CLK

CASSIDY LEVY KENT

Canadian Trade Law Year in Review, 2024

Jan M. Nitoslawski
International Trade Counsel
jnitoslawski@cassidylevy.com

Alexander Hobbs
International Trade Counsel
ahobbs@cassidylevy.com

Mallory Felix
Articling Student
mfelix@cassidylevy.com

In this third edition of the *Canadian Trade Law Year in Review*, the team at CLK Canada has reviewed key judicial and administrative decisions from 2024 that will be of interest and use to practitioners in Canadian trade law. These decisions are divided according to their subject area, with this year's review covering decisions pursuant to the *Special Import Measures Act*, the *Customs Act*, the *Customs Tariff*, the *Special Economic Measures Act* and Canada's free trade agreements.

The Special Import Measures Act

This year featured two judicial decisions dealing with Canada's trade remedies regime under the *Special Import Measures Act*, R.S.C., 1985, c. S-15 [*SIMA*], both pertaining to the administration of existing anti-dumping Orders. In the first, the Federal Court of Appeal ("FCA") dismissed an appeal and allowed a cross-appeal of a Canadian International Trade Tribunal ("CITT") decision regarding the methodology by which the Canada Border Services Agency ("CBSA") calculated export prices for sales occurring between related parties and tested the reliability of such transactions. In the second, the Federal Court granted a motion to strike an application for judicial review of the outcome of a CBSA re-investigation, finding that this type of administrative action was not a "decision" amenable to judicial review.

Both decisions will be of interest to practitioners as they provide guidance on the methodology for the calculation of export prices in related party transactions and confirm that parties cannot bypass the statutory appeal mechanism by seeking judicial review of the CBSA's procedures for the review of normal values and export prices, irrespective of whether they are exporters, imports, or the domestic industry.

Remington Sales Co. d.b.a, Hyundai Heavy Industries (Canada) v. Canada (Border Services Agency, 2024 FCA 25 [*Remington*]

In this first decision, the FCA dismissed an appeal and granted a cross-appeal from a decision of the CITT, brought by Remington Sales Co. ("Remington"), and the CBSA and Hitachi Energy Canada Inc. ("Hitachi Energy"), respectively. The FCA reversed the CITT's decision that the CBSA's long-standing "reliability test" was not a proper basis for forming an opinion of reliability under section 25 of the *SIMA*, holding that the CBSA has broad discretion to determine whether an export price is reliable and that the agency's "reliability test" was an appropriate means of doing so.

This statutory appeal arose from the redetermination of anti-dumping duties assessed on large power transformers imported by Remington from South Korea. The CBSA formed the opinion that section 24 export prices were unreliable based on a quantitative reliability test that compared export prices calculated under section 24 and section 25 of the *SIMA*. Remington appealed the redetermination to the CITT. The CITT granted the appeal in part, finding that the CBSA's exclusive reliance on a quantitative methodology for assessing reliability contravened the *SIMA*, and remanded the matter for a reconsideration of reliability according to an array of qualitative factors.

Remington appealed two facets of the CITT's decision to the FCA. First, it challenged the CITT's authority to remand the matter of reliability for redetermination by the President. Second, it challenged the CITT's finding that revenues for ancillary services were properly excluded from the calculation of export prices. Both heads of Remington's appeal were dismissed.

First, the Court held that it was not an error of law for the CITT to remand the matter to the President for a redetermination of reliability. Notwithstanding that appeals to the CITT under section 61 of the *SIMA* are conducted *de novo*, the FCA found that subsection 61(3) of the *SIMA* gives the CITT broad discretion in fashioning a remedy, which includes the power to remand.

Second, the Court found that CITT did not commit an error of law in calculating export prices exclusive of revenues associated with ancillary services listed separately in customer contracts. Given that the *SIMA* focuses on determining the price of goods, the FCA saw no reason why the export price should include an amount for profit realized on the sale of an ancillary service where that ancillary service was separately priced.

On the cross-appeal, the Court agreed that the CITT committed an error of law in rejecting the CBSA's methodology on the basis that it was exclusively mathematical. As the Court observed, the "SIMA is a numbers-based statute" and contains several other concepts that are determined by way of mathematical calculation (*e.g.*, dumping and normal values). The Court saw no merit in the CITT's concern that the President was effectively using section 25 export prices first as a comparator to ascertain whether section 24 prices were reliable and second to calculate export

prices if the section 24 prices were found to be unreliable. Instead, the Court noted that "to determine whether a particular amount is reliable, it would be logical to compare that amount to an amount that is reliable." In this sense, the FCA acknowledged the "dual role" which can be played by section 25 of the SIMA.

Moreover, the Court found that the CBSA has broad discretion in selecting the methodology for forming an opinion on the reliability of section 24 export prices. The *SIMA*'s silence on factors that the President must consider in forming an opinion on reliability leaves that choice with the CBSA. The Court recognized that the President had selected a quantitative methodology properly within the scope of her discretion and that the CITT therefore erred in imposing mandatory non-quantitative factors on the CBSA "in a statutory scheme that is quantitative."

The decision in *Remington* is notable in that it vindicates the CBSA's long-standing reliability test, and thereby provides stakeholders with considerably greater certainty than the qualitative factor-based assessment which had been called for by the CITT. *Remington* also provides valuable guidance for trade practitioners on two other important issues. *First*, it confirms that the CITT—in an appeal under section 61 of the *SIMA*—has the authority to remand matters to the CBSA for redetermination. *Second*, the decision confirms that it is appropriate for the CBSA to exclude from the starting point of export price calculations the prices paid by customers for ancillary services that are separately itemized in sales contracts and which do not contribute to the value of the goods.

Çolakoğlu Metalurji A.S. v. Altasteel Inc., 2024 FC 831 [*Çolakoğlu*]

In this decision, the Federal Court granted the respondents' motion to strike an application for judicial review brought by a group of Turkish exporters and a Canadian importer of concrete reinforcing bar ("rebar") in respect of a re-investigation of normal values by the CBSA. The Court struck the application because the outcome of a CBSA re-investigation is merely a "preliminary step" and is therefore not a "decision" subject to judicial review within the meaning of section 18.1 of the *Federal Courts Act*.

