



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-058

Kinedyne Canada Limited

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, December 17, 2013*

*Corrigendum issued
Thursday, December 19, 2013*

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IN THE MATTER OF an appeal heard on September 17, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 8, 2012, with respect to an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KINEDYNE CANADA LIMITED

Appellant

AND

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

Respondent

DECISION

The appeal is allowed in part.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

IN THE MATTER OF an appeal heard on September 17, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 8, 2012, with respect to an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

KINEDYNE CANADA LIMITED

Appellant

AND

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

Respondent

CORRIGENDUM

The second paragraph of the statement of reasons should have read as follows:

2. The issue in this appeal is whether the goods in issue should be classified under tariff item No. 8479.89.90 of the schedule of the *Customs Tariff* as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84 or, in the alternative, in residual heading No. 73.26 as other articles of iron and steel, as claimed by Kinedyne, or are instead properly classified under tariff item No. 8205.59.90 as other hand tools not elsewhere specified or included or, in the alternative, under tariff item No. 8205.70.90 as other vices, clamps and the like, as asserted by the CBSA.

By order of the Tribunal,

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 17, 2013
Tribunal Member: Pasquale Michael Saroli, Presiding Member
Counsel for the Tribunal: Alexandra Pietrzak
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Ekaterina Pavlova

PARTICIPANTS:

Appellant	Counsel/Representative
Kinedyne Canada Limited	Rajesh Mamtora
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Elizabeth Kikuchi

WITNESS:

David Thibodeau
Professor and Acting Chair
Algonquin College

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Kinedyne Canada Limited (Kinedyne) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), with regard to an advance ruling issued under paragraph 43(1)(c) in respect of certain lever chain binders (LCBs), adjustable lever binders (ALBs) and ratchet chain/load binders (RLBs) (the goods in issue).

2. The issue in this appeal is whether the goods in issue should be classified under tariff item No. 8708.99.99 of the schedule to the *Customs Tariff*² as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05, as claimed by Kinedyne, or are properly classified under tariff item No. 8205.59.90 as other hand tools not elsewhere specified or included, as determined by the CBSA. In the alternative, the CBSA argued that the goods in issue are properly classified under tariff item No. 8205.70.90 as other vices, clamps and the like.

PROCEDURAL HISTORY

3. On March 30, 2012, Kinedyne applied for an advance ruling under paragraph 43(1)(c) of the *Act*, submitting that the goods in issue should be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

4. The CBSA issued an advance ruling on June 1, 2012, in which it found that the goods in issue were properly classified under tariff item No. 8205.59.90 as other hand tools, not elsewhere specified or included.

5. On June 13, 2012, Kinedyne requested a review of the advance ruling under subsection 60(2) of the *Act*, reiterating its view that the goods in issue should be classified under tariff item No. 8479.89.90.

6. On November 8, 2012 the CBSA issued a revised ruling under subsection 60(2) of the *Act* in which it determined that the goods in issue were properly classified under tariff item No. 8708.99.99 as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05.

7. Kinedyne filed the present appeal with the Canadian International Trade Tribunal (the Tribunal) on January 9, 2013.

8. On May 7, 2013, the CBSA filed its brief, in which it reverted to its original position in the advance ruling of June 1, 2012, that the goods in issue were properly classified under tariff item No. 8205.59.90.

9. Kinedyne wrote to the Tribunal on May 7, 2013, to request permission to file an additional appellant's brief, as its original appellant's brief had been drafted in response to the CBSA's final determination on November 8, 2012, that the goods in issue were properly classified under tariff item No. 8708.99.99. Since the CBSA subsequently revised this position in its brief, Kinedyne sought an opportunity to respond to this change in classification.

10. Kinedyne filed an additional appellant's brief on June 10, 2013.

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

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

11. On June 6, 2013, the CBSA wrote to request an adjournment of the hearing, which had been scheduled for July 4, 2013. The hearing was subsequently rescheduled for September 17, 2013.

12. On June 14, 2013, the CBSA filed an additional respondent's brief in which it submitted, by way of a new alternative argument, that, should the Tribunal find that the goods in issue are not "hand tools, not elsewhere specified or included", they would be properly classified under tariff item No. 8205.70.90 as other vices, clamps and the like.

13. On September 3, 2013, after having been granted permission by the Tribunal, Kinedyne submitted a further additional appellant's brief in response to the new alternative argument advanced by the CBSA in its additional respondent's brief filed on June 14, 2013.

14. The CBSA filed a further additional respondent's brief on September 9, 2013.

15. The Tribunal held a public hearing on September 17, 2013, in Ottawa, Ontario. The CBSA called one witness: Mr. David Thibodeau, Professor and Acting Chair, Algonquin College, who was recognized as an expert in the field of mechanical engineering. Kinedyne did not call any witnesses.

GOODS IN ISSUE

16. The goods in issue are mechanical devices designed to tighten and secure loads on trailers, flatbed trucks, vessels and trains and to assist in other material handling activities. They are made of formed steel and include the following components: gears, pawls, operating ratchet-levers, hooks, links and pins. The ratchet-lever is operated to either tighten or loosen the chain that runs over or through the cargo.

