



Ottawa, Thursday, January 16, 2003

Appeal No. AP-2001-012

IN THE MATTER OF an appeal heard on December 3, 2001,
under section 61 of the *Special Import Measures Act*, R.S.C. 1985,
c. S-15;

AND IN THE MATTER OF a redetermination of the
Commissioner of the Canada Customs and Revenue Agency
dated March 15, 2001, pursuant to section 59 of the *Special
Import Measures Act*.

BETWEEN

MACSTEEL INTERNATIONAL (CANADA) LIMITED

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-2001-012

MACSTEEL INTERNATIONAL (CANADA) LIMITED

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

The respondent issued a redetermination in respect of goods imported by the appellant requiring the payment of anti-dumping duties in accordance with the Tribunal's order in Review No. RR-98-004. The redetermination was based on the respondent's finding that the goods in issue were pieces of plate of a thickness of 4 in. and, as such, of the same description as the goods to which the Tribunal's order applies.

HELD: The appeal is dismissed. In the Tribunal's order, anti-dumping duties were imposed on hot-rolled carbon steel plate and high-strength low-alloy plate not further manufactured than hot-rolled, heat treated or not, in cut lengths, in widths from 24 in. (610 mm) to 152 in. (3,860 mm) inclusive, and thicknesses from 0.187 in. (4.75 mm) to 4 in. (101.6 mm) inclusive, made to specified ASTM and equivalent standards. The issue in this appeal is whether the goods in issue, being 102 mm plate, are goods of the same description as the goods to which the Tribunal's order applies. The evidence shows that the goods in issue are, for the most part, identical to 4-in. plate, can be used for the same applications and are sold at the same price. Accordingly, the Tribunal is of the view that the goods in issue are goods of the same description as the goods to which its order applies.

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 3, 2001
Date of Decision: January 16, 2003

Tribunal Members: Peter F. Thalheimer, Presiding Member
Zdenek Kvarda, Member
Ellen Fry, Member

Counsel for the Tribunal: Marie-France Dagenais

Clerk of the Tribunal: Margaret Fisher

Appearances: Tamra Alexander, for the appellant
Derek Rasmussen, for the respondent



Appeal No. AP-2001-012

MACSTEEL INTERNATIONAL (CANADA) LIMITED

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

TRIBUNAL: PETER F. THALHEIMER, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*¹ from a redetermination of the Commissioner of the Canada Customs and Revenue Agency, in which the Commissioner confirmed that the goods in issue, 16 pieces of hot-rolled steel plate, imported from the Republic of Korea (Korea) by the appellant in July 1999, were goods of the same description as the goods to which the Tribunal's order in Review No. RR-98-004² applies and are therefore subject to anti-dumping duties.

The Order applies, among other things, to hot-rolled carbon steel plate imported from Korea in "thicknesses from 0.187 in. (4.75 mm) to 4 in. (101.6 mm) inclusive".

Pursuant to section 59 of SIMA, the respondent applied anti-dumping duties to the goods in issue, as the respondent concluded that the goods in issue were goods of the same description as those described in the Order.

The issue before the Tribunal is whether the goods in issue are goods of the same description as the goods to which the Order applies.

EVIDENCE

Mr. George John Ganem, Senior Vice-President of Macsteel International USA Corporation (Macsteel USA), gave evidence on the appellant's behalf. Based on his review of the file, Mr. Ganem described the ordering process used by the appellant in order to effect the transaction for the goods in issue. He testified that the purchase order involving the goods in issue was to fulfil a requirement for 4-in. plate, but specified that the plate was to be 102 mm thick. He explained that, when Dongkuk Steel Mill Co., Ltd. (Dongkuk) agreed to manufacture the goods in issue, it was aware that the goods had to be produced to a minimum thickness of 102 mm to avoid paying anti-dumping duties. This is evidenced by the e-mails exchanged between the two companies.

After going through all the documents that were filed by the appellant, Mr. Ganem stated that most of the key import documents that were not computer generated described the goods as being 102 mm thick. He made a specific reference to the mill certificate, which certifies that Dongkuk produced 102-mm plate according to the terms of the purchasing contract.

1. R.S.C. 1985, c. S-15 [hereinafter SIMA].
2. *Certain Hot-rolled Carbon Steel Plate and High-strength Low-alloy Plate* (17 May 1999) (CITT) [hereinafter Order].

