Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2012-039,
AP-2012-050 and AP-2012-059

Universal Consumer Products, Inc.,
LIV Outdoor (International) Inc. and
Maine Ornamental, LLC

v.

President of the Canada Border Services Agency

Decision and reasons issued
Wednesday, September 11, 2013

Canada

TABLE OF CONTENTS

IN THE MATTER OF appeals heard on May 14 and 15, 2013, pursuant to section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated July 31, September 13 and December 20, 2012, with respect to requests for re-determination pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

UNIVERSAL CONSUMER PRODUCTS, INC., LIV OUTDOOR (INTERNATIONAL) INC. AND MAINE ORNAMENTAL, LLC **Appellants**

AND

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

DECISION

The appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Daniel Petit
Daniel Petit
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	May 14 and 15, 2013
Tribunal Members:	Jason W. Downey, Presiding Member Serge Fréchette, Member Daniel Petit, Member
Counsel for the Tribunal:	Alain Xatruch Alexandra Pietrzak
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellants	**Counsel/Representatives**
Universal Consumer Products, Inc. Maine Ornamental, LLC	Darrel H. Pearson Elliot J. Burger
LIV Outdoor (International) Inc.	Cyndee Todgham Cherniak

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Tatiana Sandler David Aaron

WITNESSES:

John P. Kozal Senior Project Engineer Universal Forest Products Inc.	John Teller General Manager of Operations Universal Consumer Products, Inc.
Maurizio Bertato President LIV Outdoor (International) Inc.	

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STATEMENT OF REASONS

BACKGROUND

1. These are appeals filed by Universal Consumer Products, Inc. (Universal), LIV Outdoor (International) Inc. (LIV) and Maine Ornamental, LLC (Maine) (the appellants) under section 61 of the *Special Import Measures Act*[1] from 50 decisions of the President of the Canada Borders Services Agency (CBSA) made under section 59. Sixteen decisions relate to goods imported by Universal, 2 decisions relate to goods imported by LIV, and 32 decisions relate to goods imported by Maine. As the aluminum balusters (the goods in issue) imported by the appellants are substantially similar, the Tribunal determined that the appeals should be joined and heard together.

2. Subsection 61(3) of *SIMA* allows the Tribunal to ". . . make such order or finding as the nature of the matter may require and . . . declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken . . . ." In these appeals, the Tribunal must determine the following:

- whether the goods in issue are of the same description as the aluminum extrusions described in the Tribunal's findings in *Aluminum Extrusions*[2] (the subject goods) and therefore subject to anti-dumping and countervailing duties; and
- if they are of the same description, whether, in LIV's case, the duties should be refunded because of an officially induced error on the part of the CBSA.

3. The CBSA determined that the goods in issue were of the same description as the subject goods and that, accordingly, anti-dumping and countervailing duties were payable.

4. The appellants argued that the goods in issue are kits or, alternatively, that the goods in issue have been further worked to the point that they no longer share the characteristics of the subject goods.

PROCEDURAL HISTORY

5. The goods in issue are manufactured in the People's Republic of China and were imported into Canada by the appellants from either Singapore or the United States beginning in January 2010.

6. After the importation, LIV's customs broker asked the CBSA whether certain goods imported by LIV were of the same description as the subject goods.[3] On March 9, 2010, the CBSA e-mailed LIV in response and stated its opinion that the imported goods were not of the same description as the subject goods.[4]

7. In and around June 2011 and February 2012, however, pursuant to section 57 of *SIMA*, the CBSA determined that the goods in issue were of the same description as the subject goods. Following requests for re-determination by the appellants, the CBSA, on July 31, September 13 and December 20, 2012, issued 50 detailed adjustment statements pursuant to section 59 affirming the determinations.

8. Universal filed its appeal on October 29, 2012, LIV filed its appeal on December 7, 2012, and Maine filed its appeal on January 10, 2013. On February 1, 2013 the Tribunal granted Universal's and

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1. R.S.C. 1985, c. S-15 [*SIMA*].
2. (17 March 2009), NQ-2008-003 (CITT) [*Aluminum Extrusions*], as amended (10 February 2011), NQ-2008-003R (CITT) [*Aluminum Extrusions Remand*]. For clarity, it should be noted that references to "*Aluminum Extrusions*" or to the "findings" throughout these reasons are references to the Tribunal's findings and statement of reasons in Inquiry No. NQ-2008-003, unless otherwise indicated.
3. As will be discussed later, it was not satisfactorily established whether this enquiry specifically related to the goods in issue or whether it related to other goods imported by LIV.
4. Exhibit AP-2012-050-21A at para. 49.

