Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal Nos. AP-2010-033 and AP-2010-042

Contech Holdings Canada Inc.

v.

President of the Canada Border Services Agency

*Decision and reasons issued Thursday, May 17, 2012*

Canada

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IN THE MATTER OF appeals heard on December 1, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 17 decisions of the President of the Canada Border Services Agency, dated May 12 and 28, 2010, with respect to requests for further re-determinations, pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**CONTECH HOLDINGS CANADA INC.** **Appellant**

**AND**

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

## DECISION

The appeals are dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | December 1, 2011 |
| Tribunal Member: | Diane Vincent, Presiding Member |
| Counsel for the Tribunal: | Alain Xatruch |
| Manager, Registrar Programs and Services: | Michel Parent |
| Registrar Officer: | Cheryl Unitt |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representative** |
|---|---|
| Contech Holdings Canada Inc. | Martha Kirby |
| **Respondent** | **Counsel/Representative** |
| President of the Canada Border Services Agency | Lune Arpin |

**WITNESS:**

William Stolze
Owner
Techni-Gro Greenhouses Inc. and Contech Holdings Canada Inc.

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# STATEMENT OF REASONS

## BACKGROUND

1. These are appeals filed by Contech Holdings Canada Inc. (Contech) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from 17 decisions made by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to requests for further re-determinations of tariff classification.

2. The issue in these appeals is whether certain greenhouse carts and parts thereof (the goods in issue), in addition to being classified under tariff item Nos. 8716.80.20 (carts) and 8716.90.90 (parts) of the schedule to the *Customs Tariff*,[2] may also be classified under tariff item No. 9903.00.00 as articles for use in tractors powered by an internal combustion engine, for use on the farm, or, in the alternative, under the same tariff item as articles for use either in agricultural or horticultural conveyors, or in agricultural or horticultural machines of heading No. 84.36, and thereby benefit from duty-free treatment.

## PROCEDURAL HISTORY

3. Between March 9, 2006, and January 22, 2007, Contech imported the goods in issue under 17 separate transactions. At the time of importation, the goods in issue were classified under tariff item Nos. 8716.80.20 and 8716.90.90 as other vehicles for the transport of goods and other parts respectively. Customs duties were paid accordingly.

4. Contech subsequently applied for a refund of duties on the basis that the goods in issue could also be classified under tariff item No. 9903.00.00 and thereby benefit from duty-free treatment. On June 29 and 30, 2009, the CBSA determined that the goods in issue were not eligible for the benefit of tariff item No. 9903.00.00 and therefore denied Contech's application.

5. On September 23, 24 and 25, 2009, Contech requested further re-determinations of the tariff classification of the goods in issue pursuant to subsection 60(1) of the *Act*. On May 12 and 28, 2010, the CBSA issued its decisions pursuant to subsection 60(4), which denied the requests and confirmed its prior re-determinations that the goods in issue could not be classified under tariff item No. 9903.00.00.

6. On August 24, 2010, Contech filed a notice of appeal with the Tribunal pursuant to subsection 67(1) of the *Act*. However, as the 90-day statutory time period to file a notice of appeal with respect to the CBSA's decisions of May 12, 2010, had passed, Contech also filed, pursuant to section 67.1, an application for an order extending the time to file a notice of appeal with respect to those decisions.

7. On November 2, 2010, the Tribunal issued an order granting the extension of time and accepting the documents that had already been filed by Contech as a notice of appeal in respect of the CBSA's decisions of May 12, 2010.[3] On the same day, the Tribunal advised the parties that, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,[4] it had decided to combine the proceedings of the two appeals.[5]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. See *Contech Holdings Canada Inc.* (2 November 2010), EP-2010-003 (CITT).
4. S.O.R./91-499 [*Rules*].
5. Appeal No. AP-2010-033 pertains to the CBSA's decisions of May 28, 2010, whereas Appeal No. AP-2010-042 pertains to the CBSA's decisions of May 12, 2010.

