Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2002-027, AP-2002-029 to AP-2002-033 and AP-2002-108

Asea Brown Boveri Inc.

v.

Commissioner of the Canada Customs and Revenue Agency

Decision and reasons issued Tuesday, October 18, 2005

Canada

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IN THE MATTER OF an appeal heard on March 22, 2004, 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 May 23 and 27, 2002, made under subparagraph 64(*e*)(i) 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 appeals are allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 22, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth Marie-France Dagenais Nick Covelli
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Stan E. Morris, for the appellant Alexander Gay, for the respondent

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STATEMENT OF REASONS

1. These appeals are made pursuant to subsection 67(1) of the *Customs Act*[1] from decisions of the Commissioner of the Canada Customs and Revenue Agency (the CCRA) (now the President of the Canada Border Services Agency [CBSA]). The appeals are with respect to the CCRA's decisions regarding goods imported between January 27, 1988, and April 16, 1997. The decisions are with respect to requests made by Asea Brown Boveri Inc. (ABB) to have the CCRA determine that goods imported between January 18, 1988, and October 28, 1994, are like goods and qualify as subsequent goods to the goods in *Asea Brown Boveri Inc. v. Deputy M.N.R.*[2] pursuant to subparagraph 64(*e*)(i) of the *Act*.

2. In the decisions under appeal, the CCRA decided that the goods in issue were not like goods to the goods identified in *ABB 1998*[3] and did not qualify as subsequent goods. Further, the CCRA stated that the goods did not qualify for tariff relief under Code 2101 ". . . as they [were] not integral to the function of the control centers, but [were] only complementary to the integral components . . . ." In several of the decisions, the CCRA stated the following:

> . . .
>
> The subject good did not form part of the decision in CITT AP-93-092 et al, nor is it in the agreed to November 1999 list of "like" goods for purposes of subsection 64(E) of the Customs Act.
>
> Consequently, the subject good is not considered to be a subsequent good, therefore the claim is cancelled and no decision will be rendered.
>
> . . .

3. In a few decisions, the CCRA simply stated the following: "64(E)(I) not applicable. This claim is cancelled. . . ."

4. On October 4, 2002, the Tribunal placed these appeals in abeyance pending its decision in *Asea Brown Boveri Inc. v. Commissioner of the Canada Customs and Revenue Agency*,[4] which also involved an appeal by ABB of the CCRA's decision under subparagraph 64(*e*)(i) of the *Act* that certain goods were not like goods to those identified as subsequent goods in *ABB 1998* and did not qualify as subsequent goods.

ABB 1998

5. In *ABB 1998*, ABB appealed the classification of "relays" or "relay assemblies" imported between January 18, 1988, and December 14, 1991. The goods under appeal in *ABB 1998* were described as follows:

> . . .
>
> The goods in issue are described as relays or relay assemblies. They range from single individual relays that perform simple operations, such as measuring voltage, current, speed, temperature, etc., which react to pre-set parameters to control the operation of industrial equipment, such as electric generating sets in generating stations, to very complex sophisticated relay assemblies that perform all of the necessary functions to control or regulate automatically an industrial process, such as the generation, transmission or distribution of electricity.
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> . . .
>
> [Footnotes omitted]

6. The Tribunal allowed the appeals in part, sending the matter back to the respondent for further consideration.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. (10 June 1998), AP-93-392 (CITT) [*ABB 1998*].
3. *ABB 1998* at 18.
4. (16 May 2003), AP-2002-004 (CITT) [*ABB 2003*].

LEGAL FRAMEWORK

7. The following provisions of the *Act* as it read at the time of the transactions at issue are relevant to this matter:

> 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 re-determination of a marking determination under paragraph (*a*.1), to persons who are members of the prescribed class.
>
> 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.

