

Court File No. T-1295-20

**FEDERAL COURT**

B E T W E E N:

RONSCO INC.

and

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F	FEDERAL COURT
I	COUR FÉDÉRALE
L	August 31, 2021
E	DÉPARTEMENT
D	OSÉ
Plaintiff (Responding Party)	
Marc Medas	
Ottawa, ONT	19

HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS, CANADA BORDER SERVICES AGENCY  
Defendant (Moving Party)

**MOTION RECORD OF THE PLAINTIFF (RESPONDING PARTY)**  
**(Hearing Date: September 27, 2021)**

August 31, 2021

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Solicitors for the Defendant (Moving Party)

Court File No. T-1295-20

**FEDERAL COURT**

B E T W E E N:

RONSCO INC.

and

<b>e-document</b> F I L E D	<b>FEDERAL COURT</b> <b>COUR FÉDÉRALE</b>  August 31, 2021	<b>DÉPÔSÉ</b>
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HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC SAFETY AND  
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Defendant (Moving Party)

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F	FEDERAL COURT
I	COUR FÉDÉRALE
L	DÉPÔT
E	POSÉ
D	August 31, 2021
Marc Medas	
Ottawa, ONT	18

RONSCO INC.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

**AFFIDAVIT OF SUSAN GUTTERIDGE**

I, Susan Gutteridge of the City of Ottawa, in the Province of Ontario, SWEAR

THAT:

1. I am a law clerk with the law firm of Conway Baxter Wilson LLP/s.r.l., the lawyers for Ronsco Inc. (“**Ronsco**”) and as such have knowledge of the matters contained in this affidavit.
2. Ronsco’s Fresh as Amended Statement of Claim (the “**Amended SOC**”) dated May 7, 2021 is attached as **Exhibit “A”**.
3. Paragraph 26 of Ronsco’s Amended SOC references Ronsco’s request to the President of the CBSA for re-determination pursuant to section 60 of the *Customs Act*. A copy of Ronsco’s request for re-determination dated September 26, 2018 (annexes omitted) is attached as **Exhibit “B”**.
4. Paragraph 27 of Ronsco’s Amended SOC references an e-mail dated November 8, 2018 from Sue Ogilvie, Appeals Officer with the CBSA’s Toronto Trade Appeals

Unit, Finance and Corporate Management Branch. A copy of the e-mail from Ms. Ogilvie dated November 8, 2018 is attached as **Exhibit “C”**.

5. In her November 8, 2018 e-mail, Ms. Ogilvie stated that she did “not have jurisdiction under a section 60 appeal to deal with reason to believe . . . Reason to believe can only be dealt with under the appeal of an AMPs penalty under Section 129 of the Customs Act.”

6. Paragraph 28 of Ronsco’s Amended SOC references Ronsco’s appeal to the CITT. A copy of Ronsco’s Notice of Appeal to the CITT dated April 10, 2019 (annexes omitted) is attached as **Exhibit “D”**.

7. Paragraph 32 of Ronsco’s Amended SOC references Ronsco’s appeal of the CBSA’s Notice of Penalty Assessment (“NPA”) to the Minister of Public Safety and Emergency Preparedness. A copy of Ronsco’s appeal of the NPA dated December 17, 2019 (annexes omitted) is attached as **Exhibit “E”**.

8. Paragraph 33 of Ronsco’s Amended SOC references an e-mail dated August 17, 2020 from Natasha Alimohamed, Director General of the CBSA’s Recourse Directorate. A copy of the e-mail dated August 17, 2020 from Ms. Alimohamed is attached as **Exhibit “F”**.

9. Ms. Alimohamed advised that “[t]here is no review mechanism provided within the *Customs Act* that allows for an appeal or review of the application of the reassessment policy . . . [Ronsco] may apply for judicial review under section 18.1 of the *Federal Courts Act*.”

10. Paragraph 35 of Ronsco's Amended SOC references an October 14, 2020 e-mail from Peter Nostbakken, counsel for Canada. A copy of the e-mail from Mr. Nostbakken dated October 14, 2020 is attached as **Exhibit "G"**.

11. In Mr. Nostbakken's October 14, 2020 e-mail, he suggested that his client would take the position that "the Federal Court is without jurisdiction to hear the [judicial review] application in T-1037-20, if it is taken out of abeyance."

12. Colin Baxter (counsel for Ronsco) wrote to Mr. Nostbakken on October 20, 2020. A letter from Mr. Baxter to Mr. Nostbakken dated October 20, 2020 is attached as **Exhibit "H"**.

13. On April 23, 2021, the Government of Canada, on the recommendation of the Minister of Finance, amended Customs Tariff 8607.19.21. A copy of the Order-in-Council amending Customs Tariff 8607.19.21 is attached as **Exhibit "I"**.

**SWORN BEFORE ME** at the City of  
Ottawa, in the Province of Ontario on  
August 12, 2021

D. Burke-Lachaine

Commissioner for Taking Affidavits  
(or as the case may be)

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.



S. Gutteridge  
**SUSAN GUTTERIDGE**

This is **Exhibit “A”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/a.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.

File No.: T-1295-20

**FEDERAL COURT**

B E T W E E N:

**RONSCO INC.**

**Plaintiff**

**- and -**

**HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS, CANADA BORDER SERVICES AGENCY**

**Defendants**

**ACTION UNDER** s. 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

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**FRESH AS AMENDED STATEMENT OF CLAIM**

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A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

October 29, 2020

Amended: May 7, 2021

Issued by: Kimberly Lalonde  
(Registry Officer)

Address of local office: Thomas D'Arcy McGee Building  
90 Sparks Street, 5th floor  
Ottawa, Ontario  
K1A 0H9

- TO: ATTORNEY GENERAL OF CANADA  
c/o Deputy Attorney General  
Department of Justice Canada  
50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8
- TO: MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS  
c/o Deputy Attorney General  
Department of Justice Canada  
50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8
- TO: CANADA BORDER SERVICES AGENCY  
c/o Deputy Attorney General  
Department of Justice Canada  
50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8

## CLAIM

1. The plaintiff claims:
  - a. An order quashing as unreasonable the July 30, 2020 Detailed Adjustment Statements, titled Transaction No. 00003001046726 (the “July 2020 DAS”), which were issued on the basis that Ronsco Inc. (“Ronsco”) had “reason to believe” that its original tariff declaration with respect to forged railway wheels with unfinished bore holes (“rough bore wheels”) was incorrectly classified;
  - b. General damages in the amount of \$1,000,000, to be particularized before trial;
  - c. Special damages in the amount of \$1,006,641.91 compensating Ronsco for, *inter alia*, professional services incurred as a result of the Canada Border Services Agency’s (“CBSA”) actions;
  - d. \$2,544,628.30 compensating Ronsco for the administrative monetary penalties, the duties, and interest paid retroactively to the CBSA as a result of CBSA’s actions;
  - e. Costs of the proceedings; and
  - f. Such further and other relief as counsel may advise and the Court may permit.

### I. **Background**

2. Ronsco is the only Canadian-owned independent railway wheelset manufacturing shop in Canada. Ronsco is headquartered in Montreal, with five locations across Canada. Ronsco has been active for over 50 years.
3. Ronsco supplies products and services to North American and international rail, mining, and transit industries. A substantial part of Ronsco’s business involves supplying freight

and transit railway wheels and wheelsets (wheel and axle combinations) to Canadian consumers.

4. Ronsco imports rough bore wheels to meet its clients' requirements for loose wheels, and to manufacture wheelsets. The rough bore wheels Ronsco imports have unfinished bore holes, such that they must be further manufactured either in one of Ronsco's or its clients' wheelshops before they can be fitted with an axle.
5. Rough bore wheels are a manufacturing input (i.e., a good used to manufacture another good). As imported, they cannot be affixed to axles to make wheelsets. Instead, a very precise, computer-guided, boring operation must take place in a wheelshop to finish the borehole to fit the specific and unique axle to which the wheel will be affixed.
6. Rough bore wheels represent 80% of a wheelset's manufacturing cost.
7. Forged railway wheels have not been manufactured in Canada since 1994.
8. In 2005, Sumitomo Canada Limited ("Sumitomo"), one of Ronsco's competitors, requested and received from the CBSA an Advanced Ruling certifying that the rough bore wheels imported by Sumitomo for use on freight cars (i.e., which were identical in manufacture and use to those imported by Ronsco), could be imported duty-free under tariff item 8607.19.21 (re wheel blanks) ("Tariff 21").
9. At about the same time, in 2005, Ronsco began importing rough bore wheels. Ronsco sought tariff advice from its customs broker, FedEx. FedEx advised that rough bore wheels could be imported duty-free under Tariff 21.
10. Accordingly, Ronsco and Sumitomo (and the Canadian railway and customs brokerage industries as a whole) understood and reasonably believed that these wheels were to be

imported duty free under this tariff item. CBSA's own conduct since 2005 confirmed and reinforced this reasonable belief.

11. In or around the same period that Ronsco was importing rough bore wheels, numerous other competitor companies were similarly importing identical or substantially similar goods under Tariff 21 without any duty, penalty, or enforcement action by CBSA.
12. CBSA knew, or ought to have known, that Ronsco and the industry as a whole believed that Tariff 21 was the correct and appropriate classification for these imported goods.
13. In 2015, Ronsco was certified by the American Association of Railroads ("AAR") to produce wheelsets at its wheelshop in Hamilton, Ontario. This certification was the result of a \$10,000,000 capital investment by Ronsco. This investment was driven by the large demand for wheelsets in Eastern Canada and the Northeastern United States.
14. Ronsco competes with United States-based companies in supplying both the Canadian domestic wheelset market and the Northeastern United States market. In addition to "Buy American" policies (which have no equivalent in Canada), United States companies benefit from a duty-free tariff treatment of rough bore wheels for the wheelsets they will ultimately export for sale into Canada.
15. Prior to Ronsco opening its Hamilton wheelshop, there was no option for Canadian customers who did not have their own wheelshop to source wheelsets from a Canadian company. That demand was entirely fulfilled from the United States.
16. Prior to the events giving rise to this proceeding, Ronsco had plans to expand its operations in western Canada by opening a wheel shop. Due to the significant transport of bulk goods by rail, western Canada is the largest wheelset market in Canada. Ronsco's plan was to

invest \$10,000,000 in capital, which would have created 30 jobs. However, as described below, these plans were upended due to the CBSA's imposition of a 9.5% duty on rough bore wheels and its imposition of retroactive duties on Ronsco.

17. As a result, Ronsco has been unable expand its operations as planned and Canadian customers, many of whom do not have their own wheelshops, continue to be serviced by wheelsets supplied from American companies with facilities in Tacoma, Washington, and Chicago, Illinois. These American companies benefit from a significant cost advantage, due to the tariff treatment described at paragraph 14, above.

## **II. Unreasonable Imposition of Retroactive Duties on Ronsco's Imports of Rough Bore Wheels**

18. On July 11, 2017, the CBSA informed Ronsco that a Trade Compliance Verification would be conducted for goods imported by Ronsco between January 1, 2015 to December 31, 2015. Among the goods reviewed by the CBSA were "AAR approved H36 Wheels Class C, 8-3/8" bore diameter" ("rough bore wheels").
19. On April 20, 2018, Ronsco received an Interim Report from the CBSA which advised that it had determined that Tariff 21 (re wheel blanks) did not apply to the rough bore wheels imported by Ronsco, and that Tariff Item 8607.19.29 (wheels – other) ("Tariff 29), dutiable at 9.5%, applied. Ronsco was informed that it would have to make corrections and pay duties going back four years, purportedly on the basis that it had "reason to believe" that its initial tariff declaration was incorrect.
20. In response, Ronsco argued that Tariff Item 8607.19.30 (parts of wheels, duty free) was instead applicable, given that the rough bore wheels cannot perform the essential functions of a wheel (i.e., being fitted to an axle) when they are imported, as further manufacturing

is required. Ronsco also argued that it did not have, and had never had, “reason to believe” that the rough bore wheels fell into a category that was dutiable.

21. On June 26, 2018, Ronsco officials met with representatives from the office of the Minister of Public Safety and with Doug Band, the CBSA’s Director General responsible for the Trade and Anti-Dumping Programs Directorate. This meeting addressed the Interim Report. In this meeting, Mr. Band acknowledged that the wording of Tariff 21 was confusing and outdated and assured Ronsco that it would only be required to pay duties for the items identified in the Interim Report, and going forward.
22. These representations by Mr. Band are an admission that Ronsco had not had “reason to believe” that the rough bore wheels were dutiable, given the acknowledged unclear wording of Tarif 21.
23. Mr. Band’s assurances regarding retroactive duties were also consistent with CBSA policy.
24. Ronsco pleads and relies upon CBSA Memorandum D11-6-10 (“**D11-6-10**”), including section 27 thereof, and CBSA Memorandum Memorandum D-11-6-6.
25. On July 24, 2018, the CBSA issued its final Trade Compliance Verification Report (the “Verification Report”), confirming the conclusions in the Interim Report and stating that Ronsco would be required to pay \$461,446.21 in duties related to the five transactions covered by the Verification Report. The Verification Report concluded that Ronsco had “reason to believe” the goods were incorrectly classified under Tariff 21, that they should have been classified under Tariff 29, and that Ronsco would need to make corrections and pay retroactive duties on all transactions involving the rough bore wheels dating back four years.

26. On September 26, 2018, Ronsco made a request to the President of the CBSA for further re-determination, pursuant to section 60 of the *Customs Act*. Ronsco argued both that the rough bore wheels were properly classified under Tariff Item 8607.19.30 (parts of wheels) and that it did not have reason to believe that its prior selection of Tariff 21 was incorrect.
27. On November 8, 2018, Sue Ogilvie, an Appeals Officer with the CBSA's Toronto Trade Appeals Unit, Finance and Corporate Management Branch, advised that the CBSA's conclusion regarding Ronsco's "reason to believe" could only be challenged by appealing the Administrative Monetary Penalty that Ronsco would receive, under section 129 of the *Customs Act*.
28. Ronsco's appeals to the CBSA President, and subsequently to the Canadian International Trade Tribunal ("CITT"), were denied. In its ruling, the CITT acknowledged that the imposition of "historical duties" on these transactions placed a financial burden on Ronsco, particularly considering that it operates a small-margin business.
29. On December 19 2018, as required by the CBSA, Ronsco filed self-corrections for its importations of the goods at issue going back four years (i.e. for the years 2015 to 2018). The CBSA issued Detailed Adjustment Statements ("DAS") for the corrected transactions, pursuant to section 59 of the Customs Act, RSC 1985 c 1.
30. Ronsco requested a further re-determination. The CBSA issued the July 2020 DAS on July 30, 2020, pursuant to section 60 of the Customs Act. The July 2020 DAS upheld the earlier DAS and required Ronsco to pay duties and interest with respect to the corrected importations.

### **III. Ronsco's Notice of Penalty Assessment Appeal**

31. On October 11, 2019, Ronsco received a Notice of Penalty Assessment ("NPA") from the CBSA. The NPA found that Ronsco had "reason to believe" that it had incorrectly selected Tariff 21 for the goods subject to the retroactive corrections.
32. On December 17, 2019, Ronsco filed its appeal of the NPA. It made further submissions on March 10, 2020 and June 1, 2020.
33. On August 17, 2020, Natasha Alimohamed, Director General of the CBSA's Recourse Directorate, advised Ronsco that, contrary to Ms. Ogilvie's representations in November 2018 (see paragraph 27, above), Ronsco ought to have brought an application for judicial review under the *Federal Courts Act* to challenge the CBSA's conclusions with respect to Ronsco's "reason to believe". To preserve its rights, Ronsco filed the Notice of Application for Judicial Review in T-1037-20, taking the position in its Notice of Application that the judicial review should be placed in abeyance pending the outcome of Ronsco's appeal under section 135 of the *Customs Act*.
34. On September 17, 2020, Ronsco received the CBSA's decision, dated September 15, 2020, dismissing its NPA Appeal.
35. On October 14, 2020, as Ronsco was preparing to bring this appeal, counsel for Canada on the judicial review in T-1037-20 took the position that, contrary to Ms. Ogilvie's advice (see paragraph 27 above) and to Ms. Alimohamed's advice (see paragraph 33 above), Ronsco should have challenged the CBSA's conclusion regarding "reason to believe" in an appeal to the CBSA President under section 60 of the *Customs Act*. To preserve its rights, Ronsco filed a Notice of Appeal to the CITT on October 22, 2020, taking the position in its Notice of Appeal that that appeal should also be placed in abeyance.

#### IV. Ronsco Should Not Have Been Required to Pay Retroactive Duties

36. Ronsco did not have “reason to believe” that its tariff classification of the imported rough bore wheels was incorrect. It should not have been required to pay the retroactive duties set out in the July 2020 DAS.
37. Tariff 21 is not a legislative provision that is *prima facie* evident and transparent, as required by CBSA policy. Rather, it is unclear and ambiguous.
38. CBSA knowingly took contradictory positions with respect to this Tariff Item with different importers. The CBSA’s Advance Ruling from 2005, which was in place for almost 14 years, evinces CBSA’s uneven, unfair, and contradictory positions.
39. The CBSA posts Advance Rulings online for the express purpose of serving as a reference point for providing meaningful guidance and help to other importers in complying with Canada’s trade legislation.
40. Ronsco’s American competitors benefit from ruling letters from U.S. Customs and Border Protection that address tariff classification. This allows U.S. importers to understand the laws that affect their imports and the consequences of particular transactions under those laws.
41. CBSA only rescinded the 2005 Advance Ruling after deciding against Ronsco in its July 2018 Verification Report to Ronsco. In so doing, the CBSA nevertheless granted Sumitomo a significant further exemption window from paying duties by timing the Advance Ruling amendment to coincide with the enactment of the Comprehensive and Progressive Trans-Pacific Partnership free trade agreement.

42. Industry behavior also shows that Tariff 21 is not *prima facie* evident and transparent, as from 2005 to 2019 it was the CBSA's own conduct that drove importer behavior, rather than the Tariff Item's wording (which remained unchanged).
43. Approximately ten companies have imported identical or substantially similar goods into Canada under Tariff 21 from Russia, China, Japan and Ukraine. CBSA knew that this was the case.
44. Only when the CBSA issued its Verification Report against Ronsco in 2018 and rescinded Sumitomo's Advance Ruling, did many of these importers begin changing their tariff classifications from Tariff 21 to Tariff 29.
45. Finance Canada's public posture is that Canada has a duty-free tariff regime for imports of manufacturing inputs. Specifically, in 2010, the Minister of Finance declared that Canada was a "tariff-free zone" for manufacturing inputs. Under this regime, it was, and still is, express government policy that goods imported to manufacture other goods are not subject to duty (as recognized by the CITT in its judgment, rough bore wheels must undergo further manufacturing after importation in order to be fitted to axles as part of the manufacture of wheelsets). These public statements further support Ronsco's lack of "reason to believe" that its selection of Tariff 21 was improper.

## V. CBSA Breached its Public Law Duties

46. Ronsco pleads and relies upon *Paradis Honey Ltd. v. Canada*, 2015 FCA 89.
47. CBSA's conduct, as set out above and below, was "unacceptable" and "indefensible in the administrative law sense".

48. CBSA's conduct, as set out above and below, was inconsistent with, and offensive to, "public law values" and constituted "significant maladministration". CBSA's conduct requires an award of damages.
49. By imposing retroactive duties on Ronsco, CBSA treated Ronsco differently than similarly situated competitors, who were importing identical or substantially similar goods under the same Tariff as Ronsco, including Sumitomo and other companies. In doing so, CBSA unfairly favored certain importers over others, to the detriment of Ronsco, and affected the competitive landscape of the industry.
50. CBSA did not impose retroactive duties on any other importer for importing these goods under Tariff 21. CBSA did not conduct a trade compliance verification of any other importer for conduct similar to Ronsco's.
51. Numerous other companies were importing identical or substantially similar goods under the same tariff as Ronsco. None of them suffered the same unfair consequences at the hands of CBSA.
52. In particular, Sumitomo was allowed to import rough bore wheels without duty and without penalty until the 2005 Advanced Ruling was rescinded.
53. When Ronsco's representatives met with Doug Band in June 2018, his statements were an admission that Ronsco did not have "reason to believe" that its tariff declaration was incorrect. Further, he provided assurances indicating that CBSA would exercise its discretion in a manner consistent with CBSA policy so that Ronsco would not be required to pay unreasonable retroactive duties. He represented that Ronsco would only be required to pay duties for the verification period and going forward.

54. Contrary to CBSA's own internal policy, and the specific representations of its representative Mr. Band, CBSA imposed retroactive duties on Ronsco for a four-year period and denied Ronsco's appeals.
55. Throughout this appeals process, CBSA has taken inconsistent procedural positions that have created an unnecessary multiplicity of proceedings, causing Ronsco (and the Canadian public) to incur significant and unnecessary costs. Those inconsistent procedural positions include the following:
  - a. In November, 2018, Ms. Ogilvie advised that the CBSA's conclusion regarding Ronsco's "reason to believe" could only be challenged by appealing the Administrative Monetary Penalty that Ronsco would receive under section 129 of the *Customs Act*;
  - b. In August, 2020, Ms. Alimohamed, advised Ronsco that, contrary to Ms. Ogilvie's advice, Ronsco ought to have brought an application for judicial review under the *Federal Courts Act* to challenge the CBSA's conclusions with respect to Ronsco's "reason to believe";
  - c. In October 2020, as Ronsco was preparing to bring this action, counsel for the Minister on the judicial review in T-1037-20 took the position that, contrary to Ms. Ogilvie's advice and Ms. Alimohamed's advice, Ronsco should have challenged the CBSA's conclusion regarding "reason to believe" in an appeal to the CBSA President under section 60 of the *Customs Act*. Despite these inconsistent directions, Ronsco pursued each avenue of appeal to which it was directed.

56. CBSA now takes the position that it does not matter whether or not Ronsco had “reason to believe” at the time of the imports, because the *Customs Act* would require it to pay four years of retroactive duties regardless. That proposed interpretation would render the concept of “reason to believe” meaningless and would run directly contrary to CBSA’s internal policies as well as the representations by Mr. Band to Ronsco’s representatives.
57. Prior to commencing this action, and throughout the multi-year appeals process described above, CBSA never advised Ronsco of its interpretation that “reason to believe” has no application to the retroactive duties owed by Ronsco, despite Ronsco repeatedly challenging CBSA’s findings with respect to “reason to believe.”
58. CBSA’s position appears to be that the retroactive duties paid by Ronsco can only be recovered as damages.
59. Damages are necessary to cure Ronsco’s significant losses caused by CBSA’s conduct.
60. There is no public law justification for CBSA’s conduct.

## **VI. CBSA Breached its Duty of Care**

61. CBSA owed a duty of care to Ronsco, arising from:
  - a. Its role in administering and enforcing the *Customs Act*;
  - b. Its internal policies, including section 27 of CBSA Memorandum D-11-6-10;
  - c. The representations of Doug Band set out above;
  - d. CBSA’s conduct in allowing other importers to import identical or substantially similar goods under Tariff 21;

- e. CBSA's knowledge that Ronsco and the industry as a whole believed that Tariff 21 was the correct and appropriate classification for these imported goods; and
  - f. CBSA's knowledge that treating Ronsco differently from the rest of the industry would cause significant harm to Ronsco.
62. There is no public policy reason that would negate a duty of care. In particular, CBSA's duties to the broader public do not come into conflict with its duties to Ronsco, and a finding of a duty of care will not expose CBSA to indeterminate liability.
63. CBSA's duty of care required that it:
- a. Administer and enforce the *Customs Act* in a consistent manner;
  - b. Treat Ronsco in a manner that is consistent with other importers, importing substantially similar (or the same) goods;
  - c. Exercise its discretion with respect to reassessment in a manner consistent with its internal policies;
  - d. Act in a manner consistent with the representations of its representative Doug Band, including by not imposing retroactive duties;
  - e. Provide consistent and transparent directions to Ronsco in pursuing its various appeal routes; and
  - f. Interpret the *Customs Act* in a manner that attributes meaningful consequences to the concept of "reason to believe."
64. CBSA breached its duty of care, including by:

- a. Treating Ronsco differently than other similarly situated importers by imposing significant retroactive duties on Ronsco that were not imposed on other importers;
  - b. Failing to exercise its discretion in a manner consistent with its internal policies, by imposing retroactive duties on Ronsco despite Ronsco not having “reason to believe” at the time of import;
  - c. Failing to exercise its discretion in a manner consistent with the representations of Doug Band, including his representation that retroactive duties would not be imposed;
  - d. Providing inconsistent directions to Ronsco as to the appropriate appeals route to pursue;
  - e. Asserting that regardless of whether Ronsco has a “reason to believe,” it is still required to pay retroactive duties.
65. CBSA’s breaches of the standard of care have caused significant damages to Ronsco as set out below.
66. Ronsco pleads and relies upon the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

## VII. Damages

67. CBSA’s breaches of its public law duties and the applicable standard of care have caused the following damages to Ronsco:
- a. General damages in the amount of \$1,000,000, to be particularized before trial;

- b. Special damages in the amount of \$1,006,641.91 of professional fees incurred by Ronsco as a result of CBSA's breaches. Ronsco expressly asserts, and does not waive, privilege over any of the relevant privileged documents or information in this regard. Ronsco claims the following amounts:
  - i. Legal: \$347,378.15
  - ii. Trade Consultants: \$550,065.76
  - iii. Surety Bond: \$104,282.00
  - iv. Experts: \$4,916.00
- c. \$2,544,628.30 erroneously charged by CBSA to Ronsco as follows:
  - i. Duties: \$2,434,002.31;
  - ii. Interest: \$109,626.07; and
  - iii. Administrative Monetary Penalty: \$1,000

## **IX Ronsco's Right to Amend**

- 68. The causes of action alleged herein arise from substantially the same facts as those pleaded in Ronsco's statement of claim dated October 26, 2020. The defendant suffers no prejudice from these amendments.
- 69. No relevant limitations periods had expired at the time of the commencement of this proceeding on October 26, 2020. In particular, the claim was commenced well within 90 days of September 17, 2020 when Ronsco received the CBSA's decision, dated September 15, 2020, dismissing its NPA Appeal, and within 90 days of July 30, 2020,

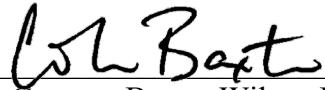
when Ronsco received the July 2020 DAS requiring it to pay duties and interest from 2015 to July 2018.

70. Rules 75, 76, 77, 200, and 201 of the *Federal Court Rules*.

The plaintiff proposes that this action be tried at Ottawa, Ontario.

October 26, 2020

Amended: May 7, 2021



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Solicitors for the Plaintiff

This is **Exhibit “B”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.

# Grey, Clark, Shih and Associates, Limited

- Public Affairs - International Trade -

---

September 26, 2018

VIA EMAIL AND COURIER

**CONFIDENTIAL**

**With Confidential Attachments**

Mr. John Ossowski  
President  
Canada Border Services Agency

c/o Recourse Directorate  
Canada Border Services Agency  
333 North River Rd., 11th Floor Tower A  
Ottawa, ON K1A 0L8

Dear Mr. Ossowski:

**RE: REQUEST FOR FURTHER REDETERMINATION, PURSUANT TO CUSTOMS ACT, S. 60 – TARIFF CLASSIFICATION OF GOODS IMPORTED BY RONSCO INC. (CASE NO. C-2016-011118)**

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These submissions, made on behalf of Ronsco Inc. (“Ronsco”), respond to the Canada Border Services Agency’s (“CBSA”) conclusions resulting from Verification #C-2012016-011118 (“the Verification”). The Verification was conducted with regard to various goods imported by Ronsco between January 1 and December 31, 2015 (“the Verification Period”). As required by the CBSA’s *Memorandum D11-6-7*, Appendix A, paragraph 10,<sup>1</sup> I have attached as **Annex “A”** a written statement from Donald G. Regan, President of Ronsco, authorizing Grey, Clark, Shih and Associates, Limited. to act on Ronsco’s behalf in this matter.

In the course of this Verification, the CBSA provided Ronsco with a report (“the Interim Report”) dated April 20, 2018, prepared by Mme Lucie Gagné, a “Senior Officer Trade Compliance” with the CBSA’s Trade Operations Division. A copy of the Interim Report is attached as **Annex “B”**. The Interim Report indicated the CBSA’s preliminary findings with respect to various goods at issue.

In response to the Interim Report, Ronsco made detailed submissions to Mme Gagné and the CBSA (“the Interim Submissions”) on May 25, 2018, setting out its position with respect to the

<sup>1</sup> CBSA, [\*Memorandum D11-6-7\*](#), “Request under Section 60 of the Customs Act for a Re-determination, a further Re-determination or a Review by the President of the Canada Border Services Agency”, 1 April 2017, Appendix A at para 10 [*Memorandum D11-6-7*].

proper tariff classification of the goods at issue. The letter submitted by Ronsco as part of these Interim Submissions, setting out its position regarding the tariff classification of the goods, is attached as **Annex “C”**.<sup>2</sup>

The specific point at issue on this appeal is the tariff classification of wheel bodies imported by Ronsco from Taiyuan Heavy Industrial Railway Transit Equipment Co. Ltd. (“Taiyuan”), in China. Specifically, Ronsco contended – and still contends – that the goods at issue are “Parts of wheels”, properly classifiable under tariff item 8607.19.30, or, alternatively, are “Parts of bogies or bissel-bogies”, properly classifiable under tariff item 8607.19.50. These arguments are generally reiterated below.

However, the CBSA’s final report, dated July 24, 2018, resulting from the Verification (“the Final Report”) indicated that the goods at issue had instead been re-determined as being classifiable under tariff item 8607.19.29 (“Wheels, whether or not fitted with axles: other”). This reclassification and change in the relevant tariff item was made even though the Final Report does not address the vast majority of Ronsco’s arguments made in its Interim Submissions. In particular, the Final Report does not address the arguments, evidence, or authorities submitted by Ronsco in support of its position that the goods are properly classifiable as “Parts of wheels” (under tariff item 8607.19.30) or, in the alternative, “Parts of bogies or bissel-bogies” (under tariff item 8607.19.50). A copy of the Final Report is attached as **Annex “D”**. For ease of reference, the full text of the relevant tariff items in the *Customs Tariff* has been attached to this letter as **Annex “E”**.

Finally, Ronsco has also since received five Detailed Adjustment Statements (“DASs”) from the CBSA reclassifying the goods pursuant to the Final Report, all with a decision date of August 27, 2018. The DASs forming the subject of this Request are attached as **Annex “F”**, while a detailed worksheet regarding all adjustments in dispute, required under CBSA *Memorandum D11-6-7*,<sup>3</sup> Appendix G is attached as **Annex “G”**. The DASs at issue indicate that Ronsco must pay duties on the goods at issue in a total amount of over \$494,000.<sup>4</sup> All of these duties are attributable to the erroneous and unexplained classification of the wheel bodies under tariff item 8607.19.29.

Ronsco therefore makes this request (“the Request”) under s. 60 of the *Customs Act*, RSC 1985, c 1 (2<sup>nd</sup> Supp) (“the *Customs Act*”) for further re-determination by the President of the CBSA. Specifically, Ronsco seeks a further re-determination of the tariff classification of the wheel bodies, specifically with regard to the transactions indicated in the DASs attached at **Annex “F”**.

<sup>2</sup> The Annexes submitted with Ronsco’s Interim Submissions are not reproduced in Annex “C”, as they have been included as separate Annexes to these submissions, as further set out below. However, the Index of Annexes included with these submissions indicates in which Annex each of these documents was found in Ronsco’s Interim Submissions.

<sup>3</sup> *Memorandum D11-6-7*, *supra* note 1, Appendix G at para 7.

<sup>4</sup> Ronsco sent payment by bank draft by courier on September 24, 2018, for delivery on September 25, 2018. Note that these amounts were paid “Under Protest” in light of this request for further-redetermination by the CBSA President, pursuant to s. 60 of the *Customs Act*, RSC 1985, c 1 (2<sup>nd</sup> Supp).

These submissions, together with the attached documentation, support Ronsco's position regarding the proper tariff classification of the goods at issue.

### ***I. Ronsco Inc. – Railway Products and Services***

Ronsco, a privately held and 100% Canadian-owned company founded in 1968, is Canada's largest supplier of products and services to Canadian and international rail, mining, and transit industries. Ronsco has over 100 employees at five locations across Canada, in Halifax, Montreal, Toronto, Hamilton, and Edmonton.

Ronsco's operations in Coteau-du-Lac, Québec and Hamilton, Ontario focus on the North American rolling-stock market, including Toronto's transit market. Ronsco has therefore been a long-term supplier of freight and transit wheels and wheelsets (i.e., bogies and bissel-bogies) to North American and international markets, working with its customers and manufacturing partners to design and develop standard AAR and customs wheel designs and profiles. In particular, Ronsco has the ability to create new wheel profiles and designs up to industry standards, as will be discussed below, through the use of detailed "finite element analysis" (FEA) and engineering analysis.