8. At the request of Contech—and with the CBSA's consent—the Tribunal held the appeals in abeyance pending a decision of the Federal Court of Appeal with regard to an appeal of the Tribunal's decision in *Kverneland Group North America Inc. v. President of the Canada Border Services Agency*[6]. On March 21, 2011, the Federal Court of Appeal dismissed the appeal.[7]

9. Contech subsequently advised the Tribunal that it wished to proceed with the appeals by way of written submissions, to which the CBSA did not object. As a result, the Tribunal informed the parties that it had decided, pursuant to rule 25 of the *Rules*, to hear the appeals by way of written submissions and that the file hearing would take place on October 27, 2011.

10. On October 7, 2011, following the filing of the parties' briefs and additional submissions, the Tribunal informed the parties that it had examined the record in these appeals and determined that it lacked sufficient evidence relating to the manner in which the goods in issue were utilized and that, in some instances, the arguments put forth by the parties lacked clarity. The Tribunal was of the view that the holding of a file hearing in these circumstances would not be appropriate and therefore decided that the appeals would proceed by way of an oral hearing.

11. On December 1, 2011, the Tribunal held a public hearing in Ottawa, Ontario. Mr. William Stolze, owner of Techni-Gro Greenhouses Inc. and Contech, appeared as a witness for Contech.[8] The CBSA did not call any witnesses.

## GOODS IN ISSUE

12. The goods in issue are greenhouse carts (referred to as "Contech carts" by the parties) and parts thereof. Each cart consists of a base fitted with four wheels, four corner posts, shelves and a hitch and pin towing system (or a drawbar), which allows it to be attached to another cart or a vehicle and moved from one point to another.[9] The carts, which can also be moved manually, come in various dimensions and materials. As for the parts, they consist of corner posts, shelves, wheel sets and hitches that are imported as replacement parts for the carts.

13. The product literature on the record refers to the carts as "high quality plant transportation carts" that are supplied to the greenhouse industry.[10] At the hearing, Mr. Stolze explained that the carts are used to move plants around in greenhouses and to collect orders for customers and bring them to the market.[11] He explained that this is typically done by attaching one or several carts to an electric towing vehicle, which then circulates through the greenhouse in order to fill the carts with plants.[12]

14. No physical exhibits were filed by the parties.

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6. (30 April 2010), AP-2009-013 (CITT) [*Kverneland*].
7. *Kverneland Group North America Inc. v. Canada (Border Services Agency)*, 2011 FCA 109 (CanLII).
8. Prior to the hearing, Contech filed an expert witness report prepared by Mr. Stolze and requested that he be qualified as an expert in the use of the goods in issue. The CBSA objected to the proposed qualification on various grounds. Contech subsequently informed the Tribunal that Mr. Stolze would be called to testify as a lay witness only. Mr. Stolze was therefore not qualified as an expert for the purposes of these appeals.
9. At the Tribunal's request, the parties submitted an agreed-upon description of the goods in issue (see Tribunal Exhibit AP-2010-033-22).
10. Tribunal Exhibit AP-2010-033-13A at 28.
11. *Transcript of Public Hearing*, 1 December 2011, at 6, 8-9.
12. *Transcript of Public Hearing*, 1 December 2011, at 6-7, 9, 11-12, 19.

## STATUTORY FRAMEWORK

15. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.

16. 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.[13] 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.[14] 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.

17. 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[15] and the Canadian Rules[16] set out in the schedule."

18. 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, until classification is completed.[17] 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."

