

Ottawa, Friday, March 5, 1999

Appeal No. AP-98-049

IN THE MATTER OF an appeal heard on January 6, 1999, 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 with respect to requests for re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**SOPREMA INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Pierre Gosselin

Pierre Gosselin  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-98-049**

**SOPREMA INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

The three products in issue are marketed as primers for the installation of waterproofing membranes. The issue in this appeal is whether Elastocol 350 and Elastocol 500 are properly classified under tariff item No. 3210.00.00 as other paints and varnishes, and Elastocol 600 under tariff item No. 3208.90.00 as other paints and varnishes based on synthetic polymers, as determined by the respondent, or should be classified under tariff item No. 2715.00.90 as other bituminous mixtures based on natural bitumen, as claimed by the appellant

**HELD:** The appeal is allowed. The Tribunal is convinced that Elastocol 350 and Elastocol 500 are based on natural bitumen, which is used in these products to make the polymer swell, and are specially designed to provide greater adhesion between specific membranes and the substrate. None of the products in issue are paints or varnishes and, consequently, exclusion (e) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 27.15, which excludes from that heading bituminous paints and varnishes, does not apply. While Elastocol 600 has a different bitumen content from the other two products, the Tribunal, relying on Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*, which applies to mixtures and requires that they be classified as if they consisted of the material or component which gives them their essential character, considers this product to be a bituminous mixture. Note (VIII) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to Rule 3 (b) further explains that the factor which determines essential character will vary as between different kinds of goods and may include the role of a constituent material in relation to the use of the goods. Based on the above, the Tribunal is convinced that bitumen plays a key role in Elastocol 600 so as to give this product its essential character.

Place of Hearing: Ottawa, Ontario

Date of Hearing: January 6, 1999

Date of Decision: March 5, 1999

Tribunal Members: Richard Lafontaine, Presiding Member  
Raynald Guay, Member  
Pierre Gosselin, Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Anne Turcotte

Appearances: Raylene Van Vliet, for the appellant  
Patrick Vézina, for the respondent

**Appeal No. AP-98-049**

**SOPREMA INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member  
RAYNALD GUAY, Member  
PIERRE GOSSELIN, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Deputy Minister of National Revenue made between May 13 and 27, 1998, with respect to the importation of three products known as Elastocol 350, Elastocol 500 and Elastocol 600.

The issue in this appeal is whether Elastocol 350 and Elastocol 500 are properly classified under tariff item No. 3210.00.00 of Schedule I to the *Customs Tariff*<sup>2</sup> as other paints and varnishes, and Elastocol 600 under tariff item No. 3208.90.00 as other paints and varnishes based on synthetic polymers, as determined by the respondent, or should be classified under tariff item No. 2715.00.90 as other bituminous mixtures based on natural bitumen, as claimed by the appellant.

At the hearing, Dr. Richard Voyer, Research & Development Manager at Soprema Inc., was qualified as an expert witness in chemistry to testify on the composition and utilization of the goods in issue. However, because of inadequate notice, he was not recognized as an expert on a product designated as “Cural,” nor as an expert on paints and varnishes.

Dr. Voyer explained that, in addition to producing liquids such as the goods in issue both in Strasbourg, France, and in Drummondville, Quebec, the appellant produces two kinds of waterproofing membrane. The first kind of membrane, which is installed with Elastocol 500 as a primer, is used for roofing applications and is applied with either a torch or hot asphalt. The second type of membrane, which is installed with Elastocol 600 as a primer, is of a peel-and-stick type and is used, among other things, for smaller roofs and to act as an air and vapour barrier. In terms of their formulations, Elastocol 500 contains a solvent (64.9 percent), bitumen (31.9 percent) and a polymer (3.2 percent), and Elastocol 600 contains a solvent (73.0 percent), bitumen (3.0 percent), a polymer (12.0 percent) and some tackifying resin (12.0 percent).<sup>3</sup> Although both Elastocol 500 and Elastocol 600 are solvent-based, the differences in their formulations result from the fact that Elastocol 600 is designed to be used with a peel-and-stick membrane, which requires a mixture of tackifying resin and bitumen to adhere to various more delicate substrates, such as gypsum. The resin also contributes to making the product more tacky, a requirement for end users such as

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. As styrene-butadiene polymer or rubber and polymer were used interchangeably during the hearing, these reasons, for the sake of uniformity, will refer only to the word “polymer.” Similarly and for the same consideration, these reasons will refer to “bitumen” rather than to “asphalt.”

roofers and installers. Elastocol 350, on the other hand, is a water-based bituminous emulsion primer that can be used with either type of membrane. Elastocol 350 does not contain any solvent and, thus, can be used indoors, for example, in basement or bathroom applications. Dr. Voyer was unaware of its specific formulation, but knows from the label of the product manufactured by Esso in France that it also contains bitumen and polymer.

In Dr. Voyer's opinion, the goods in issue are bituminous mixtures because the polymer and bitumen that they contain do not separate once they are mixed. The polymer absorbs part of the bitumen which makes it swell, increasing 10 times in volume, thus creating a separate product. Essentially, the same production process takes place for the three types of Elastocol in issue, although, in the case of Elastocol 600, the tackifying resin that it contains also contributes to the swelling of the polymer. Dr. Voyer explained that the role of the goods in issue is to improve adherence and surface qualities of the substrate before the installation of a membrane. Dr. Voyer referred, in this regard, to the *Paint/Coatings Dictionary*<sup>4</sup> which, in addition to defining "primer" for paint, defines "primer" for adhesives.<sup>5</sup> Dr. Voyer further explained that the goods in issue are produced as part of a system, inasmuch as they are developed and formulated in relation with the formulation of the waterproofing membranes with which they are used. In cross-examination, Dr. Voyer said that his explanations as to the goods in issue apply to both the products imported from France and those made in Canada, the only distinction being minor differences in the formulation between the French and the Canadian products. Dr. Voyer also confirmed the roles of the solvent (which decreases viscosity), the polymer (which provides essential flexibility to the product at lower temperatures) and the bitumen (which is used for its lighter oils which are absorbed by the polymer and make it swell). Dr. Voyer admitted that a product other than bitumen could make the polymer swell, but that it would not be suitable for the goods in issue. Using oil, for example, could result in oil migrating to the surface of the mixture, creating a thin layer of oil and resulting in delamination of the membrane. In response to the panel's questions, Dr. Voyer said that no other coating is applied with the membranes, that Elastocol 500 could be used with torch-applied membranes manufactured by other producers in Canada, but not with peel-and-stick membranes, and that there is no reaction between the primer and the membranes, just a mechanical mixture. He added that the goods in issue are not adhesives, that they have no waterproofing function by themselves, that they are not ultraviolet-resistant and that they would fall apart after six months if exposed to the sun. He also said that a specific bitumen is used because not all bitumens can be used with the appellant's formulation. Dr. Voyer reiterated that, in his opinion, the goods in issue are bituminous mixtures, even Elastocol 600, which has a lower bitumen content, because the bitumen makes the polymer swell.

Dr. Kevser Taymaz, Senior Chemist, Polymer Products Laboratory, Laboratory and Scientific Services Directorate of the Department of National Revenue, testified on behalf of the respondent as an expert witness on the composition of the goods in issue. Dr. Taymaz explained that she analyzed samples of the goods in issue in August 1997. Her calculations as to the formulations of the three products are similar to those provided by Dr. Voyer. As part of her analysis, Dr. Taymaz also tested the thickness of the products and found that they dry to a very thin film. Dr. Taymaz said that she verified the thickness because reference materials on which she relies to differentiate paints and varnishes from mastics use thickness as a criterion. Based on the test results and on the definitions provided in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>6</sup> (the Explanatory Notes), the *Compilation of ASTM Standard*

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4. (Philadelphia: The Federation, 1978).

5. Exhibit A-4, in which the second meaning of the word "primer" is described as follows: "Coating applied to a surface, prior to the application of an adhesive, to improve the performance of the bond."

