



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2011-057 and
AP-2011-058

Marmen Énergie Inc. and
Marmen Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, December 14, 2012*

*Corrigendum issued
Monday, January 7, 2013*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE..... 2

 STATUTORY FRAMEWORK..... 2

 RELEVANT CLASSIFICATION PROVISIONS..... 3

 POSITIONS OF PARTIES..... 5

 Marmen 5

 CBSA..... 6

 ANALYSIS 7

 DECISION 16

CORRIGENDUM..... 17

APPENDIX..... 18

IN THE MATTER OF appeals heard on August 23, 2012, pursuant to section 67 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 November 3, 2011, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MARMEN ÉNERGIE INC. AND MARMEN INC.

Appellants

AND

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

Respondent

DECISION

The appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 23, 2012

Tribunal Member: Jason W. Downey, Presiding Member

Counsel for the Tribunal: Courtney Fitzpatrick

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Haley Raynor

PARTICIPANTS:

Appellants	Counsel/Representative
Marmen Énergie Inc. and Marmen Inc.	Michael Kaylor
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Lune Arpin

WITNESSES:

Vincent Trudel Vice-President - Operations Marmen Inc.	Philippe Lacasse Industrial Development Advisor, Windpower, hydrogen and solar Ministère du Développement économique, de l'Innovation et de l'Exportation
Andrew Cameron Energy Analyst GL Garrad Hassan	Riadh W. Y. Habash Professor of Engineering University of Ottawa

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. These are appeals filed by Marmen Énergie Inc. and Marmen Inc. (Marmen) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from decisions made on November 3, 2012, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to requests for re-determination of tariff classification.

2. The issue in these appeals is whether various items (the goods in issue) used in the manufacture of towers for wind turbines should be classified under tariff item No. 9903.00.00 of the schedule to the *Customs Tariff*² as articles and materials that enter into the cost of manufacture or repair of, and articles for use in, windmills, and thereby benefit from duty-free treatment.

PROCEDURAL HISTORY

3. Between December 3, 2005, and January 6, 2009, Marmen imported the goods in issue. At the time of importation, the benefit of tariff item No. 9903.00.00 was not claimed.

4. In February and March of 2010, Marmen submitted requests for re-determination and refunds in accordance with subsection 74(1) of the *Act*. In its requests, Marmen contended that the goods in issue should be classified under tariff item No. 9903.00.00 and thereby benefit from duty-free treatment.

5. On March 26 and April 20, 2010, the CBSA issued decisions pursuant to paragraph 59(1)(a) of the *Act* denying Marmen's requests and determining that the goods in issue were not eligible for the benefit of tariff item No. 9903.00.00.

6. On May 28, 2010, Marmen requested re-determinations of the tariff classification of the goods in issue in accordance with subsection 60(1) of the *Act*.

7. On November 3, 2012, the CBSA denied Marmen's requests pursuant to subsection 60(4) of the *Act*.

8. On January 16, 2012, Marmen filed the present appeals with the Tribunal.

9. The Tribunal held a public hearing in Ottawa, Ontario, on August 23, 2012.

10. Three witnesses testified on behalf of Marmen: Mr. Vincent Trudel, Vice-President of Operations at Marmen Inc.; Mr. Philippe Lacasse, Industrial Development Advisor at the Ministère du Développement économique, de l'Innovation et de l'Exportation; and Mr. Andrew Cameron, Energy Analyst at GL Garrad Hassan.

11. The CBSA called one witness, Dr. Riadh W.Y. Habash, who was qualified as an expert in engineering, in electronics and in electrical and electromechanical systems, including wind energy technologies.

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

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

GOODS IN ISSUE

12. Marmen manufactures towers that enter into the final assembly of electricity-generating wind turbines. The goods in issue consist of various items used in the manufacture of these towers, including (but not limited to) cable trays, trim edge protectives, support cable trays, bracket cables, tray MTG, pinch blocks, lights, washer steel, locknut steel, cleats, cable-tower applications, pipe guards, cable ground/bonding jumpers, O-rings and strong wide hinges.³

13. The appellant filed a DVD as a physical exhibit with the Tribunal, which depicted the manufacture of a tower and demonstrated how the goods in issue are integrated into the tower.⁴

STATUTORY FRAMEWORK

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁵ 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.

15. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁶ and the *Canadian Rules*⁷ set out in the schedule.

16. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

17. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁹ published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁰

18. Chapter 99 of the *Customs Tariff*, which includes tariff item No. 9903.00.00, provides special classification provisions which allow for certain goods to be imported into Canada duty-free. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may

3. For a more complete list, see the photographs at tab 5 of Tribunal Exhibit AP-2011-057-22A.

4. Exhibit A-01.

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

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

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

8. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

9. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.

be classified in that chapter.¹¹ Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to this chapter.

RELEVANT CLASSIFICATION PROVISIONS

19. There are no notes to Section XXI (which includes Chapter 99). However, the Tribunal considers notes 3 and 4 to Chapter 99 to be relevant to the present appeals. These notes provide as follows:

3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

20. In accordance with note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under tariff items in Chapters 1 to 97 has been determined. In the present appeals, the parties have not disputed the tariff classification of any of the goods in issue under tariff items in Chapters 1 to 97. The Tribunal accepts that the goods in issue have been properly classified under various tariff items in Chapters 39, 73, 83, 84, 85 and 94 and that the condition set out in note 3 to Chapter 99 has been met. Consequently, the only issue before the Tribunal is to determine whether the goods in issue meet the conditions of tariff item No. 9903.00.00, which provides as follows:

Articles and materials that enter into the cost of manufacture or repair of the following, and articles for use in the following:

...

Generating sets for use on the farm for farm purposes only;

...

Windmills.

21. In French, tariff item No. 9903.00.00 provides as follows:

Articles et matières qui entrent dans le coût de fabrication ou de réparation des produits suivants, et articles devant servir dans ce qui suit :

...

Groupes électrogènes pour usage dans la ferme à des fins agricoles seulement;

...

Éoliennes.

11. However, Note 1 to Chapter 99 provides that the rule of specificity in Rule 3 (a) of the *General Rules* does not apply to the provisions of Chapter 99. This reflects the fact that classification in Chapters 1 to 97 and Chapter 99 is not mutually exclusive.

22. With regard to the interpretation of the above tariff item, the parties have made reference to the following provisions of the schedule to the *Customs Tariff*:

Chapter 84

**NUCLEAR REACTORS, BOILERS, MACHINERY
AND MECHANICAL APPLIANCES; PARTS THEREOF**

...

84.12 Other engines and motors.

...

Chapter 85

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

...

85.02 Electric generating sets and rotary converters.

...

8502.31.00 -- Wind-powered

23. The parties also made reference to the following *Explanatory Notes*:

Chapter 84

**Nuclear reactors, boilers, machinery and mechanical
appliances; parts thereof**

...

84.12 - Other engines and motors.

...

The heading includes reaction engines (other than turbo-jets), pneumatic power engines and motors, wind engines (windmills), spring-operated or weight-operated motors, etc., certain hydraulic power engines and motors, and certain steam or other vapour power units.

...

(D) WIND ENGINES (WINDMILLS)

This group includes all power units (wind engines or wind turbines), which directly convert into mechanical energy the action of the wind on the blades (often of variable pitch) of a propeller or rotor.

Usually mounted on a fairly tall metal pylon, the propellers or rotors have an arm perpendicular to their plane, forming a vane, or some similar device for orientating the apparatus according to the direction of the wind. The motive force is generally transmitted by reduction gearing through a vertical shaft to the power take-off shaft at ground level. Some wind motors ("depression motors") have hollow blades in which a pressure reduction is developed by rotation, and is transmitted to the ground by airtight conduits to drive a small reaction turbine.

Wind motors are usually of low power, and are mainly used in rural installations for driving irrigation pumps, drainage pumps or small electric generators.

Electric generator units composed of wind motors mounted integrally with an electric generator (including those for operation in aircraft slipstreams) are **excluded (heading 85.02)**.

...

Chapter 85

Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles

...

85.02 - Electric generating sets and rotary converters.

...

8502.31 -- Wind-powered

...

(I) ELECTRIC GENERATING SETS

The expression “generating sets” applies to the combination of an electric generator and any prime mover **other than an electric motor** (e.g., hydraulic turbines, steam turbines, wind engines, reciprocating steam engines, internal combustion engines). Generating sets consisting of the generator and its prime mover which are mounted (or designed to be mounted) together as one unit or on a common base (see the General Explanatory Note to Section XVI), are classified here **provided** they are presented together (even if packed separately for convenience of transport).

Electric generating sets for welding equipment are classified in this heading when presented separately, without their welding heads or welding appliances. However, they are **excluded (heading 85.15)** when presented together with their welding heads or welding appliances.

POSITIONS OF PARTIES

Marmen

24. Marmen submitted that the wind turbines for which its towers are produced are *windmills* and that the goods in issue are articles and materials that enter into the cost of manufacture or repair of, or articles for use in, these *windmills* and should be eligible for tariff relief under tariff item No. 9903.00.00.

25. Marmen relied on the Tribunal’s decisions in *Kverneland Group North America Inc. v. President of the Canada Border Services Agency*¹² and *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency*¹³ in support of its position that the goods in issue are articles.

26. Marmen also referred to the definition of “for use in” found in subsection 2(1) of the *Customs Tariff*, which states in part that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item. Marmen submitted that the goods in issue have been wrought or incorporated into the “host” good.¹⁴

12. (30 April 2012), AP-2009-013 (CITT).

13. (4 November 2011), AP-2008-012R (CITT) [*P.L. Light Systems*].

14. Marmen refers to the definition of “incorporate” found in *Webster’s New World Dictionary of the American Language*. See Tribunal Exhibit AP-2011-051-04A at para. 21; Tribunal Exhibit AP-2011-057-11A at tab 23.

27. Marmen submitted that there is no requirement that the importer be the person who manufactures the “host” good in order for tariff item No. 9903.00.00 to apply. Marmen submitted that the focus of the term “manufacture” in the tariff item is on the result (the creation of the *windmill*) and not on the means by which it is achieved or the person who achieves it.

28. Marmen made reference to the Tribunal’s decision in *P.L. Light Systems* where the Tribunal interpreted the phrase “enter into the cost of manufacture of”. In that decision, in *obiter*, the Tribunal considered the following types of evidence in support of the position that the goods enter into the cost of manufacture of the host good: the goods were designed exclusively for the host good; the systems were installed in the host good, in that instance, up to 75 percent of the time; and the cost of the systems were considered when planning the construction of the host good.

29. Marmen submitted that there is nothing in tariff item No. 9903.00.00 which limits *windmills* to those on a farm. Marmen further submitted that *wind turbines* are a type of *windmill* and relies on several dictionary definitions and secondary sources in support of this position.¹⁵ Marmen referred to the Federal Court of Appeal’s decision in *Conair Consumer Products Inc. v. Canada (Canada Customs and Revenue Agency)*,¹⁶ in which the Federal Court of Appeal held that “. . . [d]ictionary definitions and evidence of trade usage of words are both relevant in cases such as this, and it is within the mandate of the CITT to weigh and balance all such evidence in reaching a conclusion”¹⁷

30. At the hearing, Marmen advanced arguments with respect to the French version of tariff item No. 9903.00.00 in which the term *windmills* is expressed as *éoliennes*.

31. Marmen argued that *windmills*, in the sense of modest devices used to mill grain, run pumps or generate small amounts of electricity, as described in the *Explanatory Notes* to heading No. 84.12, should be translated directly as *moulins à vent*.

32. Marmen submitted that *éolienne* is the French term which is more commonly used in the power-generating industry to describe *wind turbines* which generate electricity, such as the goods in which Marmen’s towers are used. In light of this, *windmills* should therefore be broadly interpreted to encompass *wind turbines*. Marmen also argued that *wind turbines* evolved from the archaic *windmills* so that, because the law is considered to be always speaking, the language of the tariff should be construed so as to have evolved to include the modern day version of *windmills*, more specifically in this case, *wind turbines*.

