



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-056

Toolway Industries

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, January 22, 2020*

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DECISION 11

IN THE MATTER OF an appeal heard on September 24, 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 November 16, 2018, with respect to requests for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

TOOLWAY INDUSTRIES

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 24, 2019
Tribunal Panel: Jean Bédard, Q.C., Presiding Member
Support Staff: Heidi Lee, Counsel

PARTICIPANTS:**Appellant**

Toolway Industries

Counsel/RepresentativesMarco Ouellet
Jeffrey Goernert**Respondent**The President of the Canada Border Services
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WITNESSES:Asher Peres
President
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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by Toolway Industries (Toolway) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*¹ from a decision by the President of the Canada Border Services Agency (CBAS) dated November 16, 2018, made pursuant to subsection 60(4).

[2] The issue in appeal is whether various models of door levers (the goods in issue) are properly classified under tariff item No. 9979.00.00 as “goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities”, as claimed by Toolway.

PROCEDURAL HISTORY

[3] Between February 2014 and June 2017, Toolway imported the goods in issue in 14 transactions under headings No. 83.01 and 83.02. Toolway filed requests for re-determination pursuant to section 74 of the *Act*, on the basis that the goods qualify for conditional relief of duties under tariff item No. 9979.0.00. Between September 2017 and February 2018, the CBSA denied Toolway’s requests.

[4] In October 2017 and April 2018, Toolway requested further re-determinations. On November 16, 2018, the CBSA rejected Toolway’s requests pursuant to subsection 60(4) of the *Act*.

[5] On December 21, 2018, Toolway filed the present appeal.

[6] On September 24, 2019, the Tribunal held a public hearing in Ottawa, Ontario. Toolway called two witnesses – Mr. Asher Peres, President of Toolway, and Ms. Kate Berry, an occupational therapist. The CBSA did not call any witnesses.

GOODS IN ISSUE

[7] The goods in issue are the following seven models² of “Tough Guard” brand door levers:

| Lever type | Model No. | Lockset |
|----------------|------------|-----------------|
| U-shaped lever | No. 100865 | Entry lockset |
| U-shaped lever | No. 100866 | Privacy lockset |
| U-shaped lever | No. 100867 | Passage lockset |
| Straight lever | No. 100760 | Dummy lockset |
| Straight lever | No. 100761 | Dummy lockset |
| Wavy lever | No. 100762 | Dummy lockset |
| Wavy lever | No. 100763 | Dummy lockset |

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

² The goods in issue originally included nine additional models of levers. Toolway withdrew these models on September 17, 2019 (see Exhibit No. AP-2018-056-24, Vol. 1), and confirmed at the hearing that they were not subject to this appeal (see *Transcript* at pp. 5-6).

[8] Entry locksets can be locked and unlocked with a key. The privacy locksets lock from one side only. The passage models have no locks. The dummy locksets have no latch mechanism.

[9] The goods are approved by Underwriters Laboratory (UL) and are manufactured to grade 2 or 3 on the American National Institute/Builders Hardware Manufacturers Association (ANSI/BHMA)³ grading scale.

[10] There is no dispute that the goods are properly classified under tariff item Nos. 8302.41.90 and 8301.40.90.

STATUTORY FRAMEWORK

[11] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,⁴ which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁵ 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.

[12] 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*⁶ and the *Canadian Rules*⁷ set out in the schedule.

[13] 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.

[14] 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*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ 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.¹⁰

[15] Chapter 99, which includes tariff item No. 9979.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. The provisions of this chapter are not standardized at the international level. As none of the headings of Chapter 99 are

³ The BHMA is a trade association that develops and maintains ANSI-approved standards for various product categories, including that for the goods in appeal. See Exhibit AP-2018-056-16A at p. 56, Vol. 1.

⁴ S.C. 1997, c. 36.

⁵ Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

⁶ S.C. 1997, c. 36, schedule [*General Rules*].

⁷ S.C. 1997, c. 36, schedule.

⁸ World Customs Organization, 4th ed., Brussels, 2017.

⁹ World Customs Organization, 6th ed., Brussels, 2017.

¹⁰ See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17, and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 (CanLII), at para. 4.

divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no classification opinions or explanatory notes to consider.

[16] Note 3 to Chapter 99 is relevant to the present appeal. This note provides as follows:

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.

