Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-015

Levolor Home Fashions Canada

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, May 22, 2012

Corrigendum issued
Thursday, June 7, 2012

Canada

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CORRIGENDUM 12

IN THE MATTER OF an appeal heard on January 24, 2012, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 21, 2011, pursuant to section 59 of the *Special Import Measures Act* with respect to requests for re-determination under section 58.

BETWEEN

LEVOLOR HOME FASHIONS CANADA **Appellant**

AND

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

DECISION

The appeal is allowed (Member Vincent dissenting).

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dissenting
Diane Vincent
Member

Jason W. Downey
Jason W. Downey
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 24, 2012
Tribunal Members:	Stephen A. Leach, Presiding Member Diane Vincent, Member Jason W. Downey, Member
Counsel for the Tribunal:	Eric Wildhaber
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
Levolor Home Fashions Canada	Wendy Wagner
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Alex Kaufman
Interveners	**Counsel/Representatives**
Regal Ideas Inc.	Gordon LaFortune
Norstar Windows & Doors Ltd.	Katrina Reyes Paul Lalonde

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by Levolor Home Fashions Canada (Levolor) pursuant to subsection 61(1) of the *Special Import Measures Act*[1] from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to section 59 with respect to requests for re-determination under section 58 relating to 13 shipments of aluminum extrusions (the goods in issue).[2]

2. The CBSA found that the goods in issue did not meet the requirements of the following exclusion granted by the Tribunal in *Aluminum Extrusions*:

> Aluminum extrusions produced from a 6063 alloy type with a T5 temper designation, having a length of 3.66 m, with a powder coat finish, which finish is certified to meet the American Architectural Manufacturers Association [AAMA] AAMA 2603 standard, "Voluntary Specification, Performance Requirements and Test Procedures for Pigmented Organic Coatings on Aluminum Extrusions and Panels", for use as head rails and bottom rails in fabric window shades and blinds where the fabric has a cross-sectional honeycomb or "cellular" construction[3] [the Exclusion].

3. Regal Ideas Inc. (Regal) and Norstar Windows & Doors Ltd. (Norstar) (the Interveners) intervened in support of Levolor.

4. The Tribunal heard this matter by way of written submissions on January 24, 2012.

5. It is *not* contested (i) that the goods in issue are aluminum extrusions produced from a 6063 alloy type with a T5 temper designation, having a length of 3.66 m, with a powder coat finish, and (ii) that the goods in issue are for use as head rails and bottom rails in fabric window shades and blinds where the fabric has a cross-sectional honeycomb or "cellular" construction.

6. The sole issue in this appeal concerns the meaning of a part of the Exclusion, which reads as follows: ". . . which finish [i.e. which powder coat finish] *is certified to meet* the . . . AAMA 2603 standard, 'Voluntary Specification, Performance Requirements and Test Procedures for Pigmented Organic Coatings on Aluminum Extrusions and Panels' . . ." [emphasis added] [the Standard].

POSITIONS OF PARTIES

7. Levolor submitted evidence that it purchased the goods in issue from two suppliers, Sincere Profit and Northern States Metal, both of which, in turn, had purchased the goods in issue from their respective manufacturers, Yong Li Jian Aluminum Co. Ltd. (Yong Li) and Guang Ya Aluminum Industries Co. Ltd. (Guang Ya).

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1. R.S.C. 1985, c. S-15 [*SIMA*].
2. The transactions occurred between December 1, 2008, and March 20, 2009. See Tribunal Exhibit No. AP-2011-015-01 (protected).
3. (17 March 2009), NQ-2008-003 (CITT) at iii.

