Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal No. AP-2011-075

Jan K. Overweel Limited

v.

President of the Canada Border Services Agency

*Decision and reasons issued Tuesday, February 5, 2013*

Canada

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IN THE MATTER OF an appeal heard on November 6, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency dated March 5, 2012, with respect to a request for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**JAN K. OVERWEEL LIMITED** **Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY** **Respondent**

## DECISION

The appeal is allowed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | November 6, 2012 |
| Tribunal Member: | Stephen A. Leach, Presiding Member |
| Counsel for the Tribunal: | Eric Wildhaber<br>Anja Grabundzija |
| Manager, Registrar Programs and Services: | Michel Parent |
| Registrar Officer: | Ekaterina Pavlova |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representative** |
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# STATEMENT OF REASONS

1. This is an appeal filed by Jan K. Overweel Ltd. (JKO) on March 20, 2012, pursuant to subsection 67(1) of the *Customs Act*[1] from two decisions of the President of the Canada Border Services Agency (CBSA) dated March 5, 2012, with respect to a request for further re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether the *European Union Surtax Order*[2] (Order) applies to canned beef in jelly (goods in issue) produced partly in Italy and partly in Brazil. The Order was enacted by the Governor General in Council pursuant to subsection 53(2) and section 79 of the *Customs Tariff*.[3] According to the preamble, the Order was enacted for the purpose of responding to the failure of the governments of the countries of the European Union to comply with a World Trade Organization decision requiring the member states of the European Union to bring certain measures that restrict access for Canadian-produced beef into conformity with their international obligations. The Order imposes a surtax on specified goods that originate in a listed country of the European Union, including Italy.

3. The specific question before the Tribunal is therefore whether the goods in issue "originate in" Italy within the meaning of the Order.

## PROCEDURAL HISTORY

4. The goods in issue were imported into Canada in 2010. JKO declared that the goods in issue originated in Brazil.

5. Following an anonymous complaint letter from importers claiming that JKO was non-compliant with respect to the Order, the CBSA re-determined the origin of the goods to be Italy, in two decisions dated March 31, 2011, issued pursuant to section 59 of the *Act*. Accordingly, the CBSA also determined the amount of surtax payable under the Order.[4]

6. On June 24, 2011, JKO requested a further re-determination of the origin of the goods in issue, pursuant to subsection 60(1) of the *Act*.[5] On March 5, 2012, the CBSA, pursuant to subsection 60(4), issued two decisions confirming that the origin of the goods in issue was Italy.[6]

7. On March 20, 2012, JKO filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[7]

8. On May 17, 2012, JKO filed its brief. The CBSA filed its brief on July 16, 2012.

9. On August 27, 2012, JKO requested that the appeal be postponed by one month, in order to procure a document in support of its contention that the goods in issue originate in Brazil.[8] The CBSA objected to this request on August 30, 2012.[9] The Tribunal decided to grant JKO's request on September 7, 2012.[10]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.O.R./99-317.
3. S.C. 1997, c. 36.
4. Tribunal Exhibit AP-2011-075-06A, tab 2, Administrative Record, Vol. 1.
5. *Ibid.*
6. Tribunal Exhibit AP-2011-075-06A, tab 3, Administrative Record, Vol. 1.
7. Tribunal Exhibit AP-2011-075-01, Administrative Record, Vol. 1.
8. Tribunal Exhibit AP-2011-075-09, Administrative Record, Vol. 1.
9. Tribunal Exhibit AP-2011-075-10, Administrative Record, Vol. 1.
10. Tribunal Exhibit AP-2011-075-12, Administrative Record, Vol. 1.

10. However, on September 19, 2012, JKO requested permission to file an amended brief, on the basis that the legal arguments set out in the original brief for its conclusion that the goods in issue do not originate in Italy were wrong.[11] The CBSA objected to this request on September 20, 2012.[12]

11. Having considered the views of both parties, the Tribunal decided on September 26, 2012, to grant JKO's request to file an amended brief.[13] The CBSA was also given the opportunity to file an amended brief, which it did on October 23, 2012.