[17] As the goods in issue are classified under tariff item Nos. 8302.41.90 and 8301.40.90, the condition of note 3 to Chapter 99 requiring that the goods first be classified under tariff items in Chapters 1 to 97 is met.

[18] In order to qualify for relief of duties under tariff item No. 9979.00.00, the goods in issue must be specifically designed to assist persons with disabilities in alleviating the effects of those disabilities.

[19] The Tribunal notes that tariff item No. 9979.00.00 was amended effective on January 1, 2019. The goods in issue were imported between 2010 and 2014, and the decisions by the CBSA that are being appealed were made before the amendments came into force. Therefore, the Tribunal's analysis and decision are based on the tariff item description as it existed prior to January 1, 2019.¹¹

POSITIONS OF THE PARTIES

Toolway

[20] Toolway submitted that the goods in issue are designed to open doors with minimal effort by hand or elbow, which assists persons with disabilities such as loss of strength in the arms or hands, loss of use of the arms or hands, or vision loss.

[21] Toolway submitted that the goods were specifically designed to comply with the relevant accessibility standards set out by the *American Disability Act* (ADA) and by the Canadian Standards Association's (CSA) B651-04 "Accessible Design for the Built Environment".

CBSA

[22] The CBSA submitted that the goods do not assist persons with disabilities and that there is no rational connection between the design of the goods and its purported benefits. The CBSA also argued that there is no evidence demonstrating that the goods were purposefully designed to assist persons with disabilities.

¹¹ As of January 1, 2019, the amended tariff item No. 9979.00.00 reads as follows: "Goods specifically designed to alleviate the specific effects of a disability, and articles and materials for use in such goods."

[23] The CBSA also submitted that the goods do not actually meet the relevant ADA or CSA standards, nor is there any evidence on the record to prove their compliance. The CBSA further argued that even if the goods were compliant, mere compliance with accessibility standards is insufficient for classification under tariff item No. 9979.00.00.

ANALYSIS

The evidence before the Tribunal

[24] Toolway's evidence comprised a number of documents¹² and the testimonies of its President, Mr. Asher Peres, and of Ms. Kate Berry, an occupational therapist. The documentary evidence mostly concerned guidelines and standards for accessible design. Toolway did not provide any documentary evidence to demonstrate that the goods had been tested against, and met, these standards. The only evidence directly related to the goods in issue was the oral evidence given by the two witnesses.

[25] When asked to describe his role with the appellant, Mr. Peres informed the Tribunal that he primarily oversees product development, i.e. conducting market research and developing products that provide solutions to meet market needs.¹³ In cross-examination, Mr. Peres testified that his passion was product development and introducing new and exciting products.¹⁴ While Mr. Peres is conversant with the ADA, CSA and other relevant standards for accessibility, the Tribunal was not satisfied that he has a level of expertise that would allow the Tribunal to rely on the claims and assertions he made during his testimony. Under cross-examination, Mr. Peres largely provided self-serving arguments under solemn affirmation, as opposed to providing direct and precise answers to questions asked by counsel. Altogether, as a fact witness, Mr. Peres provided testimony that, while uncontroverted, was not particularly helpful to the Tribunal in determining the issues in appeal.

[26] Mr. Peres also testified that Toolway subjects its products to third-party quality assurance and internal due diligence,¹⁵ but the Tribunal was not provided with any documentation evidencing the results of any such testing performed in connection with the goods in issue.

[27] While actual testing against ANSI/BHMA accessibility criteria was performed by a third-party laboratory on models that were initially part of this appeal, Toolway subsequently removed these models from appeal. As a result, the test report does not cover any of the remaining goods in issue in this appeal and therefore holds no probative value. There was no evidence of

¹² CSA's B651-04 "Accessible design for the built environment" standard (Exhibit AP-2018-056-03 at p. 21, Vol. 1); a document summarizing updates to the International Code Council's A117.1-2017 Standard for Accessible and Usable Buildings and Facilities (Exhibit AP-2018-056-16A at p. 18, Vol. 1); a "Hardware Highlight" advisory document published by the BHMA on the ANSI/BHMA A156.2-2017 standard for Bored & Preamsembled Locks and Latches (Exhibit AP-2018-056-16A at p. 56, Vol. 1); information from doorware.com on ADA-compliant door hardware (Exhibit AP-2018-056-16A at p. 58, Vol. 1); an informational document on accessibility of doors and handles (Exhibit AP-2018-056-16A at p. 61, Vol. 1); Accessibility for Ontarians with Disabilities Built Environment Standard (Exhibit AP-2018-056-16A at p. 70, Vol. 1); and 2010 ADA Standards for Accessible Design (Exhibit AP-2018-056-19 at p. 31, Vol. 1). In addition, Toolway submitted its product catalogue for the goods in issue.

¹³ *Transcript* at p. 7.

¹⁴ *Transcript* at p. 24.

¹⁵ *Transcript* at p. 25.

similar testing performed on any of the remaining models which remain the subject matter of this appeal. Furthermore, the Tribunal notes that the test report in fact demonstrated that some of the former goods in issue were not fully compliant with the accessibility requirement that controls be operable with less than 22 N of force.

[28] Toolway also relied on the presence of the “ADA wheelchair symbol” in its catalogue to support its claim that the goods in issue meet the standards for goods designed to assist persons with disabilities.

[29] Ms. Berry, an occupational therapist and a rehabilitation case manager, testified as a lay witness on issues about which she has first-hand knowledge as part of her work. According to Ms. Berry, the purpose of occupational therapy is to enable function and independence, increase participation in meaningful activities and improve quality of life.¹⁶ The Tribunal finds that Ms. Berry’s uncontradicted testimony is credible.

[30] While Ms. Berry’s testimony was useful in explaining how the applicable accessibility criteria would assist in alleviating the effects of various disabilities, she was unable to conclusively testify that the goods in issue comply with the ADA and CSA requirements.

Discussion of the law

[31] As indicated above, the parties agree, and the Tribunal accepts, that the goods in issue are classified under tariff item Nos. 8302.41.90 and 8301.40.90. Accordingly, the only issue before the Tribunal is whether the goods are entitled to benefit from duty relief under tariff item No. 9979.00.00 as goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities.

[32] As held in *Sigvaris*, the Tribunal must therefore determine (1) whether the goods in issue are specifically designed to assist persons with disabilities, and (2) whether the goods in issue are specifically designed to assist such persons in alleviating the effects of those disabilities.¹⁷ In other words, there must be evidence that a design is purposefully related to the alleviation of the effect of disabilities, and there must be some evidence that the goods live up to the claim that they make.¹⁸

[33] With respect to the second part of the test, the Tribunal has consistently held that compliance with generally recognized accessibility standards (also referred to as barrier-free standards) can be indicative of the fact that the product was specifically designed to assist persons with disabilities in alleviating the effects of those disabilities.¹⁹ As the Tribunal noted in *Globe Union*:

¹⁶ *Transcript* at pp. 88, 89.

¹⁷ *Sigvaris Corporation v. President of the Canada Border Services Agency* (23 February 2009), AP-2007-009 (CITT) [*Sigvaris*] at para. 26. See also *Globe Union Canada v. President of the Canada Border Services Agency* (22 August 2019), AP-2017-055 (CITT) [*Globe Union*] at para. 28.

¹⁸ *Masai Canada Limited v. President of the Canada Border Services Agency* (5 August 2011), AP-2010-025 (CITT) [*Masai*] at para. 22.

¹⁹ *Globe Union* at paras. 29-30. See also *BSH Home Appliance Ltd. v. President of the Canada Border Services Agency* (27 October 2014), AP-2013-057 (CITT) at para. 56; and *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (11 December 2013), AP-2012-066 (CITT) [*Wolseley*] at footnote 44.

[E]vidence of compliance of the goods in issue with the barrier-free standards is sufficient in this case to show that the goods in issue were specifically designed to assist persons with disabilities in alleviating the effects of those disabilities. The goal of tariff relief under tariff item No. 9979.00.00 is not to reward the first inventor, but rather to ensure that goods intended to assist persons with disabilities and designed to that effect can enter into Canada free of tariffs. It is not necessary to reinvent the wheel each and every time.²⁰

[34] Where a good satisfies the second part of the test by complying with such standards, an appellant must also show that there was purposeful intent to comply with those standards, in order to meet the first part of the test. Documentation showing such purposeful intent during the design phase of a product would normally constitute the best way of demonstrating such intent, but the Tribunal has acknowledged that evidence may also be led from various sources, which only need to be probative and convincing.²¹

[35] In appeals, it is well established that the appellant bears the burden of establishing, on a balance of probabilities, that the CBSA's decision was incorrect. To meet this standard of proof, an appellant is expected to submit evidence that provides a solid factual basis for its position.²² In the context of tariff item No. 9979.00.00, the Tribunal has accepted various types of evidence to meet this burden.²³ It most often includes a combination of expert testimony, documentary evidence and oral testimony. In *Globe Union*, the Tribunal reaffirmed that the type of evidence required to satisfy the Tribunal that the conditions of tariff item No. 9979.00.00 are met will depend on the particular facts of each case, but that parties are always expected to "put their best foot forward" with the best available evidence. There has not yet been a successful case where an appellant relied on oral testimony only. This jurisprudence should serve as guidance for parties in such appeals.

[36] In the present case, relying solely on oral evidence from two fact witnesses, Toolway submits that the goods in issue comply with the relevant accessibility standards set out in the ADA and by the CSA. Toolway also submits that the goods were intentionally designed to meet these standards.

[37] For the reasons that follow, the Tribunal finds that, on a balance of probabilities, there is insufficient evidence to support Toolway's claims. The goods in issue therefore cannot be said to have been specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and Toolway failed to discharge its onus to convince the Tribunal that the CBSA's determination was incorrect.

²⁰ *Globe Union* at para. 42.

²¹ *Masai* at para. 21.

²² *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (22 February 2017), AP-2016-005 (CITT) at paras. 27-28.

²³ In *Sigvaris* and *Masai*, the Tribunal accepted expert medical testimony as well as scientific and technical studies or articles, in addition to testimony of employees of the appellant familiar with the design and construction of the goods, to find that the goods were entitled to relief of duties under tariff item No. 9979.00.00. In *Globe Union*, the appellant relied on product data sheets, the design of the goods and the appellant's CSA certification record, in addition to testimony from an employee of the appellant company. In *Wolseley*, the Tribunal was satisfied by the product literature, schematic drawings and specifications, and a letter from the manufacturer explaining the design process that the goods were purposefully designed to assist persons with disabilities. In that case, there was no dispute that the goods complied with the guidelines prescribed by the ADA.

Application to the facts

[38] With respect to the CSA standards, the parties agree, and the Tribunal accepts, that the following clauses are relevant²⁴ to the goods in issue:

3.2 Operating controls

3.2.1 Scope

Operating controls include, but are not limited to,

(a) door handles and locks;

...

3.2.4 Operation

Controls shall be operable

(a) with one hand;

(b) without tight grasping, pinching, or twisting of the wrist; and

(c) with a force not to exceed 22 N.

[39] The relevant ADA standards are nearly identical, and provide as follows:

309.4 Operation. *Operable parts* shall be operable with one hand and shall not require tight grasping, pinching, or twist of the wrist. The force required to activate *operable parts* shall be 5 pounds (22.2 N) maximum.

...

404.2.7 Door and Gate Hardware. Handles, pulls, latches, locks, and other *operable parts* on doors and gates shall comply with 309.4. . . .

[40] Toolway also submitted the relevant sections of the *Accessible Ontario for People with Disabilities Act* (the Ontario standards), which only differ by requiring controls to be operable with a closed fist, rather than with one hand.

[41] The Tribunal accepts that the above requirements are well established standards for accessibility. Furthermore, Ms. Berry presented credible evidence identifying the types of disabilities whose effects are alleviated by products meeting those standards, and the manner in which those effects would be alleviated.²⁵

[42] Toolway made several arguments that the goods meet the criteria set out in the above standards.

[43] First, Toolway submitted that UL approval of the goods is equal to or exceeds compliance with the CSA standards. In this regard, Mr. Peres testified that the UL requirements surpass the CSA standards.²⁶ He also stated that “the testing required to meet [UL and CSA] standards are the same”

²⁴ The Tribunal notes that the CBSA also argued that the goods must meet clauses governing the installation of the goods on the basis that the manner of installation is integral to the ability of the goods to alleviate the effects of a disability. Specifically, the CBSA argued that the goods clearly do not meet the requirements of section 4.1.3 of the CSA. It is well established that the fact that a good only becomes accessible to persons with disabilities once installed according to certain specifications is irrelevant for the purposes of tariff item No. 9979.00.00, and the manner in which a good is installed after importation does not bear upon its classification (see *Wolseley* at para. 52).

²⁵ *Transcript* at pp. 93, 96-98, 102-105.