### ***II. Tariff classification regarding the importation of wheel bodies***

#### The Goods at Issue

Having reviewed the CBSA's Interim and Final Reports, and as Ronsco indicated in its Interim Submissions, Ronsco does not dispute that the original tariff classification declared for its "AAR approved H36 Wheels Class C, 8-3/8" bore diameter" during the Verification Period was incorrect. However, as will be discussed below, Ronsco disputes that it had "reason to believe", prior to the Verification, that the originally declared tariff classification was incorrect. In any event, Ronsco has reviewed its tariff classification of these goods.

In order to determine the proper tariff classification, the *General Rules for the Interpretation of the Harmonized System* ("General Rules") must be applied.<sup>5</sup> The *General Rules* are six rules to be applied in a "hierarchical" manner, beginning with Rule 1,<sup>6</sup> which provides that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes".<sup>7</sup> Rule 6 of the *General Rules* also extends this principle to sub-headings, such that "the classification of goods in subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable." Finally, Rule 1 of the *Canadian Rules* applies the same principle to tariff items within a heading or subheading, such that they are determined "according to the

<sup>5</sup> *Customs Tariff, SC 1997, c 36*, s 10(1) and "General Rules of the Interpretation of the Harmonized System" [General Rules].

<sup>6</sup> *Canada (AG) v Igloo Vikski Inc, 2016 SCC 38* at para 29 [*Igloo Vikski*].

<sup>7</sup> *General Rules*, *supra* note 5, Rule 1.

terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [General Rules], on the understanding that only tariff items at the same level are comparable".<sup>8</sup>

Ronsco has therefore assessed the goods at issue in light of the *General Rules*, the *Canadian Rules*, and the case law applying them, most notably including the Supreme Court of Canada's recent ruling in *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38. In that case, the Supreme Court held that the deeming provisions in Rule 2 of the *General Rules* are not applicable where a heading "specifically describes the unfinished goods or composite goods as such" as "the heading specifically contemplates the incomplete or composite nature of the good in question" (emphasis added; see paragraph 22 of the Supreme Court's decision and the footnote thereto).<sup>9</sup> The Canadian International Trade Tribunal ("CITT") has since followed this explicit direction by the Supreme Court in several decisions, holding:

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.<sup>10</sup>

Furthermore, the same reasoning applies to subheadings (given Rule 6 of the *General Rules*) and to tariff items (given Rule 1 of the *Canadian Rules*).

As a result, having reviewed the physical characteristics of the goods in question, in light of the CBSA's Interim and Final Reports, as well as the production process of the goods and their usage in the market, Ronsco accepts that the wheel bodies/corps de roues<sup>11</sup> as imported do not fall within tariff item 8607.19.21:

8607.19.21

Parts of railway or tramway locomotives or rolling-stock

- Bogies, bissel-bogies (truck assemblies), axles and wheels, and parts thereof:

- - Other, including parts

- - - Wheels, whether or not fitted with axles:

8607.19.21

Parties de véhicules pour voies ferrées ou similaires

- Bogies, bissels, essieux et roues, et leurs parties :

- - Autres, y compris les parties

- - - Roues, avec ou sans essieux :

<sup>8</sup> *Ibid*, Canadian Rule 1.

<sup>9</sup> *Igloo Vikski*, *supra* note 6 at para 22 and footnote 4 [*Igloo Vikski*].

<sup>10</sup> *C Keay Investments Ltd (cob Ocean Trailer Rentals) v Canada (Border Services Agency President)*, [2018] CITT No 46 at para 36; and *Artcraft Company Inc v Canada (Border Services Agency President)*, [2018] CITT No 24 at para 20. See also, *inter alia*, *Alliance Mercantile Inc v Canada (Border Services Agency President)*, [2017] CITT No 107 at para 13; and *Nestlé Canada Inc v Canada (Border Services Agency President)*, [2017] CITT No 19 at para 18.

<sup>11</sup> See Annex "H" to this letter: World Customs Organization ("WCO"), *Explanatory Notes to the Harmonized Commodity Description and Coding System*, 6th ed (2017), "86.07 – Parts of railway or tramway locomotives or rolling-stock" (EN) and "86.07 – Parties de véhicules pour voies ferrées ou similaires" (FR) [*Explanatory Notes*, Heading 86.07].

*- - - Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches;*

*For self-propelled railway vehicles for the transport of passengers, baggage, mail or express traffic;*

*For use in the repair of tramway vehicles (excluding subway cars) with magnetic brakes*

*- - - Ébauches devant servir à la fabrication d'ensembles de roues et d'essieux pour les voitures à voyageurs de chemins de fer et de tramways (y compris les voitures de métro);*

*Pour les véhicules pour voies ferrées autopropulsés pour le transport des passagers, des bagages, de la poste ou des messageries;*

*Devant servir à la réparation des tramways (à l'exclusion des voitures de métro) avec des sabots-freins électromagnétiques glissant sur le rail*

In fact, Ronsco agrees with the CBSA's determination that it does not import "blanks".<sup>12</sup> A "blank" is defined as "a piece of metal or wood intended for further shaping or finishing",<sup>13</sup> and can therefore be considered essentially an undifferentiated wheel. That is, although a blank may be specific to use on rolling-stock, blanks are not a "part" of a wheel or committed to use as a specific type of finished wheel, as the goods imported by Ronsco are. As described below, the goods imported by Ronsco are not merely "pieces of metal" or undifferentiated wheels when they leave their country of origin destined for Canada, but rather are parts of wheels.

Furthermore, looking to the French version of tariff item 8607.19.21, the goods imported by Ronsco are not "des ébauches". An "ébauche" is defined, in its "metallurgic sense", as "Pièce ou lopin dégrossiss avant l'opération finale de transformation".<sup>14</sup> This also does not accurately describe the goods that Ronsco imports.

Instead, as will be explained below, the product imported by Ronsco is a "part of a wheel" – namely, a wheel body - falling under tariff item 8607.19.30. The WCO Explanatory Notes to Heading 86.07 of the Harmonized Commodity Description and Coding System ("the WCO Explanatory Notes"), attached as **Annex "H"**, note the following:<sup>15</sup>

*Parts of railway or tramway locomotives or rolling stock include:*

[...]

*(3) Wheels and parts thereof (wheel centres, metal tyres, etc.)*

*Parmi ces parties de véhicules pour voies ferrées ou similaires, on peut citer :*

[...]

*Les roues et leurs parties (corps de roues, bandages, frettes, centres, etc.)*

<sup>12</sup> This was accepted by Ronsco, as indicated in its Interim Submissions, p. 4, and was also noted in the CBSA's Final Report, p. 3.

<sup>13</sup> [Oxford Dictionary Online, "Blank"](https://en.oxforddictionaries.com/definition/blank), definition #4 <<https://en.oxforddictionaries.com/definition/blank>>.

<sup>14</sup> [Dictionnaire Larousse en ligne, « Ébauche »](https://www.larousse.fr/dictionnaires/francais/%C3%A9bauche/27228), nom féminin, définition #5 <<https://www.larousse.fr/dictionnaires/francais/%C3%A9bauche/27228>>.

<sup>15</sup> *Explanatory Notes*, Heading 86.07, *supra* note 11.

Specifically, Ronsco imports wheel bodies/corps de roues. The wheel bodies/corps de roues imported by Ronsco are forged, rolled and machined by the exporter to meet or exceed precise, detailed specifications that are developed, monitored, and enforced by the Association of American Railroads (“AAR”). These standards are attached to this letter as **Annex “I”**.<sup>16</sup>

Despite these strict standards, however, and despite the product being marketed and shipped as a wheel, when it is imported the product cannot perform the essential functions expected of a wheel for rolling stock. To the contrary, the goods imported by Ronsco must be further manufactured in order to be used. This is due to the fact that the rough bore diameter of the wheel bodies received by Ronsco is unable to fit any axle. The wheel bodies are not even specialized to one specific end use. When Ronsco receives the wheel bodies, they are capable of being further manufactured to fit either AAR Class F or AAR Class K axles.<sup>17</sup>

It is therefore only after Ronsco completes its final boring, machining, and finishing processes after importation that the wheel bodies are even capable of being fitted with an axle. Several photographs and videos showing the wheel bodies, as imported and after they undergo the “boring and finishing process”, as well as the boring and finishing process itself, are attached to this letter as **Annex “J”**.

The specifications to which the wheel bodies are forged and fabricated are the AAR Manual of Standards and Recommended Practices for Wheels and Axles that apply to Wheels, Carbon Steel, Specification M-107/M-208 (“the AAR Standards”), which were adopted in 1962 and were last revised in 2012.<sup>18</sup> After importation, however, Ronsco further manufactures the wheel bodies, specifically by applying a “wheel boring” process. A separate set of AAR Standards for “Wheels and Axles” – Specification S-659 – sets out the requirements for this process.<sup>19</sup> The AAR Standards for wheel boring are attached as **Annex “K”**. The AAR Standards are accepted and applied globally by manufacturers of railways, railcars, and parts thereof.

Among its other activities, Ronsco produces and sells truck assemblies for railway cars (i.e. bogies and bissel-bogies) to its clients, as per the customer’s unique design specifications. As noted above, Ronsco works with international suppliers to obtain forged wheel bodies, which are designed strictly according to the AAR specifications. The Oxford Dictionary defines “forging” as to “[m]ake or shape (a metal object) by heating it in a fire or furnace and hammering it.”<sup>20</sup> An industry definition can be found in Scot Forge’s Online glossary, which defines forging as a “[p]rocess of working hot metal to the desired shape by impact or pressure

<sup>16</sup> AAR, “Manual of Standards and Recommended Practices: Wheels and Axles”, G [M-107/M-108] 21, “Wheels, Carbon Steel” [AAR Standards for Wheel Bodies].

<sup>17</sup> *Ibid* at Appendix B, p. 51.

<sup>18</sup> AAR Standards for Wheel Bodies, *supra* note 16, attached as **Annex “I”** to this letter.

<sup>19</sup> AAR, “Manual of Standards and Recommended Practices: Wheels and Axles”, G-II [S-659] 9, “Rule 1.3: Wheels-Boring Mill Practices”.

<sup>20</sup> Oxford Dictionaries Online, “Forge”, Verb, definition #1 <<https://en.oxforddictionaries.com/definition/forge>>.

from hammers, presses or forging machines. The metal object so produced is termed a forging.”<sup>21</sup>

The forging process employed to produce the wheel bodies, from the selection of raw materials to the final forged wheel body<sup>22</sup> normally involves the eighteen steps listed below, all of which occur before the goods are exported from the forging plant and arrive in Canada (illustrated generally in **Annex “L”**, an excerpt from a statistical process control document from Ronsco’s principal wheel supplier, Taiyuan Heavy Industrial Railway Transit Equipment Co. Ltd. (“Taiyuan”)). However, the final process of forming a functional bore hole that is capable of fitting an axle occurs after the wheel bodies are imported and received at Ronsco’s plant in Hamilton. Prior to Ronsco’s certification by the AAR on December 15, 2015 to carry out the final process of forming a functional bore hole that is capable of fitting an axle at its plant in Hamilton, all processing was done at its customers’ plants.<sup>23</sup> The eighteen steps are:

1. Raw material check: Taiyuan obtains steel blooms (“lopins”) from a steel supplier, for instance Xingcheng Special Steel Works Co. Ltd. or Jiangsu Shagang Co. Ltd., and inspects and tests the material to ensure that it is suitable for forging.
2. Saw cut: The steel blooms are sawn into cylindrical blanks (“ébauches”), weighing approximately 510 kilograms, which will be heated, forged, rolled and worked to create the wheel body.
3. Blank heating: The blanks are heated in a four-zone gas rotary furnaces, progressing through pre-heating at 850°C, two heating zones at 1,220°C and 1,250°C respectively, and a final soaking zone at 1,282°C.
4. Water descaling: The heated blanks are then “descaled”, a process involving pressure washing in which deformations are removed from the heated blanks.
5. Preforming: The heated and descaled blanks are then preformed into a more circular wheel shape, which will then be forged and further worked.
6. Forging: Using a 6,000-ton press, the preformed disk is forged to the specific required diameter/thickness specifications. At this stage, the material has been differentiated for a particular use, and is no longer a “blank” (“ébauche”).
7. Rolling: Using a horizontal mill, the forged disk is rolled to form the rolling edge that travels on the rail.

<sup>21</sup> [Scot Forge Online Glossary, “Forging”](https://www.scotforge.com/Why-Forging/Glossary), online: <<https://www.scotforge.com/Why-Forging/Glossary>>.

<sup>22</sup> Note that the products imported by Ronsco are forged. Cast products, formed by pouring Molten steel into a special, usually proprietary, mould, have different properties and characteristics than forged products.

<sup>23</sup> Taiyuan Heavy Industry Railway Transit Equipment Co., Ltd., “Statistical Process Control”, 27 May 2016, p. 3, “Wheel Process Flow of TZ”, attached as **Annex “L”** to this letter.

8. Punching: Using a 1,000-ton press, a hole is punched in the centre of the wheel, which will eventually be further bored, shaped and machined after importation in order to house an axle. The wheel body then undergoes further stamping in a 3,000-ton press.
9. Hot measurement: The wheel body is heated and cooled to attain the desired microstructure and properties required to meet the specifications required for the wheel to be produced.<sup>24</sup>
10. Pre-heating: This process prevents the formation of cracks and other irregularities, reduces distortion and prevents stresses or shrinkages of the wheel body.
11. Heating: The wheel body is heated to roughly 870°C.
12. Quenching: The wheel body is rapidly cooled by immersion in liquids for roughly 5 minutes. This brings the metal back to room temperature after heat treating, in order to increase hardness and prevent the cooling process from dramatically changing the metal's microstructure.
13. Tempering: The wheel body is heated to 490°C and cooled over time, generally six hours, in order to relieve stress on the wheel body from the quenching process and to ensure dimensional stability and to achieve specific mechanical properties. The wheel body then cools to ambient temperature.
14. Machining: The wheel body is machined to remove excess or unwanted stock, i.e. the wheel is machined multiple times to achieve the finished wheel dimension. The bore hole is excluded from this process, as the bore diameter is left in its "rough" state until after export.
15. Final Inspection and Non-Destructive Testing: Wheel bodies go through two manned inspection stations for visual inspection of plate contours, hub diameters, tread and flange contours, etc. Wheel bodies also undergo ultrasonic testing and magnetic particle inspection, and hardness testing.
16. Shot Peening:<sup>25</sup> The wheel body is cleaned and finished by a fluid blowing abrasive steel balls against the wheel body's/corps de roue's surface.
17. Protection and Stamping: In the typical forging process, transparent rust protection is applied to the wheel body. However, Ronsco specifically requests that no rust preventative be applied, as non-compliant chemicals have been used in the past that have resulted in customer complaints. The wheel body is also stamped with the required markings and barcode labels are applied. The wheel body is visually inspected one final time at the completion of this process.

<sup>24</sup> [Scot Forge Online Glossary, "Heat Measurement"](https://www.scotforge.com/Why-Forging/Glossary), <<https://www.scotforge.com/Why-Forging/Glossary>>.

<sup>25</sup> Shot peening is a cold working process used to finish metal parts to prevent fatigue and stress corrosion failures and prolong product life for the part. The shot acts like a peen hammer, dimpling the surface and causing compression stresses under the dimple.

18. Storing and Transportation: Wheel bodies are prepared for export and shipped to Canada.

This process is common in the industry. Similar forging processes are set out in a product catalogue attached as **Annex “M”**,<sup>26</sup> for goods produced by OMK, a Russia-based company that produces steel goods including parts of railway wheels. Note that the steps addressing the machining of the bore hole for fitting on a specific type of axle that is described in OMK’s materials occurs after Ronsco imports the goods at issue in this case.

The forging process is generally illustrated in the following YouTube video, taken from Discovery Channel Documentary Series *How It’s Made*, season 14, episode 3 “Train Wheels” <<https://www.youtube.com/watch?v=ui--zx1RmDU>>. See also Sandvik Coromant’s promotional video at <[https://www.youtube.com/watch?v=KQ98bYFBK\\_U](https://www.youtube.com/watch?v=KQ98bYFBK_U)>.

The boring and finishing process, which occurs after the wheel body is imported to Canada, is generally illustrated in the following YouTube video, uploaded by Ronsco’s Director of Product Development & Engineering, Greg Barlow, at <<https://www.youtube.com/watch?v=Y5KOt0eT9lo>>.

Indeed, as illustrated by all of these processes, particularly as described above, Ronsco does not import “pieces of metal” (i.e. blanks), but instead imports a differentiated part. Nor does Ronsco import a completed wheel, which can be put to use as a wheel without further manufacturing, on importation. Instead, what Ronsco imports is a part of a wheel, i.e., a wheel body, which must be further manufactured in order to render it capable of use as a wheel.

A wheel body is a part of a wheel given that, after being imported, the wheel body must then be further manufactured in order to make it capable of housing an axle, and eventually to be incorporated into a truck assembly (i.e., a bogie or a bissel-bogie).

During the Verification Period, Ronsco did not itself perform this further processing. However, on December 15, 2015, Ronsco was certified by the AAR to perform the work required to render the wheel bodies imported capable of being fitted with an axle. Given that tariff item 8607.19.30 is not an end-use item, whether the processing required to make the wheel bodies into a complete wheel was performed by Ronsco or an entity purchasing from Ronsco is not relevant to the tariff classification.

The fact that the goods imported by Ronsco have become differentiated beyond the “blank” or “ébauche” stage is further demonstrated by the following documents, which make reference specifically to “wheels”, rather than “wheel blanks”:

- Ronsco’s contract with Taiyuan for the manufacture of “AAR approved H36 Wheels”, attached at **Annex “N”**; and

<sup>26</sup> OMK, “Wheels Catalogue”, p. 7, “Production Scheme”. This document is attached to this letter as **Annex “M”**.

- The commercial invoices from Taiyuan which describe “AAR approved H36 wheels”, at Annex “O”.

Note that, although these documents do use the term “wheels” to refer to the goods at issue, they are nonetheless not considered within the industry to be wheels. Indeed, as noted in Ronsco’s description of the goods in CBSA’s coding forms, the goods were listed as “AAR APPROVED H36 WHEELS/BLNKS/NOT FITTED W/AXL/NOT FNSHED [emphasis added]”. As already noted, the goods are incapable of even being fitted on to axles when they are imported. Indeed, they are incapable of performing any of the essential functions of a wheel for rolling-stock. Furthermore, as will be discussed below, numerous participants in Canada’s railway industry either import or export into Canada goods that are the same or substantially the same as those at issue; indeed, Ronsco understands that these goods are imported under tariff item 8607.19.21 as “blanks”, regardless of their end use. As a result, the language used in Ronsco’s contract with Taiyuan, and the invoices Ronsco receives from the same, should not be considered determinative of the character of the good at issue.

As explained above, all of the wheel bodies that Ronsco imports must conform to rigorous AAR Standards attached as **Annex “I”**. These specifications apply to the wheel bodies imported by Ronsco. In order for Ronsco to produce AAR-compliant truck assemblies, the manufacturers from whom Ronsco imports wheel parts must be qualified by the AAR. The qualification process involves the manufacturer producing and submitting sample items for testing by the AAR (at the manufacturer’s expense), as well as an inspection of the manufacturer’s facilities.<sup>27</sup> Thereafter, plants are inspected yearly, again at the manufacturer’s expense.<sup>28</sup> This level of expense and effort, both on the part of the manufacturer and the AAR, would not be expended on a good that was merely a “piece of metal intended for further shaping or finishing”.

Ronsco also goes to considerable annual expense to maintain its own AAR certification. This is significant because the wheel bodies, when imported, are not yet capable of being used as wheels and, as discussed above, must be further manufactured in order to be used as such. As is noted in **Annex “P”**, discussed further below, the machining done after the heat treatment process is only a rough machining. Indeed, AAR Standard 16.1 specifies that “[w]heels shall be rough bored” (see **Annex “I”**). Ronsco must therefore ensure that this further manufacturing of the wheel bodies is performed to the exacting standards set by the AAR. Indeed, these standards are so exacting precisely because, without them, the goods imported by Ronsco could not be used as wheels.

The eighteen steps in the forging process noted above must also be performed to the AAR’s Standards, as verified in the annual inspections. The AAR’s design standards aim “to ensure the wheel is compatible with the standard axles, bearings, side frames, and track”,<sup>29</sup> and also to

<sup>27</sup> AAR Standards, *supra* note 16, **Annex “I”** at Appendix B, Articles 2.0 and 3.0.

<sup>28</sup> *Ibid* at Appendix B, Article 4.0.

<sup>29</sup> *Ibid*, Article 2.0.

ensure the quality and safety of the product.<sup>30</sup> The AAR Standards apply to the forging process as follows:

- a. “Manufacture” standards at Article 5.0 apply to Steps 1-9 noted above (raw material check to hot measurement);
- b. The “Heat Treatment” standards at Article 6.0 apply to Steps 10-13 noted above (pre-heating to tempering);
- c. The “Mating” (Article 13.0), “Gauges” (Article 14.0), and “Finishes” (Article 16.0) standards apply to Steps 14 and 15 noted above (machining and final inspection and non-destructive testing);
- d. The “Ladle Analysis” (Article 8.0), “Microcleanliness” (Article 9.0), and “Brinell Hardness” (Articles 10.0 to 12.0) apply to steps 1 and 15 noted above (raw material check and final inspection and non-destructive testing);
- e. The “Inspection” standards at Article 18.0 apply to step 15 noted above (inspection and non-destructive testing);
- f. The “Shot Peening” standards at Article 7.0 apply to step 16 noted above (shot peening); and
- g. The “Marking” standards at Article 17.0 apply to step 17 noted above (protection and stamping).

For a further illustration of the relationship between the AAR Standards and the forging process, please see **Annex “P”**, which is a marked-up version of the Taiyuan wheel process flow chart that is included at page 2 of **Annex “L”**. The descriptive text in the blue boxes is taken from a 2016 inspection report regarding Taiyuan’s production of forged wheel bodies, which is attached as **Annex “Q”**.

As is evident from page 6 of **Annex “R”**, Taiyuan produces a variety of wheel parts, which are shaped and machined by Taiyuan to various diameters and for various purposes. Ronsco selects from among the various options of wheel parts that have been shaped and machined by Taiyuan, and others for use on North American rail. Currently, the wheel bodies are further manufactured after arrival at Ronsco’s Plant in Canada, where they are further machined in order to be fitted onto axles, after which they are installed on axles and integrated into bogies. Prior to December 2015, when Ronsco was AAR-certified to undertake this work, this further processing was performed by Ronsco’s end user customers.

The process of further machining the wheel bodies that are imported is also subject to strict AAR standards. After determining whether the wheel bodies will be fitted for an F Class or K Class axle, the specific wheel bodies must be bored to a precise diameter specific to the axle in question. As shown in the YouTube video uploaded by Ronsco’s Director of Product

<sup>30</sup> AAR Technical Services, “Welcome”, online: <<https://www.aar.com/standards/index.html>>. The AAR Technical Services committees “are responsible for the development, maintenance, and enforcement of North American railroad ... mechanical standards ... that promote an acceptance level of safety and efficiency”. AAR Technical Services staff members are responsible for maintaining sections of the AAR Manual of Standards and Recommended Practices.

Development & Engineering demonstrating the boring and finishing process, a computer-controlled cutting tool is applied to expand the 8-3/8 inch bore hole to the required diameter for either an F Class or K Class axle. The tolerance level for the fit between the axle selected and the bore hole created after import is one-half of one-one thousandth of an inch (i.e. 0.0005 inches, or 0.0127 millimetres (12.7 micrometres)). One of Ronsco's operators verifies the dimensions of the machined bore hole after the computer-controlled cutting process is complete.

#### Tariff Item Classification of the Goods at Issue

##### **A. The goods are properly classified under tariff item 8607.19.30, “Parts of axles or wheels”**

Ronsco therefore does not agree with the CBSA's determination that the correct tariff item is 8607.19.29 “Other” / “Autres”, which refers to “Wheels, whether or not fitted with axles / Roues, avec ou sans essieux”.

Rather, the correct tariff item for these goods is 8607.19.30, “Parts of axles or wheels”. This is because the goods imported by Ronsco are not finished wheels, but rather are parts of wheels – i.e. wheel bodies, which must be further manufactured before the good can be used as a wheel. Indeed, the goods imported cannot be construed as any kind of wheel “whether or not fitted with axles” (i.e. tariff item 8607.19.29), as the good, as imported, is not capable of fitting any axle without further machining.

Specifically, after the goods are imported, a cutting tool is applied to the bore hole to remove steel, widening the hole so that it will fit a specific axle. In addition, a chamfer (i.e. a beveled edge) is cut along the top of the bore hole, in order to facilitate guiding and centering the completed wheel body bore onto the axle during the pressing process. The bore hole must be chamfered before the wheel body can be fitted with an axle, as the 90-degree edge (which the wheel bodies have when they arrive in Canada) risks damaging the axle during the pressing process.

As noted above, the Supreme Court of Canada has determined that in order to determine the correct tariff classification of the wheel bodies, the *General Rules* must be applied in a hierarchical manner, beginning with Rule 1.<sup>31</sup> As a result, only if the appropriate heading cannot be determined through the application of Rule 1 alone should Rules 2, 3, 4 and 5 of the *General Rules* be applied.<sup>32</sup> Once the appropriate heading has been determined, Rule 6 is applied at the subheading level, followed by the application of Rule 1 of the “Canadian Rules” of interpretation,<sup>33</sup> in order to identify the proper “Canada-specific” tariff item.<sup>34</sup>

<sup>31</sup> *Igloo Vikski*, *supra* note 6 at para 29.

<sup>32</sup> *Ibid* at para 22 and footnote 4; *Gladu Tools Inc v President of the Canada Border Services Agency*, [2009 FCA 215](#) at para 7.

<sup>33</sup> *General Rules*, *supra* note 5; see also CBSA, [Memorandum D10-13-1](#), “Tariff Classification of Goods”, 15 January 2015.

As noted above, Rule 6 allows Rules 1 to 5 to be applied at the subheading level as well, once the proper heading has been determined.<sup>35</sup> However, Rule 6 and Canadian Rule 1 also emphasize that only headings, subheadings, or tariff items at the same level can be compared.<sup>36</sup> As a result, the analysis is conducted “step by step”, first at the heading level, then at the subheading level, and so on until the correct tariff item is identified. This is done with regard to factors such as the design, production process, usage, characterization of the product by the trade, and the common understanding of what the product is.<sup>37</sup> As will be discussed further below, the common understanding of the goods at issue by Ronsco and its competitors is that they are not yet wheels; indeed, their character has often been considered closer to that of a “blank” than it is to that of a “wheel”.

Finally, if goods cannot be classified under Rule 1 of the *General Rules*, Rule 2(a) of the *General Rules* allows unfinished goods to be classified with the finished goods, if they have the “essential character” of the finished goods. However, as noted above, the Supreme Court of Canada held in *Igloo Vikski* that the deeming provisions in Rule 2 are not applicable where a heading “specifically describes the unfinished goods or composite goods as such” as “the heading specifically contemplates the incomplete or composite nature of the good in question” (emphasis added).<sup>38</sup> The same reasoning applies to subheadings (given Rule 6 of the *General Rules*) and to tariff items (given rule 1 of the *Canadian Rules*).

Based on this analysis, the goods imported by Ronsco – i.e. the wheel bodies, which still require further processing in order to be able to become capable of being fitted with axles and used as wheels on rolling-stock – should be classified as “parts of wheels” under tariff item 8607.19.30, which provides for “parts of axles or wheels / parties d’essieux ou de roues”.<sup>39</sup> As discussed above, the goods at issue are neither blanks nor wheels, but rather are wheel bodies which cannot perform any of the essential functions of a wheel for rolling-stock. Indeed, not only are the wheel bodies not fitted with axles, but in fact that they cannot be fitted with axles and are not specialized to one specific end use. Once imported, Ronsco must still complete the final boring and machining processes before the goods can be fitted on axles and used on rolling-stock. The goods must therefore be considered “parts of wheels”, given that wheel bodies/corps de roues are expressly referred to as an example of a “part of a wheel” in the WCO Explanatory Notes to Heading 86.07, attached at **Annex “H”**.

<sup>34</sup> *Danson Décor Inc v President of the Canada Border Services Agency* (27 May 2011), [AP-2009-066 \(CITT\)](#) at paras 13-18.

<sup>35</sup> *General Rules*, *supra* note 5, Rule 6.

<sup>36</sup> *Ibid*, Rule 6 and Canadian Rule 1.

<sup>37</sup> *Bauer Hockey Corporation v President of the Canada Border Services Agency* (26 April 2012), [AP-2011-011 \(CITT\)](#) at para 43, citing *Partylite Gifts Ltd v Commissioner of the Canada Revenue Agency* (16 February 2004), [AP-2003-008 \(CITT\)](#) at p 5, aff’d 2005 FCA 157; *Little Bear Organic Foods v Deputy Minister of National Revenue for Customs and Excise (“DMNRCE”)* (12 February 1992), [AP-89-214 \(CITT\)](#), p. 2.

<sup>38</sup> *Igloo Vikski*, *supra* note 6 at para 22 and footnote 4.

<sup>39</sup> [Schedule to the Customs Tariff, SC 1997, c 36](#) at tariff item 8607.19.30 [Customs Tariff Schedule]. The tariff items in Heading 86.07 are attached as **Annex “E”**. The Explanatory Notes to Heading 86.07 are attached as **Annex “H”**.

As such, the goods must fall within tariff item 8607.19.30, given its specific provision for parts of wheels. Following the Supreme Court of Canada's direction in *Igloo Vikski*, the goods in question should therefore be classified under tariff item 8607.19.30 by application of Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, and without reference to Rule 2(a) of the *General Rules*.

As recognized in CBSA *Memorandum D10-0-1*, "Classification of Parts and Accessories in the *Customs Tariff*", "[t]here is no one universally applicable test" regarding what constitutes a part.<sup>40</sup> The analysis is a contextual one. *Memorandum D10-0-1* sets out the following criteria for use in determining whether a good is a part, which criteria may be "[u]sed singly or in combination", i.e., goods need not meet all of the criteria in order to be considered a "part":<sup>41</sup>

27 Five criteria have emerged over the years which set forth basic considerations for the classification of parts. To be considered to be a part, goods:

- (a) form a complete unit with the machine;
- (b) have no alternative function;
- (c) are marketed and shipped as a unit;
- (d) are necessary for the safe and prudent use of the unit; and/or
- (e) are committed to the use of the unit.

The goods imported by Ronsco fulfill the criteria in *Memorandum D10-0-1* to be considered parts. First, they cannot function as wheels as imported (27(b)). However, once they are further machined and manufactured, they constitute "complete" wheels and are capable of being mounted on axles for use (27(a)). Second, they have no alternative function, and, once finished, are also marketed and exported by Ronsco as a unit (i.e. as wheels that can be ordered depending on the number of completed wheels that a customer requires to be fitted with axles and incorporated into a bogie or bissel-bogie) (27(c)).

Although Ronsco does resell some wheel bodies to other manufacturers of combinations of finished wheels, axles and bearings (wheelsets) and bogie assemblies in Canada, the wheel bodies must always be further worked or processed in order to be marketed and shipped for use as such in an AAR-compliant manner (27(d)). Similarly, the goods in question are committed to use in finished wheels of railway rolling-stock;<sup>42</sup> indeed, as contemplated in the criteria set out in *Memorandum D10-0-1*, the wheel bodies cannot be used for any other purpose or in the manufacturing of any other wheel for any other vehicle (27(e)). In fact, such

<sup>40</sup> CBSA, [\*Memorandum D10-0-1\*](#), "Classification of Parts and Accessories in the *Customs Tariff*", 13 May 2014 at para 24.

<sup>41</sup> *Ibid* at paras 27 and 28.

<sup>42</sup> For an imported good to be "committed" for use with a particular good, it must (i) have no other use than with those goods and (ii) be necessary to their function: *ibid* at paras 25-26.

use on any other type of train or vehicle would be highly dangerous and could lead to derailment of the train.

Furthermore, the wheel bodies should not be classified as “Wheels, whether or not fitted with axles” because they are in fact incapable of being fitted with axles at the time of import. As a result, the goods in question lack one of the principal features of a wheel for rolling stock – the ability to be mounted on an axle – and cannot be considered a wheel. They are, instead, and as specifically contemplated by tariff item 8607.19.30, a “part of a wheel”.