12. On November 6, 2012, the Tribunal held a public hearing in Ottawa, Ontario.

13. The parties did not call any witnesses.

## GOODS IN ISSUE

14. The goods in issue are ready-to-eat Simmenthal brand canned beef in jelly.[14] The raw beef comes from animals that were born, bred, fed and slaughtered in Brazil. The meat pieces thus produced are placed in plastic tubes, cooked, frozen and shipped to Italy. In Italy, the meat is defrosted and automatically transported to canning lines where it is sliced and put into cans. The cans are filled with vegetable jelly and then undergo a seaming process. After sterilization, the cans are hermetically sealed, lithographed and identified.[15]

15. There is no dispute that the goods in issue are properly classified under tariff item No. 1602.50.91 of the schedule to the *Customs Tariff* as other prepared or preserved meat, meat offal or blood of bovine animals, excluding sausages and similar products. Pursuant to Schedule 1 of the Order, goods classified under this tariff item are subject to a surtax, provided the other conditions of application of the Order, namely, with respect to origin, are established.

## ANALYSIS

### Statutory Framework

16. Subsection 67(1) of the *Act* provides that "[a] person aggrieved by a decision of the President [of the CBSA] made under section 60 . . . may appeal from the decision to the . . . Tribunal . . . ." Decisions under section 60 include the CBSA's decisions on the origin of goods.

11. Tribunal Exhibit AP-2011-075-15, Administrative Record, Vol. 1.
12. Tribunal Exhibit AP-2011-075-16, Administrative Record, Vol. 1.
13. Tribunal Exhibit AP-2011-075-18, Administrative Record, Vol. 1.
14. Tribunal Exhibit AP-2011-075-06A, tabs 5, 6, Administrative Record, Vol. 1.
15. Tribunal Exhibit AP-2011-075-06A at 3, tab 5, Administrative Record, Vol. 1.

17. This appeal requires determining whether the goods in issue "originate" in Italy, within the meaning of the Order, which provides as follows:

> **1.** In this Order, "EU goods" means the goods that are described in column 2 of Schedule 1 or Schedule 2 and classified under the tariff item set out opposite that description, and that originate in Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden or the United Kingdom of Great Britain and Northern Ireland.
>
> **1.** Dans le présent décret, « marchandises de l'UE » s'entend des marchandises mentionnées à la colonne 2 des annexes 1 et 2 et classées dans les numéros tarifaires indiqués à la colonne 1, qui sont originaires de l'Autriche, de la Belgique, du Danemark, de l'Espagne, de la Finlande, de la France, de la Grèce, de l'Italie, du Luxembourg, des Pays-Bas, du Portugal, de la Suède, de la République fédérale d'Allemagne, de la République d'Irlande ou du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

18. The Order was enacted pursuant to subsection 53(2) of the *Customs Tariff*, which provides as follows:[16]

> (2) Notwithstanding this Act or any other Act of Parliament, *the Governor in Council may*, on the recommendation of the Minister and of the Minister of Foreign Affairs, by order, for the purpose of enforcing Canada's rights under a trade agreement in relation to a country or of responding to acts, policies or practices of the government of a country that adversely affect, or lead directly or indirectly to adverse effects on, trade in goods or services of Canada, do any one or more of the following:
>
> (2) Par dérogation aux autres dispositions de la présente loi et à toute autre loi fédérale, *le gouverneur en conseil*, sur recommandation du ministre et du ministre des Affaires étrangères, *peut* par décret, en vue d'exercer les droits qu'un accord commercial reconnaît au Canada à l'égard d'un pays ou de réagir aux actes, politiques ou pratiques du gouvernement d'un pays qui soit nuisent au commerce des marchandises ou services du Canada, soit provoquent directement ou indirectement des effets nocifs à cet égard, prendre une ou plusieurs des mesures suivantes :
>
> . . .
>
> [...]
>
> (*b*) *make goods that originate in any country or that are entitled to a tariff treatment provided for by regulations made under section 16*, or a class of such goods, *subject to a surtax* in an amount, in addition to the customs duty provided in this Act and the duties imposed under any Act of Parliament or in any regulation or order made under any Act of Parliament, for those goods or that class of goods;
>
> *b*) *assujettir les marchandises* ou catégories de marchandises *originaires d'un pays ou bénéficiant d'un traitement tarifaire prévu aux règlements pris en vertu de l'article 16 à une surtaxe* qui s'ajoute aux droits de douane prévus par la présente loi et aux droits imposés en application d'une loi fédérale ou de ses textes d'application à l'égard de ces marchandises ou catégories;
>
> . . .
>
> [...]
>
> [Emphasis added]

