Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2008-007

Dynamo Industries, Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, April 1, 2009

Canada

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IN THE MATTER OF an appeal heard on January 20, 2009, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated May 8, 2008, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

DYNAMO INDUSTRIES, INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 20, 2009
Tribunal Members:	Pasquale Michaele Saroli, Presiding Member Ellen Fry, Member Serge Fréchette, Member
Counsel for the Tribunal:	Jidé Afolabi
Research Director:	Audrey Chapman
Research Officer:	Jo-Anne Smith
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PARTICIPANTS:

Appellant	**Counsel/Representatives**
Dynamo Industries, Inc.	Michael Sherbo Ivan Lavrikov
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Jennifer Francis

WITNESSES:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Dynamo Industries, Inc. (Dynamo) with the Canadian International Trade Tribunal (the Tribunal) under subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA) dated May 8, 2008, with respect to a request for re-determination under subsection 60(4).

2. The issue in this appeal is whether certain playground equipment is properly classified under tariff item No. 9506.99.90 of the schedule to the *Customs Tariff*[2] as other articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in Chapter 95, as determined by the CBSA, or should be classified under tariff item No. 9506.99.10 as other articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in Chapter 95, for climbing or mountaineering, as claimed by Dynamo.

PROCEDURAL HISTORY

3. On September 26, 2007, the CBSA issued three advance rulings, pursuant to paragraph 43.1(1)(*c*) of the *Act*, concerning the tariff classification of certain rotating playground equipment, certain non-rotating playground equipment and certain playground boulders. Pursuant to the advance rulings, all three types of playground equipment were classified under tariff item No. 9506.99.90.

4. On November 2, 2007, Dynamo filed a request for re-determination of the three advance rulings, pursuant to subsection 60(1) of the *Act*, requesting that the goods be classified under tariff item No. 9506.99.10. On May 8, 2008, pursuant to subsection 60(4), the CBSA issued a decision confirming classification of the goods under tariff item No. 9506.99.90.

5. On July 30, 2008, Dynamo filed an appeal with the Tribunal pursuant to section 67 of the *Act*.

6. The CBSA subsequently reviewed its previous decisions with respect to the non-rotating playground equipment and the playground boulders and agreed that they should be classified under tariff item No. 9506.99.10. Following this decision, on December 10, 2008, Dynamo withdrew its appeal in respect of the non-rotating playground equipment and the playground boulders.

7. On January 20, 2009, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Peter Kells, President of Grace-Kells Consultant Inc., appeared as a witness for Dynamo. The Tribunal qualified Mr. Kells as an expert in the design, testing and standards of playground equipment.

GOODS IN ISSUE

8. At the outset, the appeal concerned three types of playground equipment: (i) certain rotating playground equipment; (ii) certain non-rotating playground equipment; and (iii) certain playground boulders. However, following the CBSA's re-determination to classify the non-rotating playground equipment and the playground boulders under tariff item No. 9506.99.10, Dynamo withdrew its appeal in respect of those goods.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

9. The appeal is therefore confined to the following eight models of rotating playground equipment (the goods in issue):

DX Astro Rotating Climber, Model DX-2300[3]
DX Astro Rotating Climber, Model DX-2300-F[4]
DX Apollo Rotating Climber, Model DX-1200[5]
DX Apollo Rotating Climber, Model DX-2000[6]
DX Apollo Rotating Climber, Model DX-2000-F[7]
DX Apollo Rotating Climber, Model DX-2100[8]
DX Apollo Rotating Climber, Model DX-2100-F[9]
DX Allegro Rotating Climber, Model DX-2200[10]

10. The goods in issue each have a centre pole which ranges in size from 2.5 to 4.0 metres high, depending on the overall size of the model of play structure. All the models have ropes that hang vertically from the top of the structure. These ropes are attached at equal distances around the outer edge of either a platform or floor, or central tubing. There are also horizontal ropes that are attached to the vertical ropes at regular intervals. Five of the eight models of the goods in issue have a round metal platform that rotates above the ground (i.e. models DX-1200, DX-2000-F, DX-2100-F, DX-2200 and DX-2300-F). The goods in issue are imported complete, in an unassembled condition, and come with a locking mechanism that provides the option of preventing rotation during play.[11]

11. Given the sizes and weights of the goods in issue, physical exhibits were not provided. However, enlarged photographs and product descriptions were filed for three models.[12] A video entitled "Hooked on the Feeling" was also filed as a physical exhibit.[13]

ANALYSIS

Law

12. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

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.[14] 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. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

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3. Appellant's brief, tab 1 at 22.
4. Appellant's brief, tab 6 at 33.
5. *Ibid.* at 27.
6. *Ibid.* at 29.
7. *Ibid.* at 31.
8. Appellant's brief, tab 1 at 18.
9. Appellant's brief, tab 6 at 25.
10. Appellant's brief, tab 1 at 20.
11. *Transcript of Public Hearing*, 20 January 2009, at 16-17, 45.
12. Exhibits A-01 to A-03.
13. Exhibit A-04. The video can also be viewed at www.dynamoplaygrounds.com/video_hi.php.
14. 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 as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[15] and the Canadian Rules[16] set out in the schedule."

15. 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.[17] 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."

16. 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[18] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[19] 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 respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.[20]

17. Once the Tribunal has used this approach to determine the heading in which the goods 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 Rule 1 of the *Canadian Rules* in the case of the latter.

Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes

Tariff Classification at Issue

18. In the present appeal, the parties agreed that the goods in issue are various models of rotating playground equipment. The parties also agreed that the goods in issue, imported in an unassembled state, are properly classified in heading No. 95.06 pursuant to Rule 2 (a) of the *General Rules* and in subheading No. 9506.99 pursuant to Rules 1 and 6 of the *General Rules.*

19. The Tribunal agrees with the consensus view of the parties.

20. The parties' opinions differ as to the applicable tariff item. Dynamo is of the view that the goods in issue are for climbing or mountaineering and should therefore be classified under tariff item No. 9506.99.10. The CBSA has taken the position that the applicable tariff item is 9506.99.90.

15. S.C. 1997, c. 36, schedule [*General Rules*].
16. S.C. 1997, c. 36, schedule.
17. 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 are applicable 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).
18. World Customs Organization, 2d ed., Brussels, 2003.
19. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
20. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

21. The relevant sections of the nomenclature of the *Customs Tariff* provide as follows:

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

. . .

95.06	**Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.**

. . .

9506.99	**- -Other**
9506.99.10	- - -Badminton birds (shuttle cocks); Baseball bats of aluminum; Face masks and shoulder pads for football; For climbing or mountaineering

. . .

9506.99.90	- - -Other

22. The Tribunal notes that the schedule to the *Customs Tariff* contains no section or chapter notes specific to the goods in issue.

23. The *Explanatory Notes* to heading No. 95.06 are relevant and provide as follows:

This heading covers:

(A) **Articles and equipment for general physical exercise, gymnastics or athletics,** e.g.,:

Trapeze bars and rings; horizontal and parallel bars; balance beams, vaulting horses; pommel horses; spring boards; climbing ropes and ladders; wall bars; Indian clubs; dumb-bells and bar-bells; medicine balls; rowing, cycling and other exercising apparatus; chest expanders; hand grips; starting blocks; hurdles; jumping stands and standards; vaulting poles; landing pit pads; javelins, discuses, throwing hammers and putting shots; punch balls (speed bags) and punch bags (punching bags); boxing or wrestling rings; assault course climbing walls.

(B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03**), e.g.:

. . .

(12) Equipment of a kind used in children's playgrounds (e.g., swings, slides, see-saws and giant strides).

. . .

Are the Goods in Issue for Climbing or Mountaineering?

24. The only question before the Tribunal is whether the goods in issue are for climbing or mountaineering within the context of tariff item No. 9506.99.10.

25. It is Dynamo's position that the terms "climbing" and "mountaineering" have separate meanings and that they must be considered independently in the context of tariff item No. 9506.99.10 because they are separated by "or". Dynamo indicated that the use of the disjunctive "or" means that the phrase "for climbing or mountaineering" is not restricted to the climbing of mountains. Rather, it is sufficient that the goods in issue satisfy only one of the terms. Thus, Dynamo argued that it is only necessary that the goods in issue be

either articles and equipment for climbing or articles and equipment for mountaineering, not both, in order to be classified under tariff item No. 9506.99.10. Pursuant to Dynamo's interpretation, tariff item No. 9506.99.10 would include articles and equipment for climbing.

26. Dynamo submitted that the evidence clearly establishes that the goods in issue are for climbing. It contended that the goods in issue are designed for climbing and are marketed as "climbers" and that the industry refers to the gaming activity as "net-climbing".[21] Dynamo referred to marketing material which described the goods in issue as "climbers" and which showed children playing and climbing on the structures. Dynamo noted that, in its catalogue, the goods in issue are categorized as "Rotating Climbers".[22] In addition, Dynamo's Web pages state that it combines the fun of climbing with the thrill of motion and that there is "[p]lenty of space for climbing".[23]

27. The CBSA contends that the meaning of the general word "climbing" is narrowed by virtue of the fact that it is referred to in conjunction with the more specific term "mountaineering".

28. The CBSA also submitted that the goods in issue are not designed or marketed for climbing or mountaineering. In support of this position, the CBSA referred to Dynamo's Web site, where the goods in issue are marketed as "Rotating Games", a "21st Century merry-go-round".[24] The CBSA noted that the descriptions and uses listed on Dynamo's Web site do not refer to climbing or mountaineering.[25] In its view, the marketing material shows that the goods are ". . . not marketed as something that children are meant to climb, although certainly children need to climb in order to mount the good, in order to use it, and to enjoy the rotational aspect of the good."[26]

29. The CBSA argued that the goods in issue are intended for riding, with the ropes designed for children to grasp onto for balance and safety during rotation.[27] In support of that line of argument, the CBSA submitted that certain models of the goods in issue are ". . . specifically designated as being appropriate for restricted mobility children" and that such children would not climb but ride by sitting on the floor deck in order to use the goods in issue.[28]

30. The CBSA further indicated that the evidence shows that children can use the goods in issue for activities other than climbing, such as riding, running alongside, hanging from the metal rim, sitting and standing on the floor of the structure.[29] In this regard, the CBSA contends that the capacity figures given in the marketing literature appear to be significantly higher than the number of children that would be able to climb, as opposed to ride, on the structure at the same time.

31. Dynamo submitted that it would be incorrect to consider the extent to which the goods in issue are used for climbing as opposed to other play activities. Dynamo argued that to engage in such a process would be to unjustifiably introduce new and limiting language into tariff item No. 9506.99.10, such as "exclusively" for climbing; "solely" for climbing or "principally" for climbing.[30] Dynamo asserted that such

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21. Appellant's brief, at para. 26.
22. Supplementary documents of the respondent, tab 1 at 3.
23. Appellant's brief, tab 6 at 2.
24. Respondent's brief, at para. 28.
25. *Ibid.*
26. *Transcript of Public Argument*, 20 January 2009, at 11.
27. Respondent's brief, at para. 29; *Transcript of Public Argument*, 20 January 2009, at 13.
28. *Transcript of Public Argument*, 20 January 2009, at 14.
29. *Ibid.* at 15.
30. *Ibid.* at 7-8.

words cannot be added to the tariff item for two reasons. The first is a principle of statutory interpretation which stipulates that meanings requiring the addition of words to the provision in question are not to be accepted in the face of meanings that carry no such requirement.[31] The second is that duality of use does not disqualify goods from being described in terms of their principal usage activity, in this case, from being described as climbers.[32]

32. In order to determine the correct tariff classification of the goods, the Tribunal will consider the "for climbing or mountaineering" requirement in tariff item No. 9506.99.10 and to what extent, if any, the tariff item includes the notion of non-exclusive use.

