



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2006-054

Helly Hansen Leisure Canada Inc.

v.

President of the Canada Border  
Services Agency

*Decision issued  
Monday, June 2, 2008*

*Reasons issued  
Monday, July 14, 2008*

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IN THE MATTER OF an appeal heard on January 22, 2008, under subsection 67(1) 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 October 31, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**HELLY HANSEN LEISURE CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Ellen Fry  
Ellen Fry  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 22, 2008
Tribunal Member:	Ellen Fry, Presiding Member
Research Director:	Audrey Chapman
Counsel for the Tribunal:	Georges Bujold
Research Officer:	Simon Glance
Assistant Registrar:	Gillian Burnett
Registrar Officer:	Stéphanie Doré

**PARTICIPANTS:****Appellant**

Helly Hansen Leisure Canada Inc.

**Counsel/Representative**

Riyaz Dattu

**Respondent**The President of the Canada Border Services  
Agency**Counsel/Representative**

Derek Rasmussen

**WITNESSES:**Richard Collier  
Vice President Product  
Helly Hansen ASASandra Tullio-Pow  
School of Fashion  
Faculty of Communication & Design  
Ryerson UniversityLeslie James Allen  
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed by Helly Hansen Leisure Canada Inc. (Helly Hansen) with the Canadian International Trade Tribunal (the Tribunal) under subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision on a request for review of an advance ruling issued on October 31, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether two styles of women's jackets imported by Helly Hansen, the Sunrise jacket (Style No. 65031) and the Lyric jacket (Style No. 65038) (the goods in issue), are properly classified under tariff item No. 6210.30.00 of the schedule to the *Customs Tariff*<sup>2</sup> as other garments, made up of fabrics of heading No. 59.03, of the type described in subheading Nos. 6202.11 to 6202.19, as determined by the CBSA, or should be classified under tariff item No. 3926.20.95 as other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt, as claimed by Helly Hansen.

### PROCEDURAL HISTORY

3. On May 5, 2005, the CBSA issued an advance ruling concerning the tariff classification of the goods in issue. Pursuant to this advance ruling, the goods in issue were classified under tariff item No. 6210.30.00.

4. On June 6, 2005, Helly Hansen requested a re-determination asking that the goods in issue be classified in Chapter 39 of the schedule to the *Customs Tariff*. On December 21, 2005, the CBSA replaced the May 5, 2005 advance ruling with a new advance ruling classifying the goods in issue under tariff item No. 6210.30.00 as women's jackets made of fabrics of heading 59.03.

5. On January 25, 2006, following a request for review from Helly Hansen, the CBSA informed Helly Hansen that samples of the goods in issue would be sent to the CBSA's Laboratory and Scientific Services Directorate for analysis. On June 28, 2006, the CBSA informed Helly Hansen of its intention to deny its request for classification in Chapter 39. On September 28, 2006, Helly Hansen provided additional information to the CBSA and requested a further review. On October 31, 2006, the CBSA issued its final decision on the advance ruling dispute and determined that the goods in issue were properly classified under tariff item No. 6210.30.00.

6. On January 25, 2007, Helly Hansen filed the present appeal with the Tribunal.

7. The Tribunal held a public hearing in Ottawa, Ontario, on January 22, 2008. Mr. Richard Collier, Vice-President, Product, for Helly Hansen ASA., and Ms. Sandra Tullio-Pow, School of Fashion, Faculty of Communication & Design, Ryerson University, appeared as witnesses for Helly Hansen. The Tribunal qualified Ms. Tullio-Pow as an expert witness in apparel production, apparel design and the choosing of fabric for the functional design of apparel. Mr. Leslie James Allen, Senior Analytical Chemist, of the CBSA's Laboratory and Scientific Services Directorate, appeared as a witness for the CBSA. Mr. Allen was qualified by the Tribunal as an expert witness in the analysis of textile products, including the weaves and patterns used therein.

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

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

## GOODS IN ISSUE

8. The following is a description of the two styles of jackets in issue. Both are hooded jackets with Helly Hansen logos and a right-over-left closure. The outer shell of these jackets consists of two layers, i.e. a layer of uniformly dyed textile fabric woven from yarns of nylon filaments and a layer of plastics.<sup>3</sup> The layer of fabric forms the exterior surface of the jackets, and the layer of plastics forms the interior of the jackets. The textile fabric is completely laminated on one side with the layer of plastics.<sup>4</sup>

9. According to the evidence, the textile fabric in the outer shell of each jacket is a woven fabric, and the plastic coating is made of cellular plastics, namely, polyurethane.<sup>5</sup> The textile fabric used in both jackets can be described as being “windproof”. It can also repel water to a certain, albeit limited, degree and affects the drape of the jackets.<sup>6</sup> It was described by the witnesses for Helly Hansen as a “rip stop” fabric, in that it is designed to reduce or resist tearing. To this end, the fabric is woven using thicker and heavier yarns that are inserted at regular intervals in a particular manner in order to reduce or resist tearing.<sup>7</sup> Mr. Collier testified that this constitutes “quite a technical fabric”.<sup>8</sup>

