

**REPORT TO  
THE MINISTER OF FINANCE**

**REQUEST FOR TARIFF RELIEF BY  
JMJ FASHIONS INC.  
REGARDING  
WOVEN 100 PERCENT POLYESTER FABRIC**

**OCTOBER 27 , 2000**

**JMJ FASHIONS INC.**

**REQUEST NO.: TR-99-008**

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## INTRODUCTION

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

Pursuant to the Minister's reference, the Tribunal received a request from JMJ Fashions Inc. (JMJ) on February 4, 2000, for the removal, for an indeterminate period of time, of the customs duty on importations of woven 100 percent polyester fabric for use in the manufacture of women's blouses, jackets, pants, skirts and dresses.

On March 29, 2000, the Tribunal, being satisfied that the request was properly documented, issued a notice of commencement of investigation that was distributed and published in the April 8, 2000, edition of the *Canada Gazette*.<sup>2</sup> The textile input was described in the notice as "woven fabric, having a 3/2 right hand twill weave with a steep twill line of approximately 63 degrees, dyed, solely of single non-textured polyester filaments, with a twist exceeding 1,250 turns per metre in the warp and the weft, having 'S' twist yarns in the warp and two 'S' twist yarns followed by two 'Z' twist yarns alternating in the weft, of a weight not exceeding 250 g/m<sup>2</sup>, of tariff item No. 5407.61.99, for use in the manufacture of women's blouses, jackets, pants, skirts and dresses" (the subject fabric).

As part of the investigation, the Tribunal's research staff sent questionnaires to potential producers of fabrics identical to or substitutable for the subject fabric. Questionnaires were also sent to potential users and importers of the subject fabric. A letter and a sample of the subject fabric were sent to the Canada Customs and Revenue Agency (CCRA) requesting an analysis of the sample submitted by JMJ, a complete description of its physical characteristics, an opinion on whether the tariff relief was administrable and suggested wording, should tariff relief be recommended. In addition, the Department of Foreign Affairs and International Trade (DFAIT) was asked to provide current information on any quantitative import restrictions on the subject fabric, and the Department of Industry was informed of the request and asked to provide any relevant comments. The Department of Finance was also informed of the request.

A staff investigation report, summarizing the information received from these departments, JMJ and other interested parties, was provided to those parties that had filed notices of appearance in the investigation.

A public hearing was not held for this investigation.

On September 22, 2000, after the Tribunal had received final submissions from parties, JMJ filed a copy of a laboratory report<sup>3</sup> that further supported its request. The Tribunal requested comments regarding this laboratory report, but none were received.

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

2. C. Gaz. 2000.I.1086.

3. The University of Manitoba Textile Testing Service prepared this laboratory report.

## PRODUCT INFORMATION

The subject fabric is imported from the Republic of Korea (Korea) and is used in the manufacture of women's blouses, jackets, pants, skirts and dresses. It is made with single non-textured polyester filaments and is alleged by JMJ to have superior drape and fluidity and increased breathability. The subject fabric is also known as "tricotine".

The CCRA indicated that the subject fabric is classified under tariff item No. 5407.61.99 of the schedule to the *Customs Tariff*<sup>4</sup> and is presently dutiable at 16 percent *ad valorem* under the MFN tariff and is duty free under the U.S. tariff, the Mexico tariff, the Canada-Israel Agreement tariff and the Chile tariff. It should be noted that this fabric may be imported duty free, in greige form, under tariff item No. 5407.61.96.<sup>5</sup>

## REPRESENTATIONS

### Requester

#### JMJ

JMJ, located in Winnipeg, Manitoba, produces women's jackets, pants, skirts, dresses and blouses. The primary fabric currently used by the company is 100 percent polyester.

JMJ stated that the twist of the yarn used to weave the subject fabric differentiates it from domestic fabrics, giving it distinct characteristics, such as superior drape and fluidity and increased breathability. According to JMJ, these characteristics are required because it has created an in-stock program from which its customers can receive immediate delivery, and it is imperative that the exact same quality of the fabric be used at all times so as not to disrupt the business that it has established with this program.

JMJ alleged that it has shown the subject fabric to a number of domestic producers to determine whether it could be produced locally. According to JMJ, the fabrics submitted by Consoltex Inc. (Consoltex) with its response were independently analyzed, and the results confirmed that the number of twists in the Consoltex fabrics was much lower than in the subject fabric. JMJ alleged that, due to the technology required to produce the twists in the yarns used in the subject fabric, identical or substitutable fabrics could not be produced domestically.

JMJ submitted that no other domestic manufacturers use the subject fabric and that tariff relief would prevent layoffs in its plant. It further stated that it has expanded its business dramatically in the last two years by creating an in-stock program based on specific styles manufactured with the subject fabric. JMJ maintained that this program has created a more stable work force and could allow for the addition of employees, as it expands its sales into the U.S. market.

JMJ also submitted that there is no reason to presume that substitutability or investment opportunities should bear more weight in arriving at a recommendation than should, for example, price or the supply capabilities of textile manufacturers.

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4. R.S.C. 1985 (3d Supp.), c. 41.

5. Tribunal Exhibit TR-99-008-4A at 3.

JMJ stated that the only fabrics that Consoltex submitted as identical or substitutable were its polyester fabrics and the fabric that it is currently developing to qualify as NAFTA-eligible (i.e. using yarn produced in a NAFTA country). According to MJM, even Consoltex concedes that its fabrics are different, both in technical and market terms, from the subject fabric. MJM maintained that, if Consoltex could produce an identical NAFTA-eligible fabric, MJM would purchase this fabric for all its export requirements and that it would be a legitimate candidate against the subject fabric.

JMJ submitted that, as in other tariff relief cases, a textile manufacturer maintains that it is confident of its abilities to produce an identical fabric. However, there has been no evidence placed on the record to substantiate this claim or of this manufacturer's ability to deliver an identical or substitutable fabric on acceptable market terms. MJM reiterated that there is no comparable, substitutable or identical fabric currently being made in Canada and that, therefore, tariff relief should be granted.

JMJ submitted that, while the Consoltex developmental fabric is made with a DuPont high-twist yarn, its supply is uncertain, and the yarn may not be NAFTA-eligible yarn and, apparently, may not possess the required number of twists. MJM alleged that, with the need for another company to texture this yarn (i.e. 3A Thrower<sup>6</sup>), there will be additional difficulties in producing any type of fabric, let alone acceptable fabrics.

According to MJM, the weave pattern for the subject fabric is unique, and the Consoltex fabric is of poor quality. It stated that the University of Manitoba Textile Testing Service and Orcatech Inc. corroborated the fact that there were significant technical differences between the two fabrics. MJM also stated that, based on past experience at the Tribunal, there is no support for concluding that either the polyester blend or the developmental fabrics are identical to or substitutable for the subject fabric.

JMJ objected to any claims by domestic textile manufacturers that the consumer, much less a quality and cost-conscious retailer, would confuse garments made with a domestically produced polyester fabric with the perfect colour-matching garments made by MJM with the subject fabric.

JMJ questioned Consoltex's statement that the subject fabric "presents no impediment whatever to its production in Canada". MJM indicated that it would like to see hard facts to support this statement and see the delivery of an identical fabric. MJM stated that, although the Canadian Textiles Institute (CTI) states that Consoltex has substantial sales of high-twist fabrics, these sales are for polyester/rayon fabrics and are irrelevant, since those fabrics are not substitutable for the subject fabric.

JMJ argued that the CTI's assertion that the devaluation of the Korean won has been of significant benefit to MJM is not correct because the company has always purchased in U.S. dollars. It further argued that the Asian financial crisis has not meant any real gains for apparel producers that use Korean fabric. Consequently, fabric prices in the Orient are not exerting downward price pressure on domestic textile manufacturers, and tariff relief on the subject fabric would not aggravate the current situation.

According to MJM, the textile reference was established to inject some market reality into apparel and textile tariff issues, and apparel makers are of the opinion that, if their demands cannot be satisfied domestically, then imported fabric should be brought in duty free so that apparel makers have access to the world's supply of fabrics on a cost-competitive basis.

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6. 3A Thrower is a company referred to by Consoltex in its questionnaire response.

JMJ claimed that, over the last two years, it has given domestic producers every opportunity to deliver the fabric that it requires, but that they have not managed to do so. Furthermore, their opposition has unnecessarily delayed relief and savings to which MJJ is entitled. Consequently, MJJ sought relief dating back to the initiation date of the request.

Finally, the laboratory report filed with the Tribunal on September 22, 2000, stated that the fabric being developed by Consoltex did not look like or feel the same as the subject fabric and that Consoltex had not “duplicated” the subject fabric.

