



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-055

Tyco Safety Products Canada, Ltd.
(formerly Digital Security
Controls Ltd.)

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, September 8, 2011*

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IN THE MATTER OF an appeal heard on June 14, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF four decisions of the President of the Canada Border Services Agency, dated September 30, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

**TYCO SAFETY PRODUCTS CANADA, LTD. (FORMERLY
DIGITAL SECURITY CONTROLS LTD.)**

Appellant

AND

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

Respondent

DECISION

The appeal is allowed in part.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 14, 2011
Tribunal Member:	Pasquale Michael Saroli, Presiding Member
Counsel for the Tribunal:	Courtney Fitzpatrick Danielle Lussier-Meek
Research Director:	Matthew Sreter
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PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Tyco Safety Products Canada, Ltd. (formerly Digital Security Controls Ltd.) (Tyco) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from four decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether certain models of video-based security systems (the goods in issue) are properly classified under tariff item No. 8521.90.90 of the schedule to the *Customs Tariff*² as other video recording or reproducing apparatus, whether or not incorporating a video tuner, as determined by the CBSA, or should be classified under tariff item No. 8525.50.00 as transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus, or, in the alternative, under tariff item No. 8471.49.00 as other automatic data processing machines and units thereof, not elsewhere specified or included, presented in the form of systems, as claimed by Tyco.

PROCEDURAL HISTORY

3. On July 8, 2010, Tyco, as a result of a verification conducted by the CBSA, pursuant to sections 42 and 42.1 of the *Act*, of certain importations made by Tyco in 2008, submitted self-adjustments for four importations of the goods in issue, pursuant to section 59.

4. On September 23, 2010, Tyco requested further re-determinations of the tariff classification of the goods in issue, pursuant to subsection 60(1) of the *Act*.

5. On September 30, 2010, the CBSA issued four decisions that confirmed the tariff classification of the goods in issue, pursuant to subsection 60(4) of the *Act*.

6. On December 24, 2010, Tyco filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

7. On June 14, 2011, the Tribunal held a public hearing in Ottawa, Ontario.

8. Mr. Christopher Albin, Mr. Michael Camelia and Mr. Rafael Gomez appeared as witnesses for Tyco. Mr. Albin was qualified by the Tribunal as an expert in hardware evolution, storage database management, digital tools and related software for electronic security equipment. The CBSA did not call any witnesses.

GOODS IN ISSUE

9. The goods in issue are the following 13 models of video-based security systems: (i) Intellex Ultra (models ADD600ULP050, ADD600ULP150 and ADD600ULP100); (ii) Intellex Digital Video Management System (DVMS) (models ADD800DVD025, ADD6R0DVD075, ADD6R0DVD050 and ADD600DVS016); (iii) Intellex LT (model ADD400LTD016); (iv) Intellex IP (model ADD1P100E); and (v) Electronic Digital Video Recorder (EDVR) (models ADEDVR016032, ADEDVR004032, ADEDVR004016 and ADEDVR004008).³

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

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

3. Tribunal Exhibits AP-2010-055-06A at para. 1, AP-2010-055-09, AP-2010-055-10A at para. 4.

10. During the hearing, evidence was presented by the witnesses to the effect that there are in fact two different technologies used in the various goods in issue. Therefore, the Tribunal will treat the nine Intellex models (which include Intellex Ultra, Intellex DVMS, Intellex LT and Intellex IP) and the four EDVR models separately.

PRELIMINARY ISSUES

11. Three preliminary issues were addressed by the Tribunal at the beginning of the hearing.

12. First, in addition to the above 13 models, Tyco sought to have model ADD5R0DVD075 included in the goods in issue, for which a notice of appeal had not been filed within the 90-day period mandated by subsection 67(1) of the *Act*.

13. Second, Tyco sought to have an additional 20 models (ADD400LTPV025, ADD400LTPV050, ADD600DVDV050, ADD600DVDV100, ADD600DVPV50, ADD600DVSV025, ADD600DVSV050, ADD600LTPV025, ADD600LTPV050, ADD600ULPV100, ADD600ULPV300, ADD6R0DVD100, ADD6R0DVDV150, ADD800DVDV050, ADD800DVDV100, ADD800DVSV050, ADD800LTPV025, ADDIP100, ADEDVR009016 and ADEDVR009064) included in the goods in issue, in respect of which the President of the CBSA had held its decisions under section 60 of the *Act* in abeyance pending the disposition of the current appeal.

14. Third, on the morning of the hearing, Tyco sought to file an item as a physical exhibit in these proceedings.

15. By letter dated May 31, 2011, the Tribunal invited submissions from the parties on whether (i) an appeal in respect of the classification of model ADD5R0DVD075 and related Detailed Adjustment Statement (DAS) was time-barred by operation of law and (ii) the additional 20 models should be joined to the current appeal, notwithstanding the fact that they had not yet been the subject of decisions by the President of the CBSA under section 60 of the *Act*.

