

FEDERAL COURT

BETWEEN:

MEYER HOUSEWARES CANADA INC.

Applicant

AND:

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

(Section 18.1 of the *Federal Courts Act*, R.S.C 1985, c. F-7)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears below.

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 30, McGill Street, in Montréal, Province of Québec.

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 if 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, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

MONTRÉAL, this 3rd day of October, 2022.

Issued by: _____
(Registry Officer)

Address of local office:
Registry of the Federal Courts
30 McGill Street
Montreal, Québec H2Y 3Z7

TO : **Attorney General of Canada**
National Capital Region
Civil Litigation Section
Department of Justice Canada
50 O'Connor Street, 5th Floor
Ottawa, Ontario K1A 0H8

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APPLICATION(Section 18.1 of the *Federal Courts Act*, R.S.C 1985, c. F-7)

This is an application for judicial review in respect of a decision rendered by the Minister of Finance (the “**Minister**”) on September 2, 2022, and communicated to the Applicant on same (the “**Decision**”), denying the Applicant’s request for a refund of certain duties paid (the “**Refund Request**”). On April 23, 2021, on the recommendation of the Minister and pursuant to section 82 of the *Customs Tariff*,¹ the *Order Amending the Schedule to the Customs Tariff, 2021-1*² (the “**Order**”), eliminating the customs tariff levied on selected goods by the Canada Border Services Agency (the “**CBSA**”), was registered. The Refund Request sought the retroactive application of the Order from March 12, 2021, the date that the request by the Applicant for the Order was made, to April 23, 2021, the date the Order came into force (the “**Holding Period**”), thereby refunding the excess duties paid by the Applicant in the amount of \$125,000 (the “**Excess Duties**”).

I. THE APPLICANT MAKES AN APPLICATION FOR:

1. An order to set aside the Decision and to refund the Excess Duties by applying the Order to the Holding Period, thereby providing the Applicant with relief from the customs tariff during the Holding Period;

¹ S.C. 1997, c. 36.

² SOR/2021-88, registered April 23, 2021.

2. In the alternative, an order to set aside the Decision and refer the Refund Request back to the Minister for redetermination by a different decision-maker for further review in accordance with such directions as this Court deems appropriate;
3. Costs of this Application; and
4. Such further or other relief as this Court may deem just in the circumstances.

II. THE GROUNDS FOR THE APPLICATION ARE:

5. The Applicant operates a small manufacturing plant and distribution center in Prince Edward Island and has approximately 80 employees.
6. In July 2017, the Applicant purchased the distribution and manufacturing assets of Padinox, an existing cookware supplier. At the time, the core business of Padinox was importing and distributing cookware from overseas suppliers.
7. After the acquisition of Padinox on July 17, 2017, the CBSA identified 5 separate invoices for clad and 430 stainless steel circles that were imported. The Applicant used the same classification that had been historically used by Padinox for stainless steel sheet.
8. However, the Applicant was instructed by the CBSA to reclassify these raw materials and pay duty in the same classification that it would use for a finished product destined for resale at the rate of 6.5% (the “**Reclassification**”). The Applicant disagreed because the materials were purchased to manufacture cookware, not resell them as finished products and, as such, should be zero-rated.
9. Due to the imposition of a tariff at 6.5%, the Applicant was obliged to pay approximately \$250,000 in duties since the acquisition of Padinox in 2017.
10. On March 12, 2020, the Applicant made a request to the Department of Finance Canada (“**Finance Canada**”) for relief of the applicable tariffs by amending the

Customs Tariff.

11. The Order, which eliminated the customs tariff of 6.5% on material purchased by the Applicant, was registered on April 23, 2021, approximately 12-13 months after the Applicant's request, due, in part, to the COVID-19 pandemic (the "**Pandemic**").
12. However, the Order only came into force on the day it was registered, such that no relief was granted to the Applicant between March 12, 2020 and April 21, 2021 i.e., the Holding Period.
13. As such, the Applicant remained liable for duties amounting to \$125,000 paid during the Holding Period.
14. By a letter dated June 15, 2021, the Applicant made the Refund Request to Finance Canada pursuant to section 115 of the *Customs Tariff*.
15. On June 15, 2021, the Applicant sought parallel relief of certain assessments issued by the CBSA relating to the Reclassification and penalties levied therefrom.
16. On June 18, 2021, Ms. Mondy of Finance Canada informed the Applicant to contact Finance Canada once the process with the CBSA had run its course. Ms. Mondy indicated that, following the result of the CBSA process, Finance Canada would then be able to consider the Refund Request.
17. On July 4 2022, the CBSA rendered its decision on the Applicant's request for re-determination (tariff classification) thereby reducing the tariff in respect of the Reclassification to zero. On July 25, 2022, the CBSA rendered its decision on the Applicant's remission request for a Ministerial Decision of Notice of Penalty Assessment (collectively, the "**CBSA Decisions**").
18. On September 2, 2022, the Applicant communicated the result of the CBSA Decisions to Finance Canada and requested that it review the Refund Request.