Maine's requests that their appeals be joined. Maine's and Universal's appeals were in turn joined with LIV's appeal on February 15, 2013.

9. The Tribunal held a public hearing in Ottawa, Ontario, on May 14 and 15, 2013. Maine and Universal called two witnesses: Mr. John P. Kozal, Senior Project Engineer, Universal Forest Products Inc., and Mr. John Teller, General Manager of Operations at Universal. LIV called one witness: Mr. Maurizio Bertato, President of LIV. The CBSA did not call any witnesses.

FRAMEWORK

Legal Framework

10. On March 17, 2009, the Tribunal issued a decision in *Aluminum Extrusions*, in which it decided that the dumping and subsidizing of the subject goods had caused injury to the domestic industry.

11. The issue in this appeal is whether the goods in issue are of the same description as the subject goods.

12. It is well established that the Tribunal's analysis in this regard is based on an examination of the characteristics of the goods, including physical description, the end uses, interchangeability, competition in the market, price and marketing.[5] In some cases, certain factors are not relevant. For instance, the goods could sometimes be described with relation to more limited technical specifications or industry standards.[6]

13. In *Aluminum Extrusions*, the subject goods are defined in relation to a particular production process. Specifically, the subject goods are described as having been produced via an "extrusion" process.[7] While the production process is neither a physical characteristic nor a market characteristic of the goods in issue, the production process must nonetheless be considered, as the subject goods were specifically defined in relation to the extrusion production process. As a result, in this particular instance, the Tribunal will consider the production process of the goods in issue in order to determine whether the goods in issue are of the same description as the subject goods.

14. The relevant point of reference is the state of goods at the moment of importation.[8]

15. It is also well established that, where a finding is unclear, recourse can be had to the statement of reasons for the finding. The Federal Court of Appeal, in *Deputy M.N.R (Customs and Excise) v. Trane Company of Canada*,[9] stated the following:

> [T]here is not in my opinion a clearly established principle that the reasons for decision may not be referred to in order to clarify the terms of a formal decision the precise application of which is not, as

5. See, for example, *Nikka Industries Ltd. v. Deputy M.N.R.C.E.* (20 August 1991), AP-90-018 (CITT); *Macsteel International (Canada) Limited v. Commissioner of the Canada Customs and Revenue Agency* (16 January 2003), AP-2001-012 (CITT); *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT); *Aluminart Products Limited v. President of the Canada Border Services Agency* (19 April 2012), AP-2011-027 (CITT) [*Aluminart*].
6. *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (18 November 2011), AP-2010-063 (CITT) [*Toyota*].
7. *Aluminum Extrusions* at para 1.
8. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366. See, also, *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.
9. [1982] 2 F.C. 194 (FCA) [*Trane*].

> a matter of fact, clear on its face. . . . In these circumstances it is permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal.[10]

16. The statement of reasons will normally suffice to clarify the intended meaning of an ambiguous finding.[11] If, however, a particular aspect of the Tribunal's finding is not settled by reference to the statement of reasons, it may be helpful to refer to parts of the administrative record before the Tribunal at the time of making the finding that speak directly to the ambiguity.[12]

Finding

17. The findings read as follows:

> Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that:
>
> - the dumping and subsidizing in Canada of custom-shaped aluminum extrusions originating in or exported from the People's Republic of China have caused injury to the domestic industry; and
> - the dumping and subsidizing in Canada of standard-shaped aluminum extrusions origination or exported from the People's Republic of China have caused injury to the domestic industry.