19. 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[18] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[19] 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 respected, unless there is a sound reason to do otherwise, as they serve as an interpretative guide to tariff classification in Canada.[20]

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13. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
14. The Tribunal notes that section 13 of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31, provides that the English and French versions of any act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.
15. S.C. 1997, c. 36, schedule [*General Rules*].
16. S.C. 1997, c. 36, schedule.
17. 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).
18. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
19. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
20. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

20. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.[21]

## TARIFF CLASSIFICATION AT ISSUE

21. In the present appeals, the parties agree that the goods in issue are properly classified under tariff item Nos. 8716.80.20 and 8716.90.90 as other vehicles for the transport of goods and other parts respectively.[22] The only source of disagreement between the parties—and hence the issue in these appeals—is whether the goods in issue may also be classified under tariff item No. 9903.00.00 and thereby benefit from duty-free treatment.

22. Chapter 99, which includes tariff item No. 9903.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. 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. 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.

23. There are no notes to Section XXI (which includes Chapter 99). However, the Tribunal considers notes 3 and 4 to Chapter 99 to be relevant to the present appeals. These notes provide as follows:

> 3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin 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.
>
> 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

24. In accordance with note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under tariff items in Chapters 1 to 97 has been determined. As indicated above, the parties agree that the goods in issue are properly classified in Chapter 87, under tariff item Nos. 8716.80.20 and 8716.90.90. On the basis of the evidence, the Tribunal accepts these classifications. Therefore, for the purposes of these appeals, the Tribunal is of the view that the condition set out in note 3 to Chapter 99 has been met.

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21. Rule 6 of the *General Rules* stipulates as follows: "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

22. Tribunal Exhibit AP-2010-033-11A at para. 10; Tribunal Exhibit AP-2010-033-13A at paras. 18-19, tab 2 at 41; *Transcript of Public Hearing*, 1 December 2011, at 34.

25. Consequently, the only remaining issue before the Tribunal is to determine whether the goods in issue meet the conditions of tariff item No. 9903.00.00, which provides, in relevant part, as follows:

> **9903.00.00 Articles and materials that enter into the cost of manufacture or repair of the following, and articles for use in the following:**
>
> **Agricultural or horticultural elevators or conveyors;**
>
> . . .
>
> **Agricultural or horticultural machines of heading 84.36;**
>
> . . .
>
> **Tractors powered by an internal combustion engine, not including tractors of the type used on railway station platforms, road tractors for semi-trailers or tractors of a kind for hauling logs (log skidders), and buckets, shovels, grabs, grips, bulldozer or angledozer blades, scarifiers, pneumatic tires and inner tubes for use therewith and for use on the farm;**
>
> . . .

26. Contech initially submitted that the goods in issue should benefit from duty-free treatment because they are articles for use in tractors powered by an internal combustion engine, for use on the farm, or, in the alternative, articles for use either in agricultural or horticultural conveyors, or in agricultural or horticultural machines of heading No. 84.36. However, at the hearing, Contech advised the Tribunal that it was withdrawing its argument that the goods in issue are articles for use in tractors powered by an internal combustion engine, for use on the farm.[23] In this regard, the Tribunal notes that the evidence on the record indicates that the carts are towed by an electric vehicle,[24] which rules out the possibility of the goods in issue being for use in tractors powered by an *internal combustion engine*.

27. Therefore, the Tribunal need only determine whether the goods in issue are (1) articles (2) for use either in an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36.

## POSITIONS OF PARTIES

### Contech

28. Contech submitted that the goods in issue are "articles". In this regard, it referred to CBSA Customs Notice N-278, which states that "articles" are ". . . any finished or semi-finished product which is not considered to be a material" and include ". . . items which are classified as parts . . . ."[25]

29. Contech submitted that the carts, when connected to a tractor or towing vehicle, create a single integrated agricultural or horticultural conveyor system, or agricultural or horticultural machine of heading No. 84.36, which allows for the movement of plants from the greenhouse to shipping vehicles or warehouses for auction. It noted that the *Explanatory Notes* to heading No. 84.28 (which covers other lifting, handling, loading or unloading machinery and specifically mentions "conveyors" as an example of such machinery) provide that "[c]onveyors are used for moving goods, usually in a horizontal direction, sometimes over very long distances . . . ."

