



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2016-001

B. Erickson Manufacturing Limited

*Order and reasons issued
Monday, April 3, 2017*

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IN THE MATTER OF an application made by B. Erickson Manufacturing Limited, pursuant to section 67.1 of the *Customs Act*, for an order extending the time to file a notice of appeal pursuant to section 67 of the *Customs Act* with respect to final decisions dated February 24, 2016, issued by the President of the Canada Border Services Agency.

ORDER

The application is denied.

Jean Bédard
Jean Bédard
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. On December 9, 2016, B. Erickson Manufacturing Limited (the Applicant) filed an application with the Canadian International Trade Tribunal (the Tribunal) pursuant to Rule 24.1 of the *Canadian International Trade Tribunal Rules*¹ for an order extending the time to file a notice of appeal.
2. The application indicates that the Applicant received four final decisions, dated February 24, 2016, from the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Customs Act*.² In addition, the application notes that the resulting appeal period deadline was May 24, 2016.
3. On January 16, 2017, the CBSA opposed the extension of time. On January 30, 2017, the Applicant filed further written comments in response to the CBSA's submissions.

STATUTORY PROVISIONS

4. Although the Applicant references Rule 24.1 of the *CITT Rules* in its application, normally, extensions of time to file a notice of appeal are dealt with under section 67.1 of the *Customs Act*, which provides as follows:

67.1 (1) If no notice of appeal has been filed within the time set out in section 67, a person may make an application to the Canadian International Trade Tribunal for an order extending the time within which a notice of appeal may be filed, and the Tribunal may make an order extending the time for appealing and may impose any terms that it considers just.

(2) The application must set out the reasons why the notice of appeal was not filed on time.

(3) The application must be made by filing with the President and the Canadian International Trade Tribunal the application accompanied by the notice of appeal.

(4) No order may be made under this section unless

(a) the application is made within one year after the expiry of the time set out in section 67; and

(b) the person making the application demonstrates that

(i) within the time set out in section 67 for appealing, the person was unable to act or to give a mandate to act in the person's name or the person had a *bona fide* intention to appeal,

(ii) it would be just and equitable to grant the application,

(iii) the application was made as soon as circumstances permitted, and

(iv) there are reasonable grounds for the appeal.³

5. As noted above, the *Customs Act* contains specific provisions allowing for extensions. Rule 24.1 of the *CITT Rules* simply complements the statutory provision, but does not purport to add to, amend or vary it in any way. Accordingly, the Tribunal will utilize the tests set out in section 67.1 of the *Customs Act* in disposing of this application.

1. S.O.R./91-499 [*CITT Rules*].

2. R.S.C., 1985, c. 1 (2nd Supp.).

3. The time set out in section 67 of the *Customs Act* is 90 days after the notice of the decision of the CBSA was given.

6. An applicant has the onus to demonstrate, on a balance of probabilities, that the conditions set out in section 67.1 of the *Customs Act* have been met. In order to satisfy that burden, the evidence presented must be sufficiently clear, convincing and cogent.⁴

ARGUMENT AND ANALYSIS

7. Certain of the requirements of section 67.1 of the *Customs Act* were clearly satisfied by the Applicant. In particular, the application was accompanied with a notice of appeal, as required by subsection 67.1(3). Furthermore, the application was made within the one-year time period stipulated under paragraph 67.1(4)(a).

8. The Applicant provides reasons for the delay in its application, as required by subsection 67.1(2) of the *Customs Act*; however, as discussed below, the sufficiency of those reasons remains a vital consideration and the subject matter of a distinct analysis.

Inability to Act or *Bona Fide* Intention to Appeal

9. Subparagraph 67.1(4)(b)(i) of the *Customs Act* requires an applicant to demonstrate an inability to act or to give a mandate to another to act during the 90-day appeal period, or otherwise prove a *bona fide* intention to appeal.

