



Court File No. A-793-17

FEDERAL COURT OF APPEAL

SUNCOR ENERGY INC.  
FORT HILLS ENERGY L.P.

Applicants

- and -

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

Respondents

APPLICATION UNDER SECTIONS 18.1 AND 28 OF THE *FEDERAL COURTS ACT*,  
RSC 1985, C F-7, SECTION 96.1 OF THE *SPECIAL IMPORT MEASURES ACT*, RSC  
1985, C S-15, AND RULE 301 OF THE *FEDERAL COURTS RULES*

#### NOTICE OF APPLICATION

#### TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

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 applicants. The applicants request that this application be heard at Ottawa.

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 applicants' 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.

Date: JUN 23 2017

Issued by:   
(Registry Officer) **STEPHEN GREEN**  
**REGISTRY ASSISTANT**  
**ADJOINT AU GREFFE**

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**AND TO: ATTORNEY GENERAL OF CANADA**  
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**AND TO: CANADIAN INTERNATIONAL TRADE TRIBUNAL**  
333 Laurier Avenue West, 15<sup>th</sup> Floor  
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## **APPLICATION**

This is an application for judicial review in respect of a decision of the Canadian International Trade Tribunal (the "Tribunal") denying the requests by the Applicants for certain product exclusions in Inquiry No. NQ-2016-004 (Certain Fabricated Industrial Steel Components, or "FISC") under section 42 and subsection 43(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 ("SIMA") (the "Decision").

The Decision was communicated to the Applicants on May 25, 2017. The Tribunal's Statement of Reasons was issued on June 9, 2017.

This application is pursuant to sections 18.1 and 28 of the *Federal Courts Act*, RSC 1985, C F-7; section 96.1 of SIMA, and rule 301 of the *Federal Courts Rules*.

### **The applicants make application for an order:**

- (a) declaring that in making the Decision the Tribunal acted unreasonably; acted without jurisdiction or beyond its jurisdiction or failed to exercise its jurisdiction; failed to observe a principle of natural justice, procedural fairness or other procedure that it was required to observe; committed unreasonable errors in law; and/or based the Decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it;
- (b) declaring invalid or unlawful, quashing or setting aside the Decision and granting the product exclusions requested by the Applicants;
- (c) in the alternative to (b), above, declaring invalid or unlawful, quashing or setting aside the Decision and referring the matter back to the Tribunal for a decision on the Applicants' product exclusion requests in accordance

with such directions as this Court considers necessary, including but not limited to directions requiring the Tribunal to determine, based upon the record before it, whether the FISC incorporated into or with items described in the Applicants' request for product exclusions is included within the definition of the products subject to the investigation and, if the Tribunal so concludes, directing the Tribunal to grant the exclusions requested by the Applicants;

- (d) awarding the Applicants their costs of this application; and
- (e) such further and other relief as the Applicants may request and this Court deems just.

**The grounds for the application are:**

**The Decision**

2. The Decision for which judicial review is being sought is part of an injury finding issued on May 25, 2017 by the Tribunal (the "Injury Finding"). The Injury Finding was the culmination of an inquiry pursuant to section 42 of SIMA.

3. The Injury Finding applies to goods originating in or exported from China, South Korea and Spain and which meet the following product definition:

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; but excluding electrical transmission towers; rolled steel products not further worked; steel beams not further worked; oil pump jacks; solar, wind and tidal power generation structures; power generation facilities with a rated capacity below 100 megawatts; goods classified as "prefabricated buildings" under HS Code 9406.00.90.30; structural steel for use in manufacturing facilities used in applications other than those described above; and products covered by Certain Fasteners (RR-2014-001), Structural Tubing (RR-2013-001), Carbon Steel Plate (III) (RR-2012-001), Carbon Steel Plate (VII) (NQ 2013-005) and Steel Grating (NQ-2010-002).

4. The above products imported from the subject countries are hereinafter referred to as the "Subject Goods".

5. In the Injury Finding, the Tribunal determined that the Subject Goods had caused injury to the domestic producers of "like goods". The practical effect of the Injury Finding is that Subject Goods are subject to very high anti-dumping and (in the case of China) countervailing duties.

6. In accordance with its authority under SIMA, the Tribunal excluded from the Injury Finding certain 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 from the Injury Finding goods

exported from South Korea by Hanmaek Heavy Industries Co., Ltd., and goods exported from Spain by Cintasa, S.A. on the basis that exports from these foreign producers were insignificantly dumped.

7. The Tribunal rejected product exclusion requests made by certain importers other than Anditz Hydro Canada Inc., including exclusions requested by the Applicants and to which the domestic industry parties supporting a finding of injury had consented. The consent exclusions requested by the Applicants related to the following goods:

**Exclusion 1**

Assembled FISC components, including structural supporting components such as skids, columns and bracing structures, where:

A. the FISC constitutes no more than 50% of the weight of any imported mechanical equipment or pressure equipment as herein defined;

B. the FISC weighs no more than 10,000 kg; and

C. the FISC is permanently attached to any of the following (although any finished unit may be partially disassembled at importation for the sole purpose of shipping):

i. Mechanical equipment, meaning tested engineered mechanical equipment imported as a finished unit in its final operational configuration, designed to meet particular parameters of performance specified by the end user. Mechanical equipment includes but is not limited to hydraulic power units, air compressor units, pump houses and pump packages, tailings pump barges, dredges, transformers, lube skids, prime movers, safety showers, chemical injection units, water and waste treatment units, aerial

coolers, generator units, vacuum equipment and natural gas heater units.

ii. Pressure Equipment: Pressure equipment means equipment that requires Alberta Boiler Safety Association (or other provincial equivalent) design registration, including pressure vessels, packaged boilers, heat exchangers, bullets and condensers.

### **Exclusion 2 – E-houses and Sub-Stations**

FISC components incorporated into any of the following:

A. an electrical house meaning a prefabricated walk-in modular outdoor enclosure to house medium voltage and low voltage switchgear imported as a finished unit in its final operational configuration, where the electrical house meets Canadian Standards Association requirements prior to importation;

B. a skid-mounted sub-station meaning a prefabricated walk-in modular outdoor enclosure to house electrical switchgear imported as a finished unit in its final operational configuration, where the sub-station meets Canadian Standards Association requirements prior to importation;

but not excluding goods that meet the foregoing definition that also contain mechanical or process equipment.

8. In accordance with normal practice before the Tribunal, neither the Applicants nor the Respondents presented oral arguments respecting their exclusion requests on the expectation that the Tribunal would grant such requests based on the domestic industry's consent to same and that any further argument would be academic.

9. The Tribunal held that the consent of the domestic industry was not evidence and that it did not fetter the Tribunal's discretion. The Tribunal did not ask any questions of

the Applicants nor of the domestic industry regarding the Applicant's exclusion request at or following the hearing.

**Errors in the Tribunal's Decision**

10. In carrying out its injury inquiry under section 42 of SIMA, the Tribunal may not modify the definition of the products to which the investigation applies, but it must necessarily interpret and apply this definition, among other things to determine the scope of "like goods" to which its investigation and, ultimately, the Injury Finding applies. The Tribunal failed or declined to interpret and apply the product definition with respect to the Applicants' exclusion requests.

11. In making the Injury Finding, the Tribunal determined that the scope of the Subject Goods included (i) FISC that is unassembled and (ii) FISC that is assembled into modules that do not contain goods other than FISC ("FISC-only modules"). The Tribunal, however, erroneously and unreasonably declined to determine whether or not the scope of the Subject Goods extended to FISC incorporated into "complex modules" (containing FISC and goods other than FISC) or to FISC incorporated into the kind of equipment that is the subject of the Applicants' exclusion requests.

12. In relation to the Decision, therefore, the Tribunal failed or declined to make a determination as to the scope and meaning of the product definition and, in so doing, acted unreasonably, committed reviewable errors of fact and law and acted without jurisdiction or refused to properly exercise its jurisdiction. By contrast, in relation to the exclusion granted to Andritz Hydro Canada Inc. it did make a determination that these goods fell within the product definition. In taking an inconsistent approach to the various

exclusion requests the Tribunal acted unreasonably, capriciously and in a manner that disregarded the evidence before it.

