



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2021-039

Georgian Bay Leisure Distributors
Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, December 7, 2022*

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IN THE MATTER OF an appeal heard on September 8, 2022, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 31, 2022, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

GEORGIAN BAY LEISURE DISTRIBUTORS LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Eric Wildhaber

Eric Wildhaber

Presiding Member

Place of Hearing: Videoconference
Date of Hearing: September 8, 2022

Tribunal Panel: Eric Wildhaber, Presiding Member

Tribunal Secretariat Staff: Michael Carfagnini, Counsel
Jennifer Mulligan, Senior Paralegal
Matthew Riopelle, Registrar Officer

PARTICIPANTS:**Appellant**

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WITNESSES:

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal by Georgian Bay Leisure Distributors Ltd. (Georgian Bay) pursuant to subsection 67(1) of the *Customs Act*¹ (Act) from a re-determination by the President of the Canada Border Services Agency (CBSA) dated March 3, 2022.

[2] Georgian Bay contends that the goods in issue are classifiable under tariff item No. 8479.89.90 as “other machines and mechanical appliances having individual functions, not specified or included elsewhere in [Chapter 84]”.

[3] The CBSA argues that the goods in issue fall under tariff item No. 7321.19.90, as “stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar *non-electric* domestic appliances, and parts thereof, of iron or steel” [emphasis added].

[4] The issue in this matter boils down to whether the goods in issue are “electric” or “non-electric”. As examined below, the Tribunal finds that they are “electric” domestic appliances and, consequently, classification in the tariff item proposed by the CBSA is not possible. Had they weighed no more than 20 kilograms (kg), the goods in issue would have been classified in heading 85.09, but because their weight is greater than 20 kg, they are classified under tariff item No. 8479.89.90, as proposed by Georgian Bay. The appeal is therefore allowed.

GOODS IN ISSUE

[5] The goods in issue are two models of steel barbecue-type grills. One is described as the Traeger Pellet Grill Pro Series 22 (model no. TFB57PZBO – the “Traeger Grill”). The other is the Timberline 850 (model no. TFB85WLE – the “Timberline Grill”).

PROCEDURAL HISTORY

[6] On September 9, 2020, Georgian Bay submitted a request for an advance ruling on the goods in issue pursuant to section 43.1 of the *Customs Act*.²

[7] On December 1, 2020, the CBSA ruled on that request, finding that the goods in issue are classified under tariff item No. 8516.60.90.³

[8] On December 19, 2020, Georgian Bay requested a review of the CBSA’s advance ruling decision of December 1, 2020, on the grounds that the goods in issue are not electro-thermic because it is wood pellets, not electricity, that provide the source of heat for cooking. Georgian Bay requested that the goods in issue be classified under tariff item No. 8479.89.90.⁴

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² Exhibit AP-2021-039-07 at 130.

³ *Ibid.* at 131.

⁴ *Ibid.* at 134.

[9] On January 31, 2022, the CBSA revised the advance ruling of December 1, 2020, classifying the goods in issue under tariff item No. 7321.19.90.⁵

[10] On March 2, 2022, Georgian Bay filed the present appeal, pursuant to subsection 67(1) of the Act.⁶ It filed a brief on April 27, 2022.⁷

[11] The CBSA filed a brief on July 11, 2022.⁸

[12] The Tribunal held a videoconference hearing on September 8, 2022. Gary Trotter testified on behalf of Georgian Bay. Gary Trotter is the owner/president of Georgian Bay. The CBSA did not call any witnesses.

Procedural matter

[13] At the hearing, counsel for Georgian Bay objected to certain arguments made by counsel for the CBSA that it had not raised in its brief.⁹ Indeed, the CBSA's brief addressed only why it believed that classification ought to occur in heading 73.21. The only discussion of heading 84.79 was that its nature as a residual heading means the Tribunal should first consider whether the goods in issue can be classified in heading 73.21,¹⁰ noting that the CBSA took the same position in this appeal as it did in *Rona Inc. v. President of the Canada Border Services Agency*¹¹ that the goods in issue are properly classified in heading 73.21, and not heading 84.79 as argued by Georgian Bay.¹² Aside from these points, the CBSA's brief contained no argumentation whatsoever to counter the position that Georgian Bay set out in detail in its brief to the effect that the goods in issue are properly classified in heading 84.79.

