

Federal Court



Cour fédérale

Date: 20101209

Docket: T-1597-09

Citation: 2010 FC 1261

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TRE MAIALI FASHION GROUP INC.

Applicant

and

**THE PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY
AND
THE MINISTER OF NATIONAL REVENUE**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In regard to the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), it is not the Letter of Credit that is excluded outright, at all, it is the nature of the provisions, in the Letter of Credit, itself.

[2] Every case must be related directly to pertinent legislation and interpreted in light of relevant jurisprudence (*Highland Produce Ltd. v. Egg Farmers of Canada*, 2010 FC 401, [2010] F.C.J. No. 475 (QL)), if such relevant jurisprudence exists. In an affidavit, the deficiencies of a Letter of Credit as a security is specified:

- (a) inadequate wording to protect the total amount owing, including interest;
- (b) reference to an “agreement” between the CBSA and the customer (the Applicant), when no such agreement has been entered into or proposed by the Applicant;
- (c) being time-limited, with an expiry date of March 31, 2010; and
- (d) no right to call-in the credit in the event that TD Canada Trust declines to issue a new letter upon its expiry.

II. Judicial Procedure

[3] This is an application for judicial review from a decision of the Canada Border Services Agency (CBSA), Regional Recourse Division, dated September 1, 2009, pursuant to subsection 60(1) (section 59) of the *Customs Act*, in which the Respondents found that the Applicant did not provide satisfactory security to the Minister in respect of the amount and interest owed to the Respondents, and for the issuance of a *writ of mandamus* pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, and Rule 300 and following of the *Federal Courts Rules*, SOR/98-106.

III. Background

[4] The Applicant, Tre Maiali Fashion Group Inc., imported certain items of clothing from various suppliers allegedly from the United States of America.

[5] The Respondents conducted an origin audit of the importation of goods under the trademarks Affliction, LLC, Sinful, Xtreme, Couture and Archaic for the period of January 1, 2007 to December 31, 2007.

[6] The purpose of the verification was to determine whether the imported clothing into Canada satisfied the requirements of the North American Free Trade Agreement (NAFTA) and the NAFTA Rules of Origin Regulations, and if they were entitled to the United States tariff (UST)/Mexico Tariff (MT) rate (NAFTA preferential tariff treatment) when imported into Canada.

[7] On February 27, 2009, the CBSA, Trade Compliance Division (Greater Toronto Area Region), based on information provided by the Applicant's exporters and suppliers, in accordance with subsection 59(1) of the *Customs Act*, issued and gave notice of 16 re-determination decisions regarding the origin of the goods stating that they were not entitled to NAFTA tariff preferential treatment.

[8] Accordingly, the NAFTA certificates of origin were no longer valid.

[9] The CBSA also required the Applicant to pay or secure the payment of the outstanding customs duties. According to the Detailed Adjustment Statements (DAS), on February 27, 2009, this represented a total of \$322, 880.

[10] In order to challenge the 16 decisions and to request the re-determination of the origin of the goods, on May 26, 2009, the Applicant instructed its customs broker, Milgram and Company, to file

with the CBSA Recourse Division (GTA Region), 16 “B2 Adjustment Requests” for further re-determination.

[11] The Applicant’s customs broker sent a Letter of Credit, dated March 31, 2009, issued on behalf of the Applicant’s bank, the Toronto-Dominion (TD) Bank, for the sum of \$322, 880.

[12] On June 4, 2009, Mr. Peter Wolanski, Manager, Regional Programs, Regional Recourse Division, CBSA, spoke by telephone with the Applicant’s customs broker and with the Applicant’s president, Mr. Chris Magnone, to advise them that the Letter of Credit of March 31, 2009 was not considered an acceptable security. Mr. Wolanski agreed to allow the Applicant until June 18, 2009 to provide satisfactory security.

[13] On June 23, 2009, Mr. Wolanski spoke to Mr. Magnone by telephone.

[14] On June 25, 2009, Ms. Valerie Fudge, Recourse Officer (GTA – Toronto), CBSA, sent the Applicant’s customs broker a letter explaining what would be required as a satisfactory security. Ms. Fudge also extended the Applicant’s delay to July 25, 2009 by which the Applicant was to provide the secured sum.

[15] On July 3, 2009, the Applicant’s counsel, Mr. Michael Kaylor, sent a letter to Ms. Fudge, stating that the Letter of Credit is an acceptable security.

[16] On July 13, 2009, Mr. Wolanski spoke by telephone with the Applicant's legal counsel to advise that Letters of Credit are not an acceptable security.

[17] On July 14, 2009, Mr. Wolanski spoke by telephone with the Applicant's legal counsel advising that the required bond could not have an expiry date.

