



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-017R

RBP Imports Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, February 11, 2019*

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IN THE MATTER OF an appeal heard on January 31, 2017, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a judgment of the Federal Court of Appeal, dated September 20, 2018, which set aside the decision of the Canadian International Trade Tribunal in Appeal No. AP-2012-052 on May 2, 2017, and remitted the matter to the Canadian International Trade Tribunal.

BETWEEN

RBP IMPORTS INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

Tribunal Member: Serge Fréchette, Presiding Member
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STATEMENT OF REASONS

INTRODUCTION

[1] The Canadian International Trade Tribunal (the Tribunal) conducted this remand proceeding further to a judgment of the Federal Court of Appeal (the Court),¹ which set aside the Tribunal's decision in *RBP Imports Inc. v. President of the Canada Border Services Agency*.²

[2] The Court remitted the matter back to the Tribunal on the basis that the Tribunal should have considered whether the goods in issue are classified under heading No. 76.10 as "aluminum plates, rods, profiles, tubes and the like, prepared for use in structures".

BACKGROUND

[3] The customs appeal at the heart of this remand involved the tariff classification of certain individually packaged components of aluminum railings. The components were intended to be combined in various configurations in order to form railings used in residential and commercial construction. The issue before the Tribunal was whether the goods were properly classified under heading No. 76.10 as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures, as determined by the Canada Border Services Agency (CBSA), or under heading No. 76.04 as aluminum bars, rods, and profiles as submitted by RBP Imports Inc. (RBP).

[4] The Tribunal found in favour of RBP, interpreting a reference to "assembled railings" in the explanatory notes to heading No. 73.08 (which was applicable to heading No. 76.10 by operation of a note to this effect) as indicating that unassembled or disassembled railings were not covered by the terms of heading No. 76.10.

[5] The Attorney General of Canada applied for judicial review of the Tribunal's decision. In its judgment on September 20, 2018, the Court found that, while the Tribunal accurately identified the three categories of heading No. 76.10 in its decision (namely, (1) structures, (2) parts of structures, and (3) parts for use in structures), it failed to recognize that the portion of the explanatory note containing the reference to "assembled railings" applied only to the first two of the three categories. Accordingly, the matter was referred back to the Tribunal for a rehearing which would enable the Tribunal to consider the potential application of the third category of heading No. 76.10 (in particular, "aluminum plates, rods, profiles, tubes and the like, prepared for use in structures") on the basis that the reference in the explanatory note to "assembled railings" does not apply to that category.

[6] On October 12, 2018, the Tribunal commenced this proceeding. On that date, the Tribunal informed parties that it would conduct a rehearing on the basis of written submissions, unless the parties objected. The parties did not register any objections.

[7] The Tribunal placed the arguments and evidence from *RBP Imports* on the record of this remand proceeding. In addition, both parties filed supplementary written submissions on October 26, 2018, and RBP filed a written reply on November 2, 2018.

1. 2018 FCA 167.

2. (2 May 2017), AP-2016-017 (CITT) [*RBP Imports*].

DESCRIPTION OF THE GOODS IN ISSUE

[8] The goods in issue are individually packaged components of aluminum railings, including top and bottom rails, posts, pickets, gates, brackets, spacers and bracers. The goods are intended to be combined to form railings attached to buildings in residential and commercial construction by contractors or consumers in the “Do It Yourself” market. The standard railings are 42 inches in height and are compliant with international building code requirements. The parts are found in building supply stores in Canada and are sold separately as finished products to accommodate the preferred design and dimensions of the purchaser. The goods are produced via extrusion process, are drilled, bent or notched and are cut to length and powder-coated.

PARTIES’ POSITIONS

[9] RBP argues that the goods in issue could only be considered rods, profiles and the like prepared for use in structures if the “assembled railings” in which they are ultimately used are considered structures. However, as assembled railings are parts of structures, and not structures in and of themselves, the goods in issue cannot be considered prepared for use in structures. RBP also reiterates its view that even if the railings were structures and the goods in issue were considered parts prepared for use in structures, the goods in issue cannot be classified under heading No. 76.10 because the phrase “assembled railings” in the explanatory notes limits classification under that heading to railings, and excludes parts of railings.

[10] RBP argues that an assembled railing is not a structure, nor does it become a structure by virtue of being physically attached to a structure. RBP canvasses the indicia of structures, as discussed by the Tribunal in *Toys “R” Us*,³ and argues that aluminum railings do not fall within this category. Aluminum railings are not of a substantial size, nor are they large permanent structures like buildings, bridges, or dams. While the railings are ultimately fastened along a patio or deck, they do not stand by themselves and do not provide support. These indicia, in RBP’s view, suggest that aluminum railings are not structures.

[11] RBP argues instead that railings are parts of structures, and thus the goods in issue are parts of parts of structures. RBP applies the test typically applied by the Tribunal in determining whether a good is a part of a structure, which takes into account (1) whether the goods are incorporated into a structure, (2) whether the goods are necessary and integral to the structure, and (3) common trade usage and practice. RBP suggests that railings are incorporated in most buildings and indeed required by building codes, making it common practice for these to be installed, thus meeting all of these criteria applicable to parts of structures.

[12] The CBSA maintains that the goods in issue fall within the third prong of heading No. 76.10, being “aluminum plates, rods, profiles, tubes and the like, prepared for use in structures”. The CBSA relies on certain findings in the Tribunal’s original reasons, such as that the goods are considered profiles and that they are intended to be combined to form railings that are then attached to buildings in residential and commercial construction. Further, the CBSA argues that the goods are “prepared for use” because they are drilled, bent, notched, cut to length and powder-coated.

3. *Toys “R” Us (Canada) Ltd. v. President of the Canada Border Services Agency* (22 July 2016), AP-2015-024 (CIIT) [*Toys “R” Us*].

TRIBUNAL'S ANALYSIS

[13] The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7610.90.90 as aluminum plates, rods, profiles, tubes and the like, prepared for use in structures, as determined by the CBSA, or should be classified under tariff item No. 7604.21.00 as hollow aluminum profiles, as claimed by RBP.

[14] Heading No. 76.10 covers the following goods:

Aluminum structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminum plates, rods, profiles, tubes and the like, prepared for use in structures.

[15] As indicated above, in the Tribunal's original proceeding, it found that the goods in issue are not structures or parts of structures under the first and second prongs of heading No. 76.10. The Court did not take issue with these portions of the Tribunal's analysis. The only issue to be decided in this remand is whether the goods in issue are "aluminum plates, rods, profiles, tubes and the like, prepared for use in structures".

Are the goods in issue "aluminum plates, rods, profiles, tubes and the like prepared for use in structures" under heading No. 76.10?

[16] There is no question that the goods in issue are "plates, rods, profiles, tubes and the like". As stated by the Tribunal in *RBP Imports*, they are considered profiles. Moreover, there is no question that the goods in issue are "prepared", as that term is defined in the dictionary⁴ and as the Tribunal has defined that term in previous cases.⁵ The only issue is whether the goods in issue are "for use in structures".

[17] The Tribunal notes that the final prong of heading No. 76.10 refers only to structures, and not to parts of structures. Thus, in order for the goods in issue to fall within this third prong of heading No. 76.10, they must be for use in a structure. Put another way, if the goods in issue are for use in a part of a structure (and not a structure in and of itself), that will not, in the Tribunal's view, be sufficient for the Tribunal to conclude that the goods in issue are classified in this prong of heading No. 76.10. To find otherwise would require reading the term "for use in structures" as meaning "for use in structures *and parts of structures*". Such a reading would be incongruent with a contextual analysis which takes into consideration that the text of the heading distinguishes between structures and parts of structures.

4. RBP cites the Collins On-Line Dictionary, which defines "prepared" as: "to be done or made beforehand so that the thing is ready when it is needed", and the Oxford On-line Dictionary: "make (something) ready for use or consideration".

5. *ERV Parent Co. Ltd. v. Deputy Minister of National Revenue* (12 November 1997), AP-95-127 and AP-95-191 (CITT). In that case, the Tribunal found that the goods in issue had been bent and drilled, thus meeting the "prepared for" requirement.

[18] The term “structure” is not specifically defined in the schedule to the *Customs Tariff* or in the explanatory notes.⁶ However, the Tribunal’s decision in *Toys “R” Us* provides some guidance as to how this term has been interpreted in previous cases. In that appeal, the Tribunal noted the following dictionary definitions of “structure” as being helpful in understanding the usual and ordinary meaning of the term:⁷

34. The *Shorter Oxford English Dictionary* defines a structure as follows:

That which is built or constructed; a building or edifice of any kind, esp. of considerable size and imposing appearance.

35. The *Dictionary of Architecture and Construction* defines a structure as follows:

A combination of units constructed and so interconnected, in an organized way, as to provide rigidity between its elements. 2. Any edifice.

36. *Black’s Law Dictionary* defines a structure as follows:

1. Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together, <a building is a structure>.