²⁶ *Transcript* at p. 18.

as the two organizations work with the same standards.²⁷ In addition, Mr. Peres stated that Toolway had provided UL approval, “which is not different than CSA”, as proof of CSA certification.²⁸

[44] The Tribunal is unable to accept this claim. Toolway led no evidence to support Mr. Peres’ assertions. On the contrary, the Tribunal finds that the evidence on the record in fact shows that UL approval relates to fire and other safety requirements, not accessibility standards.²⁹

[45] Toolway also argued that ANSI/BHMA certification of the goods was further evidence of their compliance with accessibility standards.

[46] The relevant standard is ANSI/BHMA A156.2-2017, which sets performance requirements for bored and preassembled locks and latches,³⁰ including grading products on a scale from 1 to 3. With respect to accessibility, an advisory document for ANSI/BHMA A156.2-2017 provides as follows:

Accessibility: There are various types of trim which meet the ADA and [International Code Council] A117.1 requirements for operable parts to be “operable with one hand and shall not require tight grasping, pinching or twisting of the wrist.” Lever or paddle type trim meets these stipulations, while knob trim should be avoided for accessible routes. In addition, BHMA certified hardware must comply with the operational forces in their respective standards, which have been shown to be suitable for accessible applications.³¹

[47] Based on the above, Toolway argued that “BHMA certification” means that the product in question meets ADA accessibility requirements. In this regard, Mr. Peres testified that the goods in issue “are certified by the [BHMA] as being ADA-compliant for accessibility”.³²

[48] The only supporting evidence that the goods meet or have been tested against ANSI/BHMA criteria is the grade to which the goods are manufactured. As noted above, all models of the goods in issue are manufactured to either grade 2 or 3. However, the evidence indicates that this grading scale relates to the quality and durability of door hardware, not accessibility.³³ The Tribunal is therefore not persuaded that the grading of the goods is relevant to their compliance with any accessibility standards and finds accordingly.

[49] As discussed earlier in this statement of reasons, Toolway also relied on the ADA wheelchair symbol, which is present in Toolway’s product catalogue alongside each model in issue, as proof that

²⁷ *Transcript* at pp. 35-36.

²⁸ *Transcript* at p. 38.

²⁹ *Transcript* at pp. 41-44; Exhibit AP-2018-056-08 at p. 87, Vol. 1.

³⁰ Exhibit AP-2018-056-16A at p. 56, Vol. 1.

³¹ *Ibid.*

³² *Transcript* at p. 22.

³³ The evidence on the record concerning the grading scale provides that “ANSI/BHMA standards set forth different product grades for door hardware products. These product grades are defined by progressive levels of performance benchmarks in each applicable standard. The purpose of each is to help identify the quality and durability of locksets through a series of operational and security tests” (see Exhibit AP-2018-056-08 at pp. 84-85, Vol. 1). Even if ANSI/BHMA performance testing did overlap with relevant accessibility requirements, there was no evidence on which the Tribunal could rely to reasonably make a positive finding on a balance of probabilities that the goods are operable with a force of no more than 22 N. See also *Transcript* at pp. 38-41; and Exhibit AP-2018-056-08 at pp. 79-80, Vol. 1.

the goods in issue meet generally accepted accessibility standards.³⁴ Mr. Peres testified that use of the ADA wheelchair symbol informs the consumer that the product meets various accessibility requirements, including the ADA and CSA.³⁵

[50] In Toolway's product catalogue, the symbol also appears next to door levers with "knob"-type trim (i.e. doorknobs).³⁶ However, the relevant accessibility standards all advise that lever-type handles are preferable over knob trim. The CSA specifically advises that "[k]nob handles . . . are not appropriate because they require tight grasping and fine finger control."³⁷ The Ontario standard requires that hardware be operable with a closed fist, which is not possible with a doorknob. The ADA also recommends door hardware that can be operated with a closed fist or loose grip, and the ANSI/BHMA advises that knob trim should be avoided for accessible routes. In addition, Ms. Berry testified that any condition that limits hand function would benefit from a lever over a knob.³⁸ Ms. Berry also attested that a knob would be inappropriate for persons with disabilities such as reduced strength, amputation, limited range of motion or a closed fist, which Ms. Berry also identified as disabilities whose effects could be alleviated by trim that can be operated by one hand or a closed fist, i.e. a lever handle.³⁹

[51] Toolway argued that the doorknob products become accessible when used in conjunction with other products, such as an electronic strike to electronically open the door,⁴⁰ and the lock mechanism requires less than 22 N to engage.⁴¹ However, the doorknob products are not advertised in conjunction with an electronic strike, and in the Tribunal's view it is evident that knob trim alone is not recommended by accessibility standards. Toolway also led no evidence that use of the symbol is in any way regulated or authorized by a relevant external organization, which could have provided a degree of credibility as to its meaning. As a whole, the Tribunal was left with the impression that Toolway's use of the symbol is generous and self-serving.