CBSA

33. The CBSA submitted that the goods in issue are not eligible for tariff relief under tariff item No. 9903.00.00 because the “host” good in which they are used is not a *windmill*, as defined in the *Explanatory Notes* to heading Nos. 84.12 and 85.02. The CBSA also submitted that the “host” good, in this case, a *wind turbine*, is not a generating set for use on the farm or for farm purposes only, but is a generating set for use in large scale commercial installations.

34. The CBSA submitted that the correct interpretation of *windmill*, as used in tariff item No. 9903.00.00, is found in the *Explanatory Notes* to heading No. 84.12.

15. See, for example, Tribunal Exhibit AP-2011-057-04A, tab 3; Tribunal Exhibit AP-2011-057-11A, tabs 21, 22; Tribunal Exhibit AP-2011-057-22A, tabs 6-18.

16. 2004 FCA 282 (CanLII).

17. *Ibid.* at para. 6.

35. In support of its position, the CBSA referred to Note 4 to Chapter 99, which provides that “[t]he words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97” and the Federal Court of Appeal’s decision in *Suzuki* which states that “. . . even in a case where the Tribunal could reasonably choose not to apply the Explanatory Notes, it does not have the authority to rewrite or ignore such Notes by redefining their terms.”¹⁸ The CBSA further submitted that legal definitions should prevail over dictionary definitions, such as the ones presented by Marmen.¹⁹

36. The CBSA submitted that the Tribunal should distinguish *windmills* from *wind turbines*, as they are not similar goods. It submitted that, in accordance with the definition found in the *Explanatory Notes*, *windmills* are usually of low power and are mainly used in rural installations, whereas *wind turbines* are used in the commercial production and distribution of electricity.

37. The CBSA argued that *windmills* and *wind turbines* have very different designs and that their shared ability to harness the power of the wind and convert it into some type of energy is the only similarity between them. The CBSA also submitted that *windmills* convert wind energy into mechanical energy *not* electrical energy and that, when *windmills* are used to produce electricity, it is through small localized electric generators, which are usually hooked up to a small electrical device, such as a pump.

38. The CBSA also noted that, according to the *Explanatory Notes*, when a wind motor is mounted integrally with an electric generator, classification is directed to heading No. 85.02 as “electric generating sets and rotary converters”. The CBSA argued that, since the goods in issue will be used in a host good that is covered by heading No. 85.02, the host good cannot be a *windmill*, as per Note (D) of the *Explanatory Notes* to heading No. 84.12.

39. The CBSA also relied on diagrams that were filed as attachments to Dr. Habash’s expert report in order to illustrate the visual differences between *windmills* and *wind turbines*.

ANALYSIS

40. In the context of these appeals, in order for the goods in issue to qualify for the benefit of duty-free treatment under tariff item No. 9903.00.00, the goods in issue must be (i) articles or materials (ii) “for use in” or that “enter into the cost of manufacture . . . of” (iii) *windmills*.

41. As the first two criteria were not disputed by the parties, the Tribunal will begin its analysis by considering whether the *wind turbines* in which the goods in issue are used are windmills for the purposes of tariff item No. 9903.00.00.

42. If the Tribunal finds that *wind turbines* are *windmills* for the purposes of tariff item No. 9903.00.00, then the Tribunal will next consider whether the goods in issue are articles or materials “for use in” or that “enter into the cost of manufacture . . . of” *windmills*. If the Tribunal finds that *wind turbines* are not *windmills* for the purposes of tariff item No. 9903.00.00, Marmen’s appeals cannot succeed, and the Tribunal will not need to consider the other two elements of that tariff item.

43. As noted above, the CBSA submitted that the definition of *windmills* found in the *Explanatory Notes* to heading No. 84.12 is the appropriate definition of *windmills* for the purposes of the schedule to the *Customs Tariff*, and the one which should be used in this case. The CBSA also submitted that *windmills* and

18. *Suzuki* at para. 17.

19. *Workmen’s Compensation Board of New Brunswick v. Cullen Stevedoring Co. Ltd.*, [1971] SCR 49.

wind turbines are different products and relied on the testimony of its expert witness, Dr. Habash, in support of this assertion.

44. With reference to diagrams, Dr. Habash provided details on the conceptual and functional differences between *windmills* and *wind turbines*.²⁰ He testified that *windmills* are typically used to run pumps, mills and other mechanical applications, whereas *wind turbines* are almost exclusively used to produce large amounts of electricity to supply the energy grid for commercial purposes. He noted that the design of a *windmill* is not optimized for producing electricity on that scale. Dr. Habash also explained that the blades, the shaft and the gear box of a *windmill* are typically called the wind motor and that, once a mechanism such as a pump, a mill, or a small generator is attached, it is a complete *windmill*.²¹

45. In terms of physical characteristics, Dr. Habash testified that *windmills* are typically shorter and do not require nacelles to house generating components, such as the drive train and the alternator. In addition, *windmills* tend to have a greater surface area (i.e. more blades) than *wind turbines*, and the blades of a windmill are designed to form a “wall”. Dr. Habash explained that this is conceptually different from the blades of a wind turbine, which are designed to form “sails”.²²

46. Dr. Habash described the different ways in which *windmills* and *wind turbines* generate energy. He explained that *windmills* are designed with the objective of generating torque, whereas wind turbines are designed to generate both speed and torque, with speed being the most important.²³

47. Dr. Habash went on to explain that *windmills* use reduction gearing which reduces the speed of the shaft in order to generate more torque, whereas *wind turbines* have gear boxes that increase the speed of the shaft in order to attain high rotation speeds (most commonly 1,800 RPMs) and to maximize energy generation in the generator.²⁴ Dr. Habash also explained that location is much more important for *wind turbines* than it is for *windmills* because *wind turbines* need to be located in open spaces with few obstructions and need to be very high in order to capture the strongest winds and to achieve high speeds.²⁵ That is not necessarily the case with *windmills*.

48. Dr. Habash indicated that *windmills* are designed with vertical shafts which convey mechanical energy down through the shaft to an external implement, such as a pump, a mill or a small generator, usually found at ground level. He explained that *wind turbines*, on the other hand, normally have a horizontal shaft located within the nacelle itself, which transmits energy to the alternator or generator.²⁶

49. Dr. Habash indicated that, in his view, *windmills* are historical systems that are not very common today. He remarked that they are typically not found in Canada but that there are some *windmills* still in use in Europe.

