

CANADIAN TARIFF CLASSIFICATION OF PARTS AND ENTITIES: STATUTORY INTERPRETATION AND PERSUASIVE AUTHORITY

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I. INTRODUCTION

The Canadian customs tariff treatment of parts and entities changed significantly in 1988 when Canada replaced its previous tariff with the Harmonized Commodity Description and Coding System (“Harmonized System” or “HS”).¹ The Harmonized System is a tariff and statistical nomenclature adopted or applied by over 200 countries and economic unions.² This article examines approaches to interpretation of the new tariff since its implementation, discussing the continuing influence of prior Canadian law and the potential use of decisions from other jurisdictions where the HS is also applied.

In most of the cases discussed in the article, the tariff description refers to parts. Disputes deal with the classification of goods imported to be assembled into end products. If the import is classified as a part, it usually benefits from a more favourable tariff treatment than it would receive if it were classified separately. The article also examines the related question of the classification of goods such as large machinery imported in pieces

¹ *Customs Tariff*, RSC 1985, c 41 (3rd Supp), (SC 1987, c 49).

² *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels 14 June 1983, with Protocol of Amendment of 14 December 1987, Can TS 1988 No 38 (entered into force 15 December 1987). As of May 12, 2016, the HS was applied by 207 countries and economic unions, including 154 contracting parties: <www.wcoomd.org>. The text of the Harmonized System is available on the website of the World Customs Organization: <www.wcoomd.org>. Canada’s Customs Tariff is available on the website of the Canada Border Services Agency: <www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2015/menu-eng.html>.

arriving at around the same time, and presented under a tariff description that refers to a complete entity. In those cases, it is necessary to identify which pieces constitute the named entity and are covered by the description.

Three cases illustrate the issues – two old, one new. The *Accessories Machinery* case was decided by the Supreme Court of Canada in 1957.³ The case concerned a replacement electric motor imported for a power shovel. As a unit, the power shovel qualified as machinery of a class or kind not made in Canada, under a tariff description in force at the time that also covered parts. The appellant argued that the replacement motor should benefit from the lower rate applying to goods of this description. The Deputy Minister was successful at all levels in maintaining that the motor should be classified instead under a different description for “electric motors ... n.o.p. [not otherwise provided].” At trial, the Tariff Board reasoned that classification had to be under the electric motors item to give that item a useful effect, since motors are by their nature intended to be parts of machines and Parliament must have wanted the item to have some content. The Board stated that “(i)t is conceivable that there might come into being an electric motor of such unique shape or design as to make it ... more specifically a *part* of a particular machine than an electric motor”⁴, but that such a situation did not exist in this case. The Exchequer Court and Supreme Court agreed with the result. By a 3-2 majority, the Supreme Court ruled that the more specific item for motors was intended to override the general provision covering parts.⁵ The decision raises the issue of the parts test used to determine which item has priority.⁶

³ *Accessories Machinery Ltd v Deputy Minister of National Revenue, Customs and Excise (DMNRCE)* (1955), App 331, 1 TBR 221, aff'd [1956] Ex CR 289, aff'd [1957] SCR 358 [*Accessories Machinery*].

⁴ *Accessories Machinery*, *supra* note 3 [emphasis in original].

⁵ *Accessories Machinery Ltd v Canada (DMNRCE)*, [1957] SCR 358 at 361. In dissent, Kellock J. stated that “(i)t would seem obvious that there must be many electric motors of which it cannot be said at the time of their importation into Canada, by a dealer, for example, that they are a ‘part’ or a ‘replacement part’ of any machine whatever. No doubt they may ultimately be used in conjunction with some machine, but that would not, in my opinion, of itself, render them ‘parts’.” (at 363).

⁶ After *Accessories Machinery*, priority was given to naming items over parts items in numerous decisions: *Hewitt Equipment v DMNRCE* (1958), App 482, 2 TBR 163; *Brunner Mond v DMNRCE* (1960) App 521, 2 TBR 208; *T.M. Holdsworth v DMNRCE* (1961) App 615, 2 TBR 311; *Timmins Aviation v DMNRCE* (1965), App 764, 3 TBR 212; *Tobin Tractor v DMNRCE* (1968), App 890, 4 TBR 192; *Cornelius Manufacturing v*

The *Accessories Machinery* decision should be seen in the context of the *Attached Motors Reference*⁷, decided by the Tariff Board in 1953. Since a number of tariff items at the time referred to motive power separately, the Department had adopted a practice of segregating all but built-in motors for duty purposes. The reference was to determine if this policy was correct, particularly in the case of attached motors. The Tariff Board in its reply emphasized the condition of the goods as imported, and declared that, if they all formed a single physical unit at that time, "there would be required quite specific legislative sanction to justify segregation of any component for separate tariff classification."⁸ The Board went on to say that motors could be treated separately if they were imported separately for repair or replacement, which was the situation in *Accessories Machinery*. The decision emphasizes the physical link at the time of importation, while leaving unanswered the question of how to deal with goods too large to transport in one piece, or complex machinery that might be ordered from one seller, but arrive from separate sources at different times, to be assembled after crossing the border. The decision is an example of entities analysis. A motor that is physically attached is covered by the description of the named entity and will not be classified separately.

The third case, *Komatsu v. Canada*, was decided in 2012 by the Canadian International Trade Tribunal ("CITT"), the successor to the Tariff Board. In *Komatsu*, the CITT cited the 1957 *Accessories Machinery* decision of the Supreme Court of Canada in support of a finding that goods were appropriately classified as hoses of vulcanized rubber rather than as parts of hydraulic systems or front-end loaders.⁹ The importer, Komatsu,

DMNRCE (1983), App 1824, 8 TBR 627, 5 CER 262; *Valon Kone Ltd v DMNRCE* (1984), App 1932, 9 TBR 97, 6 CER 170; *Akhurst Machinery Ltd v DMNRCE* (1987), App 2630, 12 TBR 181, 14 CER 98; *Diatech v DMNRCE* (1987), App 2443, 12 TBR 347, 14 CER 341; *AIS Industries v DMNRCE* (1988), App 2765, 17 CER 25; *Light Touch v DMNRCE* (1989), App 2809, 2 TCT 1139 (CITT); *R.F. Hauser v DMNRCE* (1990), App 2909, 3 TCT 2171 (CITT). Contra: *W.J. Elliott and Co v DMNRCE* (1962), App 609, 2 TBR 308; *Imperial Tobacco, Division of Imasco Ltd v DMNRCE* (1986), App 1979, 1992, 2003 and 2015, 11 TBR 158, 11 CER 129.

⁷ Reference by DMNRCE re *Attached Electric Motors* (1953), App 283, 1 TBR 105 [re *Attached Electric Motors*].

⁸ *Ibid* at 106.

⁹ *Komatsu International (Canada) Inc v Canada (Border Services Agency, President)*, AP-2010-006, [2012] CITT No 56 at para 67 [*Komatsu*]. To the same effect, the Tribunal referred (at para 68) to an earlier CITT decision that relied on HS Rule 1 to give priority to

had argued that the hoses with custom fittings were parts because they were designed in particular lengths and shapes to be installed in front-end loaders manufactured by the company.¹⁰ Relying on the ruling in *Accessories Machinery*, the CITT decided that the description as hoses was more specific and overrode the basket provision for parts. Analysis by the Supreme Court of Canada in 1957, thus, was cited as an authority for interpretation, despite the replacement of one nomenclature by another. On the facts, it was arguable that if the reasoning of the Tariff Board from that earlier dispute had been considered, it would have supported a contrary result, since the imported goods might have been “of such unique shape or design as to make [them] ... more specifically a *part* of a particular machine”¹¹ than a rubber hose. The *Komatsu* decision raises questions over the use of previous authority to interpret the Harmonized System.

This article has three main sections. The first contains remarks on interpretation of the Harmonized System. The second section deals with parts and accessories, reviewing decisions on the new tariff and the previous Canadian tariff. The third main section considers entities questions in Canadian law. A brief section follows with some comparisons to the law of the European Union, on which the Harmonized System is based. The concluding section then offers observations on the challenges of coordination in the modern, inter-connected world.

Some continuity of interpretation was to be anticipated when the new nomenclature was adopted, reflecting the understanding of ordinary language, as well as the views and expectations developed through administration of the customs tariff of Canada over several decades. The analysis in the article demonstrates this phenomenon, especially as it applies to the interpretation of parts items. Prior domestic law, however, should not be the only – or even the major influence – on interpretation when Canada implements a treaty. The treaty itself will be a source of guidance, viewed in accordance with the rules of interpretation in public international law. It is argued in this article that courts and tribunals should also consider

headings where goods are named or generically described (*York Barbell Co Ltd v DMNRCE*, AP-91-131, [1992] CITT No 40). The Tribunal also applied an Explanatory Note stating that hoses with fittings remained classified as hoses if they retained the essential character of a hose (at paras 34–37).

¹⁰ *Komatsu*, at paras 23, 37, 66.

¹¹ *Accessories Machinery*, *supra* note 3.

decisions in other jurisdictions where the same treaty is being implemented. The section on the classification of parts and entities in the European Union highlights certain areas that differ from the law in Canada. An open, comparative approach will make full information available, to the benefit of all parties, and will encourage coordination and consistency in the application of the treaty.

II. STATUTORY INTERPRETATION AND THE INTERNATIONAL CONTEXT

The Harmonized System is based on the Customs Cooperation Council Nomenclature, which developed from the earlier Brussels Tariff Nomenclature.¹² To promote consistent interpretation, the HS contains General Rules for Interpretation of the Harmonized System. The most relevant Rules for this article are as follows:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of the Rule), presented unassembled or disassembled.

...

3. When ... goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

¹² Maureen Irish, "Interpretation and Naming: The Harmonized System in Canadian Customs Tariff Law" (1993) 31 Can YB Intl L 89.

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

...

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule, the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The General Rules for Interpretation emphasize first the terms of the headings themselves, along with the Legal Notes. When Rule 1 does not solve a problem, the most specific description has priority, followed by classification in accordance with the material or component giving the goods their essential character.

The HS contains 31 Sections and 97 Chapters. The treaty is administered through the Customs Cooperation Council (CCC). Through CCC committees, member countries oversee amendments to the nomenclature and binding Legal Notes (i.e. Section, Chapter and Subheading Notes). The CCC committees also issue and update the Explanatory Notes and Classification Opinions, sources that do not have binding effect but are intended to provide guidance to encourage uniform interpretation. The Canadian Customs Tariff Act, in section 11, provides that classification shall have regard to the Explanatory Notes and the Classification Opinions¹³, in addition to the binding text of the nomenclature, the General Rules for Interpretation and the Legal Notes. Canadian tariff classification is also guided by case law and by Departmental Memoranda from Canadian customs authorities.

The decisions analyzed in this article demonstrate that, since implementation of the HS, classification has been influenced by decisions based on the pre-HS tariff. The methodology shows continuity rather than rupture, despite the adoption of the new tariff. These older authorities may be consistent with the Harmonized System, but there is a potential for

¹³ See: *Suzuki Canada Inc v Canada (Customs and Revenue Agency)*, 2004 FCA 131, [2004] FCJ No 615, leave to appeal to SCC refused: [2004] SCCA No 243; *Canada (Border Services Agency) v Decolin Inc* 2006 FCA 417, [2006] FCJ No 1963; *Arctic Cat Sales Inc v Canada (Customs and Revenue Agency)*, 2007 FCA 277, [2007] FCJ No 1139.

divergences. The HS is sufficiently different from the previous nomenclature that *stare decisis* will have limited application.¹⁴ Predictability, commercial assurance, habits of thought, and use of language are all factors that favour retaining familiar approaches to interpretation. Applied reasoning from the past has continued to influence outcomes under the Harmonized System.

The Harmonized System differs from past Canadian customs tariffs in that the HS tariff is not solely Canadian legislation, but implements an international treaty that other countries are also applying. Persuasive authority is the technique that permits courts to take account of decisions in these other countries. Canadian courts have a long history of using persuasive authority and are well-accustomed to this methodology, which keeps the legal system open to influences from other sources.¹⁵ In addition to coordination by Customs officials through the committees of the CCC, tribunals and courts should be receptive to arguments presented that are based on decisions in other jurisdictions. As modern technology reduces communication barriers, traders and all those involved in the application of the Harmonized System have a role in its clarification and consistent interpretation.

¹⁴ There is some controversy over whether decisions of the Tariff Board and the Canadian International Trade Tribunal create precedent binding as *stare decisis*. In the *Bri-Chem* trilogy of cases, the CITT ruled that failure to apply a CITT decision to other importers in the same circumstances amounted to an abuse of process by the Canada Border Services Agency (*Bri-Chem Supply Ltd v Canada (Border Services Agency)*, AP-2014-017, [2015] CITT No 116; *Ever Green Ecological Services Inc v Canada (Border Services Agency)*, AP-2014-027, [2015] CITT No 117; *Southern Pacific Resources Corp v Canada (Border Services Agency)*, AP-2014-028, [2015] CITT No 118). As between the importer and the government, a decision can be binding as *res judicata*: *Javex Company Co v Oppenheimer* [1959] Ex. C.R. 439; *Andritz Hydro Canada Inc v Canada (Border Services Agency)*, AP-2014-036, [2015] CITT No 135. In 1995, the Tribunal ruled that it was not bound by a decision under the previous Tariff that had classified goods as parts of agricultural machinery. The feed storage bags at issue would be attached to machinery for only one day. In the Harmonized System, they did not qualify as parts, but were classified as plastic articles for packing: *Farmer's Sealed Storage Inc. v Canada (MNR)*, AP-94-116 and AP-94-186, [1995] CITT No 39. In the earlier decision, the Tribunal had allowed the importer's appeal and classified the goods as parts of agricultural machinery, under item 40924-1 of the previous Customs Tariff: *Farmer's Sealed Storage v Canada (DMNRCE)*, App 2935, [1991] CITT No 47.

¹⁵ H Patrick Glenn, "Persuasive Authority" (1987) 32:2 McGill LJ 261 [Glenn, "Persuasive Authority"].

III. PARTS AND ACCESSORIES

This section deals with parts and accessories, discussing HS cases, followed by decisions from the pre-1988 system. The material on current law addresses the framework, and tests from case law and a Departmental Memorandum. The material covering the pre-1988 system for parts and accessories examines certain aspects of tariff classification in Canada at the time the HS was adopted. As will be seen, older approaches have strong continuing influence, especially the commitment test for parts that developed in pre-1988 case law.

A. Current Law

1. Parts: Continuity and the Commitment Test

The Harmonized System contains a framework for the classification of parts. In the HS, in accordance with General Rule 1, interpretation starts with the terms of the headings and any relevant Section or Chapter Notes. Note 2 to Section XV provides a definition that is applicable "throughout the Nomenclature". That Note defines the term, "parts of general use" as covering headings for things such as nails, tacks, screws, bolts, springs, metal frames, chains, fittings, buckles, cables, and clasps. The point of the definition is to exclude these goods from the mention of "parts" in other headings. In the Chapters dealing with metals and articles of metal, subject to other specific Notes, a reference to "parts" does not cover these parts of general use. They will be classified under the headings where they are named as nails, tacks, screws, etc., even if they are very specifically designed to function as a component of other goods. "Parts of general use" are not classified as parts.

