Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-035

Engineered Floors, LLC

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, July 10, 2018

Canada

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IN THE MATTER OF an appeal heard on May 1, 2018, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated September 12, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ENGINEERED FLOORS, LLC **Appellant**

AND

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

DECISION

The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 1, 2018
Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Peter Jarosz, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representative**
Engineered Floors, LLC	Sydney Martin

Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

INTRODUCTION

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) made on September 12, 2017, pursuant to subsection 60(4), which was an advance ruling regarding the origin respecting certain machine-tufted carpets to be exported by Engineered Floors, LLC (EFL).

2. The issue in this appeal is whether certain carpets produced by EFL and exported to Canada (the goods in issue) are entitled to preferential tariff treatment, in particular the United States Tariff (UST) established under the *North American Free Trade Agreement*[2] (*NAFTA*), pursuant to the schedule to the *Customs Tariff*.[3]

3. EFL is a manufacturer of carpets, located in Dalton, Georgia. The goods in issue are carpets, composed of a surface of machine-tufted polyester fibre (tufted surface fabric), with a primary backing of polypropylene yarn and a secondary backing of polypropylene yarn. (Both backings are subsequently coated with latex composite.) The tufted surface fabric is manufactured by EFL in the U.S. but the backings are purchased outside of the *NAFTA* countries.

4. The CBSA issued a final decision on September 12, 2017, pursuant to subsection 60(4) of the *Act*, with respect to the dispute filed as to the original advance ruling. EFL was thereby informed that the goods in issue did not qualify for UST treatment.

5. On October 16, 2017, EFL filed a notice of appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

6. With agreement of both parties, the Tribunal conducted the appeal through a file hearing held on May 1, 2018.

LEGAL FRAMEWORK

7. The applicable rule of origin for the goods in issue is contained in subsection 4(2) of the *NAFTA Rules of Origin Regulations* (the *Regulations*), which provides as follows:

> **(2)** A good originates in the territory of a NAFTA country where
>
> > **(a)** *each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification* as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of these Regulations;[4]
> >
> > . . .
>
> [Emphasis added]

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*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, online: Department of Foreign Affairs, Trade and Development <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng> (entered into force 1 January 1994).
3. S.C. 1997, c. 36.
4. The relevant provisions of the *NAFTA Rules of Origin Regulations* (SOR/94-14) and the *Customs Tariff* are set out in the appendix to these reasons.

8. Schedule I of the *Regulations* establishes specific rules of origin to permit certain non-originating materials to be used in the manufacture of finished goods and for the final goods to be then considered originating in the territory of a NAFTA country.

9. The specific rule of origin for the goods in issue is that any non-originating components used in the production of the goods in issue (it is undisputed that the carpets are classified in heading No. 57.03) must meet the following tariff shift requirements:

Chapter 57	**Carpets and Other Textile Floor Coverings**
57.01-57.05	A change to headings 57.01 through 57.05 from any other chapter, except from headings 51.06 through 51.13, 52.04 through 52.12, 53.08 or 53.11, Chapter 54, or headings 55.08 through 55.16.

10. In other words, non-originating components of carpets cannot be classified in Chapters 54 or 57 or in heading Nos. 51.06 through 51.13, 52.04 through 52.12, 53.08 or 53.11, or heading Nos. 55.08 through 55.16, in order for the carpets to be considered originating in the territory of a *NAFTA* country.

11. As is the case with the vast majority of rules of origin, the origin of imported goods depends on the classification of their components. In the present appeal, it is undisputed that the appropriate tariff headings for classification of the backings are 54.07 and 40.02 for the latex composite.

POSITIONS OF PARTIES

12. EFL contests the decision as to tariff treatment to be accorded to the goods in issue. EFL stated that the carpet backings are not subject to the tariff shift requirements of the specific rule of origin, but only the surface of the carpet is subject to these requirements; essentially, EFL argued that the *Regulations* (specifically, the *de minimis* rule applicable to textile goods) permit the non-originating status of the backings to be disregarded and, therefore, that the goods in issue would then be considered originating under *NAFTA*.

