



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-011

Bauer Hockey Corporation

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, April 26, 2012*

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IN THE MATTER OF an appeal heard on April 3, 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 March 16, 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

BAUER HOCKEY CORPORATION

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 3, 2012
Tribunal Member: Pasquale Michael Saroli, Presiding Member
Counsel for the Tribunal: Nick Covelli
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Cheryl Unitt

PARTICIPANTS:

Appellant	Counsel/Representative
Bauer Hockey Corporation	Kimberley L. Cook
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Max Binnie

WITNESS:

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STATEMENT OF REASONS

1. This is an appeal filed by Bauer Hockey Corporation (Bauer) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on March 16, 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.
2. The Tribunal heard the appeal in Ottawa, Ontario, on April 3, 2012. Mr. Larry Weber, Director of Risk Management and Corporate Compliance at Bauer, testified on its behalf. The CBSA did not call any witnesses.
3. The appeal concerns the tariff classification of the following two categories of Bauer ice hockey products:
 - (a) premium and core short- and long-sleeved integrated neck tops; and
 - (b) core integrated-neck, knee-length and full-length, one-piece garments(collectively, the goods in issue).²
4. The issue in this appeal is whether the goods in issue are properly classified in heading Nos. 61.10 and 61.14 of the schedule to the *Customs Tariff*,³ as determined by the CBSA, or should be classified in heading No. 95.06, as claimed by Bauer.

STATUTORY FRAMEWORK

5. The schedule to the *Customs Tariff* is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.⁴ It 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.
6. Subsection 10(1) of the *Customs Tariff* provides that classification shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁵ and the *Canadian Rules*⁶ set out in the schedule.
7. Rules 1 through 5 of the *General Rules* are structured in sequence so that classification at the heading level shall first be attempted through Rule 1, which provides that "... classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes"
8. Pursuant to Rule 6 of the *General Rules*, "... 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]"

1. R.S.C. 1985 (2d Supp.), c. 1 [Act].

2. The parties refer to each category differently: Tribunal Exhibit AP-2011-011-03A at para. 2; Tribunal Exhibit AP-2011-011-05A at para. 3. Collectively, these two categories comprise seven products: Tribunal Exhibit AP-2011-011-05A at para. 3, tab 1 at 95-96. See also Tribunal Exhibit AP-2011-011-03A, tabs 1-4.

3. S.C. 1997, c. 36.

4. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

5. S.C. 1997, c. 36, schedule [General Rules].

6. S.C. 1997, c. 36, schedule.

9. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁷ While the *Explanatory Notes* are not binding, the Tribunal will apply them, unless there is a sound reason to do otherwise.⁸

10. Finally, Rule 1 of the *Canadian Rules* states the following: “. . . 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 . . .”

TERMS OF THE HEADINGS

11. Chapter 61 falls within Section XI, “Textiles and Textile Articles”. The chapter covers knitted or crocheted articles of apparel and clothing accessories.

12. Heading No. 61.10 specifically covers the following:

Jerseys, pullovers, cardigans, waistcoats and similar articles, knitted or crocheted.

13. Heading No. 61.14 specifically covers the following:

Other garments, knitted or crocheted.

14. Chapter 95 covers toys, games and sports requisites, and parts and accessories thereof.

15. Heading No. 95.06 specifically covers the following:

Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter;

RELATIVE SECTION AND CHAPTER NOTES

16. Note 1 to Section XI provides as follows:

1. This section does not cover:

. . .

(t) *Articles of Chapter 95* (for example, toys, games, *sports requisites* and nets).

[Emphasis added]

17. Note 1 to Chapter 95 provides as follows:

1. This Chapter does not cover:

. . .

(e) *Sports clothing* or fancy dress, of textiles, *of Chapter 61* or *62*.

[Emphasis added]

7. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*]. Section 11 of the *Customs Tariff* also specifies that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*, World Customs Organization, 2d ed., Brussels, 2003, but no classification opinion is applicable to the present appeal.

8. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17.

EXPLANATORY NOTES

18. The *Explanatory Notes* to heading No. 61.10 provide as follows:

This heading covers a category of knitted or crocheted articles . . . designed to cover the upper parts of the body (jerseys, pullovers, cardigans, waistcoats and similar articles). Articles incorporating incidentally protective components such as elbow pads sewn on sleeves and used for certain sports (e.g., soccer goalkeeper jerseys) remain classified in this heading.