6. Customs Co-operation Council, 2nd ed., Brussels, 1996.

*Definitions*<sup>7</sup> and the *Paint/Coatings Dictionary*, she concluded that Elastocol 500 is a varnish. Dr. Taymaz introduced, in the record, the definition of the word “varnish”<sup>8</sup> provided in the *Compilation of ASTM Standard Definitions*. She also read the second meaning that is given to the word “varnish” which, she said, is even more specific because it refers to “a liquid composition that is converted to a transparent or translucent solid film after application as a thin layer”<sup>9</sup> and because it includes a definition of “bituminous varnish” which it defines as a dark-coloured varnish containing bituminous ingredients, the varnish being either of the oil or spirit type. Dr. Taymaz also testified that both the bitumen and the polymer contained in Elastocol 500 are film-producing agents. She confirmed that Elastocol 500 is not a paint, given that it does not contain a pigment. She added that varnishes, because they do not have pigments, dry to either a translucent or a semi-translucent coating. With respect to Elastocol 350, Dr. Taymaz explained that the sample that was brought for analysis had separated into two products: a solid chunk, containing bituminous asphalt and rubber (polymer) (in fact a little more bitumen than polymer) and an inorganic filler, and a white milky liquid, containing emulsifiers and water. She first concluded that Elastocol 350 was a bituminous mastic. However, that conclusion was revised, as literature that she received afterwards on the product indicated that it had the same coverage specifications as Elastocol 500; therefore, it could not qualify, in her view, as a mastic, but rather as a thin coating. Based on this new information, she concluded that the product was a paint in an aqueous medium. Asked in examination to clarify what she meant by “paint,” as she found no pigment in Elastocol 350, Dr. Taymaz said that when “we write reports we use ‘paint’ and ‘varnish’ interchangeably ... [b]ecause in the tariff they are mentioned together.”<sup>10</sup> In her opinion, however, Elastocol 350 is a varnish, based on the definition referred to earlier with respect to Elastocol 500 and the thinness of its coating. As to Elastocol 600, Dr. Taymaz confirmed that it contains more polymer than bitumen, albeit she briefly mentioned the presence of tackifying resin without providing the percentage contained in the product. On the basis of her earlier testimony regarding varnishes and because the product dried to a thin semi-transparent coating, she concluded that Elastocol 600 is also a varnish based, this time, on a synthetic polymer rather than on bitumen. In cross-examination, Dr. Taymaz testified that, for the purpose of her analysis, she did not have to know the intended use of the different products, only their properties. While agreeing that polymers are elastic, Dr. Taymaz said that they are used in paints and varnishes because they are also film-producing agents. She added that she did not have to test the products to see if polymer had another role because this was not part of her mandate, which was to “analyze the products for the tariff.”<sup>11</sup>

In argument, the appellant’s representative stressed that the evidence demonstrates that the goods in issue have characteristics different from those of paints and varnishes. The latter, for instance, dry hard, whereas the goods in issue dry tacky. Also, the goods in issue are designed to be compatible with waterproofing membranes. They are not used as paints or varnishes, nor could they function very well as paints, paint primers or varnishes. Referring to the fact that the goods in issue are called primers, the representative relied on a definition of the word “primer” which does contemplate something other than paint.<sup>12</sup> She maintained that a primer can mean a first coat, but not necessarily the first coat of a paint. The representative also argued that, while Dr. Taymaz, who performed the analysis of the goods in issue, did not

7. Seventh ed. (Philadelphia: ASTM, 1990).

8. “[A] liquid formulation that is converted to a transparent or translucent, solid film after application as a thin layer. Oil is a typical varnish which contains resin and drying oil as the chief film-forming ingredients and is converted to a solid film primarily by chemical reaction,” *ibid.* at 519.

9. *Supra* note 7 at 519.

10. *Transcript of Public Hearing*, January 6, 1999, at 181-82.

11. *Ibid.* at 190.

12. *Supra* note 4.

know their intended use, she nevertheless concluded that the goods are other bituminous mixtures excluded from heading No. 27.15 based on her feeling that these goods had a paint and varnish application. In fact, the representative said that the respondent seems to feel that the goods in issue are bituminous paints and varnishes even though this is not the use of the goods nor how they are marketed. The representative submitted that, on the basis of the evidence and of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>13</sup> (the General Rules), which provides that classification be based on the terms of the heading, both Elastocol 350 and Elastocol 500 must be classified as bituminous mixtures. Regarding Elastocol 600, the representative argued that, if the respondent's expert witness was unable to provide the percentage of bitumen required under heading No. 27.15 for the goods to constitute a bituminous preparation, the appellant's expert witness, on the other hand, clearly stated that bitumen is key in the formulation of the mixture. Consequently, she argued, these goods must also be classified as bituminous mixtures.