19. By an email dated September 2, 2022, Ms. Mondy of Finance Canada communicated the Decision to the Applicant, thereby refusing the Refund Request and confirmed the Order would remain effective only as of its registration i.e., April 23, 2021.
20. In so doing, the Applicant remains liable for the duties paid during the Holding Period amounting to \$125,000 and assumes the monetary burden of this liability.
21. In her email containing the Decision, Ms. Mondy merely stated:

Regarding the request for retroactivity, as conveyed in a previous discussion last year, this matter has already been decided in the context of considerations and decisions that lead to the Order-in-Council [the Order] that made a forward-only change to the Customs Tariff rate and that entered into force on April 23, 2021. As such, the department will not further consider this request.

As you know, retroactive relief from tariffs has only been granted in exceptional circumstances with compelling public policy benefits that are not present in this present case. Given the precedent and equity issues retroactivity considerations tend to raise for changing tariffs (or to remit them), this forward-only approach is consistent with past amendments to the Tariff Schedule for tariff relief of this nature.

[Our emphasis]

22. No further reasons were given in the Decision.
23. There is no possibility to procure a formal second-level review of the Decision. However, parallel to this Application, the Applicant has requested that the Minister review the Decision.

A. The Decision does not follow the principles of natural justice and is unreasonable in the circumstances

24. In rendering the Decision and denying relief, the Minister:
 - a. failed to observe a principle of natural justice and procedural fairness;
 - b. erred in law in making the Decision;
 - c. based her Decision without regard to the material before her; and

d. acted in any other way that was contrary to the law,

the whole resulting in a Decision and an outcome that is indefensible and unacceptable on the facts and the law of the present case. Thus, the Decision rendered by the Minister is unreasonable.

25. In particular, the Minister acted contrary to the principles of natural justice and procedural fairness in rendering the Decision and thereby erred in law for the following reasons:

a. the Applicant has a legitimate expectation that reasons would be given to support the Decision as to why the Refund Request was denied. The Minister failed to observe a principle of natural justice and procedural fairness in rendering the Decision without any reasons. The Applicant has a right to seek judicial review of the Decision and needs to know the reasons for the Decision in order to properly prepare for judicial review. The Decision details no reasons which render the Applicant unable to understand the basis for the Decision to deny relief; and

b. by not providing reasons to support the Decision, the Minister failed to consider the particular facts of the case at bar, namely the length of time it took the Minister to render the Decision due to the Pandemic. The Minister relayed that “relief from tariffs has only been granted in exceptional circumstances.” The Applicant submits that the Pandemic is a textbook example of “exceptional circumstances.” Thus, by failing to take into account the extraordinary nature of the Pandemic and the other reasons enumerated in the Refund Request, the Decision is unreasonable.

B. The Minister did not exercise her discretion in rendering the Decision

26. It is clear that section 115 of the *Customs Tariff* provides the Minister with the discretionary power to grant the relief sought in the Refund Request. As such, if a decision-maker is found to have fettered their discretion in making a decision, same should be set aside for failure to exercise discretion.

27. The existence of discretion implies that it must be exercised differently in different cases. Each case must be looked at individually, on its own merits. Therefore, a decision-maker who fetters their discretion commits a jurisdictional error, allowing such decision to be open to judicial review.
28. Accordingly, a decision-maker with discretionary power must exercise that discretion on a case by case basis. In the present instance, the Minister failed to do so by both refusing to consider the Refund Request and stating that its “forward-only approach is consistent with past amendments to the Tariff Schedule for tariff relief of this nature.” In simply relying on past amendments to the Tariff Schedule, the Minister fetters its discretion.

III. THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL :

29. Affidavit by Curtis Martin MacMillan, Vice-President of Operations, Meyer Housewares Canada Inc.;
30. *Order Amending the Schedule to the Customs Tariff, 2021-1* granted by the Minister to the Applicant, dated April 23, 2021;
31. Refund Request addressed to Finance Canada by a letter of the Applicant, dated June 15, 2021;
32. Email from Ms. Yannick Mondy of Finance Canada to the Applicant, dated June 18, 2021;
33. CBSA Decisions rendered on the Applicant’s request for a Ministerial Decision of Notice of Penalty Assessment, dated July 4, 2022 and July 25, 2022;
34. Email from the Applicant to Ms. Yannick Mondy of Finance Canada communicating the CBSA Decisions, dated September 2, 2022;
35. Email from Ms. Yannick Mondy of Finance Canada to the Applicant communicating the Decision, dated September 2, 2021; and

36. Such further and other affidavits and materials as counsel may advise and this Court may permit.

IV. REQUEST PURSUANT TO SUBSECTION 317(2) OF THE FEDERAL COURTS RULES

37. The Applicant requests that the Respondent send to the Applicant and to the Registry a certified copy of the following material (that is not in the possession of the Applicant but is in the possession of the Respondent):
- a. All documents and communications (including but not limited to memoranda, reports, studies, comments, notes, and documents and communications in electronic form such as email correspondence or voicemail messages) relating to, or in any way concerned with the Decision.
 - b. All CBSA and Finance Canada's policies, guidelines, bulletins, internal communiqués which touch upon or relate to Finance Canada's practices for granting a refund request pursuant to section 115 of the *Customs Tariff* or any other application legislation; and
 - c. All CBSA and Finance Canada policies, guidelines, bulletins, internal communiqués which touch upon or relate to the jurisdiction of the CRA, CBSA and Finance Canada with respect to relief sought pursuant to section 82 of the *Customs Tariff*.

MONTREAL, October 3rd, 2022



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