19. The *Explanatory Notes* to heading No. 61.14 provide as follows:

The heading includes, *inter alia*:

- (5) Special articles of apparel, whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas, used for certain sports . . . (e.g., fencing clothing, jockeys' silks . . .). However, protective equipment for sports or games (e.g., fencing masks and breast plates, ice hockey pants, etc.) are **excluded (heading 95.06)**.

20. The *Explanatory Notes* to heading No. 95.06 provide as follows:

This heading covers:

...

- (B) **Requisites for other sports . . . :**

...

- (13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards, ice hockey pants with built-in guards and pads.

...

The heading **excludes**:

...

- (e) Sports clothing of textiles, of **Chapter 61** or **62**, whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas (e.g., fencing clothing or soccer goalkeeper jerseys).

BAUER'S POSITION

21. Bauer submits that, when the relevant legal and explanatory notes are read together, it is clear that an article of apparel for sports that incorporates an incidentally protective component remains classified in Chapter 61 and that an article of apparel for sports incorporating a protective component that is more than incidental is properly classified in heading No. 95.06.⁹ Thus, according to Bauer, the appeal turns on the meaning of "incidentally protective component" and, in particular, on the issue of whether the neck guard integrated into the goods in issue is an incidentally protective component.¹⁰

9. Tribunal Exhibit AP-2011-011-03A at para. 46.

10. *Ibid.* at para. 47. The Tribunal notes, in this regard, that Bauer's argument in support of its claim that the goods in issue constitute protective sports equipment focuses primarily on the Kevlar[®] neck guards integrated into the collars of the hockey tops and one-piece garments and less on the removable XO PRO CUP[™] groin cup.

22. Bauer submits that the term “incidental” means “of minor importance”, “subordinate or secondary in importance or position”.¹¹ According to Bauer, the neck guard component of the goods in issue cannot be described as incidentally protective for the following reasons:¹²

- the goods in issue are patented under the title “Slash Resistant Garment for Protecting a Person from Injury” or “Athletic Garment For Protecting Genital Area”;¹³
- Hockey Canada¹⁴ requires all registered players to wear approved neck protection because skate blade injuries to the neck can be deadly;¹⁵
- the protective components of the goods in issue are specifically designed to protect the player from death or serious injury;¹⁶
- the goods in issue have been certified by the Bureau de normalisation du Québec as approved neck protection equipment for hockey players¹⁷ and are labeled and marketed as such;¹⁸
- the neck guard is made of Kevlar[®], *a trademarked product that is highly cut-resistant*¹⁹ and which, because of its cost, accounts for the premium price of the goods in issue relative to other articles of hockey apparel;²⁰
- the protective neck guards and groin cups are incorporated into the garments for functional purposes, i.e. to keep them in place and avoid shifting during play;²¹ and
- the goods in issue are only sold in black because, unlike hockey apparel, they are purchased for their protective function, not for their look or style.²²

23. It is Bauer’s position that the goods in issue fit within the ordinary meaning of “equipment”, i.e. “a set of tools, devices, kit etc. assembled for a specific purpose”.²³ According to Bauer, the goods in issue are assembled for the specific purpose of providing neck protection for hockey players.²⁴

24. Bauer submits that the goods in issue fall outside the genre of the example noted in the *Explanatory Notes* to heading No. 61.10, i.e. soccer goalkeeper jerseys, which are not patented, do not protect against life-threatening injuries, come in an abundance of colours and styles, are not required for minor league players and do not consist of a costly material such as Kevlar[®].²⁵

11. Tribunal Exhibit AP-2011-011-03A at para. 48.

12. *Ibid.* at para. 50.

13. *Ibid.*

14. The national governing body for ice hockey in Canada.

15. Tribunal Exhibit AP-2011-011-03A at paras. 18-20, 50.

16. *Ibid.* at paras. 16, 50.

17. *Ibid.* at paras. 17, 21-24, 50.

18. *Ibid.* at paras. 23-26, 50.

19. *Ibid.* at paras. 11-14, 50.

20. *Ibid.* at paras. 15, 50.

