Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2014-036

Andritz Hydro Canada Inc.

v.

President of the Canada Border Services Agency

Order and reasons issued
Friday, November 13, 2015

Canada

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IN THE MATTER OF an appeal filed by Andritz Hydro Canada Inc. on February 13, 2015, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a motion brought by the President of the Canada Border Services Agency on April 17, 2015, requesting that the Tribunal dismiss the appeal on the basis of the doctrine of *res judicata*.

BETWEEN

ANDRITZ HYDRO CANADA INC. **Appellant**

AND

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

ORDER

The motion is granted. As a result, the appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. On February 13, 2015, Andritz Hydro Canada Inc. (Andritz) filed an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from a further re-determination by the President of the Canada Border Services Agency (CBSA), dated November 28, 2014, made pursuant to subsection 60(4).

2. The appeal concerns the tariff classification of unassembled hydraulic turbine-driven generating sets (the goods in issue). The parties agree that the goods in issue are properly classified under tariff item No. 8502.39.10 of the schedule to the *Customs Tariff*[2] as hydraulic turbine-driven electric generating sets. However, Andritz' position is that the goods in issue may also be classified under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and thereby benefit from duty-free treatment. The CBSA opposes this position.

3. On April 17, 2015, the CBSA filed a motion to have the appeal summarily dismissed on the basis of the doctrine of *res judicata*. The CBSA's position is that the issue in this appeal was conclusively resolved by the Canadian International Trade Tribunal (the Tribunal) in *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency*.[3]

4. In that decision, the Tribunal found that hydraulic turbine-driven electric generating sets did not qualify for duty-free treatment under tariff item No. 9948.00.00 because they were not "for use in" automatic data processing machines, as required by that tariff item.

5. Subsection 2(1) of the *Customs Tariff* defines the term "for use in" as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

6. In its brief in Appeal No. AP-2012-022, Andritz argued only that the goods in issue were "attached to" an automatic data processing machine by virtue of their being connected to the local area network (LAN) of the powerhouse. However, at the hearing of that appeal, Andritz raised, for the first time, the argument that the goods in issue could also be considered "incorporated into" the LAN. The CBSA objected, and the Tribunal ultimately decided to set aside this argument in rendering its decision for reasons of procedural fairness.[4] This decision was upheld on judicial review by the Federal Court of Appeal.[5]

7. The CBSA has submitted that both branches of *res judicata*, cause of action estoppel and issue estoppel, should apply to prevent Andritz from proceeding with this appeal.

8. On May 1, 2015, the Tribunal informed the parties that it would reserve its judgment on the CBSA's motion until the hearing. The hearing was held in Ottawa, Ontario, on August 18, 2015.

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1. R.S.C., 1985, c. 1 (2nd Supp.).
2. S.C. 1997, c. 36.
3. (21 June 2013), AP-2012-022 (CITT) [*Andritz*].
4. *Andritz* at para. 34.
5. *Andritz Hydro Canada Inc. v. Canada (Border Services Agency)*, 2014 FCA 217 (CanLII).

TRIBUNAL ANALYSIS

9. The following was delivered from the bench on August 18, 2015. It is the foundation of the reasons for which the motion from the respondent was granted and the appeal ultimately dismissed.

10. My decision on the motion brought forward by the CBSA in this case is as follows. The motion is brought forward in two parts, both relating to *res judicata*, on the basis of cause of action estoppel (first part) and issue estoppel, in and of itself (second part).

11. I consider that the second test is the one that we need to look at today and, in looking at it, I refer to the following three decisions of the Supreme Court of Canada: *Danyluk v. Ainsworth Technologies Inc.*;[6] *Penner v. Niagara (Regional Police Services Board)*;[7] and *British Columbia (Workers' Compensation Board) v. Figliola*.[8]

12. In reaching my decision, I would like to read certain passages of these three decisions. In *Danyluk*, Binnie J. speaks on behalf of the Supreme Court of Canada by saying the following:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.

13. Binnie J. continues by saying the following: "A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."[9]

14. In *Penner*, Cromwell and Karakatsanis JJ. speak concerning issue estoppel itself. They discuss the legal framework by saying the following:

> [28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

15. Cromwell and Karakatsanis JJ. continue by saying that "[t]he one relevant on this appeal is the doctrine of issue estoppel"[10], which I believe to be relevant in our case also.

16. Cromwell and Karakatsanis JJ. continue by saying the following:

> [29] . . . It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.
>
> [30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice" . . . .

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6. [2001] 2 S.C.R. 460, 2001 S.C.C. 44 (CanLII) [*Danyluk*].
7. [2013] 2 S.C.R. 125, 2013 SCC 19 (CanLII) [*Penner*].
8. [2011] 3 S.C.R. 422, 2011 SCC 52 (CanLII) [*Figliola*].
9. *Danyluk* at para. 18.
10. *Penner* at para. 29.

