Appeal No. AP-2019-003

CANADIAN INTERNATIONAL TRADE TRIBUNAL

IN THE MATTER OF an appeal pursuant to section 67
of the *Customs Act*, RSC 1985, c 1 (2nd Supp)

BETWEEN:

RONSCO INC.

Appellant

- and -

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

RESPONDENT'S REPLY SUBMISSIONS

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OVERVIEW

1. The Appellant improperly introduces new evidence without a motion seeking permission from the Tribunal and after the hearing has already taken place. This not only runs contrary to the *Canadian International Trade Tribunal Rules*[1] (the "*Rules*"), but also to the Respondent's procedural rights. As such, it should be struck.

2. Regarding the Rule 2(a) analysis, the Applicant's factual reliance on *Alliance Mercantile* is ill suited, as the goods in the latter decision were found to be "substantially different" after the post-importation work in comparison with the imported goods, contrary to the goods in the present appeal. Moreover, the Appellant relies on unproven allegations with respect to the value added to the goods following the customized boring process.

3. The Tribunal need not resort to Rule 3 in this case.

I. THE APPELLANT'S NEW EVIDENCE SHOULD BE STRUCK

4. Paragraphs 13 to 15 of the Appellant's additional submissions and pages 33 to 35 of their additional submissions[2] should be struck, or in the alternative be given no weight. The introduction of this new evidence is improper in several respects. Most notably, accepting it on the record at this stage would be a breach of the procedural fairness owed to the Respondent.

5. First, section 24.1 of the *Canadian International Trade Tribunal Rules* provides that the late filing of documents can only be done by way of a motion seeking the Tribunal's permission. It is well established that a party should put their best foot forward at the first opportunity. In this case, the Appellant has omitted to file a motion. Furthermore, the Appellant had every opportunity to file the new evidence at an earlier stage.

[1] *Canadian International Trade Tribunal Rules*, SOR/91-499.
[2] The pictures of "bolted wheels" and the dictionary definition of "rolling stock".

6. Second, the inclusion of new evidence without the Tribunal's permission ignores the Tribunal direction dated October 29, 2019, that the purpose of the additional submissions was to address the parties' positions "on the application of Rule 2(a) of the General Rules for the Interpretation of the Harmonized System to the issue in appeal", and not to bolster the evidentiary record after the hearing. Rather than provide submissions on the *application* of the law to the record before the Tribunal at the close of the hearing, the Appellant is attempting to alter that record, without leave to do so. The Tribunal's direction was not an invitation to the Parties to re-open the record, but the Appellant has treated it as such.

7. Third, even if the Appellant would have asked for the Tribunal's permission by way of motion, the filing of such late evidence is even more improper that it is done after the hearing has already taken place. The Respondent is left without the possibility to test or rebut the evidence, for example by way of cross-examination.

8. As such, accepting this evidence to go on the record at this stage would constitute a breach of the procedural fairness owed to the Respondent and would not be "fair and equitable in the circumstances", contrary to paragraph 24.1(3) of the *Rules*.

9. The Respondent asks that the Tribunal strike this new evidence from the record, since it has been introduced without permission. In the alternative, the Respondent asks the Tribunal give the evidence no weight.

II. THE APPELLANT'S RULE 2(A) ANALYSIS RELIES ON A FACTUALLY DISTINGUISHABLE CASE AND UNPROVEN ALLEGATIONS

10. The Respondent generally disagrees with the Appellant's Rule 2(a) analysis, but wants to address three specific points.

11. First, the facts in *Alliance Mercantile* are distinguishable from those in the present appeal. The Appellant's reliance on them[3] is misplaced. The goods in issue in *Alliance Mercantile* were

[3] Appellant's Supplementary Written Submissions, para 24.

three styles of boot bottoms consisting of an outer sole (with heel) affixed to an unfinished and incomplete upper.[4] The goods required significant working to make the finished good by, among other things, stitch a complete new leather part to them:

> The goods in issue are finished by stitching a leather component to the boot bottoms, trimming the rand around the opening, spreading a rubber adhesive over the rand to create a waterproof barrier between the leather and the rubber bottom and to seal the stitch holes, and then adding a lining to prevent chafing while the boots are being worn.[5]

12. In the end, the Tribunal found that "the process described by AMI leads to the creation of a (new) product which is substantially different from either of its two main components" and that "the process does not relate to activities such as assembly or testing, but rather alters essential features of the goods in issue."[6] [Emphasis added]

13. In the current appeal, under the context of a Rule 2(a) analysis, the goods have the essential features of railway wheels, are easily recognizable as such, are marketed as "wheels", and are not substantially changed by the post-importation customized boring process.[7] Rather, the inside of the bore is merely adapted to fit a unique axle.