The next important Note to consider is Note 2 to Section XVI. It applies just to that Section, but the Section includes Chapters 84 and 85, the main chapters for machinery.¹⁶ Note 2(a) provides that parts that are goods named in any of the headings of Section XVI are classified under those headings rather than as parts. Once again, this confirms the priority of specific headings. Note 2(b) states that other parts will be classified with

¹⁶ Other Notes also apply a test of sole or principal use for parts. See: Note 3 to Section XVII (for Chapters 86 to 88, rail, vehicle and aircraft equipment); Note to Chapter 90 (optical, photographic and other precision instruments), applied in *Computalog Ltd. v Canada* (DMNRCE), AP-92-265, [1994] CITT No 82 [*Computalog Ltd.*].

the machines to which they belong, provided they are "suitable for use solely or principally" with that particular kind of machine or with a number of machines in the same heading. This is the parts test applicable to goods not covered in a specific heading.

The HS thus gives strong priority to specific headings for parts of general use (throughout the Nomenclature) and for goods covered by Section XVI. In Chapters 84 and 85, goods not named in a specific heading can be classified as parts of machinery if they meet the sole or principal use requirement.

Practice in Canada has produced further parts tests, in case law and in administrative guidance from Customs authorities. The main case law test dates from the 1991 decision in *York Barbell*.¹⁷ It was expressed as follows in the *GL&V* decision in 2000:

The following criteria have been found to be relevant ... : (1) whether the product in issue is essential to the operation of the other product; (2) whether the product in issue is a necessary and integral part of the other product; (3) whether the product in issue is installed in the other product; and (4) common trade usage and practice.¹⁸

The test contains repetition. A product that is "essential" is also "necessary." A part is "integral" in order to distinguish it from an accessory, which performs a supplementary function. The mention of installation refers to installation that will take place during assembly or manufacture after importation. A test requiring that components be installed at the time of importation would be an entity test.

The second major source for parts tests is Departmental Memorandum D10-0-1, first issued January 24, 1994.¹⁹ The D-Memorandum defines a part

¹⁷ *York Barbell Company Limited v Canada (DMNRCE)*, AP-90-161, [1991] CITT No 43. In the decision, the CITT allowed the appellant's appeal and ruled that rowing machine computers were "parts of a kind used in physical exercise machines." The Deputy Minister argued that "for goods to be considered a part they must be essential to the operation of the other goods, be a necessary and integral component of the other goods and be installed to the other goods in the course of manufacture." The Tribunal accepted these criteria, and added common trade usage and practice.

¹⁸ *GL&V/Black Clawson-Kennedy Pulp and Paper Machine Group Inc v Canada (Deputy MNR)*, AP-99-063, [2000] CITT No 82 at para 50, *aff'd* 2002 FCA 43, [2002] FCJ No 132 [GL&V].

¹⁹ Canada Border Services Agency, Memorandum D10-0-1, "Classification of Parts and Accessories in the *Customs Tariff*" (13 May 2014), superseding Memorandum D10-0-1 of 24 January 1994 [Memorandum D10-0-1]. The 2014 D-Memorandum states: "The

as “an identifiable component of an article, machine, apparatus, equipment, appliance or specific good which is integral to the design and essential to the function of the product in which it is used”.²⁰ This definition does not have a statutory basis. Further, the D-Memorandum contains a list of criteria indicating that parts:

- (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 unit²¹

The “and/or” conjunction confirms that these criteria do not all have to be present each time. One or several in combination could be useful in determining whether an article constitutes a part. These criteria also contain some repetition. An article that has no alternative function is committed to the use of the unit. The D-Memorandum further states that for an article to be classified as a part, it “must be committed for use with those goods.”²² As well, “[a]n article that can be used with goods other than those described ... is not to be regarded as so committed. An article which has no other use than with such goods and is necessary to their function is committed for use with them.”²³

The commitment requirement in the D-Memorandum differentiates it from the *York Barbell/GLV* case law test. The commitment requirement is also the major area of difference between the D-Memorandum and the description of parts in the Harmonized System. Reflecting the continuity of the commitment test from pre-1988 case law, the D-Memorandum adopts wording from the 1985 *Bosch* appeal, decided around the time of the adoption of the HS. In *Bosch*, car stereo radio-cassette players were classified

editing revisions made in this memorandum do not affect or change any of the existing policies or procedures” (at “In Brief”).

²⁰ Memorandum D10-0-1, *supra* note 19 at para 1. D-Memoranda and governmental practice are not binding on the CITT or on courts: *Holland Hitch of Canada Ltd v Canada (Border Services Agency, President)*, AP-2012-004, [2013] CITT No 7 at para 65, *aff’d Canada (Border Services Agency) v SAF-HOLLAND Canada Ltd*, 2014 FCA 3, [2014] FCJ No 13.

²¹ Memorandum D10-0-1, *supra* note 19 at para 27.

²² *Ibid* at para 25.

²³ *Ibid* at para 26.

as parts of radio receiving sets. In its reasoning, the Tariff Board set out the following criteria for parts:

The true test of whether an article can properly be considered to be a part of goods when parts thereof are mentioned in the tariff item depends on whether it is committed for use with such goods. Whether it is so committed for use with the goods will depend in each case upon the scope of the description of the goods. An article that can be used with goods other than those described is regarded as not so committed and one that has no use other than with such goods and is necessary for their function is committed for use with them.²⁴

A question arises when the commitment test adopted in the D-Memorandum is compared to the test for parts in Note 2(b) to Section XVI of the Harmonized System. Section XVI contains Chapters 84 and 85, the two major Chapters dealing with machinery. As outlined above, Note 2(b) provides that parts must be “suitable for use solely or principally” with a particular machine or machines. Sole use matches the commitment test, but if parts are only “principally” suitable for use with a particular machine, they could also be usable elsewhere. The question is whether the commitment test from the D-Memorandum is incompatible with the principal use test of the Harmonized System, or whether the two sources can be aligned in practice.

The material below discusses the evolution of case law since adoption of the HS, followed by the application of the D-Memorandum during that time. As will be seen, the commitment test drawn from the pre-1988 law also made its way into the Tribunal decisions.

The *York Barbell* test was applied in the *GL&V* decision. In that decision, the CITT held that an aluminium walkway was part of a paper-making machine, over-turning the decision of the Deputy Minister. The walkway was custom-designed for that specific machine and was affixed to it once installed. The Deputy Minister had argued that the walkway was not a part because the machine would function without it. The Tribunal disagreed, finding that a walkway was integral and essential for the machine because it permitted the operator to make service adjustments during production. An appeal by the Deputy Minister to the Federal Court of Appeal was dismissed.²⁵

²⁴ *Robert Bosch (Canada) Ltd v Canada (DMNRCE)* (1985), App 2089, 10 TBR 110, 9 CER 62 at 116 TBR.

²⁵ *GL&V supra* note 18. In *GL&V*, the CITT incorrectly used the citation of a different *York Barbell* decision from March 1992. In the 1992 decision, the CITT rejected the

The Tribunal's decision in *GL&V* reflected a practical, commercial point of view that looked beyond the physical functioning of the goods. In the following material, it is argued that pre-1988 Canadian cases also show a tendency to consider commercial and economic factors. This general approach to interpretation is a second aspect of continuity in tariff classification, to be discussed more fully later. The use of commercial and economic factors contrasts with the approach of the European Union, examined at the end of this article. In the EU, the Deputy Minister's argument in *GL&V* might well have been successful.

Over the years, numerous decisions have quoted the *York Barbell* list of factors. In several, the Tribunal decided against the Deputy Minister, particularly in the early cases. In *Snydergeneral*, the Tribunal rejected the Deputy Minister's classification and applied the *York Barbell* factors to decide that filters were parts of air filtration and purification systems.²⁶ The Tribunal also used the *York Barbell* factors to reject the view of the Deputy Minister and decide that goods were parts of turbine flow meters in *Simark*

appellant's argument that goods were parts of exercise machines, and ruled that they should be classified instead under a specific description for cotter-pins: *York Barbell Co Ltd v DMNRCE*, AP-91-131, [1992] CITT No 40. The 1992 decision does not contain the list of factors for the parts test. The same citation mistake was made in *Xerox Canada Ltd. v Canada (President, Border Services Agency)*, AP-2013-015, [2014] CITT No 21 at para 47.

²⁶ *SnyderGeneral Canada Inc v Canada (Deputy MNR)*, AP-92-091, [1994] CITT No 132. For a similar result, see *Bionaire Inc v Canada (Deputy MNRCE)*, AP-92-110, [1993] CITT No 83 [*Bionaire Inc*]; *Procedair Industries Inc v Canada (Deputy MNRCE)*, AP-92-152, [1993] CITT No 87. The Deputy Minister was eventually successful on related but not completely comparable facts when the Federal Court of Appeal ruled that air diffusers were not parts of hair dryers: *Canada (Deputy MNRCE) v Dannyco Trading Ltd*, [1997] FCJ No 515, rev'g *Dannyco Trading Ltd v Canada (Deputy MNRCE)*, AP-93-237, [1994] CITT No 97. See also *Lloydaire, division of Eljer Manufacturing Canada Inc v Canada (Deputy MNR)*, AP-95-096, [1996] CITT No 51, where the case law test was again quoted. In *Flextube Inc v Canada (Deputy MNR)*, AP-95-097, [1999] CITT No 16 [*Flextube*], the Tribunal decided that goods were not parts of machinery, due to lack of evidence that they were necessary and integral components and that they had been manufactured to a degree committing them to that use; the Tribunal cited both *SnyderGeneral* and a pre-1988 authority, *Access Corrosion Services Ltd v Canada (Deputy MNR)* (1984), 9 TBR 184, App 1965 at 188. In *Leeza Distribution Inc v Canada (Border Services Agency, President)*, AP-2009-057, [2010] CITT No 96, goods had not been sufficiently manufactured at the time of importation to commit them to their use as parts [*Leeza Distribution*].

Controls.²⁷ The test was quoted again in a decision against the Deputy Minister in *Atomic Ski*.²⁸ In other decisions, the Tribunal quoted the test to decide in favour of the Deputy Minister's classification.²⁹ In *Star Choice*, the *York Barbell* test convinced the Tribunal that the imported receiver/decoders were parts of satellite TV reception apparatus, as argued by the Deputy Minister, even though they could not receive directly from satellites, but required an antenna and converter.³⁰ This decision was upheld on appeal to the Federal Court of Appeal and leave to appeal to the Supreme Court of Canada was denied.³¹

Recent decisions have used the *York Barbell* criteria and discussed the requirements that parts be essential and integral. In *Nokia Products*, carrying cases were not parts of cellphones, as they were not essential for the operation of the cellphones.³² In *Newtech*, the majority of the Tribunal took

²⁷ *Simark Controls Ltd v Canada (Deputy MNR)*, AP-94-329, [1996] CITT No 5 at para 22 [*Simark Controls*]. This is the same result as in a much earlier appeal: *Landis and GYR Inc v Deputy MNRCE* (1963), App No 708, 3 TBR 122. See also *Simark Controls Ltd v Deputy MNRCE* (1985), App 2278, 10 TBR 221.

²⁸ *Atomic Ski Canada Inc v Canada (Deputy MNR)*, AP-97-030 and AP-97-031, [1998] CITT No 33, (where the appellant had also used the D-Memorandum in argument at para 9).

²⁹ *Winners Only (Canada) Ltd v Canada (Deputy MNR)*, AP-94-142, [1996] CITT No 35; *Jonic International Inc v Canada (Deputy MNR)*, AP-97-078, [1998] CITT No 75 [*Jonic*]; *Industries et Équipements Laliberté Ltée v Canada (Deputy MNR)*, AP-97-070, [1998] CITT No 97; *CL Blue Systems Ltd v Canada (Deputy MNR)*, AP-97-074, [1999] CITT No 90 [*CL Blue*]; *Fenwick Automotive Products Limited v Canada (Border Services Agency, President)*, AP-2006-063, [2009] CITT No 14, citing the test to *Winners*.

³⁰ *Star Choice Television Network Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2001-007 to AP-2001-010, [2002] CITT No 94 at para 25. This was in line with previous decisions: *Jonic*, *supra* note 29; *CL Blue*, *supra* note 29. *Contra: Canadian Satellite Communications Inc v Canada (DMNR)*, AP-94-202, [1995] CITT No 84, *aff'd* [1996] FCJ No 896 (CA), where an analogue decoder was classified as part of a television converter. In the 1992 appeal in *Philips Electronics*, a converter for cable reception was classified as part of a television since its function was integral to television reception, and not ancillary. The goods were imported, however, prior to an amendment that added a separate duty-free tariff item for TV converters: *Philips Electronics Ltd v Canada (Deputy MNRCE)* (15 June 1992), Ottawa, AP-90-211, (CITT, unreported) .

³¹ *Star Choice Television Network Inc v Canada (Customs and Revenue Agency, Commissioner)*, 2004 FCA 153, [2004] FCJ No 674, leave to appeal to SCC refused, [2004] SCCA No 276.

³² *Nokia Products Ltd v Canada (Customs and Revenue Agency, Commissioner)*, AP-2001-073, AP-2001-074, and AP-2001-084, [2003] CITT No 65. The Tribunal quoted the *York Barbell* test,

a practical, commercial approach to the *York Barbell* list, finding that coffee pots are parts of a coffee brewing system, although one dissenting member would have found that they were only dispensers or servers of coffee and not essential to the brewing function.³³ In other decisions citing *York Barbell* or *GL&V*, condensers were parts of motor vehicle air conditioners³⁴ and magnets were parts of electrically operated locks.³⁵ *Holland Hitch* cited the case law test to both *York Barbell* and *GL&V*, in a decision rejecting an argument that a wheel assembly was part of a truck frame.³⁶ In *Xerox Canada*, the CITT held that toner cartridges were parts of printers, based on the *York Barbell* criteria and also on a commitment test drawn from a decision on the pre-1988 Customs Tariff.³⁷

In fact, a commitment test has been present in certain CITT decisions since implementation of the Harmonized System, even though this is not a factor in the *York Barbell* list. In *Hoover Canada*, in 1994, the Tribunal adopted a commitment/“designed for” test from the 1985 decision in *Bosch*, finding that power nozzles were parts of vacuum cleaners.³⁸ In *Canadian Satellite*, decoders that were designed for use with television converters, and were not of value for any other use, were held to be parts.³⁹ The *Bosch*

citing it to *SnyderGeneral*, *supra* footnote 26 (as well, the Tribunal noted that the cases were advertised and sold as accessories rather than parts at para 32).

³³ *Newtech Beverage Systems Ltd v Canada (Customs and Revenue Agency, Commissioner)*, AP-2002-115 and AP-2003-029, [2004] CITT No 65.

³⁴ *Spectra/Premium Industries Inc v Canada (Border Services Agency, President)*, AP-2006-053, [2008] CITT No 16 at para 32, *aff'd* 2009 FCA 80, [2009] FCJ No 313.

³⁵ *Rutherford Controls International Corp v Canada (Border Services Agency, President)*, AP-2009-076, [2011] CITT No 8, at para 66.