[14] At the hearing, the CBSA admitted that it was raising new arguments not included in its case brief but submitted that they were based on alleged similarities between the present appeal and the Tribunal's decision in *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency*,¹³ which decision was referred to in its brief in the context of different arguments.¹⁴ The Tribunal noted its expectation that parties put their best foot forward in their written pleadings, so as not to take an opposing party by surprise at a late stage in proceedings, but indicated that Georgian Bay would have the opportunity, if necessary, to address in writing, at a later date, any new arguments by the CBSA that had already been made at that point in the hearing or that might later be made.¹⁵

⁵ *Ibid.* at 139.

⁶ Exhibit AP-2021-039-01.

⁷ Exhibit AP-2021-039-03.

⁸ Exhibit AP-2021-039-07.

⁹ *Transcript of Public Hearing* at 79–80.

¹⁰ Exhibit AP-2021-039-07 at paras. 22–26.

¹¹ (5 June 2018), AP-2017-026 (CITT) [*Rona Inc.*].

¹² Exhibit AP-2021-039-07 at para. 44.

¹³ (11 September 2017), AP-2016-026 (CITT) [*Canac Marquis*].

¹⁴ *Transcript of Public Hearing* at 80–81; Exhibit AP-2021-039-07 at para. 50, note 42.

¹⁵ Arguments made up to the time of Georgian Bay's objection are at *Transcript of Public Hearing* at 78–79; the objection, exchange on the objection and direction of the Tribunal are at *Transcript of Public Hearing* at 80–84; more new arguments were introduced after the objection was dealt with—see *Transcript of Public Hearing* at 84–85.

[15] Later in the hearing, Georgian Bay indicated that it declined to avail itself of the opportunity to address the CBSA's new and lately revealed arguments.¹⁶

[16] On September 14, 2022, the Tribunal wrote to Georgian Bay asking it to identify the precedent to which its counsel had made general reference while explaining its objection at the hearing but was unable to recall, on the spur of the moment, by case name or reference.¹⁷ Georgian Bay wrote to the Tribunal on September 14, 2022, identifying the case in issue as *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency*.¹⁸ On September 15, 2022, the Tribunal asked the CBSA to provide comments, if any, on *Andritz CITT*, noting that the decision had been upheld by the Federal Court of Appeal in *Andritz Hydro Canada Inc. v. Canada (Border Services Agency)* on appeal of an issue germane to the discussion for which it had been raised by Georgian Bay in the current proceedings.¹⁹ On September 20, 2022, the CBSA wrote to the Tribunal to indicate that it had no further comments.²⁰ The record closed on that day.

[17] The Tribunal notes that the CBSA similarly did not address Georgian Bay's arguments in support of classification in heading 84.79 when the CBSA delivered its decision of January 31, 2022; yet, Georgian Bay had made extensive arguments in support of its claim for classification in heading 84.79 in its request of December 19, 2021. Like its brief in these proceedings, the CBSA's decision of January 31, 2022, only addressed why it determined the goods to be classified in heading 73.21. The Tribunal questions why the CBSA waited until the hearing in these proceedings to address, for the first time, the issue of classification in heading 84.79. Nevertheless, the Tribunal does not believe it to be necessary to strike from the record the arguments that were revealed for the first time by the CBSA at the hearing (as the Tribunal decided to do in *Andritz CITT*, upheld on that issue by *Andritz FCA*) because they were ultimately quite short and, in any event, the Tribunal was not persuaded by them.

[18] The Tribunal reminds counsel that they are to include in their briefs at the very least the general lines of their argumentation for obvious reasons of procedural fairness, the proper management of Tribunal proceedings, and because lawyers and representatives that appear before it are officers of the court and the ultimate objective of the Tribunal is to arrive at the proper tariff classification of any good that is the subject of an appeal. As such, the Tribunal counts on parties to bring forward reasons for and against all competing tariff classification options, but this has to be done in a timely and orderly manner, as was recognized in *Andritz CITT* and *Andritz FCA*.

LEGAL FRAMEWORK

[19] 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 (WCO).²¹ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in several headings and subheadings and under tariff items.

¹⁶ *Transcript of Public Hearing* at 89.

¹⁷ See *Transcript of Public Hearing* at 81; Exhibit AP-2021-039-18.

¹⁸ (21 June 2013), AP-2012-022 (CITT) [*Andritz CITT*]; see Exhibit AP-2021-039-19.

¹⁹ 2014 FCA 217 [*Andritz FCA*]; see Exhibit AP-2021-039-20.

²⁰ Exhibit AP-2021-039-21.

