Federal Court of Appeal | Cour d'appel fédérale

Date: 20100224

Docket: A-174-09

Citation: 2010 FCA 62

CORAM: **NOËL J.A.**
PELLETIER J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

MAAX BATH INC.

Applicant

and

ALMAG ALUMINUM INC., APEL EXTRUSIONS LIMITED, CAN ART ALUMINUM EXTRUSION INC., METRA ALUMINUM INC., SIGNATURE ALUMINUM CANADA INC., SPECTRA ALUMINUM PRODUCTS LTD., SPECTRA ANODIZING INC., EXTRUDEX ALUMINUM, ARTOPEX INC., ASIA ALUMINUM HOLDINGS LTD., BLINDS TO GO INC., EXTRUDE-A-TRIM INC., GARAVENTA (CANADA) LTD., KAM KIU ALUMINIUM PRODUCTS (NA) LTD., KAM KIU ALUMINIUM PRODUCTS SDN. BHD., KROMET INTERNATIONAL INC., LOXCREEN CANADA, MALLORY INDUSTRIES, PANASIA ALUMINIUM (CHINA) LIMITED, PANASIA ALUMINUM (CALGARY) LIMITED, PANASIA ALUMINUM (MACAO COMMERCIAL OFFSHORE) LIMITED, PANASIA ALUMINUM (TORONTO) LIMITED, PINGGUO ASIA ALUMINUM CO. LTD., R-THETA THERMAL SOLUTIONS INC., RAILCRAFT INTERNATIONAL INC., REGAL ALUMINUM PRODUCTS INC., SHINING METAL TRADING INC., SINOBEC TRADING INC., TAG HARDWARE SYSTEMS LTD., TAISHAN CITY KAM KIUM ALUMINIUM EXTRUSION CO. LTD., VITRE-ART C.A.B. (1988) INC., ZMC METAL COATING INC., ALFA MEGA INC., ALUMINART PRODUCTS LIMITED, ALUMINUM CURTAINWALL SYSTEMS INC., C.R. LAWRENCE CO. OF CANADA, CHINA SQUARE INDUSTRIAL LTD., CONCORD

WEST DISTRIBUTION LTD., DIGI-KEY CORPORATION, HOME-RAIL LTD., HUNTER-DOUGLAS CANADA, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION OF BRITISH COLUMBIA, KNOLL NORTH AMERICA CORP., LEVELOR/KIRSCH WINDOW FASHIONS (A DIVISION OF NEWELL RUBBERMAID/NEWELL WINDOW FURNISHINGS INC.), MILWARD ALLOYS INC., MORSE INDUSTRIES, NEW ZHONGYA ALUMINUM FACTORY LTD., NEWELL INDUSTRIES CANADA INC., NEWELL WINDOW FURNISHINGS INC., OPUS FRAMING LTD., PACIFIC SHOWER DOORS (1995) LTD., PROFORMA INTERIORS LTD. DBA ALUGLASS, RAHUL GLASS LTD., RUHLAMAT NORTH AMERICA LTD., RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC., VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC., ZHAOQING CHINA SQUARE INDUSTRY LIMITED and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on February 16, 2010.

Judgment delivered at Ottawa, Ontario, on February 24, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
LAYDEN-STEVENSON J.A.

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Respondents

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review of the injury determination made by the Canadian International Trade Tribunal (the Tribunal) on March 17, 2009 in File No. NQ-2008-003, concerning dumped and subsidized aluminum extrusions originating in or exported from the People's Republic of China. The Tribunal determined that dumped and subsidized aluminum extrusions from China (the subject goods) caused injury to the domestic industry producing like goods in Canada and denied the product exclusion requested by the applicant MAAX Bath Inc. (MAAX or the applicant).

[2] In support of its application, MAAX contends that the Tribunal committed a series of errors: in determining the scope of the goods subject to its inquiry; in defining the domestic

industry; in finding injury to the domestic industry; and in denying the product exclusion which it claimed. The respondents Almag Aluminum Inc., Apel Extrusions Limited, Can Art Aluminum Extrusion Inc., Metra Aluminum Inc., Signature Aluminum Canada Inc., Spectra Aluminum Products Ltd., Spectra Anodizing Inc., and Extrudex Aluminum (the respondents) resist the application.

[3] For the reasons which follow, I am of the view that the application should be allowed insofar as it relates to the claimed product exclusion and that the application should otherwise be dismissed.

RELEVANT FACTS

[4] The facts are fully set out in full in the decision of the Tribunal. It is sufficient for present purposes to refer to the brief summary which follows.

[5] On August 18, 2008, following a complaint filed by the respondents (the respondent Extrudex Aluminum filed a letter in support of the complaints filed by the other respondents), the President of the Canada Border Services Agency (the Agency) initiated investigations on whether the subject goods had been dumped and subsidized.