> 64. Le sous-ministre peut procéder au réexamen du classement tarifaire, de la décision sur la conformité des marques ou de l'appréciation de la valeur en douane des marchandises importées :
>
> *e*) à tout moment, au cas où le nouveau classement ou la nouvelle appréciation résultant du réexamen donnerait effet, pour ce qui est des marchandises en cause, à une décision du Tribunal canadien du commerce extérieur, de la Cour d'appel fédérale ou de la Cour suprême du Canada, ou du sous-ministre en application de l'alinéa *b*), rendue au sujet :
>
> (i) soit d'autres marchandises pareilles du même importateur ou propriétaire importées au plus tard à la même date que les marchandises en cause, si la décision porte sur le classement tarifaire des premières,
>
> (ii) soit d'autres marchandises du même importateur ou propriétaire importées au plus tard à la même date que les marchandises en cause, si la décision porte sur le mode de détermination de la valeur en douane des premières.
>
> Le cas échéant, il donne avis sans délai de sa décision à la personne qui a déclaré en détail les marchandises en cause en application des paragraphes 32(1), (3) ou (5), à l'importateur des marchandises, à la personne qui était propriétaire des marchandises au moment de leur dédouanement et, dans le cas de la révision de décisions sur la conformité des marques prévues à l'alinéa *a*.1), aux personnes de la catégorie réglementaire.
>
> 67. (1) Toute personne qui s'estime lésée par une décision du sous-ministre rendue conformément à l'article 63 ou 64 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du sous-ministre et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

PRELIMINARY MATTER

8. As indicated, section 67 of the *Act* provides that a person who deems himself aggrieved by a decision of the Deputy Minister of National Revenue (now the President of the CBSA) made pursuant to section 64 may appeal to the Tribunal. The issue in these appeals is whether the Tribunal has jurisdiction to deal with some of the decisions that are the subject of these appeals, where the CCRA cancelled the claim on the grounds that no decision had been rendered, as, in the CCRA's view, subparagraph 64(*e*)(i) was not applicable.

9. ABB argued that the Tribunal has jurisdiction to consider these appeals, since, in its view, the CCRA made decisions under subparagraph 64(*e*)(i) of the *Act*. Referring to the Federal Court of Canada's decision in *Mueller Canada Inc.* v. *Canada*,[5] ABB argued that, in not re-determining the goods in issue as subsequent goods, the CCRA made a tariff classification decision pursuant to section 64, from which there was a right of appeal to the Tribunal according to section 67. According to ABB, to allow the characterization by the CCRA of its decision as "no decision" rather than a negative decision would thwart its right of appeal.

10. The CCRA acknowledged that the Tribunal has jurisdiction over most of the "decisions" at issue, but not with respect to the detailed adjustment statements that were cancelled. According to the CCRA, there was no ambiguous statement in the DASs, as there had been in *ABB 2003* since, in the present case, the referenced DASs stated that the transactions were simply cancelled, with no tariff classification exercise having been made. The CCRA argued that, when an importer asks for a decision, there are three options: granting of the request, denial of the request or "no decision". If the Tribunal is to determine that a cancelled transaction constitutes a decision, then the CBSA will simply be unable to communicate to importers that it has decided to make no decision since it would give rise to rights of appeal.

11. The Tribunal notes that, in *ABB 2003*, it addressed the issue of whether it had jurisdiction to consider appeals regarding negative decisions made by the CCRA pursuant to subparagraph 64(*e*)(i) of the *Act*. In that appeal, the Tribunal based its decision on the principle established in the Federal Court of Canada's decision in *Mueller*:

> . . .
>
> 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 . . . .
>
> 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.[6]
>
> . . .

The Tribunal further held:

> . . .

5. [1993] F.C.J. No. 1193 (QL) [*Mueller*].
6. *ABB 2003* at 3.

> 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.
>
> . . .
>
> . . . 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.[7]
>
> . . .
>
> [Footnotes omitted]

12. The Tribunal notes that there is a distinction to be made between the present appeals and *ABB 2003*. In *ABB 2003*, the CCRA indicated that the goods were not subsequent goods, together with a statement that the person had a right of appeal to the Tribunal pursuant to section 67 of the *Act*. There were different statements here. Rather, the CCRA simply advised that the respective DAS was "cancelled", such that "no decision [was] rendered as [paragraph] 64(E)(I) [of the Act] is not applicable" to goods included therein.[8]

13. The Tribunal is satisfied that, in this case, in determining whether to cancel the transactions, the CCRA had to go through what was, in substance, a tariff classification exercise, given the subject matter that the CCRA needed to consider in order to determine that the goods did not qualify under subparagraph 64(*e*)(i) of the *Act*. By characterizing these negative decisions as "no decisions", the CCRA thwarted ABB's rights of appeal under section 67. For this reason, the Tribunal finds that it has jurisdiction to consider these decisions.