50. He also testified that, in his opinion, *wind turbines* did not evolve from *windmills per se*.

51. He noted that, in *wind turbines*, the wind energy is converted differently than it is in *windmills* and that it is harnessed for different end uses. He explained that viewing *wind turbines* as evolving from

20. These diagrams can be seen in the attached appendix.

21. *Transcript of Public Hearing*, 23 August 2012, at 90, 91, 97.

22. *Ibid.* at 89, 92-93, 104, 132, 136.

23. *Ibid.* at 133.

24. *Ibid.* at 93.

25. *Ibid.* at 88-89, 91, 95.

26. *Ibid.* at 99, 104-106.

windmills was like viewing automobiles as evolving from the wheel. He explained that, while an automobile does have wheels, it also includes a number of other complex systems. Similarly, a *wind turbine* should not be viewed as evolving from the *windmill* simply because they both use wind energy to rotate blades.²⁷

52. Marmen did not provide expert testimony in these appeals.

53. Marmen submitted that the definition of *windmills* found in the *Explanatory Notes* to heading No. 84.12 does not apply to the interpretation of tariff item No. 9903.00.00 and that the language of the tariff should be broadly construed so as to include the modern day version of *windmills*, which, in this case, are *wind turbines*.

54. Marmen referred to documentary evidence from the Canadian Wind Energy Association and other sources in order to demonstrate that *wind turbines* are a type of *windmill* and that *windmills* used to produce electricity are commonly known as *wind turbines*.²⁸

55. Marmen's witness, Mr. Trudel, explained that the manufacture of towers for *wind turbines* makes up approximately 50 percent of Marmen's business and that all the towers that Marmen manufactures are used in *wind turbines*. He testified that, in the wind energy industry, the terms that are used to describe the products in which Marmen's towers are used are *wind turbine* in English and *éolienne* in French, but that, occasionally, the term *windmill* will be used. He also testified that a *wind turbine* is made up of a tower, blades and a nacelle and that the tower is an important component of a *wind turbine*.²⁹

56. During cross-examination, Mr. Trudel explained that, in his view, *windmill* refers to an old lattice structure with wooden blades that would be translated as *moulin à vent*. He also stated that Marmen does not make *windmills* or *moulins à vent*.

57. Finally, he agreed with the CBSA that there are two types of *éoliennes*, one that produces mechanical energy and another that produces electrical energy, and that Marmen makes towers that are exclusively used in *éoliennes* that produce electrical energy.³⁰

58. Mr. Lacasse also testified that an *éolienne* is a machine that transforms kinetic energy from the wind into electricity. He explained that, to his knowledge and practically speaking, all commercially deployed *wind turbines* in North America are for the production of energy and that *windmills* are no longer used for applications such as pumping water on agricultural land.³¹

59. Mr. Cameron testified that *wind turbines* are devices designed to convert energy from the wind into electrical energy. He explained that the most common type is the horizontal access *wind turbine* and that the major components include the blades, the nacelle, the hub and the tower. He agreed with a statement from the document titled "Opportunities for Canadian Stakeholders in the North American Large Wind Turbine Supply Chain" that *wind turbines* are an assembly of many complex systems that work together to turn mechanical energy into electrical energy, and he agreed that the tower is a typical component of a *wind turbine*. He also testified that, according to him, *éolienne* is translated as *wind turbine*.³²

27. *Transcript of Public Hearing*, 23 August 2012, at 137-38.

28. Tribunal Exhibit AP-2011-057-04A, tab 3; Tribunal Exhibit AP-2011-057-11A, tab 21.

29. *Transcript of Public Hearing*, 23 August 2012, at 10, 14, 32.

30. *Ibid.* at 45.

31. *Ibid.* at 55-56.

32. *Ibid.* at 62, 66-67.

60. During cross-examination, Mr. Cameron indicated that the term *windmill*, in terms of a machine that is used to pump or grind, is dated and not representative of language commonly used in the industry. He indicated that his industry is about generating electricity and that the industry deals with *wind turbines*, not what he understands to be *windmills*. He also confirmed, with reference to diagrams provided in materials filed with the Tribunal, that his industry is not concerned with *windmills* that pump water, as they are completely different products from *wind turbines*.³³

61. Turning now to the meaning that should be ascribed to *windmills*, in the Tribunal's view, Note 4 to Chapter 99 is relevant to the interpretation of words and phrases in tariff item No. 9903.00.00. In this regard, this provision reaffirms the well-established principle of consistent expression by providing that the words and expressions used in Chapter 99 have the same meaning as those used in Chapters 1 to 97. The Tribunal is also guided by the Federal Court of Appeal's decision in *Suzuki*, in which it held that the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise.

62. Therefore, to the extent that the words and expressions used in tariff item No. 9903.00.00 (particularly, *windmills*) have the same meaning as they do in heading No. 84.12 and that the *Explanatory Notes* to heading No. 84.12 inform the meaning of those words, the Tribunal ought to have regard to the *Explanatory Notes* to heading No. 84.12 unless there is a sound reason to do otherwise.

63. The *Explanatory Notes* to heading No. 84.12 provide as follows:

(D) WIND ENGINES (WINDMILLS)

This group includes all power units (wind engines or wind turbines), which directly convert into mechanical energy the action of the wind on the blades (often of variable pitch) of a propeller or rotor.

Usually mounted on a fairly tall metal pylon, the propellers or rotors have an arm perpendicular to their plane, forming a vane, or some similar device for orientating the apparatus according to the direction of the wind. The motive force is generally transmitted by reduction gearing through a vertical shaft to the power take-off shaft at ground level. Some wind motors ("depression motors") have hollow blades in which a pressure reduction is developed by rotation, and is transmitted to the ground by airtight conduits to drive a small reaction turbine.

Wind motors are usually of low power, and are mainly used in rural installations for driving irrigation pumps, drainage pumps or small electric generators.

Electric generator units composed of wind motors mounted integrally with an electric generator (including those for operation in aircraft slipstreams) are **excluded (heading 85.02)**.

