Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-009

Volpak Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Tuesday, January 20, 2015

Canada

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IN THE MATTER OF an appeal heard on October 16, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 15, 2012, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

VOLPAK INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Ann Penner

Ann Penner
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 16, 2014
Tribunal Member:	Ann Penner, Presiding Member
Counsel for the Tribunal:	Alexandra Pietrzak Kalyn Eadie
Acting Manager, Registry Operations:	Lindsay Vincelli
Acting Senior Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representative**
Volpak Inc.	Michael Kaylor

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Luc Vaillancourt

WITNESSES:

Marina Riccardi Administrative Assistant Service alimentaire Desco Inc.	Benoît Chevalier President Volpak Inc.

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Volpak Inc. (Volpak) on June 6, 2012, pursuant to subsection 67(1) of the *Customs Act*[1] from a re-determination made by the President of the Canada Border Services Agency (CBSA), dated March 15, 2012, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the goods imported by Volpak are properly classified under tariff item No. 0207.13.92 of the schedule to the *Customs Tariff*[2] as meat and edible offal, of the poultry of heading No. 01.05, fresh, chilled or frozen, over access commitment, bone in, as determined by the CBSA, or should be classified under tariff item No. 0207.13.91 as meat and edible offal, of the poultry of heading No. 01.05, fresh, chilled or frozen, within access commitment, as argued by Volpak.

Import for Re-Export Program

3. Volpak was a participant in the Import for Re-Export Program (IREP), which enables processers of certain products to apply for supplemental permits to import, process and re-export certain goods at a lower rate of duty than would normally apply.

4. The administration of IREP is divided between the Department of Foreign Affairs, Trade and Development (DFATD) (formerly the Department of Foreign Affairs and International Trade [DFAIT]) and the CBSA. Under the IREP, DFATD is responsible for issuing permits to participants that are then entitled to import the goods, process them and re-export them. The CBSA remains responsible for the tariff classification of goods imported under the IREP.

5. The goods which are reported with an IREP permit are referred to as being "within access commitment". Imported goods which exceed the quantity set out in the permit are considered "over access commitment" and are therefore subject to a higher rate of duty.

6. As the Canadian International Trade Tribunal (the Tribunal) stated in its previous decisions relating to this appeal, the Tribunal only has jurisdiction over the tariff classification portion of the IREP process.[3] Decisions made by DFATD regarding the issuance and cancellation of IREP permits are not within the Tribunal's jurisdiction and are therefore outside the scope of this appeal.

BACKGROUND

7. As part of the appeal before the Tribunal, the parties submitted an agreed statement of facts which set out the background of this appeal.[4] The Tribunal, therefore, accepts the facts and events detailed in the agreed statement of facts, as set out below.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.
3. See the Tribunal's order and reasons regarding the CBSA's request that the appeal be dismissed for lack of jurisdiction at Exhibit AP-2012-009-19, Vol. 1C, and the Tribunal's order and reasons regarding the admissibility of certain documents at Exhibit AP-2012-009-55A, Vol. 1E.
4. Exhibit AP-2012-009-54A, Vol. 1E.

8. On February 16, 2011, the Minister of Foreign Affairs and International Trade (the Minister) issued a permit to Volpak under the IREP, pursuant to section 8.3 of the *Export and Import Permits Act*.[5]

9. Volpak's permit authorized 17,781 kg of fresh, bone-in chicken breasts to be imported from the United States at a lower rate of duty, on the condition that the processed products be re-exported to the United States within 90 days of the importation (the initial permit).

10. On February 18, 2011, Volpak imported 17,781 kg of fresh, bone-in chicken breasts from the United States under transaction number 14035028992032, which the CBSA initially classified under tariff item No. 0207.13.91 (within access commitment).

11. On or about July 25, 2011, the Minister cancelled Volpak's initial permit and "unilaterally"[6] issued another permit, dealing with the same transaction number, which authorized a quantity of 4,379 kg of fresh, bone-in chicken breasts to be imported (the new permit).

12. On August 4, 2011, DFAIT informed the CBSA that the Minister had cancelled Volpak's initial permit and had issued the new permit authorizing 4,379 kg of fresh, bone-in chicken breasts to be imported.

13. On August 15, 2011, the CBSA initiated a verification of Volpak's transactions for the period starting on July 1, 2010, and ending on July 1, 2011, pursuant to sections 42 and 42.01 of the *Act*.

14. The CBSA found that Volpak imported 17,781 kg of fresh, bone-in chicken breasts of which:

- 4,379 kg were authorized by the new permit and exported to the United States within 90 days of the importation, as required by the new permit; and
- 13,402 kg were not authorized by the new permit.

15. On November 8, 2011, the CBSA re-classified 13,402 kg of fresh, bone-in chicken breasts under tariff item No. 0207.13.92 (over access commitment, bone in), pursuant to subsection 59(1) of the *Act*.

16. The CBSA did not however re-classify 4,379 kg of fresh, bone-in chicken breasts authorized under the new permit, which remained classified under tariff item No. 0207.13.91 (within access commitment).

17. On March 15, 2012, the CBSA maintained its decision to re-classify 13,402 kg of fresh, bone-in chicken breasts under tariff item No. 0207.13.92 (over access commitment, bone in) pursuant to subsection 60(4) of the *Act*.

PROCEDURAL HISTORY

18. A full account of the procedural history for this appeal is necessary to have a complete understanding of the scope of the appeal.

19. On June 6, 2012, Volpak Inc. (Volpak) filed an appeal with the Tribunal with regard to a decision of the CBSA made on March 15, 2012, concerning the tariff classification of chicken and chicken products (the goods in issue).

20. On September 7, 2012, Volpak filed its brief.

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5. R.S.C., 1985, c. E-19 [*EIPA*].
6. Exhibit AP-2012-009-54A at para. 4, Vol. 1E.

21. On November 2, 2012, the CBSA filed a request that the Tribunal dismiss the present appeal for lack of jurisdiction.

22. On May 14, 2013, the Tribunal issued its decision to deny the CBSA's request. In doing so, the Tribunal found that it had jurisdiction to hear the appeal regarding the CBSA's decision to re-classify the goods in issue under tariff item No. 0207.13.92 (over access commitment, bone in).

23. However, the Tribunal also directed Volpak to file further submissions regarding the alleged errors made by the CBSA in its re-determination of the tariff classification of the goods in issue. In particular, in the letter transmitting its decision to the parties, the Tribunal directed Volpak to address the following issues in its further submissions:

- Did the CBSA have the discretion to continue classifying the goods in issue under tariff item No. 0207.13.91 (within access commitment) after Volpak's initial permit was cancelled by the Minister?
- Considering that the initial permit had been cancelled for the goods in issue, did the CBSA have an obligation to perform an independent investigation to determine the volume of goods exported by Volpak?
- If the CBSA did have an obligation to perform an independent investigation, are there limitations on what methodology the CBSA may use to perform a calculation of the volume of exported goods?

24. On May 31, 2013, Volpak filed its supplemental brief.

25. On July 25, 2013, the CBSA filed its brief. On that same date, the CBSA also filed a request that the appeal proceed by way of written submissions.

26. On July 30, 2013, Volpak objected to the CBSA's request that the appeal proceed by way of written submissions.

27. On August 1, 2013, the Tribunal informed the parties that the CBSA's request to proceed by way of written submissions was denied. The Tribunal also informed the parties that the hearing for the appeal was scheduled for September 24, 2013.

28. On August 21, 2013, Volpak requested that the hearing be postponed.

29. On August 23, 2013, the Tribunal wrote to the parties to inform them that Volpak's request for the postponement of the hearing had been granted. The Tribunal stated that the hearing had been rescheduled for February 18, 2014.

30. On January 29, 2014, Volpak wrote to request that the Tribunal issue a subpoena requiring the attendance of Ms. Manon Levasseur at the hearing, on the grounds that Ms. Levasseur had signed the letter of March 15, 2012, maintaining the CBSA's decision to re-classify the goods in issue and that her testimony was therefore crucial for the disposition of the appeal. Volpak further requested that the Tribunal direct Ms. Levasseur to produce any documents upon which she relied in finding ". . . that Volpak did not meet the terms and conditions of the above-numbered import permit . . . ."[7]

7. Exhibit AP-2012-009-28 at 2, Vol. 1C.

31. On January 30, 2014, the CBSA informed the Tribunal that Ms. Levasseur would be out of the country at the time of the scheduled hearing and requested that the Tribunal seek clarification regarding the production of additional documents sought by Volpak.

32. On February 3, 2014, Volpak wrote to the Tribunal seeking a subpoena requiring Ms. Suzanne Beaudette to appear at the hearing, on the basis that she was the CBSA officer who issued the decision under section 59 of the *Act*. Volpak also wrote that "[t]he hearing will go forward as scheduled on February 18, 2014."[8]

33. On February 5, 2014, the CBSA wrote to the Tribunal to advise that Ms. Beaudette would be available on the scheduled hearing date of February 18, 2014. Nonetheless, the CBSA also submitted that ". . . Ms. Beaudette's testimony should be limited to the subject of this appeal, *i.e.* the tariff classification of the goods in issue."[9]

34. On February 6, 2014, the Tribunal wrote to the parties to inform them that it would grant the request for a subpoena. In response to the CBSA's comments, however, the Tribunal invited the parties to specifically address the following issues at the hearing:

- What is the statutory or other legal authority for the issuance and cancellation of permits under the IREP?
- What statutory or other legal authority, if any, governs the retroactive revocation of permits under the IREP?
- Does the CBSA, in the course of its enforcement duties, have discretionary authority to continue classifying goods subject to an IREP permit as "within access commitment" if that permit is subsequently cancelled after importation?[10]

35. On February 7, 2014, the CBSA filed submissions in response to the issues identified by the Tribunal in its letter of February 6, 2014.

36. On February 10, 2014, Volpak wrote to inform the Tribunal that it would be calling two witnesses during the hearing. In a separate letter of the same date, Volpak also informed the Tribunal that it would not be serving the subpoena issued by the Tribunal on Ms. Beaudette.

37. Also on February 10, 2014, the CBSA filed its book of authorities and wrote to inform the Tribunal that it intended to call one witness at the hearing. In a separate letter filed the same day, the CBSA also objected to Volpak's filing of 43 documents, consisting of a book of authorities, and a book of documents and additional documents.

38. On February 11, 2014, the Tribunal received Volpak's book of documents and additional authorities.[11]

8. Exhibit AP-2012-009-30, Vol. 1C.
9. Exhibit AP-2012-009-31, Vol. 1C.
10. Exhibit AP-2012-009-32, Vol. 1C.
11. Volpak subsequently wrote to explain to the Tribunal that, while the documents were filed with the Tribunal by the server hired by Volpak one day after the deadline set by the Tribunal for the filing of additional documents, this delay resulted from circumstances beyond Volpak's control. See Exhibit AP-2012-009-58 at para. 19, Vol. 1E.

39. On February 11, 2014, Volpak wrote to the Tribunal to argue the necessity of the additional documents filed. In addition, Volpak suggested that the hearing be postponed in order to allow the CBSA time to review the additional documents filed.

40. On February 11, 2014, the CBSA wrote to the Tribunal to reiterate its objections to Volpak's filing of additional documents.

41. On February 12, 2014, the Tribunal informed the parties that the hearing had been rescheduled for May 22, 2014, and asked the parties to file submissions regarding the relevance of the additional documents filed.

42. 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. Also on February 12, 2014, Volpak filed its comments in response to the issues identified by the Tribunal in its letter of February 6, 2014.

43. On February 17, 2014, the Tribunal informed the parties that the hearing had been rescheduled for June 5, 2014.

44. On March 18 and 20, 2014, the CBSA submitted its comments regarding the relevance of the documents filed.

45. On March 20, 2014, Volpak filed a reply to the CBSA's submissions regarding the documents filed and indicated that it was withdrawing four documents. Volpak also suggested that it would submit an additional brief in order to formalize its position.

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

47. On May 14, 2014, the CBSA submitted an agreed statement of facts on behalf of both parties.

48. The Tribunal issued an order on May 22, 2014, in which it indicated that 25 of the documents filed would be placed on the record, whereas 18 of the documents would not be placed on the record, as they either were not relevant or dealt with issues which had already been resolved in the agreed statement of facts submitted by the parties. In particular, the Tribunal noted, in its reasons dated June 5, 2014, that the ". . . review of the decisions taken by DFAIT is not within the Tribunal's jurisdiction, and are therefore not properly before the Tribunal . . . ."[12]

49. On May 26, 2014, Volpak wrote to the Tribunal and informed it that Volpak intended to file a request that the Tribunal re-consider its order of May 22, 2014 (the request for reconsideration). Volpak asked that the hearing scheduled for June 5, 2014, be postponed pending the resolution of Volpak's request for reconsideration.

50. On May 26, 2014, the Tribunal wrote to the parties to inform them that the hearing scheduled for June 5, 2014, had been postponed, as requested by Volpak, and to set dates for the filing of submissions regarding Volpak's request for reconsideration.

51. Volpak filed its submissions regarding the request for reconsideration on May 29, 2014.

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12. Exhibit AP-2012-009-55A at para. 32, Vol. 1E.

52. On June 2, 2014, the CBSA submitted its response opposing Volpak's request for reconsideration.

53. On June 19, 2014, the Tribunal informed the parties that the hearing had been rescheduled for October 16, 2014.

54. On July 8, 2014, the Tribunal issued its decision denying Volpak's request for reconsideration.

55. The Tribunal held a public hearing on October 16, 2014, in Ottawa, Ontario.

56. Volpak called Ms. Marina Riccardi, Administrative Assistant, Service alimentaire Desco Inc., and Mr. Benoît Chevalier, President of Volpak, as witnesses. The CBSA did not call any witnesses.

GOODS IN ISSUE

57. The goods in issue are 13,402 kg[13] of fresh, bone-in chicken breasts which were imported by Volpak under the IREP on February 18, 2011, and for which the permit under the IREP was subsequently cancelled on or about July 25, 2011. After the CBSA's November 8, 2011, decision under subsection 59(1) of the *Act*, the goods in issue were classified under tariff item No. 0207.13.92 (over access commitment, bone in).

LEGAL FRAMEWORK

58. As described above, the administration of the IREP is divided between DFATD and the CBSA. DFATD's authority for issuing permits under the IREP is set out in section 8.3 of the *EIPA*, which provides as follows:

> (3) Notwithstanding subsection 8(1) and subsections (1) and (2) of this section, where goods have been included on the Import Control List and the Minister has determined an import access quantity for the goods pursuant to subsection 6.2(1), the Minister may issue
>
> (*a*) a permit to import those goods in a supplemental quantity to any resident of Canada who applies for the permit, or
>
> (*b*) generally to all residents of Canada a general permit to import those goods in a supplemental quantity,
>
> subject to such terms and conditions as are described in the permit or in the regulations.

59. In addition, sections 8.5 and subsection 10(1) of the *EIPA* provide as follows:

> 8.5 An import permit or export permit issued under this Act may, if the permit so provides, have effect from a day earlier than the day on which it is issued.
>
> . . .
>
> 10(1) Subject to subsection (3), the Minister may amend, suspend, cancel or reinstate any permit, import allocation, export allocation, certificate or other authorization issued or granted under this Act.

13. While the Tribunal recognizes that Volpak imported 17,781 kg of fresh, bone-in chicken breasts, 4,379 kg of this chicken remains classified under tariff item No. 0207.13.91 (within access commitment). Volpak has not challenged the classification of this amount of the imported chicken. Thus, the appeal deals solely with the remaining 13,402 kg of imported chicken which was re-classified under tariff item No. 0207.13.92 (over access commitment, bone in).

60. The parties have agreed that the relevant provisions regarding the CBSA's tariff classification of goods imported under the IREP are set out in the *Customs Tariff* as follows:

> 10(1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.
>
> (2) Goods shall not be classified under a tariff item that contains the phrase "within access commitment" unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act* and in compliance with the conditions of the permit.

61. The relevant provisions of the schedule to the *Customs Tariff* provide as follows:

Section I

LIVES ANIMALS; ANIMAL PRODUCTS

. . .	
02.07	**Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen.**
. . .	
0207.13	**- -Cuts and offal, fresh or chilled**
. . .	
0207.13.91	- - - -Within access commitment
0207.13.92	- - - -Over access commitment, bone in

62. With respect to the tariff re-classification determined by the CBSA, the *Customs Act* states as follows:

> 59(1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may
>
> (*a*) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within
>
> (i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or
>
> (ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and
>
> (*b*) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(*c.1*), (*c.11*), (*e*), (*f*) or (*g*) that is treated by subsection 74(1.1) as a re-determination under paragraph (*a*) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (*a*).

63. Furthermore, section 42.01 of the *Act*, in respect of a verification audit, provides as follows:

> 42.01 An officer, or an officer within a class of officers, designated by the President for the purposes of this section may conduct a verification of origin (other than a verification of origin referred to in section 42.1), verification of tariff classification or verification of value for duty in

> respect of imported goods in the manner that is prescribed and may for that purpose at all reasonable times enter any prescribed premises.

64. Moreover, the *Verification of Origin (Non-Free Trade Partners), Tariff Classification and Value for Duty of Imported Goods Regulations*[14] provide as follows:

> 2(1) Subject to subsection (2), a verification in respect of goods may be conducted in a manner set out in one or more of the following paragraphs:
>
> (*a*) a review of a verification questionnaire completed by
>
> (i) the importer or owner of the goods, or
>
> (ii) the person who accounted for the goods under subsection 32(1), (3) or (5) of the Act;
>
> (*b*) a review of a written response received from a person referred to in paragraph (*a*) to a verification letter;
>
> (*c*) a review of any record or information or an inspection of any goods or component of goods received from a person referred to in paragraph (*a*);
>
> (*d*) the collection, from the premises prescribed under subsection 3(1), and review of information that
>
> (i) was requested in a verification questionnaire or verification letter but was not provided, or
>
> (ii) is needed to verify information from a completed verification questionnaire or written response to a verification letter.

ANALYSIS

Positions of Parties

Volpak

65. Volpak argued that the goods in issue should be classified under tariff item No. 0207.13.91 as they met both criteria listed under subsection 10(2) of the *Customs Tariff* required for goods to be designated as "within access commitment." Specifically, Volpak maintained that the goods in issue were imported under a valid permit and that Volpak met the conditions of the permit by re-exporting all the goods in issue after they had been further processed.[15]

66. With regard to the first criterion, Volpak submitted that, for the purposes of tariff classification, the relevant time period is the time of importation. As a valid permit was in place at the time of the importation of the goods in issue, Volpak maintained that this criterion had been met.[16] Having argued that a valid permit existed at the time of importation, Volpak then contended that it had fully complied with the conditions of that permit by re-exporting all the goods in issue.[17]

67. Volpak maintained that it met both criteria required in order for the goods in issue to be designated as "within access commitment" under tariff item No. 0207.13.91. However, Volpak argued that the CBSA failed to independently examine whether Volpak had complied with the re-exportation requirement in its

14. S.O.R./98-45 [*Regulations*].
15. *Transcript of Public Hearing*, 16 October 2014, at 45.
16. Exhibit AP-2012-009-20A at 2-3, Vol. 1C.
17. *Transcript of Public Hearing*, 16 October 2014, at 29.

initial permit. Volpak alleged that, rather than perform its own calculations as to the amount of chicken that was exported, the CBSA simply adopted DFAIT's conclusion that the goods in issue were not re-exported.

68. In doing so, Volpak stated that the CBSA fettered its discretion.[18] In particular, Volpak alleged that the imperative language of subsection 10(2) of the *Customs Tariff* strongly suggests that ". . . a public duty rests with the President and his officials to verify the correct tariff classification of the goods in issue."[19] Volpak argued that any re-determination of a tariff classification may only be done on the basis of a verification conducted under section 42 of the *Act*. Volpak submitted that, instead of conducting such a verification, the CBSA simply relied on the decision made by DFAIT.

CBSA

69. The CBSA argued that Volpak failed to demonstrate that the CBSA committed any errors in its classification of the goods in issue.

70. The CBSA contended that, as DFAIT had the statutory authority to issue, amend and cancel permits under the IREP, the CBSA's role was ". . . limited to ensuring that the goods [were] imported under the authority of a permit and importers comply with the conditions of that permit."[20]

71. Due to the amendment of the permit issued to Volpak, the CBSA submitted that it could not designate the goods in issue as "within access commitment", as goods can only be designated as such if they are imported under the authority of a permit. The CBSA stated that, as Volpak imported a greater amount of the goods in issue than was authorized under the new permit, the CBSA's classification was correct.

72. With respect to the validity of the new permit, the CBSA maintained that the appropriate venue for Volpak to challenge the Minister's decision to amend the permit was by way of judicial review before the Federal Court. As Volpak chose not to do so, the CBSA insisted that Volpak could not indirectly challenge the Minister's decision under the IREP through a tariff classification appeal before the Tribunal.

Preliminary Issue

73. Before embarking on its analysis regarding the merits of this appeal, the Tribunal wishes to make a few comments regarding the proceedings at the hearing and the witness testimony, in particular.

74. As is evident from the procedural history above, the Tribunal attempted on several occasions to ensure that the parties' submissions focused on issues that were within the Tribunal's jurisdiction. Similarly, at the hearing, the Tribunal encouraged the parties to focus their submissions on those issues that were properly before the Tribunal. Several times during the hearing, counsel for the CBSA objected to the relevance of the questions and arguments put forward by counsel for Volpak.[21] While the Tribunal recognized the concerns about the hearing not focussing on issues outside the scope of the Tribunal's jurisdiction, the Tribunal was mindful of procedural fairness and, in particular, of Volpak's right to fully present its case.

75. However, while allowing the questions and arguments to proceed notwithstanding these issues, the Tribunal was concerned about certain aspects of the witness testimony offered at the hearing. Specifically,

18. Exhibit AP-2012-009-10A at 16, Vol. 1; Exhibit AP-2012-009-20A at 2, Vol. 1C.
19. Exhibit AP-2012-009-20A at 1, Vol. 1C.
20. Exhibit AP-2012-009-012B at para. 23, Vol. 1F.
21. *Transcript of Public Hearing*, 16 October 2014, at 10, 18, 30, 33.

the Tribunal noted several occasions when counsel for Volpak contradicted or corrected the answers given by his witness.[22] Moreover, there were multiple instances in which counsel for Volpak repeatedly asked the same question or directed the witness to a particular passage in a document, when counsel was apparently dissatisfied with the original answer given by the witness.[23]

76. The role of counsel is neither to testify in the place of witnesses nor to correct or coach witnesses in their responses. Witnesses must be able to answer freely and in their own words during testimony. Therefore, as stated at the hearing, notwithstanding the interruptions and contradictions made by counsel at the hearing, the answers provided by the witnesses will stand as the answers of record.

Tariff Classification of the Goods in Issue

77. As set out above, subsection 10(2) of the *Customs Tariff* states that goods may not be designated as "within access commitment" *unless* the goods are imported under the authority of a permit issued under section 8.3 of the *EIPA and* in compliance with the conditions of that permit. Thus, in order to determine the classification of the goods in issue, the Tribunal must first determine whether the goods in issue were imported under the authority of a permit. If the Tribunal concludes that this first condition is met, it must then consider whether the goods in issue were imported in compliance with the conditions of that permit.

Were the Goods in Issue Imported under the Authority of a Permit?

78. Volpak argued that the first condition was met since, despite the fact that the initial permit was subsequently cancelled by DFAIT, a valid permit for the importation of all 17,781 kg of fresh, bone-in chicken breasts existed on the date of importation.[24] Volpak contended that, since it is the time of importation which is relevant for the classification of goods, the validity of a permit cannot be re-examined after importation has occurred. In other words, ". . . it doesn't matter if or when a permit was cancelled because the tariff classification is based on the importation of the goods, the transaction which results in the importation of the goods. . . . it isn't open to change that decision based on a retroactive cancellation of the permit."[25]

79. While the Tribunal acknowledges that the relevant period to be examined for the classification of goods is the time of importation, the Tribunal also recognizes that the IREP is a unique program that is designed to administer the flow of certain goods not only into Canada but also back to the United States over a set period of time. The IREP is a process, and the program, together with any permit issued under its auspices, governs not only the moment of importation but also the entire process of importing, processing and re-exporting.