23. *Transcript of Public Hearing*, 1 December 2011, at 4.
24. *Transcript of Public Hearing*, 1 December 2011, at 6-7.
25. "Administrative Policy Tariff Item No. 9948.00.00" (27 April 1999).

30. Contech further noted that, in *Prins Greenhouses Ltd. v. Deputy M.N.R.*,[26] the Tribunal accepted that agricultural or horticultural machines of tariff item No. 8436.80.10 could consist of a group of separate goods that contribute together to perform a clearly defined function (i.e. a functional unit as defined in Part VII of the *Explanatory Notes* to Section XVI). It submitted that, in this case, the function is the movement of plants from the greenhouse to the market. It also added that the *Explanatory Notes* to heading Nos. 84.28 and 84.36 do not preclude the goods in issue from being classified in those headings when they are connected to a tractor or towing vehicle and used in the aforementioned manner.

31. Contech submitted that the goods in issue also satisfy the "for use in" criteria, as they are physically attached and functionally joined to agricultural or horticultural conveyors, or agricultural or horticultural machines of heading No. 84.36. In this regard, it referred to the Tribunal's decisions in *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency*[27] and *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*[28] to demonstrate that the physical connection need not be permanent and that "functionally joined" simply means that the goods "for use in" other goods to which a tariff item refers (i.e. the host goods) have a functional relationship (be it active or passive) with those goods.

32. Finally, relying on the Tribunal's decision in *Farmer's Sealed Storage v. Deputy M.N.R.*,[29] Contech submitted that tariff item No. 9903.00.00 should be interpreted very broadly because Parliament clearly intended for agricultural goods to be duty-free in order to ensure that Canadian companies can compete in an increasingly competitive market. It submitted that, in these economic times, farmers should not be penalized for their ingenuity (i.e. using the carts collectively and attached to a towing vehicle) by virtue of a restrictive interpretation of that tariff item.

**CBSA**

33. The CBSA agreed with Contech that the goods in issue are "articles" for the purpose of tariff item No. 9903.00.00. However, it did not agree with Contech that the carts, when used in combination with a tractor, create an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36.

34. The CBSA referred to dictionary definitions of the term "conveyor", which provide that conveyors are machines designed for moving or transporting goods in a predetermined path, but that they do not include devices known as industrial trucks and tractors.[30] It also noted that conveyors, along with lifts, escalators and teleferics, are listed as examples of "other lifting, handling, loading or unloading machinery" in heading No. 84.28. It submitted that none of these examples are tractors or similar vehicles, but rather machinery that moves goods within a predetermined space or between two stationary points. It submitted that the carts, when attached to a tractor, are not being moved along a predetermined path or between two stationary points and therefore cannot be considered an agricultural or horticultural conveyor.

35. Relying on the Tribunal's decision in *Prins Greenhouses*, the CBSA argued that the carts, when used in combination with a tractor, cannot be considered an agricultural or horticultural machine of heading No. 84.36 because they are not marketed and sold as single integrated machines or functional units. It added that they are not even presented together at the time of importation.

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26. (9 April 2001), AP-99-045 (CITT) [*Prins Greenhouses*].
27. (3 February 2004), AP-2001-097 (CITT) [*Sony*].
28. (29 November 2001), AP-2000-047 (CITT) [*Imation*].
29. (9 September 1991), 2935 (CITT).
30. Tribunal Exhibit AP-2010-033-13A, tab 24.

36. The CBSA submitted that, at the time of importation, the goods in issue were properly classified under tariff item Nos. 8716.80.20 and 8716.90.90. As for the tractors used to pull the carts, it took the position that they are classified in heading No. 87.01 or 87.09 and are thus excluded from classification in Chapter 84 by virtue of note 1(l) to Section XVI. Consequently, it submitted that, since both the carts and the tractor are classified in Chapter 87, they cannot together be considered agricultural or horticultural conveyors (which would be classifiable in heading No. 84.28), or agricultural or horticultural machines of heading No. 84.36.