[18] On August 12, 2009, Ms. Fudge sent a letter to the Applicant's legal counsel advising him that the Letter of Credit was not an acceptable security; the deadline to pay or post security had been extended to August 31, 2009 to provide such security.

[19] On August 17, 2009, the Applicant contacted Mr. Wolanski by telephone and discussed the bond format that was required.

[20] On August 18, 2009, Mr. Christopher Parke, Counsel, Department of Justice Canada, sent an e-mail to the Applicant's legal counsel to explain that time-limited security would not suffice.

[21] On August 19, 2009, Ms. Fudge received a letter from the Applicant's legal counsel asking for a further re-determination of the decisions and advising that the Applicant would request of the Court the issuance of a *writ of mandamus*.

[22] August 21, 2009, Ms. Marlene Koehler, Manager, Policy Section of the Recourse Directorate, CBSA, and Applicant's legal counsel spoke by telephone about the deficiencies of the Letter of Credit.

[23] On August 24, 2009, Mr. Wolanski sent a letter to the Applicant's legal counsel.

[24] On August 31, 2009, Mr. Wolanski received a letter from the Applicant, stating that the Applicant would not be able to provide the required bond.

[25] On September 1, 2009, Mr. Wolanski sent a letter to the Applicant confirming that, because it had not received payment for the duties owing or satisfactory security, he had no choice but to reject the Applicant's requests for further re-determination of the origin of the imported goods.

[26] The Notice of Application to the Federal Court was filed on September 24, 2009.

IV. Position of the Parties

[27] The Applicant submits that the Respondents' refusal to accept the Letter of Credit is illegal and that the Respondents fettered their discretionary authority and acted in an arbitrary, capricious and illegal manner. The Applicant specifies that he is deprived of his right of appeal in the 16 re-determination decisions in regard to the origin of the goods.

[28] The Respondents submit that the Letter of Credit is not a satisfactory security, and that the Minister was justified in demanding a security that respects the requirements of the *Security for Debts Due to Her Majesty Regulations, SORS/87-505* (Security Regulations). As such, the amount due by the Applicant, as of November 16, 2009, was \$332,880, plus \$15,975 in interest, and the Applicant cannot request re-determination of the CBSA decision unless the Applicant meets the legal requirements.

V. Issues

- [29] (1) Did the CBSA Manager have the authority to reject the Letter of Credit as an unsatisfactory security?
- (2) Is the Letter of Credit proposed by the Applicant considered to be sufficient to the Minister in accordance with the requirements of subsection 60(1) of the *Customs Act*?

VI. Decision under Review

[30] The Respondents rejected the Applicant's request for further re-determination of origin under subsection 60(1) of the *Customs Act* on the basis that the Applicant had not provided payment of the outstanding duties and interest nor had the Applicant provided security satisfactory to the Minister. The Letter of Credit was not considered security satisfactory to the Minister.

VII. Applicable Legislation

[31] Under sections 59 and 60 of the *Customs Act*:

Re-determination or further re-determination

59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may

(a) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time

Révision et réexamen

59. (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :

a) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises

within

importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :

(i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or

(i) dans les quatre années suivant la date de la détermination, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

(ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and

(ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

(b) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(c.1), (c.11), (e), (f) or (g) that is treated by subsection 74(1.1) as a re-

b) réexaminer l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1) c.1), c.11), e), f) ou g) qui est assimilé, conformément au

determination under paragraph (a) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (a).

paragraphe 74(1.1), à une révision au titre de l'alinéa a), soit d'une correction effectuée en application de l'article 32.2 qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa a).

Notice requirement

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.

Avis de la détermination

(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement.

Payment or refund

(3) Every prescribed person who is given notice of a determination, re-determination or further re-determination under subsection (2) shall, in accordance with that decision,

(a) pay any amount owing, or additional amount owing, as the case may be, as duties in respect of the goods or, if a request is made under section 60, pay that amount or give security satisfactory to the Minister in respect of that amount

Paiement ou remboursement

(3) Les personnes visées par règlement qui ont été avisées de la décision, de la détermination, de la révision ou du réexamen en application du paragraphe (2) doivent, en conformité avec la décision, la détermination, la révision ou le réexamen, selon le cas :

a) soit verser tous droits ou tout complément de droits échus sur les marchandises ou, dans le cas où une demande est présentée en application de l'article 60, soit verser ces droits ou compléments de droits, soit donner la garantie, jugée

and any interest owing or that may become owing on that amount; or

(b) be given a refund of any duties, or a refund of any duties and interest paid (other than interest that was paid because duties were not paid when required by subsection 32(5) or section 33), in excess of the duties owing in respect of the goods.

satisfaisante par le ministre, du versement de ceux-ci et des intérêts échus ou à échoir sur ceux-ci;

b) soit recevoir le remboursement de tout excédent de droits ou de tout excédent de droits et d'intérêts — sauf les intérêts payés en raison du non-paiement de droits dans le délai prévu au paragraphe 32(5) ou à l'article 33 — versé sur les marchandises.

Amounts payable immediately

(4) Any amount owing by or to a person under subsection (3) or 66(3) in respect of goods, other than an amount in respect of which security is given, is payable immediately, whether or not a request is made under section 60.

Exception for par. (3)(a)

(5) For the purposes of paragraph (3)(a), the amount owing as duties in respect of goods under subsection (3) as a result of a determination made under subsection 58(1) does not include any amount owing as duties in respect of the goods under section 32 or 33.

Délai de paiement ou de remboursement

(4) Les sommes qu'une personne doit ou qui lui sont dues en application des paragraphes (3) ou 66(3) sur les marchandises, à l'exception des sommes pour lesquelles une garantie a été donnée, sont à payer sans délai, même si une demande a été présentée en vertu de l'article 60.

Limites

(5) Pour l'application de l'alinéa (3)a), le montant de droits dû sur les marchandises en application du paragraphe (3) à la suite de la détermination faite en vertu du paragraphe 58(1) ne comprend pas un montant dû sur celles-ci en application des articles 32 ou 33.

Review of re-determination or further re-determination

(6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.

Re-determination and Further Re-determination by President

Request for re-determination or further re-determination

60. (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.

Request for review

(2) A person may request a review of an advance ruling made under section 43.1 within ninety days after it is given to the person.

Intervention à l'égard d'une révision ou d'un réexamen

(6) La révision ou le réexamen fait en vertu du présent article ne sont susceptibles de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.

Révision ou réexamen par le président

Demande de révision ou de réexamen

60. (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.

Demande de révision

(2) Toute personne qui a reçu une décision anticipée prise en application de l'article 43.1 peut, dans les quatre-vingt-dix jours suivant la

notification de la décision anticipée, en demander la révision.

How request to be made

(3) A request under this section must be made to the President in the prescribed form and manner, with the prescribed information.

Présentation de la demande

(3) La demande prévue au présent article est présentée au président en la forme et selon les modalités réglementaires et avec les renseignements réglementaires.

President's duty on receipt of request

(4) On receipt of a request under this section, the President shall, without delay,

(a) re-determine or further re-determine the origin, tariff classification or value for duty;

(b) affirm, revise or reverse the advance ruling; or

(c) re-determine or further re-determine the marking determination.

Intervention du président

(4) Sur réception de la demande prévue au présent article, le président procède sans délai à l'une des interventions suivantes :

a) la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane;

b) la confirmation, la modification ou l'annulation de la décision anticipée;

c) la révision ou le réexamen de la décision sur la conformité des marques.

Notice requirement

(5) The President shall without delay give notice of a decision made under subsection (4), including the rationale on which the decision is made, to the person who made the request. (Emphasis added).

Avis de la décision

(5) Le président donne avis au demandeur, sans délai, de la décision qu'il a prise en application du paragraphe (4), motifs à l'appui.

[32] Section 2 of the *Customs Act* specifies the limits of the Minister's power of delegation:

Powers, duties and functions of President

(3) Any power, duty or function of the President under this Act may be exercised or performed by any person, or by any officer within a class of officers, authorized by the President to do so and, if so exercised or performed, is deemed to have been exercised or performed by the President.

Delegation

(4) The Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister, including any judicial or quasi-judicial powers or duties of the Minister, under this Act.

Delegation by Minister

(5) The Minister may authorize a person employed by the Canada Revenue Agency, or a class of those persons, to exercise powers or perform duties of the Minister, including any judicial or quasi-judicial powers or duties of the Minister, under this Act.

Delegation by Minister of National Revenue

Attributions du président

(3) Les attributions conférées au président par la présente loi peuvent être exercées par toute personne qu'il autorise à agir ainsi ou par tout agent appartenant à une catégorie d'agents qu'il autorise à agir ainsi. Les attributions ainsi exercées sont réputées l'avoir été par le président.

Délégation

(4) Le ministre peut autoriser un agent ou une catégorie d'agents à exercer les pouvoirs et fonctions, y compris les pouvoirs et fonctions judiciaires ou quasi-judiciaires, qui lui sont conférés en vertu de la présente loi.

Délégation par le ministre

(5) Le ministre peut autoriser toute personne employée par l'Agence du revenu du Canada, nommément ou au titre de son appartenance à une catégorie donnée, à exercer les pouvoirs et fonctions, y compris les pouvoirs et fonctions judiciaires ou quasi-judiciaires, qui lui sont conférés en vertu de la présente loi.

Délégation par le ministre du Revenu national

(6) The Minister of National Revenue may authorize a person employed by the Canada Revenue Agency or the Agency, or a class of those persons, to exercise powers or perform duties of that Minister, including any judicial or quasi-judicial powers or duties of that Minister, under this Act.

