



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Textiles

RECOMMENDATION

Request No. TR-2007-005

Canadian Association of Technical
Outerwear Manufacturers

(Three-layer Outerwear Fabric)

*Recommendation issued
Tuesday, October 28, 2008*

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REPORT TO THE MINISTER OF FINANCE

INTRODUCTION

1. On July 14, 1994, the Canadian International Trade Tribunal (the Tribunal) received terms of reference¹ from the Minister of Finance (the Minister) pursuant to section 19 of the *Canadian International Trade Tribunal Act*.² The Minister directed the Tribunal to investigate requests from domestic producers for tariff relief on imported textile inputs for use in their manufacturing operations and to make recommendations in respect of those requests to the Minister.

2. On July 12, 2007, pursuant to the Minister's reference, the Tribunal received a request from the Canadian Association of Technical Outerwear Manufacturers (CATOM) for the removal, for an indeterminate period of time, of the customs duty on importations from all countries of three-layer fabrics of tariff item Nos. 5903.90.29 and 6001.92.90 of the schedule to the *Customs Tariff*.³ CATOM members include the following: Arc'teryx Equipment Inc. (Arc'teryx), Mountain Equipment Co-op (MEC), Engineered Apparel Ltd., Street Sport Manufacturing Ltd. (Street Sport) and the Taiga Works-Wilderness Equipment Ltd. (Taiga).⁴

3. On December 7, 2007, being satisfied that the request was properly documented, the Tribunal issued a notice of commencement of investigation,⁵ which was distributed to those that might have an interest. A revised notice of commencement of investigation, along with a revised investigation schedule, was issued on December 21, 2007. The revised investigation schedule indicated that the Tribunal would inform parties by February 28, 2008, if it planned to hold a hearing in the case. The one-day hearing would be held on April 29, 2008.

4. The fabrics under investigation were described in the notice as a three-layer fabric consisting of a middle layer of cellular polytetrafluoroethylene, having a woven polyester or nylon fabric with or without elastomeric yarns on one side and a woven or knit fabric of polyester or nylon on the other side, of tariff item No. 5903.90.29, for use in the manufacture of breathable outdoor and ski apparel, and a three-layer fabric consisting of a middle layer of cellular polytetrafluoroethylene, having a woven nylon fabric with or without elastomeric yarns on one side and a knit pile fabric of polyester on the other side, of tariff item No. 6001.92.90, for use in the manufacture of breathable outdoor and ski apparel (the subject fabrics).

5. As of January 1, 2008, the subject fabrics classified under tariff item No. 5903.90.29 are dutiable at 14 percent *ad valorem* under the Most-Favoured-Nation (MFN) Tariff, at 10 percent *ad valorem* under the General Preferential Tariff (GPT) and at 2 percent *ad valorem* under the Costa Rica Tariff (CRT), and are duty free under the Least Developed Country Tariff (LDCT), the United States Tariff (UST), the Mexico Tariff (MT), the Canada-Israel Agreement Tariff (CIAT) and the Chile Tariff (CT). Similarly, as of January 1, 2008, the subject fabrics classified under tariff item No. 6001.92.90 are dutiable at 14 percent *ad valorem* under the MFNT and at 2 percent *ad valorem* under the CRT, and are duty free under the LDCT, the UST, the MT, the CIAT and the CT.

1. The terms of reference were last modified on October 27, 2005.

2. R.S.C. 1985 (4th Supp.), c. 47.

3. S.C. 1997, c. 36.

4. On June 3, 2008, Taiga informed the Tribunal that it was withdrawing its support.

5. C. Gaz. 2007.I.3255.

6. As part of the investigation, the Tribunal's research staff sent questionnaires to potential domestic producers of fabrics identical to or substitutable for the subject fabrics and a request for information to potential users and importers of the subject fabrics. It also requested that the Canada Border Services Agency (CBSA) provide a complete description of the physical characteristics of the fabric samples submitted by CATOM, an opinion on whether the requested tariff relief would be administrable and suggested wording to describe the subject fabrics should tariff relief be recommended. The CBSA indicated that there would be no additional costs, over and above those that it normally incurs, to administer the tariff relief should it be granted.

7. Letters were also sent to the Department of Foreign Affairs and International Trade and the Department of Industry, requesting information that could assist the Tribunal in its investigation.

8. A staff investigation report summarizing the information received from the CBSA and CATOM, as well as Bennett Fleet Inc. (Bennett), Consoltex Inc. (Consoltex) and Stedfast Inc. (Stedfast) was provided to those that had become parties to the proceedings by filing notices of appearance in the investigation.

