Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2008-030 and AP-2009-048

Arnold Bros. Transport Ltd. and Bison Transport Inc.

v.

Minister of National Revenue

Decision and reasons issued
Friday, April 30, 2010

Canada

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IN THE MATTER OF appeals heard on January 14, 2010, pursuant to section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue, dated November 28, 2008, and February 17, 2009, with respect to notices of objection served pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

ARNOLD BROS. TRANSPORT LTD. AND BISON TRANSPORT INC. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION

The appeals are dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 14, 2010
Tribunal Members:	Serge Fréchette, Presiding Member Ellen Fry, Member Stephen A. Leach, Member
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STATEMENT OF REASONS

BACKGROUND

1. These are appeals pursuant to section 81.19 of the *Excise Tax Act*[1] from decisions of the Minister of National Revenue (the Minister), dated November 28, 2008, and February 17, 2009, with respect to notices of objection served pursuant to section 81.17.

2. These decisions dismissed applications made by Arnold Bros. Transport Ltd. (Arnold) and Bison Transport Inc.[2] (Bison) for refunds of excise tax paid on diesel fuel purchased in Canada but consumed in the United States by their commercial trucks transporting goods from Canada to the United States. The Minister dismissed the applications because they had not been filed within the two-year time limit prescribed by subsection 68.1(1) of the *Act*.

3. The issue in these appeals is whether Arnold's and Bison's applications were filed within the time frames prescribed by the *Act*.

PROCEDURAL HISTORY

Arnold

4. Arnold filed an application pursuant to section 68 of the *Act*, dated September 26, 2000, for a refund of excise tax allegedly paid in error on diesel fuel used as heating oil or for generating electricity (in relation to the heating or cooling of highway trailers or sea containers). The diesel fuel was purchased between September 1, 1998, and September 30, 2000.

5. On November 20, 2002, the Federal Court of Appeal ruled, in *Penner International Inc. v. Canada (C.A.)*,[3] that diesel fuel purchased in Canada but consumed in the United States by commercial trucks transporting goods from Canada to the United States must be considered an export under the *Act* and that, therefore, excise tax paid on the purchase of diesel fuel for this use is eligible for the tax refund provided for in section 68.1 of the *Act*.

6. On December 30, 2002, Arnold filed an application pursuant to subsection 68.1(1) of the *Act* for a refund of excise tax allegedly paid on diesel fuel that it purchased in Canada but consumed in the United States during the same period as its previous application, i.e. September 1, 1998, to September 30, 2000. The application indicated that it was ". . . an addition to the previously filed [application] . . . ."

7. On December 20, 2004, the Minister issued a notice of determination disallowing Arnold's September 26, 2000, application for a refund of excise tax paid in error in respect of diesel fuel used as heating oil or for generating electricity. On the same date, the Minister issued a separate notice of determination disallowing Arnold's December 30, 2002, application for a refund of excise tax paid in respect of exported diesel fuel.

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1. R.S.C. 1985, c. E-15 [*Act*].
2. The appellant in Appeal No. AP-2009-048 was originally identified as Bison Diversified Inc. o/a Bison Transport. However, on April 1, 2010, the appellant's representative informed the Tribunal that, on April 8, 2002, Bison Diversified Inc. changed its name to Bison Transport Inc. On April 13, 2010, the Tribunal informed the parties to the appeal that the style of cause would now refer to Bison Transport Inc.
3. [2003] 2 F.C. 581 (F.C.A.) [*Penner*].

8. Arnold served notices of objection dated January 27, 2005, on the Minister regarding the December 20, 2004, notices of determination.

9. On May 2, 2007, the Federal Court ruled, in *Imperial Oil v. Canada*,[4] that diesel fuel used in an internal combustion engine of the compression-ignition type for the generation of heat for industrial purposes (including powering a compressor that heats the refrigerant used to heat or cool highway trailers) is considered to be "heating oil" under the *Act* and, thus, not subject to excise tax payable on "diesel fuel".

10. On November 28, 2008, the Minister issued a notice of decision allowing Arnold's objection regarding excise tax allegedly paid in error in respect of diesel fuel used as heating oil or for generating electricity, subject to adjustments relating to the timing of some purchases. On the same date, the Minister issued a separate notice of decision disallowing Arnold's objection regarding excise tax allegedly paid in respect of exported diesel fuel, thereby confirming its determination of December 20, 2004.

11. On February 26, 2009, Arnold appealed to the Tribunal the Minister's decision to disallow its objection regarding excise tax allegedly paid in respect of exported diesel fuel.

Bison

12. Bison filed an application pursuant to section 68 of the *Act* dated October 10, 2000, for a refund of excise tax allegedly paid in error on diesel fuel used as heating oil. The diesel fuel was purchased between September 1, 1998, and September 30, 2000.

13. After the Federal Court of Appeal issued its decision in *Penner* on November 20, 2002, but prior to February 21, 2005,[5] Bison also filed an application pursuant to subsection 68.1(1) of the *Act* for a refund of excise tax allegedly paid on diesel fuel that it purchased in Canada but exported to the United States during the same period as its previous application, i.e. September 1, 1998, to September 30, 2000. Bison requested that its previously filed application ". . . be amended to add this [additional] application . . . ."

14. On February 21, 2005, the Minister issued a notice of determination disallowing Bison's application for a refund of excise tax paid in error in respect of diesel fuel used as heating oil and rejecting Bison's request to amend the application to include excise tax paid on exported diesel fuel.

15. On March 23, 2005, Bison served a notice of objection on the Minister regarding the February 21, 2005, notice of determination.

16. On February 17, 2009, after the Federal Court had issued its decision in *Imperial Oil*, the Minister issued a notice of decision allowing Bison's objection regarding excise tax allegedly paid in error in respect of diesel fuel used as heating oil. However, the notice of decision disallowed Bison's objection regarding excise tax allegedly paid in respect of exported diesel fuel, thereby confirming its determination of February 21, 2005.

4. 2007 FC 464 [*Imperial Oil*].
5. Bison's application for a refund of excise tax paid in respect of exported diesel fuel is dated December 11, 2005. However, since the evidence indicates that the Minister rejected this application on February 21, 2005, the Tribunal considers that the date indicated on the application is incorrect and that Bison actually applied for a refund of excise tax paid in respect of exported diesel fuel before February 21, 2005.

17. On August 12, 2009, Bison appealed to the Tribunal the Minister's decision to disallow its objection regarding excise tax allegedly paid in respect of exported diesel fuel.[6]

18. As the appeals filed by Arnold and Bison dealt with the same subject matter, counsel in both appeals were the same and all parties consented, the Tribunal decided to hear the appeals simultaneously.

LEGISLATIVE PROVISIONS

19. Subsection 23(1) of the *Act* provides for the imposition of an excise tax in respect of the goods mentioned in Schedule I. It reads as follows:

> **23.** (1) Subject to subsections (6) to (8), whenever goods mentioned in Schedule I are imported or are manufactured or produced in Canada and delivered to a purchaser of those goods, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other law, an excise tax in respect of the goods at the applicable rate set out in the applicable section of that Schedule, computed, if that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.
>
> **23.** (1) Sous réserve des paragraphes (6) à (8), lorsque les marchandises énumérées à l'annexe I sont importées au Canada, ou y sont fabriquées ou produites, puis livrées à leur acheteur, il est imposé, prélevé et perçu, outre les autres droits et taxes exigibles en vertu de la présente loi ou de toute autre loi, une taxe d'accise sur ces marchandises, calculée selon le taux applicable figurant à l'article concerné de cette annexe. Lorsqu'il est précisé que ce taux est un pourcentage, il est appliqué à la valeur à l'acquitté ou au prix de vente, selon le cas.

