Federal Court of Appeal | Cour d'appel fédérale

Date: 20111025

Docket: A-389-10

Citation: 2011 FCA 298

CORAM: **EVANS J.A.**
PELLETIER J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

TARA MATERIALS, INC.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Ottawa, Ontario, on October 25, 2011.

Judgment delivered from the Bench at Ottawa, Ontario, on October 25, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 25, 2011)

EVANS J.A.

[1] This is an appeal by Tara Materials, Inc. pursuant to section 68 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1 (Act) from a decision by the Canadian International Trade Tribunal (Tribunal), dated August 3, 2010, made under subsection 67(1) of the Act. The issue before the Tribunal was whether certain goods (artists' canvases) exported to Canada from the United States were "originating goods" within the meaning of the *NAFTA Rules of Origin Regulations*, SOR/94-14 (Regulations) and therefore entitled to preferential tariff treatment under the *North American Free Trade Agreement*, 1994 Can. T.S. No. 2 (NAFTA).

[2] In the decision under appeal, the Tribunal upheld a decision of the Canada Border Services Agency (CBSA), rejecting the Appellants' claim that 100% of the goods were "originating goods" and thus entitled to the preferential treatment. Based on its interpretation of the Regulations, and subsection 7(16.1) in particular, the Tribunal held that since 72% of the material from which the goods in question were made was "originating material", the same percentage of the finished goods originated in the United States or Mexico and were thus entitled to the NAFTA preferential treatment. Accordingly, even though less than 72% of the goods were exported to Canada by the producer, the preferential treatment did not apply to 28% of the goods, because they were made from material originating from outside NAFTA.

[3] The only issue raised by counsel for the Appellant at the hearing of the appeal concerned the interpretation of subsection 7(16.1) of the Regulations. In particular, he submitted that that subsection would apply in this case only if the materials from which the goods had been made, and the goods themselves, were drawn from "the same inventory". He argued that since the evidence was that the producer in the United States kept the materials in one room and the goods in another, albeit at the same location, subsection 7(16.1) does not apply.

[4] The relevant provision is as follows:

7(16.1) Where fungible materials referred to in paragraph (16)(a) and fungible goods referred to in paragraph (16)(b) are withdrawn from the same inventory, the inventory management method used for the materials must be the same as the inventory management method used for the goods, and where	7(16.1) Si les matières fongibles visées à l'alinéa (16)a) et les produits fongibles visés à l'alinéa (16)b) sont retirés du même stock, la méthode de gestion des stocks utilisée à l'égard des matières doit être la même que celle utilisée à l'égard des produits; en outre, si la méthode de la moyenne est

the averaging method is used, the respective averaging periods for fungible materials and fungible goods are to be used.	utilisée, les périodes respectives choisies à cette fin à l'égard des matières fongibles et des produits fongibles doivent être utilisées.

[5] It was common ground that the Tribunal's decision can only be set aside if it is unreasonable and that the reasonableness standard of review applies to the Tribunal's interpretation of the provisions of the Regulations in dispute.

[6] The Appellant argues that the material from which the goods in issue were made, and the goods themselves, were only withdrawn from "the same inventory" for the purpose of subsection 7(16.1) if they were kept in the same room. Without endorsing the very broad interpretation of "the same inventory" advanced by the CBSA, the Tribunal rejected the Appellant's interpretation as too narrow and "neither realistic nor supported by the language of subsection 7(16.1) ...": see paragraph 63 of the Tribunal's reasons.

[7] We are not persuaded that the explanation given by the Tribunal for its decision is unreasonable. The text and structure of the relevant sections of the Regulations are far from clear, and the provisions in question are capable of more than one reasonable interpretation. Counsel for the Appellant conceded that he could not explain the function of his proposed interpretation of subsection 7(16.) in the context of the scheme created by the Regulations.

[8] Nor are we persuaded that the Tribunal's decision itself is unreasonable in view of the facts and the applicable law.

[9] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-389-10
STYLE OF CAUSE:	Tara Materials, Inc. v. President of the Canada Border Services Agency
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 25, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	(EVANS, PELLETIER, LAYDEN-STEVENSON JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

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