



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2008-023

Entrelec Inc. (ABB Canada)

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, December 17, 2009*

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 DECISION6

IN THE MATTER OF an appeal heard on November 4, 2009, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by *Customs Tariff*, S.C. 1997, c. 36, ss. 166, 169;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated December 2, 9 and 23, 2008, with respect to requests for re-determinations, pursuant to subsection 63(3) of the former *Customs Act*.

BETWEEN

ENTRELEC INC. (ABB CANADA)

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 4, 2009
Tribunal Member:	Ellen Fry, Presiding Member
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PARTICIPANTS:**Appellant**

Entrelec Inc. (ABB Canada)

Counsel/Representative

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Respondent

President of the Canada Border Services Agency

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WITNESS:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Entrelec Inc. (ABB Canada) (Entrelec) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from decisions of the President of the Canada Border Services Agency (CBSA) dated December 2, 9 and 23, 2008, made pursuant to subsection 63(3) of the former *Customs Act*.

2. The issue in this appeal is whether various electrical components (the goods in issue) imported by Entrelec qualify for the benefits of Code 2101 of Schedule II to the *Customs Tariff*² (Code 2101), which provides, among other things, for the duty-free entry of articles for use in process control apparatus of tariff item No. 9032.89.20 of Schedule I to the former *Customs Tariff*.

PROCEDURAL HISTORY

3. The goods in issue were imported into Canada by Entrelec between December 5, 1994, and September 16, 1996, under 75 separate transactions.

4. Between September 2, 1997, and February 17, 1998, Entrelec filed requests, pursuant to section 63 of the former *Customs Act*, for a refund of customs duties paid in respect of the goods in issue on the basis that they qualified for the benefits of Code 2101. On May 8, 1998, the CBSA suspended the processing of these requests in order that similar requests made by Entrelec in respect of earlier importations of goods identical to the goods in issue, and which were the subject of an appeal to the Tribunal, could be finally resolved.

5. On September 28, 1998, the Tribunal issued its decision in *Entrelec Inc. v. Deputy M.N.R.*³ where it found that, since Entrelec did not show that some of the goods were actually used in process control apparatus of tariff item No. 9032.89.20, it did not qualify for the benefits of Code 2101. Accordingly, the appeal was dismissed.

6. Entrelec appealed this decision to the Federal Court of Appeal. On September 14, 2000, the Federal Court of Appeal issued its decision where it determined that there was evidence that some of the goods were actually used in process control apparatus of tariff item No. 9032.89.20.⁴ Accordingly, the Federal Court of Appeal set aside the Tribunal's decision in *Entrelec 1997* and referred the matter back to the Tribunal for a re-determination of the Entrelec's claim.

7. On March 17, 2003, the Tribunal issued its decision in *Entrelec Inc. v. Commissioner of the Canada Customs and Revenue Agency*⁵ where it found that the evidence before it supported a finding that 14 percent of the goods, by value, were used in process control apparatus and were therefore entitled to the benefits of Code 2101.

1. R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by *Customs Tariff*, S.C. 1997, c. 36, ss. 166, 169 [the former *Customs Act*].

2. R.S.C. 1985 (3d Supp.), c. 41 [the former *Customs Tariff*].

3. (28 September 1998), AP-97-029 (CITT) [*Entrelec 1997*].

4. *Entrelec Inc. v. Canada (Minister of National Revenue)*, 2000 CanLII 16268 (F.C.A.).

5. (17 March 2003), AP-2000-051 (CITT) [*Entrelec 2000*].

8. Entrelec also appealed this decision to the Federal Court of Appeal. On April 19, 2004, the Federal Court of Appeal dismissed Entrelec's appeal.⁶

9. On December 2, 9 and 23, 2008, the CBSA issued 75 decisions pursuant to subsection 63(3) of the former *Customs Act* confirming that the goods in issue did not qualify for the benefits of Code 2101.

10. On February 2, 2009, Entrelec filed the present appeal with the Tribunal.

11. On November 4, 2009, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Franco d'Itri, a supply manager and business analyst for ABB Canada, testified on behalf of Entrelec. No witnesses were called by the CBSA.

