



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-025

Conair Consumer Products ULC

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 2, 2019*

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DECISION 7

IN THE MATTER OF an appeal heard on March 5, 2019, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated February 16, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CONAIR CONSUMER PRODUCTS ULC

Appellant

AND

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

Respondent

DECISION

The appeal is denied.

Ann Penner

Ann Penner

Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 5, 2019
Tribunal Panel: Ann Penner, Presiding Member
Support Staff: Kalyn Eadie, Counsel

PARTICIPANTS:**Appellant**

Conair Consumer Products ULC

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Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Conair Consumer Products ULC (Conair) on May 18, 2018, pursuant to subsection 67(1) of the *Customs Act*¹ from decisions of the President of the Canada Border Services Agency (CBSA), dated February 16, 2018, made pursuant to subsection 60(4).

2. The issue in this appeal is whether two models of hot air brushes, the “Ionic Hot Air Style Brush” and the “Spin Air Brush” (the goods in issue) are properly classified under tariff item No. 8516.32.90 of the schedule to the *Customs Tariff*² as other, other hair-dressing apparatus, as determined by the CBSA, or should be classified under tariff item No. 8516.31.00 as hair dryers, or under tariff item No. 8516.32.10 as curling irons, as claimed by Conair.

PROCEDURAL HISTORY

3. On August 25, September 29 and October 5, 2016, Conair imported the goods in issue and classified them under tariff item No. 8516.31.00 as hair dryers.

4. As a result of the CBSA’s verification of the classification of similar goods,³ Conair filed three corrections to the declarations of the tariff classification of the goods in issue, as required by section 32.2 of the *Act*, classifying them under tariff item No. 8516.32.90 as other hair-dressing apparatus. On February 9, 2017, the CBSA accepted Conair’s corrections and, in accordance with subsection 32.2(3), treated them as if they were re-determinations under paragraph 59(1)(a) of the *Act*.

5. On May 12, 2017, pursuant to subsection 60(1) of the *Act*, Conair requested a further re-determination of the classification of the goods in issue. Conair argued that the goods in issue should be classified under tariff item No. 8516.32.10 as curling irons.

6. On February 16, 2018, pursuant to subsection 60(4) of the *Act*, the CBSA further re-determined the classification of the goods in issue and maintained that they were properly classified under tariff item No. 8516.32.90 as other, other hair-dressing apparatus.

7. On May 18, 2019, Conair filed this appeal with the Tribunal.⁴

8. The Tribunal held a public hearing on March 5, 2019. The Tribunal heard testimony from Mr. M. P. Sullivan, Vice-President of Marketing at Conair,⁵ and Ms. Natasha MacDonald, the proprietor of Natasha’s Looks, a hair salon.⁶

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

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

3. The verification was completed August 11, 2016.

4. Conair’s notice of appeal was filed one day past the 90-day deadline to appeal the President’s decision. On June 13, 2019, Conair filed an application pursuant to section 67.1 of the *Act* for an extension of time to file the notice of appeal. On July 20, 2019, the Tribunal granted the extension of time and accepted the documents filed May 18 and June 13, 2018, as the Notice of Appeal. *Conair Consumer Products ULC* (20 July 2018), EP-2018-002 (CITT).

5. *Transcript of Public Hearing* at 7.

6. *Ibid.* at 49.

DESCRIPTION OF THE GOODS IN ISSUE

9. The goods in issue are two models of hot air brushes. They are electrically powered, hand-held appliances that consist of a handle and a barrel. The barrels are made of metal (coated with ceramic) or nylon plastic, and have bristles of nylon and/or natural boar. The handles contain a motor and a fan which generate hot air that is expelled through small holes on the barrel.⁷

10. The goods in issue are marketed as “multitaskers” that can be used to “style”, “shape” and “straighten” hair, add “volume”, “shine” and “smoothness”, create “lift” and “large, soft curls”.⁸ The goods in issue can also dry damp hair, and are intended for hair that is 80 to 90 percent dry.⁹

11. Conair filed a number of physical exhibits, including the goods in issue, a model of hot air brush that is not in issue in this appeal, a straightening iron, a “traditional” curling iron and a hair dryer.¹⁰ The instruction manuals for all of these items were also filed as part of these exhibits.¹¹ In addition, three videos demonstrating the use of the goods in issue and of a curling iron were filed as exhibits and shown at the hearing.¹²

LEGAL FRAMEWORK

12. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,¹³ which is designed to conform to the *Harmonized Commodity Description and Coding System* developed by the World Customs Organization (WCO). 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.

