Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-027

Aluminart Products Limited

v.

President of Canada Border Services Agency

Decision and reasons issued
Thursday, April 19, 2012

Canada

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IN THE MATTER OF an appeal heard on February 2, 2012, pursuant to subsection 61(1) 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 June 14, 2011, with respect to requests for re-determination pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

ALUMINART PRODUCTS LIMITED **Appellant**

AND

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

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Jason W. Downey
Jason W. Downey
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 2, 2012
Tribunal Members:	Diane Vincent, Presiding Member Serge Fréchette, Member Jason W. Downey, Member
Counsel for the Tribunal:	Nick Covelli
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Julie Lescom
Registrar Support Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Aluminart Products Limited	Vincent M. Routhier Gordon LaFortune
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Alexander Kaufman

WITNESSES:

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Vice-President, Finance
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Bob Peacock
President
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Robert Wright
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by Aluminart Products Ltd. (Aluminart) pursuant to subsection 61(1) of the *Special Import Measures Act*[1] from decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to section 59 of *SIMA*.

2. The appeal is supported in part by an intervener, Universal Consumer Products Inc. (Universal).[2]

3. The Tribunal heard the appeal on February 2, 2012.

4. Three witnesses testified at the hearing. Mr. Anubhav Agarwal, Vice-President, Finance, of Aluminart testified on its behalf. Mr. Bob Peacock, President of Almag Aluminum Inc., and Mr. Robert Wright, Senior Program Officer at the CBSA, testified for the CBSA.

5. There are two issues in this appeal:

- whether certain aluminum parts and products, which were imported from the People's Republic of China by Aluminart and upon which anti-dumping duties were assessed (the goods in issue), are of the same description as the goods to which the Tribunal's findings in Inquiry No. NQ-2008-003[3] (the Findings) apply; and
- whether the CBSA improperly relied upon "zeroing" when assessing the anti-dumping duties.

ANALYSIS

Are the Goods in Issue Covered by the Findings?

Goods in Issue

6. The goods in issue are certain aluminum parts and products—generally rails that are transformed into door frames—that have fittings (i.e. weather stripping, foam stripping, vinyl strip, screen mesh) attached, as well as aluminum corner keys which are used to join door frames.[4] These goods were imported by Aluminart and used in the manufacture or sale of storm doors.[5]

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1. R.S.C. 1985, c. S-15 [*SIMA*].
2. See order in *Aluminart Products Limited v. President of the Canada Border Services Agency* (24 January 2012), AP-2011-027 (CITT). The Tribunal granted this leave to intervene in the form of a written brief before the hearing, on the understanding that Universal imported kits and that kits were within the scope of the appeal. However, at the hearing, the parties clarified that kits were not covered by the CBSA's decisions; therefore, the argument presented by Universal is largely moot.
3. *Aluminum Extrusions* (17 March 2009) (CITT) [*Aluminum Extrusions*].
4. Tribunal Exhibit AP-2011-027-03A at paras. 45-47, 58-59, 66-67; Tribunal Exhibit AP-2011-027-05A at para. 12; *Transcript of Public Hearing*, 2 February 2012, at 16-18.
5. *Transcript of Public Hearing*, 2 February 2012, at 15.

7. In its appeal, Aluminart refers to aluminum faceplates sold in kits with fasteners, but the parties agree that imports of these goods were not the subject of the CBSA's decisions.[6] Therefore, faceplates and kits are outside the scope of this appeal.

Tribunal's Findings

8. The Findings read 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, originating in or exported from the People's Republic of China . . . .
>
> [Emphasis added]

Legal Framework

9. The starting point for determining whether imported goods are of the same description as the goods described in findings is the findings themselves. The Tribunal interprets findings strictly, on the basis of their ordinary meaning; the Tribunal will look behind its findings, at the statement of reasons (SOR), only if the findings are ambiguous.[7] In interpreting and applying the description of the goods in findings, the Tribunal has no authority to amend the scope of the findings, whether by narrowing or enlarging such scope.[8]

10. In determining whether imported goods are of the same description as the goods described in findings, the Tribunal has, in the past, considered a number of factors, such as physical description, end-use applications, interchangeability, competition in the marketplace, price and marketing.[9]

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6. Both parties agreed, at the outset of the hearing, that faceplates are not subject to the appeal and that the Tribunal did not have jurisdiction to issue a decision in relation thereto. *Transcript of Public Hearing*, 2 February 2012, at 4-5, 7. Therefore, the Tribunal did not entertain any argument or evidence relating to faceplates specifically or to kits in general. See order in *Aluminart Products Limited v. President of the Canada Border Services Agency* (24 January 2012), AP-2011-027 (CITT). The Tribunal granted this leave to intervene in the form of a written brief before the hearing, on the understanding that Universal imported kits and that kits were within the scope of the appeal. However, at the hearing, the parties clarified that kits were not covered by the CBSA's decisions; therefore, the argument presented by Universal is largely moot.
7. *Zellers Inc. v. Deputy M.N.R.* (25 January 1996), AP-94-351 (CITT) [*Zellers*] at 9; *BMI Canada Inc. and BMI West Inc. v. President of Canada Border Services Agency* (2 August 2011), AP-2010-039 (CITT) at para. 105; *MAAX Bath Inc. v. Almag Aluminum Inc.*, 2010 FCA 62 (CanLII) [*MAAX Bath*] at paras. 36-37.
8. *Zellers* at 8-9; *Bicycles and Frames* (10 December 1997), RR-97-003 (CITT) at 5; *DeVilbiss (Canada) Limited v. Anti-dumping Tribunal*, (1982) 44 N.R. 416 at paras. 8, 14; *MAAX Bath* at para. 35.
9. 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); *Zellers*; *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT).

11. Whether the Canadian industry is capable of producing the imported goods is not a relevant consideration in this instance.[10]

Positions of Parties

12. Aluminart submits that the aluminum doorframe rails with fittings are not covered by the Findings because they are not "produced via an extrusion process"; rather, the fittings (e.g. weather stripping, foam stripping) are attached *after* the extrusion process has occurred.[11]

13. According to Aluminart, these fittings are permanently attached in the sense that, upon importation, they are—in the case of weather stripping, for example—crimped at both ends and cannot move.[12]

14. Aluminart argues that the phrase "whether or not worked" is limited to work that is done on the extrusion itself, not work undertaken to attach things to it.[13] In this regard, Aluminart does not rely upon the ordinary meaning of the word "worked", but on the language used in the SOR because, in its view, the meaning of this term, as used in the Findings, is ambiguous.[14]

15. In the SOR to the Findings, the Tribunal stated that the product definition included aluminum extrusions that had been further processed (e.g. precision-cut, machined, punched and drilled), but not to the extent that ". . . they no longer possess the nature and physical characteristics of an aluminum extrusion as such but have become a different finished product."[15] According to Aluminart, the permanent attachment of the fittings to the rails goes beyond this type of limited further processing; it transforms the extrusions into products that are different from those described in the Findings.[16] Aluminart also notes that, in the SOR to the Findings, the Tribunal stated that the product definition did ". . . not refer to the assembly of aluminum extrusions with other components . . . ."[17] On these bases, Aluminart claims that these goods should not be covered by the Findings.