Similarly, the CITT held in *Atomic Ski Canada Inc v Canada (Deputy Minister of National Revenue)*, [1998] CITT No 33 that the plastic shells for in-line skates could not be considered “roller skates” or “other sports footwear”, but rather were “other parts of footwear”.<sup>43</sup> This was because they lacked one of the principal features of footwear: the ability to be worn as a covering for the foot and part of the leg.<sup>44</sup> Following the same reasoning, the goods imported by Ronsco are neither a wheel nor a finished but unassembled wheel. Rather, the goods in question are parts of wheels for rolling stock, and cannot yet function as wheels for rolling stock until they undergo the boring and finishing process and are able to be mounted on axles.

Given that the goods imported by Ronsco are forged, and in keeping with there being no universal test regarding what constitutes a “part”, it is unsurprising that the further manufacturing required to the part involves removing material from the good imported, rather than adding to the good or assembling the good with something else. As described above, the forging process involves applying a series of progressive steps to a blank cut from steel blooms to form it from a blank to a wheel body. It is not until all of these steps are complete, as well as the further manufacturing performed by Ronsco after importation, that the good can properly be called a wheel, as prior to that point the good could not be used effectively or safely for its intended purpose. Indeed, until all of these processes have occurred, the goods in question lack one of the principal features of a wheel for rolling stock – the ability to be mounted on an axle according to rigid and exacting specifications. Where a good cannot be effectively or safely used for its intended purpose at the time of being imported, a tariff item that specifically provides for the unfinished version of the good (i.e. a version providing for parts of the good) is to be preferred.<sup>45</sup>

Furthermore, as discussed above, although “blanks” may fall within the sub-sub-heading “Wheels, whether or not fitted with axles”, this is because a blank is an undifferentiated wheel rather than a part. Blanks do not fulfill the criteria for “parts” above, particularly given they are not “committed to the use of the unit” (i.e. the wheel), as required under *Memorandum D10-0-1*, s. 27(e). Because blanks are undifferentiated, although they may be specific to use on rolling-stock, they are in fact not yet sufficiently manufactured in order to be considered “committed” to use as a specific wheel. Indeed, a blank can be further manufactured and used on a wide variety of rolling-stock.

<sup>43</sup> *Atomic Ski Canada Inc v Canada (Deputy Minister of National Revenue)*, [1998] CITT No 33 at para 22.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Igloo Vikski*, *supra* note 6 at para 22 and footnote 4.

The wheel bodies imported by Ronsco, however, are already committed to use on a particular type of vehicle – specifically, on a particular type of railway rolling-stock, dependent on the specific wheel body that Ronsco imports. As a result, the legislator has opted to place a “blank” under the sub-sub-heading of “Wheels, whether or not fitted with axles”, because it is simply an undifferentiated wheel. Wheel bodies, however, have a specific intended purpose – to be used on a specific type of vehicle – but cannot safely or effectively be used on those vehicles until they are further manufactured by Ronsco after importation. The wheel bodies can therefore rightfully be considered “Parts of … wheels”, under tariff item 8607.19.30.

Finally, if the CBSA disagrees with Ronsco’s characterization of the goods, it is unclear which goods currently imported into Canada by any importer would be properly classified under item 8607.19.30. First, the CBSA has held that the goods are not blanks, but rather that they should be considered “wheels”, even though they have not been sufficiently processed that they can be used as wheels, i.e. by being installed in bogies or bissel-bogies. It is therefore difficult to imagine what goods would therefore fall within tariff item 8607.19.30. Indeed, Ronsco is not aware of any goods that are sufficiently processed such that they cannot be considered “blanks”, but which are not sufficiently processed to be considered “wheels”. This is true of both forged and cast wheels. That is, in Canada’s railway rolling-stock industry, there are virtually no other goods that can be considered “parts of wheels”.

This therefore raises the question of why the legislature enacted tariff item 8607.19.30 at all. If the goods at issue in this Request are not considered “parts of wheels”, this would essentially render tariff item 8607.19.30 a redundant legislative provision. This result would be absurd, given the presumption at common law that the legislature “does not speak in vain”.<sup>46</sup> Ronsco therefore disagrees that the goods at issue can be properly classified as either blanks or as wheels; rather, the goods are parts of wheels.

**B. In the alternative, the goods are properly classified under tariff item 8607.19.50, “Parts of bogies or bissel-bogies (truck assemblies)”**

Furthermore, even if the CBSA determines that the wheel bodies are not properly classified as “parts of axles or wheels” under tariff item 8607.19.30, they still would not be classifiable under tariff item 8607.19.21 (“Wheels, whether or not fitted with axles – Blanks for use in the manufacture of wheel and axle combinations...”), nor under tariff item 8607.19.29 (“Wheels, whether or not fitted with axles – Other”). Rather, if the goods are not “parts of axles or wheels”, the proper tariff item classification for the wheel bodies/corps de roues would be tariff item 8607.19.50:

*Parts of bogies or bissel-bogies (truck assemblies)*

*Parties de bogies ou bissels*

<sup>46</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed (Markham: LexisNexis, 2014) at paras 8.26-8.27; see also *Heritage Capital Corp v Equitable Trust Co*, [2016 SCC 19](#) at para 40 and *Godbout c Pagé*, [2017 SCC 18](#) at para 120.

A “bogie” is “an undercarriage with four or six wheels pivoted beneath the end of a railway vehicle”.<sup>47</sup> Bogies are comprised of a number of parts, including wheels, axles, bearing combinations, brake shoes, brake shoe keys, side springs, load springs, bolster pocket wear plates, friction wedges, column wear plates, side bearing rollers, side bearing cages, shear pads, and side frame keys, among others. A diagram of the parts constituting a bogie is attached as **Annex “S”**.

The goods imported by Ronsco are not suitable for incorporation into a wheelset, and subsequently into a bogie, without further manufacturing following import, such that they constitute a “part”. Applying the criteria in *Memorandum D10-0-1*, the goods also have no alternative function, as the only possible use for the good is to machine a bore hole of the appropriate width for fitting with an axle (forming a wheelset), following which the wheelset (i.e. a pair of mated bored wheels, fitted with an axle) are incorporated into the bogie or bissel-bogie. After this process, they are committed to use in the bogie or bissel-bogie.

**C. In the further alternative, any goods that were classifiable under tariff item 8607.19.30, as concluded by the CBSA, would be subject to the CBSA’s “duty drawback program”, and thus ultimately not subject to duties**

In the event that the CBSA disagrees with Ronsco’s submissions above and maintains that the goods at issue herein are properly classified under tariff item 8607.19.29 (“Wheels, whether or not fitted with axles: Other”), Ronsco will also be applying for a refund of any duties paid or to be paid to the CBSA with respect to these goods. Ronsco therefore intends to submit completed K32 (“Drawback Claim”) Forms in order to claim a drawback of any duties it is required to pay.

It bears noting that, according to industry statistics, almost all of the freight cars in service in North America in 2016 were owned by entities outside of Canada. Indeed, only 3.43% of freight cars in service in 2016 were Canadian-owned.<sup>48</sup> Ronsco is in the process of collecting documentation regarding the ownership of cars to which the goods in question were applied, much of which requires special access to industry records. However, for the purposes of this Request, the exceedingly small proportion of the North American railway industry made up of Canadian-owned cars demonstrates the reality that the goods in question were, in almost all cases, installed on cars owned by companies based in the United States, and were therefore ultimately exported or used to export other goods, such as potash and iron ore, to the U.S. The goods imported by Ronsco therefore fall within the criteria set out in CBSA *Memorandum D7-4-2*, “Duty Drawback Program”, paragraphs 1 to 3:<sup>49</sup> [emphasis in the following is added]:

<sup>47</sup> [Oxford Dictionaries Online, “Bogie”](https://en.oxforddictionaries.com/definition/bogie), Noun, definition #1 <<https://en.oxforddictionaries.com/definition/bogie>>.

<sup>48</sup> The American Association of Railroads’ publication “Railroad Facts” notes that, in 2016, there were 1,610,000 freight cars in service (see **Annex “T”** American Association of Railroads, “Railroads Facts” at p 53). The Railway Association of Canada’s publication “Rail Trends: 2017” notes that in 2016, there were 55,230 freight cars in service that were owned by Canadian freight railways (see **Annex “U”** Railway Association of Canada, “Rail Trends: 2017” at p 27). 55,230 is 3.43% of 1,610,000.

<sup>49</sup> CBSA, [Memorandum D7-4-2](#), “Duty Drawback Program”, 13 November 2014 at ss 1 & 2.

1. This program will be of benefit to persons who present, or will
  - (a) import goods into Canada, or
  - (b) receive goods imported into Canada, and
  - (c) export the imported goods from Canada, and
  - (d) wish to file a claim for a drawback (refund) of the duties paid.
2. When imported goods which are subsequently exported from Canada were
  - (a) further processed, or
  - (b) displayed or demonstrated in Canada, or
  - (c) used for the development or production in Canada of goods for subsequent export, and
  - (d) exported without having been used in Canada for any purpose other than for (a), (b), or (c), a drawback may be filed to claim the duties paid on the imported goods. This means a refund of the customs duties, anti-dumping and countervailing duties, or excise taxes, other than the Goods and Services Tax/Harmonized Sales Tax (GST/HST), that were paid at the time of importation, may be claimed.
3. For the purposes of paragraph 23(a), "further processed" includes imported goods, other than fuel or plant equipment, directly consumed or expended in the manufacture or production in Canada of goods for export.

As a result, although Ronsco has paid (under protest) the duties claimed by the CBSA for the goods at issue, as required by the DASs attached in **Annex "E"** and by the *Customs Act*, this was simply done to permit Ronsco to make the Request set out in this letter. Specifically, this payment under protest was in no way an acknowledgement by Ronsco that those duties are rightfully owed to the CBSA, nor has Ronsco waived its right to a refund of those duties that may be the subject of a refund under the Duty Drawback Program or other Remission request.

***III. Ronsco did not have reason to believe that the goods were not properly classified under tariff item 8607.19.21***

Ronsco agrees that the goods in question do not fall within tariff item 8607.19.21. However, for the reasons set out below, Ronsco disputes that it had reason to believe that the goods at issue were not properly classified under this tariff item.

Notably, the CBSA's Final Report states that Ronsco had "reason to believe" that the original tariff classification declared for these goods was incorrect, on the following basis:<sup>50</sup> [emphasis added]

#### "REASON TO BELIEVE"

1. With respect to section 32.2 of the *Customs Act* (the Act), specific information regarding the ... tariff classification ... of the imported goods that gives an importer reason to believe that a declaration is incorrect, can be found in:

(a) legislative provisions such as specific origin, tariff classification, or value for duty provisions that are *prima facie* (i.e., at first sight), evident (i.e., obvious, apparent), and transparent (i.e., clear, self-explanatory). For detailed examples of *prima facie*, evident and transparent legislative provisions, refer to Appendix;

As a result, the Final Report states that "specific information previously available was a legislative provision that was *prima facie*, evident, and transparent...".<sup>51</sup> The use of the conjunction "and", as employed in CBSA *Memorandum D11-6-6* regarding "Reason to Believe", suggests that legislation must have all three of these characteristics in order to constitute a "reason to believe" that an originally declared tariff classification was incorrect.

The use of the term "and" in statutes may be conjunctive or disjunctive, depending on context.<sup>52</sup> However, the CBSA should be reluctant to interpret the use of "and" in *Memorandum D11-6-6* as being disjunctive, as cases in which "and" is interpreted as being disjunctive are generally only where "and" must be so interpreted in order to avoid "absurdity".<sup>53</sup> In this case, the wording of *Memorandum D11-6-7*, s. 1(a) is unambiguous in its requirement for legislation to have three characteristics in order to give rise to "reason to believe": being *prima facie*, evident and transparent. It would not be absurd to require legislation to have all three of these characteristics in order to constitute a "reason to believe". As a result, the language in s. 1(a) of *Memorandum D11-6-7* should be given its ordinary meaning, in terms of its grammatical and ordinary sense, with consideration also given to the context in which the words are used and the greater statutory scheme in which they are found.<sup>54</sup>

Courts have also held that "[t]o read a list, particularly an all-inclusive list or series, in any way other than conjunctively would be ungrammatical and extraordinary to say the least".<sup>55</sup> As a

<sup>50</sup> CBSA, [Memorandum D11-6-6](#), "'Reason to Believe' and Self-adjustments to Declarations of Origin, Tariff Classification, and Value for Duty", 12 April 2013, s 1(a), referred to in Final Report at p 5 [Memorandum D11-6-6].

<sup>51</sup> Final Report at p 4.

<sup>52</sup> *Seck c Canada (Procureur général)*, [2012 FCA 314](#) at para 47 [Seck], citing, *inter alia*, *Canada (Minister of Citizenship and Immigration) v Hyde*, [2006 FCA 379](#) at para 22 [Hyde] and R Sullivan, *Construction of Statutes*, 5<sup>th</sup> ed (Markham: LexisNexis Canada, 2008) at pp 81-84.

<sup>53</sup> See R Sullivan, *Construction of Statutes*, 6<sup>th</sup> ed (Markham: LexisNexis Canada, 2014) at p 100.

<sup>54</sup> *Hyde*, *supra* note 52 at para 22, as cited in *Seck*, *supra* note 52.

<sup>55</sup> *Agricultural Credit Corp of Saskatchewan v Novak*, [\[1995\] 8 WWR 385 \(SKCA\)](#) at para 32. See also *Pizza Pizza Ltd v Toronto Star Newspapers Ltd*, [2002] OJ No 1858 (Ont Div Ct) at para 4, with reference to the "conjunctive

result, the ordinary meaning of the term “and” in this case – and indeed its grammatical sense – is that it should be read “conjunctively”, or cumulatively. The greater context of *Memorandum D11-6-7* and the *Customs Tariff* do not suggest that the term “and” should be interpreted here in any other way. As a result, s. 1(a) of *Memorandum D11-6-7* must be read as requiring legislation to have all three characteristics (i.e., *prima facie*, evident and transparent) in order to provide an importer with a reason to believe that an originally declared tariff classification was incorrect.

According to s. 1(a) of *Memorandum D11-6-6*, a *prima facie* legislative provision is one that has a meaning that can be understood “at first sight”; an “evident” legislative provision is one that is “obvious” or “apparent”; and a “transparent” legislative provision is one that is “clear” or “self-explanatory”. Given these definitions, a legislative provision must be “at first sight”, “obvious”, “apparent”, “clear”, and “self-explanatory” in order to fulfill these criteria and thus to provide an importer with a “reason to believe” that its originally-declared tariff classifications are incorrect. A tariff item that is ambiguous, unclear, or vague would therefore not fulfill these criteria.

#### Ambiguity of Tariff Item 8607.19.21

First, the language of the originally declared tariff item – 8607.19.21 – is not *prima facie*, evident and transparent.

In particular, the language used in the tariff item is ambiguous, for three reasons: (1) ambiguous drafting and use of the conjunction “and”; (2) ambiguous use of the term “blanks”; (3) ambiguous construction of the second and third sub-items in 8607.19.21.

For ease of reference, tariff item 8607.19.21 states the following:<sup>56</sup>

- 86.07 Parts of railway or tramway locomotives or rolling-stock.**
- **Bogies, bissel-bogies (truck assemblies), axles and wheels, and parts thereof**
- - **8607.19 Other, including parts**
- - - **Wheels, whether or not fitted with axles:**
- - - - **8607.19.21 00 Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches;**
- For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic;
- For use in the repair of tramway vehicles (excluding subway cars) with magnetic track brakes

“criteria” in rule 62.02(4)(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194; this paragraph in the *Rules of Civil Procedure* sets out two criteria required for leave to appeal from the interlocutory order of a judge, which are separated by the conjunction “and” and are therefore considered to be conjunctive.

<sup>56</sup> *Customs Tariff Schedule*, *supra* note 39 at tariff item 8607.19.30.

Tariff item 8607.19.21 00 therefore encompasses three “sub-items”, as follows: [emphasis added]

- (1) Blanks for use in the manufacture of wheel and axle combinations for railway and tramway ... passenger coaches;
- (2) For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic; and
- (3) For use in the repair of tramway vehicles with magnetic track brakes

However, it is not at all *prima facie*, evident or transparent what exact goods are referred to by these sub-items.

#### **Ambiguous Drafting and Use of the Conjunction “And”**

The first “sub-item” above (“Blanks for use in...”) is ambiguously drafted. Specifically, it is not clear whether the adjective “passenger” is used to modify the word “coaches” generally within the clause, or whether it only modifies the words “tramway ... coaches”. That is, it is not clear whether the adjective “passenger” applies to all coaches, or whether it applies only to tramway coaches (and not to railway coaches).

As a result, it is wholly unclear from the wording of this tariff item whether the first “sub-item” within 8607.19.21 00 is applicable only to passenger coaches (i.e. all passenger coaches, but no other coaches, regardless of whether used on railways or tramways), or whether it refers to all “railway ... coaches” generally (regardless of whether for passengers or for freight) and secondly to “tramway passenger ... coaches”. Clearly, the wording of this tariff item is capable of at least two different meanings and is therefore ambiguous. As a result, the “end use” requirement for this tariff item cannot be said to be *prima facie*, evident and transparent.

#### **Ambiguous Use of the Term “Blanks”**

Furthermore, the meaning of the word “blank” is not obvious or transparent. Following a detailed review of its goods, their manufacturing processes and industry specifications, Ronsco had agreed with the CBSA that the goods at issue are not “blanks”. However, the meaning of the term “blanks” in the context of the Schedule to the *Customs Tariff* is neither obvious nor transparent. While, as Ronsco outlined in its Interim Submissions, from the perspective of the manufacturing process that the subject goods undergo prior to being imported, the term “blank” refers to an earlier, undifferentiated product, the term “blank” has also been used in the industry to refer to the goods Ronsco imports.

For example, Ronsco is aware that CP has recently ordered the same goods as imported and produced by Ronsco, from Nippon Steel & Sumitomo Metal Corporation Group Ltd. Given that these goods are being sold to CP, which has not offered passenger railway service since 1978, their “end use” cannot possibly be on passenger coaches nor on any of the other end uses

falling under tariff item 8607.19.21.<sup>57</sup> However, it is Ronsco's understanding that CP has nevertheless imported these goods under tariff item 8607.19.21.

Furthermore, it is Ronsco's commercial intelligence that the following other companies have, over the past four years, imported or shipped goods into Canada that are the same or substantially the same as the goods at issue. Ronsco understands that these companies have imported or exported these goods into Canada under tariff item 8607.19.21, regardless of their end use:

- (a) Canadian National Railway Company (CN);
- (b) Canadian Pacific Railway (CP);
- (c) IEC Holden Inc., based in Saint-Laurent, QC;
- (d) The Greenbrier Companies, or "GBX", based in the United States;
- (e) Progress Rail (owned by Caterpillar Inc.), based in the United States;
- (f) ORX Rail, based in the United States;
- (g) Nippon Steel & Sumitomo Metal Corporation Group, a company based in Japan;
- (h) United Metallurgical Company (OMK), operating as part of Vyksa Steel Works and based in Russia;
- (i) Evraz Holding, based in Russia; and
- (j) KLW Wheelco, based in Switzerland.

Clearly, Ronsco's original interpretation of the term "blanks", and of tariff item 8607.19.21, appears to be shared by other industry participants and employed by other importers of the same goods. The tariff item should therefore not be considered to be *prima facie*, evident and transparent legislation.

#### **Ambiguous construction of the second and third sub-items in 8607.19.21**

Finally, it is also unclear whether the three "sub-items" referred to in this tariff item all refer to blanks, or whether the second and third sub-items refer back up to "Wheels, whether or not fitted with axles", as stated in the sub-sub-heading pertaining to these items.

Again, for ease of reference, the text of tariff item 8607.19.21 is reproduced below: [emphasis added; content in square brackets also added]

- - - Wheels, whether or not fitted with axles:
- - - 8607.19.21 00 Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches;
- [Wheels or blanks] For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic;
- [Wheels or blanks] For use in the repair of tramway vehicles (excluding subway cars) with magnetic track brakes

<sup>57</sup> As noted above, CP has not operated passenger rail services since Via Rail began providing these services in 1978.

Again, tariff item 8607.19.21 includes three “sub-items”. However, the wording of the tariff item makes it entirely unclear whether the second and third sub-items refer back to “blanks”, the term used in the first sub-item, or whether they refer back to “wheels”, the term used in the sub-sub-heading “wheels, whether or not fitted with axles”.

Given that the noun “blanks” is used in sub-item (1), while sub-items (2) and (3) do not include any noun at all that indicates the goods they refer to, it is impossible to know whether the second and third sub-items refer to blanks or to wheels. The tariff item is therefore, again, clearly ambiguous and cannot be considered *prima facie*, evident or transparent.

### **Prevalence of Differing Interpretations**

The fact that tariff item 8607.19.21 is not at all *prima facie*, evident or transparent is also clear from the fact that so many different parties involved in the importation of these goods have differing interpretations of that tariff item.

For example, in determining the proper tariff classification for the goods at issue, Ronsco originally relied on the advice it received from its customs broker, FedEx. Indeed, consistently since 2005, when Ronsco began importing these goods, Ronsco was advised by FedEx that 8607.19.21 was the appropriate tariff item. Attached at **Annex “V”** is a memo to file by one of Ronsco’s employees, based on advice about tariff classification received from FedEx in 2005.<sup>58</sup> Ronsco had no reason to question this advice, given that Ronsco had received the same advice from all three of its previous customs brokers over the past 50 years.<sup>59</sup>

### **Examples of *Prima Facie*, Evident and Transparent Tariff Classification Provisions**

Given the above, tariff item 8607.19.21 is not comparable to the tariff items set out in Memorandum D11-6-6, Appendix, para 5 as examples of *prima facie*, evident and transparent tariff classification provisions.<sup>60</sup>

The provisions set out in the Appendix are indeed examples of *prima facie*, evident and transparent legislation, given that the explanation of those tariff items provided in Memorandum D11-6-6 is simple and does not involve a significant exercise of statutory interpretation, unlike tariff item 8607.19.21.

The first example of a *prima facie*, evident and transparent tariff classification provision set out in Memorandum D11-6-6 is the following:<sup>61</sup>

<sup>58</sup> M Menanno, Memo to File, “Wheel Blanks from China”, 2005. Note that this document was an email from M Menanno to herself, memorializing the advice received from FedEx.

<sup>59</sup> Prior to using FedEx’s services, Ronsco’s customs brokers included Blaiklock Brothers, which was acquired by Livingston International in or around 1999; BGL Brokerage Ltd.; and Livingston International, itself.

<sup>60</sup> Memorandum D11-6-6, *supra* note 50, Appendix at para 5.

<sup>61</sup> *ibid.*

### **A. Classification of live fish:**

Legal Note 1 to Chapter 1 reads as follows:

“This Chapter covers all live animals except:

(a) Fish and crustaceans, molluscs and other aquatic invertebrates, of heading 03.01, 03.06 or 03.07;”

Therefore, if an importer classifies live fish in Chapter 1 of the *Customs Tariff*, the importer has reason to believe that the declaration is incorrect. The *Customs Tariff* clearly directs that live fish must be classified in Chapter 3.

Ronsco agrees that this is an example of a *prima facie*, evident and transparent tariff classification provision. However, it can clearly be distinguished from tariff item 8607.19.21, given that there is no issue in the above example of what a “fish” is, or what type of imported good would be considered a fish. Under tariff item 8607.19.21, however, as noted above, there are numerous ambiguities that make and the tariff item unclear.

The second example provision set out in Memorandum D11-6-6 is that of “black ink”:<sup>62</sup>

### **B. Classification of printing ink:**

Heading 32.15:	Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid.
	- Printing ink:
3215.11.00 00	-- Black
3215.19.00	-- Other
10	----- For newspapers
20	----- Flexographic
30	----- Lithographic, offset
90	----- Other

If the printing ink being imported is black, the importer has reason to believe that it must be classified under tariff item 3215.11.00. Ink of any other color is classified under tariff item 3215.19.00.

Again, Ronsco agrees that this is an example of a *prima facie*, evident and transparent tariff classification provision. However, it is also clearly distinguishable from tariff item 8607.19.21. Tariff items 3215.11.00 and 3215.19.00 establish different tariff items based only on the colour of the ink at issue – a single and obvious characteristic that is easily determined and that does not require significant interpretation.

This is in stark contrast to tariff item 8607.19.21. Tariff item 8607.19.21 is drafted in such way that it involves all of the ambiguities discussed above and does not lend itself to a simple determination based on obvious characteristics of the goods at issue. Rather, it is not even

<sup>62</sup> *Ibid.*

clear whether the second and third sub-items listed in tariff item 8607.19.21 refer to blanks or to wheels, nor is it clear what constitutes a “blank” at all, as reference must be had to highly specialized knowledge regarding the metallurgic process of creating forged wheels in order to interpret the meaning of a “blank”. These factors, combined with the ambiguous placement of the modifier “passenger” that obscures the meaning of the conjunction “and”, resulting in a lack of clarity with regard to the required end use of the goods in that tariff item, render tariff item 8607.19.21 significantly less clear than the ink example above.

Finally, the Memorandum D11-6-6 provides a third and final example of a *prima facie*, evident and transparent legislative provision:<sup>63</sup>

**C. Classification of “new” pneumatic tires:**

Heading 40.11:	New pneumatic tires, of rubber
4011.10.11 00	- Of a kind used on motor cars (including station wagons and racing cars)
4011.20.00	- Of a kind used on buses or lorries
	----- On-highway tires
11	----- Of a kind used on light trucks, of radial ply construction
12	----- Of a kind used on light trucks, other
13	----- Other, of radial play construction
19	----- Other
20	----- Off-highway tires
4011.30.00 00	- Of a kind used on aircraft
4011.40.00 00	- Of a kind used on motorcycles
4011.50.00 00	- Of a kind used on bicycles

An importer has reason to believe that new pneumatic tires fall under heading 40.11. The tariff item under which it is classified is clearly defined as dependant on the vehicle for which the tire is designed.

Again, tariff item 8607.19.21 can be distinguished from this example. Heading 40.11 does make it clear that “new pneumatic tires” fall within that heading. Similarly, heading 86.07 makes it clear that “parts of railway or tramway locomotives or rolling stock” will fall within it. However, for the same reasons set out above, the sub-headings, sub-sub-headings, individual tariff items, and “sub-items” – and particularly tariff item 8607.19.21 – are clearly not as *prima facie*, evident, or transparent as this example from Memorandum D11-6-6. Again, tariff item 8607.19.21 is drafted ambiguously, and cannot be said to be at first sight, evident (i.e., obvious, apparent), or transparent (i.e., clear, self-explanatory).<sup>64</sup>

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid*, s 1(a).

### Statements by Canada's Ministry of Finance and Auditor General

Finally, Ronsco had no reason to believe that, faced with an ambiguous tariff, the goods at issue, destined for manufacturing, were properly classified under tariff item for which a duty of 9.5% was payable, because of a clear and unambiguous statement made to the contrary by Canada's Ministry of Finance. Specifically, Finance Canada issued a statement on March 9, 2010, that Canada was becoming a "tariff-free zone" for manufacturers (attached as **Annex "W"**). All of the goods at issue in this Request were imported purely for manufacturing purposes.

As a result, and given all of the ambiguities inherent in the tariff items at issue, Ronsco had no reason to believe that its originally declared tariff classification for the goods at issue was incorrect, or that such a significant duty would be payable on those goods.

### Conclusion Regarding "Reason to Believe"

Overall, Ronsco clearly did not have reason to believe that its originally declared tariff classification for the goods at issue was incorrect. Although the Final Report asserts that Ronsco had "reason to believe" this, based on legislation which it claims was *prima facie*, evident and transparent, the tariff items at issue clearly do not fulfill any of these criteria.

### **IV. Conclusion**

Ronsco is in the process of self-adjusting the tariff classifications declared for the goods at issue in other transactions over the past four years. However, Ronsco disputes that 8607.19.29 is the correct classification for these goods or for any goods that are substantially the same.

As a result, should the CBSA determine that the goods at issue are properly classifiable under tariff item 8607.19.29, despite the arguments above, Ronsco will expect the CBSA to take proper action against other importers of the same goods who have imported them under tariff item 8607.19.21. Indeed, any failure by the CBSA to do so would constitute manifestly unjust and inequitable treatment of Ronsco.

Such a failure would also be contrary to domestic interests, given that Ronsco is the only privately-held Canadian company that currently operates an independent wheelshop in Canada's railway rolling-stock industry. As a result, to only conduct such a verification of the goods that Ronsco imports would be to impose a significant penalty on a Canadian company, while allowing foreign-owned corporations to import the same goods into Canada both duty- and penalty-free.

This would not only improperly penalize Ronsco but would also run contrary to the object and purpose of the *Customs Tariff* itself. As noted by the Office of the Auditor General of Canada its 2017 Spring Report regarding "Customs Duties" ("the OAG Report"), Canada's economy is constantly evolving, and it is crucial for Canada's tariff items to be reviewed regularly in order

to ensure that they actually “serve the interests of Canadians and protect industries”.<sup>65</sup> If the goods at issue in this case are considered classifiable under tariff item 8607.19.29, this will not be the case. Indeed, this would suppress Canada’s railway rolling-stock production industry, to the benefit of non-Canadian industry participants. Given this absurd result, as well as the reasoning set out above, Ronsco did not believe, and had no reason to believe, that the goods at issue should have been classified under tariff item 8607.19.21, or that the original tariff classification for the goods was incorrect at all.

As noted above, the CBSA’s Final Report dated July 24, 2018 failed to engage with or address Ronsco’s Interim Submissions of May 25, 2018. We hope and expect that we will receive a substantive response from the CBSA that answers the arguments, evidence and authorities that have been submitted by way of this Request for further re-determination. The CBSA’s reasons in relation to this Request must meet the standards of justification, transparency and intelligibility. The proper administration of Canada’s customs system, which both the Auditor General and the Senate Standing Committee on National Finance have noted is in a constant state of evolution, require no less in order for Canadian industry to continue to prosper in a twenty-first century economy.

As required pursuant to CBSA *Memorandum D11-6-7*, Appendix E, subparagraph 3(i), should this Request result in a change to the tariff classification of the goods at issue, Ronsco will submit a Form B2 to make the necessary changes resulting therefrom.

Please do not hesitate to contact me should you have any questions regarding the contents of this letter, or the attached documents, or if you require further information or clarification.

Yours truly,



Peter Clark

<sup>65</sup> Office of the Auditor General, “Report 2 – Customs Duties”, 2017 Spring Reports of the Auditor General to the Parliament of Canada, online: OAG <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201705\\_02\\_e\\_42224.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201705_02_e_42224.html)> at paras 2.64-2.65, 2.70. See also Senate, Standing Senate Committee on National Finance, *The Canada-USA Price Gap: Report of the Standing Senate Committee on National Finance* (February 2013) at p vii, Recommendation 1 (Chair: Hon Joseph A Day).

This is **Exhibit "C"**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Bamisters and Solicitors.  
Expires March 4, 2024.

---

**From:** Ogilvie, Sue [mailto:[Sue.Ogilvie@cbsa-asfc.gc.ca](mailto:Sue.Ogilvie@cbsa-asfc.gc.ca)]

**Sent:** Thursday, November 8, 2018 1:24 PM

**To:** 'Peter Clark'

**Subject:** RE: Ronsco Inc.

Good Afternoon Mr. Clark,

Yes you are correct I do not have jurisdiction under a section 60 appeal to deal with reason to believe.

It is in the best interest of the company to make the corrections within the time limit approved by the CV officer.

Reason to believe can only be dealt with under the appeal of an AMPs penalty under Section 129 of the Customs Act.

I hope this clarifies the situation for you.

Sue Ogilvie

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch

Canada Border Services Agency / Government of Canada

[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tel : 416-973-1787 / TTY: 866-335-3237

Agente d'appels, Unité des appels liés aux échanges commerciaux à Toronto, Direction générale des finances et de la gestion organisationnelle

Agence des services frontaliers du Canada / Gouvernement du Canada

[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tél: 416-973-1787 / ATS: 866-335-3237

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**From:** Peter Clark [mailto:[jpclark@greyclark.com](mailto:jpclark@greyclark.com)]

**Sent:** November 8, 2018 11:47 AM

**To:** Ogilvie, Sue <[Sue.Ogilvie@cbsa-asfc.gc.ca](mailto:Sue.Ogilvie@cbsa-asfc.gc.ca)>

**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com)

**Subject:** RE: Ronsco Inc.

Good afternoon Ms. Ogilvie,

Thank you for confirming that your records indicate that no NPA has been sent to Ronsco.

Ronsco has included the “reason to believe” issue in its appeal because it was addressed in Mme Gagné’s final report dated July 24, 2018, and has, as an ancillary consequence of her decision, required Ronsco to review and correct all of its import transactions of forged wheel bodies over the past four years. As you note in your email, Ronsco is in the process of completing this process.

Ronsco’s inclusion of the “reason to believe” issue in its appeal is therefore to address the requirement for it to correct these import transactions. Ronsco’s position is that the tariff items in question were not *prima facie*, evident, and transparent.