16. S.C. 1997, c. 36 (version in force in 2010).

19. Pursuant to section 16 of the *Interpretation Act*,[17] "[w]here an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power." Subsection 2(1) defines "enactment" as follows: ". . . an Act or regulation or any portion of an Act or regulation".

20. As the Order constitutes "regulations" within the meaning of the *Interpretation Act* and was enacted under subsection 53(2) of the *Customs Tariff*, the meaning of the word "originate" in the Order must therefore be determined by reference to the *Customs Tariff*.

21. Section 16 of the *Customs Tariff* provides the following rules of origin that are to apply for the purposes of that act:

> **16.**(1) Subject to any regulations made under subsection (2), for the purposes of this Act, goods originate in a country if the whole of the value of the goods is produced in that country.
>
> (2) The Governor in Council may, on the recommendation of the Minister, make regulations
>
> (*a*) respecting the origin of goods, including regulations
>
> (i) deeming goods, the whole or a portion of which is produced outside a country, to originate in that country for the purposes of this Act or any other Act of Parliament, subject to such conditions as are specified in the regulations,
>
> (ii) deeming goods, the whole or a portion of which is produced within a geographic area of a country, not to originate in that country for the purposes of this Act or any other Act of Parliament and not to be entitled to the preferential tariff treatment otherwise applicable under this Act, subject to such conditions as are specified in the regulations, and
>
> (iii) for determining when goods originate in a country for the purposes of this Act or any other Act of Parliament; and
>
> (*b*) for determining when goods are entitled to a tariff treatment under this Act.
>
> . . .

> **16.**(1) Sous réserve des règlements pris en vertu du paragraphe (2), les marchandises sont, pour l'application de la présente loi, originaires d'un pays si la totalité de leur valeur y a été produite.
>
> (2) Sur recommandation du ministre, le gouverneur en conseil peut, par règlement :
>
> *a*) régir l'origine des marchandises, notamment en ce qui touche :
>
> (i) l'assimilation, pour l'application de la présente loi ou de toute autre loi fédérale, à des marchandises originaires d'un pays de marchandises produites en tout ou en partie à l'extérieur de celui-ci, sous réserve des conditions précisées dans le règlement,
>
> (ii) l'assimilation, pour l'application de la présente loi ou de toute autre loi fédérale, à des marchandises non originaires d'un pays et ne bénéficiant pas du traitement tarifaire préférentiel dont elles bénéficieraient autrement en vertu de la présente loi de marchandises produites en tout ou en partie dans une zone géographique de ce pays, sous réserve des conditions précisées dans le règlement,
>
> (iii) la détermination de l'origine de marchandises pour l'application de la présente loi ou de toute autre loi fédérale;
>
> *b*) déterminer quand les marchandises peuvent bénéficier d'un traitement tarifaire prévu par la présente loi.
>
> [...]

17. R.S.C. 1985, c. I-21.

22. At the time of the importation of the goods in issue, the Governor in Council had adopted, under subsection 16(2) of the *Customs Tariff*, several regulations containing provisions on the origin of goods. These include the *Most-Favoured-Nation Tariff Rules of Origin Regulations*[18] (*MFN Origin Regulations*).

**Meaning of "originate" in Section 1 of the Order**

23. The only issue for consideration in this appeal is the interpretation of the word "originate" in section 1 of the Order.

