

anti-dumping law in Canada

Canada's anti-dumping laws are contained in a statute called the *Special Import Measures Act*. This statute will be referred to in this article as *SIMA*. Anti-dumping laws are intended to permit domestic industries of a country to seek special tariff protection against unfairly traded goods from other countries. The amount of the special tariff protection is equal to anti-dumping duties. These duties are defined as the amount required to offset the difference between "normal value" and "export price" of the goods being investigated. These terms are defined in greater detail below. Once dumping has been found, international trading rules of the World Trade Organization require that the domestic industry which is seeking protection of anti-dumping laws prove that it has been harmed by the dumping of low-priced goods into the Canadian market. As a result, an anti-dumping case under *SIMA* requires two separate sets of legal proceedings in order for a Canadian industry to obtain special tariff protection against dumped imports from another country. These legal proceedings are the dumping investigation by the President of the Canada Border Services Agency and the injury inquiry by the Canadian International Trade Tribunal.

I. dumping

Dumping occurs when the normal value of goods exceeds their export price. In general terms, the export price is the actual selling price of the goods under investigation to the importer in Canada, subject to adjustments discussed below. Normal value is intended to reflect the profitable selling price of the same goods in the exporter's home market.

The measurement of the amount of dumping is performed by officials of the Canada Border Services Agency ("CBSA"). The organization was formerly known as Revenue Canada. The CBSA may begin a dumping investigation on the basis of a written complaint from the Canadian industry, or it may choose to begin a dumping investigation on the basis of its own information. The CBSA will choose a past period of six months to a year in which to examine importations of goods under investigation. These goods are referred to below as "subject goods".

Once the investigation is started, exporters of subject goods to Canada, and the importers of those goods, are sent lengthy questionnaires or "Requests for Information" ("RFI") seeking information as to costs of production of the subject goods, pricing in the exporter's own market and information on the subject goods sold to Canada. An exporter response is required within 37 days of the beginning of the investigation. An importer response must be provided within 21 days. The CBSA officials will usually attend at the premises of the exporters and importers who respond to the RFI and conduct an audit in order to verify the information provided in the questionnaire responses. The CBSA will then use the information it obtains to determine normal values, export prices and resulting margins of dumping on subject goods shipped to Canada during the period of investigation.

(a) normal values

Normal values are intended to reflect profitable selling prices of subject goods in the exporter's home market. The practice of the CBSA is to look at selling prices of subject goods (or similar goods) in the exporter's own home market. The CBSA will analyze the exporter's cost of production and financial data to determine whether the selling price in the exporter's home market is high enough to cover all costs of production of the domestically sold goods, general, selling, administrative and all other costs, and an amount for profit. If the sales are profitable (and meet the CBSA criteria for comparability), the selling prices become the normal values which are compared to export prices. If the sales being

examined do not meet this test of profitability, The CBSA will substitute a "constructed" normal value. The constructed normal value is obtained by adding up costs of production of the goods sold to Canada, general, selling, administrative and all other costs, plus an amount for profit. Where an exporter refuses to participate in dumping proceedings, or where insufficient information is provided, SIMA allows the CBSA to determine normal values by order of the Minister. This is referred to as a "ministerial specification". For exporters who refuse to co-operate with the CBSA, the ministerial specification used is the highest margin of dumping found in any single shipment of goods from the exporters who did co-operate.

(b) export prices

These are the actual selling prices to the importer in Canada with deductions to offset any duty, brokerage charges, freight or other export-related charges incurred in sending the goods from the exporter's factory to the buyer in Canada. This is known as an "ex-factory" selling price.

Special rules are used where the exporter and importer are related to each other. In such a case, the CBSA may use the resale price from the importer to an unrelated customer in Canada, and deduct all costs of the importer from that resale price, before deducting all the export-related charges of the exporter, to obtain an ex-factory price. Where the exporter and importer are related, the CBSA will calculate export price under both methods and generally use the one which yields the highest margin of dumping.

(c) margin of dumping

As stated above, the margin of dumping is the amount by which normal value exceeds export price. The CBSA often expresses this as a percentage of export price. This margin establishes the amount of anti-dumping duties the CBSA will assess on the export price of goods after a dumping finding.

As a general rule, the CBSA must reach a preliminary decision on dumping within 90 days of the start of an investigation. Where dumping is found, the CBSA issues a "Preliminary Determination" of dumping. This means that provisional anti-dumping duties will usually be charged beginning on the date of the Preliminary Determination. In certain cases, where there are very large quantities of subject goods exported to Canada after the start of the dumping investigation, anti-dumping duties may be assessed back to the start of the investigation. All anti-dumping duties must be paid by the importer. Ninety days after the Preliminary Determination, the CBSA issues a "Final Determination" of dumping. The period between the Preliminary Determination and the Final Determination allows exporters and importers to provide any additional information that may have been requested by the CBSA. This period of time is also used by the CBSA to improve the initial estimates of normal values and export prices, made in the Preliminary Determination. Normal values issued at the Final Determination provide minimum prices which must be charged by an exporter after an injury finding to avoid the assessment of anti-dumping duties against importers.

(d) undertakings

An undertaking is a promise not to export to Canada below certain prices established by the CBSA. *SIMA* permits the CBSA to accept undertakings from exporters instead of proceeding with the dumping investigation; however, an exporter may also request that the dumping and injury investigations be completed. Should the Canadian International Trade Tribunal then make an injury finding, the undertaking would go into effect. A no-injury finding ends the need for an undertaking. The great majority of exporters of subject goods, measured by volume of sales, must agree to be subject to the undertaking before it will be accepted by the CBSA. If even one exporter breaches the undertaking, the CBSA may terminate the undertaking and either restart the dumping investigation against all exporters; or, if the dumping investigation has been completed, the CBSA may determine whether circumstances warrant the assessment of anti-dumping duties.