### **Domestic Users/Importers of the Subject Fabric**

#### Metro Textiles Inc. (Metro)

Metro submitted that it did not import the subject fabric and that it had no objections to MJJ being able to import the subject fabric duty free.

### **Domestic Producers of Allegedly Identical or Substitutable Fabrics**

#### Consoltex

Consoltex is the largest producer of man-made woven fabrics in Canada, with five manufacturing facilities located in Quebec and Ontario, employing approximately 1,000 people. Consoltex stated that, since 1996, it has made major investments in equipment and research and development in order to produce an expanding range of fabrics made from high-twist yarns. Consoltex produces and sells high-twist fabrics, made of 100 percent polyester and polyester/rayon blends, for both domestic and export markets, to manufacturers of women’s jackets, pants, skirts and dresses.

Consoltex submitted that it was asked by MJJ if it could produce an identical or substitutable fabric domestically and that MJJ’s main concern was to find a NAFTA source for this fabric. Consoltex asserted that it is working with DuPont Canada Inc. to obtain the base NAFTA-eligible yarn. The yarn will be twisted in Quebec by a well-equipped processor<sup>7</sup> that, on an ongoing basis, supplies other high-twist yarns to Consoltex in large volumes. Consoltex also submitted that, as soon as the twisted yarn was received, it would supply MJJ with the NAFTA-eligible fabric that it requested.

Consoltex opposed the request and submitted that the elimination of the MFN tariff would damage its high-twist fabric business with the removal of the tariff on a range of offshore fabrics that compete with its recently developed products. It also stated that the elimination of the MFN tariff would not benefit any apparel manufacturer in respect of its requirement for a NAFTA-eligible fabric.

#### Burlington Klopman Fabrics (Burlington)

Burlington indicated that it did not produce the subject fabric in Canada.

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7. The company’s name is 3A Thrower.

## Position of Other Interested Parties

### CTI

In response to the staff investigation report, the CTI and Consoltex filed a joint submission. The following are the major points made in that submission.

- Consoltex has been making fabrics identical to or substitutable for the subject fabric (i.e. woven polyester fabrics) ever since polyester filament yarns became available for use in woven fabrics. The twill construction specifically described in JMJ's request presents no impediment whatever for production in Canada.
- The subject fabric is made from high-twist yarns. Consoltex is one of the most experienced producers of high-twist woven polyester fabrics in the world, producing 10 million square metres of such fabrics per year.
- Consoltex made substantial investments in 1995-97 in order to produce woven apparel fabrics with high-twist yarns and has developed substantial sales of high-twist woven fabrics in the past three years.
- Consoltex has been working diligently in order to offer a NAFTA-eligible fabric to JMJ.
- JMJ's year-to-year change in sales volumes, as shown in its questionnaire response, is an indication that tariff elimination will not prevent job losses.
- The fact that the subject fabric is imported from Korea is significant because the exchange rate impact of the Asian crisis was especially severe in Korea. Korean fabric prices, landed in Canada, were abnormally low in 1999 and continue to be depressed for deliveries in 2000.
- Imports of woven polyester filament yarn fabric classified in subheading No. 5407.61 (the subheading in which the subject fabric is classified ) compete with identical or substitutable fabrics made in Canada, notably, the wide range of fabrics woven, dyed and finished by Consoltex.
- The subject fabric in greige form is available duty free from all sources. Tariff item No. 5407.61.96 allows any importer to import fabrics, such as the subject fabric, in a form that can be dyed and finished in Canada by converters such as Doubletex or manufacturers such as Consoltex.
- The fabric developed by Consoltex has overtaken many of the representations made by JMJ. To say that "this fabric cannot be produced domestically" can now be seen to be untrue.

- The record does not clearly show the respective volumes of the subject fabric required for future use in domestic apparel sold in Canada, in the United States under tariff preference levels<sup>8</sup> (TPLs) and in the United States on a NAFTA-eligible basis.
- It is generally expected that the TPLs for exports of apparel made from cotton or man-made fabrics will be fully utilized in 2000 and thereafter. Therefore, it appears advantageous to both JMJ and Consoltex for NAFTA fabrics to be produced domestically so that JMJ's apparel enters the United States duty free without TPLs. Furthermore, the full drawback of duties paid on the subject fabric imports will continue to be available to JMJ when any such fabric is used in apparel exported to the United States at MFN tariff rates.

