



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-058

9133-7048 Québec Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, October 6, 2011*

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IN THE MATTER OF an appeal heard on July 7, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated December 23, 2010, and January 4, 2011, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

9133-7048 QUÉBEC INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 7, 2011

Tribunal Member: Stephen A. Leach, Presiding Member

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David Rothstein

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by 9133-7048 Québec Inc. 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 23, 2010, and January 4, 2011, with respect to requests for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether certain women's sports brassieres, style No. Mannan 01/07, made of 95 percent cotton and 5 percent spandex (the goods in issue), allegedly produced by Mam Trading and imported by 9133-7048 Québec Inc. from Bangladesh, are entitled to preferential tariff treatment under the Market Access Initiative for least developed countries and, therefore, under the Least Developed Country Tariff (LDCT) pursuant to the *Customs Tariff*² and the *General Preferential Tariff and Least Developed Country Tariff Rules of Origin Regulations*.³

PROCEDURAL HISTORY

3. Between March 11, 2008, and May 8, 2009, 9133-7048 Québec Inc. imported the goods in issue from Bangladesh in various shipments and claimed the preferential tariff treatment under the LDCT at the time of importation.

4. By letter dated July 21, 2009, the CBSA advised 9133-7048 Québec Inc. that it was conducting an inspection of documents that supported the claims for preferential tariff treatment under the LDCT for the period from January 1 to December 31, 2008, pursuant to subsection 42(2) of the *Act*.

5. On October 8, 2009, pursuant to section 42.1 of the *Act*, the CBSA contacted Mam Trading by e-mail to inform it of the verification of origin that was being done concerning the goods in issue. The CBSA sent a verification questionnaire to Mam Trading and requested that it return it by October 15, 2009.

6. On October 14, 2009, the CBSA sent a follow-up e-mail to Mam Trading in an attempt to confirm receipt of the CBSA's e-mail of October 8, 2009, and as a reminder of the October 15, 2009, deadline for the return of the verification questionnaire.

7. By letter dated November 9, 2009, the CBSA wrote to 9133-7048 Québec Inc. to advise it that the verification that was underway could result in re-determinations pursuant to paragraph 59(1)(a) of the *Act* if the goods in issue were found not to qualify for the LDCT.

8. By letter dated November 9, 2009, to which it attached another copy of the verification questionnaire, the CBSA wrote to Mam Trading again. A further period of 30 days was given to provide a reply. The letter advised that the failure to provide the completed questionnaire by the date requested could result in the certificates of origin that were provided to 9133-7048 Québec Inc. being invalidated and the denial of the LDCT claimed for the goods in issue.

9. On November 10, 2009, the CBSA sent an e-mail to Mam Trading to inform it that it had sent it a verification questionnaire and to offer assistance and information in order to complete it. That same day, the CBSA advised 9133-7048 Québec Inc. by e-mail that a verification questionnaire had been sent to Mam Trading.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c 36.

3. S.O.R./98-34.

10. On November 23, 2009, the CBSA sent an e-mail to Mam Trading to inquire about its completion of the questionnaire. The CBSA reiterated its offer to provide assistance and information, and reminded Mam Trading of the December 10, 2009, deadline that it had fixed for the return of the questionnaire.

11. On December 22, 2009, the CBSA sent an e-mail to Mam Trading to inform it that the deadline for the return of the verification questionnaire had passed and that the claim for preferential tariff treatment under the LDCT for the goods in issue would be denied unless the requested information was provided by January 22, 2010. The CBSA reiterated this information in a letter to Mam Trading dated December 23, 2009.⁴

12. Mam Trading failed to respect the January 22, 2010, deadline. Accordingly, by letter dated January 28, 2010, that was sent by post, facsimile and e-mail, the CBSA issued a notice of denial of preferential tariff treatment under the LDCT, with respect to the goods in issue, to 9133-7048 Québec Inc. (copying Mam Trading). The letter advised 9133-7048 Québec Inc. of the further steps that it should take as a consequence of this decision.⁵

13. On January 28, 2010, Mam Trading wrote to the CBSA by e-mail as follows: “Thanks for your message. Unfortunately [I] am out of [the] country and did not receive your message earlier. Please note we shipped the goods to [C]anada what you are talking are made in [B]angladesh.” No documentation to support those assertions was provided nor was any of the information that was previously requested in the verification questionnaire.

