Federal Court of Appeal | Cour d'appel fédérale

Date: 20240202

Dockets: A-162-22 (Lead)
A-163-22

Citation: 2024 FCA 25

CORAM: **WEBB J.A.**
LASKIN J.A.
LOCKE J.A.

Docket: A-162-22

BETWEEN:

REMINGTON SALES CO. d.b.a.
HYUNDAI HEAVY INDUSTRIES (CANADA)

Appellant/
Respondent on cross-appeal

and

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

Respondents/
Appellants on cross-appeal

Docket: A-163-22

AND BETWEEN:

HYUNDAI CANADA INC.

Appellant/
Respondent on cross-appeal

and

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

Respondents/
Appellants on cross-appeal

Heard at Ottawa, Ontario, on November 22, 2023.

Judgment delivered at Ottawa, Ontario, on February 2, 2024.

PUBLIC REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	LASKIN J.A. LOCKE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20240202

Dockets: A-162-22 (Lead)
A-163-22

Citation: 2024 FCA 25

CORAM: **WEBB J.A.**
LASKIN J.A.
LOCKE J.A.

Docket:A-162-22

BETWEEN:

REMINGTON SALES CO. d.b.a.
HYUNDAI HEAVY INDUSTRIES
(CANADA)

Appellant/
Respondent on cross-appeal

and

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

Respondents/
Appellants on cross-appeal

Docket:A-163-22

AND BETWEEN:

HYUNDAI CANADA INC.

Appellant/
Respondent on cross-appeal

and

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

Respondents/

Appellants on cross-appeal

PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

WEBB J.A.

[1] Remington Sales Co. d.b.a. Hyundai Heavy Industries (Canada) (Remington) (Appeal EA-2019-009) appealed the re-determination of anti-dumping duties made by the President of the Canada Border Services Agency (CBSA) to the Canadian International Trade Tribunal (CITT). Hyundai Canada Inc. (HCI) (Appeals EA-2019-008 and EA-2019-010) also appealed this re-determination to the CITT.

[2] At the parties' request, the appeals before the CITT were combined. Although two sets of reasons were issued, the reasons rendered by the CITT in the HCI appeal were adopted in the reasons issued for the Remington appeal.

[3] The President of the CBSA (President) formed the opinion that the export price under section 24 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA) was unreliable based on a reliability test that compared the section 24 export price to the section 25 export price. The CITT found that the President's opinion should not have been solely based on the reliability test that was used but rather on a number of factors enumerated by the CITT. The CITT decided that the matter was to be remanded to the President for reconsideration.

[4] Both Remington and HCI filed an appeal to this Court. However, HCI filed a notice of discontinuance of its appeal. Prior to HCI filing its notice of discontinuance, the respondents (the President and Hitachi Energy Canada Inc. (Hitachi)) each filed notices of cross-appeal in relation to Remington's appeal and HCI's appeal.

[5] As a result, Remington's appeal and the cross-appeals of the President and Hitachi to Remington's appeal and HCI's appeal proceeded to hearing in this Court. The appeal and the cross-appeals were consolidated by the Order of this Court dated November 24, 2022, with the appeal A-162-22 being designated as the lead appeal. These reasons will be filed in A-162-22 and a copy thereof will be filed in A-163-22.

[6] For the reasons that follow, I would dismiss Remington's appeal and allow the cross-appeals of the President and Hitachi. The statutory references herein are to the various sections, subsections and paragraphs of SIMA, unless otherwise noted.

I. Background

[7] Goods imported into Canada are "dumped" (as defined in subsection 2(1)) when the normal value of the goods exceeds the export price of such goods. The margin of dumping is defined in subsection 2(1) as the difference between these two amounts. The normal value is determined in accordance with sections 15 to 23.1 and 30 and the export price is determined in accordance with sections 24 to 28 and 30. 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).

[8] In this appeal, the relevant provisions are sections 24 and 25 of SIMA. The full English and French versions of these sections are set out in the Appendix attached to these reasons.

[9] Under section 24, the export price is the lesser of the exporter's sale price for the goods (subject to certain adjustments) and the price that the importer has paid or agreed to pay for the goods (subject to certain adjustments).

[10] Section 25 provides, in part:

> 25 (1) Where, in respect of goods sold to an importer in Canada,
>
> …
>
> > (b) the President is of the opinion that the export price, as determined under section 24, is unreliable
> >
> > > (i) by reason that the sale of the goods for export to Canada was a sale between associated persons,
>
> [the export price is to be determined in accordance with the provisions of section 25].