Positions of Parties

24. In JKO's view, the origin of the goods for the purposes of the Order must be determined pursuant to the rule of general application in subsection 16(1) of the *Customs Tariff*.

25. JKO submitted that, pursuant to that provision, the general rule for the purposes of the *Customs Tariff* is that goods originate in a country when the whole of their value is produced in that country. JKO submitted that subsection 16(2), for its part, authorizes the Governor in Council to enact other rules of origin by regulation for the specific purpose of determining entitlement to tariff treatment.

26. Further, JKO submitted that paragraph 53(2)(*b*) of the *Customs Tariff*, under which the Order was enacted, mirrors section 16 by allowing a surtax to be imposed either where goods ". . . originate in any country *or* . . . [where goods] are entitled to a tariff treatment provided for by regulations . . ." [emphasis added].

27. JKO submitted that, according to its terms, the Order targets goods that "originate" in a listed country and *not* goods that are entitled to a specific tariff treatment. In particular, JKO argued that the Order does not apply depending on "entitlement to the MFN tariff treatment" and that, therefore, the rules of origin contained in the *MFN Origin Regulations* do not provide for the determination of whether goods originate in one of the countries listed in the Order.

28. Applying subsection 16(1) of the *Customs Tariff*, JKO concluded that, since the whole of the value of the goods in issue is not produced in Italy, the goods in issue do not "originate" in Italy within the meaning of the Order. Therefore, the Order does not apply to the goods in issue.

29. The CBSA's position was that the rules of origin contained in the *MFN Origin Regulations* provide for the determination of whether the goods in issue "originate" in Italy for the purposes of the Order.

30. The CBSA submitted that the origin of the goods in issue cannot be determined pursuant to subsection 16(1) of the *Customs Tariff*, since, as admitted by JKO, the goods in issue are produced in both Italy and Brazil. Further, the CBSA submitted that the Governor in Council has made regulations with respect to the origin of goods pursuant to subsection 16(2) by enacting the *MFN Origin Regulations* and that such regulations must be applied to determine the origin of the goods in issue.

31. The CBSA argued that the determination of the country of origin of imported goods is inherently linked to the determination of the tariff treatment to which the goods are entitled. While it admitted that the Order does not specify that the rules of origin contained in the *MFN Origin Regulations* are to be used, the CBSA submitted in oral argument that JKO itself initially accounted for the goods using the

18. S.O.R./98-33.

Most-Favoured-Nation Tariff, which, in the CBSA's view, means that the rules of origin contained in the *MFN Origin Regulations* apply to the determination of origin for the purposes of the Order.

32. Applying the rules of origin contained in the *MFN Origin Regulations* to the goods in issue, the CBSA submitted that, for the goods to originate in Brazil, not less than 50 percent of the total cost of production must occur in Brazil and that the goods must be finished in Brazil. As the goods are finished in Italy and JKO has not submitted evidence to demonstrate that not less than 50 percent of the cost of production is incurred in Brazil, the CBSA submitted that JKO has not demonstrated that the goods in issue originate in Brazil. Since JKO has failed to meet its burden of proof pursuant to paragraph 152(3)(*a*) of the *Act*, the country of origin of the goods in issue is Italy, as determined by the CBSA, making the surtax pursuant to the Order applicable to the goods in issue.

Tribunal's Interpretation of Section 1 of the Order

33. As noted above, the meaning of the word "originate" in the Order must be determined in the context of its parent legislation. As section 16 of the *Customs Tariff* specifically addresses rules of origin, the Tribunal must interpret the word "originate" in the Order by reference to that section. Indeed, the parties agree that this is the starting point of the analysis.

34. The Tribunal notes that, pursuant to subsection 16(1) of the *Customs Tariff*, goods ". . . originate in a country if the whole of the value of the goods is produced in that country." However, subsection 16(1) is made "[s]ubject to . . ." any regulations enacted under subsection 16(2). This indicates that, where the Governor in Council has enacted any rules of origin in addition to the rule in subsection 16(1), the rules of origin enacted by regulations apply in priority.

