



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-021

Performance Steel Specialties Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, May 29, 2012*

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IN THE MATTER OF an appeal heard on January 17 and February 1, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated April 13, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

PERFORMANCE STEEL SPECIALTIES INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

Gillian Burnett

Gillian Burnett
Acting Secretary

Place of Hearing: Ottawa, Ontario
Dates of Hearing: January 17 and February 1, 2012
Tribunal Member: Jason W. Downey, Presiding Member
Counsel for the Tribunal: Ekaterina Pavlova
Eric Wildhaber
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Cheryl Unitt

PARTICIPANTS:

| | |
|--|-------------------------------|
| Appellant | Counsel/Representative |
| Performance Steel Specialties Inc. | James Philip Jagger |
| Respondent | Counsel/Representative |
| President of the Canada Border Services Agency | Peter Nostbakken |

WITNESS:

Paul Lafontaine
President and co-founder
Optimet Concrete Products Inc.

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Performance Steel Specialities Inc. (Performance Steel) with the Canadian International Trade Tribunal (the Tribunal) on July 8, 2011, pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA) dated April 13, 2011, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7326.20.00 of the schedule to the *Customs Tariff*² as other articles of iron or steel wire, as determined by the CBSA, or whether they should be classified under tariff item No. 7216.69.00 as other angles, shapes and sections, not further worked than cold-formed or cold-finished or, alternatively, under tariff item No. 7317.00.90 as other nails, tacks, drawing pins, corrugated nails, staples (other than those of heading No. 83.05) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper, as claimed by Performance Steel.

PROCEDURAL HISTORY

3. The goods in issue were imported by Performance Steel on February 23, 2009, under tariff item No. 7317.00.10 as other nails, tacks, drawing pins, corrugated nails, staples (other than those of heading No. 83.05) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper.

4. On October 4, 2010, the CBSA conducted a compliance verification and re-determined the classification of the goods in issue under tariff item No. 7326.20.00 as other articles iron or steel wire, pursuant to subsection 42(2) of the *Act*.

5. On December 8, 2010, Performance Steel requested a further re-determination of the tariff classification, in accordance with paragraph 60(1)(a) of the *Act*. On February 10, 2011, the CBSA rendered a preliminary decision. On April 13, 2011, the CBSA issued a decision pursuant to subsection 60(4) and affirmed that the goods in issue were properly classified under tariff item No. 7326.20.00.

6. On July 8, 2011, Performance Steel filed the present appeal pursuant to subsection 67(1) of the *Act*.

7. This appeal was scheduled for January 17, 2012. On that day, as parties discussed preliminary matters, Performance Steel advised the Tribunal that it was no longer adhering to the position previously argued that the goods in issue should be classified under tariff item No. 7317.00.90, but was now advocating that they should be classified under tariff item No. 7216.69.00. This was the first mention by Performance Steel of tariff item No. 7216.69.00 throughout the entire appeal process.³

8. Performance Steel asked the Tribunal to consider its initial arguments relating to tariff item No. 7317.00.90 as an alternative position only.⁴

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

3. *Transcript of Public Hearing*, 17 January 2012, at 6-17.

4. *Ibid.* at 7.

9. In fairness to the CBSA, the Tribunal postponed the hearing in order for Performance Steel to fully explain its new arguments and to allow the CBSA to file written submissions in response to this revised position.⁵

10. The Tribunal held a second public hearing on February 1, 2012, in Ottawa, Ontario.

11. Performance Steel sought to have Mr. Paul Lafontaine, President and Co-founder of Optimet Concrete Products Inc. (Optimet Concrete), qualified as an expert witness. The CBSA did not oppose this request. The Tribunal qualified Mr. Lafontaine as an expert in the area of composite materials and mechanical engineering.⁶ Optimet Concrete is the exclusive supplier in Canada of the goods in issue.⁷

12. The Tribunal noted however that, by reason of his position with Optimet Concrete, Mr. Lafontaine had a significant financial stake in the use of the goods in issue and the outcome of this appeal. As a result, the Tribunal took this fact into account when weighing the evidence that he provided.

13. No witnesses were called by the CBSA.

GOODS IN ISSUE

14. The goods in issue are the following four types of non-alloy cold-drawn steel wire fibres that are cut to lengths of 50 mm: Optimet 9550,⁸ Optimet 11050,⁹ Optimet LHE 50100¹⁰ and Optimet FE 1050.¹¹ The first three types of fibres have waved ends and the fourth type has flattened ends. The goods in issue have a round cross-section measuring approximately 1 mm in diameter.¹² They are added to concrete before hardening as a reinforcement to prevent cracking.¹³ They are made in Ukraine and are imported in bags of various weights.¹⁴

15. Performance Steel provided the following physical exhibits:

| | |
|------|---|
| A-01 | Concrete beam |
| A-02 | Concrete beam |
| A-03 | Concrete beam |
| A-04 | Optimet 9550 steel fibres ¹⁵ |

5. *Ibid.* at 17-21; Tribunal Exhibit AP-2011-021-15.

6. *Transcript of Public Hearing*, 1 February 2012, at 36.