18. The Tribunal further described the subject goods as follows:

> . . . aluminum extrusions produced via an extrusion process of alloys having metallic elements falling within the alloy designations published by The Aluminum Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness greater than 0.5 mm, with a maximum weight per metre of 22 kg and a profile or cross-section which fits within a circle having a diameter of 254 mm (aluminum extrusions), originating in or exported from the People's Republic of China . . . .[13]

19. In addition, the Tribunal found that goods that were imported as kits which could be assembled to form finished goods and goods which had been further processed to the point that they no longer possessed the physical characteristics of aluminum extrusions were not covered by the definition of the subject goods.[14]

20. The Tribunal also found that there were a number of exclusions to the findings. However, these exclusions are not at issue in the present appeals.[15]

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10. *Trane* at 206. See, also, *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67, [2001] 4 F.C. 455 [FCA] [*Blueberry River Indian Band*]at para. 38.
11. *BMI Canada Inc. and BMI West Inc. v. President of the Canada Border Services Agency* (2 August 2011), AP-2010-039 (CITT) at paras. 105, 107.
12. *Blueberry River Indian Band.* Albeit rendered in a different context, this decision of the Federal Court of Appeal supports the Tribunal's view that, insofar as the statement of reasons is insufficient to ascertain the meaning of an ambiguous finding, documents other than the statement of reasons that were part of the administrative record before the Tribunal at the time of making the finding, and that are directly relevant to the ambiguity in issue, may be consulted to interpret the finding.
13. *Aluminum Extrusions* at para. 1.
14. *Ibid.* at paras. 351, 365.
15. For a list of the exclusions, see the appendices in both *Aluminum Extrusions* and *Aluminum Extrusions Remand*.

Goods in Issue

21. The following are the seven types of the goods in issue:[16]

PRODUCT	DESCRIPTION	IMPORTER	EXHIBIT NO.
Classic Veranda DecKorail	10 balusters, 3/4" round, 26" or 32" in length, packaged with 20 stainless steel fitted wood screws, 20 plastic washers and 20 patented high-density polyethylene baluster and stair connectors	Maine	A-01
Classic Round DecKorators	10 balusters, 3/4" round, 26" or 32" in length	LIV, Universal, Maine	A-02
Architectural Baroque Bent	5 flat bar curved balusters, 32" or 40" in length, packaged with 10 stainless steel fitted wood screws and 10 black plastic washers	LIV, Universal, Maine	A-03
Colonial	10 balusters, 26" in length	Maine	A-04
Estate	10 balusters, 26" in length	LIV, Maine	A-05
Architectural Bent	5 flat bar curved balusters, 32.25" in length, packaged with 20 stainless steel fitted wood screws, 20 plastic washers and installation instructions	LIV, Maine	A-06
Traditional Square	10 balusters, 32" in length, packaged with 40 stainless steel wood screws, 40 black plastic washers, 20 plastic end caps and installation instructions	LIV, Maine	A-07

16. Exhibit AP-2012-039-07A at 10; *Transcript of Public Hearing*, 14 May 2013, at 9-14.

22. At the time of their importation, the goods in issue were packaged in one of the following two ways:

- "baluster and accessory packages": balusters packaged together with screws and/or washers, connectors or end caps (the installation accessories) (which include the Classic Veranda DecKorail, Architectural Baroque Bent, Architectural Bent and Traditional Square models); or
- "baluster only packages": balusters packaged by themselves without any installation accessories (which include the Classic Round DecKorators, Colonial and Estate models).

Positions of Parties

Appellants

23. The appellants submit that, at the time of importation, the goods in issue were packaged as part of a baluster kit, which contained all the components necessary to be assembled into a finished good. As discussed above, some, though not all, of the goods in issue were packaged, at the time of importation, with installation accessories.[17] Regardless of whether or not the goods in issue were imported with or without installation accessories, the appellants contend that the goods in issue are *finished goods*, since the *Canadian Oxford Dictionary* defines a finished product as "having passed through the final stage of manufacture or elaboration (the finished product)."[18]

24. The appellants recognize that the goods in issue must be attached to other elements of a railing system in order to produce a final railing product. However, they argue that nothing in the Tribunal's statement of reasons in *Aluminum Extrusions* suggests that a kit cannot consist of goods which are to be employed as components in a larger system.[19] The appellants claim that, since the goods in issue are imported ready to be assembled into a deck system, and are therefore kits for the assembly of finished goods, they are not of the same description as the subject goods.