35. The Tribunal therefore further considers that the word "originate" in section 1 of the Order must be understood to assume the rule in subsection 16(1) of the *Customs Tariff*, unless any regulations enacted under subsection 16(2) modify that rule.

36. The question for the Tribunal is whether the Governor in Council has exercised the power to make rules of origin under subsection 16(2) of the *Customs Tariff* that displace the default rule in subsection 16(1) in the present situation.

37. The Tribunal disagrees with the CBSA's proposition that the *MFN Origin Regulations* displace the general rule in subsection 16(1) of the *Customs Tariff* for the purposes of the Order.

38. Looking first at the regulatory power granted pursuant to subsection 16(2) of the *Customs Tariff*, the Tribunal notes that subsection 16(2), read as a whole, gives the Governor in Council the *choice* to enact regulations under subparagraphs 16(2)(*a*)(i) to (iii) "respecting the origin of goods . . . for the purposes of this Act [i.e. the *Customs Tariff*] or any other Act of Parliament" *or*, under paragraph 16(2)(*b*), for the more restricted purpose of ". . . determining when goods are entitled to a tariff treatment under this Act [i.e. the *Customs Tariff*]."[19]

19. The French version of subsection 16(2) of the *Customs Tariff* is consistent with this interpretation.

39. For ease of reference, subsection 16(2) of the *Customs Tariff* is reproduced here:

> (2) The Governor in Council may, on the recommendation of the Minister, make regulations
>
> (*a*) *respecting the origin of goods*, including regulations
>
> (i) deeming goods, the whole or a portion of which is produced outside a country, to originate in that country *for the purposes of this Act or any other Act of Parliament*, subject to such conditions as are specified in the regulations,
>
> (ii) deeming goods, the whole or a portion of which is produced within a geographic area of a country, not to originate in that country *for the purposes of this Act or any other Act of Parliament* and not to be entitled to the preferential tariff treatment otherwise applicable under this Act, subject to such conditions as are specified in the regulations, and
>
> (iii) for determining when goods originate in a country *for the purposes of this Act or any other Act of Parliament*; and
>
> (*b*) *for determining when goods are entitled to a tariff treatment under this Act.*
>
> (2) Sur recommandation du ministre, le gouverneur en conseil peut, par règlement :
>
> *a*) régir *l'origine des marchandises*, notamment en ce qui touche :
>
> (i) l'assimilation, *pour l'application de la présente loi ou de toute autre loi fédérale*, à des marchandises originaires d'un pays de marchandises produites en tout ou en partie à l'extérieur de celui-ci, sous réserve des conditions précisées dans le règlement,
>
> (ii) l'assimilation, *pour l'application de la présente loi ou de toute autre loi fédérale*, à des marchandises non originaires d'un pays et ne bénéficiant pas du traitement tarifaire préférentiel dont elles bénéficieraient autrement en vertu de la présente loi de marchandises produites en tout ou en partie dans une zone géographique de ce pays, sous réserve des conditions précisées dans le règlement,
>
> (iii) la détermination de l'origine de marchandises *pour l'application de la présente loi ou de toute autre loi fédérale*;
>
> *b*) *déterminer quand les marchandises peuvent bénéficier d'un traitement tarifaire prévu par la présente loi*.
>
> [Emphasis added]

40. The structure of subsection 16(2) of the *Customs Tariff* thus expressly contemplates that regulations respecting rules of origin may be enacted for different purposes. This also entails the conclusion that a set of rules of origin enacted under subsection 16(2) will only be applicable or useful for those purposes for which they were enacted. With respect to interpreting the reference to "origin" in section 1 of the Order, this means that, even if the Governor in Council has enacted regulations under subsection 16(2) that prevail over the general rule in subsection 16(1) in some circumstances, it does not automatically follow that the rule in subsection 16(1) is modified for the purposes of the Order. The Tribunal considers that, in order to apply the rules of origin contained in the *MFN Origin Regulations* to the Order, it is not enough to find that the *MFN Origin Regulations* have been enacted under subsection 16(2); it must also be ascertained that such an application falls within the intended scope of the *MFN Origin Regulations*.

