CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, September 15, 1997

Appeal Nos. AP-96-063, AP-96-085 and AP-96-089

IN THE MATTER OF appeals heard on February 24, 1997, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated April 25 and 30, June 3, July 17 and 25, and August 7 and 13, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

SIMMONS CANADA INC. AND LES ENTREPRISES SOMMEX LTÉE **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

SEALY CANADA LTD. **Intervener**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-96-063, AP-96-085 and AP-96-089

SIMMONS CANADA INC. AND LES ENTREPRISES SOMMEX LTÉE **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

SEALY CANADA LTD. **Intervener**

These are appeals under section 67 of the *Customs Act* of decisions of the Deputy Minister of National Revenue made under section 63 of the *Customs Act*. The issue in these appeals is whether mattresses, box springs or sleep sets are upholstered furniture which qualify for duty-free entry under Code 9665 of Schedule II to the *Customs Tariff*. The parties agree that the goods in issue are properly classified under tariff item Nos. 5407.53.00, 5513.41.00 and 5903.90.20 and that they are used as decorative outer coverings in the manufacture of mattresses, box springs or sleep sets. The Tribunal must, therefore, determine whether mattresses, box springs or sleep sets are upholstered furniture.

HELD: The appeals are dismissed. In the Tribunal's view, subsection 68(3) of the *Customs Tariff* must be given its plain and ordinary meaning. Accordingly, where words and expressions used in Schedule II are also used in Schedule I, they must be given the same meaning as in Schedule I. In the Tribunal's view, mattresses, box springs and sleep sets are not included in the definition of "furniture" in Schedule I. In fact, there is a separate definition of "mattress supports" or "box springs" in Note (A) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the Explanatory Notes) to heading No. 94.04. In the Tribunal's view, "mattress supports" or "box springs" and "mattresses" appear to be treated differently from "furniture" in Schedule I. Further, General Note (1) of the Explanatory Notes to Chapter 94 provides that the chapter covers "[a]ll furniture and parts thereof (headings 94.01 to 94.03)," while General Note (2) provides that the chapter covers "[m]attress supports, mattresses and other articles of bedding or similar furnishing, sprung, stuffed or internally fitted with any material, or of cellular rubber or plastics, whether or not covered (heading 94.04)." Consequently, the Tribunal finds that mattresses, box springs and sleep sets are not furniture as that word is defined and treated in Schedule I and, hence, in Schedule II and, therefore, that they do not qualify for concessionary duty relief under Code 9665.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 24, 1997
Date of Decision:	September 15, 1997
Tribunal Members:	Arthur B. Trudeau, Presiding Member Raynald Guay, Member Charles A. Gracey, Member

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Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael A. Sherbo, for the appellants R. Jeff Anderson, for the respondent John W. Boscariol, for the intervener

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Appeal Nos. AP-96-063, AP-96-085 and AP-96-089

SIMMONS CANADA INC. AND LES ENTREPRISES SOMMEX LTÉE **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

SEALY CANADA LTD. **Intervener**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*[1] (the Act) of decisions of the Deputy Minister of National Revenue dated April 25 and 30, June 3, July 17 and 25 and August 7 and 13, 1996, made under section 63 of the Act.

The goods in issue are described as decorative fabrics of polyester/polypropylene and polyester/cotton blends used as decorative outer coverings in the manufacture of mattresses, box springs or sleep sets. At the time of importation, the goods in issue were accounted for by the importer under various tariff items of Schedule I to the *Customs Tariff*[2] pursuant to section 32 of the Act. In accordance with subsection 58(5) of the Act, 30 days after they were accounted for, the goods in issue were deemed to have been classified under these tariff items.

Pursuant to paragraph 60(1)(*b*) of the Act, the appellants requested re-determinations of the tariff classification of the goods in issue under various tariff items for "fabrics" and argued that they were "for use as decorative outer coverings in the manufacture of upholstered furniture" and should, therefore, qualify for duty-free entry under Code 9665 of Schedule II to the *Customs Tariff*. The respondent classified the goods in issue under the tariff items requested by the appellants; however, the respondent found that they did not qualify for duty-free entry under Code 9665. Requests for further re-determinations were filed by the appellants. The respondent confirmed the classification of the goods in issue under tariff item Nos. 5407.53.00, 5513.41.00 and 5903.90.20, but denied the appellants' requests for duty-free entry under various codes.

The issue in these appeals is whether the goods in issue qualify for duty-free entry under Code 9665.[3] The parties agree that the goods in issue are properly classified under tariff item

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. Although the appellants and the respondent referred to Codes 9665, 9666, 9667, 9668 and 9670 in their written submissions, it was agreed at the hearing that the only one at issue is Code 9665.

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Nos. 5407.53.00, 5513.41.00 and 5903.90.20 and that they are used as decorative outer coverings in the manufacture of mattresses, box springs or sleep sets. The Tribunal must, therefore, determine whether mattresses, box springs or sleep sets are upholstered furniture.

No evidence was presented at the hearing. Accordingly, the Tribunal heard only argument from the appellants' representative, counsel for the respondent and counsel for the intervener.

The appellants' representative referred to the definitions of the terms "upholstered seats" and "furniture" in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[4] (the Explanatory Notes) to heading No. 94.01 and a dictionary definition of the term "upholstered" in support of his argument that the goods in issue are included in Code 9665, that is, that they are "upholstered furniture." In brief, the representative argued that mattresses are "'movable' articles … [of] a utilitarian purpose, to equip private dwellings, hotels,… hospitals." As such, they are furniture. Furthermore, mattresses are upholstered, as they are padded, have springs and are covered with fabric.

Counsel for the intervener adopted the arguments made by the appellants' representative. In addition, he argued that the appellants and the intervener must benefit from the tariff reductions provided for in the codes on the basis that they are Canadian manufacturers of upholstered furniture. Counsel referred to several dictionary definitions of the terms "upholstered" and "furniture," which, he argued, are very broad and include the goods in issue. More particularly, counsel submitted that mattresses, box springs and sleep sets are upholstered furniture on the basis that they are articles used in a home for sleeping, convenience or habitation that have been stuffed or covered with textile. Counsel also referred to several court cases which, in his view, have given a very broad meaning to the word "furniture." He argued that the cases to which he referred support his argument that the goods in issue are furniture. Counsel also referred to *The Canadian Encyclopedia*[5] in support of his argument. More specifically, he referred to the definition of "Furniture and Fixture Industry," which provides that, "[t]oday the Canadian furniture industry is divided into 3 subsectors: household furniture, office furniture and miscellaneous furniture (ie, for restaurants, churches, schools, etc, and box springs and mattresses).[6]" A similar argument was made relying on an industry profile on "Household Furniture" of the Department of Industry, Science and Technology.

Relying on three previous decisions of the Tribunal, counsel for the intervener argued that subsection 68(3) of the *Customs Tariff*, which provides that "[t]he words and expressions used in Schedule II, wherever those words and expressions are used in Schedule I, have the same meaning as in Schedule I," does not apply to exclude box springs and mattresses from "upholstered furniture" as that term is used in Schedule II. The three Tribunal cases to which counsel referred were *Kimberly-Clark Canada Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[7] *Kappler Canada Ltd.* v. *The Deputy Minister of National Revenue*[8] and *Computalog Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*.[9] Counsel argued that the general principle expressed in *Kimberly-Clark* is that, when considering the application of a code in Schedule II, the Tribunal must look at the text of the code. It is only when there is a conflict between the application of Schedule I and Schedule II that the Tribunal may look at

4. Customs Co-operation Council, 1st ed., Brussels, 1986.
5. Vol. II (Edmonton: Hurtig Publishers).
6. *Ibid.* at 714.
7. Appeal No. AP-92-303, February 15, 1994.
8. Appeal No. AP-94-232, October 26, 1995.
9. Appeal No. AP-92-265, May 12, 1994.

