



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. EA-2019-003

2045662 Alberta Inc.

v.

President of the Canada Border
Services Agency

*Order and reasons issued
Thursday, August 6, 2020*

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IN THE MATTER OF an appeal filed by 2045662 Alberta Inc. on October 17, 2019;

AND IN THE MATTER OF a request for decision or order filed by 2045662 Alberta Inc.
on May 7, 2020.

BETWEEN

2045662 ALBERTA INC.

Appellant

AND

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

Respondent

ORDER

The appellant's requests for a stay of proceedings, an exemption from providing evidence, a reversal of the onus of proof, and a ruling on the admissibility of evidence are each denied. The appellant must file a brief conforming to rule 34 of the *Canadian International Trade Tribunal Rules* within 60 days of this Order.

Serge Fréchette

Serge Fréchette
Presiding Member

STATEMENT OF REASONS

SUMMARY

[1] This appeal concerns decisions by the President of the Canada Border Services Agency (CBSA) made pursuant to paragraph 59(1)(b) of the *Special Import Measures Act*,¹ a provision which allows the CBSA to re-determine, at any time, the normal values and amounts of subsidy on imported goods, and hence the anti-dumping and countervailing duties owing, if the importer or exporter has made any misrepresentation or committed a fraud in accounting for the goods under the *Customs Act*² or in obtaining their release.

[2] This appeal has proceeded concurrently to a related appeal, filed by Prairie Tubulars (2015) Inc. (Prairie Tubulars).³ 2045662 Alberta Inc. (Alberta Inc.) and Prairie Tubulars (collectively the “appellants”) have brought a joint request for interlocutory relief in both appeals.

[3] The appellants have requested a stay of proceedings, an exemption from providing evidence, a reversal of the onus of proof, and a ruling on the admissibility of evidence. For the reasons below, at this stage in the proceedings, the Canadian International Trade Tribunal rejects each of these four requests.

BACKGROUND

[4] Alberta Inc. imported goods that were subject to the Tribunal’s findings in Inquiry Nos. NQ-2007-001 and NQ-2009-004.⁴ The CBSA re-determined the normal values and amounts of subsidy applicable to these goods on September 17 and 18, 2019, pursuant to paragraph 59(1)(b) of *SIMA*.

[5] On October 17, 2019, Alberta Inc. filed the present appeal with the Tribunal pursuant to subsection 61(1) of *SIMA*.

[6] On December 9, 2019, Algoma Tubes Inc. and Prudential Steel ULC (collectively “Tenaris Canada”) requested intervenor status in both this appeal and the related appeal filed by Prairie Tubulars.⁵ The Tribunal considered submissions from both appellants, who opposed the request to intervene, and from the CBSA, who did not object to the intervenor request. The Tribunal granted intervenor status to Tenaris Canada on December 24, 2019.

[7] On November 22, 2019, the appellants made a joint request pursuant to subrule 23.1(1) of the *Canadian International Trade Tribunal Rules*⁶ for an order directing the CBSA to disclose all information in its possession that relates to its re-determinations in both appeals. The Tribunal

¹ R.S.C., 1985, c. S-15 [*SIMA*].

² R.S.C., 1985, c. 1 (2nd Supp.)

³ See Tribunal File No. EA-2019-004.

⁴ The imported goods were subject to the Tribunal’s findings concerning the dumping and subsidizing of certain seamless carbon or alloy steel oil and gas well casing, and of certain oil country tubular goods, originating in or exported from the People’s Republic of China. See *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT); *Oil Country Tubular Goods* (23 March 2010), NQ-2009-004 (CITT).

⁵ See Tribunal File No. EA-2019-004.

⁶ SOR/91-499 [*Rules*].

considered the requests jointly, and on December 27, 2019, the Tribunal rejected the requests of both appellants.⁷

[8] The appellants filed an application for judicial review in the Federal Court of Appeal, challenging the Tribunal's decision to deny their disclosure request. The Court struck the appellants' application on March 26, 2020, ruling that the application related to an interlocutory decision and was therefore premature.⁸

[9] On May 7, 2020, the appellants jointly filed another request under subrule 23.1(1) of the *Rules*, which is the request addressed in the present reasons. The CBSA and Tenaris Canada filed submissions opposing the appellants' request on May 25, 2020, and the appellants replied on June 2, 2020. As the Tribunal considered the requests jointly, the positions of parties and analysis at paragraphs 10 to 18 of this statement of reasons apply equally to Appeal No. EA-2019-004.

