

T-1868-23

Court File No.

FDI

FEDERAL COURT

BETWEEN:

FEDERAL COURT COUR FÉDÉRALE	
FILED	SEP 07 2023
BRITTNEY CHANNER	
TORONTO, ON	

ARTERRA WINES CANADA, DIVISION QUEBEC, INC.

Applicant

- and -

THE MINISTER OF PUBLIC SAFETY,
THE MINISTER OF EMERGENCY PREPAREDNESS,
THE CANADA BORDER SERVICES AGENCY and
THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE of APPLICATION

TO THE RESPONDENTS:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, 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 Applicant's solicitor, or if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

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

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

Date _____ Issued by _____
(Registry Officer)

Address of
local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: THE REGISTRAR
Federal Court of Canada
Application Division
180 Queen Street West
Suite 200
Toronto, Ontario M5V 3L6

AND TO: THE MINISTER OF PUBLIC SAFETY, THE MINISTER OF EMERGENCY PREPAREDNESS,
THE CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

APPLICATION

THIS IS AN APPLICATION for judicial review by Arterra Wines Canada, division Quebec, Inc. (the "Applicant") of the decision of the Respondent, the Minister of Public Safety (the "Public Safety Minister"), in which the Public Safety Minister refused to grant certain drawbacks (the "Drawbacks") claimed by the Applicant under section 113 of the *Customs Tariff*, S.C. 1997, c. 36 (the "Customs Tariff") of special duties (the "Special Duties") paid by the Applicant pursuant to section 133 of the *Excise Act, 2001*, S.C. 2002, c. 22 (the "Excise Act") on bulk spirits imported into Canada by the Applicant and subsequently exported.

THE APPLICANT MAKES APPLICATION FOR:

1. An Order directing the Public Safety Minister to grant the Drawbacks in accordance with section 113 of the Customs Tariff;
2. In the alternative, an Order directing the Public Safety Minister to accept and process the Applicant's applications for the Drawbacks, and to formally reject or approve such applications; and
3. In the further alternative, an Order directing the Public Safety Minister to advise the Minister of National Revenue (the "MNR") that the Drawbacks would have been granted by the CBSA if the Special Duties had been paid to the CBSA;
4. Costs of this application on a scale and in an amount determined by this Honourable Court to be appropriate in all of the circumstances; and
5. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Legislative framework

6. The imposition of and relief from special duties on imported spirits is governed by the Excise Act, the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the "*Customs Act*"), Customs Tariff and the regulations promulgated thereunder, including, in particular, the *Goods Imported and Exported Refund and Drawback Regulations*, SOR/96-42 (the "*Drawback Regulations*").

7. Section 133 of the Excise Act imposes a special duty on imported spirits that are delivered to or imported by a "licensed user". Subsection 133(1) provides that "[i]n addition to the duty levied under section 21.1 or 21.2 of the *Customs Tariff*, a special duty is imposed on imported spirits delivered to or imported by a licensed user at the rate set out in Schedule 5." Subsections 133(2) to (4) provide detailed rules regarding the person who is liable to pay the special duty and the time at which the special duty becomes payable.

8. Subsection 113(1) of the Customs Tariff provides that, subject to certain limitations:

a refund or drawback shall be granted of all or a portion of duties if:

- (a) relief or a refund of all or a portion of the duties could have been, but was not, granted under section 89 or 101;
- (b) all or a portion of the duties was paid; and
- (c) an application is made in accordance with subsection 113(3) and section 119.

For these purposes, "duties" is defined to include duties or taxes levied or imposed on imported goods under the Excise Act.

9. Subsection 89(1) of the Customs Tariff authorizes the grant of relief from the payment of duties that would otherwise be payable in respect of imported goods that are either (i) released, processed in Canada and subsequently exported or (ii) released and directly consumed or expended in the processing in Canada of goods that are subsequently exported.

10. Subsection 89(2) of the Customs Tariff denies relief from the payment of duties or taxes levied under the Excise Act on "designated goods", which is defined in the Customs Act (and incorporated by reference into the Customs Tariff pursuant to section 4 of the Customs Tariff) to include wine and spirits.

11. Subsection 113(3) of the Customs Tariff sets out the requirements for an application for refund or drawback of duties made under subsection 113(1). Among other things, an application must be made by a "prescribed person" or a person belonging to a "prescribed class of persons". Section 9 of the Drawback Regulations provides that a drawback may be claimed by (among others) the importer of the imported goods.