The CTI and Consoltex also referred to a list of 19 cases where the decisions rendered by the Tribunal damaged Consoltex. They further stated that no enterprise in this field could be expected to sustain tariff elimination of this kind indefinitely. On the basis of the facts and these arguments, and recognizing that the prospective costs exceed any foreseeable benefit, the Tribunal was requested to recommend no change in the tariff for this case.

## OTHER INFORMATION

DFAIT informed the Tribunal that Canada currently maintains quota restraints on the subject fabric imported from Korea, Poland and Taiwan. Accordingly, this coverage includes the subject fabric, which is classified under tariff item No. 5407.61.99. DFAIT also informed the Tribunal that bilateral agreements, which provide for these restrictions, have been in place since 1978. According to DFAIT, the quota limit on this particular woven fabric was implemented to protect Canadian manufacturers from large volumes and low prices of exports from these countries.

DFAIT also indicated that it would consider requests for ex-quota entry on textile inputs where a recommendation has been made by the Tribunal to remove the customs tariff 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.

The CCRA has indicated that there would be no additional costs, over and above those already incurred by it, to administer the tariff relief requested for the subject fabric.

## ANALYSIS

The terms of reference direct the Tribunal to evaluate the economic impact that reducing or removing a tariff would have on domestic textile producers and downstream producers and, in so doing, to consider all relevant factors, such as the substitutability of an imported fabric with a domestic fabric, the ability of domestic fabric producers to serve the Canadian downstream industries and the competitiveness of those downstream industries at home and abroad. Consequently, the Tribunal's decision to recommend tariff

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8. NAFTA provides preferential quotas for apparel and textiles that do not meet the rules of origin. These take the form of tariff preference levels, formerly known as tariff rate quotas (TRQs) under the *Canada-United States Free 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, 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.



relief is based on the extent to which it considers that such tariff relief would provide net economic gains for Canada.

JMJ's request covers a very specific type of dyed, woven twill fabric whose distinguishing characteristic is that it is made of single non-textured polyester filaments with a twist exceeding 1,250 turns per metre in the warp and the weft. According to MJJ, it has created an in-stock program based on specific styles and colours manufactured with the subject fabric. These fabrics are used in the manufacture of women's blouses, jackets, pants, skirts and dresses. MJJ is of the opinion that identical or substitutable fabrics have not been produced domestically because of the technology required to manufacture them. According to MJJ, an independent analysis confirmed that the number of twists in the Consoltex fabric was much lower than the number of twists in the subject fabric and, therefore, this fabric is neither identical to nor substitutable for the subject fabric. Furthermore, the laboratory report provided to the Tribunal on September 22, 2000, confirmed that Consoltex had not "duplicated" the subject fabric.

Consoltex and the CTI opposed MJJ's request, arguing that Consoltex has been making fabrics identical to or substitutable for the subject fabric ever since high-twist polyester filament yarns became available for use in woven fabrics. Furthermore, Consoltex argued that the high-twist fabric that it is currently developing for MJJ negates many of the representations made by MJJ regarding substitutability. Consoltex also argued that the elimination of the MFN tariff would damage its high-twist business with the removal of the tariff on a range of offshore fabrics that compete with its recently developed products, without providing any benefit to apparel manufacturers in respect of their requirements for NAFTA-eligible fabrics.

In determining whether a substitutable fabric is produced domestically, the Tribunal is guided by factors such as the technical description of the fabric, its quality, its price and its market acceptance. If these factors appear to be comparable, the Tribunal then considers the issue of availability of supply before concluding its analysis. Furthermore, as the Tribunal has stated in the past, "the fashion industry operates on a lower degree of substitutability and, therefore, searches for, and insists on, new fabrics which are, or are soon expected to be, demanded by consumers".<sup>9</sup> In other words, the Tribunal is of the view that the fashion industry attaches considerable importance to even small differences between fabrics which would allow it to offer distinctive new products.

In this case, Consoltex has stated that it currently makes woven polyester fabrics that are identical to or substitutable for the subject fabric. However, according to MJJ, these fabrics do not meet its specifications with respect to weave, weight and density of the yarn, and the number of twists. Other than stating that it currently produces fabrics with high-twist yarns, Consoltex has not supplied the Tribunal with any other evidence to contest MJJ's assertion. Accordingly, the Tribunal concludes that the polyester fabrics currently made by Consoltex are not identical to or substitutable for the subject fabric.