[6] On November 17, 2008, the Agency made preliminary determinations of dumping and subsidizing pursuant to subsection 38(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (the Act). The Agency stated it was satisfied that the subject goods had been dumped and

subsidized, that the margins of dumping and the amount of subsidy were not insignificant and that the volumes of dumped and subsidized goods were not negligible (the preliminary determination). It defined the subject goods as follows:

> Aluminum extrusions produced via an extrusion process of alloys having metallic elements falling within the alloy designations published by The Aluminum Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness greater than 0.5 mm, with a maximum weight per metre of 22 kg and a profile or cross-section which fits within a circle having a diameter of 254 mm, originating in the People's Republic of China.

[7] On November 18, 2008, the Tribunal issued a notice of commencement of inquiry pursuant to subsection 42(1) of the Act into whether injury was caused or is likely to be caused by imports of dumped and subsidized aluminum extrusions from China. The Tribunal's period of inquiry covered three full years, from January 1, 2005 to December 31, 2007, and an interim period from January 1 to September 30, 2008.

[8] On February 6, 2009, Kam Kiu Aluminium Products (Kam Kiu), a party to the proceedings, filed a notice of motion with the Tribunal requesting that it issue an order determining that the subject goods are limited to aluminum extrusions that have a wall thickness greater than 0.5 mm and excluding aluminum extrusions that do not have walls.

[9] On February 9, 2009, the applicant and two other parties in the Tribunal inquiry, Tag Hardware and Regal Aluminum filed a notice of motion with the Tribunal requesting that it issue an order determining that the subject goods do not include aluminum parts imported from China.

[10] On February 16, 2009, the Agency issued final determinations of dumping and subsidizing and found that 99.8 percent of the subject goods were dumped at an estimated overall weighted average margin of dumping of 72.6 percent as a percentage of the export price. The Agency also determined that 100 percent of the subject goods were subsidized at an estimated weighted average amount of subsidy of 47 percent of the export price.

[11] A hearing was held by the Tribunal in Ottawa from February 16 to 20, 2009, during which the parties filed submissions, provided evidence and made arguments in support of their respective positions on the issue of injury to the domestic industry and product exclusion. The Tribunal issued its findings on March 17, 2009 and its statement of reasons on April 1, 2009.

THE TRIBUNAL DECISION

[12] The Tribunal first addresses the preliminary motions filed by Kam Kiu, the applicant and others. Dealing with the notices of motion filed by Kam Kiu, the Tribunal found, as a preliminary matter, that the Agency did not intend to exclude aluminum extrusions that do not have walls from the scope of the subject goods definition (reasons, paras. 53 to 69). With respect to the notices of motion brought by the applicant (and others) seeking to exclude aluminum parts, the Tribunal found that such goods “are not necessarily excluded” (reasons, para. 78) and that this determination will be

for the Agency to make on the basis of all the facts at the time of importation (reasons, paras. 53 to 80).

[13] Turning to the analysis, the Tribunal notes that pursuant to subsection 42(1) of the Act, it must inquire into whether dumping or subsidizing of the subject goods has caused injury, a term defined in subsection 2(1) as "… material injury to a domestic industry". "Domestic industry" is in turn defined as (reasons, para. 81):

> "… the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, 'domestic industry' may be interpreted as meaning the rest of those domestic producers".

[14] The Tribunal therefore begins its analysis by defining "like goods", which the Tribunal separates along with the subject goods, into two classes: custom-shaped aluminum extrusions and standard-shaped aluminum extrusions (reasons, paras. 86 to 132). The Tribunal then proceeds to identify the domestic producers constituting the "domestic industry" for both classes in order to conduct a separate injury analysis for each (reasons, paras. 133 to 145).

[15] Prior to embarking upon its injury analysis, the Tribunal deals with a number of preliminary considerations including the means to measure the injury sustained by the domestic industry. The Tribunal finds price to be an important consideration for most purchasers (reasons, paras. 149 to 155). The Tribunal goes on to explain why it cannot adopt the "margin over metal" method to

examine the impact of the subject custom-shapes and subject standard-shapes on the domestic industry (reasons, paras. 156 to 160).

[16] Proceeding with the injury analysis, the Tribunal examines for each class, the volume of imports of the dumped and subsidized aluminum extrusions, its effects on prices and the impact on the domestic industry along with other factors which, according to the parties, were responsible for the injury sustained by the domestic industry (reasons, paras. 162 to 180; 261 to 275).

[17] The Tribunal finds that for the period in issue, a significant increase in the volume of imports of both the subject standard- and custom-shapes had occurred in absolute terms. The Tribunal also finds that the dumped and subsidized custom- and standard-shapes have significantly undercut and, to a lesser extent in the case of standard-shapes, suppressed the prices of like goods in the Canadian market (reasons, paras. 181 and 276).