80. By cancelling Volpak's initial permit, DFAIT essentially determined that the goods in issue were no longer part of the process and, therefore, no longer qualified as "within access commitment" for the purposes of the IREP. That being the case, the CBSA had no option, by virtue of the conditions set out in subsection 10(2) of the *Customs Tariff*, but to re-classify the goods in issue as outside the IREP and, thus, to designate them as "over access commitment".

81. This conclusion is reinforced by the CBSA's role within the bifurcated IREP system. The CBSA has no power to issue permits under the IREP, nor does subsection 10(2) of the *Customs Tariff* grant the

22. *Ibid.* at 13, 20, 42.
23. *Ibid.* at 26, 28, 30, 40.
24. *Ibid.* at 46.
25. *Ibid.* at 53.

CBSA the power to investigate DFATD's rationale with respect to granting or cancelling permits. The provisions of *EIPA* clearly grant DFATD sole authority to issue, amend or *cancel* permits under the IREP.[26] To allow the CBSA to effectively ignore DFATD's decision to cancel a permit would compromise the statutory framework that Parliament created.

82. Applying that statutory framework to the case at hand, Volpak argued that the goods for which DFAIT had cancelled the initial permit and decided to exclude from the new permit should be designated as "within access commitment" by the CBSA. However, the Tribunal finds that, if the CBSA had done this, it would have completely undermined DFAIT's decision under the IREP that only 4,379 kg of fresh, bone-in chicken breasts were appropriately imported at the lower rate of duty. Consequently, the CBSA would have rendered DFAIT's statutory authority meaningless.

83. Volpak's position ignores the fact that its initial permit was no longer valid. Given the conditions set out in subsection 10(2) of the *Customs Tariff*, combined with the limitations of the CBSA's role within the bifurcated IREP, the Tribunal finds that, upon being notified of the cancellation of the initial permit and the issuance of the new permit for only 4,379 kg of fresh, bone-in chicken breasts,[27] the CBSA acted properly in designating the remaining 13,402 kg, for which there was no longer a valid permit, as "over access commitment" and classifying it under item No. 0207.13.92.

84. Volpak also pointed to the decision of the Federal Court in *Dominion Sample Ltd. v. Canada (Commissioner, Customs and Revenue agency)*[28] to support its claim that the CBSA cannot "undo" an import transaction by retroactively cancelling an import certificate and charging the certificate holder for duties which had previously been remitted under a valid certificate.[29]

85. Notwithstanding Volpak's argument, the Tribunal finds that the Federal Court's decision contains important factual differences from the case at hand. In particular, in *Dominion Sample*, the CBSA's predecessor (the Canada Customs and Revenue Agency) cancelled the permit on which the applicant relied. Moreover, the Federal Court stated that such a retroactive action was unfair ". . . where both parties were content that the conditions of the certificate were being fulfilled"[30] and where the certificate holder ". . . has not in any way changed his method of doing business";[31] however, "[a]ll of a sudden, without notice, the exemption certificate is withdrawn by a unilateral decision."[32] Continuing its analysis, the Federal Court noted that there is ". . . a major difference between the certificate holder who knowingly does not comply with the rules he accepted at the start . . . ."[33]

86. By contrast, in the present case, the cancellation of the permit was carried out by DFAIT, not the CBSA. In order to determine whether the cancellation was justified, an analysis of DFAIT's authority under the *EIPA* would have to be conducted and a decision reached as to the correctness of DFAIT's decision in all the circumstances of this case. However, as was recognized by both parties, the Tribunal does not have

26. See in particular subsections 8.3(3) and 10(1) of the *EIPA*, discussed above.
27. Exhibit PR-2012-009-054A, Vol. 1E.
28. 2003 FC 1244 (CanLII) [*Dominion Sample*].
29. *Dominion Sample* at para. 66; *Transcript of Public Hearing*, 16 October 2014, at 68-69.
30. *Dominion Sample* at para. 66.
31. *Dominion Sample* at para. 68.
32. *Ibid.*
33. *Ibid.*

jurisdiction to inquire into decisions made by DFAIT.[34] As such, the Tribunal can make no order regarding the correctness of DFAIT's decision to cancel the initial permit.

