Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2012-009

Volpak Inc.

v.

President of the Canada Border Services Agency

Order issued
Thursday, May 22, 2014

Reasons issued
Thursday, June 5, 2014

Canada

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IN THE MATTER OF an appeal filed by Volpak Inc. on June 6, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a request made by the President of the Canada Border Services Agency on February 11, 2014, asking that the Canadian International Trade Tribunal reject the filing of 43 additional documents and authorities by Volpak Inc.

BETWEEN

VOLPAK INC. **Appellant**

AND

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

ORDER

WHEREAS Volpak Inc. sought to file 43 additional documents and authorities on February 11, 2014, being after the deadline set by the Canadian International Trade Tribunal;

AND WHEREAS the President of the Canada Border Services Agency objected to the filling of the additional documents and authorities by Volpak Inc.;

AND WHEREAS the Canadian International Trade Tribunal wrote to the parties on February 12, 2014, to seek their views with respect to this matter with the following results:

- on March 18 and March 19, 2014, the President of the Canada Border Services Agency affirmed his objection to the filing of additional documents and authorities by Volpak Inc. and requested that the filing of the additional documents and authorities not be accepted by the Canadian International Trade Tribunal;
- on March 20, 2014, Volpak Inc. opposed the President of the Canada Border Service Agency's request, argued the relevance of the additional documents and authorities filed and withdrew the filing of certain authorities; and
- on May 14, 2014, the President of the Canada Border Services Agency filed an agreed statement of facts on behalf of both parties.

THEREFORE, the Canadian International Trade Tribunal, having now had occasion to fully consider the matter, hereby orders as follows:

- the documents in Exhibit AP-2012-009-41A, tabs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 19 and 22, are to be placed on the record of this matter;
- the documents in Exhibit AP-2012-009-41B, tabs 4, 6, 7, 8, 11, 12, 16 and 18, are to be placed on the record of this matter;

- the remaining documents in Exhibit AP-2012-009-41A, tabs 10, 15, 17, 20, 21, 23 and 24, and in Exhibit AP-2012-009-41B, tabs 1, 2, 3, 5, 9, 10, 13, 14, 15, 17 and 19, are not accepted and will *not* be placed on the record of this matter.

The request by the President of the Canada Border Services Agency, dated February 11, 2014, is therefore granted in part.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Gillian Burnett
Gillian Burnett
Secretary

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

STATEMENT OF REASONS

BACKGROUND

1. On June 6, 2012, Volpak Inc. (Volpak) filed an appeal with the Canadian International Trade Tribunal (the Tribunal) with regard to a decision of the President of the Canada Border Services Agency (CBSA) made on March 15, 2012, pursuant to subsection 60(4) of the *Customs Act*,[1] concerning the tariff classification of chicken and chicken products (the goods in issue).

2. Volpak was a participant in the Import for Re-Export Program (IREP), which enables processers to apply for import permits to import, process, and then re-export certain goods at a lower rate of duty than would otherwise be assessed. Goods imported under an IREP permit are referred to as being "within access commitment", while goods imported without the benefit of a permit are considered "over access", and are subject to a higher rate of duty on importation.

3. Under the IREP, the Department of Foreign Affairs and International Trade (DFAIT) (now known as the Department of Foreign Affairs, Trade and Development) is responsible for issuing permits to participants, entitling them to import the goods at a lower rate of duty, on condition that they are processed and re-exported within a specified period.

4. In the instant case, Volpak applied for and received a permit for the importation of the goods in issue. When the goods in issue were imported they were classified by the CBSA as being "within access commitment" under tariff item No. 0207.13.91, and were assessed at a lower rate of duty. However, DFAIT subsequently cancelled Volpak's permit for a large portion of the goods in issue. As part of a subsequent audit of Volpak's importations of the goods in issue, the CBSA re-classified the volume of the goods in issue for which the permit had been cancelled as "over access" under tariff item No. 0207.13.93, with a higher rate of duty then assessed on those "over access" goods.

