



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal AP-2019-018

Rainbow Net & Rigging Limited

v.

President of the Canada Border
Services Agency

*Order and reasons issued
Thursday, April 21, 2022*

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IN THE MATTER OF an appeal filed by Rainbow Net & Rigging Limited on August 9, 2019, pursuant to section 61 of the *Customs Act*;

AND IN THE MATTER OF a request by the President of the Canada Border Services Agency for the dismissal of the appeal pursuant to Rule 29(c) of the *Canadian International Trade Tribunal Rules*.

BETWEEN

RAINBOW NET & RIGGING LIMITED

Appellant

AND

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

Respondent

ORDER

The appeal is dismissed.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

BACKGROUND

[1] On August 9, 2019, the Canadian International Trade Tribunal received a notice of appeal from Rainbow Net & Rigging Limited (Rainbow Net).¹

[2] On August 12, 2019, the Tribunal acknowledged receipt of the notice of appeal and advised the parties that the hearing date for the appeal was scheduled for February 13, 2020. The Tribunal further requested that Rainbow Net identify any confidential information in the notice of appeal and supporting documents by noon on August 27, 2019. The Tribunal also informed Rainbow Net that the appellant's brief was due no later than October 8, 2019.²

[3] On August 21, 2019, Rainbow Net requested an extension until September 30, 2019, to identify confidential documents in the notice of appeal.³ This request was granted on August 22, 2019.⁴

[4] On September 23, 2019, Rainbow Net requested that the deadlines for both the identification of confidential information in the notice of appeal and for the filing of the appellant's brief be extended until October 31, 2019.⁵ On September 24, 2019, the Tribunal requested that Rainbow Net provide, by September 27, 2019, a justification for the requests to extend these deadlines.⁶ On September 26, 2019, Rainbow Net replied that, as a small business, it had to juggle competing priorities and required further time to gather the information and conduct the necessary research.⁷ Also on September 26, 2019, the Canada Border Services Agency (CBSA) confirmed that it did not object to the extension of time requested by Rainbow Net, provided that it could also receive an extension of time to file the respondent's brief.⁸ On September 27, 2019, the Tribunal granted the extension requests and notified the parties that the hearing date had been cancelled and that the hearing would be rescheduled in due course.⁹

[5] On October 9, 2019, counsel for the CBSA requested that the Tribunal direct Rainbow Net to specify which goods formed the subject of its appeal and on which transactions and lines they appeared. The CBSA explained that the decision under appeal involved several different types of goods, imported on multiple transactions, and that Rainbow Net's notice of appeal was not clear, as it simply stated that Rainbow Net was "disputing the remaining amounts that are outstanding on this case".¹⁰ On October 10, 2019, Rainbow Net replied indicating that it was also not clear on which transactions were involved in the appeal, which is why its notice of appeal had been vaguely worded, and that it would also like to receive this information (presumably from the CBSA).¹¹

¹ Exhibit AP-2019-018-01.

² Exhibit AP-2019-018-02.

³ Exhibit AP-2019-018-03.

⁴ Exhibit AP-2019-018-04.

⁵ Exhibit AP-2019-018-05.

⁶ Exhibit AP-2019-018-06.

⁷ Exhibit AP-2019-018-07.

⁸ Exhibit AP-2019-018-08.

⁹ Exhibit AP-2019-018-09.

¹⁰ Exhibit AP-2019-018-10 at 1.

¹¹ Exhibit AP-2019-018-11.

