Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-009

Danby Products Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, February 16, 2018

Canada

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IN THE MATTER OF an appeal heard on November 30, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 28, 2017, with respect to a dispute pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

DANBY PRODUCTS LIMITED **Appellant**

AND

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

DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 30, 2017
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Rebecca Marshall-Pritchard, Counsel Dustin Kenall, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Danby Products Limited	Thang Trieu Katie Patterson Justin Kutyan
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Mary Roberts

WITNESSES:

Greg Hall Product Development Director Danby Products Limited	Dave Miller Director of Purchasing Danby Products Limited

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Danby Products Limited (Danby) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA) dated March 28, 2017, made pursuant to subsection 60(4).

2. The issue in this appeal is whether 21 models of compact refrigerators containing freezer compartments (the goods in issue) are classifiable under tariff item No. 8418.69.00 as other refrigerating or freezing equipment, as claimed by Danby, or under tariff item No. 8418.21.10 as compression-type household-type refrigerators, as found by the CBSA.

PROCEDURAL HISTORY

3. On May 31, 2016, Danby filed a request for an advance ruling regarding all 21 models of the goods in issue, claiming that they were properly classified under tariff item No. 8418.69.00.

4. On July 6, 2016, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*, finding that the goods in issue were properly classified under tariff item No. 8418.21.00.

5. On July 25, 2016, Danby filed a dispute of the advance ruling pursuant to subsection 60(2).

6. On March 28, 2017, the CBSA issued an amended final decision under subsection 60(4), maintaining that the goods in issue are properly classified under tariff item No. 8418.21.00.

7. On May 5, 2017, Danby filed the present appeal.

8. On November 30, 2017, the Tribunal held a public hearing, at which Danby called two witnesses. The CBSA called no witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

9. The goods in issue are compact appliances used to refrigerate and freeze foods and beverages. They range in capacity from 1.60 cubic feet (45 L) to 4.40 cubic feet (126 L). They range in dimensions from 20" to 33" in height, 18" to 21" in width, and 18.5" to 21" in depth. They all have a single external door.[2]

10. Internally, the goods in issue have a separate freezer compartment, which measures either half or the full width of the goods, depending on the model. The freezer compartment has a separate internal flap. Of course, all models have a refrigeration compartment as well. The goods freeze and cool foods and beverages by means of a compressor mechanism.[3]

11. Finally, while the goods vary in their capacities and dimensions, neither party takes the position that these differences warrant different tariff classifications for individual models, as opposed to a single tariff classification applicable to all the goods in issue.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2017-009-07C at para. 12, Vol. 1A.
3. *Ibid.* at paras. 11, 14.

LEGAL FRAMEWORK

Tariff Classification Steps

12. 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 (WCO).[4] 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.

13. Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[5] and the *Canadian Rules*[6] set out in the schedule.

14. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

15. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[7] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[8] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[9]

16. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. It is only where Rule 1 does not conclusively determine the classification of the goods that the other *General Rules* become relevant to the classification process.[10]

17. 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 use a similar approach to determine the proper subheading.[11] The final step is to determine the proper tariff item.[12]

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4. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
5. S.C. 1997, c. 36, schedule [*General Rules*].
6. S.C. 1997, c. 36, schedule.
7. WCO, 2nd ed., Brussels, 2003.
8. WCO, 5th ed., Brussels, 2012.
9. See *Canada (Attorney General) v. Suzuki Canada Inc*., 2004 FCA 131, at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the classification opinions.
10. *Canada (Attorney General) v. Igloo Vikski Inc*., 2016 SCC 38 (CanLII) at para. 21.
11. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. Rule 6 of the *General Rules* provides that "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 [Rules 1 through 5] . . ." and that "the relative Section and Chapter Notes also apply, unless the context otherwise requires."
12. Rule 1 of the *Canadian Rules* provides that "the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that "the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

Relevant Tariff Nomenclature and Notes

18. The parties agree that, pursuant to Rule 1 of the *General Rules*, the goods in issue are classified under Section XVI, Chapter 84, heading 84.18, which read as follows:

Section XVI

MACHINERY AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPMENT; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

Chapter 84

NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLICANCES; PARTS THEREOF

84.18	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading 84.15.

19. Note 3 to Section XVI describes how multi-purpose "machines" (broadly defined to include, *inter alia*, appliances)[13] should be classified; it reads as follows:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

20. Note 7 to Chapter 84 elaborates, reading in relevant part as follows:

> A machine which is used for more than one purpose is, for the purpose of classification, to be treated as if its principal purpose were its sole purpose. . . .

21. There are no notes regarding heading 84.18.

22. The 10 subheadings in the tariff nomenclature under heading 84.18 are as follows:

8418.10	-Combined refrigerator-freezers, fitted with separate external doors
	-Refrigerators, household type:
8418.21	*- -Compression-type*
8418.29	- -Other
8418.30	-Freezers of the chest type, not exceeding 800 litres capacity
8418.40	-Freezers of the upright type, not exceeding 900 litres capacity
8418.50	-Other furniture (chests, cabinets, display counters, showcases and the like) for storage and display, incorporating refrigerating or freezing equipment
	-Other refrigerating or freezing equipment; heat pumps:
8418.61	- -Heat pumps other than air conditioning machines of heading 84.15
8418.69	*- -Other*

13. See note 5 to Section XVI, which reads as follows: "For the purpose of these Notes, the expression 'machine' means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85."

	-Parts:
8418.91	- -Furniture designed to receive refrigerating or freezing equipment
8418.99	- -Other

[Emphasis added]

23. The parties agree that the only potentially applicable subheadings are 8418.21 and 8418.69,[14] for which there are no relevant explanatory notes or classification opinions.

WITNESSES AND EVIDENCE

24. Danby filed a general brochure from its website, owner's manuals for certain models of the goods in issue, and various charts based on internal monthly and annual sales and market share data.

25. Danby called two witnesses: Messrs. G. Hall and D. Miller. Mr. Hall is the Director of Product Development for Danby. He testified about the design and engineering of the goods in issue. Mr. Miller is the Director of Purchasing at Danby. He testified about the demand and the market for the goods in issue.

26. The CBSA filed no evidence and called no witnesses.

POSITIONS OF THE PARTIES

27. The CBSA submits that the "principal function" of the goods in issue is refrigeration and, therefore, pursuant to note 3 to Section XVI and note 7 to Chapter 84, they should be classified based on that function as household compression-type refrigerators under subheading 8418.21.

28. In determining the principal function of composite machine goods, the CBSA proposes that the Tribunal consider a variety of factors, including demand, marketing, distribution, design, default function, the function of greatest importance for users, and best usage.

29. The CBSA argues that the freezer function is subordinate to the primary refrigerator function. In support, it notes that Danby's marketing literature refers to the goods in issue as "compact refrigerators", not "refrigerator-freezers", merely describing the freezer capability as a feature.[15] It also observes that access to the freezer section is indirect, requiring the user to open both the external door and the internal freezer flap. Furthermore, the refrigerator is significantly, from 9.5 to 17 times, larger than the freezer section.[16] The freezer in the model with the largest freezer section occupies less than 11 percent of the total capacity of the unit.[17] The CBSA underscores that Danby's own figure shows that "[redacted] of [consumers who use compact units to store food] store frozen food" in the freezer section; the CBSA argues that this supports its position that the freezer function is secondary to the refrigerator function.[18]

14. Subheading 8418.10 would be applicable but for the fact that the goods in issue do not have separate external doors. Subheading 8418.29 is excluded because the parties agree that the goods in issue are compression-type appliances. Subheadings 8418.30 and 8418.40 are inapplicable as they cover only freezers, not refrigerators or combination refrigerator-freezers. Subheading 8418.50 only covers furniture. Subheading 8418.61 only covers heat pumps. Finally, subheadings 8418.91 and 8418.99 cover only parts.
15. Exhibit AP-2017-009-07C at 27, 32, Vol. 1A.
16. Exhibit AP-2017-009-09F at para. 33, Vol. 1A.
17. Exhibit AP-2017-009-07C at 78, Vol. 1A.
18. Exhibit AP-2017-009-07B (protected) at para. 48, Vol. 2.

