Federal Courts Reports

Recueil des décisions des Cours fédérales

T-1851-17

2021 FC 36

Prairies Tubulars (2015) Inc. (*Applicant*)

v.

Canada Border Services Agency and **President Canada Border Services Agency** and **the Attorney General of Canada** (*Respondents*)

INDEXED AS: PRAIRIES TUBULARS (2015) INC. V. CANADA (BORDER SERVICES AGENCY)

Federal Court, Ahmed J.—By videoconference between Ottawa and Calgary, September 1, 2020; Ottawa, January 11, 2021.

Anti-dumping — Application challenging constitutionality of Special Import Measures Act (Act), ss. 56(1.01)(a), 56(1.1)(a), 58(1.1)(a), 58(2)(a) (Appeal Payment Provisions) — Applicant determined by Canada Border Services Agency (CBSA) to owe anti-dumping duties on goods imported into Canada pursuant to Act — Applicant had unsuccessfully sought judicial review of CBSA's assessment, resulting in Federal Court decision holding that it does not have jurisdiction over challenges to legal validity of assessments of anti-dumping duties — However, Federal Court allowing applicant to amend its notice of application to bring constitutional challenge to Act's legislative scheme — Appeal Payment Provisions requiring applicant to pay all outstanding duties owed in order to proceed with Act's appeal procedure — Without first paying anti-dumping duties owed (duties), applicant could not judicially review or appeal CBSA's assessment imposing duties — Applicant submitting Appeal Payment Provisions invalid for three reasons: they violate Constitution Act, 1867, ss. 96–101 by barring access to courts in manner that is inconsistent with rule of law; they violate Canadian Charter of Rights and Freedoms, s. 12 by subjecting applicant, similarly situated individuals, to cruel, unusual treatment; they violate Canadian Bill of Rights, s. 1(a) by prohibiting individuals similarly situated to applicant from accessing fair hearing rights protected by Bill of Rights, s. 2(e) — Applicant importer of oil country tubular goods (OCTG) — CBSA issuing assessments relating to applicant's importations of OCTG which assessments imposing duties pursuant to Act, s. 57(b) totalling $18 829 412 — Applicant submitting was, continues to be unable to pay duties required to access appeal mechanism under Act — Main issues whether Appeal Payment Provisions violating Constitution Act, 1867, ss. 96–101; whether Appeal Payment Provisions violating Charter, s. 12; whether Appeal Payment Provisions violating Canadian Bill of Rights, s. 1(a) — With respect to Constitution Act, 1867, applicant claiming that Appeal Payment Provisions violating s. 96 because they prevent superior courts from reviewing errors made by CBSA in assessing anti-dumping duties — These errors, however, are errors of fact, law; they do not raise questions of jurisdiction or constitutionality — Appeal Payment Provisions therefore not offending s. 96 by preventing superior courts from reviewing such errors — Applicant also failing to establish that Appeal Payment Provisions subjecting it to undue hardship — Therefore, not barring applicant from accessing courts in manner that violates Constitution Act, 1867, s. 96 — Regarding Charter, s. 12, applicant had standing to forward its Charter claim but claim unsuccessful since Appeal Payment Provisions not violating Charter s. 12; not constituting "treatment" that is "cruel, unusual" — Duties not economic sanction but remedial tax directly proportionate to margin of dumping — As to

Canadian Bill of Rights, applicant needing public interest standing to forward claim under s. 1(a) — Discretion to grant such standing not exercised herein because claim not raising serious justiciable issue — Since applicant not challenging imposition of duties before court, tribunal or similar body, s. 2(e) not conferring due process rights upon it — Procedural rights afforded by Bill of Rights, s. 2(e) not transcending rights provided by statute — Appeal Payment Provisions valid federal legislation; therefore not violating applicant's rights under Bill of Rights, s. 2(e) — Application dismissed.

This was an application challenging the constitutionality of paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a) and 58(2)(a) (the Appeal Payment Provisions) of the *Special Import Measures Act* (Act). The applicant was determined by the Canada Border Services Agency (CBSA) to owe anti-dumping duties on goods imported into Canada pursuant to the Act. The applicant unsuccessfully sought a judicial review of the CBSA's assessment, resulting in a Federal Court decision holding that it does not have jurisdiction over challenges to the legal validity of assessments of anti-dumping duties. However, the Federal Court provided the applicant with the opportunity to amend its notice of application so that it may commence a constitutional challenge to the Act's legislative scheme. The Appeal Payment Provisions require the applicant to pay all outstanding duties owed in order to proceed with the Act's appeal procedure. Without first paying the anti-dumping duties owed (the duties), the applicant cannot judicially review or appeal the CBSA's assessment that imposed the duties. The applicant submitted that the Appeal Payment Provisions were invalid for three reasons: they violate sections 96 to 101 of the *Constitution Act, 1867*, by barring access to the courts in a manner that is inconsistent with the rule of law; they violate section 12 of the *Canadian Charter of Rights and Freedoms* by subjecting the applicant and similarly situated individuals to cruel and unusual treatment; and they violate subsection 1(a) of the *Canadian Bill of Rights* by prohibiting individuals similarly situated to the applicant from accessing the fair hearing rights protected by subsection 2(e) of that statute.

The applicant is an importer of oil country tubular goods (OCTG). OCTG are types of pipe used in the oil industry that are subject to anti-dumping duties under the Act. Between December 2016 and January 2017, the applicant imported OCTG that fit the description of the Canadian International Trade Tribunal's positive injury decision. The CBSA then reviewed the applicant's OCTG and requested information from the applicant regarding these imports on three different occasions. The applicant, however, did not respond to the CBSA's requests within the stipulated deadlines. Accordingly, between October and November of 2017, the CBSA issued assessments relating to the applicant's importations of OCTG. These assessments imposed the duties pursuant to paragraph 57(b) of the Act, which totalled $18 829 412. The applicant submitted that it was and continues to be, at all material times, unable to pay the duties required to access the appeal mechanism under the Act.

The main issues were whether the Appeal Payment Provisions violate sections 96 to 101 of the *Constitution Act, 1867*; whether the appeal Payment Provisions violate section 12 of the Charter; and whether the Appeal Payment Provisions violate paragraph 1(a) of the *Canadian Bill of Rights*.

Held, the application should be dismissed.

With respect to the *Constitution Act, 1867*, the applicant limited its submissions primarily to section 96, which was the operative provision for this issue. It argued in particular that the rule of law operates in two manners: (a) as an unwritten constitutional principle; and (b) as codified under section 96 of the *Constitution Act, 1867*. In light of authorities examined, legislation is valid with respect to the rule of law so long as it complies with the procedures by which it is to be enacted, amended and repealed. There were strong normative reasons for this conclusion. For instance, there is a danger in allowing a concept as nebulous as the rule of law to assume the same authority as a written constitutional provision. The rule of law is "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". The rule of law is the logic underlying the Constitution—not the Constitution itself. To find otherwise would permit vague concepts such as "orderliness" and "accountability" to become the law, as opposed to merely guide it. In the case at hand, the applicant claimed that the Appeal Payment Provisions violate section 96 because they prevent superior courts from reviewing errors made by the CBSA in assessing anti-dumping duties.

