Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-055

Monterra Lumber Mills, Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, October 22, 2012

Canada

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IN THE MATTER OF an appeal heard on June 28, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated September 27, 2011, with respect to a request for review of an advance ruling on tariff classification pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MONTERRA LUMBER MILLS, LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 28, 2012
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Ekaterina Pavlova Eric Wildhaber
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representative**
Monterra Lumber Mills, Ltd.	James Philip Jagger
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Orlagh O'Kelly

WITNESSES:

André Côté
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Science and Engineering Directorate
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by Monterra Lumber Mills, Ltd. (Monterra), on December 28, 2011, pursuant to subsection 67(1) of the *Customs Act*,[1] from a decision made on September 27, 2011, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for review of an advance ruling on tariff classification regarding certain wood-plastic composite decking marketed under the trade name Trex® (the goods in issue).

2. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3916.10.00 of the schedule to the *Customs Tariff*[2] as profile shapes, whether or not surface-worked but not otherwise worked, of polymers of ethylene, as determined by the CBSA, or should be classified under tariff item No. 4410.11.90 as other particle board, oriented strand board (OSB) and similar board (for example waferboard) of wood, whether or not agglomerated with resins or other organic binding substances or, alternatively, under tariff item No. 4410.19.90, as other similar board of wood, whether or not agglomerated with resins or other organic binding substances, as submitted by Monterra.

3. The Tribunal held a public hearing in Ottawa, Ontario, on June 28, 2012.

4. Mr. André Côté, Senior Chemist, Science and Engineering Directorate, CBSA, testified on behalf of the CBSA. Mr. Allan Granville, Senior Chemist, Science and Engineering Directorate, CBSA, also testified on behalf of the CBSA; he was qualified by the Tribunal as an expert in the field of analysis of polymers and plastics. Mr. Gerald Viel, Assistant Manager/Industry Technical Advisor, Wood Science & Technology Centre, University of New Brunswick, testified on behalf of the CBSA as well; he was qualified by the Tribunal as an expert in wood products, and the manufacture and processing of composite wood panel board.

5. No witnesses were called by Monterra.

GOODS IN ISSUE

6. A representative sample of the goods in issue was filed by Monterra as a physical exhibit.[3] Monterra did not take issue with the description of the goods in issue as found in the CBSA's decision of September 27, 2011.[4]

7. The goods in issue are used as flooring elements for exterior decking installed over traditional structural wood framing. The goods in issue have rounded corners, are approximately 6 in. (15.24 cm) wide and 1 in. (2.54 cm) thick, and are available in lengths of up to 16 ft. (487.68 cm). The top surface of the goods in issue is flat with an embossing that resembles a wood grain pattern. The bottom surface of the goods in issue has two parallel indented channels running their length.

8. The goods in issue are composed almost entirely of polymer of ethylene (approximately 50 percent by volume or 40 percent by weight) and very small particles of "wood dust" (approximately 50 percent by

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. Exhibit A-01, Trex Contours® 16-in. deck board; Tribunal Exhibit AP-2011-055-13.
4. Tribunal Exhibit AP-2011-055-04A, tab 2.

volume or 60 percent by weight); the goods in issue also contain small amounts of additives, such as colorants, stabilizers, preservatives and a fire retardant treatment.

9. Throughout the proceedings, the term "wood flour" was used by many to describe the wood particles found in the composition of the goods in issue. Following the evidence on file and the explanations given to this effect, the Tribunal will therefore adopt this term for use in its reasons.[5]

10. The polymer of ethylene is obtained from recycled waste products, such as milk jugs and grocery bags. The wood flour is composed of very small wood particles obtained from recycled wood. The wood flour and the polymer of ethylene are ground to a specific size, blended together and heated; the mixture is extruded under pressure into the required profile shape, which is then cut with a traveling saw into standard lengths. The extrusion process may impart surface textures to give the goods in issue a simulated wood grain pattern. The parties agree that the goods in issue are surface-worked but not otherwise worked.[6]

STATUTORY FRAMEWORK

11. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[7] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

12. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[8] and the *Canadian Rules*[9] set out in the schedule.

13. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

14. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[10] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[11] published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[12]

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5. As is examined below, Mr. Côté explained that the term "wood flour" is the more accurate term for the wood product contained in the goods in issue because of the size of the particles used in the circumstances (i.e. in an overwhelming proportion, smaller than 1 mm when sifted through a series of screens). *Transcript of Public Hearing*, 28 June 2012, at 13. See the discussion of Mr. Côté's testimony under "Analysis".
6. Tribunal Exhibit AP-2011-055-04A at paras. 4-7, tabs 2, 19.
7. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
8. S.C. 1997, c. 36, schedule [*General Rules*].
9. S.C. 1997, c. 36, schedule.
10. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
11. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
12. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.

15. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[13]

16. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.[14] The final step is to determine the proper tariff item.[15]

RELEVANT CLASSIFICATION PROVISIONS

17. The *Customs Tariff* provides as follows with respect to heading No. 39.16:

Section VII

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

. . .

Chapter 39

PLASTICS AND ARTICLES THEREOF

Notes

1. Throughout the Nomenclature the expression "plastics" means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

. . .

6. In headings 39.01 to 39.14, the expression "primary forms" applies only to the following forms:

   (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;

   (b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

. . .

39.16 **Monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks and profile shapes, whether or not surface-worked but not otherwise worked, of plastics.**

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13. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
14. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."
15. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

3916.10.00 -Of polymers of ethylene

18. The relevant *Explanatory Notes* to Chapter 39 provide as follows:

Plastics

The expression "plastics" is defined in Note 1 to this Chapter as meaning those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence. . . .

. . .

The term "polymerisation" is used in this definition in a wide sense and denotes any method of forming a polymer, including addition polymerisation, rearrangement polymerisation (polyaddition) and condensation polymerisation (polycondensation).

If material of this Chapter can be softened repeatedly by heat treatment and shaped into articles, e.g., by moulding, and then hardened by cooling, it is termed "thermoplastic". If it can be or has already been transformed into an infusible product by chemical or physical means (e.g., by heat), it is termed "thermosetting".

. . .

General arrangement of the Chapter

The Chapter is divided into two sub-Chapters. Sub-Chapter I covers polymers in primary forms and sub-Chapter II covers waste, parings and scrap, and semi-manufactures and articles.

In sub-Chapter I, relating to primary forms, the products of headings 39.01 to 39.11 are obtained by chemical synthesis and those of headings 39.12 and 39.13 are either natural polymers or are obtained therefrom by chemical treatment. Heading 39.14 covers ion-exchangers based on polymers of headings 39.01 to 39.13.

In sub-Chapter II, heading 39.15 relates to waste, parings and scrap of plastics. Headings 39.16 to 39.25 cover semi-manufactures or specified articles of plastics. Heading 39.26 is a residual heading which covers articles, not elsewhere specified or included, of plastics or of other materials of headings 39.01 to 39.14.

. . .

Primary forms

Headings 39.01 to 39.14 cover goods in primary forms only. The expression "primary forms" is defined in Note 6 to this Chapter. It applies only to the following forms:

. . .

(2) **Powder, granules and flakes.** In these forms they are employed for moulding, for the manufacture of varnishes, glues, etc. and as thickeners, flocculants, etc. They may consist of the unplasticised materials which become plastic in the moulding and curing process, or of materials to which plasticisers have been added; these materials may incorporate fillers (e.g., wood flour, cellulose, textile fibres, mineral substances, starch), colouring matter or other substances cited in Item (1) above. Powders may be used, for example, to coat objects by the application of heat with or without static electricity.

19. The relevant *Explanatory Notes* to heading No. 39.16 provide as follows:

> This heading covers monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks, and profile shapes. These are obtained in the length in a single operation (generally extrusion), and they have a constant or repetitive cross-section, from one end to the other. . . .
>
> The heading also includes such products which have been merely cut to a length exceeding the maximum cross-sectional dimension or surface-worked (polished, matt-finished, etc.), but not otherwise worked. . . .
>
> . . .
>
> For the classification of monofilament, rods, sticks and profile shapes of plastics combined with other materials, see the General Explanatory Note to this Chapter.

20. The *Customs Tariff* provides as follows with respect to heading No. 44.10:

Section IX

WOOD AND ARTICLES OF WOOD; WOOD CHARCOAL; CORK AND ARTICLES OF CORK; MANUFACTURES OF STRAW, OF ESPARTO OR OF OTHER PLAITING MATERIALS; BASKETWARE AND WICKERWORK

Chapter 44

WOOD AND ARTICLES OF WOOD; WOOD CHARCOAL

Notes.

. . .

6. Subject to Note 1 above and except where the context otherwise requires, any reference to "wood" in a heading of this Chapter applies also to bamboos and other materials of a woody nature.

. . .

44.10	**Particle board, oriented strand board (OSB) and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances.**
	-Of wood:
4410.11	**- -Particle board**
4410.11.10	- - -Unworked or not further worked than sanded; Whether or not painted, edge or face worked, but not otherwise worked or surface covered
4410.11.90	- - -Other
. . .	
4410.19	**- -Other**
4410.19.10	- - -Unworked or not further worked than sanded; Waferboard; Whether or not painted, edge or face worked, but not otherwise worked or surface covered

21. The relevant *Explanatory Notes* to Chapter 44 provide as follows:

GENERAL

This Chapter covers unmanufactured wood, semi-finished products of wood and, in general, articles of wood.

These products may be grouped broadly as follows:

(1) Wood in the rough . . . and fuel wood, wood waste and scrap, sawdust, wood in chips or particles; . . . wood wool and wood flour; . . . .

. . .

(3) Particle board and similar board, fibreboard, laminated wood and densified wood (headings 44.10 to 44.13).

22. The relevant *Explanatory Notes* to heading No. 44.10 provide as follows:

Particle board is a flat product manufactured in various lengths, widths and thicknesses by pressing or extrusion. It is usually made from wood chips or particles obtained by the mechanical reduction of roundwood or wood residues. It may also be produced from other ligneous materials such as fragments obtained from bagasse, bamboo, cereal straw or from flax or hemp shives. Particle board is normally agglomerated by means of an added organic binder, usually a thermosetting resin, which generally does not exceed 15 % of the weight of the board.

The chips, particles or other fragments constituting the particle boards of this heading are usually recognisable at the edges of the board with the naked eye. However, in some cases, microscopic examination may be required to distinguish the particles and fragments from the ligno-cellulosic fibres characterising the fibreboard of heading 44.11.

This heading also covers:

(1) **Oriented strand board**, which is made from layers of thin strands of wood which are at least twice as long as they are wide. These strands are mixed with binders (usually waterproof) such as isocyanate or phenolic resins, interleaved together and laid down in layers forming a thick mat in which the strands are generally oriented lengthwise in the surface layers and generally cross oriented or laid down randomly in the inner layers in order to give the board improved elastomechanical properties. The mat is subjected to heat and pressure producing a solid, uniform, rigid structural board.

(2) **Waferboard**, which is made from thin wafers of wood which are less than twice as long as they are wide. These wafers are mixed with binders (usually waterproof) such as isocyanate or phenolic resins, interleaved together and laid down randomly, thus forming a thick mat. The mat is subjected to heat and pressure producing a solid, uniform, structural board having high strength and water resistance.

The particle boards of this heading are usually sanded. . . .

. . .

The heading **does not cover**:

(a) Plates or strips of plastics containing wood flour as a filler (**Chapter 39**).

. . .

Also **excluded** from this heading are goods having the character of articles or parts of articles more specifically covered elsewhere, whether obtained directly by pressing, extrusion or moulding or by other processes.

POSITIONS OF PARTIES

Monterra

23. Monterra submitted that the goods in issue are *prima facie* classifiable in both heading No. 39.16 and heading No. 44.10. Monterra invoked Rules 1, 2 (b), 3 (a), 3 (c) of the *General Rules*.[16]

24. Monterra first submitted that, according to Rule 1 of the *General Rules*, the goods in issue should be classified in heading No. 44.10 as boards similar to particle boards, of wood particles, agglomerated with polyethylene resins. Monterra argued that the goods in issue have an appearance and functions similar to particle board, since both are used in home construction. Monterra further submitted that the word "wood", within the meaning of heading No. 44.10, may be extended to cover wood *and polyethylene* by application of Rule 2 (b).[17] Monterra relied on the expression contained in heading No. 44.10, ". . . whether or not agglomerated with *resins* or other organic binding substances" [emphasis added], maintaining that the goods in issue are similar to particle board of wood *agglomerated with* polyethylene *resin.*

25. Monterra further submitted that the goods in issue are *prima facie* classifiable in both heading No. 39.16 and heading No. 44.10 and that, therefore, they should be classified by application of Rules 2 (b) and 3 of the *General Rules*.[18]

26. Monterra took the position that heading No. 44.10 is more specific because, by contrast to heading No. 39.16, it describes both components of the goods in issue, i.e. both the wood component and the plastic component of "resins" or "polyethylene". In addition, according to Monterra, the term "boards" of heading No. 44.10 provides a more precise description of the goods in issue than the more generic term "profile shapes" of heading No. 39.16.[19] Accordingly, Monterra suggested that the goods in issue should be classified in heading No. 44.10 on the basis of Rule 3 (a) of the *General Rules.*

27. In the alternative, Monterra argued that, if the Tribunal is unable to determine the classification on the basis of Rule 3 (a) of the *General Rules*, Rule 3 (b) is not of assistance because polyethylene and wood

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16. In its brief, Monterra suggested that the goods in issue could be classified under tariff item No. 4410.11.90 by application of Rule 4 of the *General Rules*, if necessary. However, Monterra did not elaborate that argument either in its brief or at the hearing. Tribunal Exhibit AP-2011-055-04A at para. 27.
17. Rule 2 (b) of the *General Rules* provides as follows:

    > Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

18. Rule 3 of the *General Rules* provides as follows:

    > When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
    >
    > (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
    >
    > (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
    >
    > (c) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

19. *Transcript of Public Hearing*, 28 June 2012, at 156-57; Tribunal Exhibit AP-2011-055-04A at paras. 8, 19.

components equally merit consideration in discerning the essential character of the goods in issue.[20] Therefore, Monterra suggested that the classification proceed by application of Rule 3 (c), in order to classify the goods in issue in the heading which occurs last in the numerical order among those which equally merit consideration, which, in this instance, would be tariff item No. 44.10.

CBSA

28. The CBSA took the position that the goods in issue are properly classified as profile shapes of plastics of heading No. 39.16 pursuant to Rule 1 of the *General Rules* or, alternatively, in accordance with Rule 3 (b).

29. The CBSA submitted that the goods in issue are properly classified in heading No. 39.16, as they meet both requirements of that heading: (a) to be composed of plastics and (b) to consist of a profile shape.

30. The CBSA argued that the goods in issue meet the first requirement, as they are composed of plastics within the meaning of heading No. 39.16. In support of this argument, the CBSA relied on the definitions of the term "plastics" as found in Note 1 to Chapter 39, the *Explanatory Notes* to Chapter 39 and various dictionary definitions and on the explanations provided by Messrs. Côté and Granville. In this respect, the CBSA argued that the term "plastics" comprises a polymer with additives, such as the wood flour that is used as a filler in the goods in issue.

31. As for the second requirement, the CBSA referred to the *Explanatory Notes* to heading No. 39.16.[21] On the basis of the laboratory report and the testimony of Messrs. Côté and Granville, the CBSA argued that the goods in issue meet the definition of a "profile shape" within heading No. 39.16 because they are rigid, profile shapes, obtained by placing the mixture of polymer of ethylene and wood flour through a barrel extruder and heated die, and having a homogenous cross-section from one end of the product to the other.

32. In the alternative, the CBSA submitted that, if the Tribunal was unable to classify the goods in issue on the basis of Rule 1 of the *General Rules*, then Rule 2 is not of assistance and that, therefore, recourse would have to be made to Rule 3 (b).

33. In that respect, the CBSA submitted that, if the Tribunal determines that the goods in issue are *prima facie* classifiable in both heading No. 39.16 and heading No. 44.10, they remain classified in heading No. 39.16 because the plastic component imparts the essential character to the whole of the goods in issue. The CBSA added that, despite the weight of the wood component (which represents 60 percent of the total weight of the goods in issue), the other factors outlined by the *Explanatory Notes* to Rule 3 (b) of the *General Rules* and the Tribunal's case law (such as physical properties, function, shape and price) point to the plastic as being the component that gives the goods in issue their essential character.