30. As a residual subheading should only be considered where goods do not meet the terms of a specific subheading, the CBSA submits that the Tribunal need not consider residual subheading 8418.69, because the goods in issue are already properly classified based on their primary refrigerating function as household compression-type refrigerators under subheading 8418.21.

31. Danby submits that the goods in issue have no principal function and, therefore, note 3 to Section XVI and note 7 to Chapter 84 do not apply. It relies on the Tribunal's decision in *Euro-Line*, which held that refrigerator-freezer units with separate external doors had no discernible principal function.[19] In *Euro-Line*, the CBSA had also urged the Tribunal to find refrigeration to be the principal function based on relative compartment capacity and marketing, but the Tribunal rejected that approach, finding that the "refrigerator and freezer perform different functions, with neither being subordinate to the other in terms of its importance."[20] The Federal Court of Appeal rejected the CBSA's argument that the Tribunal should have interpreted the principal function test with reference to capacity and marketing, upholding the Tribunal's approach as reasonable and holding that "[t]here is no doubt that where the respective functions of a composite machine are equal in importance, the test set out in Section Note 3 becomes impracticable."[21] Danby argues that *Euro-Line* is, thus, directly on point and that by attempting to re-argue it here the CBSA is, at best, skirting the line articulated by the Federal Court of Appeal in *Bri-Chem* regarding the CBSA's proper role in relation to the Tribunal.[22]

32. Even if *Euro-Line* is not guiding under *Bri-Chem*, Danby argues that the specific facts of this appeal support a finding that the goods in issue have no principal function. The goods are designed to be used by people who want a machine with dual functionality. Indeed, Danby states that its [redacted] are the goods in issue, which account for "[redacted]."[23] It claims that "[t]he goods are popular for storing drinks", as "[redacted] consumers of compact units use them to keep drinks cold."[24] The availability of ice from the freezer section therefore promotes this use. It claims that "[redacted] of [consumers who use compact units to store food] store frozen food."[25]

33. Finally, it notes that from an engineering standpoint the freezer function is inseparable from the refrigerator section in the goods in issue. The goods use roll-bond evaporators made of aluminum plates, which are located between the refrigerator and freezer compartments and serve as a divider. The plates can reach temperatures of -20 to -25 degrees Celsius and produce the cold for both compartments. The refrigerator could not function without the evaporators of the freezer. Further, they form a closed system, meaning that the units cannot be adjusted to disable one function or another.[26]

34. In reply, the CBSA distinguishes *Euro-Line* based on the fact that the goods in that matter were larger and had separate external freezer drawers and larger freezers that were about one half the size of the refrigerator compartment. By contrast, the CBSA argues, the freezer sections of the goods in issue are too

19. *Euro-Line Appliances v. President of the Canada Border Services* Agency (12 August 2013), AP-2012-026 (CITT) [*Euro-Line*].
20. *Ibid.* at n. 59.
21. *President of the Canada Border Services Agency v. Euro-Line Appliances Inc*., 2014 FCA 208 at para. 40 [*Euro-Line JR*].
22. *Canada (Attorney General) v. Bri-Chem Supply Ltd*., 2016 FCA 257 [*Bri-Chem*].
23. Exhibit AP-2017-009-07B (protected) at para. 52, Vol. 2.
24. *Ibid*. at para. 49.
25. *Ibid*. at para. 48.
26. *Transcript of Public Hearing*, 30 November 2017, at 37, 94.

small "to have real utility to the consumer for frozen food storage."[27] The CBSA also notes that in *Euro-Line* the Federal Court of Appeal acknowledged that relative capacity and marketing "could have been used" for determining the principal function given that "Section Note 3 does not set out any particular method for resolving the issue", while ultimately deferring to the Tribunal's approach as reasonable.[28]

ANALYSIS

35. Generally, the Tribunal starts with an examination of whether goods can *prima facie* be classified in either or both tariff items proposed by the parties to an appeal. However, the Tribunal's well-settled case law directs that goods cannot be *prima facie* classifiable in a residual item unless the Tribunal has first satisfied itself that the goods cannot be classified in a more specific item.[29] Therefore, in this case, the Tribunal must begin its analysis by considering whether the goods in issue are classifiable under subheading 8418.21 and will only consider the residual ("other") subheading 8418.69 if the goods in issue cannot be classified under the former.