5. In its appeal before the Tribunal, Volpak argues that, rather than conducting an independent investigation to determine if the goods in issue had been exported as required by the permit, the CBSA simply accepted the findings of DFAIT, thereby fettering its own discretion.

PROCEDURAL HISTORY

6. On November 2, 2012, the CBSA made a request to the Tribunal, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,[2] for an order dismissing the appeal on the basis that the Tribunal does not have the jurisdiction to deal with the issue on appeal. In the alternative, the CBSA requested that Volpak provide further submissions regarding the alleged errors made by the CBSA in its re-determination of the tariff classification of the goods in issue.

7. On May 14, 2013, the Tribunal denied the CBSA's request to dismiss the appeal. However, the Tribunal granted CBSA's request that Volpak be directed to provide further submissions.

8. On May 31, 2014, Volpak filed an additional appellant's brief.

9. On July 25, 2013, the CBSA filed a respondent's brief.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
2. S.O.R./91-499.

10. On August 23, 2013, in response to a request by Volpak, the Tribunal granted a postponement of the hearing, and set a new hearing date of February 18, 2014.

11. Also in its letter of August 23, 2013, the Tribunal notified both parties that any additional documents or authorities that could not be filed with the Tribunal as part of a brief were required to be filed by February 10, 2014.

12. On February 6, 2014, the Tribunal wrote to the parties and set out three issues the Tribunal recommended the parties both address at the hearing scheduled for February 18, 2014.

13. On February 10, 2014, the CBSA filed a respondent's book of authorities.

14. On February 11, 2014, Volpak filed 43 new documents in the form of an appellant's book of authorities, and an appellant's book of documents and additional authorities (the documents in issue).

15. On February 11, 2014, the CBSA wrote to object to Volpak's filing of the documents in issue, and to request that, should the Tribunal accept the filing of the documents in issue, the hearing be postponed in order to allow the CBSA sufficient time to review the documents and file an additional brief.

16. On February 12, 2014, the Tribunal informed the parties that the hearing was rescheduled for May 22, 2014, and asked the parties to file submissions regarding the relevance of the documents in issue.

17. On February 12, 2014, Volpak wrote to the Tribunal to request a new hearing date, as counsel for Volpak was unavailable on May 22, 2014.

18. On February 17, 2014, the Tribunal informed the parties that the hearing was rescheduled for June 5, 2014.

19. On March 18 and 20, 2014, the CBSA submitted its comments regarding the relevancy of the documents in issue.

20. On March 20, 2014, Volpak filed a reply to the CBSA's submissions regarding the documents in issue, and to withdraw four documents it had previously filed amongst the documents in issue. Volpak also suggested that it submit an additional brief in order to formalize its position.

21. On March 24, 2014, the Tribunal declined Volpak's suggestion that it be allowed to submit another additional brief.

22. On May 14, 2014, the CBSA submitted an *Agreed Statement of Facts* on behalf of both parties.

23. The Tribunal issued its Order on May 22, 2014, in which it indicated that reasons would follow.

ANALYSIS

24. Upon receiving the parties' submissions regarding the documents in issue, the Tribunal assessed the relevancy of each document against the evidence and arguments contained in the briefs already filed by the parties in this appeal.

25. In conducting its analysis the Tribunal was also mindful of the requirements of procedural fairness. In particular, the Tribunal considered both the need to afford each party a reasonable opportunity to present its case and reasonable notice of the case to be met.

26. On the basis of its assessment, the Tribunal decided that 24 documents would be accepted onto the record. As for the remaining documents in issue, four documents were withdrawn by Volpak, five documents were not accepted onto the record as they deal with issues which have already been resolved by the *Agreed Statement of Facts* submitted by the parties, and nine documents were not accepted onto the record as they are not relevant to the matters at issue.

