Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-010

Wolseley Engineered Pipe Group

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, March 11, 2010

Canada

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IN THE MATTER OF an appeal heard on December 8, 2009, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated April 6, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WOLSELEY ENGINEERED PIPE GROUP **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed in part.

Ellen Fry
Ellen Fry
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 8, 2009
Tribunal Member:	Ellen Fry, Presiding Member
Research Director:	Audrey Chapman
Counsel for the Tribunal:	Nick Covelli
Research Officers:	Simon Glance Jan Wojcik
Manager, Registrar Office:	Michel Parent
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PARTICIPANTS:

Appellant	**Counsel/Representative**
Wolseley Engineered Pipe Group	Michael Sherbo
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Holly LeValliant

WITNESS:

Craig McIntosh
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North America
Wolseley Engineered Pipe Group

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by Wolseley Engineered Pipe Group (Wolseley) pursuant to subsection 67(1) of the *Customs Act*[1] from four decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. There are two issues in this appeal. The first issue is whether certain fusion machines (the goods in issue) imported by Wolseley qualify for the benefits of tariff item No. 9953.00.00 of the schedule to the *Customs Tariff*,[2] as submitted by Wolseley. The second issue is whether the goods in issue are originating under the *NAFTA Rules of Origin Regulations*[3] (i.e. goods of *NAFTA* origin) and thus, entitled to the benefits of the United States Tariff treatment.

PROCEDURAL HISTORY

3. From April 17, 2006, to November 19, 2007, Wolseley imported the goods in issue under four separate transactions. The goods in issue were classified under tariff item No. 8479.89.99.

4. On June 17, 2008, pursuant to section 59 of the *Act*, the CBSA, after conducting a verification audit, issued decisions to change the tariff classification and the value for duty of the goods in issue. The CBSA determined that the goods in issue were hydraulic welding machines. They were classified under tariff item No. 8515.80.00.

5. On September 8, 2008, pursuant to subsection 60(1) of the *Act*, Wolseley requested a further re-determination of the tariff classification and value for duty of the good at issue. At that time, Wolseley requested that the goods in issue be classified under tariff item No. 8468.80.00 or, in the alternative, under tariff item No. 8477.80.99 and that the value for currency conversion be reduced.

6. On April 6, 2009, pursuant to subsection 60(4) of the *Act*, the CBSA reduced the value for currency conversion, but denied the request for a change in tariff classification.

7. On June 3, 2009, pursuant to section 67 of the *Act*, Wolseley filed a notice of appeal with the Tribunal.

8. On June 18, 2009, Wolseley requested that the issue of tariff treatment be added to its appeal and that the appeal be held in abeyance pending the Federal Court of Appeal decision in *President of the Canada Border Services Agency v. C.B. Powell Ltd.*[4]

9. On August 5, 2009, the Tribunal denied Wolseley's request to hold the appeal in abeyance.

10. On November 30, 2009, MSR Customs and Commodity Tax Group (MSR) filed a notice of intervention.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. S.O.R./94-14.
4. Court No. A-245-09 [*C.B. Powell*].

11. On December 2, 2009, the Tribunal permitted MSR to act as an intervener and invited it to file a brief on the issue of tariff classification. On December 4, 2009, MRS filed its brief.

12. On December 7, 2009, Wolseley and the CBSA filed comments on the intervener's brief. The CBSA requested that the brief be struck from the record. However, at the hearing, the CBSA withdrew its request.[5]

13. On December 8, 2009, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Craig McIntosh, Manager, International Trade Compliance—North America, Wolseley, testified on behalf of Wolseley. No witnesses were called by the CBSA.

GOODS IN ISSUE

14. The goods in issue are McElroy fusion machines. These goods in issue butt fuse thermo-plastic pipes by first heating the ends of the pipes to a molten state and then joining the two molten pipe ends under pressure.[6]

15. The manufacturer's marketing literature further describes the goods in issue as electric hydraulic fusion machines.[7]

ANALYSIS

Law

16. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

17. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.[8] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

18. Subsection 10(1) of the *Customs Tariff* provides as follows: "... the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[9] and the Canadian Rules[10] set out in the schedule."

5. *Transcript of Public Hearing*, 8 December 2009, at 4-5.
6. Respondent's brief, para. 6.
7. Appellant's brief, tab 1.
8. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
9. S.C. 1997, c. 36, schedule [*General Rules*].
10. S.C. 1997, c. 36, schedule.

19. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[11] Classification therefore begins with Rule 1, which provides as follows: ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions."

20. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[12] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[13] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.[14]

21. Chapter 99 of the *Customs Tariff*, which includes tariff item No. 9953.00.00, provides special classification provisions that allow certain goods to be imported into Canada with tariff relief. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.[15] Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

Does the Tribunal Have Jurisdiction to Hear the Appeal of Tariff Classification Regarding Tariff Item No. 9953.00.00?

22. The CBSA argued that the Tribunal does not have jurisdiction to determine whether the goods in issue qualify for the benefits of tariff item No. 9953.00.00, since, in its view, that issue was not the subject of a re-determination by the CBSA pursuant to subsection 60(4) of the *Act*.

23. The Tribunal does not agree with the CBSA. Pursuant to section 67 of the *Act*, the Tribunal has the authority to review a decision of the CBSA made under section 60 or 61. Section 60 refers to decisions by the CBSA with respect to, *inter alia*, "tariff classification". The notice of appeal indicates that Wolseley is appealing the decision made pursuant to section 60 respecting "tariff classification". The CBSA's decision in question states that it ". . . represents a decision of the President of the Canada Border Services Agency under subsection 60(4) of the Customs Act . . ." in respect of, *inter alia*, Wolseley's ". . . request for a tariff classification change . . . ."

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11. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).
12. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
13. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
14. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.
15. However, Note 1 to Chapter 99 provides that the rule of specificity in Rule 3 (a) of the *General Rules* does not apply to the provisions of Chapter 99. This reflects the fact that classification in Chapters 1 to 97 and Chapter 99 is not mutually exclusive.

24. Whether or not goods qualify for the benefits of a tariff item in Chapter 99 is clearly a question of tariff classification.[16] In this respect, Note 3 to Chapter 99, in particular, expressly states the following:

> 3. Goods may be classified under a tariff item in this Chapter . . . only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.

25. The CBSA classified the goods in issue under tariff item No. 8515.80.00. Wolseley has not disputed this tariff classification. The relevant nomenclature reads as follows:

> **85.15** **Electric . . . brazing or welding machines and apparatus, whether or not capable of cutting . . .**
>
> . . .
>
> **-Machines and apparatus for resistance welding of metal:**
>
> . . .
>
> **-Machines and apparatus for arc (including plasma arc) welding of metals:**
>
> . . .
>
> **8515.80.00** **-Other machines and apparatus**

26. Based on the evidence, the Tribunal accepts this classification.

27. Since classification under a tariff item in Chapters 1 to 97 has been determined, the relevant precondition to classification in Chapter 99, in Note 3 to Chapter 99, has been satisfied. Therefore, the Tribunal will proceed to determine whether the goods in issue qualify for the benefits of tariff item No. 9953.00.00.

Do the Goods in Issue Qualify for the Benefits of Tariff Item No. 9953.00.00?

28. Tariff item No. 9953.00.00 reads as follows:

> **9953.00.00** **Hydraulic equipment and articles for use therein;**
> **Articles for use in compression-ignition internal combustion piston engines (diesel or semi-diesel engines);**
> **All the foregoing for use in the manufacture of road graders or road scrapers.**

29. Wolseley provided the following dictionary definitions of "hydraulic": "1. Of, involving, moved by, or operated by a fluid, especially water, under pressure . . . 3. Of or relating to hydraulics"[17] and submitted that the goods in issue meet the definition because they are marketed and sold as being hydraulic.[18]

30. The CBSA did not dispute that the goods in issue are "hydraulically powered". The Tribunal agrees that the evidence indicates that the goods in issue are hydraulically powered equipment.[19]

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16. For example, see *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (16 September 2009), AP-2008-012 (CITT) and *DSM Nutritional Products Canada Inc. v. President of the Canada border Services Agency* (2 December 2008), AP-2007-012 (CITT).
17. *The American Heritage® Dictionary of the English Language*, 4th ed., *s.v.* "hydraulic".
18. Appellant's brief, para. 21.
19. Appellant's brief, tab 1; respondent's brief, para. 6.

