Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal Nos. AP-2010-007 and AP-2010-008

C.B. Powell Limited

v.

President of the Canada Border Services Agency

Order and reasons issued Wednesday, August 11, 2010

Canada

TABLE OF CONTENTS

IN THE MATTER OF appeals filed on November 3, 2009, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF B2 reject notifications issued by the President of the Canada Border Services Agency, dated August 7 and October 17, 2008.

BETWEEN

C.B. POWELL LIMITED **Appellant**

AND

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

ORDER

The appeals are dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. These are appeals filed by C.B. Powell Limited (C.B. Powell) pursuant to section 67 of the *Customs Act*[1]. The goods in issue are jars of bacon bits imported from the United States in 2005. C.B. Powell is seeking to change the origin that it declared for the goods in issue at the time of their importation. The President of the Canada Border Services Agency (CBSA) claims that, because a decision was never made pursuant to section 60, the Canadian International Trade Tribunal (the Tribunal) does not have jurisdiction to hear the appeals. Accordingly, the Tribunal is confronted with the preliminary issue of whether or not the jurisdictional requirements of subsection 67(1) have been fulfilled. Before entertaining submissions on the merits of the appeals themselves, the Tribunal sought preliminary submissions on the jurisdictional issue.

2. For the reasons that follow, the Tribunal has determined that it does not have jurisdiction to hear these appeals.

PROCEDURAL HISTORY

3. In its customs declaration form in respect of the goods in issue, C.B. Powell declared the value for duty, the "origin" for tariff purposes, which specified Most-Favoured-Nation (MFN) tariff treatment, and a particular tariff classification number. As the CBSA did not look behind the customs declaration form at or before the time the goods were accounted for, their value for duty, origin and tariff classification were deemed to have been determined as declared, in accordance with subsection 58(2) of the *Act*.

4. The CBSA conducted an audit in 2008 and found that C.B. Powell had misclassified the goods in issue by entering the wrong classification number on its customs declaration form. Prior to issuing a re-determination pursuant to section 59 of the *Act*, the CBSA solicited views from C.B. Powell. The latter acknowledged its tariff classification error and also indicated that it had discovered that it had misstated the origin of the goods in issue, claiming that, rather than being subject to the 12.5 percent MFN tariff rate, they were eligible for duty-free tariff treatment under the *North American Free Trade Agreement*.[2] C.B. Powell requested that this further correction be made.

5. The CBSA issued a re-determination pursuant to subsection 59(1) of the *Act*, correcting the tariff classification number, but leaving the 12.5 percent MFN tariff treatment unchanged. In doing so, it noted as follows:

> This decision represents a re-determination of the tariff classification only. The tariff treatment has not been reviewed and is not being re-determined under this detailed adjustment statement (DAS).

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

6. C.B. Powell disagreed with the continued 12.5 percent MFN tariff treatment and sought recourse under subsection 60(1) of the *Act*. However, the President of the CBSA ruled that he did not have the requisite jurisdiction to decide the matter. In this regard, the CBSA, in its B2 reject notification of August 7, 2008, advised C.B. Powell that its adjustment request had been rejected without decision and without further processing, indicating as follows:

> . . . as there was no previous redetermination of origin under Section 59 of the Customs Act . . . there can be no appeal of origin under Section 60.

7. C.B. Powell brought an application for judicial review in the Federal Court, seeking a declaration that a decision had indeed been made pursuant to subsection 60(1) of the *Act* and that, therefore, an appeal lied to the Tribunal pursuant to subsection 67(1).

8. The CBSA reiterated its position that, because no re-determination of origin had been made pursuant to subsection 59(1) of the *Act*, no further re-determination was possible pursuant to subsection 60(1).

9. The Federal Court allowed the application for judicial review, declaring that the CBSA's B2 reject notification was ". . . a negative decision . . . to which an application lies to the . . . Tribunal pursuant to [subsection 67(1)] . . . ."[3] The CBSA appealed the decision.

10. In setting aside the decision of the Federal Court in the matter,[4] the Federal Court of Appeal stated as follows:

> [47] . . . It is not for the Federal Court or this Court to interpret the word "decision" in subsection 67(1) and determine whether the [Tribunal] can hear C.B. Powell's appeal. That is the task of the [Tribunal] when an appeal is brought to it under subsection 67(1).
>
> [49] . . . *Under subsection 67(1), the [Tribunal] alone is to interpret the word "decision" and decide whether it can hear an appeal.*
>
> [Emphasis added]

11. By orders dated May 12, 2010, the Tribunal granted the applications made by C.B. Powell, pursuant to section 67.1 of the *Act*, for extensions of the time for filing notices of appeal pursuant to section 67. Those requests (Application Nos. EP-2009-003 and EP-2009-004) were continued as the present appeals (Appeal Nos. AP-2010-007 and AP-2010-008).

12. By correspondence dated May 12, 2010, the Tribunal invited submissions from the parties on the preliminary issue of whether the jurisdictional requirements of subsection 67(1) of the *Act* had been fulfilled; submissions were subsequently received from both parties.

13. Being satisfied that the record contained sufficient information, the Tribunal decided to dispose of the jurisdictional question on the basis of the written record of these appeals without holding a public hearing.

---

3. *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2009 FC 528 (CanLII).
4. *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII).

JURISDICTIONAL ISSUE

Position of Parties

14. C.B. Powell submitted that the B2 reject notifications on record in these appeals constitute decisions that engage the Tribunal's jurisdiction under section 67 of the *Act*. In particular, it contended that the President of the CBSA's refusal to issue a decision pursuant to section 60 was a decision in itself.

15. For its part, the CBSA maintained that, because there had been no re-determination of origin pursuant to subsection 59(1) of the *Act*, there was no basis upon which to request a further re-determination of origin under section 60. Accordingly, the B2 reject notifications, not being further re-determinations pursuant to section 60, could not be viewed as decisions that could be the subject of an appeal to the Tribunal pursuant to section 67. In this regard, the CBSA contended that the appropriate recourse under the statutory scheme was under section 74, pursuant to which a person can apply for the refund of excess duties paid, including in circumstances where there has been a failure to claim preferential tariff treatment at the time of accounting for the imported goods.

Tribunal's Analysis

16. The Tribunal derives its jurisdiction from its enabling statute, the *Canadian International Trade Tribunal Act*,[5] which provides as follows:

> **16.** The duties and functions of the Tribunal are to
>
> . . .
>
> (*c*) hear, determine and deal with all appeals that, *pursuant to any other Act of Parliament or regulations thereunder*, may be made to the Tribunal, *and all matters related thereto*; . . .

> **16.** Le Tribunal a pour mission :
>
> [...]
>
> *c*) de connaître de tout appel pouvant y être interjeté *en vertu de toute autre loi fédérale ou de ses règlements et des questions connexes*;
>
> [...]

[Emphasis added]

17. In this regard, by virtue of subsection 67(1) of the *Act*, an appeal lies to the Tribunal from a prior decision of the President of the CBSA under subsection 60(1). Subsection 67(1) provides as follows:

> **67.** (1) 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 by filing a notice of appeal in writing with the President and the Secretary of the . . . Tribunal within ninety days after the time notice of the decision was given.

> **67.** (1) Toute personne qui s'estime lésée par une *décision du président rendue conformément aux articles 60* ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

[Emphasis added]

5. R.S.C. 1985 (4th Supp.), c. 47.

18. The federal courts have consistently held that sections 57.1 to 67 of the *Act* establish a comprehensive scheme for reviewing all matters relating to tariff classification, origin, value for duty and marking determination of goods.[6] In this regard, the rule of modern statutory interpretation[7] holds that the provisions of a statute must be interpreted in a contextual way, that is, in relation to each other, in a manner consistent with Parliament's legislative purpose.

19. A contextual reading of the Tribunal's jurisdiction under subsection 67(1) of the *Act* requires that the provision first be situated within the broader administrative scheme of the statute in order to discern how it was intended to operate in relation to the other decision-making authorities forming part of that statutory scheme.

20. In this regard, the schematic structure of the *Act* is based on sequential administrative mechanisms that allow for the re-determination and further re-determination of determinations and re-determinations by the persons specifically designated at each stage of the process to make these decisions, as well as an appeal mechanism for the review of any decisions relating to tariff classification, origin and value for duty.

