Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2009-015

Danone Inc.

v.

President of the Canada Border Services Agency

Order issued
Thursday, November 19, 2009

Reasons issued
Tuesday, December 1, 2009

Canada

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IN THE MATTER OF an appeal filed by Danone Inc. on June 25, 2009, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF appearances entered under subsection 67(2) of the *Customs Act* and notices of intervention filed, under rule 39 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, by Ultima Foods Inc. on July 3, 2009, by Parmalat Canada Inc. on August 12, 2009, and by Dairy Farmers of Canada on September 17, 2009;

AND IN THE MATTER OF a motion filed by Danone Inc. on August 7, 2009, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, and written representations filed by Danone Inc. on September 10 and 17 and October 13, 2009, for an order denying intervener status to Ultima Foods Inc., Parmalat Canada Inc. and Dairy Farmers of Canada.

BETWEEN

DANONE INC. **Appellant**

AND

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

ORDER

The motion is dismissed.

The Canadian International Trade Tribunal hereby grants intervener status in the appeal to Ultima Foods Inc., Parmalat Canada Inc. and Dairy Farmers of Canada. However, their interventions shall be limited.

Ultima Foods Inc. and Parmalat Canada Inc. shall file a joint written submission with supporting documents, if any, and present joint oral argument at the hearing on the impact that the tariff classification sought by Danone Inc. would have on their respective market positions.

Dairy Farmers of Canada shall file a written submission with supporting documents, if any, and present oral argument at the hearing on the impact that the tariff classification sought by Danone Inc. would have on Canada's supply management system.

None of the interveners shall examine or cross-examine witnesses at the hearing.

The interveners shall file their written submissions with the Secretary by December 29, 2009, and forthwith serve a copy on each party and on each other.

Danone Inc. may file a written response with the Secretary by January 29, 2010, and shall forthwith serve a copy on the President of the Canada Border Services Agency and the interveners.

André F. Scott
André F. Scott
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. On March 27, 2009, the President of the Canada Border Services Agency (CBSA) issued a decision under subsection 60(4) of the *Customs Act*[1] regarding the tariff classification of DanActive™ imported by Danone Inc. (Danone).

2. On June 25, 2009, Danone appealed the CBSA's decision to the Canadian International Trade Tribunal (the Tribunal).

3. On July 3, 2009, Ultima Foods Inc. (Ultima) entered an appearance with the Secretary under subsection 67(2) of the *Customs Act* and filed a notice of intervention under rule 39 of the *Canadian International Trade Tribunal Rules*.[2]

4. On August 7, 2009, Danone filed a motion with the Tribunal for an order denying intervener status to Ultima.

5. On August 12, 2009, Parmalat Canada Inc. (Parmalat) entered an appearance with the Secretary under subsection 67(2) of the *Customs Act* and filed a notice of intervention under rule 39 of the *Rules*.

6. On September 10, 2009, Ultima filed a response to Danone's motion, and Danone filed written representations objecting to Parmalat's intervention.

7. In a letter dated September 17, 2009, Parmalat filed a reply to Danone's response to Parmalat's application for intervener status.

8. On September 17, 2009, Danone filed written representations in reply to Ultima's response. On the same day, Dairy Farmers of Canada (DFC) entered an appearance with the Secretary under subsection 67(2) of the *Customs Act* and filed a notice of intervention under rule 39 of the *Rules*.

9. On October 13, 2009, Danone filed written representations objecting to DFC's intervention.

10. In their submissions under rule 40.1 of the *Rules*, Ultima, Parmalat and DFC each argued that the Tribunal does not have discretion to refuse to hear a person who has entered an appearance with the Secretary under subsection 67(2) of the *Customs Act*. They relied in part on the Tribunal's order in *Les Produits Laitiers Advidia Inc. v. President of the Canada Border Services Agency*,[3] in which the Tribunal accepted an intervention by DFC where the notice of intervention contained all the information required by rule 40.1 of the *Rules*.

11. Ultima, Parmalat and DFC each argued, in the alternative, that the Tribunal ought to exercise its discretion to hear from them because they had an interest in the appeal, their intervention was necessary, and their intervention may assist the Tribunal in its resolution of the appeal.

12. Danone took the position that the Tribunal has discretion to refuse interventions and should refuse to grant leave to intervene to Ultima, Parmalat and DFC because each failed to meet the established criteria set forth in rule 40.1 of the *Rules*.

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1. R.S.C. 1985 (2d Supp.), c. 1.
2. S.O.R./91-499 [*Rules*].
3. (20 April 2004), AP-2003-040 (CITT) [*Advidia*].