EVIDENCE

14. Mr. Max Degerfalt, Engineering Manager for ABB in Burlington, Ontario, testified on behalf of ABB. Mr. Degerfalt has worked with relay and relay systems for over 25 years. At the hearing of these appeals, Mr. Degerfalt was qualified as an expert in "how the relays are put together in order to function as a relay system within a power utility".[9]

15. Mr. Degerfalt testified that the goods in issue are relays and parts of relays that are used to build complete protection and control assemblies for utility power networks. Mr. Degerfalt testified that the requirements for relays in the power transmission and distribution networks and generation are very high. He testified that the relays are built to the IEEE/ANSI[10] standard c37.90, which is a much higher standard than is required for other purposes and, consequently, relays made to this standard are much more expensive than systems used for other applications. He explained that, according to the standard, "relays" are defined as follows:

> An electric device designed to respond to input conditions in a prescribed manner and after specified conditions are met to cause contact operation or similar abrupt change in associated electric control circuits.[11]

7. *ABB 2003* at 4.
8. Tribunal Exhibit AP-2002-029-1.
9. *Transcript of Public Hearing*, 22 March 2004, at 8.
10. Institute of Electrical and Electronic Engineers/American National Standards Institute.
11. *Transcript of Public Hearing*, 22 March 2004, at 13.

16. Mr. Degerfalt testified that the standard provides a classification system of relays by function, input, operating principle and performance.

17. Mr. Degerfalt testified regarding a "list of relays" dated March 19, 2003, that had been approved by the CCRA as goods qualifying as subsequent goods in relation to the goods in *ABB 1998* and that qualified for tariff relief under Code 2101. He also testified regarding a list of goods in issue contained in a document dated February 17, 2003, in which he expressed the opinion that these goods were similar in function and characteristic to those listed in *ABB 1998*. Mr. Degerfalt testified that contactors, which are included in the goods in issue, could be used as control relay systems for switching disconnecters and circuit breakers. Mr. Degerfalt described the makeup of a "process control apparatus", as well as the structure of a relay.

18. Mr. Degerfalt explained the different components of a relay system and indicated that they are all essential to its operation. He expressed the view that parts of a relay system are themselves relays. He further testified that the RADSB is an assembly for protecting a big power transformer, while the RXTUG is the power supply component. Mr. Degerfalt testified that the components cannot operate on their own, but are mounted in a box on a panel to form the total system. He further testified that the RXDSB measuring module is a relay and is an integrated part of protective relay type RADSB and that RXIED is a relay and an integrated part of protective relay type RAZFE, which is a distance relay. Similarly, Mr. Degerfalt testified that relay type RXSP is an alarm relay.

19. It was explained that the list of the goods in issue includes goods that are not relays, such as measuring and converter units, and mounting components, including apparatus bars and mounting frames, which are essential to the use of relays. The RTQTB was described as an input unit, otherwise known as a transformer unit, which is not a relay. The RXTUG was described as a power supply unit. The RXME, RXSF and RXSL are signal relays. All these goods in issue function as relays, according to Mr. Degerfalt, but are not called relays when sold on their own, since they are purchased as spare parts.

20. Mr. Degerfalt testified that the Combiflex Modular System is made up of different plug-in units on the base, which are connected on the apparatus bar and placed inside a case.

21. Mr. Degerfalt testified that there might be differences between a relay and a relay system. He testified that several of the goods in issue, such as the RXSP 1 indicator, apparatus bar and RXSGA, are component parts of relay systems. Further, he testified that many of the goods in issue may be imported separately by utility companies as spare parts and that several of the relays can be used wherever there is a high-voltage power system, such as on ships and offshore oil platforms, not necessarily only in hydro-electric power plants.