9. On February 28, 2008, the Tribunal notified parties that it had decided to hold a public hearing on April 29, 2008.

10. On April 28, 2008, Stedfast advised the Tribunal that Bennett, Consoltex and Stedfast expected to reach an agreement with CATOM with respect to the wording of the tariff relief. The Tribunal postponed *sine die* the hearing and requested that the parties provide it with the proposed revised wording as soon as possible.

11. On April 29, 2008, the parties provided the Tribunal with the proposed revised wording and requested that the Tribunal ask the CBSA to comment on its ability to administer this wording.

12. On May 1, 2008, the Tribunal directed the parties to revert to the two fabric descriptions in the Tribunal's revised notice of commencement of investigation as the basis for their agreement.

13. On May 7, 2008, CATOM and the domestic producers submitted a revised agreement. Bennett, Consoltex and Stedfast withdrew their opposition to tariff relief on the subject fabrics, with the end use modified to read "... for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel."⁶

14. On May 9, 2008, the Tribunal requested that the CBSA provide its opinion on whether the proposed tariff relief was administrable, whether the description of the middle layer of the subject fabrics was accurate and whether the subject fabrics were described accurately as three-layer fabrics. The Tribunal requested that the CBSA provide its response by May 23, 2008.

15. On June 11, 2008, the CBSA provided its response. Following additional analysis of the samples that CATOM had provided with its request, the CBSA determined that some of the fabrics consisted of four rather than three layers. In the former case, the CBSA determined that there was both a layer of cellular polytetrafluoroethylene and a layer of non-cellular polyurethane between the two sides of the fabric, instead of just a layer of cellular polytetrafluoroethylene. As a result, the description of the subject fabrics was revised to include four-layer fabrics.

6. Tribunal Exhibit TR-2007-005-61, Administrative Record, Vol. 1 at 323.

16. The CBSA indicated that the proposed tariff relief was administrable.

17. On June 13, 2008, the Tribunal circulated the revised definitions to CATOM and the domestic producers. The Tribunal requested that CATOM and the domestic producers submit a revised agreement regarding tariff relief, should they be in agreement with such relief on the basis of the revised definitions. A revised agreement with CATOM was received by the Tribunal on July 4, 2008, from Bennett and Consoltex and on July 8, 2008, from Stedfast.

18. On July 16, 2008, the Tribunal issued a notice of revised description.⁷ The notice indicated that persons interested in participating in the investigation as a result of the revised description were to file a notice of appearance by August 1, 2008.

19. On July 16, 2008, Doubletex, a textile convertor and one of the potential domestic producers to which the Tribunal's research staff had sent a domestic producer's questionnaire earlier in the Tribunal's investigation,⁸ indicated to the Tribunal that it had concerns about the proposed tariff relief because it had installed new laminating machinery as a result of a recently announced outward processing initiative by the Government.⁹

20. On July 28, 2008, Oceanic Sportswear (1995) Ltd. (Oceanic) wrote to the Tribunal to inquire into whether it should file a notice of participation and submission in this investigation or a new request for tariff relief with respect to imports of multi-layer fabrics. On July 29, 2008, the Tribunal responded that, in keeping with the notice of revised description, it required, along with a notice of participation, an explanation as to how the revised fabric descriptions had changed Oceanic's interest in this investigation.

21. On July 29, 2008, Doubletex requested an extension to respond to the Tribunal's notice of revised description. On July 30, 2008, the Tribunal granted Doubletex until August 8, 2008, to file a notice of participation. The Tribunal also directed that Doubletex file an explanation, by this same date, as to how the revised fabric descriptions had changed its interest in the investigation.

22. On July 30, 2008, Oceanic submitted a notice of participation and requested that the Tribunal join its request for tariff relief on three-layer fabrics having a middle layer of polyurethane with the current investigation.

23. On August 4, 2008, Doubletex responded to the Tribunal.

24. On August 7, 2008, the Tribunal rejected Oceanic's request to participate in the investigation because it had failed to provide the explanation required by the Tribunal.

25. On August 11, 2008, the Tribunal rejected Doubletex's request to participate in the investigation.

26. In the Tribunal's view, Doubletex failed to provide information indicative of how the revised fabric descriptions had changed its interest in the investigation.

7. C. Gaz. 2008.I.2261.

8. Tribunal Exhibit TR-2007-005-09, Administrative Record, Vol. 3 at 2.

9. *Outward Processing Remission Order (Textiles and Apparel)*, C. Gaz. 2008.II.1089.