[11] The President made a final determination of dumping on October 22, 2012. The determination was made with respect to "liquid dielectric transformers (power 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 Korea" (paragraph 5 of the reasons of the CITT in both appeals).

[12] The CITT made a finding that the dumping had caused injury to the domestic industry on November 20, 2012.

[13] In 2018, the CBSA initiated a review of the normal values and export prices applicable to power transformers exported from Korea to Canada by Hyundai Electric & Energy Systems (Hyundai Electric). The period of investigation for this review was from November 1, 2016, to October 31, 2018.

[14] In conducting this review, the CBSA determined that Remington imported transformers produced by Hyundai Electric and that Remington and Hyundai Electric were associated for the purposes of SIMA. The President, based on a reliability test conducted by the CBSA that calculated export prices under section 25, formed the opinion that the export prices determined under section 24 were not reliable. Therefore, the export prices were determined in accordance with the provisions of section 25.

[15] The export prices determined under section 25 resulted in retroactive assessments of anti-dumping duties.

[16] Remington and HCI each appealed the re-determination made by the President of the amount of the anti-dumping duties, and in particular the determination of the export price by the President, to the CITT.

II. Decision of the CITT

[17] The hearing before the CITT was an appeal *de novo*. The CITT addressed the arguments of HCI fully in its reasons issued in HCI's appeals and then incorporated by reference these reasons in its decision in Remington's appeal. Therefore, even though HCI has discontinued its appeal to this Court, to understand the reasoning of the CITT it is necessary to refer to the reasons issued by the CITT in HCI's appeals. The references herein to particular paragraphs in the CITT's reasons are references to the paragraphs in the reasons issued in the HCI appeals, unless otherwise indicated.

[18] The issues raised by Remington and HCI all related to the determination of the export price. In particular, they questioned whether a reliability test based on calculating the export price under section 25 was an appropriate basis for the President to form an opinion on whether the export price determined under section 24 was reliable. Remington and HCI also challenged certain deductions that the President made in determining the export price.

[19] The CITT described the reliability test conducted by the President in paragraph 23:

> … To perform the reliability test, the CBSA will select a representative sample of transactions and perform the export price calculation using the methodology of

> section 24 and then using the methodology of section 25 and compare the two results. If the section 25 export price is equal to or greater than the section 24 export price in 80 percent or more of the sample transactions, measured by volume or value as appropriate, then the section 24 export price will normally be considered reliable. Conversely, if the section 25 export price is lower than the section 24 export price in more than 20 percent of the sample transactions, then the section 24 export price will usually be considered unreliable, and section 25 will be used to determine export prices for that exporter.

[20] The CITT noted, in paragraph 24 of its reasons, that "[t]he aim of the calculations under both sections 24 and 25 is to arrive at an ex-factory price for the goods".

[21] The CITT concluded that the President erred in only performing a mathematical computation to assess whether the export price under section 24 was reliable:

> [80] Further, a determination of reliability that is focused exclusively on a mathematical formula comparing section 24 and section 25 export prices, with the objective of determining what should have been the appropriate level of profit realized on the importer's resale of the goods, falls short of what would constitute an appropriate consideration of relevant factors that determine the reliability of the section 24 export price.

[22] In paragraph 85, the CITT set out what, in its view, must be considered by the President in forming an opinion on the reliability of the section 24 export price:

> A proper reliability test must examine the section 24 export price in terms of its character or quality. It must assess reliability on the basis of all relevant factors such as the general and specific economic commercial conditions that existed at the time of the transaction, the consistency and accuracy of financial books and records that normally reveal the financial situation of the parties to the transaction, the particular nature of the goods that are the subject of trade, and the commercial context in which the transaction is completed. The reliability test must address the specific mischief which is to be prevented such as manipulation of the prices, etc.

[23] Since the test used by the President did not assess the "character and quality of the section 24 export price" but rather "only compared two sets of prices — the section 24 export price and the section 25 export price" (paragraph 86) — the CITT remanded the matter to the President for reconsideration of whether the section 24 export price was unreliable.

[24] The CITT then addressed HCI's arguments concerning the amounts deducted in computing the export price. In particular, HCI submitted that for the purposes of paragraph 25(1)(*d*), "the price of the goods as assembled" is the total contract price for the goods and any related services that are to be provided under the contract. The costs, charges or expenses for the services would then be deducted under subparagraphs 25(1)(*d*)(ii) to (v).

