Appeal No. AP-2019-003

CANADIAN INTERNATIONAL TRADE TRIBUNAL

IN THE MATTER OF an appeal pursuant to section 67
of the *Customs Act*, RSC 1985, c 1 (2nd Supp)

BETWEEN:

RONSCO INC.

Appellant

- and -

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

RESPONDENT'S ADDITIONAL SUBMISSIONS

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"Art is never finished, only abandoned." — Leonardo da Vinci

I. OVERVIEW OF THE RESPONDENT'S POSITION

1. The contentious issue in this appeal is the meaning and scope of the term "wheels" as it appears in the first level (3-dash) tariff item "wheels, whether or not fitted with axles",. This tariff item provides for: (1) wheels not fitted with axles; and (2) wheels fitted with axles (otherwise known as *wheel sets (running gear)*)[1].

2. The CBSA is of the position that the goods are finished at the time of importation. They are covered by the term "wheels" under the provision for 'wheels, not fitted with axles'. For the reasons set out in the Respondent's brief, Counsel's oral arguments and below, they are classified on the basis of Rule 1 of the *General Rules* applied through Rule 1 of the *Canadian Rules* (together referred to for ease of reference as "Rule 1") under tariff item "wheels, whether or not fitted with axles".

3. The CBSA submits that in the alternative, should the Tribunal consider the goods to be unfinished, then the result would be the same, if classified by the application of Rules 1 and 2(a) of the *General Rules* applied through Rule 1 of the *Canadian Rules* (together referred to for ease of reference as "Rule 2(a)"). The goods have the essential character of finished wheels: they have all the essential features of a railway wheel; they are easily recognizable as such; the work added to them is not substantial when compared to the 18 step manufacturing process; and both the manufacturer and the Appellant market them as "wheels".

[1] See Legal Note 2(a) to Chapter 86, Respondent's brief ("RB"), Tab 4, p 36.

II. PRIMARY POSITION: THE GOODS ARE CLASSIFIED UNDER 3-DASH TARIFF ITEM "WHEELS, WHETHER OR NOT FITTED WITH AXLES" ON THE BASIS OF RULE 1

4. The goods (H36 forged wheels) are described by the American Association of Railroads as "standard AAR wheel types, wide flange contour for freight cars"[2] including those which consist of a rough bore.[3] In other words, they are referred to as "standard wheels". Furthermore, the manufacturer and the Appellant market and refer to the goods as "wheels".[4] There is no indication to suggest that Parliament intended to restrict the 3-dash tariff item to final-bored wheels. Based on the usage of the term "wheels" in the industry, "wheels" has a broad meaning.

5. Mr. Montgomery in his testimony stated that the goods in issue are always imported with rough bores. This was confirmed by the expert Mr. Lepore. In fact, both witnesses testified to the effect that no independent wheel would be imported with a finished bore, because the customized boring process only happens when the wheel is mounted onto a unique axle[5]. Consequently, the evidence shows that the provision for "wheels, not fitted with axles" necessarily refers to wheels with rough bores.

6. The customized boring process does not change the fundamental nature of the goods. The analogy with generic-sized wedding dresses requiring tailoring to fit a bride's unique measurements is on point. Those dresses would be nonetheless be classified as finished dresses upon importation, even though they require further tailoring in order to be properly worn. Similarly, the goods in issue are imported with rough bores mainly because the Appellant does not know yet with which unique axle the wheels are going to be fitted onto.

7. In light of the foregoing, the goods are considered to be encompassed by the term "wheels", and thus are properly classified under 3-dash tariff item "wheels, whether or not fitted with axles" on the basis of Rule 1. The goods are ultimately classified under 4-dash tariff item 8607.19.29 as "other - wheels, whether or not fitted with axles".[6]

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[2] Appellant's brief ("AB"), Tab 8, p 126.
[3] AB, Tab 8, p 104.
[4] See for example AB, Tab 20; RB, Tabs 10 and 11.
[5] As explained by the witnesses, the purpose of that process is to assemble the wheels and the axles together, in order to make wheelsets. See also Export report, at paras 10, 15, 16, 29, 36 and 48.
[6] For the reasons stated in Respondent's brief and during Counsel's oral submissions on October 24, 2019.