13. The CBSA's position is captured in a portion of its decision which stated as follows:

> Although the weight of the secondary backing is 2.4% of the finished goods, the *de minimis* provision does not apply to fabric. This fabric must be made of originating materials, in order for the finished goods to qualify.
>
> As the backings do not meet the requirements of the specific rule of origin for the finished goods, it is determined that the Marvelous (EF506) carpet, style 1450 does not qualify for NAFTA and is not entitled to the NAFTA preferential tariff treatment.

14. In its brief, the CBSA submitted that the backings are not yarns or fibres and that the *de minimis* provision does not apply. The CBSA pointed out that EFL's interpretation is not supported by any provision of the *Regulations*, including any chapter notes of the schedule to the *Customs Tariff*.

15. In its reply brief, EFL argued again that the more limited *de minimis* provision applies to goods of Chapter 57. EFL submitted that the chapter notes do not serve to limit the applicability of the *de minimis* provision for textile goods. EFL maintains that the goods in issue qualify for *NAFTA* treatment, specifically the UST.

TRIBUNAL'S ANALYSIS

16. As set out above, both of the secondary backings are classified in tariff heading No. 54.07 and originate outside a *NAFTA* country.

17. Chapter 54 is one of the chapters excluded by the specific rule of origin for heading No. 57.03; therefore, goods made with either non-originating component cannot meet the requirements of the specific rules of origin for the goods in issue. For this reason, the Tribunal must examine whether origin is conferred on the final goods through the *de minimis* rule, as advanced by EFL.

The *De Minimis* Treatment of Textile Goods under *NAFTA*

18. The general *de minimis* rule contained in subsection 5(1) of the *Regulations* expressly does not apply to textile goods.[5]

19. However, as indicated in subsection 5(6) of the *Regulations*, there is a specific and more limited provision for *de minimis* non-originating content in textile goods, i.e. goods of Chapters 50 through 63. This provision states that such goods shall be considered to originate in the territory of a *NAFTA* country if the total weight of the non-originating *fibres or yarns* does not exceed seven percent of the total weight of the component of the goods that is determinative of the tariff classification of the goods (the determinative component).

20. Contrary to the arguments of EFL, the above provision does not address in any way the originating status of any components other than the determinative component, nor does it permit the origin of these other components to be disregarded when determining the origin of the final good.

21. The provision merely permits non-originating fibres or yarns to be used in one specific component of textile goods, i.e. the determinative component. This provision is not applicable to the facts of this case as no such non-originating yarn or fibre is used in the making of the tufted surface fabric even if it is considered the determinative component (as agreed upon by the parties).[6]

22. EFL submitted two U.S. customs rulings to support its position that the above provision means that the origin of other components can be disregarded. The Tribunal has stated previously that it is not bound by

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5. Paragraph 5(4)(m) of the *Regulations*.
6. Exhibit AP-2017-035-07A at paras. 30-33, Vol. 1; Exhibit AP-2017-035-18 at 1-2, Vol. 1A. It is not necessary to decide the issue in this appeal but, as an aside, the Tribunal notes that there are three possible interpretations of the provision contained in subsection 5(6) of the *Regulations*:
   - there must always be one component identified for the purposes of this provision. This is implied by the application of the identifying rule in subsection 5(7), which appears to be a means of choosing only one component as determinative (either by the "essential character" or "last in numerical order" or "most akin" rule);
   - in some cases, no single component of the goods can be found to "determine" the good's classification, and the *de minimis* provision is applied to all components. In *Maples Industries, Inc. v. President of the Canada Border Services Agency* (18 July 2016), AP-2014-009 (CITT), the Tribunal noted that the appellant and the CBSA agreed on this interpretation – however, resolving these competing interpretations was not necessary for a disposition of the appeal;
   - alternatively, that if there is no component that determines the good's classification, the *de minimis* provision is not applicable to any components.

