Court File No. A-163-22

FEDERAL COURT OF APPEAL

B E T W E E N:

HYUNDAI CANADA INC.

Appellant

- and -

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY
and HITACHI ENERGY CANADA INC.

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 10, 2022

Issued by: "Veton Mamudov"

(Registry Officer)

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal under Section 62 of the *Special Import Measures Act* ("**SIMA**") from the decision of the Canadian International Trade Tribunal ("**CITT**"), dated May 12, 2022 (CITT Appeals EA-2019-008 and EA-2019-010) (the "**Decision**") (i) allowing the Appellant's appeal as to the issue of reliability of export prices but declining its statutory *de novo* jurisdiction to determine this issue, and instead remanding to the President of the Canada Border Services Agency (the "**President**") the very same issue, and ultimately the determination of the export prices for under Section 59 of the SIMA, and (ii) disallowing the Appellant's appeal respecting the calculation of export prices under SIMA Subsection 25(1)(d). The purpose of the CITT appeals was to determine the correct export prices of certain imported large power transformers for the purpose of determining anti-dumping duty assessments.

The CITT found that the President had employed an incorrect test in forming the opinion that the Appellant's Section 24 export prices of the goods subject to the Decision were "unreliable" ("**export price reliability**") which, had the opinion been correctly formed, would have justified the President's calculation of the Appellant's export prices under Paragraph 25(1)(d) of the SIMA. Having found that the basis for the export price reliability opinion by the President was incorrect, the CITT should have performed its *de novo* jurisdictional duty, and concluded that the export prices were reliable and accordingly should be calculated under Paragraph 24 of the SIMA as was pleaded by the Appellant. Instead, the CITT remanded the issue of export price reliability, and ultimately the calculation of the export price, to the President. The CITT identified the relevant factors to determine the reliability of Section 24 export prices under the SIMA. Despite the evidence that the President relied entirely on an incorrect test to determine export price reliability the CITT remanded for the sole reason that "…the Tribunal does not know what the CBSA considered in its decision.". The CITT then dismissed the Appellant's appeal with respect to the President's calculation of the Paragraph 25(1)(d) export prices.

THE APPELLANT ASKS for:

1. a Finding that the Appellant's Section 24 export prices are reliable and therefore that Section 24 export prices should be utilized to determine the margin of dumping of large power transformers imported by the Appellant;

2. an Order setting aside the Decision and directing the President to re-determine the export prices of the large power transformers subject to this Appeal under Section 24 of the SIMA within 90 days of this Honourable Court's decision in this Appeal, specifically utilizing the Section 24 export prices calculated by the President at the conclusion of Normal Value and Export Price Review TR 2018 UP1, and to pay any resulting refunds and interest owing to the Appellant;

3. in the alternative, an Order setting aside the Decision and directing the CITT to determine the export prices of the large power transformers subject to this Appeal under Section 24 of the SIMA within 90 days of this Honourable Court's decision in this Appeal and based on the existing record in EA-2019-008, EA-2019-009, and EA-2019-010, and to require the payment of any resulting refunds and interest owing to the Appellant;

4. costs of the Appeal; and

5. such further and other relief as the Appellant may request and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

Background

6. Anti-dumping duties are assessed on imported of goods in an amount equal to the margin of dumping, which is the amount by which the normal value exceeds the export price. The normal value is a benchmark price representing the price of the goods in the exporter's home market. The export price under Section 24 is the price of the goods sold to the importer, adjusted as

prescribed. If there is no Section 24 export price or the President forms the opinion that the Section 24 export price is unreliable due to an association between the importer and the exporter or a compensatory arrangement, the export price is calculated according to one of the prescribed methodologies in Paragraphs 25(1)(c), (d) and (e). A Paragraph 25(1)(d) export price is the price of the goods as assembled, packaged, further manufactured or incorporated into other goods that are sold to an unrelated purchaser in Canada, adjusted as specified.

7. The calculated amounts of the normal value and the export price are determinative of the margin of dumping and thus the amount of the anti-dumping duties payable by the importer.

8. The SIMA provides for a series of *de novo* reassessments of anti-dumping duties which, subject to certain preconditions and limitations, may be initiated by the importer or by an officer designated by the President or the President. A reassessment by the President may be appealed to the CITT, which hears the appeal *de novo*. Under SIMA Section 61, the CITT is ultimately responsible for ensuring that anti-dumping duty assessments are correct. This Court's role under SIMA Section 62 is to decide for itself whether the CITT erred in law in making a decision.

9. The subject matters of the series of *de novo* reassessments in the SIMA are limited to the elements of an anti-dumping or countervailing duty assessment: (i) whether imported goods are subject to an injury finding made by the CITT, (ii) the normal value of the imported goods, (iii) the export price of the imported goods, and (iv) the amount of subsidy or export subsidy attributed to the imported goods.