36. The goods in issue can only be classified under subheading 8418.21 as refrigerators if refrigeration is their principal function. The Tribunal understands that the CBSA is not taking the position that the Tribunal's finding in *Euro-Line* – that combination refrigerator-freezer units had no principle function – was wrong as a matter of law but, rather, that the combination refrigerator-freezer units in the present appeal differ sufficiently in terms of size and accessibility to warrant a different finding. Requesting a different application of facts to law when goods meaningfully differ is permitted under *Bri-Chem*.[30]

37. However, the Tribunal finds that the goods in issue do not meaningfully differ from those in *Euro-Line* for the purpose of ascertaining the principal function of a combination refrigerator-freezer.

The False Size-Functionality Distinction

38. The CBSA argues that the freezer section in the goods in issue is too small to be of "real utility" to consumers for storing frozen food: one could not put a "turkey" in these freezers it argued.[31] But the CBSA does not explain why the relative size of each compartment should matter. Danby brought evidence that some consumers chose to purchase the goods in issue specifically for the freezers that they contain.[32] The CBSA brought no evidence to contradict that fact, nor any evidence at all on the intended or actual use of the goods in issue.

39. Mr. Hall testified that the goods in issue were designed to provide the consumer the same functionality as a full-size fridge-freezer, only smaller. The refrigerator compartment provides safe storage of perishable items between zero and five degrees Fahrenheit while the freezer maintains below-zero temperature. The freezer functionality permits as wide a range of foods and beverages as the refrigerator, including meat, vegetables, fruit, and frozen drinks and treats. The relative size of the compartments is based on consumer preference, in particular how often and in what quantities consumers buy and store frozen versus perishable food.[33]

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27. Exhibit AP-2017-009-09F at para. 31, Vol. 1A.
28. *Euro-Line JR* at para. 41.
29. See *First Jewelry Ltd. v. President of the Canada Border Services Agency* (25 November 2016), AP-2015-028 (CITT) at para. 39 n. 18.
30. *Bri-Chem* at para. 47.
31. *Transcript of Public Hearing*, 30 November 2017, at 37, 94.
32. The burden of proof in a customs appeal rests on the appellant, but that does not mean the CBSA can sit on its hands when the appellant has discharged its burden instead of bringing its own evidence in rebuttal.
33. *Transcript of Public Hearing*, 30 November 2017, at 30-33.

40. In terms of the engineering of the goods in issue, Mr. Hall testified that the refrigerator compartment could not function without the freezer compartment because the unit uses only one evaporator to create cold for both compartments. Because that evaporator is part of the freezer compartment, it cannot be removed without making the refrigerator compartment non-functional. The refrigerator compartment cannot be expanded at the expense of the freezer compartment, nor can the refrigerator be disabled to expand the freezer.[34]

41. The Tribunal finds that this evidence clearly demonstrates that the freezing and refrigeration functions are equal and distinct. Further, the goods in issue are engineered to operate as one interdependent, inseparable unit, with neither one subordinated to the other. In this sense, it is useful to reference the French version of section note 3 which reads:

> Sauf dispositions contraires, les combinaisons de machines d'espèces différentes destinées à fonctionner ensemble et ne constituant qu'un seul corps, ainsi que les machines conçues pour assurer deux ou plusieurs fonctions différentes, alternatives ou complémentaires, sont classées suivant *la fonction principale qui caractérise l'ensemble*.
>
> [Emphasis added]

42. The French version is instructive because it clarifies that one does not apply section note 3 by simply reviewing the multiple functions of a good and determining, in some quantitative or rote fashion, which function is used most often. Rather, section note 3 only applies if there is in fact a principal function that characterises (*caractérise*) the good as a whole (*l'ensemble*). Here, there is not. The evidence before the Tribunal is that the goods in issue are characterized as a whole by their mixed functionality of being able to cool and freeze.

