

A-195-17

Court File No. ~~F 923-17~~



FEDERAL COURT OF APPEAL

LNG CANADA DEVELOPMENT INC.

Applicant

- and -

CANADIAN INSTITUTE OF STEEL CONSTRUCTION, IRONWORKERS INTERNATIONAL, OCEAN STEEL & CONSTRUCTION LTD., SUPERMETAL STRUCTURES INC., SUPREME GROUP LP, WAIWARD STEEL LP, WALTERS INC., ANDRITZ HYDRO CANADA INC., CANADIAN NATURAL RESOURCES LTD., CH2M HILL CANADA LTD., ENBRIDGE PIPELINES INC., CHINA CHAMBER OF INTERNATIONAL COMMERCE, CINTASA, S.A., LAFARGE CANADA INC., DELEGATION OF THE EUROPEAN UNION TO CANADA, EMBASSY OF SPAIN – ECONOMIC AND COMMERCIAL OFFICE, FLUOR CANADA LTD., SHANGUAI SHUANGYAN CHEMICAL EQUIPMENT MANUFACTURING CO., SHANGHAI YANDA ENGINEERING CO. LTD., SUNCOR ENERGY INC., YANDA CANADA LTD., YANDA (HAIMEN) HEAVY EQUIPMENT MANUFACTURING CO. LTD., AND THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Canada.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is

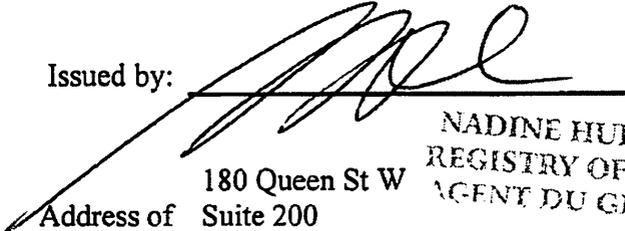
self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 26, 2017

Issued by:


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AND TO: ATTORNEY GENERAL OF CANADA
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AND TO: THE CANADIAN INTERNATIONAL TRADE TRIBUNAL
333 Laurier Avenue West, 15th Floor
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APPLICATION

This is an application for judicial review in respect of an order and decision made by the Canadian International Trade Tribunal (the “Tribunal”) on May 25, 2017, pursuant to an inquiry under section 42 of the *Special Import Measures Act* (the “SIMA”) , concerning certain fabricated industrial steel components (“FISC”) originating in or exported from the People’s Republic of China, the Republic of Korea and the Kingdom of Spain (the “Finding”).

The Applicant makes application pursuant to sections 18.1 and 28 of the *Federal Courts Act*, section 96.1 of the *SIMA*, and Rule 301 of the *Federal Court Rules* for an order:

- (a) setting aside the decision of the Tribunal to not determine whether the FISC contained within modules of mixed FISC and non-FISC content (“Complex Modules”) are subject goods and declaring that such FISC are not subject goods;
- (b) in the alternative, remitting the matter to the Tribunal and requiring it to determine, based upon the record before it, whether the FISC contained within the Complex Modules are subject goods;
- (c) in the alternative, remitting the matter to the Tribunal and requiring it to determine, based upon the record before it, whether the FISC contained within the Complex Modules of a type described in the product exclusion request of LNG Canada Development Inc. (the “LNG Modules”) are subject goods;

- (d) quashing and setting aside the order and decision of the Tribunal to deny the product exclusion request of LNG Canada Development Inc. and granting said exclusion request;
- (e) in the alternative, quashing and setting aside the order and decision of the Tribunal to deny the product exclusion request of LNG Canada Development Inc. and remitting the matter to the Tribunal for determination;
- (f) awarding the Applicant its costs on the application; and
- (g) providing such further and other relief as the Applicant may request and this Court deem just.

The grounds for the application are:

1. The Applicant is a joint venture company comprised of four global energy companies with substantial experience in liquefied natural gas (“LNG”) – Shell, PetroChina, KOGAS and Mitsubishi Corporation. LNG Canada Development Inc. (“LNGC”) has proposed to design, build and operate a LNG plant and marine export terminal facility near Kitimat, British Columbia (the “LNG Project”). The plant will cool natural gas delivered via pipeline to the site and reduce it to liquid form for storage and shipment to overseas markets. If built, it will be the largest of its kind in Canada, bringing significant benefits to local First Nations, municipal, provincial, and federal governments, Canadian businesses, and Canadian workers;

