



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2019-001

Latoplast Ltd.

*Order and reasons issued
Thursday, July 25, 2019*

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IN THE MATTER OF an application made by Latoplast Ltd., 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 decision dated November 20, 2018, issued by the President of the Canada Border Services Agency.

ORDER

Having considered the application and submissions of Latoplast Ltd. and the submissions of the Canada Border Services Agency, and being satisfied that the requirements and conditions set out in section 67.1 of the *Customs Act* have been met, the Canadian International Trade Tribunal hereby grants the application for an extension of time and hereby accepts the documents filed by Latoplast Ltd. 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

INTRODUCTION

1. This is an application by Latoplast Ltd. (Latoplast) for an extension of time to appeal a decision of the President of the Canada Border Services Agency (CBSA).
2. The goods in issue are various models of latex and nitrile examination gloves.

BACKGROUND

3. On February 20, 2019, Latoplast filed a notice of appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Customs Act*,¹ from a decision of the CBSA made on November 20, 2018, pursuant to subsection 60(4) of the *Act*. A copy of the CBSA's decision was filed on February 21, 2019.
4. Pursuant to subsection 67(1) of the *Act*, a notice of appeal must be filed with the Tribunal within 90 days after notice of the decision was given. The deadline to file a notice of appeal with respect to the decision dated November 20, 2018, was therefore February 19, 2019. In other words, Latoplast filed its notice of appeal one day after the deadline.
5. On February 25, 2019, the Tribunal wrote to Latoplast advising that its notice of appeal was not timely. The Tribunal also advised that Latoplast could file an application for an order extending the time within which a notice of appeal may be filed, pursuant to section 67.1 of the *Act*.
6. On April 16, 2019, Latoplast filed an application for an extension of time. On May 16, 2019, the CBSA filed submissions in opposition to the application. On May 29, 2019, Latoplast filed reply submissions.

STATUTORY FRAMEWORK

7. 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,

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

- (iii) the application was made as soon as circumstances permitted, and
- (iv) there are reasonable grounds for the appeal.

ANALYSIS

8. An application for an extension of time must meet the five conditions set out in subsection 67.1(4) of the *Act*. The onus lies with the applicant to demonstrate, on a balance of probabilities, that these conditions have been met.²

9. The CBSA did not dispute that Latoplast met the first, second, and fifth conditions. The Tribunal agrees. Despite consideration of the CBSA's submissions disputing the third and fourth conditions, the Tribunal finds that Latoplast has met each of these conditions as well.

Application Made Within One Year

10. Latoplast's application was made within one year after the expiry of time set out in section 67 of the *Act*, which would be February 19, 2020. Latoplast filed its application for an extension of time on April 16, 2019.

Bona Fide Intention to Appeal

11. Latoplast claimed that it had a *bona fide* intention to appeal the CBSA's decision, and submitted that the delay was due to the miscalculation of its customs broker. The CBSA did not dispute that Latoplast had a *bona fide* intention to appeal.

12. The Tribunal agrees and finds that this condition has been met. Latoplast filed the appeal just one day late, indicating that Latoplast had formed an intention to file the appeal within the 90-day appeal period and had worked on the appeal during that period.³

Just and Equitable

13. While the CBSA disputed this point, the Tribunal is satisfied that granting Latoplast's request for an extension of time would be just and equitable in the circumstances.

14. Latoplast's initial one-day delay in filing appears to have been an honest mistake, and Latoplast promptly took action to remediate the failure by retaining a lawyer, even though the application for an extension of time was not filed immediately. The Tribunal considers these circumstances to be similar to those in *Full Bore Marketing*, in which the Tribunal considered it to be just and equitable to grant an application for extension of time under section 60.2 of the *Act* where "an honest mistake was committed" and "efforts to rectify it were promptly taken".⁴

15. While there may be minor inconvenience to the CBSA if the application is granted, the CBSA has not demonstrated prejudice to other importers.

2. *Conair Consumer Products ULC* (20 July 2018), EP-2018-002 (CITT) [*Conair*] at para. 6.

3. The Tribunal has previously allowed an extension of time where it found that the applicant had worked on the appeal during the 90-day appeal period and had filed its notice shortly after the expiry of the 90 days. See *Fritz Marketing Inc. v. President of the Canada Border Services Agency* (2 November 2006), AP-2005-029 (CITT); *Conair* at para 9.

4. *Full Bore Marketing Inc.* (22 August 2018), EP-2018-001 (CITT) [*Full Bore*] at para. 18.

As Soon as Circumstances Permitted

16. The Tribunal is satisfied that Latoplast submitted its application for an extension of time as soon as circumstances permitted.

17. The CBSA argued that Latoplast did not demonstrate the necessary urgency, given that it filed the application on April 16, 2019, which was 50 days after receiving the Tribunal's letter advising that the appeal had been filed late.

18. There is no bright-line test for what constitutes "as soon as circumstances permitted".⁵ Rather, the Tribunal must make a fact-specific determination on a case-by-case basis. The only hard deadline for an application for extension of time is that it must be made within one year after the expiry of the time set out in section 67 of the *Act*, as noted above.⁶

19. As the Tribunal has expressed in the context of an application under section 60.2 of the *Act*, while statutory deadlines are not to be taken lightly, the *Act* "expressly gives the Tribunal permission to alter and extend statutory deadlines for certain requests".⁷ This allows the Tribunal to be an accessible administrative forum for dispute resolution, provided that the conditions in the *Act* are met.

20. The Tribunal is satisfied that several facts demonstrate a sufficient sense of urgency on the part of Latoplast. First, Latoplast submitted that it instructed a lawyer to file an application for extension of time as soon as the error in filing date was realized.⁸ Second, once retained, the lawyer did not file the application immediately because he was occupied with three hearings before the Tribunal within a short period of time. However, after the third hearing on April 9, 2019, he filed the application on April 16, 2019.

21. While the Tribunal appreciates that workload may be an issue, it expects matters to be attended to with some urgency. Nonetheless, having considered the specific facts in this case, the Tribunal is satisfied that this criterion has been met. In particular, the Tribunal accepts that the very short delay between the date of counsel's last hearing and the date he filed the present application indicates that he turned his mind to the application as soon as his circumstances permitted.

22. Finally, the Tribunal ascribes little weight to the affidavit of the President of Latoplast, Bruce Batler, which states that Mr. Batler instructed Michael Smith of MSR Customs & Commodity Tax Group to file an appeal with the Tribunal on April 1, 2019. The facts contradict this date: if Mr. Batler gave instructions on April 1, 2019, the notice of appeal would not have been filed on February 20, 2019. As the date in the affidavit is handwritten, the Tribunal considers that it was likely an unintentional error.

Reasonable Grounds

23. The CBSA did not make submissions on whether the grounds for Latoplast's appeal were reasonable. The Tribunal finds that reasonable grounds for the appeal do exist; however, the Tribunal is not entirely satisfied with the parties' submissions on this point. That reasonable grounds for an appeal exist

5. The Tribunal takes into account the provisions of the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12, which provides that an enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

6. *Customs Act*, para. 67.1(4)(a).

7. *Full Bore* at para. 17.

8. Exhibit EP-2019-001-03 at 3, Vol. 1.

should not be taken for granted. As the Tribunal has recently stated in *Conair*, parties are expected to address each criterion, including a “fulsome explanation of the grounds of appeal”.⁹

24. Notwithstanding this omission, the Tribunal has examined the CBSA’s decision and finds that there are reasonable grounds for an appeal. The appeal appears to relate largely to a question of fact, as opposed to one of law. At issue is whether the various models of latex and nitrile examination gloves in question should be classified under tariff item No. 4015.19.10 (“Protective gloves to be employed with protective suits in a noxious atmosphere”) as requested by Latoplast, or under tariff item No. 4015.19.90 (“Other”) as determined by the CBSA.

25. This classification depends on a factual determination of whether the gloves are to be employed in a noxious environment. While the CBSA has determined that Latoplast provided insufficient evidence of use in a noxious environment,¹⁰ appeals before the Tribunal proceed *de novo* and Latoplast will have another opportunity to file such evidence on an appeal before the Tribunal.

DECISION

26. For the foregoing reasons, the Tribunal grants the application for an extension of time to file a notice of appeal.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

9. *Conair* at para. 14.

10. Exhibit EP-2019-001-01A at 3, Vol. 1.