Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. EA-2014-002 and EA-2014-003

Robertson Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, January 25, 2016

Canada

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IN THE MATTER OF appeals heard on October 6, 2015, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated July 11 and September 24, 2014, with respect to a request for re-determination pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

ROBERTSON INC. **Appellant**

AND

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

DECISION

The appeals are dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Daniel Petit
Daniel Petit
Member

Rose Ritcey
Rose Ritcey
Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 6, 2015
Tribunal Members:	Serge Fréchette, Presiding Member Daniel Petit, Member Rose Ritcey, Member
Counsel for the Tribunal:	Alexandra Pietrzak Anja Grabundzija Cassandra Baker (case assistance officer) Rohan Mathai (student-at-law)
Registrar Officer:	Julie Lescom

PARTICIPANTS:

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Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Kirk G. Shannon Youri Tessier-Stall

WITNESSES:

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President
Robertson Inc.

Salim Brahimi
President and Principal Engineer
IBECA Technologies Corp.

Alexander Lawton
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STATEMENT OF REASONS

BACKGROUND

1. Robertson Inc. (Robertson) filed these appeals[1] with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 61 of the *Special Import Measures Act*[2] from eight re-determinations by the President of the Canada Border Services Agency (CBSA) pursuant to section 59.

2. The appeals concern the duties payable on certain goods imported by Robertson. The CBSA determined that the goods were of the same description as the goods in respect of which the Tribunal made an order in pursuant to paragraph 76.03(12)(b) of *SIMA*[3] and were therefore subject to the imposition of anti-dumping and countervailing duties. The CBSA assessed the amount of anti-dumping duties at the rate of 170 percent, established by ministerial specification in accordance with section 29.

3. In its brief,[4] Robertson raised three issues that can be summarized as follows:

- whether the CBSA erred by assessing duties on certain fasteners (the Category 1 goods) that are properly within the scope of an exclusion for drawer handle screws granted by the Tribunal in the *Fasteners inquiry*;
- whether the CBSA erred by refusing to assess anti-dumping duties on certain other fasteners (Category 2a goods) on the basis of the normal value established for the same product in a separate subsequent importation; and
- whether the CBSA erred by refusing to establish normal values for certain other fasteners (Category 2b goods)[5] when requested by Robertson.

4. The Tribunal held a hearing in Ottawa, Ontario, on October 6, 2015, with public and *in camera* sessions. Robertson called Mr. Jeffrey Bent, President of Robertson as a witness. The CBSA called two witnesses, Mr. Salim Brahimi, President and Principal Engineer, IBECA Technologies Corp., and Mr. Alexander Lawton, Manager, Trade Compliance Division, CBSA.

5. At the hearing, the Tribunal granted the CBSA's request to qualify Mr. Brahimi as an expert in the design and manufacture of fasteners, and domestic and international fastener standards.[6] Robertson contested the qualification on the basis that much of Mr. Brahimi's work has been in areas that are ". . . far afield from the day-to-day issues . . . in the context of light fasteners".[7] It also argued that Mr. Brahimi was insufficiently independent, as he had in the past worked for Canadian producers of fasteners that may be

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1. Robertson initially filed separate appeals on October 9, 2014 (EA-2014-002) and December 19, 2014 (EA-2014-003). The Tribunal combined the two appeals on January 22, 2015, at Robertson's request.
2. R.S.C., 1985, c. S-15 [*SIMA*].
3. *Certain Fasteners* (7 January 2005), NQ-2004-005 (CITT) [the *Fasteners inquiry*], continued, with amendment, in *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT). All the goods in issue were imported while the Tribunal's order in Expiry Review No. RR-2009-001 was in effect; that order continued the findings in all respects relevant to these appeals. As such, in this statement of reasons, references are to the findings and reasons in the *Fasteners inquiry*, unless indicated otherwise.
4. Exhibit EA-2014-002-11A, Vol. 1A.
5. While Robertson's brief only appeared to make this argument with respect to the Category 2b goods, at the hearing, Robertson appeared to make the same arguments in respect of the Category 2a goods as well. *Transcript of Public Hearing*, 6 October 2015, at 219, 264. Accordingly, as discussed later in these reason, the Tribunal will analyze this argument with respect to *both* Category 2a goods and Category 2b goods [Category 2 goods].
6. Exhibit EA-2014-002-44, Vol. 1H; *Transcript of Public Hearing*, 6 October 2015, at 118.
7. *Transcript of Public Hearing*, Vol. 1, 6 October 2015, at 119-20.

impacted by the Tribunal's decision and may accept work from them in the future.[8] The Tribunal did not accept Robertson's arguments.

6. The Tribunal found that Mr. Brahimi had expertise in the design and manufacture of fasteners, as well as in domestic and international fastener standards, considering his extensive academic and professional experience related to fasteners, his publications and his longstanding involvement and contributions to fastener industry standards committees. In addition, the Tribunal was satisfied that Mr. Brahimi had no personal, financial or other interest in the outcome of this proceeding. Accordingly, having found Mr. Brahimi to be qualified in respect of every criterion identified by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*,[9] the Tribunal qualified Mr. Brahimi as an expert witness in the identified areas.[10]

7. Pursuant to subsection 61(3) of *SIMA*, the Tribunal can ". . . make such order or finding as the nature of the matter may require and . . . declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken . . . ." In this case, the Tribunal must determine whether duties are payable on the Category 1 goods and what amount of duty is payable on the Category 2 goods.

8. The Tribunal will discuss the relevant facts and law for each category of goods in turn. Before doing so, the Tribunal will address a preliminary issue raised by the CBSA.

PRELIMINARY MOTION ON JURISDICTION

9. As a preliminary matter, the CBSA submitted that certain arguments in connection with the Category 1 goods and the Category 2 goods put forward by Robertson were claims that Robertson had been treated unfairly by the CBSA. It also submitted that the Tribunal does not have jurisdiction to consider questions of procedural fairness on an appeal under section 61 of *SIMA*. The CBSA asked the Tribunal to dismiss Robertson's claims that were in essence procedural fairness arguments and limit arguments made by Robertson at the hearing to those properly before the Tribunal.

10. Robertson did not contest the submission that the Tribunal lacks jurisdiction to adjudicate on procedural fairness grounds, but contested the CBSA's characterization of its arguments. Robertson submitted that the way in which it was treated by the CBSA relates directly to the substantive issues on appeal, namely, whether the Category 1 goods are within the scope of an exclusion granted by the Tribunal in the *Fasteners inquiry* and whether duties on the Category 2 goods were properly assessed, applying the ministerial specification pursuant to section 29 of *SIMA*.

11. The Tribunal stated at the hearing that it did not consider that it has jurisdiction to entertain questions of procedural fairness as grounds of appeal *per se*, but rejected the CBSA's preliminary motion on the basis that it was premature to determine the connection of each argument to the substantive issues in these appeals. It indicated that it would hear all arguments and provide full reasons for its position in this statement of reasons.[11]

12. The Tribunal has consistently held that its jurisdiction under section 16 of the *Canadian International Trade Tribunal Act*[12] and section 61 of *SIMA* does not extend to matters of natural justice or procedural fairness, on their own, as grounds of appeal.[13] Pursuant to section 61 of *SIMA*, the Tribunal's

8. *Ibid.* at 118-19.
9. [2015] 2 S.C.R. 182, 2015 SCC 23 (CanLII).
10. *Transcript of Public Hearing*, 6 October 2015, at 123-24.
11. *Ibid.* at 22-23.
12. R.S.C., 1985, c. 47 (4th Supp.).
13. *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at paras. 8-9.

authority is to make ". . . such order or finding as the nature of the matter may require . . ." on an appeal from a CBSA re-determination under section 59 of *SIMA* concerning whether the imported goods are of the same description as goods to which an order or finding of the Tribunal applies or concerning the normal value or export price of such goods.[14] Furthermore, appeals pursuant to section 61 of *SIMA* proceed *de novo*, and the objective is to decide whether a determination by the CBSA was correct or whether a different determination should be made.[15]

13. That said, questions of procedure or fairness of treatment before the CBSA may, in certain cases, shed some light on the correctness of a CBSA determination in respect of an issue properly within the Tribunal's jurisdiction. From a factual perspective, the procedures followed by the CBSA, while not in and of themselves grounds of appeal, may have some connection with the ultimate decision to be reached *de novo* on appeal.[16] For instance, there could be a situation where evidence indicates that the method used to establish a normal value was arbitrary. This, in turn, may form part of the evidence showing that the normal value reached is incorrect. The Tribunal will therefore consider fairness or procedure issues inasmuch as they are factually relevant to an issue properly before it.

14. Accordingly, the Tribunal has considered the arguments and evidence concerning the way in which Robertson was treated by the CBSA in this perspective. They are addressed in the reasons below as necessary.

ANALYSIS

Category 1 Goods: Are the Category 1 Goods of the Same Description as Excluded Goods?

15. The Category 1 goods are 8-gauge truss head machine screws.[17] The only question concerning the Category 1 goods is whether they are "drawer handle screws", a category of goods expressly excluded from the scope of the Tribunal's findings. The parties agree, and it is clear to the Tribunal, that the Category 1 goods are otherwise screws within the scope of the findings.

(i) Parties' Positions

16. Robertson submitted that the Category 1 goods were manufactured exclusively to fasten handles to drawers and are in fact used as drawer handle screws and, thus, of the same description as the excluded goods. Robertson argued that there was no authority for the CBSA's position that, in order for the exclusion of drawer handle screws to apply to imported goods, the screws must be imported together with the drawer handles. Additionally, Robertson disputed the CBSA's position that the eventual end use of screws is not relevant to whether they are of the same description as the goods excluded by the Tribunal in the findings.

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14. In accordance with section 56 of *SIMA* and the subsequent sections setting out the statutory appeal scheme. *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (29 October 2014), AP-2012-035 (CITT) at para. 45.
15. *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*, 2010 FC 78 (CanLII) at para. 24, affirmed in *Toyota Tsusho America Inc. v. Canada (Border Services Agency)*, 2010 FCA 262 (CanLII).
16. *Ibid.*; *GRK Fasteners v. Canada (Attorney General)*, 2011 FC 198 (CanLII) at para. 28. See, also, albeit in a different context, *Spike marks inc. v. Canada (Attorney General)*, 2008 FC 203 (CanLII) at para. 41; *Fritz Marketing Inc. v. Canada*, [2009] 4 F.C.R. 314, 2009 FCA 62 (CanLII).
17. The Category 1 goods relate to fasteners covered by Detailed Adjustment Statement (DAS) Nos. 12997-192162966, 12997-192189592 and 12977-192189477, as described in the parties' agreed statement of facts, Exhibit EA-2014-002-56A at para. 2, Vol. 1I.

Robertson added that the CBSA's failure to apply the exclusion to the Category 1 goods is inconsistent with its previous enforcement of the exclusion.

17. The CBSA argued that the exclusion of drawer handle screws was only intended to apply to screws imported with drawer handles in corresponding quantities and that the eventual end use of screws imported in bulk is not a relevant consideration. It pointed out that there is no explanation of the exclusion in the Tribunal's statement of reasons and no definition of drawer handle screws in international or domestic standards. Furthermore, while machine screws are commonly used to fasten handles to drawers, the CBSA noted that machine screws have other applications. As such, importation with a drawer handle is necessary to define the functionality of the particular machine screw at the time of importation.[18] The CBSA argued that its interpretation of the exclusion makes common sense and is practical, while Robertson's interpretation would be unworkable.

18. As the Category 1 goods were imported in bulk, the CBSA submitted that they are machine screws subject to the order to which no exclusion applies. The CBSA argued furthermore that the evidence on the record does not demonstrate that the Category 1 goods are drawer handle screws. The CBSA further argued that the alleged inconsistent application of the exclusion of drawer handle screws by the CBSA is a question of procedural fairness and, thus, outside the scope of the Tribunal's jurisdiction.

(ii) Analysis

19. Pursuant to subsection 3(1) of *SIMA*, anti-dumping duties apply to goods of the same description as goods in respect of which the Tribunal has made an order or finding of injury. In an appeal under section 61 where the applicability of duties to imported goods is in issue, the Tribunal must therefore determine whether the goods are of the same description as goods described in a finding.

20. Similarly, where the question on appeal is whether the imported goods are *excluded* from the scope of a finding, the relevant question is whether the goods are of the same description as the excluded goods.[19]

21. The starting point of the analysis is the ordinary meaning of the words of the exclusion from a finding. The wording of a finding itself is determinative; however, if a finding is ambiguous, relevant elements of the record, usually from the statement of reasons, may provide guidance in interpreting it. The Tribunal may not however amend the scope of a finding, either by narrowing or expanding it.[20]

22. Furthermore, it is well established that the determination of whether goods are of the same description as the goods to which a Tribunal finding applies must be based on an examination of the goods as a whole and the state of the goods at importation. It is also well established that this determination must be based on an examination of the characteristics of the goods, including physical description, end-use

18. *Transcript of Public Hearing*, 6 October 2015, at 237-38.
19. *Ideal Roofing Company Limited and Havelock Metal Products Inc. v. President of the Canada Border Services Agency* (10 July 2014), AP-2013-008 and AP-2013-009 (CITT) [*Ideal Roofing*] at para. 21; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) [*Powers Industries*] at para. 25.
20. *Ideal Roofing* at para. 22; *Levolor Home Fashions Canada v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-015 (CITT) at para. 17; *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT) [*Cobra Anchors*] at para. 7; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at paras. 23-25; *Salzgitter Mannesmann International (Canada) Inc. and Varsteel Ltd. v. President of the Canada Border Services Agency* (25 September 2013), AP-2012-047 and AP-2012-048 (CITT) at paras. 11-15.

applications, interchangeability, competition in the marketplace, price and marketing.[21] While not all these factors are necessarily relevant in all cases, the Tribunal has previously stated that such characteristics are relevant in determining whether goods are of the same description as any of the types of screws *excluded* from the findings in the *Fasteners inquiry*.[22]

23. The relevant exclusion from the findings in the *Fasteners inquiry* provides as follows:

> **APPENDIX A**
>
> **PRODUCTS EXCLUDED FROM THE FINDING FOR CARBON STEEL SCREWS**
>
> All carbon steel screws that are listed under List A1 are *specifically excluded*.
>
> . . .
>
> - Drawer handle screws (*Vis de poignée de tiroir*)
>
> [Footnote omitted]

24. The ordinary meaning of these words is clear. The words "drawer handle" in association with the word "screw" unambiguously indicate that the excluded screws are those used to fasten a handle to a drawer. There is no need to look beyond this language in this case.

25. Accordingly, in order to qualify for the exclusion, it must be demonstrated that imported screws *will* be used for the purpose of fastening a handle to a drawer. It is insufficient to demonstrate that the screws are merely *capable* of being used for that purpose.

26. The evidence shows that the Category 1 goods were imported in bulk and were not accompanied by corresponding handles. Invoices relating to the Category 1 goods submitted to the CBSA included no mention of drawer handles or drawer handle screws. In addition, Robertson's catalogues do not identify the goods as drawer handle screws, but rather as truss head machine screws. This was confirmed by Mr. Bent at the hearing.

