Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-022

Andritz Hydro Canada Inc. and
VA Tech Hydro Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, June 21, 2013

Canada

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IN THE MATTER OF an appeal heard on February 21, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 37 decisions of the President of the Canada Border Services Agency, dated July 23, 27, 30 and 31, 2012, with respect to requests for further re-determinations pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ANDRITZ HYDRO CANADA INC. AND VA TECH HYDRO CANADA INC. **Appellants**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 21, 2013
Tribunal Member:	Serge Fréchette, Presiding Member
Counsel for the Tribunal:	Alain Xatruch Anja Grabundzija
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Cheryl Unitt

PARTICIPANTS:

Appellants	**Counsel/Representative**
Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc.	Sean Everden Michael R. Smith
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Leah Garvin

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. (collectively referred to as Andritz)[1] with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[2] from 37 decisions made by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to requests for further re-determinations of tariff classification.

2. The issue in this appeal is whether hydraulic turbine-driven electric generating sets (the goods in issue), in addition to being classified under tariff item No. 8502.39.10 of the schedule to the *Customs Tariff*,[3] may be classified under tariff item No. 9948.00.00 as articles for use in automatic data processing machines and thereby benefit from duty-free treatment.

PROCEDURAL HISTORY

3. Between August 18, 2008, and October 6, 2010, Andritz imported the goods in issue under 37 separate transactions. At the time of their importation, the goods in issue were classified under tariff item No. 8410.13.10 as hydraulic turbines of a power exceeding 10,000 kW. Customs duties were paid accordingly.

4. Following a trade compliance verification pertaining to some of the import transactions, the CBSA issued re-determinations pursuant to paragraph 59(1)(*b*) of the *Act*, whereby it reclassified the goods in issue under tariff item No. 8410.90.20 as other parts of hydraulic turbines. Andritz subsequently filed requests for further re-determinations of the tariff classification of the goods in issue pursuant to subsection 60(1), wherein it also claimed that the goods in issue qualified for the benefits of tariff item No. 9948.00.00.

5. With respect to the rest of the import transactions, Andritz applied for a refund of duties pursuant to paragraph 74(1)(*e*) of the *Act* on the basis that duties were paid as a result of an error in the tariff classification of the goods in issue. In this regard, Andritz requested a change in the tariff classification of the goods in issue and claimed that they also qualified for the benefits of tariff item No. 9948.00.00. The CBSA denied Andritz' applications. Pursuant to subsection 74(4), these denials were deemed to be re-determinations under paragraph 59(1)(*a*). Andritz subsequently filed requests for further re-determinations pursuant to subsection 60(1).

6. On July 23, 27, 30 and 31, 2012, the CBSA issued, pursuant to subsection 60(4) of the *Act*, its decisions pertaining to all 37 import transactions, which reclassified the goods in issue under tariff item No. 8502.39.10 as hydraulic turbine-driven electric generating sets, but confirmed that they were not eligible for the benefits of tariff item No. 9948.00.00.

7. On August 16, 2012, Andritz filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

8. On February 21, 2013, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Marc Coache, Technical Manager at Andritz, appeared as a witness for Andritz. Mr. Coache was qualified by the Tribunal

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1. The evidence on the record indicates that VA Tech Hydro Canada Inc. was purchased by Andritz Hydro Canada Inc. See *Transcript of Public Hearing*, 21 February 2013, at 39-40.
2. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
3. S.C. 1997, c. 36.

as an expert in compact hydro technology, as well as in the installation of the goods in issue and their function and use within the powerhouse in which they were installed.[4] Dr. Aidan Foss, Principal Engineer at ANF Energy Solutions Inc., appeared as a witness for the CBSA. Dr. Foss was qualified by the Tribunal as an expert in hydro-turbine electric power plant controllers.[5]

GOODS IN ISSUE

9. The goods in issue are hydraulic turbine-driven electric generating sets, which consist of a turbine inlet valve, turbine, generator, excitation system and speed governor.[6] They were imported under a consortium agreement for use in the construction and operation of powerhouses in British Columbia. Powerhouses (also called power plants or generating stations) are facilities that are used for the generation of electrical power.

