

Ottawa, Tuesday, August 20, 1991

Appeal No. AP-90-018

IN THE MATTER OF an appeal heard on April 9, 1991,
pursuant to section 61 of the *Special Import Measures Act*,
R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a re-determination of the
Deputy Minister of National Revenue for Customs and
Excise pursuant to section 59 of the *Special Import
Measures Act* with respect to a request under section 58 of
the *Special Import Measures Act*.

BETWEEN

NIKKA INDUSTRIES LTD.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the leaded polypropylene rope in issue is not of the same description as those goods covered by the finding of the Anti-dumping Tribunal, in Inquiry No. ADT-8-82, respecting the dumping of twisted polypropylene rope, originating in or exported from the Republic of Korea.

Arthur B. Trudeau

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Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Sidney A. Fraleigh

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Member

Robert J. Martin

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Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-018

NIKKA INDUSTRIES LTD.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

On March 25, 1987, Nikka Industries Ltd. (Nikka) ordered 100 coils of three-stranded, leaded polypropylene rope from Bum Hwa Industrial Co. Ltd. of Korea (the exporter) at a price of US\$43 per coil (the first entry). On August 19, 1988, Nikka ordered a further 100 coils of three-stranded, leaded polypropylene rope from the exporter at a price of US\$64.80 per coil (the second entry).

By Notice of Assessment dated December 14, 1988, an anti-dumping duty of \$2,929.16 was imposed on Nikka and paid by it in respect of the first entry. By the Canada Customs B2-1 Detailed Adjustment Statement dated February 3, 1989, an anti-dumping duty of \$4,144.61 was imposed on Nikka and paid by it in respect of the second entry. Both decisions stated that leaded, twisted polypropylene rope was subject to an anti-dumping duty in accordance with departmental Memorandum D15-1-26.

Nikka appealed the decisions to the Deputy Minister of National Revenue for Customs and Excise pursuant to section 58 of the Special Import Measures Act, which appeals were denied by the decision dated March 6, 1990. As a result of the appeals, minor adjustments were made in the calculation of normal values and export prices to take into consideration a change in the rate of exchange, resulting in a further amount due of \$78.26 with respect to the first entry and a refund of \$67.39 with respect to the second entry. On May 10, 1990, Nikka appealed to this Tribunal.

HELD: *The appeal is allowed. The Tribunal finds that the leaded polypropylene rope in issue is not of the same description as those goods covered by the finding of the Anti-dumping Tribunal, in Inquiry No. ADT-8-82, respecting the dumping of twisted polypropylene rope, originating in or exported from the Republic of Korea.*

*Place of Hearing: Vancouver, British Columbia
Date of Hearing: April 9, 1991
Date of Decision: August 20, 1991
Tribunal Members: Arthur B. Trudeau, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member
Counsel for the Tribunal: David M. Attwater
Clerk of the Tribunal: Nicole Pelletier*

Appearances: Thomas P. Fellhauer, for the appellant
Brian J. Saunders, for the respondent

Cases Cited: *Twisted Polypropylene, Polyethylene and Nylon Rope, Originating in or Exported from the Republic of Korea, Anti-dumping Tribunal, Inquiry No. ADT-8-82, October 7, 1982, reported in 4 C.E.R. 347; Twisted Polypropylene and Nylon Rope Originating in or Exported from the Republic of Korea, Canadian Import Tribunal, Review No. R-6-86, February 17, 1987, reported in 13 C.E.R. 300; Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd. and Anti-dumping Tribunal, [1982] 2 F.C. 283; Sarco Canada Limited v. Anti-dumping Tribunal, [1979] 1 F.C. 247; Dryden House Sales Ltd. v. Anti-dumping Tribunal, [1980] 1 F.C. 639.*

Appeal No. AP-90-018

NIKKA INDUSTRIES LTD.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

The issue in this appeal is whether the imported goods, namely, three-stranded, leaded polypropylene rope from the Republic of Korea, are of the same description as goods that were the subject of a finding of the Anti-dumping Tribunal and thus subject to an anti-dumping duty.