12. Subsection 113(5) of the Customs Tariff provides that "[d]espite the exception in subsection 89(2), a refund or drawback of duties or taxes levied or imposed under sections 21.1 to 21.3, the *Excise Act, 2001* or the *Excise Tax Act* shall be granted under paragraph (1)(a) on designated goods" [emphasis added]. Accordingly, notwithstanding subsection 89(2) of the Customs Tariff, pursuant to subsection 113(5) of the Customs Tariff, a refund or drawback of duties or taxes shall be granted under paragraph 113(1)(a) where such duties or taxes are levied or imposed on designated goods under (i) any of section 21.1 to section 21.3 of the Customs Tariff, (ii) any provision of the Excise Act or (iii) any provision of the Excise Tax Act, R.S.C. 1985, c. E-15.

Importation of bulk spirits for use in the production of fortified wine for export

13. The Applicant was formally known as Marques Constellation Quebec, Inc./Constellation Brands Quebec, Inc.

14. During the period between July 2013 to October 2015 (the "First Period"), the Applicant imported bulk spirits (the "Imported Spirits") from Grain Processing Corporation in the United States.

15. During the First Period, the Applicant was a "spirits licensee" and a "licensed user", in each case for the purposes of the Excise Act. Because the Applicant was a spirits licensee and a licensed user, it did not pay the Special Duties to the Canada Border Services Agency (the "CBSA") when the Imported Spirits were imported. Instead, the Applicant self-assessed and paid the Special Duties to the Canada Revenue Agency (the "CRA") at the time the Imported Spirits were blended with wine to produce the fortified wine that was subsequently exported. The aggregate amount of the Special Duties paid to the CRA on the Imported Spirits during the First Period was \$696,221.51.

16. The Applicant determined that \$652,105.42 of the Special Duty was paid in respect of Imported Spirits that were blended with wine in the making of fortified wine that was exported from Canada.

Initial dealings with representatives of the CBSA

17. On January 20, 2014, Elizabeth Jackman ("Ms Jackman"), who was then a student-at-law at Goodmans LLP, had a telephone conversation with Houda Nida ("Ms Nida"), Senior Officer in the Trade Operations Division of the CBSA, in which she sought confirmation

from Ms Nida that the Applicant was entitled to drawbacks under section 113 of the Customs Tariff in respect of the Special Duties paid by the Applicant on the Imported Spirits during the Relevant Period.

18. The aforesaid telephone conversation was followed by an e-mail from Ms Jackman to Ms Nida dated January 21, 2014, in which Ms Jackman sought clarification as to (i) whether drawbacks of the Special Duties levied on the Imported Spirits were available under section 113 of the Customs Tariff where the Imported Spirits are blended with wine in Canada and then exported as fortified wine, and (ii) whether the entitlement to such drawback depends on whether the Special Duties were paid at the time of importation or at the time of delivery to the licensed user of the Imported Spirits.

19. By e-mail dated January 24, 2014, Ms Jackman inquired with Ms Nida as to the status of the drawback inquiry.

20. By e-mail dated January 28, 2014, Ms Nida advised Ms Jackman that the drawback inquiry had been directed to the Drawback Department of the CBSA.

21. By e-mail dated January 28, 2014, Ms Jackman advised Ms Nida that she had spoken with a representative of the Drawback Department, and had been asked to provide to Ms Nida a list of the countries of import and export that the inquiry related to. Ms Jackman advised Ms Nida that the drawback inquiry was general in nature, and should be addressed on the alternate assumptions that the countries of import and export were and were not signatories to the North American Free Trade Agreement.

22. By e-mail dated February 3, 2014, Ms Jackman inquired with Ms Nida as to the status of the drawback inquiry.

23. By e-mail dated February 20, 2014, Glenn Ernst ("Mr. Ernst"), partner at Goodmans LLP, inquired with Ms Nida as to the status of the drawback inquiry.

24. By e-mail dated February 25, 2014, Ms Nida advised Mr Ernst that the drawback inquiry had been referred to one of the CBSA specialists in Ottawa for further review.

25. By e-mail dated February 25, 2014, Valérie Boucher ("Ms Boucher"), Manager of the Trade Services Division (Quebec Region) of the CBSA, forwarded an e-mail from Charles Allain ("Mr Allain"), Senior Program Officer of the Trade Incentives Unit of the CBSA, in which Mr Allain advised Ms Boucher that "[a]ll duties and taxes (excluding GST/HST) imposed on imported spirits under the legislation as described under subsection 113(5) of the *Customs Tariff* (CT) may be eligible for drawback provided all conditions are met, including any waivers, if required under section 119 of the CT". Ms Boucher's e-mail also attached CBSA Memoranda D7-4-2, "Duty Drawback Program" and D7-4-3, "NAFTA Requirements for Drawback and Duty Deferral".

Application to the CBSA for the Drawbacks

26. Based on the instructions received by Ms Jackman from Ms Pina Boggia and certain other representatives of the CBSA, the Applicant applied for drawbacks in respect of the Special Duties paid on the Imported Spirits by duly completing and filing with the CBSA Form K32, "Drawback Claim" for each of the three claim periods included in the First Period (July 2013 to February 2014, March 2014 to February 2015 and March 2015 to October 2015). The drawback applications were filed with the CBSA on February 26, 2016.

27. On June 8, 2016, Ms Debbie Morocco of the Applicant received a telephone call from Mr Mirko Grubić, a representative of the CBSA who had been assigned to review the drawback applications, advising that since the Special Duties had been paid to the CRA rather than the CBSA, the drawback applications should be made to the CRA, and that he would be returning the drawback application forms to the Applicant unprocessed.

Further Dealings with Representatives of the CBSA

28. On June 14, 2016, Ms Jackman sent an e-mail to Scott McCormick ("Mr McCormick"), Senior Program Advisor, Programs Branch of the CBSA, seeking clarification as to the Applicant's entitlement to drawbacks in respect of the Special Duties paid on the Imported Spirits.

29. By e-mail dated June 22, 2016, Mr McCormick advised Ms Jackman that "[b]ased on the available information, the special excise taxes were paid to the CRA post importation and do qualify for a drawback in accordance with subsection 113(5) of the Customs Tariff. Therefore, any request for a refund must be submitted to the CRA."

Application to the CRA for refunds

30. Based on the advice from CBSA (including, in particular, the aforementioned e-mail from Mr McCormick), the Applicant applied to the CRA for refunds of the Special Duties paid on the Imported Spirits by duly completing and filing with the CRA Form B256, "Application for Refund", in respect of each the claim periods included in the Relevant Period, together with copies of the drawback applications (Form K32s) originally filed with the CBSA. The refund applications were filed with the CRA on July 4, 2016.

31. On October 31, 2016, the Applicant received a letter from the CRA advising that the refund applications had been rejected "due to the fact that there is no provision in the Act [i.e. the Excise Act] that allow a refund on the spirits used in the fortification of wine which is thereafter exported." Based on the wording of the aforesaid letter, the CRA appears to have applied the provisions of the Excise Act, but not the provisions of the Customs Tariff, in determining that the Applicant was not entitled to a refund or drawback of the Special Duties paid by it on the Imported Spirits.

32. On November 8, 2016, Mr Ernst and Mr Kabir Jamal ("Mr Jamal"), then an associate at Goodmans LLP, had a telephone conversation with Mr McCormick regarding the Applicant's entitlement to the Drawbacks under the Customs Tariff. During the telephone conversation, Mr McCormick asserted for the first time that the Applicant was not entitled to the Drawbacks. Mr Ernst reminded Mr McCormick of the e-mail from Mr McCormick dated June 22, 2016, in which Mr McCormick stated that special duties paid by the Applicant "do qualify for a drawback in accordance with subsection 113(5) of the Customs Tariff."

33. On November 8, 2016, shortly after their telephone conversation, Mr Jamal forwarded a copy of the June 22, 2016 e-mail back to Mr McCormick for review. On the same day, Mr McCormick sent an e-mail to Mr Ernst and Mr Jamal, in which he advised that the June 22, 2016 e-mail contained a typographical error and that "the word "not" was omitted between "do qualify"".

34. On November 8, 2016, shortly after the receipt of the aforesaid e-mail from Mr McCormick, Mr Ernst and Mr Jamal had a telephone conversation with Mr McCormick, in which they inquired as to the statutory basis for Mr McCormick's determination that the

Applicant was not entitled to the Drawbacks, particularly in light of the clear wording of subsection 113(5) of the Customs Tariff.

