Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2012-070

Cargill Inc.

v.

President of the Canada Border Services Agency

Order and reasons issued
Thursday, September 5, 2013

Canada

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IN THE MATTER OF an appeal filed by Cargill Inc. on February 28, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a motion filed by the President of the Canada Border Services Agency on May 31, 2013, pursuant to rules 3, 5 and 24 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, for an order dismissing the appeal and written representations filed by Cargill Inc. on July 4, 2013, and the President of the Canada Border Services Agency on July 18, 2013.

BETWEEN

CARGILL INC. **Appellant**

AND

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

ORDER

The motion is denied. The hearing of this appeal will be held at a date to be scheduled.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND AND ISSUE

1. This is a preliminary motion in an appeal filed by Cargill Inc. (Cargill) on February 28, 2013, pursuant to subsection 67(1) of the *Customs Act*,[1] from a decision dated February 4, 2013, made by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) concerning the origin of certain refined, bleached and deodorized palm stearin oil (the goods in issue) exported by Cargill.

2. On May 31, 2013, the CBSA filed a motion with the Canadian International Trade Tribunal (the Tribunal), pursuant to rules 3, 5 and 24 of the *Canadian International Trade Tribunal Rules*,[2] for an order dismissing the appeal on the grounds that it is plain and obvious that the appeal has no chance of success.

3. On July 4, 2013, Cargill filed a response to the CBSA's motion.

4. On July 18, 2013, the CBSA filed a reply to Cargill's response to the CBSA's motion.

POSITIONS OF PARTIES

5. The CBSA submitted that the Tribunal has jurisdiction and authority, pursuant to subsection 17(2) of the *Canadian International Trade Tribunal Act*,[3] and rules 3, 5 and 24 of the *Rules*, to grant the motion. The CBSA referred to the Tribunal's analysis in *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency*,[4] in which it held that in order to dismiss an appeal it must be "... plain and obvious ..."[5] that the pleadings have no chance of success. In addition, the CBSA noted the Tribunal's previous finding in *Newman's Valve Limited v. Deputy M.N.R.*,[6] in which the Tribunal held that "... an impossible appeal [should not be] allowed to proceed down the path of expensive and futile litigation."[7]

6. The CBSA contended that Cargill is actually appealing the CBSA's re-determination, in which the CBSA held that the goods in issue do not qualify as originating in a *North American Free Trade Agreement*[8] country. However, the CBSA argued that Cargill has repeatedly failed to provide any evidence to establish that the goods actually originate in a *NAFTA* country, pursuant to, *inter alia*, the *Act*, the *NAFTA Rules of Origin Regulations*[9] and the *Proof of Origin of Imported Goods Regulations*.[10] According to the CBSA, Cargill is essentially asking the Tribunal to ignore the legislative scheme for determining origin and to declare that the goods in issue are entitled to *NAFTA* preferential tariff treatment without proving that they actually originate in a *NAFTA* country. As a result, the CBSA submitted that Cargill's appeal has no chance of success and should therefore be dismissed.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.O.R./91-499 [*Rules*].
3. R.S.C. 1985 (4th Supp.) c. 47.
4. (6 April 2011), AP-2010-005 (CITT).
5. *Ibid.* at para. 5.
6. (10 October 1997), AP-96-121 (CITT).
7. *Ibid.* at 3.
8. *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*].
9. S.O.R./94-14.
10. S.O.R./98-52.

7. Cargill asserted that proving the origin of the goods in issue is not the issue in this appeal. Rather, Cargill insisted that the issue is the validity of the decision made by the CBSA on February 10, 2010, pursuant to subsection 59(1) of the *Act*. In particular, Cargill argued that the CBSA improperly used an advance ruling concerning the tariff classification and origin of the goods in issue, which it had previously made on March 23, 2009, as the basis for its decision under subsection 59(1). Cargill submitted that, in doing so, the CBSA acted outside of its authority. In support of its position, Cargill argued that, as a matter of law, advance rulings can only apply on a going forward basis and cannot be used as a foundation to re-determine the origin of goods imported prior to the effective date of those advance rulings. As such, Cargill Inc. asserted that the CBSA improperly applied the advance ruling to the goods in issue, which were imported prior to the March 23, 2009, effective date of the advance ruling.