[18] Turning to the impact of the imported dumped and subsidized custom- and standard-shaped goods on the domestic industry, the Tribunal concludes there is a causal relationship between these imports and the injury experienced by the domestic industry during the period at issue and finds the injury to be material, satisfying the definition of injury found at subsection 2(1) of the Act (reasons, paras. 182 to 213; 277 to 282).

[19] As for the other factors said to be responsible for the injury experienced by the domestic industry, the Tribunal concludes that notwithstanding the fact that some of the losses or injury may

be attributable to other factors, these did not negate the material injury caused by imports of the subject custom- and standard-shapes during the period at issue (reasons, paras. 214 to 260; 304 to 332).

[20] The last part of the Tribunal's decision focuses on the parties' product exclusion requests. The Tribunal received 119 exclusion requests from 34 different entities, of which 5 were granted in addition to the request consented to by the domestic producers. The Tribunal denied the applicant's request on the basis of insufficient supporting evidence (reasons, paras. 333 to 381).

LEGISLATIVE FRAMEWORK

[21] It is useful to set out the definition of "injury" in subsection 2(1) of the Act as well as subsections 38(1), 42(1) and 43(1):

"injury" « *dommage* »	« dommage » "*injury*"
2. (1) "injury" means material injury to a domestic industry;	**2.** (1) « dommage » Le dommage sensible causé à une branche de production nationale.
Preliminary determination of dumping or subsidizing	Décision provisoire de dumping ou de subventionnement
38. (1) Subject to section 39, after the sixtieth and on or before the ninetieth day after the initiation of an investigation under section 31, the President shall make a preliminary determination of dumping or subsidizing with respect to the goods in	**38.** (1) Sous réserve de l'article 39, après le soixantième jour mais au plus tard le quatre-vingt-dixième jour suivant l'ouverture de l'enquête prévue à l'article 31, le président rend une décision provisoire de dumping ou de subventionnement concernant les

respect of which the investigation has not been terminated under section 35 after estimating and specifying, in relation to each exporter of goods in respect of which the investigation is made, as follows:

(*a*) in the case of dumped goods,

(i) estimating the margin of dumping of the goods to which the preliminary determination applies, using the information available to him at the time the estimate is made, and

(ii) specifying the goods to which the preliminary determination applies;

(*b*) in the case of subsidized goods,

(i) estimating the amount of subsidy on the goods to which the preliminary determination applies, using the information available to him at the time the estimate is made,

(ii) specifying the goods to which the preliminary determination applies, and

(iii) subject to subsection (2), where the whole or any part of the subsidy on the goods to which the preliminary determination applies is a prohibited subsidy, specifying that there is a prohibited subsidy on the goods and estimating the amount of the prohibited subsidy thereon; and

(*c*) in the case of dumped or subsidized goods, specifying the

marchandises au sujet desquelles n'a pas eu lieu la clôture d'enquête prévue à l'article 35, après avoir, pour chacun des exportateurs des marchandises pour lesquelles l'enquête est menée :

a) dans le cas de marchandises sous-évaluées :

(i) fait l'estimation de la marge de dumping des marchandises, compte tenu des renseignements dont il dispose,

(ii) précisé les marchandises visées par la décision;

b) dans le cas de marchandises subventionnées :

(i) fait l'estimation du montant de subvention concernant les marchandises, compte tenu des renseignements dont il dispose,

(ii) précisé les marchandises visées par la décision,

(iii) sous réserve du paragraphe (2), précisé, s'il y a lieu, que les marchandises font l'objet d'une subvention prohibée et le montant estimatif de cette subvention;

c) dans le cas de marchandises sous-évaluées ou subventionnées, précisé le nom de la personne qu'il croit être l'importateur, compte tenu des renseignements dont il dispose à la date de l'estimation visée au sous-alinéa *a*)(i) ou *b*)(i), selon le cas.

name of the person the President believes, on the information available to the President at the time the President makes the estimate referred to in subparagraph (*a*)(i) or (*b*)(i), as the case may be, is the importer in Canada of the goods.

Tribunal to make inquiry

42. (1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:

…

Enquête du Tribunal

42. (1) Dès réception par le secrétaire de l'avis de décision provisoire prévu au paragraphe 38(3), le Tribunal fait enquête sur celles parmi les questions suivantes qui sont indiquées dans les circonstances, à savoir :

[…]

Tribunal to make order or finding

43. (1) In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall, forthwith after the date of receipt by the Secretary of notice of a final determination of dumping or subsidizing with respect to any of those goods, but, in any event, not later than one hundred and twenty days after the date of receipt by the Secretary of notice of a preliminary determination with respect to the goods, make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.

