



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2010-063

Toyota Tsusho America Inc.

v.

President of the Canada Border
Services Agency

*Order and reasons issued
Wednesday, April 27, 2011*

TABLE OF CONTENTS

ORDERi
STATEMENT OF REASONS1

IN THE MATTER OF an appeal filed by Toyota Tsusho America Inc. on February 22, 2011, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a request filed by Toyota Tsusho America Inc. on March 7, 2011, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, and written representations filed by the President of the Canada Border Services Agency on March 21, 2011, and Toyota Tsusho America Inc. on March 25, 2011, for the issuance of subpoenas in the context of an examination for discovery of certain individuals, for the production of documents and for the resolution of issues concerning the Canadian International Trade Tribunal's jurisdiction.

BETWEEN

TOYOTA TSUSHO AMERICA INC.

Appellant

AND

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

Respondent

ORDER

Having considered the representations made by the parties on the aforementioned request, the Canadian International Trade Tribunal hereby disposes of said request as follows.

The Canadian International Trade Tribunal reserves judgment on Toyota Tsusho America Inc.'s request for the production of documents and the issuance of subpoenas until the President of the Canada Border Services Agency has had the opportunity to file its brief, which is to contain, pursuant to paragraph 35(2)(d) of the *Canadian International Trade Tribunal Rules*, a copy of any document that may be useful in explaining or supporting the appeal and any other information relating to the appeal that the Canadian International Trade Tribunal requires. At that time, the Canadian International Trade Tribunal will afford the parties an opportunity to make further submissions in respect of this request.

The Canadian International Trade Tribunal does not have the authority to consider, in appeals pursuant to section 61 of the *Special Import Measures Act*, which proceed *de novo*, issues of natural justice and procedural fairness relating to the manner in which the President of the Canada Border Services Agency's decision was reached. As such, the Canadian International Trade Tribunal will not admit evidence or hear argument at the hearing on the manner in which the President of the Canada Border Services Agency's decision was reached. However, evidence and argument relating to the reliability of oral testimony and written evidence on the record remain relevant.

The Canadian International Trade Tribunal does not have the authority to grant an injunction to prevent the President of the Canada Border Services Agency from assessing duties in the event that the Canadian International Trade Tribunal determines that the goods in issue are subject goods.

Diane Vincent

Diane Vincent
Presiding Member

Serge Fréchette

Serge Fréchette
Member

Pasquale Michaele Saroli

Pasquale Michaele Saroli
Member

Dominique Laporte

Dominique Laporte
Secretary

STATEMENT OF REASONS

1. On March 7, 2011, the Canadian International Trade Tribunal (the Tribunal) received a request from Toyota Tsusho America Inc. (Toyota) for the Tribunal to:

- grant Toyota the right to an examination for discovery in respect of four employees of the Canada Border Services Agency (CBSA) and to issue subpoenas in the context of this examination;
- order the production, by the CBSA, of all documents and information in its possession concerning the importation of steel plate containing boron;
- advise whether it has the jurisdiction to consider issues of natural justice and procedural fairness in an appeal pursuant to section 61 of the *Special Import Measures Act*,¹ and
- advise whether it has the authority to issue an injunction to prevent the CBSA from assessing duties on the goods in issue should the Tribunal determine that these products are properly subject to the Tribunal's findings.

2. First, turning to Toyota's request for an examination for discovery and the production of the CBSA's documents, the Tribunal is satisfied that Toyota knows the case that it has to meet in order to prepare its brief. Moreover, the Tribunal is satisfied that the *Canadian International Trade Tribunal Rules*² provide for adequate documentary disclosure for the purposes of this appeal. Pursuant to rule 35 of the *Rules*, the CBSA is required to serve and file a detailed written response to Toyota's brief, which must include all material facts, arguments and supporting documents upon which it intends to rely. This level of disclosure would ordinarily be sufficient to allow Toyota to know the case that it has to meet prior to the hearing.

3. As indicated by the Federal Court in *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*,³ appeals before the Tribunal proceed *de novo*. As such, the parties are not bound by their previous submissions and are entitled to raise new arguments and introduce new evidence in appeals before the Tribunal. The Tribunal therefore relies on the parties, having reference to the requirements found in the *Rules*, to file all relevant information with the Tribunal in order to allow it to properly adjudicate appeals.

4. Further, the Tribunal notes that Toyota will have the opportunity to cross-examine the CBSA's witnesses, including any expert witnesses, at the hearing.

5. On this basis, the Tribunal has decided to reserve judgment on Toyota's request for the production of documents and the issuance of subpoenas until the CBSA has filed its brief and supporting documentation and the parties have been afforded an opportunity to make further submissions in respect of the request.

6. Second, turning to the Tribunal's jurisdiction, its interpretation of its delegated authority under its enabling legislation (and other legislation conferring jurisdiction on it, such as *SIMA*) is that it does not have the authority to consider, in appeals pursuant to section 61 of *SIMA*, issues of natural justice and procedural fairness relating to the manner in which the CBSA's decision was reached.

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

2. S.O.R./91-499 [*Rules*].

3. 2010 FC 78 (CanLII) at para. 24.

7. The Tribunal has held, on numerous occasions, that it lacks jurisdiction to address issues of fairness or equity.⁴

8. Appeals before the Tribunal proceed *de novo*. The Tribunal will carefully evaluate the evidence presented by each party and reach its own determination with respect to whether the goods in issue are subject goods. In doing so, the Tribunal strives to maintain a process that is procedurally fair with respect to its own *de novo* proceedings and that respects the principles of natural justice. As such, the eventual result of this appeal will be a new determination with respect to whether the goods in issue are subject goods, which has been made in a fair and transparent manner.

9. Therefore, for the purposes of this appeal, the Tribunal is of the view that questions relating to the degree of procedural fairness accorded to Toyota by the CBSA in reaching its decision regarding whether the goods in issue are subject goods in those prior proceedings are irrelevant. The issue before the Tribunal is the correctness of the CBSA's decision, and the Tribunal will not admit evidence or hear argument on the manner in which the CBSA's decision was reached at the hearing. However, evidence and argument relating to the reliability of oral testimony and written evidence on the record remain relevant.

10. Finally, with respect to the Tribunal's authority to grant an injunction to prevent the CBSA from assessing duties in the event that the Tribunal determines that goods in issue are subject goods, the Tribunal does not have the authority to issue such an injunction.

11. Subsection 3(1) of *SIMA* provides that anti-dumping duties *shall* be levied, collected and paid in the case of dumped goods imported into Canada in respect of which the Tribunal has made an order or finding that goods of the same description have caused injury or retardation or have threatened to cause injury. As subsection 3(1) creates a mandatory obligation to levy and collect anti-dumping duties, and absent an express statutory provision conferring such jurisdiction upon it, the Tribunal does not have the authority to alter or waive the liability of duties under *SIMA*.

Diane Vincent

Diane Vincent
Presiding Member

Serge Fréchette

Serge Fréchette
Member

Pasquale Michaele Saroli

Pasquale Michaele Saroli
Member

4. *Gammon Trading Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (21 April 2004), AP-2003-012 (CITT) at para. 11; *Richards Packaging Inc. and Duopac Packaging Inc. v. Deputy M.N.R.* (10 February 1999), AP-98-007 and AP-98-010 (CITT) at 5-6.