The underlying application for judicial review arose from a re-investigation by the CBSA in the course of administering anti-dumping duties against rebar originating from Türkiye. In response to material changes in the market, the CBSA initiated a re-investigation of the normal values of four Turkish exporters. The CBSA concluded the re-investigation in May 2023, finding that a particular market situation ("PMS") existed in Türkiye, and assigned new normal values to be used prospectively. The Applicants—an importer of Turkish rebar, five exporters of Turkish rebar, and one industry group—sought judicial review of the outcome of the CBSA's re-investigation on two grounds: *first*, that the CBSA lacks legal authority to conduct a re-investigation; and *second*, that the CBSA's conclusion on the existence of a PMS in Türkiye was unreasonable. The respondent domestic industry brought a motion to strike.

The Court granted the motion, finding that a re-investigation "does not affect legal rights, impose legal obligations or cause prejudicial effects" and therefore is not an administrative action that triggers the right to bring an application for judicial review. She followed binding precedent which found that CBSA re-investigations and normal value reviews, in their "nature and substance", are "simply preliminary steps that may lead to an assessment of anti-dumping duties", akin to advance rulings which are not subject to judicial review. The nature of the applicant—importer, exporter, or otherwise—does not affect this analysis. The Court also followed *Husteel Co. Ltd v Canada (Attorney General)*, 2020 FC 430 and found that a loss of sales or business by the importers is not a legal effect or consequence that transforms the re-investigation into a decision subject to judicial review.

The Court likewise dismissed the Applicants' argument that the motion to strike should be denied because a novel issue was raised, namely the *vires* of the CBSA's statutory authority to engage in re-investigations. Notwithstanding that this issue indeed had not previously been considered by the Courts and was a valid ground of review in administrative law, the Court found that the application was fundamentally flawed because there was no decision subject to review and as such did not state a "cognizable administrative law claim".

By way of *obiter* in the event she was incorrect in finding that a CBSA re-investigation is not subject to judicial review, the Court applied the three-part test from *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 in assessing whether an adequate alternative remedy is available to the Applicants such that the Court should decline to hear the application. Of note, she found that while importers have an adequate alternative remedy under the redetermination scheme at sections 56-62 of the *SIMA*, exporters are not similarly situated because they do not have the right to trigger the redetermination scheme in their own right. It was therefore not "plain and obvious" that exporters have an adequate alternative remedy. That said, in conducting this analysis, the Court dismissed the Applicants' argument that questions going to the CBSA's jurisdiction to engage in re-investigations or going to the reasonableness of the CBSA's finding on the existence of a particular market situation could not be adjudicated by the CITT under the statutory appeal mechanism under the *SIMA*. On these grounds, the Court held that if the CBSA's re-investigation is found to be a reviewable matter, she would decline to strike the application in respect of the Applicant exporters, but would strike application in respect of the Applicant importer, who would be entitled to avail itself of an appeal at the CITT and raise all necessary issues in that venue.

Finally, the Court noted the Supreme Court's decision in *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 entails that judicial review of a CITT decision under section 62 of the *SIMA* "may be available" but declined to opine on the effect of privative clauses because the issue was not raised as a basis for striking the motion. The availability of judicial review from CITT decisions under section 62—due to the applicability of the privative clause at section 18.5 of the *Federal Courts Act* and since the *SIMA* does not expressly contemplate judicial review of those decisions at section 96.1—thus remains a question to be addressed in a future case.

The decision in *Çolakoğlu* contains several elements that will be useful to trade practitioners going forward. Of greatest importance, this case bolsters existing jurisprudence foreclosing the availability of judicial review of the CBSA's procedures for reviewing and issuing prospective normal values, irrespective of the ground of review or the applicant's identity. *Çolakoğlu* is under appeal to the FCA and will be heard on February 5, 2025. Practitioners will be well served by reviewing the eventual decision.

SIMA Determinations by the CITT & CBSA

In addition to the foregoing decisions in the Federal Courts, the CITT this year made affirmative findings in two antidumping and countervailing investigations. In *Certain Wire Rod*, the CITT held that dumped imports originating from or exported from China, Egypt and Vietnam injured the domestic industry during the period of investigation ("POI"). Likewise in *Certain Pea Protein*, the CITT held dumped and subsidized pea protein originating from or exported from China injured the domestic industry during the POI.

This past year also featured the initiation of a series of new cases, namely *Concrete Reinforcing Bar 5* from Bulgaria, Thailand and the United Arab Emirates and *Sucker Rods 2* from Argentina, Brazil and Mexico, along with a highly unusual CBSA-initiated case targeting a sole exporter in *Corrosion-Resistant Steel Sheets* from Türkiye. In addition, the CBSA initiated the first ever anti-circumvention investigation under subsection 72(1) of the *SIMA*, targeting subject goods under *Container Chassis* from China assembled or completed in Vietnam. The conduct and outcome of this anti-circumvention case will be one to watch given its precedent-setting nature. Decisions in these four cases will be published in 2025.

Finally, trade practitioners and interested parties should note that the CBSA overhauled its administrative procedures for the updating of normal values, export prices, and amounts for subsidy in November 2024. Under the auspices of the new Market Watch Unit—a Budget 2024 initiative—the CBSA has moved away from an *ad hoc* system of re-investigations and normal value reviews in favour of an annual review process termed "Administrative Review". While the CBSA has so far initiated three administrative reviews, uncertainty remains as to how these reviews will be conducted. Practitioners should monitor how these reviews are conducted as well as forthcoming updates to *D Memorandum D14-1-8* and the SIMA Handbook, which will hopefully provide more details on this new system.

Certain Wire Rod (October 4, 2024), NQ-2024-001 (CITT) [*Wire Rod*]

On October 4, 2024, the CITT found that dumped wire rod imported from China, Egypt and Vietnam injured the domestic industry and that anti-dumping duties should be levied.

