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Canadian Trade Law Year in Review, 2025

In this fourth edition of our *Canadian Trade Law Year in Review*, the team at CLK Canada has reviewed and summarized important judicial and administrative decisions from 2025 that will be of interest and use to trade law practitioners and stakeholders alike. These decisions are divided according to their subject area, with this year's review covering important decisions made pursuant to the *Special Import Measures Act*, the *Customs Act* and *Customs Tariff*, the *Special Economic Measures Act* and Canada's free trade agreements. In the broader context of significant changes to Canada's federal procurement regime in 2025, including new "Buy Canadian" and reciprocal procurement policies, we have also summarized some of the most important federal procurement law decisions from 2025.

THE SPECIAL IMPORT MEASURES ACT - CITT

This section reviews four trade remedies decisions of the Canadian International Trade Tribunal (the "**CITT**") made pursuant to the *Special Import Measures Act* ("***SIMA***"). In three of these cases, the CITT addressed significant threshold issues at the Preliminary Inquiry stage that either disposed of the matter at that stage or resurfaced as recurring issues during the Final Inquiry. Of particular interest here, the CITT added additional clarity to the meaning of "domestic industry" in *Renewable Diesel* (May 5, 2025), PI-2024-004, discussed below. Further, in *Hot-rolled Carbon Steel Plate* (December 17, 2025), RR-2024-008, the CITT opined on the impact of Canada's new steel tariff-rate quotas ("**TRQ**") and provided helpful guidance on the impact of U.S. Section 232 steel tariffs.

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The number of trade remedies cases initiated by the Canada Border Services Agency ("**CBSA**") over 2025 was the highest number on record since 2001. The majority of the trade remedies cases initiated by the CBSA in 2025 will not conclude until 2026. As such, 2026 is set to be one of the most active years—if not *the* most active year—for trade remedies in Canada's history.

Polyethylene Terephthalate (October 15, 2025), NQ-2025-002 (Reasons Not Yet Published Online)

On October 15, 2025, the CITT determined that Polyethylene Terephthalate ("**PET**") resin manufactured in or exported from China and Pakistan had caused injury to the domestic industry. In doing so, the CITT made three important determinations on threshold issues in trade remedies cases, each of which make this case essential reading for trade law practitioners.

First, the CITT partially reversed its prior line of decisions on the concept of "cross-cumulation." Prior CITT decisions held that the analysis of the injury caused by one countries' subsidization was unable to be cross cumulated with the injury caused by the other countries' dumping. This was due to the WTO Appellate Body's decision in *U.S. – Carbon Steel (India)*, which held that such cross-cumulation was illegal. However, here, the CITT reassessed its prior decisions in light of instructions from the Supreme Court of Canada on statutory interpretation and the principle that Canadian legislation should be interpreted to diverge from Canada's treaty obligations where there is a clear indication of intention to do so by Parliament. The CITT found that an amendment to the *SIMA* enacted in April 2000, which replaced the word "may" with "shall" in subsection 42(3), clearly signaled Parliament's intent to require a cross-cumulated injury analysis involving subsidization from one country and dumping from others when the prescribed conditions are met. As such, after finding these conditions were met, the CITT cumulated its analysis of the injury caused by subsidization from China with its analysis of the injury caused by dumping and found that PET resin from China and Pakistan had caused injury to the domestic industry.

Second, the CITT emphasized that parties in *SIMA* proceedings must raise threshold issues at the earliest opportunity, which is almost always at the preliminary inquiry stage. In this case, Novatex, the main exporter of PET resin to Canada, argued after the preliminary inquiry that 100% recycled PET ("**rPET**") should have been treated as like goods or as a separate class of goods, despite rPET having been excluded from the product definition. Because these arguments were raised after the preliminary inquiry and after questionnaires had been issued, the CITT lacked information on rPET as a separate class of goods and found that gathering such information so late could raise procedural fairness concerns. As a result, it rejected Novatex's arguments and, based on the limited record, also concluded that rPET was not like goods to the subject PET resin.

Third, in a separate concurring opinion, Member Lee clarified her view on the proper sequence in which the injury inquiry should proceed. Specifically, according to Member Lee, after determining volume and price effects, the CITT must determine: (1) the injury suffered by the domestic industry; (2) the materiality of such injury; (3) whether the dumping or subsidizing of the subject goods has in and of itself caused material injury to the domestic industry; and (4) whether any other factors prevent or break the causal link between the dumping or subsidizing and the injury. Key here, Member Lee specifically noted that, in her opinion, the CITT's materiality analysis should take place after and separately from the initial injury analysis.

This decision provides important guidance on several aspects of the CITT's trade remedies jurisprudence which should be of interest to practitioners and stakeholders alike. In particular, it clarifies and updates the CITT's approach to cross-cumulation, reinforces the expectation that threshold issues be raised at the earliest possible stage of a proceeding, and offers further insight from at least one member—through a concurring opinion—into the sequencing of the CITT's injury analysis.

Renewable Diesel (May 5, 2025), PI-2024-004

In this case, the CITT decided to terminate its inquiry into renewable diesel products produced in or exported from the United States at the preliminary inquiry stage of the proceeding. Notably, this case turned on the identity of the "domestic industry" under the *SIMA*.

The complainant in this case, Tidewater Renewables Ltd. ("**Tidewater**"), is a Canadian manufacturer of renewable diesel products. It is by far the smaller of two renewable diesel producing companies in Canada, the other being Braya Renewable Fuels LP ("**Braya**"), which did not support Tidewater's complaint. Under the *SIMA*, the CBSA may initiate a case only where Canadian producers of like goods representing more than 50% of the production capacity for like goods among those expressing a position support the proceeding, *and* when those producers expressing support for the case represent more than 25% of total Canadian production capacity. According to the United States and the largest U.S. exporter to Canada, Valero Energy Inc., Tidewater only represented 22% of total renewable diesel products produced in Canada. Nonetheless, the CBSA excluded Braya from the domestic industry entirely on the basis that it was only exporting, and did not sell in the Canadian market. As such, for the purpose of initiation, the CBSA found that Tidewater represented 100% of Canadian production.

As noted by the CITT, at the Preliminary Inquiry stage the CITT is required to assess whether the evidence on the record provides a "reasonable indication" that the goods subject to CITT's inquiry have caused or are threatening to cause injury to the domestic industry. In doing so, the CITT also makes initial determinations on ancillary issues, including the identity of like goods,

the number of classes of goods and, key here, an assessment of the identity of the domestic industry for the purposes of its injury analysis.

In doing this analysis for this case, the CITT noted that it did not have the authority to overrule the CBSA's standing decision. However, the CITT also found, based on its own interpretation of the *SIMA*, that there was nothing in the *SIMA* that allowed the CITT to exclude Braya from the domestic industry on the basis that it did not sell like goods in the Canadian market. The CITT also rejected the argument from Tidewater, that because Braya had temporarily stopped producing in January 2025, Braya should not be considered a member of the domestic industry. Here, the CITT noted that Braya had been producing between February 2024 and January 2025 (i.e., during the CITT's period of inquiry), and that it could not be excluded from the domestic industry because it was temporarily not producing.

Furthermore, the CITT determined that Tidewater accounted for at most 34.2 percent of total Canadian production of renewable diesel in 2024. Therefore, given its size relative to Braya, and the lack of fragmentation of the industry considering there were only two producers, the CITT also found that Tidewater did not represent a "major proportion" of the domestic industry, which would have allowed the CITT to only look at the injury to Tidewater in its analysis. Instead, the CITT found it necessary in this case to assess injury to the domestic industry on the whole, including *both* Braya and Tidewater.

The Complaint did not contain evidence of injury to Braya, and Braya had provided no information suggesting that it was injured by the export of renewable diesel from the United States. The injury and threat of injury evidence on the CITT's record therefore did not speak to injury to the domestic industry as a whole. On this basis, the CITT found that it did not have evidence disclosing a reasonable indication of injury to both members of the domestic industry, and it terminated the case.

On balance, this case provides important clarity and guidance to practitioners on the CITT's domestic industry analysis, and when the CITT is likely to consider a member of the domestic industry to be a major proportion of that domestic industry. This case also provides guidance on the degree of evidence required to support a finding at the preliminary inquiry stage of a trade remedies proceeding.

Concrete Reinforcing Bar (January 13, 2025), NQ-2024-003

In this case, the CITT found that concrete reinforcing bar from Bulgaria, Thailand and the United Arab Emirates had caused injury to the domestic industry. In doing so, the CITT made the fairly uncommon decision to reverse its initial findings in its preliminary inquiry.

In the CITT's preliminary inquiry in this case, the CITT was skeptical of the domestic industry's arguments pertaining to the issues of causation and materiality. Specifically, while the CITT

found that subject good volume increased, and subject good pricing undercut pricing of like goods produced by the domestic industry, it could not conclude that undercutting caused price depression, as it noted a similar price declines in other global markets based on the data on the record. It also found that the impact of the subject goods on the domestic industry was unclear, and that evidence on the record did not disclose that the injury to the domestic industry was material. The CITT did however find a reasonable indication of a threat of injury which allowed it to move forward to its final injury inquiry.

The CITT reconsidered the conclusions from its preliminary inquiry based on the additional evidence placed on the record during the CITT's final injury inquiry. At the outset, the CITT stated that based on the record, the subject goods' undercutting had in fact led to price depression. In coming to this conclusion, the CITT noted that the there were similar price declines in the United States, a country which had protection against the subject countries in place. However, the CITT also found the lost sales and lost revenue evidence provided by the domestic industry clearly showed that the domestic industry had decreased its prices in response to increased volumes of subject goods.

Next, the CITT re-examined the impact of subject goods on the domestic industry. The CITT noted that based on the record, the domestic industry's market share declined at the same time as subject good market share increased, suggesting that the decline in the domestic industry's share of the market was caused by subject goods. The domestic industry also pointed out that this was market share that the domestic industry should have gained as a result of the Canadian rebar measures already in place as a result of the past four rebar cases before the CITT, and that importers were once again source-switching to the cheapest source—an action which the CITT had previously found caused injury to the domestic industry. The CITT found this argument persuasive.

On financial performance, investments, and impact on workers, the CITT relied on a combination of the data on the record, which showed a decline in profitability, investments and employment, and testimony from the complainants and their employees, which drew a causal line from these data trends to subject imports, to find that the domestic industry's injury had been caused by subject goods. Finally, on materiality, the CITT determined that the declines in profitability, investment and employment, which were caused by the subject imports, had materially injured the domestic industry.

This case serves as a great example of the type of evidence that the CITT considers persuasive in coming to its conclusions on injury, especially when comparing this final inquiry decision to the initial preliminary inquiry decision.

Hot-rolled Carbon Steel Plate (December 17, 2025), RR-2024-008 (Reasons Not Yet Published Online)

In this case, the CITT found that the expiry of the anti-dumping order in place against certain hot-rolled carbon steel plate from Brazil, Denmark, Indonesia, Italy, Japan, and South Korea is likely to result in injury to the domestic industry. For that reason, the CITT continued the Order in place. This case is particularly notable because the CITT rejected the argument that Canada's TRQs applicable to the subject countries provided sufficient protection to prevent injury to the domestic industry if anti-dumping duties were rescinded.

In its reasons, the CITT decided two notable threshold matters before undertaking its likely injury analysis. First, the Japanese producers argued that the CITT should terminate the expiry review under s. 76.03(2) of the *SIMA* because the review was not supported by domestic producers. More specifically, the Japanese producers contended that the phrase "supported by domestic producers" in s. 76.03(2) should be interpreted to mean supported by domestic producers that represent "much of or a significant portion of" the domestic industry's production of like goods (i.e., the typical standard for an original injury inquiry). In dismissing this initial ground of argument, the CITT noted that the imposition of a major proportion threshold in an expiry review would unnecessarily restrict the CITT's discretion to evaluate whether the termination of an expiry review is warranted on a case-by-case basis. In any event, the expiry review was in fact supported by multiple domestic producers, with additional supporting submissions from other producers, service centres, and unions.

Second, POSCO, a Korean producer, asked the CITT to separately assess the likely effect of Korean dumped imports. In its view, Korean steel plate is distinguishable from other subject goods and domestic like goods. The CITT declined to decumulate Korea from its analysis, in part for two notable reasons. First, the fact that the subject goods from Korea were imported during the period of review is of little assistance in establishing what the conditions of competition will be between subject good imports from all relevant countries *on a prospective basis*. Second, the CITT held that measures taken in Korea to curb the influx of Chinese steel into its domestic market are not relevant to the Tribunal's decision on cumulation, which is premised on examining the conditions of competition that would exist between subject goods or between subject goods and like goods *in the Canadian market* should the order be rescinded.

