CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, May 16, 2003

Appeal No. AP-2002-004

IN THE MATTER OF an appeal heard on October 3, 2002, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated January 29, 2002, with respect to a request for redetermination under section 64 of the *Customs Act*.

BETWEEN

ASEA BROWN BOVERI INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2002-004

ASEA BROWN BOVERI INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

This is an appeal pursuant to subsection 67(1) of the *Customs Act* (the *Act*) from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) made under subparagraph 64(*e*)(i) of the *Act*. The first issue in this appeal is whether the Tribunal has jurisdiction to decide the appeal. The second issue is whether the covers for Type ITH relays and upgrade kits for Type DPU relays constitute "subsequent goods" to the goods in *Asea Brown Boveri Inc. v. Deputy M.N.R.* (*ABB 1998*).

HELD: The appeal is dismissed. The Tribunal finds that it has jurisdiction to decide this appeal. In the context of the specific facts of this case, in light of previous Tribunal decisions and the Federal Court of Canada's decision in *Mueller Canada Inc. v. Canada*, the Tribunal finds that the Commissioner made decisions pursuant to section 64 of the *Act* when he determined that the goods in issue were not subsequent goods. In the Tribunal's view, in making those decisions, the Commissioner had to go through a tariff classification exercise. The Commissioner made decisions on the merits of the requests of Asea Brown Boveri Inc. (ABB). To qualify those decisions as "no decisions" rather than negative determinations would thwart ABB's right of appeal under section 67.

In addition, the Tribunal notes that the detailed adjustment statements issued by the Commissioner indicated that the decisions were made pursuant to paragraph 64(*e*) of the *Act* and were subject to appeal under section 67.

The Tribunal finds that similarity in material, characteristics and function are relevant criteria to determine whether goods are like other goods. In this appeal, the Tribunal does not see similarity in material as crucial to its determination. With respect to characteristics, the goods in issue and those in *ABB 1998* do not seem to share much except for the fact that they are comprised in a larger whole. This is certainly not enough to warrant a determination that they are similar in characteristics.

The functions of the goods in issue, as compared to those of the goods in *ABB 1998*, confirm how different they are. The covers serve to protect the relays from harmful environmental conditions. The upgrade kits serve to add functionality to the relays and to correct faults in the software of the relays. The relays or relay assemblies in *ABB 1998* served to protect electrical circuits from electrical problems and to transmit data on the system's operation to the control centre. It was this latter capability that qualified the relays as part of process control and, hence, made them eligible for the benefit of Code 2101. Clearly, the goods in issue do not have functions similar to those of the goods in *ABB 1998*. The Tribunal finds that the covers for Type ITH relays and upgrade kits for Type DPU relays in issue do not constitute, for the purpose of subparagraph 64(*e*)(i) of the *Act*, "subsequent goods" to the goods in *ABB 1998*.

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Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 3, 2002
Date of Decision:	May 16, 2003
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Philippe Cellard
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Stanley E. Morris and Ray L. Wistaff, for the appellant Patricia Johnston, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-2002-004

ASEA BROWN BOVERI INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated January 29, 2002, made under subparagraph 64(*e*)(i) of the *Act*. The first issue in this appeal is whether the Tribunal has jurisdiction to decide the appeal. The second issue is whether the covers for Type ITH[2] relays and upgrade kits for Type DPU[3] relays, imported by Asea Brown Boveri Inc. (ABB) in December 1995 and August 1996, constitute "subsequent goods" to the goods in *Asea Brown Boveri Inc. v. Deputy M.N.R.*[4]

The following provisions of the *Act* are relevant to this appeal:

> 64. The Deputy Minister may re-determine the tariff classification or marking determination or re-appraise the value for duty or imported goods
>
> (e) at any time, where the re-determination or re-appraisal would give effect in respect of the goods, in this paragraph referred to as the "subsequent goods", to a decision of the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada, or of the Deputy Minister under paragraph (b), made in respect of
>
> (i) other like goods of the same importer or owner imported on or prior to the date of importation of the subsequent goods, where the decision relates to the tariff classification of those other goods, or
> (ii) other goods of the same importer or owner imported on or prior to the date of importation of the subsequent goods, where the decision relates to the manner of determining the value for duty of those other goods,
>
> and, where the Deputy Minister makes a re-determination or re-appraisal under this section, the Deputy Minister shall immediately give notice of that decision to the person who accounted for the goods under subsection 32(1), (3) or (5), the importer of the goods or the person who was the owner of the goods at the time of release, or, in the case of a redetermination of a marking determination under paragraph (*a*.1), to persons who are members of the prescribed class.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Instantaneous trip unit.
3. Distribution protection unit.
4. (10 June 1998), AP-93-392 (CITT) [*ABB 1998*].

