Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-017

Bri-Chem Supply Ltd.

v.

President of the Canada Border Services Agency

Decision issued
Friday, September 18, 2015

Reasons issued
Friday, October 2, 2015

Canada

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IN THE MATTER OF an appeal heard on May 7 and 8, 2015, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF various requests for re-determination, dated April 28, 2014, made under the *Customs Act*, as submitted to the President of the Canada Border Services Agency.

BETWEEN

BRI-CHEM SUPPLY LTD. **Appellant**

AND

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

DECISION

The appeal is allowed. Amounts paid by Bri-Chem Supply Ltd., in order to pursue this appeal, are to be refunded by the Canada Border Services Agency.

Jason W. Downey
Jason W. Downey
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	May 7 and 8, 2015
Tribunal Member:	Jason W. Downey, Presiding Member
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STATEMENT OF REASONS

SUMMARY

1. This is an appeal filed by Bri-Chem Supply Ltd. (Bri-Chem) with the Canadian International Trade Tribunal (the Tribunal) on August 4, 2014, pursuant to subsection 67(1) of the *Customs Act*.[1] The goods in issue are carboxymethyl starch oil well-drilling compounds. They act as a fluid-loss control agent for water-based drilling fluids. However, for reasons described below, the goods in issue are of secondary consideration in this appeal.

2. This appeal is one of three cases heard by the Tribunal in May and June 2015 that all dealt with the same issue, namely, the ability of taxpayers to make corrections to erroneous customs declarations according to the *Act*. A public hearing was held on May 7 and 8, 2015,[2] for this appeal and *Ever Green Ecological Services Inc. v. President of the Canada Border Services Agency*.[3] The third case, *Southern Pacific Resource Corp. v. President of the Canada Border Services Agency*,[4] was heard on June 2, 2015. Separate reasons for the latter two cases are issued concurrently with these reasons.

3. Bri-Chem is appealing the claim by the President of the Canada Border Services Agency (CBSA) that it owes duty on the goods in issue. The Tribunal finds that Bri-Chem owes none and that amounts paid by Bri-Chem, in order to pursue this appeal, are to be refunded by the CBSA.

4. The Tribunal also finds that the CBSA's actions constitute an abuse of process. The evidence is clear that the CBSA developed and enforced a policy that purposely contradicted the Tribunal's decision in *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*.[5] Having earlier abandoned an attempt to appeal the Tribunal's decision in *Frito-Lay*[6] before the Federal Court of Appeal, the CBSA sought to retry *Frito-Lay* through the pursuit of this matter, which raised no substantially different issue from that in *Frito-Lay* or which would warrant revisiting that decision. This course of action was at the expense of Bri-Chem and other importers in the same situation, such as Ever Green Ecological Services Inc. and Southern Pacific Resource Corp.,[7] that rightfully sought to correct honest customs accounting mistakes such as those identified in *Frito-Lay*. The Tribunal regrets that it lacks the power to award costs in such circumstances.

TRIBUNAL'S JURISDICTION

5. The CBSA argued that the Tribunal lacks jurisdiction to hear Bri-Chem's claims on the basis that there was no re-determination of tariff treatment pursuant to subsection 59(1) of the *Act* and, therefore, no basis upon which to request a further re-determination under subsection 60(1). It is the CBSA's contention that the B2 reject notifications are not *decisions* that are subject to an appeal to the Tribunal pursuant to section 67. This argument is entirely unfounded. In fact, the same reasoning was definitively rejected by the

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*]. The appendix to this statement of reasons reproduces the legislative provisions cited herein.
2. The record remained open until May 22, 2015, in order to allow the filing of certain revised exhibits as directed by the Tribunal at the hearing. Exhibit AP-2014-017-31, Vol. 1E.
3. (18 September 2015), AP-2014-027 (CITT).
4. (18 September 2015), AP-2014-028 (CITT) [*Southern Pacific*].
5. (21 December 2012), AP-2010-002 (CITT) [*Frito-Lay*].
6. *Attorney General of Canada v. Frito-Lay Canada, Inc.*, Court File No. A-103-13.
7. These are only known instances where importers in similar circumstances chose to bring their cases to the Tribunal. Other affected parties potentially exist as well.

Federal Court of Appeal some five years ago in *Canada (Border Services Agency) v. C.B. Powell Limited*,[8] and the CBSA brought no basis that could justify departing from the applicability of *C.B. Powell 2010* to this matter. This matter was also addressed in *Frito-Lay* and dismissed for lack of merit.[9] The Tribunal has jurisdiction to decide this appeal.

REVENUE-NEUTRAL MISTAKES CAN BE CORRECTED

Bri-Chem Made Revenue-neutral Corrections as Contemplated in Frito-Lay

6. Bri-Chem imported the goods in issue from the United States in 10 transactions between February 6 and September 24, 2012. At the time of importation, Bri-Chem classified the goods in issue under tariff item No. 3505.10.90 of the schedule to the *Customs Tariff*[10] (importers enter that information at box No. 27 on customs forms).[11] Bri-Chem declared the goods as being of U.S. origin (box No. 12, specifically, indicating "USC", for "United States – South Carolina").

7. The Most-Favoured-Nation (MFN) rate of duty for tariff item No. 3505.10.90 is zero. The rates of duty for *all other* preferential tariff treatments for tariff item No. 3505.10.90 are also zero, including for the United States Tariff (UST/NAFTA, code 10). As such, those goods would have entered Canada duty-free no matter where they originated in the world.[12] Bri-Chem entered code 2 in box No. 14 for tariff treatment, corresponding to MFN tariff treatment.

8. The CBSA did not challenge the U.S. origin of the goods nor Bri-Chem's claim that it possessed valid NAFTA certificates of origin for those same goods.[13] It follows that Bri-Chem could have claimed UST/NAFTA tariff treatment at the time of accounting, had there been an advantage to do so. In fact, it did not matter what tariff treatment was declared because there was no difference in the rate of duty—*being zero for both MFN and UST/NAFTA tariff treatments.*[14]

9. Bri-Chem discovered, following a CBSA audit, that it had made a mistake in tariff *classification*.[15] Instead of being classified under tariff item No. 3505.10.90 (duty-free under the MFN and all other preferential tariffs, including UST/NAFTA), the goods in issue should have been classified under tariff item

8. 2010 F.C.A. 61 [*C.B. Powell 2010*] in particular at paras. 35, 49.
9. *Frito-Lay* at paras. 68-69.
10. S.C. 1997, c. 36.
11. See coding at http://www.cbsa-asfc.gc.ca/publications/dm-md/d17/d17-1-10-eng.html.
12. The only exception is if the goods originated in the People's Republic of Korea, which is the only country that is subject to the General Tariff.
13. The CBSA did not examine the validity of the certificates of origin. *Transcript of Public Hearing*, Vol. 2, 8 May 2015, at 210, 214.
14. The only exception is if the goods originated in the People's Republic of Korea, which is the only country that is subject to the General Tariff.
15. On August 7, 2013, the CBSA decided to audit Bri-Chem's transactions for tariff classification pursuant to sections 42 and 42.01 of the *Act*. The CBSA looked at various transactions by Bri-Chem for the period from January 1 to December 31, 2012. Tribunal Exhibit AP-2014-017-15C (protected), Exhibit A-8, Vol. 2. It is worthy to note that the goods in issue were last imported on September 24, 2012. On September 27, 2013 (a full year after Bri-Chem's last importation), the CBSA issued an interim report for that verification wherein it informed Bri-Chem that the goods in issue should not have been classified as "other modified starches" of tariff item No. 3505.10.90 (as originally claimed by Bri-Chem), but rather as "other etherified or esterified starches" of tariff item No. 3505.10.19. Tribunal Exhibit AP-2014-017-15C (protected), Exhibit A-10, Vol. 2. As discussed, this revised tariff item now attracted an MFN rate of duty of 8 percent *ad valorem* versus zero (duty free) under UST/NAFTA tariff treatment.

No. 3505.10.19; this revised tariff item attracts an MFN rate of duty of 8 percent *ad valorem*, but is duty-free under the UST/NAFTA tariff.

10. On October 10, 2013, Bri-Chem filed 10 routine corrections pursuant to section 32.2 of the *Act* (one for each import transaction), changing the tariff *classification* of the goods to tariff item No. 3505.10.19. At the very same time, Bri-Chem also claimed UST/NAFTA tariff treatment—this maintained the duty-free status of the original claim.[16] This constituted precisely the type of "revenue-neutral" correction of an honest mistake that was upheld in *Frito-Lay*,[17] simply substituting one zero-duty situation with another. This is also the exact type of scenario envisioned by *C.B Powell Limited v. Canada (Border Services Agency)*.[18] The Tribunal finds that the CBSA should have recognized and accepted Bri-Chem's "revenue-neutral" transaction as such.

11. That should have been the end of the matter for Bri-Chem. Unfortunately, it was not, as the CBSA decided to reject the correction and essentially adopted the same position that it unsuccessfully argued in *Frito-Lay*.

CBSA Re-litigated Frito-Lay

12. The Tribunal accepted to hear this appeal, and the above-referenced related matters, on the CBSA's insistence that it was bringing forward matters that were distinguishable from *Frito-Lay*. As it turned out, the Tribunal was presented with the following same set of circumstances as in *Frito-Lay*:

- The goods in issue were not what they were thought to be in terms of proper tariff classification. The importer made a mistake and, therefore, under subsection 32.2(2) of the *Act*, made a correction in tariff *classification* to align with the results of CBSA's audit.
- Under the original tariff item (now known to be erroneous), the goods in issue had a rate of duty of zero "across the board" (i.e. at zero, not only under the MFN tariff but also under all other tariffs).
- In the move occasioned by the correction in tariff classification, the new tariff item commanded an MFN rate that was higher than the UST/NAFTA rate (in this case, 8 percent compared to zero).
- Since the importer had not paid duty on its original (erroneous) claim, it saw no reason to pay duty on its corrected tariff classification claim when the UST/NAFTA rate was also zero and, therefore, proceeded to make a "revenue-neutral" claim for duty-free UST/NAFTA tariff *treatment*, at the very same time, on the very same form.

13. In addition to its refusal to recognize the same fact situation as had existed in *Frito-Lay*, the CBSA maintained the very same position that it had argued in that case: essentially, it reasserted that, while

16. Tribunal Exhibit AP-2014-017-15C (protected), Exhibit A-12, Vol. 2.
17. *Frito-Lay* at paras. 29-30. Additionally, as was the case in *Frito-Lay*, because MFN tariff treatment is not a preferential tariff treatment under a free trade agreement, the correction of tariff classification was in respect of a claim of tariff treatment other than an incorrect claim of preferential tariff under a free trade agreement and, therefore, subsection 32.2(2) of the *Act* applied as opposed to subsection 32.2(1).
18. 2011 F.C.A. 137 at para. 37, per Stratas J.: ". . . [the appellant] tried to change the tariff treatment by using the administrative appeal regime in Part III of the Act. But Parliament's plain words in sections 58, 59, 60 and 67 of the Act, as reasonably interpreted by the Tribunal, do not permit that. Further, Parliament has provided for importers to correct their declarations or pursue other recourses within a certain period of time in certain circumstances: see, for example, sections 32.2 and 74 of the Act."

Bri-Chem could correct the "incorrect" tariff classification, it could not claim anything other than the "not incorrect"[19] MFN tariff treatment of its original accounting and was therefore "stuck" with MFN tariff treatment.

14. Furthermore, the CBSA developed a spurious theory in which the revenue-neutral correction in tariff classification somehow triggered a momentary "owing" situation which it characterized as a "*zero-refund position*",[20] and by which the accompanying UST/NAFTA tariff treatment would purportedly not be available to Bri-Chem because of a one-year deadline under subparagraph 74(3)*b*)(ii) (in Part IV - Abatements and Refunds) of the *Act*.

Frito-Lay Should have been Applied—not Deliberately Ignored

15. The incongruous implication of the CBSA's position for Bri-Chem remains identical to the situation that was rejected in *Frito-Lay*. According to the CBSA, an importer *must correct*[21] part of an original customs declaration, but is not allowed to maintain the duty-free position of its original declaration, even when it is elementary that, had the mistake not been made, the goods would have entered Canada duty-free under the UST/NAFTA tariff in any event. The Tribunal cannot agree.

16. The CBSA's position is disjunctive and defies the very purpose of preferential trade agreements. It is discordant as it proposes the decoupling of tariff treatment from tariff classification. It also ignores the day-to-day commercial reality of importers that would never reasonably make a tariff treatment claim other than MFN when the MFN rate of duty is already zero. It further ignores the basic fact that Bri-Chem only *later* realized that it was wrong in its initial tariff classification. More fundamentally, Bri-Chem would only be in a position to ascertain the applicable tariff treatment regarding a new position *after* it belatedly learned of its mistake.

17. There is no basis to the CBSA's contention that MFN tariff treatment is "*not* an *incorrect* tariff treatment". Such a statement is at best bureaucratically narrow-minded; at worst, it is entirely misleading if not underhanded, and it is also beside the point. It focusses on a purported "correction" to *tariff treatment*, whereas the proper analytical starting point is that the only "correction" that took place was to *tariff classification*.

18. Importantly, Bri-Chem did not correct the "origin" of the goods; they were always stated as being of U.S. origin. When Bri-Chem corrected the tariff classification, the accompanying choice of the UST/NAFTA tariff treatment that was always available to its goods of U.S. origin simply maintained the *status quo ante* of the previously claimed zero rate of duty and was, therefore, revenue-neutral. It is properly consequential that Bri-Chem was animated by a "reason to believe" when it learned that its initially claimed *tariff classification* was incorrect, whether viewed from either a subjective or an objective point of view.

19. The CBSA's position fails because it seeks to artificially devise a way to catch the taxpayer into paying duties on goods that are rightfully duty-free. As examined in *Frito-Lay*, subsections 32.2(2) and (5) of the *Act* allow for a *correction* of tariff classification and a concurrent choice of a revenue-neutral UST/NAFTA *tariff treatment* because a refund-generating situation is not created. The *Act* does not permit the CBSA to receive the artificial windfall that it is seeking to have upheld in this matter.

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19. *Transcript of Public Hearing*, Vol. 1, 7 May 2015, at 172-73.
20. The term "zero refund" does not appear anywhere in the *Act*; it is a creation of the CBSA.
21. Subsection 32.2(1) of the *Act* uses "shall."

20. The goods in issue were declared as being of U.S. origin from the moment they entered the country and they were eligible from the very beginning to benefit from duty-free UST/NAFTA tariff treatment under both the erroneously claimed initial tariff item and the later corrected one. In other words, had the accounting mistake not been made, the goods would have entered Canada duty-free in the first place.[22] It is also logically understandable that, for goods of a given origin, when choosing between several available tariff treatments that all have a rate of duty of zero, an importer would use the simplest one.[23]

21. The CBSA continues to eclipse from its position something that it already knows—that the classification of goods under an eight-digit tariff item does not operate in a vacuum. Fundamentally, for importers, the schedule to the *Customs Tariff* exists so that goods can be paired-up with the appropriate and most advantageous rate of duty. If goods attract a rate of duty of zero under the MFN tariff, there is no reason to look further for another rate.

22. Further, the CBSA's position continues to be predicated on a misunderstanding of the two regimes of the *Act* (section 32.2 for Corrections and section 74 for Refunds). What Parliament intended through section 32.2 was to ensure that erroneous declarations of origin, tariff classification and/or value for duty be corrected and that any duties owed be paid, *but only when duties are truly owing*.[24]

23. Meanwhile, subsection 74(1) applies to ". . . a person *who paid* duties on any imported goods . . ." [emphasis added] which is clearly not the case here. Section 74 does not allow the CBSA to operate schemes which would ensnare importers into duties on goods that are legitimately entitled to enter Canada duty-free; that is tantamount to taxation in the absence of legislation.[25] Indeed, the CBSA itself appears to recognize such absence of precise authority when referring to what it calls an "administrative solution".[26]

24. Finally, Bri-Chem presented evidence which clearly shows that the CBSA knowingly frustrated importers from the applicability of *Frito-Lay* to either similar or even identical situations of fact. Internal documents, such as e-mails, training materials and correspondence to stakeholders emanating from a senior official, all demonstrated that the CBSA created and applied a deliberate policy designed to disregard *Frito-Lay*.[27] To the Tribunal's knowledge, such actions are unprecedented; they are perhaps contemptible as well.