27. The specific rationale for the Tribunal's decision for each of the documents is discussed below.

Documents Withdrawn

28. In its letter of March 20, 2014, Volpak stated that, upon further consideration, several documents were not relevant to the issues at hand, and were therefore being withdrawn. The documents that were withdrawn are the following:

- *Romain L. Klaasen v. President of the Canada Border Services Agency*, AP-2004-007 (CITT);[3]
- *KAO Brands Canada Inc. v. President of the Canada Border Services Agency*, AP-2013-018 (CITT);[4]
- *Canada (Attorney General) v. Amazon.com, Inc.*, 2011 FCA 328 (CanLII);[5] and
- *Canada (Attorney General) v. Savoie-Forgeot*, 2014 FCA 26 (CanLII).[6]

Documents Accepted Onto the Record

29. The following documents were accepted onto the record as being relevant to the matters at issue in this appeal.

- Definition of "condition" from *Black's Law Dictionary*:[7] Volpak argues that the CBSA had an independent obligation to verify whether Volpak fulfilled the conditions of the IREP permit by exporting the goods in issue.[8] As this is a live issue before the Tribunal, the definition of "condition" is relevant to this appeal.
- Definition of "verify" from *Webster's New World Dictionary*:[9] Volpak argues that the CBSA did not properly verify whether the conditions of the IREP permit were fulfilled by Volpak.[10] The Tribunal therefore accepts that the meaning of "verify" is germane to this appeal.

3. Exhibit AP-2012-070-41A, tab 20.
4. *Ibid*., tab 21.
5. *Ibid*., tab 23.
6. *Ibid*., tab 24.
7. Exhibit AP-2012-009-41B, tab 4.
8. Exhibit AP-2012-009-20A at 2.
9. Exhibit AP-2012-009-41B, tab 6.
10. Exhibit AP-2012-009-20A at 2.

- IREP Production Record:[11] In the event that Volpak is successful in arguing that the CBSA had an independent obligation to verify what quantity of the goods in issue was exported by Volpak, then Volpak's production and export records will be useful in conducting calculations.[12]
- Production Log (Export):[13] The production and export logs are relevant to Volpak's argument that the CBSA had an independent obligation to verify the quantity of the goods in issue actually exported by Volpak.
- Certificate No. 232163[14] and Certificate No. 232164:[15] As discussed above, these certificates may be necessary to determine what quantities of the goods in issue were in fact exported.
- Export Report for February 2011:[16] As discussed above, this record may be necessary to determine what quantities of the goods in issue were in fact exported.
- Sample labels:[17] As Volpak argues that the processing of the goods in issue, and the resultant impact on the weight of the goods in issue, affects the calculations for the quantity of the goods in issue which were in fact exported,[18] documentation indicating the composition and weight of the goods in issue may be required.
- Memorandums D10-18-1,[19] D19-10-2[20] and D20-1-4:[21] The Tribunal notes that these memoranda were produced by the CBSA as guides to its enforcement policies. Given that these memoranda provide a contextual framework, and that the CBSA is presumed to know the contents of the memoranda it produces, the memoranda are accepted onto the record.
- Certain provisions of the *Customs Act*:[22] In the *Agreed Statement of Facts* submitted to the Tribunal, the parties agreed that the CBSA initiated an audit under section 42 of the *Customs Act*, that 13,402 kg of the goods in issue were re-classified as "over access commitment" pursuant to section 59 of the *Customs Act*, and that the CBSA maintained its decision to re-classify 13,402 kg of the goods in issue pursuant to subsection 60(4) of the *Customs Act*.[23] While section 32.2 of the *Customs Act* (which deals with an importer's obligation to correct an inaccurate declaration of tariff classification) was not directly cited by either party, the CBSA nevertheless brought it into play when, in its respondent's brief, it stated that, after the IREP permit was amended by DFAIT, Volpak did not "make any correction to its declaration of tariff classification" for the goods in issue.[24] As such, all of these provisions are before the Tribunal in this appeal, and thus are duly admitted onto the record.