22. In answering questions from the Tribunal regarding the goods in issue as compared to the goods in *ABB 1998*, Mr. Degerfalt testified that most of the goods in issue are updated versions of the goods in *ABB 1998*. In comparing the goods in *ABB 1998* to the goods listed in issue, he testified as follows:

- RADSE Differential Relay is an older version of RADSP;
- RVH Thermal Relay has the same function as RXVE, but a different technology;
- RVZP is mounted in a different way from RXVE, but has the same technology;
- TU is the same as RXED and SPAU with a different mounting;
- RXFE and TFF are frequency-measuring relays identical to RFA, but RFA uses an older mounting principle;
- EH is the next generation of EG; they are the same contactors, but one is an updated version;
- RXSF is, in principle, similar to RXSP, but it has more contacts and less flags;

- RXOTB is the same as SPAU and the same as RXEG in function, but with different mounting principles; RXEG and RXOTB have the same technology; SPAU has a more modern technology and a microprocessor inside it;
- RXMK and RXMA are the same function wise, but RXMK measures AC, which is a different voltage; PR is also the same as RXMA, in principle;
- RQDA is a measuring part of RADSG;
- RXIED is similar to RXID, RXIL, RXIK and RXIC; they are current measuring relays, but are very high-speed and have four signals to start;
- RACID is the same as the goods in *ABB 1998*;
- RXDSB is the measuring unit of RADSB;
- RXMBB is the same as RXMA, but it has several relays in the same case;
- RXMP has a lot of similarities to RXIG.

ARGUMENT

23. ABB argued that the issue in these appeals is whether the parts in the present appeals are "like goods" to the relays or relay assemblies in *ABB 1998*, since they were also parts of relay, relay cubicles or relay panels.

24. ABB argued that, in *ABB 1998*, the Tribunal classified individual relays and relay assemblies and that the Tribunal found that both were parts of larger relay panels or cubicles. ABB further argued that the goods in issue, including the transformers and mounting brackets, are also parts of relay assemblies and, therefore, like goods to those in *ABB 1998*. Therefore, the goods in issue should be considered to be subsequent goods.

25. ABB argued that, since relay cubicles and relay panels might share the same tariff classification as parts of a relay or relay assembly, they are like goods to the relays or relay assemblies in *ABB 1998*.

26. Further, ABB argued that the only definition of "like" goods that should be applied in these appeals is that found in Memorandum D11-6-3[12] as it was at the time of importation. ABB pointed out that Memorandum D11-6-3 provides that goods must be the same in material characteristic, but that does not mean that they have to be identical to be like goods, as argued by the CCRA.

27. In response to submissions made by the CCRA, ABB submitted that it did not neglect or refuse to supply information regarding the goods in issue that would have enabled the CCRA determine if they were subsequent goods. ABB explained that it provided a document describing the goods that was written in Swedish, since there was no English version of the information.

28. The CCRA argued that it had requested from ABB information regarding a number of the goods in issue, but none was forthcoming. Further, the CCRA argued that the entry of evidence, in these appeals, of documentation describing the goods in issue as relays, in Swedish, does not provide adequate opportunity to respond. The CCRA argued that the process undertaken, in the appeals, of asking the witness whether the goods in issue were or were not similar to those in *ABB 1998* is not appropriate, since such a determination is to be made by Customs officials. Therefore, the CCRA requested that, if the Tribunal is persuaded that the appeals should be allowed, the matter should be directed back to the CCRA to determine whether the goods in issue are like goods and whether Code 2101 applies, in consideration of this new evidence.

12. *Administrative Policy Respecting Re-determinations or Further Re-determinations Made Pursuant to Paragraph 61(1)(c) of the Customs Act* (18 March 1998) (CBSA).