64. The Tribunal has reviewed the elements of this definition. The definition suggests that *windmills* include all power units that convert wind energy directly into mechanical energy using the blades of a propeller or rotor.

65. It also suggests that the power unit (or wind motor) is usually mounted on a tall metal pylon and that the motive force is generally transmitted by *reduction gearing* through a *vertical shaft to the ground level*. The Tribunal agrees that the language used to describe a windmill in the *Explanatory Notes* to heading No. 84.12 is generally consistent with the description of *windmills* provided by Dr. Habash in his expert testimony.

33. *Transcript of Public Hearing*, 23 August 2012, at 72-73; Tribunal Exhibit AP-2011-057-22A, tab 18.

66. In particular, as noted above, Dr. Habash indicated that the gear box of a windmill is used to reduce the speed of the shaft (i.e. reduction gearing) and that windmills have a vertical shaft that brings mechanical energy to the surface, or ground level, where it attaches to an implement.

67. However, the definition found in the *Explanatory Notes* to heading No. 84.12 is not necessarily conclusive in establishing that *wind turbines* are not *windmills*. For example, the second and third paragraphs of the definition indicate that the motive force is *generally* transmitted by reduction gearing, that wind motors are *usually* of low power and that they are *mainly* found in rural installations.

68. The Tribunal notes that the nature of that language is non-mandatory; therefore, arguably, products that do not use reduction gearing, that are not of low power or that are not found in rural installations may still be captured by that language. The Tribunal also notes that the first line of the definition found in the *Explanatory Notes* to heading No. 84.12 includes a reference to *wind turbines*, which suggests that *wind turbines* are included within the scope of this definition.

69. Moreover, at the hearing, Marmen noted that the French version of the *Explanatory Notes* to heading No. 84.12 does not provide a definition of *éolienne* (the terminology used in the French version of tariff item No. 9903.00.00), but rather defines *moteurs à vent ou éoliens*, which is therefore not the appropriate definition to apply with respect to tariff item No. 9903.00.00.

70. For its part, the CBSA argued that Marmen's position overlooks the fact that *windmill* appears in the English versions of both tariff item No. 9903.00.00 and the *Explanatory Notes* to heading No. 84.12.

71. Upon reviewing the French and English versions of the *Explanatory Notes* to heading No. 84.12, the Tribunal notes that, in the English version, *windmill* does in fact appear in both tariff item No. 9903.00.00 and the *Explanatory Notes* to heading No. 84.12 and that the French version, while not using identical terminology, uses terminology that is very similar (*éolienne v. moteurs à vent ou éoliens* and *turbine éolienne*) and describes the same type of good. Therefore, the Tribunal finds it worthwhile to consider the definition of *windmill* found in the *Explanatory Notes* to heading No. 84.12.

72. In addition, the Tribunal was referred by the CBSA to heading No. 85.02, which covers electric generating sets and rotary converters, and the *Explanatory Notes* to heading No. 85.02, which describe electric generating sets. The *Explanatory Notes* to heading No. 85.02 provide as follows:

The expression "generating sets" applies to the combination of an electric generator and any prime mover **other than an electric motor** (e.g., . . . wind engines . . .). Generating sets consisting of the generator and its prime mover which are mounted (or designed to be mounted) together as one unit or on a common base (see the General Explanatory Note to Section XVI), are classified here . . .

73. The Tribunal finds that this description is in line with the evidence presented at the hearing with respect to the composition and structure of large *wind turbines*. In particular, a feature of *wind turbines* noted by the expert and lay testimony at the hearing, and confirmed in the documentary evidence on file, is that the electric generator (also referred to as the alternator) is located in the nacelle along with the gear box and the low/high speed shafts.³⁴

74. The Tribunal therefore finds that, in a *wind turbine*, the generator and its prime mover are mounted together as one unit. The Tribunal also notes that there is a reference to heading No. 85.02 in the

34. *Transcript of Public Hearing*, 23 August 2012, at 93, 122-24; Tribunal Exhibit AP-2011-057-22A, tab 10.

Explanatory Notes to heading No. 84.12, which directs the tariff classification of “[e]lectric generator units composed of wind motors mounted integrally with an electric generator . . .” to heading No. 85.02.

75. Although not strictly determinative for the purposes of these appeals, the Tribunal is of the view that *wind turbines* appear to be classifiable in heading No. 85.02.

76. In particular, the Tribunal observes that tariff item No. 8502.31.00 covers wind-powered generating sets, which, at a minimum, implies that there is a distinction to be made between *windmills* and wind-powered generating sets. In addition, where generating sets appear in tariff item No. 9903.00.00, they are qualified by the language “. . . for use on the farm for farm purposes only”, thereby making it clear that wind-powered generating sets that are not for use on the farm for farm purposes only are not entitled to the benefit of tariff item No. 9903.00.00.

77. At the hearing, Marmen also submitted that *éolienne* in the French version of tariff item No. 9903.00.00 is a reference to *wind turbines*, not *windmills*. Mr. Trudel, Mr. Lacasse, and Mr. Cameron each confirmed that *éolienne* is the French word used by the industry to describe a *wind turbine*.

78. The CBSA submitted that there was evidence on the record which clearly demonstrated that *éolienne* has two commonly used meanings—one referring to a device that generates electricity, the other referring to a device that generates mechanical energy from the wind.

79. The CBSA submitted that the common meaning of *éolienne* and *windmill* is the meaning ascribed in the *Explanatory Notes* to heading No. 84.12. It further submitted that, if one looks at the definition of *windmill* or *moteurs à vent ou éoliens* found in the *Explanatory Notes* to heading No. 84.12, it is clear that the definition is referring to more than just a motor, as it mentions other components of a *windmill*, including the tower and the blades.

80. The Tribunal notes that section 13 of the *Official Languages Act*³⁵ provides that the English and French versions of any act of Parliament are equally authoritative. Thus, neither the English nor the French version of the schedule to the *Customs Tariff* enjoys priority over the other. If the two versions appear to say different things, the inconsistency cannot be resolved in a way that automatically gives priority to one of the versions. The basic rule governing the interpretation of bilingual enactments that are inconsistently drafted is known as the “shared meaning rule”, by which the ordinary meaning that is shared by both versions is presumed to be the meaning intended by Parliament and is therefore the one that ought to be adopted.³⁶

81. The question in this case thus becomes whether *éolienne* and *windmill* are in conflict with each other and, if so, whether a shared meaning of these two terms can be established.

