



Court File No.: A-84-21

FEDERAL COURT OF APPEAL

**CANADIAN HARDWOOD PLYWOOD AND VENEER ASSOCIATION,  
COLUMBIA FOREST PRODUCTS, ROCKSHIELD ENGINEERED WOOD  
PRODUCTS ULC and HUSKY PLYWOOD (A DIVISION OF  
COMMONWEALTH PLYWOOD COMPANY LIMITED)**

Applicants

– and –

**ATTORNEY GENERAL OF CANADA, CANUSA WOOD PRODUCTS  
LIMITED, HARDWOODS SPECIALTY PRODUCTS LP, MCCORRY & CO.  
LTD., PANOPLY WOOD PRODUCTS INC., UPPER CANADA FOREST  
PRODUCTS INC., UNITED STEELWORKERS, UNIFOR and  
ASSOCIATION DES SALARIÉS DU CONTRE-PLAQUÉ DE STE-THÉRÈSE**

Respondents

**Application under section 96.1 of the  
*Special Import Measures Act*, R.S.C. 1985, c. S-15 as amended**

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**NOTICE OF APPLICATION**

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**TO THE RESPONDENTS:**

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

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicants. The Applicants request that this application be heard at Ottawa, Ontario.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitors, or where the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

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

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

Date: March 19, 2021

Issued by:

  
(Registry Officer)

Address of local office:

Ottawa Local Office  
Thomas D'Arcy McGee Building  
90 Sparks Street, Main Floor  
Ottawa, ON K1A 0H9

ORIGINAL SIGNED BY  
S. CHOJNACKI  
A SIGNÉ L'ORIGINAL

**TO: The Administrator, Federal Court of Appeal**  
Thomas D'Arcy McGee Building  
90 Sparks Street, Main Floor  
Ottawa, ON K1A 0H9

**AND TO: Attorney General of Canada**  
Department of Justice Canada  
50 O'Connor Street, 5<sup>th</sup> Floor  
Ottawa, ON K1A 0H8

**AND TO: Canadian International Trade Tribunal**  
333 Laurier Ave. West  
Ottawa ON K1A 0G7

**AND TO: Hardwoods Specialty Products LP**  
27231 58th Crescent  
Langley, BC V4W 3W7

**AND TO: Panoply Wood Products Inc.**  
209-1024 Ridgeway Avenue  
Coquitlam, BC V3J 1S5

**AND TO: Canusa Wood Products Limited**  
Suite 500  
1281 West Georgia Street  
Vancouver, B.C. V6E 3J7

- AND TO: McCorry & Co. Ltd.**  
Tanjung Aru Plaza, 3rd Floor, Block C,  
Suite 6-8, Jalan Mat Salleh,  
Tanjung Aru, 88100 Kota Kinabalu,  
Sabah, Malaysia
- AND TO: Upper Canada Forest Products Ltd.**  
7088 Financial Drive  
Mississauga, Ontario L5N 7H5
- AND TO: United Steelworkers**  
Suite 800, 234 Eglinton Avenue East  
Toronto, ON M4P 1K7
- AND TO: Unifor**  
205 Placer Court  
Toronto, ON M2H 3H9
- AND TO: Association des Salariés du Contre-Plaqué de  
Ste-Thérèse**  
15 boul. Labelle Sainte-Thérèse Québec J7E 4H9

## APPLICATION

This Application for judicial review is jointly made by the Canadian Hardwood Plywood and Veneer Association, Columbia Forest Products (“**Columbia**”), Rockshield Engineered Wood Products ULC (“**Rockshield**”), and Husky Plywood (a division of Commonwealth Plywood Company Limited) (“**Husky**”) (collectively, the “**Applicants**”) pursuant to section 96.1 of the *Special Import Measures Act*, R.S.C. 1985, c-S-15, as amended (the “**SIMA**”), in respect of the finding made by the Canadian International Trade Tribunal (the “**Tribunal**”) in Tribunal Inquiry No. NQ-2020-002 (the “**Finding**”), which was an inquiry conducted pursuant to section 42 of the SIMA in respect of certain decorative and other non-structural plywood<sup>1</sup> (“**decorative plywood**”) originating in or exported from the People’s Republic of China (“**China**”) (the “**Inquiry**”). The Tribunal issued its Finding on February 19, 2021 and issued the Reasons for its decision (the “**Reasons**”) on March 5, 2021. The Tribunal found the dumping and subsidizing of decorative plywood from China did not cause injury and was not threatening to cause injury to the domestic industry (respectively, the “**No-Injury Finding**” and the “**No-Threat Finding**”). The No-Injury Finding and the No-Threat Finding were made under subsection 43(1) of the SIMA.