21. *Ibid.* at paras. 7-8, 50.

22. *Ibid.* at para. 50.

23. *Ibid.* at para. 55.

24. *Ibid.* at para. 56.

25. *Ibid.* at paras. 57-58.

CBSA'S POSITION

25. The CBSA agrees with Bauer that the appeal turns on the issue of whether the protection afforded by the protective components of the goods in issue is incidental.

26. The CBSA submits that the protective components are incidental for, *inter alia*, the following reasons:

- the goods in issue are garments designed, manufactured and sized to cover the torso and to provide a base layer when playing hockey, similar to how fencing clothing is used in that sport;²⁶
- whereas the protective equipment referred to in the *Explanatory Notes* (e.g. fencing masks, ice hockey pants) usually consists of protective components of metals or plastics or pads that are put together by minimal textile components, the goods in issue are made mostly of textile fabrics;²⁷
- the protection of the neck and groin is incidental to the primary use of the goods in issue, which is as articles of apparel;²⁸
- the goods in issue are marketed in Bauer's catalogue and on its Web site as "Apparel", while elbow, shin and shoulder pads are marketed as "Protective";²⁹
- a comparison of the prices of long-sleeved tops with integrated neck guards and long-sleeved tops without neck protection indicates that the price premium on the former is not significant;³⁰
- the *Explanatory Notes* to heading No. 95.06 indicate, by way of example, that fencing clothing—which may also incorporate Kevlar[®] or other protective ballistic fabrics—is excluded from that heading;³¹
- the *Explanatory Notes* to heading No. 95.06 specifically list padding in the groin area as an example of "incidentally protective components";³²
- the *Explanatory Notes* to heading No. 61.14 confirm that this heading includes clothing designed and used for a specific protective purpose (e.g. coveralls for factory workers and airmen's electrically heated clothing);³³
- Hockey Canada does not require adult males to wear approved neck protection³⁴ and, while it requires minor league and female players to wear approved neck protection, it does not specifically require the use of Bauer's tops or one-piece garments with integrated neck guards, since Bauer and other manufacturers market stand-alone neck protectors;³⁵ and

26. Tribunal Exhibit AP-2011-011-05A at para. 35.

27. *Ibid.* at paras. 36, 55.

28. *Ibid.* at para. 40.

29. *Ibid.* at paras. 38-39.

30. *Ibid.* at para. 51.

31. *Ibid.* at para. 49; tab 10 at 10.

32. *Ibid.* at paras. 47-48.

33. *Ibid.* at para. 52.

34. *Ibid.* at para. 56.

35. *Ibid.* at para. 57.

- In *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*,³⁶ the Tribunal found that heading No. 62.16 may cover gloves that incorporate materials with protective attributes and that the insertion of hard plastic pads inside hockey gloves does not transform articles of apparel into articles of plastic.³⁷

27. The CBSA takes the position that the “tops” are knitted and, as such, are referred to in heading No. 61.10.³⁸ However, because the one-piece garments cover more of the body than the tops, they fall in a different heading, i.e. heading No. 61.14, as “[o]ther garments, knitted or crocheted”.³⁹

ANALYSIS

28. Bauer claims that the goods in issue fall to be classified in heading No. 95.06, which provides as follows:

Chapter 95	
TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF	
...	
95.06	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.
...	
9506.99	--Other
...	
9506.99.90	---Other
...	
	-----Other equipment:
...	
83	-----For ice hockey or field hockey

29. The CBSA counters that the goods in issue are properly classified in heading No. 61.10, in the case of the integrated neck tops (tops), and in heading No. 61.14, in the case of the integrated neck one-piece garments, which provide as follows:

Chapter 61	
ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, KNITTED OR CROCHETED	
...	
61.10	Jerseys, pullovers, cardigans, waistcoats and similar articles, knitted or crocheted.
...	

36. (10 February 2011), AP-2009-045 (CITT) [*Sher-Wood*].

37. Tribunal Exhibit AP-2011-011-05A at paras. 58-59.

38. *Ibid.* at para. 24.

39. *Ibid.* at para. 27.