13. In arriving at the Decision, the Tribunal also made a finding that the Applicants could not request exclusions for products in relation to which the Applicants had also reserved the right to argue that the products were beyond the scope of the investigation (i.e outside the product definition). In so doing, the Tribunal made an unreasonable and reviewable error.

14. The Applicants were entitled to reserve their rights with respect to the scope of the product definition, and in basing its rejection of their exclusion requests entirely or in part on this reservation, the Tribunal acted unreasonably; acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; unreasonably erred in fact and law and, therefore, committed a reviewable error.

15. The Tribunal's Statement of Reasons issued on June 9, 2017, discloses that in arriving at the Injury Finding and the Decision, the Tribunal also made inconsistent and irreconcilable findings with respect to whether FISC contained in certain modules and in the process equipment subject to the Applicants' exclusion requests fall within the product definition that applies to the investigation. These incoherent findings cannot logically co-exist and in making such inconsistent findings the Tribunal acted unreasonably and made reviewable errors of fact and law.

16. The Tribunal's Statement of Reasons further discloses that the Tribunal also based its denial of the Applicants' exclusion requests at least in part on its assumption that the "requests were made as a precaution against enforcement by the CBSA of its finding on FISC incorporated into complex modules or into other equipment". In so doing, the Tribunal acted unreasonably, made an erroneous and reviewable error of law and made an erroneous finding of fact that is not based on any evidence before the Tribunal and that was made without regard to the material that was before the Tribunal.

17. The Tribunal's Statement of Reasons further discloses that the Tribunal also based its denial of the Applicants' exclusion requests at least in part on the determination that the Tribunal cannot grant an exclusion request where there are "uncertainties associated with the goods which are the subject of the exclusion requests". In so finding, the Tribunal acted unreasonably, acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction and made a reviewable error of fact and law.

18. The Tribunal's Statement of Reasons further discloses that the Tribunal also based its denial of the Applicants' exclusion requests at least in part on the determination that the evidence did not allow the Tribunal to conclude whether the products for which the exclusion requests were made were in fact goods subject to the investigation. In so finding, the Tribunal acted unreasonably, acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction and made a reviewable error of fact and law.

19. In its Statement of Reasons, the Tribunal also erroneously and unreasonably determined that other mechanisms are available to adequately address the issue of whether or not the FISC contained in the products subject to the Applicants' exclusion requests are within the scope of the Subject Goods. These other mechanisms mentioned by the Tribunal were requests for redetermination under the SIMA, interim reviews under the SIMA, public interest inquiries under the SIMA, and remission requests under the *Financial Administration Act*, R.S.C., 1985, c. F-11. None of these mechanisms offers remedies that are equivalent to or adequate alternatives to the exclusion of products from an injury determination under subsection 43(1) of the SIMA.

20. The Tribunal acted unreasonably and erred in law and refused to exercise its jurisdiction when it declined to consider the merits of the Applicants' exclusion requests in light of the consent of the parties supporting a finding of injury, including whether or not the exclusion requests would cause injury to the domestic industry.

21. Finally, the Tribunal further breached principles of natural justice and procedural fairness by rendering the Decision without having heard legal arguments respecting the Applicants' consent exclusion requests at or following the hearing.

**This application relies upon 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.

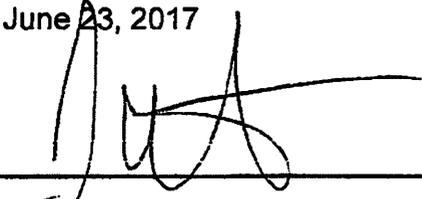
**This application will be supported by the following material:**

- i. The affidavit or affidavits of a representative of the Applicants;
- ii. Any other affidavit evidence the Applicants deem advisable;
- 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;
- iv. The Tribunal's Statement of Reasons; and
- v. Such further materials as the Applicants may advise.

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicants request the Canadian International Trade Tribunal to send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the 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; and
- 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 23, 2017



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BETWEEN:

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NOTICE OF APPLICATION

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