[25] The CITT found that since SIMA is focused on the dumping of goods, the President did not err in excluding the amounts to be paid for any services that were separately identified in the contract for the sale of the transformers. Since the price for the goods used by the President did not include any amounts payable for such services, no further deduction would be made under subparagraphs 25(1)(*d*)(ii) to (v) in relation to such services.

[26] In the reasons related to Remington's appeal, the CITT summarized its findings with respect to the other deductions that were in issue in relation to the re-determination of the export prices:

> [50] For the same reasons given in EA-2019-008 and EA-2019-010 [HCI's appeals], the Tribunal also makes several findings regarding the deductions made in re-determining export prices under sections 24 and 25 of SIMA:

…

> (b) The Tribunal finds that, as the amount of profit is not being challenged, its deduction cannot be an issue, regardless of whether there are amounts regarding profit on services in the profit calculation.
>
> (c) The Tribunal finds that it is not convinced that the evidence shows that the CBSA engaged in the practice of selecting the higher of service expenses or revenues for the purpose of reducing the section 25 export prices.
>
> (d) The Tribunal finds that the CBSA correctly deducted third-party expenses for the purpose of arriving at the ex-factory price.
>
> (e) For reasons of judicial economy, the Tribunal will not address whether paragraph 25(1)(c) should be applied rather than paragraph 25(1)(d). Nothing turns on the outcome of this question in the context of this proceeding.

[27] The CITT also found that there was no support in SIMA for "Remington's submission that a specific item that was unforeseen is extraneous and should not have been deducted in the section 25 calculation" (paragraph 51 of the reasons related to Remington's appeal).

III. Issues and Standard of Review

[28] Section 62 restricts any appeal to this Court to only questions of law. No appeal lies to this Court on any question of fact or mixed fact and law (unless there is an extricable question of law). Since appeals are restricted to questions of law, the standard of review is correctness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37).

[29] Remington raises three issues in this appeal:

(a) whether the CITT erred in law in remanding the matter to the President for re-determination;

(b) whether the CITT erred in law in its interpretation of paragraph 25(1)(*d*); and

(c) whether the CITT made incorrect findings of fact in relation to paragraph 25(1)(*d*) that would constitute errors of law.

[30] The issues related to the interpretation of paragraph 25(1)(*d*) and the factual findings in relation to this paragraph will be addressed together.

[31] In the cross-appeals the issue is whether the CITT erred in determining that the reliability test adopted by the President could not be used to determine the reliability of the section 24 export price.

IV. Analysis

[32] The issues arising in the appeal will be addressed first and then the issue in the cross-appeal will be addressed.

A. *Decision to remand the matter to the President*

[33] Remington can only succeed with respect to this issue if, as a matter of law, the CITT was required to decide whether the section 24 export price was unreliable and to then determine the export price under section 24 (if the CITT determined that the export price under that section

was reliable) or under section 25 (if the CITT determined that the section 24 export price was unreliable).

[34] Remington, in its argument, emphasized the following statement found at paragraph 89 of the CITT's reasons:

> [89] However, the Tribunal does not know what the CBSA considered in its decision. Therefore, in these circumstances, the Tribunal must remand this decision back to the CBSA for a reconsideration on the basis of the Tribunal's reasons.

[35] Although the reference is to what the CBSA considered in its decision, since the decision in issue is the opinion of the President concerning whether the section 24 export price was reliable, this reference should be read as referring to what the President considered. Remington's argument is that the CITT did know what the President considered.

[36] The evidence confirmed that the President relied on the reliability test as described above. The CITT, in its reasons at paragraph 80, found that "a determination of reliability that is focused exclusively on a mathematical formula comparing section 24 and section 25 export prices" was not appropriate. The CITT also noted at paragraph 83 that although the CBSA's policy indicates that other factors may be relevant in determining the reliability of a section 24 export price, "there is no evidence that such other factors were taken into account by the President in this case".

[37] Remington points to such statements to indicate that the CITT misspoke when it stated that it did "not know what the CBSA considered in its decision". However, in my view, this statement must be read in context. The CITT was aware that the President relied on the reliability test described above in forming the opinion of unreliability. The CITT rejected the sole reliance on this mathematical comparison and set out a number of factors that must be considered by the President. Having made these findings, the error made by the CITT in paragraph 89 was simply misstating its rationale for remanding the matter to the President. Having set out a number of factors that the President did not consider, the CITT would not know whether the President (whose opinion is the relevant opinion under section 25) would form the same opinion on reliability once the factors set out in paragraph 85 were considered.

