



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

Ottawa, Tuesday, September 23, 2003

**Appeal No. AP-2002-103**

IN THE MATTER OF an appeal heard on May 26, 2003, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated October 21, October 30 and November 4, 2002, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**MON-TEX MILLS LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

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## UNOFFICIAL SUMMARY

**Appeal No. AP-2002-103**

**MON-TEX MILLS LTD.**

**Appellant**

**AND**

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

**Respondent**

The goods in issue are various shower curtain sets put up for retail sale, the primary components of which all consist of a double swag polyester shower curtain and a vinyl plastic shower liner. Mon-Tex Mills Ltd. (Mon-Tex) challenged the determination of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) that the goods in issue are other curtains of synthetic fibres of tariff item No. 6303.92.90, arguing instead that they should be classified as other household articles of plastics under tariff items No. 3924.90.00. More specifically, Mon-Tex submitted that the essential character of the goods in issue, pursuant to Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System* (the *General Rules*) is imparted upon the whole by the vinyl liner rather than by the double swag polyester shower curtain, as determined by the Commissioner. Mon-Tex argued that the utilitarian properties of the vinyl liner should be preferred over the decorative properties of the double swag polyester shower curtain in determining the essential character of the goods in issue.

**HELD:** The appeal is dismissed. The Tribunal views the evidence on file as showing that the fashion and decorative properties of the double swag polyester shower curtain are greater than the utilitarian properties of the vinyl liner. Furthermore, the weight and value of the outer double swag polyester shower curtain are substantially greater than those of the vinyl liner, which remains essentially the same irrespective of the price of the various sets that are before the Tribunal in this appeal. Accordingly, pursuant to Rule 3 (b) of the *General Rules* and having regard to Note (VIII) of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to Rule 3 (b), the Tribunal finds that it is the outer double swag polyester shower curtain that gives the goods in issue their essential character and, thereby, directs their classification under tariff item No. 6303.92.90, as determined by the Commissioner.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 26, 2003
Date of Decision:	September 23, 2003
Tribunal Member:	Pierre Gosselin, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Peter Baron, for the appellant Yannick Landry, for the respondent



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**MON-TEX MILLS LTD.**

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**AND**

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**Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member

**REASONS FOR DECISION**

This is an appeal under subsection 67(1) of the *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency (Commissioner) made on October 21, October 30 and November 4, 2002, pursuant to subsection 60(4) the *Act*. The issue in these appeals is whether the goods in issue are properly classified as other curtains of synthetic fibres under tariff item No. 6303.92.90 of the Schedule to the *Customs Tariff*,<sup>2</sup> as determined by the Commissioner, or whether they should be classified as other household articles of plastics under tariff item No. 3924.90.00, as claimed by Mon-Tex Mills Ltd. (Mon-Tex). The goods in issue were imported between December 1, 1999, and October 1, 2001.

The relevant tariff nomenclature is as follows:

39.24	Tableware, kitchenware, other household articles and toilet articles, of plastics.
3924.90.00	-Other
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14.
3926.90	-Other
3926.90.90	---Other
63.03	Curtains (including drapes) and interior blinds; curtain or bed valances. -Other:
6303.92	--Of synthetic fibres
6303.92.90	---Other
63.04	Other furnishing articles, excluding those of heading 94.04. -Other:
6304.93	--Not knitted or crocheted, of synthetic fibres
6304.93.90	---Other

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

2. S.C. 1997, c. 36.

The goods in issue are various shower curtain sets that all consist of four types of goods: a double swag polyester shower curtain, a vinyl plastic shower liner, two tiebacks for the curtains and two wall hooks. They are packaged together and are ready for retail sale.

## EVIDENCE

Mr. Jerry Schwartz, President of Mon-Tex, testified on its behalf. Mr. Schwartz indicated that he co-founded Mon-Tex in 1962. The company is an award-winning importer of shower curtains and accessories.

Mr. Schwartz testified that the most important feature of the goods in issue is the vinyl liner component because it prevents water, soap scum and mould and mildew from finding themselves outside the shower/bathtub area. In his view, the vinyl liner would provide a sense of privacy and be a decorative item. The double-swag polyester shower curtain has always been sold as a set with the vinyl liner because, without it, the double swag polyester shower curtain serves no purpose or, at least, it would not offer the same protection from spillage. Mr. Schwartz indicated that approximately 20 to 25 percent of the fabric shower curtains sold by Mon-Tex are sold in retail sets.

With respect to Exhibits A-1 and A-4, Mr. Schwartz indicated that they are identical except for colour. Mr. Schwartz testified as to the first cost and retail cost of these goods, stating that they are at the opening price range of the market for shower curtains and shower curtain sets. Mr. Schwartz testified that Exhibits A-2 and A-3 both contain a double-swag polyester shower curtain and a vinyl liner produced by Mon-Tex in Canada; they are in the mid to mid-high range in terms of retail price found in the market. Mr. Schwartz testified as to the differences in price and composition between these various exhibits, as well as to the cost ratio between various components of the sets. Mr. Schwartz commented upon various listings regarding shower curtains and sets that are found in the Sears on-line catalogue. Mr. Schwartz further testified that his partner, Allure Home Creations of New Jersey, imports goods identical to the goods in issue into the United States where they are classified in the manner suggested by Mon-Tex in this appeal.