Ordonnances ou conclusions du Tribunal

43. (1) Dans le cas des enquêtes visées à l'article 42, le Tribunal rend, à l'égard de marchandises objet d'une décision définitive de dumping ou de subventionnement, les ordonnances ou les conclusions indiquées dans chaque cas en y précisant les marchandises concernées et, le cas échéant, leur fournisseur et leur pays d'exportation. Ces ordonnances ou conclusions sont rendues dès réception par le secrétaire de l'avis de cette décision définitive mais, au plus tard, dans les cent vingt jours suivant la date à laquelle le secrétaire reçoit l'avis de décision provisoire.

[22] It is also useful to refer to subsection 37.1(1) of the *Special Import Measures Regulations*, SOR/84-927:

Injury, Retardation or Threat of Injury	Dommage, retard ou menace de dommage
37.1 (1) For the purposes of determining whether the dumping or subsidizing of any goods has caused injury or retardation, the following factors are prescribed:	**37.1** (1) Les facteurs pris en compte pour décider si le dumping ou le subventionnement de marchandises cause un dommage ou un retard sont les suivants :
(*a*) the volume of the dumped or subsidized goods and, in particular, whether there has been a significant increase in the volume of imports of the dumped or subsidized goods, either in absolute terms or relative to the production or consumption of like goods;	*a*) le volume des marchandises sous-évaluées ou subventionnées et, plus précisément, s'il y a eu une augmentation marquée du volume des importations des marchandises sous-évaluées ou subventionnées, soit en quantité absolue, soit par rapport à la production ou à la consommation de marchandises similaires;
(*b*) the effect of the dumped or subsidized goods on the price of like goods and, in particular, whether the dumped or subsidized goods have significantly	*b*) l'effet des marchandises sous-évaluées ou subventionnées sur le prix des marchandises similaires et, plus particulièrement, si les marchandises sous-évaluées ou subventionnées ont, de façon marquée, mené :
(i) undercut the price of like goods, (ii) depressed the price of like goods, or (iii) suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred;	(i) soit à la sous-cotation du prix des marchandises similaires, (ii) soit à la baisse du prix des marchandises similaires, (iii) soit à la compression du prix des marchandises similaires en empêchant les augmentations de prix qui par ailleurs se seraient vraisemblablement produites pour ces marchandises;
(*c*) the resulting impact of the dumped or subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the	

domestic industry, including

(i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity,
(ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital,
(ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and
(iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support program; and

(*d*) any other factors that are relevant in the circumstances.

c) l'incidence des marchandises sous-évaluées ou subventionnées sur la situation de la branche de production nationale et, plus précisément, tous les facteurs et indices économiques pertinents influant sur cette situation, y compris :

(i) tout déclin réel ou potentiel dans la production, les ventes, la part de marché, les bénéfices, la productivité, le rendement sur capital investi ou l'utilisation de la capacité de la branche de production,
(ii) toute incidence négative réelle ou potentielle sur les liquidités, les stocks, les emplois, les salaires, la croissance ou la capacité de financement,
(ii.1) l'importance de la marge de dumping des marchandises ou du montant de subvention octroyé pour celles-ci,
(iii) dans le cas des produits agricoles qui sont subventionnés, y compris tout produit qui est un produit ou une marchandise agricole aux termes d'une loi fédérale ou provinciale, toute augmentation du fardeau subi par un programme de soutien gouvernemental;

d) tout autre facteur pertinent, compte tenu des circonstances.

THE PARTIES' POSITIONS

[23] The applicant submits the Tribunal improperly defined the subject goods which allegedly have caused injury to domestic producers of like goods in Canada. The Tribunal must accept the product definition laid out by the Agency in the preliminary determination and though it may interpret an ambiguous definition, the applicant is of the view that no such ambiguity exists. The applicant contends that the Tribunal unduly extended the scope of goods covered by the definition and committed a reviewable error by including solid extrusions, which by their solid property have no walls, to the product definition which requires "having a wall thickness greater than 0.5 mm" and by determining that aluminum parts fall within the subject goods definition. The applicant submits that as this is a jurisdictional issue, this determination is reviewable on the basis of the correctness standard.

[24] The applicant also maintains that by improperly determining the scope of the subject goods, the Tribunal improperly determined the domestic industry producing like goods. The applicant is of the view that companies providing services in the finishing and fabricating of extrusions to domestic extruders should not have been excluded from the domestic industry producing like goods and that the same can be said of companies purchasing aluminum extrusions to produce aluminum parts for their own use. The applicant submits that despite evidence demonstrating the domestic industry extended to a broader range of companies, the Tribunal narrowed its scope to aluminum extruders and a few outside finishers and fabricators. The applicant contends that the Tribunal based its injury finding on an erroneous finding of fact, contrary to the requirements of paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*).