17. The nine models of the goods in issue, which are generally described as load or chain binders, fall into three distinct categories, as follows:

DESCRIPTION	PART NO.	COMPOSITION
LCBs	10046	Made of formed steel, fits 1/4" chain
	10036	Made of formed steel, fits 5/16" to 3/8" chain
	10036HD	Made of formed steel, fits 3/8" to 1/2" chain
	10036XHD	Made of formed Steel, fits 1/2" to 5/8" chain
ALBs	10049	Made of formed steel, fits 5/16" to 3/8" chain
RLBs	10047	Made of formed steel, fits 1/4" to 5/16" chain
	10035	Made of formed steel, fits 5/16" to 3/8" chain
	10035HD	Made of formed steel, fits 3/8" to 1/2" chain
	10035XHD	Made of formed steel, fits 1/2" to 5/8" chain

18. The CBSA filed three physical exhibits—one sample of each of the categories of the goods in issue. The parties agreed that these three physical exhibits accurately reflected the goods in issue.³

ANALYSIS

Legal Framework

19. 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

3. *Transcript of Public Hearing*, 17 September 2013, at 4.

Rules for the Interpretation of the Harmonized System^[4] and the Canadian Rules^[5] set out in the schedule.” 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* developed by the World Customs Organization.⁶ 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. Sections and chapters may include notes concerning their interpretation.

20. 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.⁷ Classification therefore begins with Rule 1, which provides as follows: “. . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.”

21. Section 11 of the *Customs Tariff* provides as follows: “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 Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.¹⁰

22. Thus, the Tribunal will first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relevant section or chapter notes in the *Customs Tariff*, having regard to any relevant *Explanatory Notes* or *Classification Opinions*. It is only if the Tribunal is not satisfied that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading they should be classified.

23. 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 and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

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

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

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

7. 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).

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

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

10. Specifically, the Federal Court of Appeal, in *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*], indicated, at para. 13, that: “. . . the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international community, the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise.” [Emphasis added]

Positions of Parties

Kinedyne

24. Kinedyne submits that the goods in issue are "...mechanical devices performing individual function[s]"¹¹ and should be classified in heading No. 84.79. In this regard, Kinedyne maintains that the goods in issue are "mechanically operated"¹² and consist of more or less complex combinations of moving and stationary parts, which work through the production, modification or transmission of force and motion.¹³ In particular, Kinedyne contends that the goods in issue function by applying pressure to the handle or lever, which in turn adds or removes tension in the chain securing the load. Moreover, Kinedyne asserts that goods in issue act directly on the load that they are securing or tightening, and are doing "useful work" through the transmission of force or motion to an external body (i.e. the load).¹⁴

25. While the CBSA alleged that the goods in issue must be a complex machine in order to be classified in heading No. 84.79, Kinedyne notes that the *Customs Tariff* does not differentiate between a *simple* machine and a *complex* machine.¹⁵ Furthermore, Kinedyne maintains that, even if heading No. 84.79 did include only complex machines, the goods in issue are each formed of two or more simple machines which work together to make the goods in issue complex machines. Thus, Kinedyne submits that the goods in issue should be classified in heading No. 84.79.

26. In the alternative, if the Tribunal finds that any of the goods in issue do not have sufficient mechanical properties for classification in heading No. 84.79, Kinedyne contends that they could be classified in heading No. 73.26. In particular, Kinedyne argues that, since the goods in issue are made of iron and steel, but are neither clamps nor hand tools, they may be classified in heading No. 73.26 as other articles of iron and steel.¹⁶

CBSA

27. The CBSA submits that the goods in issue are properly classified in heading No. 82.05 as other hand tools. In this respect, it claims that the goods in issue meet the five criteria necessary for classification in heading No. 82.05. In particular, the CBSA states the following with regard to the goods in issue:

- they are articles;
- they have a working edge, working surface or other working part;
- they are made of base metal;
- they can be used independently in the hand and may incorporate simple mechanisms; and
- they are not included in other headings of Chapter 82 or elsewhere in the Nomenclature.

28. The CBSA argues that there is a distinction to be drawn between simple machines comprised of simple mechanisms and complex machines.¹⁷ The CBSA submits that the goods in issue, which are

11. Exhibit AP-2012-058-05A at para. 24.

12. *Ibid.* at para. 29.

13. *Ibid.* at para. 42.

14. *Ibid.* at para. 28.

15. *Ibid.* at para. 38.

16. Exhibit AP-2012-058-30A at para. 33.

17. Exhibit AP-2012-058-07A at paras. 29, 31.

operated by hand and consist of simple mechanisms, are analogous to simple machines.¹⁸ In this regard, the CBSA argues that heading No. 82.05 properly includes simple machines.¹⁹

29. Following on this distinction, the CBSA argues that heading No. 84.79, which covers “[m]achines and mechanical appliances . . .”,²⁰ is reserved for complex machines.²¹ As the goods in issue function through the operation of levers or screw mechanisms, the CBSA contends that they are simple machines.²² Thus, the CBSA maintains that the goods in issue, not being complex machines, cannot be classified in heading No. 84.79.

30. In the alternative, the CBSA submits that the goods in issue may be classified in heading No. 82.05 as vices, clamps and the like. In particular, the CBSA states that the primary purpose of the goods in issue is to hold and secure loads. Thus, the CBSA argues the following:

- the purpose of the load binders and how they are used are “like” or similar to clamps; and
- the goods in issue are therefore properly classified in heading No. 82.05 on this ground.²³

Tariff Classification of the Goods in Issue

31. Rule 1 of the *General Rules* 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 provisions that follow.

32. The parties submit, and the Tribunal accepts,²⁴ that heading Nos. 84.79, 73.26 and 82.05 are the only tariff headings of potential relevance to the classification of the goods in issue.

33. Specifically, Kinedyne claims that the goods in issue fall to be classified in heading No. 84.79 as follows:

Section XVI

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

...

Chapter 84

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

...

18. *Ibid.* at paras. 28, 29.

19. *Ibid.* at paras. 26-29.

20. *Ibid.* at para. 31.

21. *Transcript of Public Hearing*, 17 September 2013, at 21.

22. Exhibit AP-2012-058-07A at paras. 26, 29; Exhibit AP-2012-058-25A at para. 8.

23. Exhibit AP-2012-058-20A at para. 8.

24. It being the role of the Tribunal to determine the correct tariff classification of goods in issue, the Tribunal is not bound by the competing classifications suggested by the parties. See, for example, *Reha Enterprises Ltd. and Cosmetic Import Co. Limited v. Deputy M.N.R.* (28 October 1999), AP-98-053 and AP-98-054 (CITT).

84.79 *Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.*

...

- Other machines and mechanical appliances:

...

8479.89 --Other

...

8479.89.90 ---Other

[Emphasis added]

34. By way of alternative classification, Kinedyne submits that, if the Tribunal finds that any of the goods in issue do not have sufficient mechanical properties for classification in heading No. 84.79, they should be classified as follows:

Section XV

BASE METALS AND ARTICLES OF BASE METAL

...

Chapter 73

ARTICLES OF IRON AND STEEL

...

73.26 Other articles of iron and steel.

35. The CBSA counters that the goods in issue are properly classified in heading No. 82.05 as follows:

Section XV

BASE METALS AND ARTICLES OF BASE METAL

...

Chapter 82

**TOOLS, IMPLEMENTS, CUTLERY, SPOONS
AND FORKS, OF BASE METAL; PARTS THEREOF
OF BASE METAL**

...

82.05 *Hand tools . . . not elsewhere specified or included; . . .*

...

-Other hand tools . . .

...

8205.59 --Other

...

8205.59.90 ---Other

[Emphasis added]

36. The CBSA submits, by way of alternative argument, that, if the goods in issue are determined not to be hand tools, they nonetheless remain properly classified in heading No. 82.05 as goods that are like clamps, as follows:

Section XV	
BASE METALS AND ARTICLES OF BASE METAL	
...	
Chapter 82	
TOOLS, IMPLEMENTS, CUTLERY, SPOONS AND FORKS, OF BASE METAL; PARTS THEREOF OF BASE METAL	
...	
82.05	Hand tools (including glaziers' diamonds), not elsewhere specified or included; blow lamps; vices, clamps and the like, other than accessories for and parts of, machine tools; . . .
...	
8205.70	-Vices, clamps and the like
...	
8205.70.90	-- -Other

[Emphasis added]

37. The Tribunal notes that, by operation of Note 1(f) to Section XV, which includes Chapter 82, and of Note 1(k) to Section XVI, which includes Chapter 84, heading Nos. 82.05 and 84.79 are rendered mutually exclusive, such that *prima facie* classification of the goods in issue in either heading would preclude their *prima facie* classification in the other.²⁵ These legal notes provide as follows:

Section XV	
...	
1.	This Section does not cover:
...	
	(f) <i>Articles of Section XVI</i> (machinery, mechanical appliances and electrical goods), ²⁶
...	

25. As was noted by the Tribunal in *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) [citing *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT) at 5; *Dynamic Furniture Corp. v. President of the Canada Border Services Agency* (31 March 2009), AP-2005-043 (CITT) at 8; and *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (28 January 2011), AP-2009-076 (CITT)], "... it is logical to conclude that goods cannot be *prima facie* classifiable in two headings that are mutually exclusive by virtue of relevant legal notes." See *Bauer Hockey Corporation v. President of the Canada Border Services Agency* (26 April 2012), AP-2011-011 (CITT) at para. 33.

26. More specifically, the *Explanatory Notes* to Chapter 82 provide the following clarification: "This Chapter covers certain specific kinds of base metal articles, of the nature of tools, implements . . . etc., which . . . are not machinery or appliances of Section XVI . . ." [Emphasis added]

Section XVI

...

1. This Section does not cover:

...

- (k) Articles of *Chapter* 82 or 83.

[Emphasis added]

38. The tariff classification of the goods in issue, and the disposition of the current appeal, therefore turns on the issue of whether the goods in issue, as presented for importation,²⁷ are properly described as hand tools or, alternatively, as vices, clamps or the like, of heading No. 82.05, as submitted by the CBSA, or should be described as machines or mechanical appliances of heading No. 84.79 or, alternatively, as other articles of iron and steel of heading No. 73.26, as submitted by Kinedyne.

Should the Goods in Issue be Classified in Heading No. 84.79 as Machines and Mechanical Appliances Having Individual Functions?

39. The Tribunal has previously stated that the terms “machine” and “mechanical appliance” in heading No. 84.79 are analogous terms that have become essentially interchangeable.²⁸

40. The definition of “machine” in the *Shorter Oxford English Dictionary* includes the following: “4. An apparatus, an appliance . . . Any instrument that transmits force or directs its application”.²⁹ More specifically, *Merriam-Webster’s Collegiate Dictionary* defines “machine” to include the following: “e (1): an assemblage of parts that transmit forces, motion and energy one to another in a predetermined manner.”³⁰ That the assembled parts must interact with each other is consistent with the evidence of the CBSA’s expert witness, Mr. Thibodeau, who stated as follows:

*A complex machine consists of two or more simple machines working together [with] [w]orking together mean[ing] **the output force of one simple machine becomes the input force for another simple machine.***³¹

[Bold added for emphasis]

27. See *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada indicated that the time for determining tariff classification is at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada’s customs legislation in 1955, it is the Tribunal’s view that the principle set out in that case remains valid today, despite various amendments by Parliament to Canada’s customs legislation in the intervening years. See, also, *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case, and, for example, *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) at para. 29.

28. *Canadian Tire Corporation Limited v. President of the Canadian Border Services Agency* (29 November 2007), AP-2006-041 (CITT) [*Canadian Tire 2007*] at para. 26. See, also, *Canper Industrial Products Ltd. v. Deputy M.N.R.* (24 January 1995), AP-94-034 (CITT) at 4, wherein the Tribunal stated that “. . . the words ‘machines’ and ‘mechanical appliances’ are closely related in terms of the nature of the goods falling within their ambit and, therefore, falling in heading No. 84.79.”

29. Fifth ed., s.v. “machine”.

30. Eleventh ed., s.v. “machine”.

31. Exhibit AP-2012-058-25A at para. 3.

41. The definition of the word “mechanical” in the *Shorter Oxford English Dictionary* includes the following: “2. Of the nature of a machine or machines”,³² while the *Merriam-Webster’s Collegiate Dictionary* defines the term as follows: “1(a)(1): of or relating to machinery or tools”.³³

42. The term “appliance” is in turn defined in the *Shorter Oxford English Dictionary* as including the following: “2 A thing applied as a means to an end: a device, a utensil, an apparatus”,³⁴ while the *Merriam-Webster’s Collegiate Dictionary* defines the term to include the following: “1b: an instrument or device designed for a particular use or function”.³⁵ A “mechanical appliance” would therefore be an instrument, device or apparatus, in the nature of a machine, which is designed to fulfill a particular use or function.

43. For purposes of the present analysis, the Tribunal will simply use the term “mechanical appliances”. In this regard, and consistent with the above definitions, Supplementary Note 1 to Section XVI provides as follows:

In this Section the term “mechanically operated” refers to those goods which are comprised of *a more or less complex combination of moving and stationary parts* and *do work* through the *production, modification or transmission of force and motion*.

[Emphasis added]

44. It is well established in Tribunal jurisprudence that, in order for goods to be considered mechanical appliances, they must (a) “. . . do work through some combination of moving parts”³⁶ and (b) “. . . produce, modify or transmit force *to an external body . . .*”³⁷ [Emphasis added]

45. The *Explanatory Notes* to heading No. 84.79 reiterate that “[t]his heading is **restricted to** machinery having individual functions . . .” The Tribunal has previously indicated that, in conducting its assessment of whether goods perform an individual function, “. . . it must look at the goods in their entirety . . . [as it is] the goods in their entirety that must perform a function on their own . . .”³⁸

46. On the basis of the foregoing, the Tribunal concludes that, in order for a good to be a mechanical appliance of heading No. 84.79, it must meet the following criteria:

- (i) the good must be a device, apparatus or instrument;
- (ii) the good must be *comprised of a* more or less complex combination of moving and stationary parts;
- (iii) the parts of which the good is comprised must do work through the production, modification or transmission of force and motion;
- (iv) the good, considered in its entirety, must perform an individual function, distinctly and independently of any other machine or appliance; and
- (v) the good must act on something extraneous to itself (i.e. on an external body).

32. Fifth ed., s.v. “mechanical”.

33. Eleventh ed., s.v. “mechanical”.

34. Fifth ed., s.v. “appliance”.

35. Eleventh ed., s.v. “appliance”.

36. *Nailor Industries Inc. v. Deputy M.N.R.* (13 July 1998), AP-97-083 and AP-97-101 (CITT) at 5.

37. *Canadian Tire 2007* at para. 27.

38. *Ibid.* at para. 26.

47. In this respect, the Tribunal finds as follows:

- with respect to criterion (i), load binders are *devices* used in a load binding system—a description of the goods in issue that is acknowledged by the CBSA³⁹ and accepted by both parties,⁴⁰ and which is reflective of both legislative description⁴¹ and the cargo transportation industry’s own characterization of same;⁴²
- with respect to criterion (iii), each of the goods in issue creates a mechanical advantage through the modification of force, the transmission of which is used to do work—a fact acknowledged by the CBSA’s expert witness, Mr. Thibodeau;⁴³
- with respect to criterion (iv), each of the goods in issue performs an individual function that is separate and distinct from that of the truck trailer⁴⁴—a fact acknowledged by the CBSA;⁴⁵ and
- with respect to criterion (v), each of the goods in issue, as a load binding device, acts upon something extraneous to itself, namely, the trailer cargo being secured—a fact acknowledged by the CBSA.⁴⁶

48. In short, the Tribunal is satisfied that each of the goods in issue satisfies criteria (i), (iii), (iv) and (v) above. Consequently, in determining whether the goods in issue are mechanical appliances, the only remaining issue is whether each is sufficiently mechanical, that is, whether each is comprised of a more or less complex combination of moving and stationary parts for the purposes of criterion (ii) and, by extension, Supplementary Note 1 to Section XVI from whence that criterion derives.

49. With the above as context, the Tribunal will now embark upon an assessment of each of the three categories of the goods in issue against criterion (ii) above.

39. At the hearing, the CBSA conceded that the goods in issue “. . . are in the nature of a device” *Transcript of Public Hearing*, 17 September 2013, at 140.

40. *Transcript of Public Hearing*, September 17, 2013, at 140; Exhibit AP-2012-058-05A at para. 6.

41. For example, the B.C. *Commercial Transport Regulations*, B.C. Reg. 30/78, made pursuant to the B.C. *Commercial Transport Act*, R.S.B.C. 1996, c. 58, state that a load securement *device* means “(a) a tie down, *binder*, lock, chain, cable, belt, rope, winch, cinch, hook or covering” [emphasis added]. See Exhibit AP-2012-058-17, tab 6 at 23.

42. In particular, the Web Sling & Tie Down Association, Inc., *Recommended Standard Specification for Load Binders Used with Chain Tie Downs*” (WSTDA-T-6) defines “binders” as “. . . *devices* designed to be used with chain for the purpose of securing cargo” [emphasis added].

43. Indeed, the practical utility of load binders derives from their ability to create mechanical advantage in the application of tension to the securing of cargo loads. See, for instance, *Transcript of Public Hearing*, 17 September 2013, at 41-47.

44. See Exhibit AP-2012-058-05A, tab 1 at 19. In this respect, the *Explanatory Notes* to heading No. 84.79 provide as follows:

. . . the following are to be regarded as having “individual functions”:

(A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance.

. . .

(B) Mechanical devices which cannot perform their function unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, **provided** that this function:

(i) *is distinct from that which is performed by the machine or appliance whereon they are to be mounted*, or by the entity wherein they are to be incorporated, and

(ii) *does not play an integral and inseparable part in the operation of such machine, appliance or entity.*

[Emphasis added]

45. *Transcript of Public Hearing*, 17 September 2013, at 135.

46. Exhibit AP-2012-058-07A at para. 18.

– LCBs

50. With respect to LCBs, the Tribunal accepts the view of Mr. Thibodeau that the LCB “. . . is a lever only . . .”,⁴⁷ which is essentially consistent with Kinedyne’s explanation that a lever-type load binder facilitates the restraining of a load by drawing two grab hooks together “. . . by pivoting lever element.”⁴⁸

51. In the Tribunal’s view, this relatively simple assemblage does not constitute a more or less complex combination of moving and stationary parts for purposes of criterion (ii) above.

52. That being the case, the Tribunal finds that LCBs are not mechanical appliances of heading No. 84.79.

– ALBs

53. In his testimony, Mr. Thibodeau stated that “[t]he [ALB] consists of a lever and a screw”.⁴⁹ Mr. Thibodeau further stated that “. . . the lever and screw do not work together [with] the screw [being] adjusted independently from the action of the lever . . .”.⁵⁰ The Tribunal considers this description to be essentially consistent with Kinedyne’s own description that “[a]n [ALB] is similar to a lever binder with an addition of an adjustable end [with] this adjustable end [having] a built-in screw mechanism that extends or retracts the link connection.”⁵¹

54. In the Tribunal’s view, this relatively simple assemblage does not meet criterion (ii) above. In particular, the addition of an independent, adjustment screw to LCBs is not, in the Tribunal’s view, sufficient to bring ALBs within the realm of devices properly characterized as being a more or less complex combination of moving and stationary parts.

55. That being the case, the Tribunal finds that the ALBs in issue are not mechanical appliances of heading No. 84.79.

– RLBs

56. The CBSA submits that the coverage of heading No. 84.79 is limited to complex machines, that is, machines comprised of *two or more simple machines* that work together, such that the output force of one simple machine becomes the input force for another, with the sequence of interactions culminating in a mechanical advantage applied to the performance of an individual function.⁵²

57. Kinedyne counters that there is no basis in the Nomenclature and, in particular, in Supplementary Note 1 to Section XVI to support the CBSA’s interpretation.⁵³ In fact, the CBSA acknowledged the following:

. . . this concept of simple machine versus complex machine is not something that is expressly set out in the materials.⁵⁴

47. Exhibit AP-2012-058-25A at para. 5.

48. Exhibit AP-2012-058-05A at para. 22(II).

49. Exhibit AP-2012-058-25A at para. 6. This is consistent with the report of Mr. Grey Howard (which was placed on the record by Kinedyne) that “[t]he Adjustable Lever Chain Binder is similar [to the LCB] but also incorporates a threaded component . . .” See Exhibit AP-2012-058-31A at 4, 5.

50. Exhibit AP-2012-058-25A at para. 6.

51. Exhibit AP-2012-058-05A at para. 22(III).

52. Exhibit AP-2012-058-07A at para. 32; *Transcript of Public Hearing*, 17 September 2013, at 123.

53. *Transcript of Public Hearing*, 17 September 2013, at 105-106.

54. *Ibid.* at 117.

58. The Tribunal agrees with Kinedyne. Supplementary Note 1 to Section XVI, by its own terms, refers to “. . . a more or less complex combination of moving and stationary parts . . .” [emphasis added]. In the Tribunal’s view, there is no reasonable basis upon which to read into Supplementary Note 1 the additional requirement that each of the “parts” constituting the complex combination must be simple machines in their own right, which interact in sequence through the output force of one becoming the input force of another. The Tribunal finds that this view is supported by the fact that the complex combination is explicitly in reference to both moving and stationary *parts*.

59. Upon visual inspection,⁵⁵ it is clear that RLBs, unlike lever-type load binders, operate on the basis of a more complex ratchet and pawl system, with the complex combination of moving and stationary parts comprising RLBs, depicted in the schematic diagrams of same.⁵⁶

60. While the Tribunal accepts Mr. Thibodeau’s evidence that any force applied to the ratchet passes through the ratchet unchanged in either direction or magnitude,⁵⁷ the evidence indicates that the threaded screw converts torque into magnified linear force, the transmission of which serves to retract the chain hooks to tension the cargo load. Indeed, on cross-examination, Mr. Thibodeau acknowledged that the RLBs in issue operate, at least in part, as machines.⁵⁸

61. On the basis of the foregoing analysis, the Tribunal is satisfied that the RLBs in issue are sufficiently mechanical to meet criterion (ii) above.

62. As the RLBs in issue meet all five criteria listed above, the Tribunal finds that, unlike the lever-type load binders in issue, they are *prima facie* classifiable in heading No. 84.79 and specifically under tariff item No. 8479.89.90 as other machines and mechanical appliances.

63. Finally, with heading Nos. 84.79 and 82.05 having been rendered mutually exclusive by operation of the legal notes, the *prima facie* classification of the RLBs in issue in the former heading precludes their *prima facie* classification in the latter heading.

Are the LCBs and ALBs in Issue Properly Classified in Heading No. 82.05 as Hand Tools?

64. While neither the legal notes nor the *Explanatory Notes* specifically define “hand tool”, they do identify the criteria that must be met in order for goods to be classified in heading No. 82.05 as hand tools. In this regard, and as correctly noted by the CBSA, the goods in issue (i) must be *articles*,⁵⁹ (ii) must have a working edge, working surface or other working part,⁶⁰ (iii) must be made of base metal,⁶¹ (iv) must be

55. Exhibit AP-2012-058-B-01.

56. Exhibit AP-2012-058-05A, tab 7 at 84.

57. Exhibit AP-2012-058-25A at para. 7.

58. *Transcript of Public Hearing*, 17 September 2013, at 69, 70.

59. The Tribunal has previously accepted that an “article” is “. . . any finished or semi-finished product, which is not considered to be a material.” See *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT) at para. 25.

60. See Note 1 to Chapter 82.

61. See Note 1(a) to Chapter 82. In this regard, Note 3 to Section XV, which includes Chapter 82, provides as follows:

Throughout the Nomenclature, the expression “base metals” means: iron and steel, copper, nickel, aluminum, lead, zinc, tin, tungsten (wolfram), molybdenum, tantalum, magnesium, cobalt, bismuth, cadmium, titanium, zirconium, antimony, manganese, beryllium, chromium, germanium, vanadium, gallium, hafnium, indium, niobium (columbium), rhenium and thallium.

such that they can be used independently in the hand,⁶² whether or not they incorporate simple mechanisms⁶³ and (v) must not be included in other headings of Chapter 82 or elsewhere in the Nomenclature.⁶⁴

65. Kinedyne acknowledges, and the Tribunal agrees, that the goods in issue—being articles of formed steel, and therefore of base metal, with a working part (i.e. ratchet or lever)—meet the first three criteria.⁶⁵ Kinedyne contends however that the goods in issue do not meet the remaining two criteria because they are not for use independently in the hand and are included in headings elsewhere in the Nomenclature.⁶⁶

66. In the Tribunal’s view, while manually engaged, the goods in issue, rather than being used independently *in* the hand, are in fact used independently *of* the hand; that is to say, in fulfilling their utilitarian purpose of securing a cargo in transit, the goods in issue function independently and outside of the hand to become a critical part of a load binding system. Kinedyne explains as follows:

Hand Tools are considered mechanical implements usually held **independently** in hand **for working upon something** . . . Load Binders are not held independently in hand, they are attached either to the flooring of the trailer or with any other support on the trailer. These Load Binders move along with the trailer as a fixed attachment after the task of binding load on trailer is complete. . . . **On the other hand, hand tools . . . do not move with the item upon which work is done.**⁶⁷

67. In this respect, the Tribunal is inclined to agree with Kinedyne that load binders are not hand tools used independently in the hand to do work, but are rather in the nature of cargo control equipment, a view that is consistent with the trucking industry’s own characterization of same⁶⁸ and the distinction that it draws between the two.⁶⁹

68. On the basis of the foregoing, the Tribunal finds that LCBs and ALBs are not properly described as hand tools, within the intended meaning of that term in heading No. 82.05.