²¹ Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

[20] Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System* (General Rules)²² and the *Canadian Rules*²³ set out in the schedule.

[21] 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.

[22] 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* (Classification Opinions)²⁴ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (Explanatory Notes),²⁵ published by the WCO. While the Classification Opinions and the Explanatory Notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.²⁶

[23] 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.²⁷

[24] 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.²⁸ The final step is to determine the proper tariff item.²⁹

²² S.C. 1997, c. 36, schedule.

²³ S.C. 1997, c. 36, schedule.

²⁴ WCO, 2nd ed., Brussels, 2003.

²⁵ WCO, 5th ed., Brussels, 2012.

²⁶ See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the Explanatory Notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the Classification Opinions.

²⁷ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

²⁸ 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."

²⁹ 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." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

[25] The relevant tariff nomenclature for tariff item No. 7321.19.90 is as follows:

**Section XV
BASE METALS AND ARTICLES OF BASE METAL**

**Chapter 73
Articles of iron or steel**

73.21 Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, of iron or steel.

...

7321.19 - -Other, including appliances for solid fuel

...

7321.19.90 - - -Other

[26] The relevant tariff nomenclature for tariff item No. 8479.89.90 is as follows:

**Section XVI
MACHINERY AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPMENT;
PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION
IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND
ACCESSORIES OF SUCH ARTICLES**

**Chapter 84
NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL
APPLIANCES; PARTS THEREOF**

...

84.79 Machines and mechanical appliances having individual functions, not specified elsewhere in this Chapter.

...

8479.89.90 - - -Other

[27] The relevant tariff nomenclature for heading 85.09 is as follows:

**Chapter 85
ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEREOF; SOUND
RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND
RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH
ARTICLES**

...

85.09 **Electro-mechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 85.08.**

...

8509.80 **-Other appliances**

8509.80.10 - - -Ultrasonic vaporizers

8509.80.90 - - -Other

[28] The relevant tariff nomenclature for heading 85.16 up to tariff item No. 8516.60.90 is as follows:

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

...

8516.60 **-Other ovens; cookers, cooking plates, boiling rings, grillers and roasters**

8516.60.10 - - -Bread makers;
 Indoor smokeless barbecues;
 Rice cookers

...

8516.60.20 - - -Ovens, cooking stoves and ranges

...

8516.60.90 - - -Other

[29] The relevant section notes, chapter notes, and explanatory notes can be found at Annex I.

EVIDENCE

[30] Georgian Bay played a video for the Tribunal that explained the functioning of the Timberline Grill. The full narration of the video is provided here because it is instructive on the operation of the goods in issue:

The Timberline 850 – or how I learned to Traeger on my summer vacation. Here is the Traeger in its natural habitat [video shows grill outside on a residential backyard deck next to a house].

The basics – how does it work? Provide power [video turns to animated images of the Traeger Grill with power cord symbol indicating that it needs to be plugged into an outlet; the animation continues with the following narrated descriptions overlaid over the images].

The operation of the Traeger is controlled by its “electronic brain”. So, it needs to be plugged into a standard wall receptacle. The brain controls an electrically driven auger. The auger moves wood pellets from the hopper to the fire pot. The brain also controls an electric fan, which supplies forced air to the fire pot. The “hot rod” is an electric heating element which ignites the wood pellets during the start-up cycle—it too is controlled by the Traeger’s brain. The brain monitors a temperature sensor and adjusts accordingly to achieve your target temp[erature].

Provide Pellets. Fill the hopper with food-grade wood pellets. The brain controls the entire cooking experience from power up to shut down [image shows the power cord actioning the brain, with linkage/control of the auger, fan, hot rod, and temperature sensor]. Now let’s see it in action in the real world!

[Video returns to real-life action scenes]. Plug it in [an individual plugs the good into an outdoor outlet and then lifts grill cover up to expose the inside of the good with the words that follow overlaid].

Here’s the fire pot on this well-used Traeger. We’ve removed some internal hardware so you can see. [Image changes and zooms to the fire pot, now obviously a new unused one]. The end of the auger can be seen on this new fire pot. At the bottom of the fire pot is the “hot-rod” igniter. [Video returns to live-action outdoor scene where individual flicks the ON/OFF power switch to ON].

The main power switch is on the back of the hopper. [Operator’s finger is shown depressing the power-up button for the brain and then making various adjustments]. Power up the brain. [Brain is on]. Turn the dial to your desired temp[erature] [in the video, it is set to 275 degrees Fahrenheit]. Press dial to set temp[erature], locking it into the brain’s memory. Press the IGNITE button to get it going. [Screen on brain shows: “Igniting...”]. The brain starts the electric auger motor [scene shows the motor then moves to show the operator’s hand opening the hopper, and the scenes or mechanical actions are described hereafter]. A look inside an empty hopper reveals the slowly turning auger. The auger transports pellets from the hopper to the fire pot. The brain energizes the hot rod and turns on the fan. After a few moments, the pellets start smoking. [The brain is shown again, now displaying 150 degrees Fahrenheit (and increasing) and “...Pre-heating...”]. The temp[erature] starts climbing towards the target. [Scene shifts back to the fire pot].

The brain controls the auger and fan to produce a forge-like environment in the fire pot. [Image zooms out to show the barrel of the good with the heat shield now placed over the fire pot and the drip tray over the heat shield, and then the operator placing the grill in place]. The heat shield is normally in place. So is the drip tray and the cooking grate. [The camera focuses again on the brain, whose screen now shows a temperature of 211 degrees Fahrenheit—recall that the temperature was set to 275 degrees Fahrenheit]. Almost there!

The brain continues sending pellets and air to the fire pot. The temp[erature] sensor is constantly monitored. When the target temperature is reached, the pellet feed and air supply are adjusted to maintain your target temp[erature] as you cook.

When you’re done cooking, press the button to enter the shutdown cycle. The brain stops the auger but keeps the electric fan going. Any residual pellets in the fire pot are consumed by

forced air from the fan maintaining the fire, leaving the fire pot virtually empty. When the shutdown cycle completes, the brain turns itself off. [Camera shows operator actioning the switch on the back of the hopper to OFF]. Power switch to off and you're done!

Power outages – will I still be able to Traeger? What happens if I lose power while Traegering? Let's simulate that by pulling the plug. [Operator pulls the plug]. Because your Traeger relies on its brain, a loss of power will cause it to completely stop. Any pellets in the fire pot will continue to burn but this will be insufficient to continue cooking. The auger will stop. The fan will stop. When power is restored, you will need to start again. [Video ends].³⁰

[31] It is uncontested that the Traeger Grill functions in the same manner as the Timberline Grill and, therefore, that the demonstration video is illustrative of how both grills work.

[32] Gary Trotter testified that his company built Traeger's Canadian presence from the ground up beginning in 2005, taking care of sales, marketing, building the distribution network, and maintenance, including supplying all technical and warranty support, on-site repairs and demonstrations, etc.³¹ His testimony on the functioning of the goods in issue was consistent with the description contained in the video on file. Salient excerpts of Gary Trotter's testimony are as follows:

... it is a sophisticated outdoor oven ... All you do is, walk up to the grill, turn it on ... I depend on the magic electric controller to control the heat. So, it's like an outdoor oven.³²

...

... as the pellets are delivered to ... what I call a soup can, the air from the fan will ... keep that fire going. So, I need the air hitting those pellets and that fire to make sure I have a hot enough flame to maintain my temperature.³³

...

The fire box, the soup can, is where the actual fire is, and the pellets are delivered from [the] hopper to [the] soup can, which has air holes in it, and the fan flows air into [the] soup can and the pellets ... [The soup can is] never overloaded with pellets because you can't ... you don't want to snuff out the fire, so the auger only delivers enough pellets [into the soup can] to maintain the fire and to reach the desired temperature ... [The electric controller], it's the magic. It's sort of like a computer unit ... it senses the heat temperature of the barrel of the barbeque and it then directs the components to do what they are supposed to do. It directs the air from the fan. It turns the auger on and off.³⁴

...

³⁰ See Exhibit AP-2021-039-15.A and Exhibit AP-2021-039-15.B for the video [demonstration video].

³¹ *Transcript of Public Hearing* at 8.

³² *Transcript of Public Hearing* at 9.

³³ *Transcript of Public Hearing* at 10.

³⁴ *Transcript of Public Hearing* at 11–12.

... [I]f that fan stops, we lose the heat; there's just [not] enough air for the fire pot ... [The fan] circulates the air through the chamber of the grill so that I have a consistent heat like a convection ... in the barbeque chamber ...³⁵

ANALYSIS

[33] The issue in this matter boils down to whether the goods in issue are “electric” or “non-electric”, because heading 73.21 (proposed by the CBSA) applies to “non-electric” domestic appliances only.³⁶

[34] For the reasons that follow, the Tribunal finds that the goods in issue are electric goods; they are therefore *not* “non-electric”, as contemplated by heading 73.21, as they must remain connected to a household electrical outlet in order to function. The goods in issue are instead properly classified under tariff item No. 8479.89.90 as “other machines or mechanical appliances with individual functions, not specified or included elsewhere in [Chapter 84].”

Findings of fact

[35] The Tribunal finds that Gary Trotter’s testimony was entirely frank and credible. Importantly, the evidence provided by Georgian Bay was uncontroverted because the CBSA called no witnesses to dispute any of the facts on the record.

[36] The evidence indicates that the goods in issue require significantly less effort or attention to use than the traditional charcoal or propane-type barbecue. Gary Trotter testified that the human element is so removed that some grilling traditionalists appear to object to this being called barbecuing at all, for example that some barbecue competitions do not allow his products because they are “electric and ... too easy to use.”³⁷ As he stated, “I can set it and forget it.”³⁸ People use this type of appliance, essentially unattended, to grill or smoke at low temperatures over several hours, if not “overnight”.

[37] Temperature is monitored and maintained electronically by mechanical delivery of the wood pellets to the fire box by the auger and convection heat diffusion by a fan. An electric igniter rod operates for the first few minutes of operation to light the wood pellet fuel in the fire box and then turns off, after which the fire box continues to provide heat by burning wood pellet fuel delivered by the auger, as long as enough wood pellets have been loaded into the pellet hopper (storage container). The fan circulates heat and smoke from the fire box through the chamber of the grill to cook the food. The electronic controller, essentially a computer, continuously monitors the temperature inside the grill through a “resistance temperature detector” probe and adjusts the operation of the auger and fan as necessary to maintain the desired temperature. Both the auger and the fan are powered by electric motors.³⁹ This appliance provides computer-controlled electrically powered mechanized automatic grilling, which deliberately involves only minimal human input. The goods in issue do not function without electricity.

³⁵ *Transcript of Public Hearing* at 14.

³⁶ This finding is consistent with the Tribunal’s analysis in *Canac Marquis* and *Rona Inc.*, and with the arguments of all parties in those decisions and the present appeal.

³⁷ *Transcript of Public Hearing* at 18.

³⁸ *Transcript of Public Hearing* at 19.

³⁹ *Transcript of Public Hearing* at 10–14; Exhibit AP-2021-039-14 at 14, 22–28; see also the demonstration video.

[38] The parties agree that the goods are domestic appliances made essentially of steel.⁴⁰ They are to be used outdoors and require being plugged into a standard 110 V household electric outlet.⁴¹

[39] The goods are controlled by a computer/electronic controller (also referred to in the demonstration video as the “brain”), which coordinates: (1) the feeding of wood pellets by a mechanical auger from a pellet storage hopper to the “fire pot” or “soup can-size” combustion chamber; (2) the activation of the “hot-rod” for start-up ignition of the first pellets that were brought to the fire pot at start-up by the auger; after start-up, the hot-rod turns off and the fire remains ignited after that through the continuous arrival of subsequent pellets carried and fed by the auger to the fire, as required and determined by the brain; and (3) a draft induction fan that carries the resultant heat and smoke from the combusted material throughout the cooking chamber.

[40] The auger mechanism is a continuous screw housed in a cylinder joining the hopper and the fire pot. Pellets are drawn into the auger from the hopper by gravity, and the auger’s screw threads. The pellets then travel the length of the auger between its screw threads and the walls of the cylinder to the fire pot as the mechanical auger shank turns.

[41] The computer coordinates the mechanics of the appliance in accordance with the “digital thermostat control” instructions inputted by the user as to the desired temperature and cooking settings. Those computer-controlled instructions action the mechanical automatic feeding of pellets to maintain the desired temperature throughout the cooking cycle. Start-up and shutdown are done via the computer, which is also Wi-Fi enabled for mobile device remote control by the user.

[42] Programmed temperature maintenance is achieved by an automated varying pellet feed rate, where auger action is deliberately increased or decreased by computer command throughout the desired cooking cycle according to readings from a “resistance temperature detector” probe (or thermostat).

[43] Inside the cooking chamber, food is placed on a grill, below which is an empty space, then a steel drip tray (or grease drain pan). The fire pot is located a few inches below the drip tray and covered by a “heat baffle”. The fire pot is not visible or readily accessible while the good is in use because the fire pot is protected and indeed hidden from sight by the heat baffle (immediately above the fire pot) and the drip tray (above the heat baffle but below the cooking grill). There is clearly no way to manually feed wood pellets into the fire pot at any time during the cooking cycle.

[44] The drip tray acts as a “secondary point of heat distribution” (the heat baffle and draft induction fan being other mechanisms or points of heat distribution) by “channeling the heat into the front and rear of the cooking chamber”.⁴² In other words, cooking is done by indirect fan convection heat (as opposed to direct heat which occurs, for example, when food is placed over an open fire).

[45] Importantly, the goods stop working if the electricity supply is lost, for example in the event of a power outage. Without electricity, the computer stops working and the auger stops feeding

⁴⁰ *Transcript of Public Hearing* at 38–40, 67.

⁴¹ The product literature states that “an appropriate 3-prong outlet ... with [ground fault circuit interrupter] GFCI protection is required.” Exhibit AP-2021-039-03 at 16.

⁴² Exhibit AP-2021-039-03 at 14.

pellets to the fire, which eventually burns out as the remaining pellets are consumed and no new ones arrive to feed the fire. The fan and temperature readings also stop.⁴³

[46] Very simply: the goods cannot function without electricity. There is no non-electric or manual mode to use these goods. Gary Trotter testified that sales are sometimes lost because of this fact, in particular for customers in areas that experience regular intermittent power outages.⁴⁴ People have even asked for the reimbursement of their food cost when food left to cook overnight spoiled after the grill turned off due to power loss.⁴⁵ Gary Trotter testified that an electrical issue with a component had previously resulted in a product recall where products had to be tested to ensure electrical safety before sales could resume.⁴⁶

[47] The goods produce heat, but the origin of that heat comes from the combustion of the wood pellets, *not* from the electricity. As such, the goods are not “electro-thermal”. The goods in issue contain various moving mechanical parts powered by electricity and, indeed, as a whole, constitute a cooker machine. Consequently, the goods in issue are properly described as “electro-mechanical”.

The goods in issue are not classified in heading 73.21 because they are electric

[48] The Tribunal was not persuaded by the CBSA’s arguments concerning *Canac Marquis*⁴⁷ and considers that decision to be essentially of no guidance to the current proceedings. The parties in that case agreed that the goods were non-electric, as required by heading 73.21.⁴⁸ In contrast, the Tribunal’s finding that the goods presently in issue require electricity to function is part of the basis for its decision. The Tribunal in *Canac Marquis* also found that the gas-powered space heaters in that matter could not be classified as machines because they had no moving parts or ability to transmit force.⁴⁹ Again, in contrast, the goods presently in issue require moving parts to function, including the fan and especially the auger, which provides fuel to the fire box. Although the moving parts do not create heat, they are essential to the function of the goods, which the parties agreed is to cook food.

[49] In *Rona Inc.*, the Tribunal declined to find that a barbecue’s electric igniter button was sufficient to render it “electric”. The Tribunal in that case found that the electric igniter button was insufficient to remove a propane barbecue from the realm of “non-electric” appliances according to the meaning of that expression in heading 73.21. The igniter switch was a minor non-essential component, because it was not needed to light the barbecues in question and because, once lit, the barbecues did not require electricity to continue functioning.⁵⁰ This can be clearly contrasted to the goods in issue, which require continuous electrical supply to perform their function even once the wood pellets in the fire box are lit.

⁴³ *Transcript of Public Hearing* at 16–18; demonstration video.

⁴⁴ *Transcript of Public Hearing* at 16.

⁴⁵ *Transcript of Public Hearing* at 17: “... people want to get reimbursed for the meat because they say, ‘I went to bed and ... my brisket never cooked overnight because I lost power.’ So, when you lose power you ... at any time during the cook you lose power you have to look for an alternative source, like you know move it to another item or something to cook on, because you can’t cook on the grill anymore.”

⁴⁶ *Transcript of Public Hearing* at 18.

⁴⁷ These were the arguments that were raised improperly late in the proceedings.

⁴⁸ *Canac Marquis* at paras. 42, 60–61.

⁴⁹ *Canac Marquis* at paras. 35–39.

⁵⁰ *Rona Inc.* at paras. 20–29.