These errors, however, are errors of fact and law—they do not raise questions of jurisdiction or constitutionality. The Appeal Payment Provisions therefore do not offend section 96 by preventing superior courts from reviewing such errors. While legislation may be inconsistent with section 96 of the *Constitution Act, 1867*, if it creates financial obstacles that impose undue hardship on potential litigants by requiring them to "sacrifice reasonable expenses in order to bring a claim", given the applicant's gross earnings and numerous related companies, the applicant failed to have its argument that the Appeal Payment Provisions cause it undue hardship accepted. Moreover, the Appeal Payment Provisions do not prevent an initial consideration of the applicant's claim. The duties were assessed by the CBSA and found to be warranted by the Tribunal. The applicant was provided numerous opportunities to respond to the CBSA's inquiries regarding its imported goods, but failed to do so until after the duties were imposed. Thus, the applicant failed to establish that the Appeal Payment Provisions subject it to undue hardship. The Appeal Payment Provisions therefore do not bar the applicant from accessing the courts in a manner that violates section 96 of the *Constitution Act, 1867*.

Regarding section 12 of the Charter, the applicant had standing to forward its Charter claim but that claim was ultimately unsuccessful since the Appeal Payment Provisions do not violate section 12 of the Charter. In appealing the assessment of taxes and resulting penalties, a corporation has been found to be involuntarily brought before the courts. Accordingly, the applicant, in appealing the duties, was also involuntarily brought before the Court. It therefore had private interest standing under the exception established by case law examined. The applicant submitted that the Payment Appeal Provisions violate section 12 of the Charter because they are a form of "treatment" that is "cruel and unusual"; however, this argument was rejected. The Appeal Payment Provisions are a law of general application that all individuals of Canadian society are subject to. The fact that the Appeal Payment Provisions impact an individual in a manner which causes them to suffer does not entail that they are subject to "treatment" at the hands of the state. Moreover, the Appeal Payment Provisions are not "cruel and unusual." As noted by the respondent, an economic sanction is not cruel and unusual if it is "tightly linked" to an economic offence. The duties are indeed not an economic sanction. Rather, they are a remedial tax that is directly proportionate to the margin of dumping. Even if the Appeal Payment Provisions do subject an individual to treatment, this proportionality ensures that such an individual is not deprived of their livelihood in a manner that is "incompatible with human dignity". Accordingly, the Appeal Payment Provisions, by requiring that anti-dumping duties be paid before engaging in the appeals process under the Act, are not "cruel and unusual."

As to the *Canadian Bill of Rights*, the applicant submitted that it has a right to a fair hearing under paragraph 2(e) of the Bill of Rights. It asserted that when legislation such as the Act creates an adjudicative process to which paragraph 2(e) of the Bill of Rights applies, paragraph 1(a) protects access to that process. To advance such a claim, the applicant needed public interest standing. Three factors were considered to determine whether the discretion to grant such standing should be exercised: (a) whether there is a serious justiciable issue raised; (b) whether the applicant has a real stake or a genuine interest in it; and (c) whether, in all the circumstances, this application is a reasonable and effective way to bring the issue before the courts. The first factor weighed strongly against granting the applicant public interest standing. The applicant's claim did not raise a substantial constitutional issue that was far from frivolous since it was so unlikely to succeed that its result was a foregone conclusion. Case law examined was clear that paragraph 2(e) of the Bill of Rights does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process but it rather only offers protection if and when a hearing is held. Since the applicant was not challenging the imposition of the duties before a court, tribunal or similar body, paragraph 2(e) did not confer due process rights upon it. The procedural rights afforded by paragraph 2(e) of the Bill of Rights do not transcend the rights provided by statute. The Appeal Payment Provisions are valid federal legislation and therefore do not violate the applicant's rights under paragraph 2(e). With respect to the applicant's claim under paragraph 1(a), there were no "compelling reasons" relating to "objective and manageable standards by which a Court should be guided" that warranted invalidating the Appeal Payment Provisions. Therefore, the applicant's claim under the Bill of Rights did not raise a serious justiciable issue. While the other remaining factors may have been satisfied, they weighed lightly in relation to the finding that the applicant's claim

failed to raise a serious justiciable issue. Therefore, the applicant did not have public interest standing to forward its claim under paragraph 1(a) of the Bill of Rights.

STATUTES AND REGULATIONS CITED

Canadian Bill of Rights, S.C. 1960, c. 44, ss. 1(a), 2(e).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 12.

Canadian Wheat Board Act, R.S.C., 1985, c. C-24.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 96, 96–101.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52(1).

Criminal Code, R.S.C., 1985, c. C-46, s. 491(1)(b).

Federal Courts Rules, SOR/98-106, Tariff B, column III.

Special Import Measures Act, R.S.C., 1985, c. S-15, ss. 2(1) “importer”, “person”, 8(1), 55, 56, 57(b), 58(1.1),(2), 61(1),(3), 62(1).

CASES CITED

APPLIED:

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385, [1998] S.C.J. No. 61 (QL); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161, [1991] S.C.J. No. 79 (QL); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 451 D.L.R. (4th) 367, revg *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, 2019 QCCA 373; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, (1998), 166 D.L.R. (4th) 1, [1998] S.C.J. No. 781 (QL); *Stanley J. Tessmer Law Corporation v. The Queen*, 2009 TCC 104, 1998 G.T.C. 939 affd 2013 FCA 290, 297 C.R.R. (2d) 255; *Gratl v. Canada*, 2012 FCA 88, 2012 D.T.C. 5075; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *R. v. Bryan*, [1998] 6 W.W.R. 616, 132 Man. R. (2d) 167 (Q.B.).

DISTINGUISHED:

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31; *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179; *R. v. Montague*, 2014 ONCA 439, 120 O.R. (3d) 401; *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267.

CONSIDERED:

Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency), 2018 FC 991; *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1, [1981] S.C.J. No. 80 (QL); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, (1988), 53 D.L.R. (4th) 1, [1988] S.C.J. No. 76 (QL); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321, [1985] S.C.J. No. 17 (QL); *Rodriguez v. British Columbia (Attorney General)*, [1993] 3

S.C.R. 519, (1993), 107 D.L.R. (4th) 342, [1993] S.C.J. No. 94 (QL); *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Goltz*, [1991] 3 S.C.R. 485, (1991), 61 B.C.L.R. (2d) 145, [1991] S.C.J. No. 90 (QL); *R. v. Pham* (2005), 77 O.R. (3d) 401, [2005] O.J. No. 5127 (QL), 203 C.C.C. (3d) 326 (C.A.), affd 2006 SCC 26, [2006] 1 S.C.R. 940; *R. v. Pham* (2002), 167 C.C.C. (3d) 570, [2002] O.J. No. 2545 (QL) (C.A.).

REFERRED TO:

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, (1995), 130 D.L.R. (4th) 385, [1995] S.C.J. No. 101 (QL); *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, (1990), 68 D.L.R. (4th) 147, [1990] S.C.J. No. 27 (QL); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577, [1989] S.C.J. No. 36 (QL); *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, (1989), 61 D.L.R. (4th) 385, [1989] S.C.J. No. 88 (QL); *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Curr v. The Queen*, [1972] S.C.R. 889, (1972), 26 D.L.R. (3d) 603, [1972] S.C.J. No. 66 (QL); *Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191, [2015] 3 F.C.R. 346; *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

APPLICATION challenging the constitutionality of paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a) and 58(2)(a) of the *Special Import Measures Act* after the applicant was determined by the Canada Border Services Agency to owe anti-dumping duties on goods imported into Canada pursuant to the Act. Application dismissed.