21. Turning to the statutory scheme itself, section 57.1 of the *Act* provides the methodologies for the determination of origin, tariff classification and value for duty. Section 57.1 provides as follows:

57.1 For the purposes of sections 58 to 70,	**57.1** Pour l'application des articles 58 à 70 :
(*a*) the *origin* of imported goods is to be determined in accordance with section 16 of the *Customs Tariff* and the regulations under that section;	*a*) l'*origine* des marchandises importées est déterminée conformément à l'article 16 du *Tarif des douanes* et aux règlements d'application de cet article;
(*b*) the *tariff classification* of imported goods is to be determined in accordance with sections 10 and 11 of the *Customs Tariff*, unless otherwise provided in that Act; and	*b*) le *classement tarifaire* des marchandises importées est déterminé conformément aux articles 10 et 11 du *Tarif des douanes*, sauf indication contraire de cette loi;
(*c*) the *value for duty* of imported goods is to be determined in accordance with sections 47 to 55 of this Act and section 87 of the *Customs Tariff*.	*c*) la *valeur en douane* des marchandises importées est déterminée conformément aux articles 47 à 55 de la présente loi et à l'article 87 du *Tarif des douanes*.

[Emphasis added]

6. *Abbott Laboratories Ltd. v. Canada (Minister of National Revenue)*, 2004 FC 140 (CanLII). The same principle was reaffirmed by the Federal Court of Appeal in its recent decision in relation to the same issue that the parties to these appeals brought to the federal courts. In *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) at para. 28, the Federal Court of Appeal stated as follows: "Under the Act, Parliament has established an administrative process of adjudications and appeals in this area."
7. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, citing E. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

22. Subsections 58(1) and (2) of the *Act*, in respect of actual determinations by an officer,[8] or by an officer within a class of officers, designated by the President of the CBSA[9] and in respect of deemed determinations, provide as follows:

> **58.** (1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, may *determine* the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).
>
> (2) If the origin, tariff classification and value for duty of imported goods are not determined under subsection (1), the origin, tariff classification and value for duty of the goods are *deemed to be determined*, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(*a*). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).
>
> **58.** (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut *déterminer* l'origine, le classement tarifaire et la valeur en douane des marchandises importées au plus tard au moment de leur déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).
>
> (2) Pour l'application de la présente loi, l'origine, le classement tarifaire et la valeur en douane des marchandises importées qui n'ont pas été déterminés conformément au paragraphe (1) sont *considérés comme ayant été déterminés* selon les énonciations portées par l'auteur de la déclaration en détail en la forme réglementaire sous le régime de l'alinéa 32(1)*a*). Cette détermination est réputée avoir été faite au moment de la déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).
>
> [Emphasis added]

23. Subsections 59(1) and (2) of the *Act*, in respect of re-determinations of prior determinations and further re-determinations of prior re-determinations by customs officers, provide as follows:

> **59**. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section, may
>
> (*a*) in the case of a determination under section . . . 58, *re-determine* the origin, tariff classification, value for duty or marking determination of any imported goods at any time within
>
> (i) four years after the date of the determination . . . or
>
> (ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and
>
> (*b*) *further re-determine* the origin, tariff classification or value for duty of imported
>
> **59**. (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :
>
> *a*) dans le cas d'une décision prévue à l'article [...] 58, *réviser* l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :
>
> (i) dans les quatre années suivant la date de la détermination [...]
>
> (ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

8. Subsection 2(1) of the *Act* defines "officer" as follows: "'officer' means a person employed in the administration or enforcement of this Act, the *Customs Tariff* or the *Special Import Measures Act* and includes any member of the Royal Canadian Mounted Police".
9. Referred to herein as "designated officers". For ease of reference, "officers" and "designated officers" are herein collectively referred to as "customs officers".

> goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed . . . .
>
> (2) An officer who makes a determination under subsection . . . 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give *notice* of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.
>
> *b*) *réexaminer* l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire [...].
>
> (2) L'agent qui procède à la décision ou à la détermination en vertu [du paragraphe] [...] 58(1) [...] ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai *avis* de ses conclusions, motifs à l'appui, aux personnes visées par règlement.
>
> [Emphasis added]

24. Subsections 60(1) and (4) of the *Act*, as the next stage in the administrative scheme of the *Act*, provide recourse to the President of the CBSA for a re-determination from a prior determination by a customs officer pursuant to subsection 58(1), or for a further re-determination from a re-determination or further re-determination pursuant to subsection 59(1). By virtue of the fact that the authority conferred upon customs officers by subsection 59(1) extends to the re-determination of determinations made pursuant to section 58, recourse under subsection 60(1) would also be available from re-determination of a deemed determination by a customs officer under subsection 58(2). Subsections 60(1) and (4) provide as follows:

> **60.** (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.
>
> . . .
>
> (4) On receipt of a request under this section, the President shall, without delay,
>
> (*a*) re-determine or further re-determine the origin, tariff classification or value for duty;
>
> (*b*) affirm, revise or reverse the advance ruling; or
>
> (*c*) re-determine or further re-determine the marking determination.
>
> **60.** (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.
>
> [...]
>
> (4) Sur réception de la demande prévue au présent article, le président procède sans délai à l'une des interventions suivantes :
>
> *a*) la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane;
>
> *b*) la confirmation, la modification ou l'annulation de la décision anticipée;
>
> *c*) la révision ou le réexamen de la décision sur la conformité des marques.

25. Finally, by virtue of subsection 67(1) of the *Act*, an appeal lies to the Tribunal from a prior decision of the President of the CBSA under section 60:

> **67.** (1) 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 by filing a notice of appeal in writing with the President and the Secretary of the [Tribunal] within ninety days after the time notice of the decision was given.
>
> **67.** (1) Toute personne qui s'estime lésée par une *décision du président rendue conformément aux articles 60* ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.
>
> [Emphasis added]

26. As noted earlier, the Federal Court of Appeal, in a recent decision in the matter,[10] stated that, under subsection 67(1), the Tribunal alone was to interpret the word "decision" and to decide whether it had jurisdiction to hear an appeal.

27. While it is the Tribunal's responsibility, in determining whether or not it can hear an appeal, to interpret the word "decision" in subsection 67(1) of the *Act*, it cannot ascribe to that term a meaning that is inconsistent with the overall scheme of the statute and, in particular, with the jurisdiction statutorily conferred upon it by Parliament. In this regard, the Tribunal is mindful of the Supreme Court of Canada's admonition in *Dunsmuir v. New Brunswick*[11] that:

> [59] . . . true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. *The tribunal must interpret its grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction* . . . .
>
> [Emphasis added]

28. The Tribunal's authority under subsection 67(1) of the *Act* to hear an appeal is contingent on a prior "decision" having been made by the President of the CBSA pursuant to subsection 60(1).

29. The Federal Court of Appeal, in *Moumdjian v. Canada (Security Intelligence Review Committee)*,[12] indicated that ". . . the term 'decision or order' has no fixed or precise meaning but, rather, depends on the statutory context . . . ." In this regard, the Tribunal agrees with the CBSA that the only decisions that the President of the CBSA is authorized to make pursuant to subsection 60(1) of the *Act* are re-determinations and further re-determinations of the tariff classification, origin and value for duty of goods that were the subject of a decision pursuant to subsection 59(2).[13]

30. It follows from the interrelated and sequential nature of the administrative mechanisms in the *Act* that, without either a prior determination made by a customs officer pursuant to subsection 58(1), or a re-determination under subsection 59(1) of the subsection 58(2) deemed determination of origin, there would be nothing for the President of the CBSA to re-determine or to further re-determine in respect of that issue under the authority conferred upon him by subsection 60(1). A request pursuant to subsection 60(1) in such a situation would therefore necessarily be met with a rejection notice. In the absence of a "decision" pursuant to subsection 60(1), an appeal would not lie to the Tribunal pursuant to subsection 67(1).

---

10. *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII).
11. [2008] 1 S.C.R. 190.
12. [1999] 4 F.C. 624 at para. 23.
13. Tribunal Exhibit AP-2010-007-05A at para. 35.

31. The Tribunal finds that, in the present appeals, there was in fact no actual re-determination made by a customs officer, pursuant to subsection 59(1) of the *Act*, of the subsection 58(2) deemed determination in respect of origin. However, such a decision could also conceivably arise by necessary implication as a consequence of other decisions made, thereby providing the basis for a request to the President of the CBSA under subsection 60(1).