37. The CBSA further submitted that, even if the carts, together with a tractor, could be considered as such conveyors or machines, the carts would not satisfy the second requirement of the "for use in" test, as they do not enhance the operation or functionality of the conveyors or machines and, thus, cannot be said to be functionally joined to them.[31]

38. Finally, the CBSA submitted that, if Parliament had intended for all agricultural goods to be duty-free, it would have said so. It submitted that Parliament's intent was rather to provide duty-free treatment only for those goods meeting the specific conditions of tariff item No. 9903.00.00. It also added that difficult economic times or the ingenuity of using the carts collectively with a tractor are not factors that are relevant for tariff classification purposes and that the payment of the correct amount of duty cannot be characterized as a penalty.

## TRIBUNAL'S ANALYSIS

39. As mentioned above, the Tribunal must determine whether the goods in issue are (1) articles (2) for use either in agricultural or horticultural conveyors, or in agricultural or horticultural machines of heading No. 84.36. The goods in issue will only be eligible for the benefit of tariff item No. 9903.00.00 if both conditions are met.

### Are the Goods in Issue "Articles"?

40. While the term "articles" is not defined for the purposes of tariff item No. 9903.00.00, the parties are in agreement that the goods in issue are "articles".

41. On the basis of the normal usage of the term,[32] the Tribunal agrees that the goods in issue are articles.

### Are the Goods in Issue "For Use In" Agricultural or Horticultural Conveyors, or Agricultural or Horticultural Machines of Heading No. 84.36?

42. Subsection 2(1) of the *Customs Tariff* defines the term "for use in" as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

31. The CBSA agreed that, since the carts are fitted with a hitch and pin towing system, they may be physically attached to a good listed in tariff item No. 9903.00.00.

32 The *Canadian Oxford Dictionary*, 2d ed., defines "article" as follows: "**1** a particular or separate thing, esp. one of a set . . . ."

43. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal applies a test with two requirements for determining whether goods are attached to other goods and, hence, "for use in" those other goods. In particular, the goods must be (1) physically connected and (2) functionally joined to the other goods.[33] The Tribunal has also held that goods are functionally joined to other goods (i.e. the host goods) when they enhance or complement the function of those goods.[34]

44. The parties' arguments in this case were predominantly focused on the question of whether the carts, when connected to a tractor, form an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36 and, ultimately, whether the carts are functionally joined to such a conveyor or machine. However, these arguments overlook a fundamental issue, which the Tribunal believes must first be addressed: Is it possible for the carts to constitute an essential part of a conveyor or machine and, at the same time, be "for use in" that conveyor or machine? Stated more generically, is it possible for a good to constitute an essential part of a host good and, at the same time, be "for use in" that host good?

45. At the hearing, the Tribunal asked the parties whether a host good has to pre-exist and function independently of another good in order for that other good to be "for use in" the host good. The CBSA responded by stating that it believed that the host good must always exist by itself and, in support of its view, referred to a number of the Tribunal's decisions where the host good existed independently of the goods that were "for use in" the host good.[35] For its part, Contech simply responded by stating that, in *Prins Greenhouses* and *P.L. Light*, the host goods were determined to be agricultural or horticultural machines of heading No. 84.36.[36]

46. In the Tribunal's view, the definition of the term "for use in" found in subsection 2(1) of the *Customs Tariff* makes it clear that goods that are "for use in" host goods are distinct from host goods (the definition refers to "goods classified in the tariff item" and "other goods referred to in that tariff item"). Moreover, if goods that are "for use in" host goods and host goods are distinct, then it logically follows that the host goods must exist independently of the other goods. In fact, goods that constitute an essential part of host goods should only be regarded as enabling the existence of the host goods rather than enhancing or complementing their function. If Parliament had intended for tariff item No. 9903.00.00 to cover "parts" of the goods listed therein, it would not have used the term "for use in", which clearly has a different meaning.

