Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-046

Duhamel & Dewar Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, February 8, 2007

Canada

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IN THE MATTER OF an appeal heard on September 13, 2006, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 31, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

DUHAMEL & DEWAR INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

James A. Ogilvy
James A. Ogilvy
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 13, 2006
Tribunal Members:	Serge Fréchette, Presiding Member Pierre Gosselin, Member James A. Ogilvy, Member
Counsel for the Tribunal:	Dominique Laporte
Registrar Officer:	Valérie Cannavino
Appearances:	Victor Duhamel, for the appellant Alysia Davies, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA) dated January 31, 2006, made pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether a used 2000 Monaco Signature motor home, which was imported by Duhamel & Dewar Inc. (Duhamel & Dewar) on July 12, 2002, meets the requirements for preferential tariff treatment under the *North American Free Trade Agreement.*[2]

EVIDENCE

3. Mr. Victor Duhamel, an owner of Duhamel & Dewar, explained that, in 2002, he wanted to buy a used motor home from a company called Buddy Gregg Motor Homes Inc. (Buddy Gregg), of Knoxville, Tennessee. He stated that, when he called the CBSA, he was advised that there were no duties on used motor homes and further stated that neither his broker, George A. Gray Customs Brokers Limited, nor the CBSA mentioned *NAFTA*. According to Mr. Duhamel, he was eventually informed about the requirement for a certificate of origin, but that information came from his broker, and only after he had arrived in Tennessee. A certificate of origin was signed by Buddy Gregg and faxed to his broker.

4. A few months after the importation, the CBSA advised Mr. Duhamel that his motor home was subject to duties because it did not meet the conditions for preferential tariff treatment under *NAFTA*. Mr. Duhamel contacted the manufacturer, Monaco Coach Corporation (Monaco), and learned that Monaco had been audited on four 2002 models, all of which qualified for the preferential tariff treatment, and that his motor home had been manufactured in the same plant. He testified that he requested a bill of materials from Monaco, but was informed that those records could not be retrieved. He referred to a letter from Monaco that explained that there was no difference between the motor home imported by Duhamel & Dewar and those that were audited by the CBSA, given that the same materials were used and were purchased from the same vendors.

5. Mr. Raymond Thibeault, Manager of the Origin and Valuation Audit Unit at the CBSA, appeared on behalf of the CBSA. For the testimony that did not relate to the factual elements of this case, Mr. Thibeault was qualified as an expert in auditing, specifically in auditing in a *NAFTA* environment. He explained the audit responsibilities and the manner in which an audit is conducted in a *NAFTA* environment. In his testimony as a lay witness, he indicated that the case at issue, involving used RVs, resulted from a complaint by an importer. Once the CBSA identified the case as one requiring additional auditing, it issued a letter to the exporter asking it to substantiate the certificate of origin. The auditor's role was to try to validate the information on the certificate of origin.

6. Mr. Thibeault noted that, under *NAFTA*, an importer is responsible for having a duly completed certificate of origin before claiming the preferential tariff treatment and must, upon request, produce it within five days.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

7. In his testimony as an expert, Mr. Thibeault explained the roles of an exporter, a producer and an importer within the *NAFTA* framework. Under *NAFTA*, an exporter must ensure the completion of a certificate of origin and, in doing so, makes a declaration that the information provided refers to the goods that will qualify for preferential tariff treatment under *NAFTA*. If the exporter is not the producer, it is required to obtain the requisite information before completing the certificate of origin. Mr. Thibeault explained that the producer can issue a certificate of origin, but must present it to the exporter. He also explained that the CBSA normally requires permission from the exporter to communicate directly with the producer. The exporter can request specific information from the producer to complete a supplier confirmation and forward the information directly to the CBSA. In order to produce this information, the producer or exporter usually needs to provide the bill of materials, which is a list of all the parts and materials used to produce the goods and normally identifies the suppliers of those parts and materials and indicates whether or not the parts or materials qualify as originating goods. The CBSA must also determine whether the information is accurate. In the present case, the CBSA tried to determine the regional value content and the net cost of goods and to identify the non-originating goods.