The CITT then went on to consider whether there would be a significant increase in the volume of subject imports if the order was rescinded. Importantly for practitioners, in the course of its analysis, the CITT opined on the likely impact of Canada's TRQs on prospective import volumes. The CITT found that the TRQs are not likely to significantly affect the volume of subject goods. The CITT acknowledged that volumes from non-free trade agreement partners may be lower, but noted that subject goods that fall within TRQ quantities are free to compete in the Canadian

market on price. The CITT also noted that even if Canadian TRQs provide "some minimal protection" to the domestic industry, these TRQs are temporary.

The CITT also considered the impact of the United States Section 232 steel tariffs on likely subject good diversion to the Canadian market in the case anti-dumping duties were rescinded. While the impact of the tariffs must not be conflated with the likely impact of dumped subject goods, the CITT affirmed that it must take the Canadian industry as it finds it. The CITT also found that that U.S. Section 232 tariffs left the domestic steel plate industry vulnerable, and that Canada is a prime target for large volumes of diverted low-cost steel exports that were otherwise destined for the United States. Of note, in making this point, the CITT drew an analogy between the tariffs and the COVID-19 pandemic. While neither event were themselves caused by subject imports, their impact bears on the likely impact that subject imports will have on the Canadian market.

Practitioners should take careful note of the CITT's treatment of TRQs and U.S. tariff measures, which remain hot-button issues in Canadian trade law. Specifically, the CITT determined in this case that TRQs are not necessarily sufficient on their own to protect the domestic industry such that anti-dumping duties would be unnecessary, and further characterized TRQs as "temporary" measures. At the same time, the CITT determined that U.S. tariff measures could be used as relevant contextual factors in assessing the vulnerability of the domestic industry and the likely impact of resumed dumping.

SPECIAL IMPORT MEASURES ACT - CBSA

As with last year's *Canadian Trade Law Year in Review*, this year we have reviewed CBSA decisions made under Canada's trade remedies system pursuant to the *SIMA*. There were several such decisions made and we have selected, in our view, the most important three cases to summarize in this publication: *Corrosion Resistant Steel Sheet 3* (July 31, 2025), COR3 2025 IN, Stainless Steel Sinks (October 31, 2025), SSS 2025 UP1 and *Thermal Paper Rolls* (December 9, 2025), TPR 2025 IN. These three cases are particularly important and constitute mandatory reading for practitioners working in the trade remedies space. Specifically, these cases clarify the CBSA's modern policy on countervailing duties when the government of the country of export fails to respond to a CBSA subsidy questionnaire and provide the CBSA's most recent view of particular market situation under the *SIMA*, which appears to have evolved to become further circumscribed, and the significant guidance on when the CBSA will apply *SIMA* section 20 to a new product.

In last year's edition of the *Canadian Trade Law Year in Review*, we also discussed the advent of the CBSA's annual "Administrative Review" system under the CBSA's Market Watch initiative, which has now replaced the former "Normal Value Review" and "Re-investigation" proceedings. One of these summarized decisions is an Administrative Review decision and

appears to have coincided with the CBSA's aforementioned policy change regarding subsidization.

Corrosion Resistant Steel Sheet 3 (July 31, 2025), COR3 2025 IN

In this final determination decision pursuant to an anti-dumping case, the CBSA decided to terminate its investigation into corrosion resistant steel sheet ("**COR**") originating in or exported from the Republic of Türkiye by Borçelik Çelik Sanayi Ticaret A.Ş. ("**Borçelik**"). The case turned primarily on the CBSA's determination that the evidence on the record did not support the existence of a "particular market situation" in Türkiye.

According to the *SIMA* and CBSA policy, a particular market situation exists when the export sale of a subject good is not comparable to domestic sale price of that good in the domestic market due to market distortions in the subject country. If the CBSA finds a particular market situation exists, the sales affected by that situation will not be considered for the purpose of calculating normal values. In this case, ArcelorMittal Dofasco G.P. ("**AMD**"), and Stelco Inc. ("**Stelco**"), members of the Canadian domestic industry, argued that the imports of certain input products from China, Russia, Japan and India into Türkiye were dumped and therefore distorted production costs and home market prices, leading to incomparability of domestic sales prices and export prices.

To analyze the existence of a particular market situation, the CBSA examined the price level of these input products and of COR itself in Türkiye and other similar geographic areas, including Italy, and other Southern European markets. The CBSA hypothesized that it should see diverging price levels over the time periods where AMD and Stelco alleged that these dumped input products had entered the Turkish market. Based on this analysis, the CBSA concluded that there was in fact a divergence in these commodity prices. However, the CBSA could not conclude that this was caused by a particular market situation in Türkiye. Instead, the CBSA claimed that there were certain intervening factors that could have led to the divergence in price it observed, but that it did not have sufficient information to be able to evaluate these theories, and did not have enough time to collect that information. It therefore found that the divergence in COR prices and COR input product prices between Türkiye and similar surrounding countries was not proof of a particular market situation.

AMD and Stelco raised other potential factors that led to a particular market situation, including volatile economic conditions, other distorted inputs, lack of inflation accounting adjustments in Türkiye, the presence of dumped COR in the Turkish market, government support programs, and the Turkish inward processing regime. Here again, the CBSA found that in the face of the data supplied by Borçelik, it could not conclude that these factors, either together or alone, had caused a particular market situation in Türkiye, and that these sales were not unusable for that reason. With domestic COR sales that were usable in the domestic market for the purpose of

calculating normal values according the CBSA, the CBSA was able to compare the domestic prices for COR sold by Borçelik in Türkiye to the export price of those same goods sold into Canada by Borçelik. In doing so, the CBSA found no margin of dumping and terminated the case.

This case underscores for practitioners the persistently high threshold for establishing a particular market situation, including an apparent requirement that the domestic industry rule out alternative explanations, unrelated to a particular market situation, that could give rise to similar price effects.

Stainless Steel Sinks (October 31, 2025), SSS 2025 UP1

In this Administrative Review, the CBSA established new normal values, export prices, and amounts of subsidy for Chinese producers of stainless-steel sinks. As discussed in our 2024 *Canadian Trade Law Year in Review*, the CBSA has replaced its former Normal Value Review and Re-Investigation processes with an Administrative Review system designed to update normal values, export prices, and subsidy amounts on an annual basis to ensure effective enforcement of the *SIMA*. Of particular significance to trade law practitioners and stakeholders is the CBSA's apparent new subsidy policy, under which it will apply the same ministerial-specification subsidy amount when the government of the subject country fails to respond to the subsidy questionnaire, even where exporters have provided responses. Furthermore, this is the first case where the CBSA applied *SIMA* section 20 in the context of an Administrative Review or Re-Investigation after having not made that finding in the original investigation.

To update amounts for subsidy in this case, the CBSA sent out subsidy questionnaires to the Government of China and Chinese exporters of stainless-steel sinks. Uniquely in this case, the CBSA notified the Government of China and these exporters that if the Government of China failed to respond to the subsidy questionnaire, the CBSA would use subsection 30.4(2) of the *SIMA* (i.e., ministerial specification) to set the amount for subsidy at 264.94 CNY per unit for all exporters. The Government of China failed to respond to the subsidy questionnaire, and as such, the CBSA made good on its promise.

This decision represents an apparent shift in CBSA policy as, in the CBSA's prior re-investigation process, the CBSA would provide unique amounts of subsidy to exporters who responded to the CBSA's questionnaire. The decision to provide the same amounts of subsidy to all exporters where the Government of China fails to respond to the CBSA's subsidy questionnaire has since been followed by the CBSA in *Stainless Steel Grating* (November 5, 2025), SG 2025 UP1; *Carbon Steel Fasteners* (August 28, 2025), FAS 2025 UP1 and *Oil country tubular goods and seamless casing* (July 9, 2025), OS 2025 UP1 among others. As such, this case represents an important development in the CBSA's *SIMA* enforcement regime which will be of particular interest to practitioners moving forward.

Thermal Paper Rolls (December 9, 2025), TPR 2025 IN

In its final determination in the investigation into whether imports of lightweight thermal paper from China were dumped or subsidized, the CBSA concluded that domestic prices in China's papermaking sector were substantially determined by the Government of China. Accordingly, the CBSA applied section 20 of *SIMA* and relied on surrogate data from the United States to determine normal values. Of particular interest to trade law practitioners, this decision represents the first instance in which the CBSA has found section 20 conditions to exist outside the steel, iron, aluminum and related products sectors.

Before conducting its section 20 investigation, the CBSA had to define the sector under review. In doing so, the CBSA broadened the scope of its section 20 investigation from the Chinese lightweight thermal paper sector to the Chinese papermaking sector as a whole. The CBSA found that it was appropriate expand the scope of the sector in this case given that the costs of production for thermal paper depend heavily on the cost of its major input, thermal paper jumbo rolls. Over the CBSA's period of investigation, these "jumbo rolls" were produced in significant quantities by large Chinese papermaking enterprises that were often state-owned.

After defining the sector it would analyze, the CBSA moved on to investigate Chinese behaviour indicating that Chinese prices in the papermaking sector were substantially determined by the Government of China. Here, the CBSA began by considering Chinese government industrial policy planning initiatives, specifically including China's "Five-Year-Plans" ("**FYP**") and other similar government policy publications which described China's intention to intervene in multiple areas of the Chinese economy that are relevant to papermaking. In this analysis, the CBSA also relied on provincial and municipal FYPs, underscoring that relevant evidence of government intervention is not purely limited to federal initiatives. According to the CBSA, these publications demonstrated "substantial government control" of the Chinese papermaking sector.

The CBSA continued its analysis by considering the extent to which state-owned and state-controlled enterprises were present in the marketplace for jumbo thermal paper rolls. The CBSA relied on a market share analysis derived by the complainants based on public capacity data. That market share analysis showed that the vast majority of papermaking capacity in China was owned or substantially influenced by the Government of China. The CBSA further found that state-oversight mechanisms present across many Chinese enterprises allow government policy objectives to influence even non-state-owned firms in the papermaking industry.

Next, the CBSA considered the influence of industry associations, government financial support, and evidence of direct intervention concerning the price of key raw material inputs. Here, the CBSA found that government ownership of industry associations was another avenue through which the Government of China could influence the Chinese papermaking industry, and that the prevalence of Chinese subsidy programs and influence in relevant Chinese

chemical industries were indicative of the fact that prices for Chinese thermal paper may not be set according to competitive market conditions. Concluding its analysis of government support, the CBSA determined that the Government of China influences the Chinese papermaking sector.

Finally, the CBSA considered whether this government influence resulted in price distortions in the Chinese papermaking industry. In this respect, the CBSA analyzed publicly available information from Fastmarkets, and confidential data supplied by the Domestic Industry concerning the pricing for jumbo rolls from Germany and pricing of thermal paper rolls in the United States. The CBSA compared these prices for jumbo rolls and finished thermal paper rolls with the domestic pricing of the sole cooperative exporter, Shenzhen Likexin Industrial Co., Ltd. ("**Shenzhen**"), as well as with data provided by the domestic industry on Chinese domestic jumbo roll prices. This information showed that prices in China were consistently and materially lower than those in the United States in every quarter of the CBSA's period of inquiry. Accordingly, the CBSA found that pricing in China's papermaking industry was not determined under competitive market conditions and that the Government of China substantially determined prices, justifying the application of *SIMA* section 20 and the use of the United States as a surrogate to calculate normal values.

Interestingly here, the CBSA applied a ministerial specification to Shenzhen, finding its responses to CBSA's Request of Information ("RFI") to be complete but unreliable because Shenzhen refused verification. However, despite finding Shenzhen to be deficient, the CBSA still used Shenzhen's domestic sales data for the purposes of *SIMA* section 20 price analyses given that this data represented the best information available, especially considering the Government of China failed to respond to the CBSA's RFI.

These reasons are essential reading for practitioners relying on section 20 to calculate normal values, as they provide valuable guidance on the types of information the CBSA considers persuasive in a section 20 investigation. Here, in addition to detailed policy and general market information, the Domestic Industry was able to supply actual data for pricing in other markets that the CBSA could use to compare Chinese pricing on the record which was a major indicator that the Government of China substantially determines prices in the papermaking industry. This decision also clarifies that the CBSA may cast a wide net and look at entire sectors at a high level rather than just the goods at issue when determining whether a government is substantially determining pricing. Finally, the CBSA clarified that responses from exporters which are deficient for calculating dumping margins may at times still be relevant for other price analyses where there is no other verifiable or reliable information.