47. The Tribunal notes that, in almost all decisions involving the classification of goods in Chapter 99 and the interpretation of the term "for use in", the host goods did appear to exist independently of the goods that were "for use in" the host goods.[37] For example, in *Kverneland*, tractors powered by an internal combustion engine, for use on the farm, did exist independently of the hay bale wrappers that were claimed to be for use in the tractors. In *Sony*, *PHD* and *Jam Industries*, automatic data-processing machines (i.e. computers) did exist independently of the various goods that were found, or claimed, to be for use in the computers. In *P.L. Light* and *A.M.A*, integrated greenhouse systems did exist independently of the reflectors and rock wool that were found to be for use in the integrated greenhouse systems.

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33. See *Kverneland*; *Imation*; *Sony*; *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) [*PHD*]; *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) [*Agri-Pack*]; *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT) [*Jam Industries*].
34. See, for example, *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (4 November 2011), AP-2008-012R (CITT) [*P.L. Light*]; *Kverneland*; *Jam Industries*.
35. See *Transcript of Public Hearing*, 1 December 2011, at 53-54, 60-61.
36. See *Transcript of Public Hearing*, 1 December 2011, at 58-59.
37. See, for example, *Kverneland*; *Imation*; *Sony*; *PHD*; *Agri-Pack*; *Jam Industries*; *P.L. Light*; *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT); *A.M.A. Plastics Ltd. v. President of the Canada Border Services Agency* (23 September 2010), AP-2009-052 (CITT) [*A.M.A.*]. The Tribunal notes that, in *Prins Greenhouses*, the goods that were in issue did appear to contribute to the existence of the host goods.

48. In the present case, Contech claims that the carts are for use in an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36. However, it is clear that such a conveyor or machine (i.e. the claimed host good) does not exist independently of the carts. In fact, Contech's argument is that the carts, when connected to a tractor, form a conveyor or machine. Thus, it follows from Contech's own argument that there can be no conveyor or machine without the carts and that, without the carts, only a tractor remains as a potential host good (tractors are classified in Chapter 87).[38] Accordingly, the Tribunal is of the view that the goods in issue cannot be "for use in" an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36. On this basis alone, the appeals should be dismissed.

49. However, even if the Tribunal had found it possible for goods to form an essential part of host goods and, at the same time, be "for use in" those host goods, it would have found that the carts, when connected to a tractor, do not form an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36.

50. The *Merriam-Webster's Collegiate Dictionary*[39] defines a "conveyor" as ". . . a mechanical apparatus for moving articles or bulk material from place to place (as by an endless moving belt or a chain of receptacles)." However, a more fulsome definition can be found in the *McGraw-Hill Concise Encyclopedia of Engineering*,[40] which defines a "conveyor" as follows:

> A horizontal, inclined, declined, or vertical machine for moving or transporting bulk materials, packages, or objects in a path predetermined by the design of the device and having points of loading and discharge fixed or selective. Included in this category are skip hoist and vertical reciprocating and inclined reciprocating conveyors; but in the strictest sense this category does not include those devices known as industrial trucks, tractors and trailers, cranes, hoists, monorail cranes, power and hand shovels or scoops, bucket drag lines, platform elevators, or highway or rail vehicles.

51. In the Tribunal's view, it is clear that the carts, when connected to a tractor, do not form a machine for moving plants along a predetermined path between two fixed points and thus cannot be considered a conveyor. Although Contech argued that the carts and tractor follow a predetermined path or plan when they are used to remove plants from greenhouses,[41] the Tribunal was not persuaded by this argument. While the carts and tractor may follow a path that has been determined ahead of time by their operator (i.e. driver), they do not follow a path that has been predetermined by the *design* of the machine. In any event, the Tribunal notes that tractors and trailers are specifically excluded from the above definition of "conveyor".

52. Part (II)(C) of the *Explanatory Notes* to heading No. 84.28, which covers conveyors, also provides further evidence that carts and a tractor do not constitute a conveyor. The *Explanatory Notes* list three types of conveyors that would be classifiable in heading No. 84.28—none of which are akin to carts connected to a tractor.

