



Ottawa, Friday, January 7, 1994

Appeal No. AP-92-182

IN THE MATTER OF an appeal heard on April 16 and 19, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated October 8, 1991, with respect to a request for re-determination under subsection 63(3) of the *Customs Act*.

BETWEEN

ELECTRIC MOBILITY (CANADA) CORP.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lise Bergeron

Lise Bergeron
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-182

ELECTRIC MOBILITY (CANADA) CORP.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

This is an appeal under section 67 of the Customs Act from a decision of the Deputy Minister of National Revenue for Customs and Excise under subsection 63(3) of the Customs Act. The issues are: (1) whether the "Rascal ConvertAble" scooter is "of a class or kind not made in Canada" and therefore exempt, under Code 2530 of Schedule II to the Customs Tariff, from duty in heading Nos. 87.13 and 87.14, and (2) whether there is a substantial quantity of invalid chairs manufactured in Canada of the same class or kind as the "Rascal ConvertAble" scooter.

HELD: *The appeal is allowed. The "Rascal ConvertAble" scooter is "of a class or kind not made in Canada" by virtue of its unique design, which gives it the capability of being converted from three wheels to four wheels and which makes it more manoeuvrable in confined areas than Canadian-built, three-wheeled scooters. Since no Canadian-built scooter has this convertibility feature, there are no scooters of the same class or kind as the "Rascal ConvertAble" scooter, and there is not, therefore, a substantial quantity of scooters of the same class or kind as the "Rascal ConvertAble" scooter manufactured in Canada.*

*Place of Hearing: Ottawa, Ontario
Dates of Hearing: April 16 and 19, 1993
Date of Decision: January 7, 1994*

*Tribunal Members: Lise Bergeron, Presiding Member
Arthur B. Trudeau, Member
Charles A. Gracey, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

*Appearances: Dean A. Peroff, for the appellant
Ian McCowan, for the respondent*

Appeal No. AP-92-182

ELECTRIC MOBILITY (CANADA) CORP.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise under subsection 63(3) of the Act. There was no disagreement between the parties that the "Rascal ConvertAble" scooter (Rascal scooter), a mobility device for persons with a physical disability, and its related parts imported by the appellant were properly classified in heading Nos. 87.13 and 87.14 of Schedule I to the *Customs Tariff*² as "Invalid carriages (wheelchairs), whether or not motorized or otherwise mechanically propelled" and parts thereof. The issues are whether the Rascal scooter is an invalid or commode chair, for use by a disabled person, "of a class or kind not made in Canada" and therefore exempt, under Code 2530 of Schedule II to the *Customs Tariff*, from duty in heading Nos. 87.13 and 87.14, and whether there is a substantial quantity of invalid chairs manufactured in Canada of the same class or kind as the Rascal scooter.

Seven different models of the Rascal scooter were imported: models 210, 220, 230 and 240, which are three-wheeled models, and models 250 and 270, which are four-wheeled models. All of the Rascal scooters are designed so that either a one- or a two-wheeled front end may be attached to the rear portion of the scooter. The one-wheeled front end is equipped with a T-shaped, two-handled steering and control device, known as a tiller, and the two-wheeled front end has a more compact, side-mounted, one-handled tiller.

Four witnesses appeared on behalf of the appellant: Mr. Michael Flowers, President of the appellant and the Electric Mobility Corporation in the United States; Ms. Catherine Kissick, an occupational therapist; Ms. Darlene Speers, a physiotherapist; and Mr. William Brown, a user of the Rascal scooter.

Mr. Flowers explained that all models of the Rascal scooter have the convertibility feature which has been patented under Canadian Patent No. 1,301,664 called "Convertible Personal Vehicle Having a Take-Apart Frame" (the patent). According to Mr. Flowers, in the four-wheeled form, the Rascal scooter has a shorter wheelbase, about 19.5 in. measured from the centre of the front wheels to the centre of the rear wheels, and a turning radius of 31.3 in., as compared to Canadian-built, three-wheeled scooters which have a wheelbase ranging from 30.0 to 35.0 in. and a larger turning radius ranging from 40.0 to 45.0 in. The smaller turning radius permits the Rascal scooter to turn at a tighter angle and allows the user to get closer to objects, such as desks, tables and countertops. Finally, in addressing the issue of weight capacity, Mr. Flowers explained that

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).

the Rascal scooter has a listed weight capacity of 400 lbs and is able to accommodate heavier users than can Canadian-built scooters, as a result of its frame design, which is a die-cast aluminum as opposed to a welded frame, and of its seat-base and seat-post arrangements which all enhance the durability of the scooter.

