Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. EA-2014-001

Canadian Tire Corporation, Limited

v.

President of the Canada Border Services Agency

Order and reasons issued
Tuesday, June 30, 2015

Canada

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IN THE MATTER OF an appeal filed by Canadian Tire Corporation, Limited on July 28, 2014, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a motion filed by Canadian Tire Corporation, Limited on April 23, 2015, asking that the Tribunal order that certain correspondence between the parties be admissible in this proceeding.

BETWEEN

CANADIAN TIRE CORPORATION, LIMITED **Appellant**

AND

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

ORDER

The motion is allowed in part.

Daniel Petit
Daniel Petit
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. On July 28, 2014, Canadian Tire Corporation, Limited (CTC) filed an appeal with the Canadian International Trade Tribunal (the Tribunal) with regard to decisions of the President of the Canada Border Services Agency (CBSA) made on April 30, 2014, pursuant to subsection 61(1) of the *Special Import Measures Act*.[1]

2. The issue in the appeal is the identity of the exporter for the purposes of calculating the amount of anti-dumping duties payable by CTC. The CBSA assessed anti-dumping duties using Tianjin as the exporter; however, CTC's position in this appeal is that the CBSA should have found that the exporter was Chitech Industries II Ltd. (Chitech).

3. On January 22, 2015, the Tribunal received a letter from counsel for the CBSA indicating that, upon review of the CTC's brief, it agreed that Chitech should have been considered the exporter with respect to the transactions in issue. In other words, the CBSA conceded the issue in this appeal. Accordingly, the only outstanding issue in this appeal is the nature of the order that the Tribunal should issue to dispose of the matter.

4. On April 23, 2015, CTC filed a motion asking for an order of the Tribunal declaring that several pieces of correspondence between CTC and the CBSA are not subject to settlement privilege and are admissible as evidence in this appeal.

5. On May 7, 2015, the CBSA filed written submissions responding to CTC's motion. The CBSA agreed that some of the documents are not subject to settlement privilege. However, the CBSA argues that the rest of the documents are subject to settlement privilege and ought to be protected. The CBSA submits that no exception to settlement privilege is warranted under these circumstances because the correspondence at issue does not contain a threat. Moreover, the CBSA submitted that CTC failed to satisfy its burden of showing that the communications are relevant and necessary to dispose of the appeal or to achieve an overriding interest of justice.

LEGAL FRAMEWORK

6. The issue in this motion is whether certain documents should be allowed onto the Tribunal's record for the appeal proceeding. While the CBSA argued that these documents are subject to settlement privilege, CTC argued that they are not. In the alternative, CTC argued that, if the documents are protected by settlement privilege, there is a legal basis for overriding this privilege because the correspondence contains threats that ought not to be protected.

7. It is a well-settled principle of common law that tribunals are masters of their own procedure and are not strictly bound by the rules of evidence, provided they follow the rules of natural justice.[2] In this case, the Tribunal is of the view that it is of great importance that parties be willing and able to communicate freely with one another in the context of an appeal, without fear that their communications will be disclosed

1. R.S.C., 1985, c. S-15 [*SIMA*].
2. *Canadian National Ry. Co. v. Bell Telephone Co. of Canada*, [1939] SCR 308, 1939 CanLII 34 (SCC); *MPP Retail Inc. v. Canada (Border Services)*, 2007 CanLII 55912 (CA CITT) at para. 49.

and potentially used against them. Accordingly, the Tribunal finds it instructive to canvass the common law principles of settlement privilege.

8. The common law has long accepted a privilege for "without prejudice" communications or settlement discussions. The fundamental purpose of this privilege is to encourage the parties to settle their disputes, without fear that any admissions could be used against them, should negotiations fail. As a general rule, oral or written communications made during discussions for the purpose of settlement are not admissible as evidence. It is often said that parties will be more open, and negotiations will thus be more fruitful, if the parties know that their communications cannot subsequently be disclosed.

9. This protection operates broadly to protect communications for the purpose of settlement.[3] The privilege attaches to any communication made in an attempt to initiate negotiations toward that end, even if no offer is contained in that communication.[4]

10. Settlement privilege will generally be recognized where (i) a litigious dispute is in existence or within contemplation, (ii) a communication is made with the express or implied intention that it would not be disclosed to the court in the event that negotiations fail and (iii) the purpose of the communication must be to attempt to effect a settlement.[5]

11. The use of the phrase "without prejudice" is not required in order for the privilege to be effectively asserted, nor is it determinative of whether the privilege applies to a particular communication. Rather, in determining whether settlement privilege applies to protect documents from disclosure, a reviewing court must consider both the substance and the context of the communication.[6]

12. There are exceptions to settlement privilege, but case law suggests that these tend to be narrowly defined and seldom applied.[7] An applicant for disclosure will generally be required to demonstrate that there are compelling policy reasons to invoke an exception to the general rule.[8] The Supreme Court of Canada stated that, in order to come within an exception to settlement privilege, the party seeking to disclose the communication ". . . must show that, on balance, 'a competing public interest outweighs the public interest in encouraging settlement . . . ."[9] Further, an exception will generally only be found where the disclosure is both relevant and necessary in the circumstances of the case to support another compelling or overriding interest of justice.[10]