III. ALTERNATIVE POSITION: THE GOODS ARE CLASSIFIED UNDER THE 3-DASH TARIFF ITEM "WHEELS, WHETHER OR NOT FITTED WITH AXLES" ON THE BASIS OF RULE 2(A)

8. Should the Tribunal consider the goods to be unfinished, it is the Respondent's alternative position that the same outcome would result, if through *Canadian Rule* 1, Rules 1 and 2(a) were to be applied to the classification of the goods.[7]

a) *The goods cannot be classified as "parts of wheels"*

9. In the event the Tribunal considers the goods to be unfinished, consideration to tariff item 8607.19.30 ("parts of wheels") would be given under Rule 1, prior to turning to the analysis of whether the goods have the essential character of the finished good under Rules 1 and 2(a).[8]

10. For the reasons explained in the Respondent's brief[9] and in Counsel's oral submissions, the goods cannot be classified as "parts of wheels". After all, they do not meet the definition of "part" previously adopted by the Tribunal, and none of the individual parts of wheels such as those listed in Legal Note 2(a) to Chapter 86 and further elaborated in *Explanatory Note* 3 to heading 86.07 describes the goods (hoops, hubs, wheel centres, and metal tyres).[10]

b) *Rule 2(a) – Unfinished and incomplete goods having the "essential character" of the finished goods*

11. Should the Tribunal find that the goods are not classifiable as "parts of wheels", yet considers them "unfinished", then the analysis must turn to whether the goods are classifiable under the 3-dash tariff item "wheels, whether or not fitted with axles' on the basis of Rule 1 applied in conjunction with Rule 2(a). [11]

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[7] On the conjunctive application of Rules 1 and 2, see *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, para 22. [*Igloo Vikski*]
[8] At para 22 and footnote 4 of *Igloo Vikski*.
[9] See RB, paras 47-63, at pp 13-17.
[10] RB, Tab 3, at p 36; RB, Tab 5, at p 55.
[11] In footnote 4 of *Igloo Vikski*, the Supreme Court makes note that only where goods meet the terms of the "parts" provision are they classified there: "An example of a heading that specifically describes an unfinished good is 64.06 ("Parts of footwear"), and an example of a heading that specifically describes a composite good is 59.06 ("Rubberized textile fabrics"). Where a good falls within one of those headings, there would be no need to apply Rule 2, as the heading specifically contemplates the incomplete or composite nature of the good in question. Rule 1's direction that the classification of goods should be determined according to the terms of the headings therefore suffices." [Emphasis added.]

12. Rule 2(a) reads as follows:[12]

2. (a) Any reference in a heading (*tariff item*) to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled. [Notre soulignement]	2. a) Toute référence à un article dans une position (*un numéro tarifaire*) déterminée couvre cet article même incomplet ou non fini à la condition qu'il présente, en l'état, les caractéristiques essentielles de l'article complet ou fini. Elle couvre également l'article complet ou fini, ou à considérer comme tel en vertu des dispositions qui précèdent, lorsqu'il est présenté à l'état démonté ou non monté. [Emphasis added]

13. Only the first part of Rule 2(a), which deals with incomplete or unfinished goods, is relevant in this appeal.

14. The relevant portions of the *Explanatory Notes* to Rule 2(a) as applied to the tariff item read as follows: [13]

(I) The first part of Rule 2(a) extends the scope of any heading (*tariff item*) which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article. […] [Notre soulignement]	I) La première partie de la Règle 2 a) élargit la portée des positions *(numéros tarifaire*s) qui mentionnent un article déterminé, de manière à couvrir non seulement l'article complet mais aussi l'article incomplet ou non fini, à condition qu'il présente, en l'état, les caractéristiques essentielles de l'article complet ou fini. [Emphasis added]

[12] RB, Tab 3, p 33.
[13] *Explanatory Notes* to the *General Rules for the Interpretation of the Harmonized System*, Respondent's Additional Submissions, Tab 1.