- 6110.30.00** -Of man-made fibres
...
61.14 Other garments, knitted or crocheted.
...
6114.30.00 -Of man-made fibres

30. The Tribunal accepts that heading Nos. 95.06, 61.10 and 61.14 are the only headings of possible relevance to the classification of the goods in issue.

31. The Tribunal also agrees with the common view of the parties that Chapters 95 and 61 are rendered mutually exclusive by the notes to those chapters.⁴⁰ In this regard, Note 1(e) to Chapter 95 provides as follows:

1. This Chapter does not cover:

...

- (e) *Sports clothing* or fancy dress, of textiles, of Chapter 61 or 62;

[Emphasis added]

32. Note 1 to Section XI, which includes Chapter 61 provides as follows:

1. This Section does not cover:

...

- (t) *Articles of Chapter 95* (for example, toys, games, *sports requisites* and nets).

[Emphasis added]

33. It stands to reason, and is well established in the Tribunal's jurisprudence, that goods cannot be determined to be *prima facie* classifiable in two competing headings that are mutually exclusive by operation of the legal notes.⁴¹ Given the above-mentioned mutually exclusive notes, the Tribunal agrees with the shared view of the parties that *prima facie* classification of the goods in issue in a single heading is to be effected under Rule 1 of the *General Rules*. Accordingly, the Tribunal must determine, on the basis of the evidence before it, whether the goods in issue meet the terms of heading No. 95.06, as submitted by Bauer, or of heading Nos. 61.10 and 61.14, as submitted by the CBSA.

34. As discussed, section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to . . . the Explanatory Notes . . . as amended from time to time." In this regard, the Federal Court of Appeal, in *Suzuki*, indicated as follows: ". . . the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international

40. *Ibid.* at para. 42; Tribunal Exhibit AP-2011-011-03A at para. 39.

41. *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT) at para. 44; *Sher-Wood* at para. 37; *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT) at para. 24; *Dynamic Furniture Corp. v. President of the Canada Border Services Agency* (31 March 2009), AP-2005-043 (CITT) at para. 31.

community, *the Explanatory Notes should be respected unless there is a sound reason to do otherwise*”⁴² [emphasis added]. Indeed, the Tribunal finds the *Explanatory Notes* to be particularly useful in discerning the scope of, and demarcation line between, the headings at issue.

35. The *Explanatory Notes* to heading No. 95.06 provide as follows:

This heading covers:

...

(B) **Requisites for other sports and outdoor games (other than toys presented in sets, or separately, of heading 95.03)**, e.g.:

...

(13) *Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards, ice hockey pants with built-in guards and pads.*

[Emphasis added]

36. However, the *Explanatory Notes* to heading No. 95.06 also provide as follows:

The heading **excludes**:

...

(e) *Sports clothing of textiles, of Chapter 61 or 62, whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas (e.g., fencing clothing or soccer goalkeeper jerseys).*

[Emphasis added]

37. While sports clothing incorporating incidentally protective components are explicitly excluded from heading No. 95.06 according to the *Explanatory Notes* to that heading, these articles are captured by heading No. 61.10. In this regard, the *Explanatory Notes* to heading No. 61.10 provide as follows: “This heading covers a category of knitted or crocheted articles, without distinction between male or female wear, designed to cover the upper parts of the body (jerseys, pullovers, cardigans, waistcoats and similar articles). *Articles incorporating incidentally protective components such as elbow pads sewn on sleeves and used for certain sports (e.g., soccer goalkeeper jerseys) remain classified in this heading*” [emphasis added].

38. In the same vein, the *Explanatory Notes* to heading No. 61.14 indicate that the heading includes special articles of apparel “. . . *whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas, used for certain sports . . . (e.g., fencing clothing, jockeys’ silks, ballet skirts, leotards). However, protective equipment for sports . . . (e.g., fencing masks and breast plates, ice hockey pants, etc.) . . .*” [emphasis added] are specifically excluded from the ambit of heading No. 61.14 by virtue of the fact that such articles are covered in heading No. 95.06, according to the *Explanatory Notes* to that heading.

39. The Tribunal therefore agrees with the shared view of the parties that the classification of the goods in issue turns on the meaning of the term “incidentally protective component”.

42. *Suzuki* at para. 13.