41. With respect to the *MFN Origin Regulations*, as noted above, the full title of the regulations reads "*Most-Favoured-Nation Tariff Rules of Origin Regulations*" [underlining added for emphasis]. These regulations contain certain rules of origin in sections 1 to 3 that provide for the determination of whether given goods originate in ". . . a country that is a beneficiary of the Most-Favoured-Nation Tariff". Looking at the terms of the *MFN Origin Regulations*, the Tribunal considers that they were enacted for the specific purpose of determining entitlement to the Most-Favoured-National Tariff treatment.

42. This is consistent, furthermore, with subsection 24(1) of the *Customs Tariff*, which provides that entitlement to a certain tariff treatment is determined in accordance with regulations made under section 16 and provides as follows:

| | |
|---|---|
| **24.**(1) Unless otherwise provided in an order made under subsection (2) or otherwise specified in a tariff item, *goods are entitled to a tariff treatment*, other than the General Tariff, *under this Act only if* | **24.**(1) Sauf disposition contraire des décrets d'application du paragraphe (2) ou d'un numéro tarifaire, *les marchandises bénéficient d'un traitement tarifaire prévu par la présente loi*, à l'exception du tarif général, *si les conditions suivantes sont réunies* : |
| . . . | [...] |
| (*b*) *the goods are entitled to that tariff treatment in accordance with regulations made under section 16* or an order made under paragraph 31(1)(*a*), 34(1)(*a*), 38(1)(*a*) or 42(1)(*a*), subsection 45(13), section 48 or subsection 49(2) or 49.5(8). | *b*) *elles bénéficient du traitement tarifaire accordé en conformité avec les règlements pris en vertu de l'article 16*, ou avec les décrets ou arrêtés pris en vertu des alinéas 31(1)*a*), 34(1)*a*), 38(1)*a*) ou 42(1)*a*), du paragraphe 45(13), de l'article 48 ou des paragraphes 49(2) ou 49.5(8). |

[Emphasis added]

43. On the other hand, the Tribunal notes that, on its face, the Order bears no relation to the Most-Favoured-Nation Tariff treatment (or any other tariff treatment for that matter). As noted above, the Order was enacted under paragraph 53(2)(*b*) of the *Customs Tariff*, which allows the Governor in Council to impose certain measures for the purpose ". . . of responding to acts, policies or practices of the government of a country that adversely affect . . . trade in goods . . . of Canada . . . ." This purpose is affirmed in the preamble of the Order.[20] The surtax is imposed independently of the tariff treatment that may be applicable to given goods, and it applies over and above any rate determined under the applicable tariff treatment.

44. Further, per section 1 of the Order, its application is made dependent on origin in one of the listed countries and *not* on entitlement to a particular tariff treatment. It is noteworthy, in this respect, that paragraph 53(2)(*b*) of the *Customs Tariff* empowers the Governor in Council to impose a surtax on ". . . goods that originate in any country *or that are entitled to a tariff treatment provided for by regulations made under section 16* . . ." [emphasis added]. Clearly, the Governor in Council, in this case, did not choose to make the surtax pursuant to the Order dependent on entitlement to a tariff treatment, such as the Most-Favoured-Nation Tariff treatment.

45. In these circumstances, the Tribunal considers it difficult to conclude that the rules of origin contained in the *MFN Origin Regulations*, enacted with a view to determining entitlement to that particular tariff treatment, are relevant in determining whether the separate surtax created by the Order applies.