Schedule I. Counsel submitted that, in the present case, there is no such conflict, as there is no definition of "upholstered furniture" in Schedule I. Furthermore, the codes do not provide, for example, that they apply to goods of any particular tariff item of Schedule I. Counsel argued that the Tribunal is not bound by the meaning attributed to the term "upholstered furniture" in Schedule I. Rather, the Tribunal may consider dictionary and industry definitions of the term.

Counsel for the respondent referred to subsection 68(3) of the *Customs Tariff* and argued that mattresses, box springs or sleep sets are not upholstered furniture because they are not included in the definitions of these words in the Explanatory Notes to Chapter 94. More particularly, counsel argued that mattresses are not "'movable' articles … [of] a utilitarian purpose, to equip private dwellings, hotels,… hospitals." Furthermore, counsel noted that General Note (1) of the Explanatory Notes to Chapter 94 provides that the term "furniture" applies to goods of heading Nos. 94.01 to 94.03, while General Note (2) specifically lists "mattress supports [box-springs], mattresses and other articles of bedding" as being articles of heading No. 94.04. Counsel argued that mattresses are specifically excluded from any "furniture" headings by virtue of being specifically listed in heading No. 94.04. Finally, counsel argued that, had Parliament intended that mattresses and box springs be included in the codes, similar wording to that which appears in tariff item Nos. 4803.00.10 and 4823.70.20 would have been used, namely, "upholstered furniture, mattresses or box springs."

The Tribunal agrees with the parties that the goods in issue are properly classified under tariff item Nos. 5407.53.00, 5513.41.00 and 5903.90.20 and that they are used as decorative outer coverings in the manufacture of mattresses, box springs or sleep sets. The Tribunal must, therefore, determine whether mattresses, box springs or sleep sets are upholstered furniture in order that they may qualify for duty-free entry under Code 9665.

Counsel for the intervener argued that subsection 68(3) of the *Customs Tariff*, which provides that "[t]he words and expressions used in Schedule II, wherever those words and expressions are used in Schedule I, have the same meaning as in Schedule I," does not apply in the present case to exclude mattresses, box springs or sleep sets from the definition of "upholstered furniture" as that term is used in Schedule II. Counsel relied on three previous decisions of the Tribunal in support of his argument.

In the Tribunal's view, the first case to which counsel for the intervener referred, *Kimberly-Clarke*, is distinguishable from the present case. In that case, the Tribunal had to determine the applicability of Code 2519 to tariff item No. 4818.40.10 in light of the fact that Code 2519 appeared opposite tariff item No. 4818.40.90 and not opposite tariff item No. 4818.40.10. Moreover, Code 2519 did not appear "in the lists of codes in the Notes to Chapter 48 or on the title page of Section X of Schedule I to the *Customs Tariff*," which identified codes which could be applicable to any tariff item within that chapter or section. However, the text of Code 2519 provided that articles of heading No. 48.18 qualified for concessionary duty relief. The Tribunal held that, as Schedule I, did not refer to Schedule II, the applicability of any given code in Schedule II to a product had to be determined solely by reference to the text of the code in question in Schedule II. As the text of Code 2519 clearly indicated that this code could apply to any item which was classifiable in heading No. 48.18, the Tribunal considered that products could be considered for concessionary duty relief under Code 2519, regardless of the subheading in which they fell.

It would appear that the issue in *Kimberly-Clark* arose primarily due to the fact that Code 2519 appeared opposite tariff item No. 4818.40.90 and not opposite tariff item No. 4818.40.10, the tariff item at issue. The Tribunal held that this was not determinative in deciding whether the goods in issue, which were

classified under tariff item No. 4818.40.10, qualified for concessionary duty relief under Code 2519. The Tribunal held that, in such a case, the applicability of any given code in Schedule II or, in that case, of Code 2519 to a product must be determined solely by reference to the text of the code in question in Schedule II. The Tribunal, in this case, wishes to add that, in its view, even in cases where Schedule I specifically makes reference to a code in Schedule II, the text of the code must still be considered in deciding whether a particular product qualifies for concessionary duty relief under that code. In other words, the fact that a particular code appears opposite a tariff item in Schedule I does not mean that goods that are classified under that tariff item automatically qualify for concessionary duty relief. In fact, the Tribunal notes that the columns in Schedule I which list the codes are titled "Potential Code Number," and, before each list, it is provided that "reference should be made to the specific wording and tariff treatment requirements of the code selected to ensure that the goods qualify for classification thereunder.[10]"