31. The CBSA submitted that Mr. McIntosh's evidence confirms that the goods in issue are not for use in the manufacture of road graders or road scrapers. Wolseley did not dispute this submission. However, the parties disagree on whether the goods must be for use in the manufacture of road graders or road scrapers in order to qualify for the benefits of tariff item No. 9953.00.00.

32. Wolseley argued that, to qualify for the benefits of tariff item No. 9953.00.00, it is sufficient that the goods in issue be "[h]ydraulic equipment and articles for use therein . . . ." In its view, the phrase ". . . [a]ll of the foregoing for use in the manufacture of road graders or road scrapers", which appears after a semi-colon, does not impose an additional requirement to qualify under tariff item No. 9953.00.00. Wolseley submitted that it is an accepted principle of tariff classification that a semi-colon denotes a complete stop and that the provision before the semi-colon and the provision after the semi-colon are unrelated.

33. Wolseley cited *Bauer Nike Hockey Inc. v. President of the Canada Border Services Agency*[20] in support of its position. Similarly, MSR, which supported Wolseley's position, cited *Bauer Nike*, *Boss Lubricants v. Deputy M.N.R.*[21] and *John Martens Company v. Deputy M.N.R.C.E.*[22] All these cases involved the interpretation of tariff items that contain a semi-colon.

34. The CBSA agreed with the interpretation of the semi-colon in the tariff items in the cases cited by Wolseley and MSR. However, it submitted that the wording of tariff item No. 9953.00.00 leads to a different interpretation.

35. The CBSA submitted that hydraulic equipment is only covered by tariff item No. 9953.00.00 if the equipment is ". . . for use in the manufacturer of road graders or road scrapers" because of the phrase "[a]ll the foregoing . . . ."[23] The CBSA argued that the phrase "[h]ydraulic equipment and articles for use therein . . ." in tariff item No. 9953.00.00 must be read in the context of the phrase "[a]ll the foregoing for use in the manufacture of road graders or road scrapers." Thus, in its view, tariff item No. 9953.00.00 provides tariff relief for hydraulic equipment only if used in the manufacture of road graders or road scrapers.

36. In the Tribunal's opinion, it is clear, based on ordinary grammatical usage, that, in order for goods to qualify for duty relief under tariff item 9953.00.00, it is sufficient for the goods to be hydraulic equipment. The goods in issue do not need to also be ". . . for use in the manufacture of road graders or road scrapers."

37. This is equally true of the wording of tariff item No. 9953.00.00 in both official languages.

38. Based on the foregoing, the Tribunal concludes that the goods in issue, being hydraulic equipment, qualify for the benefits of tariff item No. 9953.00.00.

20. (18 May 2006) AP-2005-019 (CITT) [*Bauer Nike*].
21. (3 September 1997), AP-95-276 and AP-95-307 (CITT).
22. (10 May 1993), AP-92-022 (CITT).
23. Respondent's brief, para. 37.

Does the Tribunal Have Jurisdiction to Determine the Origin of the Goods in Issue?

39. Wolseley requested the Tribunal to determine the "tariff treatment" ("origin")[24] of the goods in issue, via a letter dated June 18, 2009, which states as follows: "This is to inform you that we had inadvertently omitted Tariff Treatment . . . in our Notice of Appeal dated June 3, 2009 and would like to add the Tariff Treatment to this Appeal."

40. When it imported the goods in issue from the United States, Wolseley had on file a NAFTA certificate of origin indicating U.S. origin, but declared the goods as being subject to the Most-Favoured-Nation (MFN) Tariff rather than the United States Tariff. Goods imported under the United States Tariff and the MFN Tariff are dutiable at the same rate under tariff item No. 8479.89.99, the tariff item under which Wolseley imported the goods. However, the CBSA's re-determination that the proper tariff classification was tariff item No. 8515.80.00 changed this situation because the MFN rate of duty under that tariff item is higher than the corresponding rate of duty under the United States Tariff.

