Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## ORDER AND REASONS

Appeal No. AP-2010-031

Volpak Inc.

v.

President of the Canada Border Services Agency

*Order and reasons issued*
*Monday, November 8, 2010*

Canada

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IN THE MATTER OF an appeal filed by Volpak Inc. on August 9, 2010, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a motion filed by Volpak Inc. on August 17, 2010, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, and written representations filed by the President of the Canada Border Services Agency on September 17, 2010, and Volpak Inc. on September 20, 2010, to address issues concerning the Canadian International Trade Tribunal's jurisdiction.

**BETWEEN**

**VOLPAK INC.** **Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY** **Respondent**

## ORDER

The motion is denied, and the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

# STATEMENT OF REASONS

## BACKGROUND AND ISSUES

1. This is a decision in a motion brought by Volpak Inc. (Volpak) to the Canadian International Trade Tribunal (the Tribunal) pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*.[1]

2. The dispute stems from a decision of the President of the Canada Border Services Agency (CBSA) to re-classify, pursuant to subsection 59(1) of the *Customs Act*,[2] chicken breasts imported by Volpak under classification No. 0207.12.93.00 of the schedule to the *Customs Tariff*.[3] Prior to the re-determination, Volpak had been importing the chicken breasts under classification No. 0207.13.91.00. Pursuant to subsection 59(3) of the *Act*, Volpak offered security to the CBSA and requested a re-determination of the tariff classification pursuant to section 60 of the *Act*. The CBSA refused to make a re-determination pursuant to subsection 60(4) of the *Act*, on the grounds that Volpak had failed to offer security that was ". . . satisfactory to the Minister . . ." of National Revenue (the Minister) in accordance with subsection 59(3) of the *Act*.

3. Volpak appealed the CBSA's decision to the Tribunal on August 9, 2010, and filed a motion for the Tribunal to address the following three issues:

- whether the CBSA's decision of June 10, 2010, to refuse the security offered by Volpak as not being ". . . satisfactory to the Minister . . ." was a valid decision made by a duly authorized person pursuant to the *Act*;
- whether the Tribunal has the jurisdiction to set aside the CBSA's refusal of the security and to declare the security offered by Volpak as being ". . . satisfactory to the Minister . . ."; and
- whether the Tribunal has the jurisdiction to declare that the CBSA's refusal of the security was a decision pursuant to section 60 of the *Act* and is therefore appealable to the Tribunal pursuant to section 67.

4. Volpak also applied to the Federal Court for judicial review of the validity of the CBSA's decision.

5. On August 30, 2010, the Tribunal invited written submissions on the issues raised in the motion. The CBSA filed written submissions on September 17, 2010, and Volpak filed a reply submission on September 20, 2010.

## POSITIONS OF THE PARTIES

6. The CBSA's position was that the Tribunal has no jurisdiction to review the Minister's decision or to declare that the CBSA's refusal to accept the security was a decision pursuant to section 60 of the *Act*. In support of this position, the CBSA referred to the Tribunal's decision in *C.B. Powell Limited v. President of the Canadian Border Services Agency*[4] where the Tribunal held that its authority to hear an appeal pursuant to subsection 67(1) is contingent on a decision by the CBSA pursuant to section 60.[5]

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1. S.O.R./91-499.
2. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
3. S.C. 1997, c. 36.
4. (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) [*C.B. Powell*].
5. CBSA's reply submission at paras. 12-13.

7. In particular, the CBSA submitted that a person to whom notice of a determination pursuant to subsection 59(2) of the *Act* is given may ask the CBSA for a re-determination of origin, tariff classification, value for duty or marking pursuant to section 60, but only if it has paid all duties owing or, alternatively, provided ". . . security satisfactory to the Minister . . .". The CBSA further submitted that, as the decision with respect to the security given by Volpak was made by the Minister, the CBSA had no jurisdiction to make a decision pursuant to section 60 and, indeed, made no such decision.[6]

8. The CBSA also contended that the appropriate recourse was an appeal to the Federal Court, which has the exclusive jurisdiction to grant declaratory relief regarding the validity of the Minister's decision.[7]

9. In its reply submission, Volpak argued that the Tribunal has the jurisdiction to hear the appeal, as the CBSA's refusal to make a decision pursuant to section 60 of the *Act* is in fact such a decision. Volpak relied in part on the Federal Court's decision in *C.B. Powell Ltd. v. Canada (Border Services Agency)*,[8] in which the Federal Court referred to jurisprudence that supported the view that a refusal to make a decision is itself both legally and factually a decision.[9]