25. While the appellants further acknowledge that some of the goods in issue were not packaged with installation accessories at the time of importation, they maintain that these goods were nonetheless baluster kits, as they were designed to be sold and installed with specific installation accessories which are sold separately.[20] In fact, Mr. Bertato testified that the separately packaged installation accessories were purchased together with the goods in issue approximately 97 percent of the time.[21] As such, the appellants assert that the goods in issue, whether or not packaged with installation accessories at the time of importation, are ". . . fully packaged and ready for the end consumer to purchase"[22] and contain everything needed to ". . . upgrade your deck rail and add safety to it . . . ."[23]

17. In particular, the Classic Veranda DecKorail model, Architectural Baroque Bent model, Architectural Bent model and the Traditional Square model were packaged with installation accessories. The Classic Round DecKorator model, Colonial model and Estate model were each packaged and imported *without* installation accessories included. See the table at para. 19 for a description of each product.
18. Exhibit AP-2012-039-07A at para. 37.
19. *Ibid.* at para. 45.
20. *Transcript of Public Hearing*, 14 May 2013, at 39, 40.
21. *Ibid.* at 166.
22. *Ibid.* at 29; Exhibit AP-2012-039-07A at para. 15.
23. *Transcript of Public Hearing*, 14 May 2013, at 46.

26. In addition, the appellants contend that, at the time of their importation, the goods in issue were further worked, processed or manufactured to the point that they no longer possessed the nature and physical characteristics of the subject goods; they had been transformed into different products altogether. In particular, the appellants allege the following with regard to the goods in issue:

- they have been subjected to multiple processes, including being heat pressed, dyed, stretched, reheated in an ageing oven, "precision" cut, hydraulic aesthetic stamp bent and powder coated on the outside surfaces;
- they have ". . . artistic and architectural finishes . . ."[24] which distinguish them from the subject goods;[25] and
- they have been specifically designed and tested to ensure that they meet the standards of the *International Building Code* and, thus, are goods which operate as a ". . . life safety device."[26]

27. While all the appellants have brought forward the preceding arguments, LIV further submitted that the goods in issue were classified in heading No. 76.10 of the schedule to the *Customs Tariff*,[27] which was not listed in *Aluminum Extrusions* as being a heading in which the subject goods were classified.

28. LIV asserts that the CBSA admitted, in correspondence with LIV, that heading No. 76.10 was not part of the CBSA's original dumping and subsidizing investigations.[28] LIV contends that, if the Tribunal were to find that the goods in issue were of the same description as the subject goods, this would constitute an impermissible expansion of the scope of the subject goods covered by the findings.[29]

29. LIV further claimed that it wrote to a representative of the CBSA to ask whether or not the goods in issue were of the same description as the subject goods and was first advised by the CBSA that the goods in issue were *not* subject to the findings in *Aluminum Extrusions*. LIV contends that the CBSA subsequently reversed this position and that the duties and taxes that LIV paid on the goods in issue should be remitted on the basis that LIV was persuaded to act by the faulty advice provided by a representative of the CBSA. LIV therefore raises a defence of officially induced error.

CBSA

30. The CBSA asserts that the goods in issue cannot be considered kits of finished goods, as they cannot be assembled to form a finished product.[30] It also stated the following:

> Rather, balusters are *infill components* for use in a balustrade or railing system that, in addition to balusters, must include, at a minimum, posts and top and bottom rails, which are not included with the imported goods.[31]
>
> [Emphasis in original]

24. Exhibit AP-2012-039-07A at 19.
25. *Transcript of Public Hearing*, 14 May 2013, at 99, 102.
26. *Transcript of Public Hearing*, 15 May 2013, at 240.
27. S.C. 1997, c. 36.
28. *Transcript of Public Hearing*, 15 May 2013, at 294.
29. *Ibid.* at 297.
30. *Ibid.* at 330, 335.
31. Exhibit AP-2012-039-12A at para. 2.

31. The CBSA maintains that the goods in issue have no functionality by themselves and must instead be assembled with other additional materials/goods in order to carry out their purpose.[32]

32. In support of this position, the CBSA refers to the Tribunal's statement of reasons in *Aluminum Extrusions*, in which the Tribunal described parts of a kit as ". . . disassembled finished goods . . . ."[33] In the CBSA's submission, the goods in issue are truly characterized as ". . . a package containing components intended to be part of a railing system . . . ."[34]

33. The CBSA also argues that the goods in issue have not been further worked beyond the definition of the subject goods. While the CBSA acknowledges that several finishing processes have been applied to the goods in issue, it asserts that all of these processes are listed within the additional product information contained in the Tribunal's statement of reasons in *Aluminum Extrusions*.[35]

34. The CBSA submits that the appellants' true argument is that the processes applied to the goods in issue, although listed in the additional product information, were done with a precision and finesse not contemplated in the findings. The CBSA, however, states that such an interpretation is an ". . . impermissible modification . . ."[36] of the definition of the subject goods contained in the findings.

