



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-063

Fenwick Automotive Products
Limited

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, March 11, 2009*

TABLE OF CONTENTS

DECISION.....i

STATEMENT OF REASONS 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE 2

 ANALYSIS 2

 Law 2

 Tariff Classification at Issue..... 3

 Are the Goods in Issue Part of a Hydraulic Control Assembly?.....5

 Are the Goods in Issue Hydraulic Control Assemblies?..... 11

DECISION 12

IN THE MATTER OF an appeal heard on February 19, 2008, 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 December 27, 2006, with respect to a request for further re-determination, under subsection 60(4) of the *Customs Act*.

BETWEEN

FENWICK AUTOMOTIVE PRODUCTS LIMITED

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 19, 2008

Tribunal Members: Ellen Fry, Presiding Member
James A. Ogilvy, Member
Serge Fréchette, Member

Counsel for the Tribunal: Alain Xatruch

Research Director: Audrey Chapman

Research Officer: Cathy Turner

Manager, Registrar Office: Gillian Burnett

Registrar Officer: Danielle Leclair

PARTICIPANTS:**Appellant**

Fenwick Automotive Products Limited

Counsel/RepresentativesChristopher J. Kent
Dunniela Kaufman
Christopher J. Cochlin
Christopher McLeod**Respondent**

President of the Canada Border Services Agency

Counsel/Representative

Brian Harvey

Intervener

General Motors of Canada Limited

Counsel/Representative

Sydney Martin

WITNESSES:Fred Kiameh
Technical/Warranty Service Manager
Class-A Licensed Mechanic, ASE Certified
Fenwick Automotive Products LimitedDr. Thomas A. Flaim
Flaim ConsultingDr. Atef Fahim
Professor, Mechanical Engineering
Faculty of Engineering
University of Ottawa

Please address all communications to:

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

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

STATEMENT OF REASONS

1. This is an appeal filed by Fenwick Automotive Products Limited (Fenwick) with the Canadian International Trade Tribunal (the Tribunal) under subsection 67(1) of the *Customs Act*¹ from a decision made on December 27, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether disc brake calipers (the goods in issue), in addition to being classified in Chapters 1 to 97 of the schedule to the *Customs Tariff*,² may also be classified under tariff item No. 9961.00.00 as vacuum, hydraulic or air control assemblies, or parts thereof, for use in the repair of motor vehicles principally designed for the transport of persons or goods, and thereby benefit from the duty-free treatment provided by this tariff item.

PROCEDURAL HISTORY

3. On April 16, 2003, Fenwick imported the goods in issue from the United States under tariff item No. 8708.39.90.³ No duties were paid, as Fenwick claimed preferential tariff treatment for the goods in issue under tariff item No. 9961.00.00.

4. On March 22, 2005, following a customs compliance verification pertaining to imports of certain automotive parts by Fenwick during the period from January 1 to December 31, 2003, the CBSA issued a re-determination pursuant to subsection 59(1) of the *Act* whereby it denied Fenwick entitlement to the benefit of tariff item No. 9961.00.00.

5. On June 23, 2005, Fenwick filed a request for further re-determination pursuant to subsection 60(1) of the *Act*. The CBSA denied this request, as it had not been filed within the 90-day time limit stipulated under subsection 60(1). However, the Tribunal approved Fenwick's application under section 60.2 for an extension of time to serve its request for further re-determination.⁴

6. On December 27, 2006, the CBSA issued its decision under subsection 60(4) of the *Act*, which denied Fenwick entitlement to the benefit of tariff item No. 9961.00.00 and thereby confirmed its prior re-determination.

7. On March 22, 2007, Fenwick filed the present appeal with the Tribunal.⁵

8. The Tribunal held a public hearing in Ottawa, Ontario, on February 19, 2008. Dr. Thomas A. Flaim of Flaim Consulting appeared as a witness for Fenwick. The Tribunal qualified Dr. Flaim as an expert in the design, construction and operation of hydraulic brake calipers and hydraulic brake systems. Dr. Atef Fahim, Professor of mechanical engineering at the University of Ottawa, appeared as a witness for the CBSA. The

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

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

3. On January 1, 2007, a number of amendments to the schedule to the *Customs Tariff* took effect. As a result of these amendments, goods that were previously classified under tariff item No. 8708.39.90 were classified under tariff item No. 8708.30.99. For the purposes of this appeal, the Tribunal will refer to the tariff nomenclature that was in effect at the time that the goods in issue were imported.

