendeurs;
(*b*) where the amount described in paragraph (*a*) cannot be determined, the amount of profit that generally results from sales of goods of the same general category in Canada by vendors who are at the same or substantially the same trade level as the importer to purchasers in Canada who are not associated with those vendors; or	*b*) s'il est impossible de déterminer le montant visé à l'alinéa a), le montant des bénéfices qui découlent généralement de la vente de marchandises de la même catégorie générale au Canada par des vendeurs se situant au même niveau ou presque du circuit de distribution que l'importateur, à des acheteurs se trouvant au Canada et qui ne sont pas associés à ces vendeurs;
(*c*) where the amounts described in paragraphs (*a*) and (*b*) cannot be determined, the amount of profit that generally results from sales of goods that are of the group or range of goods that is next largest to the category referred to in paragraph (*b*), by vendors in Canada who are at the same or substantially the same trade level as the importer, to purchasers in Canada who are not associated with those vendors.	*c*) s'il est impossible de déterminer les montants visés aux alinéas a) et b), le montant des bénéfices qui découlent généralement de la vente de marchandises qui sont de la gamme ou du groupe suivant qui comprend la catégorie visée à l'alinéa b), par des vendeurs au Canada se situant au même niveau — ou presque — du circuit de distribution que l'importateur, à des acheteurs se trouvant au Canada et qui ne sont pas associés à ces vendeurs.

[10] In this case it is clear from the decision of the President and from the record that the President was having difficulty in obtaining information in relation to the amount that should be used for profit. Although the President stated in the decision at paragraph 74 that:

> [t]he paragraph 25(1)(*d*) export prices were based on… an amount representative of the average industry profit in Canada pursuant to paragraph 22(*c*) of the SIMR

in Appendix 2 to the decision, the President stated that only the profit amounts for three companies were actually used. The three companies were the two complainants and HC.

[11] The Applicants submit that the amount of profit realized by ABB Inc. and CG Power Systems of Canada Inc. (the two complainants) should not have been used without adjustments because one of these companies only sells Power Transformers that it manufactures in Canada and the other company sells Power Transformers that it manufactures in Canada and also sells Power Transformers that it imports into Canada. The Applicants submit that the profit of these two companies would reflect profit from the manufacturing operation as well as from the selling operation. HC only sells Power Transformers that it imports into Canada.

[12] The amount that is to be determined is the "profit on the sale of the … goods**"** (subparagraph 25(1)(*d*)(i) of *SIMA*). The justification of the President for using the profit amounts of the manufacturer and the manufacturer / importer to determine the amount that should be used for the profit of the importer of the Power Transformers is set out in Appendix 2 to the decision:

> In the Canadian Power Transformer market, the CBSA considers the functions performed by manufacturers in selling to the end-users are the same or substantially the same as the functions performed by distributors in selling to the end-users. In effect, manufacturers and distributors are considered at the same level of trade as they both compete directly for the same customers.

[13] Although there is no reference to the SIMA Handbook, language very similar to that used by the President appears in that Handbook. The SIMA Handbook is the President's internal policy statement on the investigative and decision-making process in anti-dumping and subsidy investigations under *SIMA*. Beginning on page 314 of the SIMA Handbook, under the heading "Trade Level", the Handbook provides that:

> **Trade Level**
>
> In considering the terms "same" or "substantially the same trade level" a firm should not arbitrarily be dismissed from the data base simply because of its designation, i.e. distributor or manufacturer. Rather, care should be taken to examine the functions performed in that

> industry, particularly those relating to sales and distribution. In most industries, it would be appropriate to utilize data from both manufacturers and importers in that their sales and distribution functions will likely have significant similarities. It is recognized that, in some cases, it may be reasonable for firms at different trade levels to anticipate different profit levels. For instance, a manufacturer who performs its own distribution function, (as opposed to a distributor who purchases from the manufacturer and then resells the goods), could reasonably expect a larger profit margin than a distributor since part of the profit could reasonably be attributed to the manufacturing operation.
>
> Nevertheless, it may still be appropriate to include such a manufacturer and hold that the manufacturer is at substantially the same trade level as a distributor/importer based on the actual functions performed. Companies in Canada are generally considered to be at "substantially the same trade level" when they sell to the same customers and compete directly in the marketplace for the same customers. In any case where the above trade level considerations exist, the file should clearly explain the rationale for the decision.