8. Therefore, Cargill is asking the Tribunal to declare that the CBSA's decision made pursuant to subsection 59(1) of the *Act* in this matter is invalid. According to Cargill, such a finding would render the decision made pursuant to subsection 60(4) also invalid, which would mean that the origin and tariff treatment of the goods in issue should be deemed to be as declared by the importer at the time of importation.

9. Since the question of whether or not the decision under subsection 59(1) of the *Act* was validly made by the CBSA is a live issue that can and must be determined by the Tribunal, Cargill argued that it is not "plain and obvious" that the appeal is bereft of merit, particularly if the facts, as alleged by Cargill, are accepted as true. In this regard, Cargill submitted that, at this preliminary stage, the Tribunal must accept its allegations of fact. Thus, Cargill maintained that the appeal cannot be dismissed on a preliminary motion.

ANALYSIS

10. In *GFT Mode Canada Inc. v. Deputy M.N.R.*,[11] the Tribunal held that it has jurisdiction, on a preliminary motion, to dismiss an appeal, but that it will only do so when it is ". . . 'plain and obvious' or 'beyond doubt' . . ."[12] that the pleadings disclose no reasonable cause of action. As it noted in that case, the Tribunal considers this to be a very high threshold.

11. In reaching its conclusion in *GFT Mode Canada*, the Tribunal indicated that section 67 of the *Act* does not give parties an unrestricted right to a hearing.[13] Furthermore, the Tribunal reiterated that it has ". . . discretion to determine the scope and nature of a hearing, including whether, in these very unique cases, a hearing should be held at all."[14] The Tribunal held that, on a preliminary motion, it may be possible to determine that legal arguments made by one or more of the parties have no chance of success and that, where that is the case and there are no facts in dispute, the Tribunal may decide that there is no case to be heard.[15] The Tribunal further noted however that such circumstances are rare. The issue is whether they are present in this appeal.

12. The Tribunal is of the view that the present case does not meet the standard outlined above.

13. First, the Tribunal notes that the CBSA contests certain key facts relied upon by Cargill in support of this appeal. Indeed, the CBSA disputes that it used the conclusion of its advance ruling dated March 23, 2009, to re-determine the origin of the goods in issue. In fact, a review of the information on the

11. (18 May 2000), AP-96-046 and AP-96-074 (CITT) [*GFT Mode Canada*].
12. *Ibid.* at 2.
13. *Ibid.* at 2.
14. *Ibid.* at 2-3.
15. *Ibid.* at 3.

record to date reveals that the facts that constitute the legal foundation of the decision made on February 10, 2010, by the CBSA pursuant to subsection 59(1) of the *Act* are unclear to the Tribunal. The Tribunal considers that it is only with the benefit of a hearing that it will be able to reach a conclusion regarding the facts that are in dispute.

14. Second, the Tribunal has previously found that its jurisdiction under section 67 of the *Act* effectively enables it to examine and, if necessary, revisit the validity of decisions under section 59, which underpin any decision made under section 60 from which an appeal to the Tribunal is directly made.[16] Accordingly, in principle, the Tribunal has the authority to issue the finding sought by Cargill. Whether it should do so in the circumstances of this case is the crux of this appeal.

15. In its motion record, the CBSA did not make detailed submissions rebutting Cargill's substantive legal argument concerning the invalidity of the relevant decision under section 59 of the *Act*, nor has the CBSA adequately addressed the implications of the Tribunal potentially finding that the decision under section 59 regarding the origin and tariff treatment of the goods in issue was not validly made. In that event, the Tribunal's preliminary view is that the validity of the subsequent decision made by the CBSA under section 60, which is the subject of this appeal, would become a debatable matter, as argued by Cargill. On balance, the Tribunal is not prepared, at this preliminary stage, to find that Cargill's position does not disclose a reasonable cause of action or is completely devoid of merit.

16. Therefore, the Tribunal has not been convinced that Cargill's position has no chance of success and finds that it would be inappropriate to dismiss the appeal on this preliminary motion. By holding a hearing, the Tribunal maintains its ability to consider fully the positions of the parties in order to arrive at the proper decision.

CONCLUSION

17. For the foregoing reasons, the Tribunal finds that it is not "plain and obvious" or "beyond doubt" that Cargill cannot succeed. Therefore, the motion is denied.

DECISION

18. The motion is denied. The hearing of this appeal will be held at a date to be scheduled.

Serge Fréchette
Serge Fréchette
Presiding Member

16. *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT).