



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2016-004R

Certain Fabricated Industrial Steel
Components

*Finding and reasons issued
Friday, June 26, 2020*

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IN THE MATTER OF the recommencement of an inquiry pursuant to section 44 of the *Special Import Measures Act*;

AND FURTHER TO a decision of the Federal Court of Appeal, dated February 28, 2020, which set aside the decision of the Canadian International Trade Tribunal in Inquiry No. NQ-2016-004, dated May 25, 2017, insofar as it relates to the product exclusion requested by Fluor Canada Ltd., the product exclusion requested by Suncor Energy Inc. and Fort Hills Energy L.P., and the product exclusion requested by LNG Canada Development Inc.

CERTAIN FABRICATED INDUSTRIAL STEEL COMPONENTS

RE-DETERMINATION AND FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 44 of the *Special Import Measures Act*, has recommenced its inquiry to re-determine its decision regarding certain exclusions.

Further to its inquiry in this matter, the Canadian International Trade Tribunal's re-determination on remand is that its finding dated May 25, 2017, will be revised to read as follows:

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of fabricated structural steel and plate-work components of buildings, process equipment, process enclosures, access structures, process structures, and structures for conveyancing and material handling, including steel beams, columns, braces, frames, railings, stairs, trusses, conveyor belt frame structures and galleries, bents, bins, chutes, hoppers, ductwork, process tanks, pipe racks and apron feeders, whether assembled or partially assembled into modules, or unassembled, for use in structures for: 1. oil and gas extraction, conveyance and processing; 2. mining extraction, conveyance, storage, and processing; 3. industrial power generation facilities; 4. petrochemical plants; 5. cement plants; 6. fertilizer plants; and 7. industrial metal smelters; but excluding electrical transmission towers; rolled steel products not further worked; steel beams not further worked; oil pump jacks; solar, wind and tidal power generation structures; power generation facilities with a rated capacity below 100 megawatts; goods classified as "prefabricated buildings" under HS Code 9406.00.90.30; structural steel for use in manufacturing facilities used in applications other than those described above; and products covered by *Certain Fasteners* (RR-2014-001), *Structural Tubing* (RR-2013-001), *Carbon Steel Plate (III)* (RR-2012-001), *Carbon Steel Plate (VII)* (NQ-2013-005) and *Steel Grating* (NQ-2010-002); originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain, and the subsidizing of the above-mentioned goods originating in or exported from the People's Republic of China, have caused injury or are threatening to cause injury.

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated April 25, 2017, that the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain have been dumped and that the above-mentioned goods from the People's Republic of China have been subsidized, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping of the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea (excluding those goods exported by Hanmaek Heavy Industries Co., Ltd.) and the Kingdom of Spain (excluding those

goods exported by Cintasa, S.A.), and the subsidizing of the above-mentioned goods from the People's Republic of China have caused injury to the domestic industry.

Furthermore, the Canadian International Trade Tribunal excludes from its finding goods imported within the 2017 calendar year by Andritz Hydro Canada Inc. from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

Furthermore, further to the decision of the Federal Court of Appeal dated February 28, 2020, which set aside the Canadian International Trade Tribunal's finding dated May 25, 2017, insofar as it relates to the product exclusion requested by Fluor Canada Ltd., the product exclusion requested by Suncor Energy Inc. and Fort Hills Energy L.P., and the product exclusion requested by LNG Canada Development Inc., the Canadian International Trade Tribunal excludes the following goods from its finding, provided that these goods are subject goods:

1) FISC which is contained in modules containing FISC and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables and valves) that are interconnected and assembled together in a permanent manner, with the gross weight of each individual module exceeding 250 tonnes at the time of importation, and with the non-FISC elements accounting for at least 30% of the gross weight of the module at the time of importation, for use in projects located along the coastline of British Columbia;

2) assembled FISC, including structural supporting components, such as skids, columns, and bracing structures, where:

A. the FISC constitutes no more than 50% of the weight of any imported mechanical equipment or pressure equipment as herein defined;

B. the FISC weighs no more than 10,000 kg; and

C. the FISC is permanently attached to any of the following (although any finished unit may be partially disassembled at importation for the sole purpose of shipping):

i. Mechanical equipment, meaning tested engineered mechanical equipment imported as a finished unit in its final operations configuration, designed to meet particular parameters of performance specified by the end user. Mechanical equipment includes but is not limited to hydraulic power units, air compressor units, pump houses and pump packages, tailings pump barges, dredges, transformers, lube, skids, prime movers, safety showers, chemical injection units, water and waste treatment units, aerial coolers, generator units, vacuum equipment and natural gas heater units.

ii. Pressure Equipment: Pressure equipment means equipment that requires Alberta Boiler Safety Association (or other provincial equivalent) design registration, including pressure vessels, packaged boilers, heat exchangers, bullets and condensers.

3) FISC incorporated into any of the following:

A. An electrical house meaning a prefabricated walk-in modular outdoor enclosure to house medium voltage switchgear imported as a finished unit in its final operational configuration, where the electrical house meets Canadian Standards Association requirements prior to importation;

B. A skid-mounted sub-station meaning a prefabricated walk-in modular outdoor enclosure to house electrical switchgear imported as a finished unit in its final operational configuration, where the sub-station meets Canadian Standards Association requirements prior to importation;

but not excluding goods that meet the foregoing definition that also contain mechanical or process equipment.

Jean Bédard

Jean Bédard
Presiding Member

Rose Ann Ritcey

Rose Ann Ritcey
Member

Serge Fréchette

Serge Fréchette
Member

Place of Hearing: Ottawa, Ontario

Tribunal Panel: Jean Bédard, Presiding Member
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STATEMENT OF REASONS

INTRODUCTION

[1] This inquiry was recommenced in part as a result of the decision of the Federal Court of Appeal (the FCA), dated February 28, 2020,¹ which remanded back to the Canadian International Trade Tribunal (the Tribunal) its finding in NQ-2016-004, dated May 25, 2017, regarding the matter of the denial of certain exclusion requests for re-determination consistent with its reasons.

[2] The relevant reasons of the FCA stated the following:

In our view, the Tribunal's decision on the exclusion requests is unreasonable. The only reason explicitly stated by the Tribunal for denying the requests was that they may include goods that are not subject goods. The Tribunal described this as a problem of jurisdiction.

In our view, the difficulty identified by the Tribunal as jurisdictional is in reality a minor technical matter. For example, LNG Canada [Development Inc.] suggested that the difficulty could have easily been avoided by including in the exclusion a phrase such as "if the goods are subject goods . . .". It was incumbent on the Tribunal in these circumstances to consider ways in which the problem could be addressed. It appears that the Tribunal did not do so, and accordingly its consideration of the exclusion requests was unreasonable.²

[3] Following the receipt of the FCA's decision, the Tribunal recommenced in part its inquiry pursuant to section 44 of the *Special Import Measures Act*³ and sought submissions from the parties regarding the above issue. The following is a brief summary of submissions of the parties.

[4] Fluor Canada Ltd. (Fluor) asked that additional language be added to its exclusion request, i.e. "If the modules are determined to be subject goods". Originally, its exclusion request was for:

FISC contained in modules containing FISC and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables and valves) that are interconnected and assembled together in a permanent manner, with the gross weight of each individual module exceeding 250 metric tonnes at the time of importation, and with the non-FISC elements accounting for at least 30% of the module's gross weight at the time of importation, for use in projects located along the coastline of British Columbia.

[5] Suncor Energy Inc. and Fort Hills Energy L.P. (together Suncor) asked for additional language only in the alternative, and proposed wording such as adding "if they are subject goods", or "in the event they are subject goods". Its two exclusion requests were for:

a) . . . assembled FISC components,⁴ including structural supporting components such as skids, columns, and bracing structures, where:

¹ *Fluor Canada Ltd. et al. v. Supreme Group et al.* (28 February 2020), 2020 FCA 58 [FCA decision].