16. Having considered these issues with the benefit of views submitted by both parties, the Tribunal read its rulings into the record at the outset of the hearing.⁴

17. With regard to the first issue, the Tribunal noted that subsection 67(1) of the *Act* provides that a person aggrieved by a decision of the President of the CBSA made under section 60 or 61 of the *Act* must file a notice of appeal within 90 days after the time notice of that decision was given.

18. Subsection 67.1(1) of the *Act* authorizes the Tribunal, upon application, to make an order extending the time to make an appeal, subject to any terms that it considers just, and provided all the conditions set out in subsection 67.1(4) have been met.

19. Turning to the specific conditions set out in subsection 67.1(4) of the *Act*, there is no question that Tyco's June 6, 2011, application for an extension of time was made within one year of the expiration of the 90-day period set out in subsection 67(1) for the filing of a notice of appeal from a decision of the President of the CBSA under section 60, which, in this case, was made on September 15, 2010 (being the date on which the DAS in respect of this product model was issued). Accordingly, the Tribunal found that the application met the first condition for the granting of a time extension, as set out in paragraph 67.1(4)(a).

4. *Transcript of Public Hearing*, 14 June 2011, at 11-15.

20. The Tribunal did not, however, accept as sufficient the explanation offered by Tyco as to why it did not file a notice of appeal in respect of this model in the normal course and within the time period specified in subsection 67(1) of the *Act*. In particular, the Tribunal was not satisfied that, during the relevant period, Tyco evinced a *bona fide* intention to appeal, as required under subparagraph 67.1(4)(b)(i). Specifically, in its reply submission of June 6, 2011,⁵ Tyco cited ongoing discussions with the CBSA to obtain its consent to simply add this model to the existing appeal, given its purported similarity to the goods in issue. The Tribunal noted, however, that the correspondence filed by Tyco in support of this assertion was dated April 15, 2011, which was well beyond the 90-day period set out in subsection 67(1).

21. In any event, and as correctly noted by the CBSA in its submission in reply to the Tribunal's letter,⁶ it is not open to a party to disregard legislated time frames for the filing of notices of appeal or to circumvent the statutory requirements and procedures on extensions of time for appealing. In this regard, subsection 67.1(1) of the *Act* i) confers authority for the granting of such extensions to the Tribunal, ii) establishes mandatory requirements and procedures for the making of such applications and iii) sets out conditions that must be met before any such extension can be granted.

22. Finally, with a notice of appeal in respect of purportedly similar goods having been filed on December 24, 2010, the Tribunal was not satisfied that the application for an extension of time (which was not filed until June 6, 2011) was made as soon as circumstances permitted, as required by subparagraph 67.1(4)(b)(iii) of the *Act*.

23. For the foregoing reasons, the Tribunal found that it was unable to grant either an extension of time for the filing of a notice of appeal or the related request to have the decision in respect of model ADD5R0DVD075 joined to this appeal.

24. Turning to the second issue concerning the additional 20 models that Tyco sought to have joined to the current appeal, the Tribunal noted that subsection 67(1) of the *Act* states that an appeal lies to the Tribunal from "... a decision of the President made under section 60 or 61 ..."

25. In this regard, the CBSA claimed, and Tyco acknowledged in its reply submission, that the President of the CBSA has not yet rendered a decision pursuant to section 60 of the *Act* in respect of these models, with notice having been given to Tyco by letter dated April 8, 2011, that the CBSA was holding its requests for re-determination in abeyance pending the disposition of the current appeal.⁷

26. As the Tribunal's jurisdiction under subsection 67(1) of the *Act* is predicated on a prior decision of the President of the CBSA under section 60 or 61, the absence of such a prior decision effectively deprives the Tribunal of jurisdiction under subsection 67(1). Indeed, as explained by the Tribunal in *C.B. Powell Limited v. President of the Canada Border Services Agency*,⁸ as affirmed by the Federal Court of Appeal (FCA) in *C.B. Powell Limited v. Canada (Border Services Agency)*⁹ and cited with approval by the FCA in its decision in *Wolseley Engineered Pipe Group v. Canada Border Services Agency*,¹⁰ "... acceptance of the present appeals under the purported authority of subsection 67(1) of the *Act*, when no 'decision' had been made (either in actuality or by necessary implication) by the President of the CBSA, as the authority designated under subsection 60(1) to make such decisions, would result in the Tribunal exceeding its intended jurisdiction under the statutory scheme."¹¹

5. Tribunal Exhibit AP-2010-055-20A.

6. Tribunal Exhibit AP-2010-055-21A.

7. Tribunal Exhibit AP-2010-055-20A at 2.

8. (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) [*C.B. Powell*].

9. 2011 FCA 137 (CanLII).

10. 2011 FCA 138 (CanLII).

11. *C.B. Powell* at para. 41.

27. Given these jurisdictional limitations and other considerations, such as adequate prior notice of the description of the goods, the Tribunal found that the additional 20 models could not be joined to the current appeal, a point subsequently conceded by Tyco in its letter of June 13, 2011, to the Tribunal.¹²

28. The Tribunal therefore decided that the current appeal would be confined to the 13 models identified in paragraphs 1 and 4 of Tyco's submission¹³ and the CBSA's brief¹⁴ respectively.

29. Regarding Tyco's request for permission to file a physical exhibit on the morning of the hearing, the CBSA argued that the proposed exhibit should not be accepted for late filing, noting that, under paragraph 34(3)(b) of the *Canadian International Trade Tribunal Rules*,¹⁵ physical exhibits must be filed not less than 10 days prior to the hearing and that notice must be given to the other parties. The CBSA further noted that the proposed exhibit was not the same model as any of the models of the goods in issue and that this fact, together with the lack of notice of intention to file a physical exhibit, would be prejudicial to the CBSA, were the exhibit to be accepted on to the record.¹⁶

30. Tyco countered that the filing of the proposed exhibit would not be prejudicial to the CBSA. While Tyco acknowledged that the proposed exhibit was not one of the goods in issue, it noted that the only difference was that it was a rack-mount unit as opposed to a table-top unit. Tyco added that the proposed exhibit was for reference or display purposes only.¹⁷

31. While purported to be similar to the goods in issue, the model number indicated that the proposed exhibit was in fact not one of the goods in issue. Given the procedures set out at paragraph 34(3)(b) of the *Rules*, Tyco's failure to provide the required advance notice to the CBSA of its intention to file a physical exhibit, the CBSA's objection to the late filing of the proposed exhibit and the requirements of procedural fairness, the Tribunal found that it was inappropriate to accept the late filing of the proposed exhibit.¹⁸

ANALYSIS

Statutory Framework

32. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.

33. 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.¹⁹ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

12. Tribunal Exhibit AP-2010-055-23. This exhibit was accepted into the record with the consent of the CBSA during the public hearing. *Transcript of Public Hearing*, 14 June 2011, at 5.

13. Tribunal Exhibit AP-2010-055-06A.

14. Tribunal Exhibit AP-2010-055-10A.

15. S.O.R./91-499 [Rules].

16. *Transcript of Public Hearing*, 14 June 2011, at 7-8.

17. *Ibid.*

18. *Ibid.* at 8-9.

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

34. Subsection 10(1) of the *Customs Tariff* provides as follows: "... the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[20] and the Canadian Rules^[21] set out in the schedule."

35. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, regard must be had to Rule 2, and so on, until classification is completed.²² Classification therefore begins with Rule 1, which provides as follows: "... for legal purposes, 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 following provisions." The next provision to consider, if necessary, is Rule 2 (a), which notably provides the following additional guidance: "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article."

36. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[23] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[24] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.²⁵

37. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

Relevant Provisions of the Customs Tariff and Explanatory Notes

38. The provisions of the *Customs Tariff*, which Tyco claims to be relevant and applicable to the goods in issue, are 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**

...

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

21. S.C. 1997, c. 36, schedule.

22. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

23. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

24. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

25. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

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**

...

85.25 **Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders.**

8525.50.00 **- Transmission apparatus**

39. The relevant section notes to Section XVI provide as follows:

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

...

5. For the purpose of these Notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.

40. The relevant *Explanatory Notes* to Section XVI provide as follows:

(VI) MULTI-FUNCTION MACHINES AND COMPOSITE MACHINES

(Section Note 3)

...

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); ...

41. In the alternative, should the Tribunal find that the goods in issue are not classifiable in heading No. 85.25, Tyco claims that the goods in issue fall to be classified in heading No. 84.71 (a heading which falls under Section XVI), with the relevant provisions of the *Customs Tariff* being as follows:

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

...

84.71 **Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.**

...

- Other automatic data processing machines:

...

8471.49.00 **- -Other, presented in the form of systems**

42. The relevant note to Chapter 84 provides as follows:

5. . . .

(E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

43. The provisions of the *Customs Tariff*, which the CBSA considers to be relevant and applicable to the goods in issue, are as follows:

8521 Video recording or reproducing apparatus, whether or not incorporating a video tuner.

. . .

8521.90 -Other

. . .