14. Second, the Appellant ignores[8] the fact that the Tribunal has specifically stated that functionality should not be a determinative factor under the Rule 2(a) analysis.[9] If functionality were to be an essential criterion, Rule 2(a) would be meaningless in most cases.

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[4] *Alliance Mercantile Inc. v. President of the Canada Border Services Agency* (November 3, 2017), AP-2016-038 [CITT], para 8. [*Alliance Mercantile*]
[5] *Alliance Mercantile*, para 46.
[6] *Alliance Mercantile*, para 72.
[7] Even so, little to no weight should be given to the customized boring process in the case of the goods at issue. This is because, as acknowledged by the Appellant in its brief (Exhibit 3C) at para 3, footnote 5, p 2, and as stated by Mr. Montgomery during his testimony, Ronsco Inc. did not have a wheelshop at the time the goods were imported, and did not conduct the customized boring process itself. There is no evidence that the goods underwent the customized boring process.
[8] Appellant's Supplementary Written Submissions, paras 20-21.
[9] *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011), AP-2010-060 [CITT], at para 44.

15. Third, the Appellant alleges that the value added to the goods is "extremely significant", without relying on any evidence.[10] In fact, the value added to the goods was never discussed during the testimonies. While the customized boring process, the mounting process[11] and the Appellant's wheelshop installations were discussed, nothing was put forward by the Appellant with regards specifically to the comparison between the value of the goods in issue before importation and their value after the customized boring process.

16. Moreover, it should be noted that the wheelshop's operating costs are not only incurred for the customized boring process of newly imported wheels (in other words the finishing of the goods under the Rule 2(a) analysis). They are also used for the mounting process (i.e. the making of wheelsets), for axles' work, and for used wheels' work (e.g. to extend their lifespan). Therefore, the Appellant's unqualified invitation to rely on these unquantified costs with respect to the value added to the goods in issue is misleading.

17. Furthermore, there is no evidence that the goods in issue in this appeal underwent the customized boring process, because Ronsco Inc. did not have a wheelshop at the time the goods were imported, and did not conduct the customized boring process itself.[12] Therefore, the wheels in issue were marketed and sold by the Appellant as imported (with rough bores). This further supports the Respondent's position that the goods meet the term "wheels" and should be classified as such by Rule 1.

18. In any event, it is the nature and extent of the work performed after importation that should be the primary focus.[13] Compared to the 18 step process for the manufacturing of the goods, the customization of the wheels to a specific axle cannot be said to be "extraordinarily significant", as claimed by the Appellant,[14] or "of such a considerable proportion as to render absurd the

[10] Appellant's Supplementary Written Submissions, para 24.
[11] The mounting process should be excluded from the value added determination, because it does not relate to independent wheels, but rather to wheelsets.
[12] Appellant's Brief, para 3, footnote 5, p 2; confirmed by Mr. Montgomery during his testimony.
[13] Which, again, should exclude the mounting process.
[14] Appellant's additional written submissions, para 26.

claim that those goods as imported have the essential character of the finished or complete goods."[15]

III. THE TRIBUNAL NEED NOT RESORT TO RULE 3

19. As to the Appellant's submissions with regards to the application of Rule 3 to the goods, the Respondent submits that it suffices to classify the goods by Rule 1 alone or in the alternative, by Rules 1 and 2(a) under 3-dash tariff item "wheels, whether or not fitted with axles". The Tribunal does not need to resort to Rule 3 in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, Ontario, this 19th day of November, 2019.

Charles Maher
Solicitor for the Respondent

[15] *Alliance Mercantile*, para 65.