8. Mr. Thibeault explained that, in auditing used recreational vehicles, 20 to 25 companies, including Duhamel & Dewar, were identified as high risk and stated that the CBSA decided to proceed with the auditing of their files. The goods were identified as being classified under a rule of origin that requires a regional value content. Following the normal procedure under the requirement for regional value content, the CBSA communicated with the exporter, Buddy Gregg, to validate the information and, at the same time, notified the importer. Following an exchange of communications with the CBSA, the exporter withdrew the certificate of origin. Mr. Thibeault explained that, on the basis of this information, the CBSA advised Mr. Duhamel on April 16, 2004, that the motor home did not qualify for the preferential tariff treatment under *NAFTA*. A re-determination of this decision was requested under subsection 60(1) of the *Act*.

9. Mr. Thibeault explained that, during the re-determination process, various documents were provided, for example, a certificate of origin completed by the producer, the dealer's retail window sticker that contains a list of standard equipment and a letter from Monaco to Duhamel & Dewar, dated September 9, 2005, stating that the motor home in issue satisfied the *NAFTA* conditions for preferential tariff treatment. According to Mr. Thibeault, Duhamel & Dewar requested that the CBSA compare the motor home in issue with another vehicle, but Mr. Thibeault refused, since the CBSA is not mandated to use information from another file to determine the origin of a product. He also stated that what he had for a comparison was a transaction value, but the *NAFTA Rules of Origin Regulations*[3] state that the net cost method must be used. Duhamel & Dewar also requested that the letter from Monaco be taken into consideration.

10. Mr. Thibeault explained that Duhamel & Dewar also asked that the motor home in issue be compared with the four motor homes that were audited in 2002. He explained that the CBSA confirmed that the models were not similar to the motor home in issue.

ARGUMENT

11. Duhamel & Dewar urged the Tribunal to uphold the preferential tariff treatment under *NAFTA* on the importation of its motor home. In its brief, Duhamel & Dewar argued that the requirement to pay duties on the motor home was unjust, given that the evidence on the record indicates that it was advised by the CBSA that *NAFTA* requirements did not apply to the motor home in issue, but that, in any case, the motor home met those requirements. Duhamel & Dewar supported this argument by referring to the certificate of

3. S.O.R./94-14.

origin from the producer and a letter from the exporter that indicated that no alteration had been done on the motor home after it was manufactured. Duhamel & Dewar also contended that the motor home was nearly identical to the 2003 model that met the requirements of the *NAFTA* rules of origin.

12. The CBSA indicated that it understood Duhamel & Dewar's unfortunate consequences in this case, but that the auditors must perform their duties in accordance with the law. It argued that part of its duties is to verify the origin of goods, regardless of who the importer may be. It submitted that the *Act*, in particular section 97.1, states that a certificate of origin must be issued by an exporter. It further submitted that it does not have the power to change the wording to "producer", nor does it have the power to compel a producer outside the borders of Canada to disclose information.

13. The CBSA explained that *NAFTA* sets out the information that is needed to support a claim for preferential tariff treatment and the procedure for audits of such goods. The *NAFTA* rules of origin state that goods, such as the motor home in issue, must meet the requirements for regional value content. For this reason, information about the value and former tariff classification of any non-originating components must be provided. The CBSA emphasized that it is necessary for an auditor to have enough information, including proof of origin in the form of a certificate of origin issued by the exporter, to allow the determination of whether these requirements are met.

14. The CBSA noted that the exporter had provided a certificate of origin, but had subsequently withdrawn it, and that the producer had failed to provide the supporting information required. It also noted that it had been unable to compare one model with another model of motor home in the absence of the required information.

15. Finally, the CBSA submitted that it was therefore justified to exercise its powers under subsection 42.1(2) of the *Act* and to withdraw the preferential tariff treatment under *NAFTA*.

DECISION

16. The issue in this appeal is whether the motor home imported by Duhamel & Dewar is entitled to preferential tariff treatment under *NAFTA*.