7. *Ibid.* at 33-34.

8. Tribunal Exhibit AP-2011-021-05A, tab 2 at 23.

9. *Ibid.* at 28.

10. *Ibid.* at 33.

11. *Ibid.* at 38.

12. Tribunal Exhibit AP-2011-021-03A at para. 6; Tribunal Exhibit AP-2011-021-05A at para. 3, tab 2; Tribunal Exhibit AP-2011-021-17A at paras. 6, 15.

13. Tribunal Exhibit AP-2011-021-03A at paras 5-12; Tribunal Exhibit AP-2011-021-05A at para. 3, tabs 2, 20; *Transcript of Public Hearing*, 1 February 2012, at 48-56, 63-65.

14. Tribunal Exhibit AP-2011-021-05A, tab 2; *Transcript of Public Hearing*, 1 February 2012, at 25, 30, 57, 70.

15. Filed throughout the course of the hearing held on February 1, 2012; *Transcript of Public Hearing*, 1 February 2012, at 47.

16. Exhibits A-01, A-02 and A-03 are samples of concrete beams that contain the goods in issue. Those exhibits had been subjected to rupture force (each beam was effectively broken into two pieces) to show how the goods in issue are entrapped in the concrete matrix to which they are added.¹⁶ Exhibit A-04 is a free-standing example of one of the four types of the goods in issue.

STATUTORY FRAMEWORK

17. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.¹⁷ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

18. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[18] and the Canadian Rules^[19] set out in the schedule.”

19. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed.²⁰

20. Rule 1 of the *General Rules* provides as follows:

1. . . . 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.

21. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.²¹ While the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods, the Tribunal will apply them, unless there is a sound reason to do otherwise.²²

16. *Transcript of Public Hearing*, 1 February 2012, at 44-48.

17. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

18. S.C. 1997, c. 36, schedule [*General Rules*].

19. S.C. 1997, c. 36, schedule.

20. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

21. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*]. Section 11 of the *Customs Tariff* also specifies that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, World Customs Organization, 2d ed., Brussels, 2003.

22. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17.

22. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading by applying Rule 6 of the *General Rules*.²³ The final step is to determine the tariff item by applying Rule 1 of the *Canadian Rules*.²⁴

23. The relevant provisions of the *Customs Tariff* provide as follows:

Section XV

BASE METALS AND ARTICLES OF BASE METAL

...

Chapter 72

IRON AND STEEL

...

II. -IRON AND NON-ALLOY STEEL

...

72.16 **Angles, shapes and sections of iron or non-alloy steel.**

...

-Angles, shapes and sections, not further worked than cold-formed or cold-finished:

...

7216.69.00 **--Other**

...

Chapter 73

ARTICLES OF IRON OR STEEL

...

7317.00 **Nails, tacks, drawing pins, corrugated nails, staples (other than those of heading 83.05) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper.**

...

90 -----*Other*

...

73.26 **Other articles of iron or steel.**

...

7326.20.00 **-Articles of iron or steel wire**

23. Rule 6 of the *General Rules* provides as follows: "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 purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

24. Rule 1 of the *Canadian Rules* provides that the tariff item shall be identified according to the terms of the tariff item and any related supplementary notes and, *mutatis mutandis*, to the *General Rules*, for example, by reading the word "heading" in Rule 1 of the *General Rules* as "tariff item".

24. The relevant *Explanatory Notes* to Section XV provide as follows:

GENERAL

This Section covers base metals (including those in a chemically pure state) and many articles thereof. . . .

. . .

Each of the Chapters 72 to 76 and 78 to 81 covers particular unwrought base metals and products of those metals such as bars, rods, wire or sheets, as well as articles thereof, **except** certain specified articles of base metal which, without regard to the nature of the constituent metal, are classified in **Chapter 82 or 83**, these Chapters being **limited** to the specified articles.

25. The relevant notes to Chapter 72 provide as follows:

1. In this Chapter and, in the case of Notes (d), (e) and (f) throughout the Nomenclature, the following expressions have the meanings hereby assigned to them:

. . .

(ij) **Semi-finished products**

Continuous cast products of solid section, whether or not subjected to primary hot-rolling; and

Other products of solid section, which have not been further worked than subjected to primary hot-rolling or roughly shaped by forging, including blanks for angles, shapes or sections.

These products are not presented in coils.

(k) **Flat-rolled products**

. . .

(l) **Bars and rods, hot-rolled, in irregularly wound coils**

Hot-rolled products in irregularly wound coils, which have a solid cross-section in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles or other convex polygons (including “flattened circles” and “modified rectangles”, of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). These products may have indentations, ribs, grooves or other deformations produced during the rolling process (reinforcing bars and rods).

(m) **Other bars and rods**

Products which do not conform to any of the definitions at (ij), (k) or (l) above or to the definition of wire, which have a uniform solid cross-section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles or other convex polygons (including “flattened circles” and “modified rectangles”, of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). These products may:

- have indentations, ribs, grooves or other deformations produced during the rolling process (reinforcing bars and rods);
- be twisted after rolling.