4. See *Fenwick Automotive Products Ltd.* (19 April 2006), EP-2005-036 (CITT).

5. While Fenwick's notice of appeal also addressed other goods (caliper castings), Fenwick later decided to discontinue its appeal with respect to these goods, as the CBSA determined that they were entitled to the benefit of tariff item No. 9965.00.00.

Tribunal qualified Dr. Fahim as an expert in mechanical engineering, control theory, control systems, control systems in the automotive context, automotive engineering, vehicle dynamics and design of automotive systems and assemblies, including brake systems and assemblies.

9. In addition to the above expert witnesses, Mr. Fred Kiameh, a technical service manager with Fenwick, testified on behalf of Fenwick.

GOODS IN ISSUE

10. The goods in issue are new disc brake calipers that were sold as replacement parts for 1999 to 2002 Ford Mustangs. They were manufactured in Australia and exported to Canada by Global Parts Source Inc. of Holland, Michigan.

11. According to the evidence, a disc brake caliper can be described as a clamping device that straddles a rotating disc (rotor) and, by hydraulic action, activates internal pistons which press brake pads against both sides of the rotor to generate friction and thus stop or slow a vehicle.⁶ In other words, a disc brake caliper is a device that forms part of a vehicle's hydraulic brake system and serves to convert hydraulic pressure to mechanical force.⁷

12. According to Mr. Kiameh, the goods in issue are referred to as "bare calipers" and consist of assemblies which contain a caliper casting, pistons, a seal and a bleeder valve.⁸ Bare calipers are to be distinguished from "semi-loaded" calipers, which include additional items, such as bushings, mounting bolts, washers and brackets, and "loaded" calipers, which include brake pads and all of the foregoing.⁹

13. At the Tribunal's request, Fenwick filed two samples of disc brake calipers for 1999 to 2002 Ford Mustangs (one left front caliper and one right front caliper), which, Fenwick indicated, are identical to, or representative of, the goods in issue. Fenwick also filed a hydraulic brake demonstration model which simulates the operation of a vehicle's hydraulic brake system. The demonstration model included a brake pedal, a vacuum booster, a master cylinder, a metering valve, hoses, a rotor and a disc brake caliper, which were from a 2000 Ford Mustang, and a small electric motor to turn the rotor to simulate vehicle movement.¹⁰

ANALYSIS

Law

14. 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.

15. 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.¹¹ The schedule is divided into sections and chapters, with

6. Tribunal Exhibit AP-2006-063-17A, tabs 11, 13, 14.

7. *Ibid.*, tab 14.

8. *Transcript of Public Hearing*, 19 February 2008, at 36, 44.

9. *Ibid.* at 24, 36, 44.

10. *Ibid.* at 14, 16.

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

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.

16. Subsection 10(1) of the *Customs Tariff* reads 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^[12] and the Canadian Rules^[13] set out in the schedule.”

17. The *General Rules* comprise six rules. Classification begins with Rule 1, which reads 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.” If the Tribunal cannot determine the classification of the goods in accordance with Rule 1, it must move on to Rule 2, and so on.¹⁴

18. Section 11 of the *Customs Tariff* states the following: “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 Explanatory Notes to the Harmonized Commodity Description and Coding System,^[16] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.”

19. 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 the *Canadian Rules* in the case of the latter.

Tariff Classification at Issue

20. In the present appeal, the parties agree that the goods in issue are properly classified under tariff item No. 8708.39.90 as other brakes and servo-brakes, and parts thereof, of the motor vehicles of heading Nos. 87.01 to 87.05. The issue before the Tribunal is whether the goods in issue may also be classified under tariff item No. 9961.00.00 and thereby benefit from duty-free treatment.

21. Chapter 99, which includes tariff item No. 9961.00.00, provides special classification provisions that allow certain goods to be imported into Canada with tariff relief. 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.¹⁷ 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.

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

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

14. 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 for 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).

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

16. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

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

22. There are no section notes to Section XXI (which includes Chapter 99). With respect to chapter notes, the Tribunal is of the view that Note 3 to Chapter 99 is relevant to the present appeal. It reads 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.