35. With regard to the additional arguments put forward by LIV, the CBSA asserts the following:

> [It] never suggested in any of its memoranda or other notices to the public regarding CBSA enforcement of the Tribunal's finding that the tariff codes listed in its public notices or memoranda were the only codes under which subject goods could be classified.[37]

36. The CBSA contends that the purpose of the memoranda and other notices is simply to serve as a guideline as to the tariff codes under which goods are typically classified. Moreover, the CBSA asserts that it is the physical characteristics of the goods in issue, and not the tariff code, which are determinative of whether the goods in issue are of the same description as the subject goods.

TRIBUNAL'S ANALYSIS

Issue No. 1: Are the Goods in Issue of the Same Description as the Subject Goods?

37. The Tribunal notes that whether or not there is an ambiguity in the findings is a fact-driven inquiry, which must be determined on a case-by-case basis.

38. With respect to the appellants' contention that the goods in issue have been worked or further processed to the point that they are no longer aluminum extrusions, the Tribunal notes that, in *Aluminart*, it accepted that the term "worked" in the findings was ambiguous and, therefore, referred to the statement of reasons. On the basis of this previous decision, together with the particulars of the present appeals, the Tribunal concludes that the language of the findings is ambiguous on this point.

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32. *Transcript of Public Hearing*, 15 May 2013, at 330.
33. At para. 349.
34. *Transcript of Public Hearing*, 15 May 2013, at 331.
35. *Ibid.* at 336.
36. *Ibid.* at 337.
37. Exhibit AP-2012-050-036A at para. 56.

39. Likewise, with regard to the appellants' argument that the goods in issue are kits, the Tribunal considers that the language of the findings is not clear as to whether kits are of the same description as the subject goods.

40. The Tribunal will therefore have recourse to the statement of reasons in *Aluminum Extrusions* in order to resolve the ambiguities presented in these appeals.

Have the Goods in Issue Been Further Processed?

41. In order to determine what is meant by the term "whether or not worked", as stated in the findings, regard must be had to the following passages in the statement of reasons in *Aluminum Extrusions*:

> 95. In light of this definition and additional information, the Tribunal is of the view that the subject goods and, therefore, the like goods include aluminum extrusion products that have been *further processed, but only to a certain extent. For example, the wording of the definition and the contextual guidance provided by the additional product information make it clear that aluminum extrusion products that have been anodized, painted or otherwise coated, and worked (e.g. precision cut, machined, punched and drilled) are included in the scope of the like goods.*
>
> 96. However, the Tribunal considers that the definition of the subject goods cannot be reasonably interpreted to include finished aluminum goods that are processed or manufactured to such an extent that they no longer possess the nature and physical characteristics of an aluminum extrusion as such but have become a different product. The additional product information supports this conclusion by limiting the relevant working and fabricating operations to steps that occur prior to the utilization of the extrusions in a finished product. The Tribunal further notes that the fact that the additional product information does not refer to the assembly of aluminum extrusions with other components, also supports this conclusion.
>
> [Emphasis added]

42. These passages must be read in conjunction with paragraph 23 of the statement of reasons in *Aluminum Extrusions*, which states the following:

> 23. Working or fabricating extrusions *includes any operation performed other than mechanical, anodized, painted or other finishing, prior to utilization of the extrusion in a finished product. These can include precision cutting, machining, punching, drilling and bending.*
>
> [Emphasis added]

43. The parties have agreed that the goods in issue are made of aluminum and produced via an extrusion process.[38]

44. The appellants also conceded that the different processes applied to the goods in issue are all enumerated in paragraph 23 of the statement of reasons in *Aluminum Extrusions*.[39]

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38. *Transcript of Public Hearing*, 15 May 2013, at 235.
39. While the appellants originally stated that the "high compression spin molding" process applied to the Architectural Bent and Architectural Baroque Bent models of the goods in issue were processes not contemplated by the findings, they later conceded that all of the processes applied to the goods in issue were enumerated in the findings. See *Transcript of Public Hearing*, 15 May 2013, at 255, 279-80.