Ms. Kissick explained her role on the Mobility Device Evaluation Team (MDET) of the Assistive Device Branch (ADB) which evaluated the Rascal scooter from December 1990 to January 1991 for the purposes of determining if it should be approved for funding by the Assistive Devices Program (ADP) of the Ontario Ministry of Health. She referred to the results of her clinical evaluation in her report dated January 8, 1991, in which she stated that, with respect to performance and durability, the Rascal scooter "offers a unique feature with a standard front end and two handled tiller which can be switched with a small front end and one sided tiller. The adjustable feature improves manoeuvrability in small/crowded spaces." She also stated that the Rascal scooter was good for independent transfer, that it was adaptable to small indoor areas or large indoor/outdoor spaces, and that the smaller front end and tiller were ideal for getting close to work spaces. She stated, generally, that the convertibility to four wheels reduces the length of the scooter and its turning radius, thereby increasing manoeuvrability. At the time of the report, she was not aware of any Canadian-built scooter that had the feature of indoor manoeuvrability for access to work spaces or small turning radius.

Ms. Speers, an expert in the assessment of the needs of the physically disabled and in the prescription of assistive devices, and a former consultant for the ADP, stated that, in her opinion, the convertibility feature from a one-wheeled front end to a shorter two-wheeled front end, the flexible one-handed tiller on the two-wheeled front end and the greater weight capacity of the Rascal scooter were features not available on Canadian-built scooters. She formulated this opinion after having attended seminars and trade shows organized by manufacturers and vendors, after having reviewed trade literature published by manufacturers and after having examined the Rascal scooter itself. She was familiar with the Carrette scooter manufactured by Everest & Jennings Canadian Limited (Everest & Jennings) and the 2000FS and 2001LX scooters manufactured by Fortress Scientific Limited (Fortress), but, in her view, these scooters did not have the same features as the Rascal scooter. She was not familiar with scooters manufactured by Ranger Scooters Ltd. (Ranger), since they were not then approved by the ADP. She agreed that the three-wheeled Rascal scooter, in models 210, 220, 230 and 240, with the one-wheeled front end has a turning radius that is comparable to that of other scooters available in the Canadian scooter market.

Mr. Brown, a user of the Rascal scooter, model 240, explained that, prior to purchasing his scooter in June 1991, he familiarized himself with scooters manufactured by Fortress and Everest & Jennings, but chose the Rascal scooter because, at the time, he weighed 439 lbs, and it was the only one which, in his opinion, had sufficient weight capacity. From all the literature that he had reviewed from various manufacturers, none were represented as being capable of carrying more than 350 lbs, and none of the manufacturers would offer a warranty for use by a person weighing more than 350 lbs. The literature on the Rascal scooter stated that it had a weight capacity of up to 400 lbs, but the appellant guaranteed Mr. Brown's scooter for one year. Mr. Brown also indicated that he was interested in the conversion capability, which would be useful if he returned to work or if his disability worsened and he had to use the scooter indoors.

Witnesses for both the respondent and the appellant agreed that the Rascal scooter has unique features not available on Canadian-built scooters, particularly the convertibility feature, its shorter wheelbase and smaller turning radius for better indoor manoeuvrability, but they were of the view that these features did not make the Rascal scooter of a class or kind different from Canadian-built scooters.