8521.90.90 ---Other

Positions of Parties

Tyco

44. Tyco claims that the goods in issue form a complete microprocessor-based closed-circuit television (CCTV) system (excluding cameras) and should be classified according to their principle function. While Tyco acknowledges that the goods in issue have a recording function, it contends that the transmission capabilities of the goods take functional precedence over any recording or video-playback features. Tyco submits that the goods in issue ought to be classified in heading No. 85.25 as “transmission apparatus”, as, in its view, that definition corresponds to principle function.

45. In the alternative, Tyco submits that the goods in issue are classifiable in heading No. 84.71 and, more specifically, under tariff item No. 8471.49.00 as other automatic data processing machines and units thereof, not elsewhere specified or included, presented in the form of systems. In this regard, Tyco argues that the goods in issue are, at their core, computers.

46. In response to the CBSA’s re-determination that the goods in issue are properly classified in heading No. 85.21 as video recording or reproducing apparatus, Tyco argues that recording was not the principal function of the goods, as the design capabilities of the goods included, in addition to the recording of video and sound, multiplexing for the transmission of live video CCTV signals, live CCTV video transmission over the Internet, video decoding and encoding, video camera control (pan, tilt, zoom) and recording security events with alarm-triggered dome positioning.²⁶

47. Tyco further argues that the goods in issue are distinguishable from the goods in *Pelco Worldwide Headquarters v. President of the Canada Border Services Agency*,²⁷ thereby rendering the Tribunal’s decision in that case inappropriate as a benchmark for tariff classification in the present case. In this regard, Tyco submits that the goods in *Pelco* “...approached security imaging from a ‘recording first’ philosophy . . .”,²⁸ with the less sophisticated live video monitoring capabilities of the goods in that case

26. Tribunal Exhibit AP-2010-055-06A at para. 20.

27. (27 September 2007), AP-2006-016 and AP-2006-018 (CITT) [*Pelco*] at para. 2. The goods in *Pelco* were described as digital video recorders.

28. Tribunal Exhibit AP-2010-055-06A at para. 17.

limiting their ability to transmit live video images to remote locations, thereby reducing live monitoring to a function ancillary and subordinate to that of recording. By contrast, Tyco argues that the goods in issue are multi-function systems that focus on proactive “real-time” enhanced video surveillance, with the recording function being secondary to the generation, transmission, display, remote control and triggered recording of live images in response to specific surveillance requirements and security events.

CBSA

48. The CBSA, for its part, argues that the goods in issue are multi-function or composite machines and that, in accordance with note 3 to Section XVI, are to be classified in the heading which describes their principal function. The CBSA claims that the marketing, design and best usage of the goods in issue point to recording as their principal function, which renders them properly classifiable in heading No. 85.21.

49. The CBSA contends that the goods in issue are similar to the goods in *Pelco*, in that (i) both are used in CCTV security surveillance, (ii) both are able to receive video signals from multiple cameras, (iii) both allow for the real-time monitoring of images and for the playback of recorded video, and (iv) both allow for the display of images from multiple sources on one screen, the recording of multiple images on a computer hard disk and the transmission of multiple images to remote locations. Accordingly, the Tribunal should similarly find that the principal function of the goods in issue is that of recording.

50. The CBSA further argues that the compression technology embedded in the goods in issue, which is referred to as “Active Content Compression” (ACC), principally benefits the recording function by reducing file size and thereby allowing more recorded images to be stored on the hard drive.²⁹

51. In response to Tyco’s submission that the goods in issue are much more technologically advanced than the goods in *Pelco*, the CBSA argues that advanced technology or sophistication does not change the principal function, which remains that of recording.

Tariff Classification of the Goods in Issue

52. Rule 1 of the *General Rules* provides that “. . . classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes”

53. The Tribunal, having regard to the specific terms used in the tariff headings at issue, finds that the goods in issue, whether as “apparatus” of heading No. 85.21 or 85.25 or “machines” of heading No. 84.71, are “machines” within the meaning of that term in note 5 to Section XVI.

54. The parties agree, and the Tribunal accepts, that the goods in issue are machines³⁰ designed to perform two or more complementary or alternative functions, in particular, the recording and transmission of digitized video images.

55. In this regard, while heading No. 85.21 describes machines that perform a video recording function and heading No. 85.25 describes machines that perform a video transmission function, neither heading describes, *eo nomine*, machines that perform both functions. The Tribunal therefore finds that the goods in issue are not described *as such* in either heading No. 85.21 or heading No. 85.25, with each of these headings referring to only part of the goods in issue.

29. Tribunal Exhibit AP-2010-055-10A, tab 14.

30. Tribunal Exhibit AP-2010-055-6A at paras. 73, 74, 86; Tribunal Exhibit AP-2010-055-10A at para. 44.

56. In such circumstances, the normal application of the *General Rules*, which are applied sequentially, would eventually take one to Rule 3 (a), which provides that “. . . when two or more headings each refer to part only of the materials or substances contained in . . . composite goods . . . those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods”, and, in turn, to Rule 3 (b), which provides that “. . . composite goods . . . made up of different components . . . which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, *insofar as this criterion is applicable*.” [Emphasis added].