27. Earlier in the investigation, on December 7, 2007, the Tribunal sent Doubletex a letter advising it that the Tribunal had issued a notice of commencement of investigation, as well as a copy of that notice as it would be published in the December 15, 2007, edition of the *Canada Gazette*, Part I. Doubletex did not complete the domestic producer's questionnaire as requested by the Tribunal.

28. Accordingly, Doubletex was aware of this investigation and had ample opportunity to file a submission. Any connection between this investigation and Doubletex's intention to make relevant investments pursuant to the initiative on outward processing should have been brought forward earlier.

29. In view of the above, allowing Doubletex to intervene at this stage of the investigative process would have been unfair to CATOM.

30. On August 19, 2008, the Tribunal wrote to inform parties that the record was closed for this case, that the hearing was cancelled, that no further submissions, including any on the retroactive application of tariff relief, would be accepted and that the Tribunal would proceed with its recommendation to the Minister.¹⁰

REPRESENTATIONS

Position of the Clothing Industry

CATOM

31. CATOM submitted that no identical or substitutable fabrics are produced in Canada.

32. Arc'teryx was founded in 1989 to market high-quality goods to the climbing industry. Arc'teryx began selling apparel in 1998 and manufactures outerwear apparel using the subject fabrics at its facility in Burnaby, British Columbia, which has a manufacturing staff of 200 employees. MEC is a retail co-operative that was founded in 1971 to supply outdoor equipment. MEC is the importer of record for the subject fabrics, but contracts with a separate company, Street Sport, to manufacture the garments. MEC then sells the garments in its retail stores.

33. Previously, most of the fabrics imported by the CATOM members originated in the United States and were duty free under the provisions of the *North American Free Trade Agreement*.¹¹ In recent years, W.L Gore & Associates (Gore), an important producer of the subject fabrics in the United States, moved its operations to various countries in Asia, including the People's Republic of China (China) and Japan. As a result, the fabrics imported by CATOM members became subject to duties of either 14 percent *ad valorem* under the MFN Tariff or 10 percent *ad valorem* under the GPT.

34. CATOM submitted that these double-digit tariffs have significantly increased production costs and have damaged the competitiveness of its members. In particular, the increased duties have made it more difficult to compete in the Canadian market against imports of outerwear apparel from China and other offshore sources. CATOM contended that, if its members have to continue to assume the additional duty

10. The letter to parties also noted that the version of the Notice of Revised Product Descriptions published on the Tribunal's Web site had two minor inconsistencies in comparison with the version that was published in the *Canada Gazette* and that the latter version was correct.

11. *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).

costs, they may be forced to shut their Canadian manufacturing operations and relocate offshore in order to compete. This would entail the loss of over 500 jobs. CATOM submitted that tariff relief would result in annual duty savings of more than \$300,000 to its members.

35. CATOM requested that tariff relief be granted retroactively to January 1, 2005, the effective date of the Government's broad tariff relief relating to the Tribunal's recommendations in Reference Nos. MN-2004-002¹² and MN-2005-001.¹³

36. CATOM submitted that, in 2005, as part of Reference No. MN-2005-001, Stedfast made claims regarding the imminent production of fabrics that would be substitutable for the fabrics imported by Arc'teryx. According to CATOM, since Stedfast made its claims of "imminent production" in 2005, it has failed to produce fabrics that are identical or substitutable for the subject fabrics. Further, CATOM contended that Stedfast's fabrics are used in the manufacture of protective, military, industrial and medical apparel, not in the manufacture of outdoor or ski apparel.

Position of the Textile Industry

Bennett

37. Bennett of Québec, Quebec, has produced multi-layer fabrics composed of woven or knit fabrics of nylon or polyester laminated to cellular or solid membranes for more than 15 years.

38. Bennett initially opposed the request for tariff relief on the basis that the subject fabrics are available from several Canadian textile producers, including Bennett. According to Bennett, the definition of the subject fabrics was too broad, and tariff relief would needlessly expose the Canadian textile industry to harm.

39. Bennett submitted that Gore-Tex™ fabrics are produced by Gore in the United States and can be imported duty free into Canada.

40. Bennett provided samples of two allegedly identical or substitutable fabrics for analysis. According to the CBSA, both samples consisted of three layers, with one side of woven nylon fabric and the other side of knit polyester fabric. Bennett designated the composition of the middle layer as confidential.