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> 67. (1) A person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

EVIDENCE

Mr. John M. Gillies, Consulting Engineer, Protection & Communication, Utility Automation, ABB Inc., testified as an expert witness on behalf of ABB. His expertise is in automatic control systems at power utilities. Mr. Gillies testified that the covers in issue are specifically designed for Type ITH relays, to protect the relays from harmful environmental conditions, and constitute an essential part of a Type ITH relay installation. He testified that the upgrade kits for Type DPU relays constitute an essential part of those relays. The purpose of the upgrade kit is to add functionality to the relay and to correct software faults, including the Y2K bug. Mr. Gillies indicated that both the covers for Type ITH relays and the upgrade kits for Type DPU relays are used for protection and control in an electrical power station. On cross-examination, Mr. Gillies acknowledged that neither the covers in issue nor the upgrade kits in issue constitute, in themselves, relays or relay assemblies.

ARGUMENT

ABB submitted that, in refusing to qualify the goods in issue as subsequent goods and to classify them under Code 2101, the Commissioner made a decision under section 64 of the *Act* that was subject to appeal to the Tribunal under section 67. ABB referred to the detailed adjustment statements (DASs) issued with respect to the goods in issue to support its position that a decision had been made by the Commissioner.

ABB submitted that the goods in issue are like goods to the relays and relay assemblies in *ABB 1998*. It submitted that the relays and relay assemblies in *ABB 1998* were "parts" of larger relay assemblies. ABB submitted that, similarly, the goods in issue are "parts" of relays, larger relays or relay assemblies and should be considered "subsequent goods" and receive the benefit of Code 2101. It added that the goods in issue qualify as "subsequent goods" although they are not, in themselves, relays or relay assemblies.

ABB argued that the goods in issue should be entitled to the benefit of Code 2101, since they are parts of relays that are incorporated in larger relay assemblies that provide information on the status of electrical networks under automatic control of a control centre located in stations or substations and classified under tariff item No. 9032.89.20 of the schedule to the *Customs Tariff*.[5] ABB argued that, in denying the request for application of Code 2101, the Commissioner failed to consider the function and end use of the goods in issue. Relying on previous Tribunal decisions, ABB submitted that separately presented parts of goods, previously entitled to the benefit of Code 2101, are also entitled to the benefit of Code 2101 when incorporated into the host unit.

The Commissioner submitted that the Tribunal does not have jurisdiction to decide this appeal. He argued that, for a decision to be made under subparagraph 64(*e*)(i) of the *Act*, the decision has to give effect to a Tribunal decision, in other words, it has to be positive. In this appeal, because the goods in issue do not qualify as "subsequent goods" to those in *ABB 1998*, any attempt to redetermine would not give effect to a previous Tribunal decision. The Commissioner referred to *Fisher Scientific Ltd. v. Deputy M.N.R.*[6] and *Philips Electronics Ltd. v. Deputy M.N.R.*[7] to support his position that a refusal to entertain a request for

5. S.C. 1997, c. 36.
6. (7 May 1996), AP-94-324 (CITT) [*Fisher*].
7. (18 December 1997), AP-95-224 (CITT) [*Philips*].

redetermination filed under section 64 is not a decision that is subject to appeal to the Tribunal under section 67. With respect to the mention in the DASs that a decision had been made under section 64, the Commissioner submitted that ABB could not have been misled by the wording of the DASs, as it had been informed, both orally and in writing, before the DASs were issued, that he was refusing to redetermine the classification of the goods in issue and would not be making a decision in respect of those goods under section 64.