57. However, note 3 to Section XVI directs that “. . . composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the *principal function*.” [Emphasis added]

58. In this regard, the parties agree and the Tribunal accepts that, in so doing, note 3 to Section XVI effectively equates the “essential character” of composite machines to their “principal function”, such that the component which, in the application of Rule 1 of the *General Rules*, is determined to perform the “principal function” of the goods in issue is also considered to be the component that confers to those goods their “essential character”, thereby rendering the essential character criterion in Rule 3 (b) inapplicable.³¹

59. Finally, for those situations where the principal function of a multi-function machine cannot be determined, the *Explanatory Notes* to Section XVI provide for direct recourse to Rule 3 (c) of the *General Rules*, pursuant to which the goods in issue are to be classified in the heading which occurs last in numerical order among those headings which equally merit consideration:

(VI) MULTI-FUNCTION MACHINES AND COMPOSITE MACHINES

(Section Note 3)

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c).

[Emphasis added]

60. As mentioned above, both parties agree that the goods in issue are composite machines and that, accordingly, classification is governed by note 3 to Section XVI. The Tribunal will therefore conduct a “principal function” analysis of the goods in issue in order to determine in which of the competing headings the goods in issue fall to be classified.

Principal Function Analysis—Intellex Models (Intellex)

61. The determination of principal function involves an assessment of the importance of each function relative to that of each of the other functions performed by a multi-function machine. In this regard, the relative importance of each function is dependent, in large part, upon the demands of the marketplace and the level of technology involved in the performance of that function.

62. It therefore follows that the principal function of a multi-function machine should not be viewed as a static determination, but rather as one that is subject to change over time and with successive versions of the machine. In particular, shifting customer demands in the marketplace and technological advancements over time can lead to a specific function acquiring greater prominence relative to the other functions performed by a multi-function machine.

31. *Transcript of Public Hearing*, 14 June 2011, at 174, 191, 203-204.

– The Effect of Changes in Market Demand on Principal Function

63. The evidence indicates and the Tribunal accepts as inherently logical that, since the horrific events of September 11, 2001, there has been an increasing demand on the part of customers for real-time surveillance capabilities to enable proactive responses to security events, as opposed to the purely reactive responses enabled by the review of recorded data.³²

64. In this regard, the evidence indicates that Intellex has evolved to include specific features and functionalities that allow for more robust real-time surveillance and for such activities to be consolidated in a centralized command and control centre (or hub) that covers multiple security points of interest, which may be spread across a wide geographic area (i.e. zone of interest).³³

65. The Tribunal accepts that this centralization of command and control functions has in turn allowed for the realization of cost efficiencies of scale in overall surveillance activities.³⁴ In this regard, in describing the proprietary ACC algorithm contained in Intellex,³⁵ Mr. Camelia explained as follows:

It also has an extremely beneficial effect [in] that it produces a smaller total stream in terms of the number of bits that are necessary for transmission of a stream.

That compression algorithm opened the door for us to truly expand the usefulness of a video management system for many purposes beyond simply recording. . . .

This compression algorithm can sense, detect and then remove the effect of noise, reducing the size of the transmitted video which is so important to bandwidth.³⁶

66. Mr. Camelia further explained how some of Tyco's clients that have multiple sites spread across a large geographic area have bandwidth constraints because of their need also to transmit a variety of other data types (e.g. point-of-sale activity, data for inventory controls). The ACC algorithm allows for remote surveillance that "... can fit [the clients'] objectives of getting that video that has been compressed and ... transmitted to a remote location for corporate review ... and not interfere with the normal transmission of [other] data that they need for running their business."³⁷ In addition to allowing for the cost-efficient transmission of live video feeds through the reduction of bandwidth utilization, Intellex has other features that are conducive to more effective real-time surveillance.³⁸

32. *Ibid.* at 88-89; Tribunal Exhibit AP-2010-055-15A at para. 26.

33. *Transcript of Public Hearing*, 14 June 2011, at 34, 36, 43.

34. *Ibid.* at 43-44.

35. The Tribunal notes that certain models of the goods in issue (EDVR models) do not utilize the proprietary ACC algorithm; rather these particular models utilize a Motion Joint Photographic Experts Group (M-JPEG) compression system which is not proprietary to Tyco, and is available on the commercial market. *Transcript of Public Hearing*, 14 June 2011, at 116, 158-59.

36. *Transcript of Public Hearing*, 14 June 2011, at 38-39.

