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 issued
Tuesday, August 30, 2011

Reasons issued
Tuesday, September 6, 2011

Canada

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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 August 8, 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 August 9, 2011, and Toyota Tsusho America Inc. on August 12, 2011, for the issuance of subpoenas to summon certain persons to attend the hearing to be held by the Canadian International Trade Tribunal in this appeal and for the production of documents.

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 grants Toyota Tsusho America Inc.'s request for the issuance of subpoenas to Mr. Darryl Larson, Ms. Micheline Vanier, Mr. Paul Loo, Ms. Francine Bouchard and Ms. Caterina Ardito-Toffolo so that they may give evidence concerning the issue of whether the goods imported by Toyota Tsusho America Inc. are of the same description as the goods described in the Canadian International Trade Tribunal's order in Expiry Review No. RR-2007-001 in respect of certain hot-rolled carbon steel plate. However, the Canadian International Trade Tribunal will not admit any evidence at the hearing on the manner in which the President of the Canada Border Services Agency's decision was reached.

The Canadian International Trade Tribunal dismisses Toyota Tsusho America Inc.'s request for the production of documents.

Jason W. Downey
Jason W. Downey
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. These proceedings arise from an appeal filed by Toyota Tsusho America Inc. (Toyota) on February 22, 2011, pursuant to subsection 61(1) of the *Special Import Measures Act*,[1] from a decision by the President of the Canada Border Services Agency (CBSA). The President of the CBSA decided that goods imported by Toyota were of the same description as the goods described in the Tribunal's order in Expiry Review No. RR-2007-001 and, therefore, were subject to anti-dumping duties.

2. On March 7, 2011, Toyota filed a request with the Tribunal, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,[2] for, *inter alia*, the issuance of subpoenas to four employees of the CBSA, an order that the President of the CBSA produce certain documents and direction on whether the Tribunal had jurisdiction to consider issues of natural justice and procedural fairness in relation to the manner in which the President of the CBSA's decision was made.

3. On April 27, 2011, after having considered representations made by the parties, the Tribunal held that it did not have the authority to consider issues of natural justice and procedural fairness relating to the manner in which the President of the CBSA's decision was reached and, therefore, would not admit evidence or hear argument at the hearing on the manner in which such decision was reached. The Tribunal added that ". . . evidence and argument relating to the reliability of oral testimony and written evidence on the record remain relevant."

4. However, the Tribunal reserved its decision on the merits of the request for subpoenas and the production of documents to allow the President of the CBSA the opportunity to file his brief on the merits of the appeal. The Tribunal also indicated that the parties would be provided an opportunity to make further submissions in respect of the request once the President of the CBSA had filed his brief.

5. The President of the CBSA filed his brief on June 27, 2011.

6. On August 8, 2011, Toyota filed a new request for the issuance of subpoenas to the same four employees of the CBSA referred to in its first request, as well as to the director of the CBSA who, pursuant to a delegation instrument, had made the decision on behalf of the President of the CBSA which is the subject matter of this appeal. Toyota also renewed its request for an order for disclosure. The Tribunal received written submissions from Toyota in relation to this new request on August 8 and 12, 2011, and a reply from the President of the CBSA on August 9, 2011. The President of the CBSA objected to the issuance of the subpoenas and the production of the documents.

7. On August 30, 2011, after having considered these submissions, the Tribunal agreed to issue the subpoenas on the condition that the testimony of the five employees of the CBSA be limited to the issue of whether the goods imported by Toyota were of the same description as the goods described in the Tribunal's order in Expiry Review No. RR-2007-001, and not in respect of the manner in which the President of the CBSA had reached the decision which is the subject of this appeal, and dismissed the request for the President of the CBSA to produce the requested documents. The reasons for these decisions follow.

8. First, concerning the subpoenas, the President of the CBSA makes it clear that he does not intend to call any of the five employees in question to testify at the hearing. It is also clear that Toyota wishes to question these persons. That being the case, Toyota's only resort is to ask the Tribunal to summon the persons to appear at the hearing by way of subpoenas. Indeed, subrule 20(2) of the *Rules* specifically allows parties to request subpoenas from the Tribunal.