Under cross-examination by the Commissioner, Mr. Schwartz gave details as to his education and business background. With respect to Exhibits A-1 and A-4, Mr. Schwartz confirmed that their packaging makes no reference to the thickness of the vinyl liner, while Exhibits B-1 and B-3 do. The latter exhibits also refer to mildew and bacteria resistance. Mr. Schwartz also testified as to the respective prices of the polyester and vinyl plastic shower curtain components of the goods in issue.

In response to questions by the Tribunal, Mr. Schwartz indicated that the double-swag polyester shower curtain, once installed, draws across the length of the bathtub but leaves a gap in the middle. That is why, according to Mr. Schwartz, the vinyl liner plays such an important part in the set. Mr. Schwartz confirmed that the liners from both the Canadian-manufactured and imported sets are identical regardless of the price of each set and that the liners themselves are sourced from abroad.

Ms. Leslie Behnia, Analytical Chemist, Textile and Polymer Products Section, Laboratory and Scientific Services Directorate, Canada Customs and Revenue Agency (CCRA), testified on behalf of the Commissioner. She was qualified by the Tribunal as an expert witness in the chemical analysis of textiles.<sup>3</sup> Ms. Behnia explained both the methodology of the analysis that she undertook on the goods in issue and the

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3. Ms. Behnia's *curriculum vitae* is at Tribunal Exhibit AP-2002-103-13. Ms. Behnia's expert report is at Tab 3 of the Commissioner's Brief, Tribunal Exhibit AP-2002-103-10.2.

contents of her report. She testified that the goods in issue are composed of the four components previously identified. Ms. Behnia confirmed that the major component, at 56 percent of the total weight, is the double swag polyester shower curtain, which is woven from yarns of man-made filament yarns of polyester, not highly twisted. The next component in prominence, at 39 percent of the total weight, is the vinyl liner. The two tiebacks, made of the same material as the polyester shower curtain, represent approximately 4 percent of the total weight, and the plastic hooks, approximately 1 percent.

Under cross-examination by Mon-Tex, Ms. Behnia indicated that her analysis does not comprise an evaluation of the quality of the goods in issue because the CCRA does not require such information for tariff classification purposes.

## ARGUMENT

Mon-Tex submitted that the goods in issue should be classified according to Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*.<sup>4</sup> In accordance with that rule, Mon-Tex submitted, the vinyl liner provides the goods in issue with their essential character. In support of this view, Mon-Tex relied on Mr. Schwartz's testimony to the effect that it is that component that plays the principal role in the set: that of keeping water in the shower/bathtub area and of protecting the shower curtain against soap scum, mildew and bacteria. Conversely, Mon-Tex argued that the double swag polyester shower curtain provides decor without any of the utilitarian functions of the vinyl liner. Mon-Tex was, therefore, of the view that the essential character of the goods in issue cannot be provided by a component that provides only decor and none of the functional characteristics of the set. Mon-Tex also submitted that the value of a particular component of the set is not, in itself, determinant of essential character. Mon-Tex reviewed the Tribunal's decision in *Naturin Canada v. Deputy M.N.R.*<sup>5</sup> relating to the interpretation of "essential character". Mon-Tex argued that there is no evidence on file to indicate that the weight of any component of the goods in issue adds or detracts from the essential character of the whole. Mon-Tex further argued that two U.S. customs decisions are relevant to these proceedings.<sup>6</sup> Mon-Tex also made representations relative to the usefulness of having recourse to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>7</sup> to Rule 5 (a) of the *General Rules* and to those of heading Nos. 69.13<sup>8</sup> and 83.06<sup>9</sup> in classifying the goods in issue. Finally, Mon-Tex submitted that the CCRA is not uniformly applying National Customs Ruling (NCR) No. 185483 across Canada.

The Commissioner also submitted that classification of the goods in issue should be done according to Rule 3 (b) of the *General Rules*. The Commissioner submitted, however, that it is the double swag polyester shower curtain component that provides the essential character to the goods in issue and, accordingly, that classification should, therefore, be directed by that component. The Commissioner submitted that the weight, the value and the role of the double swag polyester shower curtain all favour that component being designated as the one that provides the goods in issue with their essential character.

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4. *Supra* note 2, Schedule [*General Rules*].

5. (14 January 2000), AP-98-108 (CITT) [*Naturin*].

6. *Better Home Plastics Corp. v. United States* (9 February 1996, amended 12 and 15 February 1996), 93-01-00065 (U.S. Court of International Trade); *Better Home Plastics Corporation v. The United States* (16 July 1997), 96-1322 (U.S. Court of Appeals for the Federal Circuit).

7. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

8. "Statuettes and other ornamental ceramic articles".