32. For example, in *Mueller Canada Inc. v. Canada*[14], several Orders in Council had been passed to implement changes to the *Customs Tariff* as a consequence of the implementation of the *Harmonized Commodity Description and Coding System* in Canada, with all changes retroactive to January 1, 1988. On May 1, 1990, the Governor in Council issued Customs Tariff Schedules Amendment Order, No. 7,[15] which revoked tariff item No. 8481.90.40, "manual valve parts", and substituted tariff item No. 8481.90.10, "parts for flow control gates (valves) o/t hand operated". Mueller Canada Inc., being of the opinion that this change affected the tariff classification of the items that it imported, filed a request for re-determination on March 29, 1992. On January 29, 1993, the Department of National Revenue issued a DAS rejecting the request for a re-determination of the tariff classification, stating: "Consideration cannot be given to this request as the goods are not covered by the retroactive tariff amendment . . . ." On February 20, 1993, Mueller Canada Inc. filed a request for further re-determination, which was rejected by the Deputy Minister of National Revenue "without decision" and with the notation that the request "cannot be further processed". In this regard, the request for further re-determination was considered invalid on the grounds that the January 29, 1993, request for re-determination resulted in no decision, as it was rejected. However, on review, the Federal Court found as follows: "In forming an opinion that the retroactive order did not apply to these goods, the respondents [necessarily] had to go through a tariff classification exercise." In effect, the Deputy Minister of National Revenue, in refusing to make a further re-determination, essentially rendered a "negative decision" (as opposed to "no decision") that affirmed the original tariff classification and that, as such, was properly the subject of an appeal to the Tribunal.

33. Similarly, in *Editions Gallery Ltd. v. President of the Canada Border Services Agency*,[16] the CBSA issued DASs on June 23, 2005, that indicated the CBSA's decision on tariff classification and that the goods were subject to an MFN duty rate of 6.5 percent. In a letter dated May 16, 2005, the CBSA Recourse Division indicated that it was refusing a request for a re-determination of origin for the following reason: "There was no NAFTA origin decision made in these cases. Unfortunately, the Recourse Division may only consider a re-determination of origin request under Section 60 of the Customs Act if an origin decision was previously made. Consequently, the Recourse Division is unable to consider the origin re-determination request in these cases. As a result the tariff treatment for these cases remains as originally entered under MFN." The Tribunal found that, in concluding, in its prior decision, that the MFN duty rate was applicable, the CBSA necessarily had to first determine whether any preferential tariffs (e.g. under *NAFTA*) applied, which necessarily implied that a re-determination on origin had been made. In this regard, the Tribunal stated as follows:

> 21. The Tribunal understands from the foregoing that the CBSA Recourse Division did not consider it possible to make a re-determination of origin under section 60 of the *Customs Act* because it was of the view that an origin determination had not previously been made.
>
> 22. However, the CBSA issued DASs on June 23, 2005, that indicate not only the CBSA's decision on classification but also that the goods are of MFN origin and that the MFN "rate of duty is 6.5%". Those DASs indicate that they represent ". . . decision[s] of the President of the Canada Border

14. [1993] F.C.J. No. 1193 (QL) [*Mueller*].
15. S.O.R./90-265.
16. (26 July 2006) AP-2005-017 (CITT) [*Editions Gallery*].

> Services Agency under subsection 60(4) of the Customs Act . . .", i.e. a re-determination. 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.

34. In considering the relevancy of these cases in the present circumstances, a distinction must be drawn between tariff classification on the one hand and origin on the other. Subsection 2(1) of the *Act* defines "tariff classification" as follows:

> "tariff classification" means the classification of imported goods under a tariff item in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*.
>
> « classement tarifaire » Le classement des marchandises importées dans un numéro tarifaire de la liste des dispositions tarifaires de l'annexe du *Tarif des douanes*.

35. Tariff classification is based on the physical description of imported goods, with the Tribunal determining the proper tariff classification of the goods in accordance with prescribed interpretative rules.[17] In this regard, the tariff classification exercise is separate and distinct from the determination of the tariff treatment to be accorded the goods, as classified.

36. The determination of origin, on the other hand, is an integral part of the determination of the tariff treatment to be accorded to imported goods, as classified, and, in particular, of whether or not the goods qualify for preferential tariff treatment (e.g. under *NAFTA*).

37. In both *Mueller* and *Editions Gallery*, the decisions in respect of which re-determinations were sought arose by necessary implication from the decisions that were actually made by the customs authorities. However, that is clearly not the case here.