² FCA decision at paras. 42-43.

³ R.S.C., 1985, c. S-15.

⁴ The term "components" will not be included in the Tribunal's consideration of the wording of the relevant exclusion, as it is unnecessary (fabricated industrial steel components or FISC suffices as a short-form description of the subject goods). As well, the term "components" may be confusing as it could describe components of (FIS)Components, i.e. *parts of FISC*, which may not be subject goods.

- A. the FISC constitutes no more than 50% of the weight of any imported mechanical equipment or pressure equipment as herein defined;
- B. the FISC weighs no more than 10,000 kg; and
- C. the FISC is permanently attached to any of the following (although any finished unit may be partially disassembled at importation for the sole purpose of shipping):
 - 1. Mechanical equipment, meaning tested engineered mechanical equipment imported as a finished unit in its final operations configuration, designed to meet particular parameters of performance specified by the end user. Mechanical equipment includes but is not limited to hydraulic power units, air; compressor units, pump houses and pump packages, tailings pump barges, dredges, transformers, lube, skids, prime movers, safety showers, chemical injection units, water and waste treatment units, aerial coolers, generator units, vacuum equipment and natural gas heater units.
 - 2. Pressure Equipment: Pressure equipment means equipment that requires Alberta Boiler Safety Association (or other provincial equivalent) design registration, including pressure vessels, packaged boilers, heat exchangers, bullets and condensers.

. . . FISC components incorporated into any of the following:

- A. An electrical house meaning a prefabricated walk-in modular outdoor enclosure to house medium voltage switchgear imported as a finished unit in its final operational configuration, where the electrical house meets Canadian Standards Association requirements prior to importation;
- B. A skid-mounted sub-station meaning a prefabricated walk-in modular outdoor enclosure to house electrical switchgear imported as a finished unit in its final operational configuration, where the sub-station meets Canadian Standards Association requirements prior to importation;

but not excluding goods that meet the foregoing definition that also contain mechanical or process equipment.

[6] The Canadian Institute of Steel Construction (CISC), on behalf of the domestic producers, advocated granting the exclusion request by Suncor as consented to and, in the alternative, also granting the Fluor exclusion as consented to (and in further alternative granting both of these with additional language “if the goods are subject goods”). CISC argued that the Fluor and the LNG Canada Development Inc. (LNG Canada) exclusion requests are now moot by virtue of the Remission Order for duties on subject goods destined for LNG Canada’s Kitimat project.⁵

[7] LNG Canada did not participate in the current phase of the recommended inquiry. Its exclusion request was for “modules containing fabricated industrial steel components (‘FISC’) and goods other than FISC (including but not limited to piping industrial process equipment or machinery, cables, measurement equipment and valves) that are interconnected and assembled together in a permanent manner for use in the LNG Canada Project at Kitimat British Columbia.”

⁵ This Remission Order was made after the Tribunal’s finding and after the FCA’s hearing: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-297/FullText.html>.

TRIBUNAL'S ANALYSIS ON REMAND

[8] The FCA clearly indicated that the sole error of the Tribunal was its omission, in light of the consent of the domestic industry to the granting of the exclusions, to consider a practical approach to resolving the difficulties which it had identified in formulating the wording of the exclusions. The existence of the consent by the domestic industry was central to the decision of the FCA.

[9] At the outset, it is important to indicate that, despite the indications to the contrary by the FCA,⁶ the Tribunal's record shows that domestic producers did *not* consent to the entirety of LNG Canada's request. They opposed and argued against the granting of that request on the basis that they could produce the relevant subject goods where their weight did not exceed 250 tonnes.⁷ The Tribunal's record indicates that the exclusion requested by Fluor covered part of LNG Canada's requirements, i.e. for goods exceeding 250 tonnes for LNG Canada's project, but did not cover its requirements for an exclusion for goods *not* exceeding 250 tonnes destined for its project.