POSITIONS OF PARTIES

Alberta Inc. and Prairie Tubulars (Appellants)

[10] The appellants make the following four requests:

- (a) Order postponing the appeal: The appellants request that the Tribunal postpone the appeal pursuant to subrule 26(1) of the *Rules*, pending the conclusion of related criminal matters. The appellants submit that there is an ongoing criminal investigation conducted by the CBSA that is based on allegations of fraud and misrepresentation stemming from the same transactions that are at issue in the present appeal. Therefore, according to the appellants, continuing with the appeal would cause irreparable harm, meeting the test for granting a stay under *RJR-MacDonald*.⁹ The appellants argue that sources of this irreparable harm would include: (1) the CBSA using information obtained in Tribunal proceedings for the purpose of its related criminal investigation, (2) the fact that the appellants are deprived of the use of documents seized by the CBSA during its criminal investigation, and (3) the potential for the CBSA to object to disclosing its entire criminal file in the course of the Tribunal proceedings pursuant to section 37 of the *Canada Evidence Act*.¹⁰
- (b) Order exempting the appellants from filing evidence: In the alternative, if the appeal proceeds, the appellants request that the Tribunal order that they do not

⁷ 2045662 *Alberta Inc. v. President of the Canada Border Services Agency* (27 December 2019), EA-2019-003 (CITT) [*Alberta Inc. CITT*]; *Prairie Tubulars (2015) Inc. v. President of the Canada Border Services Agency* (27 December 2019), EA-2019-004 (CITT) [*Prairie Tubulars CITT*].

⁸ 2045662 *Alberta Inc. and Prairie Tubulars 2015 Inc. v. President of the Canada Border Services Agency* (26 March 2020), FCA A-487-19.

⁹ *RJR-MacDonald v. Canada (Attorney General)* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 [*RJR-Macdonald*]. The test in *RJR-Macdonald* requires the applicant to show (1) that there is a serious issue to be tried, (2) that the applicant would suffer irreparable harm if the relief is not granted, and (3) that the balance of convenience favours granting the stay. This test has been applied to determine whether administrative proceedings should be stayed pending criminal proceedings: see, for example, *Dr. Alan Cockeram v. College of Physicians and Surgeons (N.B.)*, 2013 NBQB 197 (CanLII).

¹⁰ R.S.C., 1985, c. C-5.

have to file any evidence pursuant to rule 34 of the *Rules*. Given that the CBSA alleges fraud and misrepresentation, the appellants argue that the CBSA should have to put the entirety of its case on the record first. The appellants cite case law from the income tax context, which establishes that “wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used” and that administrative statutory powers cannot be used to compel evidence and circumvent the requirement to obtain a warrant.¹¹

- (c) Order reversing the onus of proof: The appellants request that the Tribunal place an onus on the CBSA to prove allegations of fraud and misrepresentation. The appellants compare paragraph 59(1)(b) of *SIMA* to subsection 152(4) of the *Income Tax Act*,¹² which both allow a reassessment outside of the usual statutory reassessment period if there has been misrepresentation or fraud. Citing income tax cases in which the government bears the onus to show misrepresentation or fraud that would justify a reassessment beyond the normal period, the appellants argue that the same logic should apply under *SIMA* to place the onus on the CBSA.¹³
- (d) Order declaring the CBSA’s evidence inadmissible: Citing procedural fairness concerns, the appellants argue that the Tribunal must not admit into evidence any anonymous witness statements from the CBSA.

CBSA (Respondent)

[11] The CBSA responds to the appellants’ four requests as follows:

- (a) Order postponing the appeal: The CBSA argues that the appellants have not met their burden to show that proceeding with the appeal would cause “compelling and cogent evidence of prejudice” or “irreparable harm”.¹⁴ The CBSA emphasizes that the criminal proceedings are at the investigation stage and charges have not yet been laid. In addition, according to the CBSA, it is impossible to determine whether the transactions at issue in the Tribunal appeal are related to the criminal investigation. Finally, the CBSA argues that counsel and government officials are bound by an undertaking to use any confidential information obtained through a Tribunal proceeding exclusively for the purpose of that Tribunal proceeding. Therefore, the CBSA concludes that continuing with the Tribunal proceeding will not undermine the fairness of any future criminal trial.
- (b) Order exempting the appellants from filing evidence: The CBSA submits that there is no reason to exempt the appellants from filing evidence, as the appellants have not shown a likelihood that confidential information filed as part of their brief can be used in criminal proceedings or given to criminal investigators.