³⁶ *Holland Hitch of Canada Ltd. v Canada (Border Services Agency, President)*, AP-2012-004, [2013] CITT No 7, *aff'd Canada (Border Services Agency) v SAF-HOLLAND Canada Ltd.*, 2014 FCA 3, [2014] FCJ No 13.

³⁷ *Xerox Canada Ltd. v Canada (Border Services Agency, President)*, AP-2013-015, [2014] CITT No 21 at para 46: “[A] good must be solely committed for use with another good and specifically designed for another good in order to be considered a ‘part,’” referring to *Staub Electronics Ltd. v Deputy MNRCE* (1989), App 2764, [1989] CITT No 34.

³⁸ *Hoover Canada, a division of MH Canadian Holdings Limited v Canada (Deputy MNR)*, AP-93-128, [1994] CITT No 115. In the decision, the Tribunal noted that “part” is not defined in either the prior Canadian tariff or the Harmonized System.

³⁹ *Canadian Satellite Communications Inc v Canada (Deputy MNR)*, AP-94-202, [1995] CITT No 84, *aff'd* [1996] FCJ No 896 (CA).

commitment test was applied by the Federal Court of Appeal in *Dannycos*.⁴⁰ In *JIT*, the drawer slides were parts because they were designed specifically for metal filing cabinets with heavy loads.⁴¹ In *Commonwealth Wholesale*, razor blade cartridges were parts of shavers, since they were “especially committed for use with ... shavers and ... essential to their function.”⁴² In *Pièces d’Auto*, the Tribunal referred to the *GL&V* test in its finding that the imported wheel hub assemblies were parts of motor vehicles. The goods were sold as parts and were designed for specific motor vehicles, just as the walkway in *GL&V* was designed for its particular use. In the decision, the Tribunal in *Pièces d’Auto* went on to formulate a new list of criteria:

[T]he goods in issue are automotive ‘parts’ because they are (1) essential to the functioning of a motor vehicle, (2) specifically designed for use therein, (3) not designed for other applications and (4) considered parts in common trade usage and practice.⁴³

This list differs from the *York Barbell* criteria. It omits the mention of installation and a link to integral function, although these may be implied. The main distinction is the added requirement that goods be specifically designed for a particular application and no other. It was noted above that the D-Memorandum test may not match the “sole or principal use” test for parts in Note 2(b) of Section XVI, the HS Section that contains the main Chapters dealing with machinery and parts. *Pièces d’Auto* raises the same question of compatibility for the case law test. If goods must be designed for

⁴⁰ *Deputy Minister of National Revenue for Customs and Excise v Dannycos Trading Ltd*, [1997] FCJ No 515, rev’g AP-93-237, [1994] CITT No 97. Other references to authorities from the previous system occurred as well: *Flextube*, *supra* note 26 at para 38.

⁴¹ *J.I.T. Industrial Supply & Distribution Ltd v Canada (Border Services Agency, President)*, AP-2008-015, [2010] CITT No 8 at para 63; *Cf Canmade Furniture Products Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2003-025, [2004] CITT No 64 (in contrast, drawer slides that were not committed to particular furniture were not parts, at para 42).

⁴² *Commonwealth Wholesale Corp v Canada (Border Services Agency, President)*, AP-2011-010 & AP-2011-019, [2012] CITT No 22 at para 28.

⁴³ *Les Pièces d’Auto Transit Inc v Canada (Border Services Agency, President)*, AP-2009-005, [2010] CITT No 87 at para 50, aff’d 2011 FCA 279, [2011] FCJ No 1409 [*Les Pièces d’Auto*]. The *Pièces d’Auto* test was applied by the Tribunal in *BMW* to find that side-view mirror housings were parts of the motor vehicle models for which they were designed: *BMW Canada Inc v Canada (Border Services Agency, President)*, AP-2013-050, [2014] CITT No 98 at para 39.

only one application and no other, that application is their sole use and the test does not seem to contemplate a principal use.

Since 1994, the D-Memorandum test has been applied in Tribunal decisions, although less frequently than the case law test.⁴⁴ In the *Black & Decker* decision, at the beginning of 2004, the appellant cited the D-Memorandum list to argue that grass catcher bags were parts of lawnmowers. The Tribunal agreed, noting the necessity of the bags for the safe operation of the mowers as a “key” factor.⁴⁵

In a later *Black & Decker* decision, in November of 2004, the Tribunal considered both the D-Memorandum list and the HS test of sole or principal use.⁴⁶ The Tribunal found that battery packs were parts of power tools, since they were “necessary for the safe and prudent use of the tools, as the electrical connections are enclosed and the power source is locked into place on the tool.”⁴⁷ As well, the battery packs were “uniquely fitted to and exclusive to a specific tool or range of tools.”⁴⁸ The Tribunal then went on to consider whether they were suitable for use solely or principally with the tools, pursuant to Note 2(b) to Section XVI. There was evidence that they could be used for flashlights and radios, but the predominant use was with the tools, and the proportion of any other use was “minuscule in comparison.”⁴⁹ Although the battery packs were not solely for use with the tools, the Tribunal found that they were suitable principally for this use and were therefore parts. It is unlikely that a strict commitment test would have been met, due to the other possible uses. When the facts presented this potential discrepancy between the D-Memorandum and the legally binding

⁴⁴ See *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-98-001, [2000] CITT No 17 at para 24. The D-Memorandum was used in argument unsuccessfully by the importer in *Brother International Corp (Canada) Ltd v Canada (Deputy MNR)*, AP-97-100, [1998] CITT No 89.

⁴⁵ *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2003-007, [2004] CITT No 15 at para 21. The grass catchers at issue were for mowers that could be operated in the rear discharge position. The Tribunal distinguished these goods from the grass catchers found to be accessories in *DMNRCE v Androck Inc*, [1987] FCJ No 45, 13 CER 239, 74 NR 255 (CA), which were for side discharge lawn mowers.

⁴⁶ *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2002-116, [2004] CITT No 130 at para 32.

⁴⁷ *Ibid* at para 33.

⁴⁸ *Ibid*

⁴⁹ *Ibid* at para 34.

Section Note, the Tribunal appropriately applied the Section Note, in a decision that was affirmed by the Federal Court of Appeal.⁵⁰

The D-Memorandum list, by its terms, does not require that all factors be present in order for goods to be parts,⁵¹ although the commitment test receives special emphasis.⁵² It can be argued, thus, that there is no direct incompatibility between the D-Memorandum and Note 2(b) of HS Section XVI. Should there be a conflict, the Section Note is statutory, and legally binding. It has priority over the D-Memorandum, and also over any general commitment test derived from case law.

The CITT dealt with potential incompatibility with the D-Memorandum by giving priority, as it should, to the Section Note. The same result is expected should there be a conflict between the Section Note and a commitment test derived from the case law. The Section Note is binding, and “sole or principal use” must be the applicable rule. Interpretation always remains subject to binding Section, Chapter and Subheading Notes, and to guidance from Classification Opinions and Explanatory Notes.⁵³ In *Garlock*, the Tribunal interpreted sole or principal use without referring to either the D-Memorandum or a commitment test. In the decision, a dissenting Tribunal member would have accepted evidence of the sale of 125 out of the annual production of 200 oil seals as demonstrating a general trend that showed principal use. The majority of the Tribunal disagreed and rejected the importer’s argument that the oil seals were parts of disc harrows.⁵⁴

Any argument over principal use or commitment will require findings of fact. The theoretical possibility of another use might not be considered significant, especially if that theoretical possibility were too expensive to be

⁵⁰ *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, 2005 FCA 384, [2005] FCJ No 1897. The court affirmed the reasonableness of the finding that the goods were suitable principally for use with the tools at para 7.

⁵¹ As the Tribunal pointed out in *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2002-116, [2004] CITT No 130 at para 32.

⁵² Memorandum D10-0-1, *supra* note 19 at paras 25, 26. The list is in paragraph 27.

⁵³ *RB Packings & Seals Inc v Canada (DMNRCE)*, AP-94-166, [1995] CITT No 38. As well, the Tribunal has been careful about where a commitment test would apply, refusing to use it for interpretation of a description of goods “of a kind used with” certain other goods: *Ballarat Corp. of Canada v Canada (Deputy MNR)*, AP-93-359, [1995] CITT No 85.

⁵⁴ *Garlock of Canada Ltd v Canada (Deputy MNRCE)*, AP-93-035, [1994] CITT No 76.

commercially reasonable. Tariff classification normally takes account of trade usage,⁵⁵ and the commercial context is a significant factor in decisions. In *Pièces d'Auto*, there was testimony that use of the goods for non-intended purposes could involve risk to an engineer's professional liability.⁵⁶ As well, the Tribunal found it "particularly telling" that the goods were sold for specific vehicles with individual parts numbers.⁵⁷ Whether through textual interpretation or through findings of fact, some measure of compatibility can be found between a commitment requirement and a test of sole or principal use. It appears, nonetheless, that the need for such accommodation is due to the continuing influence of pre-1988 law.

Support for a decision will not always require a case law test or a D-Memorandum to guide interpretation.⁵⁸ As the CITT stated in *Fleetguard*: "No extensive reference to jurisprudence is needed to conclude that when the *raison d'être* of a product is to be inextricably connected to, or to function as an essential element of, a larger product, then such product is considered a part."⁵⁹ In the 1990s, there were occasional references to consulting the ordinary or grammatical meaning of words before applying a statutory definition, an approach that may have encouraged carryover of thinking from the pre-1988 system.⁶⁰

⁵⁵ *Canmade Furniture Products Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2003-025, [2004] CITT No 64 at para 47.

⁵⁶ *Les Pièces d'Auto Transit*, *supra* note 43 at para 51. If there is agreement, the parties could file a statement of facts setting out the principal use: *Advance Engineered Products Ltd v Canada (Deputy MNR)*, AP-96-079, AP-96-087, AP-96-095, [1998] CITT No 74 at para 22.

⁵⁷ *Les Pièces d'Auto Transit*, *supra* note 43 at para 49. Advertising and marketing were similarly influential in *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2002-116, [2004] CITT No 130 at paras 13, 19, 29.

⁵⁸ *Bionaire Inc*, *supra* note 26.

⁵⁹ *Fleetguard International Corporation v Canada (DMNRCE)* (25 August 1992), Ottawa AP-90-121 (CITT, unreported) at 6. For other analysis emphasizing function, see: *Nailor Industries Inc. v Canada (Deputy MNR)*, AP-97-083, AP-97-101, [1998] CITT No 42; *Shop-Vac Canada Ltd. v Canada (Deputy MNR)*, AP-94-353, [1996] CITT No 10; *IEC-Holden Inc v Canada (DMNRCE)* (28 April 1992), Ottawa AP-91-150 (CITT, unreported); *Sandvik Rock Tools, a division of Sandvik Canada Inc v Canada (DMNRCE)*, AP-91-110, AP-91-138, [1992] CITT No 84. See further: *Sandvik Tamrock Canada Inc v Canada (Deputy MNR)*, AP-99-083, [2000] CITT No 45, rev'd 2001 FCA 340, [2001] FCJ No 1692.

⁶⁰ *Kaneng Industries Inc v Canada (Deputy MNR)*, AP-96-127, [1997] CITT No 125 at para 16: "Before considering whether the goods in issue are classifiable as 'parts' within the

This review of parts decisions demonstrates that the transition to the Harmonized System involved continuity in legal interpretation, rather than a break. In *York Barbell* in 1991, counsel for both parties were using tests from previous decisions, not a new test for the HS context.⁶¹ These tests did not develop only after implementation of the HS, but were in fact already in use, and represent the continuation of the old system. For interpretation, the main challenge has been the commitment requirement, which was not present in *York Barbell*, but appeared in later case law and also, in fairly emphatic form, in the 1994 D-Memorandum. The wording of the “committed or designed for” language in the D-Memorandum would not likely have been so strong if the starting point had been an HS Section Note that referred to suitability for use solely or principally with other goods. Even if the D-Memorandum is not determinative in Tribunal decisions, it will have an influence on the practice of Customs authorities and importers.

2. Accessories: Sole or Principal Use

The D-Memorandum defines an accessory as “an article which performs a secondary or subordinate role, not essential to the function, which could improve the effectiveness of the host machine, equipment, apparatus or appliance.”⁶² This definition does not have a statutory basis. In contrast to its commitment test for parts, the D-Memorandum states, that “[f]or an article to be considered an accessory it must be solely or principally for use with a particular good and must supplement the functionality of that good.”⁶³ Decisions of the Tribunal since 1988 have relied on previous authorities and occasionally have mentioned a commitment or “designed

tariff nomenclature, the Tribunal must decide whether the goods in issue are parts of machinery for making or finishing paper or paperboard, in the generic sense.” See also *Lloydair, division of Eljer Manufacturing Canada Inc v Canada (Deputy MNR)*, AP-95-096, [1996] CITT No 51 at para 19: “In order for the Tribunal to determine whether those goods are classifiable as ‘parts’ ..., it must first consider whether they are parts of air heaters and hot air distributors in the grammatical and ordinary sense.”

⁶¹ *York Barbell Company Ltd v Canada (Deputy MNRCE)*, AP 91-161, [1991] CITT No 43. Counsel for the Deputy Minister referred to two decisions under the previous system: *Moore Dry Kiln Company of Canada v DMNRCE* (1972), App 990, 5 TBR 401; *Deputy MNRCE v Androck Inc*, [1987] FCJ No 45, 13 CER 239, 74 NR 255 (CA), rev’g *Androck Inc v Deputy MNRCE* (1984), App 2081, 9 TBR 352, 8 CER 49.

⁶² Memorandum D10-0-1, *supra* note 19 at para 1.

⁶³ *Ibid* at para 29.

for” test.⁶⁴ Unlike the case law on parts, this factor has not been interpreted stringently and several decisions have found suitability for principal use to be sufficient.

Accessories extend the functions of a basic good, and contribute in a subordinate way. In *Busrel*, it was held that plastic mouse pads were accessories for a computer mouse. They were for use solely or principally with a computer mouse, in accordance with the language of the HS Heading. The Tribunal applied the Explanatory Note for the Heading, which explained that accessories were designed to perform a particular service relative to the main function of the machine – in this case, providing a surface for the mouse to track. Citing the *Androck* decision from the pre-1988 system, the Tribunal ruled that an accessory does not have to be necessary to the operation of the main product, or integrated into that product.⁶⁵ The CITT in *Dannycos* classified air diffusers as parts of hair dryers, as they were solely dedicated for that use; the Federal Court of Appeal reversed this decision, finding them to be accessories, since they were additional and not necessary for the function of drying hair.⁶⁶

Parts are expected to last a certain period of time. If they are dedicated but for an intermittent use that is peripheral to the main function, they could be accessories or a more specific description might apply. In *Brother International*, printing cartridges were not parts of labelling machines, but were classified as typewriter ribbons.⁶⁷ In *Xerox*, thermal transfer film rolls used in fax machines were not parts, even though they were dedicated to

⁶⁴ *Uvex Toko Canada Ltd v Canada (Deputy MNR)*, AP-95-269, AP-95-285, [1996] CITT No 77.