8. Levolor obtained a product data sheet from Sincere Profit (the Product Data Sheet) that indicates that the powder coating applied by Yong Li conforms to the Standard.[4] Northern States Metal obtained a statement of conformance from Guang Ya (the Guang Ya Statement) that indicates that Northern States Metal's purchases (which were then sold to Levolor) comply with the Standard.[5]

9. Levolor also produced certificates [the Certificates] dated January 12, 2010, in which the AAMA indicates that the painting processes used by Yong Li and Guang Ya meet the Standard.[6] Furthermore, Levolor provided evidence that Yong Li and Guang Ya have been using the same painting processes for several years; this evidence included the dates of importation for the goods in issue.[7]

10. Levolor argued that a plain reading of the language used in the Exclusion and the Tribunal's statement of reasons in *Aluminum Extrusions* supports its position that the goods in issue should be granted the benefit of the Exclusion. Levolor argued that the Product Data Sheet and the Guang Ya Statement were sufficient, in and of themselves, to certify that the goods in issue met the Standard. In the alternative, Levolor argued that the goods in issue have been verified to meet the Standard by the issuance of the Certificates.[8]

11. The CBSA's position is that the goods in issue did not meet the Standard at the time of their importation.[9] Furthermore, it argues that the Product Data Sheet or the Guang Ya Statement is insufficient for the Tribunal to grant the exclusion because only the AAMA can certify compliance with the Standard.[10]

12. The CBSA did not challenge the validity of the Certificates and accepts that they are a valid basis for granting the Exclusion with regard to importations that entered Canada as of January 12, 2010, which is the date that appears on the face of the Certificates.

13. The CBSA also made arguments that suggest that the Tribunal should re-examine the evidence and arguments that served as the basis for its findings in *Aluminum Extrusions*, specifically with respect to representations made by Levolor to the Tribunal at the time that it was seeking the Exclusion. Last, the CBSA also argued that allowing this appeal would cause injury to the domestic industry.

14. The Tribunal notes that the Interveners' representations had little to do with the goods in issue and more to do with issues that each of them has with the CBSA regarding the importation of other goods.

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4. Tribunal Exhibit AP-2011-015-07B, tab B.
5. Tribunal Exhibit AP-2011-015-07A at paras. 26-27.
6. Tribunal Exhibit AP-2011-015-07B, tab D. Tribunal Exhibit AP-2011-015-07A at paras. 29-31.
7. Levolor initially provided this evidence to the CBSA in response to the following request made by a CBSA: "... please have your suppliers [Sincere Profit and Northern States Metal] confirm that those [Yong Li and Guang Ya] are the paint applicators [Levolor's suppliers Sincere Profit and Northern States Metal] that they sub-contract to and that they have been selling the same products to you for x number of years." Tribunal Exhibit AP-2011-015-07B, tab E.
8. Tribunal Exhibit AP-2011-015-07A at paras. 50-53.
9. Tribunal Exhibit AP-2011-015-048A at paras. 42-50.
10. *Ibid.* at paras. 26-31.

15. However, the Interveners' arguments do raise the issue of the proper interpretation of the terms "certified to meet [a given standard]". The Interveners argue that those terms are unambiguous. Regal made the point that, in this proceeding, the CBSA appears to be attempting to seek a reconsideration of the Exclusion and that, if such is the case, the proper process for doing so is the interim review process provided for under section 76.01 of *SIMA*.[11]

16. All parties made various arguments in favour of the Tribunal adopting different interpretations of the Exclusion on the basis of their respective views of what the Tribunal intended to say in paragraph 366 of its statement of reasons in *Aluminum Extrusions*.

ANALYSIS

17. The principles that the Tribunal follows when determining whether goods are of the same description as the goods to which an exclusion applies are as follows. First, the Tribunal has no authority to amend the scope of the findings, whether by narrowing or enlarging such scope, or by re-examining the *raison d'être* of an exclusion.[12] Second, the Tribunal interprets its findings on the basis of their ordinary meaning. Third, the Tribunal will not look behind its findings unless they are ambiguous and, even then, will only look at its statement of reasons.[13]

18. Therefore, if the ordinary meaning of the words "certified to meet [a given standard]" can resolve the issue in this case, it is unnecessary for the Tribunal to interpret paragraph 366 of its statement of reasons in *Aluminum Extrusions*, as the parties, to varying extents, have invited it to do. In addition, as raised by Regal, the Tribunal is of the view that it must guard itself from engaging in a debate as to whether the Exclusion should have been granted in the first place, or whether it should be maintained, or whether allowing this appeal would cause injury to the domestic industry. Such questions are not properly before the Tribunal in an appeal under section 61 of *SIMA*. Rather, the interim review process provided for under section 76.01 is the only vehicle for such inquiries.