82. The *Merriam-Webster’s Collegiate Dictionary* defines *windmill* as “a mill or machine operated by the wind *usu.* acting on oblique vanes or sails that radiate from a horizontal shaft; *esp* a wind-driven water pump or electric generator.”³⁷

83. The *Canadian Oxford Dictionary* defines *windmill* as “a mill, pump, or generator driven by the action of the wind on its rotating sails or blades.”³⁸

35. R.S.C. 1985 (4th Supp.), c. 31.

36. R. Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 85.

37. Eleventh ed., *s.v.* “windmill”.

38. Second ed., *s.v.* “windmill”.

84. The *Robert & Collins Senior Dictionnaire Français-Anglais* translates *windmill* as *moulin à vent*.³⁹ The *Larousse Advanced Dictionary French-English/Anglais-Français 2007* translates *windmill*, with respect to a building, as *moulin à vent* and, with respect to a wind turbine, as *aéromoteur* and *éolienne*.⁴⁰

85. *Le Petit Robert 2011* lists “*éolien, ienne*” as an adjective and defines it as “**2.** Resulting from the action of the wind **3.** That is moved by the wind”⁴¹ [translation]. The same dictionary defines *machine éolienne* as a noun and states that an *éolienne* is a “machine that collects the energy of the wind, metallic wheel with vanes on top of a tower”⁴² [translation].

86. *Le Robert & Collins Senior Dictionnaire Français-Anglais 2007* translates “*éolien, ienne*”, as an adjective, as *wind* and *éolienne*, as a feminine noun, as a *windmill* or *wind pump*.⁴³

87. The *Larousse Advanced Dictionary French-English/Anglais-Français* translates *éolienne* as *windmill* or a *wind pump*.⁴⁴

88. After considering the aforementioned dictionary definitions, the Tribunal has made a number of observations.

89. First, the Tribunal observes that *éolienne* can be used either as a noun or as an adjective.

90. Second, the Tribunal observes that, when used as an adjective, *éolien* or *éolienne* describes the action of the wind and that, when used as a noun, *éolienne* (especially in the feminine form) describes either a *windmill* or a *wind pump*.

91. Finally, the Tribunal observes that *windmill* is translated as *moulin à vent* and that *wind turbine* is translated as *éolienne*. The Tribunal also observes that *windmill* is used primarily as a noun and not as an adjective.

92. On the basis of these dictionary definitions and in light of the evidence in this case, including the expert testimony, which clearly demonstrates that *windmills* and *wind turbines* are two different devices, the Tribunal finds that it is not possible to ascertain the shared meaning of *windmill* and *éolienne* for the purposes of tariff item No. 9903.00.00 on the basis of the ordinary meanings of these terms.

93. The Tribunal will therefore consider a contextual interpretation of *windmills* and *éoliennes* in relation to the other items listed in tariff item No. 9903.00.00 in order to determine the correct meaning that should be ascribed to these terms.

94. As noted above, Chapter 99 provides special classification provisions for commercial goods.

95. The Tribunal’s review of Chapter 99 confirms that these special provisions are drafted in such a way that products of a similar nature which are entitled to duty relief are usually grouped together in the same tariff item. For example, tariff item No. 9901.00.00 provides duty relief for articles and materials for use in the manufacture or repair of items used in commercial fishing or the commercial harvesting of marine

39. Second ed., s.v. “windmill”.

40. First ed., s.v. “windmill”.

41. First ed., s.v. “éolien, -ienne”.

42. First ed., s.v. “*machine éolienne*”.

43. Fifth ed., s.v. “éolien, -ienne”.

44. First ed., s.v. “éolienne”.

plants; tariff item No. 9904.00.00 provides duty relief for certain kosher goods; and tariff item No. 9948.00.00 provides duty relief for articles for use in certain electronic/data processing devices.

96. The Tribunal has reviewed the list of “host” goods found in tariff item No. 9903.00.00 and has reached the conclusion that each of the “host” goods in that tariff item relates in some way to agriculture, horticulture or agri-business. The Tribunal notes that, even though a number of the goods listed in tariff item No. 9903.00.00 could potentially be related to something other than agriculture, horticulture or agri-business (for example, air heaters, twine, carbon dioxide generators, clippers, fuel tanks, generators, hitches and couplings, sprinklers, buckets, shovels, inner tubes, etc.), where these goods appear in tariff item No. 9903.00.00, they include qualifying language that confirms their status as goods related in some way to agriculture, horticulture or agri-business.

97. For example, tariff item No. 9903.00.00 includes air heaters *for orchards; binder or baler twine; carbon dioxide generators to be employed in controlling the atmosphere in greenhouses; clippers for animals and for use on the farm; fuel tanks and generators for generating electricity for agricultural or horticultural purposes; hitches and couplings for use on the farm; sprinkle irrigation systems for use on the farm or in greenhouses; buckets, shovels, and inner tubes for use with tractors and for use on the farm.*

98. Marmen argued that the structure of tariff item No. 9903.00.00 is such that the use of successive semi-colons allows for certain goods to be considered in isolation from the other items included in this tariff item, therefore requiring no link to the agricultural, horticultural or agri-business sectors. Using this approach, Marmen argued that the very last item listed in tariff item No. 9903.00.00, namely, *windmills*, does not require a link to the agricultural, horticultural or agri-business sectors because no explicitly qualifying language is included in tariff item No. 9903.00.00 in connection with that item. Marmen therefore argued that *windmills* can, in this way, encompass *wind turbines*.

99. The Tribunal does not agree. The rule of modern statutory interpretation holds that the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intent of Parliament.⁴⁵ In addition, the use of internal groupings to inform the meaning of legislation is a tool of interpretation that has been used by the courts.⁴⁶

100. Accordingly, the Tribunal believes that, when viewed as a whole, tariff item No. 9903.00.00, and all the goods that it encompasses, notwithstanding punctuation, deals exclusively with goods that are in some way related to farming, agriculture, horticulture or agri-business.