10. The evidence also indicates that a different weaving process was used to achieve this effect in each jacket. In this regard, Mr. Collier stated that the fabric in the Sunrise jacket is a “broken rip stop” fabric, which is a special form of “rip stop” fabric, because the weave has a broken element that creates gaps in the arrangement of yarns compared to a conventional “rip stop” fabric, such as the one used in the Lyric jacket.<sup>9</sup> Mr. Allen noted that the fabric of the Sunrise jacket is not a regular “rip stop” fabric because it is not a plain weave fabric such as the one of the Lyric jacket, which, in his view, is a typical “rip stop” fabric. However, he did not dispute the statements of the witnesses for Helly Hansen that the fabric used in the Sunrise jacket is also a “rip stop” fabric.<sup>10</sup>

11. All witnesses agreed that there is a visible pattern within the textile fabric used in both jackets. Each fabric has its own distinctive pattern. In the case of the Lyric jacket, the pattern consists of squares of different sizes (3 cm and 3.5 mm). In the case of the Sunrise jacket, it consists of a series of T-shaped lines on the surface of the textile fabric.<sup>11</sup>

12. The goods in issue are worn for recreational activities, such as skiing.<sup>12</sup> According to the witnesses for Helly Hansen, the polyurethane plastic layer on the interior of the two jackets in issue is critical to the performance of the jackets, in that it prevents moisture from rain or snow from getting in, while at the same time allowing moisture from perspiration to get out, thus keeping the wearer’s body temperature in the optimal zone for physical exertion. Mr. Collier indicated that the plastic membrane could not be worn on the outside of the garment because it would tear or easily wear out due to the demanding conditions for which the jacket was intended and, thus, no longer provide the intended performance.<sup>13</sup>

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3. Tribunal Exhibit AP-2006-054-21A; *Transcript of Public Hearing*, 22 January 2008, at 51-52, 101-102.

4. *Ibid.* at 103, 117.

5. *Transcript of Public Hearing*, 22 January 2008, at 114, 118, 189-90.

6. *Ibid.* at 64-70, 124-27.

7. Tribunal Exhibit AP-2006-054-23A; *Transcript of Public Hearing*, 22 January 2008, at 47-48, 111-16.

8. *Transcript of Public Hearing*, 22 January 2008, at 47.

9. Tribunal Exhibit AP-2006-054-21A; *Transcript of Public Hearing*, 22 January 2008, at 48-49, 76.

10. *Transcript of Public Hearing*, 22 January 2008, at 219-20.

11. *Ibid.* at 47-48, 118-20, 132-33, 191-96.

12. *Ibid.* at 62-63.

13. *Ibid.* at 51-54, 107-109.

## ANALYSIS

### Law

13. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

14. The tariff nomenclature is set out in considerable detail in the schedule to the *Customs Tariff*, which is divided into sections and chapters.<sup>14</sup> Each chapter of the schedule contains a list of goods categorized under a number of headings, subheadings and individual tariff items. Sections and chapters can include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the methodology that the Tribunal must follow when interpreting the schedule in order to come to the proper tariff classification of a given good.

15. Subsection 10(1) of the *Customs Tariff* reads as follows: “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>[15]</sup> and the *Canadian Rules*<sup>[16]</sup> set out in the schedule.”

16. The *General Rules* are comprised of six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.<sup>17</sup> Classification, therefore, always begins with Rule 1, which reads as follows: “. . . for legal purposes, 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 following provisions.”

17. Section 11 of the *Customs Tariff* states as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System<sup>[18]</sup> and the Explanatory Notes to the Harmonized Commodity Description and Coding System,<sup>[19]</sup> published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.”

18. Once the Tribunal has used this process to determine the heading in which the goods should be classified, the next step is to determine the appropriate subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

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14. S.C. 1997, c. 36.

15. *Ibid.*, schedule [*General Rules*].

16. *Ibid.*, schedule [*Canadian Rules*].

17. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable for classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable for classification at the tariff item level.

18. World Customs Organization, 2d ed., Brussels, 2003.

19. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].

**Tariff Classification at Issue, Applicable General Rules and Relevant Notes**

19. The nomenclature of the *Customs Tariff* which Helly Hansen claims should apply to the goods in issue reads as follows:

...	
<b>39.26</b>	<b>Other articles of plastics and articles of other materials of headings 39.01 to 39.14.</b>
...	
<b>3926.20</b>	<b>-Articles of apparel and clothing accessories (including gloves, mittens and mitts)</b>
...	
3926.20.95	- - - -Other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt
...	