THE CUSTOMS ACT & CUSTOMS TARIFF

This year was an extremely active year for customs appeals, likely due in part to the uncertainty introduced into the by the United States' global tariffs in 2025. Three customs decisions ended up being judicially reviewed by the Federal Court of Appeal ("**FCA**"), where the FCA was clear that the level of deference afforded to the CITT when reviewing these decisions is high, and that the entire statutory scheme for customs appeals under the *SIMA* should be exhausted before applying for judicial review before the FCA.

For its part, the CITT also made decisions applying its test to determine whether a good is primarily "for use in" another good, and clarified the extent to which the World Customs Organization's Explanatory Notes should be used in the CBSA's tariff classification decisions. On this latter point, the CITT found that these Explanatory Notes are helpful interpretation tools but are subsidiary to the explanation notes found in the *Customs Tariff*. Of particular interest for citizens crossing the border, the CITT also clarified that mistaken importation is not an excuse, and that even an accidental temporary importation can be subject to the full weight of Canada's customs regime. Finally, on a narrower point, the CITT grappled with whether a device that could be activated by a smartphone was primarily for use in that smartphone, which may be relevant for future trade of "smart devices" in Canada where those devices are used in conjunction with a smartphone application.

Several of these decisions have not yet been published by the CITT, however they are available from the CITT upon request.

Skechers USA Canada, Inc. v Canada (Border Services Agency), 2025 FCA 1

This case was an appeal from an order of the Federal Court upholding the decision of an associate judge to grant the CBSA's motion to strike Skechers USA Canada ("**Skechers**")'s application for judicial review.

During a compliance verification of Skechers, the CBSA issued an interim report that stated Skechers should correct certain declarations of value for duty to include commissions paid for the current and the prior four years. Skechers disputed that the commissions paid were dutiable and requested that corrections be made going forward only. The CBSA denied the request and confirmed in its final report that Skechers had to make corrections for the prior four years. Skechers then requested rescission of the final report, an indefinite extension of the time for making corrections to its declarations, and a waiver or cancellation of penalties and interest pending resolution of the disputed duties. The CBSA denied each request, and so Skechers applied for judicial review to the Federal Court. The associate judge at the Federal Court struck the notice of application on the grounds that the CBSA's refusals were not decisions amenable to judicial review because the CBSA did not have the discretion to exempt Skechers under the *Customs Act*. Skechers then appealed to the FCA.

In upholding the Federal Court's decision, the FCA confirmed that in general, an individual should not seek judicial review of CBSA decisions relating to value for duty until they have exhausted the comprehensive and multi-level re-determination and appeal process established under the *Customs Act*. Even in situations where the CBSA has not yet released an official re-determination or a Detailed Adjustment Statement, it is nonetheless premature to seek judicial review until the CBSA has made a redetermination, and the applicant has pursued the appeals process.

Practitioners should take note of this case for two reasons. *First*, practitioners should note that the Federal Court's finding that the CBSA did not have the discretion to exempt Skechers or importers from the relevant provisions of the *Customs Act*, means that there is no judicially reviewable error when the CBSA declines to grant an exemption. Similarly, the CBSA does not have the discretion to grant blanket and indeterminate waivers of penalties and interest. *Second*, in situations concerning value for duty, the applicant must generally wait until they have exhausted the *Customs Act* appeal process before applying for judicial review. Importantly, the FCA noted that in situations such as this one, where the CBSA had not yet issued a formal re-determination, the applicant does not yet have an immediate right to recourse under the statutory appeals process. Nonetheless, the applicant is expected to request a re-determination and follow the statutory process rather than launch an application for judicial review which would be premature.

Best Buy Canada Ltd v Canada (Border Services Agency), 2025 FCA 45

In this case before the FCA, Best Buy Canada Ltd. ("**Best Buy**") pursued a statutory appeal from a Canadian International Trade Tribunal ("**CITT**") decision concerning the customs classification of wine coolers, and concurrently brought a separate application for judicial review. The FCA dismissed both the appeal and the application.

At the outset, the FCA dismissed Best Buy's appeal, holding that the CITT had not erred in applying *Danby Products Limited v Canada (Border Services Agency)*, 2021 FCA 82 ("**Danby**"), which addressed the customs classification of the same product on closely analogous facts. The FCA declined Best Buy's request to overturn Danby, emphasizing that, as an intermediate appellate court, it may depart from its prior jurisprudence only where the earlier decision is shown to be "manifestly wrong."

The FCA then considered the second, and arguably more noteworthy, issue on appeal: was it appropriate for Best Buy to bring a concurrent application for judicial review alongside its statutory appeal? Justice Stratas, writing for the FCA, acknowledged that its own jurisprudence—namely, *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161—that restrictive statutory appeal mechanisms do not prevent a party from bringing a judicial review

application on any administrative law grounds. However, the FCA went on to qualify that permission as follows, at para 11:

> [J]ust because *Best Buy* says parties *can* bring a separate application for judicial review doesn't mean they *should*. In fact, in most cases they shouldn't. Why? Just about anything that can be raised in a separate application for judicial review can be raised in a statutory appeal where only "questions of law" can be raised.

Practitioners should read this case and carefully consider the FCA's guidance when weighing whether to bring a separate judicial review where a statutory customs appeal is ongoing. In the rare case where a necessary judicial review is brought concurrently, the FCA stated that it *must* be consolidated with the statutory appeal under Rule 105. Needless judicial reviews should never be brought or should be immediately discontinued pursuant to Rule 165 of the *Federal Courts Rules*.

The FCA did not elaborate on what constitutes a "needless judicial review" but it dismissed the application because the submissions merely adopted the submissions in the statutory appeal and nothing more. In this way, the case suggests that applicants are advised to clearly lay out the independent grounds for a concurrent judicial review; applicants cannot merely rely on their arguments in one application to support the other. If there is nothing new or unique to say in an application for judicial review as opposed to a statutory appeal, this case questions whether it is truly necessary to bring both applications concurrently.

Byrne v Canada (Border Services Agency), 2025 FCA 30

In this case before the FCA, the Applicant, James Byrne, applied for judicial review of a CITT decision affirming the CBSA's prohibition of the entry of a pistol into Canada. The FCA dismissed the application for judicial review of the CITT's decision on the basis that questions of law were not properly before the FCA, the decision was not unreasonable, and the applicant had not been treated unfairly.

The CBSA initially prohibited the Applicant's pistol from entering Canada on the grounds that it met the definition of a replica firearm under subsection 84(1) of the *Criminal Code*. The CITT upheld the CBSA's decision, finding that the pistol resembled (with near precision) the SIG Sauer model P226 MK25 pistol, and that it was prohibited from importation under the *Customs Tariff* because it met the *Criminal Code* definition of a "replica firearm".

At the outset of its analysis, the FCA determined that applicants must choose whether to bring a judicial review or statutory appeal of a customs classification decision under the *Customs Act* carefully. The FCA noted that questions of fact or mixed fact and law may be brought in a judicial review application, whereas questions of law should be brought only in a statutory appeal

under subsection 68(1) of the *Customs Act*. The Applicant alleged several errors of law, including that the CITT erred in exercising criminal law jurisdiction and that the CITT erred in only considering the characteristics of the goods upon importation rather than considering changes that may happen at a later date. The FCA declined to consider these issues finding that they should have been brought in an appeal under subsection 68(1) of the *Customs Act* rather than through an application for judicial review.

The FCA then moved on to the arguments made by the Applicant, who alleged that the CITT's finding was unreasonable for two reasons: (1) the CITT erred in preferring the CBSA's expert witness over his own; and (2) the CITT made unreasonable factual findings about the pistol's characteristics. Here, the FCA determined that the CITT is owed significant deference in its assessment of the facts in a Customs determination. Indeed, the FCA confirmed, following *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], that a reviewing court will only interfere with the CITT's findings in exceptional circumstances. With this in mind, the FCA found no basis to interfere with any of the CITT's findings, especially where the CITT provided lucid and logical reasons for preferring one expert's evidence over another.

Finally, the FCA confirmed that while questions of procedural fairness attract a correctness standard in effect, to determine whether the process followed by the CITT satisfied the level of fairness required in all of the circumstances, an applicant must provide reasons why there has been a violation of procedural fairness. Specifically, allegations of bias impose a heavy burden on the party alleging bias to prove the allegations. Mere suspicion will not suffice; an applicant must bring substantial and cogent evidence that makes it more likely than not that the decision-maker would not decide the matter fairly. In this case, the FCA found no evidence of bias on the record. The fact that the CITT did not accept the Applicant's arguments is not evidence of bias.

This case serves as a stark reminder to practitioners and stakeholders of the significant deference the FCA affords the CITT in reviewing customs decisions, as well as the high evidentiary threshold required to establish bias before the CITT.

Atrium Innovations Inc (November 7, 2025), AP-2021-032 and AP-2022-026 (Reasons Not Yet Published Online)

This customs classification appeal concerned whether certain natural health products ("**NHP**") were properly classified as "medicaments" under heading 30.04 of the *Customs Tariff*. The matter was heard concurrently with *Nature's Way of Canada Limited* (November 7, 2025), AP-2022-041, and both appeals were allowed on essentially the same basis.

Between 2019 and 2020, the CBSA re-classified several NHPs from heading 30.04 (medicaments) which entered duty free, to heading 21.06 (other food preparations), which carries a higher 10.5 percent duty, pursuant to certain amendments to the World Customs

Organization ("**WCO**") Explanatory Notes made in 2019. As a result, the CBSA informed Atrium Innovations Inc. ("**Atrium**") that it had reason to believe that Atrium had to self-correct various the tariff classifications of several transactions going back to November 10, 2017, due to a mistaken belief that some of the 2019 amendments to the Explanatory Notes were made in 2019. The CITT rejected the CBSA's position that the 2019 notes could be applied retroactively, and the CBSA throughout the proceeding amended its position on this issue, such that the new classification only applied as of November 30, 2019.

In its analysis, the CITT considered the approach to customs classification from first principles, finding that tariff classification is primarily based on the descriptions set out in the *Customs Tariff*. The CITT noted the importance of the difference between the WCO Harmonized System, and the List of Tariff provisions. The former is a product of the WCO, whereas the latter is binding domestic Canadian law. *First*, the Tribunal first noted that classification of imported goods must be determined in accordance with the General Rules and the Canadian Rules. Again, the CITT drew an important distinction between the two: the General Rules are a product of the WCO, and they are only binding to the extent that they have been set out in the schedule of the *Customs Tariff*, whereas the Canadian Rules are a legally binding enactment of Parliament. The Tribunal then observed that classification begins with a review of the terms of the relevant *Customs Tariff* heading and any relevant section or chapter notes. In this respect, the CITT highlighted that not all notes are created equal: Section and Chapter Notes have legal authority, whereas Explanatory Notes and Classification Opinions do not. Finally, the CITT noted that section 11 of the *Customs Tariff Act* provides that the reviewing authority shall "have regard" to the WCO Explanatory Notes and Classification Opinions, and that to "have regard" means to "consider".

In this case, the 2019 WCO Explanatory Notes for heading 30.04 had been updated to include the word "efficacy" in terms of explaining the types of items that should be classified as medicaments. Therefore, not just items that could be used for medicinal purposes, but those that that are effective are medicaments. However, the heading had not changed and included the broader word "use". The CITT rejected that the change to the WCO Explanatory Notes altered whether NHPs were medicaments or not as the change in the WCO Explanatory Notes could not change the plain meaning of the word "use" which appears in the List of Tariff Provisions. The CITT found that the NHPs at issue were *used* as medicaments, irrespective of their efficacy, because Health Canada has approved the goods in issue for medicinal *uses*.

This case has broader implications for practitioners given that this case was atypical: the central issue was not classification *per se*, but whether 2019 changes to the WCO Harmonized System Explanatory Notes altered the state of Canadian law itself. The CITT found that the 2019 WCO amendments to the Explanatory Notes are inoperative in the circumstances of this case, and that the goods in issues were medicaments prior to December 1, 2019, and remain so to today.