10. This Appeal arises from anti-dumping duty assessments by the President on certain of the Appellant's importations of large power transformers produced in the Republic of Korea for export to Canada by Hyundai Electric & Energy Systems Co. Ltd. based on the results of the Normal Value and Export Price

Review conducted by the Canada Border Services Agency, which included its review of the export prices which are central to this Appeal ("**TR 2018 UP1**").

11. The President calculated the export prices of the importations at issue under SIMA Paragraph 25(1)(d) because he formed the opinion that the SIMA Section 24 export prices were unreliable due to an association between the Appellant and the exporter. The President's opinion was based on the results of the President's export price reliability test, as applied in TR 2018 UP1.

12. In consolidated CITT appeals EA-2019-008 and EA-2019-010, the Appellant appealed the export prices determined and used by the President to assess anti-dumping duties following the conclusion of TR 2018 UP1. The Appellant challenged (i) the test applied by the President to form the opinion that the Section 24 export prices were unreliable, (ii) the application of the President's test to the importations subject to TR 2018 UP1, and (iii) the President's calculation of the export prices under Paragraph 25(1)(d).

13. The CITT heard the Appellant's appeals together with an appeal to the CITT by Remington Sales Co. (EA-2019-009). The facts and issues in EA-2019-009 are almost identical to those in EA-2019-008 and EA-2019-010. Due to the commonality of facts and issues, the CITT's reasons for its decision in EA-2019-009 incorporate by reference parts of the Decision, including the parts that are at issue in this Appeal.

14. The Appellant challenges (i) the CITT's decision to remand the export prices subject to the Decision and (ii) the CITT's interpretation of SIMA Paragraph 25(1)(d) and certain of its related but unfounded factual findings.

Remand Decision

15. The CITT committed errors of law by failing to exercise its *de novo* jurisdiction to determine the export prices and instead remanding their determination to the President for reconsideration. The CITT granted the President, who was *functus officio*, another opportunity to re-determine the

export prices at issue. The CITT ought to have determined the export prices under SIMA Section 24 as it had decided that the President had incorrectly formed the opinion that the Appellant's Section 24 export prices were unreliable.

16. **First,** the CITT's statutory mandate is to efficiently decide questions properly before it in a SIMA Section 61 appeal, including the determination of the export price, once and for all and based on findings that only the CITT can make. By declining to determine the export prices under SIMA Section 24, the CITT failed to fulfill its statutory mandate.

17. **Second,** the CITT failed to decide the Appeals based on the *de novo* standard applicable to appeals under SIMA Section 61, and instead remanded the determination of export price reliability on the basis that "…the Tribunal does not know what the CBSA considered in its decision".

18. The CITT correctly described and explained the applicable *de novo* standard it then failed to apply:

> …the Tribunal's proceeding is an appeal *de novo* ; it is not a review of the prior decision on the basis of the CBSA record and on a reasonableness standard…In view of the above, it is not strictly relevant how the CBSA arrived at the decisions being challenged but only whether the decisions were correct…The Tribunal is tasked with correctly interpreting SIMA and making its decision accordingly.

19. **Third,** the CITT committed an egregious error of fact, which rises to the level of an error of law, by justifying the remand decision on a finding that (i) was contrary to the evidence in the record, and (ii) was internally inconsistent with and contradictory to the CITT's own findings in the Decision. The CITT stated that, factually, it did not know "what the CBSA considered in its decision" to determine that the Appellant's Section 24 export prices were unreliable. However, the CITT knew exactly what the CBSA considered in the President's decision. Specifically the CITT knew that the President had relied exclusively on its incorrect reliability test – and no other factor – when

determining export price reliability. It made specific findings to this effect in the Decision:

> In the case at hand, the opinion of the President, as stated in the CBSA's decision and pleadings, *is based entirely* on a comparison of the export prices determined using the methodology of section 24 of SIMA with the export prices determined by the President using the methodology of paragraph 25(1)(d)…
>
> …However, there is *no evidence that such other factors* [relating to export price reliability] *were taken into account* by the President in this case. [Emphasis added.]

Interpretation of Paragraph 25(1)(d)

20. The CITT misquoted the text of Paragraph 25(1)(d) as requiring the identification of "the price for which the goods *were sold*" when, as the CITT stated elsewhere in its Decision, the relevant text states: "the price of the goods *as assembled*". [Emphasis added.]

21. Based on this error of statutory interpretation, the CITT further erred in law by developing a novel methodology to calculate Paragraph 25(1)(d) export prices that is contrary to the statutory formula set out in the chapeau and subparagraphs of Paragraph 25(1)(d), as well as contrary to established authorities and inconsistent with other findings in the Decision.

22. The statutory formula in Paragraph 25(1)(d) requires that the export price calculation be based on the price of the imported goods sold to an unrelated purchaser in Canada, less the sum of the following:

(a) 25(1)(d)(i) an amount for profit determined under the *Special Import Measures Regulations*;

(b) 25(1)(d)(ii) indirect selling expenses incurred in selling the goods (i.e. overhead); and

(c) 25(1)(d)(iii) to (v) direct selling expenses incurred by the importer and the exporter in selling the goods, including "costs that are attributable

> or in any manner related to the assembly of the goods" and "all other costs, charges and expenses…incurred on or after the importation of the imported goods and on or before the sale of the goods as assembled".