In any event, the Tribunal is of the view that the *Kimberly-Clarke* case does not establish any general principle regarding the interpretation and application of subsection 68(3) of the *Customs Tariff*. In fact, there is no reference to this subsection in the Tribunal's reasons for decision. The Tribunal does not agree with counsel for the intervener's interpretation of subsection 68(3). The Tribunal is not persuaded by the argument that it can only refer to Schedule I when there is a conflict between that schedule and Schedule II. The Tribunal was unable to find clear support for counsel's proposition in *Kappler* and *Computalog*, the two cases to which he referred. In the Tribunal's view, subsection 68(3) must be given its plain and ordinary meaning. Accordingly, where words and expressions used in Schedule II are also used in Schedule I, they must be given the same meaning.

In the present case, the expression "upholstered furniture" is not defined in Schedule I. There is, however, a definition of the word "furniture." The Tribunal is of the opinion that, in such a case, subsection 68(3) of the *Customs Tariff* clearly directs the Tribunal to consider the definition of this word found in Schedule I in order to give it meaning in the context of Schedule II, before considering any other source. With respect to counsel for the intervener's argument that the Tribunal should not refer to Schedule I, as it does not define the expression "upholstered furniture," the Tribunal notes that none of the other sources referred to in argument by any of the parties or the intervener define this expression. All of the definitions were separate definitions of the words "upholstered" and "furniture."

Accordingly, the Tribunal considered the definition and the tariff treatment of furniture and of mattresses, box springs and sleep sets in Schedule I in order to determine whether the latter qualify for concessionary duty relief under Code 9665.

The Explanatory Notes to Chapter 94 define the word "furniture," in part, as "[a]ny 'movable' articles (not included under other more specific headings of the Nomenclature), which have the essential characteristics that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices,... hospitals,… etc. ... Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category." In the Tribunal's view, mattresses, box springs and sleep sets are not included in this definition. In fact, there is a separate definition of "mattress supports" or "box springs" in Note (A) of the Explanatory Notes to heading No. 94.04. It provides that mattress supports are "the sprung part of a bed, normally consisting of a wooden or metal frame fitted with springs or steel wire mesh (spring or wire supports), or of a wooden

10. See, for example, "General Information Concerning Potential Concessionary Codes," Chapter 54 of Schedule I to the *Customs Tariff*.

frame with internal springs and stuffing covered with fabric (mattress bases).” In the Tribunal’s view, a bed would definitely be considered “furniture” in Schedule I; however, “mattress supports” or “box springs” and “mattresses,” although parts of a bed, appear to be treated differently.

The Tribunal further notes that General Note (1) of the Explanatory Notes to Chapter 94 provides that the chapter covers “[a]ll furniture and parts thereof (headings 94.01 to 94.03)”, while General Note (2) provides that the chapter covers “[m]attress supports, mattresses and other articles of bedding or similar furnishing, sprung, stuffed or internally fitted with any material, or of cellular rubber or plastics, whether or not covered (heading 94.04).” This supports the Tribunal’s conclusion that “mattress supports” or “box springs” and “mattresses” are dealt with separately in Schedule I.

For all of the above reasons, the Tribunal finds that mattresses, box springs and sleep sets are not furniture as that word is defined and treated in Schedule I and, hence, in Schedule II and, therefore, that they do not qualify for concessionary duty relief under Code 9665.

Accordingly, the appeals are dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
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