(n) **Angles, shapes and sections**

Products having a uniform solid cross-section along their whole length which do not conform to any of the definitions at (ij), (k), (l) or (m) above or to the definition of wire.

Chapter 72 does not include products of heading 73.01 or 73.02.

(o) **Wire**

26. Cold-formed products in coils, of any uniform solid cross-section along their whole length, which do not conform to the definition of flat-rolled products. The relevant notes to Chapter 73 provide as follows:

2. In this Chapter the word “wire” means hot or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm.

27. The relevant *Explanatory Notes* to Chapter 72, Sub-chapter II and heading No. 72.16 provide as follows:

GENERAL

This Chapter covers the ferrous metals, i.e., pig iron, spiegeleisen, ferro-alloys and other primary materials (sub-Chapter I), as well as certain products of the iron and steel industry (ingots and other primary forms, semi-finished products and the principal products derived directly therefrom) of iron or non-alloy steel (sub-Chapter II), of stainless steel (sub-Chapter III) and of other alloy steel (sub-Chapter IV).

Further worked articles, such as castings, forgings, etc., and sheet piling, welded angles, shapes and sections, railway or tramway track construction material and tubes are classified in **Chapter 73** or, in certain cases, in other Chapters.

...

(III) Production of ingots or other primary forms and of semi-finished products

...

(IV) Production of finished products

Semi-finished products and, in certain cases, ingots are subsequently converted into finished products.

These are generally subdivided into **flat products** (“wide flats”, including “universal plates”, “wide coil”, sheets, plates and strip) and **long products** (bars and rods, hot-rolled, in irregularly wound coils, other bars and rods, angles, shapes, sections and wire).

These products are obtained by plastic deformation, either hot, directly from ingots or semi-finished products (by hot-rolling, forging or hot-drawing) or cold, indirectly from hot finished products (by cold-rolling, extrusion, wire-drawing, bright-drawing), followed in some cases by finishing operations (e.g., cold-finished bars obtained by centre-less grinding or by precision turning).

...

For the purpose of this Note, the following expressions have the meanings hereby assigned to them:

...

(B) Cold plastic deformation

...

(4) **Wire-drawing** is a cold process in which bars or rods in irregularly wound coils are drawn through one or more dies at high speed to obtain coiled wire of smaller diameter.

(5) **Bright-drawing** is a cold process in which bars or rods, whether or not in irregularly wound coils, are drawn (at relatively low speed) through one or more dies to obtain products of smaller or different shaped section.

...

(C) **Subsequent manufacture and finishing**

The finished products may be subjected to further finishing treatments or converted into other articles by a series of operations such as:

- (1) **Mechanical working**, i.e., turning, milling, grinding, perforation or punching, folding, sizing, peeling, etc.; however, it should be noted that rough turning merely to eliminate the oxidation scale and crust and rough trimming are not regarded as finishing operations leading to a change in classification.
- (2) **Surface treatments** or other operations, including cladding, to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. They include:

...

GENERAL

Provided that they are of iron or non-alloy steel this sub-Chapter covers:

...

- (2) Semi-finished products such as blooms, billets, rounds, slabs, sheet bars, pieces roughly shaped by forging, blanks for angles, shapes and sections (heading 72.07).

...

- (5) Angles, shapes and sections (heading 72.16).
- (6) Wire (heading 72.17).

...

Angles, shapes and sections are defined in Note 1 (n) to this Chapter.

...

Angles, shapes and sections are usually produced by hot-rolling, hot-drawing, hot-extrusion or hot-forging or forging blooms or billets.

The heading includes goods which have been cold-formed or cold-finished (by cold-drawing, etc.) and also covers angles, shapes and sections made by forming on a roll type machine or by forming sheets, plates or strip on a press. So-called “ribbed sheets and plates” having an angular profile are also classified here.

The products of this heading may have been subjected to working such as drilling, punching or twisting or to surface treatment such as coating, plating or cladding - see Part IV (C) of the General Explanatory Note to this Chapter, **provided** they do not thereby assume the character of articles or of products falling in other headings.

The heavier angles, shapes and sections (e.g., girders, beams, pillars and joists) are used in the construction of bridges, buildings, ships, etc.; lighter products are used in the manufacture of agricultural implements, machinery, automobiles, fences, furniture, sliding door or curtain tracks, umbrella ribs and numerous other articles.

The heading **does not cover**:

...

- (b) Articles prepared for use in structures (**heading 73.08**).

28. The relevant *Explanatory Notes* to Chapter 73 and heading Nos. 73.16 and 73.26 provide as follows:

GENERAL

This Chapter covers a certain number of specific articles in headings 73.01 to 73.24, and in headings 73.25 and 73.26 a group of articles not specified or included in Chapter 82 or 83 and not falling in other Chapters of the Nomenclature, of iron (including cast iron as defined in Note 1 to this Chapter) or steel.

...

The heading covers:

(A) **Nails, tacks, staples (other than those of heading 83.05) and similar articles**, usually manufactured by the following methods:

...

(3) Cutting from sheet or strip followed, if necessary, by finishing either mechanically or by hand.

...