40. The Tribunal also accepts Bauer's submission that the term "incidentally", in the context of its use in the *Explanatory Notes*, is a concept denoting a position of subordinate or secondary importance.⁴³ It stands to reason, therefore, that a determination on whether the protection afforded by a particular component is incidental requires a prior determination of the primary function of the article of which the component in question forms part. In short, whether the integrated Kevlar[®] neck guards and XO PRO CUP[™] groin cups are incidentally protective components of the goods in issue turns on the question of whether the tops and one-piece garments function primarily as base-layer apparel or as protective equipment for ice hockey.

41. While not seeking to downplay the absolute importance of neck guards and groin cups, which are clearly essential to the protection of hockey players from potentially catastrophic injury,⁴⁴ the issue, in the Tribunal's view, is not whether the protection afforded by these components is of fundamental importance *in se*, but rather whether it pertains to the primary function of the goods in issue.

42. The incidental nature of the protection afforded by the integrated neck guards and groin cups is supported by the fact that Bauer also offers base-layer apparel without these protective components.⁴⁵ Indeed, the removable groin cups are not incorporated into the one-piece garments.⁴⁶ Moreover, while the evidence indicates that integration into hockey tops can improve comfort and the overall effectiveness of the neck guards by securing them in place,⁴⁷ their incorporation into such base-layer apparel is not necessary for their use. In this regard, the Tribunal agrees with the CBSA's view that "... [one] would be hard pressed to imagine a circumstance where ... an entire upper body or an entire body garment is required to hold a neck guard in place ..."⁴⁸ The Tribunal notes, in this regard, that neck guards can be purchased separately, as stand-alone items.⁴⁹

43. In *Partylite Gifts Ltd. v. Commissioner of the Canada Customs and Revenue Agency*,⁵⁰ the Tribunal stated that "... the design, best usage, marketing and distribution of the goods in issue are indicative of the proper tariff classification of the goods." In this regard, the Tribunal notes that Bauer's *2010 Product Catalog* markets the goods in issue as "BAUER Protective Base Layer" under the "Performance Apparel" category,⁵¹ the same category where the base-layer apparel without the protective components are found.⁵² The Tribunal notes that, in that category, the goods in issue are described as a "garment".⁵³ If the protective components of the goods in issue were indeed considered to be their defining attribute, then presumably they would have been marketed as such under the "Protective" category of Bauer's catalogue.⁵⁴

43. In this regard, the definition of "incidental" includes the following: "**1. a.** Occurring ... in ... *subordinate* conjunction with something else of which it forms no essential part ..." [emphasis added] (*The Oxford English Dictionary*, 2d ed., s.v. "incidental"); "**2** Occurring as something ... of *secondary* importance; not directly relevant to ..." [emphasis added] (*Shorter Oxford English Dictionary*, 5th ed., s.v. "incidental").

44. *Transcript of Public Hearing*, 3 April 2012, at 11-12.

45. Tribunal Exhibit AP-2011-011-05A, tab 1 at 129.

46. *Transcript of Public Hearing*, 3 April 2012, at 63.

47. *Ibid.* at 23-24, 73.

48. *Ibid.* at 138-39.

49. Tribunal Exhibit AP-2011-011-05A, tab 1 at 120.

50. (16 February 2004), AP-2003-008 (CITT) at 5.

51. Tribunal Exhibit AP-2011-011-05A, tab 1 at 25, 116-17.

52. *Ibid.* at 25, 116-17.

53. *Ibid.* at 116.

54. *Ibid.* at 25.

44. The incidental nature of the protection afforded by the integrated neck guard and cup is also suggested by the fact that these are described in Bauer's *2010 Product Catalog* as "plus" features to the existing performance-related benefits of the Bauer base-layer garments.⁵⁵

BAUER BASE LAYER: *The all-essential layer between a hockey player's skin and their protective equipment. Performance apparel engineered for the ice, to address the game's unique demands and enhance player performance. Plus the firm belief the best product takes cues not just from the body but the body in action.*

BAUER PROTECTIVE BASE LAYER: *All the benefits of BAUER Base Layer plus: integrated KEVLAR® neck guard, XO PRO CUP™ cup and enhanced cup suspension system.*

[Emphasis added]

This wording suggests that the goods in issue are base-layer apparel, with added protective components.