The Commissioner argued that, in the event that the Tribunal determined that it had jurisdiction to decide this appeal, it should find that the goods in issue are not "subsequent goods" to the goods in *ABB 1998*. The Commissioner submitted that the covers and upgrade kits in issue are not similar in material, characteristics and function to the relays and relay assemblies in *ABB 1998*, and submitted that the latter decision did not deal with components, parts or accessories of relays.

DECISION

The first issue in this appeal is whether the Tribunal has jurisdiction to decide the appeal. Section 67 of the *Act*, as it read at the time of the transactions at issue (as reproduced above), provided that a person who deemed himself aggrieved by a decision of the Deputy Minister of National Revenue made pursuant to section 64 might appeal from the decision to the Tribunal. The question is whether, in this case, the Commissioner made a decision pursuant to section 64 when he decided that the goods in issue did not constitute subsequent goods. That question has been dealt with by the Tribunal in *Fisher* and in *Philips*. In both cases, the Tribunal adopted reasoning based on the Federal Court of Canada's decision in *Mueller Canada Inc. v. Canada*.[8] In *Fisher*, the Tribunal first summarized *Mueller* and then dealt with its impact on the question as to whether a decision had been made under section 64, and stated:

> In *Mueller*, an application was filed with the Federal Court for a declaration that certain decisions made by the respondent pursuant to subsections 60(3) and 63(3) of the Act were "decisions" under the relevant sections of the Act. Alternatively, the applicant sought an order of *mandamus* compelling the respondent to exercise his statutory duty in respect of the requests for re-determination. On May 1, 1990, certain amendments were made to the *Customs Tariff*. The applicant, being of the opinion that this change affected the classification of the goods imported by it, filed a request for re-determination pursuant to sections 60 and 72.1 of the Act. The request under section 60 was rejected. The respondent found that consideration could not be given to the request, as the goods were not covered by the retroactive tariff amendment and as there was no other criteria for consideration. The applicant filed a request for further re-determination pursuant to section 63 of the Act, which was rejected by the respondent. The request was considered invalid on the basis that the time limit for filing such a request had expired and that no decision had been made in respect of the rejection of the request for re-determination under section 60 of the Act.
>
> The Federal Court found that, in forming the opinion that the retroactive amendment did not apply to the applicant's goods, the respondent had to go through a tariff classification exercise. In the view of the Federal Court, this constituted a disguised decision on the merits. By characterizing the decisions as "no decisions" rather than negative decisions, the respondent thwarted the applicant's rights of appeal under sections 60 and 63 of the Act. The Federal Court, therefore, allowed the application.
>
> On the basis of *Mueller*, the Tribunal is of the view that there clearly must be a decision from the respondent with respect to the merits of the tariff classification in order to give the Tribunal jurisdiction under section 67 of the Act. This is not the case in this appeal. Relying on *Mueller*, the Tribunal is of the view that the respondent's refusal to entertain a request for re-determination under section 64 of the Act does not constitute a decision for purposes of section 67 of the Act.[9]

8. [1993] F.C.J. No. 1193 (QL) [*Mueller*].
9. *Supra* note 6 at 3-4.

In *Philips*, the Tribunal adopted the reasoning it had applied in *Fisher*, but determined that, based on the facts of the case, there was no decision for purposes of section 67 of the *Act*.

In this case, the Tribunal adopts the reasoning it applied in *Fisher* and *Philips*, continuing to apply the approach in *Mueller*. Based on the facts of this case, the Tribunal finds that the Commissioner made decisions pursuant to section 64 of the *Act* when he determined that the goods in issue were not subsequent goods. In the Tribunal's view, in making those decisions, the Commissioner had to go through what was in substance a tariff classification exercise.

In considering this issue, the Tribunal relied on the DASs as the primary source of evidence. Both DASs state as follows:

> With respect to the parts, the central issue is whether they qualify as subsequent goods and would therefore qualify for 2101 as well. This is not the case because they are not identical to the goods that [were] under appeal at the Tribunal. Consequently, section [64(*e*)(i)] is not applicable and the use of TC 2101 is not allowed on the parts.