20. Section 9.1 of Schedule I to the *Act* mentions diesel fuel and sets out the applicable rate.

21. Subsection 2(1) of the *Act* indicates that "diesel fuel" does not include fuel oil that is used as heating oil. It provides as follows:

> "diesel fuel" includes any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel oil that is intended for use and is actually used as heating oil.
>
> « combustible diesel » S'entend notamment de toute huile combustible qui peut être utilisée dans les moteurs à combustion interne de type allumage par compression, à l'exception de toute huile combustible destinée à être utilisée et utilisée de fait comme huile à chauffage.

22. In addition, paragraph 23(8)(*c*) of the *Act* provides that the excise tax imposed pursuant to subsection 23(1) is not payable in the case of diesel fuel used for generating electricity. It provides as follows:

> (8) The tax imposed under subsection (1) is not payable in the case of
>
> . . .
>
> (*c*) diesel fuel for use in the generation of electricity, except where the electricity so generated is used primarily in the operation of a vehicle.
>
> (8) La taxe imposée en vertu du paragraphe (1) n'est pas exigible :
>
> [...]
>
> *c*) dans le cas de combustible diesel devant servir à la production d'électricité, sauf lorsque l'électricité ainsi produite est principalement utilisée pour faire fonctionner un véhicule.

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6. On July 17, 2009, in response to an application made by Bison pursuant to subsection 81.32(1) of the *Act* for an extension of time to file an appeal pursuant to section 81.19, the Tribunal, pursuant to subsection 81.32(7), granted the extension of time and allowed Bison until August 14, 2009, to file an appeal. See *Bison Diversified Inc. o/a Bison Transport* (17 July 2009), EP-2009-001 (CITT).

23. Subsection 68(1) of the *Act* allows a person to apply, within a specified time frame, for a refund of excise tax paid in error in respect of any goods. It reads as follows:[7]

> **68**. (1) If a person, otherwise than pursuant to an assessment, has paid any moneys in error in respect of any goods, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of the moneys shall, subject to this Part, be paid to the person if the person applies for the payment of the amount within two years after the payment of the moneys.
>
> **68**. (1) Lorsqu'une personne, sauf à la suite d'une cotisation, a payé relativement à des marchandises, par erreur de fait ou de droit ou autrement, des sommes d'argent qui ont été prises en compte à titre de taxes, de pénalités, d'intérêts ou d'autres sommes en vertu de la présente loi, un montant égal à ces sommes d'argent est versé à la personne, sous réserve des autres dispositions de la présente partie, si elle en fait la demande dans les deux ans suivant le paiement de ces sommes.

24. Subsection 68.1(1) of the *Act* allows a person to apply, within a specified time frame, for a refund of excise tax paid in respect of goods that have been exported from Canada. It reads as follows:

> **68.1** (1) Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations made by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if that person applies therefor within two years after the export of the goods.
>
> **68.1** (1) Lorsque la taxe prévue par la présente loi a été payée sur des marchandises qu'une personne a exportées du Canada en conformité avec les règlements pris par le ministre, un montant égal à cette taxe est, sous réserve des autres dispositions de la présente partie, payé à la personne si elle en fait la demande dans les deux ans suivant l'exportation des marchandises.

25. However, following the Federal Court of Appeal's decision in *Penner*, the Government amended the *Act* by adding subsection 68.1(3) to make it clear that a refund of excise tax is not available in respect of diesel fuel transported out of the country in the fuel tank of a vehicle. Subsection 68.1(3) provides as follows:

> **68.1** (3) For greater certainty, no amount is payable to a person under subsection (1) in respect of tax paid on gasoline or diesel fuel transported out of Canada in the fuel tank of the vehicle that is used for that transportation.
>
> **68.1** (3) Il est entendu qu'aucun montant n'est à payer à une personne aux termes du paragraphe (1) au titre de la taxe payée sur l'essence ou le combustible diesel qui est transporté en dehors du Canada dans le réservoir à combustible du véhicule qui sert à ce transport.

26. Subsection 68.1(3) of the *Act* only applies in respect of applications for refund received by the Minister after February 17, 2003.[8]

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7. In 2007, section 68 of the *Act* was amended by section 43 of the *Budget Implementation Act, 2007*, S.C. 2007, c. 29, and the changes were deemed to have come into force on September 3, 1985. Although the changes made to subsection 68(1) of the *Act* were very minor in nature, a new section was added (section 68.01) to provide for a specific mechanism to allow end users to file applications for refunds of excise tax paid on diesel fuel used as heating oil or to generate electricity. Subsection 43 of the *Budget Implementation Act, 2007* also provided that, if an application that had already been made pursuant to section 68 of the *Act* could have been made pursuant to section 68.01 of the *Act*, the application was deemed to have been made pursuant to section 68.01 of the *Act*. The Tribunal has not considered it necessary to reproduce these provisions here as they are not relevant for purposes of the Tribunal's analysis and its disposition of the present appeals.
8. See subsection 63(2) of the *Budget Implementation Act, 2003*, S.C. 2003, c. 15.

27. Therefore, in summary, an application for a refund of excise tax, whether paid in respect of diesel fuel used as heating oil or for generating electricity or whether paid in respect of exported diesel fuel, must be made within two years of the payment of the excise tax or within two years after the export of the goods. In the case of diesel fuel transported out of Canada in the fuel tank of a vehicle used for that transportation, the application must also have been made on or before February 17, 2003.

ANALYSIS

28. The parties agree that, as indicated above, applications for refunds of excise tax paid in respect of exported diesel fuel were filed by Arnold on December 30, 2002, and by Bison sometime after November 20, 2002 (i.e. after the decision in *Penner*). The issue in these appeals is whether these applications (the applications in issue) were filed within the applicable limitation periods.

29. It is clear that, on their face, these applications were filed outside the two-year time limit prescribed by subsection 68.1(1) of the *Act* (i.e. they were made more than two years after the alleged export of the diesel fuel)[9] and that, since Bison's application was filed sometime after November 20, 2002, it may have been filed after the deadline of February 17, 2003, prescribed by subsection 63(2) of the *Budget Implementation Act, 2003*.

30. However, Arnold and Bison submitted that, following the Federal Court of Appeal's decision in *Penner*, they immediately took steps to expand their previous applications for refunds of excise tax paid in error on diesel fuel used as heating oil or for generating electricity (the original applications) to include diesel fuel exported during the same period. They argued that, by taking these steps, i.e. by filing applications on December 30, 2002, and after November 20, 2002, respectively, they had applied for refunds within two years after the export of the diesel fuel, as required by subsection 68.1(1) of the *Act*.

31. Arnold and Bison submitted that, when the Minister issued notices of determination on December 20, 2004, and February 21, 2005, the Minister was aware of the *Penner* decision and of the fact that both Arnold and Bison wished to expand the original applications to include exported diesel fuel. In their view, the original applications were still "open" and established a right to refunds pursuant to the *Act*. As the original applications were amended before they were considered by the Minister, in their view, the Minister had an obligation to apply the *Penner* decision to its consideration of the amended applications.

32. Arnold and Bison also submitted that the circumstances of the present appeals can be distinguished from those that existed in *Scott Paper Limited v. Canada*.[10] In *Scott Paper*, the Federal Court of Appeal, in upholding decisions of the Tribunal[11] and the Federal Court,[12] determined that a claim for a refund of federal sales tax paid on facial tissue could not subsequently be interpreted to include tax paid on bathroom tissue. Arnold and Bison submitted that, in the present appeals, there is only one product involved—diesel fuel. They submitted that a second distinction was that they had advised the Minister that they wished to expand the original applications before the Minister issued notices of determination and not after, as was the case in *Scott Paper*. They submitted that a third distinction was that the present appeals deal with applications for refunds of excise tax, whereas *Scott Paper* dealt with an application for a refund of federal sales tax.