My client has asked me to confirm that you do not have jurisdiction to hear an appeal of this issue (reason to believe), please advise me of the same as soon as possible.

Best regards,

Peter Clark

**From:** Peter Clark [<mailto:jpclark@greyclark.com>]  
**Sent:** Tuesday, November 6, 2018 2:28 PM  
**To:** 'Ogilvie, Sue'  
**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com)  
**Subject:** RE: Ronsco Inc.

Hi Sue

Thank you for drawing this matter to my attention

Best Regards

Peter

**From:** Ogilvie, Sue [<mailto:Sue.Ogilvie@cbsa-asfc.gc.ca>]  
**Sent:** Tuesday, November 6, 2018 1:31 PM  
**To:** 'jpclark@greyclark.com'  
**Subject:** FW: Ronsco Inc.

Good Afternoon Mr. Clark,  
 My apologies for addressing you as Mr. Grey in my previous email.

I contacted the CV officer who worked on C-2016-011118.  
 You are correct they have not issued an NPA as yet.  
 Apparently an extension was requested to submit the amended B2's and it was granted. The AMP(s) will be issued when they do the follow-up.

Sorry to have bothered you with this but I wanted to make sure that if you were appealing the AMP it got to the correct person.

Regards,  
 Sue Ogilvie

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch  
 Canada Border Services Agency / Government of Canada  
[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tel : 416-973-1787 / TTY: 866-335-3237

Agente d'appels, Unité des appels liés aux échanges commerciaux à Toronto, Direction générale des finances et de la gestion organisationnelle

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**From:** Ogilvie, Sue

**Sent:** November 6, 2018 10:44 AM

**To:** 'jpclark@greyclark.com' <[jpclark@greyclark.com](mailto:jpclark@greyclark.com)>

**Subject:** Ronsco Inc.

Good Morning Mr. Grey,

I have been reviewing your appeal letter concerning tariff classification of the H36 wheels.

You also discuss Reason to Believe. Have you appealed the AMP penalty?

I will only be dealing with Tariff Classification.

If the appeal submitted is concerning tariff classification and the AMP penalty please advise the Notice of Penalty Assessment Number (NPA #).

Appeal of the AMP penalty would be assigned to another officer. I have not been able to find a record of an AMP appeal.

Regards

**Sue Ogilvie**

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch

Canada Border Services Agency / Government of Canada

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1, rue Front Ouest, 3<sup>ème</sup> étage, Toronto, ON M5J 2X5 / Télécopieur : 416-954-6740

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This is **Exhibit “D”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

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CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## NOTICE OF APPEAL

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**CANADIAN INTERNATIONAL TRADE TRIBUNAL****NOTICE OF APPEAL**

*Appeals pertain to a decision or re-determination of the President of the Canadian Border Services Agency, or an assessment, reassessment, rejection, decision or determination of the Minister of National Revenue, pursuant to section 67 of the Customs Act, sections 81.19, 81.21, 81.22, 81.23 or 81.33 of the Excise Tax Act, or section 61 of the Special Import Measures Act.*

**APPELLANT IDENTIFICATION****Corporate Information****Individual authorized to file appeal:**

Name: Donald G. Regan  
Title: President  
E-mail: dgregan@ronesco.com  
Telephone Number: 416-644-0175

**Company:**

Company Name: Ronsco Inc.  
Doing Business As (dba): \_\_\_\_\_  
Suite Number: \_\_\_\_\_  
Street Address: 75 Industrielle St.  
City: Coteau-du-Lac  
Province: Québec  
Postal Code: J0P 1B0  
Telephone Number: 416-644-0175

Signature



2019-04-10

Date (year/month/day)

**COUNSEL IDENTIFICATION**

*Appellants may retain independent counsel. Counsel includes any person who acts in a proceeding on behalf of a party, such as a lawyer or consultant.*

*\*Please note that confidential information is only made available to independent counsel.*

*If independent counsel is retained, provide the following information:*

**Counsel Information**

Name of counsel:	<u>Colin S. Baxter, Alyssa Edwards</u>
Name of counsel's firm:	<u>Conway Baxter Wilson LLP/s.r.l.</u>
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Postal Code:	<u>K2A 3X9</u>
Telephone Number:	<u>613-288-0149</u>

Note that, if an oral hearing is held before the Tribunal, Ronsco Inc. may also be represented by the following additional counsel:

Name of counsel:	<u>Peter Clark</u>
Name of counsel's firm:	<u>Grey, Clark, Shih and Associates, Limited</u>
Suite Number:	<u></u>
Street Address:	<u>571 Blair Road</u>
City:	<u>Ottawa</u>
Province:	<u>Ontario</u>
Postal Code:	<u>K1J 7M3</u>
Telephone Number:	<u>613-238-7743</u>

**Forms**

Counsel should file the following forms with the appeal:

- |          |  |
|----------|--|
| Form I   | Notice of Participation (Party) (to be completed by appellant) |
| Form II  | Notice of Representation (Counsel)                             |
| Form III | Declaration and Undertaking (Counsel and Consultant)           |

These forms are available on the Tribunal's Web site at [www.citt-tcce.gc.ca/en/forms](http://www.citt-tcce.gc.ca/en/forms)

**ELIGIBILITY**

*Check the box that relates to the legislation and subject matter of your appeal:*

**Customs Act**

- The tariff classification of imported goods or goods subject to an advance ruling (including matters relative to prohibited weapons/devices)
- The value for duty of imported goods
- The origin of imported goods or goods subject to an advance ruling
- The marking of imported goods

**Excise Tax Act**

- The assessment or determination of excise tax

**Special Import Measures Act**

- Whether imported goods are of the same description as dumped or subsidized goods subject to an injury finding made by the Tribunal
- The normal value or the amount of a subsidy of dumped or subsidized goods subject to an injury finding made by the Tribunal
- The export price of dumped or subsidized goods subject to an injury finding made by the Tribunal

## INFORMATION REGARDING THE APPEAL

### Detailed Adjustment Statement (DAS), if applicable

*If you are in possession of one or more DAS issued by the Canada Border Services Agency, indicate the Original Transaction Number(s) and date(s) of the DAS below, and attach a copy of every DAS to this Notice of Appeal.*

Date of Transaction/ Importation	Original Transaction No. (Importation)	Decision Date (CBSA Verification)	Transaction No. (CBSA Verification)	Description of Goods (Ronsco Inc.)	Tariff Classification (Original)	Description of Goods (CBSA Verification and Re-determination)	Tariff Classification (Verification and Re-determination)
May 15, 2015	13003172664734	Aug. 27, 2018	1004088561	Wheel Bodies	8607.19.21	Wide Flange Wheels	8607.19.29
May 25, 2018	13003172665074	Aug. 27, 2018	1004088572	Wheel Bodies	8607.19.21	Wide Flange Wheels	8607.19.29
Aug. 26, 2015	13003704306035	Aug. 27, 2018	1004088583	Wheel Bodies	8607.19.21	Wide Flange Wheels	8607.19.29
Oct. 23, 2015	13003704475201	Aug. 27, 2018	1004088594	Wheel Bodies	8607.19.21	Wide Flange Wheels	8607.19.29
Nov. 23, 2015	13003705530245	August 27, 2018	1004088607	Wheel Bodies	8607.19.21	Wide Flange Wheels	8607.19.29

See all DASs listed above, attached as **Annex "A"** to this Notice of Appeal.

### Other Deciding Document

*If you are in possession of one or more deciding document(s), other than a DAS, issued by the Canada Border Services Agency or by the Canada Revenue Agency, indicate the file number(s) and date(s) of the deciding document(s) below, and attach a copy of each deciding document to this Notice of Appeal.*

Deciding Document	File Number	Date	Annex to This Notice of Appeal
CBSA Trade Compliance Verification Interim Report	Case No.: C-2016-011118	April 20, 2018	<b>Annex "B"</b>
CBSA Trade Compliance Verification Final Report	Case No.: C-2016-011118	July 24, 2018	<b>Annex "C"</b>
Decision of the President of the CBSA under s. 60(4) of the Customs Act	File No.: 18-501 TRS No: 281819	January 18, 2019	<b>Annex "D"</b>

**Date of Decision at Issue**

*Provide the date of the decision that you are appealing.*

**January 18, 2019 (Decision of the President of the CBSA under s. 60 of the Customs Act; CBSA File #: 18-0501; TRS #: 281819)**

**Good(s) at Issue**

*Provide a brief description of the good(s) subject to this appeal.*

The goods at issue are **wheel bodies for use in the manufacturing of finished forged wheels for application to rail cars in the form of wheel and axle combinations (known as “wheelsets” or “wheelset assemblies”)**. Upon importation, a “wheel boring” process must be applied to wheel bodies in order further to manufacture them into finished wheels. The finished wheels are then mounted onto axles and bearings are attached to produce “wheelsets”. Wheelsets are then incorporated into “truck assemblies” (“bogies”), which are installed on rail cars that travel throughout North America.

**Question(s) at Issue**

*Provide a brief description of your argument, as well as that of the Canada Border Services Agency or the Canada Revenue Agency, if known. Please cite provisions of the relevant legislation or regulations that you intend to rely on. Indicate the remedy sought from the Tribunal.*

The issue in this case is the tariff classification of the wheel bodies imported by Ronsco Inc. (“Ronsco”). In the transactions at issue, these goods were imported under tariff item 8607.19.21 (“wheel blanks”, duty-free).<sup>1</sup> (The full text of the tariff items indicated here are reproduced in the footnotes below.) In selecting tariff item 8607.19.21, Ronsco relied on tariff classification advice received from its customs broker, FedEx Trade Networks Canada Inc., as well as Ronsco’s commercial knowledge that other importers of these goods were importing them under tariff item 8607.19.21 for the same end use.

However, upon receiving the Canada Border Services Agency (“CBSA”)’s interim report issued in the course of its trade compliance verification (the “Reports”), Ronsco conducted an in-depth review of the goods and tariff items at issue. On this basis, Ronsco now does not dispute that tariff item 8607.19.21 is not the most accurate classification of the goods at issue. Instead, Ronsco will argue that these goods constitute “parts of wheels”, properly classified under tariff item 8607.19.30 (duty-free).<sup>2</sup>

Based on the CBSA’s Reports, and on the decision of the CBSA President under s. 60(4) of the *Customs Act*, Ronsco expects that the CBSA will argue that the goods are “wheels – other” because they have the “essential character” of a finished wheel, and that they are properly classified under tariff item 8607.19.29 (9.5% duty) as a result.<sup>3</sup> **Ronsco therefore seeks an order reversing the decision of the CBSA President, and finding that the goods at issue are “parts of wheels”, properly classified under tariff item 8607.19.30.**

<sup>1</sup> Schedule to the *Customs Tariff*, SC 1997, c 36 [*Customs Tariff Schedule*]. Tariff item 8607.19.21 is “Wheels, whether or not fitted with axles: - Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches; For self-propelled railway vehicles for the transport of passengers, baggage, mail or express traffic; For use in the repair of tramway vehicles (excluding subway cars) with magnetic track brakes”.

<sup>2</sup> *Customs Tariff Schedule*, *supra* note 1. Tariff item 8607.19.30 is “Parts of axles or wheels”.

In making its arguments, RonSCO intends to rely, *inter alia*, on the text of the tariff items at issue, based on the Schedule to the *Customs Tariff*<sup>4</sup>, the “General Rules for the Interpretation of the Harmonized System” and the “Canadian Rules” contained therein;<sup>5</sup> the World Customs Organization (“WCO”)’s “Explanatory Notes”,<sup>6</sup> particularly the Explanatory Notes to Heading 86.07 of the Harmonized System; CBSA policies, including *Memorandum D10-0-1*;<sup>7</sup> and CITT or other case law interpreting the foregoing.

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<sup>3</sup> *Customs Tariff Schedule*, *supra* note 1. Tariff item 8607.19.29 is “Wheels, whether or not fitted with axles: - Other”.

<sup>4</sup> *Customs Tariff Schedule*, *supra* note 1.

<sup>5</sup> *Ibid* at i.

<sup>6</sup> World Customs Organization (“WCO”), *Explanatory Notes to the Harmonized Commodity Description and Coding System*, 6th ed (2017). See especially “86.07 – Parts of railway or tramway locomotives or rolling-stock” (EN) and “86.07 – Parties de véhicules pour voies ferrées ou similaires” (FR).

<sup>7</sup> CBSA, *Memorandum D10-0-1*, “Classification of Parts and Accessories in the *Customs Tariff*”, 13 May 2014.

**CONFIDENTIAL INFORMATION**

- I confirm that this Notice of Appeal DOES NOT contain any confidential information. I hereby advise the Canadian International Trade Tribunal that, should the appeal proceed, government officials involved in the appeal may be granted access to any future confidential documents that may be filed by the appellant in these proceedings, including the appellant's brief.

**OR**

- I confirm that this Notice of Appeal DOES contain confidential information. I hereby advise the Canadian International Trade Tribunal that, should the appeal proceed, government officials involved in the appeal may be granted access to the following: (a) the confidential version of this Notice of Appeal, including any documents appended thereto; and (b) any confidential documents that may be filed by the appellant in these proceedings, including the appellant's brief.

D.G. Regan

Name (Print)

M.D. Redam

Signature

2019-4-10

Date (year/month/day)

Note: If this Notice of Appeal contains confidential information, you are required to produce a **public version** of the information by **blackling out or deleting** the information you wish to protect. This public version must be filed along with the Notice of Appeal. *Blanket confidentiality cannot be applied to the entirety of your Notice of Appeal.* Please see the *Confidentiality Guidelines*, available on the Tribunal's Web site at [http://www.citt.gc.ca/en/Confidentiality\\_guidelines\\_e](http://www.citt.gc.ca/en/Confidentiality_guidelines_e)

This is **Exhibit “E”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Bamisters and Solicitors.  
Expires March 4, 2024.

Donald G. Regan  
 President  
 Ronsco Inc.  
 75 Industrielle St.  
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December 17, 2019

**COURIER**

**CONFIDENTIAL**

Hon. Bill Blair, P.C., M.P.  
 Minister of Public Safety and Emergency Preparedness  
 c/o Recourse Directorate  
 Canadian Border Services Agency  
 Place Vanier Tower A  
 333 North River Rd., 11th Floor  
 Ottawa, ON K1A 0L8

Dear Minister Blair:

**RE: APPEAL OF NOTICE OF PENALTY ASSESSMENT No. 209442**

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## I. Overview

These submissions, made on behalf of Ronsco Inc. (“Ronsco”), respond to Notice of Penalty Assessment No. 209442 dated October 3, 2019 (the “NPA”). A copy of the NPA is attached as **Annex “A”**. Penalties have been assessed against Ronsco for having incorrectly declared what the Canadian Border Services Agency (“CBSA”) deemed to be “tapered roller bearings” and “H36 wide flange wheels for railway vehicles”. Ronsco is not appealing the contravention determined with respect to the “tapered roller bearings”, but is appealing the CBSA’s conclusions with respect to the “H36 wide flange wheels for railway vehicles”.<sup>1</sup>

Ronsco has been assessed an Administrative Monetary Penalty on the basis that it had “reason to believe” that tariff item 8607.19.21 was not the correct tariff item for these goods. However, the wording of tariff items 8607.19.21 and 8607.19.29 is not *prima facie*, evident and transparent, such that by the CBSA’s own policy Ronsco did not have “reason to believe”. The ambiguity of tariff item 8607.19.21 is evident from its confusing wording,<sup>2</sup> the CBSA’s own views as expressed both in a 2005 Advance Ruling for identical goods delivered to one of Ronsco’s competitors (revoked only after the CBSA’s Verification in 2018) and by a CBSA

<sup>1</sup> As set out further below, Ronsco has appealed the CBSA’s determination that the goods at issue are “H36 wide flange wheels for railway vehicles” to the Canadian International Trade Tribunal.

<sup>2</sup> The full text of the tariff items in Heading 86.07 of the *Customs Tariff Schedule* are attached as **Annex “B”**.

Director General, Mr. Doug Band, and the differing interpretations of that tariff item by those who import these goods.

As detailed below, the NPA should be overturned on the basis that Ronsco did not have reason to believe that its declaration with respect to the subject goods was incorrect. Accordingly, Ronsco has not contravened the *Customs Act*, such that the NPA should be cancelled and various other remedial steps (detailed below) should be taken with respect to the retroactive duties that Ronsco has been required to pay.

## II. Background

The NPA was issued following the CBSA's conclusions in Trade Compliance Verification #C-2012016-011118 ("the Verification"), regarding certain goods Ronsco imported between January 1 and December 31, 2015. The CBSA's conclusions from the Verification were set out in its "Final Report" of July 24, 2018.<sup>3</sup>

Ronsco sought a Further Re-determination from the CBSA President under s. 60 of the *Customs Act*;<sup>4</sup> however, the President's Decision upheld the CBSA's conclusions.<sup>5</sup> Ronsco has appealed the President's Decision to the Canadian International Trade Tribunal ("CITT").<sup>6</sup> The appeal was heard on October 24, 2019 and supplementary written submissions and reply submissions were filed on November 12 and 19, 2019, respectively. The CITT has yet to render a decision in this matter.

As required by the CBSA's Final Report, Ronsco filed corrections to its import transactions from the previous four years. After filing these corrections and paying the required retroactive duties (under protest), Ronsco received the NPA. The CBSA's conclusions in the NPA are summarized in the table below:

Goods at Issue (CBSA Determination)	Tariff Classification (Declared)	Tariff Classification (CBSA Determination)	Contravention Determined by CBSA
Tapered roller bearings	8607.19.50.30	8482.20.00.14	C082
H36 wide flange wheels for railway vehicles	8607.19.21.00	8607.19.29.00	C352

As noted above, Ronsco is appealing Contravention C352. Consistent with its appeal to the Canadian International Trade Tribunal ("CITT"), addressed below, and given the variety of names for the goods at issue,<sup>7</sup> Ronsco will refer to the goods as "Wheel Bodies".

<sup>3</sup> The following documents related to the CBSA Verification are annexed to this submission: the CBSA's "Interim Report" (20 April 2018) (**Annex "C"**); Ronsco's "Interim Submissions" (25 May 2018) (**Annex "D"**); and the CBSA's "Final Report" (24 July 2018) (**Annex "E"**).

<sup>4</sup> RSC 1985, c 1 (2<sup>nd</sup> Supp), s 60 [*Customs Act*].

<sup>5</sup> The following documents related to Ronsco's request for Further Re-determination are annexed to this submission: Ronsco's request for Further Re-determination (26 September 2018) (**Annex "F"**); and the decision of the CBSA President (18 January 2019) (**Annex "G"**).

<sup>6</sup> Ronsco Inc, CITT Appellant's Brief (14 June 2019) (**Annex "H"**) [Ronsco CITT Appellant's Brief]. This document contains confidential information, which is indicated with yellow highlighting.

<sup>7</sup> *Ibid* at para 38. The various names for the goods are also set out in the Affidavit of Brian Lambert (21 October 2019), *infra* note 29, Annex M at para 6.

Pursuant to sections 131(1)(c) and 132(1)(b) of the *Customs Act*,<sup>8</sup> the Minister has the authority to consider whether an importer failed to comply with the Act and, where there has been no contravention of the Act, to cancel a penalty assessment and authorize the return of any money paid on account of a penalty.

In its Final Report and in the NPA, the CBSA decided that Ronsco had specific information that gave it “reason to believe” that the tariff classification originally declared for the Wheel Bodies was incorrect.<sup>9</sup> The NPA indicates that this “specific information” was the tariff provisions at issue.<sup>10</sup>

On this basis, “Contravention C352” was assessed against Ronsco with respect to the Wheel Bodies:<sup>11</sup>

Authorized person failed to pay duties as a result of required corrections to a declaration of tariff classification within 90 days after having reason to believe that the declaration was incorrect. [emphasis added]

Ronsco is appealing this contravention assessment as it did not have “reason to believe” that tariff item 8607.19.21 was incorrect.

### III. Arguments

Following a detailed review of the goods and tariff items at issue, which included research into the manufacturer’s metallurgical production processes, Ronsco agreed with the CBSA that the Wheel Bodies do not fall within tariff item 8607.19.21. However, Ronsco disputes that it had “reason to believe” that the goods were not properly classified under this tariff item, on the following grounds:

- (A) an importer only has “reason to believe” that a declaration is incorrect based on legislative provisions if those legislative provisions are *prima facie*, evident, and transparent;
- (B) the legislative provisions at issue (i.e., the tariff items) are not *prima facie*, evident and transparent; and
- (C) Ronsco had no “reason to believe” that its declarations were incorrect given a policy statement issued by the Department of Finance regarding goods for manufacturing.

Accordingly, Ronsco cannot be considered to have had reason to believe that the tariff classification originally declared for the Wheel Bodies was incorrect.

<sup>8</sup> *Supra* note 4, ss 2(1), 109.3, 129(1), 131(1) and 132(1). Subsection 129(1) grants the Minister authority to review a notice of assessment issued under section 109.3 of the *Customs Act*, such as the NPA, and to issue a decision under section 131 of the *Customs Act*. Subsection 132(1)(b) of the *Customs Act* allows the Minister to cancel a penalty assessment and refund any money and interest paid on account of a penalty. Subsection 2(1) of the *Customs Act* defines “Minister” as the Minister of Public Safety and Emergency Preparedness.

<sup>9</sup> See Notice of Penalty Assessment No 209442 (3 October 2019), Annex A, p 1 [NPA].

<sup>10</sup> *Ibid.*

<sup>11</sup> CBSA, “Administrative Monetary Penalty System: C352”, online: CBSA <<https://www.cbsa-asfc.gc.ca/trade-commerce/amps/contraventions-infractions/c352-eng.html>>.

## A. An importer only has “reason to believe” that a declaration is incorrect based on legislative provisions if those legislative provisions are *prima facie*, evident, and transparent

The CBSA’s “policy and guidelines” regarding “reason to believe” and the self-adjustment process are set out in CBSA Memorandum D11-6-6, titled “‘Reason to Believe’ and Self-adjustments to Declarations of Origin, Tariff Classification, and Value for Duty”.<sup>12</sup> The CBSA relies on Memorandum D11-6-6’s treatment of “legislative provisions” as the basis for Ronsco’s “reason to believe”:<sup>13</sup>

### “REASON TO BELIEVE”

1. With respect to section 32.2 of the *Customs Act* (the Act), specific information regarding the [...] tariff classification [...] of the imported goods that gives an importer reason to believe that a declaration is incorrect, can be found in:

(a) legislative provisions such as specific origin, tariff classification, or value for duty provisions that are *prima facie* (i.e., at first sight), evident (i.e., obvious, apparent), and transparent (i.e., clear, self-explanatory). For detailed examples of *prima facie*, evident and transparent legislative provisions, refer to Appendix; [emphasis added]

Memorandum D11-6-6 sets out three characteristics legislation must have in order to constitute “reason to believe” that an originally declared tariff classification was incorrect. The legislative provision must be: (i) *prima facie*; (ii) evident; and (iii) transparent.

Given the use of the word “and” in Memorandum D11-6-6, all three characteristics must be present. The ordinary meaning of the term “and” in this case – and indeed its grammatical sense – is that it should be read “conjunctively”, or cumulatively.<sup>14</sup> Courts have held that “[t]o read a list, particularly an all-inclusive list or series, in any way other than conjunctively would be ungrammatical and extraordinary to say the least”.<sup>15</sup> Indeed, cases in which “and” is interpreted as disjunctive generally only arise where a provision must be so interpreted in order to avoid “absurdity”.<sup>16</sup>

In this case, the wording of Memorandum D11-6-6, s. 1(a) is unambiguous in its requirement for legislation to have three characteristics in order to give rise to “reason to believe”: being *prima facie*, evident and transparent. It would not be absurd to require legislation to have all three of these characteristics in order to constitute a “reason to believe”, given that all three of

<sup>12</sup> CBSA, [Memorandum D11-6-6](#), “‘Reason to Believe’ and Self-adjustments to Declarations of Origin, Tariff Classification, and Value for Duty” (12 April 2013), p 1 and s 1(a) [Memorandum D11-6-6].

<sup>13</sup> NPA, *supra* note 9, Annex A, p 1.

<sup>14</sup> The Oxford Dictionary defines “and” as “[u]sed to connect words of the same part of speech, clauses, or sentences, that are to be taken jointly [emphasis added]”: Oxford Dictionary, “And” (Conjunction), Definition #1, online: Lexico <<https://www.lexico.com/en/definition/and>>, Annex “I”.

<sup>15</sup> [Agricultural Credit Corp of Saskatchewan v Novak](#), [1995] 8 WWR 385 (SKCA) at para 32. See also *Pizza Pizza Ltd v Toronto Star Newspapers Ltd*, [2002] OJ No 1858 (Ont Div Ct) at para 4, with reference to the “conjunctive criteria” in rule 62.02(4)(a) of the [Rules of Civil Procedure](#), RRO 1990, Reg 194; this paragraph in the *Rules of Civil Procedure* sets out two criteria required for leave to appeal from the interlocutory order of a judge, which are separated by the conjunction “and”, and are therefore considered to be conjunctive.

<sup>16</sup> See R Sullivan, *Construction of Statutes*, 6<sup>th</sup> ed (Markham: LexisNexis Canada, 2014), p 100.

them ultimately refer to the same requirement – that is, the ease with which an importer should be able to understand and apply the legislation at issue. The term “and” should therefore be read conjunctively in both Memorandum D11-6-6 and the NPA.

The greater context of Memorandum D11-6-6 also does not suggest that the term “and” in the Memorandum should be interpreted in any other way. There is nothing in Memorandum D11-6-6, the *Customs Act*, or the *Customs Tariff* that suggests that legislation only has to have one of these characteristics in order to provide an importer with reason to believe that an originally declared tariff item was incorrect. As a result, s. 1(a) of Memorandum D11-6-6 must be read as requiring legislation to have all three characteristics (i.e., *prima facie*, evident and transparent) in order to have provided Ronsco with reason to believe that its originally declared tariff classification was incorrect.

## B. The tariff items at issue are not *prima facie*, evident and transparent

According to s. 1(a) of Memorandum D11-6-6:

- a *prima facie* legislative provision is one that has a meaning that can be understood “at first sight”;
- an “evident” legislative provision is one that is “obvious, apparent”; and
- a “transparent” legislative provision is one that is “clear, self-explanatory”.

Given these definitions, a legislative provision must be “at first sight”, “obvious”, “apparent”, “clear”, and “self-explanatory” in order to fulfill these criteria and to provide an importer with a “reason to believe” that a declared tariff classification is incorrect. It follows that a tariff item that is ambiguous, unclear, or otherwise not obvious or self-explanatory at first sight, would not fulfill the criteria in Memorandum D11-6-6 and could not constitute “reason to believe”.

Tariff items 8607.19.21 and 8607.19.29 do not fulfill the criteria required by s. 1(a) of Memorandum D11-6-6 for the following reasons:

- (1) tariff item 8607.19.21 is ambiguous, unclear, and not obvious or self-explanatory at first sight;
- (2) the ambiguities in tariff item 8607.19.21 render tariff item 8607.19.29 equally ambiguous, unclear, and not obvious or self-explanatory;
- (3) items 8607.19.21 and 8607.19.29 are much different from the CBSA’s examples of “*prima facie*, evident and transparent” tariff items;
- (4) other industry participants have also considered Wheel Bodies to be properly classified under tariff item 8607.19.21; and
- (5) the CBSA itself has considered Wheel Bodies to be properly classified under tariff item 8607.19.21.

### (1) Tariff item 8607.19.21 is ambiguous, unclear, and not obvious or self-explanatory at first sight

The language of the tariff item originally declared by Ronsco – 8607.19.21 – cannot constitute specific information giving Ronsco “reason to believe” that the originally declared tariff

classification is incorrect. This is because its wording and meaning are ambiguous, unclear, and not obvious or self-explanatory at first sight.

Tariff item 8607.19.21 states the following:<sup>17</sup>

**86.07 Parts of railway or tramway locomotives or rolling-stock.**

- **Bogies, bissel-bogies (truck assemblies), axles and wheels, and parts thereof**

-- **8607.19 Other, including parts**

--- Wheels, whether or not fitted with axles:

---- 8607.19.21 00 Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches;

For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic;

For use in the repair of tramway vehicles (excluding subway cars) with magnetic track brakes

Tariff item 8607.19.21 00 therefore encompasses three “sub-items”:

- (1) Blanks for use in the manufacture of wheel and axle combinations for railway and tramway ... passenger coaches;
- (2) For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic; and
- (3) For use in the repair of tramway vehicles with magnetic track brakes. [emphasis added]

However, it is not at all *prima facie*, evident or transparent what exact goods are referred to by these sub-items. This is because (a) the wording of tariff item 8607.19.21, and use of the word “and” therein, is ambiguous; and (b) the meaning of the term “blanks” is ambiguous, unclear, and not obvious or self-explanatory at first sight.

*(a) The wording of tariff item 8607.19.21, and use of the word “and” therein, is ambiguous*

Tariff item 8607.19.21 is ambiguously drafted and has multiple possible meanings.

First, the use of the word “and” in the first “sub-item” above (“Blanks for use in...”) is ambiguous, in that it is capable of two meanings. Unlike heading 86.07 (“Parts of railway or tramway locomotives or rolling-stock”), which refers to “railway or tramway” locomotives and rolling-stock, tariff item 8607.19.21 refers to “railway and tramway [...] passenger coaches”. The presence of the word “or” in heading 86.07 requires that that item be read disjunctively, as it would not make sense for heading 86.07 to only apply to locomotives and rolling-stock that could be used on both railways and tramways. The matter is not as clear with regard to tariff item 8607.19.21.

Indeed, tariff item 8607.19.21 refers to “railway and tramway [...] passenger coaches”. That is, it first refers to “railway” without specifying the type of vehicle in question, and then refers to

<sup>17</sup> [Schedule to the Customs Tariff](#), SC 1997, c 36, tariff item 8607.19.21 [*Customs Tariff Schedule*]. As noted above, the full text of the tariff items in Heading 86.07 are attached as Annex B.

“tramway [...] passenger coaches”. At least two possible readings arise: a disjunctive reading, in which the tariff item deals separately with railway vehicles generally and tramway passenger coaches, or a conjunctive reading in which the tariff item deals with passenger coaches that may operate both on railways or tramways.

In this case, given the application of the caselaw noted above, the word “and” must be read disjunctively in order to avoid absurdity. It would be absurd to read the word “and” conjunctively in the first sub-item of tariff item 8607.19.21, as it would then refer to passenger coaches for both railway and tramway, even though railway and tramway systems are quite simply distinct and are dealt with distinctly at the heading level. Given the disjunctive approach taken in heading 86.07, it makes greater sense to read tariff item 8607.19.21 as referring to goods for use in railway vehicles generally, and to goods for use in tramway passenger coaches (including subway cars). In any event, however, the meaning of tariff item 8607.19.21 is not apparent “on its face”, as resort must be had to caselaw in order to reach the disjunctive reading of the word “and”.

Second, if the word “and” in tariff item 8607.19.21 were read conjunctively, then a third possible meaning of the tariff item arises. Specifically, it is not clear whether the adjective “passenger” would modify the word “coaches” generally within the clause, or whether it would only modify the words “tramway ... coaches”. That is, because the adjective “passenger” follows the word “tramway”, it is not clear whether that adjective applies to all coaches addressed in the tariff item (i.e., both railway and tramway coaches), or whether it applies only to tramway coaches (and not to railway coaches).

As a result, it is entirely unclear from the wording of this tariff item whether the first “sub-item” within 8607.19.21 00 is applicable only to passenger coaches (i.e., all passenger coaches, but no other coaches, regardless of whether used on railways or tramways), or whether it refers to all railway vehicles generally (regardless of whether for passengers or for freight) and secondly to “tramway passenger ... coaches”. The wording of this tariff item is capable of at least two different meanings and is therefore ambiguous.<sup>18</sup> In particular, the “end use” requirement for this tariff item cannot be said to be *prima facie*, evident and transparent.

*(b) The meaning of the term “blanks” is ambiguous, unclear, and not obvious or self-explanatory at first sight*

Following a detailed review of the goods, their manufacturing processes, and industry specifications, Ronsco agreed with the CBSA that the goods at issue are not “blanks”. However, it is important to note that this agreement was not derived from Ronsco’s reading of the statute on its face. The meaning of the term “blanks” in the context of the Schedule to the *Customs Tariff* is not *prima facie*, evident, or transparent. From the perspective of the manufacturing process that the subject goods undergo prior to being imported, the CBSA and Ronsco have agreed that the term “blank” refers to an earlier, undifferentiated product.<sup>19</sup> In

<sup>18</sup> The Ontario Court of Appeal has defined “ambiguous” as meaning “reasonably susceptible of more than one meaning”: *Hi-Tech Group Inc v Sears Canada Inc*, [2001] OJ No 33, 102 ACWS (3d) 79 (ONCA) at para 18, cited in *Nouri v Negravi*, 2015 ONSC 2736, 253 ACWS (3d) 80 at para 44. Although these cases concerned provisions in a contract, there is no reason why a similar definition should not apply to provisions of the *Customs Tariff*.