45. That the protection afforded by the integrated neck guards is incidental to the primary function of the goods in issue as base-layer tops is also indicated by Bauer's own description of the integrated neck guard in its *2010 Product Catalog* as "our latest 'innovation'".⁵⁶ While Mr. Weber testified that the use of the word "innovation" was in reference to the neck guards and not to the shirts,⁵⁷ it seems clear from the immediately preceding sentence in the product description that the innovation in question is Bauer's base-layer tops, i.e. "Engineered to react to the needs of the elite hockey player, BAUER *performance apparel* has always been a step ahead. Now comes our *latest innovation: the integrated neck guard*" [emphasis added].⁵⁸ The inference that one is clearly being invited to draw is that the innovative integration⁵⁹ of neck guards into the base-layer tops has allowed Bauer base-layer hockey apparel to remain a step ahead of the competition. Indeed, that the innovation in question is to the goods in issue as base-layer tops is supported by the following explanation given by Mr. Weber for the integration of the neck guards into the tops: ". . . unfortunately our base layer doesn't do very well at retail. . . . This is not only . . . a better neck protection because it's integrated, but it's a way to boost up a category that frankly is very weak."⁶⁰ The fact that it is the garment that is being innovated rather than the neck guard is further reflected in Mr. Weber's testimony that the goods in issue seem to be squeezing the regular base layers out of the market.⁶¹

46. The performance-related features of the tops and one-piece garments also point to the fact that the goods in issue were primarily designed to serve as base-layer garments between the player's skin and protective equipment. These features, according to Bauer's own literature, include mesh panels strategically placed at heat zones for added breathability, high-density grip prints to stabilize elbow pads during play, raglan seams and forward-shifted side seams that reduce irritation caused by equipment contact at pressure points, flatlock seam construction for a chafe-free fit, a Thermo-Max™ anti-bacterial and moisture management system, and reinforced three-dimensional sock fastener tabs (in the case of the one-piece

55. *Ibid.* at 117.

56. In this regard, the meaning of the term "innovation" includes the following: ". . . the alteration of something [already] established . . ." (*Shorter Oxford English Dictionary*, 5th ed., s.v. "innovation").

57. *Transcript of Public Hearing*, 3 April 2012, at 65.

58. Tribunal Exhibit AP-2011-011-05A, tab 1 at 116.

59. Bauer's *2010 Product Catalog* indicates that the neck guard is "[b]uilt into the collar of our . . . Base Layer top" Tribunal Exhibit AP-2011-011-05A, tab 1 at 116.

60. *Transcript of Public Hearing*, 3 April 2012, at 61.

61. Mr. Weber testified that there was a lot of excess inventory of the base-layer apparel without the protective components and implied the goods in issue were Bauer's answer to more popular base-layer apparel (also without integrated neck guards) sold by its competitors. *Transcript of Public Hearing*, 3 April 2012, at 64-65.

garments).⁶² Indeed, Mr. Weber referred to base-layer apparel as “undershirts”,⁶³ (which is also consistent with the manner in which the integrated neck tops have been described in the marketplace).⁶⁴ That the goods in issue are worn under the player’s hockey equipment and uniform and, as such, are not visible during play also explains why they are monochromatic rather than being available in different colours.

47. For all of the above reasons, and while not diminishing the importance *in se* of the protection afforded by the integrated Kevlar[®] neck guards and XO PRO CUP[™] groin cups, it is the Tribunal’s view that the design and marketing of the goods in issue point to their primary function as base-layer hockey apparel, with the integrated neck guards and groin cups being incidentally protective components thereof.

48. In the Tribunal’s view, the fact that Hockey Canada requires all players registered in minor and female hockey leagues to wear neck guards is not sufficient to transform the goods in issue into hockey equipment by virtue only of the fact that protective components have been integrated into them. This view is supported by the fact that the use of stand-alone neck guards is permitted.

49. In the Tribunal’s view, the integration of these protective components into the goods in issue represents an innovation to, but not the essence of, those goods, which remains that of base-layer hockey apparel. More specifically, the modification of the base-layer tops by the incorporation of certified Kevlar[®] neck guards into the collars does not deprive them of their fundamental character as hockey apparel nor does the insertion of a removable XO PRO CUP[™] with enhanced cup suspension system into the existing one-piece garments transform these base-layer garments into hockey equipment.