11. Exhibit AP-2012-009-41B, tab 7.
12. Exhibit AP-2012-009-10A at para. 80.
13. *Ibid.* at para. 80.
14. Exhibit AP-2012-009-41B, tab 11.
15. *Ibid.*, tab 12.
16. *Ibid.*, tab 16.
17. *Ibid.*, tab 18.
18. Exhibit AP-2012-009-20A at 4.
19. Exhibit AP-2012-009-41A, tab 1.
20. *Ibid.*, tab 2.
21. *Ibid.*, tab 3.
22. *Ibid.*, tab 4.
23. Exhibit AP-2012-009-54A at paras. 6, 8, 10.
24. Exhibit AP-2012-009-22A at para. 9.

- Certain provisions of the *Customs Tariff*:[25] The Tribunal finds that both section 10 and section 90 of the *Customs Tariff*[26] are relevant to the matters at issue, and should therefore be accepted onto the record. Specifically, section 10 sets out the CBSA's authority to classify goods as "within access commitment", and therefore goes to the very heart of this appeal. With respect to section 90 of the *Customs Tariff*, the Tribunal accepts Volpak's contention that the provision (and related case) is being submitted in attempt to show an allegedly analogous situation involving the interpretation of the *Customs Act* in situations where a permit for importation is retroactively cancelled.[27] While the Tribunal takes no position on the merits of this proposed argument, it nonetheless recognizes the relevance to Volpak's arguments advanced in this appeal.
- *Export and Import Permits Act*:[28] As the *Export and Import Permits Act*[29] is relevant to the functioning of the IREP, the Tribunal finds that it provides context for the matters in issue, and therefore will be admitted onto the record.
- *Import Permits Regulations*:[30] As with the *Export and Import Permits Act* discussed above, the Tribunal finds that the *Import Permits Regulations*[31] provides potentially necessary context for the matters in issue, and thus will be admitted onto the record.
- *Interpretation Act*:[32] The *Interpretation Act*[33] is an over-arching legislative document of general application, which is accepted onto the record as such.
- *Reporting of Exported Goods Regulations*:[34] Volpak argues that the CBSA had an independent obligation to verify whether Volpak fulfilled the conditions of the IREP permit by exporting the goods in issue.[35] If this argument is successful, the *Reporting of Exported Goods Regulations*[36] may assist the Tribunal in determining whether Volpak provided the CBSA with the information necessary to evaluate whether the goods in issue were properly exported.
- *Murphy v. Canada (National Revenue)*, 2009 FC 1226 (CanLII)[37] [*Murphy*]: In its letter of May 14, 2013, the Tribunal asked the parties to address certain issues, one of which being whether the CBSA had an obligation to perform an independent investigation to determine the volume of goods exported by Volpak.[38] While the Tribunal takes no position on the matter, it accepts the potential relevance of the *Murphy* decision to Volpak's argument that the CBSA did have such an obligation, and that it could not "delegate" its obligation by simply accepting the findings of DFAIT.[39]

25. Exhibit AP-2012-009-41A, tab 5.
26. S.C. 1997, c. 36.
27. Exhibit AP-2012-009-43 at 2-3.
28. Exhibit AP-2012-009-41A, tab 6.
29. R.S.C., 1985, c. E-19.
30. Exhibit AP-2012-009-41A, tab 7.
31. SOR/79-5.
32. Exhibit AP-2012-009-41A, tab 8.
33. R.S.C., 1985, c. I-21.
34. Exhibit AP-2012-009-41A, tab 9.
35. Exhibit AP-2012-009-20A at 2.
36. SOR/2005-23.
37. Exhibit AP-2012-009-41A, tab 11.
38. Exhibit AP-2012-009-19.
39. Exhibit AP-2012-009-49 at 2.