[38] Subsection 61(3) provides that the CITT **may** make such order as may be required — it does not obligate the CITT to make any specific order or finding:

(3) On any appeal under subsection (1) or (1.1), the Tribunal may make such order or finding as the nature of the matter may require and, without limiting the generality of the foregoing, may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken, and an order, finding or declaration of the Tribunal is final and conclusive subject to further appeal as provided in section 62.	(3) Le Tribunal, saisi d'un appel en vertu des paragraphes (1) ou (1.1), peut rendre les ordonnances ou conclusions indiquées en l'espèce et, notamment, déclarer soit quels droits sont payables, soit qu'aucun droit n'est payable sur les marchandises visées par l'appel. Les ordonnances, conclusions et déclarations du Tribunal sont définitives, sauf recours prévu à l'article 62.

[39] Whether the circumstances of a particular case would warrant remanding a matter to the President is a question of fact or mixed fact and law and cannot be appealed to this Court.

Having found that there were a number of factors that, in the CITT's view, the President should have considered in rendering the reliability opinion, it was not an error of law for the CITT to remand the matter to the President. Remington cannot succeed on this ground of appeal.

B. *Interpretation of paragraph 25(1)(d) and the factual findings related thereto*

[40] In paragraph 93 of its reasons, the CITT noted "[t]he basic purpose of SIMA is to address the dumping of *goods*. It is not intended to address the dumping of services" (emphasis added by the CITT).

[41] Remington, in its memorandum at paragraph 100, confirms that the ultimate determination is the export price of the goods: "[i]t is obvious that the value of services must be eliminated to determine the export price of the goods."

[42] The dispute is how the amount for services is eliminated. In calculating the export price, the CBSA would first determine if the contract specified a separate amount for services. For contracts where the price for the particular goods is set out and an additional amount for services that do not contribute to the value of the goods is also specified, the amount for the goods used by the CBSA, before any deductions contemplated by subparagraphs 25(1)(*d*)(ii) to (v) were made, was the price identified for the goods; *i.e.* the amount specified for the services was not included. No amount was deducted under subparagraphs 25(1)(*d*)(ii) to (v) in relation to these services, as the contract price for these services was not included as part of the price of the goods.

[43] Remington's position is that the starting amount should have been the full contract price and then the amounts for the services should have been deducted under subparagraphs 25(1)(*d*)(ii) to (v).

[44] Since the parties acknowledged that freight was one such service and that the provision of this service was not confidential, a simple example using freight as the service will illustrate the difference between the two positions.

[45] Assume that the total contract price is $1,200 and that contract specifies that $1,000 is for particular goods and $200 is for the freight.

[46] For the purposes of determining the section 25 export price, the CBSA would have used $1,000 as the price for the goods. In this simple example, there would be no further deductions under section 25 and the export price would be $1,000.

[47] Remington's position is that the price (before considering the section 25 deductions) should have been $1,200. The freight would then be deducted as required by subparagraphs 25(1)(*d*)(ii) to (v). If the deduction required for freight would also be $200, then there would no difference in the export price — it would still be $1,000. However, if the cost of the freight incurred by the exporter was only $150 (which would mean that the exporter marked up the cost of the freight to $200), Remington submitted that the amount to be deducted under subparagraph 25(1)(*d*)(ii) to (v) would only be $150.

[48] However, since SIMA is focused on determining whether particular goods are being dumped and the amount of anti-dumping duties to be imposed if goods are dumped, it is far from clear why the export price should reflect an amount for profit realized on a sale of services that do not contribute to the value of the goods. The focus is on the goods, not the services, as acknowledged by the CITT and Remington.

[49] In this case the CITT made the following findings with respect to the services, the amount payable for which was excluded in determining the starting price for the goods:

> [96] Therefore, the value of services that are a separate and distinct object of trade and do not contribute to the value of the subject good should not be included in the "price for which the goods were sold". It would be an error for the CBSA to include the price of services in its calculations where it is not demonstrated that those services were part of the same transaction as that of the transformer and that their value contributes to the value of the subject goods themselves. The prices of those services were set out separately from the prices of the goods and the evidence establishes no connection between the value of the imported transformers themselves and the value of the services that were excluded by the CBSA at the outset of the calculation. In all appearances, those services were distinct and were not part of the consideration when the price of the transformers was set.

[50] The findings that the prices for the services were set out separately from the prices for the goods and that there was no connection between these services and the value of the goods were findings of fact. Remington argues that these findings of fact are errors of law.

[51] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC), the Supreme Court of Canada stated:

> [41] … If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. ...

[52] In *R. v. J.M.H.*, 2011 SCC 45 the Supreme Court noted:

> [25] It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604.

[53] In *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57, at para. 5, the Saskatchewan Court of Appeal also noted that a finding of fact will be an error of law if it "… (b) is made on the basis of irrelevant evidence or in disregard of relevant evidence; or, (c) is based on an irrational inference of fact".

[54] The CITT reviewed the contracts and the services provided and made the factual findings as set out in paragraph 49 above. There was supporting evidence for these findings and there is no indication that the CITT based these findings on irrelevant evidence or by disregarding relevant evidence or on an irrational inference of fact. To the extent that these findings were based on the interpretation of the contracts, as noted by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 50, the interpretation of contracts is a question of mixed fact and law. Remington has not established that the CITT made any errors of fact that would be errors of law.

[55] Remington also argued that the CITT erred in not finding that the President used the higher of the expense and revenue for a certain service. The CITT reviewed the evidence and found that it was "not convinced that the evidence shows that the CBSA engaged in the practice of selecting the higher of service expenses or revenues for the purpose of reducing the section 25 export prices" (paragraph 50 (c) of the CITT's reasons related to Remington's appeal). This finding of fact does not rise to the level of an error of law.

[56] With respect to the interpretation of paragraph 25(1)(*d*), Remington submitted that the CITT erred in referring to "the price for which the goods were sold" in paragraphs 95 and 96 and footnote 31 of its reasons. Paragraph 25(1)(*d*) refers to "the price of the goods as assembled". Paragraph 25(1)(*c*) refers to the "the price for which the goods were so sold".

[57] In the appeal before the CITT, there was an issue concerning whether paragraph 25(1)(*c*) (which applies to goods sold in the condition in which they are imported) or paragraph 25(1)(*d*) (which applies to goods imported for the purpose of assembly) was applicable to the importations in issue.

[58] The CITT, in paragraph 105 of its reasons, noted:

> [105] [ABB Power Grids Canada Inc. – now Hitachi Energy Canada Inc.] submits that paragraph 25(1)(c) should be applied rather than paragraph 25(1)(d), because the goods were sold "in the condition in which they were or are to be imported" (i.e. unassembled) rather than "for the purpose of assembly". However, all parties agreed that it would make no difference to the outcome of the calculation.

[59] Remington, in its memorandum, only acknowledges that the CITT declined to resolve the issue of whether paragraph 25(1)(*c*) or paragraph 25(1)(*d*) was applicable. Remington does not otherwise address this paragraph from the CITT reasons, and in particular, does not take issue with the statement that the parties had agreed that the outcome of the calculation would be the same. Since Remington acknowledged at the appeal before the CITT that the same export price would be determined whether paragraph 25(1)(*c*) or paragraph 25(1)(*d*) applied, there would be no difference in determining "the price for which the goods were sold" and the "the price of the goods as assembled" in this case. Remington is, in effect, acknowledging that for its argument, it is not significant whether the starting point is "the price for which the goods were sold" or "the price of the goods as assembled". If this would have been significant then the outcome of the calculation would not necessarily be the same.

[60] As a result, even though the correct expression to use when referring to paragraph 25(1)(*d*) is "the price of the goods as assembled", nothing turns on the CITT's use of the expression "the price for which the goods were sold".

[61] The CITT did not err in interpreting section 25 as allowing the CBSA to use the identified price for the particular goods as the price of the goods excluding any amount specifically identified in the contract as an amount payable for services that did not contribute to the value of the goods. The CITT also did not make any factual findings that would be an error of law.

[62] In my view, Remington cannot succeed on this ground of appeal.

C. *Conclusion on Remington's Appeal*

[63] As a result, I would dismiss Remington's appeal, with costs.

D. *Cross-Appeal*

[64] The cross-appeal also challenges the decision of the CITT to remand the matter to the President, albeit for different reasons than submitted by Remington.

[65] Section 25 provides, in part, that if the President is of the opinion that the export price, as determined under section 24, is unreliable by reason that the exporter and the importer are associated persons for the purposes of SIMA, the export price is to be determined as set out in section 25.