[25] With regard to the finding of injury itself, the applicant submits that the Tribunal erroneously based its finding on a price analysis rather than on non-dumping factors related to quality, reliability of supply and the reputation of the supplier, which the record showed were more important considerations for the purchasers.

[26] Finally, the applicant objects to the Tribunal's denial of its product exclusion request. The applicant submits that the domestic extruders provided no evidence in support of their claim that they could provide the required aluminum parts and that it was unreasonable for the Tribunal to impose the onus of demonstrating otherwise on the applicant. The Tribunal ignored the clear evidence presented describing the exhaustive efforts made by the applicant to obtain a domestic source of aluminum parts and erred in concluding that the applicant did not provide sufficient evidence that domestic extruders as a whole could not provide the aluminum parts needed. The applicant further contends that this finding is diametrically opposed to the Tribunal's previous finding that domestic extruders' loss of sales were in part due to the absence of fully integrated extruders.

[27] In response to the applicant's contention that the Tribunal's determination regarding the scope of the goods defined by the Agency raises an issue of jurisdiction, the respondents say that the issue is factual. According to the respondents, a determination dealing with the nature of extrusions, such as whether they have a "wall" or whether they are "parts", gives rise to a question of fact and should be reviewed, as all other issues raised by the applicant, on a reasonableness standard.

[28] According to the respondents, the decision that goods without a “wall” and aluminum “parts” are included in the definition of subject goods, falls within a permissible set of outcomes and was supported by evidence before the Tribunal. The respondents argue that this is also the case for the Tribunal’s definition of the domestic industry, its finding of injury to the domestic industry and its denial of the applicant’s exclusion request. The respondents submit that the Tribunal did not, in this regard, act in a perverse or capricious manner, or disregard evidence or act without evidence before it and this Court should therefore dismiss the application for judicial review.

[29] In any event, the respondents are of the view that as a consequence of the applicant’s consistent position that the goods which it imports are not subject goods, the applicant is barred from judicial review as it is not “directly affected” by the Tribunal decision pursuant to subsection 18.1(1) of the *Federal Courts Act*. Rather than seeking judicial review of the Tribunal’s finding of injury of imported dumped and subsidized goods to the domestic industry, the proper recourse would be, as the Tribunal suggested, to demonstrate at the time of importation that the goods imported by the applicant are not subject goods. The respondents contend that the application for judicial review should be summarily dismissed on this basis.

ANALYSIS AND DECISION

[30] Dealing first with this last contention, it is true that should the applicant eventually be able to show at the time of importation that the aluminum parts which it imports are not subject goods, the decision of the Tribunal will have had no impact on the applicant. However, the Tribunal agreed to consider and dispose of the arguments put forth by the applicant on the assumption that the goods

which it imports are subject goods (reasons, para. 360) and the status of the applicant's imports has yet to be determined. It follows that as the matter presently stands, it cannot be said that the applicant is not "directly affected" by the Tribunal's decision.

[31] Turning to the substantive issues, the parties agree that the Tribunal's definition of the domestic industry, its finding of injury on the said industry along with its denial of the applicant's exclusion request constitute findings of fact and should be reviewed on a standard of reasonableness as defined by the Supreme Court of Canada in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (*Dunsmuir*). The only point of contention lies in the Tribunal's determination of the scope of the subject goods. The applicant frames this issue as a "true" question of jurisdiction or *vires* which stands to be reviewed on a standard of correctness (*Dunsmuir*, paras. 59).

[32] I respectfully disagree. A review of the applicant's submissions before the Tribunal and of the reasons of the Tribunal does not indicate that its jurisdiction to render the decision was contested or otherwise in issue. In particular, no one took issue with the fact that the Tribunal had to ascertain the scope of the goods to which the Agency's preliminary determination applied. The Tribunal said in this respect (reasons, para. 57):

> …, the Tribunal agrees that it cannot modify the [Agency]'s definition of the subject goods. Under [the Act] the [Agency] has the exclusive jurisdiction to establish the definition of the subject goods and to determine whether a dumping or subsidizing investigation will be initiated. However, subsection 42(1) of [the Act] stipulates that every injury inquiry conducted pursuant to section 42 involves an examination of whether the dumping or subsidizing of "… any goods to which the preliminary determination applies …" has caused injury or retardation or is threatening to cause injury to a "domestic industry", which is in turn defined as the "… domestic producers … of the like

> goods …" In order to conduct its inquiry, the Tribunal must therefore ascertain the scope of the goods to which the preliminary determination applies (i.e. the subject goods).
>
> [Emphasis added]

[33] This last sentence accurately identifies the task which the Tribunal was asked to undertake. The applicant (and others) argued that certain goods fell outside the ambit of the preliminary determination and asked the Tribunal to draw the line, a task which is unquestionably within the Tribunal's jurisdiction (*DeVilbiss (Canada) Limited, Phelan and Smith Limited and Waffle's Electric Limited v. Anti-Dumping Tribunal*, 44 N.R. 416, para. 8 (*DeVilbiss*)). Properly understood, the issue raised by the applicant does not go to jurisdiction but to the exercise of that jurisdiction. As with the other issues which the applicant has raised, the Tribunal will have committed a reviewable error only if its interpretation and application of the Agency's definition of the subject goods can be shown to be unreasonable.