There are many types of these goods including:

Wire nails of uniform cross-section as used by carpenters, etc.; moulders' nails; glazing nails; cobblers' nails; staples (insulated or not) pointed at both ends, for electric wiring, picture frames, fencing, etc. and other staples not presented in strips; pointed screw-nails with twisted shanks and unslotted heads; tacks and sprigs for cobblers, upholsterers, etc.; hobnails for heavy duty footwear; nails for pictures, mirrors, fencing, etc.; unthreaded nails for shoeing animals; unthreaded frost studs for animals; small triangles, etc. (usually of tin-plate) used for fixing window-panes; decorative studs for upholsterers; studs for marking railway sleepers.

...

This heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in Chapter 82 or 83 or more specifically covered elsewhere in the Nomenclature.

POSITIONS OF PARTIES

Performance Steel

29. The position taken by Performance Steel was not always clear, and the Tribunal had to ask for clarifications at several instances during the hearing.²⁵ Although Performance Steel relied on heading Nos. 72.16 and, alternatively, 73.17, it liberally invoked heading Nos. 72.15, 73.08 and 73.18 as other possible options, either directly or by varying forms of inference. Ultimately, it took the position that the goods in issue should be classified, on the basis of Rule 1 of the *General Rules*, in heading No. 72.16 as other angles, shapes and sections, not further worked than cold-formed or cold-finished, or alternatively in heading No. 73.17²⁶ as other nails, tacks, drawing pins, corrugated nails, staples (other than those of heading No. 83.05) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper.

25. *Transcript of Public Hearing*, 1 February 2012, at 88-89, 99-100, 103-105.

26. *Ibid.* at 105.

30. Performance Steel submitted that the goods in issue are classifiable in Chapter 72 because they are not “articles” within the terms of Chapter 73. The goods in issue were subjected only to cold wire-drawing and bright drawing, and were then cut to size and deformed by twisting, but they did not assume the character of “articles”.²⁷

31. Alternatively, Performance Steel submitted that, if the goods in issue are to be considered “articles”, they should be classified in heading No. 73.17 as nails, tacks, drawing pins, corrugated nails, staples (other than those of heading No. 83.05) and *similar* articles, of iron and steel. According to Performance Steel, this view may be supported by the fact that an article can be viewed as “similar” to specifically classified articles if it shares their important characteristics and functions.²⁸ In this respect, Performance Steel emphasized that the function of the goods in issue is to fasten separated concrete by allowing it to resist to various forces to which it may be subjected.²⁹

CBSA

32. The CBSA submitted that the goods in issue are properly classified in heading No. 73.26 on the basis of Rule 1 of the *General Rules*. In its view, the goods in issue are named or generically described in heading No. 73.26 as other articles of iron or steel.

33. The CBSA submitted that the goods in issue are obtained by the cold drawing of steel wire and therefore meet the terms “articles of iron or steel wire” of heading No. 73.26 (specifically under tariff item No. 7326.20.00). Referring to note (2) of the *Explanatory Notes* to heading No. 73.26 (which refers, *inter alia*, to “[a]rticles of wire”), the CBSA argued that the goods in issue are (i) articles of steel wire, (ii) named or generically described in heading No. 73.26 and (iii) not included elsewhere in the nomenclature.

34. The CBSA argued that the term “article” is broad enough to include the goods in issue. It cited *Kverneland Group North America Inc. v. President of the Canada Border Services Agency*³⁰ and *Rui Royal*, where the Tribunal referred to the *Canadian Oxford Dictionary* definition of “article” as “**1** a particular or separate thing, esp. one of set”³¹ The CBSA submitted that, according to the laboratory reports³² and Performance Steel’s brief,³³ the goods in issue have been manufactured from cold-drawn steel wire, cut to size, flattened, bent or waved³⁴ and thus meet the definition of “article” as a “particular” and “separate” thing, serving a particular purpose.

27. In support of its position, Performance Steel referred to the Tribunal’s decision in *Great West Van Conversions Inc. v. President of the Canada Border Services Agency* (30 November 2011), AP-2010-037 (CITT) [*Great West Van*]. Tribunal Exhibit AP-2011-021-16A at paras. 1-4, 17.

28. Tribunal Exhibit AP-2011-021-03A (protected) at paras. 23, 24; *York Barbell Co. Ltd. v. Deputy M.N.R.C.E.* (16 March 1992), AP-91-131 (CITT); *Camper Industrial Products Ltd. v. Deputy M.N.R.* (24 January 1995), AP-94-034 (CITT); *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) [*Hoza*]; *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) [*Rui Royal*]; *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (5 July 2011), AP-2010-027 (CITT).

29. Tribunal Exhibit AP-2011-021-03A (protected) at paras. 28, 29.

30. (30 April 2010), AP-2009-013 (CITT).

31. Tribunal Exhibit AP-2011-021-17A at para. 14.

32. Tribunal Exhibit AP-2011-021-05A, tab 2.

33. Tribunal Exhibit AP-2011-021-03A (protected) at para. 5, tab 1 at 21, tab 2 at 27.

34. Tribunal Exhibit AP-2011-021-17A at para. 15.

35. The CBSA argued that the goods in issue are not classifiable in heading No. 72.16 because the processes used to obtain “angles, shapes or sections” mentioned in the *Explanatory Notes* to heading No. 72.16 do not include cutting steel wire and further processing the goods by flattening or bending the ends.