Thus, it is clear that the Commissioner did not simply decide not to address the requests for redetermination. The Commissioner addressed ABB's requests and made negative decisions on the merits of the requests. To qualify those decisions as "no decisions" rather than negative determinations would thwart ABB's right of appeal under section 67 of the *Act*.

In addition, the Tribunal notes that both DASs issued by the Commissioner indicated as follows:

> This represents a decision of the Commissioner of the Canada Customs and Revenue Agency under paragraph [64(*e*)] of the Customs Act.
>
> An appeal of a decision issued under section 63 or 64 of the Customs Act may be made under section 67, by filing a written notice with the Commissioner of the Canada Customs and Revenue Agency and the Secretary of the Canadian International Trade Tribunal within 10 days from the date of the decision.

The Commissioner argued that this part of the DASs did not refer to the goods in issue, but applied only to the decisions under the DASs to qualify certain other goods as subsequent goods. However, the Tribunal does not consider that the Commissioner's point of view is a reasonable interpretation of the DASs. It is clear to the Tribunal that the language and structure of the DASs did not make a distinction, in this regard, between the different types of goods covered. Furthermore, the Commissioner's interpretation would lead to the paradoxical result that the only decisions subject to appeal under section 67 of the *Act* were those that granted ABB's requests.

Given that the Tribunal finds that it has jurisdiction to decide this appeal, it must determine whether the goods in issue are "subsequent goods" to the goods in *ABB 1998*. Subsequent goods under subparagraph 64(*e*)(i) of the *Act* are goods that are "like goods" of the same importer or owner, imported on or prior to the date of importation of the subsequent goods. The only question with respect to the issue of subsequent goods is whether the goods in issue are "like goods" to those in *ABB 1998*.

The expression "like goods" is not defined in the *Act*. *The Canadian Oxford Dictionary* defines "like" as "having some or all of the qualities of another or each other or an original".[10] Similarly, the *Special Import Measures Act*[11] defines "like goods" as "(*a*) goods that are identical in all respects to the other goods, or (*b*) in the absence of any goods described in paragraph (*a*), goods the uses and other characteristics of which closely resemble those of the other goods". In considering the issue of like goods under the Special Import Measures Act, the Tribunal typically looks at a number of factors, including the physical

10. 1998, *s.v.* "like".
11. R.S.C. 1985, c. S-15, s. 2(1).

characteristics, the method of manufacture, the market characteristics and whether the goods fulfil the same customer needs. These same factors are also useful in a "like goods" analysis under the *Act*, bearing in mind that the purpose of such an analysis differs from the purpose of a "like goods" analysis in injury inquiries under the *Special Import Measures Act*.

In the Tribunal's view, the goods in issue have very little in common with the goods in *ABB 1998*. In that case, the goods were relays and relay assemblies. In this case, the goods in issue are not relays but rather covers and software upgrade kits for relays. Clearly, the goods in issue are not identical to the goods in *ABB 1998*.

With respect to physical characteristics, the goods in issue and those in *ABB 1998* do not seem to share much except for the fact that they are comprised in a larger whole. This is certainly not enough to warrant a determination that they are similar in characteristics. There is an infinite number of examples where two goods are comprised in a larger whole, but nonetheless cannot be said to be similar in characteristics. For example, a car engine and a car hood are not similar in characteristics.

The functions of the goods in issue, as compared to those of the goods in *ABB 1998*, confirm how different they are. The covers serve to protect the relays from harmful environmental conditions. The upgrade kits serve to add functionality to the relays and to correct faults in the software of the relays. The relays or relay assemblies in *ABB 1998* served to protect electrical circuits from electrical problems and to transmit data on the system's operation to the control centre. It was this latter capability that qualified the relays as part of process control and, hence, made them eligible for the benefit of Code 2101. Clearly, the goods in issue do not fill customer needs similar to those filled by the goods in *ABB 1998*. Similarly, the evidence did not indicate that they have similar market characteristics.

On the basis of the above analysis, the Tribunal finds that the covers for Type ITH relays and the upgrade kits for Type DPU relays in issue are not like goods to the goods in *ABB 1998* and, hence, do not constitute, for the purpose of subparagraph 64(*e*)(i) of the *Act*, "subsequent goods" to the goods in *ABB 1998*. Therefore, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member