14. On February 1, 2010, the CBSA acknowledged by e-mail the receipt of Mam Trading’s e-mail dated January 28, 2010. Among other things, this e-mail suggested that Mam Trading might be able to assist 9133-7048 Québec Inc. with documentation to file an appeal of the CBSA’s decision of December 23, 2009, pursuant to section 59 of the *Act*. Further correspondence dated February 2, 2010, is also on the record.

15. 9133-7048 Québec Inc. subsequently asked for a re-determination of the CBSA’s decision dated December 23, 2009. By letter dated November 19, 2010, the CBSA informed 9133-7048 Québec Inc. that it had reached a preliminary decision denying the request for re-determination.⁶ The CBSA issued final decisions to that effect on December 23, 2010, and January 4, 2011, pursuant to subsection 60(4) of the *Act*.⁷

16. On January 11, 2011, 9133-7048 Québec Inc. filed a notice of appeal of those decisions with the Tribunal pursuant to subsection 67(1) of the *Act*.

17. On July 5, 2011, the Tribunal requested that 9133-7048 Québec Inc. file a copy of the certificates of origin provided by Mam Trading, which were filed on July 6, 2011.⁸ At that time, the CBSA also filed a copy of a Memorandum of Understanding between Bangladesh and Canada dated December 31, 2002, and the *Verification of Origin (Non-Free Trade Partners), Tariff Classification and Value for Duty of Imported Goods Regulations*.⁹

4. Tribunal Exhibit AP-2010-058-09A, tab C at 70.

5. *Ibid.* at 72, 76.

6. Tribunal Exhibit AP-2010-058-01.

7. Tribunal Exhibit AP-2010-058-09A, tab C; Tribunal Exhibit AP-2010-058-01.

8. Tribunal Exhibit AP-2010-058-15.

9. S.O.R./98-45.

18. On July 7, 2011, the Tribunal held a public hearing in Ottawa, Ontario. The CBSA called Mr. Byron Fitzgerald, Manager, Litigation Section, CBSA, and Mr. Frederick Aboagye, Origin Auditor, Origin and Valuation Unit, CBSA, as witnesses. 9133-7048 Québec Inc. did not call any witnesses.

GOODS IN ISSUE

19. The goods in issue are described as women's sports brassieres made of 95 percent cotton and 5 percent spandex.

20. The following exhibits were filed by 9133-7048 Québec Inc.:¹⁰

Exhibit Number	Description
A-01	Sports bra, grey with pink piping
A-02	Sports bra, white with racer back
A-03	Sports bra, white, tube style
A-04	Sports bra, white, V-cut style

LEGAL FRAMEWORK

21. 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 decisions on the origin of goods, as is the case in this matter.

22. Canadian law provides criteria for determining whether goods are entitled to preferential tariff treatment, such as under the LDCT.

23. Subsection 24(1) of the *Customs Tariff* provides the general conditions that must be met in order for goods to be entitled to the benefit of a preferential tariff treatment and reads 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

- (a) proof of origin of the goods is given in accordance with the *Customs Act*; and
- (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), 49.01(8) or 49.5(8).

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 :

- a) leur origine est établie en conformité avec la *Loi sur les douanes*;
- b) elles bénéficient du traitement tarifaire accordé en conformité avec les règlements 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), 49.01(8) ou 49.5(8).

24. Therefore, in order for the goods in issue to be entitled to preferential tariff treatment under the LDCT, subsection 24(1) of the *Customs Tariff* requires that the two following conditions be met: (1) proof of origin of the goods is given in accordance with the *Act*; and (2) the goods are entitled to that tariff treatment in accordance with the applicable regulations or order.

10. Tribunal Exhibit AP-2010-058-15.

25. With respect to the first condition, subsection 35.1(1) of the *Act* requires that “. . . 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.”

26. In addition, subsection 35.1(5) of the *Act* provides as follows:

(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.

(5) Le traitement tarifaire préférentiel découlant d'un accord de libre-échange peut être refusé ou retiré à des marchandises pour lesquelles ce traitement est demandé dans le cas où leur importateur ou leur propriétaire, ou la personne tenue de justifier leur origine en application du présent article, ne se conforme pas à une disposition quelconque de la présente loi, du *Tarif des douanes* ou des règlements d'application de l'une ou l'autre de ces lois concernant l'application de ce traitement à ces marchandises.

27. In accordance with subsection 4(2) of the *Proof of Origin of Imported Goods Regulations*,¹¹ where the benefit of preferential treatment under the LDCT is claimed for goods, the importer or owner of the goods must furnish a certificate of origin for the goods, as proof of origin. The Tribunal notes that no form of a certificate of origin is prescribed under these regulations.

28. Subsection 2(2.4) of the *General Preferential Tariff and Least Developed Country Tariff Rules of Origin Regulations* states as follows:¹²

(2.4) Goods of tariff item Nos. set out in Parts C1 and C2 of the schedule originate in a least developed country if they are assembled in a least developed country from fabric cut in that country or in Canada, or from parts knit to shape, provided the fabric, or the parts knit to shape, are produced in

(a) any least developed country or Canada from yarns originating in a least developed country, a beneficiary country or Canada, provided the yarns or fabric do not undergo further processing outside a least developed country or Canada; or

(b) a beneficiary country from yarns originating in a least developed country, a beneficiary country or Canada, provided

(i) the yarns and fabric do not undergo further processing outside a least developed country, a beneficiary country or Canada, and

(ii) the value of any materials, including packing, that are used in the manufacture of the goods and that originate outside the least developed country in which the goods

(2.4) Sont des marchandises originaires d'un pays parmi les moins développés celles dont les numéros tarifaires figurent aux parties C1 et C2 de l'annexe et qui ont été confectionnées dans un tel pays à partir de tissu taillé dans ce pays ou au Canada, ou à partir de pièces façonnées, à la condition que le tissu ou les pièces façonnées soient produites :

a) soit dans un pays parmi les moins développés ou au Canada à partir de fils originaires d'un pays parmi les moins développés, d'un pays bénéficiaire ou du Canada, les fils et le tissu n'ayant pas fait l'objet d'un traitement supplémentaire à l'extérieur d'un pays parmi les moins développés ou du Canada;

b) soit dans un pays bénéficiaire à partir de fils originaires d'un pays parmi les moins développés, d'un pays bénéficiaire ou du Canada, si les conditions suivantes sont réunies :

(i) les fils ou le tissu ne font pas l'objet d'un traitement supplémentaire à l'extérieur d'un pays parmi les moins développés, d'un pays