[10] As well, the FCA decision does not prevent the Tribunal from now explicitly stating other reasons for the grant or denial of any of these requests.

Exclusion sought by Suncor

[11] The exclusion should be granted for goods described in paragraph 39(a) of Suncor's submission, with the addition of the words "provided that these goods are subject goods". The additional language to be added is necessary because it is consistent with the previous assertions of the Tribunal that it cannot determine whether these are subject goods. If there is no additional language, it could be inferred that the Tribunal considers these to be subject goods, which is not necessarily the case.

Exclusion sought by Fluor

[12] For the reasons noted above, the exclusion initially requested by Fluor, i.e. the exclusion for goods described during the inquiry and for which parties represented to the Tribunal that there was an agreement, should be granted *with* the addition of the words "provided that these goods are subject goods". The description of the goods covered by the exclusion that is being granted must be limited to FISC only as the subject goods of the inquiry were FISC and not "modules".

[13] The FCA's remand to the Tribunal of its initial decision not to grant the exclusion requested by Fluor has the effect of situating the issue back to the context that existed at the time of the inquiry. In these circumstances, the Tribunal finds that it would be inappropriate, as suggested by the domestic industry, to consider the existence of the Remission Order, a measure that was adopted after the Tribunal's inquiry was completed and its decision rendered, for the purpose of determining whether the request by Fluor is moot. The Tribunal recognizes that the Remission Order is a statutory instrument that can be judicially noticed and considered. The fact remains, however, that the Remission Order is an *a posteriori* factual consideration, i.e. one which would not have been considered by the Tribunal during its original proceeding. Further, the Remission Order is not strictly dispositive of an exclusion request.

⁶ See FCA Reasons at paras. 3, 36-37.

⁷ See, *inter alia*, the Tribunal's public record regarding LNG Canada's exclusion: Exhibits NQ-2016-004-26.06, NQ-2016-004-28.01 (see especially Exhibit NQ-2016-004-28.01D) and NQ-2016-004-33.06; *Transcript of Public Evidence* at 523; *Transcript of Public Argument* at 736-745, 747.

[14] Most importantly, the Remission Order does not cover all of the goods sought to be excluded by Fluor from the Tribunal's finding.⁸ Thus, the grant of the exclusion is still relevant in a practical sense.

Exclusion sought by LNG Canada

[15] During the original inquiry, LNG Canada requested an exclusion for:

Modules containing fabricated industrial steel components ("FISC") and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables, measurement equipment and valves) that are interconnected and assembled together in a permanent manner, for use in the LNG Canada Project at Kitimat British Columbia.⁹

[16] In its Product Exclusion Request Form, LNG Canada provides the following rationale for its request:

Based upon the investigation that was undertaken, the domestic industry does not appear to have the capability of producing modules of sufficient number and scale to fulfill the needs of the LNGC Project.¹⁰

[17] In the same paragraph, LNG Canada added:

However, LNGC recognizes that there may be claims by the domestic industry that it is capable of fulfilling some small component of the work, particularly for the smaller modules. LNGC reserves the right to amend its exclusion request accordingly.¹¹

[18] First, the Tribunal notes that the LNG Canada exclusion request seeks an exclusion for *modules* containing the subject goods. The exclusion is not directly addressing the subject goods, which are FISC. The Tribunal cannot grant an exclusion for goods that are not the subject matter of an inquiry and, therefore, cannot grant the exclusion as presented by LNG Canada.

[19] The Tribunal also notes that LNG Canada's exclusion request was not consented in its entirety by the domestic industry. During the final argument, counsel for the domestic industry indicated that it had consented to an exclusion that would cover FISC in modules over 250 tonnes, under certain conditions.¹² While there was no oral or written agreement presented by the parties to the Tribunal with regard to that portion of LNG Canada's exclusion request, the Tribunal takes note that such consent was indicated verbally by counsel for the domestic industry.