23. The CITT's novel methodology does not follow this formula, but rather introduces a different formula, requiring a threshold exercise of "eliminating" or "removing" revenues associated with services that are a (i) "separate object of trade", (ii) are "purchased separately" from the goods and (iii) do not contribute to the "value" of the goods sold to an unrelated purchaser in Canada. From the resulting amount, the following are then to be deducted: (i) the amount for profit, (ii) the indirect selling expenses, (iii) the exporter's direct selling expenses, and (iv) expenses incurred by the importer to perform activities in selling the goods that are not a separate object of trade and contribute to the value of the goods.

24. It is not contested that Paragraph 25(1)(d) requires the deduction of the value of services performed in connection with the sale from the price paid by the purchaser in Canada in the calculation of a Paragraph 25(1)(d) export price. The debate is *how* the value of these services should be deducted (as a threshold step, or as a direct expense deduction) and *what* value should be deducted (the revenues billed for the service or the expenses incurred to perform the service).

25. The CITT asserted that it did not need express authority to remove services revenues as a threshold step in the Paragraph 25(1)(d) calculation and justified its approach on the grounds that "[i]t is implicit as all of the relevant provisions of the act refer "goods" rather than "goods and services" and thus, based on this implicit power, the President can eliminate services revenues at the outset of the Paragraph 25(1)(d) calculation.

26. The CITT's assertion is incorrect: the text of Paragraph 25(1)(d) specifies both *how* to remove the value of services performed in connection with the sale of

the goods as assembled when calculating a Paragraph 25(1)(d) export price and *what* to deduct.

27. The chapeau of Paragraph 25(1)(d) refers to "the price of the goods as assembled". As assembly is a service, the SIMA does not expressly authorize any adjustment to this amount by the CBSA, the President or the CITT. Assembly service-related revenues for the performance of services in connection with the sale of the goods must not be eliminated at the outset of the Paragraph 25(1)(d) calculation because Subparagraph 25(1)(d)(iii) requires the deduction of expenses "that are attributable or in any manner related to the assembly" (the *what*) from the price of the goods as assembled (the *how*). Neither the President nor the CITT has the express or implicit discretionary authority to treat these expense deductions as optional in light of the terms of the SIMA.

28. The same logic applies to any service performed *in connection with the sale* to the unrelated purchaser in Canada. If an importer incurs an expense in selling the goods that falls within the direct expense deductions of SIMA Subparagraphs 25(1)(d)(iii) to (v), the expenses, not the revenues, must be deducted. Service revenues unrelated to the sale of goods should obviously be excluded from the Paragraph 25(1)(d) calculation, as should the related expenses, because they would be outside the scope of the required deductions in Subparagraph 25(1)(d)(iii) to (v), which only permit the deduction of expenses incurred in connection with the sale of the goods.

29. The Tribunal invented new legal concepts and exceeded its authority under SIMA based on self-professed and self-attributed implicit powers. It considered only two words, "goods" and "price", in its interpretation of Paragraph 25(1)(d); it gave no weight to any of the other 321 words in that provision. The express words of the statute preclude the CITT from usurping the powers of Parliament in order to justify its novel interpretation of Paragraph 25(1)(d).

30. The CITT also made egregious findings of fact contrary to the evidence in applying its incorrect interpretation of Paragraph 25(1)(d) to the evidence, including the following findings:

(a) That the evidence did not establish a connection between the "value" of the imported large power transformer and the "value" of the services performed by the Appellant in Canada when the evidence established that the services performed by the Appellant were exclusively related to the value of the large power transformers at issue and to their sale;

(b) That the prices of services performed by the Appellant were set out separately from the prices of the goods when, as acknowledged by the CITT, "…these services were sometimes listed separately on purchase orders, invoices, and contracts";

(c) That the amount for profit in Subparagraph 25(1)(d)(i) is calculated by applying a ratio to the cost of production of the imported goods when it is actually calculated by applying a ratio to the price of the imported goods when sold to an unrelated purchaser in Canada (i.e., the starting point of the Paragraph 25(1)(d) export price calculation).

(d) That the President had not engaged in a practice of selecting the higher of the expense and the revenue for a given service, contrary to the evidence of the President's application of the rule on the CITT's record.

31. The Appellant relies upon:

(a) The protected and public record of the appeal proceedings before the CITT in EA-2019-008, EA-2019-009 and EA-2019-010;

(b) The transcripts of the protected and public hearings before the CITT in EA-2019-008, EA-2019-009, and EA-2019-010;

(c) *Special Import Measures Act* (R.S.C., 1985, c. S-15);

(d) *Special Import Measures Regulations* (SOR/84-927);

(e) Federal Courts Act (R.S.C., 1985, c. F-7); and

(f) Such further and other grounds as counsel may advise and the Court may permit.

32. The appellant proposes that this appeal be heard in Toronto.

DocuSigned by:

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August 10, 2022

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