11. S.O.R./98-52.

12. S.O.R./98-34 [*Preferential and LDC Rules of Origin Regulations*].

- are assembled is no more than 75% of the ex-factory price of the goods as packed for shipment to Canada.
- bénéficiaire ou du Canada;
(ii) la valeur des matières — y compris l'emballage — qui ont été utilisées dans la fabrication des marchandises, et qui sont originaires de l'extérieur du pays parmi les moins développés où les marchandises ont été confectionnées, représente au plus 75 % du prix ex-usine de ces marchandises, emballées et prêtes à être expédiées au Canada.
29. Subsection 42.1(1) of the *Act* provides for the verification of origin as follows:
- 42.1(1)** Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, or any person, or any person within a class of persons, designated by the President to act on behalf of such an officer, may, subject to the prescribed conditions,
- (a) conduct a verification of origin of goods for which preferential tariff treatment under a free trade agreement, other than CEFTA, is claimed
- (i) by entering any prescribed premises or place at any reasonable time, or
- (ii) in the prescribed manner; or
- ...
- 42.1(1)** L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article ou la personne désignée par le président, individuellement ou au titre de son appartenance à une catégorie, pour agir pour le compte d'un tel agent peut, sous réserve des conditions réglementaires :
- a) vérifier l'origine des marchandises faisant l'objet d'une demande de traitement tarifaire préférentiel découlant d'un accord de libre-échange autre que l'ALÉCA :
- i) soit en pénétrant, à toute heure raisonnable, dans un lieu faisant partie d'une catégorie réglementaire,
- ii) soit de toute autre manière prévue par règlement;
- [...]
30. Subsection 2(2) of the *Verification of Origin (Non-Free Trade Partners), Tariff Classification and Value for Duty of Imported Goods Regulations* provides as follows:
- (2) A verification in respect of goods of tariff item numbers set out in the schedule to the *General Preferential Tariff and Least Developed Country Tariff Rules of Origin Regulations* for which the benefit of the Least Developed Country Tariff is claimed may be conducted in a manner set out in one or more of the following paragraphs:
- (a) a review of a verification questionnaire completed by
- (i) the importer or owner of the goods,
- (ii) the person who accounted for the goods under subsection 32(1), (3) or (5) of the Act,
- (iii) the exporter or producer of the goods, or
- (iv) a producer or supplier of a material that is used in the production of the goods;
- (b) a review of a written response received from a person referred to in paragraph (a) to a verification letter;
- (2) La vérification des marchandises dont le numéro tarifaire figure à l'annexe du *Règlement sur les règles d'origine (tarif de préférence général et tarif des pays les moins développés)* et pour lesquelles le bénéfice du tarif des pays les moins développés est demandé se fait selon l'une ou plusieurs des modalités suivantes :
- a) l'examen d'un questionnaire de vérification rempli par l'une des personnes suivantes :
- (i) l'importateur ou le propriétaire des marchandises,
- (ii) la personne qui fait une déclaration en détail des marchandises aux termes des paragraphes 32(1), (3) ou (5) de la Loi,
- (iii) l'exportateur ou le producteur des marchandises,
- (iv) le producteur ou le fournisseur de matières utilisées dans la production des marchandises;
- b) l'examen de la réponse écrite de l'une des personnes visées à l'alinéa a) à une lettre de vérification;

(c) a review of any record or information or an inspection of any goods or component of goods received from a person referred to in paragraph (a);

c) l'examen de documents, renseignements, marchandises ou composants de marchandises reçus de l'une des personnes visées à l'alinéa a);
[...]

...

ANALYSIS

31. The parties do not dispute the validity of the certificates of origin in this matter *per se*. Rather, the sole issue is whether the CBSA was correct in denying 9133-7048 Québec Inc.'s claim for preferential tariff treatment under the LDCT after an unsuccessful verification process. The Tribunal notes that the CBSA was unable to obtain the information necessary to verify the origin of the goods in issue claimed by 9133-7048 Québec Inc. and neither was the Tribunal. Accordingly, the Tribunal finds, as did the CBSA, that the goods in issue do not qualify for preferential tariff treatment under the LDCT.

32. The steps that were taken during the verification process described above are not contested. The CBSA made several attempts, all unsuccessful, to obtain the required information from 9133-7048 Québec Inc. and/or Mam Trading. Throughout, the CBSA gave warnings as to the possible consequences of non-compliance. It appears that, to the extent of its ability, 9133-7048 Québec Inc. always cooperated fully with the CBSA. But 9133-7048 Québec Inc. found itself in the situation of not being able to count on the cooperation of its former supplier.

33. Mr. Rothstein testified that he had market intelligence to the effect that Mam Trading had ceased to conduct business. The Tribunal has no reason to doubt Mr. Rothstein's testimony. However, the record also shows that a known representative of Mam Trading acknowledged e-mail correspondence, but only after the CBSA had denied preferential tariff treatment under the LDCT for the goods in issue.

34. Subsection 42.1(2) of the *Act* provides the CBSA with the legislative authority to withdraw the claimed preferential tariff treatment if the CBSA does not have enough information, including proof of origin, to determine whether the necessary requirements have been met.¹³ Ultimately, no evidence or documentation to support the origin of the goods claimed by 9133-7048 Québec Inc. was ever provided to the CBSA. The absence of the requisite information led to the withdrawal of preferential tariff treatment under the LDCT in accordance with subsection 42.1(2).