⁶⁵ *Bureau de Relations d’Affaires Internationales Inc (Busrel Inc) v Canada (Deputy MNR)*, AP-97-139 and AP-98-042, [1999] CITT No 67 at para 16 [*Bureau de Relations d’Affaires Internationales*], citing *Canada (Deputy MNRCE) v Androck Inc*, [1987] FCJ No 45 (CA), 13 CER 239 (FCA). See also *Great Canadian Casino Co v Canada (Deputy MNRCE)*, AP-96-230 to AP-96-236, [2002] CITT No 15 [*Great Canadian Casino*].

⁶⁶ *Dannycos Trading Ltd v Canada (Deputy MNRCE)*, AP-93-237, [1994] CITT No 97, rev’d [1997] FCJ No 515 (CA).

⁶⁷ *Brother International Corp (Canada) Ltd v Canada (Deputy MNR)*, AP-97-100, [1998] CITT No 89 (the description as typewriter ribbons was related to essential character under Rule 3B, even though the impression was made by heat rather than by pressure as in a typewriter, at paras 34–35). The CITT also cited in support from the pre-1988 system: *Canadian Totalisator Company, a Division of General Instruments of Canada v Canada (Deputy MNRCE)* (1986), App No 2184, 11 TBR 120; *Xerox Canada v DMNRCE* (1988) Apps 2678, 2722, 17 CER 47 (TB).

this use and the machines could not function without them. Since the rolls were used up in a short period of time and discarded, they were classified as similar to typewriter ribbons.⁶⁸ Moreover, even if something could properly qualify as an accessory, there may be an applicable, more specific description.⁶⁹ In *Cycles Lambert*, training devices that turned a bicycle into a stationary bicycle met the requirement of sole or principal use in an Explanatory Note, but were not bicycle accessories because they were more specifically described as exercise apparatus.⁷⁰

The element of dedication could be fulfilled by principal use, if the description so provides. In *Fisher Scientific*, large, re-usable syringes could be used with other machines, but were sufficiently dedicated to chromatographs to meet the requirement of principal use, and thus were accessories. As the relevant Section Note mentioned principal use, and not just sole use, the Tribunal allowed the appeal, finding that any other uses were significantly less frequent than use with chromatographs.⁷¹ In *Canadian Tire*, the Tribunal considered the marketing of tool holders in deciding that they met the principal use requirement and were accessories, allowing an appeal.⁷² In *Udisco*, miniature buildings were accessories for reduced-size model trains. While counsel for the Deputy Minister argued that they had other potential uses, the Tribunal gave greater weight to the commercial context. Manufacturers' catalogues and witness testimony showed an absence of retail sales other than with model trains. Accordingly, the Tribunal ruled that the evidence met the requirement of sole or

⁶⁸ *Xerox Canada Ltd v Canada (Deputy MNR)*, AP-98-061, [1999] CITT No 44 at para 26, aff'd 2001 FCA 90, [2001] FCJ No 477 at para 2. In contrast, toner cartridges for photocopiers were accessories in *Sharp Electronics of Canada Ltd v Canada (Deputy MNR)*, AP-98-092, [2000] CITT No 40 at para 58.

⁶⁹ *Rui Royal International Corp v Canada (Border Services Agency, President)*, AP-2010-003, [2011] CITT No 24; *Fastco Canada v Canada (Deputy MNR)*, AP-96-078, [1997] CITT No 43.

⁷⁰ *Cycles Lambert Inc v Canada (Border Services Agency, President)*, AP-2011-060, [2013] CITT No 40, aff'd 2015 FCA 45, [2015] FCJ No 194.

⁷¹ *Fisher Scientific Limited v Canada (Deputy MNRCE)*, AP-89-181, AP-89-244, [1994] CITT No 75 [*Fisher Scientific*]. See *Rittal Systems Ltd v Canada (Deputy MNR)*, AP-99-012, [2000] CITT No 44 at paras 41–42 [*Rittal Systems*].

⁷² *Canadian Tire Corp v Canada (Border Services Agency, President)*, AP-2004-057, [2006] CITT No 97 at para 27.

principal use in the Chapter Note.⁷³ In *Rittal*, the Tribunal held that certain enclosures were accessories of automatic data processing machines, as they were principally used to support these machines, consequently allowing an appeal on this issue.⁷⁴ The enclosures for trampolines in *Maurice Pincoffs* were designed for specific models and thus met the requirement of principal, if not sole, use.⁷⁵ In allowing the appeal, the Tribunal ruled that they did not have to be imported with the trampolines in order to be classified as accessories.⁷⁶

In a number of disputes, the CITT decided that principal use was sufficient for goods to qualify as accessories. On this point, the Tribunal allowed several appeals from initial classification decisions by customs authorities, who may have been using a stricter, commitment approach. In contrast to the language applicable to parts, the provisions of the Departmental Memorandum on accessories are appropriately drafted to reflect the HS language of suitability for sole or principal use.

In summary, for both parts and accessories, classification decisions show the continuing effect of pre-1988 law, raising the potential for discrepancy with the HS, especially concerning parts. The *Komatsu* decision, outlined in the introduction, used the 1957 Supreme Court of Canada decision in *Accessories Machinery* as an authority affirming the HS priority of specific descriptions over classification as parts. Whether as confirmation or divergence, the continuing effect of prior authorities is not dictated by *stare decisis*, given the replacement of one nomenclature by another. For parts and accessories, the HS establishes a new framework for classification.

B. Law Prior to 1988

1. Parts pre-1988: Commitment and Commercial Factors

This material discusses the treatment of parts and accessories in Canadian law prior to adoption of the Harmonized System. It describes the development of the commitment test in the case law and notes the influence of commercial and economic factors, including advertising and trade usage,

⁷³ *Udisco Ltd v Canada (Deputy MNRCE)*, AP-91-269, [1992] CITT No 121.

⁷⁴ *Rittal Systems*, *supra* note 71.

⁷⁵ *Maurice Pincoffs Canada Inc v Canada (Border Services Agency, President)*, AP-2013-027, [2014] CITT No 32.

⁷⁶ *Ibid.*

common features in decisions both before and after implementation of the Harmonized System.

In the pre-1988 Customs Tariff, interpretation of “parts” and “accessories” took place in a context without the HS priority rules, and without the HS language referring to sole or principal use. The legal framework was quite different in the previous legislation, as the Tariff Board pointed out in its report on the conversion to the Harmonized System.⁷⁷ The pre-1988 Customs Tariff included many descriptions mentioning parts, including several wide end use provisions that covered articles and materials imported for use in the manufacture of particular products, and goods imported for use in certain economic sectors.⁷⁸ In its report, the Tariff Board made recommendations to deal with the transition to higher rates, as parts moved away from these wide provisions with favourable tariff treatment and into new tariff descriptions after the conversion.

In 1972, in the *Danfoss* appeal,⁷⁹ the Federal Court of Appeal distinguished parts items from end use items, which required actual use of the goods for the particular listed purpose. In *Danfoss*, the imported compressors were not included in the item for “refrigerator parts”, and would not have been included even if it had been shown that all such compressors imported into Canada were invariably incorporated into refrigerators. In their condition as imported, there was nothing to prevent the compressors from being used in vending machines, farm milk coolers, water fountain coolers, dehumidifiers and other equipment; therefore, at the time of importation, they were not “refrigerator parts.” The Court confirmed the decision of the Tariff Board below which had stated that:

Tariff item 41507-1 enumerates “refrigerator parts”; such an enumeration implies goods which are either by their very nature parts of refrigerators or are, at the time of importation, incorporated into a refrigerator or packaged together with the other parts of such a refrigerator. The item does not use words equivalent to “for use as refrigerator parts” or “for use in making refrigerators”. It is an item describing goods rather than indicating the use to which they are put.

⁷⁷ Tariff Board, *Canada’s Customs Tariff According to the Harmonized System*, Reference 163, 1985–1988. For discussion of the conversion of parts items, see Vol IV, Part 1, at 1.22–1.28.

⁷⁸ See Maureen Irish, “Objectivity and Statutory Interpretation: End Use in the Canadian Customs Tariff” (2008) 46 Can YB Intl L 3.

⁷⁹ *Deputy MNRCE v Danfoss Manufacturing*, [1972] FC 798 (CA) at para 11.

There exist such things as certain insulated doors and sides, certain door handles, certain refrigerating compartments, certain shelving and other things which, by nature and design, are parts for refrigerators and generally are committed to use as such.

The compressors in issue do not belong in this category.⁸⁰

End use items depended on actual use, which could be reported and tracked. In contrast, for parts items, the question was whether the goods were "by nature and design ... committed" to their role. Sometimes the required degree of commitment was found in the stage of processing, if goods had been treated or manufactured to a degree that destined them to a particular application. In the early *Union Tractor* appeal, the attachments were parts of power shovels, because they were designed for that use and had been "advanced to a point which definitely commits them to a specific machine."⁸¹ This did not mean that the parts had to be completely finished, unless the tariff item contained such a qualification. In the *L'Atelier du Cadre* appeal, the wood pieces were sufficiently manufactured to be furniture parts, even though labour was still required to assemble the furniture for sale.⁸² Similarly, in *Access Corrosion*, the imported steel anodes were sufficiently finished to be parts of electrical apparatus, even though wires would have to be added before installation.⁸³ If the required degree of commitment was not present, the goods would not yet be parts,⁸⁴ but the simple fact that some further processing was required was not determinative. On occasion, the line was difficult to draw, as in the *Exchanger Sales* appeal involving forgings for a heat exchanger to be used in

⁸⁰ *Danfoss Manufacturing Co v Deputy MNRCE* (1971) App 940, 5 TBR 75 at 76-77. Extracts from these paragraphs were quoted by the Federal Court of Appeal, see *ibid*.

⁸¹ *Union Tractor v Deputy MNRCE* (1949), App 196, 1 TBR 25 at 26. See also *Ocelot Chemicals v Deputy MNRCE* (1985), App 2019, 10 CER 208.

⁸² *L'Atelier du Cadre Enrg v Deputy MNRCE* (1958), App 472, 2 TBR 157.

⁸³ *Access Corrosion v Deputy MNRCE* (1984), App 1965, 9 TBR 184, 6 CER 228. See also: *Joy Manufacturing Co v Deputy MNRCE* (1984), App 2083, 9 TBR 155, 6 CER 208; *GTE Sylvania Ltd v Deputy MNRCE* (1986), App 1867, 11 TBR 535, 13 CER 48.

⁸⁴ *Harvey Carruthers Ltd and Sherritt Gordon Mines Ltd v Deputy MNRCE* (1958), App 465, 2 TBR 147 [*Harvey Carruthers*]. Extra manufacturing might also advance the goods to the point where they were no longer parts, but had become something else specifically listed in the tariff: *Kirkwood Commutators v Deputy MNRCE* (1981) App 1551, 7 TBR 335, 3 CER 127, where the goods were still automobile parts because they had not yet advanced to the point of being "segments".

the recovery of products from natural gas. The majority of the Board found the forgings to be parts of the exchanger, despite the fact that considerable work was still needed to finish them to the precise dimensions required and to drill holes. Tariff Board member Dauphinée dissented on this point, since the forgings, as imported, were not sufficiently formed to be physically identified with any particular part of the exchanger. In his opinion, the purchaser's intentions as to use would be relevant for an end use item, but not for a determination as to parts, which should demand a closer physical link.⁸⁵

The physical link could be found when goods were custom-made for a particular entity.⁸⁶ In contrast, if the goods were relatively standard equipment suitable for various applications, they were unlikely to be found to be parts.⁸⁷ Between custom-made goods and standard equipment, there was some allowance for interchangeability before goods were disqualified as parts.⁸⁸ In the *Bosch* appeal, in 1985, car stereo radio-cassette players were classified as parts of radio receiving sets despite some interchangeability. In a decision that is the basis of the 1994 D-Memorandum, the Tariff Board set out the following criteria for parts:

The true test of whether an article can properly be considered to be a part of goods when parts thereof are mentioned in the tariff item depends on whether it is committed for use with such goods. Whether it is so committed for use with the goods will depend in each case upon the scope of the description of the goods. An article that can be used with goods other than those described is regarded as not so committed and one that has no use other than with such goods and is necessary

⁸⁵ *Exchanger Sales v DMNRCE* (1973), App 1046, (1974) C Gaz I, 1830 .

⁸⁶ *Pluswood Manufacturing Ltd v DMNRCE* (1984), App 1962, 9 TBR 100, 6 CER 166. See also *Radex v DMNRCE* (1988), App 2834, 17 CER 155 (TB).

⁸⁷ *Western Agricultural Supply Co v DMNRCE* (1959), App 518, 2 TBR 206. See: *Ackron Plastics Ltd v DMNRCE* (1964), App 760, 3 TBR 200; *Montreal Standard Publishing Co v DMNRCE* (1964), App 767, 3 TBR 226; *Canadian General Electric v DMNRCE* (1984), App 1970, 9 TBR 130, 6 CER 190 [*Canadian General Electric*]; *Mitel Corp v DMNRCE* (1985), App 2159, 10 TBR 90, 9 CER 40; *Anixter Inc v DMNRCE* (1986), App 2384, 11 TBR 495, 13 CER 4; *Kraus Industries v DMNRCE* (1988), App 2782, 17 CER 164 (TB). In *Electrodesign v DMNRCE* (1961), App 556, 2 TBR 241 [*Electrodesign*], it was physical commitment in the basic entity that was lacking; the electronometer there in question could be adapted for any type of ionization chamber and the imported chambers were therefore not parts.

⁸⁸ *Sperry New Holland Division of Sperry Rand Canada Ltd v DMNRCE* (1977), App 1205, 6 TBR 428 [*Sperry*] . But see *Ferguson Supply Ltd v DMNRCE* (1982), App 1871, 8 TBR 393, 5 CER 22 [*Ferguson Supply*].

for their function is committed for use with them. In this appeal the article, consisting of the tuner, pre-amplifier and related apparatus has no use other than as a component of a radio receiving set and is necessary for the functioning of the set. It is a part thereof, and that is so notwithstanding that it may have been imported and sold separately, may have been made by a different manufacturer than have the other components and may be substituted by apparatus of a different design or manufacturer.⁸⁹

The Board maintained the test of commitment to a particular use, and added the necessity requirement to differentiate parts from accessories. In *Bosch*, it was clear that different components could be substituted for each particular set, and it also appeared that each particular component was not destined for any specific set. The key fact seems to have been that the components were designed for use with radio receiving sets in general; their application was thus sufficiently limited to constitute commitment.⁹⁰

Goods were more likely to meet the commitment requirement if their application was narrow. If there was clearly a separate possible use, then the required degree of commitment was not present.⁹¹ Often, it was the physical possibility of a different use that counted.⁹² When goods were designed to operate together, commercial practicality could indicate that, in fact, there was no other use. The imported replacement chutes in *Burnbrae Farms*, for

⁸⁹ *Robert Bosch (Canada) v DMNRCE* (1985), App 2089, 10 TBR 110, 9 CER 62 at 116 TBR [*Bosch*].

⁹⁰ In the *Bosch* decision, (*ibid*), the Board also mentioned an earlier declaration (*Canadian Hanson & Van Winkle v DMNRCE* (1953), App 291, 1 TBR 126) in which buffing sections had been found to be not parts because they were usable on any buffing machine. Noting that the sections were nevertheless designed for that application, the Board stated that *Canadian Hanson* was no longer authoritative. See also *Moore Dry Kiln v DMNRCE* (1972), App 990, 5 TBR 401 [*Moore Dry Kiln*].