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9. The diesel fuel was exported during the period from September 1, 1998, to September 30, 2000.
10. 2006 FCA 372 (CanLII) [*Scott Paper*].
11. *Scott Paper Limited v. M.N.R.* (11 April 2002), AP-2000-034 (CITT).
12. *Scott Paper Ltd. v. Canada*, 2005 FC 1354 (CanLII).

33. In support of their position, Arnold and Bison also referred to the Tribunal's decision in *Erin Michaels Mfg. Inc. v. M.N.R.*,[13] in which additional information came to light before the Minister disposed of a refund application.

34. The Minister disagreed with the position advanced by Arnold and Bison that the applications in issue expanded the original applications. The Minister submitted that the original applications pertained to diesel fuel used as heating oil or for generating electricity, while the applications in issue pertained to exported diesel fuel. Therefore, in the Minister's view, the applications in issue were new and separate applications that fell outside the two-year time limit prescribed by subsection 68.1(1) of the *Act* and, in the case of Bison, the application was also made after the deadline of February 17, 2003, prescribed by subsection 63(2) of the *Budget Implementation Act, 2003*.

35. The Minister also disagreed with the interpretation by Arnold and Bison of the Federal Court of Appeal's decision in *Scott Paper*. The Minister noted that, in *Scott Paper*, the Federal Court of Appeal found that, in filing its claim in May 1992, Scott Paper Limited was not claiming and did not intend to claim a refund in regard to tax paid in error on bathroom tissue. It submitted that Arnold and Bison, in filing their original applications, were not claiming and did not intend to claim a refund in respect of excise tax paid on exported diesel fuel. The Minister submitted that the original applications made no mention of excise tax paid on exported diesel fuel and provided no indication that they were being made to comply with the time limitations under the *Act* pending the decision in *Penner*. The Minister noted that, since Arnold and Bison were unaware that they could receive a refund on exported diesel fuel until November 2002 when the decision in *Penner* was issued, they could not have intended to claim a refund in respect of excise tax paid on exported diesel fuel at the time the original applications were filed.

36. Finally, the Minister argued that, unlike the situation in *Erin Michaels*, Arnold and Bison had not miscalculated the amount of taxes paid in error in respect of goods for which they had otherwise made a valid claim.

37. In its decision in *Scott Paper Limited v. M.N.R.*, the Tribunal stated that, in order to avoid rendering meaningless the two-year limitation period prescribed by section 68 of the *Act*, an application for a refund of excise tax pursuant to that section must provide a reasonable indication of what is being applied for. The Tribunal stated as follows:[14]

> . . . Section 68 of the Act indicates that the amount of the moneys paid in error by a person will be paid to the person "if he applies therefor" within the required period. In the Tribunal's view, the person has not fulfilled the requirement of "appl[ying] therefor" unless the person gives a reasonable indication of what he is applying for. Consequently, it is the Tribunal's view that section 68 requires that a person who applies for a refund indicate the nature of the alleged error.
>
> To accept the appellant's interpretation would require the Tribunal to ignore the explicit wording of the part of the section pertaining to the two-year limitation period. The limitation period would be rendered meaningless if an applicant could simply make a blanket claim, within the two-year period, and then use that claim to support an unlimited number of specific claims, made over an unlimited period of years, as new potential errors are identified. . . .

13. (10 January 1997), AP-94-330 (CITT) [*Erin Michaels*].
14. *Scott Paper Limited v. M.N.R.* (11 April 2002), AP-2000-034 (CITT) at 4-5.

38. The Federal Court of Appeal agreed with the Tribunal's view that an application for a refund of excise tax pursuant to section 68 of the *Act* required that the goods for which the request was made be clearly identified. The Federal Court of Appeal stated as follows:[15]

> . . . section [68] allows a person who has paid tax in error to seek a reimbursement of its moneys within two years after the payment. The operative words in the section are, in my view, the words "applies therefor". The French version uses the words "si elle en fait la demande". Therefore, for a person to obtain a refund of moneys paid in error, he must "apply therefor" within two years after the payment of the moneys. This necessarily means that the person must apply for the moneys paid in error. That, in my view, cannot be done without specifying the error which is at the heart of the demand for a reimbursement. In specifying the error, it is essential to give an indication of the goods to which the payment of [federal sales tax] pertains since, without that information, there is no explanation of the error and, hence, no possibility of a refund by Revenue Canada, in that Revenue Canada will not be able to make any calculation of the moneys to be reimbursed.