[20] For the reasons that follow, the Tribunal finds that it is not necessary to grant a separate exclusion to address the portion of LNG Canada's request which had been consented to by the domestic industry.

⁸ The Remission Order covers two specific projects in British Columbia, whereas the Fluor exclusion request is not so limited and covers "projects located along the coastline of British Columbia".

⁹ Exhibit NQ-2016-004-26.06, Vol. 1.3 at 225.

¹⁰ Exhibit NQ-2016-004-26.06, Vol. 1.3 at 230 (para. 25).

¹¹ Exhibit NQ-2016-004-26.06, Vol. 1.3 at 230 (para. 25).

¹² *Transcript of Public Hearing* at 747.

[21] The exclusion granted above to Fluor¹³ is generic, i.e. it is not restricted just to Fluor. The exclusion covers FISC included in modules weighing more than 250 tonnes. The exclusion consented to between Fluor and the domestic industry also includes an additional condition related to the minimum quantity of the non-FISC elements that must be included in the modules.

[22] Although LNG Canada's exclusion request is for "modules", it indicates that these modules include *FISC and goods other than FISC*. The Tribunal finds that the additional condition is reasonable. It ensures that there is more than a token amount of "goods other than FISC" in the large modules covered by the exclusion and they will not turn out to be assembled FISC by another name. It offers an additional degree of protection to the domestic industry against a future injury. As a result, the Tribunal finds that the exclusion already granted to Fluor adequately covers the portion of LNG Canada's request that was consented by the domestic industry.

[23] As indicated above, LNG Canada foresaw that the domestic industry may claim that it is "capable of fulfilling some small component of the work, particularly for the smaller modules".¹⁴ LNG Canada said that it reserved the right to amend its exclusion request accordingly.¹⁵ The domestic industry presented extensive evidence that it was able to produce the like goods for inclusion in modules.¹⁶ By consenting to the exclusion request for FISC contained in modules with a gross weight exceeding 250 tonnes only, the domestic industry indicated *a contrario* that it was capable to produce, assemble and deliver in Canada FISC incorporated into modules weighing 250 tonnes or less just as LNG Canada had anticipated.

[24] The Tribunal notes that there is no evidence on record that the domestic industry cannot produce the FISC that would be "interconnected and assembled together" in the modules. Upon review of the evidence, the Tribunal is satisfied that the domestic industry can satisfy the needs of the market segment that is not covered by the exclusions that have been consented to and granted by the Tribunal. The Tribunal finds that granting an additional exclusion for FISC contained in modules weighing 250 tonnes or less would materially injure the domestic industry.

[25] For those reasons, LNG Canada's exclusion request is denied and the initial decision of the Tribunal in respect of this exclusion request remains unchanged.

[26] The Tribunal notes that, unlike Suncor and Fluor, LNG Canada did not participate in the present proceeding. The Tribunal cannot and will not presume as to the reasons as to why LNG Canada did not do so, although it takes judicial notice of the fact that LNG Canada appears to have taken a parallel approach in order to obtain the relief that it sought. LNG Canada sought and obtained the Remission Order for imports of FISC that are destined to its project. As a result, those goods can

¹³ FISC which is contained in modules containing FISC and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables and valves) that are interconnected and assembled together in a permanent manner, with the gross weight of each individual module exceeding 250 tonnes at the time of importation, and with the non-FISC elements accounting for at least 30% of the gross weight of the module at the time of importation, for use in projects located along the coastline of British Columbia.

¹⁴ See footnote 11 above.

¹⁵ The Tribunal notes that despite the evidence presented by the domestic industry, LNG Canada did not amend its request.

¹⁶ Exhibits NQ-2016-004-26.06, NQ-2016-004-28.01D, NQ-2016-004-29.01C (protected), NQ-2016-004-29.01A (protected), NQ-2016-004-35.01, and NQ-2016-004-36.01 (protected); *Transcript of Public Hearing* at 523-527; *Transcript of In Camera Hearing* at 332-333.

be imported into Canada free of duties that might otherwise apply as a result of the initial decision of the Tribunal. LNG Canada has thus obtained the relief that it sought.