10. Volpak also submitted that the Tribunal has exclusive original jurisdiction to determine the validity of a Detailed Adjustment Statement (DAS) and that jurisdiction over the validity of a DAS includes the question of whether the person who decided whether the security was satisfactory was legally authorized to do so. Volpak maintained that the person who determined that Volpak's security was unsatisfactory was not authorized to act on the Minister's behalf and that, therefore, the decision was invalid. As the decision with respect to the security was invalid, the CBSA's refusal to make a decision pursuant to section 60 of the *Act* was equally invalid.[10]

11. Volpak further argued that sections 16 and 17 of the *Canadian International Trade Tribunal Act*,[11] coupled with section 31 of the *Interpretation Act*,[12] bestow upon the Tribunal exclusive original jurisdiction to deal with all matters broadly related to an appeal and that the validity of the alleged decision of the Minister is a matter related to the CBSA's decision pursuant to section 60 of the *Act*.[13]

## LEGISLATION

12. Subsection 59(3) of the *Act* states that "[e]very 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 and any interest owing or that may become owing on that amount . . ." [emphasis added].

13. Subsection 60(1) of the *Act* states that a request for re-determination may be made to the CBSA *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*.

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6. *Ibid.* at para. 14.
7. *Ibid.* at paras. 22-24.
8. 2009 FC 528 (CanLII) [*C.B. Powell (FC)*].
9. Volpak's reply submission at paras. 9-12.
10. *Ibid.* at para. 18.
11. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
12. R.S.C. 1985, c. I-21.
13. Volpak's reply submission at paras. 25-37.

14. Subsection 67(1) of the *Act* provides that a person aggrieved by a decision of the CBSA made pursuant to section 60 or 61 may appeal from the decision to the Tribunal.

## ANALYSIS

15. The Tribunal has determined that it does not have express or implied authority to rule on whether or not a decision made by or on behalf of the Minister pursuant to subsection 59(3) of the *Act* was made by a duly authorized person or to assess the adequacy of any security offered thereto. Subsection 67(1) very clearly provides that the Tribunal's authority to hear appeals pursuant to the *Act* arises from decisions made by the CBSA pursuant to section 60 or 61. Volpak concedes that there has been no decision pursuant to section 61, and section 60 refers to re-determinations and further re-determinations by the CBSA in respect of origin, tariff classification, value for duty or marking. Subsection 67(1) makes no reference to decisions of the Minister in respect of security or otherwise.

16. In *Canada v. Fritz Marketing Inc.*,[14] the Federal Court of Appeal stated that the Tribunal had the mandate to determine the validity and correctness of a DAS. However, the Tribunal disagrees with Volpak's position that, because the Tribunal has the jurisdiction to decide the validity and correctness of a DAS, it also has the jurisdiction to re-determine the adequacy of security provided to the Minister pursuant to subsection 60(1) of the *Act*.

17. With respect to Volpak's submission that the Tribunal has exclusive original jurisdiction to deal with all matters broadly related to an appeal and that the Minister's decision is a matter related to an appeal, as contemplated by section 16 of the *CITT Act*, the Tribunal takes a different view. In that connection, the Tribunal finds its previous commentary on the scope of section 16 of the *CITT Act* helpful. In *Spike Marks Inc. v. President of the Canada Border Services Agency*, the Tribunal stated that "[i]t is true that paragraph 16(*c*) of the *CITT Act* gives the Tribunal power to 'hear, determine and deal with' appeals and 'all matters related thereto.' However, that is not the same thing as a grant of authority to determine *all* questions of law that arise in any matter before it"[15].

18. Upon a plain reading of subsections 59(3) and 60(1) of the *Act*, the provision of the security is an unmistakable condition precedent to making a request to the CBSA for a re-determination. Although the Minister's decision with respect to security may have an impact on a person's ability to request a re-determination, in the Tribunal's view, it is not so closely connected to the re-determination by the CBSA or the appeal of the CBSA's decision that it would be considered a related decision. The Minister's decision is purely financial in nature, and the Minister is bound to consider certain Treasury Board regulations and guidelines in reaching a decision. The CBSA's decision relates to issues of tariff classification, origin, value for duty or marking under the *Act*. Furthermore, the CBSA has not disputed that the Tribunal has the jurisdiction to consider all matters related to the validity of a decision pursuant to section 60. The CBSA's position is that a request for a decision pursuant to section 60 was not validly made and that, therefore, the CBSA has not made any decision pursuant to section 60.

19. Volpak has also referred the Tribunal to several cases in an attempt to demonstrate that the scope of the Tribunal's jurisdiction includes the jurisdiction to review the Minister's decision. This jurisprudence demonstrates that the Tribunal has been designated by Parliament as a specialized tribunal with a recognized expertise. It further indicates that the presence of three privative clauses in the *CITT Act* and paragraph 28(1)(*b*) of the *Federal Courts Act* are indicative of Parliament's intention to oust judicial review

14. 2009 FCA 62 (CanLII).
15. (31 October 2006), AP-2006-007 (CITT) at para. 6.

by the Federal Court. However, in the Tribunal's view, this jurisprudence does not provide any evidence that the Tribunal has the jurisdiction to review a decision made by the Minister. Moreover, there is nothing in the nature of the Minister's decision with respect to the sufficiency of the security offered by Volpak that requires the Tribunal's expertise.