9. "Bells, gongs and the like, non-electric, of base metal; statuettes and other ornaments, of base metal; photograph, picture or similar frames, of base metal; mirrors of base metal".

Moreover, the Commissioner submitted that both weight and value are each objective and consistent ways to determine the essential character of goods. The Commissioner discussed several Tribunal decisions on this issue.<sup>10</sup> The Commissioner argued that the vinyl liner plays only a secondary role compared to the double swag polyester shower curtain. It is the ornamental role of the latter that plays the primary role in consumer selection of the goods in issue over a simple vinyl liner, which is the only component that would be necessary if utilitarian considerations were a consumer's only preoccupation. The Commissioner discussed the two U.S. customs decisions cited by Mon-Tex in relation to their significance with respect to classification of the goods in issue. The Commissioner submitted that the ornamental role of the double swag polyester shower curtain is more important than the protective role of the vinyl liner and that this is confirmed by the packaging of the set, which would indicate that the vinyl liner is included as an accessory or subordinate part of the whole. Finally, the Commissioner submitted that NCR No. 185483 is not relevant to this appeal because the goods that are the subject of that ruling have not been introduced as evidence in these proceedings; moreover, according to the Commissioner, that ruling is now revoked.

## DECISION

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules* and the *Canadian Rules*.<sup>11</sup> The *General Rules* are structured in a cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc.

The Tribunal notes that the parties to this appeal share the view that classification of the goods in issue should be determined according to Rule 3 (b) of the *General Rules*, the relevant excerpt of which is as follows:

goods put up in sets for retail sale . . . shall be classified as if they consisted of . . . the . . . component which gives them their essential character, insofar as this criterion is applicable.

The Tribunal is of the view that classification of the goods in issue cannot be determined according to Rule 1 of the *General Rules* and that Rules 2 (a), 2 (b) and 3 (a) are not relevant to these proceedings. The Tribunal agrees with the parties to this appeal that Rule 3 (b) is the appropriate rule upon which to rely for classification of the goods in issue.

The only remaining question that must be decided is which component of the goods in issue, the double swag polyester shower curtain or the vinyl liner, provides the whole with its essential character.<sup>12</sup>

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10. *Naturin; Nortesco Inc. v. Deputy M.N.R.* (16 October 1997), AP-96-092 (CITT); *Sanofi Canada Inc. v. Deputy M.N.R.* (18 December 1998), AP-97-117 (CITT).

11. *Supra* note 2, schedule.

12. As previously indicated, the goods in issue also contain two tiebacks for the curtains and two wall hooks. The Tribunal shares the view of the parties that these items of lesser importance are irrelevant for classification purposes in this instance.

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*<sup>13</sup> and the *Explanatory Notes*. Note (VIII) of the *Explanatory Notes* to Rule 3 (b) of the *General Rules* is relevant to this appeal and is as follows:

- (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The Tribunal is of the view that all shower curtains, be they simple sheets of waterproof material or more complex sets, like the goods in issue, are designed to prevent water from going beyond the shower/bathtub area. A simple examination of the goods in issue clearly shows that it is their fashion elements and decorative nature that distinguish them from simple vinyl shower liners. The Tribunal was not convinced by the evidence adduced at the hearing that the utilitarian nature of the goods in issue is of greater importance than their decorative properties. Rather, in the Tribunal's view, the evidence on file indicates that, in the packaging<sup>14</sup> and promotional materials<sup>15</sup> of the goods in issue, the emphasis is placed on the design and decorative elements. Indeed, both the packaging and the promotional materials merely mention the vinyl liner as an item that is "included" in the package, while emphasizing the decorative aspects of the outer double swag polyester shower curtain and matching tiebacks. Furthermore, the weight<sup>16</sup> and value<sup>17</sup> of the outer double swag polyester shower curtain are substantially greater than those of the vinyl liner, which remains essentially the same irrespective of the price of the various sets that are before the Tribunal in this appeal.

Accordingly, the Tribunal is of the view that it is the outer double swag polyester shower curtain that gives the whole its essential character. Classification of the goods in issue is, therefore, directed in accordance with that item, which is a good of tariff item No. 6303.92.90.

For the foregoing reasons, the appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

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

14. *Appellant's Book of Additional Documents*, Tab 10.

15. *Ibid.*, Tab 3 at 2.

16. *Transcript of Public Hearing* at 37; Respondent's Brief, Tab 3 at 2.

17. See *Transcript of Public Hearing* at 11-12, 14, 25. In particular, the Tribunal notes that Mr. Schwartz testified that the cost ratio between the polyester component and the vinyl liner of the various goods in issue is between 4-to-1 and 9-to-1 (*Transcript of Public Hearing* at 14). Documents on file in this appeal are to the same effect (see *Appellant's Book of Additional Documents*, Tab 9 and Respondent's Brief, Tab 9). The Tribunal is, therefore, satisfied that, for all the goods in issue, the value of the vinyl liner component is much less than the polyester component.