27. Mr. Bent testified, however, that Robertson's catalogues serve merely as a "placeholder" for its Web site, as Robertson serves long-term customers that are knowledgeable distributors in the area of woodworking and do not require an explanation of the applications for which these screws are intended. Mr. Bent further testified that Robertson's customers advertise these screws in their own catalogues as drawer handle screws.[23] Robertson submitted "sample" marketing materials belonging to two customers that advertise truss head Robertson machine screws for fastening handles.[24]

28. Indeed, Mr. Bent testified that Robertson sells its truss head machine screws for the specific application of fastening handles to drawers. According to Mr. Bent, truss heads have a low profile, which is more aesthetically pleasing, and provide a larger bearing surface to prevent the screw from pulling through

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21. *Powers Industries* at paras. 21-22, 37; *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, 1965 CanLII 82 (SCC); *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Ltd. et al.*, [1973] S.C.R. 21, 1972 CanLII 125 (SCC); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Cobra Anchors* at para. 26; *Colonial Élégance Inc. v. President of the Canada Border Services Agency* (11 September 2013), AP-2012-038 (CITT) at para. 14; *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (18 November 2011), AP-2010-063 (CITT) at para. 60.
22. *Powers Industries* at para. 37.
23. *Transcript of Public Hearing*, 6 October 2015, at 34-35; 70-75.
24. Exhibit EA-2014-002-28B (protected), tab 3, Vol. 2B.

the cabinet.[25] Mr. Bent also testified that, if customers were to ask for drawer handle screws, they would be directed to Robertson's truss head machine screws. Mr. Bent stated that Robertson sells such screws into the drawer handle industry and, more precisely, to distributors in the woodworking business to attach knobs and pulls to cabinets and drawers.[26]

29. Nevertheless, the expert testimony of M. Brahimi demonstrates that the Category 1 goods remain generic machine screws with no special characteristics that would *limit* their use to fastening drawer handles *only*. Mr. Brahimi indicated, in his expert report, that the physical exhibits that he examined ". . . conform to generic standard specifications for Type III Truss Head Machine Screws . . . [and] do not deviate from the standard requirements and do not present any additional and distinguishing design features to make them uniquely more suitable for any specific application"[27] [emphasis in original]. He further added that these screws are ". . . *generic*, *general purpose*, *standard* fasteners that may be used in any application for which they are physically and mechanically suited . . . [and that] there are no unique features that make the screws more suited for attaching drawer handles than another appropriate fastener type"[28] [emphasis in original]. At the hearing, Mr. Brahimi confirmed that, while the physical exhibits of Category 1 goods that he examined were suitable to fasten handles to drawers, they essentially remain "hardware" that could be used for any other application for which they are appropriate based on their configuration and size.[29]

30. On this basis, and having examined the relevant physical exhibits submitted by Robertson, the Tribunal finds insufficient evidence to conclude that the Category 1 goods are screws that will be used in Canada *solely* for the purpose of fastening handles to drawers. Rather, the Tribunal finds that the Category 1 goods are machine screws that *could* be used for various purposes.

31. Although the Tribunal agrees with the CBSA's conclusion that the Category 1 goods are not drawer handle screws within the meaning of the exclusion, the Tribunal does not accept the CBSA's interpretation that the only manner to show that imported screws are drawer handle screws is to import them together with drawer handles in corresponding quantities. No such evidentiary requirement is suggested by the language of the exclusion.

32. The exclusion simply requires demonstration that the goods will be used with drawer handles once imported. Importing the screws with drawer handles may be one way of showing that they are drawer handle screws. However, provided the importer is able to adduce sufficient evidence to demonstrate that the imported screws, as presented for importation, will be used in Canada for fastening handles to drawers, the requirement can be met whether or not they are imported together with drawer handles.

33. In fact, Mr. Lawton from the CBSA testified to an instance where certain screws imported by Robertson were determined to be within the scope of the exclusion for drawer handle screws on the basis of evidence tracking the sale of the screws, by SKU number, to Robertson's unrelated customers and into those customers' catalogues, where the screws were sold with drawer handles. Mr. Lawton testified that, in that instance, ". . . we were able to obtain additional information to confirm that these goods, even though they were not imported with drawer handles were, for purposes of the exclusion, qualified because they were being sold with drawer handles . . . ."[30] In other words, the information on Robertson's sales and in its

25. *Transcript of Public Hearing*, 6 October 2015, at 32.
26. *Ibid.* at 38, 52-53.
27. Exhibit EA-2014-002-44A at para. 9, Vol. H.
28. *Ibid.* at para. 12.
29. *Transcript of Public Hearing*, 6 October 2015, at 142-45.
30. *Ibid.* at 200; *Transcript of In Camera Hearing*, 6 October 2015, at 37-39.

customers' catalogues provided a clear connection between the imported screws and their end use with drawer handles. The Tribunal sees this as an example of an alternative method by which it could be demonstrated that imported goods meet the requirements of the exclusion for drawer handle screws.[31]

34. In conclusion, while the CBSA's interpretation of how the exclusion for drawer handle screws could be demonstrated was overly restrictive, on the evidence on the record, the Tribunal finds that the Category 1 goods are not within the scope of the exclusion, properly interpreted, for drawer handle screws.

