



Court File No. *A-196-17*

FEDERAL COURT OF APPEAL

FLUOR CANADA LTD.

Applicant

- and -

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

Respondents

NOTICE OF APPLICATION

(Court seal)

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, Ontario.

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 prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where 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.

Date: June 26, 2017

Issued by: JACQUELINE SMITH
REGISTRY OFFICER
AGENT DU GREFFE

(Registry Officer)

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AND TO: ATTORNEY GENERAL OF CANADA
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AND TO: THE CANADIAN INTERNATIONAL TRADE TRIBUNAL
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APPLICATION

This is an application for judicial review pursuant to section 96.1 of the *Special Import Measures Act* (“SIMA”) in respect of the finding issued by the Canadian International Trade Tribunal (the “Tribunal”) in Inquiry No. NQ-2016-004 on May 25, 2017 (the “Finding”).

The applicant makes application for:

- i. an order setting aside the Tribunal’s Scope Determination (as defined herein) and referring the matter back to the Tribunal for determination in accordance with such directions as this Honourable Court considers necessary, including but not limited to a direction requiring the Tribunal to determine whether or not FISC incorporated into Complex Modules (as defined herein) falls within the scope of the Subject Goods;
- ii. an order setting aside the Tribunal’s denial of the applicant’s Consent Exclusion Request (as defined herein) and replacing it with a decision granting said request;
- iii. in the alternative to (ii), an order setting aside the Tribunal’s denial of the applicant’s Consent Exclusion Request and referring the matter back to the Tribunal for determination in accordance with such directions as this Honourable Court considers necessary, including but not limited to a direction requiring the Tribunal to grant said Consent Exclusion Request if the Tribunal determines that FISC incorporated into Complex Modules falls within the scope of the Subject Goods; and

iv. its costs of these proceedings.

The grounds for this application are:

A. Background

1. The applicant, Fluor Canada Ltd., a Canadian corporation, is an EPC (engineering, procurement and construction) company based in Calgary, Alberta. The applicant designs and constructs industrial projects for clients in Canada in the oil, gas, petrochemical, mining, and power sectors. The capital costs of these projects can be in the tens and hundreds of millions of dollars.

2. A construction material used by Fluor, and the subject-matter of the Tribunal's Finding, is 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. FISC covered by the Finding were defined as: "fabricated structural steel and plate-work components of buildings, process equipment, process enclosures, access structures, process structures, and structures for conveyancing and material handling, including steel beams, columns, braces, frames, railings, stairs, trusses, conveyor belt frame structures and galleries, bents, bins, chutes, hoppers, ductwork, process tanks, pipe racks and apron feeders, whether assembled or partially assembled into modules, or unassembled, for use in structures for: 1. oil and gas extraction, conveyance and processing; 2. mining extraction, conveyance, storage, and processing; 3. industrial power generation facilities; 4. petrochemical plants; 5. cement plants; 6. fertilizer plants; and 7. industrial metal smelters" (the "Subject Goods").

3. At a general level, there were four issues for the Tribunal to decide:
 - i. Whether the dumping or subsidy of unassembled FISC from certain countries caused injury to the domestic industry in Canada;
 - ii. Whether FISC that is assembled into modules that do not contain goods other than FISC (*i.e.* “FISC-only modules”) caused injury to the domestic industry in Canada;
 - iii. Whether or not the scope of the Subject Goods extended to FISC incorporated into complex modules containing FISC and goods other than FISC (“Complex Modules”); and
 - iv. Whether, with the consent of the domestic industry, certain Complex Modules for specific projects would be excluded from the Tribunal’s finding of injury or threat of injury.
4. The Tribunal determined that the scope of the Subject Goods included FISC that is unassembled and FISC-only modules (*i.e.* points i and ii above). These determinations are not being reviewed in this application.
5. The Tribunal also found that the dumping and/or subsidizing of the Subject Goods originating in or exported from China, Korea and Spain caused injury to the domestic industry in Canada with the exception of: (i) goods exported from Korea by Hanmaek Heavy Industries Co., Ltd., (ii) goods exported from Spain by Cintasa, S.A., and (iii) goods imported into Canada in 2017 by Andritz Hydro Canada Inc. from Korea for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

6. Despite an ample evidentiary record, the Tribunal refused to determine whether or not the scope of the Subject Goods extended to FISC incorporated into Complex Modules. The Tribunal's refusal to determine whether or not FISC incorporated into Complex Modules are Subject Goods is hereinafter referred to as the "Scope Determination".
7. Notwithstanding the consent of the domestic industry, the Tribunal also denied the applicant's product exclusion request for defined Complex Modules, hereinafter referred to as the "Consent Exclusion Request".
8. The Tribunal's refusal to exercise its jurisdiction and address the Scope Determination and deny the Consent Exclusion Request are both incorrect, unreasonable and require correction by this Court.

B. The Scope Determination

9. In reaching its decision, the Tribunal was under a positive obligation to exercise its jurisdiction and determine the scope of the Subject Goods and like goods produced by the domestic industry for the purpose of its injury analysis.
10. The applicant and other interested parties submitted extensive documentary and oral evidence regarding the construction, composition and configuration of Complex Modules. While the parties made competing submissions as to whether FISC incorporated into Complex Modules were or were not within the scope of Subject Goods, none of the parties submitted that a decision could not be made on the record before the Tribunal.

11. Notwithstanding a complete evidentiary record, the Tribunal refused to carry out its statutory mandate and exercise its jurisdiction to determine whether FISC incorporated into Complex Modules fell within the scope of Subject Goods. The Tribunal incorrectly and unreasonably found that it did not have sufficient information to determine whether or not FISC incorporated into Complex Modules fell within the definition of Subject Goods.