[50] In the present proceedings, the CBSA's position is that *Rona Inc.* would stand for the proposition that a barbecue must be classified based on the combustible material that provides the heat source for cooking. The Tribunal does not read *Rona Inc.* as having established that view but rather as simply standing for the proposition that a small direct current AA battery-powered spark igniter switch does not turn a propane barbecue into an electric appliance. Heading 73.21 speaks of "non-electric" appliances and therefore implicitly excludes from its ambit electric appliances. The argument advanced by the appellant in *Rona Inc.* was a stretch of any reasonable person's imagination. As such, the precedential value of *Rona Inc.* is limited.

[51] The only question germane to this appeal is whether the goods in issue are *electric* appliances.

[52] To be sure, the goods in issue use wood pellets to produce heat, but that heat is rendered efficacious for cooking purposes thanks only to the heat diffusion force and convection effect of the air that is provided by the *electrically driven* mechanical fan. The fan would have nothing to diffuse if there was no heat from the fire. Yet the fire in the fire pot can only be maintained if it is fed wood pellets by an *electrically driven* mechanical auger. The auger itself is driven by a computer (it too powered by electricity) which takes readings from an *electronic* temperature monitor.⁵¹ All these components work in electronically programmed mechanical tandem if and only if they are continuously supplied with 110 V alternating current through the physical plug-in of a three-pronged plug to a household GFCI power outlet. If a supply of electricity is disconnected or absent for any reason, the goods in issue, according to the uncontroverted evidence in this matter, become totally useless.

[53] As such, and very simply put, the goods in issue require electricity to perform their intended function and therefore cannot fall into any of the categories of "non-electric" goods listed in heading 73.21—they are therefore not classifiable in that heading.

Classification

[54] In light of the conclusion in the preceding section, the Tribunal turns to other relevant headings.

[55] Heading 85.09 concerns "electro-mechanical domestic appliances, with self-contained electric motor". The goods in issue perfectly meet this description. However, Note (4)(b) to Chapter 85 *excludes* from heading 85.09 goods whose weight exceeds 20 kg. The CBSA's decision of January 31, 2022, indicates that the Timberline Grill weighs 213 lb (96.6 kg) and the Traeger Grill weighs 103 lb (46.72 kg), and Gary Trotter's testimony confirmed that the goods in issue weigh well in excess of 20 kg.⁵² As such, it is uncontested that they exceed the 20 kg threshold of Note (4)(b) to Chapter 85 and are consequently *excluded* from heading 85.09.

[56] Heading 85.16 was set aside as an alternative by both Georgian Bay and the CBSA. The Tribunal agrees with their assessment.⁵³ Regarding the CBSA's allegation that Georgian Bay has

⁵¹ The electrically powered "hot-rod" igniter is this matter's approximate equivalent to the battery-powered igniter switch in *Rona Inc.* (albeit the "hot-rod" igniter is arguably more sophisticated than the igniter switch that produces only a spark).

⁵² Exhibit AP-2021-039-03 at 49; *Transcript of Public Hearing* at 10.

⁵³ Exhibit AP-2021-039-03 at 49–50.

changed its position on the necessity of electricity to the operation of the goods,⁵⁴ the Tribunal considers it sufficient to note its finding above that the analysis in *Rona Inc.* is not applicable to the goods presently in issue. Even once lit, the grill could not function without the electromechanical components which depend on electric current to operate, including the auger which continuously feeds wood pellet fuel into the fire box.

[57] That leaves residual heading 84.79. According to the terms of the heading and the relevant section, chapter and explanatory notes, goods must meet the following criteria in order to be classified in heading 84.79:

- (i) they must be machines or mechanical appliances;
- (ii) they must have individual functions;
- (iii) they must not be excluded from Chapter 84 by any other section or chapter note; and
- (iv) they must not be more specifically described elsewhere in Chapter 84 or any other chapter of the nomenclature.⁵⁵

[58] As discussed above, the Tribunal finds that the goods in issue are machines or mechanical appliances, as they include moving parts which are essential to their individual function. It was uncontested and even advocated by both parties that the goods in issue have the individual function of cooking food. As they are not classifiable in heading 73.21, they are not excluded from Chapter 84 by Legal Note 1(d) to that chapter. They are not more specifically covered by a heading in any other chapter of the nomenclature, and they are not classifiable in any other heading of Chapter 84. All the relevant facts and required legal conditions discussed above in support of this finding were proven or demonstrated by Georgian Bay.

[59] The Tribunal further finds that the goods are properly classified under tariff item No. 8479.89.90, as “other” machines or mechanical appliances of heading 84.79, as they are not specifically described elsewhere under that heading at the subheading or tariff item level.