45. However, the appellants argue the following:

> . . . the level of precision employed with respect to each of these processes goes well beyond the simple processes envisioned by the [T]ribunal and results in a real and substantive transformation of the goods, which alters their nature and physical characteristics into a downstream product: a sellable aluminum baluster that meets building code.[40]

46. The appellants therefore ask the Tribunal to look not only at the working processes applied to the goods in issue themselves but also at the manner in which those processes were applied.

47. After having examined the goods in issue in great detail and fully considered the arguments put forward by the appellants, the Tribunal has come to the conclusion that the goods in issue are aluminum extrusions as contemplated by the findings, as they have *not* been further processed to the point that they are no longer of the same description as the subject goods.

48. In *Aluminum Extrusions*, the subject goods are defined by the production processes applied to them. Thus, the production processes applied to the goods in issue are a determinative factor. If the goods in issue meet the description set out in *Aluminum Extrusions*, then they must be of the same description as the subject goods. It is only if the goods in issue have been further processed to such an extent that they no longer possess the characteristics of the subject goods that they may be found to be outside the scope of the product definition.

49. Having considered all the evidence presented by the parties, the Tribunal finds that the goods in issue remain products that resulted from an extrusion process, to which a limited degree of further processing was added prior to their importation. The statement of reasons in *Aluminum Extrusions* clearly identifies several processes that may be applied to the goods, *without* the goods falling outside the scope of the finding, including precision cutting, bending, punching, drilling, finishing and painting.

50. While the appellants have argued that the methods by which these processes are applied distinguish the goods in issue from the subject goods, the Tribunal finds that the precision cutting, whether done once or twice, the bending, whether mechanical or otherwise, the punching or the painting is not any different from what is described in paragraphs 23 and 95 of the statement of reasons in *Aluminum Extrusions*. There is no indication in that statement of reasons that the intensity with which these processes are applied in any way constitutes a characteristic by which to distinguish the subject goods from non-subject goods.

51. Simply put, the appellants did not demonstrate how any or all of these processes have transformed the goods in issue into something other than the type of goods that are described in *Aluminum Extrusions* or how the goods in issue were altered to such a degree that they are no longer of the same description as the subject goods.

52. The appellants attempted to demonstrate that there were significant differences between the goods in issue and "raw" aluminum extrusions in respect of market characteristics. As discussed above, the subject goods are specifically defined by way of the production processes applied and their physical characteristics. Since the goods in issue were produced via the processes set out in the findings and still possess the same physical characteristics as defined in *Aluminum Extrusions*, these characteristics are determinative. While the goods in issue may possess other qualities, such as market characteristics which are unique to them, these other characteristics cannot operate to trump or override the very definition set out in the findings.

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40. *Transcript of Public Hearing*, 15 May 2013, at 244-45.

53. Further, the argument presented by the appellants purportedly distinguishing "raw" aluminum extrusions from the goods in issue is deceptive in nature. It is true that the goods in issue may possess more qualities than those that were presented by Mr. Bertato as very basic extrusions; however, the true test is not comparative in nature but rather determinative, that is, whether any of these extrusions fall within the scope of the findings.

54. The fact that the goods in issue are presented as market-ready balusters which can serve no other end use[41] is not further determinative. The Tribunal does not accept the argument that the goods have only one possible end use and are therefore not of the same description as the subject goods. The Tribunal already dealt with this issue in *Aluminum Extrusions*, as set out in the following:

> 77. . . . the Tribunal notes that the definition of the subject goods, as clarified by the additional product information, does not limit the scope of the subject goods on the basis of end use. In the Tribunal's opinion, the definition is sufficiently broad to include goods that have a single use. Indeed, custom-shaped aluminum extrusions, which are clearly subject goods, are typically manufactured to serve a specific use. In other words, while aluminum inputs that have a single, specific end use may be considered aluminum parts as opposed to aluminum extrusions by the requesting parties, such goods may still meet the conditions of the definition of the subject goods.

55. Therefore, the end use of the goods in issue does not take them outside the scope of the findings.

56. As a result of the foregoing, the Tribunal concludes that the goods in issue are of the same description as the subject goods.

Are the Goods in Issue "Kits"?

57. In the statement of reasons in *Aluminum Extrusions*, the Tribunal stated the following:

> 351. With respect to products which were alleged to be parts of a "kit", the Tribunal took the view, consistent with what it previously stated in the section addressing like goods and classes of goods, that *if, at the time of importation, the kit comprised the necessary parts to assemble finished goods, they were finished goods rather than extrusions and, thus, not covered by the definition of the subject goods*.
>
> [Emphasis added]

58. As such, the Tribunal must determine whether the goods imported as either baluster only packages or baluster and accessory packages form a finished good.

