

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL



TRIBUNAL CANADIEN  
DU COMMERCE  
EXTÉRIEUR

**REPORT TO  
THE MINISTER OF FINANCE**

**REQUEST FOR TARIFF RELIEF BY  
BALLIN INC.  
REGARDING  
CERTAIN POLYESTER/RAYON FABRICS**

**OCTOBER 27, 1999**

**BALLIN INC.**

**REQUEST NO.: TR-97-012**

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## INTRODUCTION

On July 14, 1994, the Canadian International Trade Tribunal (the Tribunal) received terms of reference<sup>1</sup> from the Minister of Finance (the Minister) pursuant to section 19 of the *Canadian International Trade Tribunal Act*.<sup>2</sup> 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.

Pursuant to the Minister's reference, the Tribunal received, on December 16, 1997,<sup>3</sup> a request from Ballin Inc. (Ballin), of Ville Saint-Laurent, Quebec, for the removal, for an indeterminate period of time, of the customs duty on importations from all countries of certain polyester/rayon fabrics, for use in the manufacture of men's trousers and shorts.

On March 25, 1999, the Tribunal, being satisfied that the request was properly documented, issued a notice of commencement of investigation, which was distributed to interested parties known to the Tribunal and published in the April 3, 1999, edition of the *Canada Gazette*, Part I.<sup>4</sup> The fabrics under investigation were described in the notice as: (1) woven fabrics, of yarns of different colours, of polyester filaments mixed solely with rayon staple fibres, the 2-ply warp yarns and the single weft yarns measuring not less than 190 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 2.4 decitex per single staple fibre, of a weight exceeding 170 g/m<sup>2</sup>, of tariff item No. 5407.93.90; and (2) woven fabrics, of yarns of different colours, of rayon staple fibres mixed mainly with polyester filaments or polyester staple fibres, measuring not less than 85 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 3.4 decitex per single staple fibre, weighing at least 120 g/m<sup>2</sup> but not more than 210 g/m<sup>2</sup>, of tariff item No. 5516.23.90, both for use in the manufacture of men's trousers and shorts (the subject fabrics).

As part of the investigation, the Tribunal's research staff sent questionnaires to potential producers of fabrics identical to or substitutable for the subject fabrics. A request for information was also sent to potential importers of the subject fabrics.<sup>5</sup> A letter was sent to the Department of National Revenue (Revenue Canada) requesting information on the tariff classification of the subject fabrics, and samples were provided for laboratory analysis. Letters were also sent to a number of other government departments requesting information and advice.

A staff investigation report, summarizing the information received from these departments, Ballin, questionnaire respondents and other interested parties, was provided to those parties that had filed notices of appearance in the investigation, thereby becoming parties to the proceedings. Following distribution of the

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1. On March 20 and July 24, 1996, and on November 26, 1997, the Minister of Finance revised the terms of reference.
  2. R.S.C. 1985 (4th Supp.), c. 47.
  3. On February 26 and March 12, 1999, Ballin Inc. filed amendments to the request.
  4. C. Gaz. 1999.I.946.
  5. On April 22, 1999, Tribunal staff learned that The Copley Apparel Group Ltd., of Hamilton, Ontario, and SSIA Moda Corp., of Montréal, Quebec, may have been importing the subject fabrics. Requests for information were sent to these two companies on April 23, 1999, but only The Copley Apparel Group Ltd. responded.

staff investigation report, Ballin, Doubletex and the Canadian Textiles Institute<sup>6</sup> (CTI) filed submissions with the Tribunal.

A public hearing was not held for this investigation.

## **PRODUCT INFORMATION**

The subject fabrics, imported from the Republic of Korea (Korea), Spain and Turkey, are used in the manufacture of men's trousers and walking shorts. Ballin conducts all manufacturing operations on the subject fabrics in Canada.

As of January 1, 1999, the subject fabrics, classified for customs purposes under tariff item Nos. 5407.93.90 and 5516.23.90 of the schedule to the *Customs Tariff*,<sup>7</sup> are dutiable at 16.0 percent *ad valorem* under the MFN tariff and at 10.0 percent *ad valorem* under the Chile tariff and are duty free under the US tariff, the Mexico tariff and the Canada-Israel Agreement tariff. The MFN tariff will remain at 16.0 percent *ad valorem* until December 31, 2002, and then will be reduced to 15.1 percent *ad valorem* and 14.0 percent *ad valorem* on January 1, 2003, and January 1, 2004, respectively.

## **REPRESENTATIONS**

### **Users of the Subject Fabrics**

#### Requester

Ballin, founded in 1946, manufactures men's trousers and shorts, as well as women's sportswear (jackets, pants and shirts). Ballin is considered a leader in the production of men's high-end trousers. Within the next two years, Ballin envisages moving away from the production of lower-priced products, which currently accounts for about 30 percent of its total production. In order to satisfy this market segment, Ballin plans to continue to import trousers and shorts from the People's Republic of China. Ballin has two manufacturing facilities, one located in Saint-Césaire, Quebec, where all sewing operations are conducted, and the other in Ville Saint-Laurent, where its cutting, pressing, warehousing and distribution operations are located.

Ballin alleged that identical or substitutable fabrics are not available in Canada and that the subject fabrics have unique characteristics that give the appearance and feel of fabrics made from natural fibres. In this connection, Ballin indicated that the subject fabrics are made from a new generation of polynosic<sup>8</sup> staple fibres, limited in supply and entirely different from the synthetic fibres used by domestic producers. Ballin stated that polynosic fibres are natural, non-synthetic, man-made fibres derived from wood pulp, which were developed and only available in Japan. Ballin submitted that the process utilized in the production of the subject fabrics, including the fibrillation,<sup>9</sup> dyeing and tumbling processes, create the "peach

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6. The submission received by the Tribunal on June 14, 1999, was also made on behalf Consoltex Inc.