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22. Basic knowledge of customs matters dictates that an importer would have claimed UST/NAFTA tariff treatment from the time of initial accounting had it realized, at the time, that its goods were classifiable under tariff item No. 3505.10.19 instead of tariff item No. 3505.10.90. Few, if any, importers would willingly pay duties when a preferential regime is available to them.
23. The NAFTA regime imposes more involved administrative obligations on importers when it comes to availability, production and conservation of necessary documentation over extended periods of time. A claim for MFN tariff treatment is typically less demanding, as it is open to every nation in the world, excluding the People's Republic of Korea.
24. Subsection 32.2(5) of the *Act* forbids a refund of duties.
25. For a discussion of the inapplicability of section 74 of the *Act* to revenue-neutral situations, see *Frito-Lay* at paras. 99-101. In *Southern Pacific*, the Tribunal heard evidence that indicated that revenue-neutral transactions could not be processed by the CBSA's electronic system. The Tribunal can only ponder whether that inconvenience played any role in the CBSA's policy to disregard *Frito-Lay*. *Transcript of Public Hearing* in *Southern Pacific*, 2 June 2015, at 116-21.
26. The CBSA's position was particularly troublesome because the CBSA effectively asked the Tribunal to endorse, absent any legislative grant by Parliament, a scheme devised by the CBSA that results in absurdities. *Transcript of Public Hearing* in *Southern Pacific*, 2 June 2015, at 102.
27. Exhibit AP-2014-017-15B, tabs 2, 3, 4, Vol. 1A.

RETRYING FRITO-LAY WAS AN ABUSE OF PROCESS

25. In *Frito-Lay*, the Tribunal remarked that the CBSA had engaged the taxpayer on what it then called "an administrative ride".[28] The CBSA's decision here to embark on what appears to have been a policy of outright disregard[29] for *Frito-Lay* goes beyond this. It appears that it has since caught others like Bri-Chem, such as Ever Green Ecological Services Inc. and Southern Pacific Resource Corp. (and possibly more), in the exact same predicament. The Tribunal was further troubled to learn that the CBSA had done so with full knowledge that the *Act* does not explicitly uphold such actions.[30]

26. This course of action has resulted in months of engagement by Bri-Chem starting on February 3, 2014, when the CBSA issued detailed adjustment statements, pursuant to subsection 59(2) of the *Act* giving notice that it had accepted the corrections to tariff classification, but that it rejected the claimed UST/NAFTA tariff treatment.[31]

27. Bri-Chem challenged that view, engaging the CBSA with what the importing community considered was settled law. The CBSA then issued B2 reject notifications dated May 8, 2014.[32] Bri-Chem was then forced to bring its case to the Tribunal where it faced continued opposition, including the contesting of actual jurisdiction, all of which resulted in the incurrence of additional costs.

28. It appears that the CBSA attempted an approach identical to the course of action that it pursued in the lead-up to *Frito-Lay*. As explained above, the Tribunal finds that there is no basis in law for such a course of action. As stated in *Frito-Lay*, section 32.2 of the *Act* allows for revenue-neutral corrections such as the ones made by Bri-Chem; section 74 for its part pertains to ***refunds*** of *monies* ***paid***.[33] Bri-Chem was never in a refund situation, no matter how the CBSA would attempt to obliquely characterize it with the use of creative language. The CBSA should have accepted Bri-Chem's adjustment statements in application of *Frito-Lay*.

29. Bri-Chem made extensive arguments to the effect that the CBSA's position was subject to the *res judicata* doctrine *per* issue estoppel or, alternatively, that the CBSA's actions constituted an abuse of process.

30. The Tribunal is incapable of finding application of issue estoppel to this matter because there is no prescribed identity of the parties involved.[34] However, the Tribunal does find that an abuse of process did

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28. *Frito-Lay* at para. 31.
29. Exhibit AP-2014-017-15B, tabs 2, 4, Vol. 1A.
30. Regarding avowed legislative gap filling, see Exhibit AP-2014-017-15B, tab 2 at 10, Vol. 1A; *Transcript of Public Hearing*, Vol. 2, 8 May 2015, at 205. See the CBSA's changing administrative policy towards this issue over time in Exhibit AP-2014-017-21B, tab 13 at para. 35, tab 14 at paras. 15, 37, tab 15, Vol. 1E.
31. Tribunal Exhibit AP-2014-017-15C (protected), Exhibit A-16, Vol. 2.
32. Tribunal Exhibit AP-2014-017-15C (protected), Exhibit A-20, Vol. 2.
33. *Frito-Lay* at paras. 62-64, 86, 98-101.
34. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (CanLII) [*Danyluk*], per Binnie J., at paras. 24-25. In the present instance, the first and second preconditions for the operation of issue estoppel are present, but not the third. See *Danyluk* at para. 25:

    > [t]he preconditions to the operation of issue estoppel were set out by Dickson J. in [*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248] . . . at p. 254:
    >
    > (1) that the same question has been decided;
    > (2) that the judicial decision which is said to create the estoppel was final; and,
    > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

take place, as the CBSA effectively set out to re-litigate the very same issues of law decided by the Tribunal in *Frito-Lay*.