Position of the Applicant

10. The Applicant explains that its business is operated primarily by Mr. Erickson and his wife as their family business, and that it missed its filing deadline as a result of a period of grief, following the death of Mr. Erickson's father who had been in an unfortunate accident and required significant care during the latter half of April 2016. In addition, the Applicant points to a number of other obligations it had to attend to around the same time, including a pre-planned vacation in Mexico (in March 2016) and a trade show in Las Vegas for the benefit of the business. The Applicant also indicates that tensions arose with its customs representative. The Applicant indicates that it allowed these tensions to abate – resulting in a further delay – before launching this application. However, it is the Applicant's assertion that, through Mr. Erickson, it possessed a continuous intention to appeal as it sought replacement representation.⁵

Position of the CBSA

11. The CBSA submits that, according to *National Food Distribution Centre*, to be successful, an applicant must show an “element of irresistible and compelling restraint beyond one's own free will.”⁶ The CBSA asserts that the circumstances set out by the Applicant – the vacation, death, and trade show – fall short of restraint beyond free will. The CBSA further asserts that the Applicant is a 55-person company and is thus equipped with individuals to whom a mandate to act could have been given.⁷

12. The CBSA also posits that, further to the Tribunal's decision in *Fritz Marketing Inc.*,⁸ the making of an application shortly after the expiry of the 90-day appeal period is indicative of a *bona fide* intention to

4. *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII), para. 46.

5. Application, EP-2016-001-01, Part 2 at 3.

6. *National Food Distribution Centre* (12 March 2010), EP-2009-002 (CITT), para. 14.

7. Respondent's Submissions, EP-2016-001-03A at 5, 6.

8. *Fritz Marketing Inc. v. President of the Canada Border Services Agency* (2 November 2006), AP-2005-029 (CITT).

appeal as it suggests prior work was undertaken during that period. The CBSA notes that, in this case, the Applicant waited almost 200 days to make its application.⁹

Tribunal's Analysis

13. Regarding the Applicant's difficulties to act, or to give a mandate to act on its behalf, the Tribunal sees no reason to depart from the position expressed in *National Food Distribution Centre*. The essential requirement is that the inability must be readily apparent to the reasonable observer in that it emanates from a profound limitation of free will. A vacation or one's attendance at a trade show does not constitute such a limitation. The unexpected death of a parent, while profound, does not in itself constitute such a limitation either. The passing of Mr. Erickson's father took place almost one month before the expiry of the appeal period, which still left adequate time to complete the filing of the appeal or to give a mandate to that effect.

14. Furthermore, the fact that Mr. Erickson attended the trade show in Las Vegas shortly after his father's death indicates that, despite his loss, he was still able to function and look after his business. The Tribunal does not dispute the importance of attending a trade show and developing business contacts. However, attending to the filing of a notice of appeal in a matter where the amount in issue is substantial should have been accorded at least as much importance by the Applicant's owners.

15. In *National Food Distribution Centre*, the Tribunal said that "[a]n exhaustive list of circumstances that would qualify as giving rise to an inability to act is not known to the Tribunal. Whether circumstances qualify as such remains to be determined on a case-by-case basis."¹⁰ For the reasons set out above, the Tribunal finds that the circumstances of this case do not qualify as giving rise to an inability to act.

16. While a *bona fide* intention to appeal may be shown in other ways, the Tribunal agrees with the CBSA that the approach set out by the Tribunal in *Fritz Marketing Inc.* is one such way. In that case, the Tribunal granted the application made by Fritz Marketing, based on its finding that Fritz Marketing had during the 90-day appeal period worked on the appeal, reviewing its position and assembling the documentation necessary to file the appeal.¹¹ Furthermore, Fritz Marketing had filed its notice shortly after the expiry of the 90-day appeal period.

17. According to his affidavit, Mr. Erickson started discussing the appeal with his family and customs broker sometime between the beginning and the middle of April 2016.¹² Also according to the affidavit, Mr. Erickson claims to have formed the intention to appeal but was unable to file the appeal or give a mandate to file the appeal after his father's accident in mid-April. However, unlike in *Fritz Marketing Inc.*, none of the documents filed by the Applicant suggest that it had started working on the appeal during the 90-day appeal period, nor do they sufficiently demonstrate such a *bona fide* intention in any other way.