7. R.S.C. 1985 (3rd Supp.), c. 41.

8. The *Dictionary of Fibre & Textile Technology*, 1990, defines a polynosic fibre as a "high-wet-modulus rayon staple having a microfibrillar structure of fibers. The molecular length of the cellulose [a carbohydrate which is the chief component of the cell walls of plants] forming the fiber is about twice as long as in conventional rayon". Such fibres fall within the ISO definition of "modal" (generic name).

9. The act of breaking up a fibre into the minute fibrous elements from which the main structure is formed.

skin” or “velvet hand” of the subject fabrics, as well as their uniqueness. In this respect, Ballin claimed that no domestic producer has the technical capability to manufacture fabrics through this production process.

Ballin claimed that the subject fabrics feel soft and silky to the touch, with a “peach skin” finish, and also possess superior dimensional stability when blended with synthetic fibres, such as polyester. Ballin submitted that, while the high-density weave gives the subject fabrics the appearance and feel of fabrics made from natural fibres, such as silk, the subject fabrics retain their shape, are easy to care for and are very durable in terms of both wash and care. Ballin also claimed that the subject fabrics provide for optimal wearability and comfort, in that they are light and breathable, and allow for high moisture absorption, unlike synthetic fabrics, such as polyester, which do not breathe well and which retain moisture. Ballin stated that the subject fabrics enjoy a certain exclusivity and allure, which appeal to high-end retailers such as Saks Fifth Avenue, Nordstrom and A. Gold & Sons.<sup>10</sup> As such, trousers and shorts manufactured from the subject fabrics command a higher price in the marketplace.

Ballin stated that Consoltex Inc. (Consoltex) has never offered it fabrics that are substitutable for the subject fabrics, but that, on two occasions, it approached Consoltex to determine whether it could meet Ballin’s requirements. Ballin indicated, however, that fabrics produced by Consoltex are unacceptable, given factors such as composition, “hand”, performance, quality and marketability. Ballin pointed out that, when certain fabrics from Consoltex were tested, Ballin encountered difficulties during the cutting and assembly operations. Ballin also stated that the Consoltex fabrics cost approximately half the price of the subject fabrics and meet the needs of a different, low-end market niche. Ballin submitted that the fabrics produced by Consoltex do not have the allure or physical characteristics of the subject fabrics, do not have the “peach skin” finish, have more of a plastic feel and high-lustre look and, therefore, are not suitable for sales to high-end retailers and their customers. Ballin indicated that, if domestic textile mills were producing a fabric that is appropriate for its needs, it would purchase from these producers. Given the dynamic nature of the textile and apparel industries, Ballin stated that it must acquire specific fabrics that it knows will be marketable within a short time frame.

Ballin also claimed that the overall market for trousers and shorts manufactured from the subject fabrics is growing. Ballin submitted that lower fabric costs, resulting from tariff relief, would allow it to be more competitive in both the domestic and export markets. This, according to Ballin, would enable it to maintain or increase market share. In this connection, Ballin pointed out that it has experienced stiff price competition in the US market from reputable manufacturers, as well as from low-priced “knock-off” finished goods from Asia. Ballin submitted that tariff relief would translate into increased sales (approximately \$4 million in additional revenues), the hiring of new employees, the purchase of new equipment and spin-offs for local support industries. Ballin stated that tariff relief would not result in any “cost” to the domestic textile industry.

In addition, Ballin submitted that modifications to the duty drawback program have resulted in higher prices for its end products sold in the United States and decreased its competitive edge relative to

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10. In its request, Ballin included a tag that is attached to certain trousers manufactured from the subject fabrics (“MICROFIBER—The finest textile fibre”).

US manufacturers. It also stated that tariff relief would be of significant benefit to the company in the event that tariff preferential levels (TPLs)<sup>11</sup> for cotton and man-made fibre apparel are exceeded in the future.

In its response submission, Ballin argued that its request is confined to polynosic(modal)/polyester fabrics and that, based on the evidence provided by all users/importers of fabrics similar to the subject fabrics, domestic mills do not produce a similar or identical fabric that is acceptable to manufacturers of high-end trousers and shorts and that meets the needs of the high-end retail sector. Ballin submitted that, contrary to the CTI's assertion, it has not "contrived" the description of the subject fabrics in order to exclude imported fabrics used by its competitors or to distinguish the description from any rayon/polyester fabrics that are produced domestically. The technical description of the subject fabrics fits the classification under the *Harmonized Commodity Description and Coding System*<sup>12</sup> of four fabrics that play a significant role in Ballin's high-end retail line.

Ballin argued that the samples provided by the CTI/Consoltex and Doubletex are neither identical to nor substitutable for the subject fabrics in terms of composition, production process, look, "hand" and quality. Ballin submitted that it is committed to purchasing fabrics from domestic producers if they can offer a product that meets its specific needs and that, given the economic benefits to be realized through domestic sourcing, it would only make sense for it to purchase from domestic mills, if indeed they produce an adequate substitute for the subject fabrics. Ballin argued that, based on the evidence that it and other importers/users have submitted, there is no domestic supply of acceptable polynosic textile inputs for the manufacture of high-end garments. Therefore, there is no substitutability between the subject fabrics and the sample fabrics provided by the CTI/Consoltex or Doubletex. Ballin argued that these sample fabrics meet the needs of the lower-end retail sector and that, hence, it is not possible for domestic textile producers to sustain losses in a market in which their fabrics do not compete. Ballin submitted that tariff relief would result in net economic gain to Canadian interests.

Ballin also argued that the rayon/polyester fabric samples provided by the CTI/Consoltex belie the assertion that Consoltex has demonstrated that it has the equipment and know-how to achieve the textile characteristics claimed by Ballin for the subject fabrics and that Consoltex offers trouser fabrics with the same or similar look and feel as the Ballin imports. Ballin argued that evidence on file indicates that it consulted with Consoltex on numerous occasions in order to review its product line, but that the fabrics offered by Consoltex were and remain unacceptable (too flimsy, light and weak) to Ballin as substitutes for the subject fabrics. Ballin argued that the characteristics of the subject fabrics, such as the type of rayon fibres that make up their composition (i.e. polynosic), the finishing process involved, and the resultant difference in look, "hand" and quality, differentiate them from the Consoltex fabrics. Ballin argued that the characteristics of the Consoltex fabrics make them more appropriate for use in the low-end retail market, to which Ballin's request does not relate.