43. Mr. Miller testified about the market for the goods in issue. He estimated that, in the market for compact units, about [redacted] percent are of the models sold are combination refrigerator-freezer units. He testified that the goods in issue comprise about [redacted] percent of Danby's total sales.[35] He reported that Danby's market research reveals that [redacted] percent of owners of a compact unit use it to store beverages, [redacted] percent use it to store food, and [redacted] percent use the freezer section to store frozen food.[36]

44. The Tribunal finds that this evidence persuasively demonstrates that combination units are in high demand in the compact unit market and that consumers do in fact actually use the freezer compartments in these units for a distinct purpose (storing foods that must be frozen) that cannot be replicated by the refrigeration compartment. Thus, this evidence too supports the conclusion that the freezer function is equal to and distinct from the refrigeration function.

45. The Tribunal finds that there is nothing in heading 84.18 or any of the applicable subheadings that supports treating refrigerators, freezers, or combination units differently based on the relative capacity of their cooling or freezing compartments or the total size of the goods in issue. In the absence of such distinguishing features in the terms of the tariff, the Tribunal is not prepared to find that one person's frozen TV-dinner or ice-cream cone are any less important than another's cold beverage, bag lunch, or leftovers.

34. *Transcript of Public Hearing*, 30 November 2017, at 38, 41-42.
35. *Transcript of Public Hearing* (protected), 30 November 2017, at 1.
36. *Ibid.* at 3.

Other Irrelevant Considerations

46. The CBSA submitted that the lack of immediate access to the freezer compartment (the user must open the main door to reach the freezer flap) is also indicative of its subsidiary function.

47. The Tribunal finds here too that the CBSA's argument does not track the evidence. Mr. Hall testified that consumers access the freezer section less frequently than the refrigerator section based on how they incorporate the use of frozen foods in their diets. The smaller size of freezer versus refrigerator compartments in combination units is common; the ratios differ across models but the freezer compartment is always the smaller of the two.[37] This reflects the fact that consumers eat a smaller volume of frozen foods than perishable foods. There is thus no basis to support the argument that the relative size of the freezing and cooling compartments reflects their relative importance to the consumer. Take away either – you'll have unhappy people.

48. Finally, the CBSA's reliance on marketing materials that describe the goods in issue as "compact refrigerators" and their freezing compartment as a mere "feature" is not convincing either, particularly given that this ground was already explicitly rejected in *Euro-Line*.[38] *Bri-Chem* instructs that where the CBSA does not rely on different facts to distinguish a prior Tribunal decision it may only attempt to relitigate a settled classification where it is:[39]

> able to identify and articulate with good reasons one or more specific elements in the tribunal's earlier decision that, in the administrator's *bona fide* and informed view, is likely wrong. The flaw must have significance based on all of the circumstances known to the administrator, including the probable impact of the flaw on future cases and the prejudice that will be caused to the administrator's mandate, the parties it regulates, or both.
>
> This is something far removed from an administrator putting essentially the same facts, the same law and the same arguments to a tribunal on the off-chance it might decide differently. Tribunal proceedings are not a game of roulette where a player, having lost, can just hope for better luck and try again.

49. The CBSA's marketing argument was based on the same facts that it relied on in *Euro-Line*. Yet it did not identify any reason at all for the Tribunal to treat the marketing evidence differently in this case. The Tribunal therefore rejects this argument as unfounded for the same reasons as it provided in *Euro-Line*.

CONCLUSION

50. For all of the above reasons, the Tribunal finds that the goods in issue have no discernible principal function. Therefore, section note 3 is inapplicable.

51. In the absence of section note 3 conferring on the goods in issue a principal function, no specific subheading of heading 84.18 applies. Therefore, the Tribunal finds that the goods are properly classified in residual subheading 8418.69 as "other refrigerating or freezing equipment". The "other" subheading contains only two tariff item numbers: 8418.69.20 ("commercial refrigerating installations (store type)") and 8418.69.90 ("other"). As the goods do not fit in the first more specific tariff item number, they are properly classified under the residual tariff item No. 8418.69.90.

37. *Transcript of Public Hearing*, 30 November 2017, at 18, 25, 34, 45, 70-72.
38. *Euro-Line* at para. 54.
39. *Bri-Chem* at paras. 51-52.

DECISION

52. The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member