Category 2 Goods: What Is the Amount of Duties Payable?

35. The Category 2 goods were all assessed anti-dumping duties at the rate of 170 percent, in accordance with the ministerial specification pursuant to section 29 of *SIMA*. Robertson contests this amount of anti-dumping duties. Robertson argues in essence that the CBSA erred in applying the 170 percent ministerial specification pursuant to section 29 in a situation where it was possible to determine a duty rate on the basis of specific normal values for the goods.

(i) Determination of Duties Payable and Normal Values: Legal Framework

36. Anti-dumping duties payable on goods are equal to the margin of dumping of the imported goods.[32] Subsection 2(1) of *SIMA* defines "margin of dumping" as ". . . the amount by which the *normal value* of the goods exceeds the export price of the goods" [emphasis added].

– Normal Values

37. Subsection 2(1) of *SIMA* defines "normal value" as the ". . . normal value determined in accordance with sections 15 to 23 and 29 and 30". In broad terms, the normal value of goods is the value of those goods in the country of export, as determined by one of the methods prescribed by *SIMA*.

38. Section 15 of *SIMA* sets out the basic method for determining the normal value of goods on the basis of the price of like goods when sold by the exporter in the country of export, within prescribed conditions.

39. Other sections of *SIMA*, and the *SIM Regulations*, provide additional methods for determining normal values. For example, subsection 19(b) of *SIMA* provides that, where the normal value of goods cannot be determined pursuant to section 15 of *SIMA*, normal values can be established on the basis of the aggregate costs of production of the goods imported into Canada, added to other reasonable costs and an amount for profit.

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31. The CBSA insisted that the evidence deemed satisfactory in this particular instance was discovered in the course of an on-site verification commenced for other reasons and that it would be unworkable to require the CBSA to make such verifications as a matter of course. However, nothing in the Tribunal's decision would require the CBSA to embark on such a course of action. As will be discussed below, *SIMA* and the *Special Import Measures Regulations*, S.O.R./84-927 [*SIM Regulations*], put the obligation to provide relevant information on the importers. On the other hand, the Tribunal cannot accept Robertson's argument that the fact that these specific importations of screws were shown to be used for drawer handles is evidence that all Category 1 goods will be used in Canada for the same application; *Transcript of Public Hearing*, 6 October 2015, at 207.
32. Paragraph 3(1)(a) of *SIMA*.

40. Finally, subsection 29(1) of *SIMA* provides as follows:

> 29(1) Where, in the opinion of the President, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28, the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies.

41. Normal values are first determined in the context of the CBSA's dumping investigation and are applied to future importations. Normal values can however be re-determined when goods are imported in the context of the re-determination and appeal processes pursuant to sections 56 to 61 of *SIMA*, as discussed below.

– Determinations and Re-Determinations of Duties Payable on Imported Goods

42. Pursuant to subsection 56(1) of *SIMA*, the CBSA can make a determination regarding the anti-dumping duties applicable to imported goods, including by determining their normal value.

43. *SIMA* further includes a sequence of provisions through which an importer can request a re-determination of, *inter alia*, the normal value of imported goods. These provisions, in turn, allow the CBSA to make such a re-determination upon the importer's request or on its own initiative.

44. Specifically, pursuant to paragraph 56(1.01)(a) of *SIMA*, an importer may request that the CBSA make a re-determination of a determination under section 56, which re-determination the CBSA can make pursuant to section 57. In addition, pursuant to paragraph 58(1.1)(a), an importer can request that the CBSA make a further re-determination of a re-determination under section 57. The CBSA makes such a further re-determination pursuant to section 59.

45. Finally, an importer aggrieved by a re-determination pursuant to section 59 of *SIMA* may appeal to the Tribunal pursuant to subsection 61(1). As discussed above, pursuant subsection 61(3), the Tribunal decides issues before it, including the correctness of normal values established by the CBSA, *de novo* and makes the order or finding that the matter requires.

(ii) CBSA's 2013 Re-investigation in Relation to the *Fasteners Inquiry* Aiming to Update Normal Values

46. During the five-year span of a Tribunal finding or order, the CBSA periodically conducts re-investigations, the purpose of which includes updating the normal values first calculated in the context of its dumping investigations for particular products and exporters. This administrative procedure is not provided by *SIMA* but forms part of the CBSA's ongoing enforcement of findings and orders under *SIMA*. Two relevant re-investigations occurred in relation to the *Fasteners inquiry*, one in 2011 (the 2011 re-investigation) and the other in 2013 (the 2013 re-investigation).

