CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, May 29, 1998

Appeal No. AP-97-059

IN THE MATTER OF a motion by the Deputy Minister of National Revenue requesting that the Canadian International Trade Tribunal dismiss the appeal filed under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

BETWEEN

CANADIAN FRACMASTER LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby determines that it does not have jurisdiction to hear this appeal, as it involves the same cause of action which was before it in Appeal No. AP-95-098, *Canadian Fracmaster Ltd.* v. *The Deputy Minister of National Revenue*. Consequently, the motion is granted, and this appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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BETWEEN

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REASONS FOR DECISION

On August 1, 1997, Canadian Fracmaster Ltd. filed an appeal with the Tribunal pursuant to section 67 of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue dated May 9, 1997, made under paragraph 64(*d*) of the Act. The respondent's decisions were to give effect to the Tribunal's decision in a prior appeal, *Canadian Fracmaster Ltd.* v. *The Deputy Minister of National Revenue*[2] (the 1996 appeal), where it was determined that coiled steel tubing was more properly classified under tariff item No. 7306.50.00 of Schedule I to the *Customs Tariff*[3] as other tubes and pipes, of iron or steel, welded, of circular cross-section, of other alloy steel, than under tariff item No. 8307.10.00 as flexible tubing of base metal, with or without fittings, of iron or steel.

The appellant's representative filed a brief with the Tribunal on October 10, 1997, where it was indicated that this appeal involves the same goods as those in issue in the 1996 appeal (i.e. coiled steel tubing), but that the doctrine of issue estoppel does not apply to prevent the Tribunal from hearing this appeal, as it raises new issues involving tariff classification which were not considered in the 1996 appeal. The representative argued that the goods in issue should be classified under tariff item No. 7306.20.00 as other tubes and pipes, of iron or steel, more particularly, as casing and tubing of a kind used in drilling for oil or gas, rather than under tariff item No. 7306.50.00, as determined in the 1996 appeal. It was also argued that the goods in issue qualify for duty-free entry under Code 1570 of Schedule II to the *Customs Tariff*, as they are used in the "exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells up to and including the wellhead assembly or surface oil pumping unit."

The appellant's representative argued that the meaning of the expression "of a kind used" was not considered in the 1996 appeal. She noted that it was defined by the Tribunal in *Ballarat Corporation Ltd.* v.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Appeal No. AP-95-098, October 31, 1996.
3. R.S.C. 1985, c. 41 (3rd Supp.).

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The Deputy Minister of National Revenue,[4] a decision which was rendered on December 19, 1995, shortly before the 1996 appeal was heard on February 6, 1996, which hearing was held before the publication of Customs Notice N-044[5] which adopted the Tribunal's interpretation in *Ballarat*. The representative argued that the doctrine of issue estoppel does not apply, as one of the three tests identified by the Tribunal in *I.D. Foods Superior Corp.* v. *The Deputy Minister of National Revenue*[6] has not been met (i.e. this appeal does not involve the same question as that which was decided in the 1996 appeal). In any event, the representative argued that the *Ballarat* decision provides strong support for the Tribunal to revisit the tariff classification of the goods in issue.

On November 13, 1997, counsel for the respondent filed a notice of motion for the dismissal of this appeal on the grounds that the issue in this appeal, that is, the proper tariff classification of coiled steel tubing, was decided by the Tribunal in the 1996 appeal. She submitted that the doctrine of issue estoppel must be invoked to preclude the hearing of this appeal on its merits. Counsel noted that the same parties that were before the Tribunal in the 1996 appeal are before the Tribunal in this appeal. Counsel argued that the Tribunal's reasoning in *I.D. Foods* applies to dispose of this motion and, as such, of this appeal. She requested that the motion be argued orally before the Tribunal or via teleconference. Should the Tribunal decide to deal with the motion in writing, counsel requested an opportunity to file formal written representations. In the event that the Tribunal dismissed the motion, counsel requested that the deadline for filing the respondent's brief be postponed.

On November 20, 1997, the Tribunal sent a letter to counsel for the respondent, a copy of which was sent to the appellant's representative, requesting that both parties provide the Tribunal with any additional submissions which they may have dealing with the notice of motion. The Tribunal indicated that, once it had received these submissions, it would review the documents and decide how to proceed with the motion.

