



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2018-004

J. Byrne

*Order and reasons issued
Wednesday, May 22, 2019*

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IN THE MATTER OF an application made by J. Byrne, 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 of the President of the Canada Border Services Agency dated December 19, 2018.

ORDER

Having considered the application made by J. Byrne and having noted that the President of the Canada Border Services Agency takes no position regarding the application, the Canadian International Trade Tribunal is 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 extension of time to file a notice of appeal and accepts the documents filed by J. Byrne on March 20, 2019, as a notice of appeal, pursuant to subsection 67(1) of the *Customs Act*.

Jean Bédard, Q.C.
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. This concerns an application filed by Mr. J. Byrne on March 25, 2019, pursuant to section 67.1 of the *Customs Act*¹ for an order extending the time to file a notice of appeal.
2. On December 19, 2018, the President of the Canada Border Services Agency (CBSA) issued a final decision pursuant to section 60 of the *Act*, classifying the good in issue, an airsoft lower receiver, under tariff item No. 9898.00.00 as a prohibited weapon, thus barring its importation.
3. Pursuant to subsection 67(1) of the *Act*, a notice of appeal must be filed with the Canadian International Trade 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 CBSA's decision was therefore March 19, 2019. Mr. Byrne filed a notice of appeal on March 20, 2019, one day after the deadline.
4. On March 22, 2019, the Tribunal advised Mr. Byrne that his application was late, and that he may file an application for an order extending the time to file a notice of appeal, pursuant to section 67.1 of the *Act*. On March 25, 2019, Mr. Byrne filed an application for such an order.
5. On March 26, 2019, the Tribunal acknowledged receipt of the application and requested that the CBSA make its submissions, if any, by April 25, 2019. On April 11, 2019, the CBSA stated that it took no position regarding the application.

STATUTORY PROVISIONS

6. Subsection 67(1) of the *Act* provides as follows:

67 (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

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

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

- (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.

ANALYSIS

8. An applicant has the onus to demonstrate, on a balance of probabilities, that the conditions set out in section 67.1 of the *Act* have been met. In order to satisfy that burden, the evidence presented must be sufficiently clear, convincing and cogent.² In this case, the Tribunal notes that the appellant is a self-represented party. Although Mr. Byrne may not have clearly addressed each requirement of section 67.1, he did provide the relevant facts to allow the Tribunal to make its determination.

9. Mr. Byrne clearly satisfied certain requirements of section 67.1: Mr. Byrne submitted a notice of appeal and an application for an extension of time, as required by subsection 67.1(3), and the application was received six days after the deadline to file a notice of appeal, well within the one-year limit stipulated under paragraph 67.1(4)(a).

10. Regarding subsection 67.1(2), Mr. Byrne states that the notice of appeal was not filed on time due to the CBSA failing to transmit its decision in a timely manner. Although the CBSA's decision is dated December 19, 2018, according to the evidence filed by Mr. Byrne, the postage stamp on the envelope is dated February 18, 2019. Mr. Byrne submits that he only received the CBSA's decision on or about February 26, 2019, which left him with less than thirty days to file an appeal.

11. As indicated above, subsection 67(1) provides that an appeal must be filed with the Tribunal "within ninety days after the time notice of the decision was given". In light of the late mailing of the CBSA's decision, it would be unreasonable to consider that Mr. Byrne had ninety days to prepare and file a notice of appeal.

12. In addition, it seems that Mr. Byrne miscalculated the deadline to file under subsection 67(1) by one day, stating in his notice of appeal that the deadline to file was on or before March 20, 2019. The Tribunal accepts that the CBSA's delay and Mr. Byrne's clerical error caused him to file the notice of appeal after the deadline.

13. With respect to the requirement for a *bona fide* intention to appeal in subparagraph 67.1(4)(b)(i), the Tribunal has previously found that "in order to demonstrate an inability to act, an applicant must establish an element of irresistible and compelling restraint beyond one's own free will."³ The Tribunal has also stated 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."⁴

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

3. *G. Awad* (8 February 2019), EP-2018-003 (CITT) at para. 16; *McDougall* at para. 46.

4. *National Food Distribution Centre* (12 March 2010), EP-2009-002 (CITT) at note 5.

In *Fritz Marketing Inc.*, the Tribunal allowed an application where it was apparent that the applicant had been working on its appeal during the ninety-day period.⁵

14. Here, Mr. Byrne filed the notice of appeal only thirty days after the date the CBSA's decision was mailed, and only one day past the deadline to file such notice. Mr. Byrne's notice contained an outline of his arguments, which shows that Mr. Byrne had been working on his appeal since receiving the CBSA's decision. As such, the Tribunal is satisfied that Mr. Byrne had a *bona fide* intention to appeal, as required by subparagraph 67.1(4)(b)(i).

15. Considering the above, the Tribunal finds that it would be just and equitable to grant the application, as required by subparagraph 67.1(4)(b)(ii).

16. The Tribunal is also satisfied that the application was made as soon as circumstances permitted, since Mr. Byrne filed the application one working day after being advised by the Tribunal that the notice of appeal was late. This satisfies the requirement of subparagraph 67.1(4)(b)(iii).

17. Finally, Mr. Byrne must demonstrate that there are reasonable grounds for appeal, as per subparagraph 67.1(4)(b)(iv). In his notice of appeal, Mr. Byrne developed a number of arguments, some of which, upon review, were based on questions of facts. In this context, the Tribunal is satisfied that Mr. Byrne meets the requirement of subparagraph 67.1(4)(b)(iv).

DECISION

18. 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*.

19. Noting that Mr. Byrne has filed a notice of appeal with the Tribunal and 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 the deadlines to file their submissions.

Jean Bédard, Q.C.
Presiding Member

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