41. Wolseley submitted to the Tribunal that the CBSA had in effect made a re-determination of both the tariff classification of the goods in issue and their tariff treatment. In this regard, Wolseley argued that a re-determination of tariff classification is automatically accompanied by a re-determination of the rate of duty, which in turn depends on the origin of the goods. In this regard, Wolseley referred to *Roche Vitamins Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*[25] and *Editions Gallery Ltd. v. President of the Canada Border Services Agency*.[26] In *Editions Gallery*, the Tribunal indicated as follows:

> Although the CBSA Recourse Division did not consider that it could make a re-determination of origin, the fact is that, in order to re-determine the duty rate, the CBSA needed to decide whether the initial deemed determination of origin would stand; otherwise, it would not know what duty rate to apply. The Tribunal therefore considers that the DASs issued on June 23, 2005, included a re-determination of origin which confirms the original MFN determination.[27]

42. In addition, Wolseley cited the Federal Court of Appeal decisions in *Canada v. Fritz Marketing Inc.*[28] and *C.B. Powell* and the Federal Court of Canada's decision in *Mueller Canada Inc. v. Canada*[29] where, in its view, the courts held that a non-decision is in fact a decision which can be appealed.

43. The CBSA takes the position that the Tribunal does not have jurisdiction to hear an appeal relating to the origin of the goods in issue. According to the CBSA, this is not a case where it has refused to make a re-determination on tariff treatment, but rather a case in which Wolseley never requested such a re-determination. The CBSA noted that the Tribunal's authority to hear an appeal under subsection 67(1) of the *Act* stems from re-determinations by the CBSA under sections 60 and 61.

44. The CBSA distinguished the present appeal from *C.B. Powell* and *Editions Gallery*. The appellants in those cases had specifically requested re-determinations of both the tariff classification and the origin. It submitted that, in contrast, Wolseley's request for a re-determination by the CBSA specified tariff classification and value for duty, but not origin.

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24. The terms "tariff treatment" and "origin" are used interchangeably throughout this text.
25. (26 January 2006) AP-2003-036 (CITT).
26. (26 July 2006), AP-2005-017 (CITT) [*Editions Gallery*].
27. *Editions Gallery* at para. 22.
28. 2009 FCA 62 (CanLII).
29. [1993] F.C.J. No. 1193 (QL).

45. For the Tribunal to have jurisdiction to hear an appeal relating to origin, there must be a decision on origin by the CBSA made pursuant to section 60 or 61of the *Act*. Subsection 67(1) establishes this jurisdiction by providing that "[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 . . . ." Whether there has been such a decision made by the CBSA is a question of fact to be determined in the circumstances of each case.

46. In the Tribunal's view, the facts of the present appeal indicate that there was not a decision made by the CBSA pursuant to section 60 or 61 of the *Act* relating to the origin of the goods within the meaning of section 67.

47. The original determination by the CBSA, pursuant to section 59 of the *Act*, which was subsequently the subject of the CBSA's re-determination pursuant to section 60, did not deal with the origin of the goods in issue. The decision pursuant to section 59 in this case refers to classification and value for duty, but not origin.[30] There is no general language in the decision pursuant to section 59 that could reasonably be interpreted to cover the origin of the goods.

48. The verification report, upon which the decision pursuant to section 59 of the *Act* was based, indicates that, in addition to tariff classification and value for duty, the origin of the goods in issue was verified.[31] However, the verification report makes it clear, with respect to origin, that "[t]he verification undertaken was only to determine if the importer's requirement, to have a valid Certificate of Origin on file . . . was fulfilled."[32] The verification report specifically added that "[t]his review should in no way be misconstrued as meaning that a determination as to the origin of the goods has been made"[33] and that ". . . no issues have come to the attention of CBSA at this time with respect to Origin . . . ."[34]

49. The decision pursuant to section 60 of the *Act* specifically addresses tariff classification and value for currency conversion, but not origin.[35] There is no general language in the decision pursuant to section 60 that could reasonably be interpreted to cover the origin of the goods.

50. Wolseley's request for a re-determination of the CBSA's decision pursuant to section 60 of the *Act* indicates clearly that it is a request with respect to tariff classification and value for duty, but not origin.[36] There is no general language in this request for re-determination that could reasonably be interpreted to cover the origin of the goods.

51. Based on the foregoing, the Tribunal does not have jurisdiction to determine the origin of the goods in issue.

DECISION

52. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 9953.00.00 as hydraulic equipment.

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30. Respondent's brief, tab 4.
31. Respondent's brief, tab 3 at 3.
32. *Ibid.* at 19.
33. *Ibid.*
34. *Ibid.*
35. Respondent's brief, tab 6.
36. Respondent's brief, tab 5.

53. The appeal is therefore allowed in part.

Ellen Fry

Ellen Fry
Presiding Member