II. injury

Once the President of the CBSA has initiated a dumping investigation, the Canadian International Trade Tribunal (the "CITT") is charged with the task of determining whether the dumping found by the CBSA has caused injury or retardation, or threatens to cause injury to the production in Canada of subject goods.

(a) preliminary inquiry

After an anti-dumping or subsidy case has been initiated, the CITT investigates, on a preliminary basis, whether the evidence discloses a reasonable indication that dumping has caused injury or retardation or threatens to cause injury to Canadian production. This process may simply be through written submissions, and does not require proof, but merely a "reasonable indication" that there is injury being suffered by Canadian producers. The process is completed within 60 days. The CITT is primarily concerned with the question as to whether such evidence as is presented to it supports allegations of injury. The CITT will not proceed to weigh the evidence until the full inquiry process begins with the CBSA Preliminary Determination.

(b) the CITT inquiry

The CITT Inquiry begins at the time of the CBSA Preliminary Determination and lasts 120 days. The CITT's mandate is to determine whether the dumping found by the CBSA has caused or threatens to cause material injury (or retardation) to the production in Canada of like goods. "Material injury" has been interpreted as a financial harm that is not insignificant. The CITT sends out questionnaires to Canadian producers, importers, end-users and other interested parties. The Canadian industry is asked to report to the CITT on its financial performance and to provide information on allegations of disruptive pricing or lost sales caused by dumped imports. Some of the more common types of injury claimed by the Canadian industry in these proceedings include:

price erosion, price suppression, lost employment, lost sales, loss of market share and declines in profitability. Any exporter or importer has a right to appear before the CITT to challenge both the claims of material injury and claims that the injury was caused by dumping. The exporter or importer may also ask the CITT to exclude its goods from an injury finding if such goods are not available in Canada or for other reasons. The public hearing portion of the CITT Inquiry generally begins about three months after the Preliminary Determination. The CITT must hold the hearing and make its decision within 120 days of the Preliminary Determination of dumping by the President of the CBSA, which is 30 days after the Final Determination. If the CITT reaches a conclusion that no injury has been proven or no likelihood of future injury exists, then dumping proceedings are terminated and all anti-dumping duty collected is refunded. Where the CITT finds material injury caused by dumping, then the CBSA will continue to monitor importations of subject goods and assess anti-dumping duties (if applicable) until the injury finding is terminated.

(c) review and termination of injury findings

SIMA provides that injury findings must be reviewed every five years to determine whether they are still necessary to protect the Canadian industry from dumping. Findings will be terminated unless it can be demonstrated that there is a likelihood of renewed dumping and an ongoing threat to Canadian production from dumped imports.

SIMA also contains special provisions that permit the CITT to review injury findings and terminate them in less than five years, if there are significant changes in circumstances from those at the time of the original injury finding. Some reasons for early termination by the CITT in previous cases include the lack of production in Canada of subject goods, and the closing of all production facilities in Canada.

III. court challenges

Canadian law permits either an exporter or an importer of subject goods to challenge a dumping finding by the CBSA, or an injury finding by the CITT, in the Federal Court of Appeal. Parties from *NAFTA* countries may choose, as an alternative, judicial review by a *NAFTA* binational panel. This same rights apply to the Canadian industry in the event of a no-dumping or no-injury finding. The Federal Court of Appeal and a binational panel have the power to uphold or reverse the decisions of either the CBSA or the CITT.

IV. administrative reviews of dumping

Once an injury finding has been made by the CITT, there are three types of review proceedings that may be conducted by the CBSA. First, the CBSA is required by *SIMA* to recalculate normal values and export prices for the 120 day period from the Preliminary Determination of dumping until the date of the CITT decision. If the exporter or importer does not wish to participate in this process, then the CBSA will simply retain any anti-dumping duties that were assessed during that period. If the Final Determination margins of dumping are lower than at the Preliminary Determination, the difference in anti-dumping duties will be refunded to the importer, even if the exporter and importer do not participate in this administrative review.

A second type of administrative review arises from the ongoing enforcement of the dumping finding. The CBSA may, at the request of the exporter, provide "undumped" normal values for future shipments. As long as the exporter's ex-factory selling price (that is, the export price) is greater than the normal values determined by the CBSA, then no anti-dumping duty is payable on shipments made in accordance with those normal values. These reviews are conducted every one or two years. It is often the case that a well-organized exporter can use these undumped normal values to increase profits on sales to Canada through higher prices available in the Canadian market after an injury finding by the CITT. This is a matter we shall discuss in further detail in our next

article which will describe how an exporter can turn a dumping investigation to its advantage.

The third type of administrative review permits the CBSA to re-assess anti-dumping duties retroactively for up to two years. This procedure is used where the CBSA finds that subject goods have been sold at less than the normal values for that exporter.

V. conclusions

This article has provided a general overview of Canadian anti-dumping law. It is intended only as a brief description of anti-dumping proceedings, and therefore does not cover all aspects of anti-dumping law. The reader should understand that there are many additional rules and policies which determine how anti-dumping laws are applied in each particular case. Anyone involved in Canadian anti-dumping proceedings should obtain professional legal advice from experts on Canadian anti-dumping law.

by [Geoffrey C. Kubrick](#)

For more information on this topic, please contact:

Ottawa [Geoffrey C. Kubrick](#)

613.232.7171
ext.129

geoffrey.kubrick@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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