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11. The *North American Free Trade Agreement* (hereinafter NAFTA) provides preferential quotas for apparel and textiles that do not meet the rules of origin. These take the form of TPLs, formerly known as tariff rate quotas (TRQs) under the *Canada-United States Trade Agreement*. TPLs permit the importation of a fixed quantity of certain "non-originating" goods into Canada, the United States and Mexico at the NAFTA rate of duty. To qualify for this, manufacturers must have cut (or knitted or shaped) and sewn or otherwise assembled the apparel in Canada. Goods entering a NAFTA country in quantities above the TPLs are subject to the higher MFN rate of duty usually applied to non-NAFTA trading partners. Under NAFTA, however, full duty drawback will continue to apply indefinitely to Canadian apparel exports to the United States that are traded at full MFN rates of duty (i.e. after the TPLs have been fully utilized).

12. Customs Co-operation Council, 1st ed., Brussels, 1987.

With respect to the Tencel<sup>13</sup> and Tencel blends provided by Doubletex, Ballin argued that they are not similar in composition to the subject fabrics. Ballin indicated that it purchases Doubletex's "Dakota" Tencel/cotton blend for its women's lower-end casual wear, but that it has not found that Doubletex offers a fabric that is an acceptable substitute for the subject fabrics. On this point, Ballin noted that Doubletex's fabrics do not even fall into the same category as the subject fabrics, in that they are either 100 percent Tencel or Tencel/cotton blends. In this connection, Ballin indicated that, in a previous case, the Tribunal stated that "the technical composition and description must generally be in the same category for goods to be fully substitutable".<sup>14</sup>

Ballin argued that, in light of the substantial differences between the Doubletex Micro-Diamond fabric and the subject fabrics, particularly in terms of appearance, the allegedly identical fabric is in no way an acceptable substitute for the subject fabrics. Furthermore, Ballin argued that a finding of substitutability cannot be made in respect of the Micro-Diamond fabric because it is in the early stages of development and is by no means commercially available in the quantities and varieties demanded and required by the apparel manufacturing industry.<sup>15</sup> Ballin submitted that the production of just one identical fabric, currently in its development stage, cannot possibly be construed as an ability and willingness to meet the diverse needs of Ballin and other importers and users of high-end polynosic fabrics.

Ballin also submitted that Doubletex's interest and effort in developing an identical polynosic fabric through an identical production process is, in and of itself, an acknowledgement that there is no substitutable textile input currently produced by Canadian mills. Ballin also noted that, in a previous case, the Tribunal stated that it "does not necessarily equate the ability to produce a fabric with the ability to supply this fabric when all other factors are considered".<sup>16</sup>

Ballin argued that the price differential between the subject fabrics and the allegedly identical or substitutable domestic fabrics is, with little exception, substantial. The premium that Ballin and other importers have paid for the subject fabrics in the past, and that they will continue to pay in the future, even if tariff relief is granted, indicates that the domestic fabrics are not substitutable for the subject fabrics. While the 1999 landed costs of the subject fabrics are closer in price to Doubletex's Tencel or Tencel blends, Ballin submitted that it does not consider these fabrics to be relevant to this request, as they are not made from polynosic fibres. Ballin argued that the Tribunal has no proper evidence before it regarding the Doubletex Micro-Diamond fabric. Furthermore, Ballin argued that the consideration of price is even more relevant as

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13. Tencel is a trade name for "lyocell", a solvent-spun cellulosic fibre which was developed by Courtaulds, a company based in Axis, Alabama. In April 1996, the US Federal Trade Commission recognized lyocell as a subclass of rayon (FTC News Release, April 12, 1996).
  14. *Report to the Minister of Finance: Request for Tariff Relief by Doubletex Regarding High-twist, Woven Fabric of 100 Percent Cotton* (21 December 1998), TR-95-13A (C.I.T.T.) at 6.
  15. Supplementary submission dated July 23, 1999. On June 28, 1999, Doubletex filed with the Tribunal a confidential sample of a fabric identified as "Micro-Diamond", along with a note describing some of its physical characteristics. On July 7, 1999, Doubletex was requested by the Tribunal to submit an application to file a late submission. After reviewing Doubletex's application and the submissions from other parties, the Tribunal accepted the application and placed the confidential sample and the descriptive note on the record of the investigation. After an undertaking of confidentiality not to disclose the sample to other parties was submitted to and accepted by the Tribunal, Ballin was provided with a confidential sample of the Micro-Diamond fabric.
  16. *Report to the Minister of Finance: Request for Tariff Relief by Camp Mate Limited Regarding No-See-Um Mesh Fabric* (3 September 1996), TR-95-061 (C.I.T.T.) at 5.

regards substitutability when it is apparent that, even with the removal of the customs duty, the subject fabrics will remain more expensive than allegedly substitutable fabrics.

Ballin argued that, in the past, the Tribunal has considered an importer's need to supply quality garments to the high end of the retail market to be a relevant consideration in its determination of substitutability. In addition, Ballin argued that, in previous cases, the Tribunal has considered the acceptance by the market of the allegedly substitutable fabrics for a specific end use or market sector in the determination of whether a fabric is substitutable. In this context, Ballin submitted that the CTI/Consoltex and Doubletex are opposing a request for tariff relief for fabrics destined to a market in which their fabrics simply do not compete.

Ballin also submitted that Barmish Inc. (Barmish) and The Copley Apparel Group Ltd. (Copley) have, in principle, expressly supported its request because acceptable substitutable fabrics are simply not available in Canada. Ballin indicated that Barmish and Copley can benefit from tariff relief by sourcing fabrics that meet the description of the subject fabrics and that they are also free to initiate requests for tariff relief on their specific fabrics.