34. In particular, the CBSA submitted that the plastic component is indispensable to the shape and texture of the goods in issue; the price of the plastic input is several times the price of the wood flour input;

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20. Tribunal Exhibit AP-2011-055-04A at para. 12. The Tribunal notes however that Monterra recognized, at para. 10 of that document, that the polyethylene component ". . . contributes more to the [goods in issue] than the agglomeration of the wood component . . . ."
21. The *Explanatory Notes* to heading No. 39.16 provide the following definition: "This heading covers monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks, and profile shapes. These are obtained in the length in a single operation (generally extrusion), and they have a constant or repetitive cross-section, from one end to the other. Hollow profile shapes have a cross-section different from that of tubes, pipes and hoses of heading 39.17 (see Note 8 to this Chapter)."

the plastic component provides the physical properties of the goods in issue (weather, moisture and insect resistance, splinter-free, excellent traction, low-maintenance product, etc.). According to the CBSA, the wood flour is nothing more than filler that allows for the use of less plastic in the goods in issue.

35. In rebuttal to Monterra's position, the CBSA indicated that the *Explanatory Notes* to heading No. 44.10 exclude from the scope of that heading ". . . goods having the character of articles or parts of articles *more specifically covered elsewhere*, whether obtained directly by pressing, extrusion or moulding or by other processes" [emphasis added]. The CBSA argued that the goods in issue are more specifically included in heading No. 39.16 and do not share similar characteristic and functions of "particle boards" or "similar boards" within the meaning of heading No. 44.10.

ANALYSIS

36. The Tribunal is of the view that, in light of the evidence presented before it, this appeal can be resolved on the basis of Rule 1 of the *General Rules*, and that, therefore, recourse to the other *General Rules* is not necessary.

37. The Tribunal examined Monterra's position first and, for the reasons below, could not conclude that it was founded. The Tribunal then proceeded to examine the CBSA's position and, in doing so, confirmed that the goods in issue are properly classified in heading No. 39.16.

Are the Goods in Issue Included in Heading No. 44.10 as Particle Boards, Oriented Strand Boards, Waferboards or Other Similar Boards?

38. Heading No. 44.10 provides as follows:

> **Particle board, oriented strand board (OSB) and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances.**

39. The terms of the heading are such that, for the goods in issue to be classified in heading No. 44.10, they must meet the following requirements: (i) be particle board, oriented strand board (OSB), waferboard, or similar board; (ii) be made of wood material; and (iii) "whether or not" agglomerated with resins or other organic substances. In addition, the goods in issue cannot be more specifically covered by another heading.[22]

40. Monterra takes the position that the goods in issue are "similar boards" to particle board, OSB or waferboard. In the past, the Tribunal has indicated that the test for determining "similarity" is not a strict one and that "similar" does not mean "identical", but indicated that, for goods to be viewed as "similar" to other goods, they must share important physical and functional characteristics.[23]

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22. The *Explanatory Notes* to heading No. 44.10 indicate that goods ". . . having the character of articles . . . *more specifically covered elsewhere*, whether obtained directly by . . . extrusion . . ." [emphasis added] are to be excluded from that heading.
23. *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82; *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at paras. 25-26.

41. The terms "particle board", "OSB" and "waferboard" are defined in the *Explanatory Notes* to heading No. 44.10 as follows:

> **Particle board** is a flat product manufactured in various lengths, widths and thicknesses by pressing or extrusion. It is usually made from wood chips or particles obtained by the mechanical reduction of roundwood or wood residues. It may also be produced from other ligneous materials such as fragments obtained from bagasse, bamboo, cereal straw or from flax or hemp shives. Particle board is normally agglomerated by means of an added organic binder, usually a thermosetting resin, which generally does not exceed 15 % of the weight of the board.
>
> . . .
>
> (1) **Oriented strand board**, which is made from layers of thin strands of wood which are at least twice as long as they are wide. These strands are mixed with binders (usually waterproof) such as isocyanate or phenolic resins, interleaved together and laid down in layers forming a thick mat in which the strands are generally oriented lengthwise in the surface layers and generally cross oriented or laid down randomly in the inner layers in order to give the board improved elastomechanical properties. The mat is subjected to heat and pressure producing a solid, uniform, rigid structural board.
>
> (2) **Waferboard**, which is made from thin wafers of wood which are less than twice as long as they are wide. These wafers are mixed with binders (usually waterproof) such as isocyanate or phenolic resins, interleaved together and laid down randomly, thus forming a thick mat. The mat is subjected to heat and pressure producing a solid, uniform, structural board having high strength and water resistance.
>
> The particle boards of this heading are usually sanded. . . .

42. According to the *Explanatory Notes* to heading No. 44.10 and the testimony of Mr. Viel, OSB and waferboard are made from layers or wafers. The *Explanatory Notes* to heading No. 44.10 also indicate that particle board is usually made from wood *chips or particles* obtained by the mechanical reduction of roundwood or wood residues.

43. Mr. Viel explained that the geometry of the wood particles is critical in order to obtain the "fibre to-fibre crossings" which give products their strength. Mr. Viel testified that the wood particles found in particle board are made of sawdust and shavings, measuring up to 10 mm in length but, on average, measuring 5 mm in length. The wood particles in OSB and waferboard are even larger. In all instances, such particles are larger than particles of wood flour found in the goods in issue.

44. Mr. Viel stated that the wood flour found in the goods in issue is ". . . very fine and very granular, so if you tried to form it into a mat and make a board of it, you wouldn't get many fibre-to-fibre crossings, which is what gives you strength."[24]

45. Mr. Granville testified that the texture of the goods in issue is smooth, monolithic, homogeneous and not layered.[25] According to the laboratory report and the testimony of Mr. Côté, the goods in issue are composed of polymer of ethylene and very finely ground wood dust (described as wood flour), where 90 percent of the wood particles measure less than 1 mm.[26] The Tribunal notes that the goods in issue are not sanded, contrary to what is envisaged by the *Explanatory Notes* to heading No. 44.10.