31. In the Tribunal's view, the manner in which the CBSA chose to treat Bri-Chem's adjustment statements and force it into costly administrative and quasi-judicial proceedings constitutes an abuse of process as contemplated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*.[35]

32. The Tribunal is chiefly concerned with curtailing behaviours that can bring the administrative and quasi-judicial decision-making processes into disrepute.[36] The CBSA should also be concerned. Such considerations were underscored by the Supreme Court of Canada in *C.U.P.E., Local 79* as follows:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> 52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

33. The CBSA did not meet any of the conditions for re-litigation identified by the Supreme Court of Canada in *C.U.P.E., Local 79*. To be sure, a party can choose to ask the Tribunal to revisit previous decisions when different situations, different facts and different recourse to the legislation effectively arise, but absent such sufficiently distinguishing elements from one case to another, a party should act with caution, and most likely abstain altogether. This is particularly the case for the CBSA whose actions and decisions have broad application.

34. The abuse of process that occurred in this matter is particularly troublesome, as it was deliberate and involved an elaborate design. There appears to have been absolutely no *bona fide* basis upon which the CBSA could have honestly and legitimately argued that some discrete fact or situation would have been different from *Frito-Lay*. Rather, the CBSA's actions appear to have been developed and executed with the specific mindset and intent to disregard a previous Tribunal decision, culminating in nothing short of the conscious re-trial of that matter.

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35. [2003] 3 S.C.R. 77, 2003 S.C.C. 63 (CanLII) [*C.U.P.E., Local 79*] at para. 37.
36. *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 F.C.A. 210 (CanLII) at paras. 20-21; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 1993 CanLII 106 at para. 94; *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (11 December 2013), AP-2012-066 (CITT) at para. 37; *Regal Ideas Inc. v. President of the Canada Border Services Agency* (27 May 2013), AP-2012-025 (CITT) at para. 14.

35. The Tribunal is reminded of the words of Abella J. in *British Columbia (Workers' Compensation Board) v. Figliola*,[37] in dealing with the effects of specific legislation in that case, yet quite relevant more generally here:[38]

> [36]. . . That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

36. Furthermore, these actions take place in a context where the Tribunal has no power to indemnify Bri-Chem, even partially, for its needlessly incurred costs. Indeed, on the one hand, the *Act* requires a party like Bri-Chem to pay contested duties owing or provide security as a condition-precedent for commencing an appeal. On the other hand, and conversely, the *Act* does *not* allow the Tribunal to award costs to Bri-Chem even in circumstances of abuse of process like here.

37. Finally, the Tribunal wishes to articulate its concern in regard to the practice of putting the precedential value of its decisions into question by the CBSA.[39] Both respectful and responsible application of Tribunal precedent is important for stability and predictability in the importing community. Importers should not be subjected to costly and unfair litigation of cases for matters that have already been dealt with through proper legal authority. This is a matter that goes to the heart of, and constitutes a fundamental tenet of, the rule of law and fair and easy access to Canada's system of administrative justice. Such opposition ultimately leads to a breach of trust in the system and obfuscates the proper administration of justice.

DECISION

38. The appeal is allowed. Amounts paid by Bri-Chem, in order to pursue this appeal, are to be refunded by the CBSA.

Jason W. Downey
Jason W. Downey
Presiding Member

37. [2011] 3 S.C.R. 422, 2011 SCC 52 (CanLII).
38. 2011 SCC 52, [2011] 3 S.C.R. 422, See also paras. 31 and 33. for a discussion as to the availability of the *res judicata* doctrine and the interaction with the abuse of process doctrine.
39. Exhibit AP-2014-017-18A at paras. 48-49, Vol. 1B; *Transcript of Public Hearing*, 7 May 2015, Vol. 1 at 156-57.