   In most cases, the Tribunal envisages that the first interpretation will be most consistent with the wording of the provision. However, the facts of each case may dictate an alternative interpretation.

such rulings, as is the case with rulings issued by the CBSA.[7] The Tribunal is not bound by rulings of administrative agencies, especially ones interpreting non-Canadian implementing legislation, but more importantly it is not convinced of their relevance and support for EFL's position on the facts of this case.

23. In particular, the Tribunal notes that both of the U.S. customs rulings relied upon deal with goods of Chapters 63 and 62 (fabric-covered hangers and men's trousers, respectively) for which the relevant U.S.-specific rules of origin are different than for goods of Chapter 57, such as the goods in issue.

24. Specifically, the U.S. Harmonized Tariff Schedule (HTS) General Notes to the *NAFTA Rules of Origin*, Chapter 62, Rule 1, and Chapter 63, Rule 3, contain the type of provision relied upon by the appellant, which permits the origin of certain components to be disregarded. The *Regulations* also contains such provisions for various goods of Chapters 62 and 63. For example, Chapter 63 contains the following note:

> Note: For purposes of determining the origin of a good of this Chapter, *the rule applicable to that good shall only apply to the component that determines the tariff classification of the good* and such component must satisfy the tariff change requirements set out in the rule for that good.
>
> [Emphasis and underlining added]

25. The U.S. HTS General Notes to Chapter 57 do not contain the type of provisions relied on by EFL; the *Regulations* similarly do not contain such provisions, either of general application or regarding goods of Chapter 57 specifically. Therefore, the interpretation advanced by EFL is not supported by law.

Other Issues

26. The Tribunal was not presented with any argument or given evidence of a self-produced/intermediate material designation in this case; the use of this provision was not claimed by EFL.

SUMMARY

27. Since the secondary backings are non-originating and do not satisfy the tariff shift requirement of the specific rule of origin, the goods in issue do not qualify for UST treatment.

DECISION

28. The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

7. *Liteline Corporation v. President of the Canada Border Services Agency* (1 February 2016), AP-2014-029 (CITT) at para. 43.

APPENDIX

NAFTA Rules of Origin Regulations

PART I

Definitions and Interpretation

2 (1) For purposes of these Regulations,

. . .

non-originating good means a good that does not qualify as originating under these Regulations; . . .

non-originating material means a material that does not qualify as originating under these Regulations; . . .

. . .

originating good means a good that qualifies as originating under these Regulations; . . .

originating material means a material that qualifies as originating under these Regulations; . . .

. . .

self-produced material means a material that is produced by the producer of a good and used in the production of that good; . . .

. . .

(4) Where an example, referred to as an "Example", is set out in these Regulations, the example is for purposes of illustrating the application of a provision, and where there is any inconsistency between the example and the provision, the provision prevails to the extent of the inconsistency.

. . .

PART II

Originating Goods

General

. . .

4 (2) A good originates in the territory of a NAFTA country where

(a) each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of these Regulations;

. . .

(8) For purposes of determining whether non-originating materials undergo an applicable change in tariff classification, a self-produced material may, at the choice of the producer of that material, be considered as a material used in the production of a good into which the self-produced material is incorporated.

. . .

De Minimis

5 (1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of all non-originating materials that are used in the

production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven per cent . . .

. . .

(4) Subsections (1) and (2) do not apply to

. . .

(m) a non-originating material that is used in the production of a good of any of Chapters 50 through 63.

. . .

(6) A good of any of Chapters 50 through 63, that does not originate in the territory of a NAFTA country because certain fibres or yarns that are used in the production of the component of the good that determines the tariff classification of the good do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries, shall be considered to originate in the territory of a NAFTA country if

(a) the total weight of all those fibres or yarns is not more than seven per cent of the total weight of that component; and

(b) the good satisfies all other applicable requirements of these Regulations.