The CITT's past injury determination relied on the following findings of fact in respect of imports of subject goods and their impact on the domestic industry. Notwithstanding that there was no increase in absolute volumes of subject imports during the POI, the CITT found that the overall market for wire rod in Canada shrank, meaning that the volume of subject goods relative to the domestic consumption of goods had increased during that period. As regards price effects, the CITT found that the subject imports undercut domestic like goods, and "exercised pressure" to depress prices in the Canadian market. Subject goods were used in negotiations by customers to "drive down" domestic industry prices, illustrating that the subject goods—rather than general market forced—were responsible for pricing pressure facing the domestic industry. The CITT therefore found that the domestic industry was adversely impacted in the form of reduced profitability on otherwise steady sales volumes during the POI. Price undercutting and price depression by imports meant that "the domestic industry held on as best it could in order to maintain volume and market share, and the employment of their workforce, through sales made at depressed prices", leading it to an "existential brink".

The CITT's injury analysis is particularly informative for trade practitioners in four respects. *First*, the CITT followed established practice by conducting its injury analysis only in respect of the domestic industry's merchant market sales, to the exclusion of captive sales to affiliated entities, but then went on to assess the materiality of that merchant market injury as against the domestic industry's production of like goods as a whole (i.e., inclusive of captive sales and export sales). Materiality of injury was a central issue in dispute in this inquiry, and the CITT's adherence to consistent past practice in cases involving sales to affiliates (i.e., a captive market component) therefore has brought further clarity and predictability on this point. *Second*, the CITT accepted that adverse impacts on the domestic industry's profitability and ability to raise capital were alone sufficient to substantiate a finding of injury, notwithstanding that the domestic industry did not experience negative effects on market share, sales volumes, employment, or capacity utilization. *Third*, as regards materiality, the CITT accepted that a severe loss in profitability in only one segment of the domestic industry's business—*i.e.*, in its merchant market sales, as opposed to affiliate sales—was sufficient to support the conclusion that the injury sustained by the domestic industry was of a material extent and that injury was deemed material "when considered in relation to the domestic production as a whole." *Fourth*, the CITT accepted that injury occurring only during a "6 to 12 month" period at the tail end of the POI was of sufficient duration to be considered material.

While ultimately not determinative, the CITT also addressed the interplay between duties imposed on certain Chinese steel and aluminum products pursuant to section 53 of the *Customs Tariff* and an anti-dumping Finding. Because the section 53 duties were not in place during the retrospective period during which injury was found to have occurred, the CITT held these duties were not relevant, and that the domestic industry was entitled to *SIMA* protection "notwithstanding other measures that may be taken by the Government of Canada and that may impact the importation of Chinese wire rod in the future." However, to the extent that the

CITT had engaged in a forward-looking threat of injury assessment, it would have been properly considered the effect of these duties in its analysis.

On balance, the CITT's decision in *Wire Rod* will be of use and interest to trade practitioners in that it provides helpful guidance in ascertaining the degree and duration of injury necessary to meet the threshold of materiality to support the imposition of trade remedies. Practitioners will also note that the Government of Egypt has filed a properly documented request for a public interest inquiry in respect of the *Wire Rod* Finding. In the event the CITT decides to conduct a public interest inquiry, this would mark the first such inquiry since *Concrete Reinforcing Bar* (December 22, 2015).

Certain Pea Protein (November 19, 2024), NQ-2024-002 (CITT) [*Pea Protein*]

On November 19, 2024, the CITT found that dumped and subsidized pea protein imported from China injured the domestic industry and that anti-dumping and countervailing duties should be levied. *Pea Protein* marks the first Canadian food product trade case since *Wheat Gluten* in 2020.

The CITT's assessment relied on the following findings of fact in respect of imports of subject goods and their impact on the domestic industry. The CITT found a significant increase in the volume of imports of subject goods during the POI on both an absolute and relative basis. Of interest, the CITT noted that in a context where a significant proportion of domestic production during the POI went to exports, it considered "the ratio of subject imports to domestic sales of domestic production more relevant to its analysis" and, given the establishment of a new domestic production facility during the POI, gave "little weight to the decrease in subject imports relative to domestic production."

As regards price effects, the CITT accepted the domestic industry's submission that certain sales should be excluded from unit price calculations because they occurred under "atypical circumstances" and held that the subject goods had engaged in significant price undercutting, with even presumptively more expensive organic pea protein from China undercutting domestic non-organic like goods. The CITT also found that while there was evidence of price depression late in the POI the evidence of price suppression was more compelling. Specifically, the CITT found persuasive evidence that the domestic industry was unable to increase their sales prices to cover the increase in their costs during the POI.

The CITT's impact and materiality analysis is likewise instructive in several regards. *First*, the CITT found that the two domestic producers experienced adverse impacts of a differing nature. While the long-established producer—Nutri-Pea GP Inc—sustained a decline in sales volumes, market share, and profitability, the new domestic producer—Roquette Canada Ltd., whose facility was established midway through the POI—experienced adverse impact because it did not experience a reasonably expected level of growth in sales or market share due to the

presence of unfairly traded Chinese subject goods in the Canadian market. The CITT found that, as a new entrant in the market, Roquette's lack of profitability in the short term was less probative than Nutri-Pea's declining profitability. *Second*, the CITT rejected the argument that low or insignificant subsidy or dumping margins severed the causal link between subject imports and any adverse impact on the domestic industry. The CITT noted that all exports were found to have not insignificant margins for either dumping, subsidy, or both, and in any event that the majority of subject goods imported were dumped and subsidized at a combined rate of 44.4 percent. The CITT followed its established precedent by noting that the focus of its inquiry is assessing "the effect of dumped or subsidized imports themselves … rather than the effects of the dumping or subsidizing *per se*."

The CITT's decision in *Pea Protein* provides useful guidance on the composition of the domestic industry. The CITT declined to consider as part of the domestic industry a former producer that was in receivership and which did not complete a producer questionnaire. The CITT likewise excluded from the domestic industry two companies that were planning on establishing production facilities in Canada in the coming years on the basis of admission by these companies that they had not produced the goods during the POI.

In sum, the CITT's decision in *Pea Protein* contains guidance that will be of use and interest to trade practitioners on the composition of the domestic industry, on assessing the effect of import volumes in a context where the domestic industry is export reliant, and likewise confirms that a newly-established domestic producer's failure to achieve reasonable growth will be considered by the CITT as probative evidence of an adverse impact by subject goods.

THE CUSTOMS ACT & CUSTOMS TARIFF

This year's Federal Court decisions pertaining to the *Customs Act R.S.C.*, 1985, c. 1 (2nd Supp.) [*Customs Act*] and the *Customs Tariff*, SC 1997, c 36 [*Customs Tariff*] involved remission requests, goods classification appeals, and border seizure reviews. In *Meyer Houseware*, the Federal Court determined that the Minister's decision to not grant duty remission to a Canadian cookware manufacturer was unreasonable. In *Pokphand Foods*, the Court emphasized that tariff classification appeals under section 68 of the *Customs Act* must be carefully framed to address legal issues only. And in *Su*, the Federal Court confirmed that the burden of proof rests with the applicant or appellant to demonstrate that goods seized at the border were unlawfully seized, and that lack of intent does not serve as a defense to a contravention of section 12 of the *Customs Act*.

These decisions will be of significant interest to both practitioners and importers, as they offer practical insights into Canadian customs law. They also provide valuable lessons on the types of arguments that are likely to be ineffective when challenging certain government decisions under the *Customs Act*.

Meyer Housewares Canada Inc. v. Canada (Attorney General), 2024 FC 1435 [*Meyer Houseware*]

In this case, the Federal Court granted an application for judicial review of a decision of an official in the Department of Finance denying a request for remission for duties paid. The decision was found to be unreasonable because the official's reasons for rejecting the Meyer Housewares' duty remission request did not meaningfully engage with key issues raised in the request.

By way of background, Meyer Housewares Canada Inc. ("Meyer"), Canada's sole cookware producer, imported stainless steel in 2018 and 2019, leading to a dispute with the CBSA over whether the goods were duty-free raw materials or finished goods attracting a 6.5 percent tariff. In March 2020, Meyer requested discretionary duty remission from the Department of Finance pursuant to section 115 of the *Customs Tariff*. In April 2021, the Minister of Finance issued an Order in Council ("OIC") setting the duty rate for Meyer's imports at 0 percent, but did not grant remission for duties already paid. Shortly before the OIC, however, the CBSA assessed duties on Meyer's imports—and imposed a penalty—prompting Meyer to unsuccessfully request the retroactive application of the OIC to the date of its original remission request on June 15, 2021. In July 2022, Meyer won its CBSA appeal—confirming that no duties were owed on the 2018 and 2019 imports—and made a remission request to the Department of Finance in August 2022 for duties it had paid on imports of the same products between March 2020 and April 2021, when the OIC came into effect.

On September 2, 2022, the Department of Finance responded in a brief email that duty remission is granted only in exceptional circumstances, that the OIC had only prospective effects, and that the Department of Finance would not provide Meyer's duty remission request. Meyer applied for judicial review in relation to this decision.

The Court found that the decision was unreasonable because the official's reasons denying remission—the September 2022 email—failed to meaningfully engage with the key issues raised by Meyer in its interactions with the Department of Finance and failed to justify the decision. Following on well-established precedent, the Court wrote that "to be reasonable, a decision refusing relief had to say something about why those circumstances were judged insufficient", especially so where the decision-maker is afforded broad discretion, as with decisions pursuant to section 115 of the *Customs Tariff*. Notwithstanding that Meyers did not expressly refer to duty remission in its August 2022 correspondence, the Court found that the official's September 2022 response showed she understood Meyer sought this particular remedy and was therefore required to meaningfully engage with that request. The official's mere statement that retroactive duty remission was available only in exceptional circumstances did not adequately justify the decision; rather, a reasonable decision would have explained why the circumstances of the Meyer's remission request identified in the June 2021

letter were insufficient to warrant granting remission. The decision was thus set aside and remanded to the Minister of Finance for redetermination.

The decision in *Meyer Houseware* is relevant to practitioners and administrative decision-makers alike, and highlights the importance of thorough reasons that engage the issues before them and provide the requisite level of justification in their decisions. *Meyer Houseware* also suggests that decision-makers are required to contextualize their decision-making and consider pertinent communications that may be made through less formal mediums such as phone calls and emails. Finally, *Meyer Houseware* serves as a reminder that Courts will not consider justifications for decisions that were not raised by the decision-maker themselves, further affirming the general rule against "bootstrapping" administrative reasons.

Charoen Pokphand Foods Canada Inc. v. Canada (Border Services Agency), 2024 FCA 101 [*Pokphand Foods*]

In this decision, the Court dismissed a statutory appeal under section 68 of the *Customs Act* because the question of whether the CITT had incorrectly classified certain shrimp wonton soups consisted of questions of mixed fact and law that were not subject to a section 68 statutory appeal, which is reserved for questions of law.

The goods at issue were packages of six sealed containers of five wontons stuffed with cooked shrimp placed in a frozen soup concentrate. The goods required the addition of water and heating to be consumed. The Appellant, Charoen Pokphand Foods Canada ("Pokphand Foods") applied to the CITT, arguing that the goods should be classified under tariff item No. 2104.10.00 as "soups and broths and preparations therefor." The CITT disagreed and found that the goods were correctly classified under item No. 1902.20.00 as "stuffed pasta, whether or not cooked or otherwise prepared." Pokphand Foods brought a statutory pursuant section 68 of the *Customs Act*.

First, the Court dismissed Pokphand Foods's argument that the CITT erred in its application of the *General Rules for the Interpretation of the Harmonized System* (the "*General Rules of Interpretation*"). The Rules are a hierarchical system of interpretation that instruct on how to determine whether goods fit under a particular tariff code. However, the application of a legal provision to a set of facts is a matter of mixed fact and law, the Court therefore did not have jurisdiction on a limited statutory appeal pursuant to section 68 of the *Customs Act* to address questions of this nature.

Second, the Court dismissed Pokphand Foods' argument that the CITT misinterpreted rule 3(b), which calls for an assessment of the "essential character" of the goods at issue. Pokphand Foods argued that the CITT erred by placing greater importance on the weight of the goods' components rather than the way the goods were marketed. Here again, the Court held that the

examination of the essential character of goods involves a factual determination, which was beyond the Court's jurisdiction in a section 68 appeal.