15. When applied in the present appeal, Rule 2(a) would extend the scope of the tariff item "wheels, whether or not fitted with axles", to include unfinished wheels, provided that the goods have the essential character of a complete and finished wheel.

16. The "essential character" inquiry is evidence-driven, as it is impossible to establish a universally applicable test. Each case must be determined on its own merit.[14] That said, the factors previously relied upon by the Tribunal in order to determine whether a good in issue has the essential character of a complete and finished article include[15]:

    i) Whether they have the essential features of the complete or finished good;

    ii) Whether they are recognizable or identifiable as the complete or finished good;

    iii) Whether the work or value added to the goods after importation is of such a considerable proportion as to render absurd the claim that those goods as imported have the essential character of the finished or complete goods; and

    iv) The manner in which they are marketed.

c) *The goods have the essential character of finished wheels (those not fitted with axles)*

i) *The goods have the essential features of finished wheels*

17. The goods have the complex design and appearance of a railway wheel. The evidence establishes that the goods are manufactured through an elaborate and sophisticated 18-step manufacturing process, which includes heating, forging, rolling, quenching, tempering and shot peening phases.[16] That process gives the goods their essential features in many respects.

18. First, as stated by the Appellant, "these 18 steps must also be performed to the AAR's Standards", which ensures that "the wheel is compatible with the standard axles, bearings, side frames, and track", and to ensure "the quality and the safety of the product".[17] Manifestly,

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[14] *Alliance Mercantile Inc. v. President of the Canada Border Services Agency* (November 3, 2017), AP-2016-038 [CITT], at para 62. [*Alliance Mercantile Inc.*]
[15] *C. Keay Investment Ltd. dba Ocean Trailer Rentals v. President of the Canada Border Services Agency* (May 15, 2018), AP-2017-031 [CITT] at para 65, citing *Alliance Mercantile* at para 65 and *Renelle Furniture Inc. v. President of the Canada Border Services Agency* (23 March 2017), AP-2005-028 [CITT].
[16] AB, Tab 3.
[17] AB, Tab 3, p 31.

considerable work has been done on the goods prior to the time of importation so that they are compatible with particular classes of axles (classes K and F).

19. Second, this 18-step process is responsible for giving the railway wheels their specialized design (geometric shape).[18] As explained in the Respondent's brief and confirmed by the witnesses testimonies, the goods have all the main parts of a railway wheel (rim, flange, hub, web, tread and bore), and have already attained their final shape.[19] Without this shape, the goods would not be considered wheels by the AAR.

20. Third, the 18-step process is also responsible for giving the wheels their reduced impurities, which is a feature responsible for the wheels' greater resistance to fatigue cracks and lower temperatures, and greater lifespan. The expert qualifies this feature as the "principal feature/characteristic of a forged wheel".[20] At the time of importation, the goods have already acquired this feature/characteristic.

21. The fact that the goods are not immediately ready to be used on an axle at the time of importation (in other words their "operability" or "functionality") is inconsequential. As stated by the Tribunal, "in referring to an article as incomplete, Rule 2(a) of the General Rules manifestly includes an article that may lack some components and that is therefore likely not fully operational. Limiting the test to function […] would render Rule 2 (a) virtually meaningless. [Emphasis added]"[21] This should apply *mutatis mutandis* to unfinished goods. Functionality is not a determinative factor under the Rule 2(a) analysis.