[14] The Respondents argue that the above passage was approved by a decision of a Bi-national Panel conducting a review pursuant to the North American Free Trade Agreement and dated April 15, 2002 in the matter of *Certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers*, CDA-USA-2000-1904-003. While the Bi-national panel did quote the above passage (except the last sentence of the first paragraph and the first sentence of the second paragraph) in its decision, there is no explicit indication that this panel approved the parts of this passage that it did quote. Immediately before quoting the excerpt from this passage the panel stated that:

> As to whether the sales that were taken into account were made by vendors at substantially the same trade level, to purchasers not associated with the companies investigated, the Commission explained that it sought to obtain profit information from numerous Canadian sources during the course of the investigation, and that the resulting profit figure used was based on the best information available. In this context, the SIMA Handbook, part 5.10.2.3, stipulates that…

[15] Immediately following the quoted extract, the Panel stated that:

> The Commissioner has argued that all the companies investigated sold to the same customers and competed for the same market; consequently, they should be considered of

> the same trade level. This panel was not directed to any evidence on the record, and it is the Commissioner's submission that it had no evidence before it at the investigation stage which would indicate that the sales made were to associated companies. This panel is not convinced of Camco's arguments in this matter. If the sales contested by Camco were those made by Camco to associated purchasers, then it should have pointed that fact out to the Commissioner at an earlier stage. Instead, Camco provided the Commissioner with figures, only to complain about the use of those figures following the Final Determination.

[16] The argument in that case was related to whether certain amounts should be used because the sales were made to associated persons. There is no indication that any challenge was made to the use of the amount for profit for a company that manufactures and sells to end users in determining the amount for profit of an importer who only distributes the product.

[17] The amount that the President is attempting to determine in this case is the amount for profit of the importer, which amount is used to calculate the export price. The export price is only determined by calculating an amount based on the importer's selling price, profit and costs (as set out in section 25 of *SIMA*) if the export price determined under section 24 of *SIMA* is unreliable. The export price under section 24 of *SIMA* is the lesser of the exporter's selling price (subject to certain adjustments) and the importer's purchase price (subject to certain adjustments). The amount calculated under section 25 of *SIMA* is, therefore, meant to be a reasonable estimate of the amount that the importer would have paid for the product if the importer would not have been associated with the exporter. It seems to me that in calculating this estimated amount care should be taken in determining whether the amount for profit of a company that both manufactures and sells to end users should be used to determine the amount for profit of a company that only imports and sells to end users.

[18] In *Canderel v. The Queen*, [1998] 1 S.C.R. 147, Justice Iacobucci, writing on behalf of the Supreme Court of Canada, stated that:

> 30 What, then, is the true nature of "profit" for tax purposes? While the concept has been variously expressed, perhaps the clearest and most concise articulation of the term is to be found in the oft-quoted decision of this Court in *M.N.R. v. Irwin*, [1964] S.C.R. 662, at p. 664, where profit in a year was taken to consist of "the difference between the receipts from the trade or business during such year ... and the expenditure laid out to earn those receipts" (emphasis in original). This definition was echoed by Jackett P. in *Associated Investors of Canada Ltd. v. M.N.R.*, [1967] 2 Ex. C.R. 96, where he stated at p. 102:
>
> > Ordinary commercial principles dictate, according to the decisions, that the annual profit from a business must be ascertained by setting against the revenues from the business for the year, the expenses incurred in earning such revenues.