C. **The Consent Exclusion Request**

12. As an alternative position on the Scope Determination, the applicant sought an order that FISC incorporated into certain and specific complex modules would be excluded from any finding of injury or threat of injury made by the Tribunal. This was described as:

FISC contained in modules containing FISC and goods other than FISC (including but not limited to piping, industrial process equipment or machinery, cables and valves) that are interconnected and assembled together in a permanent manner, with the gross weight of each individual module exceeding 250 metric tonnes at the time of importation, and with the non-FISC elements accounting for at least 30% of the module's gross weight at the time of importation, for use in projects located along the coastline of British Columbia.

13. The domestic industry, whose rights and interests the Tribunal is required to protect, consented in writing to this exclusion. The consent agreement was read into and filed on the evidentiary record.
14. The longstanding and consistent practice of the Tribunal is to grant product exclusion requests made with the consent of the domestic industry.

15. After the consent was filed as part of the evidentiary record, the Tribunal did not request or receive legal argument on the applicant's Consent Exclusion Request. The Tribunal did not ask any questions of the applicant or the domestic industry regarding the Consent Exclusion Request at the hearing. If the Tribunal intended to depart from its practice of accepting the consent of the domestic industry, procedural fairness required that it alert the parties and make this a live issue for the hearing.
16. As with the Scope Determination, the Tribunal refused to carry out its statutory mandate and exercise its jurisdiction to determine that the FISC incorporated into Complex Modules should be excluded from the Tribunal's Finding as the domestic industry had already agreed, as evidenced by its consent. The Tribunal incorrectly and unreasonably found that the Consent Exclusion Request was "highly speculative and overly general" due to the timing of the industrial projects in Canada that would require Complex Modules in the future.

D. Consequences of the Tribunal's Finding

17. If the Tribunal's Finding stands uncorrected, Complex Modules generally, and the Complex Modules that are the subject of the Consent Exclusion Request specifically, may (or may not) be subject to prohibitive anti-dumping and/or countervailing duties for the next five years. The evidence before the Tribunal was that the Complex Modules cannot be supplied by the domestic industry in Canada, nor does the domestic industry have any plans to supply the Complex Modules that are the subject of the Consent Exclusion Request.

18. The Canada Border Service Agency (“CBSA”) will not have the interpretive guidance of the Tribunal as to if and how to apply anti-dumping and/or countervailing duties on FISC incorporated into Complex Modules. If such anti-dumping and/or countervailing duties are applied, importers, such as the applicant, will be required to undertake expensive and uncertain post-importation administrative appeal processes to clarify the scope of the Subject Goods with CBSA. Such appeals would require the importer to pay significant anti-dumping and/or countervailing duties (likely in the amount of tens of millions of dollars given the price of the Complex Modules) before a determination is made and will inevitably bring the same issue on appeal before the same Tribunal, likely on a virtually identical evidentiary record.
19. In addition to the Tribunal's obligations under the *Special Import Measures Act* to exercise its jurisdiction, the guiding principles of achieving a just, expeditious, inexpensive and proportionate determination of issues on their merits mandate that the Scope Determination and Consent Exclusion Request be determined on the existing evidentiary record.

E. Summary

20. The Applicant makes this application on the following grounds under subsection 96.1(2) of SIMA:
 - i. The Tribunal refused to exercise its jurisdiction and make a determination as to whether FISC contained in Complex Modules are Subject Goods and like goods for the purposes of its injury analysis;

- ii. The Tribunal refused to exercise its jurisdiction and make a determination as to whether the FISC that was the subject of the applicant's Consent Exclusion Request should be excluded from the Tribunal's Finding;
- iii. The Tribunal erred in law by limiting its injury inquiry to importations of goods that were most common during the Tribunal's period of inquiry and by failing to treat its finding as applying to future importations in concluding that prospective importations of complex modules can be addressed in the procedures set out in sections 45 of SIMA, sections 56 to 61 of SIMA, section 76.01 of SIMA, or remission requests under the *Financial Administration Act*; and
- iv. The Tribunal breached principles of procedural fairness by not requesting or hearing oral argument respecting the applicant's Consent Exclusion Request at the hearing and by precluding the applicant from seeking an exclusion as an alternative to its pleading that FISC incorporated into complex modules are non-subject goods.

This applicant relies on the following statutes and regulations:

- i. *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- ii. *Federal Courts Rules*, SOR/98-106, as amended;
- iii. *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended;
- iv. *Special Import Measures Regulations* SOR/94/927, as amended;
- v. *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, as amended; and

- vi. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 1868 U.N.T.S. 201.

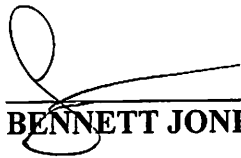
This application will be supported by the following material:

- i. The affidavit(s) of the applicant; and
- iii. Documentation filed with the Court pursuant to Rule 317 of the *Federal Courts Rules*, as requested below, subject to appropriate orders of this Court to preserve confidentiality.

Pursuant to Rule 317 of the *Federal Courts Rules*, the applicant requests the Canadian International Trade 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 Canadian International Trade Tribunal to the applicants and to the Registry:

- i. All exhibits maintained by the Tribunal relating to Inquiry Number NQ-2016-004; an
- ii. All transcripts of the pre-hearing conferences and public and in camera hearings conducted by the Tribunal in Inquiry Number NQ-2016-004.

June 26, 2017



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