<sup>19</sup> In response to the CBSA’s April 20, 2018 Interim Report, sent as part of the Verification, Ronsco submitted that a “blank” was a piece of steel that is cut off a steel “bloom” – the CBSA agreed that the goods were not “blanks”.

that sense, tariff item 8607.19.21, and by extension tariff item 8607.19.29, is not a self-explanatory text. Reference must be had to other sources in order to understand it.

However, the term “wheel blank” has also been used extensively in the railway industry to refer to the goods Ronsco imports. The term “blank” is used, along with other industry terms (e.g., “wheel plate”) to refer to the unfinished nature of the goods upon importation.<sup>20</sup> The use of the term is clear from the “Canada Customs Coding Forms” pertaining to the import transactions of Wheel Bodies concerned by the Verification (and by the NPA), three of which make explicit reference to the unfinished nature of the goods and refer to them as “blanks”.<sup>21</sup> Due to the unclear meaning of the term “blanks” in tariff item 8607.19.21, as well as the ambiguous end use requirement (set out above), tariff item 8607.19.21 cannot be considered *prima facie*, evident and transparent.

(2) The ambiguities in tariff item 8607.19.21 render tariff item 8607.19.29 equally ambiguous, unclear, and not obvious or self-explanatory

The “three-dash” suppressed heading “Wheels, whether or not fitted with axles” is divided into two “four-dash” tariff items:

- - - Wheels, whether or not fitted with axles:

- - - - 8607.19.21 00 Blanks for use in the manufacture of wheel and axle combinations for railway and tramway (including subway cars) passenger coaches;
- For self-propelled railway vehicles for the transport of passenger, baggage, mail or express traffic;
- For use in the repair of tramway vehicles (excluding subway cars) with magnetic track brakes
- - - - 8607.19.29 00 Other

Any good falling under the suppressed heading “Wheels, whether or not fitted with axles” must either be classified under tariff item 8607.19.21, or must be classified as “Other” under tariff item 8607.19.29. It follows that any ambiguity in interpreting the scope of tariff item 8607.19.21 renders the scope of 8607.19.29 equally ambiguous.

As a result, neither tariff item 8607.19.21 nor tariff item 8607.19.29 can be considered *prima facie*, evident and transparent, such that neither of them can constitute reason to believe that the tariff classification originally declared for the Wheel Bodies was incorrect.

(3) Tariff items 8607.19.21 and 8607.19.29 can be distinguished from the CBSA’s examples of “prima facie, evident and transparent” tariff items

The Appendix to CBSA Memorandum D11-6-6 provides three examples of tariff items that are *prima facie*, evident, and transparent.<sup>22</sup> Each of the tariff classification provisions discussed in

This was noted on p 3 of the CBSA’s “Final Report” (24 July 2018), Annex E. Ronsco agreed with this conclusion in its Interim Submissions (25 May 2018), Annex D; its Request to the CBSA for Further Re-determination (26 September 2018), Annex F; and its CITT Appellant’s Brief (14 June 2019), Annex H.

<sup>20</sup> Ronsco Inc, CITT Appellant’s Brief, *supra* note 6, Annex H at para 38.

<sup>21</sup> Canada Customs Coding Forms for the transactions at issue (**Annex “J”**).

<sup>22</sup> Memorandum D11-6-6, *supra* note 12, Appendix at para 5.

Memorandum D11-6-6 is simple and, unlike tariff items 8607.19.21 and 8607.19.29, does not require significant interpretation to be understood.

The first example the CBSA gives of a *prima facie*, evident and transparent tariff classification provision is the following:<sup>23</sup>

**A. Classification of live fish:**

Legal Note 1 to Chapter 1 reads as follows:

“This Chapter covers all live animals except:

(a) Fish and crustaceans, molluscs and other aquatic invertebrates, of heading 03.01, 03.06 or 03.07;”

Therefore, if an importer classifies live fish in Chapter 1 of the *Customs Tariff*, the importer has reason to believe that the declaration is incorrect. The *Customs Tariff* clearly directs that live fish must be classified in Chapter 3.

Ronsco agrees that this is an example of a *prima facie*, evident and transparent tariff classification provision. However, it can clearly be distinguished from tariff items 8607.19.21 and 8607.19.29, given that there is no issue in the above example of what a “fish” is, or what type of imported good would be considered a fish. The word “fish” is clear on its face, and the distinction between fish and other animals is obvious and apparent. The language is self-explanatory. The wording of tariff items 8607.19.21 and 8607.19.29, on the other hand, is ambiguous and requires significant interpretation to know what goods are covered, including reference to materials outside the tariff item.

The second example set out in Memorandum D11-6-6 is that of “black ink”:<sup>24</sup>

**B. Classification of printing ink:**

Heading 32.15: Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid.

- Printing ink:

3215.11.00 00 -- Black

3215.19.00 -- Other

10 ----- For newspapers

20 ----- Flexographic

30 ----- Lithographic, offset

90 ----- Other

If the printing ink being imported is black, the importer has reason to believe that it must be classified under tariff item 3215.11.00. Ink of any other color is classified under tariff item 3215.19.00.

Ronsco agrees that this example is also *prima facie*, evident and transparent. However, it is also clearly very different from tariff items 8607.19.21 and 8607.19.29. Tariff items 3215.11.00 and

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

3215.19.00 establish different tariff items based only on the colour of the ink at issue – a single and obvious characteristic that is easily determined and does not require significant interpretation. The difference between the colour black and other colours can be understood at first sight, is obvious and apparent, and is clear and self-explanatory.

This is in stark contrast to tariff items 8607.19.21 and 8607.19.29. Tariff item 8607.19.21 is drafted in such way that it involves the numerous issues discussed above and does not lend itself to a simple determination based on a single obvious characteristic of the goods at issue. Tariff item 8607.19.29, “Other”, is similarly ambiguous, given that it covers all “Wheels, whether or not fitted with axles” that are not classifiable under tariff item 8607.19.21. The ambiguity in tariff item 8607.19.29 arises from its being incapable of definition without reference to tariff item 8607.19.21.

Memorandum D11-6-6 provides a third and final example of a *prima facie*, evident and transparent legislative provision:<sup>25</sup>

**C. Classification of “new” pneumatic tires:**

Heading 40.11:	New pneumatic tires, of rubber
4011.10.11 00	- Of a kind used on motor cars (including station wagons and racing cars)
4011.20.00	- Of a kind used on buses or lorries
	----- On-highway tires
11	----- Of a kind used on light trucks, of radial ply construction
12	----- Of a kind used on light trucks, other
13	----- Other, of radial play construction
19	----- Other
20	----- Off-highway tires
4011.30.00 00	- Of a kind used on aircraft
4011.40.00 00	- Of a kind used on motorcycles
4011.50.00 00	- Of a kind used on bicycles

An importer has reason to believe that new pneumatic tires fall under heading 40.11. The tariff item under which it is classified is clearly defined as dependant on the vehicle for which the tire is designed.

The similarity between tariff items 8607.19.21 and 8607.19.29 and the example above ends at the heading level. Heading 40.11 makes it clear that “new pneumatic tires” fall within that heading. Similarly, heading 86.07 makes it clear that “parts of railway or tramway locomotives or rolling stock” will fall within it.

However, the similarities end here. Unlike with heading 40.11, the sub-headings, “suppressed” headings, individual tariff items, and “sub-items” at issue in tariff items 8607.19.21 and 8607.19.29 require importers to interpret vague language while considering several potential meanings within a single tariff item. This includes an ambiguous end-use requirement as well as the term “blanks”, which could refer to multiple types of goods.

The tariff items under heading 40.11 are *prima facie*, evident and transparent because they set

<sup>25</sup> *Ibid.*

out single types or kinds of new pneumatic tires of rubber in question. This only requires the importer to determine the type of vehicle for which a new pneumatic tire is designed and, in the case of buses or lorries, to consider whether the wheels will be used on-highway or off-highway, and whether the tires are of radial play construction. In contrast to the above example, tariff items 8607.19.21 and 8607.19.29 are clearly not *prima facie*, evident, or transparent. That is, neither tariff item 8607.19.21 nor tariff item 8607.19.29 can be said to be at first sight, evident (i.e., obvious, apparent), or transparent (i.e., clear, self-explanatory), as they require importers to conduct an in-depth analysis of their goods and of the tariff items at issue, and to classify their goods based on unclear criteria.<sup>26</sup>

(4) Numerous other industry participants have considered Wheel Bodies to be properly classified under tariff item 8607.19.21

The ambiguities in tariff items 8607.19.21 and 8607.19.29 are supported by the fact that various other industry participants have also considered Wheel Bodies to be properly classified under tariff item 8607.19.21.

To Ronsco's knowledge, since at least 2005 the following other companies have also imported or shipped goods into Canada that are the same or substantially the same as the Wheel Bodies. Ronsco understands that these companies have imported these goods into Canada under tariff item 8607.19.21, regardless of their end use:

- (a) Canadian Pacific Railway (CP);
- (b) Canadian National Railway Company (CN);
- (c) IEC Holden Inc., based in Saint-Laurent, QC;
- (d) Progress Rail (owned by Caterpillar Inc.), based in the United States;
- (e) Sumitomo Canada Limited, a subsidiary of Nippon Steel & Sumitomo Metal Corporation Group, a company based in Japan;
- (f) United Metallurgical Company (OMK), operating as part of Vyksa Steel Works and based in Russia; and
- (g) KLW Wheelco, based on Switzerland.

CP, for example, has recently ordered wheel bodies from Nippon Steel & Sumitomo Metal Corporation Group Ltd. Given that CP has not offered passenger railway service since 1978,<sup>27</sup> the "end use" of the goods imported by CP cannot possibly be for "passenger coaches", nor any of the other end uses under tariff item 8607.19.21 that the CBSA says are *prima facie*, evident or transparent. CP has nevertheless imported these goods under tariff item 8607.19.21.

In determining the proper tariff classification for the goods at issue, Ronsco also relied on the advice it received from its customs broker, FedEx. Beginning in 2005, when Ronsco first imported these goods, Ronsco was consistently advised by FedEx that 8607.19.21 was the appropriate tariff item. Attached at **Annex "K"** is a memo to file by one of Ronsco's employees, based on advice about tariff classification received from FedEx in 2005.<sup>28</sup> Ronsco had no reason to question this advice, given that so many other industry participants were declaring the same

<sup>26</sup> *Ibid*, s 1(a).

<sup>27</sup> CP has not operated passenger rail services since Via Rail began providing these services in 1978.

<sup>28</sup> Mary Mennano, Memo to File, "Wheel Blanks from China" (23 August 2005), Annex L. This document was an email from Ms. Menanno, a Ronsco employee, to herself, memorializing the advice received from FedEx.

goods with the same end use under the same tariff item.

Given that so many industry participants considered wheel bodies to be properly classified under tariff item 8607.19.21, this tariff item, along with 8607.19.29, cannot be considered *prima facie*, evident and transparent legislation giving Ronsco – and all the companies listed above – reason to believe that their tariff classification declarations were incorrect.

(5) The CBSA itself has considered Wheel Bodies to be properly classified under tariff item 8607.19.21

For nearly 13 years, the CBSA itself also considered the Wheel Bodies imported by Ronsco to be properly classified under tariff item 8607.19.21. In December 2005, the CBSA issued an Advance Ruling for Tariff Classification (the “Advance Ruling”) to Sumitomo Canada Limited (“Sumitomo”). The Advance Ruling confirmed that H36 wheel bodies imported by Sumitomo – the same goods with the same end use as those imported by Ronsco – could be classified under tariff item 8607.19.21.<sup>29</sup> It was only in October 2018, once the CBSA completed its Verification of Ronsco, that the CBSA revoked Sumitomo’s 2005 Advance Ruling and advised Sumitomo that its wheel bodies would have to be classified under tariff item 8607.19.29 beginning in January 2019.<sup>30</sup>

Ronsco’s original interpretation of the term “blanks”, and of tariff item 8607.19.21, has clearly been shared not only by other industry participants and importers of Wheel Bodies, but also by the CBSA itself. Given that the CBSA’s own agents have not been able to consistently delineate the scopes of tariff items 8607.19.21 and 8607.19.29, the wording of 8607.19.21 cannot be considered at first sight to be “obvious”, “apparent”, “clear”, or “self-explanatory”.

In June 2018, while awaiting the CBSA’s Final Report, Ronsco and its advisors also met with staff from the office of the Honourable Ralph Goodale, then Minister of Public Safety and Emergency Preparedness.<sup>31</sup> Although Ronsco had not expected CBSA staff to be present at this meeting, two Directors General from the CBSA, including Mr. Doug Band, were also in attendance. Mr. Band arrived with a folder of documents that was roughly one inch thick, which Ronsco understood to be its file. Based on Mr. Band’s handling of the documents in this file during the meeting and his reactions to Ronsco’s briefing, Mr. Band was clearly knowledgeable about Ronsco’s file.

Mr. Band advised Ronsco that the CBSA’s forthcoming Final Report would likely confirm the conclusions that had been set out in its “Interim Report” – that is, that the Wheel Bodies were properly classified under tariff item 8607.19.29. However, Mr. Band stated that the retroactive impact of this determination (i.e., the issue of “reason to believe”) fell within his ultimate

<sup>29</sup> Affidavit of Brian Lambert (21 October 2019), **Annex “L”** at paras 5-9. This affidavit formed part of the public record in Ronsco’s hearing before the CITT, held on October 24, 2019. Paragraph 6 of Mr. Lambert’s affidavit notes that wheel blanks may also be called wheel plates or wheel bodies in the railway industry.

<sup>30</sup> Tariff Classification Advance Ruling \*\*Amendment\*\* (22 October 2018), **Annex “L(1)”**, attached to Affidavit of Brian Lambert (21 October 2019), *supra* note 29, Annex M.

<sup>31</sup> This meeting took place on June 26, 2018 at 11:00 AM in Minister Goodale’s suite at 269 Laurier Avenue West, in Ottawa. In attendance on behalf of Ronsco were Mimma Francescangeli, Ronsco’s Executive Vice President and Chief Financial Officer; Kent Montgomery, Ronsco’s Executive Vice President and Chief Operating Officer; and Richard Mahoney and Peter Clark, two of Ronsco’s advisors. The staff present from Minister Goodale’s office were David Hurl and Laura Lebel.

responsibility and that he did not think Ronsco should have to pay duties on all of its import transactions going back four years.

Based on CBSA Memorandum D11-6-10, “Reassessment Policy”, an importer is only required to correct all import transactions going back a maximum of four years if specific information was available to the importer giving it “reason to believe” that its original tariff classification declarations were incorrect.<sup>32</sup> Given Mr. Band’s statements at this meeting, the CBSA’s view as of June 2018 was that the tariff items at issue did not give Ronsco reason to believe that its original declarations were incorrect.

Given Mr. Band’s representations, Ronsco was shocked when it received the CBSA’s Final Report, which indicated that the tariff items at issue did give Ronsco reason to believe that its declarations were incorrect and that retroactive duties would be imposed. When Ronsco’s representatives spoke to Mr. Band again on August 16, 2018, he acknowledged the comments he had made at the meeting in June 2018, but claimed he had made a mistake because he had been briefed on the wrong file before the meeting. Mr. Band stated that retroactive duties would be imposed and that there was nothing he could do about this. Ronsco’s advisors who were present at the meeting have confirmed their willingness to swear affidavits confirming Mr. Band’s oral representations to Ronsco.

Given the CBSA’s own views, as demonstrated both by the Advance Ruling issued to Sumitomo (which remained in force until January 2019) and by Mr. Band’s comments in June 2018, tariff items 8607.19.21 and 8607.19.29 is not *prima facie*, evident and transparent. The confusion even among the CBSA’s own employees demonstrates that these tariff items are ambiguous, unclear, and otherwise not obvious or self-explanatory at first sight.

### C. Ronsco had no “reason to believe” that its declarations were incorrect given a policy statement issued by the Department of Finance regarding goods for manufacturing

Since at least 2010, the Department of Finance’s policy has been that Canada is a “tariff-free zone” for manufacturers. This policy was announced in a statement issued by Canada’s Department of Finance on March 9, 2010 (attached as Annex “M”). Wheel Bodies, including the goods imported by Ronsco, require significant further manufacturing work before they can be used as wheels, and are therefore only imported for manufacturing purposes.<sup>33</sup> As a result, Ronsco had no reason to believe that the Wheel Bodies were properly classified under tariff item 8607.19.29 – a tariff item on which a duty of 9.5% is payable.<sup>34</sup>

Given the Department of Finance’s statement in March 2010, along with the ambiguous tariff items at issue, Ronsco cannot be considered to have had reason to believe that the tariff item originally declared for the Wheel Bodies – 8607.19.21 – was incorrect.

<sup>32</sup> CBSA, *Memorandum D11-6-10, “Reassessment Policy”*, online: CBSA <<https://www.cbsa-asfc.gc.ca/publications/dm-md/d11/d11-6-10-eng.html>> at paras 25-27 [Memorandum D11-6-10].

<sup>33</sup> This is explained in greater detail in Ronsco’s CITT Appellant’s Brief, *supra* note 6, Annex H at paras 6-13 and 37.

<sup>34</sup> *Customs Tariff Schedule*, *supra* note 17, Annex B, tariff item 8607.19.29.

## IV. Conclusion

The CBSA has applied Contravention C352 to Ronsco's importations of Wheel Bodies concerned by the Verification, stating that Ronsco "failed to pay duties as a result of required corrections to a declaration of tariff classification within 90 days after having reason to believe that the declaration was incorrect."<sup>35</sup> However, the CBSA bases this on legislation which it claims is *prima facie*, evident and transparent – that is, at first sight, "obvious", "apparent", "clear", and "self-explanatory".

In fact, tariff items 8607.19.21 and 8607.19.29 are ambiguous, unclear, and neither obvious nor self-explanatory at first sight. This is clear from the wording of these provisions as well as the views of numerous industry participants. This includes the CBSA itself, which allowed Wheel Bodies to be imported under tariff item 8607.19.21 for nearly 13 years. As recently as June 2018, a CBSA executive informed Ronsco that it should not be forced to pay retroactive duties on its imports of Wheel Bodies over the past four years – a requirement that only results from an importer having "specific information" giving it reason to believe that a declaration was incorrect.<sup>36</sup> Given all of these factors, the original tariff classification declared by Ronsco for the Wheel Bodies was selected entirely in good faith, and it cannot be considered to have had reason to believe that this declaration was incorrect.

On this basis, Ronsco respectfully requests the following:

- (a) that the CBSA's decision in the NPA to apply Contravention C352 to the five import transactions at issue be reversed;
- (b) that the CBSA refund the \$500 penalty paid by Ronsco pursuant to the NPA;
- (c) that the CBSA further re-determine the tariff classification of Wheel Bodies imported in the transactions for which Ronsco filed corrections on January 2, 2019, to 8607.19.21, pursuant to s. 59(1) of the *Customs Act* or otherwise, given that these corrections would not have been required but for the CBSA's erroneous conclusion that Ronsco had reason to believe that the tariff classification originally declared for the Wheel Bodies was incorrect;
- (d) if more than four years have passed since the original tariff classification determination of any of the goods at issue, that the Minister deem it advisable pursuant to s. 59(1)(b) of the *Customs Act* that the tariff classification of those goods be further re-determined within such further time as may be prescribed; and
- (e) regardless of the relief sought in subparagraphs (c) or (d), that the CBSA refund the \$2,497,478.74 in duties and interest<sup>37</sup> paid by Ronsco as a result of its corrections filed on January 2, 2019, pursuant to s. 59(3)(b) of the *Customs Act* or otherwise, plus interest on those amounts.

<sup>35</sup> NPA, *supra* note 9, Annex A, pp 2 and 4.

<sup>36</sup> Memorandum D11-6-10, *supra* note 32 at paras 25-27.

<sup>37</sup> Ronsco paid \$2,434,002.31 in duties plus \$63,476.43 in interest as a result of the corrections filed on January 2, 2019. Pursuant to CBSA Memorandum D6-2-3, "Refund of Duties" (10 September 2018), s 1, Ronsco has not included GST here. However, if GST may be included in this refund for any reason, Ronsco also claims the \$121,700.10 in GST it paid as a result of its corrections filed January 2, 2019.

Yours truly,

  
Donald G. Regan

This is **Exhibit “F”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.

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**From:** Alimohamed, Natasha <Natasha.Alimohamed@cbsa-asfc.gc.ca>  
**Sent:** Monday, August 17, 2020 7:04 PM  
**To:** Mimma Francescangeli  
**Cc:** jpclark@greyclark.com; Tucker, JohnD  
**Subject:** RE: Security

Good evening, Ms. Francescangeli,

Thank you for your of August 13<sup>th</sup>. We appreciate your concern regarding the outstanding amount that is required to be paid and I wish to provide some further clarifications.

The CBSA will not take any action to claim against the bond prior to the end of the 90-day appeal period to the CITT, which is October 28<sup>th</sup>, 2020. Similarly, the CBSA will not collect against the bond if a payment arrangement is made with CRA Collections. If neither of these two situations occur, however, CBSA will take action to claim against the security bond, though, as indicated, not before October 28<sup>th</sup>, 2020.

I also wish to clarify that the notice of claim letter that was issued that it is being construed as an intent to claim against the bond by a specific date should not be considered as such as the letter only establishes an intent to claim if the debt is not paid, and does not specify a particular date, but awaits a response from all the parties involved to the request for payment.

With respect to the decisions made under sections 60 and 131 and 132/133 of the *Customs Act*, they are indeed separate and distinct. The request under section 60 of the *Customs Act* was for a further re-determination by the President of the tariff classification of the H36 wheels for which the security bond was posted. This was an appeal of a decision related to the importation of specific goods. A decision under subsection 60(4) ensued on July 30, 2020 confirming the tariff classification of these goods to be the same as the tariff classification of similar goods determined by the CITT in appeal AP-2019-003. It must be noted that, since the CITT has made its decision, and it was not appealed further, the classification for the H36 Class C wheels is binding with respect to importations of these goods. Given this CITT decision, there is no ability for the CBSA to further re-determine the classification of the goods. In fact, based on the provisions of paragraph 61(1)(c), the CBSA is required to give effect of this decision to any subsequent importations of the same goods.

Finally, regarding your request as per section 129 of the *Customs Act*, it is a request for a Minister's decision regarding the issuance of the Notice of Penalty Assessment (NPA). I wish to clarify that the review of this NPA will solely review the infractions/contraventions, specifically whether the importer failed to submit the required corrections within 90 days after having reason to believe that their declaration was incorrect. It will not review the reassessment period determined by the CBSA under the reassessment policy outlined in D11-6-10 for which corrections were filed (July 24, 2014 to July 24, 2018). The outcome of this appeal will either overturn the penalty and return the amount paid on the NPA, or uphold it and determine if the quantum of the penalty assessed was reasonable. Most importantly, the outcome of the appealed NPA will not affect the amounts owed on the corrections submitted based on the verification report findings.

There is no review mechanism provided within the *Customs Act* that allows for an appeal or review of the application of the reassessment policy. As John Tucker has advised, where no review or appeal process exists in legislation and

where a client believes that the CBSA has not exercised the available discretion in a fair and reasonable manner, the client may apply for judicial review under section 18.1 of the *Federal Courts Act*.

I trust that the helps to clarify the situation.

Natasha Alimohamed

**From:** Mimma Francescangeli <mfrancescangeli@ronsco.com>  
**Sent:** August 13, 2020 3:44 PM  
**To:** Alimohamed, Natasha <Natasha.Alimohamed@cbsa-asfc.gc.ca>  
**Cc:** jpclark@greyclark.com; Tucker, JohnD <John.Tucker@cbsa-asfc.gc.ca>  
**Subject:** RE: Security

Good afternoon Ms. Alimohamed,

Thank you for your email received earlier today. While I appreciate the explanation as to the rationale behind Mr. Tucker's July 30, 2020 letter, your response does not address Ronsco's concerns.

Ronsco is asking for an assurance that it will not be required to pay the duties in question until it has exhausted all of its appeal mechanisms. I understand your view that the current legislative regime under the *Customs Act* does not provide for this. However, information provided in your email below shows that there is a means of meeting both Ronsco's and the CBSA's interests in this interim period while we await a decision from the Montreal Trade Appeals Unit on Ronsco's "reason to believe" appeal.

While you characterize the decisions under sections 60 and 131 or 132/33 of the Customs Act as separate, one of the Appeals Officers under your supervision advised Ronsco in January 2019 that the requirement to pay duties on the basis of "reason to believe" could not be appealed to the CBSA President, and instead conclusions related to "reason to believe" had to be appealed via an appeal of the Notice of Penalty Assessment under section 131. We had to wait many months to bring that appeal, while waiting for the Notice of Penalty Assessment to be issued. When we finally were able to bring that appeal, we were told it could not move forward until the section 60 appeal was decided (that appeal having been made to preserve Ronsco's rights while the CITT appeal was ongoing).

The Minister's decision under sections 132/133 of the Customs Act is absolutely connected to the payment of these duties. The CBSA's Memorandum D11-6-10, regarding retroactive corrections, specifies that these need not be made if there is no "reason to believe" (para 27). If Ronsco is successful in its request to the Minister, the corollary would be that para 27 of Memorandum D11-6-10 would apply. As such, it is clear that Ronsco is still pursuing its internal appeals within the CBSA with respect to the amounts in issue, as it was advised to do in January 2019.

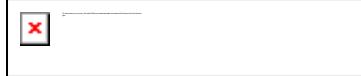
Based on your email, it is entirely possible to accommodate Ronsco's interest while preserving the CBSA's interest in protecting the debt in the event that it is not paid. As you note, the bond requires that any notice of claim be provided within 90 days of the President's decision. Given the decision date of July 30, 2020, that leaves the CBSA until October 28, 2020 to give notice of claim (which is also Ronsco's deadline for appealing to the CITT). Despite having 90 days to make a notice of claim, Mr. Tucker issued a notice of claim on the same day that the President made his decision (in fact, before the decision was even communicated to us).

In order to accommodate both the CBSA's and Ronsco's interest, we ask that you confirm that the CBSA will not make a claim against the bond before October 14, 2020. The Montreal Trade Appeals Unit has advised that a decision will be made with regard to Ronsco's "reason to believe" appeal by September 18, 2020. As such, confirming that the CBSA will not make a claim against the bond before October 14, 2020 will provide Ronsco with sufficient time to receive this decision and, in the event it is unsuccessful in its appeal to the Minister, consider its options with respect to proceedings in Federal Court under section 135 of the *Customs Act*. This would also ensure that the CBSA still has a further two week window under the bond to ensure that a payment plan is in place between Ronsco and the CRA.

Given the concerns you note related to the current economic instability related to COVID-19 and the major impact of these duties on Ronsco's business, your prompt response would be appreciated.

Sincerely,

**Mimma  
Francescangeli**



Email me | Écrivez-moi  
(514) 866-1033 Ext. 320  
(514) 235-1420

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J0P 1B0, Québec, CA

Celebrating 50 years of service.  
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**From:** Alimohamed, Natasha <[Natasha.Alimohamed@cbsa-asfc.gc.ca](mailto:Natasha.Alimohamed@cbsa-asfc.gc.ca)>

**Sent:** Thursday, August 13, 2020 9:24 AM

**To:** Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)>

**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com); Tucker, JohnD <[John.Tucker@cbsa-asfc.gc.ca](mailto:John.Tucker@cbsa-asfc.gc.ca)>

**Subject:** Security

**Re : Security to permit Ronesco to exhaust all of its remedies under the Customs Act**

Ms. Francescangeli:

This message is in response to your emailed letter of August 6 2020. I understand that this has been a lengthy situation in dealing with the Canada Border Services Agency (CBSA) over the issue of the requirement to pay a substantial amount that you identify as retroactive duties. I can appreciate your concerns in the current economic instability created by the COVID-19 pandemic should Ronesco be required to pay these retroactive duty amounts immediately.

As you have advised, John Tucker of the Recourse Directorate issued a notice of claim letter to the surety company that provided the bond to secure the retroactive duty amounts. The security bond was filed to cover the duties, taxes and interest owing for the submitted tariff classifications corrections related to the reassessment period determined by the CBSA, in lieu of payment to proceed with the section 60 appeal. This letter was issued as the clause for the security bond requires that any notice of claim be provided within 90 days of the date of the President's decision notice, which was issued on July 30th 2020. The letter advises that the amounts are due within 30 days of the decision or interest will accrue. The CBSA issues a notice of claim letter to ensure that its interest in the debt is protected in the event that a debt is not paid. It also provides notice that the security will be called upon if the debt is not paid and advises all parties of this but does not specify a time frame as that is based upon the response of the parties to the decision.

As our communication with your representative Mr. Clark advised, there are two options where the bond may be retained: 1) if an appeal is filed with the Canadian International Trade Tribunal; and 2) if a payment arrangement is made with the Canada Revenue Agency to pay the debt which I understand you are currently trying to put in place. As a President's decision has been rendered under subsection 60(4) of the *Customs Act*, the above two options are the only ones which allow us to retain the bond since it was submitted as part of the appeal process under section 60 of the *Customs Act*.

Please note that there is no requirement for payment or security to appeal a Notice of penalty under section 129 of the *Customs Act*. Consequently, it is not required to retain the security in place for the duty reassessments as it does not form part of the appeal as per section 129 of the *Customs Act*. The decisions made by Recourse appeals officers under section 60 and sections 131 or 132/133 of the *Customs Act* are separate and have distinct decision processes.

I trust that the above information is helpful.

Sincerely,  
Natasha Alimohamed

---

**From:** Alimohamed, Natasha <[Natasha.Alimohamed@cbsa-asfc.gc.ca](mailto:Natasha.Alimohamed@cbsa-asfc.gc.ca)>  
**Sent:** August 7, 2020 10:37 AM  
**To:** Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)>  
**Cc:** Lafortune, Cynthia <[Cynthia.Lafortune@cbsa-asfc.gc.ca](mailto:Cynthia.Lafortune@cbsa-asfc.gc.ca)>; Tucker, JohnD <[John.Tucker@cbsa-asfc.gc.ca](mailto:John.Tucker@cbsa-asfc.gc.ca)>; [jpc Clark@greyclark.com](mailto:jpc Clark@greyclark.com)  
**Subject:** Re: Security

Thank you for your message, Ms. Francescangeli. I will return to you shortly on this.

Natasha

Sent from my iPhone

On Aug 6, 2020, at 3:41 PM, Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)> wrote:

Good Afternoon Ms. Alimohamed,

Please see attached correspondence for your consideration.

Kindly confirm receipt.

Thank You,

**Mimma  
Francescangeli**

Email me | Écrivez-moi  
(514) 866-1033 Ext. 320  
(514) 235-1420

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75 Rue Industrielle, Coteau-du-Lac  
J0P 1B0, Québec, CA

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This is **Exhibit “G”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Bruce Lachance  
A Commissioner for Taking Affidavits

---

**From:** Nostbakken, Peter <Peter.Nostbakken@justice.gc.ca>  
**Sent:** Wednesday, October 14, 2020 1:21 PM  
**To:** David Taylor <DTaylor@conway.pro>  
**Cc:** Maher, Charles <Charles.Maher@justice.gc.ca>; Moores, James <James.Moores@justice.gc.ca>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Good afternoon David,

I will be joining Charles Maher as counsel for the AGC on these files.

We write to indicate that, as a reasonable manner for moving these various matters forward, the AGC would not oppose an abeyance of T-1037-20 pending a section 135 appeal of the Minister's decision to uphold the Notice of Penalty Assessment (NPA). This position is taken without prejudice to the AGC's ability to argue that the Federal Court is without jurisdiction to hear the application in T-1037-20, if it is taken out of abeyance (see *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 396).

Further, while the AGC does not oppose an abeyance, the issues that would be before the court on a 135 appeal and the issues in the judicial review application are not "in common", though there may be shared facts. Accordingly, paragraph 25 of the Notice of Application in T-1037-20 is not accurate.

A section 135 appeal would deal with whether the NPA was properly issued, as upheld by the Minister, based on the finding that the appellant had "reason to believe" the declared tariff classification was incorrect and its failure to correct the classification within 90 days. T-1037-20, on the other hand, seeks judicial review not of the NPA or the Minister's decision but of the Detailed Adjustment Statements issued on July 30, 2020.