37. *Ibid.* at 105.

38. *Transcript of Public Hearing*, 14 June 2011, at 27-30. Mr. Gomez provided the Tribunal with a demonstration of how Intellex functions as a live video surveillance tool, with the ability to remotely enable or disable the system recording functions, or to realign or adjust camera views.

– The Effect of Technological Advancements on Principal Function

67. The Tribunal understands that these goods in issue form the core of a complete CCTV surveillance system. Mr. Camelia described the basic operational schematic of Intellex as follows:

Analogue video cameras, which do not form part of the goods in issue, are strategically placed at points of interest within a geographic zone of interest which can be local, regional, national or international. The analogue video signal transmissions are fed into an off-the-shelf computer which includes a daughter card that allows these signals to be digitized, compressed (using the proprietary ACC algorithm) and combined for transmission to a network interface. The signals can then be re-transmitted to different network destinations, e.g. computer monitors, laptops, mobile phones, external storage devices.³⁹

68. The Tribunal accepts that the technologies incorporated into Intellex have served to enhance the economic/operational feasibility and centralization of real-time surveillance.

69. In particular, the proprietary daughter card is designed to accept incoming video streams and process (i.e. digitize and compress) them for transmission to destinations designated by the system operator.⁴⁰

70. In this regard and as already noted, Intellex employs a proprietary ACC algorithm which, by reducing the bandwidth footprint of digitized video streams, has rendered their transmission to multiple (including remote) destinations economically and operationally feasible. When asked to explain the importance of bandwidth efficiency, Mr. Albin stated the following: “The importance of bandwidth efficiency is because this is a transmission device, [and] a lot of my customers don’t have the luxury of having a dedicated network Some of them are forced to use their security system over a network where they do their day-to-day commerce. So it’s extremely important for them . . . to keep bandwidth [usage] to a minimum”⁴¹ Mr. Camelia stated the following: “Many of our customers will complain if we do anything that would consume more bandwidth. Large retailers, for example, have a fixed bandwidth capability between their multitude of stores. So bandwidth considerations for the ACC compression was extremely important because of the benefit it has for reducing the burden for transmission.”⁴²

71. Finally, the virtual matrix switching capability, which the Tribunal understands to be unique to Intellex,⁴³ allows for the compilation, organization and display, on a single or multiple screens of selected live video streams from multiple camera sources,⁴⁴ and for the operator to transmit camera control commands (i.e. tilt, pan, scan, etc.) during live transmission.⁴⁵

39. *Transcript of Public Hearing*, 14 June 2011, at 100-104, 177-78. Mr. Camelia also testified that Intellex treats all connected peripherals as a location or destination to which processed video can be transmitted. *Transcript of Public Hearing*, 14 June 2011, at 31-32.

40. *Transcript of Public Hearing*, 14 June 2011, at 31, 74, 83.

41. *Ibid.* at 144.

42. *Ibid.* at 39-40.

43. *Ibid.* at 77-79.

44. *Ibid.* at 37, 79-80, 83-87.

45. *Ibid.* at 29-30.

72. The Tribunal concludes that these goods in issue differ significantly from those in *Pelco*. The goods in *that case* did not offer the advanced capability of the ACC algorithm present in the goods in issue,⁴⁶ had a reduced number of live remote client connections⁴⁷ and used a multiplexer (as opposed to a virtual matrix, as in the case of the goods in issue).⁴⁸ Indeed, the Tribunal notes the CBSA's acknowledgement that these goods in issue are more technologically advanced than the goods in *Pelco*.⁴⁹

73. On the basis of the evidence, the Tribunal finds that the technological advancements embedded in these goods in issue allow them to effectively "quarterback" the entire surveillance system by accepting and processing video streams for their re-transmission to designated destinations in the manner directed by the operator of the surveillance system.⁵⁰

74. The importance of the transmission function of these goods in issue does not however detract from their recording function. Indeed, the Tribunal notes that, as part of the toolkit of their surveillance system, these goods in issue allow, among other things, for video recording, video playback, pre-programming of recording schedules and alarm-triggered automatic recording.⁵¹

75. The Tribunal agrees with the CBSA's observation that Tyco's ACC white paper focuses heavily on the benefits of the proprietary ACC algorithm to the recording function. Albeit that this may be attributable, in large part, to the fact that this promotional literature may have been tailored to a particular audience, it is nonetheless indicative of a significant commercial market demographic that ascribes continued importance to the local (i.e. hard-drive) recording function.⁵²

76. Indeed, the evidence on record shows that the internal hard-drive capacities of various models of the goods in issue have been increasing over time. While Tyco contends that this is largely due to the independent product design decisions of the computer manufacturers themselves, the Tribunal is not convinced on the evidence that Tyco could not have procured computer boxes with smaller or stripped-out hard drives, if such were indeed better suited to its purposes and to the demands of its customers.⁵³

77. Furthermore, Tyco acknowledges that compression technology has also benefited the recording function through file compression.⁵⁴

46. *Ibid.* at 36-37, 136.