50. In addition to the design and marketing considerations discussed above, the view that the protective Kevlar[®] neck guards and XO PRO CUP[™] groin cups do not deprive the goods in issue of their character as sports clothing is consonant with the *Explanatory Notes* to heading No. 95.06 and, in particular, with the indication that sports clothing of Chapter 61 remains excluded from heading No. 95.06 notwithstanding the incorporation of incidentally protective components in the groin area, and with the specific exclusion of “fencing clothing” from the scope of that heading notwithstanding the fact that fencing clothing, like the goods in issue, may, according to evidence on the record, incorporate Kevlar[®] or other protective ballistic fabrics.⁶⁵

The heading **excludes**:

...

- (e) Sports clothing of textiles, of **Chapter 61** or **62**, whether or not incorporating *incidentally protective components* such as pads or padding *in the* elbow, knee or *groin areas* (e.g., *fencing clothing* or soccer goalkeeper jerseys).

[Emphasis added]

62. Tribunal Exhibit AP-2011-011-05A, tab 1 at 118-19.

63. *Transcript of Public Hearing*, 3 April 2012, at 42.

64. Tribunal Exhibit AP-2011-011-05A, tab 11 at 333-34. Sports Rousseau included Bauer’s long-sleeved integrated neck tops under “hockey accessories: underwear/undergarments” on its Web site.

65. According to the literature, “[f]encing outfits are made of tough cotton or nylon. *Kevlar was added to top level uniform pieces* (jacket, breeches, underarm protector, lamé, and the bib of the mask) . . . *In recent years other ballistic fabrics such as Dyneema have been developed that resist puncture and which do not have kevlar’s issues.* FIE rules state that the tournament outfits must be made of fabric that resists a force of 800 newtons (180 lb_p) and that the mask bib must resist double that amount” [emphasis added]. Tribunal Exhibit AP-2011-011-05A, tab 10 at 10).

51. Turning specifically to Bauer's submission that the relative cost of the different components of the goods in issue points to the essential nature of the integrated neck guard, the evidence does indeed indicate that Kevlar[®] is significantly more expensive on a per yard basis than the other base-layer textile fabrics.⁶⁶ However, Bauer's own pricing data imply that, overall, the neck guard represents less than half the price of the goods in issue.⁶⁷ Further, the record indicates that Bauer's base-layer tops with integrated neck guards are sold within the same retail price range as those without the neck guards.⁶⁸ In any event, the relatively higher cost of a particular component *vis-à-vis* other components of the goods in issue is not dispositive of tariff classification and is relevant only insofar as it is indicative—either alone or in conjunction with other considerations—of the primary function of the goods and, by logical extension, functions incidental thereto.⁶⁹

52. Having regard to all of the above considerations, the Tribunal is satisfied that the protection afforded by the integrated neck guard and by the removable plastic groin cup is incidental to the primary function of the goods in issue, which is that of a base-layer hockey garment.

53. The Tribunal therefore finds, on the basis of Rule 1 of the *General Rules*, that the goods in issue are properly classified in heading Nos. 61.10 and 61.14, as determined by the CBSA.

DECISION

54. The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

66. In this regard, the evidence indicates that Kevlar[®] costs \$22 per yard as opposed to \$3 per yard for the base-layer textile fabric. *Transcript of Public Hearing*, 3 April 2012, at 25.

67. Tribunal Exhibit AP-2011-011-12A (protected).

68. Tribunal Exhibit AP-2011-011-05A, tab 11.

69. Insofar as “essential” and “incidental” are inversely related concepts, the Tribunal considers its finding in *Oriental Trading (MTL) Ltd. v. Deputy M.N.R.* (31 August 1992), AP-91-081 and AP-91-223 (CITT) to be of relevance, albeit the fact that it arose in a somewhat different context. In that case, the Tribunal had to determine which component of cotton swabs—the cotton wadding or the polypropylene stem—gave the goods their essential character. Despite the evidence that the stem weighed more, was bulkier and accounted for more of the cost of the cotton swabs than did the wadding, the Tribunal found, on the basis of the role that the cotton wadding played in the personal hygiene function of the product, that the essential character was conferred by the cotton wadding.