The relevant provisions of the *Special Import Measures Act*¹ (the Act) to this appeal are:

3. There shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or subsidizing of goods of the same description has caused, is causing or is likely to cause material injury or has caused or is causing retardation, a duty as follows:

(a) in the case of dumped goods, an anti-dumping duty in an amount equal to the margin of dumping of the imported goods; ...

56.(1) Where, subsequent to the making of an order or finding of the Tribunal or an order of the Governor in Council imposing a countervailing duty under section 7, any goods are imported into Canada, a determination by a customs officer

(a) as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies,

...

made within thirty days after they were accounted for under subsection 32(1), (3) or (5) of the Customs Act is final and conclusive.

1. R.S.C., 1985, c. S-15, as amended.

FACTS AND EVIDENCE

(a) Finding of the Anti-dumping Tribunal

On October 7, 1982, the Anti-dumping Tribunal made a finding² (the 1982 finding) pursuant to subsection 16(3) of the former *Anti-dumping Act*³ in respect of twisted polypropylene, polyethylene and nylon rope, originating in or exported from the Republic of Korea. The Anti-dumping Tribunal found that:

1. the dumping in Canada of twisted polypropylene rope, originating in or exported from the Republic of Korea had caused, was causing and was likely to cause material injury to the production in Canada of like goods; and that
2. the dumping in Canada of twisted nylon rope, originating in or exported from the Republic of Korea had caused, was causing and was likely to cause material injury to the production in Canada of like goods; but that
3. the dumping in Canada of twisted polyethylene rope, originating in or exported from the Republic of Korea had not caused, was not causing and was not likely to cause material injury to the production in Canada of like goods.

By review finding⁴ dated February 17, 1987, the Canadian Import Tribunal ordered that the finding of the former Anti-dumping Tribunal be continued without amendment effective that day.

(b) Importation by the Appellant

On March 25, 1987, Nikka Industries Ltd. (Nikka) ordered 100 coils of three-stranded, leaded polypropylene rope from Bum Hwa Industrial Co. Ltd. of Korea (the exporter) at a price of US\$43 per coil (the first entry). The duty paid value of the first entry was CAN\$5,783.50.

On August 19, 1988, Nikka ordered a further 100 coils of three-stranded, leaded polypropylene rope from the exporter at a price of US\$64.80 per coil (the second entry). The duty paid value of the second entry was CAN\$7,840.80.

By Notice of Assessment dated December 14, 1988, representing a decision pursuant to section 57 of the Act, an anti-dumping duty of \$2,929.16 was imposed on Nikka and paid by it in respect of the first entry. By Canada Customs B2-1 Detailed Adjustment Statement dated February 3, 1989, also representing a decision pursuant to section 57 of the Act, an anti-dumping

2. *Twisted Polypropylene, Polyethylene and Nylon Rope, Originating in or Exported from the Republic of Korea*, Anti-dumping Tribunal, Inquiry No. ADT-8-82, October 7, 1982, reported in 4 C.E.R. 347.

3. R.S.C., 1970, c. A-15.

4. *Twisted Polypropylene and Nylon Rope Originating in or Exported from the Republic of Korea*, Canadian Import Tribunal, Review No. R-6-86, February 17, 1987, reported in 13 C.E.R. 300.

duty of \$4,144.61 was imposed on Nikka and paid by it in respect of the second entry. Both decisions stated that leaded, twisted polypropylene rope was subject to an anti-dumping duty in accordance with departmental Memorandum D15-1-26.

Nikka appealed the decisions to the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) pursuant to section 58 of the Act, which appeals were denied by the decision dated March 6, 1990. As a result of the appeals, minor adjustments were made in the calculation of normal values and export prices to take into consideration a change in the rate of exchange, resulting in a further amount due of \$78.26 with respect to the first entry and a refund of \$67.39 with respect to the second entry.

On May 10, 1990, Nikka appealed to this Tribunal.

(c) The Imported Goods

As its witness, the appellant introduced Mr. Peter Yamauchi, Managing Director of Nikka. He described the goods in issue as leaded, twisted polypropylene rope. The rope is composed of three strands, each strand being made of polypropylene fibres with a thread of lead down the middle. The polypropylene fibres have a rough surface, giving the rope a somewhat natural look and feel.

The witness stated that the leaded polypropylene rope was designed for and used exclusively by the commercial fishing industry. Specifically, cod and halibut fishermen use it as a "long line" or "ground line," which is a line anchored to the ocean floor onto which are tied "ganging" that have a hook on their end. The leaded rope in issue is particularly suited as long line because it sinks and its rough surface retards knots from slipping.

The rope was ordered in 1800-ft. lengths, which is referred to as a skate, as that is the regular length of a long line. The witness stated that he specified what weight of lead he wanted in the rope. A single skate of rope weighs approximately 48 lbs, with the lead component representing approximately 18 lbs.

Mr. Yamauchi distinguished the leaded rope from standard twisted polypropylene rope. He indicated that the standard rope is multi-filament and the leaded rope is not. He also indicated that the texture of the standard rope is smooth. The witness stated that the standard rope could be used for any application; however, it would not be used as a ground line because it floats and its smooth surface allows knots to slip. He indicated that the standard rope is readily available at any hardware store for general purpose applications. In contrast, the leaded rope is found only in commercial fishing stores and is never used as a general purpose rope. The witness explained that the appellant's product brochure lists the leaded rope separately from the standard ropes under the heading "ground line."

Mr. Yamauchi testified that he was not aware of any Canadian producer of the leaded rope in 1981 or 1982. He stated that in 1987 or 1988, he became aware that Scotia Twines Limited produced such a product in Canada.

No witness was called for the respondent.

ARGUMENTS

The argument by counsel for the appellant was structured into three general sections. First, he considered the definition of "goods of the same description" as used in section 3 and subsection 56(1) of the Act. Second, he considered the description of the subject goods and third, the description of the goods described in the finding of the Anti-dumping Tribunal.

With regard to the meaning of the phrase "goods of the same description" as used in the Act, counsel argued that the Tribunal should adopt the plain ordinary meaning of what are goods of the same description. He argued that the Tribunal should not rely on the definition of "like goods" in the Act as the term has taken a special meaning and has a particular use. He advised caution in relying on the jurisprudence dealing with the term "like goods," but generally supported the tests applied by the courts in those cases.

Counsel noted that the appellant and the exporter, in documents leading to the commercial transactions, refer to the goods as polypropylene leaded rope. In the trade, the rope is referred to as "leaded ground line" or "leaded poly." The appellant claims that it could not order polypropylene rope and expect to receive leaded rope. Similarly, a fisherman must specify leaded rope if he expects to receive the goods in issue. As the lead component of the rope is significant, counsel argued that the word "leaded" is critical to identifying and describing the goods.

The appellant's counsel argued that the finding of the Anti-dumping Tribunal is based on the policy of protecting Canadian production of like goods. In this regard, the *Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd. and Anti-dumping Tribunal*⁵ case was referred to, where Mr. Justice Le Dain at page 287 stated:

... the purpose of the [Anti-dumping] Act must be to protect the production of goods which, because they are identical to or closely resemble the dumped goods, are in competition with the latter...

Counsel noted that Scotia Twines Limited, a firm that now manufactures leaded polypropylene rope, did not participate in the 1982 proceedings of the Anti-dumping Tribunal. Therefore, there was no domestic industry for the production of the leaded rope in 1982.

The appellant's counsel referred the Tribunal to the statement of reasons of the finding of the Anti-dumping Tribunal to clarify which imported twisted polypropylene ropes were subject to the finding. He noted that the finding referred to twisted polypropylene and nylon rope without making any specific inclusions or exclusions. He argued that the finding focussed on twisted synthetic rope and excluded braided and plaited rope from its consideration. Also, the Anti-dumping Tribunal had this focus because the complainants only manufactured twisted rope and it was not concerned about other goods that were not produced, such as leaded rope.

Counsel then referred the Tribunal to two paragraphs of the 1982 finding, which he felt were helpful in identifying the goods in issue. At page 350,⁶ the Anti-dumping Tribunal described the goods as follows:

5. [1982] 2 F.C. 283.

6. *Supra*, note 2.

Twisted polypropylene rope and twisted polyethylene rope are manufactured from resins to which colour pigments have been added. The resins are converted from granules or pellets into continuous monofilaments by the extrusion process. The monofilaments are then bundled together to form rope yarn. A number of yarns are twisted together to form strands, which in turn are twisted to form finished rope.

