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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE June 28, 2024 28 juin 2024	D É P O S É
(T-1199-23) Samantha Chojnacki		
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Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

**ÇOLAKOĞLU METALURJI A.S.,
İÇDAS ÇELİK ENERJİ TERSANE VE ULAŞIM A.Ş.,
EKİNCİLER DEMİR VE ÇELİK SANAYİ A.Ş.,
KROMAN ÇELİK SANAYİ A.Ş.,
KAPTAN DEMİR ÇELİK ENDÜSTRİ VE TİCARET A.Ş.,
and
TURKISH STEEL EXPORTERS' ASSOCIATION**

Appellants
(Applicants)

-and-

**ALTA STEEL INC.,
ARCELORMITTAL LONG PRODUCTS CANADA, G.P.,
GERDAU AMERISTEEL CORPORATION,
JEBSEN & JESSEN METALS GMBH, and
MAX AICHER (NORTH AMERICA) INC.**

Respondents
(Respondents)

NOTICE OF APPEAL

TO THE RESPONDENTS:

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

THIS APPEAL will be heard by the Federal Court of Appeal 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 appellants request that this appeal be heard at Ottawa.

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 judgment 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.

June 28, 2024

Issued by: _____

(Registry Officer)

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APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment and Reasons for Judgment of the Honourable Justice Turley of the Federal Court dated May 31, 2024 in Court File No. T-1199-23 (the “**Judgment**”).

THE APPELLANTS ASK THAT this Court:

1. Allow this appeal and set aside the Judgment;
2. Make the judgment that the Federal Court ought to have made;
3. Grant the Appellants their costs both in this Court and in the Court below; and
4. Grant such further and other relief as this Honourable Court may find just.

THE GROUNDS FOR THIS APPEAL are as follows:

1. At issue is whether exporters are directly affected by re-investigation decisions of the Canada Border Services Agency (“**CBSA**”). The within application for judicial review was struck on the basis of a line of Federal Court decisions, which the Court below found were binding on it.
2. The Federal Court of Appeal is not bound by those lower Court decisions and intervention is necessary to correct the law, which currently results in an obvious injustice to exporters trading with Canada.
3. The determination that exporters are not directly affected by CBSA re-investigation decisions is an error of law.

Background to CBSA Investigations and Re-Investigations

4. The *Special Import Measures Act* (“**SIMA**”)¹ protects Canadian producers from the injurious effects of dumped imports by providing a specified and limited remedy,

¹ *Special Import Measures Act*, [RSC 1985, c-15](#)

namely, the imposition of duties in an amount equal to the margin of dumping of the goods they import - not more, not less.

5. The purpose of the SIMA is not to close borders and halt trade. Doing so would grossly exceed the remedies that the SIMA provides and would violate every commitment that Canada and 163 other nations made following more than five decades of negotiations that culminated in the World Trade Organization's Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "**Anti-Dumping Agreement**").

6. Canadian producers who believe they have suffered material injury from the dumping of goods imported into Canada can file a complaint with the CBSA under the SIMA. If CBSA commences an investigation, exporters and Canadian producers are considered to be "parties to a proceeding" under section 83 of the SIMA and enjoy full participatory rights, including the right to review and comment on any confidential information submitted to the CBSA and to file legal submissions on any issue arising from the investigation.

7. At the conclusion of an investigation, the CBSA determines whether goods exported by individual exporters over a certain period of time were dumped, and if so, by how much. The CBSA determines and issues normal values and export prices for individual exporters who participate in the investigation.

8. In a separate but parallel proceeding, the Canadian International Trade Tribunal ("**Tribunal**") will conduct an inquiry into whether the dumping of goods imported into Canada have caused material injury to the Canadian domestic industry.

9. If the CBSA finds that the goods exported by an exporter were dumped and if the Tribunal finds that the dumping of the goods caused or threaten to cause material injury, imports will become subject to antidumping duties pursuant to section 3 of the SIMA for a period of five years.

10. During the five years in which a dumping finding is in place, the CBSA will periodically and at its discretion conduct re-investigations, which is a second investigation of the same kind, on the same issues. The process for re-investigations is nearly identical to the process for investigations.

11. At the conclusion of a re-investigation, the CBSA issues updated normal values, dictating the new minimum prices at which an exporter can sell the goods to an importer in Canada without triggering the imposition of duties on the importer of those goods. In other words, CBSA re-investigation decisions (like investigation decisions) establish legally mandated minimum prices.

The Re-Investigation Decision Below

12. On December 10, 2014, the CBSA concluded its investigation and issued a final determination (the “**First Investigation Decision**”) that, *inter alia*, certain rebar from Türkiye, had been dumped. The First Investigation Decision established the minimum prices (i.e. normal values) at which certain exporters could sell rebar to importers in Canada without the imposition of duties on the importer.