Based on the evidence, Ballin argued that the economic gain to be realized through tariff relief on the subject fabrics is both concrete and realizable and that, by contrast, the projections as to the potential cost to Consoltex and Doubletex through price erosion or lost sales are based entirely on an assumption of substitutability. Ballin submitted that, should the Tribunal find that Consoltex's and Doubletex's fabrics are not substitutable, the domestic industry's projections as to potential costs, and the assumptions upon which they are based, cannot stand.

#### Peerless Clothing Inc. (Peerless)

Peerless, of Montréal, Quebec, has been manufacturing men's apparel since 1919. Following the *Canada-United States Free Trade Agreement*,<sup>17</sup> Peerless established itself as an international manufacturing and marketing company, with a significant presence in the US market. In this connection, it has signed exclusive licence agreements to market well-known brand names such as Chaps by Ralph Lauren, Ralph by Ralph Lauren and DKNY (Donna Karan New York).

Peerless supported Ballin's request for tariff relief. Peerless submitted that, if the market demands garments made from certain fabrics, Peerless must produce them, otherwise offshore imports of finished goods will satisfy this demand and, as a result, Peerless will lose sales. Peerless stated that it has to work within certain parameters when establishing an ultimate price point and that, therefore, the linkage between price and quality is very important in today's market.

Peerless indicated that its support for Ballin's request is, to a large extent, designed to overcome the modifications to the duty drawback program under NAFTA,<sup>18</sup> so as to maintain the company's export profile on apparel made from those fabrics that are clearly not available from Canadian production. Peerless submitted that the removal of the customs duty on imports of the subject fabrics will lower costs, which will allow it to lower its wholesale prices significantly and compete more effectively with imports of the finished products. Peerless also indicated that the benefits would be passed on to the consumer.

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17. 22 December 1987, Can. T.S. 1989 No. 3.

18. 32 I.L.M. 289 (entered into force 1 January 1994).



## Domestic Textile Producers

### Consoltex

Consoltex, of Ville Saint-Laurent, is a major producer of fabrics of man-made fibres. In Cowansville, Quebec, it has two facilities, a weaving operation and a dyeing and finishing plant, which employ over 450 people. In 1998, it produced 169 fabrics in the polyester/rayon and rayon/polyester categories. According to Consoltex, sales of these fabrics represent a significant portion of its total fashion division sales.

Consoltex opposed the request for tariff relief, submitting that it produces and sells a broad range of fabrics made from rayon and polyester to fashion apparel manufacturers in Canada and the United States, for use in the production of men's trousers and shorts. Consoltex pointed out that, in response to market demand, and due to its efforts in the research and development area, its product range is always evolving. Consoltex indicated that it is equipped to weave virtually any fabric in the polyester and rayon categories and that, because of its knowledge and finishing equipment, it can vary the "hand", touch and appearance of its fabrics to meet the changing preferences of customers.

Consoltex indicated that, over the years, it has developed a strong reputation in the field of patterned multi-coloured fabrics by cross-dyeing<sup>19</sup> and that various finishes and surface effects, including "peach skin" finishes, are produced by using appropriate combinations of yarn, fabric construction and finishing processes.

Consoltex claimed that it produces many fabrics which meet the physical description of the subject fabrics. In addition, Consoltex indicated that, in the past months, it has developed new high-end fabrics using bi-shrinkage yarns, multifilaments, microfibres and high-twist yarns.<sup>20</sup> These fabrics have been well received by both domestic and export customers. Consoltex submitted that fabrics identical to the subject fabrics can be produced by using pre-dyed yarns. However, according to Consoltex, this alternative is less cost effective and requires longer lead times. Consoltex indicated that domestic customers would not accept the higher costs and longer delivery times required for fabrics of pre-dyed yarns.

With respect to the anticipated benefits described by Ballin if tariff relief were granted, Consoltex submitted that: (1) Ballin's projections regarding increases in sales are not supported by market or financial analysis; (2) it is concerned about the adverse effects on its existing business with Barmish, as well as potential business with Ballin and Peerless; (3) competition from imported finished goods is not new; (4) the need for tariff relief on the subject fabrics is not apparent, since Ballin enjoys higher trouser prices in the United States than in Canada; (5) the modifications to the duty drawback program under NAFTA have not stopped Ballin's export growth; (6) Ballin's projected shortage of TPLs, by the year 2001, is mere speculation; and (7) good fabrics can be purchased in unlimited quantities from companies, including Consoltex, in NAFTA countries; therefore, any concerns about duty drawback and TPLs are unfounded.

Consoltex stated that it does not consider some of its Canadian sales of polyester/rayon and rayon/polyester fabrics as sales to low-end garment manufacturers. Consoltex mentioned that Ballin does not

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19. A method of dyeing blend or combination fabrics to two or more shades by the use of dyes with different affinities for the different fibres.

20. As part of its response to the Tribunal's domestic producer's questionnaire, Consoltex provided 10 samples of allegedly substitutable fabrics made from polyester/rayon and rayon/polyester and 5 samples of allegedly substitutable fabrics with "peach skin" and similar finishes.

seem interested in buying fabrics from Consoltex for the production of men's garments. Consoltex explained that, when it provided samples of new products (Luxor and Excelsior) to Ballin for testing, Ballin did not apprise Consoltex of any difficulties with the cutting of these fabrics. Consoltex noted that these fabrics are growing in demand and that none of its customers in Canada or in the United States have complained about problems at the cutting stage.

