



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2008-010

EMCO Electric International –
Electrical Resource International

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, June 25, 2009*

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IN THE MATTER OF an appeal heard on February 26, 2009, under subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated May 30, 2008, with respect to requests for re-determinations, under section 59 of the *Special Import Measures Act*.

BETWEEN

**EMCO ELECTRIC INTERNATIONAL – ELECTRICAL
RESOURCE INTERNATIONAL**

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Hélène Nadeau
Hélène Nadeau
Secretary

| | |
|---------------------------|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | February 26, 2009 |
| Tribunal Members: | Ellen Fry, Presiding Member Diane Vincent, Member Pasquale Michael Saroli, Member |
| Research Director: | Audrey Chapman |
| Research Officer: | Simon Glance |
| Counsel for the Tribunal: | Alain Xatruch |
| Manager, Registrar Office | Michel Parent |
| Registrar Officer: | Cheryl Unitt |

PARTICIPANTS:

| | |
|---|-------------------------------|
| Appellant | Counsel/Representative |
| EMCO Electric International – Electrical Resource International | Vincent Routhier |
| Respondent | Counsel/Representative |
| President of the Canada Border Services Agency | Elizabeth Kikuchi |

WITNESS:

Richard Tamulewicz
President
EMCO Electric International – Electrical Resource International

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STATEMENT OF REASONS

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by EMCO Electric International – Electrical Resource International (EMCO) pursuant to subsection 61(1) of the *Special Import Measures Act*¹ from a decision dated May 30, 2008, by the President of the Canada Border Services Agency (CBSA) under section 59.

2. The issue in this appeal is whether, for purposes of calculating normal values under *SIMA*, the exporter of certain carbon steel pipe nipples and threaded couplings imported into Canada from the People's Republic of China (China) by EMCO (the goods in issue) is Plumbtek Industries Inc. (Plumbtek), as claimed by EMCO, or the producer² of the goods in issue, as determined by the CBSA.

3. The goods in issue were, at the time of their importation, subject to the Tribunal's finding of injury made under subsection 43(1) of *SIMA* in Inquiry No. NQ-2002-004³ and, therefore, subject to the imposition of anti-dumping duties.

PROCEDURAL HISTORY

4. The goods in issue were imported into Canada from China by EMCO under two separate transactions, which occurred on February 22 and June 8, 2006.

5. On March 14, 2007, the CBSA issued re-determinations under section 57 of *SIMA* for the two transactions, whereby it determined that anti-dumping duties were to be assessed in accordance with a ministerial specification made pursuant to section 29 on the basis of an advance over the export price of 153 percent for carbon steel pipe nipples and 74 percent for carbon steel threaded couplings.

6. On June 11, 2007, EMCO filed, pursuant to paragraph 58(1.1)(a) of *SIMA*, two requests for re-determination of the CBSA's re-determinations made under section 57. It requested that anti-dumping duties be assessed by determining specific normal values based on the identification of Plumbtek as the exporter of the goods in issue.

7. On May 30, 2008, the CBSA issued its re-determinations under section 59 of *SIMA*, whereby it determined that the producer of the goods in issue, not Plumbtek, was the exporter for *SIMA* purposes.

8. On August 28, 2008, EMCO filed an appeal with the Tribunal from the CBSA's re-determinations made under section 59 of *SIMA*.

9. The Tribunal held a public hearing in Ottawa, Ontario, on February 26, 2009.

10. EMCO called one witness, Mr. Richard Tamulewicz, President of EMCO. The CBSA did not call any witnesses.

11. No physical exhibits were filed by the parties.

1. R.S.C. 1985, c. S-15 [*SIMA*].

2. The name of the Chinese producer has been designated as confidential information by EMCO.

3. *Certain Carbon Steel Pipe Nipples, Threaded Couplings and Adaptor Fittings, in Nominal Diameters up to and Including 6 Inches or the Metric Equivalents, Originating In or Exported From The People's Republic Of China* (16 July 2003), NQ-2002-004 (CITT) [*Carbon Steel Pipe Fittings*].

ANALYSIS

12. In the present appeal, the parties agree that the goods in issue are subject to the Tribunal's finding of injury made in *Carbon Steel Pipe Fittings*. The issue before the Tribunal is to determine the identity of the exporter of the goods in issue for *SIMA* purposes.

Law

13. Anti-dumping duties are payable when the goods imported into Canada are of the same description as the goods in respect of which the Tribunal has made an order or finding under section 43 of *SIMA*. Subsection 3(1) provides as follows:

3.(1) Subject to section 7.1, there shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or subsidizing of goods of the same description has caused injury . . . a duty as follows:

(a) in the case of dumped goods, *an anti-dumping duty in an amount equal to the margin of dumping of the imported goods*;

...

3.(1) Sous réserve de l'article 7.1, les marchandises sous-évaluées ou subventionnées importées au Canada alors que le Tribunal a établi avant leur dédouanement, par ordonnance ou dans ses conclusions, que le dumping ou le subventionnement de marchandises de même description a causé un dommage [...] sont assujetties aux droits suivants :

a) dans le cas de marchandises sous-évaluées, des droits antidumping d'un montant égal à la marge de dumping des marchandises;

[...]

[Emphasis added]

14. Subsection 2(1) of *SIMA* defines "margin of dumping" as "... the amount by which the normal value of the goods exceeds the export price of the goods". "Normal value", in turn, is defined as the "... normal value determined in accordance with sections 15 to 23 and 29 and 30". These provisions establish a sequential series of methodologies that may be employed to determine the normal value of goods.

15. Within these provisions, multiple references are made to the term "exporter". For example, section 15 of *SIMA* provides that "[s]ubject to sections 19 and 20, where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are *sold by the exporter* of the first mentioned goods . . ." [emphasis added].

16. *SIMA* does not define the term "exporter".

Who is the Exporter of the Goods in Issue for *SIMA* Purposes?

17. The CBSA submitted that, although *SIMA* does not define the term "exporter", guidance as to the meaning of the term is found in subsection 2(1), which defines "country of export" as "... the country from which the goods were shipped directly to Canada . . ." It submitted that a logical extension of this definition is that an "exporter" for *SIMA* purposes is the person located in the country of export who ships the goods directly to Canada.

18. The CBSA further submitted that the approach taken by the Exchequer Court of Canada in *Her Majesty The Queen v. The Singer Manufacturing Company*⁴ and adopted by the Tribunal in *J.B. Multi-National Trade Inc. v. Deputy M.N.R.C.E.*⁵ indicates that the determination of the identity of the exporter is a fact-driven inquiry with a focus on the knowledge and conduct of the parties to the transaction. Moreover, it submitted that, in *Singer*, the Exchequer Court of Canada indicated that the vesting of possession and legal title to the goods is not conclusive evidence of the identity of the exporter.

19. The CBSA submitted that its general guideline for identifying the “exporter” for *SIMA* purposes adopts the foregoing approach.⁶ The relevant part of the guideline reads as follows:

For purposes of *SIMA*, the [CBSA] generally considers the exporter to be the person or firm who is a principal in the transaction, located in the country of export at the point of direct shipment to Canada who gave up responsibility for the goods by knowingly placing them in the hands of a carrier, courier, forwarding company, their own truck or conveyance for delivery to Canada.⁷

20. The CBSA submitted that a review of the documents on the record, which demonstrate the knowledge and conduct of the parties, indicates that it was the producer in China, not Plumbtek, that gave up responsibility for the goods in issue by knowingly placing them in the hands of a conveyance for delivery to Canada and should therefore be considered the exporter.

21. While the CBSA acknowledged that EMCO purchased the goods in issue from Plumbtek and that Plumbtek purchased the goods in issue from the producer through the producer’s selling agent, it contended that the terms of the contracts (as reflected in the *pro forma* invoices)⁸ for the purchase of the goods in issue between Plumbtek and the producer’s selling agent confirmed the role of the producer as the exporter.

22. In particular, the CBSA noted that the contracts provided that the producer, via its selling agent:

- would deliver the goods in issue to “any Chinese port” (the port of destination was identified as “Canada port”);
- would provide the shipping vessel;
- would notify Plumbtek of the contract number, the name and quantity of the goods in issue, the name of the carrying vessel and the date of shipment, only after loading was completed;
- was entitled to make partial shipments and/or transshipments;
- was not responsible for late or non-delivery of the goods in issue due to *force majeure*; and
- would provide Plumbtek with a certificate issued by the China Council for the Promotion of International Trade.

23. Notwithstanding that a specific term of the contract specified “FOB mill, loaded in container”, the CBSA submitted that the contracts imposed ongoing obligations on the producer with regard to the goods in issue after their delivery at the mill gate. It submitted that these obligations demonstrate that the producer

4. [1968] 1 Ex.C.R. 129 [*Singer*].

5. (28 April 1994), AP-93-055 (CITT) [*J.B. Multi-National Trade*].

6. This general guideline was set out in the CBSA’s statement of reasons regarding the final determination of the dumping of certain carbon steel pipe fittings originating in or exported from China.

7. Tribunal Exhibit AP-2008-010-03B, exhibit 3 at 164. See, also, *Transcript of Public Hearing*, 26 February 2009, at 130.

8. Tribunal Exhibit AP-2008-010-03B, exhibit 1 at 68-71, 130-32.

had knowledge that the goods in issue were destined for Canada and remained responsible for the goods until they were placed in the hands of a conveyance for delivery to Canada. According to the CBSA, Plumbtek was at most an intermediary in the transaction between the producer and EMCO.

24. The CBSA argued that it was important to look behind the transactions to see who knowingly provided the goods in issue for export to Canada. In its view, Plumbtek's ownership of the goods in issue at the time of exportation is not sufficient to establish it as the exporter. According to the CBSA, since Plumbtek does not manufacture goods, does not sell any goods domestically, does not warehouse or otherwise physically handle goods, it can best be described as a trading company that merely provided a service by facilitating sales to EMCO. It argued that arranging for transport and completing documents are services that could have been provided by anyone, regardless of location.

25. EMCO submitted that, in simple terms, an exporter is the party that sends goods from one country to another by legitimate means. It submitted that the approach taken by the Exchequer Court of Canada in *Singer* and adopted by the Tribunal in *J.B. Multi-National Trade* is that the term "exporter" must be interpreted from a business or commercial point of view and that this requires an examination of the specific roles of the parties to a transaction.

26. EMCO did not take issue with the CBSA's guideline for identifying the "exporter" and argued that Plumbtek was the exporter as contemplated by the guideline because it was the principal in the transaction, located in the country of export at the point of direct shipment to Canada, that gave up responsibility for the goods by knowingly placing them in the hands of a carrier for delivery to Canada.

27. EMCO submitted that the CBSA's re-determinations were based on a misinterpretation of language used in standard contracts such as the one used between Plumbtek and the producer's selling agent. It submitted that the specific terms of the contracts were "FOB mill, loaded in container" and that references to "any Chinese port" meant nothing in this case. The term "any Chinese port", in its view, is simply a generic term contained on a *pro forma* invoice that had no bearing on the specific sale between Plumbtek and the producer's selling agent. EMCO also submitted that other terms of the contracts, such as those pertaining to partial shipments and transshipments, were also not relevant, as it was clear that the goods in issue were sold on an ex-factory basis. It further noted that neither the producer nor its selling agent arranged for or provided the shipping vessel.

28. EMCO submitted that all the commercial documents establish that Plumbtek was the exporter and that neither the producer nor its selling agent played a role in the transactions beyond that of producing the goods in issue to Plumbtek's order. In particular, it submitted that the evidence establishes that:

- Plumbtek made arm's length purchases of the goods in issue from the producer's selling agent;
- Plumbtek paid for and had title to the goods in issue until payment was received from EMCO;
- all relevant sale and shipping documents identify Plumbtek as the seller and exporter of the goods in issue;
- Plumbtek made all relevant and necessary arrangements for the carriage of the goods in issue from their point of delivery at the mill gate in China to Canada;
- the producer did not effect any tasks or take any measures for the export of the goods in issue, in conformity with the "FOB mill, loaded in container" terms of the contracts;

- Plumbtek carried the liability for loss of the goods in issue from receipt at the mill gate until payment was made by EMCO; and
- there was no evidence that any party in China other than Plumbtek acted as the exporter of the goods in issue.

29. In Canadian law, the accepted approach to statutory interpretation is the modern contextual approach, which provides that “. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁹

30. As previously noted, *SIMA* does not define the term “exporter”. Although the term is used in several sections of *SIMA*, these sections do not suggest any definition other than the normal meaning of the word.

31. In this regard, the Tribunal notes that the *Canadian Oxford Dictionary* defines the word “export” as follows: “. . . send out (goods, services, etc.) to another country, esp. for sale”¹⁰ The Tribunal observes that the word “exporter” is not defined separately but presumes that it would have a corresponding meaning.

32. In *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,¹¹ the Supreme Court of Canada considered the meaning of “sale for export to Canada” for purposes of determining value for duty under section 48 of the *Customs Act*.¹² However, the Tribunal agrees with the CBSA that the definition of the term “exporter” for *SIMA* purposes should not necessarily be the same as the definition for *Customs Act* purposes. The Tribunal also notes that, in general conceptual terms, an entity that makes the “sale for export to Canada” in a given situation may not always be the same as the entity that is the “exporter”.

33. In *Singer*, the Exchequer Court of Canada considered the meaning of the term “exporter” for purposes of determining anti-dumping duty liability. It stated as follows:

The words “exporter” and “importer” are not words of art in the law; they are words that gain the meaning that they have when used in a context such as that found here from the business or commercial world. It follows, therefore, in my view, that the matter must be approached from a business or commercial point of view . . . The essential feature in my view is that the exporter must be the person in the foreign country who sends the goods into Canada and the importer must be the person to whom they are sent in Canada¹³

34. In the Tribunal’s view, this definition of “exporter” is consistent with the dictionary definition of “export” quoted above.

9. Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at 41.

10. Second ed., s.v. “export”.

11. [2001] 2 S.C.R. 100.

12. R.S.C. 1985 (2d Supp.), c. 1.

13. *Singer* at 135-36.

35. As noted by the parties, in *J.B. Multi-National Trade*, the Tribunal adopted the approach used in *Singer* and determined the identity of the exporter based on the particular facts of the case. The Tribunal sees no compelling reason to deviate from this approach in the current case. It will therefore determine what entity in China sent the goods in issue to Canada within the context of the particular circumstances of the two importations under consideration. In these particular circumstances, possession and legal title to the goods are significant factors in determining the identity of the exporter in accordance with the definition discussed above.

36. While the parties appear to agree on the definition of “exporter” that was applied by the CBSA in this case, the Tribunal notes that the CBSA indicated that this definition stems from administrative practice rather than legislation or jurisprudence.¹⁴ Furthermore, in the Tribunal’s view, the evidence does not indicate that this definition represents either the normal meaning of the term or normal industry usage. Consequently, the Tribunal does not accept this definition to the extent that it goes beyond the definition adopted by the Tribunal in previous cases, as indicated above.

37. The Tribunal notes that EMCO filed a large amount of documentary evidence concerning the commercial transactions that occurred for the two importations under consideration. Many of these documents concerned transactions to which EMCO was not a party and, hence, EMCO obtained them from Plumbtek. The witness for EMCO testified that Plumbtek indicated that it could not locate all the documentation relating to the importations of the goods in issue and that, where it could not locate a particular document, it provided the same “type” of document for a similar transaction.¹⁵ Although there was no opportunity to cross-examine a representative from Plumbtek concerning the truth of this statement, the CBSA did not contest the authenticity of any of these documents.

38. The commercial documents pertaining to the two importations under consideration consistently show Plumbtek as the owner of the goods in issue from the time they left the producer’s mill in China until Plumbtek received payment from EMCO. The contracts (i.e. the *pro forma* invoices) for the purchase of the goods in issue between Plumbtek and the producer’s selling agent indicate that:

- Plumbtek was the buyer and that the producer’s selling agent was the vendor on an “FOB mill, loaded into container” basis, pursuant to which title to the goods in issue would have passed to Plumbtek upon the goods being containerized and delivered at the mill gate;
- payment by Plumbtek to the producer’s selling agent was effected via a 30 percent down payment, with the balance being due after receiving the bill of lading from the producer’s selling agent;
- if quality, quantity or weight was found not to be in accordance with the contracts, Plumbtek was given explicit recourse against the producer’s selling agent, subject to a *force majeure* exception; and
- the producer’s selling agent was to provide the shipping vessel.

14. *Transcript of Public Hearing*, 26 February 2009, at 150-51.

15. The documents relating to the February 22, 2006, importation are contained in Tribunal Exhibit AP-2008-010-03B, exhibit 1 at 110-39. The documents relating to the June 8, 2006, importation are contained in Tribunal Exhibit AP-2008-010-03B, exhibit 1 at 39-81 and Tribunal Exhibit AP-2008-010-015 at 7, 12.

39. The CBSA argued that this last provision contradicted the “FOB mill, loaded in container” terms of the contracts, suggesting that the producer’s selling agent really owned the goods in issue until they arrived in Canada. However, the Tribunal finds that the evidence on the record indicates that it was Plumbtek, not the producer’s selling agent, that made all the necessary arrangements for the carriage of the goods in issue from their point of delivery at the mill gate in China to Canada.¹⁶ This was implicitly recognized by the CBSA at the hearing.¹⁷ In any event, the fact that the producer’s selling agent may have provided some collateral services to Plumbtek does not detract from the fact that Plumbtek was, at all relevant times, the owner of the goods in issue and that, hence, once the ownership of the goods in issue vested in Plumbtek upon their delivery at the mill gate, the producer’s selling agent could only deal with the goods in accordance with Plumbtek’s instructions.

40. In addition to the *pro forma* invoices, a number of other documents point to Plumbtek, which was the owner of the goods in issue at all relevant times, as the exporter thereof, including:

- the bills of lading, which serve as a document of title to goods in transit, showing Plumbtek as the shipper/exporter of the goods in issue;¹⁸
- the certificates of origin issued by the Chinese Government showing Plumbtek as the exporter;¹⁹
- the invoices pertaining to the carriage of the goods in issue from the producer’s mill to Canada showing Plumbtek as the payer;²⁰
- the cargo transportation insurance policies showing Plumbtek as the only insured party²¹ with neither the producer nor its selling agent being named under the policies;
- the bank debit confirmations showing that EMCO paid Plumbtek for the goods in issue;²²
- the Canada Customs coding forms listing Plumbtek as the vendor of the goods in issue;²³
- the invoices pertaining to logistics services relating to the entry of the goods in issue into Canada and their delivery from the Canadian port to EMCO, showing Plumbtek as the vendor and shipper;²⁴
- the purchase orders for the goods in issue, which were issued by EMCO to Plumbtek;²⁵ and
- the invoices and packing lists for the goods in issue, which were issued by Plumbtek to EMCO.²⁶

16. Tribunal Exhibit AP-2008-010-15 at 6, 7.

17. *Transcript of Public Hearing*, 26 February 2009, at 141.

18. Tribunal Exhibit AP-2008-010-03B, exhibit 1 at 76, 135.

19. *Ibid.* at 77, 136.

20. Tribunal Exhibit AP-2008-010-15 at 7.

21. Tribunal Exhibit AP-2008-010-03B, exhibit 1 at 78, 137.

22. *Ibid.* at 80-81, 138-39.

23. *Ibid.* at 39, 110.

24. *Ibid.* at 40-41, 111-12.

25. *Ibid.* at 45-50, 114.

26. *Ibid.* at 72-75, 133-34.

41. The witness for EMCO testified that, although EMCO did not have a written agreement with Plumbtek, EMCO's relationship was entirely with Plumbtek, which supplies EMCO with a number of different products from a range of producers in China, rather than with the producer or its selling agent.²⁷ The witness indicated that EMCO never communicated with the producer or its selling agent.²⁸ Indeed, EMCO's testimony indicated that EMCO did not know the identity of the producer of the goods in issue until after it had placed the order.²⁹

42. The witness for EMCO also testified that the goods in issue were purchased from Plumbtek on a cost, insurance and freight basis.³⁰ EMCO wire-transferred payment for the goods in issue to Plumbtek only after receiving electronic copies of the shipping documents.³¹ After receiving payment, Plumbtek sent EMCO the original shipping documents and endorsed the maritime insurance policy over to EMCO, effectively transferring ownership and, thus, enabling it to take physical possession of the goods in issue in Canada.³²

43. In the Tribunal's view, the evidence does not indicate that, with respect to the relevant commercial transactions, Plumbtek was acting as the agent of either the producer or its selling agent. Furthermore, in the Tribunal's view, the evidence does not indicate any kind of non-arm's length relationship between Plumbtek and the producer or its selling agent. The Tribunal notes that the existence of any such relationship was not argued by the CBSA.³³

44. Rather, the evidence indicates clearly that Plumbtek, acting on its own account, was the owner of the goods in issue at the point in time when the goods were sent to Canada and, hence, was the entity that exercised the power to send the goods in issue to Canada.

45. Accordingly, taking into account all the relevant circumstances, including Plumbtek's ownership of the goods in issue, it is clear that Plumbtek was the exporter of the goods in issue for *SIMA* purposes.

46. In coming to this conclusion, the Tribunal was aware that Plumbtek's dealings with the goods in issue were largely effected through a series of paper-based transactions, a situation that is not uncommon in international commerce (as outlined above) and that the producer had knowledge that the goods in issue were being produced specifically for export to Canada. In this regard, the Tribunal finds no indication in *SIMA* that the physical handling of goods is essential to being considered the exporter of those goods or that a foreign producer, solely by virtue of knowing that goods that it is producing are destined for a particular export market, necessarily becomes the exporter of those goods. Considering these two factors in the context of the other evidence in this case, the Tribunal considers that they are not sufficient to make any other party the exporter.

27. *Transcript of Public Hearing*, 26 February 2009, at 13, 18-19, 55.

28. *Ibid.* at 18-19.

29. *Ibid.* at 69-70.

30. *Ibid.* at 15.

31. *Ibid.* at 21.

32. *Ibid.* at 21, 58.

33. *Ibid.* at 153.

DECISION

47. For the foregoing reasons, the Tribunal has determined that Plumbtek is the exporter of the goods in issue.

48. Accordingly, the appeal is allowed.

Ellen Fry

Ellen Fry
Presiding Member

Diane Vincent

Diane Vincent
Member

Pasquale Michael Saroli

Pasquale Michael Saroli
Member