[6] On October 11, 2019, the Tribunal requested that counsel for the CBSA review the attachments to the notice of appeal and the appellant's brief once they were filed on October 31, 2019, and then notify the Tribunal should more information still be required as to the goods that formed the subject of the appeal. Alternatively, the Tribunal stated that, should the CBSA require this information before October 31, 2019, it should advise the Tribunal and provide an explanation for the urgency of the request.¹²

[7] On October 17, 2019, Rainbow Net requested a further extension to the deadlines to identify confidential information and file its brief. Rainbow Net stated that it had made various requests for information "vital to its submission" to the provincial and federal governments and had not yet received responses to these requests, which prevented it from preparing a thorough submission.¹³ On October 23, 2019, the CBSA indicated that it did not object to these further extensions.¹⁴

[8] On October 23, 2019, the Tribunal placed the file in abeyance and cancelled all existing deadlines. The Tribunal requested that Rainbow Net inform the Tribunal of its intentions with respect to the appeal by no later than November 25, 2019.¹⁵

[9] Rainbow Net did not update the Tribunal by November 25, 2019, as requested. On November 26, 2019, the Tribunal contacted Rainbow Net by telephone and requested that it send an update in writing. The Tribunal sent further email reminders on December 9 and 17, 2019. On December 18, 2019, Rainbow Net responded that it had not yet received the necessary information from the federal Minister of Fisheries, Oceans and the Canadian Coast Guard regarding commercial fishery classifications and that it would advise the Tribunal once it had received this information.¹⁶

[10] On December 19, 2019, the Tribunal informed the parties that the hearing would remain in abeyance to allow Rainbow Net time to obtain the information necessary to continue the appeal. The Tribunal requested that Rainbow Net inform the Tribunal of its intentions with respect to the appeal by no later than February 20, 2020.¹⁷

[11] Again, Rainbow Net did not update the Tribunal by February 20, 2020, as requested. On February 24 and March 4, 2020, the Tribunal sent email reminders to Rainbow Net. On March 5, 2020, Rainbow Net replied that the Department of Fisheries and Oceans (DFO) had still not replied to its numerous requests for information.¹⁸

[12] On March 11, 2020, the Tribunal informed the parties that the appeal would continue to be held in abeyance and requested that Rainbow Net inform the Tribunal of its intentions with respect to the appeal by no later than June 12, 2020.¹⁹

[13] Rainbow Net did not update the Tribunal by June 12, 2020, as requested. On September 17, 2020, the Tribunal sent an email reminder to Rainbow Net. On September 18, 2020, Rainbow Net replied that it was still waiting for information from DFO and requested that the file remain in

¹² Exhibit AP-2019-018-12.

¹³ Exhibit AP-2019-018-13.

¹⁴ Exhibit AP-2019-018-14.

¹⁵ Exhibit AP-2019-018-15.

¹⁶ Exhibit AP-2019-018-16.

¹⁷ Exhibit AP-2019-018-17.

¹⁸ Exhibit AP-2019-018-18.

¹⁹ Exhibit AP-2019-018-19.

abeyance.²⁰ On September 21, 2020, the CBSA requested that the Tribunal direct Rainbow Net to provide clarification as to what information it was seeking from the DFO and why that information was necessary for its appeal, given that the appeal concerned the tariff classification of goods.²¹ On September 21, 2020, Rainbow Net replied that it would provide the requested information.²²

[14] On January 8, 2021, the Tribunal informed the parties that it had not received the information requested by the CBSA from Rainbow Net. The Tribunal requested that, by no later than January 15, 2021, Rainbow Net either forward this information to the Tribunal for the record or, alternatively, if Rainbow Net had not yet provided the information to the CBSA, that it provide the information to the CBSA and the Tribunal. The Tribunal requested that Rainbow Net also provide an update with respect to its intentions regarding the appeal and noted that the file would continue in abeyance. No response from Rainbow Net was received by no later than January 15, 2021.²³

[15] On September 28, 2021, counsel for the CBSA requested further clarification from the Tribunal with regard to the following: (1) which information was missing for the tariff classification appeal to proceed; (2) why that information had not yet been made available and when Rainbow Net expected to obtain it; and (3) how that information was relevant for the purposes of the above-noted appeal. The CBSA further requested that, if Rainbow Net was unable to provide adequate explanations regarding these items, the appeal proceed without further delay.²⁴