Polypropylene rope is light, durable, flexible, and the most economical of the three subject ropes. (It sells for about 50% of the price of nylon rope.) It is suitable for a wide variety of marine, farm and general purpose applications, and being a low cost multi-purpose rope, it has a wide appeal in the retail hardware market.

Counsel noted that the 1982 finding very carefully describes the raw material content, manufacturing process and end use of twisted polypropylene rope, but gives no indication that it should also apply to polypropylene rope with a lead core. He argued that because the subject goods contain a lead core in each strand, they therefore differ in their raw material content, manufacturing process and end use. The lead rope is not a light weight, low cost, multi-purpose rope appealing to the retail hardware market, but rather is specifically designed to be used as a ground line by the commercial fishing industry because it sinks. He noted that the goods in issue contain a special raw material, i.e., lead, that had to be added at the manufacturing stage.

Without developing the argument at the hearing, the appellant stated in its brief that paragraph 56(1)(a) of the Act states that a determination by a customs officer shall be "as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies." It does not say "whether the imported goods are of a similar type or class as goods to which the order or finding applies." Accordingly, the appellant submitted that the goods imported are sufficiently dissimilar from the goods described in the 1982 finding such that they are not goods of the same description and, unless the goods imported are goods of the same description (and not merely of a similar type or class of goods), they are not subject to the anti-dumping duty.

The appellant further submitted in its brief that a broader interpretation of the 1982 finding should not be adopted without a full and formal examination of the circumstances surrounding leaded rope, including submissions from the particular parties involved in the manufacture and sale of leaded rope, especially in light of the onerous penalties imposed upon goods that are subject to the 1982 finding. The appellant concluded by arguing that, as a general rule of statutory interpretation, fiscal legislation must be interpreted against the taxing authority.

The respondent's counsel noted that the finding of the Anti-dumping Tribunal was consequent upon a preliminary determination made by the Deputy Minister in respect of twisted polypropylene, polyethylene and nylon rope, originating in or exported from the Republic of Korea. The Anti-dumping Tribunal could have made its finding of material injury in respect of all or any of the goods covered by the preliminary determination. It could have excluded goods from the class of goods set out by the Deputy Minister as it excluded polyethylene rope. Accordingly, counsel argued that the Anti-dumping Tribunal could have excluded certain goods, such as the leaded rope, from the overall generic class of polypropylene rope. However, it did not. He argued, therefore, that the class of goods to which the 1982 finding applies is the entire class of polypropylene rope.

Counsel argued that the evidence supports the submission that the leaded rope is a sub-species of polypropylene rope. He referred to the statements of the appellant's witness, Mr. Yamauchi, who indicated that the rope is composed of polypropylene with a thread of lead found in each strand. He also referred to the various brochures submitted as exhibits by the appellant, which identified the subject goods as being composed of polypropylene.

Counsel argued that "goods of the same description" do not have to be goods that are identical in all respects to the goods subject to the 1982 finding. He argued that the Tribunal can look to the concept of like goods set out in the former *Anti-dumping Act*⁷ and now the *Special Import Measures Act*.⁸ In this regard, counsel referred the Tribunal to various decisions of the Federal Court of Appeal.

In the *Sarco Canada Limited v. Anti-dumping Tribunal*⁹ decision, at page 253, Mr. Justice Heald stated that, in defining "like goods," the Tribunal is " ... required to consider all of the characteristics or qualities of the goods, and not restrict itself to a consideration of something less than the totality of those characteristics." Counsel noted that the decision stands for the proposition that the Tribunal must look at all the characteristics of the subject goods, including their composition, function and market.

The second decision relied on by the respondent's counsel was the *Noury Chemical*¹⁰ decision. He referred to page 287 where the purpose of the Act is identified. He noted that the Court rejected the argument that like goods only include goods that closely resemble the dumped goods, where there are no identical goods. Counsel argued that the purpose of the Act is to protect Canadian production and the *Noury Chemical* decision stands for the proposition that an expansive approach to the consideration of whether the dumped goods are harming Canadian production should be adopted.