38. Given the sequencing of decisions in the process for determining duty liability pursuant to the *Customs Tariff* and, in particular, the fact that tariff classification would logically precede the determination of origin for tariff treatment purposes, a determination in respect of the former would not necessarily imply a determination in respect of the latter. In this regard, the Tribunal agrees with the CBSA's assertion that ". . . it would be inappropriate for the Tribunal to conclude that when tariff classification was re-determined, tariff treatment was also necessarily re-determined."[18]

39. Given the absence of a re-determination by a customs officer pursuant to subsection 59(1) of the *Act* of the subsection 58(2) deemed determination of origin and that such a re-determination could not be said to have arisen by necessary implication from the re-determination of the tariff classification that was actually made, the Tribunal finds that the President of the CBSA was correct in concluding that he had no jurisdiction pursuant to subsection 60(1) to make a decision (i.e. a further re-determination) on the issue of origin.

---

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 and the Canadian Rules set out in the schedule."
18. Tribunal Exhibit AP-2010-007-05A at para. 90.

40. Absent a decision on origin by the President of the CBSA pursuant to subsection 60(1) of the *Act*, the Tribunal has no jurisdiction to consider an appeal under subsection 67(1). The Tribunal, in *Wolseley Engineered Pipe Group v. President of the Canada Border Services Agency*,[19] stated as follows:

> 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 61 of the *Act*. . . .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.

The Tribunal considers *Wolseley* to be particularly relevant in the circumstances, given the similarity of the facts in that case to those in the present appeals. In that case, the Tribunal found as follows:

> 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. *There is no general language in the decision pursuant to section 59 that could reasonably be interpreted to cover the origin of the goods*.
>
> [Emphasis added, footnote omitted]

41. Indeed, acceptance of the present appeals under the purported authority of subsection 67(1) of the *Act*, when no "decision" had been made (either in actuality or by necessary implication) by the President of the CBSA, as the authority designated under subsection 60(1) to make such decisions, would result in the Tribunal exceeding its intended jurisdiction under the statutory scheme. In this regard, the Tribunal agrees with the CBSA's contention that, rather than being itself a decision under section 60, "[t]he B-2 Reject Notification [was] an administrative notice [that] informed C.B. Powell that it did not meet the criteria established by the *Act* in order to file a request for further re-determination under [subsection] 60(1)."[20]

42. Rather than seeking to invoke subsection 67(1) of the *Act* through a strained interpretation of the word "decision" in that provision, the Tribunal agrees with the CBSA that the appropriate recourse would have been under section 74, which also forms part of the broader administrative scheme of the statute and which allows a person to apply for a refund of duties paid, including in circumstances where there had been a failure to claim preferential tariff treatment under *NAFTA* at the time the goods were accounted for pursuant to the *Act*. Section 74 provides as follows:

> **74** (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if
>
> . . .
>
> (*c.1*) the goods were exported from a NAFTA country or from Chile but no claim for preferential tariff treatment under NAFTA or no claim for preferential tariff treatment under CCFTA, as the case may be, was made in respect of those goods at the time they were accounted for under subsection 32(1), (3) or (5);
>
> . . .

> **74.** (1) Sous réserve des autres dispositions du présent article, de l'article 75 et des règlements d'application de l'article 81, le demandeur qui a payé des droits sur des marchandises importées peut, conformément au paragraphe (3), faire une demande de remboursement de tout ou partie de ces droits et le ministre peut accorder à la personne qui, conformément à la présente loi, a payé des droits sur des marchandises importées le remboursement total ou partiel de ces droits dans les cas suivants :
>
> [...]
>
> *c.1*) les marchandises ont été exportées d'un pays ALÉNA ou du Chili mais n'ont pas fait l'objet d'une demande visant l'obtention du traitement tarifaire préférentiel de l'ALÉNA ou de celui de l'ALÉCC au moment de leur déclaration en détail en application du paragraphe 32(1), (3) ou (5);
>
> [...]

19. (11 March 2010) AP-2009-010 (CITT) [*Wolseley*].
20. Tribunal Exhibit AP-2010-007-05A at para. 97.

43. Finally, with regard to C.B. Powell's contention that "[t]he right to a refund under s. 74 is independent of the Appellant's right to request a re-determination under s. 60 (following a deemed determination)", the fact that these are separate administrative remedies operating within the broader statutory scheme does not detract from the fact that recourse pursuant to section 60 of the *Act* can only be had where the clear requirements of that provision have been met.[21]

DECISION

44. For the above reasons, the Tribunal does not consider itself, in the circumstances, to have the requisite jurisdiction to hear these appeals.

45. The appeals are therefore dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

21. Tribunal Exhibit AP-2010-007-09A at para. 29.