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24. *Transcript of Public Hearing*, 28 June 2012, at 110.
25. *Transcript of Public Hearing*, 28 June 2012, at 39.
26. *Transcript of Public Hearing*, 28 June 2012, at 13.

46. Heading No. 44.10 further provides that the goods included in that heading are made of ". . . wood . . . whether or not agglomerated with resins . . . ." The *Explanatory Notes* to heading No. 44.10 specify that the resins added to wood particles are usually of a kind called *thermosetting resins* and do not exceed 15 percent of the weight of the product.

47. Mr. Granville indicated that the term "resin" was historically used to describe what is known as "thermosetting resins". He stated however that, ". . . today, the term 'resin' is almost used interchangeably with the term 'polymer'."[27] He also referred to *Hawley's Condensed Chemical Dictionary* which states that ". . . the term *resin* is so broadly used as to be almost meaningless . . . ."[28] On the basis of this evidence, the Tribunal is satisfied that the words "polymer" and "resin" are used interchangeably and that, thus, the term "resin" in heading No. 44.10 can also be understood to include a "polymer".

48. Mr. Granville explained that the goods in issue are instead made of "thermoplastic material". In particular, they can be reheated and reshaped.[29] In contrast, the uncontroverted expert testimony of Messrs. Viel and Granville,[30] as well as the testimony of Mr. Côté,[31] show that the resins used in the products of heading No. 44.10 (particle boards, OSB and waferboards) are clearly of "thermosetting resins".[32]

49. The distinction between these two types of resins is important. According to the evidence, thermoplastic resins are of a type which can be heated and reheated in order to bend them into desired shapes. After manufacture, the resin hardens, but its chemical composition allows it to revert to a pliable form upon further application of heat; this can be done a number of times. Thermosetting resins, on the other hand, appear to have a chemical composition which, upon hardening, forms "cross-links" at the molecular level which sets the polymer definitely. It cannot be reheated in order to obtain malleability. The application of heat to the solidified compound would only burn or char the polymer, and the application of force would break the links which have formed and, hence, break the product itself. Once thermosetting resins harden, they are essentially "set" to a permanent form.

50. Mr. Viel testified that particle board is made of ". . . wood particles, a glue, a resin glue, and usually a bit of wax."[33] According to him, there are three types of thermosetting resins used in manufacturing particle board, OSB and waferboard, depending on how much water resistance is required for the specific

27. *Transcript of Public Hearing*, 28 June 2012, at 66.
28. Fifteenth ed., *s.v.* "resin, synthetic"; Tribunal Exhibit AP-2011-055-19; *Transcript of Public Hearing*, 28 June 2012, at 13, 66-68.
29. *Transcript of Public Hearing*, 28 June 2012, at 40-41: "Thermoplastic material is a plastic material that when it is heated, it softens and can become molten and even liquid in state, and then can be heated and moulded into shape and then retains that shape once it's cooled". *Transcript of Public Hearing*, 28 June 2012, at 90: ". . . thermoplastic resin is a resin that can be melted, moulded, cooled to a shape, then melted again and cooled and moulded several times, so it does not cross link, whereas a thermosetting resin will cross link. And then if you go to melt it, you end up burning and charring it before it melts." The Tribunal notes that the explanations provided by Mr. Granville are consistent with the definitions provided in the *Explanatory Notes* to Chapter 39: "If material of this Chapter can be softened repeatedly by heat treatment and shaped into articles, e.g., by moulding, and then hardened by cooling, it is termed 'thermoplastic'. If it can be or has already been transformed into an infusible product by chemical or physical means (e.g., by heat), it is termed 'thermosetting'." See also Tribunal Exhibit AP-2011-055-11B, tab 7.
30. *Transcript of Public Hearing*, 28 June 2012, at 90, 105.
31. *Transcript of Public Hearing*, 28 June 2012, at 21.
32. *Transcript of Public Hearing*, 28 June 2012, at 105.
33. *Transcript of Public Hearing*, 28 June 2012, at 103.

product: *urea formaldehyde* (the most common), *phenol formaldehyde* and *melamine urea formaldehyde*. Mr. Viel also explained that the resin glue allows the wood particles of the particle board to adhere together. Other resins that could be used as binders are isocyanates, which are polyurethane adhesives. Mr. Viel stated that the amount of resin glue used for particle board is usually 6 to 8 percent of the weight of the product and that he has never seen more than 10 to 15 percent used.[34]

51. In contrast, the goods in issue contain the polymer of ethylene—which is a thermoplastic resin, not a thermosetting resin—in an amount representing approximately 40 percent of their weight.[35] This ratio represents more than 2.5 times the upper amount given in the *Explanatory Notes* to heading No. 44.10 for the use of resin (". . . generally does not exceed 15 % of the weight of the board").

52. It was also explained that, with the goods in issue, there is no actual chemical bonding between the wood flour and the polymer molecules. Rather, as they are chemically "dissimilar", the polymer only effectively "encapsulates" the wood; hence, no bond is created *per se*. To achieve bonding properties, a "coupling agent", such as maleic anhydride, must be used to hold the basic compounds of the total mixture together.[36]

53. With respect to manufacturing processes and physical characteristics, Mr. Viel explained that there are fundamental differences in the processes used to manufacture, on one hand, particle board, OSB and waferboard and, on the other hand, the goods in issue.

54. In the manufacture of particle board, a small amount of resin glue is added to the wood particles which are guided and deposited on a rolling table through the use aerodynamics, which orients the wood particles in a way to provide for optimized surface-to-surface adhesion. The amalgamation is then pressed under heat and pressure in order to make a finished panel.