With respect to the physical characteristics of the subject fabrics, Consoltex argued that some of the claims made by Ballin in its request are false or misleading. In this connection, Consoltex submitted that: (1) all rayon staple fibres are derived from cellulose; (2) polynosic staple fibres are not a new generation of fibres because the term "polynosic" has been used since the 1960s to describe rayon fibres with improved wet modulus (a characteristic of many man-made fibres and, in particular, polyester); (3) the 4 samples submitted with Ballin's request and the 10 samples provided by Consoltex are made from a combination of the same generic fibre types, i.e. polyester and rayon; therefore, one must conclude that the rayon staple fibres found in both groups of fabrics are synthetic; (4) there is no evidence to support the superiority of the subject fabrics over domestic fabrics with respect to shape retention, ease of care, durability, wearability, breathability and high moisture absorption; and (5) there is no basis for marketing trousers made from the subject fabrics as "microfibres", since Revenue Canada did not find any such fibres in Ballin's samples.

Consoltex also objected strongly to any tariff concession based on nuances of finish, e.g. "peach skin" finish, or the production process used to achieve it, especially in the absence of any technical information. If tariff relief were granted, Consoltex submitted that it would be seriously damaged, since rayon/polyester and polyester/rayon fabrics, of yarns of different colours,<sup>21</sup> account for a significant portion of the sales, production and jobs of its fashion division. In this connection, Consoltex indicated that, with the exception of 2 samples of 100 percent rayon fabrics, the 10 samples that it submitted to the Tribunal cover the entire weight range of the 4 samples submitted by Ballin, as well as other Ballin samples provided to Revenue Canada for analysis.<sup>22</sup> In addition, Consoltex pointed out that the fibre content in both the domestic and imported fabrics is similar.

In conclusion, Consoltex submitted that the detailed specifications, e.g. decitex of the staple fibre content, in the Tribunal's notice of commencement of investigation do little or nothing to limit injury to Consoltex because, with or without those limits, thousands of polyester and rayon fabrics would be competing duty free against its fashion division production. In this context, Consoltex indicated that Ballin's request threatens its domestic and export sales of fabrics for use in the manufacture of men's and women's apparel. Although the Tribunal's investigation is limited to the manufacture of men's trousers and shorts, Consoltex submitted that, should tariff relief be granted, other companies will argue the same case for the women's apparel sector.

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21. Consoltex indicated that, to enlarge its product line and create a broader range of fabrics, of yarns of different colours, it has developed products based on yarn types having different dyeing properties.

22. In total, Ballin submitted 17 samples to Revenue Canada for analysis. However, only 4 samples (fabric nos. 626, 635, 713 and 936) were submitted to the Tribunal for consideration under Ballin's amended request of March 12, 1999. The description of the subject fabrics contained in the Tribunal's notice of commencement of investigation dated March 25, 1999, is based on these 4 samples only. Of the remaining 13 samples, only 1 additional fabric (a second sample of fabric no. 635) can be considered a subject fabric as per the description in the Tribunal's notice of commencement of investigation.

### Doubletex

Doubletex, of Montréal, is Canada's largest fabric converting mill and employs over 470 people. The company imports greige fabrics, including nylon, polyester, polyester/rayon, polyester/viscose, polyester/cotton and cotton, from around the world for converting at its three plants in Montréal, Toronto, Ontario, and Winnipeg, Manitoba.

Doubletex opposed the request for tariff relief, submitting that it produces substitutable fabrics made from Tencel or Tencel blends and that it also has an identical fabric in development, the Micro-Diamond fabric, made from polynosic/polyester fibres. It indicated that, in this case, the pricing of the Micro-Diamond fabric should not be a significant factor in the Tribunal's deliberations because the price of the new fabric is not fixed. Should tariff relief be granted, Doubletex stated that the price of the subject fabrics would likely be less than the price of its Micro-Diamond fabric. Doubletex indicated that its fabrics have the same "hand", drape, appearance and end use as Ballin's imported fabrics. Doubletex stated that the finishing processes (fibrillation, dyeing for 18 to 24 hours and tumbling) described in Ballin's request are not unique or difficult. Doubletex currently uses these processes in a number of fabric categories, including the polynosic blended fabrics. Doubletex pointed out that, over the past two years, it has invested \$1.5 million in equipment to perform these operations and approximately \$350,000 in research and development with respect to this business. It also indicated that this sector is a growing part of its business and is critical to the company's future. Doubletex submitted that, should tariff relief be granted, its sales of Tencel, Tencel blends and Micro-Diamond, its investment in capital equipment and jobs will be put at risk.

With respect to the cost-benefit analysis prepared by Tribunal staff, Doubletex submitted that the inclusion of dollar value benefits for Peerless may not be consistent with the application-specific nature of the textile reference. It also argued that, should tariff relief be granted, Barmish and Copley would be at a cost disadvantage and, as a result, may have to reduce their prices to match the new Ballin prices. Doubletex submitted that these cost considerations are just as valid as Peerless's benefit considerations and, therefore, should have been included in the cost-benefit analysis.

Should the Tribunal recommend tariff relief, Doubletex requested that, as in the case with all finished fabric tariff applications (dyed, yarn-dyed, etc.), greige fabrics (bleached, unbleached, prepared for dyeing), of the same class or kind, be included within the application.

### CTI

The CTI opposed Ballin's request for tariff relief because there is extensive production in Canada of a broad range of fabrics made from rayon and polyester by two excellent manufacturers, namely, Consoltex and Doubletex. The CTI indicated that domestic production covers the Ballin range, in terms of fibre, fabric construction and weight, and that Consoltex and Doubletex extend beyond this range with offerings of polyester-rich blends and rayon-rich blends respectively.

The CTI submitted that the description of the subject fabrics, contained in the Tribunal's notice of commencement of investigation, does not differentiate, in any meaningful way, Ballin's imports from domestic fabrics, which are closely similar, if not identical, in fibre content, weight, appearance and "hand". The CTI pointed out that Consoltex and Doubletex have made fixed capital investments which enable them to supply a diverse range of such fabrics in practically unlimited quantities to willing purchasers. In addition, the CTI stated that the said description does not define any class of goods recognizable by textile manufacturers or by manufacturers of men's trousers.