13. In regard to threats, the public policy of encouraging candid settlement discussions will often yield to the interest in exposing these tactics, such that no privilege applies.[11] However, case law establishes that not all threats arsing in the context of settlement discussions will justify an exception to settlement

3. *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32 (CanLII) [*Brown*] at paras. 39-40; *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII) [*Dos Santos*] at paras. 14-15.
4. *Evergreen Building Ltd. v. IBI Leaseholds Ltd. et al*., 2006 BCSC 1190 (CanLII) [*Evergreen*] at para. 9; *Bellatrix Exploration Ltd. v. Pen West Petroleum Ltd*., 2013 ABCA 10 (CanLII) [*Bellatrix*] at para. 26.
5. *Brown* at para. 30; *Bellatrix* at para. 34.
6. *Pine Valley Developments Corporation v. Marsh*, 2008 CanLII 35694 (ON SC) at para. 5; *Bellatrix* at para. 25.
7. *Bellatrix* at para. 28.
8. *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, [2005] BCCA 188 (CanLII) at para. 21.
9. *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 SCR 623, 2013 SCC 37 (CanLII) at para. 19.
10. *Brown* at para. 63; *Dos Santos* at paras. 19-20.
11. *Augier v. Vis*, 2011 ONSC 4583 (CanLII) [*Augier*] at para. 18.

privilege.[12] In *Evergreen*, the Supreme Court of British Columbia stated that ". . . it is not enough to characterize it as a threat. Rather, it must be of such a character that the public interest in its disclosure outweighs the public interest in protecting settlement communications."[13] Further, the Supreme Court of British Columbia stated that "[p]rivilege is lost not by making a threat, but by threatening to do something of an egregious nature."[14]

14. The Tribunal will consider CTC's motion in light of these principles.

ANALYSIS

15. Quite clearly, the parties are embroiled in a litigious dispute. Accordingly, this first prong of the common law test for settlement privilege is met.

16. In regard to whether the communications at issue were made with the express or implied intention that they would not be disclosed to the Tribunal in the event that negotiations failed, the parties agree that no such intention exists with respect to certain pieces of correspondence.[15] This correspondence includes letters between the parties and the Tribunal, and correspondence that was previously appended to those letters by the parties themselves.[16] The Tribunal finds that these documents were never intended by the parties to be treated as confidential and, accordingly, that these documents are not protected by settlement privilege.

17. Of the remaining correspondence, the Tribunal finds, taking into account the documents themselves and the various facts and circumstances surrounding the creation of these documents, that there is an intention that all such documents not be disclosed.

18. It is clear from the submissions of both parties that they were amidst negotiations from December 2014 onward, including the time these communications took place. Considering this context and the content of those communications, the Tribunal accepts that there was an intention that these documents not be disclosed. This is true regardless of whether the particular documents at issue have been specifically marked as being "without prejudice". Moreover, it is irrelevant that the correspondence at issue does not contain an actual offer and, as such, is not required in order for settlement privilege to protect the documents from disclosure.[17]

19. Contrary to CTC's assertions, the Tribunal is not convinced that anything in the correspondence can be characterized as a threat, nor an *egregious* threat that would justify overriding settlement privilege. In the Tribunal's view, the particular communication that CTC points to as constituting a threat contains a statement of the factual and legal consequences that flow from a potential Tribunal determination that Chitech, and not Tianjin, is the exporter for the purposes of the transactions at issue.[18] Pointing out a consequence that arises through the operation of *SIMA*, in the Tribunal's view, does not constitute a threat.

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12. Case law suggests that not all threats arising in the context of settlement discussions will justify an exception to settlement privilege, because the public policy behind settlement privilege is a compelling one. See *Brown* at para. 65; *Dos Santos* at para. 19; *Evergreen* at para. 11.
13. *Evergreen* at para. 12; *Augier* at para. 15.
14. *Evergreen* at para. 16; *Monument Mining Limited v. Balendran Chong & Bodi*, 2012 BCSC 389 (CanLII) at paras. 21-26.
15. Exhibit EA-2014-001-24C (protected), tabs 2A-2C, 2P.
16. Exhibits EA-2014-001-06, EA-2014-001-07 and EA-2014-001-12, Vol. 1A.
17. *Bellatrix* at para. 26.
18. Exhibit EA-2014-001-24C (protected), tab 2H.

Moreover, the Tribunal is of the view that there has been no impropriety on the part of the CSBA in highlighting these consequences to CTC.

20. The advantage that accrues to CTC from being informed of potential outcomes while weighing its options in the present appeal, with the benefit of a prospective analysis provided by the CBSA, is not something that the Tribunal wants to discourage by ordering the disclosure of documents that would be considered protected under the common law of settlement privilege.

21. Furthermore, the Tribunal is not convinced by CTC's arguments that this correspondence is relevant or necessary for the disposition of this appeal, nor that there is any public policy reason that necessitates the disclosure of this correspondence.

DECISION

22. Accordingly, certain correspondence produced by CTC is admissible.[19] The Tribunal notes that this correspondence is already found on the public record of this proceeding.[20]

23. For the reasons above, the Tribunal finds that the remainder of the correspondence should not be allowed onto the record of this proceeding.

Daniel Petit
Daniel Petit
Presiding Member

19. Exhibit EA-2014-001-24C (protected), tabs 2A-2C, 2P.
20. Exhibits EA-2014-001-06, EA-2014-001-07 and EA-2014-001-12, Vol. 1A.