59. The appellants have argued that, even though the baluster only packages did not contain any installation accessories at the time of importation, they should be considered kits because they are later presented to the consumer together with installation accessories, implying that the consumer will buy the accessories at the same time as the balusters.[42]

60. As stated by the Federal Court of Appeal in *Abbott Laboratories Ltd. v. Deputy M.N.R.C.E.*,[43] it is the condition of the goods at the time of importation, and not at the time of sale, which is determinative. Therefore, since baluster only packages were imported without installation accessories, it is irrelevant

41. *Ibid.* at 264, 266.
42. *Transcript of Public Hearing*, 14 May 2013, at 166.
43. [1986] 70 N.R. 222.

whether they were later presented, packaged or sold to the consumer together with various installation accessories. Since, at the time of their importation, the baluster only packages were not packaged together with installation accessories which the appellants contended were essential for their installation,[44] they were not, at that time, capable of being assembled to form a finished good. At the time of their importation, they simply remained aluminum extrusions with the same physical characteristics as the subject goods. Therefore, the baluster only packages are not kits which can be assembled to form a finished good.

61. Furthermore, the Tribunal finds that the baluster and accessory packages, which at the time of importation contained both balusters *and* installation accessories, also cannot be assembled to form a finished good.

62. As the evidence indicated, the baluster and accessory packages must be ". . . installed on an existing railing . . ."[45] by attaching them to a top and bottom rail.[46] It is only when the baluster and accessory packages have been attached to these additional components that the goods in issue become part of a finished good, in the form of a complete railing system. This point is demonstrated by the method in which the goods in issue are tested for compliance with safety codes. Mr. Kozal stated the following:

> . . . we have to make a full-scale model of the railing that we need to test with our baluster kits incorporated into that system.[47]

63. Until the goods in issue are assembled together with other railing components and become a finished good, they simply remain inputs which must be incorporated into a larger railing system.

64. Furthermore, the Tribunal carefully considered the goods in issue, analyzed them at length and considered every individual characteristic of each exhibit. Through this analysis, it was evident that the installation accessories contained in the baluster and accessory packages were simply that, accessories. Although they may be useful to the consumer, the fact remains that their value in relation to the overall content of aluminum extrusions is minimal. The simple addition of screws, washers or round plastic connectors[48] to what are essentially aluminum extrusions cannot be understood to change the nature of these goods into what would now be known as a "kit". To accept such a contention would essentially negate the purpose of the findings.[49]

65. Finally, the appellants pointed to the colourful, consumer-ready packaging, presented with SKUs, and installation and warranty information as an additional factor which further contributes to defining the goods in issue as kits which can be assembled to form a finished good. The Tribunal believes that this presentation may very well facilitate importation, distribution and overall sales appeal of the goods in issue, but packaging, in and of itself, does not change the nature of the goods.

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44. *Transcript of Public Hearing*, 14 May 2013, at 39.
45. *Ibid.* at 44.
46. *Ibid.* at 47.
47. *Ibid.* at 54.
48. It was unclear as to the actual necessity of any of these added components for all applications. The washers were only to be used to prevent corrosion in pressure treated lumber, which contains a corrosive chemical to aluminum, but were not necessary for other kinds of lumber, such as pine or cedar; the connectors are a proprietary type of "ball" connector hailed for ease of installation, but the balusters could also be installed without them where holes are drilled in the lumber or already present in the case of replacement balusters.
49. See *Aluminart* at para. 29.

66. As a result of the foregoing, the Tribunal finds that the goods in issue are of the same description as the subject goods, as they do not comprise kits which are assembled to form finished goods.

Tariff Heading

67. With regard to LIV's argument that the findings did not list goods imported in heading No. 76.10, the Tribunal has previously recognized that tariff classification is for guidance purposes only.[50] In the statement of reasons of *Aluminum Extrusions*, the Tribunal stated the following:

> 352. As far as tariff classification is concerned, the Tribunal is of the view that, while it may assist in reaching a decision as to whether or not products constitute subject goods, it is not determinative. The CBSA has expressed itself in similar terms in its statements of reasons for the preliminary and final determinations of dumping and subsidizing, where it stated that the listing of tariff classification numbers is for convenience of reference only and that the definition of the subject goods is authoritative.