[Emphasis added]

23. In accordance with the preceding note, 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 in Chapter 87, under tariff item No. 8708.39.90. The Tribunal agrees with this conclusion. Therefore, for the purposes of this appeal, the Tribunal is of the view that this condition has been met.

24. Consequently, the Tribunal must now determine whether the goods in issue meet the conditions of tariff item No. 9961.00.00, which reads as follows:

9961.00.00 The following for use in the repair of road tractors for semi-trailers, motor vehicles principally designed for the transport of persons or goods, or fire fighting vehicles, and parts thereof:

...

Vacuum, hydraulic or air control assemblies, other than assemblies for spring brakes;

Parts of the foregoing, other than:

Electric weld tubing and double wall copper brazed tubing, of an external diameter not exceeding 9.525 mm and wall thickness not exceeding 0.711 mm, for vacuum, hydraulic or air control assemblies;

Hydraulic brake hoses and hydraulic brake locks;

Hydraulic gear pumps to operate hoists and other accessories;

Manual slack adjusters for air brake systems;

Polyamide air brake tubing.

25. The Tribunal initially considered a potential ambiguity in the language of this tariff item. The phrase “[v]acuum, hydraulic or air control assemblies” in the English version of the tariff item could be understood to mean either:

- (1) vacuum assemblies, hydraulic assemblies or air control assemblies; or
- (2) vacuum control assemblies, hydraulic control assemblies or air control assemblies.

26. However, reference to the French version of the tariff item shows that the latter is the correct meaning of the phrase. The Tribunal notes that this interpretation appears to be the meaning accepted by the parties.

27. Neither party argued that the goods in issue are either vacuum control assemblies or air control assemblies, or parts thereof, or that any of the exceptions listed under tariff item No. 9961.00.00 preclude the goods in issue from being classified under that tariff item. Further, it was not disputed that the goods in issue are “. . . for use in the repair of . . . motor vehicles principally designed for the transport of persons or goods. . .”. The evidence in this respect is clear, as the goods in issue were sold as replacement parts for 1999 to 2002 Ford Mustangs.

28. Therefore, the Tribunal is left to determine whether the goods in issue are hydraulic control assemblies or parts thereof. Given that Fenwick's position in this appeal is that the goods in issue are parts of a hydraulic control assembly, the Tribunal will consider this issue first. In the event that the Tribunal determines that the goods in issue are not parts of a hydraulic control assembly, it will then consider whether they are themselves hydraulic control assemblies.

Are the Goods in Issue Part of a Hydraulic Control Assembly?

29. Fenwick argued that the goods in issue form an integral part of the hydraulic control assembly used in a vehicle's hydraulic brake system and should therefore be entitled to the benefit of tariff item No. 9961.00.00. In its view, a hydraulic brake system can be defined as a "brake system in which brake operation and control uses hydraulic pressure."¹⁸ It submitted that, within such a system, brake action is initiated by the introduction of pressure to the brake pedal, which forces a plunger into a master cylinder and generates hydraulic pressure. That pressure forces brake fluid out of the master cylinder and into brake lines and hoses, which in turn distribute the fluid to the goods in issue. Pistons, which are internal parts of the goods in issue, are activated by this hydraulic pressure and press brake pads against both sides of a rotor to generate friction, which causes a reduction in the speed of the vehicle.

30. As the term "hydraulic control assembly" is not defined in the *Customs Tariff*, Fenwick sought to rely on the ordinary meaning of the term to establish its scope. By referring to dictionary definitions, it described a "hydraulic control assembly" as parts assembled together into a unit for the purpose of regulating something through the manipulation of liquid moving in a confined space under pressure.¹⁹ It submitted that the hydraulic control assembly that is incorporated into a vehicle's hydraulic brake system begins with a plunger that is pushed by a brake pedal into a master cylinder and ends with the pistons found inside the goods in issue. In its view, all components between these start and end points serve to activate the brakes of the vehicle and control its movement (i.e. the speed and force of the braking) through the use of hydraulic pressure. The goods in issue are the last point in the chain of hydraulic action that engages the vehicle's brakes through the conversion of hydraulic pressure into mechanical force.

