

the cloud with a silver lining: how to survive Canadian anti- dumping actions

1. introduction

When a company becomes subject to an anti-dumping investigation, it can be the start of significant damage to sales in Canada. A finding by the Canada Border Services Agency ("CBSA") that there has been dumping can result in preliminary anti-dumping duties so high as to make participation in the Canadian market economically impossible in the short-run. If the Canadian International Trade Tribunal ("CITT") subsequently finds that dumping has caused material injury to Canadian producers, an unprepared exporter may be effectively prevented from competing in the Canadian market for five years or more. However, with careful planning and some hard work, disruption in sales to Canada can be reduced and the process may even give rise to market opportunities for the well-prepared exporter. This article will describe how an exporter can minimize lost business and perhaps even increase the profitability of its sales to Canada with proper planning. Readers should first review the first article in this series, **Anti-dumping Law in Canada** in order to fully understand the concepts that are discussed here.

Anti-dumping proceedings in Canada are a bifurcated process. This means that there are two government agencies which must make an appropriate finding to justify anti-dumping protection. First, the CBSA must find that there is dumping. This will lead to the imposition of provisional antidumping duties for a period of four

months. At the same time, the CITT must determine whether the dumping is causing material injury to production in Canada of goods which compete with dumped imported products. Only if the CITT finds injury will anti-dumping protection be extended for five years. In this context, participation of an exporter in the CBSA dumping investigation is aimed at planning for continued participation in the Canadian market in the event that the CITT makes an injury finding.

2. the dumping investigation

An exporter's first notice of a dumping investigation usually comes with receipt of a Request for Information ("RFI") from the CBSA. This RFI seeks extensive information on exports to Canada and domestic sales of the exporter, as well as financial information about the exporter. Very often, a company will simply ignore this request for information. This can be a serious error since the CBSA will arbitrarily assign a dumping margin for non-cooperating exporters. This margin of dumping is usually determined by taking the highest single margin of dumping found for any one sale by any exporter in the entire investigation. A margin of dumping determined in this manner will almost certainly be very high and will probably eliminate the exporter from the Canadian market completely. If an exporter's participation in the Canadian market is currently an important part of its business or an important aspect of a company's longer range strategic plan, it should respond to the RFI to hopefully keep the dumping margin down and protect its ability to participate in the Canadian market.

When there are many companies exporting subject goods to Canada, the CBSA may only send RFIs to a sample of exporters who, together, comprise a significant percentage of the total exports under investigation. In some cases, this percentage has been as little as 60% of total goods shipped to Canada during the CBSA period of investigation. Where an exporter is not sent an RFI, it will be assigned a dumping margin, though usually not as high as for an exporter who was sent an RFI and refused to cooperate. This lower margin of dumping is based upon the

average margin of dumping for all exporters from that country who did provide a response to the RFI. Thus, the margin of dumping for an exporter who is not requested to respond to an RFI will generally be the average of other exporters from the same country who cooperated with the investigation. Where no exporter cooperated, the highest margin of dumping found in the investigation may be employed. It should be noted that the CBSA will often permit an exporter to volunteer to respond to an RFI, even if not originally asked.

2.1 the advantages of cooperation

There are certain advantages that arise from participation in the CBSA investigation at an early stage. It may be possible to negotiate an undertaking with the CBSA. This process may, under certain conditions, permit exporters to provide a promise not to sell into Canada below certain prices determined by the CBSA. In return, dumping proceedings will be suspended. If the price levels determined by the CBSA allow an exporter to remain competitive in the Canadian market, then this may be a profitable road to follow. It must be noted, however, that this process is not available unless most exporters (who account for most of the shipments of subject goods to Canada) cooperate in the CBSA investigation.