¹¹ *Kligman v. M.N.R.*, 2004 FCA 152, per Létourneau J.A. at para. 5, citing *R. v. Jarvis*, 2002 SCC 73.

¹² R.S.C., 1985, c. 1 (5th Supp.).

¹³ See *Mensah v. The Queen*, 2008 TCC 378 at para. 8.

¹⁴ *Toth Equity Limited v. Mirzakhali*, 2008 CanLII 63175 (ON SC) at para. 2.

- (c) Order reversing the onus of proof: According to the CBSA, the issue the onus of proof should be determined after the Tribunal has heard parties' evidence. The CBSA acknowledges that it is not impossible to conceive of a situation in which it would be appropriate for the respondent to bear the onus. However, the CBSA submits that the decision to shift the onus should not be made in a factual vacuum.
- (d) Order declaring the CBSA's evidence inadmissible: The CBSA argues that the admissibility of evidence should only be determined after the evidence has been filed.

Tenaris Canada (Intervenor)

[12] Tenaris Canada essentially takes the same position as the CBSA and adds that postponing the appeal would delay the collection of anti-dumping duties, therefore prejudicing the domestic industry and contravening the purpose of *SIMA*.

ANALYSIS

[13] For the following reasons, the Tribunal rejects each of the appellants' four requests.

[14] In the Tribunal's view, the bulk of the appellants' concerns were already considered in the Tribunal's decision on the appellants' request for disclosure.¹⁵ In that decision, the Tribunal found that "the fact that this is an appeal of re-determinations made by the President of the CBSA pursuant to paragraph 59(1)(b) of *SIMA*, which entails a finding of misrepresentation or fraud, does not change the level of documentary disclosure required by the *Rules*".¹⁶ The Tribunal determined that the *Rules* provide for adequate documentary disclosure, noting that the appellants may make a new request for disclosure *after* the CBSA has filed its brief, if they are of the view that disclosure has been insufficient.¹⁷

[15] In the Tribunal's view, there is nothing exceptional about the appellants' circumstances that would warrant a stay of proceedings. The threshold for granting a stay is a high one, "requiring the demonstration of extraordinary or exceptional circumstances".¹⁸ The Tribunal notes that there are not yet any concurrent criminal proceedings: a criminal investigation is ongoing, but no charges have yet been laid. The existence of concurrent criminal proceedings is therefore speculative.

[16] Secondly, the Tribunal does not find it appropriate to reverse the onus of proof at this time, nor to exempt the appellants from filing evidence. An appeal under subsection 61(1) of *SIMA* is *de novo*, meaning that the appellants have both the opportunity and the responsibility to freshly make their case. An appellant "may rely upon various forms of evidence",¹⁹ including affidavits and witness testimony. The Tribunal sees no reason for which the appellants should not be capable of producing a brief conforming to the requirements of rule 34. If the appellants are of the view that additional disclosure and/or an opportunity for rebuttal evidence are warranted after the CBSA has filed its brief, they can make an application to the Tribunal at that time.

¹⁵ *Alberta Inc. CITT and Prairie Tubulars CITT*.

¹⁶ *Alberta Inc. CITT* at para. 9.

¹⁷ *Ibid.* at paras. 9-10.

¹⁸ *Schreiber v. Federal Republic of Germany*, 2001 CanLII 20859 (ON CA) at para. 4.

¹⁹ *KAO Brands Canada Inc v. President of the Canada Border Services Agency* (16 January 2014), AP-2013-018 (CITT) at para. 21.

[17] Finally, a declaration on the admissibility of evidence at this time would be speculative and premature. The Tribunal will decide any questions relating to the admissibility or weight of evidence once the evidence has been filed.

[18] In light of the above, the appellants are required to file a brief conforming to the requirements of rule 34, as well as any accompanying evidence and/or arguments in regard to constitutional questions, within 60 days of this order. The CBSA must file its response within 60 days of service of the appellants' brief, in accordance with rule 35. As noted above, if the CBSA's brief raises issues or evidence of which the appellants were previously unaware, the Tribunal may consider allowing the appellants to provide rebuttal evidence.

ORDER

[19] The appellant's requests for a stay of proceedings, an exemption from providing evidence, a reversal of the onus of proof, and a ruling on the admissibility of evidence are each denied. The appellant must file a brief conforming to rule 34 of the *Canadian International Trade Tribunal Rules* within 60 days of this Order.

Serge Fréchette

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Presiding Member