⁹¹ *Electrodesign*, *supra* note 87; *J H Ryder Machinery Co v DMNRCE* (1962), App 599, 2 TBR 292 [*J H Ryder* (1962)]; *Opticom Technologies Inc v DMNRCE* (1988), App 2619, 13 TBR 196, 16 CER 160; *Sherwood Medical Industries (Canada) Ltd v DMNRCE* (1986), App 2397, 11 TBR 520, 13 CER 30; *George S Trudell Co v DMNRCE* (1988), App 2712, 13 TBR 239, 16 CER 257. These last two appeals can be contrasted with *Novocol Chemical Manufacturing Co v DMNRCE* (1988), App 2731, 13 TBR 183, 16 CER 132.

⁹² *General Instrument of Canada Ltd v DMNRCE* (1976), App 1151, 6 TBR 338 [*General Instruments*]. In some disputes prior to the *Bosch* decision (*supra* note 89), it helped if goods could be used only with one particular make or model: *Walbern Industries Ltd v DMNRCE* (1975), App 1084, 6 TBR 246 [*Walbern Industries*]; *Bestpipe Ltd v DMNRCE* (1979), App 928, 5 TBR 58; *Outboard Marine Corp of Canada Ltd v DMNRCE* (1981), App 1724, 7 TBR 423, 3 CER 258 [*Outboard Marine*].

example, were found to be parts of a poultry manure removal system because they were designed specifically to operate with the automatic system and were sold only for that purpose.⁹³ In the *Booth Photographic* appeal, the Tariff Board originally declared that the imported automatic roller was not part of a film processor; the Federal Court of Appeal, however, determined that the roller which was designed for only this purpose was so closely connected to the rest of the processor that it changed the nature of the basic goods from manually-driven to power-driven.⁹⁴ Once it had been decided that there were thus two distinct types of processors, it was easy for the Board on the rehearing to conclude that the roller was part of a power-driven processor. In *Moore Dry Kiln*, involving an electronic control system imported for a veneer clipper, the Board similarly found that the addition of the new automatic control changed the basic nature of the goods; the control had been designed to function as a single integrated automatic unit with the clipper and was therefore part of it, even though it could be adapted with minor modifications for use on other standard clippers.⁹⁵ If various components thus all formed part of a single system, their physical distance from each other was not significant. In the *Maple Leaf Potato Chips* appeal, a heat exchanger was found to be part of a fryer even though separated by a wall from the rest of the equipment, because all of the parts were designed to operate together in controlling the temperature of the oil, and they had no other function.⁹⁶

⁹³ *Bumbrae Farms Ltd v DMNRCE* (1979), App 1440, 6 TBR 957, 1 CER 323 [*Bumbrae Farms*]. See also: *Leslie Taylor Manufacturing v DMNRCE* (1983), App 1963, 8 TBR 772, 5 CER 557, aff'd FCA, March 15, 1985 without written reasons (see 11 TBR 159) [*Leslie Taylor*]; *Imperial Tobacco, Division of Imasco Ltd v DMNRCE* (1986), Apps 1979 et al, 11 TBR 158, 11 CER 129 [*Imperial Tobacco*]; *Ingersoll-Rand Door Hardware Canada Inc v DMNRCE* (1988), Apps 2361, 2378, 2380, 2424, 13 TBR 219, 16 CER 235.

⁹⁴ *Booth Photographic Ltd v DMNRCE* (1981), App 1510, 7 TBR 329, 3 CER 124, rev'd (1982) 4 CER 176 (FCA), reheard (1983), App 1510, 8 TBR 521, 5 CER 140. Generators for electronic accordions, however, were accessories only, and not parts: *Excelsior Supply Co v DMNRCE* (1984), App 2094, 9 TBR 257, 7 CER 274.

⁹⁵ *Moore Dry Kiln v DMNRCE* (1972), *supra* note 90. See also: *Outboard Marine, supra* note 92; *Canadiana Garden Products Inc v DMNRCE* (1981), Apps 1761-62, 7 TBR 400, 3 CER 244; *Reference re Self-Propelled Lawn Grooming Riding Machines & Related Attachments* (1986), App 2294, 11 TBR 440, 12 CER 171, reconsideration prohibited, *MTD Products Limited v Tariff Board of Canada* (1986) 13 CER 123 (FCTD).

⁹⁶ The whole system had been imported disassembled in three truck-loads: *Maple Leaf Potato Chips v DMNRCE* (1965), App 796, 3 TBR 27. Physical distance was similarly

The *Bosch* decision quoted above stated that an import had to be necessary for the functioning of the basic goods in order to be a part.⁹⁷ The concern with necessity was linked to the idea that a part should be central in some way, as distinguished from a mere accessory. Attention could focus on mechanical necessity, something that had to be present for the goods to function, but the commercial context was a particularly important factor. In the *Sperry New Holland* appeal, for example, the pipes in question were parts of agricultural machinery because, without them, "the forage blower would simply propel the forage material twenty to thirty feet into the air in a 'blizzard of hay or corn'."⁹⁸ In the *Northern Machinery* appeal, a trap was part of a grain mill because it was "performing a function essential to the safe and prudent operation of the mill."⁹⁹ In *Walbern Industries*, the Board considered economic necessity. In that appeal, a cross-loader was found to be part of an egg-handling machine because, without it, the machine could not be operated "at an economic rate of speed or ... at the designed capacity."¹⁰⁰

As this discussion has illustrated, parts were supposed to be linked to the functioning of the basic goods. If they served a different function, they were separate goods, not parts.¹⁰¹ Attention to function could help to

found insignificant as an entity test: *Shaft Sinkers v DMNRCE, U. & N. Equipment v DMNRCE* (1968), Apps 875-876, 4 TBR 156 (item covered parts, but imported goods held to constitute single entity).

⁹⁷ *Bosch*, *supra* note 89. In addition to functional necessity, parts still had to meet a commitment test: *Dominion Textile Co v DMNRCE* (1967), App 865, 4 TBR 78 at 81.

⁹⁸ *Sperry*, *supra* note 88. See also: *General Instruments*, *supra* note 92; *Burnbrae Farms*, *supra* note 93; *Leslie Taylor*, *supra* note 93; *Imperial Tobacco*, *supra* note 93.

⁹⁹ *Northern Machinery Ltd v DMNRCE* (1962), App 633, 2 TBR 317 at 319 [*Northern Machinery*].

¹⁰⁰ *Walbern Industries v DMNRCE* (1975), *supra* note 92 at 251.

¹⁰¹ *SKF Canada Ltd v DMNRCE* (1982), Apps 1713, 1818, 8 TBR 179, 4 CER 209, affd [1983] FCJ No 202, 10 CER 6, 47 NR 61 (FCA) [*SKF Canada*]. In *Moore Dry Kiln*, *supra* note 90, the imported control system had proved unworkable for other purposes and was therefore functioning only as part of a veneer clipper. See the separate opinion of Tariff Board member Gorman in *Simark Controls v DMNRCE* (1985), App 2278, 10 TBR 221, 9 CER 270, in which he found the imported goods to be parts of meters, rather than meters themselves, since they did not have separate measuring capacity but functioned as part of a system which did the measuring and recording. See also *Maxi-Torque Drill Systems Inc v DMNRCE* (1988), App 2699, 13 TBR 21, 16 CER 6 [*Maxi-Torque*].

resolve the ambiguity when articles might be parts of two distinct things.¹⁰² Trade usage was also mentioned¹⁰³ and advertising played a role;¹⁰⁴ an article could be a part within the meaning of a tariff item even though it was described as an accessory or attachment in the manufacturer's literature.¹⁰⁵ While packaging or selling goods together was some indication that they were parts,¹⁰⁶ the fact that goods were packaged and sold separately was not definitive. The radio-cassette players in the *Bosch* appeal, for example, were parts of radio receiving sets even though they were "imported and sold separately."¹⁰⁷ In *Bosch*, the Board stated that parts did not have to be made by the manufacturer of the basic goods.¹⁰⁸ Conversely, the fact that the sources were different was used in other cases as some indication that goods were not parts.¹⁰⁹

2. Accessories pre-1988: Commercial Factors and Systems

The necessity requirement for accessories was applied by the Federal Court of Appeal in 1987 in the *Androck* case. The Court held that grasscatcher bags were not parts of lawnmowers. While the bags were committed to this use, it was clear that the lawnmowers could operate

¹⁰² *Superior Electronics v DMNRCE*, Apps 1082, 1083, July 5, 1976, (1977) C Gaz I, 2803 .

¹⁰³ *Leepo Machine Products Ltd v DMNRCE* (1964), App 759, 3 TBR 199 ; *Cascade Co-operative Union v DMNRCE*, *Vernon Fruit Union v DMNRCE* (1966) Apps 804, 823, 3 TBR 281; *SKF Canada*, *supra* note 101.

¹⁰⁴ *SKF Canada* , *supra* note 101; *Electrodesign*, *supra* note 87.

¹⁰⁵ *Northern Machinery*, *supra* note 99; *Walbern Industries*, *supra* note 92.

¹⁰⁶ *Northern Machinery*, *supra* note 99; *Burnbrae Farms*, *supra* note 93.

¹⁰⁷ *Bosch*, *supra* note 89 at 116 TBR; *Outboard Marine*, *supra* note 92; *Harry D Shields Ltd v DMNRCE* (1980), App 1489, 7 TBR 1, 2 CER 1. *Contra Canadian General Electric*, *supra* note 87.

¹⁰⁸ See *Moore Dry Kiln*, *supra* note 90.

¹⁰⁹ *Ferguson Supply*, *supra* note 88; *Control Data Canada Ltd v DMNRCE* (1982), App 1512, 8 TBR 111, 4 CER 81; *J H Ryder* (1962), *supra* note 91.

without them and the bags were thus accessories.¹¹⁰ *Androck* has since been cited in decisions under the new HS tariff.¹¹¹

In the pre-1988 decisions, the commitment test applied.¹¹² To be an accessory, the imported good had to be dedicated or committed to a given use, but in some subsidiary way. In the *Ferguson Supply* appeal,¹¹³ for example, the appellant was successful in maintaining that tail gate assemblies for dump trucks used in oil-sands operations were accessories, but not parts. The tail gates were specially designed to handle clay and other wet materials. When in operation, they would be welded onto the trucks, but this did not in itself make them parts. They were manufactured and supplied by separate companies, not by the manufacturers of the trucks, and the trucks could be used for other general purposes without the tail gates. In the *Frantek Software* appeal,¹¹⁴ interface boards used to permit computers to be connected to printers were accessories for those computers, and not accessories for the printers as the appellant had argued. They could be used for a variety of printers but were committed to be slotted into particular computers, from which they derived their power. The Board noted that they would not be computer parts, however, since parts criteria were "more

¹¹⁰ *DMNRCE v Androck Inc*, [1987] FCJ No 45, 13 CER 239, 74 N.R. 255 (CA), rev'g (1984) App 2081, 9 TBR 352, 8 CER 49. See: *Carousel Photographics Ltd v DMNRCE* (1986), App 2477, 11 TBR 517, 13 CER 28; *Staub Electronics Ltd v DMNRCE* (1987), App 2532, 12 TBR 14, 13 CER 193; *Digidyne Inc v DMNRCE* (1987), App 2652, 12 TBR 620, 15 CER 301 [*Digidyne*]; *Staub Electronics Ltd v DMNRCE* (1989), App 2764, 2 TCT 1230 (CITT).

¹¹¹ *Bureau de Relations d'Affaires Internationales*, *supra* note 65 at para 16. See also *Great Canadian Casino*, *supra* note 65. Counsel for the Deputy Minister referred to *Androck* in the *Canadian Meter* appeal before the Tribunal: *Canadian Meter, a division of Singer Co of Canada Ltd v Canada (Deputy MNR)*, AP-96-059, [1997] CITT No 52 at para 10, arguing successfully that goods were parts of gas meters. *Androck* was distinguished in a decision involving lawnmowers of a different design: *Black & Decker Canada Inc v Canada (Customs and Revenue Agency, Commissioner)*, AP-2003-007, [2004] CITT No 15.

¹¹² *General Supply Company of Canada v DMNRCE* (1955), App 326, 1 TBR 214, aff'd [1956] Ex CR 248.

¹¹³ *Ferguson Supply v DMNRCE* (1982), *supra* note 88. See also: *Falcon Equipment Co v DMNRCE* (1952), App 257, 1 TBR 67; *Staub Electronics v DMNRCE* (1987), App 2532, 12 TBR 14, 13 CER 193.

¹¹⁴ *Frantek Software Distributors Inc v DMNRCE* (1986), App 2223, 11 TBR 9, 10 CER 268.

restrictive,¹¹⁵ presumably requiring that the boards be necessary for the computers to function, which was not the case on the facts.

The *Stewart-Warner* appeal¹¹⁶ involved interpretation of the general machinery tariff item in the pre-1988 Tariff: "(m)achines, n.o.p., and accessories, attachments, control equipment and tools for use therewith; parts of the foregoing". The appellant had imported a pump, reels, and various hoses and components for a motor oil lubrication system. The Tariff Board found the pump and main reel to be an entity, and then addressed the question of whether the other components might qualify as accessories, attachments or control equipment. Despite evidence of a fair amount of interchangeability, the overhead hoses, control valve and other components were held to qualify, since they were necessary for the system to operate in a garage or workshop. In argument, it had been suggested that the overhead reels might qualify separately as machinery, but the Board decided that they could in any case be classified as accessories, because their central purpose was for use in systems designed by the appellant. None of the various components were really committed to use with any particular pump, and if a stringent commitment test had been applied, they probably would not have qualified. The Board's approach may have been guided by the idea that mechanical systems should not be split up too readily for classification purposes, particularly when all the various components were entered at about the same time.

In summary, in the pre-1988 system, the commitment test for parts developed in contrast to end use items. Parts had to qualify as such at the time of importation. Classification could not depend on an actual end use that would be subject to potential verification by Customs authorities. The tests that evolved for parts and accessories have had continuing influence on the interpretation of the new HS tariff. Experience of the administration of end use items may have promoted an understanding of the commercial and economic context around the use of imports.

¹¹⁵ *Ibid* at 270; *EMJ Data Systems Inc v DMNRCE* (1987) Apps 2690, 2728, 2770, 12 TBR 520, 15 CER 170. See also *Digidyne*, *supra* note 110.

¹¹⁶ *Stewart-Warner Corp of Canada Ltd v DMNRCE* (1979), App 1356, 6 TBR 758, 1 CER 49 [*Stewart-Warner*].

IV. ENTITY CASES

This section considers certain entity questions, looking at two matters that have been problematic. Both are the subject of specific provisions in the Harmonized System. The first deals with entities and the condition of goods at the time of classification. The second concerns entity tests for complex machinery. The section reviews these problems in pre-1988 law, and then discusses how they are addressed in current HS disputes.

A. Pre-1988 law

1. *Time of Classification, pre-1988*

In order to operate a tariff classification system, customs authorities must be able to tell when they have been presented with a "something" requiring classification. This is not as easy as it sounds, since many imports are too big to be shipped in one large package. Different components could be delivered at different times, possibly from different manufacturers.