[60] In accordance with Rule 1 of the General Rules and the Canadian Rules, the goods in issue are classified under tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

DECISION

[61] The appeal is allowed.

Eric Wildhaber
Eric Wildhaber
Presiding Member

⁵⁴ *Transcript of Public Hearing* at 32–36; Exhibit AP-2021-039-07 at 136–137.

⁵⁵ See explanatory notes (a), (b) and (c) to heading 84.79. See also *Canac Marquis* at paras. 34, 40.

ANNEX I

Relevant Section, Chapter and Explanatory Notes

Legal Note 1 to Section XV provides in relevant part as follows:

1. This Section does not cover:

...

- (f) Articles of Section XVI (machinery, mechanical appliances and electrical goods);

The Explanatory Notes to heading 73.21 provide in relevant part as follows:

This heading covers a group of appliances which meet all of the following requirements :

- (i) be designed for the production and utilisation of heat for space heating, cooking or boiling purposes;
- (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g., solar energy);
- (iii) be normally used in the household or for camping.

These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, maximum heating capacity, furnace or grate capacity in the case of solid fuel, size of tank where liquid fuel is used. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

This heading includes :

- (1) Stoves, heaters, grates and fires of the type used for space heating, braziers, etc.
- (2) Gas and oil radiators incorporating heating elements, for the same use.
- (3) Kitchen ranges, stoves and cookers.
- (4) Ovens incorporating heating elements (e.g., for roasting, pastry and bread-making).
- (5) Spirit or pressure stoves, camping stoves, travelling stoves, etc.; gas-rings; plate warmers incorporating provision for heating elements.
- (6) Wash boilers with grates or other heating elements.

The heading also covers stoves incorporating subsidiary boilers for central heating. On the other hand the heading **excludes** appliances also using electricity for heating purposes, as in the case of combined gas-electric cookers for example (**heading 85.16**).

Legal Note 1 to Chapter 84 provides in relevant part as follows:

1. This Chapter does not cover :

...

- (d) Articles of heading 73.21 or 73.22 or similar articles of other base metals (Chapters 74 to 76 or 78 to 81);

...

Legal Note 7 to Chapter 84 provides as follows:

7. A machine which is used for more than one purpose is, for the purpose of classification, to be treated as if its principal purpose were its sole purpose.

Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 84.79. Heading 84.79 also covers machines for making a rope or cable (for example, standing, twisting or cabling machines) from metal wire, textile yarn or any other material or from a combination of such materials.

The Explanatory Notes to Chapter 84 provide in relevant part as follows:

GENERAL

(A) GENERAL CONTENT OF THE CHAPTER

Subject to the provisions of the General Explanatory Note to Section XVI, this Chapter covers all machinery and mechanical appliances, and parts thereof, not more specifically covered by **Chapter 85**, and not being :

...

- (e) Stoves, central heating radiators and other goods of **heading 73.21** or **73.22**, and similar articles of other base metals.

...

It should also be noted that machinery and apparatus of a kind covered by Chapter 84 remain in this Chapter even if electric, for example :

- (1) Machinery powered by electric motor.
- (2) Electrically heated machinery, for example, electric central heating boilers of heading 84.03, machinery of heading 84.19 and other machinery (e.g., calenders, textile washing or bleaching machines or presses) incorporating electrical heating elements.
- (3) Machines operated electro-magnetically (e.g., electro-magnetic valves) or incorporating electro-magnetic devices (e.g., textile looms with electrical automatic stop motions, cranes with electro-magnetic lifting heads and lathes with electro-magnetic chucks).
- (4) Machines operated electronically (e.g., electronic calculating or automatic data processing machines) or incorporating photoelectric or electronic devices (e.g., rolling mills with photo-electric apparatus and machine-tools incorporating a variety of electronic control devices).

The Explanatory Notes to heading 84.79 provide in relevant part as follows:

This heading is **restricted to** machinery having individual functions, which :

- (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.
- and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.
- and (c) Cannot be classified in any other particular heading of this Chapter since :
 - (i) No other heading covers it by reference to its method of functioning, description or type.
 - and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.
 - or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).

Legal Note 4 to Chapter 85 provides in relevant part as follows:

4. Heading 85.09 covers only the following electro-mechanical machines of the kind commonly used for domestic purposes:

- (a) Floor polishers, food grinders and mixers, and fruit or vegetable juice extractors, of any weight;
- (b) Other machines provided the weight of such machines does not exceed 20 kg.