W Konoby (January 16, 2025), AP-2023-023 (Reasons Not Yet Published Online)

This customs and excise appeal decision by the CITT concerns a dispute over whether an individual importer was liable for Good and Services Taxes ("**GST**") on his vehicle when he crossed the border with that vehicle from the United States in April 2021 to temporarily resume residence in Oshawa, Ontario, and then brought the vehicle back to the United States. The CITT dismissed the appeal, finding that the importer had in fact made an importation into Canada according to the *Customs Act*.

The importer, initially a resident of Canada, purchased a car in the United States for personal use. He drove the car across the border intending to temporarily keep it in Oshawa on April 2021, before driving it back to the United States later in the year. The importer was required to fill in a Casual Goods Accounting Document, within which he reported the car as being valued at $19,913.03. The CBSA found that the importer had imported the vehicle into Canada and was therefore liable to pay an excise tax of $100 for the air conditioner in the car, and $1,000 as the 5% GST on the vehicle. The importer requested a refund in 2022 when he moved back to the United States, which was denied. He appealed the CBSA's decision to the CITT under the *Customs Act* on three grounds: (1) the car was never imported to Canada; (2) he was entitled to a refund in any case; and (3) The CITT nonetheless has the jurisdiction to grant a refund of duties.

The CITT disagreed with the importer's first argument and concluded that despite only entering Canada temporarily, the car had been imported. In coming to this conclusion, the CITT considered the ordinary meaning of "importation" as "to bring into the country or cause to bring into the country." Importantly, the CITT found that the intention of the importer is irrelevant for considering whether something was imported or not. The CITT found that it was not legally relevant that the importer did not intend to keep the car in Canada or use the car in Canada.

The CITT similarly disagreed with the importer's second argument, that he was entitled to a refund of GST and excise taxes because he had subsequently exported the car to the United States. The CITT found that there is an exception under tariff item 9802.00.00 for conveyances (cars) imported by a person into Canada for their own personal transportation, provided that the car is re-exported within 30 days. There is a further exception to this rule, that the minister may extend the 30 days to 60 days provided that the importer specify, at the time of importation, the date on which the person intends to export the conveyance from Canada. The CITT applied these requirements strictly and found that the importer had not complied with the exception, as the car had been in Canada for 208 days, and the importer had not clearly indicated to the border agent on the day of his entry his anticipated date of departure.

Lastly, the CITT rejected the argument that the importer should be given duty reimbursement on equitable grounds. The CITT noted that its jurisdiction is statutory, and pertains exclusively to tariff classification, value for duty, origin and marking of imported goods. As such, equitable relief was something it was unable to grant.

This case clarifies several fundamental issues in customs law, including the interpretation of "importation," the scope of the CITT's authority to grant duty relief, and its lack of jurisdiction to provide equitable relief. It also serves as an important reminder to all Canadians that, under this decision, unintentional importation is not a recognized excuse under the *Customs Act*: goods are either imported (thereby triggering the obligation to pay all applicable duties) or they are not.

Bazz Inc (January 6, 2025), AP-2021-010 [*Bazz Inc.*] (Reasons Not Yet Published Online)

In this customs appeal, the CITT held that "smart" light-emitting diode fixtures ("smart fixtures") were not properly classified as being "for use in" digital processing machines and therefore did not qualify for tariff-free treatment. Rather, the CITT determined that because the smart fixtures were not "functionally joined to the host goods", they were properly classified separately from those host goods as "other lighting fittings not elsewhere specified or included."

The appellant in this case, Bazz Inc., imported smart fixtures which could be controlled by a smartphone application. Bazz Inc. claimed duty free treatment under tariff item 9948.00.00 as goods for use in the automatic processing machines (i.e., the smart phone) they were supposed to be used with. The only issue in this case was whether the goods in issue were "functionally joined" to the smartphone.

According to the CITT in its analysis, when the CITT has to determine whether one good is "for use in" another, the CITT has a long line of jurisprudence holding that it must deploy a two-part test to determine: 1) that the article be physically joined with the host good; and 2) that the article be functionally joined to the host good. To be functionally joined to the host good, the CITT found that the smart fixtures "must enhance[] or complement[] the function of the host good by helping the host good to execute its functions or allowing it to acquire additional capabilities." The CITT accepted that the goods were physically joined even when the physical connection is digital, such as via a Wi-Fi signal. However, the CITT did not find that the goods were functionally joined. Instead, the CITT found that the smartphone *application* that allows the host goods (i.e., the smartphone) to control the light fixtures increases the functionality of host goods, and not the light fixture.

The broader implication of this case, particularly for stakeholders, is that smart devices cannot be imported under tariff item 9948.00.00 as articles for use in automatic data processing machines (smartphones, tablets etc.) simply because those smart devices can be controlled by

an application on the smartphone. Instead, according to this decision, to qualify under tariff item 9948.00.00, the importer will have to show that the good itself increases the functioning or capabilities of the automated device that it is linked to in line with the reasoning of the CITT in this case.

Medline Canada Corporation (Corrigendum issued March 18, 2025), AP-2022-004 and AP-2022-017

In this customs appeal before the CITT, Medline Corporation Canada ("Medline") challenged two CBSA re-determinations in which the CBSA denied Medline's refund claims on the basis that certain sterile rubber surgical gloves were not "for use in" surgical instruments within the meaning of the *Customs Tariff*. The CITT concluded that the CBSA had erred, and that certain sterile rubber surgical gloves imported by Medline qualified for duty-free treatment under tariff item 9977.00.00 as "articles for use in instruments and appliances used in medical, surgical, dental or veterinary sciences."

Like *Bazz Inc.*, this case turned on the CITT's interpretation of "for use in" under subsection 2(1) of the *Customs Tariff*, which requires that goods be wrought into, incorporated into, or attached to the host goods. Since the gloves were neither wrought into nor incorporated into surgical instruments, the CITT applied its established two-part test to the "attached to" element of the test, requiring that the goods be both functionally joined and physically connected to the host goods.

On functional connection, the CITT found that the gloves significantly enhance the operation of surgical instruments. The evidence demonstrated that the gloves improve grip, reduce slippage in the presence of bodily fluids, preserve tactile sensitivity necessary for precision, and provide a sterile barrier essential to preventing infection. Although a scalpel can theoretically cut without gloves, the CITT emphasized that surgery cannot be performed in practice without sterile gloves, making them functionally indispensable to the effective use of surgical instruments.

On physical connection, the CITT rejected the CBSA's argument that attachment requires permanent fixing or insertion. Relying on prior jurisprudence, the CITT held that physical connection may be temporary and need only amount to a "real and effective connection." It found that the direct, mandatory contact between surgical gloves and instruments during surgery, combined with their functional interdependence, satisfied the physical connection requirement under the Customs Tariff. As a result, the appeals were allowed, and the gloves were held to be eligible for duty-free treatment under tariff item 9977.00.00 in addition to their classification under tariff item 4015.11.00.

This case is of practical value to practitioners, as it clarifies that the "physical connection" element of the "for use in" test encompasses situations in which the host goods have a

mandatory relationship with the goods at issue—requiring physical contact between them for the duration of the activity for which the host goods are intended.

J White (August 27, 2025), AP-2025-001

This case involved an appeal to the CITT concerning the tariff classification of Sound Mitigation Equipment, specifically, the Slimline device manufactured by Witt Machine & Tool Co. The CBSA had classified the device as a prohibited device under tariff item 9898.00.00 following a re-determination under paragraph 60(4)(a) of the *Customs Act*, prompting the Appellant to appeal that decision under subsection 67(1) of the *Act*.

After the appeal was filed, the CBSA advised the CITT that it no longer contested the matter and agreed that the good in issue had been incorrectly classified as a prohibited device. The CBSA acknowledged that the device did not meet the definition of a prohibited device under subsection 84(1) of the *Criminal Code* and confirmed that the good was admissible for importation into Canada and should instead be classified under a tariff item in Chapter 93 of the *Customs Tariff*.

However, despite the parties' agreement on the proper classification, the CBSA was unable to correct the classification administratively. Under subparagraph 61(1)(a)(i) of the *Customs Act*, the CBSA may only issue a further re-determination prior to an appeal hearing if the change would result in a reduction of duties payable. Because the reclassification sought by both parties would not reduce duties, the CBSA was statutorily barred from making the correction on its own authority.

As a result, the CITT's intervention was required to resolve the matter procedurally. At the request of the CBSA, and in light of the absence of a dispute between the parties, the CITT allowed the appeal, thereby removing the prohibited-device classification under tariff item 9898.00.00 and enabling the good to be treated as admissible for importation under the appropriate Chapter 93 tariff provision.

This case is an interesting example of a situation requiring the CITT to correct a mistake made by the CBSA, even where the CBSA agrees that a correction should be made, because of the statutory scheme of the *Customs Act*. Practitioners should take note that the holding in this case means an appeal to the CITT may be necessary in circumstances where an importer wants a good to be classified in a different manner than it was classified by the CBSA, but reclassifying the good will not lead to a reduction in duties owed.

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, Canada's Federal Courts made six decisions in application for judicial review under the *Special Economic Measures Act,* SC 1992, c 17 [*SEMA*]. Most of these decisions concern the procedural pathway by which individuals may challenge the Minister of Foreign Affairs' decision to recommend listing or delisting to the Governor in Council. In most cases, the Court clarified that individuals must first apply to the Minister of Foreign Affairs for delisting under the applicable sanctions regulations, and that the Minister must render a decision under that regulatory scheme, before an application for judicial review may be brought before the Federal Court. Another key observation made by the courts, which is most notably described by the Federal Court of Appeal in *Makarov v Canada (Foreign Affairs)*, 2025 FCA 223 is that the level of deference owed to the Minister is deciding not to delist sanctioned entities is very high.

Makarov v Canada (Foreign Affairs), 2025 FCA 223

In this case, the FCA dismissed an appeal of an Applicant, Igor Viktorovich Makarov, upholding the Federal Court's conclusion that the Minister of Foreign Affairs' decision not to recommend Mr. Makarov's removal from the sanctions list under the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 [*Russia Regulations*], (i.e., "delisting") was reasonable. The FCA found that the Federal Court was not unduly deferential to the Minister, and that the Minister's decision was reasonable.

The Minister's initial decision to recommend listing was based on her finding that there were reasonable grounds to believe the Appellant was an "associate" of other sanctioned individuals and of Russian officials under subsection 2(c) of the *Russia Regulations*. As further described in our 2024 *Canadian Trade Law Year in Review*, the Federal Court's decision in *Makarov v Canada (Foreign Affairs)*, 2024 FC 1234 provided instructive reasons on the level of deference provided to the Minister when making the decision to refuse to recommend delisting. Specifically, the Federal Court's initial decision in this case was the first under the most modern iteration of the *Russia Regulation* to note that 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. In this appeal, the Appellant contested the considerable deference the Federal Court showed to the Minister, given the significant personal impact upon him.

In its analysis of the Appellant's argument, the FCA confirmed and expanded on the observations previously made by the Federal Court regarding the level of deference owed by the Minister when making delisting recommendations. The FCA emphasized that the Minister must weigh both parties' evidence, apply the legislative standards reasonably, and give

"reasons responsive to the significant personal and state interests at stake." However, the FCA also held that decisions under *SEMA* and the *Russia Regulations* involve inherently policy-laden judgments within the executive's core responsibility for managing Canada's foreign relations and international interests, requiring sensitive and complex assessments grounded in evolving expertise. These qualities mean delisting decisions occur "in the realm of the quintessentially executive" making them "a matter beyond the ken of the Courts." As such, the FCA determined that the Minister's decision is "rather unconstrained." With that said, the Court clarified that, although judicial intervention will be rare, the Minister does not have absolute discretion and is not exempted from the rule of law, citing *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC).

Under this framework, the Federal Court of Appeal considered the Minister's appreciation of the meaning of an "associate" in paragraph 2(c) of the *Russia Regulations*. Here, the FCA noted that the Minister's decision was based on the evidence as it was provided by the Applicant at the time of that decision, and that if the Appellant had additional information supporting delisting, the Appellant was free to provide that information to the Minister under subsection 8(5) of the *Russia Regulations*. The Court also found that the reasons provided by the Minister showed an appreciation of the interests at stake in the judicial review proceeding, and rejected the appeal.

This decision adds helpful confirmation from an appellate-level court regarding the extreme level of deference courts are to give to delisting decisions made by the Minister of Foreign Affairs. Practitioners and stakeholders should take note of the FCA's reasons here and put their best foot forward during their initial statutory delisting applications.