> [31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme.

17. Finally, *Penner* states the following: "However, as this Court said in *Danyluk*, at para. 67: 'The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case.'"[11]

18. In *Penner*, Cromwell and Karakatsanis JJ. refer to that two-step test used in *Danyluk*. In *Danyluk*, Binnie J. spells out the test, mentioning that it is a two-step analysis: "The rules governing issue estoppel should not be mechanically applied."[12]

19. As was mentioned in *Danyluk*, "[t]he underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. . . . The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*."[13]

20. I believe that, in the present case, that motion has been met and that the moving party in this case, the CBSA, has met that burden. As stated in *Danyluk*, "[i]f successful, the court must still determine whether, as a matter of discretion, . . . "—and this discretion ultimately belongs to me—". . . issue estoppel *ought* to be applied . . ."[14] [emphasis in original].

21. Binnie J. issues a number of decisions here.

22. To begin, in mentioning that I believe that the CBSA has met its test, the CBSA spelled out the following three-part test:

- Whether the same question has been decided—I believe so.
- Whether the decision is final—I believe so.
- Whether the parties to the decision are the same or their privies are the same as the current proceedings—I think this to be the case, as I do not think that there is any difference there.

23. The second part of the test is the use of my discretion. This is considered in *Danyluk* where Binnie J. discusses the exercise of discretion by referring to the following test in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*:[15]

> [32] It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

11. *Penner* at para. 31.
12. *Danyluk* at para. 33.
13. *Danyluk* at para. 33.
14. *Danyluk* at para. 33.
15. 1998 CanLII 6467 (BC CA).

24. Going further, Binnie J. spells out a seven-part test or seven factors that can be considered by a decision maker in using his discretion. They are spelled out in *Danyluk*. I consider the seventh criterion or consideration, that of potential injustice, to be the most important in the present case. The criterion can be expressed as follows: if I did not allow this case to move forward, would I be creating potentially an injustice to Andritz?

25. Binnie J. stated as follows: "Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan* . . . ."[16]

26. In the present case, I must say that Andritz had full opportunity to present its case back in 2012 or, in that 2012 decision, chose a way of action that was specific at that time, decided to move on a specific part of the "for use in" test and only brought the "incorporated into" argument much, much later, to the point where it was disallowed.

27. To use an expression, at that time, Andritz made its bed and had to lie in it. This is echoed in *Penner*. When using the discretion, the Tribunal here is asked to look at the following two-pronged test:

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

28. Now this is part of the problem here. Would it be unfair to not allow Andritz to continue today, considering that it was not allowed to argue the "incorporated into" requirement in 2012?

29. That is what I must consider and that is the decision that I must make. And the basis of my consideration is found in *Penner*, where Cromwell and Karakatsanis JJ. discuss the second part of the test. They spell out that this situation may occur and, speaking of the fairness of using results of the prior proceedings, state as follows:

> [42] . . . This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. . . . In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context.

30. By saying this, Cromwell and Karakatsanis JJ. basically tell us that the differences between the prior cases must be significant. I have asked counsel for Andritz today to spell out how these differences were apparent, and he aptly tells me that, in his opinion there is a difference between "incorporated into" and "attached to."

31. I do not see that difference. It is not evident in any of the material. It is not evident in the argument. It is neither evident in any of the goods themselves, having a recognition, especially in the initial submissions of counsel for Andritz, that we are basically talking about the same goods here and we are basically talking about the same tariff classification, which is a "for use in" provision.

32. The Tribunal's interpretation of the "for use in" provision and the two-part test have already been upheld by the Federal Court of Appeal and, barring any significant differences today in the approach, the consideration or the legal test, which I cannot see between the "attached to" and "incorporated into"

16. *Danyluk* at para. 80.

provisions, and especially considering that the Federal Court of Appeal has upheld the interpretation of the "for use in" chapeau, itself, and not subsequent interpretations, I do not see any significant differences. Therefore, in using my discretion, I find that this case is similar, if not identical, to *Andritz* and should not proceed on the basis of *res judicata* and issue estoppel.

33. In closing, I will refer to *Figliola* on this basis, where Abella J. considered, at that time, a provision of section 27 of the applicable statute that was relevant to that case. And Abella J. uses the following words that I think are useful here:

> [36] . . . the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

34. Abella J. further states that "[a]ll of these questions go to determining whether the substance of a complaint has been 'appropriately dealt with'. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute."[17]

35. Having considered the ensemble of the facts and the law in this case, I come to the conclusion that this is essentially a relitigation of the same dispute that occurred in 2012 but with only a very discrete potential difference, which, in my view, brings nothing new to the table.

36. For that reason, I declare this case to be settled and that the appeal will not go forward.

DECISION

37. In light of the foregoing, the motion is granted. As a result, the appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

17. *Figliola* at para. 37.