19. Accordingly, the starting point for determining whether the goods in issue are of the same description as the goods to which the Exclusion applies is the text of the Exclusion itself.

20. A plain reading of the Exclusion does not require an importer to present a certificate from the AAMA at the time of importation; however, the position taken by the CBSA in this case would require the Tribunal to read such a requirement into the Exclusion, which, as a matter of law, it cannot do.

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11. Tribunal Exhibit AP-2011-015-52A at paras. 28-30.
12. *Zellers Inc. v. Deputy M.N.R.* (25 January 1996), AP-94-351 (CITT) [*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 Inc. v. Almag Aluminum Inc.*, 2010 FCA 62 (CanLII) [*MAAX Bath*] at para. 35.
13. *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; *Aluminart Products Limited v. President of the Canada Border Services Agency* (19 April 2012), AP-2011-027 (CITT) at para. 9; *MAAX Bath* at paras. 36-37.

21. Indeed, when the Tribunal has intended to make the production of a certificate at the time of importation a condition *sine qua non* to claim the benefit of an exclusion, it has said so explicitly, and in precise detail, as it did in *Refined Sugar* in the following manner:

> 9. Organic sugar meeting the requirements of the Canadian General Standards Board standard No. CAN/CGSB-32.310-99 (Organic Agriculture), the U.S. *Federal Organic Foods Production Act of 1990* or any rules adopted under that act, or the European Union EN2092/94 (Organic Regulation), where it is *accompanied by a transaction certificate* affirming compliance with the standard *signed* by an ISO Guide 65 accredited certifying authority.[14]
>
> [Emphasis added]

22. In contrast to the requirements in *Refined Sugar*, the Exclusion simply requires that the goods meet the Standard, but does not specify the evidence necessary to prove that the goods meet the Standard or when to provide such evidence.

23. Therefore, the Tribunal finds that, on the basis of the wording of the Exclusion, providing a certificate from the AAMA is not the only method of proving that the goods in issue meet the Standard and, furthermore, that an importer can demonstrate compliance with the Standard post-importation.

24. Accordingly, the Product Data Sheet and the Guang Ya Statement could be sufficient to certify that the goods in issue meet the Standard, and such evidence could be provided to the CBSA post-importation to verify that the goods in issue meet the Standard.

25. However, in this case, to prove that the goods in issue meet the Standard, Levolor provided not only the Product Data Sheet and the Guang Ya Statement but also the Certificates.[15]

26. While the CBSA acknowledges that the Certificates are sufficient to prove conformity with the Standard for any importations of the goods in issue made after the January 12, 2010, date noted on the Certificates, it takes the position that any importations prior to that date do not meet the Standard.

27. However, the uncontested evidence in this matter indicates that, for the years covering the production and importation of the goods in issue, the manufacturers have been using the same painting process. The evidence also shows that it was that very painting process that was used on the goods in issue (samples were provided during the verification process) and that it was verified by the AAMA to be in conformance with the Standard.[16]

28. Therefore, the position taken by the CBSA seems to suggest, without providing evidence, that the painting process used by the manufacturers was somehow different prior to January 12, 2010. Indeed, absent such evidence, the CBSA's position, if adopted, would lead to the illogical conclusion that the very products that were used as samples in the AAMA certification could not benefit from the Exclusion.

29. The CBSA's position would also lead to the absurd result that the goods in issue manufactured prior to January 12, 2010, could benefit from the Exclusion solely on the basis of arriving in Canada on or after January 12, 2010. For example: Samples A and B are manufactured prior to January 12, 2010, using the

14. (3 November 2000), RR-99-006 (CITT) [*Refined Sugar*], appendix.
15. Tribunal Exhibit AP-2011-015-07A at paras. 26-27, 29-32; Tribunal Exhibit AP-2011-015-07B at para. 4.
16. Tribunal Exhibit AP-2011-015-07A at paras. 52-53.

same painting process that the AAMA has certified as having met the Standard. Sample A arrives in Canada on January 11, 2010. Sample B arrives in Canada on January 12, 2010. The logic of the CBSA's position entails denying the benefit of the Exclusion to Sample A, but affording it to Sample B.

30. For the foregoing reasons, the majority of the Tribunal rejects the position taken by the CBSA and is of the view that the goods in issue meet the requirements of the Exclusion because Levolor has demonstrated that they have a finish that is certified to meet the Standard. As indicated above, the other requirements of the Exclusion were not in issue. Consequently, the goods in issue should be afforded the benefit of the Exclusion.

DECISION

31. The appeal is allowed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Jason W. Downey
Jason W. Downey
Member

DISSENTING OPINION OF MEMBER VINCENT

32. I respectfully disagree with my colleagues' interpretation of the wording of the Exclusion and with their resulting findings (i) that the Exclusion simply requires that the goods in issue meet the Standard and (ii) that a self-declaration by the manufacturers was a proper certification that the goods in issue met the AAMA Standard. In my view, correctly interpreted having regard to the Tribunal's reasons to ascertain the meaning of the finding, the Exclusion requires more than a statement by an importer that its goods meet the Standard, even if such statement is supported, as was the case in this appeal, with some evidence emanating from the manufacturers of the goods. On my reading, it requires that an importer claiming the benefits of the Exclusion demonstrate that, at the time of importation, the goods were certified *by the AAMA* to meet the Standard, i.e. that a certification from the AAMA *existed* at the time of importation.

33. In other words, I find that a self-declaration of compliance with the Standard by an importer or manufacturer is not sufficient. I would have dismissed this appeal since the evidence indicates that, at the time of importation, the goods in issue were *not* certified by the AAMA to meet the Standard. In fact, as was noted by my colleagues, certificates from the AAMA attesting that the painting process used by the manufacturers of the goods in issue met the Standard were not issued until January 12, 2010, that is, after the importation of the goods in issue, which occurred between December 1, 2008 and December 14, 2009.

34. The reasons underlying my dissenting opinion and conclusion are set out in the following paragraphs.

35. I agree with my colleagues that the starting point for determining whether the goods in issue are of the same description as the goods described in the Exclusion is the text of the Exclusion itself. In this regard, I note that the text of the Exclusion reads as follows: "Aluminum extrusions . . . with a powder coat finish, which finish *is certified* to meet the . . . AAMA 2603 standard . . . ." [emphasis added]. It does not read "Aluminum extrusions with a powder coat finish, which finish *meets* the [AAMA] standard." In my view, the words "is certified" must be given meaning and, in its analysis, the majority has implied that the text of the Exclusion merely establishes a requirement that the powder coating applied to the aluminum extrusions at issue "meet" the Standard.

36. The ordinary meaning of the term "certify" is as follows:

> . . . **1** make a formal statement of; attest; attest to (*certified that he had witnessed the crime*). **2 a** declare by certificate that a person is qualified or competent (*certified as a bookkeeper*). **b** declare by certificate that something has met esp. safety standards (*the car has been certified*). . . .[17]
>
> [Italics in original, underlining added for emphasis]

37. Thus, a possible interpretation of the use of the words "is certified" by the Tribunal in the text of the Exclusion is that the Tribunal meant that the powder coat finish of the subject aluminum extrusions be declared "by certificate" to meet the Standard in order to fall within the ambit of the Exclusion. I am therefore unable to concur with my colleagues' statement that "[a] plain reading of the Exclusion does not require an importer to present a certificate from AAMA at the time of importation . . . . At the very least, the ordinary meaning of the words "is certified to meet the [Standard]" in this context is not clear. In view of the fact that these words can reasonably be interpreted to mean "is declared by certificate to meet the Standard", I find that the position taken by the CBSA does not necessarily require the Tribunal to read an additional requirement into the Exclusion.