(6) Le ministre du Revenu national peut autoriser toute personne employée par l'Agence du revenu du Canada ou par l'Agence, nommément ou au titre de son appartenance à une catégorie donnée, à exercer les pouvoirs et fonctions, y compris les pouvoirs et fonctions judiciaires ou quasi-judiciaires, qui lui sont conférés en vertu de la présente loi.

[33] Sections 3 and 4 of the Security Regulations specifies:

AUTHORIZATION

3. Any appropriate Minister responsible for the recovery or collection of any debt or obligation due or payable to Her Majesty or claim by Her Majesty may accept any security that is deemed to be a security pursuant to section 4 in respect of any such debt, obligation or claim and may execute and deliver

(a) on payment of any such debt, obligation or claim, any instrument that will effectively release or discharge any security accepted in respect of the debt, obligation or claim; or

(b) on payment of a portion of any such debt, obligation or claim, any instrument that will effectively release or discharge any security

AUTORISATION

3. Le ministre compétent responsable du recouvrement ou de la perception d'une dette ou d'une obligation due ou payable à Sa Majesté ou d'une réclamation de Sa Majesté est autorisé à recevoir une garantie réputée constituer une garantie en vertu de l'article 4, à l'égard de la dette, de l'obligation ou de la réclamation, et à signer :

a) contre le règlement d'une telle dette, obligation ou réclamation, tout document nécessaire pour donner quittance et mainlevée de toute garantie reçue à l'égard de la dette, de l'obligation ou de la réclamation;

b) contre le règlement d'une partie d'une telle dette, obligation ou réclamation, tout document nécessaire pour donner quittance et

accepted in respect of the portion of the debt, obligation or claim that has been paid.

mainlevée de toute garantie reçue à l'égard de cette partie de la dette, de l'obligation ou de la réclamation.

SECURITY

4. For the purposes of these Regulations, only a charge in favour of Her Majesty on the existing or future personal or real property of a debtor or on the existing personal or real property of a person who is the surety or guarantor of the debtor, shall be deemed to be a security. (Emphasis added).

GARANTIE

4. Pour l'application du présent règlement, est réputé constituer une garantie un droit en faveur de Sa Majesté sur les biens immobiliers ou personnels actuels ou futurs d'un débiteur ou sur les biens personnels actuels ou immobiliers d'une personne qui est garant ou caution du débiteur.

[34] The *Regulations Respecting the Accounting for Imported Goods and the Payment of Duties*, SOR/86-1062, specify:

Security for Release of Goods

11. (1) The security required under paragraphs 7.2(b), 7.3(b), 9(a) and 10.5(2)(f) shall be in the form of

- (a) cash;
- (b) a certified cheque;
- (c) a transferable bond issued by the Government of Canada;
- (d) a bond issued by

Garantie relative au dédouanement des marchandises

11. (1) La garantie visée aux alinéas 7.2b), 7.3b), 9a) et 10.5(2)f) est :

- a) soit un paiement en espèces;
- b) soit un chèque visé;
- c) soit une obligation transférable émise par le gouvernement du Canada;
- d) soit une caution émise, selon le cas :

(i) a company that is registered and holds a certificate of registry to carry on the fidelity or surety class of insurance business and that is approved by the President of the Treasury Board as a company whose bonds may be accepted by the Government of Canada,

(i) par une compagnie enregistrée détenant un certificat d'enregistrement lui permettant de faire des opérations dans les catégories de l'assurance contre les abus de confiance ou de l'assurance caution et qui est approuvée par le président du Conseil du Trésor à titre de compagnie dont les cautions peuvent être acceptées par le gouvernement du Canada,

(i) a member of the Canadian Payments Association referred to in section 4 of the *Canadian Payments Association Act*,

(ii) par un membre de l'Association canadienne des paiements aux termes de l'article 4 de la *Loi sur l'Association canadienne des paiements*,

(iii) a corporation that accepts deposits insured by the Canada Deposit Insurance Corporation or the Régie de l'assurance-dépôts du Québec to the maximum amounts permitted by the statutes under which those institutions were established,

(iii) par une société qui accepte des dépôts garantis par la Société d'assurance-dépôts du Canada ou par la Régie de l'assurance-dépôts du Québec, jusqu'à concurrence du maximum permis par leur législation respective,

(iv) a credit union as defined in subsection 137(6) of the *Income Tax Act*, or

(iv) par une caisse de crédit au sens du paragraphe 137(6) de la *Loi de l'impôt sur le revenu*,

(v) a corporation that accepts deposits from the public, if repayment of the deposits is guaranteed by Her Majesty in right of a province; or

(v) par une société qui accepte du public des dépôts dont le remboursement est garanti par Sa Majesté du chef d'une province;