[16] On October 9, 2021, the Tribunal directed Rainbow Net to provide the clarification requested by the CBSA by no later than October 19, 2021, and stated that if an acceptable justification for why Rainbow Net was unable to file the appellant's brief was not provided, the Tribunal would remove this file from abeyance and set dates for the filing of the parties' briefs as well as the hearing. The Tribunal also directed Rainbow Net to identify confidential information in the notice of appeal by no later than October 19, 2021. In addition, the Tribunal warned Rainbow Net that its appeal could be dismissed pursuant to rule 29 of the *Canadian International Trade Tribunal Rules* (Rules) for failure to follow the Tribunal's directions.²⁵

[17] Nothing was received from Rainbow Net by October 19, 2021. On October 26, 2021, the CBSA requested that, as Rainbow Net had not provided its explanations by October 19, 2021, the Tribunal set a deadline for the filing of the appellant's brief. The CBSA also requested that, should Rainbow Net not file its brief by the deadline, the appeal be dismissed pursuant to rule 29.²⁶ On the same day, Rainbow Net replied that it would respond to the Tribunal's letter of October 5, 2021, within two weeks.²⁷

[18] On October 27, 2019, the Tribunal set the deadline of November 17, 2021, for the filing of the appellant's brief, and again directed Rainbow Net to identify confidential information in its notice

²⁰ Exhibit AP-2019-018-20.

²¹ Exhibit AP-2019-018-21.

²² Exhibit AP-2019-018-22.

²³ Exhibit AP-2019-018-23.

²⁴ Exhibit AP-2019-018-24.

²⁵ Exhibit AP-2019-018-25.

²⁶ Exhibit AP-2019-018-26.

²⁷ Exhibit AP-2019-018-35.

of appeal by that date. The Tribunal warned Rainbow Net that failure to file its brief by November 17, 2021, could result in its appeal being dismissed.²⁸

[19] On November 17, 2021, Rainbow Net filed a letter detailing the steps it had followed to obtain the information it was seeking from the DFO, as well as the difficulties it had faced as a small business during the COVID-19 pandemic. The letter also contained statements disputing the CBSA's findings that:

- (i) certain ropes with a diameter of over 38 mm are not articles or materials for use in the manufacture or repair of the goods enumerated in tariff item No. 9901.00.00 to be employed in commercial fishing;
- (ii) crab traps are not "fishing nets" within the meaning of tariff item No. 9901.00.00; and
- (iii) goods for use in aquaculture cannot be classified in tariff item No. 9901.00.00 because they are not goods to be employed in commercial fishing.²⁹

[20] On November 19, 2021, the Tribunal acknowledged receipt of this letter and stated that it would consider the letter, along with the notice of appeal filed on August 9, 2019, as constituting Rainbow Net's appellant's brief. The Tribunal accordingly set a new hearing date of April 7, 2022, and advised the CBSA that the respondent's brief was due no later than January 17, 2022.³⁰

[21] On November 23, 2021, the CBSA requested that the deadline for filing the respondent's brief be suspended. The CBSA submitted that, as Rainbow Net had never identified confidential information in its notice of appeal, the CBSA had never been granted access to the full notice of appeal. It added that Rainbow Net had never fully specified what goods were the subject of the appeal in response to the Tribunal's directions. The CBSA submitted that it did not have sufficient information to complete its respondent's brief. Accordingly, the CBSA requested that its brief be due either 60 days from the date that Rainbow Net clarified the scope of the goods under appeal, confirmed whether the notice of appeal contained protected information, and provided the President access to the notice of appeal, or February 17, 2022, whichever was later.³¹

[22] On November 30, 2021, the Tribunal granted the CBSA's request and stated that a new date for the filing of the respondent's brief would be set once the missing information was received from Rainbow Net.³² On December 1, 2021, Rainbow Net indicated that it would respond by the end of the following week.³³ No response was received from Rainbow Net within that timeframe. On January 4, 2022, in response to a reminder from the Tribunal, Rainbow Net's representative indicated that they were in isolation and would not be able to access their office for a few weeks.³⁴

[23] On March 8, 2022, the CBSA requested that the Tribunal set a new deadline for Rainbow Net to specify which goods were subject to the appeal and confirm whether its notice of appeal contained

²⁸ Exhibit AP-2019-018-27.

