



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Customs and Excise Appeals

GUIDE

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APPEALS – A DESCRIPTIVE GUIDE-

INTRODUCTION

The Canadian International Trade Tribunal (the Tribunal) hears and decides appeals from decisions of the Canada Border Services Agency (CBSA) under the *Customs Act* and the *Special Import Measures Act (SIMA)*. Appeals made under the *Customs Act* relate to the tariff classification, value for duty and origin of imported goods. Appeals made under *SIMA* relate to the application, to imported goods, of Tribunal findings or orders concerning injury or retardation caused by dumping and/or subsidizing and the normal value, export price or amount of subsidy in relation to the imported goods.

The Tribunal also hears and decides appeals from certain decisions of the Minister of National Revenue (the Minister) made under the *Excise Tax Act*. These appeals relate to assessments or determinations of excise tax.

This document sets out matters of procedure related to appeal proceedings before the Tribunal. In the event of any inconsistency between this document and the applicable legislation, including the *Canadian International Trade Tribunal Rules*, the *Customs Act*, *SIMA* and the *Excise Tax Act*, the legislation prevails.

Filing Documents with the Tribunal – Rule 12

This guide refers to the filing of various documents during an appeal proceeding. In all proceedings conducted by the Tribunal, including all appeals covered by this guide, parties are required to file documents with the Tribunal in electronic format. The Tribunal will only accept paper filings in circumstances where a party provides a compelling justification to do so.

Requirements concerning the filing of confidential information are detailed further on in this guide.

Parties are encouraged to file both confidential and/or public documents with the Tribunal electronically through its Secure E-filing Service which can be found on the Tribunal's Web site at <https://efiling-depote-pub.citt-tcce.gc.ca/submit-eng.aspx>. This service allows the secure transmission of confidential business information. The information is fully encrypted from the sender to the Tribunal. Alternatively, in all instances, parties are free to file documents via normal email transmission to the Tribunal. However, they should be mindful that by choosing that method of transmission over the Secure E-filing Service method, they assume the risk that their confidential information may be compromised.

Eligibility to Appeal – Rule 30

The Tribunal's appeal proceedings apply to an appeal from a decision or re-determination of the President of the CBSA or from an assessment, reassessment, rejection, decision or determination of the Minister of National Revenue, as the case may be, pursuant to:

- section 67 of the *Customs Act*,
- section 61 of the *Special Import Measures Act*,
- sections 81.19, 81.21, 81.22, 81.23 or 81.33 of the *Excise Tax Act*.

Under the *Customs Act*, a person, or business, may appeal the decision of the President of the CBSA relating to:

1. the tariff classification of imported goods;
2. the value for duty of imported goods; or
3. the origin of imported goods.

Under *SIMA*, a person, or business, may appeal a decision of the President of CBSA concerning the following:

1. whether imported goods are of the same description as goods found to have been dumped or subsidized and which are subject to an injury finding made by the Tribunal;
2. the normal value or the amount of a subsidy of those goods;
3. the export price of those goods; or
4. a scope ruling as to whether certain goods are subject to an order of the Governor in Council imposing a countervailing duty, an injury finding made by the Tribunal or an undertaking.

Under the *Excise Tax Act*, a person, or business, may appeal a decision of the Minister of National Revenue in respect of an assessment or determination for federal sales tax or excise tax.

Filing a Notice of Appeal – Rule 31

The appeal process is set in motion when a notice of appeal (or letter) is filed with the Tribunal. The notice of appeal or letter must state the appellant's intentions and be accompanied by a copy of the assessment, reassessment, rejection, decision, determination or re-determination, as the case may be, from which the appeal is launched. The notice of appeal is to be filed with:

1. In the case of an appeal under the *Customs Act* or the *Special Import Measures Act* with the Tribunal and the President of the CBSA; or
2. In the case of an appeal under the *Excise Tax Act* with the Tribunal.

Submission of Appellant's Brief—Rule 34

The appellant must submit one **electronic copy** of the appellant's brief to the Registrar no later than 60 days after the Tribunal acknowledges receipt of the filing of a notice of appeal. The date on which the brief is due will be communicated to the appellant in the Tribunal's letter of acknowledgment.