62. In particular, the *Explanatory Notes* to Chapter 82 provide as follows:

GENERAL

This Chapter includes:

- (a) *Tools* which, *apart from certain specified exceptions* (e.g., blades for machine saws), are *used in the hand* (headings 82.01 to 82.05).

...

In general, *the Chapter covers tools which can be used independently in the hand*, whether or not they incorporate simple mechanisms such as gearing, crank-handles, plungers, screw mechanisms or levers.

[Emphasis added]

63. See the *Explanatory Notes* to heading No. 82.05, which provide as follows:

[This heading] includes a large number of hand tools (*including some with simple hand-operated mechanisms such as cranks, ratchets or gearing*).

[Emphasis added]

64. See, in particular, the *Explanatory Notes* to heading No. 82.05, which provide as follows:

This heading covers all hand tools **not included** in other headings of this Chapter or elsewhere in the Nomenclature (see the General Explanatory Notes to this Chapter)

65. Exhibit AP-2012-058-17 at para. 6.

66. *Ibid.* at para. 6.

67. *Ibid.* at para. 7.

68. *Ibid.* at 12, 14.

69. For example, the commercial listing of “Truckers Supplies” in Exhibit AP-2012-058-17 at 9 refers to tools and load binders separately as follows: “For the truck you might need things like tire chains, tires, *tools*, parts . . . *load binders*, load straps . . .” [emphasis added].

Are the LCBs and ALBs in Issue Properly Classified in Heading No. 82.05 as Vices, Clamps and the Like Other Than Accessories for and Parts of Machine Tools?

69. The Tribunal will next consider the CBSA's alternative argument that the goods in issue, even if found not to be *hand tools*, remain properly classified in heading No. 82.05, by virtue of falling within the discrete category of "vices, clamps and the like, other than accessories for and parts of, machine tools", which forms part of the broader tariff heading description.

70. On the basis of the absence of evidence suggesting otherwise, the Tribunal finds that the goods in issue are not accessories for, or parts of, machine tools, a factual point which was not in issue in these proceedings.

71. The term "clamp" is not defined in the *Customs Tariff*, albeit the fact that it does arise in different areas of the Nomenclature.⁷⁰ In these situations, the Tribunal commonly begins its analysis by turning to generally recognized sources to establish the ordinary meaning of a term. In this respect, *Webster's Third New International Dictionary of the English Language*, defines "clamp" as including the following: "a: a device . . . designed to bind or constrict or to press two or more parts together so as to hold them firmly in their relative position b: any of various instruments or appliances . . . for holding or compressing something".⁷¹ In a similar vein, the definition of the term in *The Oxford English Dictionary* includes the following: "2. a. A name for various appliances, tools or instruments with opposite sides or parts which may be screwed or otherwise brought together, so as to seize, hold, compress or pinch anything".⁷²

72. The Tribunal is able to discern from the above that an article derives its essential character as a clamp primarily on the basis of its functional purpose or end use, with the term capturing various articles designed to seize, bind, hold, constrict, compress or pinch objects together so as to hold them firmly in their relative position.

73. The CBSA contends that the goods in issue fall in heading No. 82.05 by virtue of being like clamps. As to the meaning of the phrase "and the like" in heading No. 82.05, the Tribunal has previously stated that "[t]he test to determine whether goods are 'like' . . . is not strict, and the goods need not be identical. Rather, the test will be met if such goods share important characteristics and have common features."⁷³

74. In *Canadian Tire 2012*, the Tribunal found that the cargo ratchet tie-downs in issue in that case reflected the underlying end use of clamps and, as such, met the description of "clamps or the like" in heading No. 82.05.⁷⁴ In the present case, it is not disputed,⁷⁵ and the Tribunal accepts, that the LCBs and ALBs in issue are devices designed to tighten chains in order to secure cargo loads in transit. In this respect, the Tribunal sees no practical difference between the underlying end use of these lever-type load binders and the tie-downs in issue in *Canadian Tire 2012*.

75. The Tribunal must also consider the relevant *Explanatory Notes* when determining the classification of the goods in issue. As previously noted, section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to . . . the [*Explanatory Notes*] . . . as

70. See, for instance, heading No. 85.05 and the *Explanatory Notes* to heading Nos. 84.66 and 73.07.

71. Unabridged, s.v. "clamp".

72. Second ed., s.v. "clamp".

73. *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-024 (CITT) [*Canadian Tire 2012*] at para. 44.

74. *Canadian Tire 2012* at paras. 8, 45.