12. *Report on the Production in Canada of Certain Fibres, Yarns and Apparel Fabrics*, June 2005 (CITT). On January 10, 2005, the Minister directed the Tribunal to inquire into the domestic availability of fibres, yarns and apparel fabrics classified under 591 tariff items and to propose a tariff structure that would distinguish these textile inputs from those not produced in Canada. In its final report, the Tribunal recommended that duties be eliminated on 341 tariff items for which there was no evidence of current or imminent domestic production. The Tribunal recommended the retention of duties on fabrics classified under tariff item Nos. 5903.90.29 and 6001.92.90.

13. *An Inquiry Into the Availability of Certain Apparel Fabrics Produced in Canada*, April 2006 (CITT). On October 27, 2005, the Tribunal was directed by the Minister to inquire into the availability from Canadian production of apparel fabrics classified under 12 tariff items. The Tribunal's approach was to recommend the retention of duties for the entire tariff item if there was evidence of actual or imminent domestic production of any fabrics classified under that tariff item. One of these tariff items was 5903.90.29. In its final report, the Tribunal recommended the retention of duties on fabrics classified under tariff item No. 5903.90.29.

Consoltex

41. Consoltex is a private company. It weaves and dyes fabrics used in the production of multi-layer breathable fabrics at its facilities in Cowansville, Quebec.

42. Consoltex initially opposed the request for tariff relief. According to Consoltex, each of the multi-layer breathable waterproof fabrics that it produces for use in the manufacture of outdoor apparel competes with the subject fabrics. Consoltex expects the breathable waterproof fabric segment of the market to continue to grow.

43. Consoltex asserted that CATOM's estimate of more than \$300,000 in savings needs to be reduced to take into account two factors. First, Gore-Tex™ fabrics manufactured in China will be less expensive than comparable fabrics manufactured in the United States. Second, the benefits resulting from tariff relief may not necessarily accrue to CATOM members, but could be captured by retailers or by Gore.

44. Consoltex submitted 12 samples of allegedly identical or substitutable fabrics to the Tribunal, 1 of which was confidential and not sent to the CBSA for analysis. The CBSA determined that 3 of the samples consisted of two layers, with one side of woven polyester or nylon fabric and the other side of knit polyester fabric, assembled by means of a plastic adhesive. Three other samples also consisted of two layers, with one side of woven nylon or aramid fabric and the other side of cellular polytetrafluoroethylene, cellular polytetrafluoroethylene combined with polyurethane or polyurethane. The remaining 5 samples consisted of three layers, with one side of woven nylon, polyester or aramid fabric and the other side of knit polyester or aramid fabric. The middle layer was cellular polytetrafluoroethylene, cellular polytetrafluoroethylene combined with polyurethane or polyurethane.

Stedfast

45. Stedfast was established in 1930 and produces multi-layer fabrics at its plant in Granby, Quebec.

46. Stedfast initially opposed CATOM's request for tariff relief on the basis that identical fabrics are currently available from it and other Canadian textile producers. Further, Stedfast asserted that both it and other Canadian textile producers manufacture substitutable fabrics, including two-layer fabrics with polytetrafluoroethylene membranes and three-layer fabrics with alternative water-repelling components.

47. Stedfast submitted that tariff relief on the broad range of three-layer fabrics included in the description of the subject fabrics would have a severe negative impact on it and other Canadian textile producers, which are already contending with the effects of the strong Canadian dollar.

48. Stedfast submitted three samples that were analyzed by the CBSA. The fabrics consisted of three layers, with one side of woven nylon or polyester fabric, the other side of knit polyester fabric and a middle layer of cellular polytetrafluoroethylene combined with polyurethane or polyurethane.

ANALYSIS

49. The Minister's terms of reference direct the Tribunal to assess the economic impact on domestic textile and downstream producers of reducing or removing a tariff and, in so doing, to take into account all relevant economic factors, including, where appropriate, the availability of substitutable inputs from domestic sources and a domestic versus foreign price comparison. The Tribunal's decision on whether to recommend tariff relief is based on the extent to which it considers that such tariff relief would maximize net economic gains for Canada and would be administrable on a cost-effective basis.

50. CATOM claimed that there is no domestic production of fabrics identical to or substitutable for the subject fabrics. This position was originally contested by Bennett, Consoltex and Stedfast.

51. However, as a result of discussions among CATOM and the domestic producers, an agreement was reached with respect to the request for tariff relief. Under the agreement, the domestic producers withdrew their opposition to tariff relief on the subject fabrics, but with the more restrictive end use noted above.

52. Accordingly, other than the corresponding duty revenues forgone by the Government, the Tribunal does not believe that there will be any direct commercial costs associated with the removal of the customs duty on the importation of the subject fabrics. On the basis of the information available to the Tribunal, granting tariff relief will result in annual benefits to CATOM and other importers of more than \$350,000. The actual value of the benefits will depend on the extent to which CATOM members are eligible for duty drawback on apparel manufactured using the subject fabrics.¹⁴ In summary, the Tribunal finds that the tariff relief requested by CATOM would provide net economic gains for Canada.

