Federal Court of Appeal | Cour d'appel fédérale

Date: 20101028

Docket: A-515-09

Citation: 2010 FCA 288

CORAM: **NADON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

OWEN & COMPANY LIMITED

Applicant

and

GLOBE SPRING & CUSHION CO. LTD.
SIMMONS CANADA INC.
KEYNOR ASIA & I/E CO. LTD.
KEYNOR SPRING MANUFACTURING INC.
PACIFIC BEDSPRING ASSEMBLIES LTD.
RESTWELL SLEEP PRODUCTS
SPRING AIR SOMMEX CORPORATION
SPRINGWALL SLEEP PRODUCTS INC.

Respondents

Heard at Ottawa, Ontario, on October 27, 2010.

Judgment delivered from the Bench at Ottawa, Ontario, on October 28, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: **LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 28, 2010)

LAYDEN-STEVENSON J.A.

[1] This is an application for judicial review of the injury determination made by the Canadian International Trade Tribunal (the tribunal) under the *Special Import Measures Act*, R.S.C. 1985,

c. S-15 (SIMA) in File No. NQ-2009-002. The tribunal determined that the dumping of certain mattress innerspring units originating in or exported from the People's Republic of China (the subject goods) had caused injury to the Canadian domestic industry producing like goods in Canada. The tribunal also denied the product exclusions requested by the applicant Owen & Company Limited (Owen).

[2] Owen contends that the tribunal erred in a number of respects, specifically:

- the tribunal erred in failing to distinguish between the effect of undumped goods and dumped goods;
- the tribunal erred in determining that the undumped subject goods might have been dumped; and
- the tribunal erred in denying Owen's product exclusion requests.

[3] The respondents, Globe Spring & Cushion Co. Ltd. (Globe), and Simmons Canada Inc. (Simmons), maintain that the tribunal made no such errors.

[4] The tribunal is highly specialized and is entitled to significant deference. Only questions related to its jurisdiction are reviewed on a standard of correctness. All other questions attract a standard of reasonableness: *Defence Construction (1951) Ltd. v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47 at paras. 17-20. For the reasons that follow, we are of the view that this application should be dismissed.

[5] Owen claims that the tribunal was bound to specifically distinguish the effects of dumped goods from the effects of undumped goods. We agree that one of the factors set out in the *Special Import Measures Regulations*, S.O.R./84-927 (the Regulations) is whether any factors other than the dumping of the goods have caused injury or are threatening to cause injury on the basis of the values and prices of imports of like goods that are not dumped (para. 37.1(3)(b)(i)).

[6] In its reasons, the tribunal engaged in an extensive discussion regarding the volume of the subject goods. At paragraph 70, it concluded that the imports from China obtained a market share gain of five percentage points during the period of inquiry, which corresponded exactly to the market share losses experienced by the domestic industry. Owen argues that a "significant proportion, if not all, of that increase in market share was taken by undumped imports" (Owen memorandum of fact and law at para. 47). The record does not support that submission. To the contrary, the record discloses that the increase in market share was substantially a result of the dumped goods (Owen application record, tab 3, pp. 43, 61; Globe confidential record, tab 8, pp. 92, 94, 95; Simmons confidential record, tab 3, pp. 47, 51; Owen confidential record, tab 48). Owen does not point to evidence in the record that suggests otherwise.

[7] Similarly, the tribunal engaged in an equally extensive analysis regarding the effects of the subject goods on prices. After arriving at a number of pivotal findings with respect to pricing, it recognized that some of the subject goods had been determined by the Canada Border Services Agency (CBSA) to be undumped (tribunal's reasons at para. 85). It appears to have concluded, at least implicitly, that the injury caused by the dumped goods was substantial.

[8] As mentioned earlier, paragraph 37.1(3)(b)(i) of the Regulations requires the tribunal to determine whether any factors other than the dumping of the goods have caused injury. The volume and prices of undumped goods is one of the factors. As noted, the tribunal engaged in extensive analysis regarding the volume and prices of the subject goods.

[9] It would have been preferable for the tribunal to have provided a more fulsome explanation as to why it did not consider it necessary to eliminate the effects of the undumped goods. In some circumstances, such an explanation may indeed be required. However, in these circumstances, it was reasonable for the tribunal to conduct an inquiry with respect to the subject goods and to draw conclusions regarding the effects of dumped goods based on data sets which covered the subject goods, provided that consideration was given to undumped goods. The tribunal turned its mind to the undumped goods.

[10] In our view, a fair reading of the tribunal's decision is that it was satisfied, notwithstanding the possible effect of the undumped goods, that such effect would not alter its finding that the dumped goods had caused injury to the domestic market. In short, its reasons, read in totality, lead to the conclusion that the injury from the dumped goods was substantial, notwithstanding the undumped goods. On the basis of the record, that conclusion was one that was reasonably open to the tribunal.

[11] Owen's second argument is founded upon the last sentence of paragraph 85 of the tribunal's reasons. Owen contends that it was improper for the tribunal to suggest that individual shipments

could have been dumped since dumping is only determined in the aggregate and, in any event, such determination lies exclusively with the CBSA. In our view, the impugned sentence does nothing more than recognize that the modern analysis determines dumping in the aggregate despite that individual imports may have been made below their normal value. The tribunal could have referred to “individual imports below normal value” rather than to individual “dumped” imports. Either way, read contextually, the tribunal conducted its injury analysis on the basis of the CBSA findings as to the existence of substantial dumping and particular dumping margins. The tribunal’s sentence is but an observation.

[12] Owen’s third argument concerns the tribunal’s denial of Owen’s exclusion requests. This argument is two-pronged. However, it will not be necessary to address the second prong because the first prong is dispositive.

[13] The SIMA provides the tribunal with a very broad discretion to grant exclusions as the nature of the matter may require. In *Sacilor Acieries v. Canada (Anti-dumping Tribunal*) (1985), 60 N.R. 371, 9 C.E.R. 210 (F.C.A.D.), this Court concluded that the question whether to exclude products on the basis that they had not been dumped is either a matter of fact or discretion, not a matter of law.

[14] Notably, although the exclusion requests were framed as generically-worded product exclusions, the Tribunal did address Owen’s factual circumstances. There is no challenge to the tribunal’s determination that the evidence indicates Globe is capable of producing substitutable

products. On this basis alone, it was open to the tribunal to deny Owen's exclusion requests. The refusal to grant Owen's exclusion requests was not unreasonable.

[15] For these reasons, the application for judicial review will be dismissed with costs to the respondents.

"Carolyn Layden-Stevenson"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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