46. The CBSA argued however that tariff treatment and determinations of origin are inherently linked and that, since JKO chose to claim Most-Favoured-Nation Tariff treatment when it accounted for the goods

20. The preamble reads as follows: "His Excellency the Governor General in Council, pursuant to subsection 53(2) and section 79 of the *Customs Tariff* . . . for the purposes of responding to the failure of the governments of the countries of the European Union to comply with a World Trade Organization decision requiring the member states of the European Union to bring certain measures imposed by the European Commission that restrict access for Canadian-produced beef into conformity with their obligations which failure adversely affects trade in goods of Canada, hereby makes the annexed *European Union Surtax Order*."

upon their importation, the rules of origin contained in the *MFN Origin Regulations* must also apply to the Order by reason of this choice. Because there are regulations respecting rules of origin that provide for the determination of whether the goods are entitled to the claimed tariff treatment, the CBSA submitted that the same regulations should also apply for the purposes of establishing whether the surtax pursuant to the Order applies.[21]

47. The Tribunal cannot accept this proposition. Presuming, for the sake of argument, that JKO's choice of the Most-Favoured-Nation Tariff treatment could lead, in law, to the application of the rules of origin contained in the *MFN Origin Regulations* for the purposes of the Order, the Tribunal notes that sections 1 and 3 of the *MFN Origin Regulations* simply do not allow for the identification of a particular country of origin.

48. For ease of reference, sections 1 and 3 of the *MFN Origin Regulations* are reproduced here:

| | |
|---|---|
| **1.** Goods originate in *a country* that is a beneficiary of the Most-Favoured-Nation Tariff if<br>(*a*) not less than 50 per cent of the cost of production of the goods is incurred by the industry of *one or more countries* that are beneficiaries of the Most-Favoured-Nation Tariff, *or by the industry of Canada*; and<br>(*b*) the goods were finished in *a country* that is a beneficiary of the Most-Favoured-Nation Tariff in the form in which they are imported into Canada. | **1.** Sont des marchandises originaires *d'un pays* bénéficiaire du tarif de la nation la plus favorisée les marchandises :<br>*a*) dont au moins 50 % du coût de production a été engagé par l'industrie *d'un ou de plusieurs pays* bénéficiaires de ce tarif *ou par l'industrie du Canada*;<br>*b*) dont la finition a été effectuée dans *un pays* bénéficiaire de ce tarif et qui sont importées au Canada dans cet état fini. |
| . . . | [...] |
| **3**. Goods are entitled to the Most-Favoured-Nation Tariff only if the goods are shipped directly to Canada, with or without transhipment, *from a country that is a beneficiary of the Most-Favoured-Nation Tariff*. | **3**. Les marchandises ne bénéficient du tarif de la nation la plus favorisée que si elles sont expédiées directement au Canada, avec ou sans transbordement, *à partir d'un pays bénéficiaire de ce tarif*. |

[Emphasis added]

49. In the CBSA's submission, paragraphs 1(*a*) and (*b*) and section 3 of the *MFN Origin Regulations* set out three cumulative conditions that allow for the identification of a country of origin. Applying those conditions to the facts, the CBSA concludes that Italy is the country of origin of the goods in issue.

50. However, a close reading of these provisions of the *MFN Origin Regulations* does not support the CBSA's interpretation. The conditions set out in paragraphs 1(*a*) and (*b*) and section 3 do not lead to the identification of any one country as the origin of given goods.

51. Section 1 of the *MFN Origin Regulations* states that "[g]oods originate in a country . . ." that is a beneficiary of the Most-Favoured-Nation Tariff if the conditions in paragraphs (*a*) and (*b*) are met. However, nothing in section 1 requires that the different conditions of production occur in the *same* country. Paragraph 1(*a*) simply provides that not less than 50 percent of the cost of production must be incurred in "one or more" countries that are beneficiaries of the Most-Favoured-Nation Tariff or in Canada. By referring to "a" country, paragraph 1(*b*) similarly indicates that the goods may be finished in yet *another*

21. *Transcript of Public Hearing*, 6 November 2012, at 8-9.

country that is a beneficiary of the Most-Favoured-Nation Tariff. In addition, pursuant to section 3, the goods may be shipped from *still another* country that is a beneficiary of the Most-Favoured-Nation Tariff.