2. The facilities for the LNG Project will be constructed using Complex Modules manufactured abroad and imported into Canada;

History of the Proceedings

2. The Tribunal began its inquiry under section 42 of the *SIMA* on January 25, 2017. The Tribunal undertook an extensive documentary review which included responses to numerous questionnaires issued to the parties, an investigation report by the Tribunal's research staff, responses to requests for information from the parties, and parties' statements of evidence, briefs and aides to argument;

3. Between May 1 and May 8, 2017, the Tribunal also heard evidence and argument regarding the inquiry. This *viva voce* evidence and argument at the hearing itself together with the written materials formed the record before the Tribunal for purposes of determining whether the subject goods caused or threatened to cause injury to domestic production of like goods, and whether to grant any exclusions from the Finding;

4. A central issue before the Tribunal was whether the FISC components of the Complex Modules were within the scope of the subject goods definition provided by the Canada Border Services Agency ("CBSA");

5. During five days of hearing, the parties provided numerous witnesses that spoke directly to the composition of these modules, their construction techniques, their dimensions, and how the FISC and non-FISC components are integrated in the manufacture of the Complex Modules abroad;

6. During the testimony of those supporting a finding of injury (the “Domestic Industry”), the Tribunal remained seized of the issue, asking numerous questions to determine whether the Domestic Industry could produce the Complex Modules out of mixed FISC and non-FISC components. The Tribunal indicated multiple times that it was aware of the need to interpret the scope of the subject goods definition from the CBSA;

7. During these questions, and during cross examination by the parties opposed to the finding, the Domestic Industry appeared to have full knowledge of the scope of what was contained within the Complex Modules, and the nature of what was meant by a Complex Module;

8. The parties opposed to an injury finding provided extensive documentary submissions and evidence onto the record. The parties opposed also provided three days of *viva voce* evidence, including testimony from multiple individuals with decades of experience with the construction and supply of modules. During this time, the Tribunal did not seek any additional information;

9. At no time during the proceeding did the Tribunal, the Domestic Industry or the parties opposed indicate any uncertainty as to the characteristics or nature of the Complex Modules or the LNG Modules;

10. In argument it was clear that all parties had full understanding of the characteristics of the Complex Modules. Similarly, there was no misunderstanding or confusion by any party, or apparently by the Tribunal, regarding the composition or essential character of the Complex Modules or the LNG Modules;

The Tribunal Decision

11. On May 25, 2017, the Tribunal issued its decision that the dumping of certain FISC originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain, and the subsidization of certain FISC originating in or exported from the People's Republic of China, had caused injury to the domestic production of like goods. The Tribunal excluded from the Finding goods imported within the 2017 calendar year by Andritz Hydro Canada Inc. from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador. The Tribunal also excluded goods exported by Cintasa from Spain and goods exported by Hanmaek from Korea;

12. The Tribunal noted that it had the power to determine the scope of the CBSA's definition of subject goods. To assist in this determination, which was clearly within the Tribunal's self-described jurisdiction, the parties had supplied a voluminous evidentiary record. Despite this, the Tribunal refused to exercise its jurisdiction to consider whether the FISC incorporated into the Complex Modules fell within the definition of the subject goods;

13. In doing so, the Tribunal chose to ignore substantial evidence on the record and instead erroneously stated that the focus of its inquiry had been on unassembled FISC or FISC-only modules. Indeed, the lack of clarity regarding the definition of the Complex Modules, and the incumbent requirement on the Tribunal to provide such clarity of scope, was the rationale for participation by many of the parties to the inquiry;

14. The Tribunal also denied most of the product exclusion requests. This included the product exclusion request of LNGC. LNGC had requested an exclusion for the FISC contained within modules containing FISC and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables, measurement equipment and vales) that are interconnected and assembled together in a permanent manner, for use in the LNG Project at Kitimat, British Columbia;

15. Once again ignoring the extensive evidentiary record, the Tribunal determined that until the Complex Modules were imported or ready to be imported, the information before it as to their characteristics, dimensions, end uses, composition, and essential character (including a detailed list of representative LNG Modules for use in the construction of the LNG Project), was simply not specific enough to render a determination as to whether the goods were within the scope of the subject goods definition. Without blueprints and specific imports, the Tribunal decided it was beyond its abilities to understand what it was being asked to rule upon;

16. The Tribunal also held that in order for LNGC to be granted the exclusion it would first have to concede that the FISC within the Complex Modules fell within the definition of the subject goods. It refused to consider LNGC's argument for granting the exclusion in the alternative, effectively forcing LNGC to surrender its legal rights to challenge the scope of the subject goods definition;

