



Ottawa, Thursday, March 7, 2002

Appeal No. AP-2000-041

IN THE MATTER OF an appeal heard on March 8, 2001, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated August 11, 2000, with respect to a request for redetermination under section 61 of the *Customs Act*.

BETWEEN

FORMICA CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS
AND REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2000-041

FORMICA CANADA INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency dated August 11, 2000, made under section 63 of the *Customs Act*, regarding goods imported into Canada on April 2, 1998. The goods in issue are Formica high-pressure laminates described as rigid non-cellular laminated sheets, which are composed of three main layers: (1) the core layer, which is kraft paper impregnated with a phenolic resin; (2) the decorative layer, which is paper impregnated with a melamine-formaldehyde resin; and (3) the overlay layer, which is alpha-cellulose paper impregnated with a melamine resin. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3921.90.99 as other sheets of plastics, as determined by the respondent, or should be classified under tariff item No. 3921.90.91 as other sheets of plastics of polymers of heading No. 39.09, excluding of urea-formaldehyde resins, of melamine-formaldehyde resins, of phenol-formaldehyde resins or of polyurethanes, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal notes that the parties agree that the goods in issue are properly classified in Chapter 39 as “[p]lastics and articles thereof” and, more particularly, in heading No. 39.21, which covers plates, sheets, film, foil and strip, of plastics. The Tribunal agrees with the parties that, in order for the goods in issue to be classified under tariff item No. 3921.90.91, two conditions must be met: (1) the goods in issue must be made of polymers of heading No. 39.09; and (2) the goods in issue must not fall within the exclusions. The parties agree that the goods are made of polymers of heading No. 39.09. As for the second condition, the Tribunal is of the view that the evidence shows that the goods in issue are block copolymers made of melamine-formaldehyde and phenol-formaldehyde polymers. The Tribunal is also of the view that, based on the evidence, the phenol-formaldehyde monomer units predominate by weight over the melamine-formaldehyde monomer units. In applying Note 4 to Chapter 39, the Tribunal finds that the goods in issue are plastic sheets of phenol-formaldehyde resins and, as such, are excluded from classification under tariff item No. 3921.90.91. Therefore, the Tribunal finds that the goods in issue are properly classified under tariff item No. 3921.90.99.

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 8, 2001

Date of Decision: March 7, 2002

Tribunal Members: Zdenek Kvarda, Presiding Member
Peter F. Thalheimer, Member
James A. Ogilvy, Member

Counsel for the Tribunal: Marie-France Dagenais

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael Sherbo, for the appellant
Louis Sébastien, for the respondent



Appeal No. AP-2000-041

FORMICA CANADA INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

TRIBUNAL: ZDENEK KVARDA, Presiding Member
PETER F. THALHEIMER, Member
JAMES A. OGILVY, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under section 67 of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency dated August 11, 2000, made under section 63 of the Act, regarding goods imported into Canada on April 2, 1998. The goods in issue are Formica high-pressure laminates described as rigid non-cellular laminated sheets, which are composed of three main layers: (1) the core layer, which is kraft paper impregnated with a phenolic resin; (2) the decorative layer, which is paper impregnated with a melamine-formaldehyde resin; and (3) the overlay layer, which is alpha-cellulose paper impregnated with a melamine resin. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3921.90.99 of the schedule to the *Customs Tariff*² as other sheets of plastics, as determined by the respondent, or should be classified under tariff item No. 3921.90.91 as other sheets of plastics of polymers of heading No. 39.09, excluding of urea-formaldehyde resins, of melamine-formaldehyde resins, of phenol-formaldehyde resins or of polyurethanes, as claimed by the appellant.

The relevant tariff nomenclature is as follows:

- 39.09 Amino-resins, phenolic resins and polyurethanes, in primary forms.
- 39.21 Other plates, sheets, film, foil and strip, of plastics.
- 3921.90 -Other
- 3921.90.91 ----Of polymers of heading No. 39.09, excluding of urea-formaldehyde resins, of melamine-formaldehyde resins, of phenol-formaldehyde resins or of polyurethanes;
- 3921.90.99 ----Other

EVIDENCE

The appellant filed a sample of the goods in issue as a physical exhibit. The parties agreed that the goods in issue are Formica high-pressure laminates described as rigid non-cellular laminated sheets, which are composed of three main layers: (1) the core layer, which is kraft paper impregnated with a phenolic

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. S.C. 1997, c. 36.

resin; (2) the decorative layer, which is paper impregnated with a melamine-formaldehyde resin; and (3) the overlay layer, which is alpha-cellulose paper impregnated with a melamine resin.

Ms. Dina Barsoum, Technical Manager at Formica Canada Inc., gave evidence on the appellant's behalf. Ms. Barsoum was qualified as an expert in the field of chemistry, as well as in the manufacture of laminates.