87. The Tribunal is cognizant that the retroactive cancellation of the initial permit may have had negative consequences for Volpak. However, as stated in the Tribunal's reasons for its order in *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency*,[35] the Tribunal ". . . lacks jurisdiction to address issues of fairness or equity."[36] As is evident in *Dominion Sample*, should Volpak have wished to challenge the fairness of such an action, it could have sought redress through an application for judicial review. The Tribunal, being constrained by its statutory mandate, is simply not the correct venue to challenge the fairness of a decision taken by DFATD.

88. Accordingly, the Tribunal finds that the first condition is not met, since the goods in issue were not imported under the authority of a valid permit. Consequently, the goods in issue are properly classified under tariff item No. 0207.13.92 and designated as "over access commitment, bone in".

Did the CBSA Conduct a Proper Verification?

89. While the foregoing is sufficient to dispose of the issue in this appeal, the Tribunal will nonetheless address the second aspect of Volpak's argument, namely, that, if a re-determination of tariff classification is done under section 59 of the *Act*, it may only be made on the basis of a verification conducted under section 42.

90. Volpak insisted that it did re-export the goods in issue, as required by the initial permit.[37] As such, much of Volpak's evidence was tendered in order to demonstrate that the CBSA had failed to conduct a verification under section 42.01 of the *Act* and had instead simply adopted DFAIT's conclusion that 13,402 kg of chicken had not been properly re-exported.[38]

91. In support of this position, Mr. Chevalier testified that, after receiving notice of a verification under section 42.01 of the *Act*, Volpak provided the CBSA with the import declaration for the goods in issue. However, he noted that Volpak did not receive any further requests for information. Likewise, the CBSA did not conduct a site visit of Volpak's premises.[39] Thus, Volpak contended that the CBSA ". . . made no independent inquiry with respect to how the amount of 13,402 was determined, to which transactions it applied, and proceeded simply to apply it to the transaction in issue in whole and without asking any questions or making any inquiry with respect to how that quantity in kilograms was arrived at."[40]

92. The Tribunal notes that this argument is premised on the assumption that the CBSA's rationale for re-determining the tariff classification of the goods in issue was that not all the goods in issue imported under the IREP were properly re-exported. However, as was made clear by the correspondence sent by the CBSA, the re-classification was based on the fact that the initial permit had been cancelled, *not* based on the fact that Volpak had failed to meet the conditions of the permit:

> Fresh, bone-in chicken breasts, declared under number 0207.13.91.00, while they should have been declared under number 0207.13.92.00. According to the documents provided by Volpak Inc., as well as the information obtained from DFAIT, import permit No. 24980514 is cancelled and is replaced

34. *Transcript of Public Hearing*, 16 October 2014, at 10.
35. (27 April 2011), AP-2010-063 (CITT) [*Toyota*].
36. *Toyota* at para. 7.
37. *Transcript of Public Hearing*, 16 October 2014, at 29.
38. *Ibid.*
39. *Transcript of Public Hearing*, 16 October 2014, at 42.
40. *Ibid.* at 50.

> with permit No. 25214413 for a quantity of 4,379 kg and a value of CAN$8,101.00. Therefore, 13,402 kg of chicken breasts must be classified under number 0207.13.92.00 (over access commitment).[41]
>
> [Translation]

93. As the CBSA's re-determination of the tariff classification of the goods in issue was based upon the cancellation of the initial permit, it follows that any verification that it conducted would be focussed on the status of Volpak's IREP permit. To the extent that Volpak did not have an IREP permit for the goods in issue, the CBSA had no authority to designate those goods as being "within access commitment".

94. Both section 42.01 of the *Act* and section 2.1 of the *Regulations* clearly demonstrate that the method by which a verification audit is to take place is discretionary. While the CBSA could choose to conduct a site visit, the *Regulations* also state that a verification audit may also be conducted through a review of an importer's written response to a verification letter. Therefore, the Tribunal concludes that, in the present circumstances, once the CBSA had confirmed, on the basis of the response received to its verification letter, that the permit had been cancelled, it met its verification obligations under the *Act*.

DECISION

95. The appeal is dismissed.

Ann Penner
Ann Penner
Presiding Member

41. Exhibit AP-2012-009-10A, tab 12 at 3, Vol. 1.