(7) For purposes of subsection (6),

(a) the component of a good that determines the tariff classification of that good shall be identified in accordance with the first of the following General Rules for the Interpretation of the Harmonized System under which the identification can be determined, namely, Rule 3(b), Rule 3(c) and Rule 4; and

(b) where the component of the good that determines the tariff classification of the good is a blend of two or more yarns or fibres, all yarns and fibres used in the production of the component shall be taken into account in determining the weight of fibres and yarns in that component.

. . .

Example 6: subsections 5(6) and (7)

Producer A, located in a NAFTA country, produces women's dresses of subheading 6204.41 from fine wool fabric of heading 51.12. This fine wool fabric, also produced by Producer A, is the component of the dress that determines its tariff classification under subheading 6204.41.

The rule set out in Schedule I for subheading 6204.41, under which the dress is classified, specifies both a change in tariff classification from any other chapter, except from those headings and chapters under which certain yarns and fabrics, including combed wool yarn and wool fabric, are classified, and a requirement that the good be cut and sewn or otherwise assembled in the territory of one or more of the NAFTA countries.

Therefore, with respect to that part of the rule that specifies a change in tariff classification, in order for the dress to qualify as an originating good, the combed wool yarn and the fine wool fabric made therefrom that are used by Producer A in the production of the dress must be originating materials.

At one point Producer A uses a small quantity of non-originating combed wool yarn in the production of the fine wool fabric. Under subsection 5(6), if the total weight of the non-originating combed wool yarn does not exceed seven per cent of the total weight of all the yarn used in the production of the component of the dress that determines its tariff classification, that is, the wool fabric, the dress would be considered an originating good.

. . .

(4) Except for purposes of determining the value of non-originating materials used in the production of a light-duty automotive good and except in the case of an automotive component assembly, automotive component or sub-component for use as original equipment in the production of a heavy-duty vehicle, for purposes of calculating the regional value content of a good the producer of the good may designate as an intermediate material any self-produced material that is used in the production of the good, provided that where an intermediate material is subject to a regional value-content requirement, no other self-produced material that is subject to a regional value-content requirement and is incorporated into that intermediate material is also designated by the producer as an intermediate material.

(5) For purposes of subsection (4),

(a) in order to qualify as an originating material, a self-produced material that is designated as an intermediate material must qualify as an originating material under these Regulations;

(b) the designation of a self-produced material as an intermediate material shall be made solely at the choice of the producer of that self-produced material; and

(c) except as otherwise provided in subsection 14(4), the proviso set out in subsection (4) does not apply with respect to an intermediate material used by another producer in the production of a material that is subsequently acquired and used in the production of a good by the producer referred to in subsection (4).

. . .

Schedule I

Specific Rules of Origin

1 For purposes of this Schedule,

(a) the specific rule or set of rules that applies to a tariff provision is set out adjacent to that tariff provision;

(b) rule that is applicable to a tariff item takes precedence over a rule that is applicable to the heading or subheading under which that tariff item falls;

(c) a requirement of a change in tariff classification applies only to non-originating materials; and

(d) a reference to weight in the rules for goods of any of Chapters 1 through 24 shall be construed as a reference to dry weight unless otherwise specified in the Harmonized System.

. . .

SECTION XI

Textiles and Textile Articles

(Chapters 50 Through 63)

Note: *The textile and apparel rules should be read in conjunction with Annex 300-B (Textile and Apparel Goods) of the Agreement. For purposes of the rules in this Section, the term* ***wholly*** *means that the good is made entirely or solely of the named material.*

. . .

Chapter 57	**Carpets and Other Textile Floor Coverings**
57.01-57.05	A change to headings 57.01 through 57.05 from any other chapter, except from headings 51.06 through 51.13, 52.04 through 52.12, 53.08 or 53.11, Chapter 54, or headings 55.08 through 55.16.

Customs Tariff

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

. . .

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

. . .

Section XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 57

CARPETS AND OTHER TEXTILE FLOOR COVERINGS

. . .

Notes.

1. For the purposes of this Chapter, the term "carpets and other textile floor coverings" means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

. . .

57.03 Carpets and other textile floor coverings, tufted, whether or not made up.