[66] The CITT rejected the President's use of the provisions of section 25 to calculate an export price to be compared to the section 24 export price (the amount paid, subject to certain adjustments) to test the reliability of the section 24 price. In essence, the President was using section 25 (which is triggered once the President forms the opinion that the section 24 export price is unreliable) as a basis to form an opinion concerning the reliability of the section 24 export price. This dual role for section 25 (to assist in making the required opinion and to then calculate the export price that will be used, if the opinion is that the section 24 export price is unreliable) was acknowledged by the CBSA at the hearing of this appeal.

[67] The issue is whether it was an error of law for the CITT to reject this dual role for section 25 and impose mandatory factors that the President must consider in making the required reliability opinion.

[68] In my view, this was an error of law.

[69] In paragraph 80 of its reasons, the CITT takes exception to the exclusive use of a mathematical formula comparing section 24 and section 25 export prices. However, SIMA is a numbers based statute. The definition of "dumped" in subsection 2(1) incorporates a comparison of two amounts:

dumped, in relation to any goods, means that the normal value of the goods exceeds the export price thereof;	sous-évalué Qualificatif de marchandises dont la valeur normale est supérieure à leur prix à l'exportation.

[70] Normal value is defined in subsection 2(1):

"normal value" means normal value determined in accordance with sections 15 to 23 and 29 and 30;	valeur normale La valeur établie conformément aux articles 15 à 23, 29 et 30.

[71] The normal value of goods is to be determined based on the price of like goods that are sold to the persons identified in paragraph 15(*a*) and in the circumstances as set out in paragraphs 15(*b*) to (*e*), subject to certain adjustments. If there are insufficient qualifying sales of like goods, the normal value, subject to section 20, is determined either by using the price at which like

goods are sold to other countries or by using the cost of production and adding a reasonable amount for administrative, selling and all other costs and a reasonable amount for profits (section 19).

[72] The normal value is, therefore, an amount that will require some computation.

[73] Likewise, export price is an amount that, whether section 24 or 25 is used, will require some computation.

[74] To determine whether a particular amount is reliable, it would be logical to compare that amount to an amount that is reliable. As noted by the CBSA, Parliament has specified that when the section 24 amount is unreliable, the export price is to be determined under section 25. This would mean that an export price determined under section 25 would be considered reliable. Parliament would not have intended that one unreliable price be replaced by another unreliable price.

[75] The President chose to use an export price calculated under section 25 as a basis to test the reliability of the section 24 export price. Section 25 stipulates that it is the President's opinion that is relevant. There are no stipulated guidelines or factors that the President must consider. Therefore, the President has a broad discretion.

[76] The purpose of SIMA is to determine if goods are being dumped into Canada and if so to impose anti-dumping duties. The duties imposed are determined by a formula (subsection 3(1)

and section 30.2). In my view, given the context and purpose of the statutory scheme, the CITT erred in interpreting the provisions of section 25 to find that the President could not use a reliability test based on calculating export prices under section 25. The CITT also erred in imposing non-quantitative factors that the President must consider in assessing the reliability of section 24 export prices in a statutory scheme that is quantitative.

[77] As a result, I would allow the cross-appeal.

V. Conclusion

[78] I would dismiss the appeal and allow the cross-appeals. I would set aside the decisions of the CITT and, in rendering the decisions that the CITT should have made, I would dismiss the appeals of Remington and HCI from the re-determination of the amount of the anti-dumping duties. I would award costs to the President and Hitachi in relation to Remington's appeal and the cross-appeal in relation to that appeal.

"Wyman W. Webb"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
George R. Locke J.A."

APPENDIX

Sections 24 and 25 of the *Special Import Measures Act,* R.S.C. 1985, c. S-15

Section 24

24 The export price of goods sold to an importer in Canada, notwithstanding any invoice or affidavit to the contrary, is an amount equal to the lesser of	24 Le prix à l'exportation de marchandises vendues à un importateur se trouvant au Canada est, malgré toute facture ou affidavit incompatible, égal au moindre des deux montants suivants :
(a) the exporter's sale price for the goods, adjusted by deducting therefrom	a) le prix auquel l'exportateur a vendu les marchandises et rectifié par déduction des montants suivants :
(i) the costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export,	(i) les frais entraînés par la préparation des marchandises en vue de leur expédition vers le Canada et venant en sus de ceux habituellement entraînés par des ventes de marchandises similaires pour consommation dans le pays d'exportation,
(ii) any duty or tax imposed on the goods by or pursuant to a law of Canada or of a province, to the extent that the duty or tax is paid by or on behalf or at the request of the exporter, and	(ii) les droits et taxes imposés en vertu d'une loi fédérale ou provinciale et payés par l'exportateur, en son nom ou à sa demande,
(iii) all other costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted	(iii) tous les autres frais découlant de l'exportation des marchandises ou découlant de leur expédition, depuis le lieu désigné à l'alinéa 15e) ou le lieu qui lui a été substitué en vertu de l'alinéa 16(1)a);