Counsel for the respondent stressed the importance of the Explanatory Notes as mentioned in section 11 of the *Customs Tariff*. Counsel added, in this regard, that the Explanatory Notes to heading No. 27.15 specifically exclude from that heading Elastocol 350 and Elastocol 500 because they are bituminous varnishes. In addition, counsel maintained that the *Compilation of ASTM Standard Definitions* defines varnish as a liquid that is converted to a transparent or translucent solid film after application as a thin layer and that it also refers specifically to bituminous varnishes. In his view, that definition is very broad and does not provide for a specific use. Counsel further argued that exclusion (e) of the Explanatory Notes to heading No. 27.15 provides some characteristics of those varnishes that are excluded from that heading, including the ability to dry on exposure to air in the manner of paints and varnishes and the thin but hard film that they leave. Also, in counsel's view, all the paints and varnishes not found in heading No. 32.08 fall in heading No. 32.10, which is less specific. Furthermore, as Elastocol 350 and Elastocol 500 are classifiable in heading No. 32.10, they are automatically excluded from heading No. 27.15. Counsel pointed out, in this regard, that Note (B)(3) of the Explanatory Notes to heading No. 32.10 makes explicit reference to exclusion (e) of the Explanatory Notes to heading No. 27.15.<sup>14</sup> Regarding Elastocol 600, counsel argued that this product constitutes a varnish based on polymer in heading No. 32.08, since the evidence has revealed its high content of polymer. In counsel's view, polymer is the most important component and feature of the product that allows it to sell. Counsel once more relied on the broad definition given to the word "varnish." He added that Note (B) of the Explanatory Notes to heading No. 32.08 states that varnishes and lacquers of this heading are liquid preparations for protecting or decorating surfaces. Counsel maintained that Elastocol 600 protects the roof or other surface because the polymer that it contains protects against cracking under low temperatures and because its good adherence contributes to the protection of the surface on which it is applied. Counsel also argued that heading No. 32.08 is more specific than heading No. 27.15. Alternatively, counsel argued that Elastocol 600 should be classified in heading No. 40.05 as rubber and articles thereof, considering, among other things, that, once the product is dried, 90 percent of the remaining coating is constituted of rubber, given that the high proportion of solvent has evaporated.

In reply, the appellant's representative argued that the goods in issue are not for decorating, nor are they for protecting, as they are not waterproofing materials. They are used as a primer, she added, and each primer is formulated to match a particular membrane.

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13. *Supra* note 2, Schedule I.

14. As noted by counsel, there appears to be a mistake in Note (B)(3), as it refers to exclusion (d) of the Explanatory Notes to heading No. 27.15, while the context suggests that it should be referring to exclusion (e).

After having carefully examined the evidence and the arguments of the parties, the Tribunal is of the view that the goods in issue were not properly classified, based on a misconception from the beginning that they are varnishes. The Tribunal will deal first with Elastocol 350 and Elastocol 500 and then with Elastocol 600.

The Tribunal notes that the respondent's expert report recognizes that Elastocol 350 and Elastocol 500 are bituminous mixtures. Furthermore, the evidence reveals that one of the main reasons that these products were excluded for consideration in heading No. 27.15 is based on the belief that exclusion (e) of the Explanatory Notes to that heading, which excludes bituminous paints and varnishes, applies to the goods in issue. However, as exclusion (e) deals with paints and varnishes, a prerequisite for the exclusion is that the products be paints or varnishes; if they are neither, the exclusion simply does not apply. The Tribunal notes, in this regard, that counsel for the respondent does not contend that the goods in issue are paints. Therefore, in relation to exclusion (e), the only issue is whether the products are varnishes. According to the evidence, the products are marketed and sold as primers, not as varnishes. The Tribunal is satisfied that among primers are those associated with adhesives, which are defined as coatings applied to a surface, prior to the application of an adhesive, to improve the performance of the bond.<sup>15</sup> Elastocol 350 and Elastocol 500 are precisely designed for this purpose. In fact, the evidence reveals that these products have no function other than to be used with waterproofing membranes to enhance their adhesion. The Tribunal further notes that these products, which are not ultraviolet-resistant, are not themselves waterproof and would fall apart after six months if exposed to the sun. They are not finished products, since the appellant, which manufactures Elastocol 500 and sells Elastocol 350, would not recommend that they be used alone or for any other application than as part of a system with the waterproofing membranes. Since the goods are primers and not varnishes, whether they may also meet some of the criteria of exclusion (e), for instance, by containing film-producing agents such as polymer or by leaving a thin coating, becomes irrelevant. For greater certainty, the Tribunal finally notes that, while these products dry in less than 2 hours, they dry tacky for approximately 24 hours to ensure a better adhesion of the waterproofing membranes with which they are to be installed. This also distinguishes Elastocol 350 and Elastocol 500 from varnishes which dry to a hard finish and are defined as being protective or decorative.