APPEARANCES

Paul Reid and *Brendan Miller* for applicant.

Max Binnie and *Craig Collins-Williams* for respondents.

SOLICITORS OF RECORD

Walsh LLP, Calgary, for applicant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment and judgment rendered in English by

AHMED J.:

I. Overview

[1] The applicant was determined by the Canada Border Services Agency (the CBSA) to owe anti-dumping duties on goods imported into Canada pursuant to the *Special Import Measures Act*, R.S.C., 1985, c. S-15 (SIMA). The applicant unsuccessfully sought a judicial review of the CBSA's assessment, resulting in the decision of *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency)*, 2018 FC 991 (*Prairies Tubulars, 2018*). In that case, Justice Mactavish of this Court (as she then was) held that the Federal Court does not have jurisdiction over challenges to the legal validity of assessments of anti-dumping duties (*Prairies Tubulars, 2018*, at paragraph 44). However, Justice Mactavish provided the applicant with the opportunity to amend its notice of application so that it may commence a constitutional challenge to SIMA's legislative scheme (*Prairies Tubulars, 2018*, at paragraph 49).

[2] The applicant returns to this Court and challenges the constitutionality of paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a) and 58(2)(a) of SIMA (the Appeal Payment Provisions). The Appeal Payment Provisions require the applicant to pay all outstanding duties owed in order to proceed with SIMA's appeal procedure. Without first paying the anti-dumping duties owed (the Duties), the applicant cannot judicially review or appeal the CBSA's assessment that imposed the Duties.

[3] The applicant submits that the Appeal Payment Provisions are invalid for three reasons. First, the applicant submits that the Appeal Payment Provisions violate sections 96–101 of The *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5] (*Constitution Act, 1867*), by barring access to the courts in a manner that is inconsistent with the rule of law. Second, the applicant submits that the Appeal Payment Provisions violate section 12 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter) (The *Constitution Act, 1982*), by subjecting the applicant and similarly situated individuals to cruel and unusual treatment. Third, the applicant submits that the Appeal Payment Provisions violate paragraph 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (Bill of Rights), by prohibiting individuals similarly situated to the applicant from accessing the fair hearing rights protected by paragraph 2(e) of that statute.

[4] For the reasons that follow, I find that the Appeal Payment Provisions are valid legislation. This application is therefore dismissed.

II. Facts

A. *The Statutory Scheme*

[5] In *Prairies Tubulars, 2018*, Justice Mactavish set out the factual background of this case and SIMA's statutory scheme. For the sake of brevity, I will provide only a short summary.

[6] The purpose of SIMA is:

> … to protect domestic manufacturers against the marketing in Canada of foreign-made articles at unreasonably low prices, a practice known as "dumping"…. Dumping occurs when goods are sold to importers in Canada at prices that are lower than the price at which comparable goods are sold in the country of export, or where goods are sold in Canada at unprofitable prices. In order to protect Canadian manufacturers, the margin of dumping on imported goods may be off-set by the imposition of anti-dumping duties on the goods in question.

(*Prairies Tubulars, 2018*, at paragraph 6.)

[7] The CBSA and the Canadian International Trade Tribunal (CITT) are jointly responsible for administering SIMA. The CBSA may impose provisional duties on imported goods if it arrives at a preliminary determination that dumping has occurred and considers that the imposition of provisional duties is necessary to prevent injury, retardation or threat of injury: SIMA, subsection 8(1). If the CITT subsequently concludes that dumping has caused injury to the relevant Canadian industry, the CBSA

may impose anti-dumping duties: SIMA, sections 55 and 56 (*Prairies Tubulars, 2018*, at paragraph 8).

[8] Anti-dumping duties imposed by the CBSA are not punitive, but are rather equal to the "margin of dumping." The margin of dumping is calculated by comparing the price of goods when sold in Canada to the price of goods when bought in the country of export.

[9] Determinations by the CBSA to impose anti-dumping duties are "final": SIMA, subsection 56(1). This Court does not have jurisdiction to judicially review such determinations (*Prairies Tubulars, 2018*, at paragraph 44). Importers may apply to the CBSA for a re-determination of the duties owing, but only if "the importer has paid all duties owing on the goods": SIMA, subsections 56(1)–56(1.01). After a re-determination, the importer may apply to the President of CBSA for a further re-determination, but—once again—only if "the importer has paid all duties owing on the goods": SIMA, subsections 58(1.1)–58(2) (*Prairies Tubulars, 2018*, at paragraphs 9–10).

[10] Importers can appeal the President of the CBSA's re-determinations to the CITT: SIMA, subsection 61(1). The CITT's appeal decisions are final and conclusive, subject only to an appeal to the Federal Court of Appeal on a question of law: SIMA, subsections 61(3) and 62(1) (*Prairies Tubulars, 2018*, at paragraph 11).

B. *The Applicant*

[11] The applicant is an importer of oil country tubular goods (OCTG). OCTG are types of pipe used in the oil industry that are subject to anti-dumping duties under SIMA.

[12] Between December 2016 and January 2017, the applicant imported OCTG that fit the description of the CITT's positive injury decision. The CBSA then reviewed the applicant's OCTG and requested information from the applicant regarding these imports on three different occasions. The applicant, however, did not respond to the CBSA's requests within the stipulated deadlines. Accordingly, between October and November of 2017, the CBSA issued assessments relating to the applicant's importations of OCTG. These assessments imposed the Duties pursuant to paragraph 57(b) of SIMA, which total $18 829 412.

[13] The applicant submits that it is, and at all material times was, unable to pay the Duties required to access the appeal mechanism under SIMA. This fact is the only one significantly disputed by the parties. In support of the applicant's inability to pay, the applicant's director, Mr. Charles Zhang, affirmed that the applicant's net income was $1 295 839 in the fiscal year ending March 2017 and $233 833 in the fiscal year ending March 2018, despite gross earnings of $36 096 769 and $51 259 566 respectively. The respondent characterizes this information as "unsupported" by the documentary evidence.

[14] The applicant wound down its operations in June 2017. Given the cessation of the applicant's business, the respondent argues that either Mr. Zhang himself or a company related to the applicant may be able to loan the applicant the money required to pay the Duties. The applicant asserts that receiving such a loan is not possible.

[15] Mr. Zhang claims that he is unable to loan the applicant the money required to pay the Duties. In support of this claim, Mr. Zhang provided his notices of assessment for the years 2016–2018, which show he never earned before tax income of greater than $40 000 during those years. Mr. Zhang has not provided his tax returns for those years.

[16] Mr. Zhang is a majority shareholder of Canadian Energy Supplies & Services Inc. (CESSI), which wholly owns the applicant corporation. Mr. Zhang claims that CESSI is unable to loan the applicant the money required to pay the Duties.

[17] Mr. Zhang wholly owns a company named 204562 Alberta Inc., which began importing OCTG in June 2017, as the applicant wound down its business operations. The applicant has not provided any financial information regarding 204562 Alberta Inc.

[18] Mr. Zhang is the CEO and President of Northern Clover Inc., which is 51 percent owned by Mr. Zhang's daughter and 49 percent owned by Mr. Zhang's business partner. Northern Clover Inc. continued the business operations of the applicant—it serves the same clients with the same team members and sells the same products. The applicant has not provided any financial information regarding Northern Clover Inc.