Fridman v Canada (Foreign Affairs), 2025 FC 493 [*Fridman*]

In this case, the Federal Court dismissed two consolidated applications for judicial review of the Ministers decision to refuse to recommend that the Applicants, Katia and Laura Fridman, be delisted from the sanctions list under the *Russia Regulations*. In doing so, the Federal Court determined that the Minister's decision was reasonable and declined to reweigh evidence that was previously provided to the Minister by the Applicants.

By way of background, the Applicants in this case are daughters of the head of Russia's largest private bank who was previously found to be an associate of Russian President Vladimir Putin and added to Canada's sanctions list under paragraph 2(c) of the *Russia Regulations*. Canada sought to prevent sanctions evasion in 2022 by eliminating options for sanctioned individuals and entities through use of their family members, amending the *Russia Regulations* to allow the Governor in Council to add relatives of sanctioned individuals to Canada's sanctions list. As such, the Applicants were added to the Sanctions List under paragraph 2(d) of the *Russia Regulations* because they are family members of an individual listed under paragraph 2(c). The Applicants applied for delisting, but the Minister refused to recommend the Applicants be

delisted on the grounds that there were no "reasonable grounds" to recommend delisting. The core issue of the application was whether this decision of the Minister was reasonable.

The Applicants made several arguments in support of their general claim that the Minister's decision was unreasonable. At the outset, the Applicants argued that not all family members of listed individuals were on the sanctions list, and so the decision of the Minister was discriminatory. On this point, the Applicants also argued that family status is a prohibited ground of discrimination under the *Canadian Human Rights Act*. In rejecting this argument, the Court determined that who the Minister decides to include in the sanctions list under the *Russia Regulations* is a fundamentally discretionary decision. The Court also determined that it did not have to assess the Government of Canada's compliance with the *Canadian Human Rights Act*, as there was no nexus between the Applicants and Canada. Indeed, the applicants had "no presence, personal or economic in Canada."

The Applicants also argued that there is no evidence that they were or might be used to evade sanctions, and that the application for delisting was about them, not their father. Here again, the Court disagreed, finding that the statutory scheme was aimed at preventing the use of family members to evade sanctions, and that, due to their proximity to their father, it was reasonable for the Minister to place the Applicants on the sanctions list. The Federal Court also determined that this argument was essentially an invitation to the Court to reweigh evidence submitted to the Minister. Noting the high level of deference provided to the Minister in delisting decisions, the Court refused to reassess the Minister's assessment of the evidence.

The Applicant further argued that there was not a "sufficient link" between the Applicants, the objectives of Canada's sanctions regime, and Russia's invasion of Ukraine, using the decisions of European courts to bolster this argument. The Federal Court rejected this argument and instead found that the continued listing of the Applicants was reasonably within the purpose of the *Russia Regulations* which it found was to (1) impose economic costs on Russia; (2) emphasize Canada's condemnation of Russia's latest violations of Ukrainian Territory; and (3) continued unity with Canada's international partners in responding to those violations. The Court further found that the decisions of European courts were not helpful or persuasive for cases decided under Canada's distinct sanctions regime.

Practitioners should take note of this case, as it adds clarity to several facets of Canada's sanctions regime under the *Russia Regulations*. Indeed, the Federal Court opined on the purpose of the *Russia Regulations* which may be particularly helpful when providing evidence and argument during delisting applications before the Minister. The Federal Court also determined that what matters in circumstances in which families are listed under the *Russia Regulations* are the initially listed family member and the proximity of the family members to that individual, rather than the family members' likelihood of violating Canada's sanctions laws *per se*. Furthermore, the Court determined that broad discretion provided to the Minister allows the Minister to add family members of sanctioned persons to the sanctions list even

when in similar circumstances, the Minister has not done so. Finally, this case confirms that the *Canadian Human Rights Act* will be of limited use to sanctioned individuals without a personal or economic presence in Canada, and serves as an import reminder that the Federal Court will not reweigh or reassess evidence provided to the Minister in an application for judicial review.

Braun v Canada (Attorney General), 2025 FC 1684 [*Braun*]

In this case, the Federal Court dismissed an appeal from a decision of an Associate Judge granting the Attorney General's motion to strike an application for judicial review. The application challenged the Government of Canada's decision to list the Applicant, Mr. Franz Carl Braun, as a sanctioned individual under the *Special Economic Measures (Haiti) Regulations*, SOR/2022-226 [*Haiti Regulations*]. The core issue on appeal was whether section 8 of the *Haiti Regulations*—which is a statutory method of requesting delisting under those regulations—was an adequate alternative remedy that should have been exhausted before the Applicant applied for judicial review.

In its analysis, the Court examined four key issues. *First*, the court assessed whether the Associate Judge erred in failing to follow the legal framework for determining whether section 8 of the *Haiti Regulations* was an adequate alternative remedy. The Court answered this question in the affirmative. In doing so, the Court rejected the applicant's argument that the Associate Judge had improperly focused on the efficacy of the delisting process, rather than on whether judicial review was the appropriate means to allow the applicant to clear his name in light of the process's opacity and the delisting mechanism's inability to fully address this concern.

Second, the Court considered whether the Associate Judge erred by failing to account for the "burden" imposed by the initial listing decision when assessing a section 8 application, on the basis that the de-listing process amounts to a reconsideration by the same decision-maker that initially listed the individual. Specifically, the Applicant argued that the initial decision to recommend listing to the Governor in Council is made by the Minister of Foreign affairs, and a decision to recommend de-listing an individual to the Governor in Council is also made by the Minister of Foreign Affairs under section 8, the decision is effectively a reconsideration by the decision-maker rather than a new decision. The Court again rejected this argument, noting that it had been raised and dismissed by the Court in multiple prior cases. The Court emphasized that it is not the Governor in Council—the original decision-maker—who considers a section 8 application, but rather the Minister, to whom the applicant may submit any additional evidence. As a result, the decision-making process is fundamentally different from a reconsideration.

Third, the Court considered whether the delisting process is capable of curing any procedural defects arising from the initial listing decision. The Applicant argued that the lack of an opportunity to make submissions during the listing process, together with the failure to receive

a record of the decision, rendered the process procedurally unfair unless the Applicant was able to seek judicial review. However, the Court disagreed, noting that there is no right under the *Haiti Regulations* for advance notice of listing, which would be incongruent with the purposes of the sanctions regime. The Court referred to the Court's assertion in *Bigio v Canada (Governor General in Council)*, 2025 FC 888 that these are questions of policy, and therefore better suited to the legislative process, rather than the courts.

Finally, the Court addressed the Applicant's complaints that section 8 delisting requests are inadequate, inefficient, costly, and a waste of judicial resources that additionally do not allow an Applicant to address the procedural defects of the initial decision. The Court addressed each of these concerns, finding that prejudging the amount of time it would take the Minister to make the decision would be inappropriate, and that there are numerous other cases where procedural and substantive criticisms were successful, never alleging ineffectively or untimeliness of the process, ultimately finding that the Associate Justice did not make any error in concluding that the section 8 process was an appropriate remedy, despite acknowledging that the Minister cannot grant the relief that the Applicant sought via judicial review.

Bigio v Canada (Governor General in Council), 2025 FC 888

In this case, which is very similar to the above-discussed *Braun,* the Federal Court dismissed an appeal of an Order of a Case Management Judge on the basis that the Applicant had not yet exhausted the adequate alternative remedy under section 8 of the *Haiti Regulations*. The Applicant, a retired Haitian businessman, did not apply for delisting under section 8 of the *Haiti Regulations*. The Court found that, despite the process having a number of procedural irregularities, none warranted remitting the matter back to the Case Management Judge for redetermination.

At the outset, the Court considered whether the Case Management Judge's Order was procedurally fair. The Applicant made six arguments to that effect: (1) the motion to strike decision wasn't rendered for 11 months after being heard; (2) at the time the motion to strike was argued, case law that was relied on by the Case Management Judge in his decision was not available to the parties; (3) an affidavit was struck without hearing submissions on admissibility; (4) The Case Management Judge conflated the struck affidavit with a similar but not identical affidavit; (5) the Case Management Judge incorrectly stated that two exhibits were contested, when in fact none were; (6) the Case Management Judge awarded costs differently than was agreed by the parties.

Dealing with each of these arguments in turn, the Court found that referring to case law that was not cited by the parties is not an error of law or a breach of procedural fairness and, when examining the appropriateness of having struck the affidavit, that deficiencies in evidence must be addressed whether parties raise the issue or not, the Court additionally affirmed that

declining to remit a matter to the decision maker is appropriate where the same outcome is inevitable and would serve no useful purpose. In doing so, the Court found that, based on its assessment of whether the Order was factually and legally correct, none of the procedural irregularities claimed by the Appellant warranted remittance.

The Court then turned to whether the Case Management Judge's Order was factually supported and legally correct. Although the Court found that most of the Applicant's arguments had already been addressed in *Mobile Telesystems Public Joint Stock Company v Canada (Attorney General)*, 2025 FC 181, the Court focused primarily on the absence of a 90-day decision-making time limit in the *Haiti Regulations*, in contrast to the *Russian Regulations*. The Court concluded that nothing turned on this distinction, noting that an applicant who does not receive a decision within a reasonable time may seek relief in the nature of mandamus. The Court further held that the Minister's decision-making discretion was sufficiently broad to address alleged procedural shortcomings and that, in any event, such concerns raised questions of policy to be resolved through the legislative process rather than by the courts. The appeal was therefore dismissed.

Both this case and *Braun* serve as stark reminders to practitioners engaging in efforts to delist sanctioned entities that bringing an application for judicial review should only be done after all attempts at statutory relief have been exhausted.

Melnichenko v Canada (Foreign Affairs), 2025 FC 1185

In this case, the Federal Court dismissed an application for judicial review of the Minister's decision to not recommend to the Governor in Council that the Applicant, Mr. Andrey Igorevich Melnichenko, be delisted as a sanctioned individual from Schedule 1 of the *Russia Regulations*.

The Minister of Foreign Affairs initially listed the Applicant under the *Russia Regulations* on the basis that there were reasonable grounds to conclude that the Applicant was an "associate" of senior officials of the Government of Russia under paragraph 2(c) of the *Russia Regulations*. The Applicant applied to the Minister under section 8 of the *Russia Regulations* for delisting, providing additional evidence that, according to the Applicant, disproved his association with the Government of Russia. Pursuant to this application, the Minister determined that, based on the materials provided by the Applicant, there were not reasonable grounds to conclude that the Applicant was *not* an associate of the Government of Russia and dismissed the application. The Applicant then applied to the Federal Court for judicial review of the Minister's decision not to recommend delisting.

In its application before the Court, the Applicant made two core arguments. The applicant first argued that the Minister's interpretation of "associate" in paragraph 2(c) of the *Russia Regulations* was unreasonably broad, confusing the noun "associate" with the verb "to associate with." On this point, the Applicant also argued that the term "associate" was required to be

interpreted in accordance with *Charter* values—particularly the freedom of association, and the right to participate in lawful organizations without fear of unjust sanction. The Applicant then moved on to argue that the Minister "dismissed relevant and credible evidence as irrelevant without justification."

Beginning its analysis, the Federal Court reaffirmed its position from *Makarov v Canada (Foreign Affairs)*, 2024 FC 1234 that the widest level of deference should be applied to the Minister's decision under the *Russia Regulations*. According to the Court, in accordance with *Vavilov*, the broad language of the *Russia Regulations* justified a broad interpretation of the term "associate" contained within. Under this broad interpretation, the Court found that it was apparent that Parliament intended the term "associate" to include persons who are not directly engaged with President Putin, and thus the Minister's interpretation was reasonable.

The Court also dismissed the Applicant's argument that the term "associate" was required to be interpreted in accordance with *Charter*. The Court determined that the Minister was not required to consider *Charter* values because the Applicant had not raised this argument prior to the Minister's decision. Even in the case the Applicant had raised this argument, the Court also determined that the Applicant has no nexus to Canada that would entitle him to any *Charter* protection, and the Applicant did not clarify which *Charter* value underpinning the freedom of association should be considered. Finally, the Court noted that recognizing freedom of association as a *Charter* value in the manner suggested would be inconsistent with the purpose of the *Russia Regulations*, which is to sanction those engaged in violations of international law.