31. Having defined the hydraulic control assembly in the foregoing manner, Fenwick submitted that the goods in issue are clearly parts of such an assembly. Relying on the factors that, in its view, are normally considered by the Tribunal to determine whether goods are parts of other goods,²⁰ Fenwick submitted that the goods in issue are: (1) essential to the operation of the hydraulic control assembly; (2) integral components of the hydraulic control assembly; (3) installed in the hydraulic control assembly; and (4) readily identifiable, through common trade usage and practice, as constituent parts of the hydraulic control assembly. Fenwick argued that, without the goods in issue as final components, the remainder of the hydraulic control assembly would serve no purpose within the vehicle's brake system. In other words, it was of the view that there can be no hydraulic control without the goods in issue.

32. Fenwick's position was supported by Dr. Flaim's expert report and testimony. In his expert report, Dr. Flaim stated that the goods in issue are dual-function devices that have both mechanical and hydraulic elements. However, he stated that, in a time-sequence analysis of a braking event, the hydraulic features of the goods in issue are a pre-condition to their mechanical features. He explained that among the hydraulic

18. See Tribunal Exhibit AP-2006-063-12A, para. 23. Fenwick referred to the definition of "hydraulic brake system" found at www.motorera.com/dictionary.

19. Tribunal Exhibit AP-2006-063-12A, para. 51.

20. Fenwick cited the Tribunal's decision in *Winners Only (Canada) Ltd. v. Deputy M.N.R.* (13 May 1996), AP-94-142 (CITT) as guidance for the interpretation of the term "parts of".

control characteristics of the goods in issue are the minimization of brake drag when the brakes are not applied, the automatic adjustment to accommodate brake pad wear over time and the minimization of hysteresis²¹ during brake modulation. At the hearing, Dr. Flaim stated that, without the goods in issue, hydraulic pressure cannot be generated, which results in an absence of control over the vehicle, the braking, and the hydraulic fluid itself. In Dr. Flaim's opinion, the goods in issue are essential components for hydraulic control and are thus parts of the hydraulic control assembly.

33. The CBSA, on the other hand, argued that the goods in issue are not parts of a hydraulic control assembly used to control a vehicle's brakes and should therefore not be entitled to the benefit of tariff item No. 9961.00.00. In its view, the goods in issue are integral parts of a vehicle's disc brake assembly, which it defined as including a rotor that turns with the wheel and a disc brake caliper that is stationary.

34. The CBSA submitted that, on the basis of ordinary definitions, a "hydraulic control assembly" can be defined as a number of component parts fitted together to form a whole, which directs or controls hydraulic pressure.²² It submitted that, in the context of a vehicle's hydraulic brake system, the master cylinder is the heart of the hydraulic control assembly, as it produces the hydraulic pressure (from mechanical force applied on the brake pedal), amplifies it and controls its distribution throughout the vehicle. According to the CBSA, the function of the goods in issue is not to direct or control hydraulic pressure, but to convert the action of hydraulic pressure created and delivered to it by the hydraulic control assembly to mechanical force used to apply the brake pads against the rotors to stop or slow the vehicle. In other words, the goods in issue merely respond to the pressure delivered from upstream components.

35. Relying on the same factors as Fenwick for determining whether goods are parts of other goods, the CBSA submitted that the goods in issue are: (1) not essential, absolutely necessary or indispensable to the method of working or operation of the hydraulic control assembly; (2) not an integral part of the hydraulic control assembly; (3) not installed in the hydraulic control assembly; and (4) not, based on common trade usage and practice, parts of the hydraulic control assembly. It submitted that common trade usage makes it clear that the goods in issue are parts of a disc brake assembly. It further submitted that the fact that the goods in issue receive hydraulic pressure through a brake hose connected to the hydraulic control assembly does not make the goods in issue parts of this assembly.

36. The CBSA submitted that, in its testimony and submissions, Fenwick equated the terms "hydraulic control assembly", "hydraulic control system", "hydraulic brake system" and "brake system" generally. In its view, the terms "system" and "assembly" are not synonymous. While the CBSA stated that it had no problem with the goods in issue fitting into the notion of a hydraulic brake system, it did not agree that they are parts of a hydraulic control assembly.

37. The CBSA's position was supported by Dr. Fahim's expert report and testimony. In his testimony, Dr. Fahim stated that, from a design perspective, the term "assembly" has a specific meaning that is different from the meaning of the term "system". He defined a "system" as a collection of things that interact together and defined an "assembly" as components that are tightly fitted together to form a unit. He described the distinction between the two as being that a system could have components that are scattered but still interact together, whereas an assembly has components that are fitted together in close proximity. In his view, there are usually separate hydraulic control assemblies within a vehicle's hydraulic brake system.

21. In his testimony, Dr. Flaim explained that hysteresis is the effect that results from the absence of a linear relationship between hydraulic pressure and torque (i.e. the force with which the brake pads are pressed against the rotor). See *Transcript of Public Hearing*, 19 February 2008, at 57-62.

22. Tribunal Exhibit AP-2006-063-17A, tab 1, paras. 22, 23.

One assembly includes the master cylinder, which generates hydraulic pressure, while another one includes the proportioning valve, which distributes the pressure to the goods in issue. Dr. Fahim noted that, in newer cars, the entire control assembly, including the master cylinder, proportioning valve and anti-lock brake system (ABS) unit, forms an integrated unit, i.e. a single assembly. In his opinion, the goods in issue are actuators which respond to hydraulic pressure and are integral and essential parts of a hydraulic brake system. However, they are not parts of a hydraulic control assembly.

38. The Tribunal notes that there is some difficulty in determining whether the goods in issue are parts of a hydraulic control assembly, as the term “hydraulic control assembly” is not well defined. According to Fenwick, the hydraulic control assembly that is incorporated into a vehicle’s hydraulic brake system includes the plunger (which is pushed by the brake pedal into the master cylinder), the pistons found inside the goods in issue and all other components in between these start and end points.

39. If the Tribunal finds that the components which are alleged by Fenwick to constitute a hydraulic control assembly are, in fact, such an assembly, then it would logically follow that the goods in issue are parts of that assembly. Consequently, the Tribunal will seek to determine whether these components, taken together, constitute a hydraulic control assembly by examining each of the three criteria contained in this term. If any one of these criteria is not satisfied, then the goods in issue will not be parts of a hydraulic control assembly.

Hydraulic

40. The *Canadian Oxford Dictionary*²³ defines “hydraulic” as follows: “. . . **1** (of water, oil, etc.) conveyed through pipes or channels usu. by pressure. **2** (of a mechanism etc.) operated by liquid moving in this manner (*hydraulic brakes; hydraulic lift*) . . .” On the basis of these definitions, the Tribunal is of the opinion that the components alleged by Fenwick to constitute a hydraulic control assembly are clearly hydraulic in nature. These components, including the goods in issue, are in direct contact with the brake fluid and either serve to convey the fluid or are actuated by the fluid. The Tribunal notes that the parties did not appear to disagree in this regard. Therefore, the Tribunal is of the view that this criterion has been satisfied.

Control

41. The *Canadian Oxford Dictionary* defines the term “control” as follows: “**1** the power of directing, command (*under the control of*) . . .”²⁴ “Control” is also defined as “the function or power of directing and regulating”.²⁵ Therefore, based on these definitions, control means the action of directing or regulating something.

42. While the parties did not appear to disagree as to the meaning that should be attributed to the term “control”, they did disagree as to the object of control. The parties disagreed as to what was controlling and what was being controlled. According to Fenwick, the purported hydraulic control assembly functions to control the speed and force of the brakes (i.e. the control of vehicle movement) through the use of hydraulic pressure. The CBSA is of the view that the object of control is the hydraulic fluid itself (i.e. the control of hydraulic pressure). The Tribunal observes that determining the object of control depends, to a large extent, on the meaning that is given to the term “control”.

23. Second ed., s.v. “hydraulic”.

24. S.v. “control”.

25. *The Oxford English Dictionary*, 2d ed., s.v. “control”.