Considering the respondent's admission that Elastocol 350 and Elastocol 500 are bituminous mixtures and having dealt with exclusion (e) of the Explanatory Notes to heading No. 27.15, there remains, however, the issue of whether these products are based on natural bitumen, as contemplated in heading No. 27.15. The Tribunal is convinced that Elastocol 350 and Elastocol 500 are based on natural bitumen, which is used in these products to make the polymer swell, and are specially designed to provide greater adhesion between specific membranes and the substrate. The Tribunal notes, in this regard, that the solvent in Elastocol 500, or the water in the case of Elastocol 350, is used mainly to reduce the viscosity of the products, while the polymer adds adherence and elasticity to the products, which is warranted in cold temperatures. The Tribunal also notes, with respect to Elastocol 350, that, although this product is not manufactured by the appellant, Dr. Voyer's testimony was unambiguous as to the characteristics of that product and the function of the bitumen that it contains. On the other hand, the respondent's expert first concluded that the product was a mastic, then that it was a paint in an aqueous medium. Only at the hearing, and contrary to her own expert report, did Dr. Taymaz finally conclude that Elastocol 350 was a varnish. In the Tribunal's view, Rule 1 of the General Rules applies in this case and requires that Elastocol 350 and Elastocol 500 be classified according to the terms of heading No. 27.15 and not to those of heading No. 32.10.

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15. *Supra* note 4.

With respect to Elastocol 600, the Tribunal notes that the Explanatory Notes to heading No. 32.08 refer to varnishes as liquid preparations for protecting or decorating surfaces. Those are two functions that, in the Tribunal's view, are not applicable to the goods in issue. Clearly, the goods have no decorative functions, nor was it argued that they have any. Counsel for the respondent argued that Elastocol 600 helps protect the substrate over which it is applied because it has a good adherence and contains a high proportion of polymer that protects against cracking. In the Tribunal's view, while the polymer provides adherence and flexibility to Elastocol 600, this does not make it a protective coating. Elastocol 600 is not made for use as a final product, since it has no waterproofing capabilities of its own and does not dry to a hard finish; rather, it is part of a system designed to be used with a specific waterproofing membrane. Finally, for the same reasons discussed earlier as to the non-application to Elastocol 350 and Elastocol 500 of exclusion (e) of the Explanatory Notes to heading No. 27.15, Elastocol 600 is not a varnish, and that exclusion does not apply to this product either.

Having concluded that Elastocol 600 is also not a varnish, there remains again the question of whether it constitutes a bituminous mixture based on bitumen in heading No. 27.15 or a compounded rubber in heading No. 40.05. The Tribunal is of the view that heading Nos. 27.15 and 40.05 are equally specific and that, consequently, the goods in issue cannot be classified according to Rule 3 (a) of the General Rules.

The Tribunal accepts the arguments of the appellant's representative that, irrespective of the amount of bitumen that it contains, Elastocol 600 is in fact not much different from Elastocol 350 and Elastocol 500, as bitumen is key in its formulation. Recognizing that Elastocol 600 contains only 3 percent bitumen compared with 12 percent rubber, the Tribunal notes that this product also contains 12 percent tackifying resin and 73 percent solvent. The solvent, it is clear, does not provide to Elastocol 600 its essential character, but rather it decreases viscosity and assists the product in penetrating the substrate. As for the polymer, although it provides elasticity, it is equal to the amount of tackifying resin that provides the tacky feeling wanted by the end users. Both the polymer and the tackifying resin help in providing a good adhesion. In this respect, the bitumen, once again, appears to be the key component in the composition of Elastocol 600, as it makes the polymer swell and is essential to the correct formulation of the product, which is to be used exclusively with waterproofing membranes. In light of Note (VIII) of the Explanatory Notes to Rule 3 (b), this is critical when one considers the role of bitumen in relation to the use of Elastocol 600 with the waterproofing membranes. The Tribunal is of the view that Rule 3 (b) of the General Rules is pertinent in this case, since Elastocol 600 can, on a *prima facie* basis, be classifiable in at least two headings, none of which provides a more specific description. Rule 3 (b), which applies to mixtures, requires that they be classified as if they consisted of the material or component which gives them their essential character. Note (VIII) of the Explanatory Notes to that rule further explains that the factor which determines essential character will vary as between different kinds of goods and may include the role of a constituent material in relation to the use of the goods. Based on the above, the Tribunal is convinced that bitumen plays a key role in Elastocol 600, so as to give that product its essential character. Consequently, Elastocol 600 constitutes a bituminous mixture based on bitumen in heading No. 27.15 and is, therefore, not a compounded rubber in heading No. 40.05.

For all these reasons, the appeal is allowed. Elastocol 350, Elastocol 500 and Elastocol 600 should be classified as bituminous mixtures in heading No. 27.15 and, as such, under tariff item No. 2715.00.90 as other bituminous mixtures.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Pierre Gosselin

Pierre Gosselin  
Member