13. 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*¹⁴ and the *Canadian Rules*¹⁵ set out in the schedule.

14. 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.

15. 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*¹⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding*

7. *Ibid.* at 11.

8. Exhibit AP-2018-025-10A, Vol. 1 at 51-67.

9. Exhibits AP-2018-025-A-01 and A-02 (instruction manuals); *Transcript of Public Hearing* at 21 and 28.

10. Exhibits AP-2018-025-A-01 to A-06.

11. Exhibit AP-2018-025-15, Vol. 1.

12. Exhibits AP-2018-025-B-01 and B-02; *Transcript of Public Hearing* at 4, 6.

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

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

15. S.C. 1997, c. 36, schedule [*Canadian Rules*].

16. WCO, 4th ed., Brussels, 2017.

System,¹⁷ 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.¹⁸

16. 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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other *General Rules* become relevant to the classification process.¹⁹

17. 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.²⁰ The final step is to determine the proper tariff item.²¹

Relevant tariff nomenclature, legal and explanatory notes

18. The relevant tariff nomenclature is as follows:

SECTION XVI

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

...

Chapter 85

ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEROF; SOUND RECORDERS AND REPRODUCERS; TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

...

85.16 **Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic**

17. WCO, 6th ed., Brussels, 2017.

18. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 13, 17; *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20, at para. 4.

19. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

20. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. 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."

21. 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." The classification opinions and explanatory notes do not apply to classification at the tariff item level.

appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45.

...

-Electro-thermic hair-dressing or hand-drying apparatus:

8516.31.00 - -Hair dryers

...

8516.32 - -Other hair-dressing apparatus

8516.32.10 - -Curling irons

8516.32.90 - -Other

19. Note 3 to Section XVI and the relevant explanatory notes provide as follows:

3.- Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

(VI) MULTI-FUNCTION MACHINES
AND COMPOSITE MACHINES

(Section Note 3)

In general, multi-function machines are classified according to the principal function of the machine.

Multi-function machines are, for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g., milling, boring, lapping).

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.69 to 84.72.

Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.

ANALYSIS

20. In an appeal of this sort, the Tribunal's role is to determine the proper tariff classification of the goods in issue on the basis of their characteristics at the time of importation.

21. The parties agree, and the Tribunal accepts, that the goods in issue should be classified under heading No. 85.16 according to Rule 1 of the *General Rules*. Although Conair initially argued that the goods in issue could potentially be classified in subheading No. 8516.31 as hair dryers, it conceded at the hearing that the goods in issue are not hair dryers in light of their different characteristics and the fact that their purpose is not to dry hair.²² Accordingly, the Tribunal will not consider whether the goods in issue can be classified in subheading No. 8516.31 and finds that they are classified in subheading No. 8516.32 as other hair-dressing apparatus.

22. *Transcript of Public Hearing* at 65.

22. As such, the only issue that remains to be resolved in this appeal is the classification of the goods in issue at the tariff item level. The Tribunal will therefore consider whether the goods in issue are (1) curling irons of tariff item No. 8516.32.10 or (2) other, other hair-dressing apparatus of tariff item No. 8516.32.90.

Are the goods in issue curling irons?