43. At the hearing, the Tribunal heard evidence from Dr. Fahim regarding the functioning of different types of control systems. By making reference to some of his university teaching materials,²⁶ Dr. Fahim explained that an automatic controller functions by giving a command and then verifying the execution of that command through the use of a sensor.²⁷ If the command is not executed properly, the controller modifies the command in an attempt to achieve the desired result. Dr. Fahim referred to this type of system as a “closed-loop” control system. He also explained that, in the context of a vehicle’s brake system, it is the driver of the vehicle that is in effect closing the control loop.²⁸ Therefore, when the driver of the vehicle wants to slow the vehicle, he or she pushes on the brake pedal. Through sensory perceptions, the driver is then able to determine whether to increase or decrease the pressure applied to the brake pedal in order to modify the rate at which the vehicle slows.

44. The Tribunal notes that, within any system whose aim is to achieve control over a certain function, most, if not all, components of that system will be essential to achieve that control. From this perspective, the Tribunal agrees that every component that forms part of a vehicle’s hydraulic brake system is likely essential to achieve control over the brakes and thus over vehicle movement. However, the Tribunal must consider that the legislators intended every word in the *Customs Tariff* to be significant. It is the Tribunal’s view that, if the term “control” were interpreted in this manner, there would be no requirement for it to appear in the term “hydraulic control assemblies”. Every component of a hydraulic assembly would automatically be considered necessary to achieve control over a certain function. The Tribunal therefore regards the term “control” found in tariff item No. 9961.00.00 as intended to have a more precise meaning. In the Tribunal’s opinion, the components that control are the components that give a command. Although other components may be necessary to convey that command and/or to execute it, those components are not generating the command (i.e. they are not generating the control function).²⁹

45. The Tribunal considers that the object of control in the current context is downstream from the control assembly as described by Dr. Fahim, and may be the hydraulic fluid itself or the calipers. Both are controlled through the generation of pressure in this control assembly, as argued by the CBSA.

46. At the hearing, Dr. Fahim gave examples of hydraulic control assemblies found within a vehicle’s brake system that are responsible for generating hydraulic pressure (master cylinder) and distributing the pressure in the correct proportion to the goods in issue (proportioning valve).³⁰ He noted that, when these hydraulic control assemblies generate and then distribute pressure to the goods in issue (i.e. when they regulate the pressure), there is no feedback received from the goods in issue.³¹ In other words, there is no closing of the loop. He referred to this as an “open-loop” control system.

47. Dr. Fahim’s testimony indicated that, in his view, the goods in issue do not control the hydraulic pressure. In fact, he stated on numerous occasions that the goods in issue are considered actuators which respond to hydraulic pressure.³² The Tribunal agrees with this characterization of the goods in issue. Basing its conclusion on the evidence, the Tribunal is of the view that the various hydraulic control assemblies, as

26. Tribunal Exhibit AP-2006-063-26A, tab 4.

27. *Transcript of Public Hearing*, 19 February 2008, at 122-23.

28. *Ibid.* at 148-49, 170.

29. The Tribunal notes that this view is consistent with Dr. Fahim’s teaching materials which clearly show that the controller is the component that gives the command (i.e. that generates the control function). See Tribunal Exhibit AP-2006-063-26A, tab 4.

30. Dr. Fahim noted that, in newer cars, these assemblies may be combined with an ABS unit into one integrated unit (i.e. a single assembly). See *Transcript of Public Hearing*, 19 February 2008, at 142, 143.

31. *Transcript of Public Hearing*, 19 February 2008, at 137-38, 155.

32. *Ibid.* at 138, 141, 187, 198.

defined by Dr. Fahim, which are upstream from the goods in issue, provide a control function by creating, amplifying and directing the hydraulic pressure, and that the goods in issue are the recipients of that control. The Tribunal notes that a source of definitions for automotive terms that was referred to by both parties defines a “brake actuator” as a “unit which converts hydraulic pressure, air pressure, vacuum, or electrical current or other forms of energy to a force which applies a brake.”³³ Therefore, the Tribunal agrees with the CBSA that the goods in issue are energy conversion mechanisms which *respond* to hydraulic pressure.

48. The Tribunal noted previously that, in both his expert report and testimony, Dr. Flaim indicated that the goods in issue serve, among other things, to minimize brake drag, prevent a displacement limited condition and minimize hysteresis. While these may in fact constitute important functions which have an effect on the overall performance of the brake system, the Tribunal agrees with Dr. Fahim that they do not control the hydraulic pressure.³⁴

49. Therefore, in summary, the Tribunal is of opinion that the goods in issue control neither the brakes and vehicle movement, nor the hydraulic pressure. Such control instead originates upstream from the goods in issue, with the driver of the vehicle and with various hydraulic control assemblies, such as the master cylinder. For their part, the goods in issue are actuators which respond to hydraulic pressure. Accordingly, the Tribunal finds that the goods in issue are not parts of a hydraulic *control* assembly.