[34] In this respect, the Tribunal found that the scope of the subject goods as defined by the Agency was broad enough to include goods which allegedly have no "walls" and goods which are described as aluminum "parts". The applicant maintains that in so holding the Tribunal, in effect, amended the definition of the subject goods.

[35] It is undisputed that the Tribunal cannot amend the Agency's definition. However, this Court has recognized that where the Tribunal has difficulty in determining the goods to which the determination applies, it must endeavour to ascertain its meaning (*DeVilbiss*, para. 14).

[36] With respect to the aspect of the decision that pertains to goods without a "wall", the Tribunal referred to the additional product information found in the Agency's statement of reasons to better understand the definition of subject goods. Given this information – which suggests that solid profile extrusions are included in the definition of the subject goods (reasons, paras. 64 and 65) – the Tribunal rejected the argument that goods without a "wall" fell outside the definition of the subject goods (reasons, para. 68):

> Based on the foregoing, the Tribunal's interpretation is that the phrase "having a wall thickness greater than 0.5 mm" in the definition of the subject goods means that the subject goods, *that have walls*, must have walls with a thickness greater than 0.5 mm. In the Tribunal's opinion, had the [Agency] intended to exclude aluminum extrusions that do not have walls, including solid aluminum extrusions, from the scope of the subject goods, it would have done so expressly and would not have investigated the dumping and subsidizing of solid aluminum extrusions such as bars and rods.

[37] This conclusion was open to the Tribunal when regard is had to the evidence and has not been shown to be unreasonable.

[38] With respect to the "parts" which, according to the applicant, were not subject goods, the Tribunal said (reasons, para. 78):

> In summary, the Tribunal is of the view that the definition of the subject goods includes aluminum extrusions that have been further processed to a certain extent and finds that, as a result, goods generically described as aluminum parts by the requesting parties are not necessarily excluded from the scope of the goods to which the preliminary determinations apply. An order determining that the subject goods do not include aluminum parts imported from China would amount to an amendment to the [Agency]'s definition of the subject goods because it would effectively restrict the scope of this definition. As discussed above, the Tribunal does not have the authority to make such an amendment.

[39] The Tribunal went on to conclude that this determination should be made by the Agency at the time of importation (reasons, para. 79). Again, this conclusion falls within a permissible set of outcomes and has not been shown to be unreasonable.

[40] With respect to the Tribunal's definition of the domestic market, the applicant first argues that by improperly determining the scope of the subject goods the Tribunal also improperly determined the domestic industry producing like goods. Since, as I have found, the Tribunal did not improperly determine the scope of the subject goods, this argument must be rejected.

[41] Alternatively, the applicant argues that the Tribunal improperly excluded from the domestic industry companies that finish and fabricate aluminum extrusions on the basis that these companies provide tolling service under contract to the domestic extruders. The Tribunal said in this regard (reasons, para. 141):

> … The extrusions that are outsourced for finishing and fabrication remain the extruder's property and are generally returned to the extruders that, in turn, sell the products to their customers. In effect, aluminum extrusion products are provided to finishers and fabricators on a tolling basis. In view of this evidence, the Tribunal is not convinced that finishers and fabricators that provide services to the aforementioned domestic producers of aluminum extrusions by performing certain processing steps on their products actually produce like goods. Since the extruders retain ownership of the outsourced products throughout this process and then sell the finished products to their customers, the Tribunal is of the view that the products that are sent to finishers and fabricators and then returned to the domestic producers of aluminum extrusions must be considered as part of the domestic production of the extruders.

[42] The applicant contends that there is no evidence on the record to support the conclusion that these outside service providers only provided finishing and fabrication services to the domestic extruders on a tolling basis.

[43] With respect, the Tribunal expresses the view that aluminum extrusion products are generally provided to finishers and fabricators on a tolling basis, and the record does support such a view since it indicates that tolling is the rule and exceptions are very rare (transcript of public hearing, vol. 2, pp. 301 to 303).