RETROACTIVE TARIFF RELIEF

53. With regard to CATOM's request for retroactive tariff relief, the Tribunal has stated, in many previous cases, that it will not consider recommending such relief other than in exceptional circumstances.

54. CATOM submitted that such exceptional circumstances exist in this case. It argued that fabrics classified under one of the tariff items examined in Reference No. MN-2005-001, i.e. tariff item No. 5903.90.29, are the subject matter of the present request and would have been granted tariff relief effective January 1, 2005, but for representations regarding the imminent production of substitutable fabrics made by a Canadian producer during the investigative process that led to the Tribunal's report to the Minister. CATOM submitted that those representations were not subjected to the scrutiny that cross-examination during a hearing would afford and that they have not been borne out by subsequent facts.

55. CATOM asserted that there was precedent for retroactive tariff relief in the Government's decision to implement the Tribunal's recommendations in Reference Nos. MN-2004-002 and MN-2005-001 retroactively to January 1, 2005.

56. The Tribunal has recommended the retroactive application of tariff relief in only one case under the standing textile reference.¹⁵ In that case, the Tribunal indicated that it "...[would] not consider recommending such relief other than in the most exceptional circumstances."¹⁶ The requester met that test because undisputed evidence indicated that, unless prompt and appropriate action was taken to allow for the refund of the duty already paid, due to the requester's limited size and due to the losses that it had absorbed, its commercial viability would have been adversely affected.

57. While CATOM has argued that exceptional circumstances exist, no evidence of the eventual collapse of its members resulting from the application of duties on the subject fabrics exists within the facts that relate to this request.

14. Tribunal Exhibit TR-2007-005-02, Administrative Record, Vol. 2 at 3.

15. *Re Request for Tariff Relief by Alpine Joe Sportswear Ltd.* (27 March 1997), TR-96-006 (CITT).

16. *Ibid.* at 3.

58. Moreover, the asserted basis for the retroactive tariff relief claimed by CATOM essentially requires a re-examination of the basis of the Tribunal's recommendation in Reference No. MN-2005-001 with respect to tariff item No. 5903.90.29. Such a re-examination would be undesirable because the recommendation in Reference No. MN-2005-001 settled a specific concern for a specific time, based on the facts available at that time and the Tribunal's chosen analytic approach to its terms of reference for the inquiry.

59. Lastly, the Government's policy-based decisions with regard to the implementation of broad-based tariff relief cannot be equated with the Tribunal's task in making recommendations to the Government concerning specific requests, based on pre-established terms of reference.

60. Accordingly, the Tribunal declines CATOM's request that it recommend retroactive tariff relief to the Minister.

RECOMMENDATION

61. In light of the foregoing, the Tribunal hereby recommends to the Minister that tariff relief be granted as soon as possible, for an indeterminate period of time, on importations from all countries of:

- three-layer fabric consisting of a middle layer of cellular polytetrafluoroethylene, having a woven nylon fabric with or without elastomeric yarns on one side and a knit pile fabric of polyester on the other side, of tariff item No. 6001.92.90, for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel;
- three-layer fabric consisting of a middle layer of cellular polytetrafluoroethylene, having a woven polyester or nylon fabric with or without elastomeric yarns on one side and a woven or knit fabric of polyester or nylon on the other side, of tariff item No. 5903.90.29, for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel;
- four-layer fabric consisting of a first layer of woven polyester or nylon fabric with or without elastomeric yarns, a second layer of cellular polytetrafluoroethylene, a third layer of non-cellular polyurethane and a fourth layer of woven or knit fabric of polyester or nylon, of tariff item No. 5903.90.29, for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel;
- four-layer fabric consisting of a first layer of woven polyester or nylon fabric with or without elastomeric yarns, a second layer of cellular polytetrafluoroethylene, a third layer of non-cellular polyurethane and a fourth layer of woven or knit fabric of polyester or nylon, of tariff item No. 5903.20.29, for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel; and

- four-layer fabric consisting of a first layer of woven nylon fabric with or without elastomeric yarns, a second layer of cellular polytetrafluoroethylene, a third layer of non-cellular polyurethane and a fourth layer of knit pile fabric of polyester, of tariff item No. 6001.92.90, for use in the manufacture of water-resistant or waterproof, breathable recreational outerwear, including alpine hiking and climbing, skiing or mountaineering apparel.

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