53. In *Prins Greenhouses*, the Tribunal determined that certain interconnected components were intended to contribute together to the clearly defined function of controlling and regulating the climate and environment of a greenhouse to ensure optimal plant growth and should therefore be classified under tariff item No. 8436.80.10 as other agricultural or horticultural type of machinery. Contech argued that, in this case, the carts and the tractor are intended to contribute together to a clearly defined function, i.e. the movement of plants from the greenhouse to the market, and should therefore also be classified under that tariff item. However, the Tribunal notes that, in *Prins Greenhouses*, it also indicated that the goods were

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38. The Tribunal notes that Contech withdrew its argument that the goods in issue were articles for use in tractors powered by an internal combustion engine, for use on the farm. As stated above, the evidence on the record indicates that the carts are towed by an electric vehicle or tractor.
39. Eleventh ed., *s.v.* "conveyor".
40. 2005, *s.v.* "conveyor".
41. *Transcript of Public Hearing*, 1 December 2011, at 38, 62.

marketed and sold as a complete climate and environmental control system for greenhouses and not as individual components.[42] This is manifestly not the case here. Indeed, at the hearing, Mr. Stolze testified that the carts were not imported, marketed or sold with a tractor.[43] Therefore, the Tribunal is of the view that the carts, when connected to a tractor, do not form an agricultural or horticultural machine of heading No. 84.36.

54. The Tribunal also notes that, if the carts, together with a tractor, were considered to form an agricultural or horticultural machine of heading No. 84.36, this would lead to the inevitable conclusion that the goods in issue are parts of such a machine and thus classifiable under tariff item No. 8436.99.00 as other parts. However, both parties, as well as the Tribunal, agree that the goods in issue were properly classified in Chapter 87, under tariff item Nos. 8716.80.20 and 8716.90.90. This serves to reinforce the Tribunal's view that the carts, when connected to a tractor, do not form an agricultural or horticultural machine of heading No. 84.36.

55. Although Contech did not expressly argue that the goods in issue could also be classified under tariff item No. 9903.00.00 as articles and materials that enter into the cost of manufacture or repair of agricultural or horticultural conveyors, or agricultural or horticultural machines of heading No. 84.36, it did allude to this possibility.[44] However, as the Tribunal has already expressed the view that the carts, when connected to a tractor, do not form an agricultural or horticultural conveyor, or an agricultural or horticultural machine of heading No. 84.36, such an argument would not prove successful.

56. Finally, with respect to Contech's argument that tariff item No. 9903.00.00 should be interpreted very broadly because Parliament intended for agricultural goods to be duty-free, the Tribunal notes that there is nothing in that tariff item which indicates that all things agricultural were intended to be covered. In order to be classified under tariff item No. 9903.00.00, goods must satisfy very specific criteria. In this case, the Tribunal has determined that the goods in issue do not meet these criteria and are thus not entitled to duty-free treatment. As the Tribunal has previously held, it is not a court of equity and must apply the law as it is.[45]

## DECISION

57. For the foregoing reasons, the Tribunal concludes that the goods in issue are not articles for use in agricultural or horticultural conveyors, or agricultural or horticultural machines of heading No. 84.36, and are therefore not entitled to the duty-free treatment conferred by tariff item No. 9903.00.00.

58. The appeals are therefore dismissed.

Diane Vincent
Diane Vincent
Presiding Member

42. *Prins Greenhouses* at 6.
43. *Transcript of Public Hearing*, 1 December 2011, at 12.
44. Tribunal Exhibit AP-2010-033-11A at paras. 12, 14; *Transcript of Public Hearing*, 1 December 2011, at 37, 41.
45. *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT) at 3; *Manju Bhogal v. Deputy M.N.R.* (7 October 1998), AP-97-140 (CITT) at 3.