(e) subject to subsection (3), where the goods are commercial goods on which the duties payable are less than the amount that the Minister determines, a remittance by credit card in respect of which the importer or owner of the goods is the cardholder or authorized user, where the issuer of the credit card has entered into an agreement with the Government of Canada establishing the conditions of the acceptance and use of that credit card.

e) sous réserve du paragraphe (3), soit un versement effectué au moyen d'une carte de crédit dont le détenteur ou l'utilisateur autorisé est l'importateur ou le propriétaire des marchandises et dont l'émetteur a conclu avec le gouvernement du Canada une entente prévoyant les conditions d'acceptation et d'utilisation de la carte, lorsqu'il s'agit de marchandises commerciales pour lesquelles les droits exigibles s'élèvent à un montant inférieur à celui que fixe le ministre.

(2) Subject to subsection (3), the security required under paragraphs 7.2(b) and 9(a) shall be

(2) Sous réserve du paragraphe (3), la garantie visée aux alinéas 7.2b) et 9a) doit être :

(a) in an amount determined by the Minister; and

a) de tel montant que fixe le ministre;

(b) deposited with an officer at the customs office where the goods are to be released.

b) remise à un agent du bureau de douane où les marchandises doivent être dédouanées.

(3) Where a person intends to request the release of goods on a continuing basis, a general security of an amount

(3) Lorsqu'une personne entend demander le dédouanement de marchandises de façon continue, une garantie

that is determined by the Minister shall be deposited with

générale de tel montant que fixe le ministre doit être remise :

(a) the chief officer of customs, where the person intends to request the release of goods from one customs office only;

a) à l'agent en chef des douanes, si la personne entend demander le dédouanement de marchandises à un seul bureau de douane;

(b) each chief officer of customs, where the person intends to request the release of goods from more than one customs office; or

b) à chacun des agents en chef des douanes, si la personne entend demander le dédouanement de marchandises à plus d'un bureau de douane;

(c) the Commissioner, where the person intends to request the release of goods from more than one customs office and does not deposit a general security with each applicable chief officer of customs.

c) au commissaire, si la personne entend demander le dédouanement de marchandises à plus d'un bureau de douane et ne remet pas une garantie générale à chaque agent en chef des douanes en cause.

(4) The security required under paragraphs 7.3(b) and 10.5(2)(f) shall be

(4) La garantie visée aux alinéas 7.3b) et 10.5(2)f) doit être :

(a) in an amount determined by the Minister; and

a) de tel montant que détermine le ministre;

(b) deposited with the Commissioner.

b) remise au commissaire.

[35] The Memorandum D1-7-1 (Posting Security for Transacting Bonded Operations, CBSA, Ottawa, October 7, 2008) establishes and explains general policies and procedures relating to the posting of security for participating in CBSA bonded transactions. The relevant sections read as follows:

Acceptance of Security Deposits

4. Security can be posted in one of, or a combination of, the following forms:

(a) cash

(b) a certified cheque or money order

(c) a transferable bond issued by the Government of Canada, or

(d) a bond issued by either of the following:

(i) a company that is approved by the Treasury Board as an entity whose bonds may be accepted by the Government of Canada. Please refer to Treasury Board website, Appendix L.

(ii) a member of the Canadian Payments Association (CPA) as referred to in section 4 of the *Canadian Payments Association Act*. Please refer to the Canadian Payments Association website.

(iii) a corporation that accepts deposits insured

Acceptation des dépôts de garantie

4. Une garantie peut être déposée par l'une des formes suivantes ou par une combinaison de ces formes :

a) le paiement en espèces,

b) un chèque certifié ou un mandat,

c) une obligation transférable émise par le gouvernement du Canada,

d) un cautionnement émis, selon le cas :

(i) par une compagnie approuvée par le Conseil du Trésor à titre d'entité dont les cautionnements peuvent être acceptés par le gouvernement du Canada. Veuillez consulter le site internet du Conseil du Trésor à l'annexe L.

(ii) par un membre de l'Association canadienne des paiements (ACP) aux termes de l'article 4 de la *Loi sur l'Association canadienne des paiements*. Veuillez consulter le site internet de l'Association canadienne des paiements.

(iii) par une société qui accepte des dépôts

by the Canada Deposits Insurance Corporation or the Régie de l'assurance-dépôts du Québec to the maximum permitted by the statutes under which those institutions were established.

garantis par la Société d'assurance-dépôts du Canada ou par la Régie de l'assurance-dépôts du Québec, jusqu'au maximum permis par leur législation respective,

(iv) a credit union as defined in subsection 137(6)(b) of *the Income Tax Act* (CPA membership must be through a central co-operative).

