



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2018-002

Conair Consumer Products ULC

*Order and reasons issued
Friday, July 20, 2018*

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IN THE MATTER OF an application made by Conair Consumer Products ULC, 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 a final decision dated February 16, 2018, issued by the President of the Canada Border Services Agency.

ORDER

Having considered the application of Conair Consumer Products ULC, having noted that the President of the Canada Border Services Agency takes no position regarding the application, and being satisfied that the requirements and conditions set out in subsections 67.1(2) and (4) of the *Customs Act* have been met, the Canadian International Trade Tribunal grants the extension of time to file a notice of appeal and hereby accepts the documents filed by Conair Consumer Products ULC on May 18, 2018, and June 13, 2018, as a notice of appeal, pursuant to subsection 67(1) of the *Customs Act*.

Jean Bédard

Jean Bédard, Q.C.

Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. On February 16, 2018, Conair Consumer Products ULC (Conair) received three final decisions from the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Customs Act*.¹
2. Pursuant to subsection 67(1) of the *Act*, a notice of appeal must be filed with the Canadian International Trade Tribunal (the Tribunal) within ninety days after the time notice of the decision was given. The deadline to file a notice of appeal with respect to the decisions dated February 16, 2018, was therefore May 17, 2018. Conair filed its notice of appeal on May 18, 2018, one day after the deadline.
3. On June 13, 2018, Conair filed an application with the Tribunal, pursuant to section 67.1, for an order extending the time to file a notice of appeal.
4. On June 14, 2018, the Tribunal acknowledged receipt of the application and requested that the CBSA make its submissions, if any, by July 16, 2018. On June 26, 2018, the CBSA stated that it took no position regarding the application.

STATUTORY PROVISIONS

5. Section 67.1 of the *Act* 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.

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

6. An applicant has the onus to demonstrate, on a balance of probabilities, that the conditions set out in section 67.1 have been met. In order to satisfy that burden, the evidence presented must be sufficiently clear, convincing and cogent.²

ANALYSIS

7. Conair clearly satisfied certain of the above-mentioned requirements: the application was accompanied by a notice of appeal, as required by subsection 67.1(3) of the *Act*, and the application was received 27 days after the deadline to file a notice of appeal, well within the one-year limit stipulated under paragraph 67.1(4)(a).

8. Regarding the reasons why the notice of appeal was not filed on time, the application states that “the person responsible for filing the appeals inadvertently miscalculated the deadline” and subsequently filed the appeal with the Tribunal one day after the 90-day deadline expired.³ The Tribunal accepts this explanation that a clerical error caused the delay, satisfying subsection 67.1(2).

9. The application states that Conair instructed its counsel to initiate the appeal “[o]n or about May 14, 2018”, i.e. three days before the filing deadline. The application includes an affidavit attesting to this fact, dated June 11, 2018, and signed by J. Clem MacMullin, Conair’s general manager. The Tribunal accepts this and the fact that the appeal was filed only one day late as evidence of a *bona fide* intention to appeal within the time limit, as required by subparagraph 67.1(4)(b)(i).

10. Under these circumstances, the Tribunal agrees with Conair that such a minor delay, caused by an honest mistake, should not deprive it of its right to contest the President’s decision. On this basis, Conair has demonstrated that it would be just and equitable to grant the application, satisfying subparagraph 67.1(4)(b)(ii).

11. The Tribunal also accepts Conair’s submissions that the application was made as soon as circumstances permitted, as required by subparagraph 67.1(4)(b)(iii), stating that its counsel immediately prepared the application upon being advised by the Tribunal of its miscalculation.

12. The application, under the heading “Reasonable Grounds to Support the Appeal”, provides as follows:

13. The goods in issue are a Hot Air Brush which is used to style hair and a Spin Air Brush which is used to curl hair;

14. Applicant contends that the goods in issue should be classified under tariff item 8516.31.00 as domestic hair dryers or under tariff item 8516.32.10 as curling irons.

15. The Affidavit of J. Clem MacMullin (**Tab 3**) is submitted in support of the present application.

13. The affidavit of Mr. MacMullin, while providing sufficient evidence of a *bona fide* intention to appeal within the time limit, is silent regarding the substantive grounds of the appeal.