Mr. Ganem testified that the discrepancy between the purchasing contract between Dongkuk and Macsteel USA and the computer-generated invoice issued by Macsteel USA to the appellant, which indicates that the plate is 4 in. thick, is due to the inability of the computer system to use measurements both in inches and millimetres on the same document. He testified that, since the majority of the goods in the order were specified in inches, the purchase order for the goods in issue was also expressed in inches. He stated that, as there is no exact equivalent in the computer database for 102 mm, i.e. 4.016 in., the closest measurement available, 4 in., was selected.

Finally, Mr. Ganem testified that 102-mm plate and 4-in. plate are relatively identical and interchangeable products that can be used for the same basic applications at the same price. He stated that, while the customer, in this instance, would have been satisfied with 4-in. plate, most customers would prefer material to be above the ordered minimum thickness, especially with heavy plate.

In cross-examination, Mr. Ganem acknowledged that the pieces of plate were not measured when they entered the country.

Mr. Barry Knight, Purchasing Manager for Samuel Plate Sales, also testified on the appellant's behalf. He testified that the requirement was for 4-in. plate, a standard stock size for inventory. The plate was to come from Brazil but, as Companhia Siderúrgica Paulista, the Brazilian company, could not produce this heavy a plate, it was supplied by Korea. He further testified that he knew that this meant that, in all likelihood, the material would be supplied in a thickness of 4.016 in. or 102 mm because the appellant, being the importer of record, would be subject to anti-dumping duties if it imported 4-in. plate. Mr. Knight testified that, based on his company's normal practice, some of the pieces of plate, probably 2 or 3 of the 16 pieces, would have been measured in his company's plant and found to conform to the mill certificate that indicated that the thickness of the plate was 102 mm. This measurement would have confirmed that the pieces of plate were more than 4 in. or 4 1/16 in. thick, but would not have checked to see whether they were close to 102 mm. He testified that tape measures were used for the measurement, but that he did not know whether the tape measures were accurate enough to measure in units as small as 1/8 or 1/16 of an inch. According to Mr. Knight, there were no records of the results of measuring these particular pieces of plate, because records would only be kept if the measurement showed that the plate did not meet the specifications. He acknowledged that plate of a thickness of 4.016 in. is totally acceptable as 4-in. plate.

Mr. Darryl Larson, Manager, Wood and Paper, Antidumping and Countervailing Directorate, Canada Customs and Revenue Agency, testified on behalf of the respondent. He testified that the transaction at issue was identified for review to determine whether the goods were subject to the Order. He testified that, since the customs invoice provided by the broker described the goods as 4 in. by 96 in. by 240 in. plate from Korea, it was determined that anti-dumping duties were payable on these goods. He further testified that the additional documentation provided to support the importer's objection to that decision still referred to the thickness of the subject goods as being 4 in.

Mr. Harold W. Ellison gave evidence on the respondent's behalf. Mr. Ellison was qualified by the Tribunal as an expert in matters associated with steel plate, including the description of steel plate thicknesses. He testified that the domestic industry's practice in referring to plate thickness using the metric system would be not to show decimals, so that 4-in. plate would be shown as being 102 mm thick. He referred to several Stelco Inc. price lists containing 4-in. plate that reflected this practice.

Mr. Ellison explained that ASTM standards are the general set of guidelines for thickness, width and length tolerances for all plate sizes and that ASTM A36, which applies to the goods in issue, is a specification that lays out the chemistry limits and the mechanical limits, such as yield strength, tensile strength and elongation for the specific plate grade at issue. He further explained that ASTM A6 prescribes the permitted variations in thickness for plate.

Mr. Ellison testified that, according to these standards, the tolerated thickness for 4-in. plate is between 3.986 in. and 4.154 in. He further testified that, in his opinion, plate that is 102 mm thick would fall within the range of tolerated thicknesses for 4-in. plate and could be sold as 4-in. plate.

ARGUMENT

The appellant submitted that the issue before the Tribunal is whether the plate imported by the appellant is 102 mm thick. It argued that the more relevant documents, such as the purchase order, the bill of lading and the mill test certification, show that the plate was specifically ordered and produced to 102 mm in thickness.