36. Referring to the definition of “twist” in the *McGraw-Hill Dictionary of Scientific and Technical Terms*, i.e. “[i]n a fiber, rope, yarn, or cord, the turns about its axis per unit length; usually expressed as TPI (turns per inch)”,³⁵ the CBSA submitted that the goods in issue are not further worked by “twisting”, as asserted by Performance Steel. Rather, the goods have been manufactured by cutting steel wire and flattening or bending the ends.³⁶

37. With respect to Performance Steel’s alternative argument regarding heading No. 73.17, the CBSA submitted that the goods in issue are not articles that are “similar” to those included in heading No. 73.17 because they do not belong to the same specific class of goods and do not share the same characteristics and functions as those listed in that heading.

38. On the basis of the dictionary definitions of the terms “fastener” and “nail”, the CBSA maintained that the goods in issue do not have the same important characteristics as articles listed in heading No. 73.17 because they (i) do not have at least one pointed end, (ii) are not used to be forcibly inserted (they are added to the liquid concrete without use of force), (iii) are not used to fasten or join two or more pieces together and (iv) are not fixed at a specific point on material.³⁷

EVIDENCE

39. The parties agree that the goods in issue are non-alloy cold-drawn steel wire cut to short lengths of 50 mm and a diameter of 0.95 or 1.12 mm and that the fibres are “deformed” (bent or flattened) into wave ends or flattened ends.³⁸

40. Mr. Lafontaine testified that the wave ends or flattened ends of the fibres are different deformations but that the common purpose is to “. . . create a resistance, an anchorage, so that the fibre doesn’t pull out too easily in the concrete, and it’s able to hold these [microcracks] much better, and reduce the rate of propagation of those cracks.”³⁹

41. Mr. Lafontaine explained the role of the fibres in the reinforcement of the concrete, the evolution in the concrete reinforcement industry, the manner in which the fibres assure three-dimensional reinforcement, the characteristics of the fibres, the process of adding the fibres to the concrete, the different types of fibres used in construction material and the types of structures in which the reinforced concrete is used.

35. *Ibid.* at para. 45, tab. 8.

36. *Ibid.* at para. 45.

37. Tribunal Exhibit AP-2011-021-05A at paras. 32-45, tabs 19, 20, 21; *Rui Royal*.

38. Tribunal Exhibit AP-2011-021-03A (protected) at paras. 5-7; *Transcript of Public Hearing*, 1 February 2012, at 51-52, 67, 68.

39. *Transcript of Public Hearing*, 1 February 2012, at 67-68. See also *Transcript of Public Hearing*, 1 February 2012, at 51 where Mr. Lafontaine stated as follows: “Those deformations have been introduced to fibres in order to improve what we call the pullout resistance, the tensile resistance, because fibres work in concrete only when concrete starts cracking. What I mean by cracking is cracking that is not visual. It is very, very small microcracks and those fibres tend to pull out. The moment the bond between the fibre and the concrete is [broken], it means it fails because of a crack that is propagating. The end deformation improves the overall pullout resistance of the fibre, making it much more effective to reinforce concrete.”

Mr. Lafontaine testified that the fibres are statistically distributed to form a three-dimensional concrete reinforcement where “. . . fibres are oriented in just about every direction, which are directly available to intercept any microcrack that could form in any direction in a concrete structure.”⁴⁰

42. Although helpful in understanding how the fibres function within the concrete itself, Mr. Lafontaine acknowledged that he had very little knowledge, if any, as to how the goods in issue were manufactured.⁴¹ Mr. Lafontaine’s testimony was therefore of limited help to the Tribunal in resolving this matter.

ANALYSIS

43. Performance Steel bears the initial onus of proving that the CBSA erred in its classification of the goods in issue.⁴² The Tribunal was not persuaded by the often unnecessary convoluted arguments presented by Performance Steel, which concentrated more on trying to convince the Tribunal that the goods in issue should *not* be classified in heading Nos. 72.13, 72.14, 72.15, 73.08 and 73.18 rather than on explaining why they *should be* classified in heading No. 72.16 or, alternatively, 73.17.

44. In the Tribunal’s view, the proper analytical framework for disposing of this matter is as follows. Pursuant to the *Explanatory Notes* to Chapter 73, this chapter “. . . covers a certain number of specific articles in headings 73.01 to 73.24, and in headings 73.25 and 73.26 a group of articles *not specified or included in Chapter 82 or 83 and not falling in other Chapters of the Nomenclature, of iron* (including cast iron as defined in Note 1 to this Chapter) *or steel*” [emphasis added].

45. Given that heading No. 73.26 was intended to operate as a residual heading, the Tribunal considers it appropriate to first determine whether the goods in issue are classifiable in heading No. 72.16 or 73.17, as claimed by Performance Steel. If they are, the goods in issue are therefore excluded from the scope of heading No. 73.26.