101. The Tribunal notes that the Marmen’s witnesses each testified that *wind turbines* are connected to the energy sector. Mr. Trudel indicated in his testimony that Marmen “. . . manufactures many parts for the energy sector, whether for electric turbines or for hydraulic, gas, vapour or nuclear turbines. [Marmen] is in all the energy fields”⁴⁷ [translation].

102. In addition, the Tribunal notes that Mr. Lacasse is employed by the Quebec Ministère du Développement économique, de l’Innovation et de l’Exportation.

45. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26.

46. See, for example, *Committee for the commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 163.

47. *Transcript of Public Hearing*, 23 August 2012, at 21.

103. Mr. Cameron also stated that he is an energy analyst and that his employer supports the wind energy industry.⁴⁸

104. The Tribunal also observes that Marmen advertises itself on its Web site as providing services to the energy sector and that Marmen advertises its towers under the wind energy sector of that Web site. Moreover, the Tribunal observes that many of the documents describing *wind turbines* and *éoliennes* that were submitted by Marmen were produced by government departments and other agencies which are related to the energy sector, not the agricultural sector.⁴⁹

105. Therefore, the Tribunal finds that, regardless of whether or not the definition of *windmill* found in the *Explanatory Notes* to heading No. 84.12 is to be applied in this case, *windmills* and *éoliennes* are to be interpreted in light of the context in which the terms appear in Chapter 99.

106. As such, the Tribunal concludes that the definition of *windmills* does not include the *wind turbines* in which the goods in issue are used, as they have no connection to farming, agriculture, horticulture or agri-business, but instead relate to the energy sector. As noted above, this interpretation of *windmills* is also consistent with the expert testimony given by Dr. Habash.

107. As the Tribunal has found that *wind turbines* relate to the energy sector, the Tribunal is also unable to conclude that the *wind turbines*, in which the goods in issue are used, are for use on a farm for farm purposes only.

108. Therefore, if the Tribunal were to find that *wind turbines* are generating sets as described in tariff item No. 8502.31.00, they would still not be eligible for the benefit of tariff item No. 9903.00.00, as they do not meet the qualification of being “. . . for use on the farm for farm purposes only” which appears in that tariff item in connection with generating sets.

109. In reaching its conclusion, the Tribunal considered Marmen’s reference to *British Columbia Telephone Company v. The Queen*⁵⁰ and its argument that new technology can be embraced by old language.⁵¹ However, the Tribunal finds that *B.C. Telephone Company* can be distinguished from the present case.

110. For example, in *B.C. Telephone Company*, which considered whether the term “cable” included new fibre optic transmission systems, there was evidence that fibre optic transmission systems were a form of cable, within the ordinary meaning of the term. By contrast, the evidence presented by the expert and lay witnesses in this case confirms that *wind turbines* and *windmills* are two different products.⁵² Moreover, the Tribunal has already concluded that a contextual interpretation of *windmills* in tariff item No. 9903.00.00 does not include *wind turbines*.

111. The evidence that the goods in issue are used to build towers that form part of *wind turbines* was not contested in this case. However, as stated at the outset of its analysis, because the Tribunal has found that

48. *Transcript of Public Hearing*, 23 August 2012, at 59-60.

49. See, for example, Tribunal Exhibit AP-2011-057-04A, tab 3, which was published by the Canadian Wind Energy Association and the Department of Natural Resources; Tribunal Exhibit AP-2011-057-22B, which includes extracts from the Hydro Québec Web site; Tribunal Exhibit AP-2011-057-22A, tabs 6-10, which was published by the Department of Industry.

50. 92 DTC 6129 (FCA) [*B.C. Telephone Company*].

51. *B.C. Telephone Company* at 6232.

52. *Transcript of Public Hearing*, 23 August 2012, at 101.

wind turbines are not *windmills* or generating sets for use on the farm for farm purposes only, Marmen cannot succeed in its appeals. As such, the Tribunal need not determine whether the goods in issue are articles or materials or whether the goods in issue meet the Tribunal's test of being "for use in" or "entering into the cost of manufacture" of either of the host goods.

DECISION

112. For the foregoing reasons, the appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

IN THE MATTER OF appeals heard on August 23, 2012, pursuant to section 67 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 November 3, 2011, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MARMEN ÉNERGIE INC. AND MARMEN INC.

Appellants

AND

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

Respondent

CORRIGENDUM

The date in paragraphs 1 and 7 of the Statement of Reasons should have read “November 3, 2011”.