- *Ereiser v. Canada*, 2013 FCA 20 (CanLII):[40] As this case speaks to the interpretation of what constitutes a "valid" decision within a legislative scheme, the Tribunal accepts that it is relevant to the issue of whether the CBSA's tariff re-classification of the goods in issue was validly made.
- *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII)[41] [*JP Morgan*]: In its appellant's brief, Volpak argues that the CBSA had "fettered its discretion" by adopting DFAIT's conclusion rather than performing its own independent investigation as to whether the goods in issue had been exported in accordance with the terms of the permit.[42] The Tribunal is satisfied that insofar as *JP Morgan* speaks to the issue of the "fettering of discretion" it is relevant to the arguments already advanced by Volpak.
- *Chapman v. Canada (Minister of National Revenue)*, 2002 FCT 655 (CanLII):[43] The Tribunal is satisfied that as this case speaks to the issue of the "fettering of discretion" it is relevant to the arguments already advanced by Volpak.
- *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 (CanLII):[44] The Tribunal notes that this case was cited by Volpak in its original appellant's brief and, therefore, it already forms part of the record for this appeal.
- *Dominion Sample Ltd. v. Canada (Commissioner, Customs and Revenue agency)*, 2003 FC 1244:[45] As the matter at the heart of this appeal goes to the proper classification of goods when the permit under which they were imported has been retroactively cancelled (i.e. after importation has already occurred), the Tribunal finds that the excerpts from this case dealing with the retroactive revocation of a permit are relevant.
- *Kinedyne Canada Limited v. President of the Canada Border Services Agency*, AP-2012-058 (CITT):[46] Volpak stated that this case was submitted in support of the statement in its appellant's additional brief that tariff classification is determined at the time the goods are imported.[47] The Tribunal agrees that this case reference is of relevance to an issue of law in this appeal of which the CBSA has already been made aware.
- *Canada (Minister of Public Safety and Emergency Preparedness) v. Maydak*, 2005 FCA 186 (CanLII):[48] The passages of this case highlighted by Volpak set out the definitions of "investigate" and "investigation". As this goes to Volpak's argument that the CBSA had an independent duty to determine whether Volpak was in compliance with the terms of its permit, the Tribunal finds the case is relevant to the matters in issue.

30. In deciding to admit the foregoing documents onto the record, the Tribunal emphasizes that they are being accepted only insofar as they bear upon issues of law and/or of fact already properly in issue in this appeal.

40. Exhibit AP-2012-009-41A, tab 12.
41. *Ibid*., tab 13.
42. Exhibit AP-2012-009-10A at paras. 87-88.
43. Exhibit AP-2012-009-41A, tab 14.
44. *Ibid*., tab 16.
45. *Ibid*., tab 18.
46. *Ibid*., tab 19.
47. Exhibit AP-2012-009-20A at 2.
48. Exhibit AP-2012-009-41A, tab 22.

Documents Made Unnecessary by the Filing of the *Agreed Statement of Facts*

31. As the *Agreed Statement of Facts* was submitted to the Tribunal by the parties after the documents in issue were filed, several issues to which these documents pertain have since been resolved. In this connection, the Tribunal finds that the following documents in issue are no longer of relevance to the disposition of this appeal.

- Import Controls and Import Permits information sheet:[49] The operation of the IREP, as well as the process of applying for an IREP permit, are already well-described on the record. Moreover, the fact that Volpak applied for and was issued an IREP permit for the goods in issue is accepted in the parties' *Agreed Statement of Facts*.[50] As the facts which this document is intended to support are already established, the Tribunal finds that this document is no longer necessary for the disposition of this case.
- Application for Import/Export Permit form:[51] As the process of applying for an IREP permit and the fact that Volpak applied for and was issued an IREP permit for the goods in issue is accepted in the parties' *Agreed Statement of Facts*,[52] the Tribunal finds that this document is no longer necessary for the disposition of this case. Moreover, the Tribunal notes that this is a blank form, which does not contain any information specific to Volpak or the goods in issue.
- Export Declaration form:[53] Again, the Tribunal notes that this is a blank form, which does not contain any information specific to Volpak or the goods in issue. Given that the issue, as argued by Volpak, is whether Volpak properly exported the goods in issue in accordance with the terms of the permit, and that the operation of the IREP is already well-described on the record, the Tribunal finds that this document is of no assistance in resolving the matters at issue. Moreover, the operation of the IREP is within the purview of DFAIT, and is therefore outside the jurisdiction of the Tribunal.
- Application Form to Import Products for Re-Export, application year 2011:[54] In the *Agreed Statement of Facts*, the parties have established that Volpak applied for and was issued an import permit pursuant to section 8.3 of the *Export and Import Permits Act*.[55] As the facts which this document is intended to support are already established, the Tribunal finds that this document is no longer necessary for the disposition of this case.
- Imports, in particular 17,781 kg from Harrison:[56] In the *Agreed Statement of Facts*, the parties have established that Volpak imported 17,781 kg of the goods in issue, which were classified by the CBSA as "within access commitment".[57] As the facts which this document is intended to support are already established, the Tribunal finds that this document is no longer necessary for the disposition of this case.