The Court then moved to consider the evidence that the Applicant claimed the Minister unreasonably dismissed as irrelevant. Here, the Court determined that the Minister reasonably determined that certain evidence relied upon by the Applicant was not relevant as it did not disprove an association between the Applicant and the Government of Russia under the *Russia Regulations*. Specifically, the Court noted that evidence showing that the Applicant did not have a personal relationship with Russia President Vladimir Putin and was not related to his "inner circle", did not disprove that the Applicant was an "associate" of the Government of Russia in accordance with the *Russia Regulations*. Therefore, the Minister's use of the word "irrelevant" to describe this evidence was reasonable. Having found both that the Minister's interpretation of the word "associate" and decision to dismiss certain evidence as irrelevant were reasonable, the Court dismissed the application.

This decision clarifies the Federal Court's view that the extent to which foreign nationals are able to claim *Charter* protection when dealing with Canada's sanctions regime is limited, and that the term "associate" may be interpreted broadly by the Minister. This decision and *Fridman* also serve as further examples of the very significant degree of deference that the Federal Court provides to the Minister of Foreign Affairs in delisting applications under Canada's sanctions regime.

Mobile Telesystems Public Joint Stock Company v Canada (Attorney General), 2025 FC 181

In this case, the Federal Court dismissed the appeal of the Applicant, Mobile TeleSystems Public Joint Stock Company, from an order of a Case Management Judge granting a motion to strike its Notice of Application. The Case Management Judge struck the Notice of Application because the Applicant 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 Applicant made several arguments in support of its position that the Case Management Judge's decision was not factually supported or correct. At the outset, the Applicant asserted that the remedy provided by section 8 of the *Russia Regulations* amounts to a reconsideration, because the *de facto* decision-maker in the initial decision to list an individual and a section 8 delisting application is the Minister of Foreign Affairs. The Case Management Judge instead found that the power to *list* an individual under section 2 of the *Russia Regulations* is explicitly conferred upon the Governor in Council, while under section 8 of the *Russia Regulations,* it is the Minister who must decide whether to make a *recommendation* to the Governor in Council that a person's name be removed from the Sanctions List. In supporting the Case Management Judge's determination, the Federal Court further noted that, in an application under section 8 for delisting, the applicant may submit additional evidence and information, which "fundamentally distinguishes" the decision made by the Minister under section 8 from the decision made by the Governor in Council under section 2. As such, the Federal Court went on found that the Case Management Judge did not err in its determination that the Minister's decision under section 8 was not a reconsideration of a prior decision.

The Applicant then asserted that the Case Management Judge misconstrued the essential character of the dispute as the "removal of its name from the Sanctions List," and that the removal of its name from the Sanctions List was only one of the reasons for commencing an application for judicial review. Instead, the Applicant claimed that it was also interested in "vindicating its position that it should never have been listed in the first place, and obtaining a declaration that the decisions was *ultra vires* the powers of the Minister and [Governor in Council]." In this appeal, the Federal Court noted that an order of an associate judge characterizing the essential character of a dispute may be overturned only if it betrays a palpable and overriding error. The Federal Court found no such error in the Case Management Judge's determination that the essence of the Applicant's complaint was that it should not be on the sanctions list, and agreed with the Case Management Judge that section 8 of the *Russia Regulations* provides the Applicant with an adequate and effective remedy to address that complaint.

Practitioners should take particular note of the Court's decision on this second point. Indeed, according to the Federal Court, where the essence of a client's complaint under Canada sanctions regime is that it is on Canada's sanctions list, issues such as reputational harm that

may not be remedied through delisting under section 8 of the *Russia Regulations*, may not be used to circumvent statutory delisting mechanisms.

THE EXPORT AND IMPORT PERMITS ACT

This year there was one notable case decided under the *Export and Import Permits Act*, RCS 1985, c E-19, pertaining to the export of military good. The case is interesting insofar as it relates to amendments made to applications for judicial review in response to decisions made by the Government of Canada that pertain to the subject matter covered by those applications.

Farah v Canada (Foreign Affairs), 2025 FC 679

In this appeal of a decision of a Case Management Judge, the Federal Court considered whether the applicant could amend its application for judicial review of Canada's decision to issue military export permits to Israel. Specifically, the applicant sought to add further *Charter* claims and broaden the scope of its application for judicial review to challenge to Canada's export-control framework. The Case Management Judge originally refused leave to amend a notice of application relating to export and brokering permits issued under the *Export and Import Permits Act* following October 9, 2023, in the context of Israel's military operations in Gaza. The Federal Court agreed with the Case Management Judge's decision not to allow an amendment to the application to include certain claims regarding the *Charter*, and further found that the applicant's attempt to broaden its application to include reviews of Canada's export permit system was offside the *Federal Courts Rules*.

The applicants' proposed amendments fell into two categories. *First*, the applicants sought to add allegations that the issuance of export permits breached section 15 of the Canadian Charter of Rights and Freedoms (the "**section 15 amendments**"), in addition to their existing claim under section 7 of the *Charter*. *Second*, they sought to broaden the application to challenge paragraph 2(a) of the Export Control List and General Export Permit No. 47, which allow certain military exports to the United States that may subsequently be transferred to Israel (the "**Indirect Arms Export Amendments**").

On appeal, the Court held that the Case Management Judge applied the correct legal test for amendments under Rule 75 of the *Federal Courts Rules*. The Court reaffirmed that proposed amendments must satisfy a threshold requirement of yielding a sustainable pleading, must not cause non-compensable prejudice, and must be in the interests of justice. With respect to the proposed section 15 amendments, the Court agreed that they failed to disclose a reasonable cause of action under Rule 301. While the notice of application described Israel's conduct and Canada's approval of export permits, it did not plead material facts establishing how Canada's conduct created a distinction on enumerated or analogous grounds or perpetuated substantive

discrimination. In denying leave to amend, the Court held that bald assertions of a breach of the *Charter*, without a pleaded causal link between the alleged discrimination and the impugned state action, are insufficient and should not be permitted by way of amendment.

The Court further concluded that the proposed challenges to paragraph 2(a) of the Export Control List and General Export Permit No. 47 could not be added to the application because they contravened Rule 302 of the *Federal Courts Rules*, which requires that an application for judicial review be limited to a single order in respect of which relief is sought. According to the Court, the measures that the Indirect Arms Export Amendments applied to were distinct regulatory decisions adopted years earlier in different factual and legal contexts and did not form part of a continuing course of conduct with the issuance of Israel-specific export permits. As a result, they could not properly be joined in a single judicial review application. The appeal was therefore dismissed, with costs to the government respondents in the cause, leaving open the possibility that properly pleaded Charter claims or separate applications challenging Canada's broader export-control regime could be brought in accordance with the *Federal Courts Rules*.

This case serves as an important general reminder to practitioners as to the scope of amendments that will be allowed in a judicial review of the Government of Canada's export control decisions, and the scope of allegations that must be raised in new applications.

FREE TRADE AGREEMENT PANEL DECISIONS

There were no state-to-state trade cases concerning Canada that concluded in 2025. However, Canadian entities initiated three requests for binational panel review under Article 10.12 of the *United States-Mexico-Canada Agreement* ("**CUSMA**"), summarized below. Last year, we noted that while 2024 had fewer CUSMA dispute settlement decisions than 2023, the continued reliance on CUSMA dispute settlement spoke to its nascent success as a forum for addressing trade-related issues. This trend appears to have continued in 2025, marked by multiple Chapter 10 dispute settlement complaints and Canada's request for consultations under Chapter 31 regarding the Trump Administration's tariff measures affecting a wide range of Canadian goods.

Each of the three requests concerns a five-year renewal of anti-dumping or countervailing duties imposed by the United States against Canadian goods. Canada is also involved in several new requests made to the World Trade Organization ("**WTO**"), summarized below.

CUSMA Panels requested in 2025

Multiple Canadian entities have requested panels under Article 12.10 of the *United States-Mexico-Canada Agreement* following decisions in the United States to renew three anti-dumping or countervailing duty orders against goods from Canada. One focused on Canadian-produced large diameter welded pipe ("**LDWP**") and the other two, an anti-dumping and a countervailing duty order, on Canadian softwood lumber products.

First, on May 30, 2025, Evraz Inc. NA Canada (now Interpro Pipe and Steel) submitted a request for review of the results of the five-year sunset review of the anti-dumping order on LDWP from Canada. The order also covers LDWP imported from China, Greece, India, South Korea, and Türkiye. Specifically, Evraz claims that subject LDWP imports from Canada should not have been cumulated with imports from the other subject countries when assessing whether revoking the order is likely to cause injury to the domestic LDWP industry in the United States.

Second, on August 28, 2025, a coalition of Canadian softwood lumber producers, industry associations, the Federal Government, and several provincial governments submitted a request for review of the results of the five-year sunset review of the anti-dumping order on certain softwood lumber products from Canada. In effect, the coalition is challenging the U.S. Department of Commerce (the "**DOC**")'s methodology for calculating the dumping margins for Canadian softwood lumber producers. Notably, among other grounds, the coalition contests Commerce's use of zeroing (ignoring non-dumped sales) when calculating margins, which the WTO has found to be inconsistent with the Anti-Dumping Agreement and which the CBSA has not used since 2005.

And *third*, on September 11, 2025, the abovementioned coalition submitted a request for review of the results of the five-year sunset review of the countervailing duty order on certain softwood lumber products from Canada. The coalition contests, among other grounds, the DOC's finding that Canada's federal and provincial governments provided subsidies to Canadian softwood lumber producers during the period of review (i.e., 2023) as well as the DOC's determination of the amount of countervailing duties to be imposed. According to the coalition, the DOC erroneously concluded that at least 20 separate government programs, including stumpage fees for harvesting Crown timber and several tax measures, were countervailable subsidies. In many cases, the coalition asserts that the DOC made errors of fact and law in calculating the benefit of a particular program. As above for the anti-dumping challenge, the coalition also contests DOC's use of zeroing of negative benefits in its calculations.

WTO Requests in 2025

While WTO panels did not publish any reports concerning Canada in 2025, Canada has found itself on both sides of new cases at the WTO in 2025. These cases concern politically sensitive trade restrictive measures adopted by the United States, China, and Canada itself.

At the outset, Canada requested consultations with the United States pursuant to Articles 1 and 4 of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("**DSU**") regarding the Trump Administration's imposition of tariffs on a wide range of Canadian products. Specifically, Canada requested consultations the *ad valorem* duties imposed on energy products and other non-energy goods subject to the *IEEPA* fentanyl tariffs, automobiles and automobile parts, and steel and aluminum articles. In all instances, among other grounds, Canada alleges that the U.S. tariff measures are inconsistent with the United States' obligations under the *General Agreement on Tariffs and Trade, 1994* ("**GATT 1994**"). Canada has also filed requests for binational consultations with the United States under *CUSMA* Article 31.4 with respect to each of the above measures.

In March 2025, Canada also requested consultations under the DSU regarding measures adopted by China that impose 100% *ad valorem* duties on certain Canadian agricultural and fishery products, including canola seed oil, imported into China. In late 2024, China had conducted an "antidiscrimination investigation" into Canada's decision to impose surtaxes on a range of Chinese goods, including 100% duties on Chinese electric vehicles. Upon conclusion of the investigation, China imposed the above duties as "antidiscrimination measures." Canada alleged that these measures are inconsistent with China's WTO obligations, notably the requirement to seek recourse through the DSU panel process before imposing unilateral trade measures. On May 12, 2025, Canada announced that consultations had failed to settle the dispute and requested the formation of a panel. The parties also announced on August 20, 2025, that they would agree to enter arbitration following the panel report if the WTO Appellate Body does not have enough members to hear an appeal.

Although not directly related to the ongoing WTO dispute, China's retaliatory measures have proven to be a political hot button issue within Canada. Indeed, Saskatchewan Premier Scott Moe has petitioned the Federal Government to remove Canada's surtax on Chinese electric vehicles in a bid to re-open the Chinese market to Canadian canola oil exports.

China also requested consultations under the DSU with Canada, on August 20, 2025, regarding Canada's steel and aluminum tariff-rate quotas ("**TRQs**") that were imposed in July 2025. The impugned TRQs limit the volume of steel and aluminum products that may be imported into Canada from non-free trade agreement partners, including China, in one year. Any goods imported above the TRQ limit are subject to a 50% surtax. Chinese steel and aluminum imports are also subject to an additional 25% surtax. China alleges that Canada has breached its obligations under the *GATT 1994*.