16. Aluminart claims that the corner keys are cut to lengths of no more than 2 inches and, therefore, are too short to share the same nature and physical characteristics as the aluminum extrusions covered by the Findings.[18] Aluminart acknowledges that these cuts are precision cuts, but claims that the specific lengths mean that the corner keys are too small to be further processed and, therefore, are, from the user's perspective, finished goods rather than aluminum extrusions *per se*.[19]

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10. This is a factor which is considered in an injury inquiry if the Tribunal is requested to determine whether a particular product ought to be excluded from its finding. The Tribunal tends to reject a product exclusion request when the evidence discloses that the domestic industry produces or is capable of producing the same product or a substitutable product. See, for example, *Iodinated Contrast Media* (1 May 2000), NQ-99-003 (CITT) at 22; *Fasteners* (26 September 2006), NQ-2004-005R (CITT) at 4-5; *Carbon Steel Welded Pipe* (20 August 20008) NQ-2008-001 (CITT) at 21. In the present case, however, the issue is not whether the Tribunal ought to exclude the goods in issue from the Findings, but whether the goods in issue are already within the scope of the Findings.
11. Tribunal Exhibit AP-2011-027-03A at paras. 49-52.
12. *Transcript of Public Hearing*, 2 February 2012, at 80.
13. Tribunal Exhibit AP-2011-027-03A at paras. 55-56.
14. *Ibid.* at paras. 52-56; *Transcript of Public Hearing*, 2 February 2012, at 90, 144.
15. *Aluminum Extrusions* at para. 96.
16. Tribunal Exhibit AP-2011-027-03A at para. 57; *Transcript of Public Hearing*, 2 February 2012, at 81.
17. *Aluminum Extrusions* at para. 96.
18. Tribunal Exhibit AP-2011-027-03A at paras. 64-70.
19. *Transcript of Public Hearing*, 2 February 2012, at 84-85.

17. The CBSA agrees with Aluminart that the term "worked" is ambiguous and that, therefore, the Tribunal should have recourse to the SOR to determine its meaning. In this respect, however, the CBSA contends that the line is drawn where goods are produced by an aluminum extruder (in which case the product is covered by the Findings) rather than purchased from an extruder and then turned into a downstream product.[20]

18. According to the CBSA, the finished products that the Tribunal considered in the SOR were not subject goods, were sold by users or purchasers of extrusions, fulfilled different customer needs and did not closely resemble the subject goods in terms of physical and market characteristics.[21]

19. The CBSA argues that, as a fabricator or equipment manufacturer of storm doors, Aluminart further processes (i.e. cut) the goods prior to their becoming finished products (i.e. storm doors) and that, therefore, they do not have the qualities of finished products at the time of importation.[22]

20. The CBSA adds that ". . . small additions of weather stripping, foam or screen mesh"[23] do not change the nature or physical characteristics of the rails, which hence remain in the realm of aluminum extrusions covered by the Findings.[24]

21. The CBSA submits that the corner keys possess the same nature and physical characteristics as the goods covered by the Findings.

Determination: Aluminum Rails With Fittings

22. It is clear that the rails, without the attached stripping, are produced via an extrusion process.[25] It is also clear that the stripping itself is not made of aluminum and is not produced via an extrusion process.[26] The issue is simply whether the attachment of the very narrow strip of non-aluminum material to an aluminum extrusion transforms the aluminum extrusion into something else.

23. Aluminart's assertion that the stripping is permanently attached is not entirely supported by the evidence. Mr. Agarwal initially testified that the stripping is permanently attached and never removed because its purpose is to insulate the storm door.[27] However, as shown in the physical exhibit,[28] he later acknowledged that the stripping is not glued to the rail and that, if the ends were cut off, the stripping could be pulled out or slid in.[29]

24. In terms of pricing, Mr. Agarwal testified that the cost of the stripping was ". . . probably not material . . . ."[30] Thus, the addition of the striping adds very little value to the aluminum rails.

20. *Ibid.*, at 102.
21. Tribunal Exhibit AP-2011-027-05A at para. 16.
22. *Ibid.* at paras. 19-20.
23. *Ibid.* at para. 15
24. *Ibid.* at paras. 15, 19, 21.
25. *Transcript of Public Hearing*, 2 February 2012, at 47.
26. *Ibid.* at 27, 33-34.
27. *Ibid.* at 14, 16.
28. Exhibit A3.
29. *Transcript of Public Hearing*, 2 February 2012, at 28.
30. *Ibid.* at 31.