This case serves as a reminder to practitioners to ensure that tariff classification appeals made under section 68 of the *Customs Act* must be carefully framed to raise a question of law, and that the review of the CITT's application of the *General Rules of Interpretation* to the factual matrix underlying the tariff classification of particular goods is unlikely to fall within the Court's jurisdiction under the statutory appeal. While the availability of concurrent judicial review to challenge errors of fact or mixed fact and law was not expressly addressed in *Pokphand Foods* and has not been expressly assessed in the context the *Customs Act* since *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161, recent jurisprudence from the Supreme Court of Canada and the FCA suggests that this recourse remains available to practitioners and parties.

Su v. Canada (Public Safety and Emergency Preparedness), 2024 FC 1632 [*Su*]

This case involved a statutory appeal of a CBSA seizure of two bottles of wine pursuant to section 135 of the *Customs Act*. Section 135 grants the Federal Court the authority to review a CBSA goods seizure decision *de novo*, with the sole issue for the Court to consider being whether the decision was made in compliance with the law. In dismissing the appeal, the Court determined that the Plaintiff had not met his "heavy burden" to fully and accurately disclose the items that he was bringing across the border notwithstanding certain mistakes made by border services officers.

The Plaintiff, Mr. Su, a permanent resident of Canada, declared 13 bottles of wine and two packs of cigarettes at land port of entry on the Canada-U.S. border. The Plaintiff indicated the value of the 13 bottles to the officers in secondary, whereupon the officer inspected the Plaintiff's vehicle and discovered two additional undeclared bottles in his possession, each valued at $5,000. The officer assessed that the Plaintiff violated section 12 of the *Customs Act* by failing to declare the bottles and seized them.

Mr. Su unsuccessfully requested a ministerial review of the seizure under section 129 of the *Customs Act* and subsequently brought a statutory appeal of the seizure to the Federal Court for a *de novo* hearing under section 135 of the *Customs Act*.

In dismissing the appeal, the Court recalled that under section 135 of the *Customs Act*, the burden to show that a seizure is unlawful, on a balance of probabilities, is borne by the plaintiff. Under well-established precedents, the reasons for an erroneous declaration leading to a contravention of section 12 of the *Customs Act*—here alleged to be forgetfulness and ignorance of the law—are irrelevant. This strict approach to contraventions of section 12, however, is offset by a policy that travelers should be afforded an opportunity to consider the accuracy and completeness of their declaration before the "point of finality" is reached. The Court held that

Mr. Su knew he was required to declare goods, there was nothing to suggest his ability to make the declaration was impaired due to fatigue, and that he was given two opportunities to ensure his declaration was complete and accurate such that the "point of finality" was reached. While the border services officers had made several clerical mistakes in completing the Secondary Inspection referral slip—which the officers acknowledged in cross-examination—these mistakes did not render their evidence non-credible in respect of the core sequence of events leading to the contravention. The Court was therefore satisfied that Mr. Su contravened section 12 of the *Customs Act* and that the border officers more than met their duty of procedural fairness.

Su serves as a reminder to travelers of their strict liability under section 12 of the *Customs Act* and that they—not the border services officers—bear the burden of proving that any seizure of their goods was unlawful when appealing a seizure decision under section 135. Additionally, *Su* confirms the degree of procedural fairness owed by border officers is context-specific and that minor processing errors made by border officers do not, by themselves, render a seizure illegal where the plaintiff has acknowledged making an improper declaration of goods at the border.

FREE TRADE AGREEMENT PANEL DECISIONS

Unlike 2023, which features a series of cases pertaining to technical rules of origin and agricultural quota administration issues, 2024 saw only two decisions under Canada's free trade agreement dispute settlement mechanisms. In *Mexico – Measures Concerning Labor Rights at the San Martín Mine (USA)*, a Panel constituted under the Canada-USA-Mexico Agreement ("CUSMA") found it did not have jurisdiction over the denial of rights alleged by the United States. In *Mexico – Genetically Engineered Corn (USA)*, a CUSMA Panel found that Mexico's biotechnology measures concerning genetically engineered corn were not based on science and undermined market access under the CUSMA. The past year also witnessed the United States filing requests for consultation in *Mexico – Energy (USA)* and *Canada – Digital Services Tax (USA)*.

While compliance with Panel recent decisions has been hotly disputed, the continued reliance on the *CUSMA* dispute mechanism speaks to its nascent success as a forum for addressing trade-related issues. Practitioners will be well served in the next year to monitor whether the incoming Trump administration in the United States will continue to rely on this mechanism or resort to other means of dispute resolution.

Mexico – Measures Concerning Labor Rights at the San Martín Mine, MEX-USA-2023-31A-01 (May 13, 2024)

In the first decision rendered under the CUSMA's facility-specific rapid response mechanism under Chapter 31 Annex A, a binational panel found it did not have jurisdiction to adjudicate the matter submitted by the United States. While the mine at issue in the dispute was properly a "covered facility" within the meaning of Article 31-A.15, the alleged denials of rights were subject to an antecedent version of Mexico's labour legislation and therefore fell outside of the jurisdiction of the Mechanism.

This dispute arose from a legal strike initiated by National Union of Mine, Metal, Steel and Allied Workers of the Mexican Republic ("Mineros") at the San Martín mine in the State of Zacatecas, Mexico, that began in 2007. Production at the mine effectively ceased until 2018, when an informal group of workers ("Coaligados") successfully organized a vote to end the strike. The Federal Conciliation and Arbitration Board declared the strike terminated and work at the mine restarted. The Mineros successfully appealed on the grounds that the Coaligados did not have legal personality and did not have power to unilaterally end the strike. That decision was handed down in June 2023. In the intervening four years, the mine was operational and employed the Coaligados and newly hired additional employees, with the mine and the Coaligados having entered into a series of labour agreements.