All of these disputes are still ongoing. Practitioners will be well served to continue monitoring new developments, particularly whether and to what extent the United States participates in the WTO dispute settlement process given the Trump Administration's past criticisms of the system. While the United States has accepted Canada's request to enter consultations, it has

communicated its position that the tariffs are matters of national security not susceptible to review.

FEDERAL GOVERNMENT PROCUREMENT

In this year's edition of our *Canadian Trade Law Year in Review*, the team at CLK has for the first time included summaries of several important federal procurement law cases decided before the FCA and the CITT. These cases are based on complaints concerning federal procurements and add interesting clarity to certain facets of federal government contracting and procurement law, including the treatment of post-award substitution of resource requirements in services procurements in *ADGA Group Consultants Inc. v. Canada*, conditional set-asides in *Primex Project Management Ltd. v. Department of Public Works and Government Services,* and the standard of proof for allegations of bidder misconduct in *White Bear Industries Ltd. v. Department of Public Works and Government Services,* among other cases and issues. While practitioners should be aware of these cases, the reasons for most of the CITT decisions discussed below have not been published by the CITT on its website at the time of publishing this year's *Canadian Trade Law Year in Review*. They are available from the CITT upon request.

Canada's procurement process and federal procurement challenge mechanism are likely to continue to change significantly in 2026 and over the next few years due to Canada's recent "Buy Canadian" and reciprocal trade policies and related regulatory changes. CLK will continue to stay current on these issues and release periodic updates as those changes occur.

ADGA Group Consultants Inc v Department of Public Works and Government Services, (January 20, 2025) PR-2024-038 (Reasons Not Yet Published Online), reviewed in part, *ADGA Group Consultants Inc v Canada (Attorney General)*, 2025 FCA 227

This case concerned a procurement conducted by Public Works and Government Services Canada ("**PWGSC**") for the provision of technical and maintenance resources and services for electronic security systems used by Correctional Services Canada ("**CSC**"). The CITT determined that the complaint filed by the incumbent supplier, ADGA Group Consultants Inc. ("**ADGA**"), was not valid on the basis that PWGSC's evaluation of ADGA's bid was reasonable, and the alleged "bait and switch" by winning bidder, RHEA Inc. and Paladin Technologies Inc. (as a joint venture) ("**RHEA/Paladin**") was a matter of contract administration outside the CITT's jurisdiction. ADGA applied for judicial review of the CITT's decision. The Federal Court of Appeal concluded that by accepting RHEA/Paladin's post-award personnel substitutions which allegedly lacked the mandatory requirements under the RFP, PWGSC had conducted a new and different procurement that was within the CITT's jurisdiction to review. The court therefore remitted the matter for redetermination by the CITT (which is pending). The court

dismissed ADGA'S other ground of review finding no reviewable error in the Tribunal's conclusion that PWGSC had reasonably evaluated ADGA's bid.

By way of background, the procurement at issue was divided into five workstreams based on geographic region. Bidders were required to include a list of named resources for each workstream, with a signed certification that the named resources would be available for the resulting contract. ADGA was awarded the contract for workstreams 1 and 2. RHEA/Paladin was awarded workstreams 3-5. No other bidders submitted proposals. Shortly after the contract award was announced,, ADGA informed employees who would have worked on the contracts for workstreams 3-5 that it had been unsuccessful. At the same time, RHEA/Paladin, in the course of discussions with CSC, began identifying ex-ADGA personnel for possible retention or hiring. As soon as the next day, RHEA/Paladin made employment offers to those personnel. The contracts for workstreams 3-5 included clauses that permitted the contractor to replace or substitute resources identified in its bid with the contracting entity's approval. RHEA/Paladin proposed to PSPC that 44 of the 45 personnel previously certified in RHEA/Paladin's winning tender as being available to fulfill the requirements of the contract be replaced or substituted with different personnel. .

In its complaint, ADGA alleged that RHEA/Paladin had either submitted a false certification, or performed a "bait and switch" by certifying the availability of its resources in its bid, and then proposing substitutes for all but one proposed resource. AGDA also alleged that at least some of the ex-ADGA personnel that RHEA/Paladin proposed as substitutes did not have the work experience to meet the RFP's mandatory requirements. ADGA further argued that, given that the evaluation of the named resources formed the basis of the evaluation, the substitution of 44 new resources post-award, some of which did not meet the mandatory criteria, resulted in a fundamentally new and different procurement.

The CITT accepted PWGSC's position that there is an important distinction between replacement or substitution of resources during the tender period and those that may occur after the contract is awarded. Once the procuring entity enters into a contract with a successful bidder, and absent any mistake made by Canada during the procurement process, the terms and conditions of the contract govern the matter. Obligations under the trade agreements that apply during the procurement process cannot extend into, or be superimposed, onto the contract administration phase.

In the CITT's view, PWGSC had discretion to accept the post-tender substitution of resources by RHEA/Paladin, and it acted reasonably in doing so. The Tribunal concluded that this was not a "bait and switch" operation that tainted the procurement process. PWGSC is generally entitled to rely on bidders' certifications until continued reliance is no longer reasonable. In this case, according to the CITT, there was (1) no evidence that RHEA/Paladin proposed to supply personnel that were not under contract at the time of bidding, as those personnel were only available for hire after the award; and (2) PWGSC is not expected to be aware of non-compete

clauses in private employment contracts nor can the CITT adjudicate them. In reaching this conclusion, the CITT distinguished earlier cases in which it had found that the Government of Canada's acceptance of goods differing from those offered in a bid amounted to the conduct of a different procurement process, whereas ADGA's concerns related to Canada's acceptance of substituted personnel from those offered in a bid for the provision of services.

The FCA found that the CITT erred in distinguishing earlier cases on the basis that they dealt with goods, rather than services. There is no distinction between goods and services in this context. Just as in a procurement for goods, services can be assessed on objective, mandatory criteria in addition to subjective, rated, criteria. By accepting substituted personnel which lacked the mandatory requirements under the RFP, the FCA found that the CITT did not sufficiently analyze the argument as to whether, accepting substitutions after the award which allegedly lacked the mandatory requirements under the RFP, PWGSC conducted a new and different procurement. The FCA concluded that while it is generally true that "the government, as a procuring entity, has the right to deploy the resources contracted for as it considers appropriate {…} this authority does not allow the government, through the power of substitution" (i.e. as provided for in the resulting contract clauses) "to change the contract into something different from that contemplated by the RFP."

The FCA's legal ratio is an important development for distinguishing procurement processes subject to the CITT's jurisdiction from matters of contract administration where the procurement of services is concerned going forward. While the CITT's decision recognized the need to facilitate resource replacement in industries or businesses with high staff turnover (e.g., IT services),), federal contractors should be aware that even where a procuring entity has a contractual right to approve the substitution or replacement of proposed personnel, such decisions could still be subject to review and, therefore, it would be prudent to ensure they remain compliant with the mandatory criteria of the procurement post-award.

White Bear Industries Ltd, (February 5, 2025) PR-2024-044 (Reasons Not Yet Published Online)

This case concerned a procurement for highway maintenance and repair services for a portion of the Alaska Highway in British Columbia. The CITT determined that a complaint from White Bear Industries ("**WBI**") was valid, and that WBI's bid was not evaluated in a procedurally fair manner and PWGSC's decision to disqualify WBI's bid was unreasonable. WBI was awarded its reasonable bid preparation costs and complaint costs. The CITT recommended as a remedy that PWGSC compensate WBI for its lost opportunity to profit, if any, reduced by an amount equal to its reasonable bid preparation costs.

PWGSC sent a request for proposal ("**RFP**") to six prequalified bidders, including WBI, which was the incumbent contractor. However, PWGSC rejected WBI's bid on the basis of two grounds

of allegedly serious misconduct that occurred during WBI's performance of a prior contract also for maintenance of another portion of the Alaska Highway. According to PWGSC, WBI had made unauthorized agreements for the purchase of additional equipment and materials outside the scope of the previous contract, and sought payment in a manner amounting to fraud and fraudulent misrepresentation. Second, a WBI employee verbally threatened a PWGSC consultant at a job site after the consultant had committed multiple safety infractions.

The RFP contained a clause (GI 11.1) that allowed PWGSC to reject bids where there was "evidence satisfactory to Canada" on a number of grounds; subsection (d) included fraud, bribery, fraudulent misrepresentation, and discrimination, and subsection (e) included a person's past improper conduct or behaviour. Of note, contrary to PWSGC's submission that the trade agreements prescribe no evidentiary standard or process by which a procuring entity can reject a proposal due to false statements or other past unsuitable conduct of the bidder, the CITT held that "evidence satisfactory to Canada" means evidence that is sufficiently probative and reliable to satisfy the civil standard of proof (i.e., a balance of probabilities).

In this case, the CITT found that PWGSC did not provide a tenable explanation for its conclusion that there was evidence that at least one of the grounds for disqualification under GI 11.1(d) was present. In the CITT's view, the evidence suggested that PWGSC likely resorted to GI 11.1(d) as a corrective measure to address WBI's failure to adhere to proper procedures in the course of performing prior contracts. However, without more, that does not mean that WBI acted fraudulently or bribed or misrepresented itself to PWGSC. Moreover, the disqualification also lacked procedural fairness; PWGSC should not have raised GI 11.1(d) without notice to WBI so it would have a chance to respond to the serious allegations.

The CITT also found that PWGSC failed to carefully consider the scope of GI 11.1(e). If an unduly low threshold can be used to disqualify bidders using section GI11, the objectives of the procurement system would be undermined, as a bidder could be disqualified for any single past infraction, even if minor, that has since been remedied. Specifically, in this case, the CITT declined to find that the "use of rough language [by a WBI employee] on a construction site in northern Canada is dispositive as to the suitability of a bidder to perform future highway maintenance work."

The CITT awarded WBI its reasonable bid preparation costs. Although there was a significant deficiency in the manner in which PWGSC administered the tender, the CITT was not willing to presume that WBI would have outperformed other bidders. Further, the CITT found that since highway maintenance is a critical service that cannot have any gaps in coverage, it would not be appropriate to recommend recission of any contract that has been awarded or to retender.

Although this case was highly factual, it is noteworthy as an example of the limit that exists on the procuring authority's discretion to disqualify bids for improper conduct on the part of a bidder. As above, the CITT imposed the civil standard of proof even though the tender did not specifically require it. Indeed, the tender purported to impose a standard of "evidence

satisfactory to Canada". In that way, the CITT was clear that a procuring entity is not permitted at law to create its own standard of proof for misconduct.

Keverest Technologies Inc (March 13, 2025), PR-2024-043 (Reasons Not Yet Published Online)

This case concerned a procurement by PWGSC for the supply of one high-resolution 128-channel LIDAR sensor for Transport Canada. The CITT determined that Keverest Technologies Inc. ("**Keverest**")'s complaint was valid and that Keverest was not given a fair chance to compete in the procurement because PWGSC did not follow the procedures in the RFP.

PWGSC posted the RFP on June 24, 2024. Bidding closed on July 26, 2024. As the RFP required, Keverest submitted its bid before closing through the SAP Business Network. Keverest had previously created three different SAP accounts for other, unrelated, tenders. While SAP allows bidders to create multiple accounts, the CanadaBuys website instructs bidders only to maintain one SAP account per CRA business number. Keverest submitted its bid for the subject contract through its "KEVEREST" account, not its "Keverest" account. On July 29, PWGSC wrote to Keverest through the SAP system to inform Keverest that its bid was missing a required form; Keverest was given two days to correct the deficiency. However, PWGSC sent the message to the "Keverest" account, not "KEVEREST". On August 5, Keverest wrote to PWSGC regarding the status of its bid. The next day, PWGSC responded that the evaluation was ongoing. Keverest followed up three more times. On September 3, PWGSC informed "KEVEREST" that its bid did not meet mandatory requirements, specifically that the above form was incomplete. PWGSC noted the July 29 bid completeness notice.

The CITT found that the RFP contained detailed instruction on bid submission and the use of the SAP system but, critically, did not expressly state that a business can have only one SAP account per CRA business number. The instructions published on the CanadaBuys website were not expressly incorporated into the RFP and so could not be relied upon to create an onus on the bidder to only have one account when submitting its bid for this procurement. Keverest submitted a compliant bid and should have received the bid completement notice through the "KEVEREST" account. PWGSC's failure to do so meant that it did not comply with the terms of the RFP. The CITT noted that PWGCS chose to use the SAP system and therefore was responsible for ensuring that communications were sent through the SAP system correctly.

The CITT recommended, as a remedy, that PWGSC not exercise its option to procure an additional sensor and instead reissue a competitive solicitation should an additional sensor be required. The CITT also awarded Keverest its reasonable bid preparation costs.

Practitioners should take note of the standard of care to which the CITT held both bidders and the procuring entity in this case. Bidders are expected to exercise reasonable diligence in the management of a procurement with a view to complying with procedures established by the

procuring entity. However, the CITT was clear that this same standard extends to the procuring entity. Keverest appeared to misunderstand requirements relating to the incomplete form and failed to follow the CanadaBuys website instructions for use of the SAP system. Nonetheless, the CITT held PWGSC accountable for failing to explicitly incorporate those instructions into the RFP, and for failing to ensure that communications were sent to the correct bidder through the SAP system that it chose to use for this procurement.

Primex Project Management Ltd (April 7, 2025), PR-2024-056 (Reasons Not Yet Published Online)

The complaint in this case concerned a procurement by PWGSC for Task-Based Informatics Professional Services required by the Department of National Defence ("**DND**"). The CITT determined that Primex Project Management Ltd. ("**Primex**")'s complaint was not valid. On behalf of DND, PWGSC had sought bids from prequalified suppliers pursuant to an existing supply arrangement. The procurement was subject to a preference for Indigenous businesses under the federal government's Procurement Strategy for Indigenous Business ("**PSIB**"). As two compliant bids were received from Indigenous businesses, PWGSC set-aside the procurement under PSIB and, as a result, gave no further consideration to Primex's bid, which did not include an Indigenous business certification. The contract was awarded to one of the Indigenous businesses, Tato SI. In the complaint, Primex alleged that one or both of the bids submitted by Indigenous businesses may not have fully complied with certain requirements of the solicitation and that PWGSC failed to properly verify that compliance during bid review. If either of the bids from Indigenous businesses did not meet all these requirements, then the set-aside for Indigenous businesses under the PSIB would not apply, and Primex's bid would have been wrongly disqualified.

In support of its complaint, Primex alleged breaches of several articles of the *Canada Free Trade Agreement* ("**CFTA**"). While the procurement was ordinarily subject to the CFTA, the fact that at least two compliant bids were received from Indigenous businesses meant that the procurement was subject to a conditional set-aside for Indigenous businesses under the PSIB and, therefore, exempt from the CFTA.

The CITT determined that PWGSC had acted reasonably in finding that two bids had been received from two Indigenous businesses, thus exempting the procurement from the provisions of the trade agreements and ousting the CITT's jurisdiction to hear the complaint. The CITT found that, while it is entitled to do so, PWGSC did not simply accept the Indigenous business certificates received as presumptively true. PWGSC confirmed that Tato SI and the other Indigenous business that had filed a compliant bid, Mindwire JV, were listed in the Indigenous Business Directory and the bid evaluators determined their certifications to be compliant. The CITT found no basis to conclude that the bid evaluations were conducted unreasonably. This means that the procurement became exempt from the CFTA once PWGSC

had reasonably determined that two compliant bids were received from Indigenous businesses. Having found that the conditional set-aside was reasonably applied, the RFP no longer pertained to a "designated contract" under the *Canadian International Tribunal Act*, and the CITT ceased to have jurisdiction to conduct an inquiry.

Practitioners should take note that this case highlights the lack of recourse for would-be complainants, including Indigenous businesses, to the CITT as a bid challenge authority when federal procurements are subject to a conditional set-aside under PSIB. Indeed, Primex had alleged a breach of Article 506 of the CFTA, claiming that its bid was disqualified without the opportunity to appeal or seek a remedy through an "official dispute resolution process." In Primex's view, the set-aside prevents suppliers from challenging unfair decisions made in relation to set-aside provisions themselves. The CITT dismissed this ground, stating that "Primex has not been denied recourse to challenge a procurement decision and to seek redress" and referred to the Federal Court of Appeal in *Canada (Attorney General) v Almon Equipment Limited*, 2010 FCA 193, which affirmed that Parliament has created a regulatory regime for oversight of federal procurement through the CITT. However, the CITT did not provide detailed reasons on the interplay between conditional set-asides and the *CFTA*'s guarantee of recourse to challenge procurement decisions.

This is an issue that may garner more attention going forward, both with respect to conditional set-asides and other similar instruments that the Government of Canada can invoke that remove or limit the CITT's jurisdiction to review federal procurements, such as the national security exemption or, more recently, Buy Canadian requirements.

5D Property Management Group (April 24, 2025), PR-2024-063 (Reasons Not Yet Published Online)

In this case, the CITT dismissed a complaint from a bidder, 5D Property Management Group, alleging that PWGSC conducted the evaluation process in a manner that was purposefully biased in favour of the winning bidder, Spark Power Corporation. The bids on the procurement opportunity were evaluated by PWGSC on behalf of the Department of the Environment, and the contract opportunity related to the provision of mechanical, plumbing, heating, air conditioning and associated building maintenance services at the Canada Centre for Inland Waters in Burlington, Ontario.

The central allegation advanced by 5D Property Management Group was that one of the evaluators on the initial bid evaluation team had been employed by Spark Power's predecessor more than five years before the evaluation, giving rise to a reasonable apprehension of bias in the bid assessment process. 5D Property Management Group also argued that because Spark Power Corporation had been a supplier of the relevant services to the Government of Canada for years, any evaluation would necessarily be biased in favour of Spark Power Corporation.

In its analysis, the CITT noted that there is a presumption of good faith on behalf of government evaluators. Furthermore, prior professional and personal relationships between a bidder and a government department does not necessarily lead to a lack of impartiality. Instead, a complainant must provide actual positive evidence showing that the evaluation was conducted in a manner that gives rise to a reasonable apprehension of bias. Here, the complainant failed to provide such evidence aside from the fact that a member of the initial evaluation team had previously worked for the incumbent bidder, which the CITT found insufficient to find that there was a reasonable apprehension of bias. The CITT went further and noted that a longstanding business relationship is also not indicative of bias, and is instead a "competitive advantage" in bidding that is may be "part of the ordinary ebb and flow of business" and that Spark Power Corporation's prior relationship with the relevant government agency did not give rise to a reasonable apprehension of bias.

Finally, the CITT also noted that despite the lack of a reasonable apprehension of bias, PWGSC nonetheless decided to conduct a re-evaluation of the bids. No evaluator with any connection to Spark Power Corporation was involved in this re-evaluation, and the CITT therefore found the re-evaluation process was similarly devoid of a reasonable apprehension of bias. The CITT went on to find that PWGSC's evaluation of bids was reasonable, and dismissed the complaint.

This case underscores for practitioners and stakeholders the stringent evidentiary standard required to establish that an evaluation gives rise to a reasonable apprehension of bias, and the fact that a voluntary re-evaluation from PWGSC may cure certain defects in a prior evaluation.

Buller Crichton Environmental Inc (May 26, 2025), PR-2024-069 (Reasons Not Yet Published Online)

In this case, the CITT found a complaint made by Buller Crichton Environmental Inc. ("**BCE**") pertaining to the supply of certain services relating to hazardous materials and indoor air quality to be invalid. BCE complained that PWGSC's evaluation of its bid was unreasonable, and not in line with the established criteria in the request for standing offer ("**RFSO**"). In rejecting these arguments, the CITT determined that PWGSC used the correct evaluation criteria and reasonably evaluated BCE's bid.

BCE's complaint centered on PWGSC's evaluation of BCE's bid specifically as it pertained to rated criterion "**RT2**" in the RFSO which required bidders to show that they had prior experience in the certain areas of hazardous materials and air quality assessment and management. PWGSC's evaluation of BCE's bid determined that BCE's bid did not disclose sufficient prior experience to meet the mandatory minimum number of points required under RT2, and thus BCE was disqualified. BCE objected to PWGSC's evaluation, claiming that it was owed more points in several areas. In response to BCE's objection, the original evaluation team plus two additional evaluators reviewed BCE's original consensus evaluation to determine

whether there were points that BCE should have been granted. This review determined that BCE was indeed owed more points than the original evaluation, but also confirmed that it had not reached the minimum passing score underRT2. BCE then complained to the Tribunal that this evaluation was flawed as PWGSC failed to use a separate evaluation table in the RFSO called the "Cumulative Evaluation Table" to derive a bidder's cumulative evaluation score. BCE claimed that certain of the descriptions in the Cumulative Evaluation Table supported its claim that its bid met the mandatory minimum evaluated score. BCE then claimed that, in any case, PWGSC's evaluation of its bid was ambiguous, and not conducted in a transparent manner or in good faith.

In its analysis of both of these arguments, the Tribunal considered (1) whether PWGSC applied the published evaluation criteria, and (2) whether the evaluation of BCE's bid was reasonable. On the first issue, the CITT found that the RFSO outlined that bids were first evaluated under "Detailed Evaluation Tables", and those scores would then be adjusted according to the mathematical formulas provided in the Cumulative Evaluation Table. As such, the CITT determined that PWGSC applied the published evaluation criteria by using the Detailed Evaluation Tables, and accepted PWGSC's statement that the descriptions in the Cumulative Evaluation Table were not meant to serve any role for evaluation purposes. However, in *obiter* the CITT commented that where descriptions are not meant to be used for evaluation purposes, they should be removed from future tenders for evaluation purposes.

Next, the CITT determined that PWGSC's evaluation of BCE's bid was reasonable as it was supported by tenable explanations and, therefore, the rejection of BCE's bid was reasonable. Furthermore, drawing off of its prior decisions, the CITT found that PWGSC was not required to address every sub-point of the evaluation criteria in the Detailed Evaluation Tables when providing its reasons for evaluation. As regards BCE's claim that PWGSC conducted its evaluation without transparency and in bad faith, the CITT found that BCE bore the onus to prove this claim. While BCE asked the CITT to draw negative inferences on the transparency and good faith of PWGSC's conduct due to the fact that PWGSC's second evaluation team awarded more points, the CITT disagreed, finding it reasonable to expect that changes to comments or scores could occur in a second evaluation.

Finally, the CITT noted that BCE raised additional allegations, including allegations of bias, in its response to PWGSC's government institution report. The CITT determined that these allegations were raised too late, and that the CITT did not have to address them as a result.

While this case was highly fact-specific, the CITT's reasons on several points may be of assistance to practitioners. Specifically, the CITT affirmed two long-standing principles: that evaluators need not provide detailed reasons or address every sub-point in of the evaluation criteria in federal procurements and that complaints must raise all grounds of complaint at the outset, in the complaint filed with the CITT as additional allegations outside the scope of the complaint will not be considered and/or could be time-barred. Furthermore, the statement in

obiter from the CITT, that evaluation tables in bid documents should not include descriptions that are not used for evaluation purposes highlights the importance for procuring entities to avoid the use of such descriptions in solicitation documents and for potential bidders to be alert to such ambiguities in evaluation grids and to seek clarification from a procuring entity, whenever possible, during the procurement process.

The British Columbia Corps of Commissionaires v Department of Public Works and Government Services (October 1, 2025), PR-2025-013 (Reasons not Yet Published Online)

In this case, the CITT determined that a complaint by The British Columbia Corps of Commissionaires ("**BCCC**") was not valid. BCCC alleged that the procurement was not properly advertised, and that PWGSC should have directly notified BCCC, the incumbent in the process.

Uniquely here, while the CITT rejected BCCC's complaint due to "unsubstantiated claims of unfairness," in its ultimate determination the CITT specifically noted that BCCC's complaint was "not without merit." The CITT noted that the complaint highlighted "potential technological issues" with the CanadaBuys website (i.e., the website that the Government of Canada uses to advertise its procurement opportunities). The CITT also determined that the complaint raised issues relating to the Government of Canada's inconsistent practice of notifying incumbent vendors about pending opportunities. Practitioners should monitor potential future changes made to the CanadaBuys platform and Canada's incumbent notification policies in response to this CITT determination.

CONCLUDING REMARKS

This year proved to be an exceptionally active one for Canadian international trade law practitioners. Uncertainty arising from U.S. tariffs and a rapidly evolving global trade landscape has driven a surge in companies and individuals seeking relief through Canada's federal courts and the CITT, who have clarified many areas of Canada's international trade and federal government procurement regimes. These decisions as well as the Government of Canada's new trade and procurement policies, and related regulatory amendments, are re-shaping the legal and policy landscape for companies doing business in Canada in 2026 and the full impacts will likely be seen over the coming years as Canadian international trade and procurement law continues to develop.