46. If it is found that the goods in issue are not classifiable in heading No. 72.16 or 73.17, the Tribunal must then determine whether the goods in issue are properly classified in heading No. 73.26.

Are the Goods in Issue Classifiable in Heading No. 72.16?

47. Performance Steel submitted that the goods in issue are classifiable in heading No. 72.16 on the basis of Rule 1 of the *General Rules*.

48. Heading No. 72.16 provides as follows:

72.16 Angles, shapes and sections of iron or non-alloy steel.

...

-Angles, shapes and sections, not further worked than cold-formed or cold-finished:

49. Note 1(n) to Chapter 72 defines “angles, shapes and sections” as products having a uniform solid cross-section along their whole length which do not conform to any of the definitions at Note 1(ij) (semi-finished products), (k) (flat-rolled products), (l) (bars and rods, hot-rolled, in irregularly wound coils) or (m) (other bars and rods) or to the definition of “wire” in Note 1(o).

40. *Transcript of Public Hearing*, 1 February 2012, at 52.

41. *Ibid.* at 30, 57, 69, 70.

42. *Wal-Mart Canada Corporation v. President of the Canada Border Services Agency* (13 June 2011), AP-2010-035 (CITT) at 35.

50. The Tribunal also notes that all the products described in Notes (ij), (k), (l), (m), (n) and (o) are rolled or drawn but *not further-worked products*.

51. According to the *Explanatory Notes* to Chapter 72, this chapter "... covers the ferrous metals ... and other *primary materials* (sub-Chapter I), as well as certain products of the iron and steel industry (ingots and other primary forms, *semi-finished products* and the *principal products derived directly therefrom*) of iron or non-alloy steel (sub-Chapter II) ... " [emphasis added].

52. However, "[f]urther worked articles, such as castings, forgings, etc., and sheet piling, welded angles, shapes and sections ... are classified in **Chapter 73** or, in certain cases, in other Chapters" [emphasis added]. Further, Part (IV) of the *Explanatory Notes* to Chapter 72 provides that *some semi-finished products* are "subsequently converted into *finished products*." These products "... are generally subdivided into **flat products** ... and **long products** (bars and rods, hot-rolled ... *other bars and rods, angles, shapes, sections and wire*)" [emphasis added]. The finished products "... are obtained by plastic deformation, either hot ... or *cold, indirectly from hot finished products* (by cold-rolling, extrusion, *wire-drawing, bright-drawing*), followed in some cases by finishing operations ... " [emphasis added].

53. In order to describe the subsequent finishing operations that do not affect the classification of the goods in Chapter 72, the *Explanatory Notes* to heading No. 72.16 refer to Note (C) of Part (IV) of the *Explanatory Notes* to Chapter 72:

- (1) **Mechanical working**, i.e. *turning, milling, grinding, perforation or punching, folding, sizing, peeling*, etc.; however, it should be noted that *rough turning* merely to eliminate the oxidation scale and crust and rough trimming *are not regarded as finishing operations leading to a change in classification*."

[Emphasis added]

54. In addition, according to the wording of the *Explanatory Notes* to heading No. 72.16, "[t]he products of this heading may *have been subjected to working such as drilling, punching or twisting* ... **provided** they do not thereby assume the character of articles or of products falling in other headings" [emphasis added].

55. Therefore, the Tribunal considers that, since the primary product from which the goods in issue are derived is steel wire, which is itself a "semi-finished product" (Note 1[o]),⁴³ and the steel fibres have been subjected to finishing work such as cutting, bending or flattening, the goods in issue do not meet the definition of "semi-finished products" within the terms of Chapter 72. For these reasons, the Tribunal is of the view that the goods in issue are in fact "finished products" according to Note (IV) of the *Explanatory Notes* to Chapter 72.

56. The Tribunal observes that the chapter notes and the *Explanatory Notes* to Chapters 72 and 73 provide for "base materials", "semi-finished" products, "finished products" and "articles". The base materials and semi-finished products are classified in Chapter 72. However, not all "finished" products *per se* are classified in Chapter 73. Indeed, finished products that have been further worked may fall in either Chapter 72 or 73 depending on the specific manufacturing process used in each case and the specific characteristics of the goods.

43. The Tribunal also notes that, as asserted by Performance Steel, the term "wire" does not have the same meaning within the definitions provided by Note 1(n) to Chapter 72 and Note 2 to Chapter 73. The definition provided for the purposes of Chapter 72 includes only the wire in coils, while the definition provided in the note to Chapter 73 does not contain such a requirement.

57. Performance Steel also relied on the definition of the term “article” applied in the Tribunal’s decision *Great West Van*.⁴⁴ First, in the context of this decision, the Tribunal did not draw a distinction between the terms “product” and “article”. Second, the term was applied for the purposes of tariff item No. 9958.00.00 with respect to completely different goods. Therefore, the Tribunal considers that this definition is not relevant for the purposes of classification in Chapters 72 and 73.