III. Preliminary Issue

[19] On January 20, 2020, the applicant submitted an affidavit affirmed by Ms. Flora Lee. The amended scheduling order of Prothonotary Tabib required the applicant to serve and file all supporting affidavits by August 6, 2019. The respondent submits that Ms. Lee's affidavit should be struck from the record because it was submitted after the required deadline.

[20] I agree. Since the affidavit of Flora Lee was submitted outside of the scheduling order of Prothonotary Tabib, it will be disregarded.

IV. Issues

[21] This application raises the following issues:

A. Do the Appeal Payment Provisions violate sections 96–101 of the *Constitution Act, 1867*?

B. Do the appeal Payment Provisions violate section 12 of the Charter?

C. Do the Appeal Payment Provisions violate paragraph 1(a) of the *Canadian Bill of Rights*?

V. Analysis

A. *Do the Appeal Payment Provisions violate sections 96–101 of the* Constitution Act, 1867*?*

[22] The applicant claims that the Appeal Payment Provisions violate sections 96–101 of the *Constitution Act, 1867*. However, the applicant limited its submissions primarily to section 96, which I agree is the operative provision for this issue. The following reasons shall therefore be limited to that provision.

[23] The constitutional powers vested in section 96 of the *Constitution Act, 1867* were aptly described by the Supreme Court in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31 (*Trial Lawyers*) [at paragraphs 29–30] (citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, (1995), 130 D.L.R. (4th) 385, [1995] S.C.J. No. 101 (QL), at paragraphs 11, 15, 37, 52), as follows:

> While s. 92(14) gives the provinces the responsibility for the administration of justice, s. 96 gives the federal government the power to appoint judges to the superior, district and county courts in each province. Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country. Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but "[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution". In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'".
>
> Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction. [Citations omitted.]

(1) Applicant's Submissions

[24] The applicant submits that the Appeal Payment Provisions violate the rule of law as contained in section 96 of the *Constitution Act, 1867* because they bar litigants with legitimate claims from accessing the courts.

[25] The applicant asserts that administrative action, such as the CBSA's assessment of the Duties, cannot be immunized from court intervention (*Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1, [1981] S.C.J. No. 80 (QL) (*Crevier*), at paragraph 19 [of 1981 CarswellQue 109 (WL Can) and at page 234 of S.C.R.]). The applicant further asserts that the rule of law protects the right to access the courts and is binding upon government action in certain circumstances (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, (1988), 53 D.L.R. (4th) 1, [1988] S.C.J. No. 76 (QL) (*BCGEU*), at paragraphs 25–26 [page 230 of S.C.R.]; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385, [1998] S.C.J. No. 61 (QL) (*Reference re Secession*), at paragraph 54).

[26] Central to the applicant's claim is *Trial Lawyers*. In that case, the Supreme Court held that court hearing fees violate section 96 of the *Constitution Act, 1867* when, absent adequate exemptions, they are so high that they subject "litigants to undue hardship, thereby effectively preventing access to the courts" (*Trial Lawyers*, at paragraph 46). Likewise, the applicant submits that the Appeal Payment Provisions violate section 96 because they subject the applicant to undue hardship, thus barring it from accessing the appeal mechanism under SIMA. The applicant contends that this infringement may be avoided if there was a discretionary mechanism that waived the Appeal Payment Provisions, or if there was a cap on the amount of duties that those provisions required.

[27] The applicant submits that *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179 (*Uber*), is analogous to the case at hand. At issue in *Uber* was an

arbitration clause in a contract between Uber, a ride-share company, and its drivers. The arbitration clause imposed financial requirements for accessing the contract's dispute resolution process, including a $14 500 USD administration fee and the requirement to attend arbitration in the Netherlands (*Uber*, at paragraph 2). In his judgment concurring on different grounds, Justice Brown held that the arbitration clause was contrary to the rule of law and public policy because it effectively denied the respondent driver access to the dispute resolution process (*Uber*, at paragraphs 112–114). The applicant submits that the Appeal Payment Provisions in the case at hand are similar to the arbitration clause in *Uber*, as both impose legal obligations that prevent potential litigants from pursuing their claims.

[28] The applicant submits that the legislative history of SIMA fails to elucidate how the Appeal Payment Provisions uphold the purposes of SIMA or Canada's obligations under international law. The applicant asserts that the true purpose of SIMA is not to deter dumping because the imposition of duties does not prevent dumping from occurring. The applicant concludes that the Appeal Payment Provisions were likely the result of lobbying efforts by Canadian industry.

(2) Respondent's Submissions

[29] The respondent submits that SIMA meets the three basic principles required of legislation by the rule of law as enumerated in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (*Imperial Tobacco*): it is legislation that is applied to all of whom its terms apply; it is legislation that exists; and the relevant state action is legally founded (at paragraph 59). Absent a failure to abide by these principles, the respondent submits that the rule of law cannot alone invalidate legislation.

[30] According to the respondent, *Trial Lawyers* is distinguishable from the case at hand. In *Trial Lawyers*, the respondent notes that the Court was concerned with how hearing fees may bar litigants from having their disputes resolved by superior courts, which would prevent individuals from challenging government action (at paragraph 40). The respondent asserts that the applicant is not an individual barred from a superior court by fees, but is rather a corporation that objects to its obligation to pay taxes imposed under a valid federal scheme.

[31] The respondent submits that imposing large amounts of duties is not contrary to the rule of law. The respondent notes that anti-dumping duties are not a fee intended to disincentivize the use of court time and resources, but rather a tool used to defend the Canadian market by ensuring that importers' costs reflect the true value of the goods they import. The respondent asserts that anti-dumping duties must be payable when assessed to protect the Canadian market because if the payment of such duties could be deferred pending their appeal, goods that are dumped into Canada could continue to harm the Canadian market with impunity.

[32] The respondent submits that there is sufficient flexibility under SIMA to ensure that the erroneous imposition of anti-dumping duties does not bar access to the courts. Specifically, the respondent notes that under paragraph 57(b) of SIMA, a CBSA officer may re-determine the imposition of duties within two years of the initial determination if the officer "deems it advisable." The respondent argues that this provision is akin to a discretionary exemption to the requirements under the Appeal Payment Provisions.

[33] Finally, the respondent submits that *Uber* is distinguishable from the case at hand. The respondent asserts that *Uber* concerned arbitration clauses in employment contracts, whereas the case at hand concerns the application of duties and the process by which to appeal those duties. According to the respondent, public policy should not set aside costs required to engage in arbitration—or in this case, duties owed to engage in an appeal—that are proportionate in the context of the parties' relationship but that one party regrets in hindsight (*Uber*, at paragraph 130).

(3) Discussion

[34] The applicant argues that the rule of law operates in two manners: (a) as an unwritten constitutional principle; and (b) as codified under section 96 of the *Constitution Act, 1867*. I shall address each of these arguments respectively.

(a) *Rule of law as an unwritten principle*

[35] In arguing that the Appeal Payment Provisions violate the rule of law as an unwritten constitutional principle, the applicant proposes a conception of the rule of law that transcends the basic standards required of legislation as articulated in *Imperial Tobacco* (at paragraphs 59–60). In my view, the applicant's claim must fail because it strays from precedent when there are strong normative reasons not to do so.

[36] I agree with the applicant's argument that access to the courts is a component of the rule of law. As noted by the applicant, the Supreme Court in *BCGEU* held that "the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens" (at paragraph 26 [of QL; page 230 of S.C.R.]).