23. Conair submitted that the goods in issue should be classified under tariff item No. 8516.32.10 as curling irons. Conair relied on the Tribunal's decision in *Conair Consumer Products Inc. v. the Commissioner of the Canada Customs and Revenue Agency*²³ to support its position. In that decision, the Tribunal adopted the dictionary definition of a curling iron as a "... metal instrument which is heated and around which a lock of hair to be curled or waved is wound". The Tribunal found that the hair crimpers and straightening irons at issue in that case did not meet that definition as they were not primarily designed to curl hair like a curling iron. The evidence in that case was that the goods in issue were marketed as being able to style hair in many different ways, including curling, and that crimpers and straightening irons were marketed under separate headings on Conair's website. Finally, the Tribunal stated that it was not convinced by the evidence that, because of their physical characteristics, purpose and design, the goods in issue were very similar to curling irons and that, as such, they should be classified as curling irons.²⁴

24. Conair submitted that, unlike the hair straighteners and crimpers at issue in *Conair I*, the goods in issue in this appeal perform the same principal function as a curling iron, namely they curl hair using heat. Conair acknowledged that there are some differences between the goods in issue and "traditional" curling irons in terms of their physical characteristics, purpose and design. Nevertheless, it ascribed those differences to technological advancements and submitted that the goods in issue are simply more modern versions of curling irons.

25. Conair also recognized that the goods in issue, like the straighteners and crimpers at issue in *Conair I*, performed multiple functions above and beyond hair curling alone, such as hair drying, smoothing, and volumizing. Conair noted that composite or multi-function machines, as defined in note 3 to Section XVI, are to be classified in accordance with their principal function according to that note and its corresponding explanatory notes, and reiterated that the principal function of the goods in issue is to curl hair.

26. In contrast, the CBSA submitted that as the goods in issue are not curling irons and, as the parties agree that the goods in issue should be classified in subheading No. 8516.32, the only possible tariff classification is in tariff item No. 8516.32.90. The CBSA submitted that, similarly to the situation in *Conair I*, the goods in issue are used to style hair in many different ways, and they are not primarily designed to curl hair in the same way as curling irons. The CBSA pointed to several differences between the goods in issue and curling irons in terms of their physical characteristics, as well as their design and marketing, which will be further elaborated below.

27. With respect to note 3 to Section XVI, the CBSA submitted that Conair had not established that the goods in issue are composed of two or more *machines* and, as a result, cannot be considered composite machines. Further, the CBSA submitted that the goods in issue are not multi-function or composite machines because they have a single function (i.e. to style hair).

23. (20 October 2003), AP-2002-095 (CITT) [*Conair I*].

24. *Ibid.* at 4-5.

28. In regards to Conair's argument concerning note 3 to Section XVI, the Tribunal agrees with the CBSA that the goods in issue have a single function and that function is to style (or dress) hair. As noted by the CBSA, the goods in issue are advertised as "multitaskers", and the evidence demonstrates that they can style hair in a variety of ways. All of these ways are captured by the definition of the term "hair-dressing", which is the expression used in the applicable heading and subheading ("hair-dressing apparatus"). According to *Merriam-Webster's Collegiate Dictionary*, "Hair-dressing" is defined as "1 a : the action or process of washing, cutting, *curling*, or *arranging* the hair . . . 2 : a preparation for *grooming and styling* the hair."²⁵ Furthermore, the goods in issue achieve different hair styles in the same way, i.e. by applying hot air to the hair while manipulating it with the brush attachment. The Tribunal therefore considers that the function of the goods in issue is best described by the term "hair-dressing"; while different hair-styling effects can be achieved using the goods in issue, it is not correct to treat these as separate functions.

29. Accordingly, note 3 to Section XVI does not apply in this instance and the Tribunal will proceed to consider whether the goods in issue can be classified in tariff item No. 8516.32.10 using only Rule 1 of the *General Rules*, i.e. whether the goods in issue are curling irons.

30. As noted by the Tribunal in *Conair I*, there is no definition of the term "curling iron" in the nomenclature or legal or explanatory notes, and the term should therefore be given its ordinary meaning. In *Conair I*, the Tribunal considered the dictionary definition of "curling iron" cited above to be determinative of the ordinary meaning.²⁶ The Tribunal will adopt the same approach in this case, and notes that the dictionary definition of "curling iron" has not changed since *Conair I* was issued in 2003.²⁷

31. The Tribunal finds that the goods in issue do not fit the definition of "curling irons". The evidence presented to the Tribunal indicates that there are significant differences between the goods in issue and curling irons in regards to their function, physical characteristics, design, and marketing.