35. From the evidence on the record, it appears that, at the time of the importation, 9133-7048 Québec Inc. did not seek to obtain documentation to verify the origin of its purchase from Mam Trading, but relied entirely on the certificates of origin that Mam Trading provided to it, presumably on the faith of the assurance given by Mam Trading. The Tribunal understands that this may be a common practice in the normal course of business, but notes that it may also have unintended consequences, such as in this case.

36. Indeed, in this instance, through no apparent fault of its own, other than that of having trusted its supplier, 9133-7048 Québec Inc. is unable to back up the origin claim that it made when relying on the certificates of origin from its now uncooperative supplier. To be sure, this can mean only three things: (1) Mam Trading cannot assist 9133-7048 Québec Inc. because it has ceased to do business; (2) Mam Trading is simply unwilling to assist 9133-7048 Québec Inc.; or (3) Mam Trading is unable to assist 9133-7048 Québec Inc. because it no longer has, and may never have had, any way of backing up the origin that it had indicated on the certificates of origin.

13. Tribunal Exhibit AP-2010-058-09A, tabs C, E; Tribunal Exhibit AP-2010-058-16.

37. 9133-7048 Québec Inc. admitted that it cannot independently obtain proof of origin of the yarns and fabrics used in the production of the goods in issue as required by subsection 2(2.4) of the *Preferential and LDC Rules of Origin Regulations*,¹⁴ and therefore is unable to meet the requirement of paragraph 24 (1)(b) of the *Customs Tariff* because of the lack of cooperation from Mam Trading. 9133-7048 Québec Inc. asked the Tribunal to view this as a “unique circumstance” and to take its good faith into consideration.¹⁵

38. As a proxy for documented evidence of the origin of the goods in issue, Mr. Rothstein asked the Tribunal to accept his experience in and knowledge of the industry,¹⁶ and therefore to accept that at least 25 percent of the value of the materials used in the manufacture of the goods in issue originated in Bangladesh, in compliance with subparagraph 2(2.4)(b)(ii) of the *Preferential and LDC Rules of Origin Regulations*.¹⁷ Mr. Fitzgerald accepted that proposition, but recalled that it is the origin of the fabrics that make up the goods in issue and not the value of the materials that entered into their manufacture that is determinative of this appeal.¹⁸

39. The Tribunal is ready to accept Mr. Rothstein’s evidence that the goods in issue were assembled in Bangladesh and that at least 25 percent of the value of the materials used in the manufacture of the goods in issue originated in Bangladesh. Ultimately, however, this information is not sufficient for the appeal to be allowed. Indeed, 9133-7048 Québec Inc. was unable to provide the Tribunal with proof of the origin of the yarns or fabrics used in the manufacture of the goods in issue, as required by paragraph 2(2.4)(a) and subparagraph 2(2.4)(b)(i) of the *Preferential and LDC Rules of Origin Regulations*. Accordingly, their origin is unknown, and that is sufficient for the Tribunal to dismiss the appeal.

40. By asking the Tribunal to take into account the purportedly “unique circumstance” in which 9133-7048 Québec Inc. found itself, 9133-7048 Québec Inc. is effectively asking the Tribunal to grant equitable relief and, therefore, to ignore explicit requirements of the *Customs Tariff* and various regulations adopted by Parliament that deal with proof of origin. That is a discretion that the Tribunal does not have. Indeed, however unintended the situation in which 9133-7048 Québec Inc. finds itself, the Tribunal does not have the power to grant equitable relief. Rather, Parliament has entrusted the Tribunal with applying the *Act*, the *Customs Tariff* and various customs-related regulations as they were adopted.

DECISION

41. The appeal is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

14. *Transcript of Public Hearing*, 7 July 2011, at 13.

15. *Ibid.* at 15; Tribunal Exhibit AP-2010-058-07; *Transcript of Public Hearing*, 7 July 2011, at 66-67.

16. *Transcript of Public Hearing*, 7 July 2011, at 14.

17. *Ibid.* at 13, 68.

18. *Ibid.* at 11, 46-47.