47. On October 21, 2013, the CBSA initiated the 2013 re-investigation. The CBSA sent requests for information (RFIs) to exporters and importers regarding all fasteners imported into Canada during the period of investigation from October 1, 2012, to September 30, 2013 (POI).[33]

48. The CBSA's letters notified exporters, importers and other interested parties that the results of the 2013 re-investigation would be used to determine normal values for future shipments of the goods released

33. Exhibit EA-2014-002-56A at para. 8-9, Vol. 1I.

from the CBSA on or after the day on which the results of the 2013 re-investigation were published and might also apply to any previous importations that occurred during the POI but which had not been processed by the CBSA prior to the conclusion of the 2013 re-investigation. The same letters informed that, where sufficient information was not submitted to the CBSA to permit the determination of normal values, these would be determined by ministerial specification, which was calculated by advancing the export price of the goods by 170 percent.[34]

49. Finally, the letters issued at the outset of the 2013 re-investigation informed parties that the CBSA would not be issuing new normal values after the close of the re-investigation except in response to a request for a re-determination or until the next re-investigation.[35]

50. The CBSA released the results of the 2013 re-investigation on March 14, 2014.

(iii) Procedural History of the Category 2 Goods

51. The Category 2 goods are various fasteners imported by Robertson.[36] All Category 2 goods were released into Canada during the POI.

52. On February 4, 2013, Robertson made requests for re-determinations pursuant to section 56 of *SIMA* in respect of all Category 2 goods. The CBSA issued re-determinations under section 57 on various dates in November 2013. For those Category 2 goods for which normal values had been established as part of the 2011 re-investigation, the CBSA applied duties on the basis of those normal values; for Category 2 goods for which no normal value had been established in the 2011 re-investigation, the CBSA applied duties at the ministerial specification rate of 170 percent.[37]

53. On January 13, 2014, Robertson submitted requests for re-determination pursuant to section 58 of *SIMA* in respect of all Category 2 goods.

54. The CBSA released the results of the 2013 re-investigation on March 14, 2014. Robertson admits that "for one reason or another", it omitted to provide the requested information to the CBSA regarding the Category 2 goods. Accordingly, the CBSA was unable to establish normal values for those products in the context of the 2013 reinvestigation.[38]

55. On July 11, 2014, the CBSA issued re-determinations under section 59 of *SIMA*, applying duties at the ministerial specification rate of 170 percent, pursuant to section 29, to all Category 2 goods.[39]

34. Exhibit EA-2014-002-13A, tabs 3, 4, 5, Vol. 1B; Exhibit EA-2014-002-56A at para. 10, Vol. 1I.
35. Exhibit EA-2014-002-13A, tabs 3, 5, Vol. 1B.
36. The Category 2 goods relate to fasteners covered in DAS Nos. 12997-192162944 (which are referred to individually by the parties as the Category 2a goods) and DAS Nos. 12997-192162955, 12997-192162999, 12997-192162977 and 12977-192162911 (which are referred to by the parties as the Category 2b goods), as defined in the parties' agreed statement of facts. Exhibit EA-2014-002-56A at para. 2, Vol. 1I.
37. Exhibit EA-2014-002-56A at para. 2, Vol. 1I; Exhibit EA-2014-002-13A at para. 33, Vol. 1B; Exhibit EA-2014-002-13C (protected), at 13B, 14B, 15B, 16B, Vol. 2B.
38. Exhibit EA-2014-002-11A at para. 16, Vol. 1A.
39. Exhibit EA-2014-002-56A at para. 16, Vol. 1I.

(iv) Category 2 Goods: Did the CBSA Refuse to Establish Normal Values and Erroneously Apply the Ministerial Specification Under Section 29 of SIMA?

– Parties' Positions

56. Robertson argued[40] that the CBSA failed to send an RFI in connection to the Category 2 goods in response to its requests for re-determinations under section 58 of *SIMA*. By not sending an RFI, Robertson argued that the CBSA acted in contradiction with its own guidance previously communicated to Robertson and refused to provide normal values. Thus, Robertson submitted, the CBSA imposed a ministerial specification rate of 170 percent contrary to the requirements of *SIMA* that the anti-dumping duties be determined on the basis of normal values calculated using information supplied by the exporter of the goods.

57. At the hearing, Robertson re-stated its argument somewhat. It submitted that the CBSA had acted "unlawfully" in its treatment of the Category 2 goods by applying section 29 of *SIMA* without proper basis or authority to do so.[41] It added that the CBSA refused to exercise its jurisdiction in making a re-determination pursuant to section 57, as it did not issue an RFI in order to establish a normal value, even though Robertson had submitted its requests under section 56 far in advance of the announcement of a re-investigation by the CBSA.[42]

58. Robertson further submitted that, before section 29 of *SIMA* can be used to assess duties, certain requirements must be met. It suggested that resort should only be had to section 29 in exceptional circumstances, such as where the importer refuses to provide sufficient information or where sufficient information cannot be provided even deploying best efforts. Robertson argued that there was no evidence at any point of a refusal on Robertson's part to provide information to the CBSA. Robertson submitted that the pre-conditions to apply section 29 were not present in this case, as Robertson had, on every occasion, provided the information that was requested from it (save an "inadvertent" failure to provide information for the Category 2 goods in the context of the 2013 re-investigation).

