



Ottawa, Wednesday, March 10, 2004

Appeal No. AP-2003-036

IN THE MATTER OF an appeal filed on September 19, 2003,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a motion by Roche Vitamins
Canada Inc., filed on October 28, 2003, pursuant to subrule 17(2)
of the *Canadian International Trade Tribunal Rules*,
S.O.R./91-499, for the production of all records relied upon by the
Commissioner of the Canada Customs and Revenue Agency in
making the tariff classification determinations under appeal, so as
to provide Roche Vitamins Canada Inc. a fair opportunity to know
the case that it has to meet and to have full knowledge of the facts
upon which those determinations were based.

BETWEEN

ROCHE VITAMINS CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

ORDER

Roche Vitamins Canada Inc.'s motion for the early production of the records of the Commissioner of the Canada Customs and Revenue Agency is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

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Appeal No. AP-2003-036

ROCHE VITAMINS CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
JAMES A. OGILVY, Member

STATEMENT OF REASONS

On June 2, 2003, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) issued a preliminary decision regarding the tariff classification of certain vitamins imported by Roche Vitamins Canada Inc. (Roche). The preliminary decision contained detailed reasons for the Commissioner's tariff classification of each of the goods in issue including an Agency Rationale prepared by the Trade Policy and Interpretation Directorate of the Canada Customs and Revenue Agency (now the Canada Border Services Agency) attached to and cited in the preliminary decision. The Agency Rationale relied upon a number of the Commissioner's laboratory reports and records of the World Customs Organization (WCO).

On June 25, 2003, the Commissioner issued his final determinations, in the form of detailed adjustment statements (DASs), under subsection 60(4) of the *Customs Act*.¹ According to each DAS, the final determinations were based upon among other things, the "review and opinion of the Agency's Trade Policy and Interpretation Directorate", i.e. the Agency Rationale.

On September 19, 2003, Roche filed a notice of appeal with the Tribunal from the Commissioner's final determinations.

On October 28, 2003, Roche filed a notice of motion with the Tribunal for the production of all records relied upon by the Commissioner in making the tariff classification determinations under appeal so as to provide Roche a fair opportunity to know the case that it has to meet and to have full knowledge of the facts upon which those determinations were based. Roche later withdrew its request for the production of records of the WCO.

In its motion record, Roche contended that the laboratory reports, having been relied upon by the Commissioner, had a direct bearing on the determinations under appeal and were, therefore, relevant. Roche

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

also described its unsuccessful efforts, between June 2 and June 19, 2003, to obtain the laboratory reports from the Commissioner, including by means of a request under the *Access to Information Act*.²

ARGUMENT

In its motion record, Roche argued that the Tribunal has authority, under subsection 17(2) of the *Canadian International Trade Tribunal Act*,³ to order the production of the Commissioner's laboratory reports. As mentioned in the previous paragraph, Roche contended that the laboratory reports were relevant because the Commissioner had relied upon them in making his final determinations. Roche also contended that fairness dictates disclosure of the laboratory reports in order for Roche to be able to contest the final determinations on appeal. Roche must have an opportunity to review the laboratory reports in order to know the case that it has to meet and to be able to challenge their validity.

The Commissioner argued, in his letter dated January 21, 2004, that the laboratory reports are irrelevant "at this stage of the proceeding", since the Commissioner has not yet sought to rely upon them, and that there can be no breach of procedural fairness in refusing to disclose them, since the *Canadian International Trade Tribunal Rules*⁴ set out an adequate documentary disclosure mechanism. The Commissioner describes the appeal as a "hearing *de novo*", which is not restricted to the record of the Commissioner's final determinations and for which Roche bears the burden not just of proving that the Commissioner was wrong but also of establishing which tariff classification was right.

DECISION

For the following reasons, Roche's motion for the production of the Commissioner's records is dismissed.

First, in the Tribunal's opinion, the DASs provide adequate notice of the Commissioner's position for Roche to be able to advance its case for appeal to the next step. Unlike some DASs, where the Commissioner's position is not outlined in great detail, the DASs in this appeal incorporate by reference the elaborate and detailed reasons of the Agency Rationale. These reasons should suffice for the purpose of indicating the issues in dispute so that Roche can put forth a *prima facie* case for reclassification of the goods in issue in its written brief.

Second, the Tribunal agrees with the Commissioner's contention that the *Rules* provide an adequate documentary disclosure mechanism for purposes of the appeal. Rule 35 requires the Commissioner to file and serve a detailed written response to Roche's brief, which must include all material facts, arguments and supporting documents upon which he intends to rely. Any further arising documents or authorities not contained in the written response must be filed and served not less than 10 days before the hearing. Such disclosure, in the Tribunal's view, would ordinarily give Roche an adequate opportunity to know the case that it has to meet.

In dismissing Roche's motion, the Tribunal wishes to make two further comments on the Commissioner's letter dated January 21, 2004.

2. R.S.C. 1985, c. A-1.
3. R.S.C. 1985 (4th Supp.), c. 47.
4. S.O.R./91-499 [*Rules*].

First, the Tribunal declines to pronounce on the Commissioner's analogy to a hearing *de novo*. Suffice it to say that an appeal lies to the Tribunal every time a person is "aggrieved" by the Commissioner's decision under section 60 of the *Act* and, in the absence of a full disclosure requirement under this section and of legislation compelling the filing of the Commissioner's full administrative record on appeal, the Tribunal relies upon the good offices of the Commissioner to make all relevant information from the review under section 60 available to an appellant and the Tribunal in order for the Tribunal to properly adjudicate the matter. Thus, although the Tribunal agrees with the Commissioner that it would be premature to compel the production of the requested information at this early stage of the proceeding, the Tribunal would expect the Commissioner to disclose *all* relevant information from the review under section 60 through the disclosure mechanism contained in rule 35 of the *Rules*.

Second, the Tribunal disagrees with the Commissioner's contention that, for purposes of this appeal, "relevant" information means only that information and documentation upon which the Commissioner chooses to rely in the course of the appeal. In the Tribunal's view, such a definition creates too narrow a scope for disclosure and, if imposed, would not be in the interests of justice. To be so restrictive would confer an unfair procedural advantage upon the Commissioner, since such limited disclosure would risk depriving Roche of useful information upon which to narrow or meet the issues in dispute.

In this appeal, the Tribunal adopts the Federal Court's standard for disclosure, which holds that, for a document to be "relevant", it must be one "which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences".⁵

Applying the above standard to this appeal, the Tribunal finds that all the laboratory reports mentioned in the Agency Rationale are relevant to this proceeding. Therefore, all such laboratory reports would ordinarily have to be disclosed by the Commissioner under the procedures contemplated in rule 35 of the *Rules* in order to give Roche an adequate opportunity to know the case that it has to meet, even though it is not necessary to disclose them at this early stage of the proceeding.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

5. *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988) 24 C.P.R. (3d) 66 at 70.