55. When manufacturing the goods in issue, however, a completely different process occurs: the plastic (polymer/stabilizers/plasticizers) is melted to a liquid form, and wood flour is added and thoroughly mixed into a type of batter. The end product is then extruded through an extrusion press which gives it a profile shape.[37]

56. Mr. Viel testified that the extrusion process is rarely used in particle board manufacturing.[38] Even though the extrusion process has been used in the past to produce particle board, Mr. Viel indicated that this process was no longer used by manufacturers for lack of efficiency and difficulty in obtaining a consistent product. Rather, to obtain particle board, OSB and waferboard, the only real method still in use is the air-blown process where wood particles are layered as a mat which is then essentially moulded into a final product through heat and pressure.

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34. *Transcript of Public Hearing*, 28 June 2012, at 103-107.
35. Tribunal Exhibit AP-2011-055-07A, tab 19.
36. *Transcript of Public Hearing*, 28 June 2012, at 77-79, 107.
37. *Transcript of Public Hearing*, 28 June 2012, at 118. "MR. VIEL: The major difference that I see is that in making particle board, I see it as a process where you are putting a small amount of glue on particles, then you are pressing those two together under heat and pressure to make a finished panel. In the extruded wood plastic composite, you are doing basically a little bit of the opposite. You are melting the plastic and adding the wood to it, although here they are showing them melted together. But basically you are adding wood to a liquid plastic and then extruding the mixture." See also *Transcript of Public Hearing*, 28 June 2012, at 136-42.
38. *Transcript of Public Hearing*, 28 June 2012, at 120, 136. See also Tribunal Exhibit AP-2011-055-11C, tab 4.

57. Mr. Viel made it clear that it is virtually impossible to use a polymer of ethylene in the air-blown process used to manufacture particle board because it needs to be heated to approximately 300 degrees Celsius in order to bestow the required properties to the resin.[39]

58. Conversely, thermosetting resins cannot be used to manufacture products like the goods in issue because such resins would burn and char before they melted.[40] Mr. Viel explained that, in the manufacture of particle board, OSB and waferboard, a particular "curing" process occurs ". . . where the resins cross link with each other and with the board and form a bond between the particles . . . ."[41] This is confirmed by Mr. Granville who also explained that thermosetting resins are cross-linked in cured form, whereas thermoplastic resins are not.

59. Mr. Viel also indicated that particle board, OSB and waferboard can be painted, cut, routed and coated, but they cannot be bent.[42] Further, they are not water-resistant (or, at best, for only a certain period of time through the further application of wax) because, even though the resin which they contain is waterproof, the wood is not.[43] In contrast, the goods in issue have properties that make them weather-, moisture- and insect-resistant, and are marketed as being "superior" to wood, while still offering a "look" which is similar to wood.[44]

60. On the subject of end uses, Mr. Viel stated that particle boards are generally input stock for further manufacturing of interior applications, such as cabinetry; waferboard and OSB are for their part used as sheathing products, roof panelling, underlayment and, very rarely, inside floor panels. It was explained that it would not be reasonable to use particle board, OSB and waferboard for outdoor use, since they would quickly deteriorate when exposed to moisture. As discussed above, given their high weather resistance, the goods in issue are used almost exclusively for exterior decking and are particularly suited, designed and marketed for that end use.[45]

61. The price of particle board, OSB and waferboard also differs significantly from that of the goods in issue. The latter are several times more expensive than any of the former three. According to Mr. Côté, when brought to equivalent size ratios, particle board, OSB and waferboard range from $2 to $4 for a

39. *Transcript of Public Hearing*, 28 June 2012, at 139.
40. *Transcript of Public Hearing*, 28 June 2012, at 90.
41. *Transcript of Public Hearing*, 28 June 2012, at 112.
42. *Transcript of Public Hearing*, 28 June 2012, at 121-22. *Transcript of Public Hearing*, 28 June 2012, at 144-45.
43. On the subject of wax providing a degree of temporary water resistance, see *Transcript of Public Hearing*, 28 June 2012, at 108. As OSB and waferboard contain phenolic resins, they are more water-resistant than particle boards. *Transcript of Public Hearing*, 28 June 2012, at 119, 123, 143. Mr. Viel stated as follows: "Because even though the resin is waterproof, the wood isn't, and if it wets and dries, it shrinks and swells and shrinks and swells, and eventually works the bonds apart. It would swell up quite badly after a while and it would also discolour, turn grey", *Transcript of Public Hearing*, 28 June 2012, at 143.
44. Mr. Granville pointed to these products being a ". . . superior alternative to wood", *Transcript of Public Hearing*, 28 June 2012, at 62. He also pointed to the slogan "Pay once, enjoy (almost) forever", Tribunal Exhibit AP 2011-055-07A, tab 17. The product literature states that "[t]he result is decking . . . products that require only periodic cleaning to stay beautiful for years to come - no need for sanding, staining or painting, ever" and that the plastic shields the wood from moisture and insect damage, preventing rotting and splintering, and making them particularly suitable for ". . . pools, hot tubs and spas", Tribunal Exhibit AP-2011-055-07A, tab 17.
45. *Transcript of Public Hearing*, 28 June 2012, at 143-46, Tribunal Exhibit AP-2011-055-07A, tab 17.

calculated unit of measure, whereas the price of the goods in issue is approximately $30 for the same unit of measure.[46]

62. Finally, Mr. Viel testified that particle board, OSB and waferboard are usually available in dimensional sheets of 4 by 8 ft.[47] The goods in issue are marketed as strips measuring no more than 6 in. by 16 ft.[48] Therefore, according to Mr. Viel, while "physically possible", it would not be practical or economically viable to use the goods in issue as a replacement for particle board, OSB or waferboard.[49]

63. The Tribunal notes that Monterra produced no witnesses to challenge the evidence adduced by the three witnesses brought forward by the CBSA, two of whom were qualified as expert witnesses in their respective fields of knowledge. Although Monterra did cross-examine these witnesses, such cross-examination did not produce any testimony which detracts from the fundamentals explained above.