13. Subsection 67(2) of the *Customs Act* provides that ". . . any person who, on or before the day of the hearing, enters an appearance with the Secretary of the Canadian International Trade Tribunal *may* be heard on the appeal" [emphasis added].

14. The use of the term "may", expressing permission, instead of the term "shall", meaning that the Tribunal would have no discretion, gives rise to two possible interpretations. First, it could be interpreted to mean that any person who enters an appearance with the Tribunal before the hearing has the right to be heard and will be heard if the person chooses to exercise this right. Alternatively, it may mean that the person is eligible to be heard, and the Tribunal must decide whether to let the person be heard.

15. In the Tribunal's view, the second interpretation is the correct one. Parliament has signalled its desire for the Tribunal's proceedings to be timely and cost-effective by stipulating, at section 35 of the *Canadian International Trade Tribunal Act*,[4] that "[h]earings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit." It is unlikely, then, that Parliament intended to unnecessarily complicate the Tribunal's appeal proceedings by requiring it to hear any person who wants to be heard, including persons whose unmerited interventions would waste the time and expense of the parties to the appeal and of the Tribunal itself.

16. Parliament's intention to let persons be heard, subject to the Tribunal's discretion to refuse their interventions, is confirmed by the *Rules*. Rule 39 of the *Rules* stipulates that "[a]n appearance referred to in subsection 67(2) of the *Customs Act* . . . may be made by filing with the Secretary a notice of intervention on the relevant Tribunal form." Rule 40.1 of the *Rules* adds that any person who files a notice of intervention pursuant to rule 39 of the *Rules* shall specify the following: "(*a*) the nature of their interest in the appeal; (*b*) the reason why their intervention is necessary; (*c*) how the person may assist the Tribunal in the resolution of the appeal; and (*d*) any other relevant matters." These requirements of the *Rules*, especially those of rule 40.1 of the *Rules*, would be pointless if subsection 67(2) of the *Customs Act* gave the person the automatic right to be heard merely on the basis of having entered an appearance with the Secretary. A more compelling rationale for rule 40.1 of the *Rules* is to establish criteria for the Tribunal by which to assess the merits of the person's proposed intervention.

17. The Tribunal finds further support for this conclusion in rule 41 of the *Rules*. Subrule 41(1) permits the Tribunal to give the parties to the appeal an opportunity to make representations in respect of the intervention. Representations from the parties would be pointless if the Tribunal had no choice but to accept the intervention. The Tribunal can seek representations from the parties in respect of the intervention because it has discretion to refuse it. Indeed, subrule 41(2) requires the Secretary to notify the parties that a person has been added as an intervener "[i]f the Tribunal *determines* . . ." [emphasis added] that the person shall be so added. Thus, it is up to the Tribunal to decide whether to permit or refuse an intervention by a person who has entered an appearance with the Secretary.

18. Accordingly, the Tribunal must assess each notice of intervention and determine, on the basis of the criteria established in rule 40.1 of the *Rules* and the representations of the parties to the appeal, whether to permit or refuse the intervention.

19. The Tribunal did not assert the contrary in *Advidia*. It stated, in that case, that ". . . neither subsection 67(2) of the *Customs Act* nor rule 39 of the . . . *Rules* provides the Tribunal with any discretion to refuse intervener status where the notice of intervention contains all the information required by rule 40.1 of the . . . *Rules*." That statement is correct; the Tribunal will permit an intervention where the notice of

4. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

intervention contains all such information. However, it is not the would-be intervener that determines whether the notice of intervention contains all such information. Rather, it is the Tribunal that determines whether the notice of intervention contains all such information, in the sense that the person seeking to intervene must satisfy the Tribunal that the criteria for intervention set forth in rule 40.1 of the *Rules* are met.

20. Turning then to rule 40.1 of the *Rules*, the Tribunal observes that paragraph (*a*) refers not simply to the person's interest in the appeal, but to the nature of the person's interest. Clearly, not any interest is sufficient for intervention; only interests of a certain nature will suffice. In the Tribunal's view, in order to be permitted to intervene, the person must have an interest that will be directly affected by the outcome of the appeal.[5] Danone claimed that only direct legal interests are sufficient, but the Tribunal finds no merit to that argument in the most recent jurisprudence referred to by the parties.[6] Also, the Tribunal does not see why, in principle, a specialized administrative tribunal like the Tribunal, which concerns itself with resolving a mix of legal and economic interests, should refuse interventions by a person with a direct economic interest in an appeal before it. In fact, the Tribunal's longstanding practice has been to permit interventions in appeals by competitors where such competitors can be affected by the outcome of the case.