### THE APPLICANTS MAKE APPLICATION FOR:

1. An Order setting aside the Tribunal’s No-Injury Finding and its No-Threat Finding, and referring the matter back to the Tribunal for determination in accordance with such directions as the Court considers appropriate;
2. A Confidentiality Order pursuant to Rule 151 of the *Federal Courts Rules*;
3. Such further and other procedural relief as may be requested, and this Honourable Court may determine to be appropriate, including, but not limited to, such procedural orders that may be necessary regarding service and scheduling to facilitate the just, most expeditious and least expensive determination of the Application;

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<sup>1</sup> The decorative plywood that is the subject of the Tribunal’s inquiry is more fully described in Annex 1 to this Notice of Application.

4. An Order awarding the Applicants their costs of this Application in accordance with the *Federal Courts Rules*; and
5. Such further and other relief as the Applicants may request and this Honourable Court may deem just.

**THE GROUNDS FOR THE APPLICATION ARE:**

**A) The Applicants**

6. The Applicant, Columbia, produces decorative plywood at its facilities located in: Hearst, Ontario; Kitchener, Ontario; and Saint-Casimir, Québec.
7. The Applicant, Rockshield, produces decorative plywood at its facility located in Cochrane, Ontario.
8. The Applicant, Husky, produces decorative plywood at its facility located in Ste-Thérèse, Québec. Husky is a division of Commonwealth Plywood Company Limited.
9. The Applicant, the Canadian Hardwood Plywood and Veneer Association, is a national trade association representing producers of decorative plywood and producers of veneer (upstream suppliers to decorative plywood producers). The association has seven members that produce decorative plywood, including Columbia, Husky and Rockshield.

**B) The Respondents**

10. Apart from the Attorney General, the United Steel Workers, Unifor and the Association des Salariés du Contre-Plaqué de Ste-Thérèse, the Respondents are importers of decorative plywood originating in China.
11. United Steel Workers, Unifor and the Association des Salariés du Contre-Plaqué de Ste-Thérèse are unions whose members are employed by certain Canadian producers of decorative plywood.

### C) Background

12. The Tribunal's Inquiry was conducted pursuant to section 42 of the SIMA to determine whether the dumping and/or subsidising of decorative plywood originating in or exported from China (the "**Subject Goods**") caused injury or were threatening to cause injury to the domestic industry.
13. Concurrently with the Tribunal's Inquiry, the President of the Canada Border Services Agency ("**CSBA**") conducted an investigation into the dumping and subsidising of Subject Goods originating in or exported from China. On January 21, 2021, the CBSA issued a final determination pursuant to section 41 of the SIMA. The CBSA made a final determination of no dumping with respect to certain specific exporters ("the **Zero-rated Exporters**"). The 'all others' combined final margins of dumping and subsidy were in excess of 300% of the total estimated export price.
14. The Applicants filed a separate Notice of Application for Judicial Review of the CBSA's Final Determination on February 19, 2021. The CBSA's final determination with respect to the Zero-rated Exporters was a result of the erroneous decision by the CBSA not to find that a Particular Market Situation ("**PMS**") exists in the Chinese decorative plywood sector. Had the CBSA found that a PMS exists in the sector as a whole and/or with respect to the Zero-rated Exporters, the CBSA would have applied alternative means of calculating the exporters' costs of production, resulting in significant margins of dumping for all participating exporters.
15. The Tribunal separated its analysis of the effects of the goods imported from China into two groups based on the CBSA's dumping and subsidy determination: imports from the Zero-rated Exporters, and all other imports from China. Accordingly, the CBSA's final determination fundamentally affected the Tribunal's assessment of injury and threat of injury in its Inquiry. Certain key trends and observations made by the Tribunal in its Reasons relied upon the distinction between the Zero-rated Exporters and the other imports

from China. Therefore, to the extent that the CBSA's final determination was erroneous, the Tribunal's determination was based on erroneous facts.