Tariff classification is done as of the time of importation¹¹⁷ and based on the condition of the goods at that time.¹¹⁸ In *Nowsco*, for example, coiled tubing did not qualify as parts of machinery in the oil and gas industry since it was not ready to be attached at the time of importation.¹¹⁹

For entity analysis, the physical linking of the goods at the time of entry was especially important. In 1973, in *Ferguson*, the Supreme Court of Canada held that electric motors could not be classified along with two trawler winches for which they had been designed and built, but had to be treated separately under the item for motors. All of the components for the winches were imported except for a connecting rod that had to be machined in place to the exact measurements. Even though the motors later became

¹¹⁷ *Canada (Deputy MNRCE) v MacMillan and Bloedel (Alberni) Ltd*, [1965] SCR 366, [1965] SCJ No 10; *Harvey Carruthers*, *supra* note 84; *Jean Carruthers v Canada (Deputy MNRCE)* (1987), App 2551, 12 TBR 242, 14 CER 193; *Fazakas v Canada (Deputy MNRCE)* (1987), App 2643, 12 TBR 512, 15 CER 152.

¹¹⁸ *Leeza Distribution*, *supra* note 26 at para 89; *Evenflo Canada Inc v Canada (Border Services Agency, President)*, AP-2009-049, [2010] CITT No 65 at para 29; *Sealand of the Pacific Ltd v Canada (Deputy MNR)*, App 3042, [1989] CITT No 17. See also *Tiffany Woodworth v Canada (Border Services Agency, President)*, AP-2006-035, [2007] CITT No 65.

¹¹⁹ *Nowsco Well Service Ltd. v Canada (Deputy MNR)*, AP-95-128, [1999] CITT No 39 at para 25. To the same effect, see *Computalog Ltd*, *supra* note 16; *Flextube*, *supra* note 26.

part of the winches, the Court decided that they did not have this status at the time of entry. In the words of the majority judgment delivered by Pigeon J.:

Can it be said ... that because each motor was designed as a unit to form a single entity with the winch and controls, each imported motor was to be considered as a single entity with the winch to be driven by it? This would mean that parts are to be regarded as falling within the classification of the whole thing rather than as such. In my view, the Board erred in law when so holding. Parts or complete parts are mentioned with many things in a number of items of the tariff classification... . In other items, parts are not mentioned ... (or) ... are dealt with separately. Within such a context, parts cannot properly be considered as included in items in which they are not mentioned. To do so would render meaningless the mention of parts or of complete parts in a great many item.¹²⁰

The dissenting judgment delivered by Laskin J. stated that there was nothing in the *Customs Tariff Act* requiring that classification be finally fixed at the time of entry if the goods might also be covered by an appropriate item on an entity basis. According to the dissent, there was no error of law in the Tariff Board's decision to treat the motors as included with the winches.

There are several factors that distinguished *Ferguson* from the Supreme Court's 1957 decision in *Accessories Machinery*, the first case discussed in this article.¹²¹ In *Ferguson*, parts were not mentioned in the item. As well, *Ferguson* was not a case of a replacement motor being imported, but rather a complete, original installation, that was arriving more or less at the same time, given its size. The motors and electrical controls had been shipped from England by a subcontractor who had made them under the direction of the main manufacturer in Belgium. The rest of the mechanical components arrived from that manufacturer three days later (in the case of one winch) and three months later (in the case of the other). It was clear that all the various pieces had been carefully and precisely built to operate together. For equipment this large, it is difficult to see what else could have been done to indicate that these were whole entities being imported. There was no difficulty in classifying the electrical controls and other mechanical gear together as components of the trawler winch. It was only the motors

¹²⁰ *DMNRCE v Ferguson Industries* (1972), [1973] SCR 21, 4 TBR 368 at 373-74 TBR [Ferguson Industries], rev'g *DMNRCE v Ferguson Industries* (1970) 4 TBR 357 (Ex Cr), rev'g *Ferguson Industries v DMNRCE* (1969), App 911, 4 TBR 344; reheard *Ferguson Industries v DMNRCE* (1973), App 911, 4 TBR 379.

¹²¹ *Accessories Machinery*, *supra* note 3.

that were separated out, presumably because of the influence of the *Accessories Machinery* decision.

As the Tariff Board noted, the situation in *Ferguson* also differed from *Accessories Machinery* in that the winch item was actually an end use one that covered “manufactures of iron, brass or other metal, of a class or kind not made in Canada, for use exclusively in the construction or equipment of ships or vessels”. The dissenting judgment in the Supreme Court of Canada would have given priority to the end use item. Furthermore, the absence of a mention of parts was not as significant as the majority judgment in the Supreme Court would indicate, since it is not clear that the motors had to be treated as parts in order to be included with the rest of the winch.¹²² If tariff items for large machinery had to mention parts in order to cover that machinery when it was being imported in pieces, it is as if the general mention of the entity was being denied useful effect.¹²³

In the final result, when the matter was referred back to the Tariff Board for rehearing, the motors were classified under the end use item as equipment for ships anyway. The Board found that, because of their special design, they were of a class or kind not made in Canada and qualified for this treatment independently. This decision was not appealed.

If parts were not mentioned in an item, it seems simple to conclude that components imported separately to enter into domestic production were not covered. The same conclusion would apply to goods imported as replacement parts. If the tariff item only referred to entities, then that is all it covered. When, however, the whole entity was being imported and pieces of it arrived at different times, the *Ferguson* decision placed very heavy emphasis on the physical condition of goods and the separate arrival of each piece.

2. Complex Machinery, pre-1988

In entity disputes prior to the adoption of the Harmonized System, the strict commitment test, requiring an absence of other uses, did not apply. While the question of use had some relevance, and the existence of two

¹²² For a contrary example under the *Excise Tax Act* that was cited unsuccessfully by the importer, see *Kirk's Stokers Ltd v DMNRCE* (1955), App 337, 1 TBR 234.

¹²³ See *Nova Aqua Sea Ltd v Canada (DMNRCE)*, App 3027, [1990] CITT No 36, in which an imported fish farm was classified as a unit, a floating structure, despite being imported unassembled, since the components were designed, packaged and sold as a unit.

independent uses could lead to a finding that goods were in fact two separate things,¹²⁴ entity appeals (particularly those from the 1950s) were more concerned with commercial and marketing factors, with whether the goods were seen in the trade as constituting a single entity.¹²⁵ In *Photographic Survey*, for example, the various components of an aerial mapping system were classified together, as they formed a "complete article of commerce."¹²⁶ It helped if, as in that case, goods were specifically designed to operate together, but this was not always a determining factor (as *Ferguson* demonstrates).¹²⁷

If goods were physically connected at the time of entry, there was an increased tendency to consider them as all one entity.¹²⁸ In the *Jutan International* appeal, a clock radio and a telephone were held to constitute one entity, "electric apparatus...n.o.p.", because they were mounted together on a plastic base, and because they were imported and marketed together in a single package. According to the majority decision of the Tariff Board, these were "two separate and distinct products ... joined in a design to provide efficiency and probably save space on a bedroom night table".¹²⁹ The

¹²⁴ *New Holland Machine Co v DMNRCE* (1961), App 532, 2 TBR 223. In *P E Bouffard Ltd v DMNRCE* (1962), App 593, 2 TBR 287, the Board also looked to the possibility of independent use, this time to find that it did not exist and that the pallets there in question were of the "very essence" of the machinery; as the tariff item involved in the appeal also referred to parts, this was a hybrid parts appeal.

¹²⁵ *Accessories Machinery Ltd v DMNRCE* (1952), App 242 (No 1), 1 TBR 48. See also: *Accessories Machinery Ltd v DMNRCE* (1951), App 221, 1 TBR 37.

¹²⁶ *Photographic Survey Corp v DMNRCE* (1951), App 244, 1 TBR 52 at 53. All three components had to be operated simultaneously in order for the measurements to be made. See also *IMS International Mailing Systems Ltd v DMNRCE* (1988), Apps 2612, 2616, 18 CER 57 (TB).

¹²⁷ *J H Ryder Machinery Co v DMNRCE* (1951) App 245, 1 TBR 53 [*J H Ryder* (1951)]; *Kallestad Canada Inc v Deputy MNRCE*, (1987), 14 CER 71 (FCA), rev'g (1986) App 2200, 11 TBR 197, 11 CER 280. See *Ferguson Industries*, *supra* note 120.

¹²⁸ *Reference re Attached Electric Motors*, *supra* note 7. In the *Attached Motors Reference*, the Board suggested that the test was not just the presence or absence of a physical link, but rather whether the motor was "attached in such a manner that its removal would destroy or weaken or alter the indivisibility of the machine or piece of machinery" (TBR at 106). See also *J H Ryder* (1951), *supra* note 127, in which the Board found that the motor on a fork lift truck should not be segregated from the truck for separate classification since both together formed an entity. See further *Esco Ltd v DMNRCE* (1984), App 1923, 9 TBR 224, 7 CER 205.

¹²⁹ *Jutan International Ltd v DMNRCE* (1984), App 2098, 9 TBR 326, 7 CER 70 at 329

Board held that they should be treated together despite their independent functions, since classification had to be done at the time of entry. Tariff Board member Gorman dissented and would have classified the goods separately as "electric telephone apparatus" and "domestic radio receiving set", because they were designed to function independently and neither was necessary to the operation of the other.

As with parts tests, economic factors could be considered to determine whether goods had other likely uses. In the *AG Marketing* appeal, a truck chassis and sprayer were classified together as a single entity. Although the truck chassis could theoretically be converted to separate road use, the cost including conversion would range from \$88,000 to \$93,000, while a chassis designed for road use alone would cost only \$35,000 to \$40,000. In these circumstances, according to the Tariff Board:

The question ... is not whether it is physically possible to adapt the chassis to other uses but whether such adaptation is feasible or likely to happen. ... (W)hile most anything is possible in this technological world, it would not be economically feasible to convert the chassis ... to other use as a regular motor vehicle. Nor, according to testimony, does it happen.¹³⁰

In a number of appeals, especially those dealing with complex machinery, parts and entity analyses were mixed together. Although the tariff item mentioned parts, the analysis did not focus on whether a smaller thing was to be treated as part of a whole, but rather on whether altogether the goods formed an entity. In these hybrid decisions, the Tariff Board's declaration concentrated on whether a "single commercial entity"¹³¹ had been created. Since these items mentioned parts, separate importations would be covered.¹³² The decisions are outlined here, as the analysis is potentially relevant to the question of "functional units" in the Harmonized System. The hybrid decisions are not binding in the new Tariff, but could have some persuasive effect.

Once the entity was identified in a hybrid parts case, it did not matter that, separately, the various components might themselves have qualified as

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¹³⁰ *AG Marketing v DMNRCE* (1985), App 2309, 10 TBR 228, 10 CER 105 at 231 TBR.

¹³¹ *Esco v DMNRCE* (1984), *supra* note 128, at 229 TBR.

¹³² Canada Border Services Agency, "Classification of Parts and Accessories in the Customs Tariff," Memorandum D10-0-1 (13 May 2014), superseding Memorandum D10-0-1 of January 24, 1994, lists as a criterion in the parts test that parts "form a complete unit with the goods" (at para 27).

entities.¹³³ It also did not matter that the various components were somewhat distant from each other when in operation, although it probably helped if they were physically connected in some way – through wires, ropes, tubes, etc. In the *Shaft Sinkers* appeal, for example, a mining hoist was treated as one entity with three main components: a friction hoist, a compensating tower and a rope storage drum all connected by ropes and electrical wires.¹³⁴

The test for identifying an entity in these hybrid parts cases was whether the components all worked together for one function. In an early pair of appeals,¹³⁵ this was treated as a matter of whether each component had the same overall purpose in order to qualify as part of a grading machine. The "systems" approach, which appeared in *Metropolitan Bio-Medical*, looked instead to whether the various pieces were designed to work together.¹³⁶ The components in that appeal were incompatible with other computer systems, except at great expense, and each was necessary for the entity to perform its function of diagnosing blood samples. The Tariff Board decided that together they formed an entity to be classified as a diagnostic article. In *Windsor Management*, there was some interchangeability, in that a different printer could be substituted, but still a printer was necessary in order for the computerized editing system to function.¹³⁷ For the systems analysis to

¹³³ *Shaft Sinkers v DMNRCE* and *U.&N. Equipment v DMNRCE* (1968), Apps 875, 876, 4 TBR 156 ; *Esco v DMNRCE* (1984), *supra* note 128.

¹³⁴ *Shaft Sinkers* and *U.&N. Equipment* (1968), *ibid.* See also: *Metropolitan Bio-Medical Laboratories v DMNRCE* (1977), App 1218, 6 TBR 445, aff'd without written reasons, FCA, October 25, 1977, File A-324-77 (see 9 TBR 340) [*Metropolitan Bio-Medical*]; *Stewart-Warner*, *supra* note 116; *R Mabit v DMNRCE* (1988), App 2622, 13 TBR 1, 15 CER 329; dissenting opinion of CITT member Trudeau in *Schlumberger v DMNRCE* (1990), App 2898, [1990] CITT No 50, 3 TCT 2302, Trudeau, dissenting [*Schlumberger*]. Concerning parts tests and similar distance, see *Maple Leaf Potato Chips Inc v DMNRCE* (1965), App 796, 3 TBR 270.

¹³⁵ *Naramata Co-operative Growers Exchange v DMNRCE* (1964), App 726, 3 TBR 144; *Cascade Co-operative Union v DMNRCE* and *Vernon Fruit Union v DMNRCE* (1966), Apps 804, 823, 3 TBR 281. The two decisions are not consistent. The 1966 decision finds an entire line of equipment, from the dump table to the lidding machine, to be a grading machine for fruit and vegetables, without requiring that each component itself perform a grading function.

¹³⁶ *Metropolitan Bio-Medical*, *supra* note 134. In an earlier appeal, a steel mill and a vertical edger were treated as two separate entities despite being designed to operate together: *Algoma Steel Corp Ltd v DMNRCE* (1960), App 517, 2 TBR 204.

¹³⁷ *Windsor Management Services v DMNRCE* (1978), App 1294, 6 TBR 674.

work, there had to be a tariff item describing the whole system. As the Tariff Board noted in the *Centrilift* appeal, the identification of a system did not mean that the components became parts of each other.¹³⁸ As well, it helped if there was a central unit to establish the basic function. In *Fromagerie d'Oka*, the various components were found to be a cheese-making system, but not a machine or separate customs entity because there was no central unit and a great deal of work was done by hand.¹³⁹

Attention to the commercial context was important. Economic factors were explicitly considered in some of the hybrid parts cases. In the *Agri-Feed Systems* appeal, overhead bins, and roof and side enclosures were held to form an entity along with the feed mill for which they were supplied. They were necessary for the efficient operation of the mill, as well as for the protection of the machinery and the comfort of the operator.¹⁴⁰

In summary, the pre-HS decisions on entity analysis had not resolved the treatment of large items crossing the border in separate pieces. In entity tests, there was emphasis on commercial recognition, while physical linkage and packaging had special significance. The hybrid parts cases directed particular attention to the functioning of goods as a system.