GOODS IN ISSUE

12. The goods in issue are various electrical components that are identical to the goods that were the subject of the Tribunal's decisions in *Entrelec 1997* and *Entrelec 2000*. More specifically, the goods in issue comprise the following:

- (i) Fuse terminal blocks
- (ii) Analog signal conditioning
 - Analog converters
 - Current/voltage converters
 - Voltage/current converters
 - Platinum resistive temperature detector (RTD) modules
 - Thermocouple/voltage or current converters
 - Voltage amplifiers
 - Current-to-current isolation
- (iii) Electronic interfaces
 - Relay interface modules
 - Opto-coupler interface modules
- (iv) Terminal blocks
 - Terminal blocks fuse holder
 - Terminal blocks for metering circuits
 - Terminal blocks for circuit testing
 - PCB terminal blocks
- (v) Relays
- (vi) Connectors

13. No physical exhibits were filed by the parties.

ANALYSIS

14. In accordance with the transitional provisions of the current *Customs Tariff*,⁷ this appeal is governed by the provisions of the former *Customs Act* and the former *Customs Tariff*, as the goods in issue were imported and accounted for prior to January 1, 1998. Prior to this date, statutory concessionary provisions which provided for lower rates of duties on goods imported for special purposes or by specified

6. *Entrelec Inc. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, 2004 FCA 159 (CanLII).

7. S.C. 1997, c. 36.

organizations could be found in Schedule II to the former *Customs Tariff*. Goods would first be classified under their applicable tariff item in Schedule I and then, provided the required conditions of Schedule II were met, special concessionary rates would apply to those goods.

15. Subsections 68(2) and (3) of the former *Customs Tariff* are relevant in this respect and read as follows:

(2) The customs duties imposed under Part I shall be reduced or removed as provided for in Schedule II or in any regulation or order made thereunder.

(3) The words and expressions used in Schedule II, wherever those words and expressions are used in Schedule I, have the same meanings as in Schedule I.

16. The nomenclature of the former *Customs Tariff* that is relevant for purposes of this appeal reads as follows:

9032 Automatic regulating or controlling instruments and apparatus.

...

-Other instruments and apparatus:

...

9032.89 - -Other

...

9032.89.20 - - -Process control apparatus, excluding sensors, which converts analog signals from or to digital signals

...

Articles (other than goods of the tariff item Nos. enumerated below) for use in:

2101 The goods of tariff item No.: . . . 9032.89.20.

17. There is no disagreement between the parties in regard to the proper tariff classification of the goods in issue (i.e. classification under Schedule I to the former *Customs Tariff*). Further, both parties agree that the goods in issue can qualify for the benefits of Code 2101. In other words, the parties agree that the goods in issue are capable of being used in process control apparatus of tariff item No. 9032.89.20. The Tribunal accepts those conclusions. Accordingly, the only issue in this appeal is whether Entrelec has provided sufficient evidence to determine that the goods in issue, or a proportion of those goods, were actually used in process control apparatus and, hence, qualify for the benefits of Code 2101.

Do the Goods in Issue Qualify for the Benefits of Code 2101?

18. Entrelec submitted that the major difference between its appeal in *Entrelec 1997* and the present appeal is that it has now been able to gather more end-use certificates, representing a larger percentage of its sales of the goods in issue. With respect to the persuasiveness of the end-use certificates, Entrelec, relying on a decision of the Federal Court,⁸ argued that end-use certificates constitute *prima facie* evidence of the use of the goods in issue and that, once produced, the burden reverts to the CBSA to disprove this evidence. Entrelec submitted that this approach is consistent with the decision of the Supreme Court of Canada in

8. See *The Queen v. Diachem of B.C. Ltd. et al.*, 77 DTC 5113 (Federal Court—Trial Division).

*Hickman Motors Ltd. v. Canada*⁹ where, in its view, the court stated that, in taxation matters, the initial onus of proof is met where an appellant makes out at least a *prima facie* case and that the onus then shifts to the Crown to rebut the *prima facie* case.