59. The CBSA argued that it has wide discretion over the process that it uses to determine normal values and that fairness claims in relation to the CBSA's failure to issue an RFI are outside the Tribunal's jurisdiction. In the alternative, the CBSA submitted that it acted fairly, as it would be unreasonable to require the CBSA to send a duplicative RFI covering the same period of time for which information had already been requested in the context of the 2013 re-investigation. Since Robertson had not provided the necessary information to establish a normal value, the CBSA argued that the decision to apply the ministerial specification was correct.

– Analysis

60. At the outset, the Tribunal repeats that it does not have jurisdiction to entertain claims of unfair treatment by the CBSA as an independent ground of appeal. However, the Tribunal may consider the manner in which the CBSA conducted its re-determinations insofar as that sheds light on the correctness of a given determination, considered *de novo*.

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40. As noted above, Robertson initially argued this point in relation to the Category 2b goods only. However, at the hearing, it also made the same argument with respect to the Category 2a goods.
41. *Transcript of Public Hearing*, 6 October 2015, at 204-205.
42. *Ibid.* at 219.

61. Robertson alleged, in essence, that the CBSA acted improperly, or failed to exercise its jurisdiction, by failing to issue a new RFI in response to Robertson's requests for re-determinations under section 58 of *SIMA*. Robertson further argued that the pre-conditions for applying section 29 had not therefore been met.

62. However, Robertson's arguments find no support in the governing legislation. There is no language in the applicable *SIMA* provisions requiring the CBSA to send out an RFI or to solicit such information. In fact, paragraph 58(1.1)(a) of *SIMA* provides as follows:

> . . . where a determination or re-determination referred to in that subsection is made in respect of any goods, . . . the importer of the goods may, within ninety days after the date of the determination or re-determination, *make a written request in the prescribed form and manner and accompanied by the prescribed information* to the President for a re-determination, if the importer has paid all duties owing on the goods . . . .
>
> [Emphasis added]

63. Paragraph 56(1.01)(a) of *SIMA*, under which Robertson made its initial requests for re-determinations, contains the same language.

64. In addition, section 52 of the *SIM Regulations* provides as follows:

> 52. For the purposes of subsections 56(1.01) and 58(1.1.) of the *Act*, a request for a re-determination shall be accompanied by
>
> (a) a statement setting out the grounds on which the determination or re-determination is contested;
>
> (b) a statement setting out the facts on which the request for re-determination is based;
>
> (c) *evidence in support of the facts* referred to in paragraph (*b*) . . . .
>
> [Emphasis added]

65. Thus, *SIMA* and the *SIM Regulations* specifically direct the importer requesting a re-determination to furnish the necessary information on which to make a decision. The onus to provide the relevant information is on the requesting party and not on the CBSA.

66. Furthermore, section 29 of *SIMA* clearly provides that where, ". . . in the opinion of the President, sufficient information has *not been furnished or is not available* to enable the determination of normal value . . . as provided in sections 15 to 28, the normal value . . . *shall* be determined in such manner as the Minister specifies." Contrary to Robertson's position, there is no suggestion in this language that, before applying section 29, additional pre-conditions, such as ensuring that the importer's failure to provide information was not merely "inadvertent", must be met.

67. Robertson did not submit evidence allowing normal values to be established either in the context of the 2013 re-investigation or in support of its requests for re-determinations. In the absence of any such evidence, the CBSA applied the ministerial specification in accordance with *SIMA*.

68. In addition, there is no indication that the CBSA denied Robertson the opportunity to provide pertinent information or has otherwise arbitrarily determined the duties payable on the Category 2 goods in either the 2013 re-investigation or the re-determination. There is no disagreement between the parties that the importation of the Category 2 goods occurred during the POI. There is similarly no disagreement that the CBSA requested the pertinent information, for all fasteners imported during the POI, at the outset of the 2013 re-investigation. The administrative process established by the CBSA in the context of the 2013

re-investigation was very clear as to the information being requested and the CBSA's intention to use that information to determine normal values for importations during the POI which were not processed by the CBSA prior to the conclusion of the 2013 re-investigation. The CBSA also clearly indicated that, if insufficient information was submitted, the ministerial specification would apply and that it would not issue new normal values except in response to a request for a re-determination.[43]

69. Robertson admitted that, during the 2013 re-investigation, it had omitted to send information for the Category 2 goods. Yet, even after requesting a re-determination pursuant to section 58 of *SIMA*, Robertson failed to provide the information necessary for the CBSA to be able to establish a normal value for the Category 2 goods. While Robertson suggested, in its brief, that the CBSA had purportedly indicated to it that it would issue an RFI in response to a request for a re-determination, in the actual e-mail from the CBSA, it "strongly" suggested that Robertson ". . . explicitly request that a Request for Information be sent to the exporter(s) . . ." if it wished normal values to be re-determined for the fasteners for which it did not yet have normal values.[44] There is no evidence on the record, nor did Robertson contend, that it requested such an RFI at any point during the re-determination process.

70. Finally, Robertson had many occasions to submit the necessary information. It seized none of them. For example, given that the CBSA did not send out an RFI in response to Robertson's requests for re-determinations pursuant to sections 56 and 58 of *SIMA*, and having acknowledged that it omitted to provide the information for the Category 2 goods during the re-investigation process, it is unclear why Robertson did not proactively provide the CBSA with the very information that was at the heart of its request for a re-determination (i.e. the information necessary for the CBSA to establish a normal value).