(iv) par une caisse de crédits au sens de l'alinéa 137(6)b) de la *Loi de l'impôt sur le revenu*, (l'adhésion à l'ACP doit être par une coopérative centrale),

(v) a corporation that accepts deposits from the public, if repayment of the deposits is guaranteed by Her Majesty in right of a province.

(v) par une société qui accepte du public des dépôts dont le remboursement est garanti par Sa Majesté du chef d'une province.

5. Letters of credit will not be accepted as security deposits for bonded revenue transactions.
(Emphasis added).

5. Les lettres de crédit ne seront pas acceptées à titre de dépôts de garantie pour les transactions en douane.

VIII. Standard of Review

[36] The Applicant requests that the Court force the Respondents to re-determine the origin of the Applicant's goods by a *writ of mandamus*:

- i) order that Applicant's letter of credit dated March 31, 2009 be declared to be in compliance with s. 59(3) and 60(1) of the *Customs Act*, and;
- ii) order that the Respondent's refusal to re-determine the origin of the goods in issue by its notification dated September 1, 2009 be set aside;

- iii) order the Respondent to re-determine the origin of the goods in issue pursuant to section 60 of the *Customs Act*.

(Notice of Application for the issuance of a *writ of mandamus* at pp. 3-4).

[37] In *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R.

6, the Supreme Court of Canada declared:

[43] The remedy awarded by the trial judge was pursuant to the discretion conferred upon him under s. 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Section 18.1(3) provides:

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

The question here is whether this Court may and should intervene with respect to remedy. The test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations. See *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404, *Friends of the Oldman River Society*, at pp. 76-77, and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 587-88. (Emphasis added).

[38] The exercise of quasi-judicial discretion, such as the CBSA's Manager's discretion to determine what constitutes a security satisfactory to the Minister pursuant to the specific *Customs Act*, is a question of law reviewable on a correctness standard. Although it is quasi-judicial discretion, the discretion must still demonstrate that it did take into account, thus, did weigh all relevant considerations.

[39] Both parties originally had agreed on the application of the standard of correctness in regard to legislation and thus more stringent on the Applicant and Respondents confronted by the legislation. The standard of correctness may nevertheless be coupled with a reasonableness component in respect of the decision as to the consideration of the Letter of Credit in question.

IX. Analysis

[40] To understand the issues of the case, it is necessary to present the relevant process as carried out in the *Customs Act*. The Applicant requested a review of a section 59 *Customs Act* re-determination. The stages of this legislative scheme have been duly considered by the Federal Court of Appeal, in *Canada v. Fritz Marketing Inc.*, 2009 FCA 62, [2009] 4 F.C.R. 314, which explains the particular statutory framework of the *Customs Act*:

[6] Pursuant to subsection 32.2(2) of the *Customs Act*, an importer who has reason to believe that its declaration of the value for duty is incorrect must submit a correction within a specified time and pay any resulting deficiency in the duties payable. Subsection 32(3) provides that, for the purposes of the *Customs Act*, such a correction is treated as a re-determination by the Agency under paragraph 59(1)(a) of the *Customs Act*. The duty to make corrections expires after four years (subsection 32.2(4) of the *Customs Act*).

[7] Pursuant to paragraph 59(1)(a) of the *Customs Act*, the Agency may make a re-determination of the value for duty of imported goods, but it must do so within four years after the date of the initial determination. Further re-determinations are permitted under paragraph 59(1)(b), subject in some cases to further time limits.

...

[9] An importer who receives a Detailed Adjustment Statement may request the President of the Agency to make a further determination pursuant to section 60. The request must be made within a stipulated time limit, which may be extended by the President or, in certain circumstances, by the Canadian International Trade Tribunal ("CITT") (sections 60.1 and 60.2). Pursuant to section 61 of the *Customs Act*, the President of the Agency has the authority to make a further re-determination, subject to certain conditions that are not relevant to this appeal.

[10] Pursuant to section 67 of the *Customs Act*, an appeal lies to the CITT from a decision of the President on a section 60 request, or a re-determination by the

President under section 60 or section 61. A further appeal lies to the Federal Court of Appeal pursuant to section 68 of the *Customs Act*.

[41] Thus, subsection 60(1) of the *Customs Act* requires that a person filing a request for re-determination first pay all amounts owing as duties and interest, or provide security sufficient to cover the amount owed. In the present case, the Applicant wished to request a further re-determination of the CBSA decision, and, as such, was required to provide the necessary security.

(1) Did the CBSA Manager have the authority to reject the Letter of Credit as an unsatisfactory security?

[42] In compliance with paragraph 59(3)(a) and subsection 60(1) of the *Customs Act*, the Applicant was to provide the “amount owed or a security satisfactory to the Minister”. Subsection 60(1) of the *Customs Act* designates the Minister as the authority to determine what constitutes a “satisfactory security”.