16. In addition to the impact of the CBSA's determination with respect to the Zero-rated Exporters on the Tribunal's factual analysis, the Tribunal also made critical legal errors in its No-Injury Finding and its No-Threat Finding.

#### **D) The Tribunal's Errors**

17. Despite significant evidence on the record to support both a finding of injury and a finding of threat of injury, the Tribunal unreasonably failed to make either finding.
18. This failure results from the Tribunal making errors of law, acting unreasonably, acting contrary to law or basing its decision on erroneous findings of fact made without regard to the material before it in the following ways:
  - a) The Tribunal used a novel, incorrect or otherwise unreasonable legal test in its past injury analysis. This test required that in order for injury to be causally related to the subject goods, it must have been increasing through the Period of Inquiry ("POI"). Neither the SIMA nor the *Special Import Measures Regulations* ("SIMR") set out a requirement that injury to a domestic industry accelerate over a POI. Injury within a period can be material without reference to the results of a past period, either within or before the Tribunal's POI. Applying an erroneous legal test, the Tribunal found that the Applicants had not been injured by the subject goods.
  - b) The Tribunal also used an incorrect or unreasonable legal test in its threat of injury analysis, by reading into the SIMA certain WTO provisions that do not form part of the legal test for threat of injury under Canadian law. More specifically, the Tribunal added a requirement for a "change of circumstances" to the threat of injury test. The SIMA test requires only that the threat of injury be "clearly foreseen and

imminent,” without regard to a change of circumstances. Applying this erroneous test, the Tribunal found no threat of injury to the Applicants.

- c) By applying incorrect and unreasonable legal tests to the facts before it for both its past injury and its threat of injury analyses, the Tribunal acted unreasonably and outside of its own jurisdiction or otherwise unreasonably fettered its discretion in a manner that is inconsistent with Parliament’s intent and the remedial purpose of the SIMA.
- d) Further, the Tribunal based its decision on certain erroneous findings of fact that it made without regard to the material before it when it found:
  - i) That while domestically produced decorative plywood is “like goods” to the subject goods and there is a single class of goods, the like goods and the subject goods do not directly compete with one another, and further, in the context of this determination, that it was not necessary for the Tribunal to be certain as to why these goods allegedly do not compete;
  - ii) That since – according to the Tribunal – the like goods and the subject goods do not directly compete, the subject goods could not cause injury to the like goods, notwithstanding the evidence that different types of decorative plywood fall along a spectrum and that significantly lower priced goods at one end of the spectrum can have a ripple effect on the price of goods at the other end of the spectrum;
  - iii) That the Applicants should have distinguished their price undercutting examples according to whether the products were from the Zero-rated Exporters or from other Chinese exporters;
  - iv) That while the degree of price undercutting was significant, its impact was not;
  - v) That the market for plywood was captured by China prior to the POI, which time period did not form part of the Tribunal’s



inquiry and therefore the Tribunal could not have assessed that prior time period in arriving at its decision; and

- vi) That the margins of dumping and amounts of subsidy determined for all exporters other than the Zero-rated Exporters were not indicative of the level of the injurious effects caused by the subject goods.

19. The Tribunal also breached its obligations of procedural fairness to the Applicants. In the context of the file hearing format necessitated by the pandemic, on the day of oral closing arguments<sup>2</sup> the Tribunal asked the Applicants certain questions about the injury and threat of injury tests and indicated in its closing remarks that it reserved the right to pose follow-up questions to the Applicants for written response. The Tribunal declined to pose any such follow-up questions and proceeded to apply novel and erroneous legal tests which the Applicants had no opportunity to clarify before the Tribunal's findings were issued. As a matter of procedural fairness, if the Tribunal was considering the application of novel legal tests for injury and threat of injury, it should have given the Applicants the opportunity to file written responses to the questions it posed during the oral closing arguments with respect to these legal tests.
20. The errors outlined above result from the Tribunal acting unreasonably, making errors of law and basing its decisions on erroneous findings of fact that were made without regard to the materials before it, or otherwise result from the Tribunal acting contrary to law. These errors individually or collectively fundamentally affected the Tribunal's analysis and the outcome of the Inquiry.