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1. R.S.C. 1985, c. S-15.
2. S.O.R./91-499 [*Rules*].

9. Pursuant to subrule 20(1) of the *Rules*, "[t]he Tribunal may, on its own initiative or at the request of any party, summon before it by subpoena any person to attend a hearing and require that person to give evidence on oath or affirmation and to produce documents or other things." The use of the word "may", as opposed to the words "shall" or "must", appears to confer a certain discretionary authority upon the Tribunal. Thus, the issuance of subpoenas is not automatic, and the Tribunal may refuse to issue them as appropriate.

10. The Tribunal notes that, in similar circumstances, the Federal Court considers the following: (1) whether there is a privilege or other legal rule which applies such that the witness should not be compelled to testify; and (2) whether the evidence is relevant and significant in regard to the issues that the Federal Court must decide.[3]

11. Accordingly, barring any legal rule (e.g. solicitor-client privilege), a party should be entitled to call upon any person to testify if that person's evidence would probably be material to the issues in dispute.[4]

12. In the present case, there is no apparent legal rule that would prohibit the employees of the CBSA from testifying before the Tribunal. Therefore, the decisive question is whether their evidence would probably be material.

13. According to Toyota, the Tribunal should issue the subpoenas in this case because the appearance of the five employees of the CBSA at the hearing is necessary to test the reliability of written evidence on the record and to respond to various claims made in the respondent's brief. The President of the CBSA counters that the reliability of the evidence of these employees is not an issue before the Tribunal because the President of the CBSA is not relying upon any of their evidence in this appeal *de novo*.

14. The Tribunal recognizes that the President of the CBSA does not intend to rely upon the evidence of the five employees in question, but that is not determinative, as it is still open to Toyota to call them as witnesses to elicit *viva voce* evidence that could cast doubt on the reliability of the written evidence on the record.

15. Therefore, to the extent that the testimony of the five employees would be within the parameters that the Tribunal has already established, the Tribunal is satisfied that it would probably be material. The Tribunal wishes to emphasize that, while it may be giving Toyota the benefit of the doubt in issuing these subpoenas, it has every intention of ensuring that Toyota respects these parameters during the hearing, and it will not permit any questions that stray beyond them.

16. Turning to the documents, the Tribunal notes that paragraph 35(2)(*d*) of the *Rules* provides that a respondent's brief shall include ". . . 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 Tribunal requires . . . ."

17. Toyota argues for a broad interpretation of this provision whereby the President of the CBSA must disclose all documents that could be useful in explaining or supporting the appeal, not just those that are relevant. For his part, the President of the CBSA claims that Toyota is on a "fishing expedition" and points out that, if the Tribunal were to accept such a broad interpretation, the CBSA would be required to add approximately 1,500 pages to the record, most of which Toyota already has in a redacted version obtained following an access to information request.

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3. *Laboratoires Servier v. Apotex Inc.*, 2008 FC 321 (CanLII).
4. *Ibid.*

18. The Tribunal does not agree with Toyota's interpretation because it relies on only part of the wording in paragraph 35(2)(*d*) of the *Rules*, i.e. ". . . any document that may be useful in explaining or supporting the appeal . . . ." However, the paragraph goes on to say ". . . and any other information relating to the appeal that the Tribunal requires . . . ." These additional words imply that the documents should be both useful and relative to the appeal. That is, they ought to be relevant to the appeal. This conclusion is consistent with the practice of the federal courts which may order a party to disclose documents that are "relevant".[5]

19. That being the case, the Tribunal is not satisfied that Toyota has demonstrated how these documents, specifically or *en masse*, are relevant to the appeal. Therefore, the request for the production of these documents is denied.

Jason W. Downey
Jason W. Downey
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Stephen A. Leach
Stephen A. Leach
Member

5. See, for example, rule 225 of the *Federal Courts Rules*, S.O.R./98-106.