Given that the importations to which the DASs at issue in T-1037-20 apply all occurred in the period subsequent to the start of the Verification Period (January 1, 2015), Memorandum D11-6-10 requires corrections and payment of related duties for those importations regardless of whether Ronsco had "reason to believe" prior to the verification. Memorandum D11-6-10 states that where an importer did not have "reason to believe" prior to the verification report, the importer will be required to amend all incorrect declarations only for the verification period and going forward, i.e.

going forward from the verification period. In contrast, if an importer did “have reason to believe”, D11-6-10 requires corrections even prior to the verification period, back to the point where the importer had “reason to believe”, to a maximum of four years. Of note, pursuant to section 59 of the *Customs Act*, the CBSA may re-determine the tariff classification of goods at any time within four years of the date the goods were initially accounted for. Paragraphs 32.2(2) and (4) of the Act require an importer to correct and pay duties on any importations incorrectly declared, within 4 years of the date the goods were initially accounted for.

Given the above, a decision on a section 135 appeal will not have an impact on the July 30, 2020 DASs or the duties flowing from them, and the issues between the two proceedings are not truly “in common” such that one proceeding will determine the other.

A letter indicating that the AGC does not oppose an abeyance is attached.

Best regards,

**Peter Nostbakken**

Senior Counsel  
 Civil Litigation Section  
 50 O'Connor Street, 5<sup>th</sup> Floor, Ottawa, Ontario K1A 0H8  
 National Litigation Sector / Department of Justice / Government of Canada  
[pnostabak@justice.gc.ca](mailto:pnostabak@justice.gc.ca) / Tel: \*New\* (613) 670-6316 / Fax: 613-954-1920

Avocat-conseil  
 Contentieux des affaires civiles  
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 Secteur national du contentieux / Ministère de la Justice Canada / Gouvernement du Canada  
[pnostabak@justice.gc.ca](mailto:pnostabak@justice.gc.ca) / tél. : \*Nouveau\* (613) 670-6316 / téléc: 613-954-1920

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**From:** Maher, Charles  
**Sent:** October 7, 2020 11:10 PM  
**To:** 'David Taylor' <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

David,

I understand your concern with the timing of the CTR and the affidavits.

Why don't we wait a bit, and agree now between us that we will bring an informal motion for an extension, if needed, and deal with timelines when and if the time comes. I don't think the Court will not hold it against us if we wait a few days in order to permit necessary discussions on the abeyance matter. Once we are clear on the abeyance matter (which should be very soon), we can approach the Court and, if needed, agree on timelines and bring an informal request.

Thanks,  
Charles

Charles Maher  
 Avocat |Counsel  
 Section du contentieux des affaires civiles | Civil Litigation Section  
 50, rue O'Connor, 5e étage | 50 O'Connor Street, 5th Floor  
 Ottawa, ON K1A 0H8  
 Ministère de la Justice Canada |Department of Justice Canada  
 Gouvernement du Canada | Government of Canada  
[charles.maher@justice.gc.ca](mailto:charles.maher@justice.gc.ca)  
 Tél/Tel. : 613-612-9217  
 Téléc./Fax. : 613-954-1920

**From:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>  
**Sent:** October 7, 2020 5:09 PM  
**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Hi Charles,

My client's preference would be to place the whole matter in abeyance, as noted in the Notice of Application. The purpose of the informal request is to give us time to get that taken care of.

If your client needs more time for the CTR, I suggest that in the informal request we make October 28 the CTR date and November 9 the date for the applicant's affidavits. In order to be efficient, I would like to see what is in the CTR before filing, so my client's affidavits are not duplicative.

DT

**David Taylor**  
**Conway Baxter Wilson LLP/s.r.l.**  
 T: 613-691-0368 | F: 613-688-0271 | [www.conway.pro](http://www.conway.pro)

**From:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>

**Sent:** Wednesday, October 7, 2020 4:52 PM

**To:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>

**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>

**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Hi David,

Yes you have our consent to an extension to October 26. Similarly, we kindly ask that your client agrees to a Rule 7 extension for the CTR, should such an extension be required (so the CTR would be due on October 28).

Regards,

Charles

Charles Maher  
 Avocat |Counsel  
 Section du contentieux des affaires civiles | Civil Litigation Section  
 50, rue O'Connor, 5e étage | 50 O'Connor Street, 5th Floor  
 Ottawa, ON K1A 0H8  
 Ministère de la Justice Canada |Department of Justice Canada  
 Gouvernement du Canada | Government of Canada  
[charles.maher@justice.gc.ca](mailto:charles.maher@justice.gc.ca)

Tél/Tel. : 613-612-9217

Téléc./Fax. : 613-954-1920

**From:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>

**Sent:** October 7, 2020 3:58 PM

**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>

**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>

**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Good afternoon Charles,

Having considered the matter, would your client agree to an informal request for an extension to Monday, October 26 so that we have time to sort out the status of the proceeding given the pending s. 135 appeal?

Best,

David

## David Taylor

Conway Baxter Wilson LLP/s.r.l.

T: 613-691-0368 | F: 613-688-0271 | [www.conway.pro](http://www.conway.pro)

**From:** David Taylor

**Sent:** Friday, October 2, 2020 3:10 PM

**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>

**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>

**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Thanks for the response Charles. I will follow-up with either a Rule 7 form for your signature or an informal request for an extension on Monday.

Best wishes for the weekend ahead,

David

**From:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>

**Sent:** Friday, October 2, 2020 3:08 PM

**To:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>

**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>

**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Hi David, I meant to reply before end of day today.

We need a little more time before providing Ronsco with a response on the abeyance order. It should come next week.

As for the Rule 7 extension, we can agree to that, or to an informal request for an extension of time if needed. We will not hold Ronsco responsible for delays coming from our end.

Have a good week-end,

Charles

Charles Maher

Avocat |Counsel

Section du contentieux des affaires civiles | Civil Litigation Section  
50, rue O'Connor, 5e étage | 50 O'Connor Street, 5th Floor  
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Gouvernement du Canada | Government of Canada  
[charles.maher@justice.gc.ca](mailto:charles.maher@justice.gc.ca)

Tél/Tel. : 613-612-9217

Téléc./Fax. : 613-954-1920

---

**From:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>  
**Sent:** October 2, 2020 3:03 PM  
**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC  
**Importance:** High

Charles,

I am following up on my September 28 email, which in turn followed up on my September 21 email.

May we please have your consent to a Rule 7 extension with respect to the Applicant's affidavits so that my client does not fall out of compliance with the rule given the time this has taken?

I would also like to know if we will need to bring a motion to place this application into abeyance pending the outcome of Ronsco's section 135 appeal.

Best,

David

---

**David Taylor**  
Conway Baxter Wilson LLP/s.r.l.  
T: 613-691-0368 | F: 613-688-0271 | [www.conway.pro](http://www.conway.pro)

---

**From:** David Taylor  
**Sent:** Monday, September 28, 2020 1:28 PM  
**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Good afternoon Charles,

Following up on my correspondence of last week, have you received instructions with respect to whether Canada will consent to this matter being placed in abeyance pending Ronsco's s. 135 appeal?

Given that we are a week out from the deadline for Ronsco's affidavits, we would appreciate a response soon if we are to bring a motion. Should a motion be required, we would seek your consent to a Rule 7 extension, so that this motion might be heard at a General sitting during the week of October 5 or 12.

I should also note that Ronsco's request for a Certified Tribunal Record was inadvertently left out of its Notice of Application. To that end, please find attached for service correspondence of today's date requesting the CTR. Of course, should the matter go into abeyance on consent, the timeline for serving the CTR would be suspended as well.

Best,

David

**From:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>  
**Sent:** Wednesday, September 23, 2020 11:21 AM  
**To:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** RE: T-1037-20: Ronsco Inc. v AGC

Hi David, well received.

Let me look into it a little more closely and seek instructions from my client. I will get back to you shortly.

Thank you,  
Charles

Charles Maher  
Avocat |Counsel  
Section du contentieux des affaires civiles | Civil Litigation Section  
50, rue O'Connor, 5e étage | 50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8  
Ministère de la Justice Canada |Department of Justice Canada  
Gouvernement du Canada | Government of Canada  
[charles.maher@justice.gc.ca](mailto:charles.maher@justice.gc.ca)  
Tél./Tel. : 613-612-9217  
Téléc./Fax. : 613-954-1920

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**From:** David Taylor <[DTaylor@conway.pro](mailto:DTaylor@conway.pro)>  
**Sent:** September 21, 2020 5:36 PM

**To:** Maher, Charles <[Charles.Maher@justice.gc.ca](mailto:Charles.Maher@justice.gc.ca)>  
**Cc:** Roy, Marc <[Marc.Roy@justice.gc.ca](mailto:Marc.Roy@justice.gc.ca)>; Colin Baxter <[CBaxter@conway.pro](mailto:CBaxter@conway.pro)>; Stephanie Baldwin <[SBaldwin@conway.pro](mailto:SBaldwin@conway.pro)>  
**Subject:** T-1037-20: Ronsco Inc. v AGC

Charles,

We have received your Notice of Appearance. Looking forward to working with you again.

As you will have seen at para 25 of Ronsco's Notice of Application for Judicial Review, Ronsco is of the view that its application for judicial review should be placed in abeyance pending the outcome of its appeal to the Minister under sections 129 and 131 of the *Customs Act* and any appeal therefrom, as the same subject matter would be before the Federal Court on this application for judicial review as is before the Minister under section 129. Indeed, Ronsco's view, based on advice in late 2018 and early 2019 from CBSA's Recourse Directorate, is that it has not yet exhausted its remedies prior to judicial review – a requirement before filing for judicial review. This application for judicial review was filed out of an abundance of caution given the contrary position taken by a CBSA Director General in mid-August.

Ronsco's s. 129/131 appeal to the Minister was denied on September 17. Ronsco will be filing an appeal pursuant to s. 135 of the Customs Act. In our view, judicial economy supports resolving Ronsco's s. 135 appeal before proceeding on any judicial review, so as not to consume the Federal Court's resources twice on the same issue.

Please advise if you will consent to the judicial review being put in abeyance. If so, we will prepare a letter and draft order for your consideration pursuant to the Court's Notice to the Profession regarding informal requests for interlocutory relief. If not, we will prepare motion materials seeking that the matter be placed in abeyance.

Best,

David

## David Taylor

**Conway Baxter Wilson LLP/s.r.l.**  
400-411 Roosevelt Avenue | Ottawa, ON K2A 3X9  
T: 613-691-0368 | F: 613-688-0271  
[DTaylor@conway.pro](mailto:DTaylor@conway.pro)  
[www.conway.pro](http://www.conway.pro)



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This is **Exhibit “H”**  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.

**Colin S. Baxter**  
**Direct Line:** 613.780.2012  
**Email:** cbaxter@conway.pro

**Assistant:** Stephanie Baldwin  
**Direct Line:** 613.780.2016  
**Email:** sbaldwin@conway.pro

October 20, 2020

**VIA EMAIL**

Peter Nostbakken  
Senior Counsel  
Department of Justice  
50 O'Connor Street, 5th Floor  
Ottawa, ON K1A 0H8

Dear Mr. Nostbakken:

**RE: T-1037-20: RONSCO INC. v. ATTORNEY GENERAL OF CANADA**  
**OUR MATTER ID: 1273-003**

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Thank you for your October 14, 2020 email to my colleague, Mr. Taylor, in response to his September 21, 2020 email to your colleague, Mr. Maher, and welcome to the file.

As will be apparent from my client's Notice of Application in this matter, the proceedings between it and the Canada Border Services Agency ("CBSA") have been lengthy since your client's decision to reverse its tariff treatment of forged rough-bore railway wheels following its 2017-2018 Trade Compliance Verification of my client.

Our client read your October 14, 2020 email with complete surprise, as it represents the third conflicting position taken by the federal government with respect to how Ronsco should challenge the duties in question.

When Ronsco initially tried to challenge the CBSA's "reason to believe" conclusions via a request for further re-determination to the CBSA President (as your email appears to suggest it should have done), Ronsco was told on November 8, 2018 by a CBSA Appeals Officer (Sue Ogilvie) that it had to pursue these arguments via a challenge to the Notice of Penalty Assessment (as it is now

doing), as the CBSA President did not have jurisdiction to deal with “reason to believe” under section 60 of the *Customs Act*.<sup>1</sup>

When Ronsco tried to challenge the CBSA’s conclusions regarding reason to believe via the Notice of Penalty Assessment process, Ronsco was told on August 17, 2020 by the Director General of the CBSA Recourse Directorate (Natasha Alimohamed) that it had to pursue these arguments via an application for judicial review under section 18.1 of the *Federal Courts Act*, (as it has done in this proceeding).

Now that Ronsco has brought an application for judicial review, as instructed, it would appear that your position is that this matter ought to have been addressed to the CBSA President, as Ronsco sought to do at the outset.

Any intention on your client’s part to rely on *Jockey Canada Company Limited v Canada (Public Safety and Emergency Preparedness)* in contradiction to its own advice regarding its internal administrative appeals processes should have been brought to our attention two years ago. Given the serious prejudice to Ronsco, we would argue that your client is estopped from relying on these arguments, as Ronsco has proceeded on the basis of your client’s advice at every step.

We will be filing a Statement of Claim to commence an action under section 135 of the *Customs Act* imminently. As such, we will write to the Court to ask that T-1037-20 be placed in abeyance, as agreed.

In response to the position taken in your October 14, 2020 email, and in light of the very short period remaining for Ronsco to raise the matter with the Canadian International Trade Tribunal (“CITT”), we will also file a Notice of Appeal to the CITT from the Detailed Adjustment Statements received on August 3, 2020, in order to preserve our client’s rights to argue the reason to believe issue in that forum, as your email says should have been done.

Finally, our client disagrees with your characterization of CBSA Memorandum D11-6-10 requiring corrections “going forward” from the Verification Period, as opposed to the date of the Verification Report, as this is in direct contradiction to express representations made to Ronsco and its advisors by the CBSA’s Director General responsible for the Trade and Anti-Dumping Programs Directorate (Doug Band) at a meeting on June 26, 2018.

Yours truly,

Colin S. Baxter

CSB/dbl

<sup>1</sup> This is apparently consistent with the Canadian International Trade Tribunal’s view of its own jurisdiction under section 67 of the *Customs Act*, as in Ronsco’s appeal to the CITT, Member Beckett held that “[t]he Tribunal’s mandate in an appeal is simply to determine the correct tariff classification of the goods in issue. It has no power to determine how the tariff classification should ultimately impact the appellant with respect to the duties imposed [...]” (*Ronsco Inc. v. President of the Canada Border Services Agency*, AP-2019-003 at para 63).

Encls.

cc: David P. Taylor  
Charles Maher

---

**From:** Ogilvie, Sue [mailto:[Sue.Ogilvie@cbsa-asfc.gc.ca](mailto:Sue.Ogilvie@cbsa-asfc.gc.ca)]  
**Sent:** Thursday, November 8, 2018 1:24 PM  
**To:** 'Peter Clark'  
**Subject:** RE: Ronsco Inc.

Good Afternoon Mr. Clark,

Yes you are correct I do not have jurisdiction under a section 60 appeal to deal with reason to believe.  
It is in the best interest of the company to make the corrections within the time limit approved by the CV officer.  
Reason to believe can only be dealt with under the appeal of an AMPs penalty under Section 129 of the Customs Act.

I hope this clarifies the situation for you.

**Sue Ogilvie**

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch  
Canada Border Services Agency / Government of Canada  
[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tel : 416-973-1787 / TTY: 866-335-3237

Agente d'appels, Unité des appels liés aux échanges commerciaux à Toronto, Direction générale des finances et de la gestion organisationnelle  
Agence des services frontaliers du Canada / Gouvernement du Canada  
[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tél: 416-973-1787 / ATS: 866-335-3237

1 Front Street West, 3<sup>rd</sup> Floor, Toronto, ON M5J 2X5 / Fax: 416-954-6740  
1, rue Front Ouest, 3<sup>ème</sup> étage, Toronto, ON M5J 2X5 / Télécopieur : 416-954-6740

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**From:** Peter Clark [mailto:[jpclark@greyclark.com](mailto:jpclark@greyclark.com)]  
**Sent:** November 8, 2018 11:47 AM  
**To:** Ogilvie, Sue <[Sue.Ogilvie@cbsa-asfc.gc.ca](mailto:Sue.Ogilvie@cbsa-asfc.gc.ca)>  
**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com)  
**Subject:** RE: Ronsco Inc.

Good afternoon Ms. Ogilvie,

Thank you for confirming that your records indicate that no NPA has been sent to Ronsco.

Ronsco has included the “reason to believe” issue in its appeal because it was addressed in Mme Gagné’s final report dated July 24, 2018, and has, as an ancillary consequence of her decision, required Ronsco to review and correct all of its import transactions of forged wheel bodies over the past four years. As you note in your email, Ronsco is in the process of completing this process.

Ronsco’s inclusion of the “reason to believe” issue in its appeal is therefore to address the requirement for it to correct these import transactions. Ronsco’s position is that the tariff items in question were not *prima facie*, evident, and transparent.

My client has asked me to confirm that you do not have jurisdiction to hear an appeal of this issue (reason to believe), please advise me of the same as soon as possible.

Best regards,

Peter Clark

**From:** Peter Clark [<mailto:jpclark@greyclark.com>]

**Sent:** Tuesday, November 6, 2018 2:28 PM

**To:** 'Ogilvie, Sue'

**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com)

**Subject:** RE: Ronsco Inc.

Hi Sue

Thank you for drawing this matter to my attention

Best Regards

Peter

**From:** Ogilvie, Sue [<mailto:Sue.Ogilvie@cbsa-asfc.gc.ca>]

**Sent:** Tuesday, November 6, 2018 1:31 PM

**To:** 'jpclark@greyclark.com'

**Subject:** FW: Ronsco Inc.

Good Afternoon Mr. Clark,

My apologies for addressing you as Mr. Grey in my previous email.

I contacted the CV officer who worked on C-2016-011118.

You are correct they have not issued an NPA as yet.

Apparently an extension was requested to submit the amended B2's and it was granted. The AMP(s) will be issued when they do the follow-up.

Sorry to have bothered you with this but I wanted to make sure that if you were appealing the AMP it got to the correct person.

Regards,

Sue Ogilvie

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch  
Canada Border Services Agency / Government of Canada

[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tel : 416-973-1787 / TTY: 866-335-3237

Agente d'appels, Unité des appels liés aux échanges commerciaux à Toronto, Direction générale des finances et de la gestion organisationnelle

Agence des services frontaliers du Canada / Gouvernement du Canada

[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tél: 416-973-1787 / ATS: 866-335-3237

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1, rue Front Ouest, 3<sup>ème</sup> étage, Toronto, ON M5J 2X5 / Télécopieur : 416-954-6740

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**From:** Ogilvie, Sue

**Sent:** November 6, 2018 10:44 AM

**To:** 'jpclark@greyclark.com' <[jpclark@greyclark.com](mailto:jpclark@greyclark.com)>

**Subject:** Ronsco Inc.

Good Morning Mr. Grey,

I have been reviewing your appeal letter concerning tariff classification of the H36 wheels.

You also discuss Reason to Believe. Have you appealed the AMP penalty?

I will only be dealing with Tariff Classification.

If the appeal submitted is concerning tariff classification and the AMP penalty please advise the Notice of Penalty Assessment Number (NPA #).

Appeal of the AMP penalty would be assigned to another officer. I have not been able to find a record of an AMP appeal.

Regards

**Sue Ogilvie**

Appeals Officer, Toronto Trade Appeals Unit, Finance and Corporate Management Branch

Canada Border Services Agency / Government of Canada

[sue.ogilvie@cbsa-asfc.gc.ca](mailto:sue.ogilvie@cbsa-asfc.gc.ca) / Tel : 416-973-1787 / TTY: 866-335-3237

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1 Front Street West, 3<sup>rd</sup> Floor, Toronto, ON M5J 2X5 / Fax: 416-954-6740

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**From:** Alimohamed, Natasha <Natasha.Alimohamed@cbsa-asfc.gc.ca>  
**Sent:** Monday, August 17, 2020 7:04 PM  
**To:** Mimma Francescangeli  
**Cc:** jpclark@greyclark.com; Tucker, JohnD  
**Subject:** RE: Security

Good evening, Ms. Francescangeli,

Thank you for your of August 13<sup>th</sup>. We appreciate your concern regarding the outstanding amount that is required to be paid and I wish to provide some further clarifications.

The CBSA will not take any action to claim against the bond prior to the end of the 90-day appeal period to the CITT, which is October 28<sup>th</sup>, 2020. Similarly, the CBSA will not collect against the bond if a payment arrangement is made with CRA Collections. If neither of these two situations occur, however, CBSA will take action to claim against the security bond, though, as indicated, not before October 28<sup>th</sup>, 2020.

I also wish to clarify that the notice of claim letter that was issued that it is being construed as an intent to claim against the bond by a specific date should not be considered as such as the letter only establishes an intent to claim if the debt is not paid, and does not specify a particular date, but awaits a response from all the parties involved to the request for payment.

With respect to the decisions made under sections 60 and 131 and 132/133 of the *Customs Act*, they are indeed separate and distinct. The request under section 60 of the *Customs Act* was for a further re-determination by the President of the tariff classification of the H36 wheels for which the security bond was posted. This was an appeal of a decision related to the importation of specific goods. A decision under subsection 60(4) ensued on July 30, 2020 confirming the tariff classification of these goods to be the same as the tariff classification of similar goods determined by the CITT in appeal AP-2019-003. It must be noted that, since the CITT has made its decision, and it was not appealed further, the classification for the H36 Class C wheels is binding with respect to importations of these goods. Given this CITT decision, there is no ability for the CBSA to further re-determine the classification of the goods. In fact, based on the provisions of paragraph 61(1)(c), the CBSA is required to give effect of this decision to any subsequent importations of the same goods.

Finally, regarding your request as per section 129 of the *Customs Act*, it is a request for a Minister's decision regarding the issuance of the Notice of Penalty Assessment (NPA). I wish to clarify that the review of this NPA will solely review the infractions/contraventions, specifically whether the importer failed to submit the required corrections within 90 days after having reason to believe that their declaration was incorrect. It will not review the reassessment period determined by the CBSA under the reassessment policy outlined in D11-6-10 for which corrections were filed (July 24, 2014 to July 24, 2018). The outcome of this appeal will either overturn the penalty and return the amount paid on the NPA, or uphold it and determine if the quantum of the penalty assessed was reasonable. Most importantly, the outcome of the appealed NPA will not affect the amounts owed on the corrections submitted based on the verification report findings.

There is no review mechanism provided within the *Customs Act* that allows for an appeal or review of the application of the reassessment policy. As John Tucker has advised, where no review or appeal process exists in legislation and

where a client believes that the CBSA has not exercised the available discretion in a fair and reasonable manner, the client may apply for judicial review under section 18.1 of the *Federal Courts Act*.

I trust that the helps to clarify the situation.

Natasha Alimohamed

**From:** Mimma Francescangeli <mfrancescangeli@ronsco.com>  
**Sent:** August 13, 2020 3:44 PM  
**To:** Alimohamed, Natasha <Natasha.Alimohamed@cbsa-asfc.gc.ca>  
**Cc:** jpclark@greyclark.com; Tucker, JohnD <John.Tucker@cbsa-asfc.gc.ca>  
**Subject:** RE: Security

Good afternoon Ms. Alimohamed,

Thank you for your email received earlier today. While I appreciate the explanation as to the rationale behind Mr. Tucker's July 30, 2020 letter, your response does not address Ronsco's concerns.

Ronsco is asking for an assurance that it will not be required to pay the duties in question until it has exhausted all of its appeal mechanisms. I understand your view that the current legislative regime under the *Customs Act* does not provide for this. However, information provided in your email below shows that there is a means of meeting both Ronsco's and the CBSA's interests in this interim period while we await a decision from the Montreal Trade Appeals Unit on Ronsco's "reason to believe" appeal.

While you characterize the decisions under sections 60 and 131 or 132/33 of the Customs Act as separate, one of the Appeals Officers under your supervision advised Ronsco in January 2019 that the requirement to pay duties on the basis of "reason to believe" could not be appealed to the CBSA President, and instead conclusions related to "reason to believe" had to be appealed via an appeal of the Notice of Penalty Assessment under section 131. We had to wait many months to bring that appeal, while waiting for the Notice of Penalty Assessment to be issued. When we finally were able to bring that appeal, we were told it could not move forward until the section 60 appeal was decided (that appeal having been made to preserve Ronsco's rights while the CITT appeal was ongoing).

The Minister's decision under sections 132/133 of the Customs Act is absolutely connected to the payment of these duties. The CBSA's Memorandum D11-6-10, regarding retroactive corrections, specifies that these need not be made if there is no "reason to believe" (para 27). If Ronsco is successful in its request to the Minister, the corollary would be that para 27 of Memorandum D11-6-10 would apply. As such, it is clear that Ronsco is still pursuing its internal appeals within the CBSA with respect to the amounts in issue, as it was advised to do in January 2019.

Based on your email, it is entirely possible to accommodate Ronsco's interest while preserving the CBSA's interest in protecting the debt in the event that it is not paid. As you note, the bond requires that any notice of claim be provided within 90 days of the President's decision. Given the decision date of July 30, 2020, that leaves the CBSA until October 28, 2020 to give notice of claim (which is also Ronsco's deadline for appealing to the CITT). Despite having 90 days to make a notice of claim, Mr. Tucker issued a notice of claim on the same day that the President made his decision (in fact, before the decision was even communicated to us).

In order to accommodate both the CBSA's and Ronsco's interest, we ask that you confirm that the CBSA will not make a claim against the bond before October 14, 2020. The Montreal Trade Appeals Unit has advised that a decision will be made with regard to Ronsco's "reason to believe" appeal by September 18, 2020. As such, confirming that the CBSA will not make a claim against the bond before October 14, 2020 will provide Ronsco with sufficient time to receive this decision and, in the event it is unsuccessful in its appeal to the Minister, consider its options with respect to proceedings in Federal Court under section 135 of the *Customs Act*. This would also ensure that the CBSA still has a further two week window under the bond to ensure that a payment plan is in place between Ronsco and the CRA.

Given the concerns you note related to the current economic instability related to COVID-19 and the major impact of these duties on Ronsco's business, your prompt response would be appreciated.

Sincerely,

**Mimma  
Francescangeli**

Email me | Écrivez-moi  
(514) 866-1033 Ext. 320  
(514) 235-1420

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**From:** Alimohamed, Natasha <[Natasha.Alimohamed@cbsa-asfc.gc.ca](mailto:Natasha.Alimohamed@cbsa-asfc.gc.ca)>

**Sent:** Thursday, August 13, 2020 9:24 AM

**To:** Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)>

**Cc:** [jpclark@greyclark.com](mailto:jpclark@greyclark.com); Tucker, JohnD <[John.Tucker@cbsa-asfc.gc.ca](mailto:John.Tucker@cbsa-asfc.gc.ca)>

**Subject:** Security

**Re : Security to permit Ronesco to exhaust all of its remedies under the Customs Act**

Ms. Francescangeli:

This message is in response to your emailed letter of August 6 2020. I understand that this has been a lengthy situation in dealing with the Canada Border Services Agency (CBSA) over the issue of the requirement to pay a substantial amount that you identify as retroactive duties. I can appreciate your concerns in the current economic instability created by the COVID-19 pandemic should Ronesco be required to pay these retroactive duty amounts immediately.

As you have advised, John Tucker of the Recourse Directorate issued a notice of claim letter to the surety company that provided the bond to secure the retroactive duty amounts. The security bond was filed to cover the duties, taxes and interest owing for the submitted tariff classifications corrections related to the reassessment period determined by the CBSA, in lieu of payment to proceed with the section 60 appeal. This letter was issued as the clause for the security bond requires that any notice of claim be provided within 90 days of the date of the President's decision notice, which was issued on July 30th 2020. The letter advises that the amounts are due within 30 days of the decision or interest will accrue. The CBSA issues a notice of claim letter to ensure that its interest in the debt is protected in the event that a debt is not paid. It also provides notice that the security will be called upon if the debt is not paid and advises all parties of this but does not specify a time frame as that is based upon the response of the parties to the decision.

As our communication with your representative Mr. Clark advised, there are two options where the bond may be retained: 1) if an appeal is filed with the Canadian International Trade Tribunal; and 2) if a payment arrangement is made with the Canada Revenue Agency to pay the debt which I understand you are currently trying to put in place. As a President's decision has been rendered under subsection 60(4) of the *Customs Act*, the above two options are the only ones which allow us to retain the bond since it was submitted as part of the appeal process under section 60 of the *Customs Act*.

Please note that there is no requirement for payment or security to appeal a Notice of penalty under section 129 of the *Customs Act*. Consequently, it is not required to retain the security in place for the duty reassessments as it does not form part of the appeal as per section 129 of the *Customs Act*. The decisions made by Recourse appeals officers under section 60 and sections 131 or 132/133 of the *Customs Act* are separate and have distinct decision processes.

I trust that the above information is helpful.

Sincerely,  
Natasha Alimohamed

---

**From:** Alimohamed, Natasha <[Natasha.Alimohamed@cbsa-asfc.gc.ca](mailto:Natasha.Alimohamed@cbsa-asfc.gc.ca)>  
**Sent:** August 7, 2020 10:37 AM  
**To:** Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)>  
**Cc:** Lafortune, Cynthia <[Cynthia.Lafortune@cbsa-asfc.gc.ca](mailto:Cynthia.Lafortune@cbsa-asfc.gc.ca)>; Tucker, JohnD <[John.Tucker@cbsa-asfc.gc.ca](mailto:John.Tucker@cbsa-asfc.gc.ca)>; [joclark@greyclark.com](mailto:joclark@greyclark.com)  
**Subject:** Re: Security

Thank you for your message, Ms. Francescangeli. I will return to you shortly on this.

Natasha

Sent from my iPhone

On Aug 6, 2020, at 3:41 PM, Mimma Francescangeli <[mfrancescangeli@ronesco.com](mailto:mfrancescangeli@ronesco.com)> wrote:

Good Afternoon Ms. Alimohamed,

Please see attached correspondence for your consideration.

Kindly confirm receipt.

Thank You,

**Mimma  
Francescangeli**

Email me | Écrivez-moi  
(514) 866-1033 Ext. 320  
(514) 235-1420

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This is Exhibit "I"  
to the affidavit of  
Susan Gutteridge  
sworn before me this  
12<sup>th</sup> day of August, 2021

D. Burke-Lachaine  
A Commissioner for Taking Affidavits

Debra Ann Burke-Lachaine, a Commissioner, etc.,  
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,  
Barristers and Solicitors.  
Expires March 4, 2024.



CANADA  
PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 2021-318  
April 23, 2021

His Excellency the Administrator of  
the Government of Canada in Council, on the recommendation  
of the Minister of Finance, pursuant to section 82 of  
the *Customs Tariff*, makes the annexed *Order Amending*  
*the Schedule to the Customs Tariff, 2021–1.*

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CLERK OF THE PRIVY COUNCIL—LA GREFFIÈRE DU CONSEIL PRIVÉ



CANADA  
PRIVY COUNCIL • CONSEIL PRIVÉ

C.P. 2021-318  
23 avril 2021

Sur recommandation de la ministre des Finances  
et en vertu de l'article 82 du *Tarif des douanes*, Son Excellence  
l'administrateur du gouvernement du Canada en conseil prend  
le *Décret modifiant l'annexe du Tarif des douanes, 2021-1*,  
ci-après.

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CLERK OF THE PRIVY COUNCIL—LA GREFFIÈRE DU CONSEIL PRIVÉ

**Order Amending the Schedule to the Customs Tariff, 2021-1****Amendments**

**1 Tariff item No. 7323.93.00 in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*<sup>1</sup> is repealed.**

**2 The List of Tariff Provisions set out in the schedule to the Act is amended as set out in Part 1 of the schedule to this Order.**

**3 The List of Tariff Provisions set out in the schedule to the Act is amended by adding, in numerical order, the tariff provisions set out in Part 2 of the schedule to this Order.**

**Coming into Force**

**4 This Order comes into force on the day on which it is registered.**

**Décret modifiant l'annexe du Tarif des douanes, 2021-1****Modifications**

**1 Le numéro tarifaire 7323.93.00 de la liste des dispositions tarifaires de l'annexe du *Tarif des douanes*<sup>1</sup> est abrogé.**

**2 La liste des dispositions tarifaires de l'annexe de la même loi est modifiée conformément à la partie 1 de l'annexe du présent décret.**

**3 La liste des dispositions tarifaires de l'annexe de la même loi est modifiée par adjonction, selon l'ordre numérique, des dispositions tarifaires figurant à la partie 2 de l'annexe du présent décret.**

**Entrée en vigueur**

**4 Le présent décret entre en vigueur à la date de son enregistrement.**

<sup>1</sup> S.C. 1997, c. 36

<sup>1</sup> L.C. 1997, ch. 36

**SCHEDULE****Part 1**

(Section 2)

**Amendments to the List of Tariff Provisions**

**1 The Description of Goods of tariff item No. 8607.19.21 is amended by**

- (a) adding a semicolon after the reference to “track brakes”; and
- (b) adding “Forged, for use in the manufacture or production of wheel sets” as a separate provision after the provision referred to in paragraph (a).