[37] I am not persuaded, however, that *BCGEU* stands for the authority that the rule of law is an unwritten constitutional principle that alone is capable of invalidating legislation. At issue in *BCGEU* was whether an injunction to clear picketers from the courts who were interfering with court proceedings violated the picketers' Charter rights (at paragraph 55 [of QL; page 243 of S.C.R.]). The Court in that case used the rule of law as an interpretive principle for determining the scope of Charter rights afforded to the picketers, not as a principle that is in itself capable of invalidating state action (*BCGEU*), at paragraphs 24–25 [of QL; pages 228–230 of S.C.R.]).

[38] I am also not persuaded by the applicant's argument that *Reference re Secession* stands for the authority that the rule of law alone is capable of invalidating legislation, aside from the basic requirements it demands of the legislative process. In *Reference re Secession*, the Supreme Court held that unwritten constitutional principles, such as the rule of law, "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions" (at paragraph 52). While the Court recognized that those principles "may in certain circumstances give rise to substantive legal obligations", such circumstances were no greater than the requirements enumerated in *Imperial Tobacco* (*Reference re Secession*, at paragraph 54; see also *Imperial Tobacco*, at paragraphs 58–59, citing *Reference re Secession*, at paragraph 71).

[39] The Court in *Reference re Secession* even cautioned against using the recognition of underlying constitutional principles, such as the rule of law, "as an

invitation to dispense with the written text of the Constitution." Specifically, the Court in *Reference re Secession* stated that (at paragraph 53):

> …. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.

[40] Similarly, the Court in *Imperial Tobacco* stated [at paragraphs 66–67]:

> Second, the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.
>
> The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text. [Citations omitted; emphasis added.]

[41] In light of the above authorities, I find that legislation is valid with respect to the rule of law so long as it complies with the procedures by which it is to be enacted, amended and repealed (*Imperial Tobacco*, at paragraphs 59–60).

[42] There are strong normative reasons for this conclusion. For instance, there is a danger in allowing a concept as nebulous as the rule of law to assume the same authority as a written constitutional provision. The rule of law is "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Secession*, at paragraph 70). The rule of law is, in other words, the logic underlying the Constitution—not the Constitution itself. To find otherwise would permit vague concepts such as "orderliness" and "accountability" to become the law, as opposed to merely guide it.

(b) *Rule of law as a principle codified under section 96 of the* Constitution Act, 1867

[43] Legislation that impinges upon the "core jurisdiction" of superior courts by denying those courts access to the powers that they traditionally exercise is inconsistent with section 96 of the *Constitution Act, 1867* (*Trial Lawyers*, at paragraph 33). Accordingly, the Supreme Court held in *Crevier* that legislation cannot immunize administrative action from review by superior courts for questions of jurisdiction or constitutionality, as the ability to answer those questions is the courts' constitutional prerogative (at paragraph 22). In contrast, legislation that merely restricts superior courts from reviewing administrative action for errors of law, whether involving statutory construction or evidentiary matters, does not impinge upon those courts' "core jurisdiction" (*Crevier*, at paragraph 22).

[44] In the case at hand, the applicant claims that the Appeal Payment Provisions violate section 96 because they prevent superior courts from reviewing errors made by

the CBSA in assessing anti-dumping duties. These errors, however, are errors of fact and law—they do not raise questions of jurisdiction or constitutionality, nor has the applicant claimed as such. The Appeal Payment Provisions therefore do not offend section 96 by preventing superior courts from reviewing such errors.

[45] I agree with the applicant that legislation may be inconsistent with section 96 of the *Constitution Act, 1867* if it creates financial obstacles that impose undue hardship on potential litigants by requiring them to "sacrifice reasonable expenses in order to bring a claim" (*Trial Lawyers*, at paragraph 46). However, in light of the applicant's gross earnings and numerous related companies, I am not persuaded by the applicant's argument that the Appeal Payment Provisions cause it undue hardship.

[46] I note that the applicant's gross earnings for the fiscal years ending in March 2017 and 2018 totalled nearly $90 million when combined. While I note that Mr. Zhang affirmed that the applicant's net earnings during this time totalled approximately $1.5 million, I accept the respondent's contention that this claim is "unsupported" by documentary evidence. In the absence of such evidence, questions remain regarding the true scope of the applicant's financial affairs and those of its related companies.

[47] Even if I accept that the applicant's financial affairs are as it claims them to be, I find that the Appeal Payment Provisions do not subject the applicant to undue hardship. There are a number of factors that differentiate the applicant's circumstances from the instances of undue hardship found in *Trial Lawyers* and *Uber*.

[48] In *Trial Lawyers*, the hearing fees at issue escalated in proportion to the length of the trial, thus penalizing litigants for long trials regardless of whether their claims were meritorious or efficiently brought (at paragraphs 61–63). Given these barriers, the claimants may have reasonably concluded that they could not bring their disputes to the courts (*Trial Lawyers*, at paragraph 62). The Court in *Trial Lawyers* therefore held that the hearing fees prevented access to the courts in a manner inconsistent with section 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law (at paragraph 64).

[49] In my view, the instance of undue hardship in *Trial Lawyers* is distinguishable from the case at hand because the Appeal Payment Provisions are remedial, not punitive. Anti-dumping duties are not costs that increase with the length of an appeal, but are rather proportionate to the margin of dumping and returnable to the importer if they are ultimately successful upon redetermination or appeal.

[50] Hearing fees and anti-dumping duties also flow from different actions. The former is the cost of accessing the courts to exercise one's rights, whereas the latter is the cost of doing business. The applicant chose to import goods into Canada with the knowledge of its obligations under SIMA and the duties that flow from those obligations. The applicant declared its imported goods to be of a particular value, thereby subjecting itself to the risk of higher duties. As the respondent correctly notes, the applicant could have chosen to do otherwise by importing less goods or by importing the same goods at a different declared value. The litigant in *Trial Lawyers*, who was seeking to retain custody of her child, had no such choices available.

[51] Finally, the Appeal Payment Provisions do not prevent an initial consideration of the applicant's claim. The Duties were assessed by the CBSA and found to be

warranted by the CITT. The applicant was provided numerous opportunities to respond to the CBSA's inquiries regarding its imported goods, but failed to do so until after the Duties were imposed. The litigant in *Trial Lawyers*, in contrast, was prevented from pursuing her claim entirely.

[52] I am also not persuaded by the applicant's argument that *Uber* is analogous to the case at hand. *Uber* was concerned with whether an arbitration agreement prevented parties from accessing the courts to exercise their rights under contract, whereas this case pertains to the application of a public tax. Nonetheless, Justice Brown's comments in *Uber* are helpful as they describe several factors for determining when undue hardship may occur, albeit in a different context.

[53] First, undue hardship may be established when the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement (*Uber*, at paragraph 131). To exercise his employment rights, the respondent in *Uber* was required to pay a sum of money that is nearly equivalent to his annual income, irrespective of the quantum or merit of his claim (*Uber*, at paragraph 132). In the case at hand, the cost to access SIMA's appeal procedure is proportionate to the margin of dumping and thus directly pertains to the issue in dispute. The Appeal Payment Provisions are not, in other words, a disincentive to undertake "proceedings <u>of any kind</u>" [emphasis in original] (*Uber*, at paragraph 132).