19. At the hearing, Entrelec addressed the CBSA's position that, because Entrelec did not provide information in the exact format that had been requested and for the vast majority of the goods in issue, it was not entitled to any refund of duties. According to Entrelec, it is clear that, based on the information provided, at least some of the goods in issue qualify for the benefits of Code 2101. Entrelec argued that, although the percentage of the goods in issue that qualify for the benefits of Code 2101 may not be much different from the 14 percent figure that the Tribunal found in *Entrelec 2000*, it should nonetheless be something.

20. The CBSA submitted that the goods in issue do not qualify for the benefits of Code 2101 because Entrelec has failed to provide sufficient evidence to demonstrate that the goods in issue were for use in process control apparatus of tariff item No. 9032.89.20. It submitted that the onus is on Entrelec to properly demonstrate the actual use of the goods in issue, which it has failed to do.

21. With respect to end-use certificates, the CBSA submitted that Entrelec has failed to establish that the end-use certificates that it has chosen to provide are representative of either its customer base or total sales with respect to the goods in issue. Moreover, it submitted that Entrelec has failed to provide evidence to address the possibility that the end-use certificates that it has submitted may be from distributors or wholesalers, whose customers may change the end use of the goods in issue to one to which Code 2101 does not apply.

22. Entrelec called Mr. Franco d'Itri as a witness. Mr. d'Itri is employed by ABB Canada, which purchased Entrelec in 2001.¹⁰ The Tribunal notes that this is approximately five years after the last importation of the goods in issue.

23. Entrelec filed end-use certificates in the form of letters from 11 of its customers.¹¹ Each letter indicates a percentage of the goods purchased from Entrelec that were used in process control apparatus and covers a time period that includes the time period during which the goods in issue were imported. According to Mr. d'Itri, Entrelec had many more customers throughout the time period during which the goods in issue were imported. Indeed, the sales data provided by Entrelec indicate that, in 1995, it had approximately 157 customers that purchased the goods in issue.¹² However, Mr. d'Itri indicated that the 11 customers that provided end-use certificates were simply the ones that were approached by Entrelec¹³ and had agreed to do so and were not necessarily representative of the totality of Entrelec's customers, for example by size of account or by type of purchase.¹⁴

24. Mr. d'Itri testified that at least 3, and possibly as many as 6,¹⁵ of the 11 customers that provided end-use certificates were actual end users of the goods in issue and, hence, would have had direct knowledge of the use of the goods in issue. The remaining customers were distributors and, hence, would

9. [1997] 2 S.C.R. 336.

10. *Transcript of Public Hearing*, 4 November 2009, at 5.

11. Tribunal Exhibit AP-2008-023-03A, tab 1.

12. *Ibid.* tab 4.

13. *Transcript of Public Hearing*, 4 November 2009, at 7, 14, 18.

14. *Ibid.* at 18.

15. When questioned by the Tribunal, Mr. d'Itri identified 3 of the 11 customers as end users (see *Transcript of Public Hearing*, 4 November 2009, at 13, 14). When questioned by Entrelec, Mr. d'Itri identified 6 of the 11 customers as end users (see *Transcript of Public Hearing*, 4 November 2009, at 23-28).

have had knowledge of the use of the goods in issue only to the extent of their knowledge of their customers' operations. The evidence did not indicate how the distributors determined the overall percentage of use of the goods in issue in process control apparatus, taking into account the percentage use of each of their customers.

25. Entelec also filed two tables that reported all sales of the goods in issue, by account, in 1995.¹⁶ The first table summarized sales by sales representative, and the second table summarized sales by region. Total sales of the goods in issue for 1995 were calculated at just over \$8.1 million. According to Mr. d'Itri, both tables were prepared using computer-generated management reports that ABB received from Entelec.¹⁷ No supporting source documents, such as invoices, were filed in evidence. In addition, Mr. d'Itri testified that he had not actually looked at the invoices or any other source documents on which these management reports were based and had no knowledge of the methodology employed in preparing the reports.¹⁸ Further, Mr. d'Itri testified that he had not examined any documentation concerning sales of the goods in issue other than for 1995.¹⁹