[43] On December 15, 2008, the President of the CBSA, Mr. Stephen Rigby, issued an *Authorization to Exercise the Powers or Perform the Duties and Functions of the Minister of Public Safety and Emergency Preparedness under the Customs Act* (Authorization), pursuant to subsection 2(4) of the *Customs Act* and subsection 12(1) and (2) of the *Canada Border Services Agency Act*, 2005, c. 38. The Authorization delegated to Mr. Wolanski the authority to determine what constitutes a “security satisfactory to the Minister”.

[44] According to the Applicant, the Respondents have fettered their discretion by refusing to accept the Applicant’s Letter of Credit. The Court does not agree with their argument; in his review of the Letter of Credit, the delegated Manager did follow the overall intent of the *Customs Act*, and

the Security Regulations, adopted by the Governor-in-Council, as well as having given consideration to the provisions of satisfactory security.

[45] In the following example, it is the designated authority who determines whether a Letter of Credit is acceptable, as is clearly demonstrated in legislation such as the *Aeronautics Act*, R.S.C. 1985, c. A-2. Therein is specified that which constitutes a satisfactory security in subsection 4.4(6):

(6) The Governor in Council may make regulations requiring registered owners and operators of aircraft who have failed to pay on time any charges imposed under this section to deposit each year with the Minister security in the form of a bond or letter of credit and in an amount satisfactory to the Minister to ensure full payment of the charges to be imposed in the next following year in respect of the aircraft. (Emphasis added).

(6) Le gouverneur en conseil peut, par règlement, exiger des propriétaires enregistrés et utilisateurs d'aéronefs défaillants le dépôt chaque année auprès du ministre des sûretés, sous forme de cautionnement ou de lettre de crédit ainsi que pour le montant, que celui-ci juge satisfaisants, en vue d'assurer l'intégralité du paiement des redevances qui frapperont leurs aéronefs l'année suivante.

[46] Also, the above provision of the *Aeronautics Act* states that the security must be in « the form of a ... letter of credit ». The *Fisheries Act*, R.S.C. 1985, c. F-14, has a similar provision in respect of a need to satisfy the Minister, as to a form satisfactory to the Minister in provision 71(1).

[47] In compliance with the Authorization, Mr. Wolanski has been delegated the authority to determine what constitutes “security satisfactory to the Minister” as used and understood in subsection 60(1) of the *Customs Act*. On September 1, 2009, he sent a letter rejecting the Applicant’s request:

You were advised that subsection 60(1) of the Customs Act requires payment or satisfactory security prior to making a request for re-determination or further re-determination of origin under this section. You were also advised that we will have no choice but to reject your requests for review if the outstanding duties and interest were not paid or secured by August 31, 2009. Unfortunately you have not provided payment nor have you provided security satisfactory to the Minister.

[48] Nothing in the CBSA's Manager's decision indicates, as the Applicant alleges, that the Respondents applied the Memoranda or Guidelines as if they were law. To support its position, the Applicant submitted the following extract from *Thamotharem v. Canada (Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385:

[62] Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms*, at page 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[49] The decision of the CBSA reflects the intention of the *Customs Act* and of the Security Regulations, which is to secure Her Majesty's revenues. It must be noted that the introductory provisions of the *Customs Act* are different and target different objectives than those outlined in the *Immigration Act*, R.S.C. 1985, c. I-2 (former). The CBSA's Comptrollership Manual is consistent with the Security Regulations. According to the Respondents, the security items listed in the CBSA Comptrollership Manual, Finance Volume, Chapter 14: Security Deposits, Section 1: Security Deposits for Revenue Transactions, paragraph 3.2: Acceptance of Security Deposits (similar to those listed in Memorandum D11-7-1) are even more extensive for a more significant understanding of the requirements of the Security Regulations.

[50] The Respondents have not fettered their discretion to a policy, guideline or Memorandum, but have only insisted that the Applicant provide adequate security to cover the debt owed to CBSA, as required by the Security Regulations. The evidence clearly demonstrates that the CBSA did not merely set aside the Letter of Credit without due consideration, although the legislation, in and of itself, does appear strict in its application. The CBSA Manager did not refuse the Letter of Credit outright on the sole basis that it was a Letter of Credit; he considered the Letter of Credit, itself, and determined that the Letter of Credit, as submitted by the Applicant, was not “satisfactory to the Minister”. It is recognized by the Court that the Letter of Credit was conditional, as it was limited in time.

(2) Is the Letter of Credit proposed by the Applicant considered to be sufficient to the Minister in accordance with the requirements of subsection 60(1) of the *Customs Act*?

[51] Dated March 31, 2009, the Letter of Credit was issued on behalf of the TD Bank. It established an “irrevocable Letter of Credit” in the Respondents’ favour in the total amount of \$322,880. The last paragraph of the Letter of Credit reads as follows:

A written demand for payment and certificate as described above must be presented at this branch on or before the end of banking business on the **31st day of March 2010**, at which time this Letter of Credit will expire.