On November 25, 1997, the appellant's representative sent a letter to the Tribunal in response to the respondent's notice of motion. She disagreed with the respondent's position as, in her view, new issues are involved in this appeal. She argued that the true test of *res judicata* or issue estoppel is the identity of the issue. She indicated that it is the appellant's position that the issue in the 1996 appeal was to determine the heading of the *Customs Tariff* in which the goods in issue were properly classified, while the issue in this appeal is separate and distinct, that is, whether the goods in issue should be classified in subheading No. 7306.20, as claimed by the appellant, or are properly classified in subheading No. 7305.50, as determined by the respondent. Accordingly, the facts in *I.D. Foods* are clearly distinguishable from the facts in this appeal. The representative added that this appeal was launched on this new issue as a result of the change in interpretative policy by the Department of National Revenue, which took effect on April 12, 1996, concerning the interpretation of the expression "of a kind used." She argued that the fact that this change in "law" took place after the Tribunal heard and rendered its decision in the 1996 appeal supports the appellant's contention that a new issue is before the Tribunal.

The appellant's representative indicated that she would prefer to deal with the motion orally before the Tribunal the next time that it sits in Vancouver, British Columbia. However, if a Vancouver sitting is not likely to be held within six months, then she would prefer that the motion be disposed of on the basis of

4. Appeal No. AP-93-359, December 19, 1995.
5. *Interpretation of the Phrase "Of a Kind Used,"* Department of National Revenue, April 12, 1996.
6. Appeal No. AP-95-252, December 12, 1996.

written submissions. She indicated that, if the Tribunal grants the respondent the opportunity to prepare formal written representations, then she would like an opportunity to prepare a formal written representation in response. She preferred not to deal with the motion via teleconference. Finally, she indicated that, until such time as the Tribunal had reached a decision on the motion, she would take no position with respect to the respondent's request for an extension of the deadline to file a brief.

On November 26, 1997, counsel for the respondent sent a letter to the Tribunal arguing that, in her view, the best way to deal with the motion was by written submissions or via teleconference. She argued that to deal with the motion orally the next time the Tribunal sat in Vancouver would cause an unnecessary delay in dealing with the substance of this appeal in the event that the motion was denied.

On December 5, 1997, the Tribunal sent a letter to counsel for the respondent requesting that she provide it with her comments on the merits of the motion. A copy of the letter was sent to the appellant's representative. Counsel complied on December 16, 1997. On January 21, 1998, the Tribunal sent a letter to both parties indicating that it would consider the materials filed by the appellant and the respondent and render a decision shortly thereafter.

In her written submission, counsel for the respondent reiterated that this appeal should be dismissed on the grounds that the issue in this appeal was decided by the Tribunal in the 1996 appeal. Counsel noted that the goods in issue in this appeal are the exact same ones as those in the 1996 appeal. Further, this appeal deals with the same importations. Counsel argued that the doctrine of *res judicata* applies to prevent the Tribunal from proceeding to hear the merits of this appeal. According to counsel, the appellant is attempting to have a rehearing of the issue, which was decided by the Tribunal in the 1996 appeal, i.e. the proper tariff classification of coiled steel tubing used in the oil and gas industry. She argued that there is no new issue in this appeal. Further, the fact that the appellant wishes to argue its case differently does not translate into a new "issue." Counsel noted that the *Ballarat* decision was rendered before the 1996 appeal was heard by the Tribunal and could, therefore, have been raised in support of the appellant's position at that time.

Counsel for the respondent referred to the Tribunal's decision in *I.D. Foods* in support of her argument that the doctrine of *res judicata* applies in this appeal. In *I.D. Foods*, the Tribunal relied on certain decisions of the Federal Court of Canada to identify the following three requirements, which must be met in order for the doctrine of issue estoppel to apply: (1) the same question must have been decided; (2) the judicial question which is said to create the estoppel must be final; and (3) the parties to the judicial decision or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Counsel argued that those three requirements have been met in this appeal. First, the same question raised in this appeal was decided by the Tribunal in the 1996 appeal. Second, the Tribunal's decision in the 1996 appeal was final. Third, the parties in this appeal are the same as in the 1996 appeal. Furthermore, the appellant is appealing the same importations which were at issue in the 1996 appeal.