#### **E) Relevant Statutes and Regulations**

21. The Applicants rely on:
  - a) The *Special Import Measures Act*, R.S.C., 1985, c. S-15, as amended;

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<sup>2</sup> Oral closing arguments were heard by the Tribunal via video conference on January 28, 2021.

- b) The *Special Import Measures Regulations*, SOR/84-927, as amended;
- c) The *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- d) The *Federal Courts Rules*, SOR/98-106, as amended; and
- e) Such other statutes and regulations as the Applicants may advise and this Honourable Court may permit.

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

- 22. The affidavit(s) submitted on behalf of the Applicants to be filed in this proceeding;
- 23. The Tribunal's Finding and Reasons in Inquiry No. NQ-2020-002 dated February 19 and March 5, 2021, respectively;
- 24. The administrative record before the Tribunal in Inquiry No. NQ-2020-002;
- 25. Any information filed with the Court in respect of the request below; and
- 26. Such further and other material as the Applicants may advise and this Honourable Court may permit.

**REQUEST FOR MATERIAL IN THE POSSESSION OF THE TRIBUNAL:**

**THE APPLICANTS HEREBY REQUEST** that the Tribunal transmit to the Applicants and the Registry, in accordance with Rule 318 of the *Federal Courts Rules*, certified copies of all materials not already in the Applicants' possession, including public and confidential exhibits and transcripts which were before the Tribunal, including the panel members and Tribunal staff, or otherwise considered by Tribunal with respect to the findings issued in Tribunal Inquiry No. NQ-2020-002: Certain decorative and other non-structural plywood originating in or exported from China. This request is being made pursuant to Rule 317 of the *Federal Courts Rules*.

Date: March 19, 2021



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Association, Columbia Forest Products,  
Rockshield Engineered Wood Products ULC  
and Huskey Plywood (a division of  
Commonwealth Plywood Company Limited)

Annex 1

The complete definition of the decorative plywood that is the subject of this Application is as follows:

Decorative and other non-structural plywood, whether or not surface coated or covered, and veneer core platforms for the production of decorative and other non-structural plywood, originating in or exported from the People's Republic of China. Decorative and other non-structural plywood is defined as a flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of wood. The veneers, along with the core are glued or otherwise bonded together. Decorative and other non-structural plywood include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP-1-2016 (including any revisions to that standard).

Excluding:

- a. Structural plywood that is manufactured to meet U.S. Products Standard PS 1-09, PS 2-09, or PS 2-10 for Structural Plywood (including any revisions to that standard or any substantially equivalent international standard intended for structural plywood), and which has both a face and a back veneer of coniferous wood
- b. Finished plywood products for use as flooring
- c. Plywood which has a shape or design other than a flat panel
- d. Phenolic Film Faced Plyform (PFF), also known as Phenolic Surface Film Plywood (PSF), defined as a panel with an "Exterior" or "Exposure 1" bond classification as is defined by The Engineered Wood Association, having an opaque phenolic film layer with a weight equal to or greater than 90g/m<sup>3</sup> permanently bonded on both the face and back veneers and an opaque, moisture resistant coating applied to the edges; and
- e. Laminated veneer lumber door and window components with (1) a maximum width of 44 millimeters, a thickness from 30 millimeters to 72 millimeters, and a length of less than 2413 millimeters, (2) water boiling point exterior adhesive, (3) a modulus of elasticity of 1,500,000 pounds per square inch or higher, (4) finger-jointed or lap-jointed core veneer with all layers oriented so that the grain is running parallel or with no more than 3 dispersed layers of veneer oriented with the grain running perpendicular to the other layers, and (5) top layer machined with a curved edge and one or more profile channels throughout

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the \_\_\_\_\_

day of MAR 19 2021 A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of MAR 19 2021 20 \_\_\_\_\_