38. On the basis of the foregoing, I find that the text of the Exclusion is ambiguous in terms of what "certified" means in the context of AAMA standards and of what type of certification or formal statement of compliance with the Standard will indeed demonstrate that a product is "certified" to have met an AAMA standard. Moreover, there is also ambiguity in terms of the person who is to provide the requisite formal statement or certificate attesting that the goods meet the Standard. Is it the AAMA, the importer itself or a third party? In fact, the Exclusion is not clear in this regard. I also note that the French version of the Exclusion does *not* include an exact French language equivalent or a literal translation for the words "which finish is certified to meet the [Standard]", such as "*ce fini étant attesté comme respectant les exigences de la norme*."[18] Arguably, thus, the French version of the Exclusion may not require any form of certification, which, in my view, also creates ambiguity in respect of the actual requirements of the Exclusion.

39. With respect, I therefore disagree with my colleagues' conclusion that the text of the Exclusion is clear on its face. In my opinion, the relevant Tribunal's finding in *Aluminum Extrusions* is open to multiple interpretations and is, consequently, ambiguous. In view of my separate opinion in this regard, I find that it

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17. *Canadian Oxford Dictionary*, 2d ed., *s.v.* "certify".
18. The French version of the Exclusion reads as follows: "*Les extrusions d'aluminium . . . enduites d'un fini de poudre sur les surfaces intérieures et extérieures de l'extrusion, ce fini respectant les exigences de la norme AAMA . . . .*" In contrast with the English version which clearly calls upon the notion of "certification" in order to demonstrate compliance with the Standard, the French version appears to merely imply that goods must "meet the requirements" ("*respectant les exigences*") of the Standard.

is permissible for the Tribunal to review its statement of reasons in *Aluminum Extrusions* in order to ascertain the meaning of the Exclusion as set out in the finding. On this issue, as my colleagues point out, the Tribunal's and the Federal Court of Appeal's jurisprudence is quite clear: the Tribunal may look at the statement of reasons that accompanied its findings in order to ascertain the meaning of its findings if they are ambiguous.

40. Indeed, in *MAAX Bath*, the Federal Court of Appeal has recognized that where the Tribunal has difficulty in determining the goods to which a finding applies, it must endeavour to "ascertain its meaning".[19] It has also been settled by the Federal Court of Appeal that it is perfectly acceptable to refer to a separately issued statement of reasons in order to interpret an otherwise ambiguous finding.[20] Similarly, in *Deputy Minister of National Revenue for Customs and Excise v. Trane Company of Canada, Limited*,[21] the Federal Court of Appeal found that the reasons for a decision may be referred to in order to clarify the terms of a formal decision the precise application of which is not, as a matter of fact, clear on its face and that, in these circumstances, it is permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal.

41. Unlike my colleagues, thus, I consider that the Tribunal could have regard to its statement of reasons in *Aluminum Extrusions* in order to determine what the Exclusion actually requires in this case. That being said, I agree with my colleagues that it is not permissible to look beyond the reasons in any event. I will therefore limit my review to the relevant paragraphs of the statement of reasons accompanying the finding in order to ascertain the meaning of the phrase ". . . certified to meet the . . . AAMA 2603 standard . . . ."

42. A review of paragraphs 363 to 366 of the Tribunal's statement of reasons in *Aluminum Extrusions* reveals that important evidence relied upon by the Tribunal to grant product exclusions, concerning aluminum extrusions with a powder coat finish certified to meet the Standard, to VAP Global Industries Inc. (VAP), Home-Rail Ltd. (Home-Rail) and Levelor was evidence filed by VAP indicating that its Chinese suppliers were AAMA-approved paint applicators whereas those of the domestic producers were not:

> The Tribunal grants the request for product exclusion filed by VAP Global Industries Inc. (VAP), which concerns aluminum extrusions with a powder coat finish for use in window frames. *VAP submitted that these products have a powder coat finish in custom colours that must be certified to meet the American Architectural Manufacturers Association AAMA 2603* and 2605 coating standards. *In this respect, it provided as evidence a list of AAMA-approved paint applicators, which included the name of its Chinese supplier (only for the AAMA 2603 coating standard) but not those of any Canadian companies*.
>
> [Emphasis added]

43. In addition, the Tribunal made the following statement:

> Although the parties opposing the request [for exclusion] claimed to be able to produce identical or substitutable products with a powder coat finish which meet the above-noted AAMA standards, they provided no evidence to support this assertion.