37. The *Random House Unabridged Dictionary* defines a structure as follows:

1. Mode of building, construction or organization;

2. Something built or constructed, as a building, bridge or dam.

[19] In *Toys “R” Us*, the Tribunal also considered jurisprudence from the Supreme Court of Canada that sheds light on the scope of the term “structure”. In particular, the Supreme Court of Canada has referred to an excerpt from Denning L.J. in *Cardiff Rating Authority v. Guest Keen Baldwin’s Iron & Steel Co.* wherein he stated as follows:

A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be moveable, as for instance, about a pivot. Thus, a windmill or a turntable is a structure.⁸

[20] After surveying the above dictionary definitions and relying on past jurisprudence and the Supreme Court of Canada’s interpretation of the word “structure” in *Cardiff Rating Authority v.*

6. As the Tribunal noted in *Toys “R” Us* at paragraphs 33 and 41, the explanatory notes provide a starting point from which to begin considering what constitutes a structure (for example, they are usually made up from bars, rods, tubes, angles, etc., and, once they are put in position, they *generally* remain in that position).

7. *Toys “R” Us*, paras. 34-37.

8. *Springman v. The Queen*, [1964] SCR 267, 1964 CanLII 69 (SCC); *British Columbia Forest Products Ltd. v. Minister of National Revenue*, [1972] SCR 101, 1971 CanLII 156 (SCC).

Guest Keen Baldwin's Iron and Steel Co.,⁹ the Tribunal in *Toys "R" Us* concluded that there are a number of characteristics germane to a structure. The Tribunal will consider those indicia below in its analysis of whether a railing is considered a structure.

[21] First, the Tribunal has held that a structure must be constructed or built in the same sense of a building, a bridge, a dam or a windmill. From a physical examination, the railings in which the goods in issue are used are not of a substantial size and do not even come close to the size or appearance of such things as buildings, bridges, dams or windmills, or the like. While the various parts of the goods in issue are ultimately assembled into railings post-importation,¹⁰ the railings in this case are not constructed or built in the same sense as described above.

[22] Second, the Tribunal relied on its decision in *Krueger International Canada Inc. v. Deputy M.N.R.*¹¹ wherein it stated that a key characteristic of a structure is its ability to support something else. In this case, in order to function as intended, the goods in issue need to be attached to a residential or commercial building, which provides support to them, rather than vice versa.¹²

[23] A third key characteristic of a structure that the Tribunal identified in *Toys "R" Us* was permanency. Unlike the baby gate at issue in *Toys "R" Us*, which the Tribunal found to lack permanency, the railing, once assembled and affixed to a residential and commercial building, is designed to stay in place for some time, possibly as long as the building itself continues to exist. Accordingly, the railings seem to meet this requirement.

[24] Although the goods in issue appear to meet the permanency requirement, on the whole and based on a global consideration of the indicia of structures above together with the factual properties of the goods in issue, the Tribunal is not convinced that a railing can be considered a structure. Accordingly, the goods in issue are not profiles prepared for use in a structure.

[25] In the Tribunal's view, the goods in issue are prepared for use in a part of a structure (being a railing, once assembled). However, the last prong of heading No. 76.10 refers only to items prepared for use in structures, and makes no reference to items prepared for use in parts of structures. As indicated above, it is not sufficient for the goods in issue to be prepared for use in a part of a structure in order for them to be considered prepared for use in a structure.

[26] For this reason and for the reasons stated in the *RBP Imports* with respect to structures and parts of structures (the first and second prongs of heading No. 76.10), the goods in issue cannot be classified in heading No. 76.10.

Heading No. 76.04

[27] Having found that a railing is not a structure, and thus the use of the goods in issue in a railing does not equate to a profile prepared for use in a structure under the third prong of heading No. 76.10, the next step is for the Tribunal to consider whether the heading proposed by RBP, namely, heading No. 76.04, applies to the goods in issue.

9. *Ibid.*

10. *Transcript of Public Hearing* at 23-26.

11. (14 February 1996), AP-94-357 (CITT).

12. *Transcript of Public Hearing* at 16-17.

[28] Nothing in the Court's ruling suggests that the Tribunal's analysis of this heading or its findings in this respect were flawed. Accordingly, for the reasons stated already in *RBP Imports*, namely, in paragraphs 41 to 46, the Tribunal finds that the goods in issue meet the terms of heading No. 76.04.

[29] As the goods in issue also meet the requirements of the subheading and tariff item proposed by RBP, for the reasons stated in *RBP Imports*, the Tribunal finds that the goods in issue are properly classified under tariff item No. 7604.21.00.

DECISION

[30] The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member