Ms. Barsoum testified that the decorative layer, which is impregnated with a melamine-formaldehyde resin, and the core layer, which is impregnated with a phenolic resin, go through a lamination process under which they are mechanically bonded under heat and pressure. She explained that polymerisation, which is a chemical reaction that brings the monomers together using heat, catalysts and additives, is very different from lamination.

Ms. Barsoum stated that Formica is a composite laminate and not a polymer or block copolymer of melamine-formaldehyde. She also stated that the product that would be obtained from the chemical reaction between phenol, melamine and formaldehyde, namely, a block copolymer of phenol-melamine-formaldehyde, would not meet the properties of the goods in issue.

In cross-examination, Ms. Barsoum acknowledged that, when the impregnated sheets are bonded, there is a chemical reaction between the melamine-formaldehyde and the phenol-formaldehyde.

Mr. Brian J. Finch, Chief, Textile and Polymer Products Section, Canada Customs and Revenue Agency, testified on behalf of the respondent. He was qualified as an expert in the chemical composition of polymers. He described the goods in issue as multi-layered plastic materials, reinforced with paper, which are composed of two polymers: (1) melamine-formaldehyde, which is the primary component found in the decorative layer; and (2) phenol-formaldehyde, which is found in the core layer. He explained that the essential component of the goods in issue is a block copolymer composed of melamine-formaldehyde prepolymers and phenol-formaldehyde prepolymers, which are compressed together with heat. He testified that, in his opinion, the high pressure and heat of the lamination process cause the prepolymers to flow, mingle and chemically react within themselves and with each other at the point of contact.

Finally, Mr. Finch stated that the phenol-formaldehyde monomer units predominate by weight over the melamine-formaldehyde monomer units.

ARGUMENT

At the outset, the appellant explained that, on January 1, 1998, the *Customs Tariff* was amended and that, as a result, tariff codes were eliminated. It further explained that, based on the concordance table that was provided with the amendment, Code 7934, under which the Tribunal had classified the same type of goods in a previous decision,³ was now written into tariff item No. 3921.90.91. Thus, the appellant argued that the goods in issue should be classified under tariff item No. 3921.90.91 as other sheets of plastics of polymers of heading No. 39.09, excluding of urea-formaldehyde resins, of melamine-formaldehyde resins, of phenol-formaldehyde resins or of polyurethanes.

3. *Formica Canada v. DMNR* (20 January 1998), AP-96-205 (CITT) [hereinafter *Formica*]. *Formica* was upheld by the Federal Court of Appeal. See *Canada (Deputy Minister of National Revenue – M.N.R.) v. Formica Canada* (25 February 1999), A-98-98 (FCA).

The appellant argued that, since both parties agree that the goods in issue are classifiable in subheading No. 3921.90, regard should be given to Rule 1 of the *Canadian Rules*,⁴ which provides the following:

For legal purposes, 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 for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.

The appellant further submitted that, to be classified under tariff item No. 3921.90.91, the goods in issue must meet two conditions. First, the goods in issue must be “[o]f polymers of heading 39.09” and, second, the goods in issue must not fall within the exclusions, that is, the goods cannot be composed of urea-formaldehyde resins, of melamine-formaldehyde resins, of phenol-formaldehyde resins **or** of polyurethanes.

Relying on the testimony of both expert witnesses, the appellant submitted that there is no issue with respect to the first condition, since the evidence shows that the goods in issue are made of melamine-formaldehyde and phenol-formaldehyde, two polymers that fall in heading No. 39.09.

With respect to the second condition, the appellant argued that the goods in issue are made of two components, i.e. melamine-formaldehyde and phenol-formaldehyde, and that a new product has been created through the lamination process. It further argued that, by correctly interpreting the word “or” found in tariff item No. 3921.90.91, it is clear that the tariff item does not exclude a finished product composed of two polymers laminated together and that, as such, the goods in issue do not fall within the exclusions listed.

The respondent argued that the goods in issue are properly classified in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁵ and Rule 1 of the *Canadian Rules* under tariff item No. 3921.90.99 as other sheets of plastics. The respondent submitted that there is uncontradicted evidence before the Tribunal that the goods in issue are sheets of plastics made of both melamine-formaldehyde resins and phenol-formaldehyde resins, the last being the predominant co-monomer and that, as such, they are specifically excluded from classification under tariff item No. 3921.90.91.

The respondent argued that the evidence also shows that the goods in issue are block copolymers and, thus, that Note 4 to Chapter 39, which partly provides for the classification of block copolymers according to the predominant weight of co-monomer units, must be taken into consideration when classifying the goods in issue. In making reference to a decision of the Federal Court of Appeal,⁶ the respondent submitted that the evidence in the present case shows that laminating two polymers creates a block copolymer and that the goods in issue are predominantly composed of phenol-formaldehyde, a component specifically excluded under tariff item No. 3921.90.91. As such, the respondent argued that the goods in issue, which can be defined as plastic sheets made of polymers of phenol-formaldehyde resins, cannot be classified under tariff item No. 3921.90.91.