75. Exhibit AP-2012-058-05A at para. 5; Exhibit AP-2012-058-07A at para. 3.

amended from time to time.” While the *Explanatory Notes* are not legally binding, the Federal Court of Appeal, in *Suzuki*, indicated that, “[t]o satisfy their interpretive purpose, and to ensure harmony within the international community, the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise.”⁷⁶

76. In this regard, the *Explanatory Notes* to heading No. 82.05 may, at first glance, appear to categorize “vices, clamps and the like” as types of “hand tools”. The *Explanatory Notes* to heading No. 82.05 provide as follows:

[Heading 82.05] includes a *large number of hand tools* (including some with simple hand-operated mechanisms such as cranks, ratchets or gearing). This *group of tools* includes:

...

(G) *Vices, clamps and the like*

[Emphasis added]

77. The Tribunal notes however that the above-referenced *Explanatory Notes* admit of two interpretations. Under the first, the “large number of hand tools” would be subsumed within a broader “group of tools”, which also includes “vices, clamps and the like”. In other words, “hand tools” would be just one subgroup within a broader category of tools. Under the second interpretation, the “group of tools” listed in the second sentence would be restricted to the previously referred to “large number of hand tools”, thereby bringing all the listed tools within the category of “hand tools”.

78. The Tribunal prefers the first interpretation, which is entirely compatible with a proper reading of heading No. 82.05. In this regard, the Tribunal notes that the various articles referred to in heading No. 82.05 are separated from each other by a semicolon, including the reference to “[h]and tools (including glaziers’ diamonds), not elsewhere specified or included” and the subsequent reference to “vices, clamps and the like”.

79. As explained by the Tribunal in previous appeals, the use of a semicolon between descriptions in the text of a heading denotes separate goods or groups of goods within the same description.⁷⁷

80. It is therefore the Tribunal’s view that, while vices, clamps and articles like vices and clamps may be considered “tools”, an ordinary grammatical reading of heading No. 82.05 precludes an interpretation of that heading and, by logical extension, of the applicable *Explanatory Notes* that would consider them to be of the “hand tool” variety.

81. If, however, the second interpretation of the *Explanatory Notes* was intended, such that vices, clamps and the like would be regarded as hand tools, the Tribunal finds that there would be sound reason to disregard this aspect of the *Explanatory Notes*, as it would be patently inconsistent with the language of the tariff heading itself.

82. In either case, the Tribunal’s earlier finding that the fact that the LCBs and ALBs in issue were found not to be hand tools does not preclude a finding that they are clamps or devices that are like clamps.

76. *Suzuki* at para. 13.

77. See *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 45; *Canadian Tire 2012* at para. 41; *Bauer Nike Hockey Inc. v. President of the Canada Border Services Agency* (18 May 2006), AP-2005-019 (CITT) at para. 23; *Boss Lubricants v. Deputy M.N.R.* (3 September 1997), AP-95-276 and AP-95-307 (CITT).

83. Finally, the Tribunal does not accept Kinedyne's suggestion that the "vices, clamps and the like" referred to in heading No. 82.05 are intended to include only those types used by tradespersons/craftsmen in a workshop setting, there being no such limitation included in the legal notes, the *Explanatory Notes* or the tariff heading itself.

84. On the basis of the above analysis and, in particular, on the functional similarity of LCBs and ALBs (as devices designed to tighten chains in order to secure cargo in transit) to clamps, together with the threshold established in jurisprudence for the assessment of whether certain goods are "like" other goods,⁷⁸ the Tribunal finds that the LCBs and ALBs in issue are properly classified in heading No. 82.05 and, in particular, in subheading No. 8205.70 as goods that are like "clamps".

Should the LCBs and ALBs in Issue be Classified in Heading No. 73.26 as Other Articles of Iron and Steel?

85. By way of alternative argument, Kinedyne submits that, if the Tribunal finds that any of the load binders in issue do not have sufficient mechanical properties for classification in heading No. 84.79, they should be classified in heading No. 73.26 as other articles of iron and steel.

86. The Tribunal notes that the relevant *Explanatory Notes* indicate that among the articles covered in heading No. 73.26 are items such as suspension clamps, dead-end clamps, and clamping or tightening bands or collars "... used for clamping flexible tubing or hose to rigid piping, taps, etc. . . ." Such items, the Tribunal recognizes, are somewhat akin to the LCBs and ALBs in issue.

87. It must be recognized however that heading No. 73.26 operates as a residual heading. In this context, the *Explanatory Notes* to heading No. 73.26 provide as follows:

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.

88. The Tribunal has already determined that LCBs and ALBs are properly classified in heading No. 82.05. As a result, the LCBs and ALBs are precluded from being classified in residual heading No. 73.26.

CONCLUSION

89. On the basis of the foregoing analysis, the Tribunal finds as follows:

- the LCBs are properly classified in heading No. 82.05 and, specifically, under tariff item 8205.70.90 as other clamps and the like;
- the ALBS are properly classified in heading No. 82.05 and, specifically, under tariff item 8205.70.90 as other clamps and the like; and

78. It is well established that, in order for goods to be considered "like" other goods, they need not be identical, but must rather share important characteristics and common features. See, for instance, *Rlogistics Limited Partnership v. President of the Canada Border Services Agency* (25 October 2011), AP-2010-057 (CITT) at paras. 64, 76, 80; *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82; *Iva Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at paras. 25-26.

- the RLBs are properly classified in heading No. 84.79 and, specifically, under tariff item 8479.89.90 as other mechanical appliances.

DECISION

90. The appeal is allowed in part.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member