Involvement in the process prior to the Preliminary Determination also allows an exporter to make additional submissions between the Preliminary Determination of dumping and the Final Determination of dumping with the aim of reducing the margin of dumping as much as possible. This allows the opportunity to provide clarification to the CBSA and to clear up misunderstandings over data. Another benefit of participating at this stage of the proceedings is that the CBSA Final Determination of dumping is subject to judicial review by the Canadian Federal Court of Appeal (or a *NAFTA* binational panel) if the exporter so desires. This provides two possible advantages to the exporter. First, the threat of judicial review may convince the CBSA to soften its methodology prior to the Final Determination. Second,

even after the Final Determination, the exporter still has the option to have the CBSA methodology reviewed to ensure that the decision is in compliance with Canadian law. There are also appeal rights after a dumping finding goes into effect, but these procedures may take several years to complete. A challenge of a Final Determination to the Canadian Federal Court of Appeal, however, can be pushed forward at an accelerated rate and completed in as little as six months to a year. A *NAFTA* binational panel proceeding lasts a little less than a year.

2.2 the benefit of undumped prices

The strategies described above become important only in the event of an injury finding by the CITT. Should the CITT make such a finding, the CBSA will proceed to enforce the finding by charging anti-dumping duties in the amount found in the Final Determination. However, exporters who have cooperated in the CBSA investigation and who have been provided with specific normal values (i.e. undumped prices) may export to Canada at or above those undumped prices, without assessment of anti-dumping duty. During the course of a dumping finding, the CBSA will periodically review and re-establish normal values, often on an annual basis. Even exporters who did not participate or cooperate at the initial investigation stage may request that the CBSA provide them with such undumped pricing for sales to Canada. However, the exporter who has been involved in the process from the outset has a significant advantage, since the appropriate accounting methodology employed by the CBSA has already been discussed and established. Furthermore, the mere possibility of judicial review of a Final Determination may tend to limit the CBSA's "creativity", and often leads to a methodology more favourable to the exporter, which can carry forward to subsequent administrative reviews. An exporter who seeks undumped pricing after a dumping finding, also has certain rights of appeal, but these involve two internal CBSA appeals, an appeal to the CITT and then finally, an appeal to the Federal Court; meanwhile, the CBSA's choice of methodology continues to be applied, and an

exporter may find themselves effectively excluded from the Canadian market until the matter is finally resolved.

Where there is anti-dumping protection in Canada, prices will almost always rise. A well prepared exporter with undumped prices will be in a position to re-enter the Canadian market sooner than competitors whose products are subject to anti-dumping duty. It is possible that with higher prices, an exporter may earn greater profits than before, even if overall volume sold declines.

2.3 the audit benefit

Another incidental benefit of participating in the CBSA investigation is that a company can often identify production or administration inefficiencies of which it was previously unaware. Part of the CBSA investigation involves an examination of all costs attributable to the production and sale of goods. This audit procedure can provide useful financial information to a company. In our experience, some examples of inefficiencies discovered in this way include: evidence of significant productivity differences between different plants in the same company, high interest payments where the company had access to lower cost debt, measurement of the amount of material inputs wasted, identification of inaccurate sales documents and customs forms. These benefits are certainly not a reason in themselves to voluntarily become involved in a dumping investigation, but rather are small benefits that may arise once an exporter chooses to become involved.

2.4 information in non-confidential versions

Another important benefit arising from the dumping investigation is the availability of market information in the non-confidential materials. There are two principal sources of such information in a CBSA dumping investigation. First, any party who submits information to the CBSA is required to provide a non-confidential summary of the documents submitted. While these non-confidential versions are heavily censored to omit commercially-

confidential information, there is often information which can be very helpful in the identification of competitors in the Canadian market, the identity of importers and other customers in the Canadian market, and the types of product being shipped, among others.

A second useful source of non-confidential information is the Statement of Reasons which accompanies the Preliminary Determination of dumping and the Final Determination of dumping. These documents provide an overview of the Canadian market and the range of products subject to the investigation. Often, the CBSA will also provide an attached list naming exporters (and their margins of dumping) as well as Canadian importers of the goods in question. This is essentially a listing of competing exporters and possible customers in Canada.