71. Similarly, Robertson did not provide the information in question to the Tribunal in the context of these *de novo* appeals. As stated by the Federal Court of Appeal, a *de novo* appeal precisely ". . . enable[s] the applicant to make the submissions it believes the CBSA ought to have asked it for to new decision-makers."[45]In the absence of any information provided by Robertson, the Tribunal finds that the CBSA correctly applied a rate of duty of 170 percent in accordance with the ministerial specification under section 29 of *SIMA*. Nothing on the record of these appeals demonstrates that a different rate of duty should apply to the Category 2 goods.

(v) Category 2a Goods: Does the Normal Value Established for the Same Product in a Subsequent Importation Apply to the Category 2a Goods?

– Parties' Positions

72. Robertson argued that, because the CBSA established a normal value (the new normal value) for products identical to the Category 2a goods, it should then have applied the new normal value to the Category 2a goods and issued a refund to Robertson.

73. The CBSA submitted that the new normal value was established for an entirely separate shipment of goods which were imported by Robertson in January 2014 (the additional goods), which importation is not at issue in these appeals. It submitted that the new normal value cannot apply to the Category 2a goods. Since the new normal value was established as a result of a request for re-determination under section 56 of

43. Exhibit EA-2014-002-13A, tabs 3, 4, 5, Vol. 1B. Exhibit EA-2014-002-56A at para. 10, Vol. 1I.
44. Exhibit EA-2014-002-06A at para. 25, Vol. 1; Exhibit EA-2014-002-11C (protected), tab 4, Vol. 2. Although this correspondence was initially included in Robertson's confidential exhibit book, the portion included above was directly quoted by Robertson in its public brief.
45. *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*, 2010 FC 78 (CanLII) at para. 24.

SIMA for the additional goods, it was entirely separate and could not apply retroactively to importations for which a different re-determination under section 59 had already been made. The CBSA argued that Robertson's position finds no support in the *SIMA* regime.

74. Finally, the CBSA pointed out that Robertson filed no new information in the context of these *de novo* appeals that could allow a normal value for the Category 2a goods to be determined.

– Analysis

75. The specific question in relation to the Category 2a goods raised by Robertson is whether the rate of anti-dumping duty of 170 percent levied on these goods is incorrect because the new normal value should apply to them.

76. There is no disagreement between the parties as to the timing and facts. Robertson imported the additional goods in January 2014. These were the same products as the Category 2a goods, but were an entirely separate shipment imported into Canada one year *after* the importation of the Category 2a goods.[46] As such, the establishment, in August 2014, of the new normal value was a separate process from the one that had been undertaken for the Category 2a goods.[47]

77. The Tribunal agrees with the CBSA. While the consideration of Robertson's requests for the Category 2a goods and the additional goods may at times have coincided, they were nonetheless distinct re-determinations, issued at distinct times and concerning goods imported one year apart. Robertson has not pointed to a basis in *SIMA* that could have allowed the CBSA to re-open its re-determination under section 59 in respect of the Category 2a goods after it was made on July 11, 2014.

78. Furthermore, in the context of these *de novo* appeals, there is no basis to conclude that the new normal value determined for the additional goods is the correct normal value for the Category 2a goods. Normal values are periodically assessed on the basis of a variety of different factors, several of which, such as sales prices and costs of production, vary over time.[48] Mr. Lawton also confirmed in examination and cross-examination at the hearing that much of the information collected by a particular RFI sent by the CBSA in respect of particular goods is specific to a given period of time.[49]

79. As such, the evidence used to establish the normal value of the additional goods was specific to those particular goods and the period of time in which they were imported.[50] Consequently, the normal value of the additional goods is not, in and of itself, convincing evidence of what the normal value of the Category 2a goods, imported a year earlier, ought to have been.

80. Accordingly, in this respect, the Tribunal finds that the CBSA correctly assessed duties on the Category 2a goods applying the ministerial specification rate of 170 percent.

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46. To be clear, the additional goods and the establishment of the applicable normal value are not part of this appeal *per se*.
47. The new normal value for the additional goods was established after Robertson had requested, and received, a re-determination pursuant to section 56 of *SIMA* in respect of the additional goods.
48. This is evident from reading section 15 of *SIMA*, as well as other provisions of *SIMA* prescribing the manner in which normal values may be determined. *Transcript of Public Hearing*, 6 October 2015, at 151-52; Exhibit EA-2014-002-13C (protected), tab 12, Vol. 2B; *Transcript of In Camera Hearing*, 6 October 2015, at 21-22.
49. *Transcript of Public Hearing*, 6 October 2015, at 175-77, 182-83, 202-203.
50. Indeed, in closing argument, Robertson appeared to be retreating from the argument that the new normal value should apply retroactively to the Category 2a goods. *Transcript of Public Hearing*, 6 October 2015, at 264.

DECISION

81. The appeals are dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Daniel Petit
Daniel Petit
Member

Rose Ritcey
Rose Ritcey
Member