The CTI indicated that none of the components of the subject fabrics meet the standard established for the term “microfibre” because the attributes of the subject fabrics, advertised as being derived from “microfibres”, cannot be attributed to fabrics which do not contain them. Moreover, the CTI pointed out, Revenue Canada’s laboratory analysis has confirmed that there are no “microfibres” in the subject fabrics and, therefore, Ballin has failed to distinguish the subject fabrics from fabrics available from domestic production.

The CTI also submitted that Consoltex and Doubletex use equivalent or identical processes to those used to produce the subject fabrics with “peach skin” finishes. It stated that Consoltex has the knowledge and equipment to produce fabrics similar to those imported by Ballin and that Doubletex has reported the development of an identical fabric to fabric no. 936, made from the same fibres (polynosic rayon and polyester).

The CTI was of the view that the case which Peerless failed to make in Request No. TR-96-014<sup>23</sup> should not succeed in this request. The CTI noted that Ballin’s fabric no. 936 is essentially identical to the lead fabric in the failed Peerless case and that, therefore, the Tribunal should act promptly to deny Ballin’s request for tariff relief. Moreover, the CTI indicated that the domestic textile industry has been forced to defend its interests twice in resource-consuming investigations.

The CTI submitted that the men’s wear fabrics produced by Consoltex at its two plants in Cowansville are sold to men’s apparel manufacturers in Canada and the United States and that this business is growing. The CTI claimed that this case is of serious concern to the domestic textile industry. In this connection, it pointed out that the production and sales of polyester/rayon and rayon/polyester fabrics account for over 50 percent of Consoltex’s production and sales in its fashion division.

The CTI submitted that, should tariff relief be granted, Ballin’s competitors, namely, Barmish and Copley, would be at a cost disadvantage and that this fact should have been taken into consideration in the Tribunal’s staff investigation report. In addition, the CTI submitted that tariff relief would create tariff and price anomalies between Ballin and its competitors. According to the CTI, domestic fabrics, as well as dutiable imported fabrics, would also be displaced and, consequently, the damage would spread.

The CTI submitted that the trouser fabric market has been distorted by petitions filed by Peerless and Ballin in a way that these manufacturers cannot look seriously for domestic products without jeopardizing their hopes for large financial windfalls from the textile tariff relief program.

## **Other Submissions**

### Barmish

Barmish, of Montréal, a manufacturer of men’s trousers, supported Ballin’s request for tariff relief. Barmish indicated that it has not imported fabrics under tariff item Nos. 5407.93.90 and 5516.23.90 in the past two years, but that it imports similar polynosic and micro-polyester fabrics. Barmish stated that these fabrics are made from modal or polynosic yarns which give them a distinctive look, as well as a soft and silky touch not available in synthetic fabrics made in Canada. It pointed out that polyester fabrics sourced in Canada do not offer the breathability or moisture absorption of micro-polyester yarns from Europe and

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23. The Tribunal did not render a decision in this case because, on January 27, 1999, Peerless withdrew its request for tariff relief.

Japan. Barmish submitted that high-end retailers, such as Harry Rosen, Holt Renfrew, Saks Fifth Avenue and Nieman Marcus, demand these unique characteristics which cannot be duplicated by Canadian textile producers.

Barmish stated that it works closely with and buys many fabrics from Canadian mills, such as Consoltex. Barmish pointed out that none of the fabrics that it purchases from Consoltex have the qualities necessary to target the high-end market. In this connection, Barmish indicated that, on several occasions, it asked Consoltex to recreate the polynosic fabrics that it imports from Spain, but that Consoltex has yet to present anything close to the imported fabrics.

Barmish indicated that Ballin is one of its major competitors in the Canadian and US markets. Barmish submitted that, if tariff relief is only granted on fabrics imported under tariff item Nos. 5407.93.90 and 5516.23.90, it and other manufacturers would be at a cost disadvantage until they are able to import identical fabrics under these tariff items. In order to correct this situation, Barmish suggested that tariff relief be granted on a wider range of tariff items for polynosic and micro-polyester fabrics.<sup>24</sup>

### Copley

Copley has been manufacturing men's apparel since 1901. It currently produces men's suits, sport coats and trousers for sale across North America. Copley supported Ballin's request because identical or substitutable fabrics are not available in Canada. Copley indicated that it imports similar fabrics under tariff item No. 5407.92.90, but that these fabrics are piece-dyed fabrics as opposed to the yarn-dyed fabrics imported by Ballin. Copley submitted that the fabrics that it imports should also be considered for tariff relief, since they are used for the same purpose and only vary slightly in appearance from the subject fabrics.<sup>25</sup>

## **OTHER INFORMATION**

The Department of Foreign Affairs and International Trade (DFAIT) informed the Tribunal that Canada maintains quota restraints on polyester filament fabric, including any fabric mixed mainly or solely with polyester filaments (category 35.0), imported from Poland, Korea and Taiwan. Accordingly, this coverage includes the subject fabrics of tariff item Nos. 5407.93.90 and 5516.23.90. Bilateral agreements, which provide for these restrictions, between the Government of Canada and the Government of the Republic of Korea and with the Taiwan Textile Federation have been in place since 1978. The bilateral agreement between the Government of Canada and the Government of Poland has been in place since 1979.

DFAIT also indicated that it will consider requests for ex-quota entry on textile inputs where a recommendation has been made by the Tribunal to remove customs duties on the basis of non-availability. Ex-quota treatment will only be granted in cases where it can be demonstrated that there is an extra charge for using products under quota or where goods are not otherwise available in Canada.

Revenue Canada indicated that there would be no additional costs, over and above those already incurred by it, to administer the tariff relief.

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24. By letters dated May 11, 1999, Barmish and Copley were advised that the Tribunal had decided not to expand the scope of the investigation because to do so would unduly delay the conclusion of the investigation and issuance of a recommendation in respect of the request filed by Ballin.

25. *Ibid.*

## ANALYSIS

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 factors, including the substitutability of an imported fabric for a domestic fabric and the ability of domestic producers to serve the Canadian downstream industries. Consequently, the Tribunal's decision to recommend tariff relief is based on the extent to which it considers that such tariff relief would provide net economic gains for Canada.

