



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2010-005

HBC Imports c/o Zellers Inc.

v.

President of the Canada Border
Services Agency

*Order issued
Friday, November 19, 2010*

*Reasons issued
Wednesday, December 22, 2010*

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IN THE MATTER OF an appeal filed by HBC Imports c/o Zellers Inc. on May 7, 2010, 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 HBC Imports c/o Zellers Inc. on October 27, 2010, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, and written representations filed by the President of the Canada Border Services Agency on November 5, 2010, and HBC Imports c/o Zellers Inc. on November 12, 2010, for an order dismissing the pleadings of the President of the Canada Border Services Agency and allowing the appeal.

BETWEEN

HBC IMPORTS C/O ZELLERS 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, as scheduled, on December 7, 2010, at 9:30 a.m.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will follow at a later date.

STATEMENT OF REASONS

BACKGROUND AND ISSUE

1. This is a preliminary motion in an appeal filed by HBC Imports c/o Zellers Inc. (HBC) on May 7, 2010, pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision dated February 9, 2010, made by the President of the Canada Border Services Agency (CBSA) regarding the tariff classification of imported products known as “Pop-Up Hampers” (the goods in issue).
2. On October 27, 2010, HBC filed a motion with the Canadian International Trade Tribunal (the Tribunal), pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*,² for an order dismissing the pleadings of the CBSA and allowing the appeal.
3. On November 5, 2010, the CBSA filed a response to HBC’s motion.
4. On November 12, 2010, HBC filed a reply to the CBSA’s response to HBC’s motion.

POSITIONS OF THE PARTIES

5. HBC submitted that the Tribunal has jurisdiction and authority, pursuant to subsection 17(2) of the *Canadian International Trade Tribunal Act*³ and rule 5, paragraph 18(1)(f) and rule 24 of the *Rules*, to grant the motion. HBC relied in part on the Tribunal’s procedural decision in *GFT Mode Canada Inc. v. Deputy M.N.R.*,⁴ in which the Tribunal determined that it has jurisdiction, on a preliminary motion, to strike out pleadings and dismiss an appeal when it is “plain and obvious” or “beyond doubt” that the pleadings disclose no reasonable cause of action.⁵
6. HBC submitted that the conditions outlined in *GFT Mode Canada* have been met in the present appeal. In its submissions, HBC argued that the facts in this case are not in dispute and that the CBSA has no chance of success in the appeal. HBC further submitted that, when one party has no chance of success, an appeal should be allowed on a preliminary motion.⁶
7. The CBSA did not dispute the Tribunal’s jurisdiction to strike out pleadings or to dismiss an appeal on a preliminary motion, but argued that the terms “plain and obvious” or “beyond doubt” create a very high threshold that was not met in this case. The CBSA advised the Tribunal to adopt a cautious approach to the use of preliminary motions to dispose of appeals. The CBSA made reference to subsection 67(2) of the *Act* which states that the Tribunal shall provide for a hearing.⁷
8. The CBSA further argued that, by bringing this motion, HBC was asking the Tribunal to make a premature determination on the questions that are central to the appeal. The CBSA noted that, although the material facts are not in dispute, the parties do not agree on the appropriate application of the *General Rules*

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. (18 May 2000), AP-96-046 and AP-96-074 [*GFT Mode Canada*].

5. Tribunal Exhibit AP-2010-005-08A at paras. 2-3.

6. *Ibid.* at paras. 4-7.

7. Tribunal Exhibit AP-2010-005-10A at paras. 5-6.

for the Interpretation of the Harmonized System.⁸ The CBSA suggested that the two approaches to the *General Rules* must be fully considered by the Tribunal in order to arrive at the appropriate tariff classification.⁹

ANALYSIS

9. In *GFT Mode Canada*, the Tribunal held that it has jurisdiction, on a preliminary motion, to strike out pleadings and dismiss an appeal but that it will only do so when it is “plain and obvious” or “beyond doubt” that the pleadings disclose no reasonable cause of action. The Tribunal considers this to be a very high threshold.

10. 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, even when one is unnecessary.¹⁰ 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.”¹¹ The Tribunal held that it is possible to determine, on a preliminary motion, 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.¹² However, the Tribunal noted that such circumstances are rare.

11. In the present motion, HBC is in effect asking the Tribunal to make a determination in respect of the tariff classification of goods without the benefit of a hearing and without considering the CBSA’s arguments. The present case does not meet the standard outlined above.

12. The Tribunal is of the view that the present case is not one in which the outcome is “plain and obvious” or “beyond doubt”. The Tribunal has not been convinced that the CBSA’s position has no chance of success, and the proper tariff classification of the goods has not been conclusively established by HBC.

13. By holding the hearing as scheduled, the Tribunal maintains its ability to consider fully the positions of the parties and the applicability of the relevant tariff classification provisions in order to arrive at the proper tariff classification of the goods in issue.

CONCLUSION

14. For the foregoing reasons, the Tribunal finds that it cannot allow the appeal on this preliminary motion.

DECISION

15. The motion is denied. The hearing of this appeal will be held, as scheduled, on December 7, 2010, at 9:30 a.m.

Diane Vincent
Diane Vincent
Presiding Member

8. S.C. 1997, c. 36, schedule [*General Rules*].

9. Tribunal Exhibit AP-2010-005-10A at paras. 1-2.

10. *GFT Mode Canada* at 2.

11. *Ibid.* at 2-3.

12. *Ibid.* at 3.