



Ottawa, Thursday, October 17, 1996

Appeal No. AP-95-093

IN THE MATTER OF an appeal heard on March 28, 1996, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated May 23, 1995, with respect to a request for re-determination under section 59 of the *Special Import Measures Act*.

BETWEEN

FLORTECH SYSTEMS LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

COLLINS & AIKMAN CORPORATION, QUEEN CARPET CORPORATION AND SHAW INDUSTRIES, INC.

Interveners

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

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Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

and

**COLLINS & AIKMAN CORPORATION, QUEEN CARPET
CORPORATION AND SHAW INDUSTRIES, INC.**

Interveners

This is an appeal under section 61 of the *Special Import Measures Act* from a re-determination of the Deputy Minister of National Revenue confirming the assessment of anti-dumping duties on certain shipments of floor coverings. There are two issues in this appeal. The primary issue is whether Powerbond constitutes goods of the same description as goods that were the subject of the Tribunal's finding of injury in Inquiry No. NQ-91-006 in respect of machine tufted carpeting from the United States and, therefore, whether it is subject to anti-dumping duties. A secondary issue raised by the appellant is whether the respondent is estopped from making representations to the Tribunal on the primary issue because of alleged representations made by the respondent's officials to the appellant at the time of the respondent's dumping investigation.

HELD: The appeal is dismissed. Whether duties are payable depends on whether the goods are of the same description as the goods to which a Tribunal finding made under section 43 of the *Special Import Measures Act* applies. As stated by the Tribunal in *APR Imports Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, it is the description of the goods in the Tribunal's finding itself that is determinative, although the Tribunal may refer to its statement of reasons where there is ambiguity. As there is no issue that Powerbond is made of a nylon pile, the only issue to be determined by the Tribunal in this appeal is whether Powerbond is of the same description as "machine tufted carpeting." The Tribunal does not find it necessary in this case to refer to the statement of reasons.

In the Tribunal's view, the evidence shows that Powerbond is carpeting and that it is, moreover, machine tufted carpeting. Powerbond is referred to as "carpet" or "carpeting" in a variety of testimonials. Furthermore, Powerbond's surface is "tufted" by a machine, which fact was acknowledged by various witnesses for the appellant and for Collins & Aikman Corporation. The Tribunal does not consider it necessary to go beyond this to conclude that Powerbond constitutes goods of the same description as those that were the subject of the Tribunal's finding.

With respect to the issue of estoppel, the representations of the respondent's officials did not involve the exercise of a non-statutory discretion. In defining the scope of the investigation and, later on, in determining whether Powerbond constitutes goods of the same description under sections 56 through 59 of the *Special Import Measures Act*, the officials were acting pursuant to the provisions of that act. Accordingly, estoppel does not lie against the Crown in this case.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 28, 1996
Date of Decision: October 17, 1996

Tribunal Members: Raynald Guay, Presiding Member
Anthony T. Eyton, Member
Arthur B. Trudeau, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

Appearances: Kenneth H. Sorensen and Deborah A. Barrington, for the appellant
Frederick B. Woyiwada, for the respondent
Glenn A. Cranker and Randall J. Hofley, for Collins & Aikman Corporation
Peter A. Magnus and Paul K. Lepsoe, for Queen Carpet Corporation and
Shaw Industries, Inc.

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Interveners

TRIBUNAL: RAYNALD GUAY, Presiding Member
ANTHONY T. EYTON, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*¹ (SIMA) from a re-determination of the Deputy Minister of National Revenue confirming the assessment of anti-dumping duties on certain shipments of floor coverings.

The appellant is a distributor of floor coverings in Eastern Canada. It imports all of its soft-surfaced products from Collins & Aikman Corporation (Collins & Aikman), located in Dalton, Georgia. The product in issue is a soft-surfaced floor covering known as “Powerbond RS” (Powerbond). Powerbond has a tufted nylon surface and a vinyl cushion or vinyl-condensed cushion backing.

On April 21, 1992, the Tribunal made a finding of injury in Inquiry No. NQ-91-006 in respect of “machine tufted carpeting with pile predominantly of nylon, other polyamide, polyester or polypropylene yarns, excluding automotive carpeting and floor coverings of an area less than five square metres, originating

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

in or exported from the United States of America.”² The appellant did not participate in either the respondent’s dumping investigation or the Tribunal’s subsequent injury inquiry, and anti-dumping duties were not initially assessed on imports of Powerbond after the Tribunal’s finding.

In January 1994, the Department of National Revenue (Revenue Canada) conducted a review of all imports from Collins & Aikman, pursuant to which it determined that Powerbond constituted goods of the same description as those that were the subject of the Tribunal’s finding, and anti-dumping duties were accordingly assessed on Powerbond. On May 23, 1995, the respondent confirmed this decision, subsequent to a request for re-determination by the appellant.

There are two issues in this appeal. The primary issue is whether Powerbond constitutes goods of the same description as goods that were the subject of the Tribunal’s finding of injury in Inquiry No. NQ-91-006 in respect of machine tufted carpeting from the United States and, therefore, whether it is subject to anti-dumping duties. A secondary issue raised by the appellant is whether the respondent is estopped from

2. *Machine Tufted Carpeting Originating in or Exported from the United States of America, Finding*, April 21, 1992, *Statement of Reasons*, May 6, 1992. The Tribunal’s finding on April 21, 1992, was that the dumping in Canada of the subject goods, other than certain product exclusions, had caused, was causing and was likely to cause material injury to the production in Canada of like goods. This finding was amended on February 11, 1994, by the Tribunal’s determination on remand (NQ-91-006 Remand [2]), in respect of review proceedings before the Binational Panel (Canadian Secretariat File No. CDA-92-1904-02), pursuant to which the Tribunal found that the dumping of the goods had not caused and was not causing material injury to the production in Canada of like goods. On January 21, 1994, the Binational Panel affirmed the Tribunal’s determination that the dumping in Canada was likely to cause material injury to the production in Canada of like goods. Pursuant to section 3 of SIMA, anti-dumping duties are payable on goods of the same description as those that are the subject of a Tribunal finding. The subject goods in that inquiry are described in the statement of reasons, in part, as follows:

The product which is the subject of this inquiry is described in the preliminary determination of dumping as machine tufted carpeting with pile predominantly of nylon, other polyamide, polyester or polypropylene yarns, excluding automotive carpeting and floor coverings of an area less than five square metres, originating in or exported from the United States of America. The term “predominantly” is interpreted to mean the fibre which predominates by weight over any other single fibre.

Machine tufted outdoor carpeting, known as “artificial grass,” is subject to the inquiry. Unfinished carpeting (unbacked) and carpeting which has been tufted, but which has not been dyed, and has no secondary backing and is commonly referred as “greige carpeting,” are also subject to this inquiry.

The subject carpeting is produced on tufting machines. These machines are equipped with hundreds of needles and hooks which insert textile carpet yarn into a primary fabric backing to produce “greige” carpeting. The yarn may be left in loop form or the tip of the loop may be cut, resulting in loop pile greige carpeting or cut pile greige carpeting, respectively. Carpeting is tufted continuously, but cut from the machine piece by piece. If the carpeting has been tufted with pre-coloured yarn, it is routed directly to the finishing line.

At the finishing line, a latex compound is applied to the back of the carpeting to secure the yarns forming the pile. A high-quality latex compound is then applied to a secondary backing of jute or polypropylene fabric. The secondary backing, which provides dimensional stability, is pressed to the back of the carpet, and it passes through an oven where the latex is dried to lock the tufts in place and to laminate the secondary backing to the greige. Cut pile carpeting is then sheared to create a uniform surface. The carpeting is then inspected, graded and cut, rolled and wrapped.

making representations to the Tribunal on the primary issue because of alleged representations made by the respondent's officials to the appellant at the time of the respondent's dumping investigation.

There are three interveners in this appeal: Collins & Aikman, Queen Carpet Corporation (Queen Carpet) and Shaw Industries, Inc. (Shaw Industries). Collins & Aikman, as indicated above, is a manufacturer of soft-surfaced floor coverings, including Powerbond. Queen Carpet and Shaw Industries are US exporters to Canada and non-resident importers of goods which have been considered to be subject to the Tribunal's finding. Pursuant to a preliminary motion by the appellant, the Tribunal limited the participation of Queen Carpet and Shaw Industries to argument only.

Two witnesses appeared on behalf of the appellant. The first witness was Mr. Jerry Lukawski, President of Flortech Systems Ltd. Mr. Lukawski began his testimony by discussing the sequence of events in respect of the treatment of Powerbond by Revenue Canada officials in the context of the respondent's dumping investigation. He testified that, at the time that the respondent's dumping investigation was initiated, Powerbond was being imported under heading No. 57.03, the heading in which the goods subject to the respondent's investigation were classified. As a result of communications with Revenue Canada officials and representations by them regarding the tariff classification of Powerbond, the appellant contacted a customs broker who expressed the view that Powerbond should be classified in heading No. 57.05, the goods of which were not subject to the respondent's investigation.

The appellant subsequently imported Powerbond under heading No. 57.05, which classification was accepted by Revenue Canada by way of a detailed adjustment statement in January 1993. Given this change in the tariff classification, Powerbond no longer fell within the scope of the headings in which the goods subject to the respondent's investigation were classified and, accordingly, the appellant did not participate further in the respondent's investigation or in the Tribunal's subsequent injury inquiry, believing Powerbond to be outside the scope of the subject goods. However, as a result of Revenue Canada's review of imports from Collins & Aikman, anti-dumping duties have been assessed on imports of Powerbond, and Powerbond was subsequently re-classified in heading No. 57.03.

Mr. Lukawski testified that Powerbond is different from what is referred to as "machine tufted carpeting." Powerbond is marketed primarily to the health care sector because, although it performs like vinyl flooring, it has a soft surface appearance. "Conventional" machine tufted carpeting or "machine tufted broadloom" (which terms were generally used by the parties supporting the appeal and their witnesses to distinguish Powerbond from the goods considered to be within the scope of the Tribunal's finding), unlike Powerbond, does not perform well in the health care sector. Powerbond has a vinyl cushion or vinyl-condensed cushion backing. It is impermeable as well as self-adhering. Mr. Lukawski stated that it is this backing which truly distinguishes Powerbond from all other floor coverings. According to Mr. Lukawski, Powerbond is approximately 100 to 200 percent higher priced than conventional machine tufted products.

Mr. Lukawski further testified that Powerbond does not meet the specifications for carpeting described in the National Standard of Canada,³ nor does it meet the specifications for office standard carpeting set by the federal government.⁴ Both specifications depict "conventional" machine tufted carpeting

3. National Standard of Canada, "Carpet for Commercial Use," CAN/CGSB-4.129-93, December 1993 at 7-8.

4. Exhibit A-3. Excerpt of federal government specifications for office standard carpeting.

and do not describe Powerbond. Specifically, Powerbond does not have a secondary backing made of fabric or a unitary backing appropriate to the method of installation as described in the National Standard of Canada documentation. During cross-examination, Mr. Lukawski acknowledged that Powerbond is “machine tufted.”

The second witness to appear on behalf of the appellant was Ms. Carole Howlett, an interior design consultant in Toronto, Ontario. Ms. Howlett described various qualities and characteristics of Powerbond that have led her to recommend it to some of her clients.

Two witnesses appeared on behalf of Collins & Aikman. The first witness was Mr. Mark L. Grizzle, Director of Technical Services for Collins & Aikman. Mr. Grizzle explained that Powerbond consists of essentially five components: (1) a nylon fibrous face; (2) a primary backing consisting of a nonwoven fabric of polyester and nylon; (3) a sealant vinyl layer; (4) a vinyl cushion layer; and (5) an adhesive layer. In describing the manufacturing process for Powerbond, Mr. Grizzle explained that, once the fibre is processed, the next step is tufting. Up to this stage, there is no difference between the manufacturing processes for Powerbond and that for “conventional” machine tufted carpeting. However, the processes differ significantly thereafter.

In the case of Powerbond, the next step might be shearing, although this is not done in all cases. In any event, the subsequent step is the application of an ethylenic vinyl precoat. The closed-cell vinyl cushion is then fused with the vinyl precoat, followed by the application of an adhesive. By contrast, machine tufted broadloom consists of three layers: (1) a fibrous face, usually consisting of a variety of fibres; (2) a primary backing, likely a woven polypropylene; and (3) a secondary backing that is adhered with a latex adhesive coating to the face of the product.

In comparing Powerbond with “conventional” machine tufted carpeting, Mr. Grizzle indicated that the integrity of Powerbond’s seams inhibits it from “zippering.” He testified that, in his view, Powerbond does not fit the description of machine tufted carpeting set out in *The Complete Carpet Manual*.⁵ Specifically, Powerbond does not have a secondary backing of a woven fibre product such as jute or polypropylene which gives it dimensional stability. Mr. Grizzle testified that the description of the secondary backing in the National Standard of Canada also does not apply to Powerbond, particularly in that Powerbond’s secondary backing is not a fabric nor is it composed of fibres.

5. Exhibit C-10, Jerry Levinstein (Monroe: Library Research Assocs., 1992). “Tufted carpet” is defined, at page 27, as follows: “In its form, tufted carpet is pile yarn pushed through primary backing and given body and stability with a secondary backing. Pile can be level loop, or cut pile, or a combination.” The anatomy of a tufted carpet is described as follows: “**1. Pile:** Tufts of fiber or face fibers. **2. Primary backing:** Frequently woven polypropylene or ‘spun’ bonded fibers. The primary backing is the ‘cloth’ that holds the tufts in place till the ‘other’ backings are applied. **3. Latex Adhesive:** A coating of adhesive is applied to seal the fibers together and can also be used to ‘hold’ the secondary backing on. If carpet is to be glued down, no laminated secondary backing is required. This coating (3) is called a unitary backing. **4. Secondary backing:** Usually a woven fiber product such as jute. When laminated to the carpet, this secondary backing gives ‘dimensional stability’, meaning the carpet can be stretched in place and stay that way (when properly installed)!”

In cross-examination, Mr. Grizzle acknowledged that, while Powerbond has some of the attributes of resilient flooring, it also has some of the more aesthetic and safety-oriented qualities of soft-surfaced floor coverings. He further acknowledged that Powerbond essentially consists of a pile yarn pushed through a primary backing to which a secondary backing is adhered and that the secondary backing (which would include the vinyl cushion and the ethylenic vinyl precoat) gives Powerbond a certain amount of body and stability. Mr. Grizzle agreed that artificial grass has no secondary backing.

The second witness to appear on behalf of Collins & Aikman was Mr. Jeff Raabe, Vice-President of Sales for Collins & Aikman. Mr. Raabe testified that the term “machine tufted carpeting” is used in the industry to refer, for the most part, to commodity-based products that can be used with or without an underpad. In his opinion, the description of “machine tufted carpet” in the federal government documentation referred to by Mr. Lukawski during his testimony was an accurate reflection of how he has heard the term used. However, in his view, Powerbond does not fit this description.

In discussing the uses and end users of Powerbond, Mr. Raabe stated that it would be used where long-term appearance retention is required, where there is heavy traffic and where, in the past, hard-surfaced flooring has been used or where “conventional” machine tufted carpeting has been used, but failed to perform as required. He indicated that, in addition to hospitals, Powerbond is targeted at heavy traffic airports and educational institutions.

In describing Collins & Aikman’s marketing strategy for Powerbond, Mr. Raabe referred to a variety of “testimonials,” also called “Powerbond performance stories.” These “testimonials” focus on specific problems that have occurred in a variety of venues or institutions and which have been solved through the use of Powerbond. Specific benefits of using Powerbond that are focussed on include: Powerbond’s impermeability; its ability to be installed while a facility remains in operation; its low maintenance requirements; its 15- to 20-year warranty; and its environmental friendliness.

In cross-examination, Mr. Raabe stated that it was his view that Collins & Aikman is not competing with traditional machine tufted carpet manufacturers; however, he acknowledged that some users of Powerbond have used “conventional” machine tufted products in the past. With reference to the various “testimonials” and other marketing literature produced by Collins & Aikman, Mr. Raabe acknowledged that Powerbond has been referred to as “carpet” or “carpeting” and that Powerbond may be considered to have intangible qualities of warmth and beauty normally associated with carpeting. He further testified that, pursuant to Collins & Aikman’s “Carpet over Carpet” program, Powerbond may be installed directly on top of old floor coverings, including over “conventional” machine tufted carpeting.

In argument, counsel for the appellant submitted, in respect of the estoppel issue, that the respondent, acting within his statutory authority under SIMA, made such representations to the appellant to the effect that Powerbond was not subject to the dumping investigation or the Tribunal’s injury inquiry, to warrant a finding of estoppel against the respondent. In their brief, counsel referred to a variety of jurisprudence and legal texts in support of this argument.⁶ As a result of the respondent’s representations and

6. *Re Loblaw's Ltd. and Ludlow Investments Ltd.* (1975), 56 D.L.R. (3d) 329; *Lever (Finance) Ltd. v. Westminster Corp.*, [1971] 1 Q.B. 220 (Eng. CA); *Husky Oil Limited v. Her Majesty the Queen* (1991), 44 F.T.R. 18, citing *Johnson v. Ramsay Fishing Company Ltd.* (1987), 15 F.T.R. 106; and J.M. Evans *et al.*, *Administrative Law* (Toronto: Emond Montgomery Publications, 1989).

actions, the appellant, to its detriment, did not participate further in the dumping investigation or take part in the Tribunal's injury inquiry. Counsel submitted that Powerbond is classifiable in heading No. 57.05 and, as such, is not, and was not, within the scope of the subject goods under investigation by the respondent.

In respect of the primary issue in this appeal, namely, whether Powerbond constitutes goods of the same description as those that were the subject of the Tribunal's finding, counsel for the appellant submitted that Powerbond is not of the type of goods envisaged as having been within the scope of the Tribunal's inquiry at the time of its original finding, in particular, because of Powerbond's pricing. Counsel further argued that, in order to determine whether Powerbond is "goods of the same description," the Tribunal must consider the full product description set out in its statement of reasons.

Counsel for the appellant argued that, in order for certain goods to be considered goods of the same description, there must be no significant dissimilarities between the two groups of goods.⁷ They submitted that, in this case, there are a number of significant dissimilarities between them, in particular in respect of the manufacturing process, the raw material content, the markets served, the end use of the goods and the pricing of the two groups of goods. In further support of their argument, counsel submitted that Powerbond does not meet the federal government specifications for machine tufted carpeting.

In arguing that Powerbond is not of the same description as machine tufted carpeting, counsel for Collins & Aikman submitted that the fact that Powerbond was "excluded" from the respondent's dumping investigation indicates that it does not fall within the normal understanding of machine tufted carpeting. Furthermore, the complaint filed by the Canadian Carpet Institute indicates that the subject goods are those classifiable in heading No. 57.03 and, therefore, goods classifiable in heading No. 57.05 are outside the scope of the investigation. Counsel submitted that the classification of the subject goods in heading No. 57.03 is indicated repeatedly in the final determination of dumping⁸ and Revenue Canada's enforcement memorandum⁹ in respect of the Tribunal's finding.

With respect to the tariff classification of Powerbond, counsel for Collins & Aikman submitted that Revenue Canada was correct in considering Powerbond classifiable in heading No. 57.05. Although counsel acknowledged that this appeal is not in respect of the tariff classification of Powerbond, the tariff nomenclature and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁰ are, in counsel's view, important considerations in respect of this appeal, and counsel proceeded to make submissions in that regard.

Counsel for Collins & Aikman further argued that Powerbond does not meet the industry definition of machine tufted carpeting included in *The Complete Carpet Manual* and the National Standard of Canada documentation. They stressed that Powerbond serves a different market from that for machine tufted carpeting and that it competes largely with vinyl flooring.

7. In support of this argument, counsel for the appellant referred to the Tribunal's decision in *Nikka Industries Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-90-018, August 20, 1991.

8. March 18, 1992.

9. *Certain Machine Tufted Carpeting*, Memorandum D15-1-100, June 16, 1993, revised on December 1, 1994, and January 24, 1996.

10. Customs Co-operation Council, 1st ed., Brussels, 1986.

Counsel for Collins & Aikman then turned to certain documents which, in their view, illustrate that Powerbond would not have been within the scope of the original complaint, the respondent's dumping investigation and the Tribunal's injury inquiry. They also reviewed the Tribunal's decisions in *Nikka, General Films Inc. v. The Deputy Minister of National Revenue*¹¹ and *Midlon Foods Inc. v. The Deputy Minister of National Revenue*¹² in support of their position in respect of the proper disposition of this appeal.

Counsel for Queen Carpet and Shaw Industries indicated that their clients take no position on the proper disposition of this appeal. However, they have intervened because the specific issues of this appeal raise potentially broader issues in respect of the definition of machine tufted carpeting. If the Tribunal is of the view that the composition of the secondary backing distinguishes Powerbond from machine tufted carpeting, counsel submitted that the Tribunal ought to clarify whether or not the finding is limited to goods with a secondary backing of jute or polypropylene fabric to which a latex compound is applied. Counsel went on to make submissions to the effect that Powerbond is, in their view, machine tufted carpeting and, furthermore, classifiable in heading No. 57.03.

Counsel for the respondent emphasized that the onus lies with the appellant to show that Powerbond is not goods of the same description. In counsel's view, the term "machine tufted carpeting" in the finding is not ambiguous and clearly includes all machine tufted carpeting with nylon pile, including Powerbond. Counsel submitted that the primary difference between Powerbond and other types of carpeting is its secondary backing, which is impermeable, but that customers generally purchase Powerbond for the intangible qualities that carpeting provides, such as comfort, warmth, safety and acoustical attributes. Powerbond is, moreover, usually installed where carpeting would ordinarily be installed and is recognized by users as carpeting. Although counsel acknowledged that Powerbond has certain special characteristics, such as impermeability and durability, these do not alter the fact that Powerbond constitutes machine tufted carpeting.

Counsel for the respondent further submitted that Powerbond is, in fact, produced by a machine that tufts nylon yarn through a primary backing, to which a secondary backing is adhered, giving it body and stability. In counsel's view, these characteristics fit the definition of machine tufted carpeting identified in Exhibit C-10.

In the view of counsel for the respondent, the arguments made by the other parties with respect to tariff classification, as well as the evidence in respect of government specifications for interior floor coverings, are irrelevant to this appeal.

Counsel for the respondent went on to distinguish the Tribunal's decisions in *Nikka* and *General Films* from the facts of the case at hand and pointed out that, although other counsel have placed considerable significance on the nature of Powerbond's secondary backing, artificial grass is also included within the scope of the Tribunal's finding, despite the fact that it has no secondary backing. In counsel's view, it would be entirely consistent with the purposes of SIMA for the Tribunal to rule that Powerbond is of the same description as machine tufted carpeting, in that it performs essentially the same function as "conventional" machine tufted carpeting and, furthermore, competes directly with it.

11. Appeal No. AP-94-169, April 18, 1995.

12. Appeal No. AP-94-173, December 7, 1995.

With respect to the issue of estoppel, counsel for the respondent argued that the case law indicates that the doctrine of estoppel cannot be applied where the effect would be to dispense with the requirements of a statute; the statute must be complied with, even if representations to the contrary are made.¹³ In this case, SIMA requires the payment of anti-dumping duties where certain goods are of the same description as those that are the subject of a Tribunal finding, such as is the case with respect to Powerbond. Counsel further argued that, even if the doctrine of estoppel did apply, the Tribunal has indicated that it has no jurisdiction to grant an equitable remedy.¹⁴ However, the evidence in this case would not, in any event, support the application of the doctrine.

In an appeal under section 61 of SIMA, the Tribunal is to make an order or finding as to whether anti-dumping duties are payable on certain imported goods. Whether duties are payable depends on whether the goods are of the same description as the goods to which a Tribunal finding made under section 43 of SIMA applies. As stated by the Tribunal in *APR Imports Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,¹⁵ it is the description of the goods in the Tribunal's finding itself that is determinative, although it was recognized by the Federal Court of Appeal in *J.V. Marketing Inc. v. Canadian International Trade Tribunal*¹⁶ that the Tribunal may refer to its statement of reasons to resolve ambiguity in the finding.

As there is no issue that Powerbond is made of a nylon pile, the only issue to be determined by the Tribunal in this appeal is whether Powerbond is of the same description as "machine tufted carpeting." The Tribunal does not find it necessary in this case to refer to the statement of reasons.

In the Tribunal's view, the evidence shows that Powerbond is carpeting and that it is, moreover, machine tufted carpeting. Powerbond is referred to as "carpet" or "carpeting" in a variety of testimonials.¹⁷ Furthermore, Powerbond's surface is "tufted" by a machine, which fact was acknowledged by various witnesses for the appellant and for Collins & Aikman.

13. On this issue, counsel for the respondent referred to the decision of the Federal Court of Canada - Trial Division in *William A. Gibbon v. The Queen*, [1978] 1 F.C. 247 (F.C.T.D.).

14. In support of this position, counsel for the respondent referred to the Tribunal's decision in *Walbern Agri-Systems Ltd. v. The Minister of National Revenue* (1989), 3 T.C.T. 2008, Appeal No. 3000, December 21, 1989.

15. Appeal No. AP-93-141, February 28, 1994.

16. Unreported, Court File No. A-1349-92, November 29, 1994.

17. For example, in "RS Stakes Claim to Revolutionary Idea," the following is stated: "When the RS came along, and we found that we were able to put this carpet on top of the existing carpet, that was really a blessing to us." In "Powerbond Endures Brutal Conditions," the following quotation is included: "Powerbond is probably one of the most ideal carpets for our airport, because of the unique environmental conditions both summer and winter.... This carpet stands up miraculously well attested by its current condition and color, so we're very pleased with it." In addition, in "Powerbond Keeps Going at IMMC," the following statement is included: "While this test proved its durability, still another proved its cleanability. When a five gallon jug of red Kool-Aid was accidentally spilled onto an area carpeted with Powerbond, it was totally and easily removed, leaving no visible stain."

The Tribunal does not consider it necessary to go beyond this to conclude that Powerbond constitutes goods of the same description as those that were the subject of the Tribunal's finding. The Tribunal notes that this appeal is not in respect of either the customs classification of Powerbond or whether Powerbond ought to be granted a product exclusion from the Tribunal's finding.

Even if the Tribunal were to consider the term "machine tufted carpeting" in its finding to be ambiguous, which it does not, and were to refer to the product description in its statement of reasons, it would still conclude that Powerbond constitutes goods of the same description as those that were the subject of the Tribunal's finding.

In the Tribunal's view, the description of the manufacturing process for "machine tufted carpeting" in the statement of reasons, which refers to the application of a latex compound and a secondary backing of jute or polypropylene, must be taken in the context of the entire product description. In considering the product description, it becomes apparent that all "machine tufted carpeting" subject to the finding does not have a secondary backing, let alone a secondary backing made of jute or polypropylene. This is evidenced by the inclusion of "artificial grass" in the finding, as well as "[u]nfinished carpeting (unbacked) and carpeting which has been tufted, but which has not been dyed, and has no secondary backing and is commonly referred as 'greige carpeting'." In other words, the Tribunal is not persuaded that either the nature of a sealant layer or the existence or nature of a secondary backing would be determinative of whether or not certain goods are considered to be goods of the same description as machine tufted carpeting within the scope of the Tribunal's finding.

The second issue that the Tribunal will address is the appellant's argument in respect of estoppel. In the decision of the Federal Court of Canada - Trial Division in *Sturdy Truck Body (1972) Limited v. Her Majesty the Queen*,¹⁸ the Federal Court made the following statement regarding the applicability of the doctrine of estoppel to the Crown:

The Courts in recent years have allowed some claims of estoppel to proceed against the Crown. Yet, it is quickly apparent when reading these decisions that estoppel can only lie against the Crown when an exercise of non-statutory discretion is involved. When interpreting a statute or acting pursuant to a legislative provision, all the authorities agree that estoppel cannot lie against the Crown: "It seems clear to me that the Minister cannot be bound by an approval given when the conditions prescribed by law were not met. [*Minister of National Revenue v. Inland Industries Limited*, [1974] S.C.R. 514]" In the case at bar, a provision of the *Excise Tax Act* was interpreted. It is up to the Court to determine the correct interpretation regardless of what interpretation the Crown has applied in the past.¹⁹

In the present case, the representations of Revenue Canada officials did not involve the exercise of a non-statutory discretion. In defining the scope of the investigation and, later on, in determining whether Powerbond constitutes goods of the same description under sections 56 through 59 of SIMA, the officials were acting pursuant to the provisions of SIMA. Accordingly, estoppel does not lie against the Crown in this case.

18. Unreported, Court File No. T-2218-89, May 12, 1995.

19. *Ibid.* at 6.

Having said this, the Tribunal notes, with some distress, the appellant's allegations that it did not participate further in the respondent's dumping investigation or the Tribunal's inquiry, believing that Powerbond was not within the scope of the investigation, and, consequently, it did not avail itself of the opportunity to participate in the Tribunal's inquiry and conceivably request a product exclusion.

For the foregoing reasons, the appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member