



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

---

## ORDER AND REASONS

Appeal No. AP-2010-064

Automated Technologies (Canada)  
Inc.

v.

President of the Canada Border  
Services Agency

*Order and reasons issued  
Tuesday, November 29, 2011*

## TABLE OF CONTENTS

ORDER .....	i
STATEMENT OF REASONS .....	1

IN THE MATTER OF an appeal filed by Automed Technologies (Canada) Inc. on March 1, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985, (2d Supp.), c. 1;

AND IN THE MATTER OF a request made by the President of the Canada Border Services Agency on May 17, 2011, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*, for an order dismissing the appeal on the basis of *res judicata*.

**BETWEEN**

**AUTOMED TECHNOLOGIES (CANADA) INC.**

**Appellant**

**AND**

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

**Respondent**

**ORDER**

The request is granted, and the appeal is dismissed.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

## STATEMENT OF REASONS

1. On March 1, 2011, Automed Technologies (Canada) Inc. (Automed Canada) filed an appeal with the Canadian International Trade Tribunal (the Tribunal) with regard to three decisions of the President of the Canada Border Services Agency (CBSA) made on December 3, 2010, pursuant to subsection 60(4) of the *Customs Act*,<sup>1</sup> concerning the tariff classification of certain non-cellular plastic film (the goods in issue).

2. On May 17, 2011, the CBSA made a request to the Tribunal, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,<sup>2</sup> for an order dismissing the appeal on the basis of *res judicata*. According to the CBSA, this appeal concerns the same parties as those in *Automed Technologies Inc. v. President of the Canada Border Services Agency*<sup>3</sup> and raises the same issue as the one which was the subject of a Tribunal final decision in that case. The CBSA also noted that the decision at issue was upheld by the Federal Court of Appeal on September 2010.<sup>4</sup>

3. The CBSA submitted that Automed Canada cannot be allowed to re-litigate the same issue that both the Tribunal and the Federal Court of Appeal have already decided. In this regard, it emphasized that, in *Cherry Stix Ltd. v. President of the Canada Border Services Agency*,<sup>5</sup> the Tribunal indicated that, in order to succeed on a request to dismiss an appeal on the basis of *res judicata*, the moving party must establish that the same issue was decided in an earlier case, that the earlier decision was final and that the parties are the same in both cases. According to the CBSA, these three conditions have been met in this case.

4. On August 15, 2011, Automed Canada filed its submissions in response to the request to dismiss the appeal. Automed Canada recognizes that an appeal will be considered inadmissible on the basis of *res judicata* if the Tribunal has already decided the same issue in an earlier decision involving the same parties. However, it argued that the parties to this appeal are different from those involved in *Automed Technologies*. According to Automed Canada, it is a separate legal entity in relation to Automed Technologies Inc., the appellant in *Automed Technologies*. On this issue, Automed Canada noted that Automed Technologies Inc. is no longer listed on the federal government's register of corporations and that Automed Canada is registered under a different number than the one that was formerly used to identify Automed Technologies Inc.. Automed Canada also noted that Automed Technologies Inc. now operates solely in the United States.

5. On September 1, 2011, the CBSA filed its response to Automed Canada's submissions. The CBSA argued that the requirement of the identity of the parties for the purpose of applying the doctrine of *res judicata* in a proceeding also includes the privies of the party involved in the case that resulted in the earlier final decision. On the basis of this established principle of Canadian law, the CBSA argued that the Tribunal's decision in *Automed Technologies* binds Automed Canada, since the latter must be considered a privy of Automed Technologies Inc., as a result of the significant ties between these two companies, which, according to the CBSA, pursue the same business goals.

6. As an example, the CBSA alleged that Automed Technologies Inc. and Automed Canada both are owned by the same parent company, i.e. AmerisourceBergen Technology Group, and that the latter participated in *Automed Technologies* by way of the testimony, before the Tribunal, of Ms. Andrea Nosek,

---

1. R.S.C. 1985 (2d Supp.), c. 1.

2. S.O.R./91-499 [Rules].

3. (20 April 2009), AP-2007-028 (CITT) [*Automed Technologies*].

4. *Automed Technologies inc. v. Canada (Border Services Agency)*, 2010 FCA 236 (CanLII).

5. (10 May 2010), AP-2008-028 (CITT).

Director, Product and Solutions Management, AmerisourceBergen Technology Group. Furthermore, the CBSA argued that Automed Canada's activities are the importation and distribution in Canada of the same goods as those imported by Automed Technologies Inc. between 2003 and 2005 and which were at issue in *Automed Technologies*.

7. The Tribunal notes that the parties agree on the judicial test that applies when determining if a request for an order to dismiss an appeal on the basis of *res judicata* should be granted. Further, the Tribunal finds that the parties agree that two of the three conditions of that test have been met in this case. In fact, it is uncontested that the present appeal concerns the same issue as the one which was the subject of a Tribunal final decision in *Automed Technologies*, that is, the tariff classification of the goods in issue. In fact, Automed Canada argued that the doctrine of *res judicata* does not apply in this case on the sole basis of its argument that the parties are not the same in both cases.