58. Finally, contrary to what has been asserted by the parties, the Tribunal does not perceive the distinction between the goods of Chapter 72 and the goods of Chapter 73 as a distinction between products (Chapter 72) and articles (Chapter 73). Rather, the Tribunal understands that Parliament has drawn a distinction between the finished products of Chapter 72 and the finished products of Chapter 73 on the basis of the nature of the finishing operation, the degree of finishing of the product and the specific characteristics of the goods as separate items.

59. Distinctions between goods of Chapters 72 and 73 should be established on a case-by-case basis, considering whether the finishing process is such that it leads to a change in the tariff classification within the terms of the headings, the legal notes and the *Explanatory Notes*.

60. While Performance Steel agrees that the goods in issue are obtained by cold plastic deformation (cold-drawn wire) within the terms of Note (IV) of the *Explanatory Notes* to Chapter 72, it argued that the further finishing treatments do not lead to a change in the classification within the terms of Note (C) of Part (IV) of the *Explanatory Notes* to Chapter 72 and the *Explanatory Notes* to heading No. 72.16.

61. Consequently, in order for the goods in issue to be potentially classifiable in Chapter 72 and, more specifically, in heading No. 72.16, they should meet, among others, two cumulative requirements. They have to have been (i) subjected to rough finishing, that (ii) does not make them assume the character of articles or products falling in other headings.

62. According to the evidence, the goods in issue have been cut from steel wire (straight length) to lengths of 5 cm and further deformed. They have been subjected to the finishing treatments of cutting and flattening or bending.

63. Performance Steel perceives these finishing operations as “sizing” (where the goods in issue have been cut to size) and “twisting”⁴⁵ (where the goods in issue have been bent and flattened).

64. In response, the CBSA refers to the previously mentioned definition of “twist” found in the *McGraw-Hill Dictionary of Scientific and Technical Terms*.

65. Although the term “twist” is not expressly defined in the chapter notes or the *Explanatory Notes* to Chapter 72, the *Explanatory Notes* to heading No. 72.14 defines the term “twisted bars” as “. . . bars which are rolled with two or more longitudinal flanges, *which are given a spiral form by twisting*” [emphasis added], actually implying that the result of the “twisting” is a spiral form.

66. “Bend”, on the other hand, is defined as follows: “to constrain or strain to tension by curving . . . to turn or force from straight or even to curved or angular”⁴⁶ and “. . . a force or adapt (esp. something straight) into a curve or angle.”⁴⁷ “Flatten” is defined as follows: “to make flat . . . to become flat . . .” or “to extend in

44. At 34.

45. Tribunal Exhibit AP-2011-021-16A at para. 23; *Transcript of Public Hearing*, 1 February 2012, at 100-101, 140-41.

46. The *Merriam-Webster’s Collegiate Dictionary*, 11th ed, s.v. “bend”.

47. *Canadian Oxford Dictionary*, 2d ed., s.v. “bend”.

or onto a flat position or form”⁴⁸. In the Tribunal’s view, these definitions do not imply a form of axial rotation. The evidence on file indicates that the goods in issue have curved or flattened ends resulting from bending and/or flattening, but not from twisting or spiralling.

67. As a result, on the basis of the evidence on the record, the Tribunal is not convinced that the goods in issue were subjected to mere rough finishing.

68. In any event, the Tribunal considers that Performance Steel has failed to meet the second cumulative requirement for the goods in issue to be classified in Chapter 72. Indeed, the Tribunal is of the view that the finishing operations to which the goods in issue were subjected were accomplished to give the goods a specific form prescribed by the *Standard Specification for Steel Fibers for Fiber-Reinforced Concrete*.⁴⁹ These finishing operations lead to a change in the characteristics and function of the goods and a change in tariff classification.

69. This view is supported by the fact that the goods in issue, being “[a]rticles prepared for use in structures” [emphasis added], are expressly excluded from the ambit of heading No. 72.16. Performance Steel recognized that the goods in issue would be “[a]rticles prepared for use in structures” if they were not precluded from classification in this heading because they are used, among others, in floating structures.⁵⁰

70. Consequently, the Tribunal is of the view that the goods in issue are not classifiable in heading No. 72.16.

Are the Goods in Issue Classifiable in Heading No. 73.17?

71. Heading No. 73.17 provides as follows:

7317.00 *Nails, tacks, drawing pins, corrugated nails, staples (other than those of heading 83.05) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper.*

[Emphasis added]

72. In previous Tribunal decisions cited by the parties, the Tribunal found that “similar articles” share essential characteristics and have common features. However, “similar” does not mean “identical”.⁵¹ The Tribunal considered whether the goods in issue share the essential characteristics and functions of the articles specifically referred to in heading No. 73.17.

73. The arguments presented by Performance Steel on this issue can be summarized as follows: nails or similar articles have been used in the past as a concrete reinforcement; and the function of the goods in issue is similar to the function of the articles of heading No. 73.17, which is to fasten the separated concrete in place to resist the compressive forces in the concrete.⁵²

48. The *Merriam-Webster’s Collegiate Dictionary*, 11th ed, s.v. “flatten”.

49. Tribunal Exhibit AP-2011-021-03A (protected), tab 2.

50. According to the *Explanatory Notes* to heading No. 72.16, “[t]he heading **does not cover**: . . . (b) Articles prepared for use in structures (**heading 73.08**).” Tribunal Exhibit AP-2011-021-16A at paras. 7-12.