29. The CCRA argued that the test for like goods for the purposes of subparagraph 64(*e*)(i) of the *Act* is quite strict. Referring to Memorandum D11-6-3, in order to be like goods, the goods in issue in these appeals must be identical in "material characteristics" and must carry on an activity which fulfils the purpose of the goods in *ABB 1998*. The CCRA argued that the goods in *ABB 1998* were relays or relay assemblies, which were self-contained units. The CCRA characterized the goods in the present appeals as parts of relays. According to the CCRA, *ABB 1998* did not involve mounting brackets, boxes, labels, keys or locks, which are the goods in the present appeals.

30. The CCRA disputed the argument that goods that share the same tariff heading are somehow like goods. Citing the example of horses and cows, the CCRA argued that a tariff heading can in fact include two items that are very different.

31. Regarding the application of Code 2101, the CCRA argued that it simply was not provided with rufficient evidence to make a deuermination that Code 2101 applies to the goods in issue.

DECISION

32. In these appeals, the Tribunal must determine whether the goods in issue are "subsequent goods" to the goods in *ABB 1998*. As indicated, subsequent goods under subparagraph 64(*e*)(i) of the *Act* are goods that are "like goods" to goods of the same importer or owner, imported on or prior to the date of importation of the subsequent goods. The goods in *ABB 1998* were also imported by ABB, and the date of importation of the goods in issue in the present appeals was subsequent to the date of importation of the goods in *ABB 1998*. Therefore, 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*.

33. In determining whether the goods in these appeals are subsequent goods to the goods listed in *ABB 1998* pursuant to subparagraph 64(*e*)(i) of the *Act*, the parties proposed several different tests, derived from a D Memorandum, a Customs Notice and the Customs Valuation Code. The Tribunal will follow the same approach as it applied in *ABB 2003*. In that case, the Tribunal examined the factors that it typically considers when considering the issue of like goods under the *Special Import Measures Act*,[13] such as the physical characteristics, the method of manufacture, the market characteristics and whether the goods fulfil the same customer needs.

34. In the present case, the goods in issue are listed in the appellant's submissions and are described as relays and ". . . necessary and essential components of relays, relay assemblies and other large relay or protection and control panels . . . ."[14]

35. The evidence presented at the hearing was that the goods listed in the appellant's brief[15] as "Relays" were relays or relay assemblies and had some similarities to the goods listed in *ABB 1998*, the original decision. In the Tribunal's view, the uncontradicted evidence shows that, in fact, some of these goods are identical to the goods listed in *ABB 1998*. In addition, the Tribunal accepts the expert testimony of Mr. Degerfalt to the effect that certain other goods are very similar to the goods listed in *ABB 1998* and only differ from those goods in the way in which they are mounted. In light of this expert evidence, the Tribunal determines that these two categories of goods qualify as subsequent goods to the goods listed in *ABB 1998*

13. R.S.C. 1985, c. S-15.
14. Appellant's brief, Part II, at 4.
15. Appellant's brief, Tab 1(a).

and should qualify for the more favourable tariff treatment of Code 2101, as determined by the CCRA when it further considered the goods in *ABB 1998*.

36. The Tribunal finds that all other relays and parts of relays are not like goods to the goods in *ABB 1998*. In particular, the relays that perform the same function as the goods listed in *ABB 1998*, but have newer technology, the relays with higher voltage than the goods listed in *ABB 1998*, and the relays that are not on the *ABB 1998* list are not sufficiently like the goods listed in *ABB 1998*. Further, the goods described by ABB as "Other Parts (not indicated as a Relay)" seem to have very little in common with the goods in *ABB 1998*, given that these goods are parts and the goods in *ABB 1998* are complete relays. ABB argued that they are essential parts of the relay assemblies and, as such, should be treated as if they were the goods of which they are parts. In support of its position, ABB pointed to the rules of classification that, in some instances, call for the classification of parts "for use in" goods under the same tariff heading as the complete goods.

37. In the Tribunal's view, this is not the proper test for determining this issue. The provision for "subsequent goods" is an exception to the general rule that allows for a re-determination of a tariff classification after the normal time limits for appeal have expired, but only if the goods in issue are like the goods imported prior to the date of importation of the goods in issue and subject to a previous determination. In the Tribunal's view, this provision does not extend to parts of the original goods, regardless of their relationship to the original goods.

38. Consequently, the appeals are allowed in part.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member