52. As such, it appears to the Tribunal that, under the *MFN Origin Regulations*, goods may be considered to "originate in a country" even if the conditions in paragraphs 1(*a*) and (*b*) and section 3 all occurred in *different* countries that are beneficiaries of the Most-Favoured-Nation Tariff. As the *MFN Origin Regulations* do not make any one condition of origin more determinative than another, it is simply not possible to conclude that the goods originate in one particular country.

53. As such, the Tribunal is convinced that the rules of origin contained in the *MFN Origin Regulations* are not designed to and in no way lead to the identification of any particular country as the origin of given goods. Indeed, the rules of origin contained in the *MFN Origin Regulations* are only useful to determine origin in a country that is a beneficiary of the Most-Favoured-Nation Tariff. This is consistent with the legislative purpose behind the *MFN Origin Regulations*, which is to determine entitlement to the Most-Favoured-Nation Tariff treatment.

54. The rules of origin contained in the *MFN Origin Regulations* are not useful in determining whether the goods in issue "originate" in Italy within the meaning of section 1 of the Order.

55. Therefore, for the purposes of the Order, the general rule of origin in subsection 16(1) of the *Customs Tariff* remains applicable. Pursuant to the rule of origin in subsection 16(1), the Order will apply to the goods in issue if the whole of their cost of production is incurred in one of the countries listed in section 1 of the Order.

56. As it is accepted between the parties that the goods in issue are produced partly in Brazil and partly in Italy, the Tribunal considers that the whole of the cost of production of the goods in issue is not incurred in Italy and that they therefore do not "originate" in Italy. Accordingly, the Order does not apply to the goods in issue.

CBSA's Arguments About Circumvention

57. At the hearing, the CBSA expressed concerns that JKO was attempting to circumvent the Order and/or was trying to latch on to a legislative void.[22] In the CBSA's view, accepting JKO's argument would mean that the Order could be "circumvented" when a small percentage of the cost of production of goods was not incurred in one country. The CBSA argued that this is contrary to the intent and spirit of the Order.

58. First, the Tribunal is not convinced that its interpretation of the word "originate" in section 1 of the Order is contrary to the intent of the Order.

59. The Tribunal notes that, as set out in the preamble, the Order has the following apparent purpose:

> . . . responding to the failure of the governments of the countries of the European Union to comply with a World Trade Organization decision requiring the member states of the European Union to bring certain measures imposed by the European Commission that restrict access for Canadian-produced beef into conformity with their obligations . . . .

60. This response is achieved by imposing a surtax. Section 1 of the Order provides, in unambiguous terms, that the surtax applies to goods that "originate in" one of the named countries. Further, according to a

22. *Transcript of Public Hearing*, 6 November 2012, at 16, 21.

"well-established principle . . . the legislature is presumed to have a mastery of existing law . . . [and] is also presumed to have known all of the circumstances surrounding the adoption of new legislation."[23] As explained in the previous section, the word "originate" used in the Order can only have the meaning of that word in subsection 16(1) of the *Customs Tariff*. Therefore, it must be presumed that the legislator *intended* the retaliation remedy enacted through the Order to apply only in the limited circumstances targeted by section 1 of the Order, that is, to goods the cost of production of which is wholly incurred in one country.

61. The CBSA presented no other evidence that would rebut this presumption and demonstrate that the legislator in fact meant to tax goods other than those that are wholly produced in one of the named countries. It is not for the Tribunal to second-guess the policy choices of the legislator or the means by which it chooses to achieve them.

62. Second, and most importantly, even if it was found that the legislator's drafting of the Order was inadvertent rather than deliberate, and that the legislator left an unintended gap, it would be inappropriate for the Tribunal to deviate from the unambiguous language of the Order. Indeed, ". . . courts . . . lack jurisdiction to cure under-inclusive legislation . . . whether the under-inclusion is due to faulty drafting or considered policy choice."[24] The Tribunal must apply the law as it finds it; changes to the legislation are properly left to the legislator.

## DECISION

63. The appeal is allowed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

23. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 59.
24. *Sullivan on the Construction of Statutes*, 5th ed. at 177.