Relying on the decision of the Federal Court — Trial Division in *Canada (Attorney General)* v. *Canada (Human Rights Commission)*,[7] counsel for the respondent submitted that the fact that the Tribunal is an administrative tribunal and not a court does not preclude the application of the doctrine of *res judicata*. Relying on the decision of the Federal Court — Trial Division in *Merck Frosst Canada Inc., and Merck & Co., Inc.* v. *The Minister of National Health and Welfare and Apotex Inc.*,[8] counsel argued that a party,

7. (1991), 43 F.T.R. 47, Court File No. T-381-90, April 24, 1991.
8. Unreported, Court File No. T-1305-93, April 1, 1997.

having received a final decision, is prevented from re-litigating a matter notwithstanding that it has found supplementary arguments that were available at the time of the original litigation. Counsel also relied on several other cases in support of this argument.

In *I.D Foods*, the Tribunal conducted a review of the law surrounding the applicability of the doctrine of *res judicata* to administrative tribunals. The Tribunal held that, although it is well-settled law that administrative tribunals are not bound by their previous decisions, the doctrine of issue estoppel can apply to proceedings before administrative tribunals in order to prevent the hearing of a matter that has already been decided. The Tribunal relied on the decision of the Federal Court of Appeal in *O'Brien* v. *Canada (Attorney General)*[9] and the decision of the Federal Court — Trial Division in *Canada (Attorney General)* v. *Canada (Human Rights Commission)* in making its decision.

In *I.D. Foods*, the Tribunal noted that there appeared to be two separate doctrines: the doctrine of *res judicata* and the doctrine of issue estoppel. The first one, *res judicata*, is the one that applies to deny a party's right to a hearing on the merits where another action is brought for the same cause of action as was the subject of previous adjudication, and the second one, issue estoppel, applies to deny a party's right to a hearing on the merits, where, the cause of action being different, some point or issue of fact has already been decided.[10] As the appeal in *I.D. Foods* dealt with a different importation from the one in the previous appeal, the Tribunal held that the doctrine of *res judicata*/cause of action did not apply to prevent the Tribunal from hearing the appeal. However, the Tribunal held that the doctrine of issue estoppel did apply to prevent the Tribunal from hearing the merits of the appeal, as the three requirements enunciated above had been met.[11]

This appeal deals with the same importations as the ones at issue in the 1996 appeal. As a result, the Tribunal is of the view that the doctrine of *res judicata*/cause of action applies to prevent the Tribunal from hearing this appeal. In addition, the Tribunal is of the view that the three conditions enunciated above have been met. More particularly, the issue in this appeal was decided in the 1996 appeal, i.e. the tariff classification of coiled steel tubing. The Tribunal notes that the issue in the 1996 appeal was the proper tariff classification of these goods at the tariff item level, i.e. whether they were properly classified under tariff item No. 7306.50.00, as determined by the respondent, or whether they should be classified under tariff item No. 8307.10.00, as claimed by the appellant.[12] Furthermore, the Tribunal's decision in the 1996 appeal was final. Lastly, the parties to this appeal are the same parties that were involved in the 1996 appeal. The Tribunal makes this decision notwithstanding the fact that this is an appeal from a decision of the respondent under paragraph 64(*d*) of the Act.

The Tribunal agrees with the argument of counsel for the respondent, supported by the cases to which she referred in support of her argument, that the appellant, having received a final decision from the Tribunal, is prevented from re-litigating the same matter, notwithstanding that it has found supplementary arguments that were available at the time of the original litigation. The Tribunal notes that the *Ballarat* decision was rendered before the hearing of the 1996 appeal and could, therefore, have been raised by the appellant at that time.

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9. 12 Admin. L.R. (2d) 287, Court File No. A-291-91, April 16, 1993.
10. *Supra* note 5 at 4-5, where the Tribunal relied on the decision of the Federal Court — Trial Division in *Musqueam Indian Band* v. *Canada (Minister of Indian and Northern Affairs)*, [1990] 2 F.C. 351.
11. *Supra* note 6 at 5-6.
12. *Supra* note 2 at 1.

Accordingly, the Tribunal hereby determines that it does not have jurisdiction to hear this appeal, as it involves the same cause of action which was before it in the 1996 appeal. Consequently, the motion is granted, and this appeal is dismissed.

Charles A. Gracey

Charles A. Gracey
Member