49. Exhibit AP-2012-009-41B, tab 1.
50. Exhibit AP-2012-009-54A at paras. 1-3.
51. Exhibit AP-2012-009-41B, tab 2.
52. Exhibit AP-2012-009-54A at paras. 1-3.
53. Exhibit AP-2012-009-41B, tab 3.
54. *Ibid*., tab 14.
55. Exhibit AP-2012-009-54A at paras. 1-2.
56. Exhibit AP-2012-009-41B, tab 15.
57. Exhibit AP-2012-009-54A at para. 3.

Documents Not Accepted Onto the Record

32. In examining each individual document in issue, the Tribunal considered not only the briefs of the parties, but also the parties' submissions with respect to the relevance of these documents. In order not to unfairly curtail Volpak's ability to present its case, the Tribunal took a broad view as to the admissibility of the documents in issue. Nonetheless, after conducting its assessment, the Tribunal found that the following documents were not admissible onto the record either due to a lack of relevance or because of the procedural unfairness their acceptance would cause to the CBSA.

- Definition of "amenity" from *Black's Law Dictionary*:[58] Volpak provided no rationale for the inclusion of this definition,[59] nor was the Tribunal able to discern one after a thorough review of the briefs and submissions of the parties. Moreover, the definitions of "amenity" provided in the document relate exclusively to real property law, and to the law of easements. As neither of those issues are before the Tribunal, the Tribunal must conclude that this document is not relevant to the matters at issue, and therefore cannot be accepted onto the record.
- Chart showing breakdown by certificate:[60] Volpak did not provide an explanation for the inclusion of this particular document, other than to say that "[t]he documents in Tabs 7 through 16 serve to demonstrate that the 17,781 kg of chicken were processed and exported in compliance with the condition of the import permit for same."[61] The Tribunal notes, however, that there is no indication of when the document was produced, or who the author of the document is. Moreover, there is no description of how the numbers contained in the chart were arrived at, or how Volpak intends to use them.
- Chart showing transformation/production:[62] As is the case with the previous document, Volpak provided no explanation for the inclusion of this document beyond stating that "[t]he documents in Tabs 7 through 16 serve to demonstrate that the 17,781 kg of chicken were processed and exported in compliance with the condition of the import permit for same."[63] Again, however, there is no indication of when the document was produced, or who the author of the document is. In addition, the document contains a number of abbreviated headings for which no explanation or definition is provided.
- Application Form to Import Products for Re-Export, application year 2010:[64] As stated in the *Agreed Statement of Facts* submitted by the parties, the goods in issue are those goods which were imported by Volpak under an import permit granted by DFAIT in 2011.[65] Volpak has made no arguments regarding goods imported under a permit issued in 2010. Furthermore, since the issuance of import permits is entirely within the purview of DFAIT pursuant to the *Export and Import Permits Act*, the Tribunal has no jurisdiction to render a decision with respect to the issuance of such permits.

58. Exhibit AP-2012-009-41B, tab 5.
59. Exhibit AP-2012-009-49 at 2.
60. Exhibit AP-2012-009-41B, tab 9.
61. Exhibit AP-2012-009-49 at 2.
62. Exhibit AP-2012-009-41B, tab 10.
63. Exhibit AP-2012-009-49 at 2.
64. Exhibit AP-2012-009-41B, tab 13.
65. Exhibit AP-2012-009-54A at paras. 1-2.