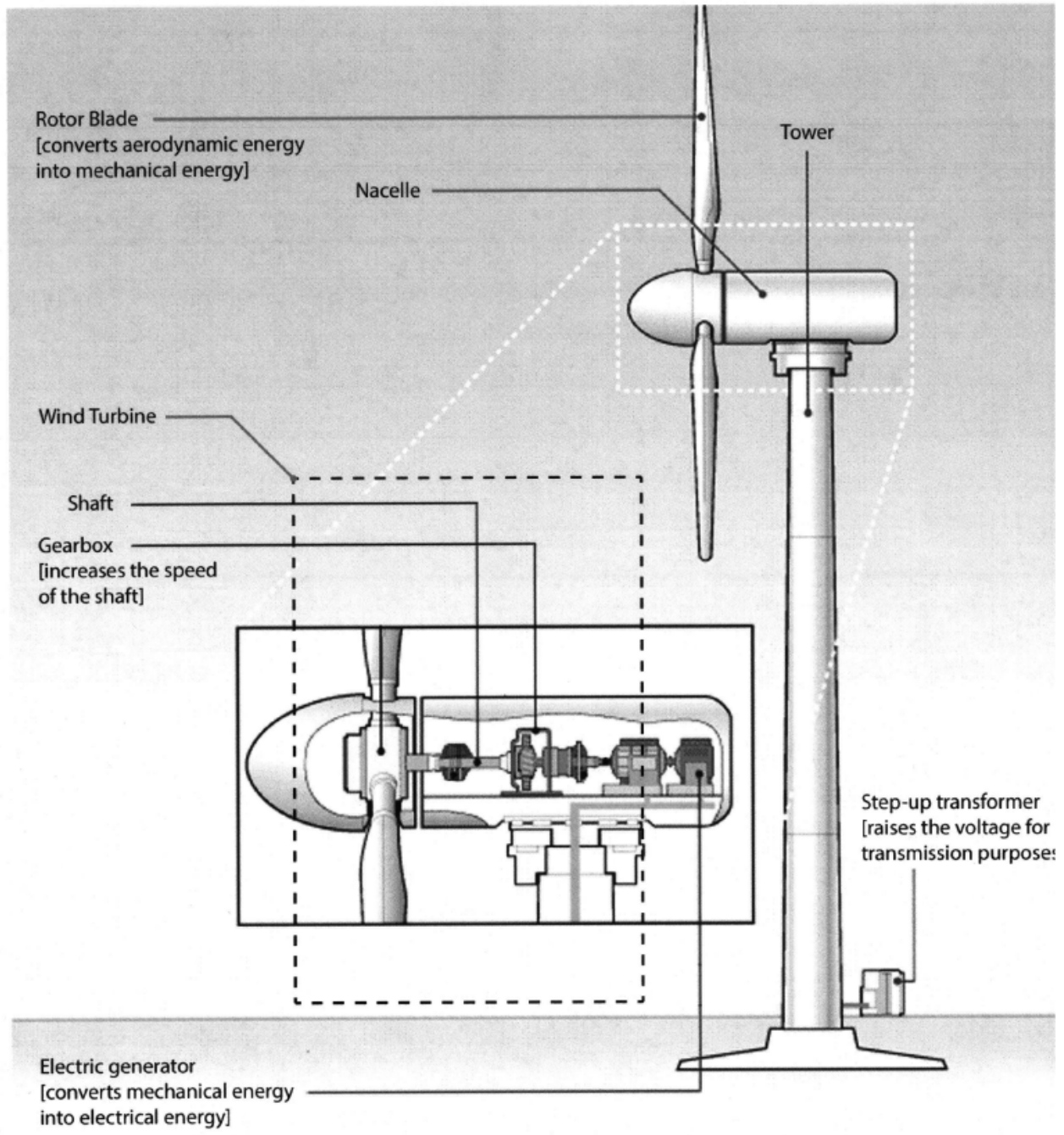
By order of the Tribunal,

Eric Wildhaber

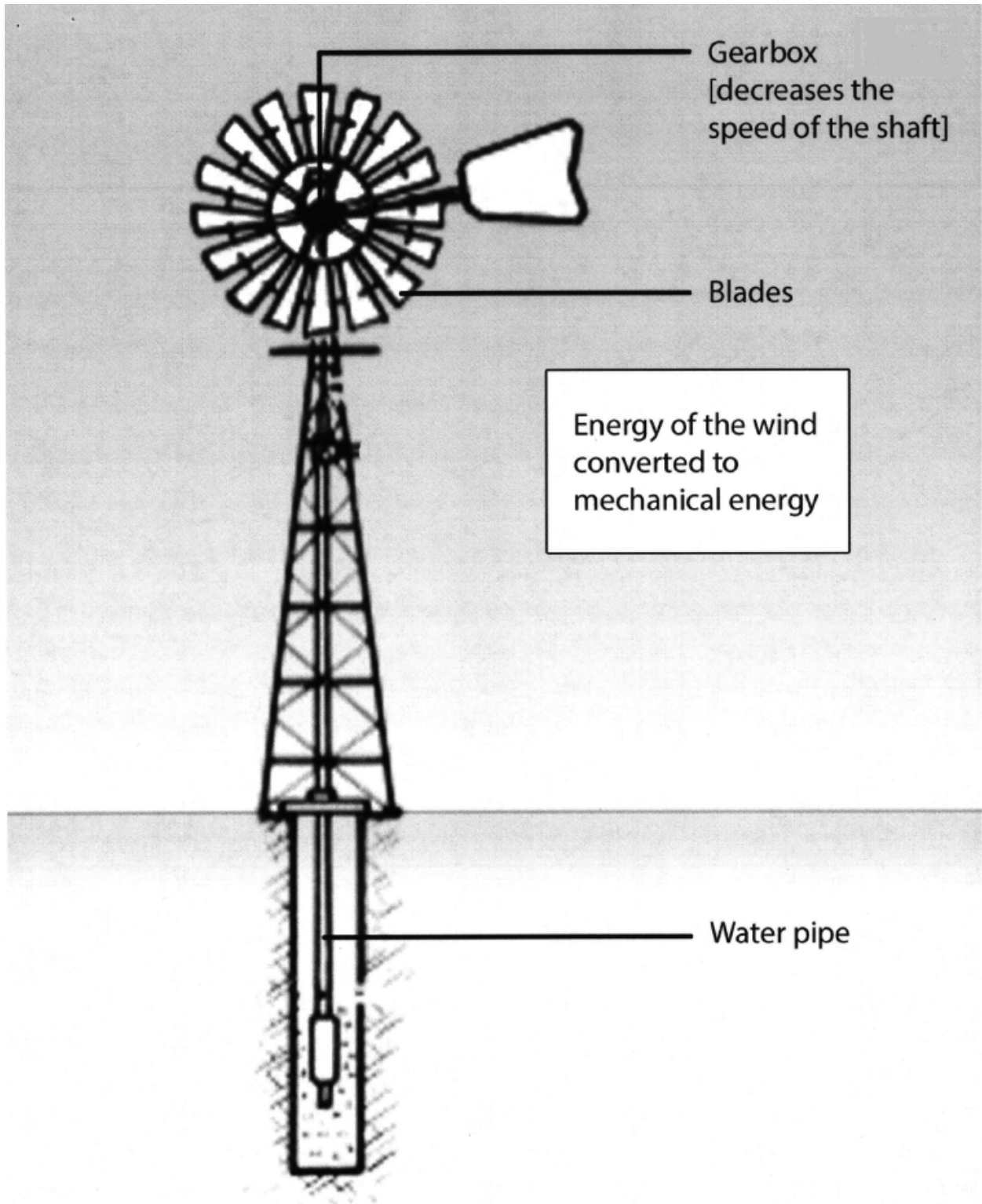
Eric Wildhaber

Secretary

APPENDIX



Wind Turbine



Windmill