²⁹ Exhibit AP-2019-018-28 at 3.

³⁰ Exhibit AP-2019-018-29.

³¹ Exhibit AP-2019-018-30.

³² Exhibit AP-2019-018-31.

³³ Exhibit AP-2019-018-36.

³⁴ Exhibit AP-2019-018-37.

confidential information. The CBSA requested that, should the missing information not be provided by Rainbow Net by that deadline, the appeal be dismissed pursuant to rule 29.³⁵

[24] On the same date, the Tribunal issued a letter to the parties indicating that it had rescheduled the hearing, as there would now be insufficient time for the CBSA to prepare its brief prior to the existing April 7, 2022, hearing date. The Tribunal also directed Rainbow Net to inform the Tribunal whether the notice of appeal contained any confidential information and, if so, to identify the confidential information and prepare a properly formatted public version of the notice of appeal by no later than March 15, 2022. The Tribunal further informed Rainbow Net that if no confidential information was identified by March 15, 2022, the entire notice of appeal would be treated as public and forwarded to the CBSA. The Tribunal also directed Rainbow Net to clarify the scope of the goods under appeal, again by no later than March 15, 2022. Finally, the Tribunal again reminded Rainbow Net that its appeal could be dismissed under rule 29 for failure to follow the Tribunal's directions.³⁶

[25] None of the requested information was received from Rainbow Net by March 15, 2022. On March 21, 2022, the Tribunal sent Rainbow Net a final request to file the missing information by no later than March 28, 2022. No response from Rainbow Net was received on that date.³⁷

[26] On April 5, 2022, the CBSA again requested that the Tribunal dismiss the appeal since Rainbow Net had not filed the missing information in accordance with the Tribunal's directions. The CBSA acknowledged that dismissal for failure to comply is a severe sanction that should be used only as a last resort but submitted that it was nevertheless justified in these circumstances, as Rainbow Net's repeated failure to comply with the Tribunal's directions demonstrated an unwillingness to cooperate toward the smooth and un-disrupted conduct of the appeal.³⁸

ANALYSIS

[27] Rule 29 provides as follows:

Where a party to a proceeding has not met any requirement of these Rules or complied with any order or direction issued by the Tribunal, the Tribunal may

- (a) stay the proceeding until it is satisfied that the requirement has been met or the order or direction has been complied with;
- (b) decide the matter in issue on the basis of the information on the record; or
- (c) make any order that it considers just and equitable in the circumstances, including a dismissal order.

[28] Since this appeal was filed, as detailed above, the Tribunal has accommodated Rainbow Net with multiple extensions to the deadlines to file its brief and to identify confidential information in

³⁵ Exhibit AP-2019-018-32.

³⁶ Exhibit AP-2019-018-33.

³⁷ Exhibit AP-2019-018-34.

³⁸ Exhibit AP-2019-018-38.

the notice of appeal, as well as by placing this file in abeyance while Rainbow Net sought out information it considered necessary to enable it to file its brief.

[29] The Tribunal is intended to be a forum of easy access and is empowered to vary its procedures in order to conduct its proceedings informally.³⁹ The fact that Rainbow Net is not represented by counsel as well as the difficulties caused to all small businesses by the COVID-19 pandemic also informed the Tribunal's decisions to grant the requested extensions and to keep this file in abeyance.

[30] However, as the Tribunal has received no response to its last two letters directing Rainbow Net to respond, the Tribunal will grant the CBSA's request to dismiss the appeal.

[31] Accordingly, the Tribunal dismisses the appeal in accordance with rule 29(c) of the Rules.

Peter Burn

Peter Burn

Presiding Member

³⁹ See section 35 of the *Canadian International Trade Tribunal Act* and rule 6 of the Rules.