therefor by virtue of paragraph 16(1)(a), and

(b) the price at which the importer has purchased or agreed to purchase the goods, adjusted by deducting therefrom all costs, charges, expenses, duties and taxes described in subparagraphs (a)(i) to (iii).

b) le prix auquel l'importateur a acheté ou s'est engagé à acheter les marchandises et rectifié par déduction des montants visés aux sous-alinéas a)(i) à (iii).

Section 25

25 (1) Where, in respect of goods sold to an importer in Canada,

(a) there is no exporter's sale price or no price at which the importer in Canada has purchased or agreed to purchase the goods, or

(b) the President is of the opinion that the export price, as determined under section 24, is unreliable

(i) by reason that the sale of the goods for export to Canada was a sale between associated persons, or

(ii) by reason of a compensatory arrangement, made between any two or more of the following, namely, the manufacturer, producer, vendor, exporter, importer in Canada, subsequent purchaser and any other person,

25 (1) Si, pour des marchandises vendues à un importateur se trouvant au Canada, selon le cas :

a) il n'y a pas de prix auquel l'exportateur a vendu les marchandises ou de prix auquel l'importateur se trouvant au Canada les a achetées ou s'est engagé à les acheter;

b) le président est d'avis que le prix à l'exportation des marchandises importées, établi selon l'article 24, est sujet à caution parce que, selon le cas :

(i) la vente des marchandises en vue de leur exportation vers le Canada a eu lieu entre personnes associées,

(ii) un arrangement de nature compensatoire, d'une part, a eu lieu entre au moins deux des personnes suivantes : le fabricant, le producteur, le vendeur, l'exportateur, l'importateur se trouvant au Canada, l'acheteur subséquent et toute autre

that directly or indirectly affects or relates to

(A) the price of the goods,

(B) the sale of the goods,

(C) the net return to the manufacturer, producer, vendor or exporter of the goods, or

(D) the net cost to the importer of the goods,

the export price of the goods is

(c) if the goods were sold by the importer in the condition in which they were or are to be imported to a person with whom, at the time of the sale, he was not associated, the price for which the goods were so sold less an amount equal to the aggregate of

(i) all costs, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,

(A) incurred on or after the importation of the goods and on or before their sale by the importer, or

(B) resulting from their sale by the importer,

(ii) an amount for profit by the importer on the sale,

personne, et, d'autre part, a un effet ou porte sur, selon le cas :

(A) le prix des marchandises,

(B) la vente des marchandises,

(C) le profit net réalisé par le fabricant, le producteur, le vendeur ou l'exportateur des marchandises,

(D) le coût net des marchandises pour l'importateur,

le prix à l'exportation des marchandises est, selon le cas :

c) si les marchandises ont été vendues par l'importateur dans le même état que lors de leur importation effective ou future et à une personne à laquelle il n'était pas associé au moment de la vente, leur prix de vente moins un montant égal à la somme des montants suivants :

(i) tous les frais, notamment les droits imposés en vertu de la présente loi ou du *Tarif des douanes*, et les taxes :

(A) soit engagés lors de l'importation des marchandises ou par la suite et lors de leur vente par l'importateur ou avant cette vente,

(B) soit découlant de leur vente par l'importateur,

(ii) un montant pour les bénéfices réalisés par l'importateur sur la vente,

(iii) the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and

(iii) les frais que la préparation des marchandises en vue de leur expédition vers le Canada a entraînés, entre autres pour l'exportateur ou l'importateur, et venant en sus de ceux habituellement entraînés par des ventes de marchandises similaires pour consommation dans le pays d'exportation,

(iv) all other costs, charges and expenses incurred by the exporter, importer or any other person resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a),

(iv) tous les autres frais engagés, entre autres par l'exportateur ou l'importateur, et découlant de l'exportation des marchandises importées ou découlant de leur expédition depuis le lieu désigné à l'alinéa 15e) ou le lieu qui lui a été substitué en vertu de l'alinéa 16(1)a);