In addition, **for appeals under the *Customs Act* and the *Special Import Measures Act***, one copy of the brief must be sent directly to counsel for the respondent at:

Department of Justice
Civil Litigation Section
Suite 500
50 O'Connor Street
Ottawa, Ontario K1A 0H8

For appeals under the *Customs Act* if you reside in **Quebec**, or your company is registered in Quebec, one copy of the brief must be sent directly to counsel for the respondent at:

Department of Justice
Tax Law Services Directorate

Quebec Regional Office (Ottawa)
St. Andrew's Tower, 6th floor
284 Wellington Street
Ottawa, Ontario K1A 0H8

For appeals under the *Excise Tax Act*, one copy of the brief must be sent directly to counsel for the respondent at:

Department of Justice
Tax Law Services
Suite 1100
99 Bank Street
Ottawa, Ontario K1A 0H8

The brief must be dated and signed by the appellant or the appellant's counsel. It must also include the appellant's contact information as follows:

- name
- address
- telephone number
- e-mail address

All paragraphs and pages of the brief must be numbered, as well as all pages of attachments. Attachments may include any documents, authorities or case law that may be useful in explaining or supporting the appellant's case and on which it intends to rely to support its position.

The brief must set out:

- a concise statement of the grounds for the appeal and the important facts relating to each ground;
- a description of the goods in issue;
- the history of the proceedings before the filing of the notice of appeal;
- the jurisdiction of the Tribunal to hear the appeal;
- the points at issue between the appellant and the respondent;
- the statutory provisions relied on;
- an outline of argument to be made at the hearing; and
- the nature of the decision sought from the Tribunal.

Submission of Respondent's Brief – Rule 35

The respondent, (either the President of the CBSA under the *Customs Act* or the *Special Import Measures Act* or the Minister of National Revenue under the *Excise Tax Act*) must submit a response to the appellant's brief within 60 days of receipt of the appellant's brief. The due date will be provided in the Tribunal's letter acknowledging receipt of the appellant's brief. The respondent must also submit one copy of its brief to the Tribunal in electronic format, and must, simultaneously, provide it to the appellant.

Submission of Confidential Information—Rule 15

A party wanting portions of the information that it files with the Tribunal to be designated as confidential must submit two versions of the information to the Tribunal:

1. A confidential version containing all the confidential information and labelled “Confidential” on every page that contains confidential information. In addition, all confidential information should be highlighted by using shading, boldface characters or square brackets; and
2. a separate public version of the same document with the confidential information **fully** deleted (i.e. you may not simply mask or hide the confidential information under shading, it must be deleted from underneath any masking or shading); or

In the alternative to filing a public version as described in 2, you may file a public summary of the confidential information. In either case, the public version or the public summary must give the party opposite and the Tribunal sufficient information to understand the nature of the confidential information.

While a party may submit documents marked “Confidential”, it does not automatically follow that the Tribunal will accept such a designation. The Tribunal reserves the right to refuse to accept a confidential designation, in whole or in part. If the Tribunal has concerns about the designation of information as confidential, the party providing the information will be given an opportunity to provide an acceptable explanation of why the designation is appropriate. In these instances, the following may occur:

1. If the Tribunal is satisfied with the explanation provided, the information will be treated as confidential.
2. If the Tribunal is not satisfied with the explanation for the requested designation of confidentiality, and the party fails to provide an acceptable public version, the information submitted as confidential will not be taken into account by the Tribunal and will not be made part of the record.
3. The party providing the information may agree to the information being placed on the public record.
4. The party providing the information may withdraw the information.

The Tribunal routinely receives requests for copies of the public briefs from interested parties, such as the general public, counsel and customs brokers; therefore, it is important that parties properly identify and segregate public and protected information as per the above instructions.

More information regarding the designation and protection of confidential information is found in the *Confidentiality Guidelines* available on the Tribunal's Web site at www.citt-tcce.gc.ca/en/Confidentiality_guidelines_e.

Filing and Service of Confidential Information—Rule 17

A party who is not represented by counsel must serve confidential information on the Tribunal *only*. The Tribunal will undertake to serve the confidential information on any other party on file who is represented by counsel and who has filed a confidentiality declaration and undertaking with the Tribunal.

Where parties are represented by counsel who have filed a declaration and undertaking with the Tribunal, said counsel are permitted to serve each other with both the public and confidential information at the same time. With respect to the service of confidential information on each other, counsel are to note the following:

1. Submissions that contain information that is confidential to *your* client may be served by electronic means provided you are willing to accept the associated risks.