Interchangeability was, however, a problem in *Astrographic Industries Inc v DMNRCE* (1987), App 2579, 12 TBR 235, 14 CER 166, along with the fact that the electric motors and the other components of the machine could be ordered separately from different manufacturers. See also *Stewart-Warner*, *supra* note 116.

¹³⁸ *Centrilift Hughes v DMNRCE* (1987), App 2539, 12 TBR 191, 14 CER 130; *Baker Oil Tools Canada v DMNRCE* (1987), Apps 2742, 2773, 12 TBR 611, 15 CER 294; *Maxi-Torque*, *supra* note 101.

¹³⁹ *Fromagerie d'Oka v DMNRCE* (1979), Apps 1410, 1423, 6 TBR 945, 1 CER 309. In *Dari Farm Supply v DMNRCE* (1963), App 655, 3 TBR 75, various pieces of milking equipment were held to constitute "a system which properly falls within the meaning of the phrase 'milking machines and attachments therefor'"(at 76), despite some minor human intervention to pour the milk from one receptacle to another. It is not clear from the decision whether anything was to be separately identified as an "attachment."

¹⁴⁰ *Agri-Feed Systems v DMNRCE* (1969), App 921, 4 TBR 411. The Board also found the bins and enclosures to be parts. The economic efficiency argument did not work, however, in *Schlumberger*, *supra* note 134, where the data transmission equipment was seen as separate from the well-logging equipment, even though it greatly enhanced the efficiency with which oil well drilling records ("logs") could be produced. Logs could be prepared through other means, and the transmission of data to a distant computer was therefore not essential.

B. Current Law

The Harmonized System has a General Rule for Interpretation on the condition of goods at the time of importation. As well, the treatment of complex machinery is addressed in a Section Note.

1. *Timing and HS Rule 2(a)*

General Rule for Interpretation 2(a) deals with goods that are imported unassembled. It is as follows:

2(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.¹⁴¹

Articles that have the essential character of the final article are classified as such, even if they are incomplete, unfinished, unassembled or disassembled. The Explanatory Note to Rule 2(a) provides that assembly can be by fixing devices such as screws, nuts and bolts, or by riveting and welding. It does not matter whether the assembly is complicated, so long as it is only assembly and does not involve further working to reach the final product.¹⁴²

In the *Renelle* appeal, the Tribunal applied Rule 2(a) to decide that unassembled metal futon frames were classified as seats, even though the mattress was lacking. The frames might not be comfortable, but the Tribunal ruled that they already had the essential character of the complete articles and were recognizable as futon beds.¹⁴³ In *Bauer Nike*, skating boots had the essential character of sports footwear despite lacking wheels and insoles.¹⁴⁴ The Tribunal distinguished that appeal from the earlier decision in *Atomic Ski*, in which plastic shells for inline skates were parts, but not yet classified as sports footwear under Rule 2(a). Since the shells lacked liners and buckles, as well as the undercarriage, they could not be worn as

¹⁴¹ Rule 2(a) applied to the gazebos imported unassembled in *Rona Corp Inc v Canada* (Border Services Agency, President), AP-2006-033, [2008] CITT No 13.

¹⁴² The Explanatory Note is quoted in *Bauer Nike Hockey Inc v Canada* (Deputy MNR), AP-99-092, [2001] CITT No 12 at para 16 [*Bauer Nike*].

¹⁴³ *Renelle Furniture Inc v Canada* (Border Services Agency, President), AP-2005-028, [2007] CITT No 17 at paras 19--22.

¹⁴⁴ *Bauer Nike*, *supra* note 142 at para 20.

coverings for the foot and thus did not have the essential character of footwear.¹⁴⁵ In *Bauer Nike*, since the boots had buckles or straps and could be worn, the Tribunal decided that they were footwear even though they were not yet complete skates.

The issue of how functional the goods have to be is a difficult one. In *Viessmann*, the imported goods were classified as a boiler pursuant to Rule 2(a), even though the control panel, gas train and electrical fittings were missing, and even though the required assembly and testing procedures after importation would increase the value by about 40% to 45%, according to one witness. In the Tribunal's view, the goods as imported included the main essential feature, the heat exchanger. The fact that they might not operate safely, "if at all", did not prevent them from being classified as a boiler.¹⁴⁶ Similarly, in *Integrated Protection*, the imported goods were a fire extinguishing system, despite the fact that pipes and electrical components would be added later. On importation, the main essential features, namely the nozzles, control head and charge, of a fire extinguisher were present.¹⁴⁷

The clock movements in *Innovation Specialties* could be used to tell time, and were classified as clocks, notwithstanding the fact that the acrylic clock bases still had to be added.¹⁴⁸ In *Readi-Bake*, the unbaked cookie dough did not yet have the essential character of a cookie or biscuit,¹⁴⁹ but in *Zellers Ltd*, the imported needlework kits were already decorative articles for Christmas trees or Christmas stockings, since the craft stitching required was a simple assembly operation.¹⁵⁰

¹⁴⁵ *Atomic Ski Canada Inc v Canada (Deputy MNR)*, AP-97-030, AP-97-031, [1998] CITT No 33 at para 22.

¹⁴⁶ *Viessmann Manufacturing Co v Canada (Deputy MNR)*, AP-96-196, AP-96-197, AP-96-198, [1997] CITT No 117 at para 30.

¹⁴⁷ *Integrated Protection Inc v Canada (Deputy MNR)*, AP-95-240, [1997] CITT No 14 at para 21.

¹⁴⁸ *Innovation Specialties Inc v Canada (Deputy MNR)*, AP-95-265, [1996] CITT No 85 at para 10.

¹⁴⁹ *Readi-Bake Inc v Canada (Deputy MNR)*, AP-95-044, [1996] CITT No 80.

¹⁵⁰ *Zellers Limited v Canada (Deputy MNR)*, AP-97-062, [1999] CITT No 11 at para 15. See also: *Dumex Medical Surgical Products Ltd v Canada (Deputy MNRCE)*, AP-91-132, [1992] CITT No 85; *Spacesaver Corp v Canada (Deputy MNR)*, AP-95-013, AP-95-073, AP-95-078, [1996] CITT No 92; *Interprovincial Corrosion Control Co Ltd v Canada (Deputy MNR)*, AP-96-041, [1997] CITT No 59; *Kaneng Industries Inc v Canada (Deputy MNR)*, AP-96-127, [1997] CITT No 125; *Rutherford Controls International Corp v Canada (Border Services*

When several parts and components are imported at about the same time, each total that presents the essential character of the completed article under Rule 2(a) can be classified as that entity. Any leftover items will then be classified individually.¹⁵¹ This rule may be inconvenient for assemblers importing all or nearly all of their components. Depending on the timing, they could risk a classification decision that they have imported the final product pursuant to Rule 2(a), rather than simply the components to be assembled.¹⁵²

2. *Complex Machinery in the HS*

Entity determinations for complex machinery are difficult, especially if several components arrive at different times. In the Harmonized System, Note 4 to Section XVI deals with this issue. Section XVI contains Chapters 84 and 85, the main Chapters on machinery. Note 4 is as follows:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter

Agency, President), AP-2009-076, [2011] CITT No 8. See also *Paulmar Cycle Inc, Division of Marr's Leisure Holdings Inc and Marr's Leisure Products Inc v Canada (Deputy MNR)*, AP-95-008, [1996] CITT No 93, an anti-dumping decision in which Rule 2(a) analysis was used to determine that the imported components were, in fact, unassembled bicycles (at para 11) and thus subject to anti-dumping duty levied on bicycles imported assembled or unassembled.

¹⁵¹ Note VII Explanatory Notes to Rule 2(a). See *Gladu Tools Inc v Canada (Border Services Agency, President)*, AP-2004-018, September 7, 2005, [2005] CITT No 55 at para 29, rev'd on other grounds 2007 FCA 213, [2007] FCJ No 781, aff'd on other grounds 2009 FCA 215, [2009] FCJ No 816.

¹⁵² Rule 2(a) may also be relevant in international trade disputes when a distinction is made between the treatment of components and the treatment of the fully assembled product. See WTO, *Report of the Appellate Body: China – Measures Affecting Imports of Automobile Parts*, WTO Doc WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, online: <<https://www.wto.org>>. China's customs tariff on complete automobiles was higher than the tariff on automotive parts. The dispute arose over measures that subjected imported parts to a charge equivalent to the higher tariff for complete vehicles whenever parts were imported in quantities sufficient to show the essential character of the final product. The Appellate Body decided that the charge was an internal measure and inconsistent with China's obligation of national treatment for the imported parts.

85, then the whole falls to be classified in the heading appropriate to that function.¹⁵³

For interpretation of this Section Note¹⁵⁴ Customs authorities issued a separate Department Memorandum, D10-13-2.¹⁵⁵ The D-Memorandum recognizes that a functional unit might arrive in more than one consignment even from different countries. The Memorandum views a functional unit as “an integral system”, whose components were designed to “contribute together to a single, clearly defined purpose.”¹⁵⁶ There may be a potential for pre-HS decisions to have some persuasive effect on interpretation, especially the hybrid parts cases with their emphasis on systems. None have been cited yet, but they could reinforce the role of the commercial context and economic feasibility.¹⁵⁷

An entity test that considers whether a good contributes to the function of another is less demanding than a strict commitment parts test. Note 4 helps to emphasize the function rather than the method of connection.¹⁵⁸ In *Grinnell*, the Note was used to classify all the components of a fire sprinkler system together as a functional unit.¹⁵⁹ In *Future Shop*, Note 4 confirmed the Deputy Minister’s classification of a power surge protector in accordance with its function as electrical apparatus.¹⁶⁰ Similarly, Note 4 supported the decision to classify the hand set and base of a cordless

¹⁵³ Harmonized System, *supra* note 2, Section XVI, Note 4.

¹⁵⁴ And also Note 3 to Chapter 90.

¹⁵⁵ Canada Border Services Agency, “Administrative Policy – Tariff Interpretation of ‘Functional Units,’” Memorandum D10-13-2 (28 March 2014), superseding Memorandum D10-13-2 of 3 April 1992. The 2014 D-Memorandum states: “The editing revisions made in this memorandum do not affect or change any of the existing policies or procedures” (at “In Brief”).

¹⁵⁶ *Ibid*, para 2. Other listed factors are: “(a) the various components make up a commercial unit which is advertised and sold at a single price; (b) the various components were purchased as one unit on one contract or a single purchase order; and (c) the sole function of the various components that comprise the integral unit cannot be accomplished if any single component is removed” (at para 6).

¹⁵⁷ See decisions discussed at note 133ff.

¹⁵⁸ Multi-function and composite machines are classified by principal function, pursuant to Note 3 to Section XVI. Note 3 was applied to cordless telephones in *Royal Telecom Inc v Canada (Deputy MNRCE)*, AP-90-027, [1991] CITT No 22.

¹⁵⁹ *Grinnell Corp of Canada Ltd (d.b.a. Grinnell Fire Protection) v Canada (Deputy MNR)*, AP-95-254, [1997] CITT No 20.

¹⁶⁰ *Future Shop Ltd v Canada (Deputy MNR)*, AP-96-042, [1997] CITT No 78.

telephone together in accordance with the telephone function in *Byers*.¹⁶¹ Function is important even when Note 4 is not directly mentioned in the reasoning. In *Northern Telecom*, imported transmitters and receivers were classified as a single unit based on their function.¹⁶² In *Procedair*, filters were crucial to the operation of a system that, “in its entirety”, was an air separator.¹⁶³

In the Harmonized System, member countries may include Chapters 98 and 99 for additional national tariff provisions. In the Canadian tariff, these chapters are used for certain special classifications and duty reductions. Decisions on the scope of these beneficial provisions have raised some entity issues involving analysis of functional units.¹⁶⁴ Note 4 has been used in some of these decisions, when goods had to be in a listed Chapter 84 or Chapter 85 heading in order to qualify for the treatment in question.¹⁶⁵ In one dispute, the Tribunal decided that a provision covered separately imported after-market automotive parts, although the booster cables at issue did not qualify, since motor vehicles are not usually sold equipped with booster cables.¹⁶⁶

¹⁶¹ *Byers v Canada (Deputy MNR)*, AP-95-271, [1997] CITT No 60.

¹⁶² *Northern Telecom Canada Ltd v Canada (Deputy MNR)*, AP-94-340, AP-95-133, AP-95-136, [1996] CITT No 16.

¹⁶³ *Procedair Industries Inc. v Canada (DMNRCE)*, AP-92-152, [1993] CITT No 87. If goods are not classified as an entity, they might still be classified together under HS General Interpretative Rule 3(b) for goods put up as a set for retail sale. See: *Canadian Tire Corp Ltd v Canada (Customs and Revenue Agency, Commissioner)*, AP-2000-056, [2002] CITT No 10; *S.C. Johnson & Son Limited v Canada (Border Services Agency, President)*, AP-2005-015, [2006] CITT No 70.

¹⁶⁴ *A.M.A. Plastics Ltd v Canada (Border Services Agency, President)*, AP-2009-052, [2010] CITT No 117 (see the discussion of commercial feasibility at para 49); *P.L. Light Systems Canada Inc v Canada (Border Services Agency, President)*, 2010 FCA 226, [2010] FCJ No 1118 (CA) rev'g AP-2008-012, [2009] CITT No 61; *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-97-124, AP-97-125, [2000] CITT No 16; *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-97-137, [1999] CITT No 100; *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-97-123, [1999] CITT No 99. See further *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-93-383, [1995] CITT No 4; *Simark Controls*, *supra* note 27.

¹⁶⁵ *Prins Greenhouses Ltd v Canada (Deputy MNR)*, AP-99-045, [2001] CITT No 28; *Asea Brown Boveri Inc v Canada (Deputy MNR)*, AP-95-189, [1996] CITT No 76. See also *Grodan Inc v Canada (Border Services Agency, President)*, AP-2011-030, [2012] CITT No 82, aff'd 2013 FCA 121, [2013] FCJ No 513.

¹⁶⁶ *Carol Cable Co Canada Ltd v Canada (Deputy MNR)*, AP-95-099, AP-95-129, [1996] CITT No 37 at para 17; *A.G. Marketing v DMNRCE*, App 2309, 10 TBR 228, 10 CER 105 at

For the entity analysis of Note 4 to be applied, all the components need to be imported, or at least enough of the components to satisfy Rule 2(a).¹⁶⁷ The treatment of separately or subsequently imported components has been raised occasionally in disputes.

In the *Sable Offshore* dispute, the Federal Court of Appeal reversed the Tribunal's decision on the treatment of components subsequently imported. The appellant argued that the imported line pipe should be classified as components of an offshore gas processing system. The Tribunal refused, because the original offshore platforms had not been classified as functional units, even though the Tribunal accepted that this would have been the proper classification. The Federal Court of Appeal reversed and ruled that the imported pipe was a component of a gas processing machine, although it was too late to correct the error for the original classification of the platforms.¹⁶⁸

The *IPSCO* decision dealt with subsequently imported parts of a steel-rolling mill and distinguished the Federal Court of Appeal's decision in *Sable Offshore*. *IPSCO* had imported the annealer and welder at issue in 2001 to incorporate them into an existing mill, built in 1993. The annealer and welder were imported to enable the mill to produce pipe to new oil industry specifications. Although the Tribunal accepted that the components all together constituted a tube mill, it ruled that new imports could not be classified as components of that functional unit. Citing its earlier decision in *Windsor Wafers*,¹⁶⁹ the Tribunal decided that this treatment was not available for later upgrades or replacements of existing components once the whole functional unit had been imported. In the Tribunal's view, both *Windsor Wafers* and *Sable Offshore* dealt with components that were required to complete a system in its original form. In the *IPSCO* dispute, the goods were replacement components to upgrade a mill that was already in operation. This was not an instance of a new entire mill being imported.¹⁷⁰

231 TBR.

¹⁶⁷ *Komatsu*, *supra* note 9 at para 78.