[52] Every case must be related directly to pertinent legislation and interpreted in light of relevant jurisprudence (*Highland*, above), if such relevant jurisprudence exists. In her affidavit, Ms. Koehler enumerates the deficiencies of the Letter of Credit as a security as specified:

- (a) inadequate wording to protect the total amount owing, including interest;
- (b) reference to an “agreement” between the CBSA and the customer (the Applicant), when no such agreement has been entered into or proposed by the Applicant;

(c) being time-limited, with an expiry date of March 31, 2010; and

(d) no right to call-in the credit in the event that TD Canada Trust declines to issue a new letter upon its expiry.

(Affidavit of Marlene Koehler at p. 13).

[53] It is not the Letter of Credit that is excluded outright, at all, it is the nature of the provisions, in themselves, that make the Letter of Credit unacceptable (the Guidelines are merely Guidelines, not simply for form in itself, but rather for the substance, therein, as to security that is available).

[54] The Court agrees with the Respondents as to the deficiencies of the Letter of Credit provided by the Applicant. The Letter of Credit has secured only an amount of \$322,880, which does not include the interest owed to the Respondents on that amount, and, as such, is not compliant with subsection 60(1) of the *Customs Act*; however, the most serious flaw in the Letter of Credit is the fact that it is not an equivalent to a continuous bond. The Letter of Credit is limited in time, with an expiry date of March 31, 2010, without any indications to the effect that the bank would renew the Letter upon its expiry.

[55] After an importer applies for further re-determination pursuant to section 60(1) of the *Customs Act*, the importer will have the right to appeal the further re-determination decision to the Canadian International Trade Tribunal (CITT), in accordance with section 67 of the *Customs Act*. Section 68 grants the right to appeal such decision before the Federal Court of Appeal and then, possibly, before the Supreme Court of Canada. The potentially long process requires continuous protection of the amount owed to the Minister, for the Minister not to be subjected to long term financial risks during an appeal process. (It is noted that the Letter of Credit had as its expiry date a

short period as projected in counter distinction to the lengthy time, it may take for final resolution of the matter.)

[56] The payment in full or satisfactory security was due to the Respondents on May 26, 2009, which was the Applicant's filing date. As analyzed in the evidence, the CBSA Manager allowed three time extensions, until August 31, 2009. In order to meet the objectives of section 60 of the *Customs Act*, the Manager had no choice but to refuse the Letter of Credit as a security satisfactory to the Minister.

[57] Also, in the examination of Mr. Magnone, the latter undertook to provide a copy of "a written acceptance from the Montreal office of the Canadian Border Service Agency, if such exists, of Applicant's Letter of Credit" (Applicant's examination of November 6, 2009, List of Undertakings at p. 3 and pp. 7-8). To date, no proof of delivery of such has been provided to the CBSA (as confirmed in the Affidavit of Marlene Koehler at p. 6).

X. Conclusion

[58] Therefore, the Letter of Credit, therein, is not an acceptable security for all the reasons considered above.

[59] Consequently, the Minister was justified in demanding security that respects the requirements of the legislative scheme. In conclusion, the application for judicial review is dismissed; no *writ of mandamus* is to be issued and the Respondents are granted costs.

JUDGMENT

THIS COURT’S JUDGMENT is that

1. the application for judicial review be dismissed;
2. no *writ of mandamus* be issued;
3. the Respondents be granted costs

Obiter

In regard to a restrictive piece of legislation (due to the separation of powers), it is not for the Court, in and of itself, (other than in a situation of decisional arbitrariness, illegality, procedural unfairness or capriciousness, to rule otherwise), but rather for the mandated person, who has the authority and the discretion under the law to assist, if possible, in reaching an amenable decision; that is, only, if, in light of the available evidence, at the discretion of the mandated authority, it appears possible to do so without compromising the tenure of the legislative scheme.

In fact, it may be in the interest of the authority, in question, in such cases to assist the business operations climate in an overall symbiotic effect on both as one; however, that would have to be, without negating the need for security that provides a valid assurance of fulfilment of legislative and authorized discretionary requirements, whereby the risk, itself, is weighed to minimize monetary loss which could ensue. The standard of correctness in respect of interpretation of a restrictive legislative scheme, can also be coupled with a standard of reasonableness as to how particular evidence is considered, in light of the *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 decision by the specialized mandated decision-maker.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1597-09

STYLE OF CAUSE: THE MAIALI FASHION GROUP INC.
v. THE PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY AND
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 30, 2010

REASONS FOR JUDGMENT: SHORE J.

DATED: December 9, 2010

APPEARANCES:

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