10. The goods in issue function by converting the kinetic energy of moving water into mechanical power by passing the water through a wheel fitted with vanes or blades (i.e. the turbine) and then converting the mechanical power into electrical power by rotating an electromagnet (i.e. the generator).[7] The role of the governors, which have processors, is to directly measure physical quantities and take action to regulate the operation of the generating sets.[8] The governors are physically connected to the turbines and generators and are located on panels just a few metres from them.[9]

11. The goods in issue are physically connected, at one end, to the B.C. electrical grid (i.e. transmission line network) via power wires and buses and, at the other end, to the local area network (LAN) of the powerhouses via the governors.[10] The LAN of the powerhouse allows for the transmission of data and commands between the governors and various other processors (e.g. unit processors and main powerhouse processor) that connect to the LAN for the purpose of fully automating the operation of the powerhouse and the generation of electricity (in these reasons, the term "LAN" will refer to the network required to transmit data and to the various processors attached to the network).[11]

12. The parties did not file any physical exhibits.

STATUTORY FRAMEWORK

13. 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).[12] 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.

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4. *Transcript of Public Hearing*, 21 February 2013, at 13.
5. *Transcript of Public Hearing*, 21 February 2013, at 64, 82.
6. *Transcript of Public Hearing*, 21 February 2013, at 16-17.
7. *Transcript of Public Hearing*, 21 February 2013, at 83.
8. *Transcript of Public Hearing*, 21 February 2013, at 27-28, 46.
9. *Transcript of Public Hearing*, 21 February 2013, at 41-44.
10. *Transcript of Public Hearing*, 21 February 2013, at 17, 23-24, 27-28, 44-45.
11. *Transcript of Public Hearing*, 21 February 2013, at 18, 48, 50-51, 92, 105.
12. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

14. 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*[13] and the *Canadian Rules*[14] set out in the schedule.

15. 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.

16. 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*[15] and the E*xplanatory Notes to the Harmonized Commodity Description and Coding System*,[16] published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[17]

17. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[18]

18. 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 use a similar approach to determine the proper subheading.[19] The final step is to determine the proper tariff item.[20]

TARIFF CLASSIFICATION AT ISSUE

19. In the present appeal, the parties agree that the goods in issue are properly classified under tariff item No. 8502.39.10 as hydraulic turbine-driven electric generating sets.[21] The only source of disagreement between the parties—and hence the issue in this appeal—is whether the goods in issue may also be classified under tariff item No. 9948.00.00 and thereby benefit from duty-free treatment.

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13. S.C. 1997, c. 36, schedule [*General Rules*].
14. S.C. 1997, c. 36, schedule.
15. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
16. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
17. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that *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 *Classification Opinions*.
18. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
19. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."
20. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." *Classification Opinions* and *Explanatory Notes* do not apply to classification at the tariff item level.
21. Tribunal Exhibit AP-2012-022-04A at para. 11; Tribunal Exhibit AP-2012-022-06A at para. 12; *Transcript of Public Hearing*, 21 February 2013, at 4, 134.

20. Chapter 99, which includes tariff item No. 9948.00.00, provides special classification provisions that generally allow 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 be classified in that chapter. 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 consider.

21. 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 appeal. 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.

22. In accordance with note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined. As indicated above, the parties agree that the goods in issue are properly classified under tariff item No. 8502.39.10. On the basis of the evidence, the Tribunal accepts this classification. Therefore, for the purposes of this appeal, the Tribunal is of the view that the condition set out in note 3 to Chapter 99 has been met.

23. Consequently, the only remaining issue before the Tribunal is to determine whether the goods in issue meet the conditions of tariff item No. 9948.00.00, which provides as follows:

> **9948.00.00** **Articles for use in the following:**
>
> . . .
>
> **Automatic data processing machines** . . .

24. With regard to the interpretation of the above tariff item, the parties have made reference to the following note to Chapter 84:

> 5. (A) For the purpose of heading 84.71, the expression "automatic data processing machines" means machines capable of:
>
> (i) Storing the processing program or programs and a least the data immediately necessary for the execution of the program;
>
> (ii) Being freely programmed in accordance with the requirements of the user;
>
> (iii) Performing arithmetical computations specified by the user; and,
>
> (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

ANALYSIS

25. In order for the goods in issue to qualify for the benefits of tariff item No. 9948.00.00, they must be (1) articles (2) for use in (3) automatic data processing machines. The goods in issue will only qualify for the benefit of tariff item No. 9948.00.00 if all three conditions are met.

"Articles"

26. While the term "articles" is not defined for the purposes of tariff item No. 9948.00.00, the parties are in agreement that the goods in issue are "articles".[22]

27. The Tribunal finds that the ordinary meaning of the term "articles" is sufficiently broad to encompass the goods in issue.

"Automatic Data Processing Machines"

28. The Tribunal will next address whether the goods in issue are for use in "automatic data processing machines" within the meaning of tariff item No. 9948.00.00.

29. Andritz submitted that the LAN of the powerhouse is an automatic data processing machine. In this regard, it noted that the CBSA's administrative policy, as set out in Customs Notice N-195,[23] is to classify entire network systems as automatic data processing machines. At the hearing, the CBSA agreed that the LAN of the powerhouse should be considered an automatic data processing machine.[24]

30. The Tribunal finds that there is no evidence on the record which indicates that a different conclusion should be reached. Therefore, the Tribunal concludes that the LAN of the powerhouse is an "automatic data processing machine" for the purposes of tariff item No. 9948.00.00.

"For Use In"

31. The Tribunal will now address the final condition for the application of tariff item No. 9948.00.00, namely, whether the goods in issue are "for use in" automatic data processing machines.

32. Subsection 2(1) of the *Customs Tariff* defines the term "for use in" as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

33. As explained in its brief, Andritz' appeal rested on the sole argument that the goods in issue are goods "for use in" automatic data processing machines because they are "attached to" an automatic data processing machine. However, at the hearing, during final argument, Andritz also argued that the goods in issue are entitled to the benefits of tariff item No. 9948.00.00 by reason of being "incorporated into" an automatic data processing machine.[25] The CBSA submitted that it was unfair for Andritz to raise a new argument at this late stage.[26] Andritz replied that its brief only addressed the "attached to" requirement because that was the basis of the CBSA's decision under section 60 of the *Act* denying classification under tariff item No. 9948.00.00.[27]

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22. Tribunal Exhibit AP-2012-022-04A at para. 38; Tribunal Exhibit AP-2012-022-06A at para. 40; *Transcript of Public Hearing*, 21 February 2013, at 5, 111, 134.
23. "Administrative Policy—Tariff Classification of Local Area Network (LAN) Equipment (1 January 1998).
24. *Transcript of Public Hearing*, 21 February 2013, at 134, 140-41.
25. *Transcript of Public Hearing*, 21 February 2013, at 118-21.
26. *Transcript of Public Hearing*, 21 February 2013, at 132-33.
27. *Transcript of Public Hearing*, 21 February 2013, at 119, 146-54.

34. The Tribunal will not consider Andritz' argument in respect of the "incorporated into" requirement because it was raised too late. First, the Tribunal notes that appeals under section 67 of the *Act* proceed *de novo* and that there was no reason for Andritz not to include, in its brief, arguments not addressed in the context of the CBSA's decision under section 60. Second, Andritz' raising the argument at the late stage of final submissions is prejudicial to the CBSA and therefore should not be allowed as a matter of due process. Parties must put forth their case at the earliest opportunity, because allowing a party to split its case is unfair to the opposing parties and disruptive of the Tribunal's proceedings.[28] This is recognized by the *Canadian International Trade Tribunal Rules*.[29] Subrule 34(2) of the *Rules* provides that an appellant must file its brief 60 days after filing the notice of appeal, including, pursuant to subparagraph 34(2)(*b*)(v), a statement of the argument to be made at the hearing. Similar rules apply to the respondent. Further, a party may seek leave to amend its brief before the hearing, pursuant to rule 24.1, if it wishes to include any alternative arguments, which leave can be granted by the Tribunal if it determines that it is fair and equitable in the circumstances to do so. Andritz chose neither of these routes.

35. Accordingly, the Tribunal will only consider Andritz' claim that the goods in issue are "for use in" automatic data processing machines by virtue of the fact that they are "attached to" an automatic data processing machine.

36. In applying subsection 2(1) of the *Customs Tariff*, the Tribunal applies a test with two requirements for determining whether goods are "attached to" other goods and, hence, "for use in" those other goods. In particular, the goods must be (1) physically connected and (2) functionally joined to the other goods.[30] The Tribunal has also held that goods are functionally joined to other goods (i.e. the host goods) when they enhance or complement the function of those other goods.[31] This has usually been understood to mean that the goods must help, in some measure, the host goods to execute their functions or allow them to acquire additional capabilities.[32]

37. However, Andritz submitted that the Tribunal's interpretation of "attached to" is incorrect. It argued that the Tribunal developed the two-part test (physically connected and functionally joined) at a time when

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28. As the Tribunal indicated in *Les Pignons L.V.M. du Québec Inc. v. M.N.R.* (19 August 2002), AP-93-315 (CITT) at 8, allowing parties to change or add to their arguments or evidence at the last minute ". . . on an issue that the opposite parties do not expect to be raised . . . would thwart the proper conduct of the Tribunal's hearing and proceeding, and would, at the same time, seriously affect the rights of the opposite parties under the rules of natural justice." See, also, *Starkey Labs-Canada Co. v. President of the Canada Border Services Agency* (29 August 2012), AP-2011-061 (CITT) at para. 32.
29. S.O.R./91-499 [*Rules*].
30. See *Kverneland Group North American Inc. v. President of the Canada Border Services Agency* (30 April 2010), AP-2009-013 (CITT) [*Kverneland*]; *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT) [*Jam Industries*]; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT) [*Sony of Canada*]; *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT) [*Imation Canada*]; *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) [*PHD*]; *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) [*Agri-Pack*].
31. See, for example, *Kverneland*; *Jam Industries*; *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (4 November 2011), AP-2008-012R (CITT) [*P.L. Light Systems*]; *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) [*Curve Distribution*].
32. See, for example, *Kverneland* at para. 53; *Curve Distribution* at para. 67; *P.L. Light Systems* at para. 26.

the definition of "for use in" contained the words "unless the context otherwise requires."[33] Andritz argued that, in the absence of these words in subsection 2(1) of the current *Customs Tariff*, the ordinary meaning of the phrase "attached to" only requires a physical connection. According to Andritz, requiring a functional connection or, further, that the goods enhance or complement the function of the host goods reads into the statute words that Parliament itself did not choose to include.[34]

38. The CBSA argued that the Tribunal's interpretation of the phrase "for use in", as stated above, has been repeatedly applied and has been affirmed by the Federal Court of Appeal.[35] It submitted that Andritz has not presented a good reason for departing from the established test. The CBSA further submitted that interpreting the phrase "attached to" as requiring only a physical connection would allow an infinite number of goods to benefit from duty-free treatment simply because they are connected to another good and that this would be inconsistent with the purpose of Chapter 99, namely, to provide a benefit to certain goods.[36]

39. The Tribunal is not convinced that it should depart from the current two-part test and its requirement for enhancement. As noted by the CBSA, the Tribunal has consistently applied this test[37] and the Federal Court of Appeal has upheld it as a reasonable interpretation of the statute.[38] Indeed, the latter cases were decided under the new definition of "for use in" and, therefore, contrary to Andritz' claim, no legislative change has occurred that would warrant re-interpreting the definition.

40. In any event, the Tribunal's two-part test results from, and still represents, the interpretation of the words "attached to" within the proper context of Chapter 99. As noted by the CBSA, if "attached to" only required a physical connection, virtually any good could meet the test by reason of a mere physical attachment to another good. The additional requirement for a functional connection is therefore in keeping with the purpose of Chapter 99, which is to eliminate or reduce duties otherwise payable on specific types of goods. This restrictive interpretation is not dependent on the presence of the words "unless the context otherwise requires", which would logically only allow to *alleviate* the requirement that the goods be "attached to" or "wrought or incorporated into" the host goods where mandated by the context of a particular tariff item in which the expression "for use in" appears.[39]

41. The Tribunal will therefore apply its two-part test, including the requirement for enhancement.

42. The first requirement—that the goods in issue be physically connected to the automatic data processing machine—is met. Although the CBSA initially questioned the existence of a physical connection,[40] at the hearing, it agreed with Andritz that the goods in issue are physically connected to the automatic data processing machine.[41] The Tribunal is satisfied that the evidence supports this conclusion.[42]

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33. Andritz refers to section 4 of the 1996 *Customs Tariff*, which provides as follows: "The expression 'for use in', wherever it occurs in a tariff item in Schedule I or a code in Schedule II in relation to goods, means, unless the context otherwise requires, that the goods must be wrought into, attached to or incorporated into other goods as provided for in that tariff item or code." See Tribunal Exhibit AP-2012-022-04B, tab 9.
34. Tribunal Exhibit AP-2012-022-04A at paras. 13-35.
35. Tribunal Exhibit AP-2012-022-06A at paras 43-45; *Transcript of Public Hearing*, 21 February 2013, at 135-36.
36. *Transcript of Public Hearing*, 21 February 2013, at 136.
37. See *Kverneland*; *Jam Industries*; *Sony of Canada*; *Imation Canada*; *PHD*; *Agri-Pack*.
38. See *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210 (CanLII) at para. 22; *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII) at paras. 28-33.
39. As indicated by the Tribunal in *Sony of Canada Ltd. v. Deputy M.N.R.* (12 December 1996), AP-95-262 (CITT).
40. Tribunal Exhibit AP-2012-022-06A at paras. 46-47.
41. *Transcript of Public Hearing*, 21 February 2013, at 137.
42. See testimony of Mr. Coache, *Transcript of Public Hearing*, 21 February 2013, at 24, 44-45.

43. The second requirement is that the goods in issue be functionally joined to the automatic data processing machine or, in other words, enhance or complement the function of the automatic data processing machine. Andritz argued that the automatic data processing machine of the powerhouse receives data from the goods in issue and uses that data to determine whether other areas of the powerhouse require adjustments, thus enabling the powerhouse to supply electricity more efficiently. In Andritz' opinion, the goods in issue therefore enhance the automatic data processing machine.[43] On the contrary, the CBSA submitted that the automatic data processing machine does not acquire increased functionality due to the goods in issue, but rather, that the goods in issue enable the automatic data processing machine to carry out its very function of data transmission and exchange. The CBSA added that, if any enhancement occurs in this interaction, it is the automatic data processing machine of the powerhouse that enhances the capacity of the goods in issue, and of the powerhouse as a whole, to generate electricity. As such, the CBSA submitted that the situation is akin to that in *Wolseley Canada Inc. v. President of the Canada Border Services Agency*,[44] where the Tribunal found that the "for use in" requirement was not met where the host good enhanced the function of the good in issue, and not the other way around.[45]

44. The Tribunal finds that the goods in issue do not enhance or complement the function of the automatic data processing machine and are therefore not functionally joined to the automatic data processing machine within the meaning of tariff item No. 9948.00.00. The evidence establishes that the overall function of the automatic data processing machine is to monitor and control the operation of the different components of the powerhouse, including the goods in issue.[46] The goods in issue (as well as other components of the powerhouse) feed data to the automatic data processing machine. The automatic data processing machine monitors and processes the data and sends back certain instructions to the goods in issue.[47] As such, the evidence does not establish that the goods in issue help the automatic data processing machine better monitor and control; rather, the goods in issue are the object of the automatic data processing machine's monitoring and control. Therefore, it cannot be said that the goods in issue *enhance or complement* the function of the automatic data processing machine.

45. Contrary to Andritz' submission, it appears to the Tribunal that a more apposite characterization of the facts in this case is that the automatic data processing machine enhances the performance of the goods in issue by optimizing the way in which they generate electricity. Although the evidence suggests that the goods in issue have been configured to work only in conjunction with the LAN and could not, without modification, function alone, the evidence also indicates that power generating sets can, in theory, generate power without the use of LANs.[48] As Dr. Foss testified, generating sets pre-date communication infrastructures, such as the LAN in this case, which were later developed to enhance the operation of generating stations and generating sets and to automate them fully.[49] The Tribunal therefore agrees with the CBSA in this respect that the facts in the present appeal are analogous to those in *Wolseley*.

43. Tribunal Exhibit AP-2012-022-04A at paras. 57-71; *Transcript of Public Hearing*, 21 February 2013, at 122-24.
44. (18 January 2011), AP-2009-004 (CITT) [*Wolseley*].
45. Tribunal Exhibit AP-2012-022-06A at paras. 48-62; *Transcript of Public Hearing*, 21 February 2013, at 137-46.
46. See, for example, testimony of Mr. Coache, *Transcript of Public Hearing*, 21 February 2013, at 18, 28-31, 51-52, 60-62; see, also, testimony of Dr. Foss, *Transcript of Public Hearing*, 21 February 2013, at 92, 99.
47. See, for example, testimony of Mr. Coache, *Transcript of Public Hearing*, 21 February 2013 at 28-31.
48. See testimony of Mr. Coache, *Transcript of Public Hearing*, 21 February 2013, at 56.
49. See testimony of Dr. Foss, *Transcript of Public Hearing*, 21 February 2013, at 85-86, 89, 105.

DECISION

46. For the foregoing reasons, the Tribunal concludes that the goods in issue are not articles for use in automatic data processing machines and are therefore not entitled to benefit from the duty-free treatment conferred by tariff item No. 9948.00.00.

47. The appeal is therefore dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member