35. Mr McCormick initially claimed that the entitlement to drawback under subsection 113(5) of the Customs Tariff was limited to duties or taxes levied or imposed under section 21.1 to 21.3 of the Excise Act, and that since the Special Duties were imposed on the Imported Spirits under section 133 of the Excise Act, drawbacks in respect of such Special Duties were not available. Mr Jamal pointed out that there is a comma between the words "sections 21.1 to 21.3" and "the Excise Act" in subsection 113(5) of the Customs Tariff and that, on the basis of ordinary principles of statutory construction, the entitlement to drawback under subsection 113(5) of the Customs Tariff extends to special duties imposed under section 133 of the Excise Act. Mr McCormick briefly conferred with a colleague, and then advised that he would need more time to review the relevant provisions.

36. By e-mail dated November 15, 2016, Mr McCormick advised Mr Ernst and Mr Jamal that the CBSA's position remained that any request for a refund of the Special Duties paid to the CRA on the Imported Spirits must be made to the CRA and that all further inquiries should be directed to the CRA.

37. On November 16, 2016, Mr Ernst and Mr Jamal telephoned Mr McCormick, seeking clarification for the revised position being taken by the CBSA in the November 15, 2016 e-mail. Mr McCormick repeated that because the Special Duties on the Imported Spirits had been paid to the CRA, it was the appropriate governmental agency to apply to for refund.

CRA Disallows Refund/Drawback

38. By Reassessment, notice of which was dated November 14, 2016, the MNR disallowed the Applicant's claim for drawback or refund for the First Period.

39. The Applicant objected to the MNR's disallowance of its refund/drawback claim by Notice of Objection dated February 6, 2017.

40. Mr Dwayne Mockler ("Mr Mockler"), an appeals officer of the Canada Revenue Agency was assigned to address the Applicant's Notice of Objection.

41. After reviewing the Applicant's Notice of Objection, Mr Mockler advised the Applicant that the CRA would grant the Applicant's refund/drawback claim if the CBSA advised the CRA that the drawback or refund was available if the Special Duty had been paid to the CBSA.

42. Mr Mockler advised the Applicant that the Applicant's refund application had been returned to the CBSA to determine whether the drawback/refund of Special Duty was available if the special duty been paid to the CBSA.

43. By letter dated August 15, 2019, Mr Mockler stated that the CBSA had rejected the Applicant's duty refund/drawback application because:

- (a) only one of the 28 importations occurred before the date of the export sale;
- (b) CBSA cannot refund duties on imported goods that were not exported;
- (c) the Applicant did not provide supporting documentation to substantiate that the imported goods were duty paid and subsequently exported; and
- (d) one of the importations did not qualify for drawback under the North American Free Trade Agreement.

44. Mr Mockler's letter stated "the fact that the duties where [sic] paid to CRA is not an issue".

45. Mr Mockler's letter stated that the matter would be held in abeyance for 60 days to give the Applicant the opportunity to provide additional information.

46. By letter dated October 10, 2019, the Applicant responded to Mr Mockler's letter, providing additional information and documents (the "Additional Information") that corrected, clarified and addressed each of the CBSA's grounds for not granting the Drawback set out in Mr Mockler's letter.

47. The Applicant was advised by Mr Mockler that the Additional Information would be forwarded to the CBSA.

48. At some point after October 10, 2019, Mr Mockler retired from the CRA. It is not certain that he forwarded the Applicant's Additional Information to the CBSA prior to his retirement.

49. In March, 2021, the Applicant forwarded the Additional Information previously sent to Mr Mockler in October 2019 to Mr Jocelyn Danis of the CRA. In August 2021, Mr Danis advised the Applicant that he had not received the Additional Information.

50. In August 2021, Mr Ernst had a telephone conference call with Mr McCormick, Mr Danis and Mr. Bradley Jablonski of the CBSA. Following this conference call, Mr Ernst sent the Additional Information to Mr McCormick's home address for the purpose of the further review by CBSA in accordance with Mr Mockler's August, 2019 Letter.

51. Mr McCormick acknowledged receipt of the Additional Information.

January 2022 Drawback/Refund Application

52. During the period from August 1, 2020 to July 31, 2021 (the "Second Period"), the Applicant paid Special Duty on spirits imported into Canada. The spirits were blended into fortified wine and subsequently exported from Canada.

53. By letter dated January 19, 2022, the Applicant applied to the CRA and the CBSA for a refund/ drawback of Special Duty paid by the Applicant during the Second Period. The amount of the refund/drawback claimed by the Applicant was \$80,580.

54. By Notice of Reassessment dated June 1, 2022, the Minister disallowed the Applicant's drawback/ refund application in respect of the Second Period.