4. *Supra* note 2, schedule.

5. *Supra* note 2, schedule [hereinafter General Rules].

6. *Continuous Colour Coat v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)* (2000), 257 N.R. 82 (FCA).

Finally, the respondent submitted that, in the alternative, the goods in issue, which can be considered composite goods, should be classified in accordance with Rule 3 (b) of the General Rules. The respondent argued that weight should be the factor relied upon to determine the essential character of the goods in issue. Applying Note 4 to Chapter 39, the respondent submitted that, since phenol-formaldehyde is the predominant monomer in the goods in issue, they are specifically excluded from classification under tariff item No. 3921.90.91 and must be classified under tariff item No. 3921.90.99 as other sheets of plastics.

DECISION

With respect to the classification of the goods in issue, the Tribunal is guided by section 10 of the *Customs Tariff*, which provides that the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules*. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁷ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁸

The Tribunal notes that the parties agree that the goods in issue are properly classified in Chapter 39 as “[p]lastics and articles thereof” and, more particularly, in heading No. 39.21, which covers plates, sheets, film, foil and strip, of plastics. The Tribunal also notes that the parties agree that the goods in issue fall in subheading No. 3921.90, as Formica is a non-cellular product.

The Tribunal agrees with the parties that, in order for the goods in issue to be classified under tariff item No. 3921.90.91, two conditions must be met: (1) the goods in issue must be made of polymers of heading No. 39.09; and (2) the goods in issue must not fall within the exclusions.

There is no issue with respect to the first condition. The evidence indicates that the goods in issue are composed of melamine-formaldehyde and phenol-formaldehyde, two polymers explicitly named in heading No. 39.09. Therefore, the only remaining issue is whether the goods in issue are made of one of the components specifically excluded under tariff item No. 3921.90.91.

The Tribunal accepts the evidence that the goods in issue are composed of polymers or copolymers of melamine-formaldehyde and phenol-formaldehyde. The Tribunal also accepts the evidence that, when the layers go through the process of heat and pressure in laminating the components of the goods in issue, a chemical reaction is triggered between the surfaces in contact with each other. The Tribunal is of the view that the melamine-formaldehyde pre-polymers are chemically attached to the phenol-formaldehyde prepolymers at the point of contact to create block copolymers made of melamine-formaldehyde and phenol-formaldehyde polymers. The Tribunal is also persuaded by the evidence that phenol-formaldehyde monomer units predominate by weight over the melamine-formaldehyde monomer units.

Given the above, the Tribunal concludes that the goods in issue are block copolymers and, therefore, that Note 4 to Chapter 39 must be applied. The Tribunal notes that, according to Note 4 to Chapter 39, copolymers are classified in the same heading as polymers of the comonomer unit which predominates by weight over every other single comonomer unit. The Tribunal also notes that the term “comonomer unit” appears in Note 4 and that, when reference is made to more than one monomer unit in the same product, the terms “monomer unit” and “comonomer unit” are synonymous. Moreover, Rule 1 of the *Canadian Rules* reiterates that classification of goods under a tariff item of a subheading or of a heading

7. Customs Co-operation Council, 1st ed., Brussels, 1987.

8. Customs Co-operation Council, 2d ed., Brussels, 1996.

shall be determined according to the General Rules. In light of the foregoing, the Tribunal determines that, in accordance with Note 4 to Chapter 39, the goods in issue are, for classification purposes, plastic sheets of phenol-formaldehyde resins.

The Tribunal notes that this determination is consistent with the reasons set out in *Formica*. In rendering its decision in that appeal, the Tribunal noted that Code 7934 did not specifically exclude polymers and copolymers of melamine-formaldehyde or phenol-formaldehyde. As explained by the Tribunal, the words “polymers of” did not, in Code 7934, appear before the words “melamine-formaldehyde or phenol-formaldehyde”, while they did appear before other products listed in the exclusions. The Tribunal was of the view that the words “polymers of” had to appear before the particular products listed in the exclusions for polymers to be excluded from the tariff code. In the present case, the words “polymer of” do appear in tariff item No. 3921.90.91, and each product listed is followed by the word “resins”, which is scientifically viewed as a synonym for the word “polymers”.⁹

Accordingly, the goods in issue fall within the exclusions listed and, as such, are excluded from classification under tariff item No. 3921.90.91.

In conclusion, the Tribunal is of the view that the goods in issue are properly classified under tariff item No. 3921.90.99.

Consequently, the appeal is dismissed.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member

9. *McGraw-Hill Dictionary of Scientific and Technical Terms*, 3d ed., s.v. “resin”.