39. In the Tribunal's view, it is clear that an application for a refund of excise tax pursuant to section 68.1 of the *Act*, like an application pursuant to section 68,[16] must identify the goods for which the request is made in order to give effect to the two-year limitation period.

40. When the original applications were filed pursuant to section 68 of the *Act*, they clearly identified the goods for which the requests were being made and the purpose for which these goods were being used. In the case of Arnold, the goods were identified as diesel fuel for use as heating oil or for generating electricity in reefers[17] or heaters (for highway trailers) or sea containers. In the case of Bison, the goods were identified as diesel fuel for use as heating oil in highway trailers. These applications for refund were clearly made on the basis of the end use of the fuel. In the Tribunal's view, there is no language in either application that could reasonably be interpreted as including a claim in respect of excise tax paid on exported diesel fuel. In addition, in the Tribunal's view, there is nothing on the record that indicates that, prior to the filing of the applications in issue, Arnold or Bison intended to apply for a refund of excise tax paid in respect of exported diesel fuel. Accordingly, the Tribunal agrees with the Minister that the evidence does not indicate that either Arnold or Bison, in its original application, was making a claim, or intended to make a claim, in respect of excise tax paid on exported diesel fuel.

41. Arnold and Bison attempted to distinguish the circumstances that existed in *Scott Paper* from the present appeals on three grounds.

42. The Tribunal has not been persuaded by these arguments.

43. Concerning the first argument, that these appeals concern only a single product, i.e. diesel fuel, the different bases on which refunds of excise tax were claimed are important distinctions. The original applications referred to diesel fuel consumed in the heating or cooling of highway trailers or sea containers, whereas the applications in issue referred to diesel fuel consumed in the United States by highway tractors (i.e. commercial trucks) transporting goods from Canada to the United States. Moreover, the original applications were based on the end use of the fuel, whereas the applications in issue were based on the fact that the fuel was exported.

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15. *Scott Paper* at para. 49.
16. The Tribunal notes that sections 68 and 68.1 of the *Act* are very similar in construction. In both cases, applications for a refund of tax paid in respect of any goods must be made within a two-year period (calculated from the time the tax was paid for section 68 and from the time the goods were exported for section 68.1).
17. "Reefer" is a short term for a "refrigerated container".

44. Concerning the second argument, it is clear that the legislation required Arnold and Bison to meet the prescribed time limits. Advising the Minister of their intentions to expand the original applications before the Minister issued notices of determination, being unaware that they could claim refunds of excise tax paid in respect of exported diesel fuel until the *Penner* decision and acting quickly after the *Penner* decision, are not valid reasons for failing to meet such time limits.

45. Respecting the third argument, while *Scott Paper* dealt with an application for refund of federal sales tax, in the Tribunal's view, the principles enunciated in that case also apply to applications made pursuant to section 68.1 of the *Act*, regardless of the fact that a different tax is involved.

46. Finally, the Tribunal is of the view that its decision in *Erin Michaels* is not of any assistance to Arnold and Bison in the context of the present appeals. The issue in that case was whether the amount of the refund for a specific alleged error could be increased from the amount claimed. It did not deal with the broadening of the basis on which a refund is claimed.

47. On the basis of the foregoing, the Tribunal concludes that the applications in issue were filed outside the two-year time limit prescribed by subsection 68.1(1) of the *Act*. Given this conclusion, the Tribunal need not consider whether Bison's application may also have been filed after the deadline of February 17, 2003, prescribed by subsection 63(2) of the *Budget Implementation Act, 2003*.

DECISION

48. For the foregoing reasons, the appeals are dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Stephen A. Leach
Stephen A. Leach
Member