[54] Second, undue hardship may occur when there is unequal bargaining power between the parties (*Uber*, at paragraph 134). While the consideration of bargaining power does not smoothly translate to the context of public taxation, this consideration does highlight the different dispositions of the applicant and the respondent in *Uber*. The applicant is not a minimum wage earner seeking to exercise its employment rights; the applicant is a sophisticated company that imported goods into Canada with full knowledge of its obligations under SIMA and the duties that flow from those obligations.

[55] In light of the above, I find that the applicant has failed to establish that the Appeal Payment Provisions subject it to undue hardship. The Appeal Payment Provisions therefore do not bar the applicant from accessing the courts in a manner that violates section 96 of the *Constitution Act, 1867*.

[56] I accept the applicant's argument that paragraph 57(b) of SIMA is not a discretionary exemption from the Appeal Payment Provisions. As the applicant correctly notes, that provision allows the CBSA to re-determine anti-dumping duties to any amount it sees fit, including the imposition of greater duties. Indeed, it is under paragraph 57(b) that the Duties are imposed (*Prairies Tubulars, 2018*, at paragraph 14).

[57] However, I do not find that a discretionary exemption from the Appeal Payment Provisions is necessary for SIMA to comply with section 96 of the *Constitution Act, 1867*. The case at hand is distinguishable from *Trial Lawyers*, where the Court held that exemptions from hearing fees were necessary to prevent certain litigants from being subject to undue hardship (at paragraph 48). Given that the applicant is not subject to undue hardship, no such exemption is necessary.

[58] I further find that a cap on duties to be paid before accessing SIMA's appeal procedure is not necessary for compliance with section 96 of the *Constitution Act, 1867*. I accept the respondent's argument that such a cap would be an arbitrary limit, thus

undermining the remedial and reciprocal nature of anti-dumping duties. In *Trial Lawyers* and *Uber*, the arbitrary amount of fees in relation to accessing an adjudicative process is what gave rise to undue hardship. In the case at hand, imposing a cap on the duties required under the Appeal Payment Provisions would undermine the proportionality between the cost required to access SIMA's appeal procedure and the margin of dumping, thus inviting arbitrariness into the procedure.

B. *Do the Appeal Payment Provisions violate section 12 of the Charter?*

[59] Section 12 of the Charter states that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." The applicant claims that the Appeal Payment Provisions violate section 12 and are therefore, pursuant to subsection 52(1) of The *Constitution Act, 1982*, of no force or effect.

[60] For the reasons that follow, I find that the applicant has standing to forward its Charter claim, but that its claim is ultimately unsuccessful, as the Appeal Payment Provisions do not violate section 12 of the Charter.

(1) Standing

[61] To bring its Charter claim to this Court, the applicant must establish that it is entitled to do so. This entitlement is otherwise known as standing. In public law cases, such as the one at hand, standing is generally limited to persons whose private rights are at stake (i.e., private interest standing) or who seek to bring matters of public interest and importance before the courts (i.e., public interest standing) (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 (*DTES Sex Workers*), at paragraphs 1, 22).

[62] The applicant submits that it has standing to bring its Charter claim upon three grounds: it has private interest standing because section 12 confers rights upon it personally; it has private interest standing under the narrow exception for corporate litigants established in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161, [1991] S.C.J. No. 79 (QL) (*Wholesale*); and it has public interest standing.

[63] The applicant's argument that section 12 of the Charter confers rights upon it rests primarily on the decision of *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, 2019 QCCA 373, in which the Quebec Court of Appeal held that corporations can be subject to cruel and unusual treatment or punishment (at paragraphs 137–138). However, subsequent to the applicant making its submissions for the case at hand, the Supreme Court overturned the Quebec Court of Appeal's decision and held that the protective scope of section 12 does not extend to corporations (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 451 D.L.R. (4th) 367 (*Quebec Inc.*), at paragraph 1).

[64] Given the unanimous decision from the Supreme Court in *Quebec Inc.*, I find that the applicant does not have private interest standing on the basis that it is conferred rights under section 12.

[65] The applicant submits that even if section 12 does not confer rights upon it personally, it nonetheless has private interest standing to challenge the Appeal

Payment Provisions. The applicant relies upon *Wholesale* as authority for this argument, in which the Supreme Court held that a corporation had standing to challenge criminal legislation under section 7 of the Charter even though section 7 does not confer rights upon corporations (at paragraphs 165, 169, Lamer C.J.C., concurring). In that case, the Court held that because the criminal penalties for misleading advertising applied to both individual and corporate accused, the corporate appellant had standing to challenge the validity of that legislation (*Wholesale*, at paragraph 172).

[66] It is common ground between the parties that the Appeal Payment Provisions equally apply to natural and legal persons. As previously discussed, the Appeal Payment Provisions apply to "importers." An "importer" is defined under subsection 2(1) of SIMA as a "person who is in reality the importer of the goods." Under that same provision, a "person" is defined as including "a partnership and an association." I therefore find that an importer includes a corporation, such as the applicant.

[67] The ground of standing established in *Wholesale* is an "exception to the general principle" that only those who are conferred rights under the Charter have private interest standing to forward Charter claims (*Wholesale*, at paragraph 166, citing *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, (1990), 68 D.L.R. (4th) 147, [1990] S.C.J. No. 27 (QL) (*Dywidag*), at paragraph 7). This exception originated from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321, [1985] S.C.J. No. 17 (QL) (*Big M Drug Mart*), in which the Supreme Court held that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid" (at paragraph 39 [of QL; pages 313–314 of S.C.R.]).

[68] Traditionally, the exception in *Wholesale* was limited to matters involving "penal proceedings" (*Wholesale*, at paragraphs 165–166, citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577, [1989] S.C.J. No. 36 (QL), at paragraph 97). The scope of this exception was later expanded, however, to include civil proceedings in which a corporation is "involuntarily brought before the courts pursuant to a regulatory regime set up under an impugned law" (*Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, (1998), 166 D.L.R. (4th) 1, [1998] S.C.J. No. 781 (QL) (*Canadian Egg Marketing*), at paragraph 44).

[69] In appealing the assessment of taxes and resulting penalties, a corporation has been found to be involuntarily brought before the courts (*Stanley J. Tessmer Law Corporation v. The Queen*, 2009 TCC 104, 1998 G.T.C. 939 (*Tessmer*), at paragraph 20, affd 2013 FCA 290, 297 C.R.R. (2d) 255). Accordingly, I find that the applicant, in appealing the Duties, is also involuntarily brought before this Court. The applicant therefore has private interest standing under the exception enumerated in *Wholesale* and *Canadian Egg Marketing*.

[70] Having found that the applicant has private interest standing to forward its Charter claim, I find that it is not necessary to address whether the applicant has public interest standing. The issue remains, however, whether the Appeal Payment Provisions violate section 12 of the Charter. As discussed in further detail below, I find that they do not.

(2) Section 12

[71] The applicant submits that the Payment Appeal Provisions violate section 12 of the Charter because they are a form of “treatment” that is “cruel and unusual.”

[72] The applicant notes that legislative prohibitions may constitute treatment under section 12 if “the individual is in some way within the special administrative control of the state” (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, (1993), 107 D.L.R. (4th) 342, [1993] S.C.J. No. 94 (QL) (*Rodriguez*), at paragraph 182 [at page 611 of S.C.R.]). Because it is “at the mercy of CBSA” to appeal the Duties, the applicant asserts that it is subject to the administrative control of the state.

[73] The applicant notes that treatment has been found to include the forfeiture of property, such as firearms (*R. v. Montague*, 2014 ONCA 439, 120 O.R. (3d) 401 (*Montague*)), and the rescindment of benefits, such as healthcare for refugee claimants (*Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267 (*Refugee Care*)).