Errors of the Tribunal

17. The Tribunal's errors are similar in both its cursory analysis of the scope of the subject goods definition, including in its refusal to issue a determination regarding whether the FISC within the Complex Modules or the LNG Modules were subject goods, and its refusal to grant the LNGC product exclusion request;

18. The Tribunal erred in findings of law and mixed fact and law by:

- (a) not taking into account relevant factors, including the extensive evidence regarding the essential characteristics and nature of the Complex Modules and LNG Modules, when determining whether the FISC contained within the Complex Modules and the LNG Modules were subject goods;
- (b) failing to exercise its discretion with regard to the LNGC's exclusion request in a manner consistent with the purposes and policies underlying the *SIMA*; and
- (c) reaching a conclusion that no person properly instructed as to the law and acting judicially could reach given the extensive evidentiary record;

19. The Tribunal further based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it by finding that there was insufficient information to make a determination as to whether the FISC contained within the Complex Modules or the LNG Modules were subject goods and:

- (a) failing to mention or address critical evidence regarding the essential nature of the Complex Modules and the LNG Modules contained within the lengthy documentary record and address in *viva voce* hearings; and
- (b) reaching this conclusion in a manner not rationally supported by the record before it;

20. The Tribunal erred by failing to observe principles of natural justice and procedural fairness by:

- (a) failing to consider the evidence before it and rendering a decision in a manner that was prejudicial to the outcome of the hearing;
- (b) requiring the Applicant to surrender its legal right to argue the scope of the subject goods definition in order to consider LNGC's exclusion request; and
- (c) rendering a decision based upon a legal theory not advanced by the parties; and

21. Such further and other grounds as counsel may submit and this Honourable Court may permit.

This application relies on the following statutes and regulations:

- (a) *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (b) *Federal Courts Rules*, SOR/98-106, as amended;

- (c) *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended;
- (d) Special Import Measures Regulations SOR/94/927, as amended;
- (e) *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, as amended;
- (f) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 1868 U.N.T.S. 201; and
- (g) Such further and other material as counsel may advise and this Honourable Court may permit.

This application will be supported by the following material:

- (a) affidavits of a representative or representatives of the Applicant;
- (b) the record of proceedings before the Tribunal, public and protected (subject to an appropriate confidentiality order);
- (c) transcripts of the proceedings before the Tribunal, public and *in camera* (subject to an appropriate confidentiality order);
- (d) application record of the Applicant; and
- (e) such further and other materials as counsel may advise.

The Applicant requests the Tribunal to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Tribunal to the Applicant and to the Registry:

- (a) all transcripts of the hearing in this inquiry, held from May 1 to May 8, 2017, both public and *in camera* (subject to an appropriate confidentiality order under Rules 151 and 152 of the *Federal Court Rules* as material required by law to be treated confidentially);
- (b) all material forming the record of the proceedings in the review before the Tribunal (subject to an appropriate confidentiality order under Rules 151 and 152 of the *Federal Court Rules* as material required by law to be treated confidentially); and
- (c) such other documents as counsel may request and this Honourable Court may permit.

June 26, 2017



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Solicitors for the Applicant

Court File No.

FEDERAL COURT OF APPEAL

LNG CANADA DEVELOPMENT INC.

Applicant

- and -

CANADIAN INSTITUTE OF STEEL CONSTRUCTION,
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INC., SUPREME GROUP LP, WAIWARD STEEL LP,
WALTERS INC., ANDRITZ HYDRO CANADA INC.,
CANADIAN NATURAL RESOURCES LTD., CH2M
HILL CANADA LTD., ENBRIDGE PIPELINES INC.,
CHINA CHAMBER OF INTERNATIONAL
COMMERCE, CINTASA, S.A., LAFARGE CANADA
INC., DELEGATION OF THE EUROPEAN UNION TO
CANADA, EMBASSY OF SPAIN – ECONOMIC AND
COMMERCIAL OFFICE, FLUOR CANADA LTD.,
SHANGUAI SHUANGYAN CHEMICAL EQUIPMENT
MANUFACTURING CO., SHANGHAI YANDA
ENGINEERING CO. LTD., SUNCOR ENERGY INC.,
YANDA CANADA LTD., YANDA (HAIMEN) HEAVY
EQUIPMENT MANUFACTURING CO. LTD., AND THE
ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

(Filed this 26 day of June, 2017)

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