20. The Tribunal has also determined that the CBSA's refusal to make a re-determination pursuant to section 60 of the *Act* does not itself amount to a decision made by the CBSA pursuant to section 60 for the purposes of an appeal to the Tribunal pursuant to subsection 67(1).

21. The Tribunal finds its previous decisions in *C.B. Powell* and *Wolseley Engineered Pipe Group v. President of the Canada Border ServicesAgency*[16] to be instructive on this point. In *C.B. Powell*, the Tribunal held that its authority to hear an appeal was contingent on a prior "decision" having been made by the CBSA pursuant to section 60 or 61 of the *Act*. The issue to be determined in that appeal was whether the CBSA's refusal to make a re-determination of origin was a decision that could be appealed to the Tribunal. In *C.B. Powell*, the Tribunal found that there had been no actual re-determination made by a customs officer with respect to origin pursuant to subsection 59(2) and that, therefore, no request could be made to the CBSA for reconsideration of the origin of the goods in issue pursuant to section 60. The Tribunal determined that, rather than being a decision pursuant to section 60, the reject notification issued by the CBSA was ". . . an administrative notice [that] informed C.B. Powell that it did not meet the criteria established by the *Act* in order to file a request for further re-determination under [subsection] 60(1)."[17]

22. As in *C.B. Powell*, the CBSA in the present case did not have jurisdiction to make a decision pursuant to section 60 of the *Act*. Subsections 59(3) and 60(1) create a clear statutory pre-condition that all amounts owing as duties and interest must be paid or security satisfactory to the Minister must be provided before a request for re-determination may be made to the CBSA. Where amounts owing as duties and interest have not been paid or security satisfactory to the Minister has not been given, the CBSA has no authority to make a re-determination or further re-determination pursuant to section 60. The Tribunal is in agreement with the CBSA that its letter of June 10, 2010, to Volpak was not a decision of the CBSA but rather an administrative notice that informed Volpak that it did not meet the criteria established by the *Act* in order to file a request for re-determination.

23. Similarly, in *Wolseley*, the Tribunal held that it did not have the jurisdiction to determine the origin of the goods in issue because the CBSA's decision pursuant to section 60 of the *Act* did not address origin. The CBSA's decision was limited to tariff classification and value for currency conversion. The Tribunal determined that, in order for it to have jurisdiction to hear an appeal relating to origin, there must be a decision on origin made pursuant to section 60 or 61. The Tribunal found that the request for re-determination made by Wolseley did not include a request to re-determine the origin of the goods in issue and that there was no language in the decision made by the CBSA that could reasonably be interpreted to cover the origin of the goods. Therefore, the Tribunal lacked jurisdiction to hear an appeal relating to origin in that case.

24. Similarly, in the present case, the Tribunal does not have jurisdiction. There has been no decision pursuant to section 60 or 61 of the *Act* by the CBSA—indeed the CBSA evidently did not even have the jurisdiction to make one—and thus there is no basis for an appeal to the Tribunal under subsection 67(1).

16. (11 March 2010), AP-2009-010 (CITT) [*Wolseley*].
17. *C.B. Powell* at para. 41.

25. In its submission, Volpak made reference to the Federal Court's decision in *C.B. Powell (FC)* in support of its view that a refusal to issue a decision is in itself a decision. The Tribunal does not consider the Federal Court's decision binding, as this decision was set aside by the Federal Court of Appeal, which held that it was the Tribunal's task to interpret the word "decision" in subsection 67(1) of the *Act* when an appeal is brought to it.[18]

26. In some circumstances, the CBSA's refusal to make a re-determination may imply that a certain decision had been made. For example, in *Editions Gallery Ltd. v. President of the Canada Border Services Agency*,[19] the Tribunal held that the decision that the MFN duty rate was applicable implied that a re-determination of origin had been made. However, the present situation is distinguishable because the necessary condition precedent to requesting a re-determination pursuant to section 60 of the *Act* (i.e. providing security) was not fulfilled; therefore, there can be no implication that the type of negative decision contemplated by the Tribunal in *Editions Gallery* was made.

27. For the foregoing reasons, the Tribunal does not have the requisite jurisdiction to hear this appeal.

## CONCLUSION

28. The motion is denied, and the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

18. 2010 FCA 61 (CanLII) at para. 47.
19. (26 July 2006), AP-2005-017 (CITT) [*Editions Gallery*] at para. 23.