- Letter dated February 18, 2011, to Volpak from Katharine Funtek:[66] Volpak stated that this letter is relevant as "[t]he 22.74% protein [content] is referenced in paragraph 1 of the letter . . . ."[67] However, further examination revealed that the reference in the letter to the 22.74% protein content is in fact a reference to a previous letter written by Volpak concerning the same. That previous letter was included with the appellant's brief already filed with the Tribunal. As the only justification by Volpak for the inclusion of the letter is to establish that the 22.74% protein content was discussed between Volpak and DFAIT, the Tribunal finds that this explanation is unsatisfactory, and does not support the acceptance of this letter onto the record.
- *BalanceCo v. President of the Canada Border Services Agency*, AP-2012-036 (CITT)[68] [*BalanceCo*]: Volpak cited this case as support for the proposition that tariff classification is a question of mixed fact and law. However, the Tribunal notes that the question in issue in *BalanceCo* was the proper delineation of the Tribunal's jurisdiction in respect of the *Customs Act*. Moreover, the proposition to which Volpak refers to does not form part of the Tribunal's reasons in the *BalanceCo* decision, but is in fact a quotation of the brief submitted by a party to the case, which in turn paraphrased an entirely different decision. As *BalanceCo* does not stand for the proposition for which it was tendered by Volpak, the Tribunal will not accept it onto the record.
- *Azubuike v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 34 (CanLII)[69] [*Azubuike*]: Volpak stated that *Azubuike* was submitted in support of the argument that the ". . . Respondent's decision to cancel the 17,781 kg permit was invalid."[70] However, as established in the *Agreed Statement of Facts* submitted by the parties, the cancellation of the permit was done by DFAIT.[71] As the review of decisions taken by DFAIT is not within the Tribunal's jurisdiction, and are therefore not properly before the Tribunal, this argument is not relevant.
- *Uranus Auto Sales Inc. v. The Queen*, 2002 CanLII 862 (TCC)[72] [*Uranus*]: Volpak contended that this case was submitted in order to demonstrate the burden of proof borne by the appellant.[73] However, upon examination the Tribunal noted that the passage indicated by Volpak in fact relates to an altogether different case regarding the *Income Tax Act*. As *Uranus* does not stand for the proposition for which it was tendered by Volpak, the Tribunal will not accept it onto the record.
- *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 SCR 715[74] [*Placer*]: Again, Volpak asserted that this case was submitted ". . . simply to demonstrate who bears the burden of proof."[75] The Tribunal notes, however, that the reasons of the Supreme Court in *Placer* expressly state that this case turns on the issue of who bears the burden of proof under the *Mining Tax Act* (with analogy made to the *Income Tax Act*).[76] Yet, the burden of proof

66. Exhibit AP-2012-009-41B, tab 17.
67. Exhibit AP-2012-009-49 at 2.
68. Exhibit AP-2012-009-41B, tab 19.
69. Exhibit AP-2012-009-41A, tab 10.
70. Exhibit AP-2012-009-49 at 2.
71. Exhibit AP-2012-009-54A at paras. 4-5.
72. Exhibit AP-2012-009-41A, tab 15.
73. Exhibit AP-2012-009-49 at 3.
74. Exhibit AP-2012-009-41A, tab 17.
75. Exhibit AP-2012-009-49 at 3.
76. Exhibit AP-2012-009-41A, tab 17 at paras. 24-25.

under the *Customs Act* is set out in section 152 of that *Act* in language which is highly divergent from that contained in the *Mining Tax Act*. Accordingly, the Tribunal finds that the decision in *Placer* regarding who bears the burden of proof under the *Mining Tax Act* has no relevance to the matters at issue in the present appeal.

33. As a result of its analysis, the Tribunal finds that the foregoing cases are not relevant to the matters at issue in this appeal.

DECISION

34. The request made by the CBSA is granted in part.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member