[74] According to the applicant, a fine may be cruel and unusual if it deprives a person of their livelihood to the point of being “incompatible with human dignity” (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599 (*Boudreault*), at paragraph 67). The applicant argues that because anti-dumping duties under SIMA may be the result of human error, and because the Appeal Payment Provisions bar such errors from being reviewed prior to the duties being paid, the Appeal Payment Provisions are incongruous with section 12.

[75] In my view, the Appeal Payment Provisions do not violate section 12 of the Charter, as they do not constitute a “treatment” that is “cruel and unusual.”

[76] With respect to the applicant’s individual circumstances, I find that *Quebec Inc.* provides a complete answer for that conclusion: corporations do not enjoy rights under section 12. For a fine to be unconstitutional, it must be “‘so excessive as to outrage standards of decency’” and “‘abhorrent or intolerable’” to society—a standard that is “inextricably anchored in human dignity” and therefore not applicable to corporate entities (*Quebec Inc.*, at paragraph 17, citing *Boudreault*, at paragraphs 45, 94).

[77] The applicant constructs much of its argument upon a hypothetical situation in which the CBSA, with immunity from judicial review, imposes anti-dumping duties upon an individual in a manner that is entirely divorced from the margin of dumping. Generally, Charter decisions cannot be made in a factual vacuum and be based upon unsupported hypotheses (*Boudreault*, at paragraph 170, citing *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pages 361–362, (1989), 61 D.L.R. (4th) 385, [1989] S.C.J. No. 88 (QL)). However, there is room for this Court to consider reasonable hypotheticals, so long as they can reasonably be expected to arise and are not “marginally imaginable” or “far-fetched” (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paragraph 56, citing *R. v. Goltz*, [1991] 3 S.C.R. 485, (1991), 61 B.C.L.R. (2d) 145, [1991] S.C.J. No. 90 (QL) (*Goltz*), at paragraph 73; for cases outside of the context of mandatory minimum sentences, see also: *Tessmer*, at paragraph 54; *Refugee Care*, at paragraph 641).

[78] I accept the applicant’s hypothetical scenario insofar as it relies upon a natural person, who does enjoy rights under section 12, importing goods into Canada that are subject to anti-dumping duties under SIMA. I find that it is reasonable to imagine such a person in the applicant’s current circumstances.

[79] I do not accept, however, the component of the applicant's hypothetical that relies upon the CBSA imposing anti-dumping duties that are grossly disproportionate to the margin of dumping. Those circumstances involve a capricious misuse of power; they are not ones that "commonly arise in day-to-day life" or through "reasonably foreseeable applications of the law" (*Goltz*, at paragraph 73; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paragraphs 22, 25). Furthermore, the applicant has not provided evidence that the CBSA has ever imposed duties in such a manner, upon either it or any other individual. The applicant is therefore unable to forward its Charter challenge upon such pretences.

[80] With respect to the merits of the applicant's section 12 claim, I find that the Appeal Payment Provisions do not constitute "treatment." The Appeal Payment Provisions are a law of general application that all individuals of Canadian society are subject to; the fact that the Appeal Payment Provisions impact an individual in a manner which causes them to suffer does not entail that they are subject to "treatment" at the hands of the state (*Rodriguez*, at paragraph 67 [page 556 of S.C.R.]).

[81] I accept the respondent's argument that *Gratl v. Canada*, 2012 FCA 88, 2012 D.T.C. 5075 (*Gratl*), is analogous to the case at hand. In that case, Sharlow J.A. held that the disallowance of deductions and imposition of penalties in the applicant's income tax assessment did not constitute treatment under section 12 of the Charter (*Gratl*, at paragraphs 3, 8). While the applicant's matter concerns the ability to appeal taxes as opposed to the assessment of taxes, it is analogous to *Gratl* in that the Appeal Payment Provisions are "a civil matter involving only economic interests" and therefore do not place individuals "under state control in a manner that could possibly be considered treatment" (at paragraph 8).

[82] I am not persuaded by the applicant's argument that the treatment in *Montague* and *Refugee Care* are analogous to the case at hand. Both *Montague* and *Refugee Care*, in the words of the respondent, concern personal freedoms fundamentally connected to the concept of human dignity—something that a tax does not.

[83] In *Montague*, the appellants were convicted of a series of firearm offences and therefore faced a mandatory forfeiture of their firearm collection pursuant to paragraph 491(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46 (at paragraphs 1–2). This forfeiture was found to constitute treatment or punishment for the purposes of section 12, as it may have "a punitive effect" (*Montague*, at paragraphs 37–38). The Duties, in contrast, have no punitive elements: they are proportionate to the margin of dumping and are returnable if one is successful upon redetermination or appeal.

[84] In *Refugee Care*, the state action at issue sought to significantly reduce the level of health care coverage available to most refugee claimants in Canada, and all but eliminated it for others (at paragraph 1). Unlike the applicants in *Refugee Care*, importers are not members of a vulnerable, poor or disadvantaged group who are being "intentionally targeted" by the government in a manner that denies them access to potentially life-saving services (at paragraph 587). Rather, they are subject to a law of general application for which only economic interests are at stake.

[85] I further find that the Appeal Payment Provisions are not "cruel and unusual." As noted by the respondent, an economic sanction is not cruel and unusual if it is "tightly linked" to an economic offence (*Boudreault*, at paragraph 93, citing *R. v. Pham*, (2005),

77 O.R. (3d) 401, [2005] O.J. No. 5127 (QL), 203 C.C.C. (3d) 326 (C.A.) (*Pham*), affd 2006 SCC 26, [2006] 1 S.C.R. 940). In *Pham*, the offenders faced a fine of $154 000 for possession of 1 200 kilograms of contraband tobacco. In finding that the fine did not violate the appellants' rights under section 12, Goudge J.A. in *Pham* [*R. v. Pham* (2002), 167 C.C.C. (3d) 570, [2002] O.J. No. 2545 (QL) (C.A.), at paragraph 19] held that:

> In my view, however, the most important consideration in the s. 12 analysis is the direct connection between the quantity of the illegal substance possessed and the size of the fine. Those who possess larger quantities are clearly players in larger criminal enterprises with larger illegal profits for whom larger minimum fines are rationally founded. The use of this factor, which is both objective and reasonable, to regulate the size of the minimum fine ensures that the punishment will not be grossly disproportionate. [Emphasis added.]

[86] Unlike the victim surcharge fine in *Boudreault*, the Duties are not an economic sanction. Rather, they are a remedial tax that is directly proportionate to the margin of dumping. Even if the Appeal Payment Provisions do subject an individual to treatment, this proportionality ensures that such an individual is not deprived of their livelihood in a manner that is "incompatible with human dignity" (*Boudreault*, at paragraph 41). Accordingly, I do not find that Appeal Payment Provisions, by requiring that anti-dumping duties be paid before engaging in the appeals process under SIMA, are "cruel and unusual."

C. *Do the Appeal Payment Provisions violate paragraph 1(a) of the* Canadian Bill of Rights*?*

[87] Paragraph 1(a) of the *Canadian Bill of Rights* states that:

> Recognition and declaration of rights and freedoms
>
> **1** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> **(a)** the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

[88] Paragraph 2(e) of the *Canadian Bill of Rights* states that:

> Construction of law
>
> **2** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> …
>
> **(e)** deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; [Emphasis added.]