8. The Tribunal is of the opinion that there is no doubt that the issue of the tariff classification of the goods in issue was disposed of in *Automed Technologies* and that the merit of that decision was then upheld by the Federal Court of Appeal. As such, the only issue to be considered in dealing with the CBSA's request is to determine if Automed Canada and Automed Technologies Inc. are different parties.

9. On this issue, the Tribunal accepts the CBSA's arguments that the doctrine of *res judicata* applies not only to the parties involved in the earlier case concerning the same issue but also to their privies. The authorities cited by the CBSA in support of its request clearly establish the principle that a decision that has force of *res judicata* binds not only the parties involved but also their privies. The privies of a party can be related companies, subsidiaries or administrators or shareholders of the parties in the earlier case.<sup>6</sup> The Tribunal has also already acknowledged that the condition with regard to the identity of the parties will be met if the parties involved in the earlier decision or their privies are the same as the parties or the privies to the proceedings in which the estoppel is raised.<sup>7</sup>

10. Therefore, the fact that Automed Canada and Automed Technologies Inc. are separate legal entities is not sufficient to conclude that the doctrine of *res judicata* does not apply in this case. The question that arises and which must be addressed is whether Automed Canada is a privy of Automed Technologies Inc. If so, the Tribunal would have to conclude that the present appeal actually involves the same parties as those in *Automed Technologies* and that its decision in that case binds Automed Canada on the basis of the doctrine of *res judicata*.

11. The authorities cited above indicate that, in order to determine if a company is a privy of another company, the ties or connections that bind these two entities must be examined. What needs to be examined is whether one has a certain control over the other, thereby making one's business part of the other's activities. As contended by the CBSA, if the party in the earlier case has an interest in the second case that was brought by a related company concerning the same issue, it is reasonable to conclude that the party who initiated the second proceedings, in which estoppel is at issue, is a privy of the party in the earlier case.

---

6. *Honeywell International Inc. c. Notiplex Sécurité incendie inc.*, 2008 QCCS 220 (CanLII); Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Toronto: LexisNexis), 2010.

7. *Canadian Fracmaster Ltd. v. Deputy M.N.R.* (29 May 1998), AP-97-059 (CITT).

12. In order to decide this issue, on September 20, 2011, the Tribunal asked Automed Canada the following questions:

- Are Automed . . . (Canada) and Automed Technologies Inc. subsidiaries of the same company, that is, AmerisourceBergen [Technology Group]?
- Does Automed Technologies Inc. still do business in Canada? Does Automed . . . (Canada), during the normal course of its business, import and distribute in Canada goods that are identical or similar to those that Automed Technologies Inc. imported in Appeal No. AP-2007-[028]?
- How are Automed . . . (Canada) and Automed Technologies Inc. otherwise linked? Please indicate if they have the same administrators or the same shareholders.

[Translation]

13. On October 4, 2011, Automed Canada responded to the Tribunal's questions. In the Tribunal's opinion, the information provided by Automed Canada confirmed that it had significant ties to Automed Technologies Inc. and demonstrated that, as argued by the CBSA, Automed Canada must be considered a privy of Automed Technologies Inc. In fact, Automed Canada is the Canadian subsidiary of Automed Technologies Inc., the latter being the sole shareholder of Automed Canada. Therefore, Automed Technologies Inc. controls Automed Canada. The Tribunal also noted that, according to the information provided by Automed Canada, three of the administrators of Automed Technologies Inc. are also administrators of Automed Canada.

14. Moreover, Automed Canada indicated that Automed Technologies Inc. is its main vendor and supplier and has no other clients in Canada. Furthermore, the goods that are purchased and imported by Automed Canada are the same as those that Automed Technologies Inc. imported at the time of the Tribunal's decision in *Automed Technologies* and that were at issue in that case. As such, it can be said that Automed Canada and Automed Technologies Inc. pursue the same business goals and have the same interests, that is, the sale and distribution in Canada of goods previously imported and sold in Canada directly by Automed Technologies Inc., in particular at the time of the Tribunal's decision in *Automed Technologies*.

15. In short, even if the two companies are separate entities in terms of structure, in fact, they are both linked by their businesses, shareholders and directing minds. These two companies clearly have common interests. Contrary to Automed Canada's allegations, that Automed Technologies Inc. and Automed Canada have separate corporation numbers, that Automed Technologies Inc. has continued to import goods in Canada in parallel with Automed Canada, at least until February 2008, or that Automed Canada also sells goods for resale to pharmacies is not relevant. This does not negate the fact that significant ties exist between the two companies, nor is it sufficient to conclude that Automed Technologies Inc. has no interest in the outcome of the current appeal.

16. Therefore, the Tribunal finds that Automed Canada and Automed Technologies Inc. are privies of each other and that, as such, the requirement of the identity of the parties for the purpose of applying the doctrine of *res judicata* is also met in this case.

17. The present appeal is therefore inadmissible on the basis of the doctrine of *res judicata* since the Tribunal has irrevocably dealt with the issue in an earlier case that involved the same parties or their privies. In these circumstances, the application of the doctrine of *res judicata* removes the possibility of contradictory decisions concerning the tariff classification of the goods in issue.

18. For the preceding reasons, the Tribunal grants the CBSA's request and dismisses the present appeal.

Serge Fréchette  
Serge Fréchette  
Presiding Member