14. The Tribunal is bound by the language of section 67.1, which unequivocally states that “[n]o order may be made under this section unless . . . the person making the application demonstrates that . . . there are

2. *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII) at para. 46; *B. Erickson Manufacturing Limited* (3 April 2017), EP-2016-001 (CITT).

3. Exhibit EP-2018-002-01A at para. 2.

reasonable grounds for the appeal.”⁴ As such, a fulsome explanation of the grounds of appeal, in support of the application, would have been appreciated by the Tribunal.

15. In considering whether this criterion is satisfied, the Tribunal considers it appropriate to generously and liberally read an application such as the present one to determine if it discloses reasonable grounds for the appeal, taking into account all of the circumstances surrounding the application. In this case, notwithstanding an omission to state these grounds in the application itself, the Tribunal finds relevant considerations in the supporting documentation filed by Conair.

16. After reviewing the CBSA decision, which Conair seeks to appeal, the Tribunal notes that it relies on a previous Tribunal decision, which also involved Conair. The goods in issue in *Conair Consumer Products Inc.* were “hair straighteners and crimpers”,⁵ while the goods in issue in the appeal that the applicant presently seeks to file are described in the application as a “Hot Air Brush” and “Spin Air Brush”.

17. The Tribunal has previously determined that the question of whether a prior Tribunal (or Tariff Board) decision is applicable to the case at hand represents reasonable grounds for the appeal, for the purpose of satisfying subparagraph 67.1(4)(b)(iv).⁶ Conversely, in *Bri-Chem*, the Federal Court of Appeal cautioned against the re-litigation of matters already decided by the Tribunal unless there are compelling arguments to do so.⁷ As such, the re-litigation of a case involving the same goods as those that have previously been examined by the Tribunal will usually not constitute a reasonable ground for an appeal.⁸

18. At first glance, the goods in issue appear to be different from those examined in *Conair I*, and the CBSA has not presented any evidence to the contrary. Beyond this *prima facie* distinction, the Tribunal does not have sufficient evidence before it to determine the applicability of *Conair I* to the tariff classification of the goods in issue. As such, the appeal does not lack reasonable grounds.

19. The Tribunal notes that previous applications, which considered more detailed submissions with regard to subparagraph 67.1(4)(b)(iv), were all opposed by the CBSA.⁹ By contrast, the CBSA did not oppose the present application.

20. In this case, the Tribunal is satisfied that Conair provided sufficient information to support reasonable grounds for the appeal for the purposes of meeting the requirement of subparagraph 67.1(4)(b)(iv). In coming to this decision, the Tribunal notes that Conair missed the usual deadline to appeal by one day, that the oversight was caused by an honest clerical error, that there remains a valid question as to the applicability of *Conair I* to the goods in issue in the appeal that the applicant seeks to file, and the fact that the application was unopposed by the CBSA.

21. The Tribunal emphasizes that, in other circumstances, it expects to see more detailed submissions regarding grounds of appeal when parties are addressing subparagraph 67.1(4)(b)(iv). That being said, in

4. Act, subparagraph 67.1(4)(b)(iv).

5. (20 October 2003), AP-2002-095 (CITT) [*Conair I*].

6. *General Motors of Canada Limited* (11 February 2009), EP-2008-002 (CITT) at paras. 16-17 [*General Motors of Canada*]; *Mr. Gordon Grandison* (31 March 2004), EP-2003-007 (CITT) [*Grandison*].

7. *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, [2017] 3 FCR 123, 2016 FCA 257 (CanLII) at para. 61;

8. *J.R. McNenly* (10 February 2012), EP-2011-001 (CITT) at paras. 27-30.

9. See e.g. *General Motors of Canada; Electronic Liquidators Ltd.* (6 November 2006), EP-2005-035 (CITT) at para. 17; *American Standard Bath & Kitchen (Canada)* (25 May 2004), EP-2003-008 (CITT) at para. 11; *Grandison*.

view of the particular circumstances of this case, the Tribunal considers Conair to have satisfied that requirement for the purposes of this application.

DECISION

22. For the foregoing reasons, the Tribunal grants the application for an extension of time to file a notice of appeal pursuant to subsection 67(1) of the *Act*.

23. Noting that Conair has filed its notice of appeal with the Tribunal and the President of the CBSA, the Tribunal will consider the appeal to have been filed on the day this order is issued and instruct the parties accordingly regarding deadlines to file their submissions.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member