[44] In any event, the Tribunal notes in the course of its reasons that, pursuant to subsection 2(1) of the Act, it need only be satisfied that the domestic producers producing a major proportion of the total production of like goods have been injured pursuant to subsection 42(1) of the Act (reasons, para. 142). In this respect, the Tribunal finds that the exclusion of companies providing services in the finishing and fabricating of extrusions to domestic extruders represents no more than 3 to 4 percent of the total domestic production of aluminum extrusions. Given this evidence, the Tribunal holds that (*ibidem*):

> …, even if the production of finishers and fabricators were to be included in the total production of like goods, it would amount to a very small proportion of the total domestic production.

[45] I can detect no error in this reasoning.

[46] The applicant further asserts that the Tribunal placed undue importance on the price factor and insufficient importance on other relevant factors in finding injury to the domestic industry. According to the applicant the Tribunal, having found that these other factors were more relevant than price in purchasing decisions, was bound to conduct its injury on the basis of these factors.

[47] The Tribunal found in this respect (reasons, para. 155):

> … Suffice it to say that, while price might not be necessarily the most important consideration in the purchasing process of either custom-shaped or standard-shaped aluminum extrusions and may come after other factors such as quality and availability of specifications, the evidence indicates that price remains a very important consideration for most purchasers, and it is in that context that the Tribunal will conduct its analysis.

[48] In concluding the Tribunal said (reasons, para. 180):

> The Tribunal therefore finds that most of the price undercutting and price suppression that took place over the [Tribunal's period of inquiry] is attributable to the dumping and subsidizing of the subject custom-shapes.

[49] Despite its reliance on price, the Tribunal under the heading "Other Factors" conducts an extensive review of other relevant factors (reasons, paras. 214 to 225). The applicant suggests in effect that more weight should have been given to factors other than price. The weighing of the evidence is a function that belongs to the Tribunal. I can detect no error in the Tribunal's conclusion that there was injury to the domestic market.

[50] Finally, with respect to the product exclusion request, the Tribunal found that the evidence adduced by the applicant was insufficient to warrant the grant of this remedy. The Tribunal noted that product exclusions are an extraordinary remedy that can only be granted when such exclusions will not cause injury to the domestic industry. In the same vein, the Tribunal recognized that the primary consideration in assessing whether an exclusion is warranted is whether the domestic industry has the capability of producing goods that are identical to or substitutable for those for which the exclusion is requested (reasons, paras. 339, 340 and 341). In this respect the Tribunal appears to have been satisfied that no single domestic extruder was capable of producing the goods for which the exclusion was sought. However, it held that the applicant had failed to show that the industry "as a whole" was unable to do so. The gist of the Tribunal's reasoning is set out in paragraph 368 of its reasons:

> … With respect to those products which may ultimately be determined to be subject goods at the time of importation, the Tribunal considered the allegation of MAAX Bath that no single domestic producer has the capability to produce the full range of products that it requires. In this respect, MAAX Bath provided evidence demonstrating that, out of five domestic producers which were contacted, none were capable of producing the full range of products for which an exclusion is requested. However, as stated earlier, as long as domestic producers, as a whole, are capable of producing the requested products (including products which are sent to finishers and fabricators), the Tribunal should reject the request. No evidence was provided which would indicate that this is not the case. Moreover, the Tribunal notes that the parties opposing the request provided evidence that indicated that they supplied MAAX Bath prior to its sourcing of products from China. In the Tribunal's opinion, there is insufficient evidence to support the request for product exclusion and it is therefore denied, as it applies to those products that may be considered subject goods at the time of importation.
>
> [Emphasis added]

[51] The evidence adduced by the applicant before the Tribunal is that as a result of a change in its manufacturing strategy, it began to look for a single supplier capable of providing a range of services fulfilling its particular needs and was unable to identify such a source within the domestic industry. As a result, it resorted to a Chinese supplier having that capacity (Product exclusion request form, applicant's record, vol. 2, p. 411; Testimony of Mario Albert, Public transcript, applicant's record, vol. 3, tab F(21), pp. 710 to 712, 714 to 716, 730 to 733, 736 to 740, 748 to 750, 755 and 756; Protected transcript, applicant's record, vol. 4, pp. 1189 to 1191 and 1193, 1194). The Tribunal, in an apparent reference to this evidence (and that of others) (reasons, para. 215), explains earlier in its reasons – in identifying factors other than dumping which may have caused injury – the difficulty confronting purchasers with specific requirements given the absence of fully integrated extruders in the domestic industry (reasons, para. 225):

> …, the Tribunal notes that there is evidence that certain purchasers have specific requirements that would be better fulfilled by a fully integrated extruder and that a domestic extruder that is not integrated to a certain level may not be suitable. Therefore, the Tribunal does acknowledge that the domestic industry may have lost sales due to service limitations and that these losses would not be inconsequential. However, the Tribunal has not attributed to the dumping and subsidizing of the subject custom shapes any injury resulting from these lost sales and does not consider that any impact of service limitations on the performance of the domestic producers during the [period of inquiry] negates the injury caused by imports of the subject custom shapes.