68. The true test is therefore not the tariff code, but whether or not the goods in issue fall within the definition of the subject goods in the findings.

69. As the Tribunal has already concluded that the goods in issue are in fact of the same description as the subject goods by virtue of the definition in the findings, the tariff code under which the goods in issue were classified is not relevant to these appeals.

Issue No. 2: Was There an Officially Induced Error?

70. LIV has claimed that the duties and taxes paid on the importation of the goods on issue should be remitted on the basis that LIV was persuaded to act by the faulty advice provided by a representative of the CBSA. LIV therefore raises the defence of officially induced error.

71. LIV alleges that the CBSA officially induced an error when, on March 9, 2010, in response to enquiries by LIV's customs broker, the CBSA informed LIV that the goods in issue were not of the same description as the subject goods. LIV stated the following:

> The Appellant followed the CBSA's instructions until it was first informed by way of a DAS that the CBSA had altered its position with respect to consumer-ready packaged balusters. . . . the CBSA did not communicate with the Appellant's customs broker or the Appellant to notify the Appellant that it was reconsidering its advice previously given. The Appellant was not given an opportunity to amend its sourcing decisions prior to the issuance of the first DAS.[51]

72. LIV maintains that its actions in importing the goods in issue were predicated on the advice provided by the CBSA, but that the CBSA subsequently changed its position, to the detriment of LIV. Therefore, LIV asks the Tribunal to recommend that the Minister of Finance grant LIV a remission order for the duties and taxes paid.

73. The CBSA denies that its correspondence with LIV in any way induced an error. The CBSA states that it kept LIV informed of the ongoing dumping and subsidizing investigations and published

50. See *Toyota* at para. 34.
51. Exhibit AP-2012-050-21A at para. 49.

classification decisions in two publicly issued memoranda. According to the CBSA, at no time did it inform LIV that the goods in issue were not subject to the Tribunal's findings.[52]

74. The defence of officially induced error was recognized by the Supreme Court of Canada in *Lévis (City) v. Tétrault; Lévis (City) v. 2629-4470 Québec inc.*,[53] in which the Supreme Court of Canada held that the following elements must be establish:

> 26 . . .
>
> (1) that an error of law or of mixed law and fact was made;
>
> (2) that the person who committed the act considered the legal consequences of his or her actions;
>
> (3) that the advice obtained came from the appropriate official;
>
> (4) that the advice was reasonable;
>
> (5) that the advice was erroneous; and
>
> (6) that the person relied on the advice in committing the act.

75. Regardless of whether the Tribunal has jurisdiction to grant the remedy sought by LIV in this case, the argument cannot succeed purely on a factual basis.

76. First, LIV did not provide any evidence demonstrating that the correspondence from the CBSA was in relation to the two importations which are the subject of LIV's appeal. While the fact that the correspondence is proximate in time to the dates of the importations may suggest that the correspondence is referring to those importations, the Tribunal cannot simply accept such a position on the basis of speculation.

77. The author of the CBSA's e-mail was not called as a witness in this hearing, despite LIV having had the option of subpoenaing her in order to put these questions to her. Given that LIV opted not to do so, the Tribunal cannot find evidence where evidence is not present.

78. Secondly, an officially induced error can only be held in such cases for forward-looking transactions. If the CBSA's correspondence did induce LIV to act a certain way, which was not established in this case, it could only impact on future importations. By its very nature, an officially induced error cannot have retroactive effect.

79. LIV confirmed that the importations in issue occurred in January and February 2010,[54] yet the correspondence from the CBSA which LIV alleges influenced its importation decisions is dated March 9, 2010.[55] Thus, the correspondence could have had no bearing on the decisions made regarding past importations, as the importations had already occurred before the CBSA's advice was allegedly given. LIV's argument of an officially induced error must therefore fail on this ground as well.

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52. Exhibit AP-2012-050-036A at para. 53.
53. 2006 SCC 12, [2006] 1 S.C.R. 420.
54. *Transcript of Public Hearing*, 15 May 2013, at 289.
55. Exhibit AP-2012-050-021A, tab 23.

CONCLUSION

80. For these reasons, the appeals are dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Daniel Petit
Daniel Petit
Member