18. While not binding on the Tribunal, the Tax Court of Canada's decision in *Kolmar v. The Queen*¹³ informs us about the elements considered by the Tax Court in assessing the *bona fide* intention to appeal and offers some useful guidance in examining the circumstances of this case. In discussing subparagraph 167(5)(b)(i) of the *Income Tax Act*, which is very similar to subparagraph 67.1(4)(b)(i) of the *Customs Act*, Justice Rip wrote:

9. Respondent's Submissions, EP-2016-001-03A at 7.

10. Para. 14, note 5.

11. Para. 8.

12. Application, EP-2016-001-01, Mr. Erickson's affidavit dated December 6, 2016, Part 2 at 8, paras. 6, 7.

13. 2003 TCC 829 (CanLII), para. 15.

The taxpayer must demonstrate, among other things, that he or she was unable to act or instruct another to act in the taxpayer's name or *had a bona fide intention to appeal within the 90 day period but because of serious illness, accident or misfortune or due to one of those inevitable mishaps that occur in life, he or she could not act or instruct another or exercise his or her intention to file an appeal on time.*

[Emphasis added]

19. The untimely passing of Mr. Erickson's father could, in some circumstances, be considered as being one of those misfortunes that occur in life, as referred to in the Tax Court's decision. On the facts of this case, however, it did not create a situation preventing the Applicant from acting or giving a mandate to act.

20. As mentioned earlier, the fact that Mr. Erickson attended the trade show shortly after his father's death indicates that he was still actively tending to his business, despite his family circumstances.

21. In terms of the Applicant's ability to give a mandate to act, the Applicant explains that Mrs. Erickson was also unavailable, as she was occupied with the liquidation of her late father-in-law's assets and providing emotional support to Mr. Erickson.

22. What the Applicant refers to in its application is more in the nature of a delegation of tasks within the company rather than the giving of a mandate as contemplated by paragraph 67.1(4)(a) of the *Customs Act*. The mandate contemplated by paragraph 67.1(4)(a) is akin to instructing a qualified third party to act on behalf of the Applicant, including, for example, a lawyer or a customs broker. There is no explanation given as to why this was not done – why a mandate could not be given either by Mr. or Mrs. Erickson, or, with proper delegation, by one of their three daughters who appear to be involved in the company¹⁴, or by another of the company's 55 employees.

23. Finally, the Tribunal cannot accept the Applicant's position that the seeking of replacement representation, undertaken after the expiry of the 90-day appeal period, meets the test of a *bona fide* intention to appeal. The *bona fide* intention must have been present during the 90-day period to file the appeal.

24. For these reasons and based on the facts of this case, the Tribunal finds that the death of Mr. Erickson's father did not create a situation whereby the applicant could not act or give a mandate. As such, the mere intention formed by Mr. Erickson in early April, without taking any meaningful subsequent action before the expiry of the 90-day period to file an appeal, is not in and of itself a *bona fide* intention as contemplated by subparagraph 67.1(4)(b)(i) of the *Customs Act*.

25. Accordingly, the Tribunal finds that the Applicant failed to present sufficiently clear, convincing and cogent evidence to demonstrate on a balance of probabilities that during the 90-day period to file an appeal, it was unable to act or to give a mandate to act in its name or that it had a *bona fide* intention to appeal.

26. An applicant needs to establish all the grounds set out in subsection 67.1(4) of the *Customs Act* in order to succeed. The failure to establish any of those grounds is fatal.

14. Further Written Submissions, EP-2016-001-05A, Tab 2 at 16.

27. However, the Tribunal will note that, even if the Applicant had met the first test, it would have, in any event, failed the third test set out in subparagraph 67.1(4)(b)(iii) of the *Customs Act*. Given the emphasis placed by the Applicant on the one-year period set out in paragraph 67.1(4)(a) of the *Customs Act*, the Tribunal will nonetheless review briefly the relevant evidence.

Subparagraph 67.1(4)(b)(iii)

Arguments of the Applicant

28. Subparagraph 67.1(4)(b)(iii) of the *Customs Act* requires an applicant to demonstrate that its application was made as soon as circumstances permitted.

29. In this regard, the Applicant merely indicates that it has not been late with regard to any customs duty or tax filings in the past, and that its replacement representative acted expeditiously upon being retained with regard to this application.¹⁵

30. Relying on the concept of “comparative delay”, the Applicant asserts that the one-year time frame is indicative of an intention to differentiate between potential appellants, providing recourse to those who are late but not unacceptably so.¹⁶ The Applicant also argues that the one-year time frame set out in paragraph 67.1(4)(a) of the *Customs Act* suggests that Parliament, in drafting the provision, must have been of the opinion that an applicant’s inability to act can last for as much as a year.

Arguments of the CBSA

31. The CBSA notes that the application was filed 196 days after the deadline,¹⁷ despite the fact that the Applicant was equipped with individuals, other than Mr. and Mrs. Erikson, to whom a mandate to act could have been given.

Tribunal’s Analysis

32. The Tribunal disagrees with the Applicant’s arguments regarding the one-year period set forth in paragraph 67.1(4)(a) of the *Customs Act*.

33. Parliament’s intention is not to give would-be appellants a choice between the 90-day appeal period on the one hand, and a much longer one-year appeal period on the other. While the one-year time frame does provide a recourse for potential appellants under certain conditions, that recourse is subject to a stringent series of tests, which are set out in section 67.1 of the *Customs Act*.

34. The one-year time frame is not a license to a potential appellant to proceed at the pace of its own choosing once the 90-day appeal period has been missed. The 90-day appeal period is a clear signal from Parliament of its intention to bring closure to the administrative proceedings under the *Customs Act* in a relatively short time frame, unless an appeal has been filed during that period. Accordingly, a sense of urgency should be present at all times.

35. The fact that the application was made *as soon as circumstances permitted* is determined on the basis of a continuum starting with the expiry of the 90-day appeal period, and on the basis of the efforts

15. Application, EP-2016-001-01, Part 2 at 5.

16. Application, EP-2016-001-01, Part 2 at 4, 6.

17. The Tribunal notes that the application was actually made 199 days after the deadline.

made both before (where applicable) and after the expiry in order to file the application or give a mandate. The one-year period is not a consideration in the application of subparagraph 67.1(4)(b)(iii) of the *Customs Act*.

36. Furthermore, the Tribunal notes paragraph 6 of Mr. Erickson's statement dated January 26, 2017, wherein he acknowledges that the Applicant's lost opportunity to file an appeal with the Tribunal caused relations with its former customs broker to become tense.¹⁸ Although it seems as if the Applicant may have had some difficulty obtaining the necessary documentation from its former customs broker, it is not clear why it took three months for the relationship to improve, subsequent to which a new customs broker was secured. Furthermore, these statements are surprising, given that the application is based on the premise that the failure to file the appeal was solely due to the Applicant's alleged inability to do so.

37. Furthermore, Mr. Erickson fails to explain why efforts were not made before September 2016 to identify a new customs broker to whom a mandate to file the appeal could be given.¹⁹ Likewise, no explanation is given as to why it took an additional period of two months – being the months of September and October 2016 – to identify and retain the new customs broker.

38. The Applicant failed to demonstrate on a balance of probabilities that it proceeded as soon as circumstances permitted. As mentioned earlier, the application was filed 199 days after the expiry of the appeal period. This is 286 days (or more than nine months) after it received the final decisions pursuant to subsection 60(4) of the *Customs Act*. In the context of this case, this is not indicative that the Applicant proceeded as soon as circumstances permitted. The sense of urgency referred to earlier in these reasons was clearly not present.

39. For the reasons indicated earlier, the Tribunal will not review the evidence and the arguments in connection with subparagraphs 67.1(4)(b)(ii) and (iv) of the *Customs Act*.

DECISION

40. The application is denied.

Jean Bédard
Jean Bédard
Presiding Member

18. Further Written Submissions, EP-2016-001-05A, Tab 3 at 18.

19. In Further Written Submissions, EP-2016-001-05A, Tab 3 at 18, Mr. Erickson simply indicates that, “[o]nce the company procured the historic records, inquiry began to find proper consultants or counsel working and specializing in this field.”