CONCLUSIONS

[27] Having regard to the foregoing, the Tribunal reaches the conclusions set out below on reconsideration of this matter.

[28] The Tribunal's re-determination on remand is that its finding dated May 25, 2017, will be revised to read as follows:

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of fabricated structural steel and plate-work components of buildings, process equipment, process enclosures, access structures, process structures, and structures for conveyancing and material handling, including steel beams, columns, braces, frames, railings, stairs, trusses, conveyor belt frame structures and galleries, bents, bins, chutes, hoppers, ductwork, process tanks, pipe racks and apron feeders, whether assembled or partially assembled into modules, or unassembled, for use in structures for: 1. oil and gas extraction, conveyance and processing; 2. mining extraction, conveyance, storage, and processing; 3. industrial power generation facilities; 4. petrochemical plants; 5. cement plants; 6. fertilizer plants; and 7. industrial metal smelters; but excluding electrical transmission towers; rolled steel products not further worked; steel beams not further worked; oil pump jacks; solar, wind and tidal power generation structures; power generation facilities with a rated capacity below 100 megawatts; goods classified as "prefabricated buildings" under HS Code 9406.00.90.30; structural steel for use in manufacturing facilities used in applications other than those described above; and products covered by *Certain Fasteners* (RR-2014-001), *Structural Tubing* (RR-2013-001), *Carbon Steel Plate (III)* (RR-2012-001), *Carbon Steel Plate (VII)* (NQ-2013-005) and *Steel Grating* (NQ-2010-002); originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain, and the subsidizing of the above-mentioned goods originating in or exported from the People's Republic of China, have caused injury or are threatening to cause injury.

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated April 25, 2017, that the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain have been dumped and that the above-mentioned goods from the People's Republic of China have been subsidized, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping of the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea (excluding those goods exported by Hanmaek Heavy Industries Co., Ltd.) and the Kingdom of Spain (excluding those goods exported by Cintasa, S.A.), and the subsidizing of the above-mentioned goods from the People's Republic of China have caused injury to the domestic industry.

Furthermore, the Canadian International Trade Tribunal excludes from its finding goods imported within the 2017 calendar year by Andritz Hydro Canada Inc. from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

Furthermore, further to the decision of the Federal Court of Appeal dated February 28, 2020, which set aside the Tribunal's finding dated May 25, 2017, insofar as it relates to the product exclusion requested by Fluor Canada Ltd., the product exclusion requested by Suncor Energy Inc. and Fort Hills Energy L.P., and the product exclusion requested by LNG Canada Development Inc., the Canadian International Trade Tribunal excludes the following goods from its finding, provided that these goods are subject goods:

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2) assembled FISC, including structural supporting components, such as skids, columns, and bracing structures, where:

A. the FISC constitutes no more than 50% of the weight of any imported mechanical equipment or pressure equipment as herein defined;

B. the FISC weighs no more than 10,000 kg; and

C. the FISC is permanently attached to any of the following (although any finished unit may be partially disassembled at importation for the sole purpose of shipping):

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ii. Pressure Equipment: Pressure equipment means equipment that requires Alberta Boiler Safety Association (or other provincial equivalent) design registration, including pressure vessels, packaged boilers, heat exchangers, bullets and condensers.

3) FISC incorporated into any of the following:

A. An electrical house meaning a prefabricated walk-in modular outdoor enclosure to house medium voltage switchgear imported as a finished unit in its final operational configuration, where the electrical house meets Canadian Standards Association requirements prior to importation;

B. A skid-mounted sub-station meaning a prefabricated walk-in modular outdoor enclosure to house electrical switchgear imported as a finished unit in its final operational configuration, where the sub-station meets Canadian Standards Association requirements prior to importation;

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