13. On September 8, 2022, the CBSA initiated a re-investigation under the ostensible authority of the SIMA. As in the first investigation, the Appellants and the named Respondents filed evidence and argument and CBSA officials traveled to the offices of the exporter Appellants in Türkiye and conducted audits lasting several days.

14. The re-investigation culminated on May 10, 2023, with the CBSA issuing a 21-page decision which setting out its determinations and reasons (the “**Re-Investigation Decision**”). The Re-investigation Decision mandated new normal values (i.e., the minimum prices) that the Appellant exporters are legally able to charge to importers in Canada without triggering the imposition of duties on those importers. In other words, it sets minimum prices at which the goods are permitted to be imported into Canada.

15. The First Investigation Decision determined normal values and export prices. The Re-Investigation Decision re-visited and re-determined those normal values and export prices.

16. A main issue in this application for judicial review is whether CBSA re-investigations and re-investigation decisions are *ultra vires* CBSA’s statutory authority. The Courts have never grappled with, let alone resolved, this question. The SIMA sets out the process of investigations, including the availability of judicial

review. The SIMA is entirely silent on re-investigations. Unlike investigations, re-investigations are conducted entirely outside the statutory scheme of the SIMA.

The Judgment under Appeal

17. The Judgment erred in holding that judicial review of a re-investigation decision is not available under the *Federal Courts Act* on the basis that exporters are not directly affected by them.

18. The Court below followed a line of Federal Court decisions, which did not consider or fundamentally misapprehended the nature and substance of re-investigations and their direct effect *on exporters*.

19. The Court below erred in following that line of decisions and erred in finding it was bound by the Federal Court's decision in *Husteel*.²

20. This Court is not bound by those decisions.

21. The re-investigation below, like all re-investigations, was a lengthy and comprehensive adversarial proceeding culminating in a definitive and binding determination with substantive legal and practical effects, which has caused substantial prejudice to the Appellants.

22. The Judgment erred in finding that CBSA re-investigations may be likened to advance rulings, which do not affect legal rights, impose legal obligations or cause prejudice because they are nothing more than a non-binding opinion. The normal values determined in re-investigations are binding, take effect as of the date of the re-investigation decision and may be applied retroactively.

23. The Court erroneously equated the "imposition" of duties (i.e., the time at which duties for a particular shipment of goods are calculated and paid) with the legal imposition of normal values (i.e., minimum prices). CBSA re-investigations, like

² *Husteel Co. Ltd v. Canada (Attorney General)*, 2020 FC 430 ("**Husteel**")

CBSA investigations, impose a binding legal requirement concerning the minimum prices at which exporters can sell to importers.

24. The Judgment erred in holding that the CBSA only determines the “normal value” at the time of importation. Normal values are not determined at the time of importation. The CBSA determines and sets normal values in investigations and re-investigations.

25. The Judgment also erred by failing to apply the proper legal test for determining whether an applicant is directly affected by the impugned decision. Despite reciting that a decision must affect legal rights, impose legal obligations, *or* cause prejudicial effects, the Judgment (and the line of cases it followed) did not consider prejudicial effects, and in particular, the prejudicial effects on exporters.

26. The Court erred in holding that the status of the applicant seeking judicial review (whether an importer or an exporter in this case) is of no consequence in determining whether a re-investigation is amenable to judicial review under the *Federal Courts Act*. There is no alternative remedy or appeal scheme available for exporters, as the Judgment itself found. Further, an exporter is the party to which CBSA issues normal values.

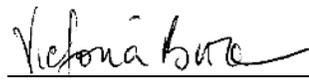
27. The Appellants filed uncontested evidence that the Re-Investigation Decision directly caused, *inter alia*, lost sales and lost business. The Judgment erred by failing to consider this evidence. The Court dismissed the Appellants’ evidence on the basis that “a similar submission was made and rejected by the Court in *Husteel*”. There was no evidence that the underlying decision (a normal value review) directly resulted in lost sales or business. The party in *Husteel* argued that the normal value review had a general impact on the company as it “priced its goods out of the Canadian market and affected the way it does business.” There was no indication in *Husteel* that there was evidence of actual lost sales or lost business that had already occurred. Regardless, *Husteel* misapprehended the test concerning the availability for judicial review, misapprehended the nature and effect of normal value reviews and re-investigations on exporters, and does not bind this Court in any event.

28. Section 18.1 of the *Federal Court Act* provides that an application for judicial review may be made by anyone directly affected by the matter in respect of which relief is sought. The Appellants are directly affected by the matter in respect of which relief is sought.

29. CBSA re-investigation decisions are amenable to judicial review.

30. The Appellants propose that the appeal be heard in Ottawa, Ontario.

DATED: June 28, 2024



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