19. At para. 35.
20. *J.V. Marketing Inc. v. Canadian International Trade Tribunal*, unreported, Court File No. A-1349-92, November 29, 1994.
21. [1982] 2 F.C. 194 (C.A.).

44. That the Tribunal relied on the same logic to grant the exclusion to Levolor is made clear by the statement that it made at paragraph 366 of its reasons concerning Levelor's request: "For the same reason as it granted the exclusion requested by VAP and Home-Rail, the Tribunal grants [the Exclusion]." Accordingly, in order to determine whether products were certified to meet the Standard, the Tribunal considered whether the painting or coating on the products was performed by AAMA-approved paint applicators. As well, after having expressly noted that the evidence indicated that the suppliers of the domestic producers did not appear on the list of AAMA-approved paint applicators, the Tribunal concluded that these companies were unable to provide evidence to substantiate their claim that they could manufacture products with a powder coat finish which meet the Standard. In my view, taken together, these statements indicate that, in order to demonstrate that a given product has a powder coat finish which is certified to meet the Standard, the Tribunal was satisfied with evidence from the AAMA attesting that this was indeed the case, but was not satisfied by a manufacturer's declaration that they could produce such a product.

45. In other words, on the basis of the Tribunal's discussion in its statement of reasons, I find that the certification as required by the Exclusion is intrinsically linked with the powder coating on the aluminum extrusions products being applied by an AAMA-approved paint applicator. In this way, the statement of reasons clearly recognizes the authority of the AAMA to certify that products have a finish that meets the Standard. The statement of reasons also confirms that a declaration by manufacturers of aluminum extrusions stating that its products meet the standard is insufficient and, therefore, does not establish that products are "certified" to meet the Standard.

46. I consider that this is the most reasonable way to ascertain the meaning or to clarify the terms of the Tribunal's finding after a review of the statement of reasons since, if the Tribunal had intended to accept a declaration by a manufacturer as proper evidence that its products are "certified" to meet the Standard, it would not have rejected to domestic producers' argument that they were able to produce products which meet the Standard. As the Tribunal did not consider the domestic producers' own assertions as sufficient evidence of compliance with the Standard, importers and exporters seeking the benefit of the Exclusion should be held to the same evidentiary requirement.

47. Otherwise, there would be a clear contradiction between what was considered by the Tribunal as required evidence for the purpose of allowing the Exclusion in the first place and the evidence that is required for the purpose of determining whether goods are actually of the same description as the goods described in the Exclusion. In my view, such contradictions must be avoided. The only way to ensure consistency in the application of the finding is to conclude that the phrase ". . . which finish is certified to meet the . . . AAMA 2603 standard . . . ." means that a certification from the AAMA is required to establish that products are covered by the Exclusion.

48. The fact that a certification from the AAMA is the only method of proving that aluminum extrusions products are certified to meet the Standard is also borne out by the uncontested evidence provided by Mr. Dean Lewis in this appeal. In his witness statement, Mr. Lewis explained how products can be certified to meet the AAMA 2063 coating standard. He notably indicated that there are laboratories accredited specifically by the AAMA to test the paint or powder coating application processes located in two locations in the United States, that the AAMA does not authorize unaffiliated laboratories to certify compliance with its standards and that only the AAMA may authorize laboratories that it inspects and accredits to provide test reports verifying compliance with its standards. Mr. Lewis also indicated that the AAMA has made its standards public and that, accordingly, it cannot prevent manufacturers from claiming

compliance with its standards. However, he stated that the purpose of the AAMA verification programs is ". . . to identify those [manufacturers] that are actually certified or verified with oversight and authorization from the AAMA."[22]

49. This evidence indicates that while manufacturers in this industry may claim that their products comply with AAMA standards, only the AAMA may certify that a given product complies with its technical standards. From this evidence, I find that, as was envisaged by the Tribunal's finding in *Aluminum Extrusions*, it is understood in the context of this industry that only the AAMA has the authority to "certify" that products meet its technical standards.