26. In addition, Entelec filed a spreadsheet prepared by Mr. d'Itri, which is based on the information contained in the tables mentioned above and which shows (1) the total amount of sales of the goods in issue made by Entelec in 1995 to each of the 11 customers that provided end-use certificates, (2) the percentage of those sales for which the goods in issue were used in process control apparatus, as reported in the end-use certificates, and (3) based on this percentage, a calculation of the amount of sales for which the goods in issue were used in process control apparatus.²⁰ According to the spreadsheet, the total amount of sales of the goods in issue made by Entelec to these 11 customers in 1995 was just under \$2.9 million,²¹ or approximately 35.5 percent of the total sales of the goods in issue for that year.

27. In the Tribunal's opinion, there are a number of deficiencies in the scope and quality of the evidence provided by Entelec. Because of these deficiencies, the evidence is insufficient to show the extent of actual use of the goods in issue in process control apparatus. This is true regardless of whether one considers the actual use of the goods generally, the actual use in any particular year or the actual use by any particular customer.

28. First, the evidence does not cover all the importations of the goods in issue, and it is unclear to what extent the evidence represents the importations as a whole, either generally, for a particular year or for a particular customer.

29. The evidence covers some of the sales of the goods in issue made in 1995. It is clear that sales in 1995 could not cover the goods in issue imported in 1996. They could cover the goods in issue imported in 1994 and/or 1995. However, since goods are not necessarily sold in the year in which they are imported, or within a fixed time period after importation, it is not clear how the 1995 sales would correlate with the goods in issue imported in 1994 and 1995.

16. Tribunal Exhibit AP-2008-023-03A, tabs 3, 4.

17. *Transcript of Public Hearing*, 4 November 2009, at 8, 12, 13, 19.

18. *Ibid.* at 13, 19, 20.

19. *Ibid.* at 17.

20. Tribunal Exhibit AP-2008-023-03A, tab 2.

21. This figure is slightly higher than that reported by Entelec, as it appears that Entelec inadvertently omitted to include the amount of sales made to 1 of the 11 customers when it calculated the total amount of sales made to the 11 customers.

30. In addition, the evidence concerning 1995 covers only 11 accounts, representing only a little more than a third of the sales of the goods in issue for that year. Mr. d'Itri testified that these 11 accounts were not necessarily representative of sales in 1995 as a whole.

31. Second, the Tribunal is not satisfied that the evidence that was provided is reliable.

32. No invoices or similar source documents from Entrelec's commercial records were filed in evidence. Entrelec filed evidence concerning sales that Mr. d'Itri indicated was based on management reports received by ABB from Entrelec. However, as indicated above, Mr. d'Itri had not actually looked at any of the source documents and had no knowledge of the methodology employed in preparing the management reports.

33. In addition, the Tribunal is not satisfied that much of the evidence in the end-use certificates is reliable. Mr. d'Itri testified that between 3 and 6 of the 11 customers that provided end-use certificates are end users and that the remaining 5 to 8 customers are distributors. Based on this testimony, between 75 and 86 percent²² of the sales covered by the end-use certificates were sales to distributors rather than end users, i.e. to a type of customer that would generally not be expected to have direct knowledge of the actual use of the goods in issue. While Mr. d'Itri may be correct in testifying that these distributors do know how their customers use their products, his evidence in this regard is second-hand information at best and relates to a period of time when Mr. d'Itri did not work for Entrelec (i.e. before Entrelec was purchased by ABB Canada).

34. In light of the foregoing, the Tribunal considers that the evidence does not indicate that any of the goods in issue were for use in process control apparatus of tariff item No. 9032.89.20. Therefore, the goods in issue do not qualify for the benefits of Code 2101.

DECISION

35. Accordingly, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

22. If 5 of the 11 customers are distributors, the percentage is 75. If 8 of the 11 customers are distributors, the percentage is 86. See footnote 14; *Transcript of Public Hearing*, 4 November 2009, at 13, 14, 23-28; Tribunal Exhibit AP-2008-023-03A, tab 2.