Assembly

50. Although the Tribunal has already found that the goods in issue are not parts of a hydraulic control assembly, it will nonetheless consider whether the components that are alleged by Fenwick to constitute a hydraulic control assembly are in fact an “assembly”.

51. Fenwick argued that all components located between the plunger that is pushed by the brake pedal into the master cylinder and the pistons found inside the goods in issue, taken together, constitute an assembly. Therefore, according to Fenwick, components such as the master cylinder, the proportioning valve and the goods in issue are parts of a single assembly. The CBSA argued that the goods in issue are parts of the disc brake assembly (which it defined as a rotor and a caliper) and that, while they may also be considered parts of a hydraulic *system*, they are not parts of a hydraulic control *assembly*. In the CBSA’s view, the terms “system” and “assembly” are not synonyms.

52. As was submitted by the CBSA, Fenwick generally equated the terms “system” and “assembly”. For example, at the hearing, Dr. Flaim stated that a “hydraulic brake system” consists of all components that come into contact with the hydraulic fluid, such as the master cylinder, metering or proportioning valves, hoses and calipers.³⁵ When asked by the Tribunal what components would be included in a “hydraulic control system” and a “hydraulic control assembly”, he responded that they would be the same components as in a “hydraulic brake system”.³⁶ Similarly, in response to questioning by Fenwick, Mr. Kiameh essentially named the same components as being included in a “hydraulic control system” and a “hydraulic control assembly”.³⁷

33. See www.motorera.com/dictionary.

34. *Transcript of Public Hearing*, 19 February 2008, at 147-48.

35. *Ibid.* at 104-105.

36. *Ibid.* at 105-106.

37. *Ibid.* at 47-48.

53. On the other hand, Dr. Fahim drew a clear distinction between a “system” and an “assembly”. In the Tribunal’s opinion, these terms should be interpreted within the proper context, which, in this case, is the automotive design context. On this basis, the Tribunal accepts Dr. Fahim’s testimony which indicated that, from a design perspective, a system is a collection of components that interact together but that are not necessarily in close proximity to each other, while an assembly is a collection of components that are tightly fitted together to form a unit.³⁸

54. The Tribunal also notes that, although dictionary definitions of the terms “system” and “assembly” do not create a clear distinction between the two, they are not inconsistent with Dr. Fahim’s interpretation. The *Canadian Oxford Dictionary* defines the term “system” as follows: “**1** a complex whole; a set of connected things, parts, institutions, etc.; an organized body of material or immaterial things (*railway system; school system*). **2** a set of devices functioning together”³⁹ It defines the term “assembly” as “a number of component parts fitted together to form a whole”.⁴⁰ The Tribunal is of the view that these definitions support the notion that a system is an interconnection of parts or devices working together to achieve a desired purpose but potentially at a distance from each other and interconnected by hoses, wires, etc., and that an assembly constitutes a number of parts fitted together to form a single device or unit which may, on its own, provide only limited functionality. Therefore, while a system may be composed of multiple assemblies, the reverse is not necessarily true.

55. Applying the above interpretations of the terms “system” and “assembly” to the facts of this appeal, the Tribunal finds that the components which are alleged by Fenwick to constitute a hydraulic control assembly do not in fact constitute a single assembly. Rather, the Tribunal agrees with Dr. Fahim that components such as master cylinders are in themselves hydraulic assemblies that form part of a vehicle’s hydraulic brake system. The goods in issue, which the Tribunal also considers as assemblies themselves, are not in close proximity to, and are not tightly fitted together with, the master cylinder and proportioning valve. While the master cylinder and proportioning valve are positioned in a central location, the goods in issue are found at the wheels.