50. In view of the foregoing, I conclude that the Exclusion requires that goods have a powder coat finish, which finish is certified *by the AAMA* to meet the Standard. Given that it is well-established that subjectivity under *SIMA* is based on an examination of the goods in the manner in which they were presented at the time of importation,[23] in order to benefit from the Exclusion, the goods in issue had to be certified by the AAMA as having a powder coat finish which meets the Standard *at the time of importation*.

51. On this issue, the evidence indicates that the goods in issue did not meet the certification requirement at the time of importation. Levolor submitted that in order to ensure that the powder coating on its venetian blinds is of high quality, it required its suppliers to warrant that they comply with the Standard. It filed a document referred to as a "certificate of conformance", obtained from one of its suppliers, dated August 2009, and signed by the manufacturer Guang Ya Aluminium Industries Co. This document merely states that the ". . . powder coat application complies with the AAMA 2603 latest revision."[24] It also obtained a document entitled "Powder Coatings Product Data Sheet" from AKZO Nobel Canada Inc. that indicates that the "Interpon D1010 conforms with the performance of AAMA 2603 . . . .",[25] in order to establish that the coating which is applied by another of Levelor's suppliers, namely, Yong Li, conforms to the Standard.

52. The fact that Levolor satisfied itself with a warranty of conformity or compliance from its suppliers does not amount to a certification by the AAMA, as required by the Tribunal, or as is understood in the industry, that its products met the Standard at the time of importation. This evidence merely indicates that for the purposes of conducting its business, it was satisfied with the manufacturers' warranting their compliance with the Standard or warranting that their products conform with the performance requirements of the Standard.

53. I note that the manufacturers did not use the words "certified to meet the requirements of the standard" or similar language. In my view, this evidence does not establish that the goods is issue had a powder coat finish "certified" to meet the Standard at the time of importation. In fact, it is only on January 12, 2010, that is, after the importation of the goods in issue, that Levolor's suppliers obtained an AAMA certification signed by Mr. Dean Lewis, Manager, Product certification. I further note that this certification was only valid for a limited period and was due to expire on July 12, 2011.[26]

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22. Tribunal Exhibit AP-2011-015-048A, tab 5, at 40.
23. *Cobra Anchors Co. Ltd. v. President of Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT); *Toyota Tsusho America, Inc. v. President of Canada Border Services Agency* (18 November 2011), AP-2010-063 (CITT).
24. Tribunal Exhibit AP-2011-015-07B, tab C.
25. *Ibid.*, tab B.
26. *Ibid.*, tab 17.

54. In effect, the majority's decision gives a retroactive effect to this certification. In my respectful opinion, this is not legally possible in the present circumstances. What matters is that the evidence indicates that the goods in issue did not meet the exclusion criteria at the time they were imported. While the certification obtained in January 2010 may apply prospectively (i.e. to goods imported after that date), the fact remains that the Exclusion requires that a certification by the AAMA exist at the time of importation, and the goods in issue were not certified to meet the Standard at that time.

55. I note that, in their analysis, my colleagues ascribed considerable weight to evidence indicating that, for the years covering the production and importation of the goods in issue, the manufacturers used the same painting process, that it was that very painting process that was used on the goods in issue (samples of which were provided during the AAMA verification process) and that this painting process was thus verified by the AAMA to be in conformance with the Standard. My colleagues also concluded that, in view of this evidence, the position of the CBSA, if adopted, would lead to the illogical conclusion that the very products that were used as samples in the AAMA certification could not benefit from the Exclusion.

56. In my view, this evidence does not change the fact that, at the time of importation, the powder coat finish of the goods in issue was not "certified" by the AAMA to meet the Standard. Unlike my colleagues, I do not consider that the position taken by the CBSA "seems to suggest, without providing evidence, that the painting process used by the manufacturers was somehow different prior to January 12, 2010." As I understand it, the issue raised by the CBSA is not whether the painting process was or may have been different prior to January 12, 2010, its argument is that, even assuming that the painting process remained the same before and after January 12, 2010, as a matter of fact, a certification from the AAMA did not exist in respect of the goods in issue at the time of importation.