2. Submissions that contain third-party confidential information, meaning confidential information that does not belong to you or your client must be served by courier and must be received by the due date set out by the Tribunal.

Filing public information

Parties must serve any public documents on the Tribunal and all other parties simultaneously, providing the Tribunal with proof of service at the same time.

Expert Witnesses—Rule 22

If a party wishes to call an expert witness to testify, that is, a witness with specialized knowledge, skill, education, training and/or experience in a particular field that is relevant to the case, the party must submit a report, prepared and signed by the expert. The expert report must be filed with the Tribunal no later than 30 days before the hearing and served on all other parties simultaneously.

If a party that has been served with an expert report wishes to rebut with expert evidence any matter set out in that report, it may file its own expert report in response. The expert report in rebuttal must be filed with the Tribunal no later than 20 days before the hearing and served on all other parties simultaneously.

Any expert report (including any report filed in rebuttal of an expert report) must indicate the name, address, qualifications and area of expertise of the expert witness and a detailed outline of the expert's testimony.

Any authorities or materials relied upon in the preparation of the expert witness report must be cited in a bibliography attached to the report. Every page of the report, including attachments, must be paginated.

The party submitting an expert report must clearly indicate the precise area of expertise in which it intends to qualify the expert witness. An expert witness must be qualified by the Tribunal before his or her expert testimony will be admitted.

Counsel for the party calling the witness bears the onus of persuading the Tribunal that the witness should be accepted as an expert in the proposed subject matter on which he or she will be asked to express an opinion, by questioning the witness on his or her *curriculum vitae*, background, training, education, skills, experiences and knowledge. Opposing counsel has the right to cross-examine the witness.

Additional Materials and Physical Samples – Subrule 34(3)

A party who intends to rely at the hearing on any documents or authorities that could not be previously filed with the Tribunal as part of a brief shall, not less than 20 days before the hearing, file them with the Tribunal, and subject to rule 17, serve a copy on the other parties.

The Tribunal will only allow additional documents to be filed in appropriate circumstances, such as information that was not reasonably available prior to the deadline for the brief; or documents filed in response to a new issue raised in the respondent's brief; or for clarification purposes. Procedural fairness and natural justice considerations dictate that parties put their best case forward at the first opportunity in order to provide the opposing party sufficient time to prepare.

All filing deadlines must be strictly observed, except in demonstrably extraordinary circumstances (e.g. information was not reasonably available prior to the deadline set for the filing of submissions, illness, etc.).

If a party wishes to file additional documents less than 20 days before the hearing it will need to ask the Tribunal for permission to do so and provide an explanation for the request.

Any physical exhibits that a party intends to rely on at the hearing must also be filed with the Tribunal not less than 20 days before the hearing. The Tribunal may also request that physical exhibits of the goods in issue be filed during the course of the appeal. In the event that special handling or storing precautions are required for a physical exhibit, this must be stated explicitly in a letter accompanying the exhibit, and clear instructions provided. Any such exhibit must be labelled clearly as requiring special attention and must be accompanied by the Material Safety Data Sheet (MSDS) or its equivalent.

If it is not possible to provide a sample of the goods, a detailed description, photograph, videotape, brochure, etc., is acceptable as long as it can be authenticated by a witness. In appeals where goods are not involved (for example, audit procedures for excise tax cases), documents in support of arguments must be presented in evidence.

At the conclusion of all proceedings related to the appeal, any party who has filed a physical exhibit will receive a letter from the Tribunal asking if they wish to have the physical exhibit returned to them at their expense or whether they wish to have the exhibit disposed of by the Tribunal. Depending on the nature of the exhibit, parties may simply ask the Tribunal to destroy the exhibit or in some cases, to donate it to a charity.

Late Filing – Rule 24.1

If a party is unable to file any brief, submission, report or any other document by the due date set out by the Tribunal, the party must make a written request to the Tribunal for an extension of time and provide reasons for the request, copying the Tribunal and other parties to the appeal at the same time. The Tribunal will typically seek the comments of the other parties prior to considering the request.

Postponements and Adjournments of Hearings—Rule 26

If a party wishes to have a scheduled hearing postponed or adjourned, the party must make the request in writing, with reasons for the request, at least 15 days before the hearing, copying the Tribunal and other parties to the appeal at the same time. The Tribunal will seek the comments of the other parties prior to considering the request.