¹⁶⁸ *Sable Offshore Energy Inc v Canada (Customs and Revenue Agency, Commissioner)*, 2003 FCA 220, [2003] FCJ 771, rev'g AP-2000-040, [2002] CITT No 21.

¹⁶⁹ *Windsor Wafers, Division of Beatrice Foods Inc v Canada (Deputy MNRCE)*, AP-89-281, [1991] CITT No 64.

¹⁷⁰ *IPSCO Inc v Canada (Border Services Agency, President)*, AP-2005-041, [2007] CITT No 52. As the item covered parts, it is not clear why the imported components were not replacement parts, although there may have been difficulty identifying the central unit

In summary, Rule 2(a) deals with the classification of goods that are unfinished or unassembled at the time of classification. The Rule would have some application to the problem presented in *Ferguson*, to support an argument that trawler winches were imported once the main components had arrived. It would still be necessary, however, to apply an entity test, such as Note 4 of Section XVI, to decide how to classify the motors. Entity tests in the pre-1988 Canadian Tariff could serve as persuasive authority in the classification of complex machinery, particularly for their use of commercial and economic factors.

V. EUROPEAN UNION

The HS Explanatory Notes and Classification Opinions are intended to promote consistency in the application of the Harmonized System throughout the world. In addition to this centralized source, courts dealing with disputes can also look to decisions in other jurisdictions for possible assistance. This section outlines some classification rulings from the European Court of Justice on parts and entities issues, pointing out approaches that differ from Canadian law. The European Community (EC) is the source of the Brussels Tariff Nomenclature and the Customs Cooperation Council Nomenclature, the two main predecessors of the Harmonized System.

The first case discussed in this article was the *Accessories Machinery* decision of the Supreme Court of Canada in 1957, in which goods were classified as motors rather than as parts.¹⁷¹ In the 2012 *Komatsu* appeal, also outlined in the introductory section, the CITT referred to *Accessories Machinery* to support a finding that goods were more specifically described as hoses rather than as parts.¹⁷² In contrast, in EC law, there is some indication that a parts description might have priority over a naming provision. The possibility arose before the European Court of Justice in the *Fuss* decision, under the earlier Customs Cooperation Council Nomenclature. The goods involved were movement detectors for alarm systems. In application, they would be connected by cables to the alarm signalling device. German customs officials ruled that they should be

for parts analysis.

¹⁷¹ *Accessories Machinery*, *supra* note 3.

¹⁷² *Komatsu*, *supra* note 9.

classified as electrical appliances and apparatus. The importer objected and maintained that they were instead parts of electric signalling apparatus. The Court found in favour of the parts description.¹⁷³ The result was the same in the *Senelco* decision, in which security tags for retail goods were classified as parts under the same heading rather than as electrical appliances and apparatus.¹⁷⁴

These two decisions did not actually threaten the classification framework for parts. The heading for electrical appliances and apparatus was residual and did not apply to goods falling within another heading of the Chapter. In other cases, classification as parts would not have priority.¹⁷⁵ The two decisions illustrate, however, that a parts description might sometimes be more specific. In the *Komatsu* appeal before the Canadian International Trade Tribunal, perhaps it would have been helpful for the importer to cite *Fuss* and *Senelco* to support an argument in favour of the parts description. While EC law would not have provided a clear answer in favour of the importer, those two cases might have had a favourable influence, as they are from a predecessor of the HS rather than a completely different tariff nomenclature.

EC law on customs classification requires parts to be physically indispensable. According to the decision in *Hark*, it is not sufficient to show that the part is needed for the intended use of the underlying whole. Rather, “it must be established that the mechanical or electric functioning of the machine or apparatus in question is dependent on that article”.¹⁷⁶ This is a very strict view of necessity that emphasizes physical functioning of the goods, without regard to commercial or economic factors. In *Hark*, the stovepipe fittings were parts of a stove, as it could not operate safely without the pipe to control flue gases. In *Unomedical*, however, drainage bags were not parts of catheters or dialysis machines, despite being designed uniquely for this use. The bags were not essential for the functioning of the apparatus

¹⁷³ *Fritz Fuss v Hauptzollamt München*, 60/77, [1977] ECR 2453. The detectors qualified as parts of composite machines on an entity analysis.

¹⁷⁴ *Senelco GmbH v Hauptzollamt München*, 57/85, [1986] ECR 821.

¹⁷⁵ *Data I/O GmbH v Hauptzollamt München* (15 May 2014), C-297/13; *Van Gend & Loos NV v Inspecteur der Invoerrechten en Accijnzen, Enschede*, 32/84, [1985] ECR 779.

¹⁷⁶ *Hark GmbH & Co. KG Kamin- und Kachelofenbau v Hauptzollamt Duisburg* (12 December 2013), C-450/12 at para 36.

and thus were not parts.¹⁷⁷ This focus on physical characteristics of goods, without regard to the commercial context, is at odds with the interpretation of parts tests in Canadian law, which show a greater willingness to take account of commercial and economic factors.¹⁷⁸

Decisions of the European Court of Justice have also considered entity analysis and HS Rule 2(a). The *IMCO* decision applying Rule 2(a), for example, covered components that were imported for pens and pencils. The goods from which complete articles could be assembled were classified as those articles. Only the surplus components were classified as parts.¹⁷⁹ Rule 2(a) can apply even if a domestic component is to be added later, so long as the goods as imported have the essential character of the complete or finished article.¹⁸⁰ The work required to assemble the components must be relatively simple, but the need for technical expertise does not prevent the operation of the Rule.¹⁸¹

¹⁷⁷ *Unomedical A/S v Skatteministeriet*, C-152/10, [2011] ECR I-5433. The Court noted that, although the apparatus did not work without a bag attached, this security mechanism was the only link. For further parts cases, see: *Siemens Nixdorf Informationssysteme AG v Hauptzollamt Augsburg*, C-11/93 [1994] ECR I-1945; *Peacock AG v Hauptzollamt Paderborn*, C-339/98, [2000] ECR I-8947; *Proxxon GmbH v Oberfinanzdirektion Köln*, C-500/04, [2006] ECR I-1545; *Kloosterboer Services BV v Inspecteur van de Belastingdienst/Douane Rotterdam*, C-173/08, [2009] ECR I-5347; *Receveur principal des douanes de Roissy Sud et al. v Rohm & Haas Electronic Materials CMP Europe GmbH et al.* (19 July 2012), C-336/11; *Rohm Semiconductor GmbH v Hauptzollamt Krefeld* (20 November 2014), C-666/13. In Case C-276/00, *Turbon International GmbH v Oberfinanzdirektion Koblenz*, C-276/00, [2002] ECR I-1389 and *Turbon International GmbH v Oberfinanzdirektion Koblenz*, C-250/05, [2006] ECR I-10531, ink cartridges for printers were classified as ink, rather than as parts.

¹⁷⁸ For commentary, see Leon Kanters, “Friday the 13th or, How to Classify ‘Parts and Accessories’ in the European Union” (2014) 9:6 *Global Trade & Customs Journal* 280. On Canadian law, see *GL&V*, *supra* note 18 and discussion in earlier sections of this article.

¹⁷⁹ *IMCO – J. Michaelis GmbH & Co. v Oberfinanzdirektion Berlin*, 165/78, [1979] ECR 1837. For commentary on the commercial context and the need for businesses to time their imports so that parts are in different consignments, see Stefano Inama and Edwin Vermulst, *Customs and Trade Law of the European Community* (London and Cambridge MA: Kluwer Law, 1999) at 154–55.

¹⁸⁰ *Directeur général des douanes et droits indirects v Humeau Beaupréau* (6 February 2014), C-2/13.

¹⁸¹ *International Flavors and Fragrances IFF (Deutschland) GmbH v Hauptzollamt Bad Reichenhall*, 295/81, [1982] ECR 3239; *Develop Dr Eisbein GmbH & Co. v Hauptzollamt Stuttgart-West*, C-35/93, [1994] ECR I-2655. See further: *Oswram GmbH v*

In entities decisions, the Court has analyzed whether components are designed to contribute to a single clearly defined function.¹⁸² Goods do not form a functional unit if a component can be used independently and for functions other than that of the components together.¹⁸³ HS Heading 8471 for automatic data processing machines has been interpreted in a number of decisions, especially with reference to Note 5(E) to Chapter 84 which excludes related machinery performing a specific function other than data processing. According to the joined *Kip* and *Hewlett Packard* cases, the Note is not meant to exclude everything with an ancillary function, such as a printer/scanner that processes data from a computer, but can also operate separately as a photocopier. The intent is to exclude apparatus whose function has nothing to do with data processing, but works with or incorporates a computer.¹⁸⁴ This analysis focuses on the physical functioning of goods, while considering somewhat more of the operational context than the indispensability test noted above for parts. The approach is not as wide-ranging as the interpretation under the previous Canadian tariff that could take account of commercial factors and economic feasibility.¹⁸⁵

Oberfinanzdirektion Frankfurt, 183/73, [1974] ECR 478; *Directeur général des douanes et droits indirects v Powerex-Europe*, C-66/89, [1990] ECR I-1959; *Hauptzollamt Mannheim v Boehringer Mannheim GmbH*, C-318/90, [1992] ECR I-3495; *GoldStar Europe GmbH v Hauptzollamt Ludwigshafen*, C-401/93, [1994] ECR I-5587.

¹⁸² *RUMA GmbH v Oberfinanzdirektion Nürnberg*, C-183/06, [2007] ECR I-1559.

¹⁸³ *Metro International Kommanditgesellschaft v Oberfinanzdirektion München*, 60/83, [1984] ECR 671; *Hauptzollamt Hannover v Telefunken Fernseh und Rudfunk GmbH*, 163/84, [1985] ECR 3299; *Telefunken Fernseh und Fundfunk GmbH v Oberfinanzdirektion München*, 223/84, [1985] ECR 3335. See HS Section XVI, Note 3. If groups of components do not qualify as functional units, they might still be classified together under Rule 3(b) as composite goods made up of different components or perhaps as goods put up in sets.

¹⁸⁴ *Kip Europe SA and Others*, C-362/07, and *Hewlett Packard International SARL*, C-363/07 v *Administration des douanes – Direction générale des douanes et droits indirects*, [2008] ECR I-9489 at para 33; *Staatssecretaris van Financiën v Kamino International Logistics BV*, C-376/07, [2009] ECR I-1167 at para 38. See further: *CBA Computer Handels- und Beteiligungs GmbH v Hauptzollamt Aachen*, C479/99, [2001] ECR I-4391; *Ikegami Electronics (Europe) GmbH v Oberfinanzdirection Nürnberg*, C-467/03, [2005] ECR I-2389; *Jacob Meijer BV*, C-304/04, and *Eagle International Freight BV*, C-305/04 v *Inspecteur van de Belastingdienst – Douanedistrict Arnheim*, [2005] ECR I-6251; *Olicom A/S v Skatteministeriet*, C-142/06, [2007] ECR I-6675; *Data I/O GmbH v Hauptzollamt Hannover*, C-370/08, [2010] ECR I-4401.

¹⁸⁵ Such as in *AG Marketing v DMNRCE* (1985), App 2309, 10 TBR 228, 10 CER 105 at

In Canadian tariff classification decisions, counsel have tended to rely on pre-1988 Canadian authority rather than decisions from other jurisdictions. It may not be easy to find foreign materials, although the internet has made searches simpler than in the past. Sometimes clients may know how their goods are classified elsewhere, or industry associations may provide information. Not every file will require a global search, but in cases of uncertainty or some complexity, it is worthwhile to consider the possible persuasive value of foreign decisions. As well, Canadian customs tariff decisions may contain interpretations of interest for other jurisdictions. Concerning parts tests and entities decisions on complex machinery, the European Court of Justice has been less willing than the Canadian International Trade Tribunal to look beyond the physical characteristics of goods, in order to take account of the commercial and economic context. It should be open to counsel outside Canada to consider presenting CITT decisions as persuasive authority in support of arguments for a more practical, contextual approach.

VI. INTERPRETATION AND INTERNATIONAL COORDINATION

The section above on the law of the European Union has examined some aspects of parts and entities analysis that differ from Canadian law. There is potential for each side to learn from the other. Customs officials cooperate with each other through the World Customs Organization. Lawyers and customs brokers may also be in contact with their international counterparts. In *Fisher Scientific*, the CITT specifically urged the Deputy Minister to make efforts to determine how Canada's trading partners are classifying similar goods, in the spirit of adapting to the new system.¹⁸⁶

Earlier sections in the article have demonstrated the continuing influence of previous Canadian law, despite the implementation of an entirely new nomenclature in 1988. The pervasiveness of old thinking may illustrate debates in the theory of comparative law concerning legal transplants. Pierre Legrand has argued against a formalist notion that rules can be transplanted from one country to another without regard to social factors or habits of thought. Meaning, in this view, derives from application

231 TBR. See also the discussion of hybrid parts cases, at note 133 ff.

¹⁸⁶ *Fisher Scientific*, *supra* note 71.

and if a rule is moved to a new legal culture, the meaning changes.¹⁸⁷ He argues that there are national cultures surrounding interpretation of even simple words such as for “bread” – “pain” in French or “Brot” in German – that cannot be easily translated and transplanted.¹⁸⁸ The words of a customs tariff operate in an international commercial context, but this article has shown that previous understandings and practices can continue to shape interpretation when a new nomenclature is adopted. The old and new interact and they will do so in each jurisdiction applying the HS. Centralized guidance from the World Customs Organization in the form of Explanatory Notes and Classification Opinions can help to promote consistency in interpretation. As well, coordination would be enhanced by the use of foreign decisions for information and possible persuasive effect in domestic judicial decisions.

Much of Canadian law is based on cooperation and coordination with other countries, through treaties, model laws and statutory borrowing. Canada has a long history of using foreign legal sources, as received law and as persuasive authority.¹⁸⁹ States cannot be completely closed to outside legal influence,¹⁹⁰ especially when they are implementing the provisions of a shared treaty. An open, comparative approach should be adopted for interpretation of the Harmonized System. Canadian courts and tribunals should consider decisions of courts in other jurisdictions, and they should take account of Canadian decisions.

¹⁸⁷ Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4 *Maastricht J European & Comparative L* 111. I thank DeLloyd Guth for reminding me of this article.

¹⁸⁸ *Ibid* at 117

¹⁸⁹ Glenn, “Persuasive Authority”, *supra* note 15.

¹⁹⁰ H Patrick Glenn, *The Cosmopolitan State* (Oxford: Oxford University Press, 2013).