CBSA Decisions

55. By letter dated July 26, 2022, the CBSA made the following decision in respect of, *inter alia*, the drawback/ refund claims made by the Applicant in respect of the First Period and the Second Period:

"In reviewing the above-noted claims, it was determined that the claims will need to be made with the Canada Revenue Agency (CRA) and not the Canada Border Services Agency (CBSA) as the claims relate to an Excise Duty refund which is covered by the CRA under Excise Duty Memorandum EDM10.1.1. The claims are therefore cancelled. Copies of the claims shall be transferred to the CRA for their review and response."

56. By letter dated April 28, 2023, CBSA issued a preliminary decision with respect to the Drawbacks (the "Draft Decision"), which determined that:

"It is the Canadian Border Service Agency's ["CBSA"] position that Arterra Wines Canada Inc. [the "Applicant"] is not entitled to a drawback based on the interpretation of the provisions of the *Excise Act*, 2001 and the *Customs Tariff* regime."

57. However, the CBSA has stated in the Draft Decision that had it had jurisdiction, the Applicant's drawback would have been allowed.

58. However, the body of the Draft Decision indicates that the CBSA is asserting that it does not have jurisdiction to decide the issue:

"...Arterra cannot subsequently claim a drawback under s.113 of the *Customs Tariff* from the CBSA as the duties in question were not customs duties, accounted for and paid upon import, under the *Customs Tariff Act* for which CBSA has jurisdiction."

59. By letter dated June 16, 2023, the Applicant responded to the Draft Decision continuing to assert that there is a statutory basis upon which it is entitled to the Drawbacks and seeking a final determination from the CBSA in respect of the Drawbacks.

60. By letter dated August 10, 2023, the CBSA issued a final decision (the "Final Decision") denying the Drawbacks.

61. The Final Decision states that the CBSA cannot grant the drawbacks as it does not have jurisdiction:

"CBSA cannot grant duty relief for duties that are not relating to customs and that were levied domestically."

Lack of procedural fairness

62. The Public Safety Minister, through his delegates, has denied the Applicant natural justice and procedural fairness by providing conflicting answers and instructions as regards the Applicant's entitlement to the Drawbacks and the appropriate governmental agency to which relief should be sought, by:

- (i) first advising counsel for the Applicant that the Applicant is entitled to the Drawbacks and that application therefor must be made to the CBSA, and
- (ii) then advising counsel for the Applicant that the Applicant is entitled to the Drawbacks but that application therefor must be made to the CRA, and
- (iii) finally advising counsel for the Applicant that the Applicant is not entitled to the Drawbacks.

63. Furthermore, the Applicant states that the Public Safety Minister erred in law in deciding that the Applicant was not entitled to the Drawbacks and that he was not able to grant the Drawbacks for the following reasons:

- (a) the Special Duties in respect of which relief is sought were levied under section 133 of the Excise Act and are therefore "duties" for the purposes of section 113 of the Customs Tariff;
- (b) the Imported Spirits on which the Special Duties were levied are "designated goods" within the meaning of subsection 113(5) of the Customs Tariff;

- (c) but for subsection 89(2) of the Customs Tariff, relief or a refund of all or a portion of the Special Duties could have been, but were not, granted under section 89 of the Customs Tariff;
- (d) all of the Special Duties levied on the Imported Spirits and for which drawbacks are sought were paid by the Applicant; and
- (e) the Applicant made an application in accordance with subsection 113(3) and section 119 of the Customs Tariff, and in accordance with the Drawback Regulations.

64. As a result, the Drawbacks should be granted to the Applicant by the Public Safety Minister.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The e-mail correspondence referred to in paragraphs 18-25, 28-29, 32-33 and 36 above;
2. The drawback applications referred to in paragraphs 26, 30 and 53 above;
3. The letters from the CBSA referred to in paragraphs 55, 56 and 60 above;
4. The letter from the CRA referred to in paragraphs 31 and 43 above;
5. The letter from the Applicant to the CBSA referred to in paragraph 59 above;
6. Affidavits from representatives of The Applicant to be sworn;
7. Other affidavits to be sworn; and

8. Such further and other material as counsel may advise and this Honourable Court may permit.

September 7, 2023



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Glenn Ernst

Tel: 416.597.3770
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Solicitor for the Applicant

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 SEP 05 2023 A.D. 20 _____

Dated this _____ day of SEP 05 2023 20 _____

ALICE PRODAN GIL
REGISTRY OFFICER
AGENT DU GREFFE