56. The Tribunal observes that, of all the documentation submitted by the parties during the course of this appeal, none depicted the goods in issue, together with other components such as the master cylinder and proportioning valve, as forming part of a single assembly. However, there were some materials which clearly identified the goods in issue as forming part of a disc brake assembly (such an assembly being composed of a rotor, caliper and brake pads).⁴¹

57. Therefore, in light of the foregoing, the Tribunal, in addition to its finding on the issue of control, finds that the goods in issue cannot be considered parts of a hydraulic control *assembly*, as defined by Fenwick.

58. The Tribunal notes that, in its written submissions and at the hearing, Fenwick argued that, if Parliament had wanted to exclude the goods in issue from the benefit of tariff item No. 9961.00.00, it would have done so expressly, just as it did for other parts such as “hydraulic brake hoses”. Fenwick submitted that the exclusion of certain listed parts, combined with the lack of any exclusion for the goods in issue, indicates that the goods in issue are entitled to the benefit of tariff item No. 9961.00.00.

38. *Ibid.* at 126-27, 142.

39. *S.v.* “system”.

40. *S.v.* “assembly”.

41. See Tribunal Exhibit AP-2006-063-17A, tabs 4, 18.

59. Although there are a number of parts excluded from tariff item No. 9961.00.00, the Tribunal only considers the exclusions for brake lines (i.e. rigid tubing) and hoses as having any relevance for the purposes of this appeal. These goods are used to channel the hydraulic fluid from the master cylinder and proportioning valve to the goods in issue. Relying on the meaning given to the terms “control” and “assembly” by the Tribunal, brake lines and hoses do not appear, at first glance, to form part of a hydraulic control assembly (which would render the exclusion unnecessary). However, the Tribunal is of the view that, given their role in directing/guiding the hydraulic fluid to the goods in issue, given the fact that they are not actuators as the goods in issue are, and given their closer proximity (as compared to the goods in issue) to components such as the master cylinder and proportioning valve, there exists sufficient uncertainty surrounding their status to explain excluding them in order to achieve greater certainty.

60. As for the goods in issue, the Tribunal has already determined that two of the three mandatory criteria which are required for their consideration as parts of a hydraulic control assembly have not been satisfied.

Are the Goods in Issue Hydraulic Control Assemblies?

61. As the Tribunal has determined that the goods in issue are not parts of a hydraulic control assembly, it will consider whether they are themselves hydraulic control assemblies.

62. Although Fenwick did not argue that the goods in issue were themselves hydraulic control assemblies, the Tribunal has no difficulty in finding, based on the foregoing analysis, that they constitute hydraulic assemblies. The goods in issue are clearly in direct contact with the brake fluid and consist of a collection of components, namely, a caliper casting, pistons, a seal and a bleeder valve, that are tightly fitted together to form a unit.

63. However, as regards the “control” criterion, the Tribunal can only conclude, on the same basis as it did earlier, that the goods in issue control neither the brakes nor the hydraulic pressure. The goods in issue are simply actuators which respond to a control function or command generated upstream. Accordingly, the Tribunal finds that the goods in issue are not hydraulic control assemblies.

64. The Tribunal notes that both General Motors of Canada Limited and Fenwick submitted that the Tribunal should follow the Tariff Board’s decision in *Superior Brake and Hydraulic Specialists Ltd. v. Deputy M.N.R.C.E.*,⁴² where it determined that spring brakes and spring brake parts were “air control assemblies”.

65. The Tribunal is hesitant to place any reliance on *Superior Brake*, because it concerned goods that were different from those in issue in the present instance and provided insufficient detail to allow the Tribunal to fully understand how they compared to the goods in issue. Moreover, in that appeal, the Tariff Board was faced with a different question from that which is before the Tribunal in the present instance. Although the Tariff Board concluded that the goods were “air control assemblies”, thus indirectly expressing a view that the control criterion was satisfied, it did not examine the matter of control separately. The Tribunal is therefore unable to accept *Superior Brake* as supportive of Fenwick’s position in this appeal.

42. 8 TBR 434 [*Superior Brake*].

DECISION

66. For the foregoing reasons, the Tribunal concludes that the goods in issue are not hydraulic control assemblies, or parts thereof, for use in the repair of motor vehicles principally designed for the transport of persons or goods and are therefore not entitled to the duty-free treatment provided by tariff item No. 9961.00.00.

67. The appeal is therefore dismissed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Serge Fréchette
Serge Fréchette
Member