The Tribunal heard evidence from Mr. Steve Elder, an expert with respect to both the technical

and the clinical aspects of mobility device evaluation, who was responsible for the MDET which evaluated the Rascal scooter. He confirmed that he adopted Ms. Kissick's statements and her findings in the clinical evaluation report, but he was of the view that the Rascal scooter did not offer different functions, only different features that did not set it apart from the average Canadian-built scooter with which he was familiar, namely, the Carrette scooter, the Fortress 2000FS and 20001LX scooters, and the Ranger scooter. He pointed out that, with respect to the three-wheeled models, the different attributes of the Rascal scooter were the sideways, anti-tipper foot support and the flexible tiller and, with respect to the four-wheeled scooter, the foot position anterior to the wheels, the one-handed side tiller drive, and the shorter wheelbase and turning radius. As to the issue of weight capacity, he stated that there is normally a difference between the weight capacity advertised in a brochure and the true weight capacity of a scooter and that customizing is always available to enhance weight capacity.

Three representatives of Canadian manufacturers of scooters appeared on behalf of the respondent and stated that their companies' scooters compete with the Rascal scooter. Mr. Gregg McBurnie, President of Ranger, which only sells scooters in British Columbia and Alberta, stated that he never had to turn away a customer because of weight and that Ranger had accommodated at least one user weighing 450 lbs by customizing the scooter. He also stated that all Ranger tillers can be operated with one hand, are adjustable in infinite increments, are durable and can withstand a lot of pressure.

Mr. Drew Gibney, Manager of Research and Development and Product Engineering for Everest & Jennings, discussed the capabilities of the Carrette scooter. He confirmed that the weight capacity is lower than that of the Rascal scooter, and he did not recall Everest & Jennings having supplied a scooter to a customer weighing over the recommended weights. He described the tiller as a straight T-tiller with an adjustable angle. He agreed that the Carrette scooter is not as manoeuvrable indoors as is the Rascal scooter, but that it is capable of being used both indoors and outdoors.

Mr. William Zerter, Vice-President of Finance for Fortress, and an engineer and chartered accountant, explained that Fortress manufactures four models of scooters: 2000FS, 2001LX, 1700FS and 1704FS. The 1700FS and 1704FS are convertible scooters, but were not available during the period of time at issue in this appeal. Fortress also manufactures manual and power wheelchairs, and, in Mr. Zerter's view, the Rascal scooter competes with low-end power wheelchairs. With respect to weight capacity, he stated that the scooters could be customized to accommodate greater weights.

The last witness for the respondent was Mr. Garth Teskey, Tariff Administrator with the Specialty Product Unit of the Department of National Revenue, who testified with respect to the issue of whether goods of the same class or kind as the Rascal scooter are manufactured in Canada in "substantial quantities" as required by subsection 12(1) of the *Customs Tariff*. As established in the *Substantial Quantity of Goods Percentage Order, 1987*,³ "substantial quantity" means a quantity sufficient to supply 10 percent of the normal Canadian consumption of the goods in issue.

Mr. Teskey reviewed the December 1991 Statistics Canada trade statistics for subheading No. 8713.90 for invalid carriages, including wheelchairs, whether or not motorized or otherwise mechanically propelled, and information compiled from Fortress, Everest & Jennings and Ranger. He concluded that, if the Rascal scooter and the Canadian-built scooters were found to be of the same class or kind, the percentage being built in Canada would be greater than 10 percent.

Although no evidence was presented with respect to the issue of climbing capabilities, both counsel agreed that, since the decision in *Aisco Industrial Safety Apparel v. The Deputy Minister of National Revenue for Customs and Excise*⁴ and the importation at issue, some Canadian scooters built

3. SOR/88-81, December 31, 1987, Canada Gazette Part II, Vol. 122, No. 2 at 843.

4. (1987), 12 T.B.R. 247.

by Fortress and Ranger have comparable climbing capabilities and that it is important for scooters to be able to climb minimum inclines.

Counsel for the appellant referred specifically to four decisions of the Tariff Board and submitted that, in determining whether the Rascal scooter was of a class or kind not made in Canada, the Tribunal should be concerned with (1) whether it has a unique capability arising from its design, as discussed in *Billiton-Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁵ (2) whether it serves the same function in the same manner as Canadian-built goods, as discussed in *Golden Boy Sales of Alberta Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁶ and (3) whether the essential characteristics of the Rascal scooter are different from Canadian-built goods, as discussed in *Canadian Cannery Limited v. The Deputy Minister of National Revenue for Customs and Excise*.⁷

Counsel for the appellant submitted that the Tribunal should be most persuaded by the Tariff Board's decision in *Aisco* that an imported scooter was of a class or kind not made in Canada because it was different from Canadian-built scooters in respect of weight, power, traction and, more specifically, climbing abilities.