47. *Ibid.* at 159.

48. *Pelco* at para. 9; *Transcript of Public Hearing*, 14 June 2011, at 75-79.

49. Tribunal Exhibit AP-2010-055-10A at para. 33.

50. *Transcript of Public Hearing*, 14 June 2011, at 24, 36, 176.

51. In cross-examination, Mr. Camelia stated that the goods in issue receive video signals from multiple cameras, allow images to be recorded and viewed in real time and playback, have programmable recording schedules, have options to record with a motion detection function and allow for recording at different rates. *Transcript of Public Hearing*, 14 June 2011, at 71-74.

52. Tribunal Exhibit AP-2010-055-10A, tabs 14, 15, 16, 17, 18.

53. *Transcript of Public Hearing*, 14 June 2011, at 147. When asked by counsel for the CBSA about the development of the storage capacity of the goods in issue since 1997, Mr. Albin stated that "[o]ver the years, that archiving did grow. . . . They did follow along with the hard drive manufacturers in regard to storage."

54. *Transcript of Public Hearing*, 14 June 2011, at 68.

78. Additionally, many of the purchasers of these goods in issue are mandated, by local law, to record. In this regard, Mr. Camelia testified that “[t]here are . . . requirements in airports for mandatory recording”⁵⁵ and that “. . . casinos . . . in various locales, have a mandatory requirement for recording.”⁵⁶ Mr. Camelia also testified that “[m]any airports have TSA [Transportation Security Administration] requirements for storage.”⁵⁷

79. While the aforementioned speaks to the continuing importance of the recording function, the overall evidence indicates that local recording is but one of many destination options for the compressed digital video transmitted by these goods in issue.

80. Moreover, the evidence indicates that there has been a shift in certain segments of the market towards the transmission of compressed digitized video to more robust offsite storage platforms. Mr. Albin stated that, from his perspective, he views the local recording function of Intellex as a liability, rather than an asset, because it is highly susceptible to failure, and notes, in this regard, that, if the unit needs to be removed for repairs, the video information “[is] . . . out of the hands of the end-user.”⁵⁸ Mr. Albin further testified that he recommends to customers that they “. . . negate the hard drives that are in those Intellex DVMS units . . . and take the video information and funnel that thorough to offsite third party archiving platforms which are highly fault tolerant”⁵⁹

81. Mr. Camelia testified that the ACC compression technology, by minimizing bandwidth consumption, is also conducive to the transmission of recorded video to remote storage locations and noted that “. . . the retransmission of that video to storage is just like . . . sending [it] to a remote command centre . . . it has a very beneficial effect on the ability to transmit storage to remote locations which is more secure”⁶⁰

82. On the basis of the above analysis, the Tribunal agrees with Mr. Albin’s view that the principal function of these goods in issue is as a transmission device to accommodate customer requirements for real-time surveillance.⁶¹

83. The Tribunal therefore finds that the Intellex models of the goods in issue fall to be classified in heading No. 85.25 and in particular, applying Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, under tariff item No. 8525.50.00 as transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus.

Principle Function Analysis—EDVR Models

84. Appeals before the Tribunal concerning tariff classification proceed *de novo*,⁶² with such proceedings not being in the nature of a *lis*, but rather, an inquiry, with the overall burden of proper classification residing with the Tribunal itself.⁶³

55. *Ibid.* at 45.

56. *Ibid.* at 48.

57. *Ibid.* at 92.

58. *Ibid.* at 132.

59. *Ibid.* at 133.

60. *Ibid.* at 40.

61. *Ibid.* at 130.

62. *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency*, 2010 FC 78 (CanLII) at para. 24; *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at para. 3.

63. *GFT Mode Canada Inc. v. Deputy M.N.R.* (18 May 2000), AP-96-046 and AP-96-074 (CITT).

85. That being said, each party does bear the onus of establishing, on a *prima facie* basis, its specific claims in respect of the proper classification of the goods in issue, which claims are subject to rebuttal by parties opposite.

86. Accordingly, it is incumbent upon Tyco, as the appellant, to establish, on a *prima facie* basis, its claim that each of the models of the goods in issue was improperly classified by the CBSA and fall to be classified in the manner in which it proposes.⁶⁴

87. The cornerstone of Tyco's argument is that the low bandwidth transmission capability associated with its proprietary ACC algorithm has allowed it to respond to the market's demand for cost-effective live surveillance capabilities⁶⁵ and, in the process, has helped elevate video transmission to the principal function of the goods in issue.