The third decision referred to by the respondent's counsel was the *Dryden House Sales Ltd. v. Anti-dumping Tribunal*¹¹ decision. He referred to page 644 and argued that, in effect, the Court of Appeal was satisfied that, even though there were some dissimilarities between the goods produced by the applicant and the goods subject to the injury finding, the Anti-dumping Tribunal was justified in ruling that they were not unique and the market was not so different as to remove them from the general class covered by the injury finding.

In summing up the significance of these decisions, counsel noted that the finding of the Anti-dumping Tribunal dealt in part with twisted polypropylene rope. He argued that the evidence presented at the hearing is that the goods in question are twisted and composed of polypropylene. He argued that the only feature the appellant has identified as taking it outside the 1982 finding is the addition of the lead. Counsel argued that one small alteration is insufficient to take the goods outside the 1982 finding as it goes against the purpose of the Act. He noted that if such were the case, then injury findings would only be valid for a period of a few days until the foreign exporters

7. *Supra*, note 3.

8. *Supra*, note 1.

9. [1979] 1 F.C. 247.

10. *Supra*, note 5.

11. [1980] 1 F.C. 639.

learned that they could add one strand of lead or make a minor alteration in the product and have the goods removed from the finding.

REASONS

The relevant part of the finding of the Anti-dumping Tribunal for purposes of this appeal states:

1. *the dumping into Canada of twisted polypropylene rope, originating in or exported from the Republic of Korea has caused, is causing and is likely to cause material injury to the production in Canada of like goods; ... [Underlining added]*

According to section 3 of the Act, only goods of the same description as those to which an order or finding has been made are subject to the anti-dumping duty. Therefore, in this appeal, the Tribunal referred to the class of goods, i.e., twisted polypropylene rope identified in the finding of the Anti-dumping Tribunal to determine the description of goods to which that finding applied.

In the Anti-dumping Tribunal's statement of reasons under the heading "The Products," the wide variety of materials that are used to manufacture rope is described. In the next paragraph, the Anti-dumping Tribunal narrowed its focus by referring to ropes composed of synthetic materials and then noted that the complainants manufacture only twisted rope. In the following paragraph, the Anti-dumping Tribunal further narrowed its focus by referring only to twisted polypropylene rope. Since the complainants manufacture only the twisted rope, the Anti-dumping Tribunal disregarded products that " ... do not generally compete for the same markets as twisted rope due to the cost differences and product specifications and characteristics." Thus, the focus of the Anti-dumping Tribunal with regard to polypropylene rope was rather narrow and specific.

The finding of the Anti-dumping Tribunal as to what constitutes like goods is not determinative of the issue in this appeal. Rather, the issue is to determine whether leaded, twisted polypropylene rope is considered goods of the same description as those identified as twisted polypropylene rope in the finding of the Anti-dumping Tribunal.

The evidence clearly indicates that the leaded rope in issue has a very narrow and specialized application that cannot effectively be matched by the standard twisted polypropylene rope. The standard rope is considered a multi-purpose rope that is generally available in the retail hardware market. On the other hand, the leaded rope is sold exclusively to the commercial fishing industry and found in specialized outlets catering to that market. As such, the two types of rope do not compete with each other in the market. Where the standard rope is low-cost, the leaded rope is not. In fact, the two types of rope are priced differently, the standard rope being sold by the foot and the leaded rope being sold by weight. The two products are also described and marketed differently based on their physical differences, that difference being accounted for by the addition of the lead strands.

Lead represents a large and significant component of the leaded polypropylene rope. It essentially defines that rope and clearly distinguishes it from the standard polypropylene rope, which contains no lead. Lead was included in the manufacture of the rope for a specific reason, namely, to give the rope a specific gravity greater than water. The Tribunal does not see the addition of the lead as a minor modification used to circumvent the effect of the Anti-dumping Tribunal's finding.

For these reasons, the Tribunal concludes that the leaded, twisted polypropylene rope in issue does not fall within the class of goods covered by twisted polypropylene rope to which the 1982 finding applies.

CONCLUSION

The appeal is allowed. The Tribunal finds that the leaded polypropylene rope in issue is not of the same description as those goods covered by the finding of the Anti-dumping Tribunal, in Inquiry No. ADT-8-82, respecting the dumping of twisted polypropylene rope, originating in or exported from the Republic of Korea.

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