25. Mr. Agarwal also acknowledged that the rails could be used to produce door frames, with or without the stripping, according to the same manufacturing process, though he was also of the opinion that the stripping was an integral part of a storm door.[31]

26. Aluminart has demonstrated that the addition of the stripping makes the rails suitable for use with a particular type of door (i.e. storm door) rather than for use in other types of door frames (e.g. interior doors) and that, therefore, aluminum doorframe rails with stripping are more versatile than aluminum doorframe rails without stripping.

27. Increased versatility, however, in and of itself, is insufficient to distinguish one kind of product from another. In this case, in particular, the work of adding stripping alone is insufficient to transform aluminum extrusions covered by the Findings into an entirely different class of downstream goods.

28. Whereas there would be no controversy if the rails lacked the stripping, as an analytical device, the Tribunal compared "the nature and physical characteristics" of Aluminart's rails with those of hypothetical aluminum rails without stripping.

29. In terms of their physical characteristics, both products would take the shape of rails and each, stripping aside, would be composed of aluminum produced via an extrusion process. In terms of their nature or market characteristics, both would be used to manufacture doorframes and, given that the price of the stripping is not material in relation to the overall price of rails with stripping, their prices would be virtually identical. The goods would presumably be distributed and sold through common or similar distribution channels, i.e. by door manufacturers or door frame suppliers. Thus, their nature and physical characteristics would be essentially the same.

30. This conclusion is not controverted by the little evidence adduced by Aluminart with respect to the nature and physical characteristics of the rails specifically and of the goods described in the Findings generally.

31. Therefore, the Tribunal finds that the aluminum rails are covered by the Findings.

Determination: Corner Keys

32. There does not seem to be any dispute that the corner keys are produced via an extrusion process. Rather, the dispute in relation to these products seems to stem from the fact that, once extruded, they are precision cut to very short lengths.[32] Does this further processing constitute "work" within the meaning of that term, as used in the Findings, or does it go so far as to transform aluminum extrusions into different products which are not covered by the Findings?

33. In answering this question, Aluminart relies in large part on the SOR, where the Tribunal clarified that the product definition included aluminum extrusions that had been further processed except to the extent that ". . . they no longer possess the nature and physical characteristics of an aluminum extrusion as

31. *Ibid.* at 30-31.
32. Mr. Agarwal testified at least twice that the cut needs to be "precise". *Transcript of Public Hearing*, 2 February 2012, at 18, 35.

such but have become a different finished product."[33] In the SOR, the Tribunal expressly identified "precision cutting" as an example of such further processing. In addition, the Tribunal stated that "[w]orking . . . can include precision cutting . . . ."[34]

34. There is nothing, whether expressly or implicitly, in the Findings, which supports Aluminart's position that precision-cut extrusions are nevertheless excluded if the resultant lengths are very short. On the contrary, the Findings expressly refer to wall thickness, maximum weight and diameter, but they do not refer to length. Thus, on the face of the Findings, short length is not a limiting physical characteristic. Consequently, the Findings cover aluminum extrusions of all lengths, including those of very short lengths.

35. Therefore, the Tribunal finds that the corner keys are covered by the Findings.

Did the CBSA Improperly Apply Zeroing?

Legal Framework

36. In the context of duty assessment, section 3 of *SIMA* requires that an anti-dumping duty equal the margin of dumping and, in turn, subsection 2(1) defines "margin of dumping" as ". . . the amount by which the normal value of the goods exceeds the export price of the goods". By comparison, in the context of a dumping investigation, subsection 30.2(1) provides that ". . . the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater."

Positions of Parties

37. Aluminart complains that the CBSA improperly relied on zeroing to calculate the margins of dumping, with the effect that the resultant anti-dumping duties were inflated.[35] In particular, the CBSA took the transactions listed in the detailed adjustment statements, treated the non-dumped products as having a margin of dumping of zero and then established the duties payable on the basis of the dumped products only.[36] Aluminart argues that the CBSA should have offset the dumped imports to the extent that the other imports were not dumped.