32. According to the evidence, curling irons have metal, sometimes ceramic-coated, barrels with a hinged spoon that is used to hold the hair in place once it is wound around the barrel.²⁸ While the goods in issue can also have metal barrels,²⁹ their barrels are essentially brushes with bristles of nylon and/or natural boar.³⁰

33. Further, the goods in issue have a fan, a motor and different speed settings, whereas curling irons do not. In curling irons, heat is transferred from the heating element to the barrel, which takes approximately 15 to 45 seconds to heat up; in contrast, the fan and motor allow the goods in issue to become hot instantly.³¹

34. In terms of their intended use, the evidence is that curling irons should not be used on a daily basis as the application of high heat (up to 400 degrees Fahrenheit) directly to the hair can cause damage; in addition, the instruction manual for the curling iron contains a warning to ensure the hot barrel does not come into contact with the skin.³² In contrast, the goods in issue are recommended for daily use and are

25. 11th ed., s.v. "hair-dressing" [emphasis added].

26. *Conair I* at 4-5.

27. *Merriam-Webster's Collegiate Dictionary*, 11th ed., s.v. "curling iron".

28. Exhibit AP-2018-025-10A, Vol. 1 at 79.

29. At least one of the barrel attachments for Exhibit AP-2018-025-A-01 is made of "nylon plastic", according to Mr. Sullivan's testimony. See *Transcript of Public Hearing* at 11.

30. Exhibits AP-2018-025-A-01, A-02 and A-05; *Transcript of Public Hearing* at 9-10, 15-16, 19, 32.

31. *Ibid.* at 13, 21, 31.

32. Exhibit AP-2018-025-10A, Vol. 1 at 79.

marketed as a less-damaging way to style the hair.³³ In addition, curling irons should only be used on hair that is completely dry, while the goods in issue can be used to finish drying damp (80 to 90 percent dry) hair.³⁴

35. As previously mentioned, in terms of their effects, curling irons curl and volumize hair whereas the goods in issue are marketed as “multitaskers” that can curl but also dry, lift, style, shape, and wave hair.³⁵ On Conair’s website, curling irons are included under the “curling iron” tab, whereas the goods in issue are found under the “hot brushes”, “hot air brushes” and “volume series” tabs.³⁶

36. Conair argued that the Tribunal should apply a broad, open-textured interpretation of the expression “curling iron”, and argued that the goods in issue are sufficiently similar in terms of their appearance and function to be considered curling irons using this approach. Conair also argued that the way the goods in issue are marketed, especially the matter of where they are located on its website, should be given little weight in this case because what is important is the primary function of the goods in issue.

37. Even adopting a broader interpretation of the term, and leaving aside the fact that the barrels of the goods in issue are not necessarily made of metal, that they are not heated in the same way as a curling iron, and that the hair is not wound around the barrel and held in place by a spoon, the goods in issue would still not be considered curling irons due to the fact that their main function, as discussed above, is not simply to curl hair but to style it in many different ways. Simply put, the goods in issue are too different from “traditional” curling irons to be considered to meet the ordinary meaning of that term.

38. In light of the above, the Tribunal finds that the goods in issue are not “curling irons” of tariff item No. 8516.32.10.

39. Since the parties and the Tribunal agree that the goods in issue are other hair-dressing apparatus of subheading No. 8516.32, and the goods in issue cannot be classified under tariff item No. 8516.32.10, the goods in issue must be properly classified under the residual tariff item No. 8516.32.90 as other, other hair-dressing apparatus.

DECISION

40. The appeal is denied.

Ann Penner

Ann Penner

Presiding Member

33. *Ibid.*; *Transcript of Public Hearing* at 13, 31-32, 34-35, 40.

34. Exhibit AP-2018-025-10A, Vol. 1 at 79; Exhibits AP-2018-025-A-01 and A-02 (instruction manuals); *Transcript of Public Hearing* at 14, 21, 23, 28, 30.

35. *Ibid.* at 11, 13-14, 19, 27, 51, 53.

36. Exhibit AP-2018-025-10A, Vol. 1 at 50-53, 75-77; *Transcript of Public Hearing* at 26-27, 29, 33.