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[18] See Export report, Annex C, at p 25.
[19] The only process remaining to do on the goods is the customization of the bore to fit a specific axle, which is comprised of a rough cut, a finish cut, and a chamfer cut, in order ultimately to make a wheelset.
[20] Expert report, paras 35-36, at p 10.
[21] *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011), AP-2010-060 [CITT], at para 44. See also *Bauer Nike Hockey Inc. v. Deputy MNR* (14 February 2001), AP-99-092 [CITT]: "In the Tribunal's view, there can be no doubt that the goods in issue have the essential character of skating boots when all that remains to be done to the boots is to add insoles. Furthermore, the Tribunal does not find that it is necessary for the soft boots to be functional as skating boots in order for them to be considered sports footwear.[Emphasis added]"

ii) *The goods are recognizable as wheels*

22. The goods are recognizable or identifiable as railway wheels.[22] In fact, counsel for the Appellant conceded this during the hearing. This is similar to the situation in *Renelle Furniture*, where the Tribunal stated "one need only glance at the goods in issue to immediately recognize them for what they are."[23]

23. In addition, the goods should be considered to be a *model* of the finished good,[24] given that the goods' fundamental nature of wheels is not being altered by the customizing/precision boring and chamfering processes undertaken after importation.

iii) *The work and value added after importation is not substantial*

24. The work added to the goods after importation is not substantial, when compared to the 18-steps process that happens before importation. Further, the evidence does not show that the value added is of such a considerable proportion as to render absurd the claim that the goods have the essential character of the finished good.

25. In *Alliance Mercantile*, the Tribunal stated:

> [71] […] While the Tribunal does not ascribe much weight to the exact cost or duration of the work performed on the goods in issue in the absence of supporting evidence, the Tribunal considers that it is the type of work, rather than its exact cost component that is relevant of the classification exercise at hand.[25]

26. Accordingly, it is the type of work performed which is relevant and not necessarily the exact cost component (or value added to the goods following the customized boring process).

27. As argued in the Respondent's brief and in Counsel's oral arguments, the fundamental features/characteristics of the goods are not changed by the customized boring process

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[22] AB, Tab 11.
[23] *Renelle Furniture Inc. v. President of the Canada Border Services Agency* (23 March 2007), AP-2005-028 [CITT], at para 19.
[24] *C. Keay Investment Ltd. dba Ocean Trailer rentals v. President of the Canada Border Services Agency* (May 15, 2018), AP-2017-031 [CITT], at para 67
[25] *Alliance Mercantile*, at para 21.

(excluding the mounting process)[26]. The complex and sophisticated 18-step manufacturing process is what gives the wheels at issue their principal features.

28. This is unlike the goods in *Alliance Mercantile* where significant further working altered the essential features of the imported goods, ultimately creating a product substantially different from the imported goods.[27]

iv) *The manner in which the goods are marketed*

29. As explained above at paragraph 5, the goods are marketed as wheels by various industry stakeholders[28], including the Appellant and the manufacturer.[29]

30. Furthermore, there is little difference between the products invoiced by the Appellant's vendor (wheel manufacturer) and the products marketed by the Appellant (wheel supplier).[30]

d) *Conclusion*

31. In conclusion, for the purposes of the Rule 2(a) analysis, the Respondent submits that the goods have the essential character of a finished wheel at the time of importation. As such, the goods are classifiable under the 3-dash tariff item "wheels, whether or not fitted with axles" on the basis of Rules 1 and 2(a) (applied through Canadian Rule 1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, Ontario, this 12th day of November, 2019.

Charles Maher
Solicitor for the Respondent

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[26] The work associated with the mounting process (heating and pressing) done on both the wheels and the axle should be excluded from this criterion, since it does not relate to the goods themselves ("wheels, not fitted with axles"). This work was explained during the hearing by the witnesses, relying on late additional documents, which were accepted by the Tribunal as Exhibit 39.

[27] *Alliance Mercantile Inc.*, at para 72.

[28] See specifically AB, Tab 5, at p 91, AB, Tab 18, at p 213.

[29] AB, Tab 20; RB, Tabs 10 and 11.

[30] See RB, Tabs 10 and 11, at pp 81 and 83.