64. For the foregoing reasons, the Tribunal is of the view that the goods in issue do not share important characteristics and functions associated with the goods described in heading No. 44.10.

65. On the basis of the uncontroverted testimony of Messrs. Viel, Granville and Côté, the laboratory report, the product literature, and the description of the manufacturing process filed on the record, the Tribunal considers that there are significant differences in shape, texture, material composition, manufacture, physical characteristics, marketing and uses of the goods in issue compared with the goods of heading No. 44.10, to the point that there is no "similarity" between the goods in issue and the goods of that heading. It follows that classification cannot occur in that heading.

66. In coming to this conclusion, the Tribunal also considered the following very fundamental point: the *Explanatory Notes* to heading No. 44.10 exclude from the ambit of that heading ". . . strips of plastics containing wood flour as a filler" and explicitly direct classification of such goods in Chapter 39.[50] The Tribunal also notes that the *Explanatory Notes* to heading No. 44.05 indicate that "wood flour" ". . . is used largely as a filler in the *plastics industry* . . ." [emphasis added]. In the section that follows, the Tribunal examines whether the goods in issue are a plastic of Chapter 39.

67. In addition, the Tribunal recalls that the *Explanatory Notes* to heading No. 44.10 exclude from the scope of that heading ". . . goods having the character of articles or parts of articles more specifically covered elsewhere . . . ." The CBSA has argued, of course, that the goods in issue are more specifically covered by heading No. 39.16.

68. The Tribunal will now turn its attention to the merits of that position.

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46. *Transcript of Public Hearing*, 28 June 2012, at 15; Tribunal Exhibit AP-2011-055-18. Through a comparative exercise, Mr. Côté shopped prices for OSB, particle board, waferboard and the goods in issue at the retail level. He then compared the square footage of the goods (which come in different formats) to the price in order to obtain a common denominator for a square foot unit of comparison. This is the unit of comparison used for price.
47. *Transcript of Public Hearing*, 28 June 2012, at 144. Particle board flooring products have to meet ANSI specifications, measure 16 in. by 16 in. and are loaded in the centre. *Transcript of Public Hearing*, 28 June 2012, at 127.
48. Tribunal Exhibit AP-2011-055-07A, tab 9 at 253.
49. *Transcript of Public Hearing*, 28 June 2012, at 144.
50. The Tribunal is satisfied that the goods in issue are "strips", be it according to common parlance or to the *Canadian Oxford Dictionary*, 2d ed., *s.v.* "strip": "a long narrow piece".

Are the Goods in Issue Included in Heading No. 39.16 as Profile Shapes of Plastic?

69. The Tribunal notes that Monterra recognized that the goods in issue are *prima facie* classifiable in heading No. 39.16.[51] Moreover, Monterra agreed that ". . . the polyethylene component contributes more to the Trex WPC board than the agglomeration of the wood component".[52]

70. Heading No. 39.16 provides as follows:

> . . . **profile shapes, whether or not surface-worked but not otherwise worked, of plastics.**

71. Heading No. 39.16 sets out three requirements for goods to be classified therein: (1) they must be profile shapes, (ii) whether or not surface-worked but not otherwise worked and (iii) of plastics. Monterra did not take issue with the fact that the goods in issue met the first and second requirements.

72. Concerning the first requirement, Monterra did not contest that the goods in issue meet the definition of "profile shape" (except for maintaining that the term "board" is more specific that the more generic term "profile shape").[53]

73. The *Explanatory Notes* to heading No. 39.16 provide the following definition:

> This heading covers monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks, and profile shapes. These are obtained in the length in a single operation (generally extrusion), and they have a constant or repetitive cross-section, from one end to the other. . . .
>
> The heading also includes such products which have been merely cut to a length exceeding the maximum cross-sectional dimension or surface-worked (polished, matt-finished, etc.), but not otherwise worked.

74. With that definition in mind, and considering the definition provided by *International Standard ISO 472*,[54] the laboratory report,[55] and the testimonies of Messrs. Côté[56] and Granville,[57] the Tribunal is satisfied that the goods in issue are "profile shapes", as they are rigid, have a constant regular cross-section from one end to the other and are obtained by extrusion.

75. Concerning the second requirement, Monterra did not contest that the goods in issue are "surface-worked . . . but not otherwise worked."[58]

76. The parties focussed their arguments on the third requirement of heading No. 39.16. According to Note 1 to Chapter 39, throughout the nomenclature, the expression "plastics" is given the following meaning:

> 1. Throughout the Nomenclature the expression "plastics" means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if

51. Tribunal Exhibit AP-2011-055-04A at paras. 6, 9.
52. Tribunal Exhibit AP-2011-055-04A at para. 10.
53. *Transcript of Public Hearing*, 28 June 2012, at 156-57.
54. Third edition, 1 November 1999, Tribunal Exhibit AP-2011-055-11B, tab 1.
55. Tribunal Exhibit AP-2011-055-07A, tab 19.
56. *Transcript of Public Hearing*, 28 June 2012, at 11-12.
57. *Transcript of Public Hearing*, 28 June 2012, at 38-39.
58. Tribunal Exhibit AP-2011-055-04A at para. 6.

> necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

77. The *Explanatory Notes* to Chapter 39 reiterate the same definition. They also enumerate the primary forms of heading Nos. 39.01 to 39.14, including "powder, granules and flakes", and more specifically fillers such as wood flour:

> **Primary forms**
>
> Headings 39.01 to 39.14 cover goods in primary forms only. The expression "primary forms" is defined in Note 6 to this Chapter. It applies only to the following forms:
>
> . . .
>
> (2) **Powder, granules and flakes.** In these forms they are employed for moulding, for the manufacture of varnishes, glues, etc. and as thickeners, flocculants, etc. They may consist of the unplasticised materials which become plastic in the moulding and curing process, or of materials to which plasticisers have been added; *these materials may incorporate fillers (e.g., wood flour*, cellulose, textile fibres, mineral substances, starch), colouring matter or other substances cited in Item (1) above. Powders may be used, for example, to coat objects by the application of heat with or without static electricity.
>
> [Emphasis added]

78. The Tribunal also considered the following definitions, filed on the record, of the term "plastic":

> **plastic** . . . material which contains as an essential ingredient a high polymer and which at some stage in its processing into finished products can be shaped by flow[59]
>
> **plastic.** (1) Capable of being shaped or molded with or without the application of heat. Soft waxes and moist clay are good examples of this property.
>
> . . .
>
> (2) A high polymer. usually synthetic, combined with other ingredients, such as curatives, fillers, reinforcing agents, colorants, plasticizers, etc. . . .[60]

79. The above definitions of "plastic" are consistent with the testimony of Mr. Granville who stated that the term "polymer" is defined as a relatively higher molecular weight organic chemical that is structured with repeating units of ethylene. According to him, the term "plastics" is broad enough to include goods that have a polymer as the essential ingredient, plus other additives such as curatives, fillers, reinforcing agents, colorants, plasticisers, antioxidants, etc.[61]

80. On the basis of the foregoing, the Tribunal accepts that the term "plastics" of heading No. 39.16 includes a polymer, to which a filler (such as wood flour) and additives (such as plasticisers, stabilizers and colorants) can be added to obtain desired properties.

81. Mr. Granville is of the opinion that the goods in issue are articles of plastics, containing polymer of ethylene and wood flour as a filler, as they have the homogeneous smooth texture that is not layered and properties associated with a plastic.[62] In addition, as discussed above, the polymer of ethylene is a

59. *International Standard ISO 472*, Third edition, 1 November 1999; Tribunal Exhibit AP-2011-055-11B, tab 1 at 11.
60. *Hawley's Condensed Chemical Dictionary*, 15th ed., Tribunal Exhibit AP-2011-055-11B, tab 2 at 17.
61. *Transcript of Public Hearing*, 28 June 2012, at 35.
62. *Transcript of Public Hearing*, 28 June 2012, at 36-38, 46-49.

thermoplastic material. Mr. Granville pointed to Monterra's Web site which indicates that the goods in issue can be heated to approximately 140 degrees Fahrenheit (60 degrees Celsius) and bent.[63]

82. Mr. Granville testified that the wood flour is merely a filler in the composition of the goods in issue, which notwithstanding remain a plastic. This filler is used primarily to reduce costs. The filler can also enhance some of the characteristics of the final product (such as strength). However, Mr. Granville testified that the same result could be achieved by adding a small amount of other products (such as an additional type of polymer).[64]

83. Mr. Granville was of the opinion that the process and machinery used in manufacturing the goods in issue are similar to those used in manufacturing plastic. He stated that no materials other than plastics are able to be extruded by a ". . . barrel screw extruder which is a plastics extruder."[65] In his view, the goods in issue are profile shapes of plastic.[66] This evidence was not challenged, and there is nothing on the record that would lead the Tribunal to conclude otherwise.

84. Considering the evidence of the record, and in particular the agreed description of the goods in issue,[67] the Tribunal is of the view that the goods in issue have the shape, texture, physical characteristics and material composition of profile shapes of plastics. They are manufactured in the same manner as plastics and have the same properties as plastic; they are designed and marketed with those properties at the forefront. As discussed above, the term "plastic" includes polymers and fillers, such as the wood flour used in the goods in issue. Therefore, the term "plastics" comprises the goods in issue.

85. For the foregoing reasons, the Tribunal is of the view that the goods in issue are classifiable in heading No. 39.16.

86. Even if the Tribunal had been able to reach the view that the goods in issue were *prima facie* classifiable in both heading No. 44.10 and heading No. 39.16, it would have classified the goods in issue in heading No. 39.16, because, in the light of the evidence on the record, it is uncontestably the plastic that imparts the essential character to the whole of the goods in issue. However, as discussed above, in this particular case, the Tribunal sees no need to have recourse to any rule other than Rule 1 of the *General Rules*.

Classification at Subheading and Tariff Item Levels

87. Heading No. 39.16 contains the following three subheadings at the one-dash level:

3916.10.00 -Of polymers of ethylene

3916.20.00 -Of polymers of vinyl chloride

3916.90.00 -Of other plastics

88. The parties agree that the plastic used to form the goods in issue is "polymer of ethylene". There are no further breakdowns of this subheading. Therefore, in accordance with Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 3916.10.00.

63. Tribunal Exhibit AP-2011-055-11B; *Transcript of Public Hearing*, 28 June 2012, at 40.
64. *Transcript of Public Hearing*, 28 June 2012, at 43-46.
65. Tribunal Exhibit AP-2011-055-04A, tab 1; *Transcript of Public Hearing*, 28 June 2012, at 59.
66. *Transcript of Public Hearing*, 28 June 2012, at 63-64.
67. Tribunal Exhibit AP-2011-055-04A at para. 4.

DECISION

89. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member