Ballin's request for tariff relief covers woven fabrics made from combinations of rayon staple fibres with polyester staple fibres or polyester filaments. In essence, Ballin claimed that identical or substitutable fabrics are not available in Canada and that the characteristics of the subject fabrics, such as the type of rayon fibres that make up their composition, i.e. polynosic fibres,<sup>26</sup> their finishing process and their resultant difference in look, "hand" and quality differentiate them from domestically produced fabrics. Other manufacturers of men's apparel supported these views. Two domestic producers, namely Consoltex and Doubletex, informed the Tribunal that they oppose this request because they produce identical or substitutable fabrics. Consoltex argued that it produces many fabrics made from polyester and rayon that are similar to or substitutable for the subject fabrics imported by Ballin. Doubletex argued that it also produces substitutable fabrics (Tencel or Tencel blends) and that it has an identical fabric in development, the Micro-Diamond fabric, made from polynosic/polyester fibres. The CTI opposed the request on the grounds that there is domestic production of identical or substitutable fabrics.

The Tribunal first considered the allegedly similar or substitutable fabrics submitted by Consoltex. In addressing the issue of substitutability, the Tribunal looked at the characteristics of the subject fabrics compared to those of fabrics produced or being developed by Consoltex. Consoltex indicated that many of its fabrics "cover" the subject fabrics in terms of fibre, fabric construction and weight. In addition, Consoltex submitted that it is equipped to weave any fabric in the polyester and rayon categories and that, by using a special finishing process, i.e. sanding, it has the capability to produce fabrics with the same "peach skin" finish, touch and appearance as those imported by Ballin. On the other hand, Ballin argued that none of the Consoltex fabrics are composed of the same type of rayon fibres, i.e. polynosic fibres, which are high-wet-modulus<sup>27</sup> rayon staple fibres, nor have they undergone a finishing process which includes fibrillation<sup>28</sup> with the use of enzymes. Upon close examination of the samples provided by Ballin and Consoltex, the Tribunal is of the view that the subject fabrics have a unique feel and finish that are not readily apparent in the Consoltex fabrics.

In assessing substitutability, the Tribunal also considered the acceptance by the market of the Consoltex fabrics. In this case, the evidence shows that Ballin exports a significant portion of its production of trousers and shorts manufactured from the subject fabrics to high-end retailers in the United States.<sup>29</sup> Consoltex indicated that it sells polyester/rayon and rayon/polyester fabrics to Barmish, a company which it does not consider a low-end garment producer.<sup>30</sup> The record shows that sales of allegedly substitutable fabrics to Barmish represent a significant portion of Consoltex's total domestic sales to manufacturers of

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26. *Supra* note 8.

27. "High modulus" is a term that refers to a material with a higher than normal resistance to deformation.

28. "Fibrillation" is the act of breaking up a fibre into minute fibrous elements from which the main structure is formed.

29. Tribunal Exhibit TR-97-012-2A (protected) at 11.

30. Tribunal Exhibit TR-97-012-21.2 at 27.

men's apparel.<sup>31</sup> The Tribunal notes that Barmish, in its response to the Tribunal's questionnaire, pointed out that none of the products that it buys from Consoltex have the qualities required for the high-end segment of the market. Barmish also stated that it imports "polynosic fabrics", similar to those imported by Ballin, so that it may offer a unique product with distinctive characteristics that cannot be duplicated with the use of domestic fabrics.<sup>32</sup> Thus, based on the information available, the Tribunal is satisfied that, in the high-end market segment that Ballin supplies, the Consoltex fabrics are not substitutable for the subject fabrics.

The Tribunal also notes that the cost of the subject fabrics, even before duty, is notably higher than the selling prices of the allegedly substitutable fabrics produced by Consoltex.<sup>33</sup> The fact that Ballin is willing to pay more for a particular fabric tends to support the Tribunal's view that Consoltex's fabrics are not directly substitutable for the subject fabrics.

The Tribunal next considered the allegedly substitutable fabrics produced by Doubletex, i.e. Tencel and Tencel blends. The record shows that, as with the allegedly substitutable fabrics produced by Consoltex, none of Doubletex's fabrics are composed of polynosic fibres nor have they undergone a finishing process which includes fibrillation with the use of enzymes. As noted earlier, the Tribunal is of the view that the subject fabrics have a unique feel and finish. This uniqueness, according to Ballin, is due to the type of rayon fibres that make up the subject fabrics, coupled with the enzyme treatment used as part of the finishing process for these fabrics. In the Tribunal's view, the fabric samples provided by Ballin are clearly different in appearance and feel from those made by Doubletex. In addition, the evidence shows that Ballin purchases Doubletex's "Dakota" fabric, a Tencel/cotton blend, for use in the manufacture of women's low-end casual apparel and men's casual trousers.<sup>34</sup> This lends support to the argument that Doubletex does not offer a fabric that is suitable for the high-end market that Ballin serves.

The Tribunal notes that the selling prices of Doubletex's allegedly substitutable fabrics are, in general, close to the landed costs of the subject fabrics. While this factor could indicate the potential substitutability of the fabrics, it is the Tribunal's view that the technical composition and description of the subject fabrics, as well as the high-end market in which Ballin serves and competes, are overriding considerations in the present case. Based on the evidence, the Tribunal concludes that the fabrics made from Tencel or Tencel blends produced by Doubletex are not substitutable for the subject fabrics.

Turning to the allegedly identical fabric, the Micro-Diamond fabric being developed by Doubletex, the Tribunal notes that it is composed of fibres, i.e. polyester and polynosic, which also make up the subject fabrics. However, the Tribunal is of the view that the Micro-Diamond fabric does not have the full characteristics of the subject fabrics in terms of "hand" and appearance. In the Tribunal's opinion, these variances establish that the Micro-Diamond fabric is not an identical fabric. The Tribunal also accepts Ballin's arguments that its choice of fabrics for use in the manufacture of trousers and shorts is driven by market demand and that its customers would perceive the Micro-Diamond fabric, which has its own specific diamond design, as different and, therefore, not directly substitutable. Moreover, the Tribunal has, in the past, recognized that the fashion industry operates on a lower degree of substitutability.<sup>35</sup> In the present case, the

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31. Tribunal Exhibit TR-97-012-22.2 (protected) at 19.