3. the injury investigation

The injury investigation is the second phase of the anti-dumping process in Canada. This is an inquiry conducted by the CITT which begins at the same time that the President of the CBSA releases a Preliminary Determination of dumping. The initial stages of the CITT injury investigation involve the collection of statistical data through questionnaires issued to companies in the Canadian industry, to importers of products from countries that are subject to the preliminary determination of dumping, and to purchasers of those products in the Canadian market. All of the questionnaire responses, as well as representations from all interested parties are placed into the CITT's official record of the proceedings. This information is further divided into the "confidential" and "non-confidential" records. The non-confidential record is available to any interested party who files a one-page document called a "Notice of Appearance". The confidential record contains all information designated as confidential by the parties submitting the information and may only be seen by counsel (usually lawyers), resident in Canada, who have executed a form called the "Declaration and Undertaking" in which the promise is given not to divulge this confidential information. A breach of the Declaration

and Undertaking can lead to severe penalties, though there have been no breaches to date that have warranted these sanctions.

3.1 the pre-hearing staff report

The CITT staff compiles and analyzes all of the statistical information provided to it and produces a "Pre-hearing Staff Report" which provides an analysis of the industrial structure, conduct, performance and other attributes of the industry under consideration. This report is released in both a confidential and non-confidential format. It is the non-confidential Staff Report which may be released to foreign exporters. This document is an important benefit that flows from participation in the CITT proceedings. It can supply information on the nature of the product marketed in Canada, the source and volume of imports from other countries, the identification of particular market segments where the Canadian industry competes, and where it does not compete. In our experience as counsel in CITT injury proceedings, we have often heard our foreign clients remark on the value of this document as a marketing analysis of the Canadian industry and the Canadian market.

3.2 other non-confidential documents

In addition to the Pre-hearing Staff Report, there are many other non-confidential documents which may serve to identify market opportunities in Canada. There are non-confidential segments of questionnaire responses provided by the domestic industry, by importers, and by buyers and users of the product under review. In addition, during the oral hearing process, there are often many non-confidential documents submitted in evidence. These documents include witness statements from participants in the Canadian market, as well as various studies and reports which are public but may not be generally available. All of this information can prove helpful in identifying market niches and market opportunities, even in the event that there is an injury finding which leads to the longer term imposition of anti-dumping duties.

3.3 meeting customers

A further advantage in participating in the CITT injury investigation process, and in the oral hearings in particular, is that for a period ranging up to one week, there is a unique gathering of all participants in the Canadian market (domestic producers, importers, exporters and customers) in one place for the course of the hearings. This opportunity to meet and exchange information, particularly with importers and purchasers, is a valuable marketing opportunity. Of particular interest is the first half of the CITT hearing process, which is dedicated to examination of the case presented by the Canadian industry. During the course of examinations of the Canadian industry's witnesses, there are periodic confidential (or "in-camera") sessions in which everyone but CITT staff, counsel and the witness are excluded. Since it is difficult to judge the length of these in-camera sessions, remaining witnesses and other observers of the public sessions will wait in a lounge outside the CITT hearing room. Our clients inform us that this is a wonderful opportunity to contact potential buyers in Canada on a direct one-to-one basis. We always highly recommend that our foreign clients have a marketing representative available during this stage of the CITT oral hearings.

4. conclusions

The principle aim of foreign exporters who actively participate in the CITT injury investigation is to obtain a "no-injury" finding by the CITT and thus avoid the long-term imposition of anti-dumping duties, or to obtain a special exclusions for their product on the ground that their special qualities are not available from Canadian production. This paper has endeavoured to demonstrate that there are other important but less tangible benefits from participating in the Canadian anti-dumping proceedings, both at the CBSA and CITT level. Participation at the CBSA level can provide a competitive advantage over other exporters where undumped prices can be obtained from the CBSA that permit continued sales in the Canadian market. Participation in the CITT injury

proceedings can provide valuable information on marketing opportunities in Canada.

Generally, if a foreign exporter or importer in Canada wishes to avoid the imposition of antidumping duties, active participation in these proceedings is the only way to defeat the attempt by the Canadian industry to obtain this special kind of tariff protection. We hope that this paper has demonstrated that a well-prepared exporter may find that even in the face of such tariff protection, there may be a profitable silver lining to the cloud of anti-dumping duties.

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.

© McMillan LLP 2013