(d) if the goods are imported for the purpose of assembly, packaging or other further manufacture in Canada or for incorporation into other goods in the course of manufacture or production in Canada, the price of the goods as assembled, packaged or otherwise further manufactured, or of the goods into which the imported goods have been incorporated, when sold to a person with whom the vendor is not associated at the time of the sale, less an amount equal to the aggregate of

d) si les marchandises sont importées pour une étape ultérieure de fabrication, pour montage ou pour conditionnement au Canada ou comme biens entrant dans la fabrication ou la production au Canada d'autres marchandises, leur prix de vente après ces opérations, ou le prix de vente des marchandises dans la fabrication desquelles elles ont été incorporées, à une personne à laquelle le vendeur n'est pas associé au moment de la vente, moins un montant égal à la somme des montants suivants :

(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,

(i) un montant pour les bénéfices réalisés sur la vente,

(ii) the administrative, selling and all other costs incurred in selling the goods described in subparagraph (i),

(ii) les frais, notamment les frais administratifs et les frais de vente,

(iii) the costs that are attributable or in any manner related to the assembly, packaging or other further manufacture or to the manufacture or production of the goods into which the imported goods have been incorporated,

(iii) tous les autres frais entraînés par les opérations en cause ou par la fabrication ou production des marchandises dans la fabrication desquelles elles ont été incorporées,

(iv) the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the imported goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and

(iv) les frais engagés, notamment par l'exportateur ou l'importateur, pour la préparation des marchandises en vue de leur expédition vers le Canada et venant en sus de ceux habituellement entraînés par la vente de marchandises similaires pour consommation dans le pays d'exportation,

(v) all other costs, charges and expenses, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,

(v) tous les autres frais, y compris les droits imposés en vertu de la présente loi ou du *Tarif des douanes*, et les taxes :

(A) resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a) that are incurred by the exporter, importer or any other person, or

(A) soit découlant de l'exportation des marchandises importées ou découlant de leur expédition vers le Canada depuis le lieu désigné à l'alinéa 15e) ou le lieu qui lui a été substitué en vertu de l'alinéa 16(1)a) et engagés, notamment par l'exportateur ou l'importateur,

(B) incurred on or after the importation of the imported goods and on or before the sale of the goods as assembled, packaged or otherwise further manufactured or of the goods

(B) soit engagés lors de l'importation des marchandises ou par la suite et lors de la vente des marchandises ayant subi ces opérations ou des marchandises dans lesquelles les marchandises

into which the imported goods have been incorporated, or

importées ont été incorporées ou avant cette vente;

(e) in any cases not provided for by paragraphs (c) and (d), the price determined in such manner as the Minister specifies.

e) dans les cas que ne prévoient pas les alinéas c) et d), le prix établi conformément aux modalités que fixe le ministre.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-162-22 (LEAD)
STYLE OF CAUSE:	REMINGTON SALES CO. d.b.a. HYUNDAI HEAVY INDUSTRIES (CANADA) v. PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and HITACHI ENERGY CANADA INC.
AND DOCKET:	A-163-22
STYLE OF CAUSE:	HYUNDAI CANADA INC. v. PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and HITACHI ENERGY CANADA INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 22, 2023
PUBLIC REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	LASKIN J.A. LOCKE J.A.
DATED:	FEBRUARY 2, 2024

APPEARANCES:

George W. H. Reid Ethan M. Gordon Andrei Mesesan	FOR THE APPELLANTS/CROSS-RESPONDENTS
Jennifer S. Bond Emily Keilty	FOR THE RESPONDENT/CROSS-APPELLANT, PRESIDENT OF THE CANADA BORDER SERVICES AGENCY
Christopher J. Kent Marc McLaren-Caux Jan M. Nitoslawski	FOR THE RESPONDENT/CROSS-APPELLANT, HITACHI ENERGY CANADA INC.

SOLICITORS OF RECORD:

Bennett Jones LLP Toronto, Ontario	FOR THE APPELLANTS/CROSS-RESPONDENTS
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT/CROSS-APPELLANT, PRESIDENT OF THE CANADA BORDER SERVICES AGENCY
Cassidy Levy Kent (Canada) LLP Ottawa, Ontario	FOR THE RESPONDENT/CROSS-APPELLANT, HITACHI ENERGY CANADA INC.