32. Tribunal Exhibit TR-97-012-24.3.

33. Tribunal Exhibit TR-97-012-42 (protected) at 13.

34. Tribunal Exhibit TR-97-012-49 at 9.

35. *Report to the Minister of Finance: Requests for Tariff Relief by Château Stores of Canada Ltd. and Hemisphere Productions Inc. Regarding Armani Gabardine* (19 September 1995), TR-94-011 and TR-94-019 (C.I.T.T.) at 7.

Tribunal finds that Ballin has demonstrated that its clientele attaches considerable importance to even small differences between fabrics, such as in fabric designs.

Recently,<sup>36</sup> the Tribunal reiterated that it is the responsibility of the domestic producers to provide evidence, not just assertions or allegations, of their ability to produce identical or substitutable fabrics. While Doubletex has indicated that it has expended efforts to develop the Micro-Diamond fabric, has invested in new equipment and is currently testing its production, this fabric is not yet offered to the market. The Tribunal has difficulty accepting Doubletex's assertions that the Micro-Diamond fabric under development will be available to the marketplace in commercial quantities or at acceptable prices in the near future. In the Tribunal's view, Doubletex has not provided adequate information in this case to support a conclusion of imminent production or potential to supply the market with the new product.

However, the Tribunal would be prepared to consider a request for a review of its recommendation provided there is a reasonable indication of a change in the circumstances that led to the recommendation.<sup>37</sup> In this case, such a change in the circumstances could be examined if Doubletex provides further evidence that it is able to produce and sell commercial quantities of identical or substitutable fabrics.

As regards the definition of the subject fabrics contained in the Tribunal's notice of commencement of investigation, the CTI submitted that the description of the subject fabrics does not differentiate, in any meaningful way, Ballin's imports from domestic fabrics. The Tribunal is of the view that this concern can be satisfied by adding a reference to polynosic fibres in the definition of the subject fabrics.

With respect to the issue of net economic impact, the Tribunal sees little cost in the granting of the tariff relief requested by Ballin. As explained above, the Tribunal is of the view that the polyester/rayon fabrics produced by Consoltex and the fabrics made from Tencel or Tencel blends produced by Doubletex are not substitutable for the subject fabrics. Accordingly, the Tribunal cannot attribute any costs on account of those fabrics to the assessment of the net economic gains to Canada from the requested tariff relief. With regard to the Micro-Diamond fabric currently under development by Doubletex, the Tribunal has not attributed any costs that might be incurred by Doubletex<sup>38</sup> to the assessment of the net economic gains to Canada from the requested tariff relief because the said fabric is not directly substitutable.

Both the CTI and Doubletex have argued that the Tribunal must take into account the cost impact of tariff relief on domestic apparel manufacturers, such as Barmish and Copley, which import similar fabrics. The Tribunal notes that, in principle, these two companies support Ballin's request for tariff relief. Tariff relief will certainly result in lower prices for Ballin. If Barmish and Copley feel that they can benefit from tariff relief by sourcing fabrics that meet the description of the subject fabrics and have the same end use, they would be free to do so. Moreover, Barmish and Copley can file separate requests for tariff relief on the fabrics that they import. In these circumstances, the Tribunal cannot attribute any costs that might be incurred by Barmish and Copley to the assessment of the net economic gains to Canada from the requested tariff relief.

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36. *Report to the Minister of Finance: Request for Tariff Relief by Tribal Sportswear Inc. Regarding Woven Fabrics of Cotton* (24 August 1999), TR-98-019 (C.I.T.T.) at 10.

37. *Textile Reference Guide* (October 1996) at 10 and *Textile Reference Guidelines* (October 1996) at para. 19.

38. Notwithstanding, the Tribunal recognizes that Doubletex has incurred some costs in the development of the Micro-Diamond fabric.



On the basis of the information available to the Tribunal, tariff relief would provide yearly benefits to Ballin and other users of the subject fabrics in excess of \$500,000. In addition, tariff relief should also result in greater production and sales, which could translate into the hiring of new employees, the purchase of new equipment and spin-offs for local support industries.

With respect to the issue of whether tariff relief should also be granted on the greige version of the subject fabrics, the Tribunal is of the view that, consistent with its previous recommendations, this should not occur in the absence of a separate investigation. However, if, at some time in the future, Doubletex were in a position to file a properly documented request for tariff relief on the greige fabrics used to produce identical or substitutable fabrics, the Tribunal would be prepared to consider an expedited investigation of that request.

### **RECOMMENDATION**

The Tribunal hereby recommends to the Minister that tariff relief be granted, for an indeterminate period of time, on importations from all countries, of: (1) woven fabrics, of yarns of different colours, of polyester filaments mixed solely with polynosic rayon staple fibres, the 2-ply warp yarns and the single weft yarns measuring not less than 190 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 2.4 decitex per single staple fibre, of a weight exceeding 170 g/m<sup>2</sup>, of subheading No. 5407.93; and (2) woven fabrics, of yarns of different colours, of polynosic rayon staples fibres, mixed mainly with polyester filaments or polyester staple fibres, measuring not less than 85 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 3.4 decitex per single staple fibre, weighing at least 120 g/m<sup>2</sup> but not more than 210 g/m<sup>2</sup>, of subheading No. 5516.23, both for use in the manufacture of men's trousers and shorts.

Peter F. Thalheimer

Peter F. Thalheimer  
Presiding Member

Patricia M. Close

Patricia M. Close  
Member

Arthur B. Trudeau

Arthur B. Trudeau  
Member