The appellant submitted that, knowing that importers needed to order 102-mm plate in order to avoid paying anti-dumping duties, it would have purposefully ordered 4-in. material only if there had been an advantage to do so. It argued that the evidence shows that there is no advantage, since the price and the applications are the same and that there is no difference for the customer. Consequently, the appellant submitted that the respondent's position makes no commercial sense.

With respect to the ASTM standards and the tolerance range of thicknesses allowed for 4-in. plate, the appellant argued that, since the Order applies to steel plate that is 4 in. thick or less, then the standards should be considered only if the goods are effectively 4 in. thick or less. Thus, it submitted that, since the goods in issue are thicker than 4 in., they cannot be qualified as 4-in. material and, as such, that the standards do not apply to these goods.

The respondent argued that the burden of proof rests with the appellant to demonstrate that the goods in issue were more than 4 in. thick and, thus, that the respondent's determination was incorrect.

The respondent further argued that the documentary evidence shows that the goods in issue were 4 in. thick and, as such, that anti-dumping duties were properly payable. The respondent submitted that the preliminary commercial invoice provided by the customs broker, which clearly describes the goods in issue as being 4 in. thick, should be the document relied upon by the Tribunal to make its decision. The respondent argued further that there are several documents that make reference to the goods in issue as being 4-in. plate and, as such, that it was appropriate for the respondent to make that determination.

In the alternative, the respondent argued that the Tribunal, in determining whether the goods in issue are of the same description as the goods to which the Order applies, must consider the ASTM standards and specifications that clearly form part of the Order. These standards prescribed an upper tolerance range of thickness for 4-in. material as 0.15 in. The respondent argued that consequently, even if the goods in issue were 102 mm thick, i.e. 4.0157 in., they would still fall under the Order.

DECISION

The goods to which the Order applies are described in the statement of reasons. The relevant portions of that description are as follows:

hot rolled carbon steel plate and high-strength low-alloy plate not further manufactured than hot-rolled, heat treated or not, in cut lengths, in widths from 24 in. (610 mm) to 152 in. (3,860 mm) inclusive, and thicknesses from 0.187 in. (4.75 mm) to 4 in. (101.6 mm) inclusive as follows:

...

plate made to ASTM specifications: . . . A36M/A36 . . . or equivalent specifications in either ASTM or other recognized designation systems or standards.

The Tribunal notes the evidence that the ASTM A36 standard, which applies to the plate in issue, allows for some variation in the thickness of the plate by incorporating the ASTM A6 standard.

Accordingly, the evidence indicated that the acceptable range for plate specified as 4 in. thick is between 3.986 in. and 4.154 in., which is the range from 101.6 mm to 104.94 mm. The acceptable range for plate specified as 102 mm thick, such as the goods in issue, is between 101.66 mm and 105.34 mm, i.e. from 4.002 in. to 4.17 in. Hence, the thicknesses of 102-mm plate and 4-in. plate overlap for most of the acceptable thickness range. The evidence indicated that a portion of this particular plate was measured, showing that it was at least 4 in. thick, but that the measurement process was not precise enough to determine the exact thickness.

The evidence indicated clearly that the goods in issue compete directly with 4-in. plate. The Tribunal accepts Mr. Ganem's testimony that 102-mm plate and 4-in. plate are relatively identical and interchangeable products that can be used for the same applications. This witness further indicated that both products are sold at the same price.³ The Tribunal also accepts the evidence that, from an end user's perspective, there is no difference between 102-mm plate and 4-in. plate. According to Mr. Knight, who testified on behalf of the appellant, plate of a thickness of 4.016 in. is totally acceptable as 4-in. plate.⁴ In addition, Mr. Ellison, the respondent's expert witness, testified that the domestic industry's practice in referring to plate thickness in the metric system is to refer to 4-in. plate as being 102 mm thick. He further testified that, in his opinion, plate that is 102 mm thick could be sold as 4-in. plate.⁵

On this basis, the Tribunal finds that the goods in issue are goods of the same description as the goods to which the Order applies. Accordingly, the appeal is dismissed.

Peter F. Thalheimer

Peter F. Thalheimer
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

Ellen Fry

Ellen Fry
Member

3. *Transcript of Public Hearing*, 3 December 2001, at 36, 37.

4. *Transcript of Public Hearing*, 3 December 2001, at 79.

5. *Transcript of Public Hearing*, 3 December 2001, at 165, 193.