38. Aluminart claims that it was improper for the CBSA to rely on zeroing because the CBSA has stated that it has discontinued the practice of zeroing, that the practice has been criticized by the World Trade Organization (WTO) and that domestic aluminum extruders are not entitled to protection beyond what is necessary to offset injurious dumping.[37]

39. In reply, CBSA says that it has discontinued the practice of zeroing when determining margins of dumping in dumping investigations, but not when assessing anti-dumping duties.[38] The CBSA explains that it stopped zeroing in investigations because subsection 30.2(1) of *SIMA* specifies that the margin of dumping in an investigation is determined by subtracting the weighted average export price from the

33. *Aluminum Extrusions* at para. 96.
34. *Ibid.* at para. 23.
35. Tribunal Exhibit AP-2011-027-03A at paras. 72-74, 77.
36. *Transcript of Public Hearing*, 2 February 2012, at 86.
37. Tribunal Exhibit AP-2011-027-03A at paras. 75-76, 78; *Transcript of Public Hearing*, 2 February 2012, at 86-87.
38. Tribunal Exhibit AP-2011-027-05A at para. 30.

weighted average normal value. By contrast, for duty assessment purposes, subsection 2(1) and section 3 simply require that the margin of dumping be determined by subtracting the export price from the normal value. The CBSA says that this difference in language means that the CBSA need not offset import transactions when assessing anti-dumping duties.[39]

40. Moreover, the CBSA contends that it would be unworkable to offset transactions for duty assessment purposes because there is no guidance in the legislation on whether the CBSA is to take into account each invoice or a particular period.[40]

41. The CBSA also contends that the elimination of zeroing would undermine the primary purpose of *SIMA*, which, it says, is to protect Canadian producers. Importers could import dumped goods that injure domestic producers without attracting anti-dumping duties if they also import the same goods at prices that are not dumped.[41]

Determination

42. It is evident that Aluminart's position on zeroing is premised in large part on a misunderstanding that, while it does not apply this methodology in the course of dumping investigations any more, the CBSA did not say that it was completely abandoning zeroing.

43. Whereas the wording of subsection 30.2(1) of *SIMA*, insofar as it refers to weighted averages, reasonably lends itself to an interpretation that is consonant with Canada's international obligations, as expressed in the zeroing decisions of the WTO Appellate Body,[42] the wording of the provisions of *SIMA* that apply in the context of the enforcement of a resultant injury finding[43] does not. Specifically, these provisions do not refer to weighted averages.

44. On a plain reading, the effect of subsection 2(1) and section 3 of *SIMA* is that the CBSA shall levy, before releasing a shipment of imported goods which are of the same description as goods in respect of which the Tribunal has made an order or finding, an anti-dumping duty equal to the extent by which the normal value of these goods exceeds the export price. Thus, when assessing duty, the customs official is obliged, by statute, to take into account the export price of the goods that are before him, not the prices of those goods and of earlier or future shipments of such goods.

45. There is no basis in Canadian legislation for allowing individual import transactions of goods that are covered by an order or finding of the Tribunal and valued at dumped prices to escape the imposition of anti-dumping duties.

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39. *Ibid.* at paras. 30-33.
40. *Ibid.* at para. 34.
41. *Ibid.* at para. 35.
42. Having regard to the language of subsection 30.2(1) of *SIMA* and the WTO jurisprudence, among other factors, the Federal Court of Appeal has found CBSA's abandonment of zeroing in dumping investigations to be reasonable: *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398, [2007] 4 FCR 101.
43. Section 3 of SIMA, as well as the definition of "margin of dumping" in subsection 2(1).

DECISION

46. The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Jason W. Downey
Jason W. Downey
Member