88. However, the following exchange between counsel for the CBSA and Mr. Camelia indicates (i) that the EDVR models of the goods in issue do not use the ACC algorithm, (ii) Tyco's uncertainty as to the compression technology actually employed in these EDVR models (although it suggested that it might be the so-called JPEG type, which is more appropriate for smaller businesses) and (iii) that the EDVR models of the goods in issue are not suitable for larger enterprises, being principally aimed at the low end of the market:

MR. MACKENZIE-FEDER: What sort of compression do the EDVR models use?

MR. CAMELIA: *The EDVR does not use active content compression*, to the best of my knowledge. I don't believe they do. *That product is a product that we provide to a down market type of application.*

MR. MACKENZIE-FEDER: In fact, I think in the documents *it uses motion JPEG compression*. Is that right?

MR. CAMELIA: *That is very likely*. In fact, motion JPEG is, as I mentioned earlier, one of those off-the-shelf kinds of compression. *That particular product is not intended to be enterprise level. It is more appropriate for a more moderately sized smaller business.*⁶⁶

[Emphasis added]

89. Mr. Camelia also testified that other compression technologies available on the market did not produce the same bandwidth efficiency as Tyco's own proprietary ACC algorithm and stated the following:

A number of competitors use more off-the-shelf compression because it's quite expensive and requires large-scale resources to develop your own compression algorithms. *There are a number of compression techniques that are used*. In fact, the white paper mentions MPEG and others that are used and *competitors who select those don't achieve the same compression that we have for both bandwidth transmission as well as for storage.*⁶⁷

[Emphasis added]

90. The Tribunal is of the view that the smaller businesses that populate the lower end of the security market are likely to have different and more modest surveillance requirements than large enterprises. In this regard, the recording function (for which less efficient compression technology may be perfectly adequate for the bandwidth compression of stored video files)⁶⁸ is likely to be relatively more important to a small

64. *Evan A. Swim Limited v. Deputy M.N.R.C.E.* (18 April 1990), AP-89-175 (CITT) at 3; *Original New York Seltzer of Canada Limited v. Deputy M.N.R.C.E.* (18 April 1990), 2820 (CITT) at 2. In each of these cases, the appeal was dismissed, "... as the appellant failed to discharge the onus of showing that the goods in issue were not properly classified by the respondent".

65. Tribunal Exhibit AP-2010-055-06A at para. 21; *Transcript of Public Hearing*, 14 June 2011, at 117.

66. *Transcript of Public Hearing*, 14 June 2011, at 119-20.

67. *Ibid.* at 116.

68. *Ibid.* at 41, 91, 207-208.

business than to a large enterprise, whose security requirements may call for the centralization of live surveillance of multiple and geographically dispersed security points of interest. Indeed, the evidence on the record indicates that the industry recognizes that a certain segment of the market remains principally interested in the recording function.⁶⁹

91. That being the case, and having regard to the above evidence on the record, the Tribunal does not find that Tyco has established, on a *prima facie* basis, that video transmission has overtaken video recording as the principal function of the four EDVR models of the goods in issue. The Tribunal therefore finds that the EDVR models of the goods in issue are properly classified in heading No. 85.21 and, in particular, applying Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, under tariff item No. 8521.90.90 as other video recording or reproducing apparatus.

Alternative Proposal for Tariff Classification in Heading No. 84.71

92. The Tribunal does not feel compelled to address Tyco's alternative claim for classification of the goods in issue in heading No. 84.71 and, specifically, under tariff item No. 8471.49.00 as other automatic data processing machines and units thereof, not elsewhere specified or included, presented in the form of systems.

93. Suffice it to say that, by virtue of note 5 (E) to Chapter 84, classification in heading No. 84.71 is not possible, the Tribunal having already determined that the goods in issue are properly classified, by virtue of *principal function*, in heading No. 85.21 in the case of the EDVR models and in heading No. 85.25 in the case of the Intellex models.

Conclusion

94. For the foregoing reasons, the Tribunal finds that the four EDVR models (AEDVR016032, AEDVR004032, AEDVR004016 and AEDVR004008) are properly classified under tariff item No. 8521.90.90 as other video recording or reproducing apparatus and that the nine Intellex models (ADD600ULP050, ADD600ULP150, ADD600ULP100, ADD800DVD025, ADD6R0DVD075, ADD6R0DVD050, ADD600DVS016, ADD400LTD016 and ADD1P100E) should be classified under tariff item No. 8525.50.00 as transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus.

DECISION

95. The appeal is allowed in part.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

69. *Ibid.* at 50. Mr. Camelia stated that "... [recording is] important certainly where it's required by law or for those customers who wouldn't buy our products certainly if it didn't have recording capability, so it is important to us for those obvious reasons."