[19] There is nothing in section 25 of *SIMA* or sections 21 and 22 of the *Special Import Measures Regulations* that would suggest that profit should mean anything other what would be determined by ordinary commercial principles and therefore profit, for the purposes of these sections, would be the amount determined by subtracting expenses from revenues. The use of an amount for profit, without any adjustment, of a company that manufactures and sells to end users in determining the profit of a company that simply imports and sells a product to end-users is not justified if the only rationale for using such amount for profit (without any adjustment) is that both companies are competing for the same customers. By focusing only on the customers to whom products are sold (and hence on the revenue component of profit), the expense component of the profit equation (which is also important) is not explicitly considered. While the functions related to the sale of goods may well be similar, the company that also manufactures goods is carrying on the manufacturing function that the company that is only importing the goods that it sells, is not. A further explanation that addresses the reasons why it would be appropriate to use the profit of the company that manufactures and sells in such circumstances would be required to justify the use of

such an amount in determining the amount for profit of a company that only imports the products that it sells. The SIMA Handbook provides for this in the last sentence of the excerpt referred to above as it states that "[i]n any case where the above trade level considerations exist, the file should clearly explain the rationale for the decision".

[20] In this case, as noted above, the President calculated the normal value under paragraph 19(*b*) of *SIMA* by adding to the cost of production for HHI certain amounts, including a reasonable amount for profit. Therefore an amount for profit attributable to the manufacturing function was included in the normal value (and increased the normal value). If an amount for profit that would reasonably be attributable to a manufacturing function is also deducted in determining the export price for HC, then the amount for profit attributable to the manufacturing function would be counted twice – once in calculating the normal value for HHI and again in determining the export price for HC. There is no indication that any adjustment was made to the amount for profit of the two complainants (both of which manufactured Power Transformers) before their respective amounts for profit were used to determine the export price for HC, nor was any rationale provided to explain why no adjustment was made. The only explanation that was provided as to why these amounts for profit were used was that the companies were competing for the same customers.

[21] Since the margin of dumping is the difference between the normal value and the export price, it does not seem to me that it would be a reasonable (nor a correct) result in this case, without any further explanation, to both increase the normal value by including an amount for profit attributable to the manufacturing function and also decrease the export price by deducting an amount for profit attributable to the manufacturing function.

[22] It should also be noted that only three amounts were used to determine the average profit amount. One of the amounts represented the profit realized by a company that only sells Power Transformers that it manufactures in Canada and another represented the profit realized by a company that sells Power Transformers that it manufacturers in Canada and Power Transformers that it imports into Canada. Therefore, two thirds of the samples used to determine the amount for profit of a company that only sells Power Transformers that it imports into Canada would presumably reflect an amount for profit attributable to a manufacturing function.

[23] The Applicants also raised certain issues with respect to the procedures followed by the President. I would note that while the Applicants only referred to the President not obtaining segregated profit information from one of the complainants in their Notice of Application, other issues were also raised in the Applicants' Memorandum of Fact and Law. Since I would refer the matter back to the President for determination, I will not address these issues related to the procedures followed by the President.

[24] It should be noted, however, that *SIMA* sets out strict time limits within which the amounts must be determined by the President. Under subsection 38(1) of *SIMA*, the President must make a preliminary determination of dumping within the 30 day period that commences 60 days after the initiation of an investigation under section 31 of *SIMA* (unless the President extends the time by 45 days as provided in subsection 39(1) of *SIMA* for the reasons as set out in that subsection). Within 90 days after the preliminary determination of dumping is made under subsection 38(1) of *SIMA*, the President must make the final determination of dumping under section 41 of *SIMA*. Since the

President has strict deadlines to meet, the President must be given considerable discretion to determine how best to obtain the necessary information within these relatively short time limits.

[25] As a result I would allow the application for judicial review, with costs, set aside the final determination of dumping, and refer the matter back to the President for determination in accordance with these reasons.

"Wyman W. Webb"
J.A.

"I agree,
Robert M. Mainville J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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No Appearance	FOR THE RESPONDENTS HYOSUNG CORPORATION, HICO AMERICA SALES AND TECHNOLOGY, INC.
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