[52] On consideration of the above, the Tribunal is not persuaded that the presence of the wheelchair symbol in Toolway's product catalogue is a reliable indicator that a product meets generally recognized accessibility standards, as suggested by Toolway, and finds accordingly.

[53] The Tribunal now turns briefly to the design characteristics of the goods themselves. Based on a physical demonstration of the goods, the Tribunal accepts that they may be operated with one hand, but notes that use of the keyed models may require some degree of pinching and twisting of the wrist. Ms. Berry also testified that the goods are "easy to use" and estimated that they could be engaged with about five pounds of force.⁴² However, as she readily acknowledged, this estimate was based on a brief examination of the goods during the hearing and a quick "baby finger" test, in which

³⁴ Exhibit AP-2018-056-03 at pp. 19-20, Vol. 1.

³⁵ *Transcript* at p. 33.

³⁶ See "Cylindrical Knob Locksets" at Exhibit AP-2018-056-03 at p. 19, Vol. 1. These products are not in appeal.

³⁷ Exhibit AP-2018-056-03 at p. 83, Vol. 1.

³⁸ *Transcript* at p. 104.

³⁹ *Transcript* at pp. 126-127.

⁴⁰ *Transcript* at pp. 54-55.

⁴¹ *Transcript* at p. 81.

⁴² *Transcript* at pp. 121-122.

Ms. Berry tested whether the goods could be engaged with her baby finger, which she testified can exert about five pounds of pressure.⁴³

[54] In the Tribunal's view, the above alone is insufficient to demonstrate on a balance of probabilities that the goods meet the relevant accessibility standards. Although an appellant is entitled to present its case in the manner of its choosing, in the circumstances of the present case, the Tribunal is compelled to note that objective evidence of the 22 N requirement could have been readily available: Ms. Berry testified that occupational therapists commonly use dynamometers, which measure force.⁴⁴

[55] As a whole, the Tribunal is unable to find that the goods in issue meet generally recognized accessibility standards or that the goods otherwise assist persons with disabilities by alleviating the effects of those disabilities. Simply put, Toolway did not provide a solid evidentiary basis on which the Tribunal could arrive at either of these findings on a balance of probabilities.

[56] Furthermore, even if the goods satisfied the second part of the *Sigvaris* test, Toolway did not submit any supporting evidence to demonstrate purposeful intent. Mr. Peres testified that the goods were specifically designed to meet ADA and CSA standards, but Toolway provided no evidence to support this assertion.

[57] As a final point, the Tribunal notes that Toolway relied on Supreme Court of Canada jurisprudence from *Hickman Motors*⁴⁵ to argue that uncontroverted oral evidence from a witness should be sufficient to establish that a good is entitled to duty-free treatment under tariff item No. 9979.00.00.⁴⁶ Toolway cited paragraph 87, in which the Court held that "where the [*Income Tax Act*] does not require supporting documentation, credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records." In the Tribunal's view, the principle set out in *Hickman Motors* is plainly rooted in the statutory provisions of the *Income Tax Act* and does not, as suggested by Toolway, apply generally to the civil standard of proof. Furthermore, this citation must be read in the context of the decision. In this case, the oral evidence was offered to prove the existence and the content of a document that had since been destroyed. In other words, the oral evidence was used to fill gaps in the documentary evidence.

[58] In the present case, Toolway's entire evidence amounted to unsupported testimony from two fact witnesses. In the circumstances of this case, this was insufficiently probative and convincing to tip the balance of probabilities in favour of the appellant.

Conclusion

[59] For the foregoing reasons, the Tribunal finds that the goods do not qualify for the benefits of tariff item No. 9979.00.00.

⁴³ *Transcript* at pp. 121-122.

⁴⁴ *Transcript* at pp. 107, 122.

⁴⁵ *Hickman Motors Ltd. v. Canada*, 1997 CanLII 357 (SCC), [1997] 2 SCR 336, at para. 87.

⁴⁶ *Transcript* at pp. 135-136.

DECISION

[60] The appeal is dismissed.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member