**Part 2**

(Section 3)

**Additions to the List of Tariff Provisions****ANNEXE****Partie 1**

(article 2)

**Modifications de la liste des dispositions tarifaires**

**1 La Dénomination des marchandises du n° tarifaire 8607.19.21 est modifiée :**

- a) par adjonction d'un point-virgule après « sur le rail »;
- b) par adjonction de « Forgées, devant servir à la fabrication ou à la production d'essieux montés » comme une disposition distincte après la disposition visée à l'alinéa a).

**Partie 2**

(article 3)

**Nouvelles dispositions tarifaires**

Tariff Item	Description of Goods	Most-Favoured-Nation Tariff		Preferential Tariff	
		Initial Rate	Final Rate	Initial Rate	Final Rate
7323.93	--Of stainless steel				
7323.93.10	--Parts for use in the manufacture of cookware	Free	Free (A)	UST: Free MXT: Free CT: Free CIAT: Free CRT: Free IT: Free NT: Free SLT: Free JT: Free PT: Free COLT: Free PAT: Free HNT: Free KRT: Free CEUT: Free UAT: Free CPTPT: Free UKT: Free GPT: Free LDCT: Free CCCT: Free AUT: N/A NZT: N/A	UST: Free (A) MXT: Free (A) CT: Free (A) CIAT: Free (A) CRT: Free (A) IT: Free (A) NT: Free (A) SLT: Free (A) JT: Free (A) PT: Free (A) COLT: Free (A) PAT: Free (A) HNT: Free (A) KRT: Free (A) CEUT: Free (A) UAT: Free (A) CPTPT: Free (A) UKT: Free (A) GPT: Free (A) LDCT: Free (A) CCCT: Free (A) AUT: N/A NZT: N/A
7323.93.90	--Other	6.5%	6.5% (A)	UST: Free MXT: Free CT: Free CIAT: Free CRT: Free IT: Free NT: Free	UST: Free (A) MXT: Free (A) CT: Free (A) CIAT: Free (A) CRT: Free (A) IT: Free (A) NT: Free (A)

<b>Tariff Item</b>	<b>Description of Goods</b>	<b>Most-Favoured-Nation Tariff</b>		<b>Preferential Tariff</b>	
		<b>Initial Rate</b>	<b>Final Rate</b>	<b>Initial Rate</b>	<b>Final Rate</b>
		SLT: Free JT: Free PT: Free COLT: Free PAT: Free HNT: Free KRT: Free CEUT: Free UAT: Free CPTPT: Free UKT: Free GPT: 5% LDCT: Free CCCT: Free AUT: N/A NZT: N/A		SLT: Free (A) JT: Free (A) PT: Free (A) COLT: Free (A) PAT: Free (A) HNT: Free (A) KRT: Free (A) CEUT: Free (A) UAT: Free (A) CPTPT: Free (A) UKT: Free (A) GPT: 5% (A) LDCT: Free (A) CCCT: Free (A) AUT: N/A NZT: N/A	
<b>Numéro tarifaire</b>	<b>Dénomination des marchandises</b>	<b>Tarif de la nation la plus favorisée</b>		<b>Tarif de préférence</b>	
		<b>Taux initial</b>	<b>Taux final</b>	<b>Taux initial</b>	<b>Taux final</b>
7323.93	--En aciers inoxydables				
7323.93.10	---Parties devant servir à la fabrication des batteries de cuisson	En fr.	En fr. (A)	TÉU : En fr. TMX : En fr. TC : En fr. TACI : En fr. TCR : En fr. TI : En fr. TN : En fr. TSL : En fr. TJ : En fr. TP : En fr. TCOL : En fr. TPA : En fr. THN : En fr. TKR : En fr. TCUE : En fr. TUA : En fr. TPTGP : En fr. TUK : En fr. TPG : En fr. TPMD : En fr. TPAC : En fr. TAU : S/O TNZ : S/O	TÉU : En fr. (A) TMX : En fr. (A) TC : En fr. (A) TACI : En fr. (A) TCR : En fr. (A) TI : En fr. (A) TN : En fr. (A) TSL : En fr. (A) TJ : En fr. (A) TP : En fr. (A) TCOL : En fr. (A) TPA : En fr. (A) THN : En fr. (A) TKR : En fr. (A) TCUE : En fr. (A) TUA : En fr. (A) TPTGP : En fr. (A) TUK : En fr (A) TPG : En fr. (A) TPMD : En fr. (A) TPAC : En fr. (A) TAU : S/O TNZ : S/O
7323.93.90	---Autres	6,5 %	6,5 % (A)	TÉU : En fr. TMX : En fr. TC : En fr. TACI : En fr. TCR : En fr. TI : En fr. TN : En fr. TSL : En fr. TJ : En fr. TP : En fr. TCOL : En fr. TPA : En fr. THN : En fr. TKR : En fr. TCUE : En fr. TUA : En fr. TPTGP : En fr. TUK : En fr.	TÉU : En fr. (A) TMX : En fr. (A) TC : En fr. (A) TACI : En fr. (A) TCR : En fr. (A) TI : En fr. (A) TN : En fr. (A) TSL : En fr. (A) TJ : En fr. (A) TP : En fr. (A) TCOL : En fr. (A) TPA : En fr. (A) THN : En fr. (A) TKR : En fr. (A) TCUE : En fr. (A) TUA : En fr. (A) TPTGP : En fr. (A) TUK : En fr. (A)

<b>Numéro tarifaire</b>	<b>Dénomination des marchandises</b>	<b>Tarif de la nation la plus favorisée</b>		<b>Tarif de préférence</b>	
		<b>Taux initial</b>	<b>Taux final</b>	<b>Taux initial</b>	<b>Taux final</b>
		TPG : 5 % TPMD : En fr. TPAC : En fr. TAU : S/O TNZ : S/O		TPG : 5 % (A) TPMD : En fr. (A) TPAC : En fr. (A) TAU : S/O TNZ : S/O	

Court File No. T-1295-20

**FEDERAL COURT**

B E T W E E N:

RONSCO INC.

Plaintiff (Responding Party)

and

HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC  
SAFETY AND EMERGENCY PREPAREDNESS, CANADA  
BORDER SERVICES AGENCY

Defendant (Moving Party)

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Court File No. T-1295-20

**FEDERAL COURT**

B E T W E E N :

RONSCO INC.

Plaintiff (Responding Party)

and

HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC  
 SAFETY AND EMERGENCY PREPAREDNESS, CANADA  
 BORDER SERVICES AGENCY

Defendant (Moving Party)

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## OVERVIEW

1. On this motion, the Defendants raise impractical, overly-technical, and unfounded legal arguments. They do so in an attempt to avoid having this Court adjudicate on its merits Ronsco's claims for damages caused by CBSA's inconsistent, unfair, and unjustified treatment. CBSA imposed on Ronsco retroactive duties totalling nearly \$2.5 million for importing goods under the same tariff used by an entire industry for many years. CBSA did so in a targeted manner, by imposing those duties solely on Ronco and not on any of the other similarly situated importers importing substantially the same goods.
2. On the basis of this conduct and other significant maladministration by CBSA, Ronsco has brought an action in damages and has pleaded in detail all of the necessary elements of a public law claim based on *Paradis Honey Ltd. v. Canada* and a claim in negligence.
3. Ronsco seeks general damages, recovery for professional fees, and damages quantified in the same amount as the retroactive duties it was required to pay, all suffered as a result of the Defendants' conduct. The specific quantification of these heads of damages is not a proper matter to be decided on this motion to strike and the Defendants' arguments regarding those issues are of no moment. Damages will be assessed by the trial judge on the merits of the case, and the Defendants will be free to raise their arguments then. But there is no basis to strike Ronsco's claims now based on the manner in which it quantifies its damages.
4. Importantly, the Defendants have sought to deny Ronsco access to justice for a number of years. In 2018, Ronsco attempted to appeal the imposition of the retroactive duties based on CBSA's finding that Ronsco had "reason to believe" that the tariff declarations at issue were incorrect but was blocked from doing so by CBSA. Ronsco has not yet had this issue adjudicated, as a result of evolving and contradictory positions taken by CBSA.
5. Now, on this motion, CBSA takes the position that this Court is without jurisdiction and that Ronsco should have taken the very same appeal route that CBSA

previously blocked Ronsco from pursuing. In 2018, CBSA told Ronsco in clear and unambiguous terms that it did “not have jurisdiction . . . to deal with reason to believe” and directed Ronsco to pursue “reason to believe” through an appeal to the minister, followed by an appeal to the Federal Court under s. 135 of the *Customs Act*.

6. Ronsco did exactly as it was instructed by CBSA, only to be met two years later with a contradictory position: that Ronsco should have pursued a judicial review. And on this motion, CBSA contradicts itself yet again, asserting now that Ronsco should have taken the appeal route leading to the CITT, as it attempted to do in 2018.

7. The Defendants are estopped in law from advancing this new position that contradicts their previous clear and unambiguous representations. Moreover, their position is antithetical to the principles of access to justice and judicial efficiency. The CITT would have no jurisdiction to consider Ronsco’s public law claim or its claim in negligence and it could not award any damages to Ronsco. As a result, if the Defendants’ position were correct (which it is not), Ronsco would need to pursue this matter in multiple proceedings in order to have the full scope of its case heard.

8. Ronsco’s Federal Court action, brought both under section 135 of the *Customs Act* and as a claim in damages against the Defendants, is the only proceeding in which it can pursue the claims that it asserts in its pleading. And all of the proceedings that the Defendants have asserted Ronsco should pursue would turn on the same issue of “reason to believe.” It would be the key issue in an appeal to the CITT, in any judicial review, and in the s. 135 appeal, and the issue is certainly relevant to (though not necessarily determinative of) Ronsco’s public law claim based on *Paradis Honey* and its negligence claim.

9. As a matter of judicial efficiency, “reason to believe” and all of the relief sought by Ronsco should be determined on the merits in this action so as to avoid duplicative proceedings, unnecessary use of judicial resources, and potentially contradictory decisions. This Court is mandated by Rule 3 of the *Federal Courts Rules*, and by decisions of the Supreme Court of Canada and the Federal Court of Appeal, to take a

pragmatic approach that ensures that cases are heard on their merits in the least costly and most efficient manner possible.

10. Ronsco has pleaded all of the necessary elements of its public law claim and its claim in negligence. Neither claim is bound to fail and there is no basis to grant the Defendant's motion. To the contrary, the significant maladministration alleged by Ronsco must ground claims for damages. Striking these claims before they are heard on their merits would set a dangerous precedent, allowing public authorities to escape liability for similar conduct that is highly offensive to public law values, and denying persons who have similarly been wronged by government conduct any means of access to justice.

## PART I - FACTS

### BACKGROUND

11. Ronsco Inc. ("Ronsco") is the only Canadian-owned independent railway wheelset manufacturing shop in Canada and has been active for over 50 years. Ronsco is headquartered in Montreal, with five locations across Canada.

12. Ronsco imports forged railway wheels with unfinished bore holes ("rough bore wheels") to meet clients' needs for loose wheels, and to manufacture wheelsets.

13. In or around 2005, Ronsco began importing rough bore wheels pursuant to tariff item 8607.19.21 (re wheel blanks) ("Tariff 21"), which is duty-free. Ronsco did so on the advice of its customs broker FedEx, who specifically advised that rough bore wheels could be imported duty-free under Tariff 21.<sup>1</sup>

14. In or around the same time, numerous other competitor companies were similarly importing identical or substantially similar goods under Tariff 21 without any duty, penalty, or enforcement action by CBSA.<sup>2</sup> In fact, in 2005, Sumitomo Canada Limited

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<sup>1</sup> Fresh as Amended Statement of Claim dated May 7, 2021 ("Amended SOC"), para 9, Ex A to Affidavit of Susan Gutteridge sworn August 12, 2021, ("Gutteridge Aff"), Responding Motion Record of the Plaintiff ("RMR"), p 8.

<sup>2</sup> Amended SOC, para 11, Ex A to Gutteridge Aff, RMR, p 9.

(“**Sumitomo**”), one of Ronsco’s competitors, requested and received from CBSA an Advanced Ruling certifying that the rough bore wheels imported by Sumitomo, which were identical in manufacture and use to those imported by Ronsco, could be imported duty-free under Tariff 21.<sup>3</sup>

### **CBSA’S UNREASONABLE IMPOSITION OF RETROACTIVE DUTIES**

15. On July 11, 2017, CBSA informed Ronsco that a Trade Compliance Verification would be conducted for goods imported by Ronsco between January 1, 2015 and December 31, 2015, including rough bore wheels.<sup>4</sup>

16. On April 20, 2018, CBSA issued an Interim Report, advising Ronsco that it had determined that Tariff 21 did not apply to the rough bore wheels, and that Tariff Item 8607.19.29 (“**Tariff 29**”), dutiable at 9.5%, applied. Ronsco was informed that it would have to make corrections and pay duties going back four years, purportedly on the basis that it had “reason to believe” that its initial tariff declaration was incorrect.<sup>5</sup>

17. On June 26, 2018, Ronsco officials met with representatives of the Minister of Public Safety and with Doug Band, the CBSA’s Director General responsible for the Trade and Anti-Dumping Programs Directorate to address the Interim Report.<sup>6</sup>

18. In the meeting, Mr. Band, in the presence of several witnesses, acknowledged that the wording of Tariff 21 was confusing and outdated and assured Ronsco that it would only be required to pay duties for the items identified in the Interim Report and going forward. These representations by Mr. Band were an admission that Ronsco had no “reason to believe” that the rough bore wheels were dutiable and his assurances regarding retroactive duties were consistent with CBSA policy under CBSA Memorandum D11-6-10 (“**D11-6-10**”).<sup>7</sup>

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<sup>3</sup> Amended SOC, para 8, Ex A to Gutteridge Aff, RMR, p 8.

<sup>4</sup> Amended SOC, para 18, Ex A to Gutteridge Aff, RMR, p 10.

<sup>5</sup> Amended SOC, para 19, Ex A to Gutteridge Aff, RMR, p 10.

<sup>6</sup> Amended SOC, para 21, Ex A to Gutteridge Aff, RMR, p 11.

<sup>7</sup> Amended SOC, paras. 21-22 Ex A to Gutteridge Aff, RMR, p 11.

19. Despite Mr. Band's representations, CBSA issued a final Trade Compliance Verification Report (the “**Verification Report**”), confirming its earlier conclusions and requiring Ronsco to pay retroactive duties dating back four years.<sup>8</sup>

#### **RONSCO ATTEMPTS TO CHALLENGE “REASON TO BELIEVE” PURSUANT TO SECTION 60 OF THE CUSTOMS ACT**

20. On September 26, 2018, Ronsco made a request to the President of the CBSA for further re-determination pursuant to s. 60 of the *Customs Act*. Ronsco specifically argued in its submissions that it should not be required to pay retroactive duties because it did not have “reason to believe” that its prior selection of Tariff 21 was incorrect.<sup>9</sup>

21. On November 8, 2018, Sue Ogilvie, an Appeals Officer with the CBSA’s Toronto Trade Appeals Unit, Finance and Corporate Management Branch, advised Ronsco that the CBSA does “not have jurisdiction under a section 60 appeal to deal with reason to believe . . . Reason to believe can only be dealt with under the appeal of an AMPs penalty under Section 129 of the Customs Act.”<sup>10</sup>

22. Ronsco’s appeals to the CBSA President, and subsequently to the Canadian International Trade Tribunal (“**CITT**”) were denied. In its decision, the CITT commented on the limits of its own jurisdiction:

The Tribunal’s mandate in an appeal is simply to determine the correct tariff classification of the goods at issue. It has no power to determine how the tariff classification should ultimately impact the appellant with respect to the duties imposed . . .<sup>11</sup>

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<sup>8</sup> Amended SOC, para 25, Ex A to Gutteridge Aff, RMR, p 11.

<sup>9</sup> Amended SOC, para 26, Ex A to Gutteridge Aff, RMR, p 11; Request for re-determination dated September 26, 2018, Ex B to Gutteridge Aff, RMR, pp 41-48.

<sup>10</sup> Amended SOC, para 27, Ex A to Gutteridge Aff, RMR, p 12; E-mail from Sue Ogilvie dated November 8, 2018 (“**Ogilvie E-mail**”), Ex C to Gutteridge Aff, RMR, p 52.

<sup>11</sup> Decision of the CITT in Appeal No. AP-2019-003 dated March 17, 2020 (“**CITT Decision**”), para 63, Ex D to Affidavit of Marc Roy sworn July 23, 2021 (“**Roy Aff**”), Motion Record of the Defendants dated July 23, 2021 (“**DMR**”), p 75.

23. On December 19, 2018, as required by the CBSA, Ronsco filed retroactive self-corrections for its importations of the goods at issue. The CBSA issued Detailed Adjustment Statements (“**DAS**”) for the corrected transactions, pursuant to section 59 of the Customs Act, RSC 1985 c 1.<sup>12</sup>

24. Ronsco requested a further re-determination, pending its appeal to the CITT, which had yet to be heard. After the CITT denied Ronsco’s appeal, the CBSA issued further Detailed Adjustment Statements on July 30, 2020 (the “**July 2020 DAS**”) upholding the earlier DAS and requiring Ronsco to pay the same duties and interest.<sup>13</sup>

### **CBSA CONTINUES TO TAKE CONTRADICTORY POSITIONS**

25. On October 11, 2019, Ronsco received a Notice of Penalty Assessment (“**NPA**”) from the CBSA. The NPA found that Ronsco had “reason to believe” that it had incorrectly selected Tariff 21 for the goods subject to the retroactive corrections.<sup>14</sup>

26. On December 17, 2019, Ronsco filed an appeal of the NPA. Consistent with Ms. Ogilvie’s advice that “reason to believe” could only be challenged by appealing the NPA, Ronsco raised this issue in its appeal.<sup>15</sup>

27. On August 17, 2020, Natasha Alimohamed, Director General of the CBSA’s Recourse Directorate, advised Ronsco that, contrary to Ms. Ogilvie’s representations in November 2018, Ronsco ought to have brought an application for judicial review to challenge the CBSA’s conclusions with respect to Ronsco’s “reason to believe” as it relates to the reassessment of duties owed. To preserve its rights, Ronsco filed a Notice of Application for Judicial Review in T-1037-20. The judicial review has been placed in abeyance pending the outcome of this proceeding.<sup>16</sup>

<sup>12</sup> Amended SOC, para 29, Ex A to Gutteridge Aff, RMR, p 12.

<sup>13</sup> Amended SOC, para 30, Ex A to Gutteridge Aff, RMR, p 12.

<sup>14</sup> Amended SOC, para 31, Ex A to Gutteridge Aff, RMR, p 13.

<sup>15</sup> Amended SOC, para 32, Ex A to Gutteridge Aff, RMR, p 13; Appeal of NPA dated December 17, 2019, Ex E to Gutteridge Aff, RMR, pp 68-79.

<sup>16</sup> Amended SOC, para 32, Ex A to Gutteridge Aff, RMR, p 13; see also the Order of Prothonotary Molgat in matter T-1037-20 dated November 4, 2020, Book of Authorities of the Plaintiff, (“**BOA**”) Tab 16.

28. Although Ms. Alimohamed’s advice contradicted Ms. Ogilvie’s, both CBSA officials represented to Ronsco that “reason to believe” could not be challenged through a s. 60 appeal, as Ms. Alimohamed stated that “[t]here is no review mechanism provided within the *Customs Act* that allows for an appeal of the application of the reassessment policy.”<sup>17</sup>

29. On September 17, 2020, Ronsco received the CBSA’s decision, dated September 15, 2020, dismissing its NPA Appeal.<sup>18</sup>

30. On October 14, 2020, as Ronsco was preparing to bring this action, counsel for Canada on the judicial review in T-1037-20 took the position that, contrary to Ms. Ogilvie’s advice and to Ms. Alimohamed’s advice, Ronsco should have challenged the CBSA’s conclusion regarding “reason to believe” in an appeal to the CBSA President under section 60 of the *Customs Act*. That is the same position that the Defendants assert on this motion, and which runs directly contrary to the previous unambiguous representations of both Ms. Ogilvie and Ms. Alimohamed.<sup>19</sup>

31. To preserve its rights, Ronsco filed an Appeal to the CITT on October 22, 2020. The appeal has been placed in abeyance pending the outcome of this proceeding.<sup>20</sup>

### CBSA’S UNFAIR TREATMENT OF RONSCO

32. CBSA knowingly took contradictory positions with respect to the application of Tariff 21 to similarly situated importers – to the detriment of Ronsco. This is demonstrated by the CBSA’s Advance Ruling, which was in place for almost 14 years and was only rescinded after CBSA decided against Ronsco in its July 2018 Verification

<sup>17</sup> E-mail from N Alimohamed dated August 17, 2020 (“Alimohamed E-mail”), Ex F to Gutteridge Aff, RMR, pp 82-83.

<sup>18</sup> Amended SOC, para 34, Ex A to Gutteridge Aff, RMR, p 13.

<sup>19</sup> Amended SOC, para 35, Ex A to Gutteridge Aff, RMR, p 13; E-mail from P. Nostbakken dated Oct 14, 2020, Ex G to Gutteridge Aff, RMR, pp 87-88; Ltr. from C. Baxter dated October 20, 2020, Ex H to Gutteridge Aff, RMR, pp 97-98.

<sup>20</sup> Amended SOC, para 35, Ex A to Gutteridge Aff, RMR, p 13

Report. CBSA posts advance rulings online for the express purpose of providing guidance to help importers comply with Canada's trade legislation.<sup>21</sup>

33. Approximately 10 companies imported identical or substantially similar goods into Canada under Tariff 21, to the knowledge of CBSA. None of these other companies was forced to pay retroactive duties by CBSA, nor were they even the subject of a trade compliance verification for conduct similar to Ronsco's.<sup>22</sup>

34. The entire industry was importing similar goods under Tariff 21 to the knowledge and approval of CBSA. It was only after CBSA issued the Verification Report that these other importers began changing their tariff classifications.<sup>23</sup>

35. CBSA unfairly favored Ronsco's competitors over Ronsco and altered the competitive landscape of the industry to Ronsco's detriment. For example, as a result of CBSA's imposition of retroactive duties on Ronsco, the company was unable to complete a planned expansion into western Canada to open a wheel shop there.<sup>24</sup>

## **RONSCO'S CLAIMS**

36. Ronsco commenced this action on October 29, 2020 pursuant to s. 135 of the *Customs Act*, seeking to challenge CBSA's finding with respect to "reason to believe" and quash the July 2020 DAS, among other relief.

37. On May 7, 2021, Ronsco amended its statement of claim to assert a public law cause of action based on *Paradis Honey* and a claim in negligence, in addition to the relief sought pursuant to s. 135 of the *Customs Act*.

38. On the basis of its claims, Ronsco seeks the following damages:

(a) General damages in the amount of \$1,000,000;

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<sup>21</sup> Amended SOC, para 38, 39, Ex A to Gutteridge Aff, RMR, p 14.

<sup>22</sup> Amended SOC, paras. 43, 50-51, Ex A to Gutteridge Aff, RMR, p 15, 16.

<sup>23</sup> Amended SOC, paras. 42, 44, Ex A to Gutteridge Aff, RMR, p 15.

<sup>24</sup> Amended SOC, paras. 16, 17, 49, Ex A to Gutteridge Aff, RMR, p 9-10, 16.

- (b) Special damages in the amount \$1,006,641.91 compensating Ronsco for professional services incurred as a result of CBSA's actions;
- (c) \$2,544,628 in amounts erroneously charged to Ronsco by CBSA as follows:
  - (i) \$2,434,002.31 in retroactive duties;
  - (ii) \$109,626.07 in interest; and
  - (iii) \$1,000 as an Administrative Monetary Penalty.

## **PART II - STATEMENT OF ISSUES**

39. The issues on this motion are:

- (a) Is it plain and obvious that Ronsco's public law claim against CBSA has no chance of success?
- (b) Is it plain and obvious that Ronsco's claim for negligence against CBSA has no chance of success?
- (c) Are the Defendants estopped from asserting that Ronsco should have pursued "reason to believe" under s. 60 of the *Customs Act*, given CBSA's previous representations contradicting their current position?
- (d) Is it plain and obvious that this Court does not have jurisdiction to hear this matter?

## **PART III - SUBMISSIONS**

### **LAW ON MOTION TO STRIKE**

40. The Federal Court of Appeal has articulated the framework for assessing a motion to strike under Rule 221 as follows: "on a motion to strike, all allegations in the claim must be taken as true and . . . the claim is to be struck *only if it is plain and obvious that the claim will fail.*"<sup>25</sup> [emphasis added]

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<sup>25</sup> *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, ("Paradis Honey") [para 76](#), BOA, Tab 11.

41. The law is clear that a claim should not be struck solely because it is novel. The Supreme Court of Canada has held that a court must be “generous and err on the side of permitting a novel but arguable claim to proceed to trial.”<sup>26</sup>

42. When considering technical procedural and jurisdiction arguments of the government on a motion to strike, the Supreme Court of Canada has made clear that courts must take a practical approach that prioritizes “access to justice”:

People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court’s approach should be practical and pragmatic with that objective in mind.<sup>27</sup>

43. This approach is consistent with the guiding principle of the *Federal Courts Rules* set out in Rule 3, requiring that this Court interpret and apply the Rules in a manner that “secure[s] the just, most expeditious and least expensive determination of every proceeding on its merits.”

44. When a claim is struck pursuant to Rule 221, Courts will often grant a plaintiff leave to amend its claim. A claim may only be struck without leave to amend when it is clear that the claim cannot be cured by amendment.<sup>28</sup>

## **RONSCO’S PUBLIC LAW CLAIM SHOULD NOT BE STRUCK**

### **A. RONSCO HAS PLEADED THE CONSTITUENT ELEMENTS**

45. Ronsco’s public law claim should not be struck, as it is not plain and obvious that the claim will fail. To the contrary, the Defendants do not assert that Ronsco has failed to plead the requisite elements of the claim.<sup>29</sup>

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<sup>26</sup> *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (“**Imperial Tobacco**”) [para 21](#), BOA, Tab 12.

<sup>27</sup> *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, (“**Telezone**”), [para 18](#), BOA Tab 6.

<sup>28</sup> *Simon v. Canada*, 2011 FCA 6, [paras. 8, 14, 21](#), BOA, Tab 14.

<sup>29</sup> The Defendants’ arguments appear to relate solely to the damages sought by Ronsco with respect to this claim, which will be addressed in more detail below.

46. In *Paradis Honey Ltd. v. Canada*, the Federal Court of Appeal recognized a cause of action for breach of public law duties, stating that “monetary relief based on public law principles qualifies as the sort of novel claim that should not be struck on a motion to strike.”<sup>30</sup> Specifically, the elements of a claim for breach of public law duties (which is separate and distinct from a claim for negligence) are as follows:<sup>31</sup>

- (a) A public law authority acts unacceptably or indefensibly in the administrative law sense; and
- (b) As a matter of discretion, a remedy should be granted.

47. When exercising its discretion, on the merits, the trial court should consider the compensatory objective of monetary relief and the quality of the public authority’s conduct.<sup>32</sup>

48. Here, Ronsco has specifically pleaded both elements required by *Paradis Honey* and the material facts underlying those claims in detail.<sup>33</sup> In particular, Ronsco pleads that CBSA breached its public law duties by treating Ronsco differently than its similarly situated competitors, unfairly favouring those competitors and creating a competitive disadvantage for Ronsco by imposing retroactive duties on Ronsco but not on any other company importing similar goods.<sup>34</sup> CBSA did so after specifically representing to Ronsco that it would not be required to pay retroactive duties.<sup>35</sup> As set out in more detail below, the only way to remedy these wrongs is to award Ronsco damages compensating it for the unfairness and competitive disadvantage it suffered, which Ronsco quantifies in its statement of claim as being equal to Ronsco’s general damages claim and the amount of the retroactive duties.<sup>36</sup>

49. Further, CBSA has taken several contradictory procedural positions (including on this motion), which have resulted in Ronsco incurring significant and unnecessary

<sup>30</sup> *Paradis Honey*, [para 118](#), BOA, Tab 11.

<sup>31</sup> *Paradis Honey*, [para 132](#), BOA, Tab 11.

<sup>32</sup> *Paradis Honey*, [paras. 143-144](#), BOA, Tab 11.

<sup>33</sup> Amended SOC, paras. 47, 48 and 59, Ex A to Gutteridge Aff, RMR, pp 15, 16, 18.

<sup>34</sup> Amended SOC, paras. 49-50, Ex A to Gutteridge Aff, RMR, p 16.

<sup>35</sup> Amended SOC, paras. 53, Ex A to Gutteridge Aff, RMR, p 16.

<sup>36</sup> Amended SOC, para 67 (a)(c), Ex A to Gutteridge Aff, RMR, pp 20-21.

costs and commencing an unnecessary multiplicity of proceedings. These wrongs should be remedied by reimbursing Ronsco for the professional fees it incurred as a result of CBSA's actions, as Ronsco also seeks in its claim.<sup>37</sup>

50. The quality of CBSA's conduct in this matter more than justifies monetary relief to Ronsco and rises to the level of "significant maladministration" that is offensive to public law values, like the conduct alleged in *Paradis Honey*.<sup>38</sup> Ronsco's allegations of wrongdoing by the CBSA go far beyond the July 2020 DAS and the issue of "reason to believe." As set out in more detail below, Ronsco's public law claim cannot be heard by the CITT, as the CITT has no jurisdiction to determine government liability or award damages. Ronsco's claim and the relief that it seeks can only be adjudicated in this proceeding.

51. CBSA has advanced no argument that the elements of Ronsco's public law claim are not properly pleaded, and, as such, there is no basis to strike Ronsco's claim for breach of public law duties.

## B. RONSCO HAS SUFFICIENTLY PLEADED ITS GENERAL DAMAGES

52. Ronsco has clearly pleaded that it seeks \$1,000,000 in general damages caused by CBSA's breaches of public law duties and its breaches of the duty of care.<sup>39</sup> Ronsco pleads the injuries caused to it with particularity: Ronsco was unjustifiably treated differently than similarly situated importers that were favoured over Ronsco, to Ronsco's detriment and competitive disadvantage.<sup>40</sup> For example, as a result of the retroactive duties imposed, Ronsco was unable to complete a planned expansion of its operations into western Canada.<sup>41</sup> CBSA's unfair treatment of Ronsco can only be compensated through an award of general damages.

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<sup>37</sup> Amended SOC, paras 55, 67 (b), Ex A to Gutteridge Aff, RMR, pp 17, 21.

<sup>38</sup> *Paradis Honey*, [paras 144](#), BOA, Tab 11; Amended SOC, para 48, Ex A to Gutteridge Aff, RMR, p 16.

<sup>39</sup> Amended SOC, paras. 59, 65, 67 (a), Ex A to Gutteridge Aff, RMR, pp 18, 20, 21.

<sup>40</sup> Amended SOC, paras. 49, 59, Ex A to Gutteridge Aff, RMR, pp 16, 18.

<sup>41</sup> Amended SOC, paras 16-17, Ex A to Gutteridge Aff, RMR, pp 9-10.

53. The Defendants do not advance any argument that general damages are not available to Ronsco as a matter of law. Instead, they broadly argue that Ronsco has not pleaded damages with sufficient particularity while failing to engage with any of the specific allegations identified above, let alone offering any purported explanation of how these allegations are deficient.<sup>42</sup>

54. The Federal Court of Appeal has made clear that “the Rules only require that the claim specify the nature of the damages claimed” and that “[a] general description of the damages claimed [is] sufficient.”<sup>43</sup> Ronsco has more than met this standard.

55. It is telling that the Defendants have not cited a single case where a claim was struck because of a failure to plead general damages with particularity. This is because general damages, in particular, are of a general nature and do not lend themselves to pleading with any greater particularity than Ronsco already has. The Federal Court has held on a motion for particulars that “it is not necessary . . . for the purposes of pleadings” that general damages be particularized.<sup>44</sup> Regardless, Ronsco has pleaded general damages with sufficient particularity, and it is far from plain or obvious that a claim for general damages will not succeed.

#### C. RONSCO’S CLAIM IS NOT A COLLATERAL ATTACK AND DAMAGES SHOULD BE ASSESSED AT TRIAL

56. Ronsco’s claim makes clear that, as a result of CBSA’s unfair and unjustified treatment in imposing retroactive duties on Ronsco and not its competitors, Ronsco suffered losses quantified as \$2,543,628.30 (including interest).<sup>45</sup>

57. The Defendants’ assertion that this is a collateral attack and that Ronsco should instead challenge the July 2020 DAS before the CITT is without merit. In its decision dated March 17, 2020, the CITT specifically held that its jurisdiction is limited to

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<sup>42</sup> Defendants’ Written Submissions paras 93-94.