In 2023, the United States engaged the dispute settlement mechanism under the CUSMA on the basis that workers were allegedly denied rights at the mine in two regards. F*irst*, the mine was open and operating in violation of Mexico's Federal Labor Laws ("LFT"), which requires that all work must cease during a legal strike. *Second*, the employer was engaged in collective bargaining with a group that was not the recognized union in possession of the exclusive collective bargaining rights at the mine.

The Panel unanimously held that that it did not have jurisdiction to adjudicate the dispute, with one panelist issuing a "separate view" that supplemented the factual record. The Panel considered three jurisdictional questions, namely 1) whether the mine is a covered facility; 2) whether the alleged denial of rights occurred in respect of legislation identified by the treaty; and 3) whether the alleged denial of rights preceded the entry into force of the treaty. Because of its conclusion on the jurisdictional issue, the Panel did not consider the merits of the denial of rights allegations.

On the first question, the Panel found that the mine was a "covered facility". On the burden of proof, the Panel accepted Mexico's submission that the complainant party must show that the good or service at issue originates from the specific facility in question. While the Panel found that the United States did not establish that the goods produced at the San Martín were exported to the United States as required under Article 31-A.15(i), the evidence showed the goods competed in Mexico with goods imported from the United States within the meaning of Article 31-a.15(ii). Of particular interest, the Panel found that the CUSMA does not require

evidence of head-to-head competition and likewise was not persuaded by the fact that ores from the mine were all consumed by affiliated companies and were not sold onto the commercial market. Instead, it held that goods "compete if they are like or substitutable and bought, sold and/or consumed in the same economic territory." Of further interest, the Panel indicated that evidence establishing that a facility is a "covered facility" "should preferably be established by the complainant in the initial request for the establishment of a panel", to ensure that the verification stage is properly focused on the substantive aspect of the claim and not on preliminary jurisdictional issues.

On the second and third questions, the Panel found that the alleged denial of rights did not occur "under legislation that complies within Annex 23-A", as required by Article 31-A-2 and footnote 2. The Panel interpreted Article 31-A-2 as limiting its jurisdiction to claims of denial of rights relating to events treated in domestic law under the LFT enacted in 2019 and occurring after the USMCA came into force on July 1, 2020. The Panel held that this temporal distinction was consistent with Mexican constitutional and federal labour law—which requires that labour dispute arising prior to the 2019 LFT be treated under the law in effect at the time of the events that gave rise to the litigation—and that the application of this Article of CUSMA should be guided by domestic labour law. Here, the strike at the San Martín mine began in 2007 and litigation in Mexican courts related thereto occurred pursuant to the pre-2019 LTF; the Panel therefore held it did not have jurisdiction over the claims by the United States.

While the particular circumstances of the *San Martin* case are *sui generis*, the Panel has supplied useful guidance on operationalizing the CUSMA's facility-specific rapid response mechanism. In this respect, this Panel decision marks a useful addition to the growing body of jurisprudence under the CUSMA.

Mexico – Measures Concerning Genetically Engineered Corn, MEX-USA-2023-31-01 (December 20, 2024) (USA)

This dispute concerned two measures adopted by Mexico the *Presidential Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn* (the "2023 Decree"), namely an order to "revoke and refrain from issuing authorization for the use of genetically modified corn grain for human consumption" (*i.e.*, in tortillas and dough) (the "Article 6.II Measure") and an instruction that authorities should "carry out the actions leading to in effect achieving the gradual substitution of genetically modified corn for animal feed and industrial use for human consumption" (the "Article 7 Measure") (together, the "Measures"). The United States alleged that the Measures were inconsistent with several provisions of the Sanitary and Phytosanitary ("SPS") Measures Chapter and the National Treatment and Market Access for Goods Chapter of the CUSMA. The CUSMA Panel found the Measures were inconsistent with the CUSMA and were not justified under the defenses invoked by Mexico.

As a threshold matter, the Panel dismissed Mexico's argument that the Measures at issue are not SPS measures that affect trade, within the meaning of Article 9.2 of the CUSMA. There was no disagreement between the parties that the Article 6.II Measure was an SPS measure, and the Panel found that it *de facto* affected trade because it expressly forecloses the possibility that GM corn might enter the country for use for direct human consumption. As for the Article 7 Measure, the Panel dismissed Mexico's argument that it fell beyond the definition of an SPS measures because it was not yet applied. The measure plainly had an SPS purpose and might affect trade by way of sending the market a signal regarding Mexico's policy on the use of GM corn and might have a chilling effect on imports.

On the substance of the claim, the Panel found that the Measures were not based on international standards or an appropriate risk assessment. It was not disputed by the parties that the Measures were not based on "relevant international standards" under Article 9.6.3 of the CUSMA, and the dispute instead centered on the appropriateness of Mexico risk assessment. While the Panel accepted that Parties have discretion to set their "appropriate level of protection" ("ALOP") and to determine whether international standards meet that ALOP, the Panel noted that an "appropriate" risk assessment is required, which "must demonstrably take relevant guidance [from international standards, guidelines and recommendations] 'into account'". The Panel held that Mexico's assessment was methodologically and substantively flawed, and therefore did not meet the requirements of an "appropriate" risk assessment under Article 9.6.8. The absence of an "appropriate" risk assessment entailed that the Measures violated a variety of other CUSMA Articles, namely Articles 9.6.6(a), 9.6.6(b), and 9.6.10.

The Panel likewise found that Mexico has not given the other Parties an opportunity to comment on the risk assessment, contrary to Article 9.6.7. The mere fact that Mexico's assessment was online was insufficient to discharge its burden, with the Panel holding that Article 9.6.7 requires formal notification of the proposed measures that describes the risk assessment methodology and inviting comments from CUSMA Parties and all other interested parties.

As regards compliance with market access obligations at Article 2.11 of the CUSMA, the Panel held that the Measures constituted an improper "prohibition or restriction on the importation" of GM corn. According to the Panel, the Article 6 Measure has the effect of prohibiting importation of GM corn for human consumption and the Article 7 Measure "casts doubt on the continued availability and viability of a market for imports that was not previously restricted." The Panel dismissed Mexico's argument that Article 2.11 was not engaged because the Measures are oriented to domestic issues, and likewise found that the fact that imports had increased was without bearing on the Article 2.11 analysis.