[89] The applicant submits that it has a right to a fair hearing under paragraph 2(e) of the Bill of Rights. The applicant asserts that when legislation such as SIMA creates an adjudicative process to which paragraph 2(e) of the Bill of Rights applies, paragraph 1(a) protects access to that process. In other words, the applicant submits that its right to a fair hearing under paragraph 2(e) of the Bill of Rights is codified under paragraph 1(a).

[90] The applicant concedes that paragraph 1(a) of the Bill of Rights does not apply to it. However, the applicant submits that it is able to forward a claim under that provision because it has public interest standing.

[91] In exercising the discretion to grant public interest standing, this Court must consider three factors: (a) whether there is a serious justiciable issue raised; (b) whether the applicant has a real stake or a genuine interest in it; and (c) whether, in all the circumstances, this application is a reasonable and effective way to bring the issue before the courts (*DTES Sex Workers*, at paragraph 37). These factors are not technical requirements, but rather interrelated considerations to be weighed cumulatively (*DTES Sex Workers*, at paragraph 36).

[92] In my view, the first factor in *DTES Sex Workers* weighs strongly against this Court granting the applicant public interest standing. The applicant's claim does not raise a substantial constitutional issue that is far from frivolous, as it is so unlikely to succeed that its result is a foregone conclusion (*DTES Sex Workers*, at paragraph 42). I recognize that this determination should be reached by examining the merits of the applicant's claim in no more than a preliminary manner (*DTES Sex Workers*, at paragraph 42). However, to display why the applicant's Bill of Rights claim does not raise a serious justiciable issue, I find it necessary to address the parties' submissions and provide my conclusions on the matter.

[93] The applicant submits that paragraph 1(a) is capable of invalidating legislation if the right asserted provides a compelling reason to do so, and there is a manageable standard by which the Court could be guided (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40 (*Authorson*), at paragraph 49, citing *Curr v. The Queen*, [1972] S.C.R. 889, at pages 899–900, (1972), 26 D.L.R. (3d) 603, [1972] S.C.J. No. 66 (QL)). Because the right claimed in *Trial Lawyers* is the same right claimed in the case at hand, albeit in different contexts, the applicant asserts that *Trial Lawyers* provides a manageable standard by which to guide this Court in invalidating legislation under paragraph 1(a).

[94] The respondent submits that paragraph 2(e) "does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process" (*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (*Kazemi Estate*), at paragraph 116). The respondent notes that paragraph 2(e) of the Bill of Rights does not prevent Parliament from terminating a legal right (*Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191, [2015] 3 F.C.R. 346, at paragraph 69, citing *Authorson*, at paragraphs 58–61). The respondent asserts that because paragraph 2(e) does not protect against the removal of a legal right, it also does not create new legal rights, such as the right to an adjudicative process before outstanding duties are paid.

[95] The respondent relies on *R. v. Bryan*, [1998] 6 W.W.R. 616, 132 Man. R. (2d) 167 (Q.B.) (*Bryan*), for the authority that the Bill of Rights "does not exempt an individual from properly enacted laws of the federal government regulating trade and commerce" (at paragraph 39 [of 1998 CarswellMan 107 (WL Can)]). *Bryan* concerned the "buy-back" provisions under the *Canadian Wheat Board Act*, R.S.C., 1985, c. C-24 [repealed, S.C. 2011, c. 25, s. 39] (Wheat Board Act), which required farmers seeking to export certain grains internationally to buy those grains from the Canadian Wheat Board (at paragraph 35). Because there was no mechanism to appeal the pricing under the buy-back scheme, the accused in *Bryan* claimed that the Wheat Board Act deprived him of his property without due process in a manner that violated paragraphs 1(a) and 2(e) of the Bill of Rights (at paragraph 10).

[96] In *Bryan*, Justice Smith held that the impugned provisions provided the accused with due process because the Wheat Board Act was valid federal legislation, and it therefore did not violate paragraphs 1(a) and 2(e) of the Bill of Rights (at paragraph 38). In other words, Justice Smith found that the Bill of Rights does not confer any due process rights beyond those provided by a constitutionally valid statute.

[97] In my view, the jurisprudence is clear that paragraph 2(e) of the Bill of Rights does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process, but it rather only offers protection if and when a hearing is held (*Kazemi Estate*, at paragraphs 116, 120, citing *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866, at paragraph 61). In other words, the protections under paragraph 2(e) are only operative in a proceeding before a court, tribunal or similar body (*Authorson*, at paragraph 61). Given that the applicant is not challenging the imposition of the Duties before a court, tribunal or similar body, paragraph 2(e) does not confer due process rights upon it.

[98] The above conclusion accords with *Bryan*, in that the procedural rights afforded by paragraph 2(e) of the Bill of Rights do not transcend the rights provided by statute. As with the buy-back scheme under the Wheat Board Act, the Appeal Payment Provisions are valid federal legislation and therefore do not violate the applicant's rights under paragraph 2(e) (*Bryan*, at paragraph 39).

[99] With respect to the applicant's claim under paragraph 1(a), I find no "'compelling reasons'" relating to "'objective and manageable standards by which a Court should be guided'" that warrant invalidating the Appeal Payment Provisions (*Authorson*, at paragraph 49). As previously discussed, the Appeal Payment Provisions accord with section 96 of the *Constitution Act, 1867*. Interpreting the Bill of Rights in relation to the *Constitution Act, 1867*, as requested by the applicant, therefore does not entail that the Appeal Payment Provisions are inconsistent with paragraph 1(a) of the Bill of Rights. That paragraph 1(a) when read together with paragraph 2(e) should somehow invalidate the Appeal Payment Provisions, despite that neither of those provisions in the Bill of Rights are capable of doing so alone, is a novel proposition that I find is unsupported by the authorities cited by the applicant.

[100] In light of the above, I find that the applicant's claim under the Bill of Rights does not raise a serious justiciable issue (*DTES Sex Workers*, at paragraph 42).

[101] With respect to the remaining *DTES Sex Workers* factors, I accept that the applicant has a genuine stake in its Charter claim: the applicant is potentially unable to

pay the Duties and is thus potentially barred from appealing the CBSA's assessment (*DTES Sex Workers*, at paragraph 43). I further accept that the applicant's claim is a reasonable and effective way to bring this issue before the courts: the applicant has the capacity to bring this claim, and there are no identifiable alternative means to do so (*DTES Sex Workers*, at paragraph 51).

[102] In my view, however, the above factors weigh lightly in relation to the finding that the applicant's claim fails to raise a serious justiciable issue. I therefore find that the applicant does not have public interest standing to forward its claim under paragraph 1(a) of the Bill of Rights.

VI. Costs

[103] The respondent requests that costs be awarded in accordance with Tariff B of the *Federal Courts Rules*, SOR/98-106 (the Rules). Given that I have found the applicant's claim to be unsuccessful, I award costs to the respondent payable forthwith by the applicant in accordance with Tariff B, column III of the Rules.

VII. Conclusion

[104] I find that the Appeal Payment Provisions do not violate sections 96–101 of the *Constitution Act, 1867*, section 12 of the Charter, or paragraph 1(a) of the Bill of Rights. This application is therefore dismissed with costs.

JUDGMENT IN T-1851-17

THIS COURT'S JUDGMENT is that:

1. Paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a) and 58(2)(a) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15, are valid legislation.

2. Costs are awarded to the respondent.