Consoltex has stated that it is currently developing a NAFTA-eligible fabric for MJJ using yarns with the required number of twists. In fact, the Tribunal believes that the development of this fabric suggests that there is a market for this product that is different from the market for Consoltex's existing line of high-twist fabrics. However, the recent laboratory report provided by MJJ indicates that the developmental fabric did not look like or feel the same as the subject fabric and that Consoltex has not "duplicated" the subject fabric. There is no evidence on the record to suggest that this fabric will be acceptable to MJJ in the near future.

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9. *Château Stores of Canada* (19 September 1995), TR-94-011 and TR-94-019 at 7.

The Tribunal has stated in the past<sup>10</sup> 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 Consoltex has indicated that it is attempting to develop a new fabric, the recent laboratory report filed with the Tribunal indicates that Consoltex has not achieved its objective; this suggests to the Tribunal that there may be problems with the development of the fabric or acceptance by JMJ. Therefore, it is still quite hypothetical as to whether Consoltex can produce and sell a fabric that is identical to or substitutable for the subject fabric. Accordingly, the Tribunal is of the view that Consoltex has not demonstrated that the fabric currently under development will be available to the market in reasonable commercial quantities or at acceptable prices in the near future. As was stated in *Tribal*, a conclusion of foreseeable and imminent production could be based on such evidence as orders on hand, actual sales, detailed results of trial runs by both the producer and end user or, in the absence of the foregoing, a feasibility study detailing capital appropriation, production and marketing plans for the new products. Nevertheless, if tariff relief is granted, the Tribunal would be prepared to consider a request for a review in the future, whenever Consoltex is in a position to provide evidence that it is able to produce and sell commercial quantities of fabrics that are identical to or substitutable for the subject fabric.

The Tribunal sees little cost in the requested tariff relief being granted. As explained before, the Tribunal does not view the fabrics currently produced by Consoltex as being substitutable for the subject fabric. With regard to the fabric currently being developed by Consoltex, the Tribunal notes that Consoltex's ability to supply and market acceptance have not, as yet, been demonstrated. Accordingly, the Tribunal cannot attribute any costs that might be incurred by Consoltex to the assessment of the net economic gains to Canada from the requested tariff relief. In making this statement, the Tribunal notes that this request is for a very specific fabric and that its importation, duty free, should have no effect on Consoltex's current high-twist fabric business. Furthermore, as noted elsewhere, TPLs for exports of apparel made from cotton or man-made fabrics will be fully utilized in the near future. Therefore, there still appears to be a strong incentive for both JMJ and Consoltex to make sure that the NAFTA-eligible version of the subject fabric is produced domestically. This would enable JMJ to export apparel to the United States duty free without using any TPLs. The granting of tariff relief will not affect this reality, and the incentive for Consoltex to develop an identical or substitutable fabric will remain.

The tariff relief will provide a yearly benefit to JMJ of more than \$150,000. Tariff relief could also lead to increased employment at JMJ, as it increases its exports to the United States.

With respect to JMJ's request for retroactive tariff relief, the Tribunal has stated, in previous cases, that it will not consider recommending such relief other than in exceptional circumstances. JMJ has provided no evidence to justify such a request. The Tribunal, therefore, is not persuaded that the current circumstances are so exceptional as to warrant a recommendation for retroactive tariff relief.

## RECOMMENDATION

In light of the foregoing, the Tribunal hereby recommends to the Minister that tariff relief be granted, for an indeterminate period of time, on importations, from all countries of woven fabric, having a 3/2 right hand twill weave with a steep twill line of approximately 63 degrees, dyed, solely of single non-textured

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10. See, for example, *Camp Mate* (10 June 1996), TR-95-051; *Lady Americana Sleep Products* (12 February 1997), TR-95-064 and TR-95-065; *Cambridge Industries* (12 February 1999), TR-98-001; *Helly Hansen Canada* (19 March 1999), TR-97-015, TR-97-016 and TR-97-020; *Jones Apparel Group Canada* (8 July 1999), TR-98-017; and *Tribal Sportswear Inc.* (24 August 1999), TR-98-019 [hereinafter *Tribal*].

polyester filaments, with a twist exceeding 1,250 turns per metre in the warp and the weft, having “S” twist yarns in the warp and two “S” twist yarns followed by two “Z” twist yarns alternating in the weft, of a weight not exceeding 250 g/m<sup>2</sup>, of subheading No. 5407.61, for use in the manufacture of women’s blouses, jackets, pants, skirts and dresses.

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