For Climbing or Mountaineering

33. Tariff item No. 9506.99.10 requires that goods classified under that tariff item be for climbing or mountaineering. The Tribunal agrees that the term "climbing" is a general descriptive word, whereas the term "mountaineering" (i.e. mountain climbing) refers to a more specific activity. In addition, because the phrase includes the word "or", the Tribunal is of the view that climbing and mountaineering are to be considered as separate activities. Further, insofar as the reference to the general activity of climbing is not presented as one within a broader category of activities that includes that of mountaineering, the Tribunal does not accept that the meaning of the term "climbing" is circumscribed by the subsequent reference to "mountaineering". As a result, the Tribunal concludes that, for goods to be properly classified under this tariff item, it is sufficient that the goods be used for either climbing or mountaineering, within the normal meaning of either of those terms.

34. The *Merriam-Webster Online Dictionary* and the *American Heritage® Dictionary of the English Language*, respectively, define "climbing" as follows: ". . . to draw or pull oneself up, over, or to the top of by using hands and feet <children *climbing* the tree> . . ." and ". . . [t]o move upward on or mount, especially by using the hands and feet . . . ."[33]

35. First, with regard to the use of the goods in issue for climbing, and with the above-noted definitions in mind, the Tribunal notes that the geometric spatial arrangement of the netting structure of the goods in issue provides for different play levels, the accessing of which, even if only to enhance the thrill of rotation, necessarily involves a climbing activity. This was acknowledged by the CBSA.[34]

36. Second, the Tribunal notes the evidence that the design of the goods in issue conforms to Canadian Standards Association (CSA) definitions of "climbing apparatus" and "climbing net structures". In this regard, Mr. Kells testified that the act of climbing typically involves both the hands and the feet and that the CSA standards, such as the specified diameter of cables and the spacing of the nets, are designed to facilitate safe climbing activity.[35] While the Tribunal recognizes that the CSA definitions and standards do not bear directly upon tariff classification, they are indicative of industry usage.

37. Third, the Tribunal notes that, according to Mr. Kells' testimony, the goods in issue are known in the industry as rotating climbers.[36]

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31. Appellant's brief, at para. 40; *Friesen v. Canada*, [1995] 3 S.C.R. 103.
32. *Transcript of Public Argument*, 20 January 2009, at 8-9.
33. Appellant's brief, tab 5.
34. *Transcript of Public Argument*, 20 January 2009, at 24.
35. *Transcript of Public Hearing*, 20 January 2009, at 75-77.
36. *Ibid.* at 81.

38. Mr. Richard Martin, CEO of Dynamo, testified that the goods in issue come with a locking mechanism that provides the option of preventing rotation. When this locking mechanism is engaged, the goods in issue cannot be used for riding and can only be used for climbing.[37]

39. Given the above, the Tribunal concludes that the goods in issue can properly be described as goods used for climbing.

Non-exclusive Use

40. With regard to the argument concerning non-exclusive use put forth by the CBSA, the Tribunal notes that the design of the goods in issue leads to significant play activities based on both climbing and rotation.

41. The presence of the rotating feature as a significant basis of play activity does not, in the Tribunal's view, negate the fact that these net structures are designed to encourage significant climbing play activity.

42. In this respect, the Tribunal notes the assertion by Dynamo that the CBSA has read restrictive words into the terms of tariff item No. 9506.99.10, words such as "exclusively" for climbing and "principally" for climbing.

43. In the Tribunal's opinion, the wording of tariff item No. 9506.99.10 does not require this. All that is required for classification in this instance is that the goods be used either for "climbing" or for "mountaineering". In the Tribunal's view, as discussed above, the evidence in this case indicates a significant degree of use for climbing that is sufficient to satisfy the requirements of the tariff item.

DECISION

44. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 9506.99.10 as other articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in Chapter 95, for climbing or mountaineering.

45. The appeal is therefore allowed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member

37. *Ibid.* at 17, 45.