51. *Hoza*.

52. Tribunal Exhibit AP-2011-021-03A (protected) at paras. 28, 29.

74. With respect to the first argument, Mr. Lafontaine testified that, in the mid-1960s, products similar to fasteners had been used in structures as concrete reinforcement.⁵³ More specifically, Mr. Lafontaine indicated that the first steel fibres used in Canada “. . . basically looked [like] concrete nail[s] -- twisted concrete nails.”⁵⁴

75. However, according to Mr. Lafontaine, the goods in issue have “. . . much, much better [properties] than [a] nail”⁵⁵ because “[t]he nail was not intended to be mixed into concrete.”⁵⁶ Moreover, according to him, the goods in issue are especially designed as an improvement over nails used in such a manner.

76. The Tribunal is of the view that it is not merely because nails were used in the past to reinforce concrete (which is far from being their commonly known intended use) that it can be said that nails are intended to be used as a concrete reinforcement, or that this is a basis for the goods in issue to be viewed as being similar to nails. Rather, the Tribunal is of the view that nails and the goods in issue are two completely different products designed for different specific uses and that they each have different characteristics.

77. With respect to the second argument, the CBSA referred to the dictionary definitions of the terms “fasten”⁵⁷ and “nail”,⁵⁸ arguing that the goods in issue do not have the same important characteristics as the articles listed in heading No. 73.17 as they (i) do not have at least one pointed end, (ii) are not used to be forcibly inserted, (iii) are not used to fasten or join two or more pieces together and (iv) are not fixed at a specific point on material.⁵⁹

78. The evidence on the record demonstrates that the goods in issue were not purposely designed to have pointed ends and that any sharpness that results from the flattening or bending of the ends of the goods in issue is purely accidental.⁶⁰

79. Further, the goods in issue are introduced into a concrete slurry before hardening, as opposed to being driven by force into an already hardened material, as would be done with nails.⁶¹ The evidence on the record shows that, once concrete hardens, the goods in issue become a component of the reinforced concrete. In other words, the Tribunal is of the view that it cannot be said that they “fasten” two different components, as nails would. The separate particles of concrete seem to be held by chemical and/or physical properties of the substance and not by the goods in issue themselves. Any “fastening” between the particles of concrete and the goods in issue would therefore not be attributable to their inherent function or characteristics, but rather to the physical or chemical properties of the concrete interacting with them.

53. *Transcript of Public Hearing*, 1 February 2012, at 54.

54. *Ibid.*

55. *Ibid.* at 79.

56. *Ibid.*

57. Tribunal Exhibit AP-2011-021-05A, tab 21; The *Merriam-Webster's Collegiate Dictionary*, 11th ed., defines “fasten” as follows: “**f** **a** : to attach esp. by pinning, tying, or nailing”.

58. Tribunal Exhibit AP-2011-021-05A, tab 19; the *Canadian Oxford Dictionary*, 2d ed., defines “nail” as “**n** a small usu. sharpened metal spike with a broadened flat head, driven in esp. with a hammer to join things together.”

59. Tribunal Exhibit AP-2011-021-05A at paras. 34-45, tabs 19, 20, 21.

60. This was recognized by Performance Steel at the hearing as follows: “The sharpened end is accidental. The sharpness is accidental as a result of the flattening. . . . It’s just the sharpness is not the point of the process, the flatness is.” *Transcript of Public Hearing*, 1 February 2012, at 26.

61. *Transcript of Public Hearing*, 1 February 2012, at 50.

80. For the foregoing reasons, the Tribunal concludes that the goods in issue and the articles of heading No. 73.17 are completely different products that do not share general or specific characteristics and have completely different functions.

Are the Goods in Issue Classifiable in Heading No. 73.26?

81. Heading No. 73.26 provides for “[o]ther articles of iron or steel.” According to the *Explanatory Notes* to heading No. 73.26, “[t]his heading covers *all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes* such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in Chapter 82 or 83 or more specifically covered elsewhere in the Nomenclature” [emphasis added].

82. The goods in issue are generically described in heading No. 73.26; they are articles of steel wire that have been obtained by cutting and other further working, such as bending or flattening.

83. Performance Steel failed to meet its burden of proving that the goods in issue are not properly classified in heading No. 73.26.

84. As discussed, heading No. 73.26 is a residual heading. Having determined that the goods in issue are neither classifiable in Chapter 72 nor in heading No. 73.17, the Tribunal considers that there is no heading of Chapter 73, other than heading No. 73.26, which would potentially apply to the goods in issue.

85. Therefore, the Tribunal finds that the goods in issue are articles of steel wire and are covered by heading No. 73.26.

Classification at the Subheading and Tariff Item Levels

86. The parties agree, and the evidence on the record illustrates, that the goods in issue are articles of steel wire. Therefore, pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 7326.20.00.

DECISION

87. For the foregoing reasons, the appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member