[52] I understand the Tribunal to be saying that the domestic industry may have lost meaningful sales due to the absence of fully integrated extruders, but that these losses have not been taken into account in assessing injury since they are due to a lack of capacity and hence cannot be attributed to dumping or subsidizing.

[53] To the extent that the applicant, as it argues, comes within the class of purchasers identified by the Tribunal in this passage and had to resort to its foreign supplier due to the absence of a fully integrated supplier in the domestic industry – a matter which the Tribunal is in the best position to determine – it was not open to the Tribunal to deny the exclusion claimed on the basis that the domestic industry "as a whole" is capable of fulfilling the applicant's needs. In other words, the applicant on the one hand cannot be found to require the services of a fully integrated extruder when assessing the causes for injury and on the other hand be found to be adequately served by the industry "as a whole" when the time comes to assess the product exclusion.

[54] In the circumstances, the appropriate remedy is to remit the matter back to the Tribunal on this narrow issue so that the Tribunal may reconsider the question whether the applicant is entitled to the product exclusion which it claimed taking into account the finding made in paragraph 225 of its reasons.

[55] I would therefore allow the application for judicial review, set aside the decision of the Tribunal insofar as it relates to the product exclusion claimed by the applicant and refer the matter back to the Tribunal for reconsideration and re-determination in conformity with these reasons. The application for judicial review should otherwise be dismissed. Given the mixed results, the parties should assume their respective costs.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-09
STYLE OF CAUSE:	**MAAX BATH INC. v. ALMAG ALUMINUM INC., APEL EXTRUSIONS LIMITED, CAN ART ALUMINUM EXTRUSION INC., METRA ALUMINUM INC., SIGNATURE ALUMINUM CANADA INC., SPECTRA ALUMINUM PRODUCTS LTD., SPECTRA ANODIZING INC., EXTRUDEX ALUMINUM, ARTOPEX INC., ASIA ALUMINUM HOLDINGS LTD., BLINDS TO GO INC., EXTRUDE-A-TRIM INC., GARAVENTA (CANADA) LTD., KAM KIU ALUMINIUM PRODUCTS (NA) LTD., KAM KIU ALUMINIUM PRODUCTS SDN. BHD., KROMET INTERNATIONAL INC., LOXCREEN CANADA, MALLORY INDUSTRIES, PANASIA ALUMINIUM (CHINA) LIMITED, PANASIA ALUMINUM (CALGARY) LIMITED, PANASIA ALUMINUM (MACAO COMMERCIAL OFFSHORE) LIMITED, PANASIA ALUMINUM (TORONTO) LIMITED, PINGGUO ASIA ALUMINUM CO. LTD., R-THETA THERMAL SOLUTIONS INC., RAILCRAFT INTERNATIONAL INC., REGAL ALUMINUM PRODUCTS INC., SHINING METAL TRADING INC., SINOBEC TRADING INC., TAG HARDWARE SYSTEMS LTD., TAISHAN CITY KAM KIUM ALUMINIUM EXTRUSION CO. LTD., VITRE-ART C.A.B. (1988) INC., ZMC METAL COATING INC., ALFA MEGA INC., ALUMINART PRODUCTS LIMITED, ALUMINUM CURTAINWALL SYSTEMS INC., C.R. LAWRENCE CO. OF CANADA, CHINA SQUARE INDUSTRIAL LTD., CONCORD WEST DISTRIBUTION LTD., DIGI-KEY CORPORATION, HOME-RAIL LTD., HUNTER-DOUGLAS CANADA, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION OF BRITISH COLUMBIA, KNOLL NORTH AMERICA CORP., LEVELOR/KIRSCH WINDOW FASHIONS (A DIVISION OF NEWELL RUBBERMAID/NEWELL WINDOW FURNISHINGS**

INC.), MILWARD ALLOYS INC., MORSE INDUSTRIES, NEW ZHONGYA ALUMINUM FACTORY LTD., NEWELL INDUSTRIES CANADA INC., NEWELL WINDOW FURNISHINGS INC., OPUS FRAMING LTD., PACIFIC SHOWER DOORS (1995) LTD., PROFORMA INTERIORS LTD. DBA ALUGLASS, RAHUL GLASS LTD., RUHLAMAT NORTH AMERICA LTD., RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC., VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC., ZHAOQING CHINA SQUARE INDUSTRY LIMITED and ATTORNEY GENERAL OF CANADA

PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 16, 2010
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Pelletier J.A. Layden-Stevenson J.A.
DATED:	February 24, 2010

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