Finally, the Panel dismissed Mexico's arguments that the Measures are saved by the exceptions at Articles 3.2.1.1 and 32.5 of the CUSMA. As regards Article 32.1.1, the Panel declined to pronounce on whether Mexico's preservation of native corn and gastronomic heritage were

"public morals" within the meaning of Article XX(a) of the GATT 1994, but held that Mexico has failed to show that the Measures were necessary to the protections of those policy goals. The Panel also found that Article XX(g)—the protection of exhaustible natural resources exception—was not engaged because Mexico has not shown any domestic measures to address the purported threat to the genetic integrity of native corn. In any event, the Panel held that the Measures are in fact disguised restrictions on trade undermining the availability of the defenses under Article XX of the GATT 1994 and the Indigenous Peoples' Rights Exception at Article 32.5 of the CUSMA.

The decision in *Mexico – GE Corn* confirms that agricultural trade policies must be rooted in science and the CUSMA requires parties to diligently conduct and substantiate SPS-related risk assessments that depart from international standards, guidelines and recommendations. In particular, the Panel's treatment of what constitutes an "appropriate" risk assessment pursuant to Article 9.6.8 of the CUSMA and its discussion of the requisite level of notification under Article 9.6.7 provide welcome guidance on the operationalization of the SPS chapter.

THE SPECIAL ECONOMIC MEASURES ACT

Canada's sanctions regime has experienced an unprecedented level of activity since Russia's invasion of Ukraine in 2022. Resulting from this activity, the Federal Court made three decisions in application for judicial review under the *Special Economic Measures Act,* S.C. 1992, c. 17 [*SEMA*]. These decisions provide welcome direction from the Courts on the non-availability of judicial review for decisions by the Minister of Foreign Affairs ("Minister") to list individuals under the *SEMA*, and on the scope of the Minister's discretion in decision-making on delisting applications.

In addition to these three decisions, the Federal Court considered a series of confidentiality motions arising from applications for judicial review under *SEMA*. The three motions—*Fridman v Canada (Foreign Affairs)*, 2024 FC 1102; *Fridman v Canada (Foreign Affairs)*, 2024 FC 1103*;* and *Makarov v Canada (Foreign Affairs),* 2024 CanLII 27355—provide helpful guidance on navigating challenges around sufficiently substantializing a party's notice of application and adducing evidence about adverse consequences related to the disclosure of information in the application.

Makarov v. Canada (Foreign Affairs), 2024 FC 1234 [*Makarov*]

The Court dismissed an application for judicial review brought by Igor Viktorovich Makarov—a major gas commodity trader in Russia and a former professional cyclist—of the Minister's decision refusing to recommend that Mr. Makarov be removed from the sanctions list under the *Special Economic Measures (Russia) Regulations,* SOR/2014-58 ("*Russia Regulations*"). The

issue at the core of the application was whether the Minister's decision that there were no "reasonable grounds" to recommend delisting Mr. Makarov was reasonable.

The Court found the Minister's decision was reasonable and made a series of instructive general observations regarding the judicial review of delisting decisions by the Minister under the SEMA. *First,* the Minister is entitled to the widest deference in weighing and assessing the record and making delisting decisions given her "polycentric" nature and her role near the apex of Canadian decision making on matters of foreign policy. While a delisting decision is justiciable, the Court noted that "the bar the Applicant must overcome to succeed is exceedingly high."

Second, the Minister is not bound by the strict rules of evidence in making delisting decisions and is entitled to rely on open-source information, information collected by Global Affairs Canada, and advice from her officials. Given the "reasonable grounds" standard applicable to delisting decisions—which requires "something more than mere suspicion" but less than proof on a balance of probabilities—and the Minister's lack of investigative powers under the *Russia Regulations*, the Court gives the Minister's consideration of a variety of sources of information the "widest deference", so long as the decision-maker determines the sources credible, reliable or trustworthy and does not commit a fundamental error in its assessment thereof.

Third, the Court repeatedly warned against reweighing evidence and conducting a "treasure hunt for errors" in a record spanning thousands of pages, particularly in the context of "opaque and complex foreign policy, personal and business relationships between the Applicant and various state and other actors in Russia and Turkmenistan".

Finally, the Court rejected the argument that the Minister imposed an impossible burden on Mr. Makarov by requiring him to prove a negative in respect of his lack of interaction with certain individuals. The Court acknowledged the challenge in proving a negative but saw this line of argument as a red herring that did not address the fundamental nature of the application, and there was no analogous impossibility in having Mr. Makarov establish that there were reasonable grounds to recommend he be delisted.

The Court refused to hear a new argument raised in the judicial review that was not raised in Mr. Makarov's delisting application. Echoing the sentiments regarding the widest discretion afforded to the Minister, the Court refused to engage in a highly foreign policy-infused and nuanced matter without the necessary benefit of the Minister's input.

The decision in *Makarov* is notable in that it constitutes the first treatment on the merits of an application for judicial review of a delisting decision under the *SEMA*. The Court confirmed that the Minister is granted a broad level of deference in delisting decisions, but allows that decisions of this nature are justiciable. While *Makarov* is currently under appeal to the FCA, with a decision anticipated in the second half of 2025, this decision has already been applied

by the Court in *Saint-Rémy* (discussed below), and provided that it survives appellate review, may become the foundational case on delisting in Canadian sanctions law.

Mobile Telesystems Public Joint Stock Company v. Canada (Attorney General), 2024 FC 1237 [*Mobile Telesystems*]

The Court in this decision granted the Attorney General's motion to strike an application for judicial review of the Governor in Council's decision to add Mobile Telesystems to the list of designated individuals pursuant to the *Russia Regulations*. The application was struck because Mobile Telesystems had not yet exhausted all adequate alternative remedies, specifically by not having availed itself of the procedure for delisting under section 8 of the *Russia Regulations*.

The Court applied the three-part framework from *P Morgan Asset Management (Canada) Inc. v Canada (National Revenue),* 2013 FCA 250 [*JP* Morgan] in concluding that the delisting mechanism constitutes an adequate alternative remedy.