APPENDIX

CUSTOMS ACT

32.2(1) Correction to declaration of origin — An importer or owner of goods for which preferential tariff treatment under a free trade agreement has been claimed or any person authorized to account for those goods under paragraph 32(6)(a) or subsection 32(7) shall, within ninety days after the importer, owner or person has reason to believe that a declaration of origin for those goods made under this Act is incorrect,	32.2(1) L'importateur ou le propriétaire de marchandises ayant fait l'objet d'une demande de traitement tarifaire préférentiel découlant d'un accord de libre-échange, ou encore la personne autorisée, sous le régime de l'alinéa 32(6)*a*) ou du paragraphe 32(7), à effectuer la déclaration en détail ou provisoire des marchandises, qui a des motifs de croire que la déclaration de l'origine de ces marchandises effectuée en application de la présente loi est inexacte doit, dans les quatre-vingt-dix jours suivant sa constatation :
(*a*) make a correction to the declaration of origin in the prescribed manner and in the prescribed form containing the prescribed information; and	*a*) effectuer une déclaration corrigée conformément aux modalités de présentation et de temps réglementaires et comportant les renseignements réglementaires;
(*b*) pay any amount owing as duties as a result of the correction to the declaration of origin and any interest owing or that may become owing on that amount.	*b*) verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.
(2) Corrections to other declarations — Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(a) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this *Act* for any of those goods is incorrect,	(2) Sous réserve des règlements pris en vertu du paragraphe (7), l'importateur ou le propriétaire de marchandises ou une personne qui appartient à une catégorie réglementaire de personnes relativement à celles-ci, ou qui est autorisée en application de l'alinéa 32(6)*a*) ou du paragraphe 32(7) à effectuer la déclaration en détail ou provisoire des marchandises, ayant des motifs de croire que la déclaration de l'origine de ces marchandises, autre que celle visée au paragraphe (1), la déclaration du classement tarifaire ou celle de la valeur en douane effectuée à l'égard d'une de ces marchandises en application de la présente loi est inexacte est tenue, dans les quatre-vingt-dix jours suivant sa constatation :
(*a*) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and	*a*) d'effectuer une correction à la déclaration en la forme et selon les modalités réglementaires et comportant les renseignements réglementaires;
(*b*) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.	*b*) de verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.
(3) Correction treated as re-determination — A correction made under this section is to be treated for	(3) Pour l'application de la présente loi, la correction de la déclaration faite en application du

the purposes of this Act as if it were a re-determination under paragraph 59(1)(a).

(4) Four-year limit on correction obligation — The obligation under this section to make a correction in respect of imported goods ends four years after the goods are accounted for under subsection 32(1), (3) or (5).

(5) Correction not to result in refund — This section does not apply to require or allow a correction that would result in a claim for a refund of duties.

. . .

59.(1) Re-determination or further re-determination — 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 57.01 or 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, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, 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 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, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(c.1), (c.11), (e), (f) or (g) that is treated by subsection 74(1.1) as a re-determination under paragraph (a) or the making of a correction under section 32.2 that is treated by

présent article est assimilée à la révision prévue à l'alinéa 59(1)*a*).

(4) L'obligation de corriger une déclaration, prévue au présent article, à l'égard de marchandises importées prend fin quatre ans après leur déclaration en détail au titre des paragraphes 32(1), (3) ou (5).

(5) Le présent article ne s'applique pas dans le cas où la correction d'une déclaration entraînerait une demande de remboursement de droits.

[...]

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 57.01 ou d'une détermination 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, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

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 d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1) *c.1*), *c.11*), *e*), *f*) ou *g*) qui est assimilé, conformément au paragraphe 74(1.1), à une révision au titre de l'alinéa *a*), soit d'une correction effectuée en application de l'article 32.2

subsection 32.2(3) as a re-determination under paragraph (a).

(2) Notice requirement — An officer who makes a determination under subsection 57.01(1) or 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.

. . .

60.(1) Request for re-determination or further re-determination — 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) President's duty on receipt of request — 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.

. . .

74.(1) Refund — 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

. . .

qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa *a*).

2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement 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.

[...]

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.

[...]

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*) 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);

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);

. . . [...]