

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110415**

**Docket: A-223-10**

**Citation: 2011 FCA 138**

**CORAM: EVANS J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**WOLSELEY ENGINEERED PIPE GROUP**

**Appellant**

**and**

**PRESIDENT OF THE CANADA BORDER SERVICES AGENCY**

**Respondent**

Heard at Toronto, Ontario, on April 12, 2011.

Judgment delivered at Ottawa, Ontario, on April 15, 2011.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

EVANS J.A.  
DAWSON J.A.

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**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] Wolseley Engineered Pipe Group (“Wolseley”) appeals from a decision dated March 11, 2010 of the Canadian International Trade Tribunal (“Tribunal”) (appeal no. AP-2009-010). The President of the Canada Border Services Agency (the “President”) cross-appeals.

[2] This matter raises issues that are very similar to those in *C.B. Powell Ltd. v. President of the Canada Border Services Agency*, 2011 FCA 137. Accordingly, we heard and determined this matter alongside *C.B. Powell*.

#### **A. The appeal**

[3] As in *C.B. Powell*, the importer, Wolseley, declared a particular origin/tariff treatment under the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) for certain goods, here certain fusion machines.

[4] The Canada Border Services Agency (CBSA) later conducted an audit. Under subsection 59(1) of the Act, it changed the tariff classification and the value for duty of the goods.

[5] Under subsection 60(1) of the Act, the appellant requested a further re-determination of the tariff classification and value for duty of the goods and achieved partial success. To this point, however, the appellant had not sought a re-determination of the origin/tariff treatment for the goods.

[6] The appellant appealed to the Tribunal under subsection 67(1) of the Act, raising only issues of the tariff classification and the value for duty of the goods. Shortly afterward, it requested that the issue of origin/tariff treatment of the goods be added to its appeal.

[7] In reasons substantially similar to those it gave in *C.B. Powell*, the Tribunal declined to consider the issue of origin/tariff treatment of the goods. In its view, there had not been any “decision” of the President on that issue within the meaning of subsection 67(1) of the Act.

[8] As in *C.B. Powell*, the appellant submits that the Tribunal’s interpretation of subsection 67(1) and its application to this case were unreasonable.

[9] For the reasons given in *C.B. Powell*, I am of the view that the Tribunal’s interpretation and application of subsection 67(1) in this case was reasonable. Indeed, in oral argument, counsel for the appellant conceded as much. Because the appellant had not requested a re-determination or further re-determination of the origin/tariff treatment of the goods under subsection 60(1), there was no basis for finding an “implied” decision in this case.

## **B. The cross-appeal**

[10] The President’s cross-appeal concerns the tariff classification of the goods. Under subsection 59(1) of the Act, the CBSA determined that the goods should be classified within tariff item 8515.80.00 under the *Customs Tariff*, S.C. 1997, c. 36. Under subsection 60(1) of the Act, the President upheld tariff item 8515.80.00 as the proper tariff classification.

[11] Chapter 99 of the *Customs Tariff* provides special classification provisions that allow certain good to be imported into Canada with tariff relief. Wolseley appealed to the Tribunal under subsection 67(1) of the Act, submitting that it was entitled to that relief because the goods fell within a tariff item in chapter 99 of the *Customs Tariff*, namely tariff item no. 9953.00.00.

[12] Although that issue had not been raised before the President, the Tribunal held that it had jurisdiction to consider it. In its view, the President had re-determined an issue relating to tariff classification and so there was a “decision” on tariff classification before it within the meaning of subsection 67(1) of the Act. As the chapter 99 issue related to tariff classification, it could be raised before the Tribunal as part of Wolseley’s submissions on tariff classification. This aspect of the Tribunal’s decision is not under challenge in this Court.

[13] What is challenged in the cross-appeal in this Court is the Tribunal’s finding in favour of Wolseley that the goods in question fall within tariff item no. 9953.00.00 of the *Customs Tariff*.

[14] The Tribunal reached this decision by interpreting tariff item no. 9953.00.00. This was an exercise in statutory interpretation of one of the Tribunal’s home statutes. Accordingly, the Tribunal’s interpretation of tariff item no. 9953.00.00 must be reviewed under the deferential standard of reasonableness.

[15] Tariff item no. 9953.00.00 provides as follows:

Hydraulic equipment and articles for    Appareils hydrauliques et articles

use therein;

devant servir dans ceux-ci;

Articles for use in compression-ignition internal combustion piston engines (diesel or semi-diesel engines);

Articles devant servir dans des moteurs à piston, à allumage par compression (moteurs diesels ou semi-diesels);

All the foregoing for use in the manufacture of road graders or road scrapers.

Tout ce qui précède devant servir à la fabrication de niveleuses ou de décapeuses pour route.

[16] The Tribunal accepted that the goods in issue were “hydraulic equipment.” However, they were not for the “use in the manufacture of road graders or road scrapers.” The issue before the Tribunal was whether the goods had to be for the “use in the manufacture of road graders or road scrapers” in order to fall within tariff item no. 9953.00.00. This depended on whether the third clause of tariff item no. 9953.00.00 modified “hydraulic equipment” in the first clause. The Tribunal held that the third clause did not modify the first clause, and so the goods, as “hydraulic equipment,” fell within tariff item no. 9953.00.00. In reaching this decision, it examined the wording of tariff item no. 9953.00.00 in isolation, placing particular emphasis on the use of semi-colons in the wording of tariff item no. 9953.00.00.

[17] However, if, as the Tribunal held, the third clause does not modify the first clause, it has no meaning in tariff item no. 9953.00.00. Further, the Tribunal did not examine other provisions in the *Customs Tariff*, in order to take into account the statutory context of the tariff item in question when determining its meaning. Had it done so, it would have appreciated that many of the tariff items have a particular grammatical structure, a structure that Parliament also used in tariff item no. 9953.00.00.

[18] It is clear that, in all those instances, the use provision limits the scope of the description of the goods. Thus, in my view, on the basis of the text and statutory context of tariff item no. 9953.00.00 the Tribunal's interpretation of it cannot be sustained, even under the deferential standard of reasonableness. The only rational reading of tariff item no. 9953.00.00 is that "hydraulic equipment," such as the goods in question, must be "for use in the manufacture of road graders or road scrapers." In this case, the goods are not "for use in the manufacture of road graders or road scrapers" and so they do not fall under tariff item no. 9953.00.00.

**C. Disposition**

[19] For these reasons, I would dismiss the appeal, allow the cross-appeal, set aside the Tribunal's decision that the goods in issue should be classified under tariff item no. 9953.00.00 and order direct that duty be calculated on the basis of the remainder of the Tribunal's decision. I would grant the President his costs of the appeal and the cross-appeal.

"David Stratas"

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J.A.

"I agree  
John M. Evans J.A."

"I agree  
Eleanor R. Dawson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-223-10

**APPEAL FROM A DECISION OF THE CANADIAN INTERNATIONAL TRADE  
TRIBUNAL DATED MARCH 11, 2010**

**STYLE OF CAUSE:** Wolseley Engineered Pipe Group  
v. President of the Canada Border  
Services Agency

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 12, 2011

**REASONS FOR JUDGMENT BY:** Stratas J.A.

**CONCURRED IN BY:** Evans J.A.  
Dawson J.A.

**DATED:** April 15, 2011

**APPEARANCES:**

Michael Kaylor FOR THE APPELLANT

Brian Harvey FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lapointe Rosenstein Marchand Mélançon, LLP FOR THE APPELLANT  
Montreal, Quebec

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada