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Court no.: T- - 22

FEDERAL COURT

BETWEEN:

CRYSTAL CLAIRE COSMETICS INC.
165 Milner Avenue
Scarborough, Ontario, M1S 4G7

Applicant

- and -

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

APPLICATION FOR JUDICIAL REVIEW **pursuant to S.18.1 of the *Federal Courts Act***

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Counsel for Applicant

Court no.: T-

FEDERAL COURT

BETWEEN:

CRYSTAL CLAIRE COSMETICS INC.

Applicant

- and -

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules*, and serve it on the Applicant's solicitor or, where the Applicant is self-represented, on the Applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Montreal, December 19, 2022

Issued by: _____

Address of
local office: _____

TO: President of the Canada Border Services Agency
Erin O'Gorman, President
Canada Border Services Agency
Place Vanier, Tower A
333 North River Road, 11th Floor
Ottawa, Ontario
K1A 0L8

I. THE FACTS:

1. This is an Application for Judicial Review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, as amended, of a decision issued on behalf of the President of the Canada Border Services Agency ("Respondent") on December 8, 2022 under K32 Drawback Claims T20-091819 (the "Decision").
2. In the Decision, Respondent refused the drawback duty claimed by Applicant, on the basis that the empty pre-labelled packaging containers (the "goods in issue") that were imported, filled with product, and then exported from Canada, do not remain in the "same condition" when exported.
3. The Applicant makes application for an Order for this Honourable Court to
 - i) a declaration that the Decision is unlawful and invalid;
 - ii) an order quashing or setting aside the Decision;
 - iii) an order requiring Respondent to grant Applicant's entitlement to the drawback duty claimed;
 - iv) an order for costs of this Application; and
 - v) such further and other relief as this Honourable Court may deem just.

II. GROUNDS FOR THE APPLICATION:

Applicant and the Goods in Issue

4. Applicant is a company doing business in Scarborough, Ontario and is a manufacturer of consumer packaged cosmetics for personal care.
5. Applicant imports the goods in issue from various manufacturers outside of North America, fills the goods in issue with products manufactured within North America and then exports such products to the United States.

6. The Decision is in respect of the goods in issue (bottles, tubes, caps and lids) that were imported from various countries and received at Applicant's location in Scarborough, Ontario.
7. The goods in issue were filled with cosmetics. The goods in issue are then sealed and prepared for shipment outside of Canada.

The Decision under Review

8. On or around February, 2021, Applicant requested a Same Condition Process Ruling from Respondent. In support of its request, Applicant submitted a spreadsheet detailing the type of containers imported, their use and export information.
9. On November 3, 2021, Respondent issued the Same Condition Process Ruling stating that the "processes applied to the goods in issue are not allowable" and therefore duty relief was "limited to the 'lesser of duty duties concept'". In other words, the duty relief was not available in Applicant's case.

Applicable Legislation

10. Article 303 of the *North American Free Trade Agreement*, December 17, 1992 [1994] Can TS No 2 ("NAFTA"), contains the "lesser of" rule that is referenced by Respondent in its Decision. Under that provision, an exporter is entitled to a drawback or refund of duties equal to the lesser of (i) the amount of customs duties paid or owed on imported goods when entering Canada; and (ii) the amount of customs duties paid on the goods entering the other NAFTA country. Paragraph 6.2 of Article 303 provides that Article 303 does not apply to:

"a good exported to the territory of another Party in the same condition as when imported into the territory of the Party from which the good was exported" (processes such as testing, cleaning, repacking or inspecting the good, or preserving it in its same

condition, shall not be considered to change a good's condition)."
[Emphasis added]

11. Respondent's Memorandum D7-4-3 clarifies that imported goods may undergo certain operations in Canada and still be considered to be exported in the same condition. As detailed under paragraph 8, section E of Article X of the *Uniform Regulations for Chapter Three and Five of the NAFTA*, goods are considered to be in the same condition if subjected only to "putting up in measured doses, or packing, repacking, packaging or repackaging".
12. Respondent's *Duty Relief Administration Manual* that governs the administrative processing of drawback and duty deferral programs under NAFTA, further provides that the process of "assembly" does not materially alter the condition of plastic bottles and caps that are filled with a product in Canada, sealed and then exported. This very example is provided in Appendix B to the *Duty Relief Administration Manual* to illustrate that a good that has been subject to such a minor process has not been materially altered and as such, it can be considered to be "in the same condition" when exported.
13. The same conclusion applies to "packaging".

Grounds for Judicial Review

14. Applicant submits that Respondent erred in law in:
 - i) ruling that Applicant was not entitled to a duty drawback under section 89 of the *Act* and the exemption provided by NAFTA, Chapter III, Article 303.6(b);
 - ii) rejecting Applicant's Request for a Same Condition Processes Ruling in February 2021, by ruling that the goods in issue exported by Applicant were not "in the same condition" as when imported into Canada;
 - iii) concluding that, because the goods in issue as exported to the United States were not in the "same condition", the "lesser of" rule of NAFTA Article 303 applied;

- iv) the rationale for its Decision that the processes applied to the goods in issue are not allowable as a "same condition" process as provided for under subsection 90(1) of the *Act*, section 9 of the *Duty Relief Regulations*, SOR/96-44, or the applicable NAFTA Article 303.6(b), is both incorrect and unreasonable;
- v) failing to consider the previous practice by Respondent in allowing a drawback of duties with respect of Applicant's exports of same type of goods in issue under the same condition argument;
- vi) failing to consider guidelines issued by Respondent with reference to examples of Canadian and United States Rulings;
- vii) such further and other orders as counsel may advise and this Honourable Court may permit.

This Application will be supported by the following material:

- i) the Decision issued by Respondent dated December 8, 2022;
- ii) Affidavit evidence to be sworn; and
- iii) such further and other grounds as counsel may advise and this Honourable Court may permit.

15. Pursuant to Rule 317(2) Counsel for Applicant herein requests that Respondent obtain from its client:

Mr. Dorge Tulotsang
Senior Officer Trade Compliance, Trade Incentives, Operations Branch
Canada Border Services Agency
Tel.: (647) 519-2314
E-mail: dorge.tulotsang@cbsa-asfc.gc.ca

A copy all of the material which was in the file of the decision-maker at the time the Decision was rendered.

And to provide such copies to Counsel for Applicant as well as the Registry of the Federal Court.

III. CONCLUSION

16. Wherefore Applicant submits that the Decision is both unreasonable and incorrect and must be set aside.

THE WHOLE WITH COSTS.

DATED at Montreal, this 19th day of December 2022.



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