57. In other words, the relevant question to assess whether goods are entitled to the benefits of the Exclusion is not whether there is evidence that the goods in issue met the Standard during the relevant period, but whether there is evidence they were duly "certified" to meet it at the time of importation. Even if the certification may have been obtained following the testing of products identical to the goods in issue and, in particular, manufactured using the same painting process, the crucial point is that the AAMA certification has a strict time frame for its application or validity and cannot be given a retroactive effect. When the issue is examined from this perspective, the evidence relied upon by the majority to reject the CBSA's argument is irrelevant because it ignores the fact that a certification from the AAMA has a specific period of validity.

58. In my view, the CBSA's arguments in this regard have merit since, in order to benefit from the Exclusion, importers have to establish that goods are "certified" to meet the Standard at the time of their importation. One cannot assume that a certification from the AAMA existed before the relevant certificates were actually issued. It was thus incumbent upon Levolor to prove that a valid certification from the AAMA existed in respect of the goods in issue when they were imported, which it failed to do. I do not see how interpreting and enforcing the Tribunal's finding to ensure that the only products that benefit from the Exclusion are those in respect of which a valid certificate issued by the AAMA attests to their compliance with the Standard at the relevant point in time would lead to unacceptable results.

59. Finally, I wish to comment on my colleagues' reliance on the Tribunal's findings in *Refined Sugar* in support of their decision. Unlike my colleagues, I find that the manner in which the Tribunal formulated the product exclusion in that case does not necessarily imply that, in this case, a certification from the AAMA was not required to prove that the goods in issue met the Standard. In my opinion, in order to determine what the Exclusion required, it is more appropriate to have regard to the statement of reasons that accompanied the Tribunal's finding in this case than to interpret *a contrario* a finding made by the Tribunal

in another case concerning different products. As previously mentioned, I am of the view that, having regard to the contents of the statement of reasons, the Tribunal's finding can reasonably be interpreted to mean that certification from the AAMA is required in order to benefit from the Exclusion.

60. This interpretation does not necessarily mean, as my colleagues have concluded, that an importer is required to present a certificate from AAMA at the time of importation. What matters is that an importer be able to demonstrate, even post-importation, for example, during the course of an audit conducted by the CBSA, that the goods that it imported had a finish which is certified by the AAMA to meet the Standard at the time of importation. Simply put, while such certification needs to exist at the time of importation on the basis of the plain language of the Exclusion, contrary to what it did in *Refined Sugar*, the Tribunal did not require that the certificate attesting that imported goods meet the standard "accompany" the goods when they are imported into Canada.

61. Thus, on the issue of when the evidence of certification needs to be provided, it is true that one can draw a distinction between the Exclusion and the finding in *Refined Sugar* which required importers to present a certificate at the time of importation. However, for the reasons discussed above, I disagree with my colleagues' conclusion that the fact that the Tribunal did not impose such a requirement in the present case is indicative that certification from AAMA was not a condition *sine qua non* to claim the benefit of the Exclusion. On the basis of my interpretation of the Exclusion, even if it is not necessary that the requisite certificate from the AAMA be presented at the time of importation, a valid certificate issued by the AAMA must nevertheless exist, at the time of importation, for importers to be able to prove that their aluminum extrusions products are certified to meet the Standard.

62. For these reasons, I would dismiss the appeal.

Diane Vincent
Diane Vincent
Member

IN THE MATTER OF an appeal heard on January 24, 2012, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 21, 2011, pursuant to section 59 of the *Special Import Measures Act* with respect to requests for re-determination under section 58.

BETWEEN

LEVOLOR HOME FASHIONS CANADA **Appellant**

AND

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

CORRIGENDUM

The last sentence of paragraph 33 should have read as follows:

In fact, as was noted by my colleagues, certificates from the AAMA attesting that the painting process used by the manufacturers of the goods in issue met the Standard were not issued until January 12, 2010, that is, after the importation of the goods in issue, which occurred between December 1, 2008 and March 20, 2009.

By order of the Tribunal,

Gillian Burnett
Gillian Burnett
Acting Secretary