<sup>43</sup> *Condon v. Canada*, 2015 FCA 159, [paras 20-22](#), BOA, Tab 7.

<sup>44</sup> *Governor and Co. of Adventures v. Beaumark Mirror Products Inc.* [1986] F.C.J. No. 834 at p 1, BOA, Tab 8.

<sup>45</sup> Amended SOC, paras. 49-51, 54, 59, 64, 65, 67 (c), Ex A to Gutteridge Aff, RMR, p 16-21.

determinations of tariff classification and has “no power to determine how the tariff classification should ultimately impact the appellant with respect to the duties imposed.”<sup>46</sup> The CITT, by its own account, would have no jurisdiction to order the Defendants to pay Ronsco’s damages. This is because s. 67 of the *Customs Act* does not confer any jurisdiction to award damages.

58. Despite this, the Defendants argue throughout their submissions that Ronsco should have brought this matter to the CITT, without acknowledging that the CITT has no jurisdiction to award the damages sought by Ronsco.<sup>47</sup> Their position would require that Ronsco challenge the July 2020 DAS in the CITT, while simultaneously challenging, in this Court, the imposition of the \$1,000 penalty, and seeking damages. All of those proceedings would require the decision maker to consider “reason to believe”. The Defendants’ position is without merit, inefficient, and entirely impractical.

59. In *Canada (Attorney General) v. Telezone*, the Supreme Court of Canada rejected a similar argument by the Attorney General that a litigant must commence a judicial review of an administrative decision before it can pursue a claim for damages flowing from that decision. The Court held that Canada’s position entailed “an awkward and duplicative two-court procedure” and held that a damages claim can be brought independently to “directly or indirectly challenge the validity or lawfulness of federal decisions.”<sup>48</sup>

60. In *Brake v. Canada (Attorney General)*, the Federal Court of Appeal similarly recognized that requiring multiple proceedings in these types of circumstances is an access to justice concern that imposes difficulties on litigants and creates the potential for the expenditure of unnecessary judicial resources and conflicting results.<sup>49</sup>

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<sup>46</sup>CITT Decision, para 63, Defendants MR, Ex D to Roy Aff., p. 75.

<sup>47</sup> Defendants’ Written Submissions, paras 50, 58.

<sup>48</sup> *Telezone*, 2010 SCC 62, [paras. 23, 30](#), BOA, Tab 6.

<sup>49</sup> *Brake v. Canada (Attorney General)*, 2019 FCA 274 (“*Brake*”), [paras. 23-28](#), BOA, Tab 5.

61. Similarly, the plaintiff beekeepers in *Paradis Honey* did not challenge the conduct at issue in that case by way of judicial review, and the Federal Court of Appeal found that their claim for damages could move forward. The Court of Appeal found that, as pleaded, “Canada’s conduct had a flavour of maladministration associated with it . . . [which] . . . can prompt an exercise of discretion in favour of monetary relief.”<sup>50</sup>

62. In considering damages, the Court of Appeal focused on the nature of the public authority’s conduct, not whether the plaintiffs had separately challenged the administrator’s decision. This Court should apply the same analysis here. Ronsco has pleaded conduct by the CBSA that rises to the level of maladministration justifying monetary relief, including CBSA’s unequal treatment of Ronsco as compared to competitors, its series of contradictory positions, and its reneging on representations to Ronsco that it would not be charged retroactive duties.

63. Furthermore, the Supreme Court has made clear that the collateral attack argument asserted by the plaintiff is properly asserted as a defence at trial, not on a motion to strike. That is because when a party has pleaded a reasonable cause of action for damages, “he or she should generally be allowed to get on with it.”<sup>51</sup>

64. Ronsco’s position is that its damages should include compensation to account for the losses associated with the retroactive duties that it paid. If the Defendants disagree with how Ronso quantifies its damages, they can advance that argument at trial. But there is no basis to strike Ronsco’s claim based on a disagreement about the appropriate measure of damages.

65. Like *Paradis Honey*, *Telezone*, and *Brake*, this case is “fundamentally about access to justice” and the Defendants here should not be permitted to insulate themselves from liability using technical procedural arguments. This Court’s approach should be “practical and pragmatic” bearing in mind the objective of minimizing “unnecessary

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<sup>50</sup> *Paradis Honey*, [paras. 147-148](#), BOA, Tab 11.

<sup>51</sup> *Canada (Attorney General) v. Telezone*, 2010 SCC 62 (“*Telezone*”), [paras. 63, 78](#), BOA, Tab 6.

cost and complexity.”<sup>52</sup> Ronsco’s claim for damages is its only means of seeking meaningful redress and those claims can only be adjudicated on their merits in this Court. There is no basis to strike Ronsco’s claim for damages, as it is far from plain or obvious that it will fail.<sup>53</sup>

#### **D. RONSCO PROPERLY SEEKS DAMAGES FOR PROFESSIONAL FEES**

66. Ronsco seeks damages for professional fees incurred as a result of CBSA’s inconsistent procedural positions, both under its public law claim and its claim in negligence.<sup>54</sup> There is no basis for striking this portion of the relief sought.

67. Courts regularly award damages for professional fees incurred as a result of a defendants’ negligence or other tortious conduct.<sup>55</sup> These are simply pecuniary damages that flow from the defendants’ conduct and there is no basis to strike them.

68. Tellingly, the defendants have not cited a single case where a defendant successfully brought a motion to strike a claim for professional fees incurred. Instead, the Defendants broadly assert that the plaintiff’s claims are an abuse of process, without in any way substantiating that argument.<sup>56</sup> They cite inapposite cases dealing with the re-litigation of claims and the potential for inconsistent results and advance no argument that those cases are in any way analogous.<sup>57</sup> That is because they are not. In fact, the

<sup>52</sup> *Telezone*, para 18, BOA, Tab 6.

<sup>53</sup> In the alternative, even if this Court strikes the claim for damages quantified as equal to the retroactive duties, it should not strike the entirety of the Plaintiff’s public law claim. Ronsco also claims general damages and professional fees as damages under the public law claim.

<sup>54</sup> Amended SOC, paras. 55, 56, 57, 58, 64(d)(e), 65, and 67(b), Ex A to Gutteridge Aff, RMR, pp 17, 18, 20.

<sup>55</sup> See e.g. *Granville Savings and Mortgage Corp. v Slevin*, [1993] 4 SCR 279, p 281, BOA, Tab 9; *Teskey v. Toronto Transit Commission*, [2003] OJ No 5315, On Sup Ct, paras 26, 41, BOA, Tab 15; *Beckstead v Ottawa (City)*, [1995] OJ No 781, aff’d [1997] OJ No. 5169 (On Ct App), p 11, BOA, Tab 4.

<sup>56</sup> Defendants’ Written Submissions, para 98.

<sup>57</sup> See *Morel v Canada*, 2008 FCA 53, at paras 17, 33, 35, 94, Defendants’ Book of Authorities (“DBOA”), Tab 39; *Latham v Canada*, 2019 CanLII 34498 (FC), at paras. 17-19, 21, 33, DBOA, Tab 33.

only threat of inconsistent results here, is if the Defendants' position is affirmed and the Plaintiff is forced to pursue a CITT appeal and a s. 135 action in parallel, litigating the issue of "reason to believe" in both proceedings.

69. While the Defendants may take issue with the quantification of damages claimed by the Plaintiff, those arguments are not appropriately advanced on a motion to strike. The Defendants are free to assert them at trial, along with any supposed abuse of process argument. The Defendants have provided no basis for this Court to strike Ronsco's request for professional fees and the matter should be heard on its merits.

## **RONSCO'S NEGLIGENCE CLAIM SHOULD NOT BE STRUCK**

### **A. RONSCO HAS SUFFICIENTLY PLEADED PROXIMITY**

70. Ronsco has specifically pleaded the facts and circumstances giving rise to a duty of care and linked them to specific obligations of the CBSA with respect to that duty.<sup>58</sup> There is no basis to strike Ronsco's detailed claim at this stage, and the Defendants have failed to articulate any credible reason in law to do so.

71. The law is clear that public bodies owe a duty of care to individuals and organizations in certain circumstances. To plead a duty of care, the allegations must "disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff." If proximity is established, the Court will then look to whether there are policy reasons that negate a duty of care.<sup>59</sup>

72. On a motion to strike, The Supreme Court of Canada has made clear that:

where the asserted basis for proximity is grounded in specific conduct and interactions, *ruling a claim out at the proximity stage may be difficult*. So long as there is a *reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity*, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial . . .<sup>60</sup> *[emphasis added]*

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<sup>58</sup> Amended SOC, paras. 61, 63, Ex A to Gutteridge Aff, RMR, pp 18-19.

<sup>59</sup> *Imperial Tobacco*, [para 39](#), BOA, Tab 12.

<sup>60</sup> *Imperial Tobacco*, [para 47](#), BOA, Tab 12.

73. Here, CBSA allowed importers to import identical or substantially similar goods under Tariff 21 for years without penalty or even investigation. CBSA knew that its conduct led Ronsco, and the industry as a whole, to believe that Tariff 21 was the appropriate classification for the goods. CBSA, then, knowingly imposed retroactive duties solely on Ronsco, and no other importer, with a full appreciation of the consequences this would have for Ronsco, and without justification.<sup>61</sup>

74. CBSA admitted through Mr. Band that Ronsco did not have “reason to believe” that its tariff declarations were incorrect and assured Ronsco that it would not have to pay retroactive duties, consistent with the CBSA’s own internal reassessment policy set out in D11-6-10. Section 27 of that policy includes mandatory language providing that where an importer did not have “reason to believe,” it “will be required to amend all incorrect declarations only for the verification period . . . and going forward” (i.e. not going back four years in retroactive duties.)<sup>62</sup> There is no doubt that CBSA’s actions and representations gave rise to a sufficiently close relationship with Ronsco in which its failure to act with reasonable care would foreseeably cause harm to Ronsco.

75. Although the Defendants attempt to broadly argue that the *Customs Act* “run[s] contrary” to a relationship of proximity, they have failed to point to any feature of the legislation that would *exclude* proximity in the context of the CBSA’s conduct described above. They have not cited any precedent for a Court finding no relationship of proximity between the CBSA and an importer.

76. The combination of CBSA’s course of conduct, representations, and internal policies gives rise to a relationship of proximity with Ronsco. At the very least, it is neither plain nor obvious that Ronsco’s allegations of proximity are bound to fail.

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<sup>61</sup> Amended SOC, paras. 12, 21, 22, 24, 42, 49, 61(d)(e)(f), Ex A to Gutteridge Aff, RMR, pp 9, 11, 15, 16, 18, 19.

<sup>62</sup> Amended SOC, paras. 21, 22, 61(b)(c), Ex A to Gutteridge Aff, RMR, pp 11, 18; [CBSA Memorandum D11-6-10](#), s 27, BOA, Tab 17.

## B. RESIDUAL POLICY CONSIDERATIONS DO NOT NEGATE A DUTY OF CARE

77. Recognizing a duty of care in the specific circumstances of this case would not lead to indeterminate liability, which is the only policy reason cited by the Defendants. This case involves unfair conduct by the CBSA targeted at a single importer in a narrow field of the economy that is significantly impacted by CBSA's conduct. Any duty of care recognized would be limited and determinate.

78. Like the claims in *Paradis Honey*, the circumstances alleged by Ronsco are “uncommon,” and any duty of care would be limited to similar circumstances.<sup>63</sup> A court hearing a trial of this matter on its merits would not need to recognize a general duty of care in the imposition of all duties by CBSA. Here, the duty arises given the narrow band of producers that import similar goods, the narrow band of consumers in the railway industry that purchase from these producers, the resulting propensity for CBSA’s conduct to affect the competitiveness of these importers and their behaviour in importing goods, and the disproportionate effect of unequal treatment of a single importer in this small market. The Defendants’ suggestion that allowing this case to move forward would impose a broad duty of care is without merit, as these circumstances are uncommon.

79. This case is also similar to *Paradis Honey* in that the relevant reassessment policy is mandatory, providing that where an importer does not have “reason to believe,” it “will be required to amend all incorrect declarations *only* for the verification period . . . and going forward” [emphasis added].<sup>64</sup> Ronsco asserts that these circumstances existed with the mandatory result that CBSA should not have required Ronsco to pay retroactive duties going back four years. Like *Paradis Honey*, there is no inconsistency here between a private law duty to Ronsco and any broader public duty of CBSA to regulate cross-border movement in a consistent manner. Ronsco is asserting that CBSA in fact regulated cross-border movement inconsistently by applying different rules to it

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<sup>63</sup> *Paradis Honey*, [para 100](#), BOA, Tab 11.

<sup>64</sup> *Paradis Honey*, [para 95](#), BOA, Tab 11; [CBSA Memorandum D11-6-10](#), s. 27, BOA, Tab 17.

than to any other players in its industry, following which it failed to apply its own internal policy in the manner required.

### **CBSA IS ESTOPPED FROM ASSERTING THAT THIS COURT IS WITHOUT JURISDICTION**

80. Throughout its appeal process, Ronsco has relied on and followed the advice of CBSA officials as to the appropriate procedure to challenge CBSA's findings with respect to "reason to believe." That is the reason that this case initially came before this Court as a s. 135 appeal (though it has now been amended to advance claims in relation to significant public law maladministration and negligence). CBSA should be estopped from asserting that this court is without jurisdiction because that position runs contrary to their previous clear and unambiguous representations to Ronsco.

81. It is well established that the doctrine of estoppel applies to public authorities:

In the public law context, promissory estoppel requires proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct . . .<sup>65</sup>

82. Ronsco attempted to raise "reason to believe" in 2018 in its request for re-determination pursuant to s. 60 of the *Customs Act*.<sup>66</sup> In response, CBSA (through Ms. Ogilvie) represented to Ronsco that the CBSA did "not have jurisdiction under a section 60 appeal to deal with reason to believe . . . Reason to believe can only be dealt with under the appeal of an AMPs penalty under Section 129 of the Customs Act."<sup>67</sup> This is a clear and unambiguous representation by the CBSA, with the purpose of inducing

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<sup>65</sup> *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34, [para 19](#), BOA, Tab 10; see also *Samsung Electronics Canada Inc. v. Canada (Health)*, 2020 FC 1103, [paras. 31-38](#), BOA, Tab 13.

<sup>66</sup> Request for re-determination dated September 26, 2018, Ex B to Gutteridge Aff, RMR, pp 41-48.

<sup>67</sup> Amended SOC, para 27, Ex A to Gutteridge Aff, RMR, p 12; Ogilvie E-mail, Ex C to Gutteridge Aff, RMR, p 52.

Ronsco not to pursue “reason to believe” in its request for re-determination and on any subsequent appeal to the CITT.

83. Ronsco relied on the CBSA’s representations, and as a result, did not raise “reason to believe” in its appeal to the CITT under section 67 of the *Customs Act*.<sup>68</sup> Instead, Ronsco waited, as it was advised to do, to receive the NPA, and only raised “reason to believe” in its appeal to the minister and subsequently in its s. 135 action, consistent with Ms. Ogilvie’s instructions to Ronsco.<sup>69</sup>

84. Then, in August of 2020, CBSA, through Ms. Alimohamed, represented to Ronsco that “reason to believe” should have been challenged through a judicial review and that “there is no review mechanism provided within the *Customs Act* that allows for an appeal or review of the application of the reassessment policy.”<sup>70</sup>

85. This is a clear and unambiguous statement made by the CBSA; this time with the purpose of inducing Ronsco to challenge “reason to believe” through a judicial review. Ronsco relied on the representation and filed a judicial review to preserve its rights. That proceeding is now being held in abeyance.

86. Given the above representations by CBSA officials, the Defendants are estopped from now asserting that the *Customs Act* removes jurisdiction from this Court and that “reason to believe” should be addressed before the CITT. Ms. Ogilvie told Ronsco that there was no jurisdiction to review “reason to believe” through the s. 60 and 67 appeals process leading to the CITT. Ms. Alimohamed told Ronsco that the *Customs Act* provides no review mechanism for this matter.

87. Ms. Alimohamed’s representations contradicted Ms. Ogilvie’s to the extent that she directed Ronsco to seek a judicial review instead of a Notice of Penalty Assessment appeal. However, both representations were consistent, to the extent that they advised

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<sup>68</sup> Notice of Appeal to the CITT dated April 10, 2019, Ex D to Gutteridge Aff, RMR, pp 62-63.

<sup>69</sup> Ltr. to B. Blair dated December 17, 2019, Ex E to Gutteridge Aff, RMR, pp 69-79.

<sup>70</sup> Amended SOC, para 27, Ex A to Gutteridge Aff, RMR, p 12; Ogilvie E-mail, Ex C to Gutteridge Aff, RMR, p 52.

Ronsco that it could not pursue “reason to believe” before the CITT. Accordingly, the Defendants are doubly estopped from now attempting to argue that the *Customs Act* requires this matter to go before the CITT.

88. Importantly, applying estoppel in this case will not prevent the application of the *Customs Act*, which is a consideration in public law estoppel cases.<sup>71</sup> To the contrary, Ronsco is asking this Court to interpret the legislation in a manner that is consistent with the interpretations previously expressed by the CBSA through the representations of both Ms. Ogilvie and Ms. Alimohamed.

89. Moreover, this interpretation is also consistent with the position taken by the CBSA before the CITT in *Jockey Canada Company v President of the Canada Border Services Agency*. In that case, CBSA argued that “it would be for the Federal Court, not the [CITT], to decide when the importer had ‘reason to believe’ that its declarations were incorrect.”<sup>72</sup> Meanwhile, two years earlier, in the very same matter, the CBSA appears to have taken the position that “reason to believe” could only be dealt with by the CITT.<sup>73</sup> Ultimately, the CITT decided the matter before it without recourse to any determination on the importer’s “reason to believe”.

90. In the *Jockey Canada* cases, the CBSA took evolving and contradictory positions on jurisdiction so as to bar the importer from ever making its case on “reason to believe” either before the CITT or the Federal Court. The Defendants are employing the exact same strategy here to try to prevent Ronsco from having its case heard.

91. The Defendants’ conduct should not be countenanced. It offends the principles of judicial efficiency and access to justice that underly this Court’s rules.<sup>74</sup> The

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<sup>71</sup> See *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34, [para 20](#), DBOA, Tab 10.

<sup>72</sup> *Jockey Canada Company v President of the Canada Border Services Agency*, 2012 CanLII 85177, (“**Jockey Canada CITT**”) [para 260](#), DBOA, Tab 31.

<sup>73</sup> *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 396, [paras. 29-30](#), DBOA, Tab 30.

<sup>74</sup> [Federal Courts Rules](#), SOR/98-106, Rule 3, BOA, Tab 3.

Defendants are estopped from asserting that this Court has no jurisdiction, given CBSA's earlier clear and unambiguous representations, on which Ronsco relied.

### **THIS COURT HAS JURISDICTION**

92. The process contained in sections 59 to 68 of the *Customs Act* does not oust this Court's jurisdiction to quash the July 2020 DAS based on Ronsco's lack of "reason to believe" or to award damages based on CBSA's conduct.

93. Subsection 60(1) of the *Customs Act* limits the scope of what can be reviewed by the CBSA President (and in turn the CITT) to re-determinations of "origin, tariff classification, value for duty or marking."<sup>75</sup> The President's decision can then be appealed to the CITT pursuant to section 67. But that provision does not include any language conferring a broader jurisdiction on the CITT to consider issues beyond the scope of what is set out in subsection 60(1).

94. Ronsco's claim does not concern the origin, tariff classification, or value for duty or marking of the rough bore wheels. Ronsco claims damages based on a course of maladministration by the CBSA that includes unequal treatment of Ronsco and its erroneous finding that Ronsco had "reason to believe" its declarations were incorrect. None of these matters come within the scope of the s. 59-68 framework and they do not fall within the CITT's jurisdiction.

95. Section 67 of the *Customs Act* also does not confer any jurisdiction on the CITT to determine Ronsco's public law claims, its claim in negligence or to award damages. The provision simply allows the CITT to hear appeals of decisions made under s. 60 or 61, limited to the matters set out in those provisions. The CITT was very clear with Ronsco that it can only consider tariff classification and it "has no power to determine how the tariff classification should ultimately impact the appellant with respect to the duties imposed."<sup>76</sup> Similarly, Ms. Ogilvie made clear to Ronsco that "reason to believe"

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<sup>75</sup> *Customs Act* s. 60(1), BOA, Tab 1.

<sup>76</sup> CITT Decision, para 63, Ex D Roy Aff, DMR, p 75.

does not fall within the jurisdiction of this framework, which was echoed by Ms. Alimohamed.<sup>77</sup>

96. In that sense, this case differs significantly from *Fritz Marketing Inc. v. Canada*, which the Defendants cite to suggest that this Court is without jurisdiction. In *Fritz*, the Federal Court of Appeal specifically grounded its decision in a finding that no party had even argued that the CITT was without jurisdiction to exclude evidence on Charter grounds, which was the basis on which the aggrieved party sought to challenge the DAS at issue.<sup>78</sup> Here, by contrast, “reason to believe” and Ronsco’s damages claims specifically fall outside the scope of the statutory framework, and the CITT therefore does not have jurisdiction to quash the July 2020 DAS in this case and it cannot grant damages. The jurisdiction must then lie in this Court.

97. Importantly, Ronsco’s claims go well beyond the issue of “reason to believe,” as they are grounded in claims of government liability based on a course of conduct and representations by CBSA that include imposing duties on Ronsco that were not imposed on any other similarly situated importer. The CITT has no jurisdiction to consider Ronsco’s claim or these broader issues.

98. As a mater of judicial efficiency, the July 2020 DAS should be addressed in this proceeding, as its validity will be determined by whether or not Ronsco had “reason to believe.” This Court will need to consider that issue both in assessing Ronsco’s claims for damages (to which the issue is relevant though not determinative) and, under s. 135 of the *Customs Act*, whether Ronsco should be required to pay the \$1,000 penalty.

99. Notably, this Court, of course, also has jurisdiction to order declaratory relief under s. 18(1)(a) of the *Federal Courts Act*, which would allow this Court to declare that the July 2020 DAS is invalid or was not properly decided. This also distinguishes this

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<sup>77</sup> Ogilvie E-mail, Ex C to Gutteridge Aff, RMR, p 52; Alimohamed E-mail, Ex F to Gutteridge Aff, RMR, pp 82-83.

<sup>78</sup> *Fritz Marketing Inc. v. Canada*, 2009 FCA 62, [para 36](#), DBOA, Tab 20.

case from *Fritz*, where the aggrieved party brought an application for judicial review under s. 18.1 of the *Federal Courts Act*.<sup>79</sup>

100. Ronsco's Federal Court action is the only proceeding in which the July 2020 DAS can be declared invalid on the basis of "reason to believe" and the only proceeding in which Ronsco's public law claim and its claim in negligence can be heard. Notably, even if this Court finds that it has no jurisdiction to declare invalid the July 2020 DAS (which it should not), Ronsco's claims in negligence and public law should be allowed to proceed, as those damages claims do not require this Court to quash the July 2020 DAS.

### **THE DEFENDANTS' POSITION WOULD REQUIRE AN UNNECESSARY MULTIPLICITY OF PROCEEDINGS**

101. Ronsco's current action is the only proceeding that can "secure the just, most expeditious and least expensive determination" of this matter on its merits.<sup>80</sup>

102. The positions advanced by the Defendants on this motion would have the absurd result of requiring Ronsco to seek the relief sought in this action through at least three or four separate proceedings:

- (a) A s. 135 action to challenge the minister's decision upholding the NPA based on a finding that Ronsco had "reason to believe" that the goods at issue could not be imported under Tariff 21;
- (b) An action to recover the damages suffered by Ronsco, which could be heard with the s. 135 action;
- (c) A separate judicial review to challenge the \$1,000 penalty amount imposed under the NPA,<sup>81</sup> and
- (d) An appeal to the CITT of the July 2020 DAS, which imposed retroactive duties on Ronsco based on a finding that Ronsco had "reason to believe" that the goods at issue could not be imported under Tariff 21.

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<sup>79</sup> *Fritz*, para 28, DBOA, Tab 20.

<sup>80</sup> *Federal Courts Rules*, Rule 3, BOA, Tab 3.

<sup>81</sup> Written Submissions of the Defendants, para 42, DMR, p 210.

103. The Defendants' position is impractical, inefficient, and overly complicated. It would create unnecessary procedural obstacles for Ronsco and unreasonably burden the CITT, the Federal Court, and the litigants. Moreover, this multiplicity of proceedings would create a significant risk of contradictory decisions, as "reason to believe" would need to be argued in at least the s. 135 appeal and the appeal to the CITT and would be relevant to Ronsco's action for damages.

104. The Defendants' effort to complicate the within procedure resembles the position taken by the Attorney General in *Telezone* that the plaintiff could not pursue its action for damages without bringing a judicial review in Federal Court. That position was resoundingly rejected by the Supreme Court because it was impractical and created an obstacle to access to justice.<sup>82</sup>

105. The Defendants' position should similarly be rejected here, consistent with this Court's mandate to secure a just and efficient resolution of this matter on its merits. Ronsco's claim should proceed to trial so that this Court can consider the full scope of CBSA's wrongdoing and the full scope of the relief sought by Ronsco.

#### **IF RONSCO HAD NO REASON TO BELIEVE, IT IS NOT REQUIRED TO PAY RETROACTIVE DUTIES**

106. Section 1 of the CBSA reassessment policy D11-6-10 sets out its purpose:

The subject of this memorandum is the reassessment period for which importers must correct their declarations of origin, tariff classification, and value for duty after identifying or receiving specific information that gives them reason to believe that their previous declarations are incorrect.<sup>83</sup>

107. Section 27 of D11-6-10 makes clear that where an importer did not have "reason to believe" at the time of its declarations, it is only required to correct its declarations and pay duties for the verification period and going forward:

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<sup>82</sup> *Telezone*, paras 18-23, BOA, Tab 6.

<sup>83</sup> Reassessment Policy, Memorandum D11-6-10, s. 1, BOA, Tab 17.

In the case of a trade compliance verification where the CBSA determines that specific information was not available, the importer will not be considered to have had "reason to believe". The importer *will be required* to amend all incorrect declarations *only* for the *verification period*, as identified in the CBSA's initial notification letter *and going forward*.<sup>84</sup> [emphasis added.]

108. Importantly, this language is mandatory ("will be required" and "only"), setting specific and non-discretionary limits on the applicable reassessment period. The mandatory language limits the duties that CBSA may impose (where an importer did not have "reason to believe") to "only . . . the verification period . . . and going forward."

109. It makes good sense that the consequences of a re-assessment would be less severe for an importer who did not have "reason to believe" that its declarations were incorrect. Canada's system of tariffs is complex and importers can very easily make inadvertent mistakes in their declarations, especially in circumstances where, like Ronsco, they received advice that their declarations were correct and the entire industry was importing substantially similar goods under the same tariff for many years.

110. In these circumstances, if an importer can establish that they had "no reason to believe," they should be relieved from paying the same duties as an importer who knowingly or recklessly made incorrect declarations, consistent with D11-6-10. CBSA's Director General, Mr. Band, appears to have agreed with the policy reasons underlying the concept of "reason to believe" when he assured Ronsco that it would not be required to pay retroactive duties, given the unclear nature of the Tarriff.

111. CBSA's late-breaking argument that Ronsco's "reason to believe" would have no effect on the duties owed is inconsistent with CBSA's own internal policies and would render the concept of "reason to believe" meaningless. Notably, before the within proceeding, CBSA's officials had never raised this interpretation with Ronsco, despite Ronsco making very clear, its position that the imposition of retroactive duties was tied to "reason to believe." One would have expected Mr. Band, Ms. Ogilvie, Ms. Alimohamed or some other CBSA official to let Ronsco know that CBSA did not see

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<sup>84</sup> [Reassessment Policy](#), Memorandum D11-6-10, s. 27, BOA, Tab 17.

any connection between “reason to believe” and retroactive duties, if in fact that was CBSA’s interpretation.

112. The Defendants now argue that s. 32.2(2) and (4) of the *Customs Act* require an importer to pay retroactive duties whether or not it had “reason to believe” at the time of import. This cannot be the case. CBSA has an internal policy that specifically addresses the interaction between an importer’s “reason to believe” and the reassessment period.<sup>85</sup> Why would CBSA even publish such a policy if “reason to believe” had no effect on the required duties?

113. The only case that the Defendants cite (*Jockey Canada CITT*) is a CITT decision where the tribunal did not consider the interaction between D11-6-10 and the *Customs Act* and therefore, did not fully consider the issue. In fact, this is the very same case in which the CITT declined to make a finding on “reason to believe” after CBSA argued that the CITT had no jurisdiction to consider the issue.<sup>86</sup> This decision is, of course, not binding on this Court and it is also entirely unpersuasive, as it failed to grapple with the key issues at play here.

114. The *Customs Act* should be interpreted in light of D11-6-10. CBSA must act within the confines of the *Customs Act*, and therefore its own internal policies must be consistent with that legislation. D11-6-10 makes clear that when an importer does not have “reason to believe,” it is required to correct its declarations for “only . . . the verification period . . . and going forward.”<sup>87</sup> Given this, the *Act* cannot be interpreted to require an importer to pay four years of retroactive duties if it did not have “reason to believe.”

115. Even if the Defendants are correct in their interpretation of the *Customs Act* (which they are not), this Court should not strike Ronsco’s claim, given that it has asserted independent bases of liability in public law and negligence grounded in CBSA’s conduct and representations that go well beyond any interpretation of “reason to believe”

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<sup>85</sup> [Reassessment Policy](#), Memorandum D11-6-10, s. 1, BOA, Tab 17.

<sup>86</sup> *Jockey Canada CITT*, paras. 260-261, DBOA, Tab 31.

<sup>87</sup> [Reassessment Policy](#), Memorandum D11-6-10, s. 27, BOA, Tab 17.

under the *Customs Act*. Notably, if the Defendants are right about their interpretation, it would give rise to a further ground for Ronsco's (and many other importers') claims against the CBSA. The necessary consequence of the Defendants' position is that the CBSA has published (and presumably sometimes follows) an internal policy that is inconsistent with its own governing statute. Ronsco and countless other importers have relied on this policy. Like the conduct at issue in this claim, that would also represent significant maladministration offensive to public law values by CBSA.

#### **PART IV - ORDER SOUGHT**

116. That the Defendants' motion be dismissed with costs.

117. In the alternative, if any portion of the Plaintiff's claim is struck, that the Plaintiff be granted leave to amend.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 31st day of August, 2021.

The image shows three handwritten signatures in blue ink. From left to right, they appear to be Colin Baxter, David Taylor, and Chris Trivisonno. The signatures are cursive and fluid.

Colin Baxter / David Taylor / Chris Trivisonno

Solicitors for the Plaintiff

## PART V - LIST OF AUTHORITIES

### Legislation and Regulations

1. *Customs Act*, RSC 1985, c 1 (2nd Supp)
2. *Federal Courts Act*, RSC 1985, c F-7
3. *Federal Courts Rules*, SOR/98-106

### Case Law

4. *Beckstead v Ottawa (City)*, [1995] OJ No 781, aff'd [1997] OJ No. 5169 (On Ct App)
5. *Brake v Canada (Attorney General)*, 2019 FCA 274
6. *Canada (Attorney General) v Telezone*, 2010 SCC 62
7. *Condon v Canada*, 2015 FCA 159
8. *Fritz Marketing Inc. v. Canada*, 2009 FCA 62
9. *Governor and Co of Adventures v Beaumark Mirror Products Inc*, [1986] F.C.J. No. 834
10. *Granville Savings and Mortgage Corp v Slevin*, [1993] 4 SCR 279
11. *Immeubles Jacques Robitaille inc v Québec (City)*, 2014 SCC 34
12. *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 396
13. *Jockey Canada Company v President of the Canada Border Services Agency*, 2012 CanLII 85177
14. *Latham v Canada*, 2019 CanLII 34498 (FC)
15. *Morel v Canada*, 2008 FCA 53
16. *Paradis Honey Ltd v Canada*, 2015 FCA 89
17. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
18. *Samsung Electronics Canada Inc v Canada (Health)*, 2020 FC 1103

19. *Simon v Canada*, 2011 FCA 6
20. *Teskey v Toronto Transit Commission*, [2003] OJ No 5315
21. Order of Prothonotary Molgat dated November 4, 2020 in *Ronsco v. Attorney General of Canada*, T-1037-20

### **Other Sources**

22. Canada Border Services Agency, Memorandum D11-6-10, Reassessment Policy (Jan. 29, 2007), available at <https://www.cbsa-asfc.gc.ca/publications/dm-md/d11/d11-6-10-eng.html>