First, the Court found that the delisting process under the *Russia Regulations* provides recourse to a listed individual, and that there are no time limits on when such an application may be made.

Second, the Court found that delisting is an adequate and effective remedy. The Court rejected the argument that a delisting application would not cure the reputational harm caused by the original listing, holding that the "essential character" of the application goes to whether the individual is listed—which would be adequately cured by delisting—and in any event that the available statutory remedy need not be identical to the declaratory relief being sought. The Court likewise rejected the argument that the power of an administrative decision maker to reconsider its own decision is, generally, not an adequate alternative remedy to judicial review. The *SEMA* contemplates that a delisting application entails a new and separate decision addressing a different question than a decision by the Governor in Council to list an individual; the delisting application may be supported by new evidence adduced by the applicant; and the delisting application is made by a different decision maker—*i.e.*, the Minister rather than the Governor in Council. The Court likewise rejected Mobile Telesystems' argument about delays involved in a delisting application on the grounds that there was no evidence of delay since an application had not been made.

Third, the Court found that the circumstances of this case did not meet the high threshold for "exceptionality" under the third step of the *JP Morgan* test. Where an adequate alternative remedy is available, as it is here, the Court held that concerns about a denial of procedural fairness prior to the final administrative decision do not constitute exceptional circumstances. "If the applicant utilizes the Section 8 Application Process and is unhappy with the result, it can

seek judicial review at that time and any issues regarding procedural fairness, delay and natural justice can be addressed in that proceeding."

The decision in *Mobile Telesystems* is notable in that it confirms that applications for judicial review of a decision by the Governor in Council to list an individual are premature, and that applicants must first avail themselves of the de-listing mechanism before seeking recourse in Court. Practitioners will also be well served by reviewing the Court's guidance on the scope of admissible affidavit evidence that may be adduced by counsel in support of an application for judicial review, under the *SEMA* or otherwise.

Saint-Rémy v. Canada (Attorney General), 2024 FC 1380 [*Saint-Rémy*]

In a case analogous to *Mobile Telesystems*, discussed above, the Court granted the Attorney General's motion to strike an application for judicial review of the Governor in Council's decision to add Mr. Saint-Rémy to the list of designed individuals pursuant to the *Haiti Regulations*, SOR/2022-226 ("*Haiti Regulations*"). The application was struck with no leave to amend because Mr. Saint-Rémy had not yet exhausted all adequate alternative remedies, specifically by not having availed himself of the procedure for delisting under section 8 of the *Haiti Regulations*.

Following *Mobile Telesystems*, the Court made a series of notable findings on the applicability of the doctrine of adequate alternative remedy to applications for judicial review of listing decisions under the *SEMA*.

First, the Court found that the absence of a statutory deadline under the *Haiti Regulations*—unlike the *Russia Regulations*—for a Minister to render a decision does not make the delisting application process an inadequate alternative remedy. The Court noted that the *Haiti Regulations* require the Minister act "on receipt of an application" and noted that *Mobile Telesystems* confirms that an applicant can seek a *mandamus* order should the Minister not make a decision in a reasonable period of time.

Second, the Court found that the mere speculation that the Minister would not respond in a timely manner to a delisting application brought by Mr. Saint-Rémy was insufficient to find that it is not an adequate alternative remedy. Following *Fortin v. Canada (Attorney General),* 2021 FC 1061, the Court found it premature to assume that the Minister would not respond in a timely manner when Mr. Saint-Rémy had yet to avail himself of that remedy.

Third, the Court rejected as conjecture Mr. Saint-Rémy's argument that the delisting application process was tantamount to the Governor in Council reconsidering their initial decision. Although decided pursuant to the *Russian Regulations*, the Court followed the reasoning in *Mobile Telesystems* in concluding that listing and delisting decisions are made according to different processes, on the basis of different submissions, and before different decision-makers.

The Court found that there is therefore no basis on which to conclude that a delisting decision constitutes a reconsideration of a listing decision.

Finally, the Court confirmed that the delisting application process is an adequate alternative remedy because it addresses all of Mr. Saint-Rémy's grievances. A delisting application allows an applicant to obtain information from the Minister and to submit new evidence or information to show there are reasonable grounds for delisting, and results in the precise relief sought in the application—the removal of Mr. Saint-Rémy's name from the sanction list. Although a delisting application was not Mr. Saint-Rémy's preferred remedy, it is adequate, effective, and available to him, and reflects the remedial route intended by Parliament under the *SEMA*.

CONCLUDING REMARKS

This past year witnessed active litigation under Canada's international trade-related legislation, with an unprecedented number of sanctions cases making their way through Canada's Courts. Likewise, several Canadian industries have been active on the trade remedies front, collectively filing four antidumping and subsidy complaints in 2024, a post-pandemic high, with decisions in *Concrete Reinforcing Bar 5* and *Sucker Rods 2* expected in 2025. The trade remedy enforcement landscape also shifted in 2024, with the CBSA initiating a rare company specific case in *Corrosion-Resistant Steel Sheets 3* and its first anti-circumvention investigation in *Container Chassis*, as well as overhauling its procedures for updating normal values, export prices, and amounts of subsidy under the new "Administrative Review" mechanism.

Going into 2025, notwithstanding that Canada's trade landscape faces considerable uncertainty stemming from the incoming U.S. administration's anticipated trade policy stance, trade practitioners will be well served by monitoring statutory, policy, and jurisprudential developments on this side of the border as well. In particular, the appeals in *Çolakoğlu* (A-226-24) and in *Makarov* (A-315-24) before the FCA, and the applications for judicial review pertaining to the *SIMA* in *Roquette Canada LDT et al V. AGC et Al.* (A-376-24) and to the *Export and Import Permit Act*, R.S.C., 1985, c. E-19 in *Hammam Farah et al v Minister of Foreign Affairs et al* (T-473-24) will be of interest to practitioners in 2025. Likewise, the outcome of the anti-circumvention investigation in *Container Chassis* and decisions under the CBSA's new administrative review process will be of interest to practitioners. Watch CLK's website for regular updates on these developments as they occur.