Requests to Intervene - Rule 40.1

A person who wishes to participate in the appeal as a third party (an intervener) must file a request to intervene with the Tribunal, specifying the nature of his or her interest in the appeal, and set out a summary of the representations to be made, and why their interest would not otherwise be adequately represented, or how he or she may assist the Tribunal in the resolution of the appeal, and any other relevant matters. The Tribunal will ask for submissions from all parties before deciding whether or not to accept the request.

Discontinuance—Rule 44

An appellant who wishes to discontinue an appeal, must file a notice of discontinuance to the Tribunal and other parties to the appeal. A copy of the notice of discontinuance can be printed from the Tribunal's Web site at www.citt-tcce.gc.ca/en/forms.

Hearings—Rule 23

The Tribunal usually sets down a hearing date when it acknowledges receipt of the appeal. Depending on the complexity and nature of the matter at issue or on the legislation under which an appeal has been filed, appeals are heard by a panel of one or three Members and are generally conducted in public. Any confidential information is discussed in an *in-camera* session, where the hearing room is closed except for Tribunal Members, Tribunal support staff, and parties.

An appellant may present their case before the Tribunal as a self-represented party or be represented by counsel. “Counsel” means any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party. Accordingly, you can choose to be represented by legal or non-legal counsel. The respondent is generally represented by counsel from the Department of Justice.

During the hearing, the appellant is the first to present their case, followed by the respondent. An intervener's case may be presented after either the appellant's case or the respondent's case, depending on which party the intervener supports. A case is presented orally, through witness testimony (including regular “lay” witnesses, and expert witnesses sworn under oath or affirmation), or by way of reference to documentary or physical evidence. All opposing parties (including interveners) have the right to cross-examine witnesses and question the validity of the evidence on the record. The Tribunal Member/panel often ask questions of the witness(es) as well.

After the witness testimony is completed, the appellant presents closing arguments in support of its position followed by the respondent. An intervener's closing argument may be presented after either the appellant's arguments or the respondent's arguments, depending on which party the intervener supports.

The closing argument should focus on explaining how the facts and the law combine to allow the Tribunal to accept that party's position, or theory of the case. Essentially, closing arguments are a party's view of how it wants the Tribunal to decide.

The appellant will have an opportunity to make reply submissions, but these should be limited to issues arising from the submissions of the respondent or intervenor that were not addressed earlier. Parties should expect active questioning from the Tribunal Member/panel during closing argument.

Proceedings are transcribed verbatim, and copies of the transcript may be examined at the Tribunal's registry or purchased from the company with which the Tribunal has contracted to transcribe the proceedings.

Although the Tribunal's procedures are somewhat less formal than those of a civil court, certain formalities are followed to ensure the orderly conduct of hearings.

Hearing by Way of Written Submissions—Rules 25(c) and 25.1

An appeal hearing can be heard in person, or by way of written submissions, commonly referred to as a “file” hearing. The Tribunal may decide to hold a file hearing either on its own initiative or at the written request of the appellant or the respondent.

The majority of file hearings tend to be for appeals involving allegedly prohibited weapons or devices or for appeals filed by appellants, who, for geographic reasons, do not wish to appear in person.

The appellant and the respondent may also consent to a file hearing if they agree upon the facts and do not feel the need to supplement their written submissions with oral argument.

Where one party requests a file hearing and does not have the other party's consent, the Tribunal will seek the views of the other party before making a decision on the type of hearing. If the Tribunal decides to hold a hearing by way of written submissions, its practice is to offer the appellant the opportunity to file a reply to the respondent's brief before the Tribunal considers the appeal and makes its decision.

Appeal Documents posted on the Tribunal's Web site

The Tribunal's hearing schedule, list of decisions pending, orders, reasons and decisions are posted on its Web site at www.citt-tcce.gc.ca/en/appeals.

Contacting the Tribunal

Any questions regarding appeal procedures should be directed to the Registrar's office at 613-993-3595.

Please note that appeal hearings can sometimes be cancelled or postponed at the last minute, therefore, interested persons planning to attend a hearing should contact the Registrar's office to obtain further information and to confirm that the hearing will be held as scheduled.

APPEAL PROCESS