17. The *NAFTA* rules of origin, as incorporated into Canadian law, provide criteria for determining whether goods are entitled to preferential tariff treatment. Chapter Four of *NAFTA* sets out the requirements for goods to qualify as originating goods, while Chapter Five establishes the requirements for certificates of origin, as well as the administration and enforcement procedures. The various provisions of Chapters Four and Five are incorporated into Canadian law under the provisions of the *Act*, the *Customs Tariff*[4] and various regulations, such as the *NAFTA Rules of Origin Regulations*, the *Proof of Origin of Imported Goods Regulations*,[5] the *NAFTA Tariff Preference Regulations*[6] and the *NAFTA and CCFTA Verification of Origin Regulations*.[7] Only the provisions pertaining to this case will be discussed.

18. In order for the motor home in issue to be entitled to a tariff treatment other than the General Tariff, in this case the United States Tariff, subsection 24(1) of the *Customs Tariff* requires that two conditions be met: (1) proof of origin of the goods must be given in accordance with the *Act*; and (2) the goods must be entitled to that tariff treatment in accordance with the applicable regulations or orders.

4. S.C. 1997, c. 36.
5. S.O.R./98-52.
6. S.O.R./94-17.
7. S.O.R./97-333.

19. The Tribunal will first determine if, in this case, proof of origin was provided in accordance with the *Act*. Subsections 35.1(1) and (5) read as follows.

> 35.1 (1) Subject to any regulations made under subsection (4), proof of origin, in the prescribed form containing the prescribed information and containing or accompanied by the information, statements or proof required by any regulations made under subsection (4), shall be furnished in respect of all goods that are imported.
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> (5) Preferential tariff treatment under a free trade agreement may be denied or withdrawn in respect of goods for which that treatment is claimed if the importer, owner or other person required to furnish proof of origin of the goods under this section fails to comply with any provision of this Act or the *Customs Tariff*, or any regulation made under either of those Acts, concerning that preferential tariff treatment.

20. In accordance with subsection 6(1) of the *Proof of Origin of Imported Goods Regulations*, where the benefit of preferential treatment under the United States Tariff is claimed for goods, a certificate of origin for the goods must be furnished as proof of origin. The CBSA submitted that Duhamel & Dewar failed to comply with the requirements of the *Act* and its regulations by not providing a valid certificate of origin for the motor home in issue.

21. The CBSA decided to proceed with an audit of the certificate of origin and requested the exporter to complete the Origin Verification Questionnaire, Regional Value Content—Net Cost Method.[8] The exporter was unable to complete the questionnaire and later withdrew the certificate of origin. Monaco, the producer of the motor home, did however provide a certificate of origin[9] dated September 9, 2005.

22. In this appeal, the CBSA submitted that Duhamel & Dewar failed to comply with the requirements of the *Act* and its regulations by not providing a valid certificate of origin for the motor home in issue. It argued that the *Act*, in particular section 97.1, requires that a certificate of origin be issued by an exporter. It emphasized that an auditor must have sufficient information to allow the determination of whether the requirements are met, including proof of origin in the form of a certificate of origin issued by the exporter. The Tribunal also recalls Mr. Thibeault's testimony, when he addressed the circumstances of the present case, that a producer cannot provide a certificate of origin in the case of used goods, considering that it has no knowledge of the possible changes made to the goods following production and prior to its being exported.

23. The decision under appeal says nothing of the validity of the certificate of origin *per se*. It makes no reference to whether a certificate of origin from the producer was acceptable or not in the circumstances under examination. However, it is clear from the decision under appeal that the CBSA's decision was motivated by Duhamel & Dewar's failure to provide the information necessary to support the claim for the preferential tariff treatment under *NAFTA*. In that light, the Tribunal will examine whether the CBSA's decision to reject Duhamel & Dewar's claim for these reasons is correct or whether it should be reversed. In other words, the Tribunal will examine whether Duhamel & Dewar indeed failed to provide the information that would demonstrate that it had met the requirements of the *NAFTA* rules of origin.

24. To address this issue in the present case, it is not necessary to examine all the specific and technical requirements that are applicable under the *NAFTA Rules of Origin Regulations* for the importation of a motor home. Suffice it to say that goods classified in certain tariff headings, such as in the case of a motor home, must meet a requirement for regional value content, and information about the value and former tariff classification of any non-originating components must be provided.

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8. Respondent's brief, Tab 10.
9. *Ibid*., Tab 13.

25. It is in this context that, on October 12, 2005, the CBSA requested the following information from Monaco to validate its certificate of origin:

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> 1. A bill of material for the make, model and year of the above-noted motorhome.
> 2. The net cost of the vehicle[.]
> 3. The tariff classification, origin (supplier's name & address) and value of the engine, transmission and the chassis. A copy of the supplier's certification for NAFTA for these three items is also required.
> 4. A list identifying the tariff classification and value of any trace materials contained in the parts for the engine, transmission and chassis.
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> . . .

26. The Tribunal notes that, pursuant to paragraph 42.1(1)(*a*) of the *Act*, the CBSA conducted an audit of the origin of the motor home imported by Duhamel & Dewar and manufactured by Monaco. Monaco's failure to provide the required information led to the withdrawal of the preferential tariff treatment, in accordance with subsection 42.1(2) of the *Act* and section 13 of the *NAFTA and CCFTA Verification of Origin Regulations*. Subsection 42.1(2) of the *Act* reads as follows:

> 42.1 (2) If an exporter or producer of goods that are subject to a verification of origin under paragraph (1)(*a*) fails to comply with the prescribed requirements or, in the case of a verification of origin under subparagraph (1)(*a*)(i), does not consent to the verification of origin in the prescribed manner and within the prescribed time, preferential tariff treatment under a free trade agreement may be denied or withdrawn from the goods.

27. After having sent the letter to Monaco requesting the above information, the CBSA was advised by Monaco that no additional information would be forwarded to support its certificate of origin. Therefore, even assuming that certification by a manufacturer can be considered sufficient when the goods in issue are used goods, in this instance the CBSA could not confirm whether the motor home in issue was entitled to the preferential tariff treatment claimed by Duhamel & Dewar.

28. This led to a preliminary determination dated November 29, 2005, being sent by Ms. Valerie J. Fudge of the CBSA, which stated the following:

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> . . . Additional information was requested from Monaco Coach Corporation in my letter of October 12, 2005. Mr. Kimball of Monaco Coach has advised that no additional information will be forwarded to support their Certificate of Origin. Without the required information or supplier certification, it cannot be determined if the motor home qualifies for the North American Free Trade Agreement. Consequently, the motor home shall remain under the MFN tariff treatment.
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> . . .

29. On January 31, 2006, a final decision confirming the preliminary decision was issued.

30. In the Tribunal's view, there was a reasonable basis for the CBSA to exercise its powers under the *Act* to withdraw the preferential tariff treatment under *NAFTA* pursuant to subsection 42.1(2) of the *Act*.

31. In reaching its decision, the Tribunal has taken into consideration a letter dated September 11, 2006, from Monaco that was addressed to the CBSA. In that letter, Monaco stated, among other things, that the motor home imported by Duhamel & Dewar was produced in Monaco's Oregon factory, the same factory

where the CBSA conducted an audit for the 2002 model year, and that Monaco ". . . passed [without] an issue. . . ." In the same letter, Monaco also gave general information about the origin of its chassis, in which it uses steel, engines, axles, tires and transmissions bought from U.S. suppliers, and stated that it constructs the remainder of the coach (the "box") using materials of which a large majority comes from U.S. suppliers. Monaco also informed the CBSA that the records for the motor home in issue were no longer available due to the passage of time.

32. In the Tribunal's view, the CBSA could not rely on the face value of this letter to compare a motor home that was manufactured in 1999 with those that were audited in 2002, but were not of the same model as the one imported by Duhamel & Dewar.[10] The supplementary information provided by Monaco falls short of satisfying the CBSA's request of October 12, 2005. In determining the origin of goods, the CBSA must act within the boundaries of the *NAFTA Rules of Origin Regulations* that set out a specific methodology to calculate the regional value content of a motor home. The Tribunal is not satisfied that there is adequate evidence before it to make a finding that the motor home in issue met the requirements for preferential tariff treatment on the basis of its review of the matter.

33. For the foregoing reasons, the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

James A. Ogilvy
James A. Ogilvy
Member

10. Duhamel & Dewar's motor home is the Signature model that was manufactured in 1999, while the four models that were audited by the CBSA are the Navigator, the Cheetah, the Patriot and the Dynasty, all of which were manufactured in 2002. *Transcript of Public Hearing*, 13 September 2006, at 115.