According to counsel for the appellant, the Rascal scooter meets all of the tests to qualify as a scooter of a class or kind not made in Canada. He submitted that the Rascal scooter creates a whole new function of indoor mobility in confined spaces, as supported by the statements of Ms. Kissick in her report and at the hearing, which were adopted by Mr. Elder and the ADP. Counsel contended that the patent is strong evidence of the uniqueness of the design of the Rascal scooter. With respect to the weight capacity of the Rascal scooter, he referred to Mr. Elder's comments that he was not aware of a Canadian-built scooter which claimed to meet the special needs of a heavy user, such as Mr. Brown, and to Mr. Flowers' evidence regarding the enhanced durability of the Rascal scooter's die-cast frame.

Counsel for the respondent submitted that the Rascal scooter is part of the class comprised of all Canadian-built scooters and that none of its features, namely, the convertibility feature and the weight capacity, is sufficient for it to be considered in a class or kind different from the general class of scooters. He submitted that the Tariff Board decision in *McClellan Derkoch Enterprises Inc. et al. v. The Deputy Minister of National Revenue for Customs and Excise*⁸ concerning wheelchairs was more helpful than the *Aisco* decision. In the former decision, it was found that the availability of different wheel sizes, push rims, seats, castors and tires did not make a certain wheelchair of a class or kind not made in Canada. He submitted that the differences between the Rascal scooter and the Canadian-built scooters are similar to those discussed in the *McClellan* case and that, therefore, by analogy, the Tribunal should find that the Rascal scooter is not of a class or kind not made in Canada. Assuming that the class or kind is comprised of all scooters, counsel submitted that the significant quantity test is met since, as stated by Mr. Teskey, Canadian-built scooters represent well over 10 percent of the Canadian scooter market.

Having reviewed the evidence and considered the arguments, the Tribunal concludes that the Rascal scooter is of a class or kind not made in Canada and that, therefore, this appeal must be allowed. The Rascal scooter has a convertibility feature from three wheels to four wheels that is not otherwise available on the Canadian market. The Tribunal finds that the patented convertibility feature is a unique design feature which offers users the advantages of the traditional three-wheeled scooter,

5. (1984), 9 T.B.R. 297.

6. (1984), 9 T.B.R. 217.

7. (1988), 13 T.B.R. 104.

8. (1984), 9 T.B.R. 249.

like that made in Canada, and of a four-wheeled scooter which, arising from the nature of its design, has superior manoeuvrability in confined spaces as compared to Canadian-built scooters. The evidence also indicated that the Rascal scooter offers a different choice to the Canadian consumer. The concept of "two vehicles in one" enables the user, through the purchase of the Rascal scooter with its convertibility feature, to enjoy greater manoeuvrability indoors while, at the same time, being able to achieve outside performance comparable to Canadian-built, three-wheeled scooters. The evidence presented to the Tribunal indicated that no Canadian-built scooter would offer the indoor manoeuvrability of the Rascal scooter.

Whether or not the Rascal scooter is imported in the three-wheeled or the four-wheeled configuration, or with both the one-wheeled and the two-wheeled front end, it is of a class or kind not made in Canada by virtue of its unique design, which makes it capable of being converted from three to four wheels, unlike any other Canadian-built scooter. Since no Canadian-built scooter has this convertibility feature, there are no scooters of the same class or kind as the Rascal scooter, and there is not, therefore, a substantial quantity of scooters of the same class or kind as the Rascal scooter manufactured in Canada.

The Tribunal does not agree with the suggestion that the Rascal scooter in the four-wheeled configuration should be compared to a power wheelchair. Several of the witnesses discussed the differences between the four-wheeled Rascal scooter and a power wheelchair and suggested that they have different applications. The power wheelchair is intended for users who are less mobile, requiring specialized seating and/or requiring a specialized method of operating the device, for example, by means of a mouth switch. Furthermore, it is apparent that the power wheelchair represents a different class of goods.

Accordingly, the appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
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Member