21. Turning to paragraph (*b*) of rule 40.1 of the *Rules*, without illustrating all the situations in which an intervention is necessary, the Tribunal takes the view that one such situation is where a person's direct interest in the outcome of the appeal would not otherwise be adequately represented.

22. With respect to the evidence, the Tribunal finds that Ultima, Parmalat and DFC each have a direct interest in the appeal that would not otherwise be adequately represented by either of the parties.

23. Ultima and Parmalat produce and sell products that compete directly with DanActive™ in the Canadian market and stand to gain or lose financially depending on how DanActive™ is classified for tariff purposes. While the CBSA can be expected to provide legal arguments and evidence in support of the tariff classification that favours Ultima and Parmalat, the latter have the first-hand expertise about relevant products to ensure that their direct interests are adequately represented in the appeal.

24. DFC represents the Canadian producers of milk and dairy products. Those producers are largely shielded by a supply management system that includes import quotas and high tariffs, the functioning of which may depend in part on the tariff classification of DanActive™. There is no reason to believe that either Danone or the CBSA will adequately address this aspect.

25. Having determined that the interventions are necessary, the Tribunal is of the view that it is superfluous to consider paragraphs (*c*) and (*d*) of rule 40.1 of the *Rules*. Nevertheless, the Tribunal finds that the expertise of Ultima and Parmalat in respect of relevant products and of DFC in respect of the relationship between tariff classification and the supply management system may assist the Tribunal in the resolution of the appeal.

26. Having determined that the interventions of Ultima, Parmalat and DFC shall be permitted, the Tribunal must determine the extent to which they will be allowed to intervene.

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5. The Tribunal observes that, in *R. v. Finta*, [1993] 1 S.C.R. 1138, the Supreme Court of Canada interpreted "an interest" in rule 18 of the *Rules of the Supreme Court of Canada* as meaning not any interest, but "a direct stake in the outcome", "an interest which is directly affected". The Tribunal also notes that *Black's Law Dictionary*, 9th ed., defines "intervention" in relevant part as "[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome. . . ."
6. See, for example, *Apotex Inc. v. Canada (Minister of Health)*, 2000 CanLII 14957 (F.C.), which was decided after rule 109 of the *Federal Courts Rules* was substantially amended.

27. Subrule 41(3) of the *Rules* gives interveners the right to receive copies of the submissions of the parties to the appeal.

28. In addition, as mentioned, subsection 67(2) of the *Customs Act* entitles interveners to be "heard". In practice, the Tribunal allows interveners to file written submissions before the hearing and present oral argument at the hearing. However, the Tribunal has the discretion to limit the extent of these written and oral submissions, and refuse to allow interveners to call their own witnesses or cross-examine the witnesses of the parties to the appeal.

29. Subsection 17(2) of the *CITT Act* provides the Tribunal, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, and matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. In addition, as mentioned, section 35 of the *CITT Act* provides that hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit. Similarly, rule 6 of the *Rules* permits the Tribunal to dispense with, vary or supplement the rules where it is fair and equitable to do so or to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit. Thus, subject to requirements of statute and regulation, the Tribunal is the master of its own procedure. While it is required by subsection 67(2) of the *Customs Act* to hear the interveners, the Tribunal is free to restrict the interveners' submissions in a manner that ensures that its proceedings are expeditious and not unduly complicated for the parties to the appeal, while at the same time being fair to the interveners.

30. The Tribunal can therefore use its authority in a manner that affords interveners the opportunity to be heard only to the extent that such interventions are necessary (or may assist the Tribunal in the resolution of the appeal, as the case may be).

31. In the present appeal, to minimize the extent to which the interventions may unduly affect Danone and unnecessarily burden the appeal with irrelevancies, the Tribunal will allow Ultima, Parmalat and DFC to file written submissions at the same time as the CBSA and present oral argument at the hearing only to the degree necessary to adequately represent their direct interests in the appeal. Ultima and Parmalat shall file a joint written submission and present joint oral argument at the hearing on the impact that the proposed tariff classification would have on their respective market positions. DFC shall file a written submission and present oral argument at the hearing on the impact that the proposed tariff classification would have on Canada's supply management system.

32. Since Danone has already filed its appellant's brief, as a matter of fairness, it will have the opportunity to file a written reply to the interveners' submissions prior to the hearing.

André F. Scott
André F. Scott
Presiding Member