20. The nomenclature which the CBSA ruled applicable to the goods in issue reads as follows:

...	
<b>59.03</b>	<b>Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 59.02.</b>
...	
<b>62.02</b>	<b>Women's or girls' overcoats, car-coats, capes, cloaks, anoraks (including ski-jackets), wind-cheaters, wind-jackets and similar articles, other than those of heading 62.04.</b>
	<b>-Overcoats, raincoats, car-coats, capes, cloaks and similar articles:</b>
<b>6202.11.00</b>	<b>- -Of wool or fine animal hair</b>
...	
<b>6202.12.00</b>	<b>- -Of cotton</b>
...	
<b>6202.13.00</b>	<b>- -Of man-made fibres</b>
...	
<b>6202.19.00</b>	<b>- -Of other textile materials</b>
...	
<b>62.10</b>	<b>Garments, made up of fabrics of heading 56.02, 56.03, 59.03, 59.06 or 59.07.</b>
...	
<b>6210.30.00</b>	<b>-Other garments, of the type described in subheadings 6202.11 to 6202.19</b>
...	



21. Both parties submitted that the tariff classification of the goods in issue can be effected by reference to Rule 1 of the *General Rules*. Based on the terms of heading No. 39.26, Note 1(h) to Section XI of the schedule to the *Customs Tariff*, Note 2(m) to Chapter 39, Note 2(a)(5) to Chapter 59 and the *Explanatory Notes* to Chapter 39, Helly Hansen argued that the appropriate classification of the goods in issue is in Chapter 39, under tariff item No. 3926.20.95, as articles of apparel of plastics combined with uniformly dyed textile fabrics serving merely for reinforcing purposes. Relying primarily on Note 2(a) to Chapter 59, the CBSA argued that the textile fabric from which the goods in issue are made is a fabric impregnated, coated, covered or laminated with plastics of heading No. 59.03. For this reason, the CBSA submitted that the goods in issue are properly classified in heading No. 62.10, under tariff item No. 6210.30.00, which applies, *inter alia*, to garments made up of fabrics of heading No. 59.03.

22. The Tribunal notes that the evidence clearly establishes that the goods in issue are made up of a material consisting of plastics combined with woven fabrics. The central issue in this appeal is whether this material is classifiable in heading No. 39.26 or No. 59.03. As is made clear by the terms of the aforementioned tariff nomenclature, both headings apply to certain articles of plastics combined with woven fabrics.

23. Since heading No. 62.10 includes “[g]arments, made up of fabrics of heading . . . 59.03 . . .”, in order to determine the heading which most properly describes such goods pursuant to Rule 1 of the *General Rules*, it is necessary to consider the terms of heading Nos. 59.03 and 39.26, and the relevant Section or Chapter Notes, taking into account the relevant *Explanatory Notes*.

24. The legal notes relating to Section XI (which includes Chapter 59), to Chapter 59 itself and to Chapter 39 provide useful guidance on how to interpret the relevant headings. First, note 1(h) to Section XI indicates that Section XI (and, thus, Chapter 59 and heading No. 59.03) does not cover “[w]oven . . . fabrics . . . impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39”. Second, Note 2(m) to Chapter 39 stipulates that Chapter 39 (which includes heading No. 39.26) does not cover “[g]oods of Section XI (textiles and textile articles)”. By virtue of these Section and Chapter Notes, it is clear that Section XI expressly excludes goods of Chapter 39 and vice versa. Consequently, heading Nos. 39.26 and 59.03 are mutually exclusive. Thus, to the extent that the goods in issue are classifiable in heading No. 62.10 as garments made up of fabrics of heading No. 59.03, as determined by the CBSA, they cannot also be *prima facie* classifiable in heading No. 39.26, as claimed by Helly Hansen. In other words, if the fabric from which the goods in issue are made is a fabric of heading No. 59.03, the goods in issue cannot be covered by Chapter 39 as other articles of apparel and clothing accessories, of plastic combined with knitted or woven fabrics, and the appeal must fail.

25. Note 2(a)(5) to Chapter 59 delineates the scope of application of heading No. 59.03, with reference to certain goods of Chapter 39, and reads as follows:

...

Heading 59.03 applies to:

- (a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular), *other than*:

...

- (5) Plates, sheets or strip of cellular plastics, combined with textile fabric, *where the textile fabric is present merely for reinforcing purposes (Chapter 39)*.

[Emphasis added]

26. As discussed above in the description of the goods in issue, the evidence indicates that they incorporate a sheet of cellular plastics (polyurethane) combined with a textile fabric and that, on both jackets, the textile fabric is laminated with the sheet of cellular plastics. Thus, pursuant to Note 2(a)(5) to Chapter 59, whether this material is classifiable in heading No. 59.03 or Chapter 39 depends on the purposes served by the textile component. As was acknowledged by the CBSA in its brief, if the fabric used in the goods in issue "... is present merely for reinforcing purposes ...", it cannot be properly classified in heading No. 59.03 and must therefore be classified in Chapter 39, as claimed by Helly Hansen.

27. Accordingly, the Tribunal must first determine whether the textile fabric used in the goods in issue is present merely for reinforcing purposes. This determination will allow the Tribunal to identify which of the competing headings properly describes the goods in issue. The Tribunal will then determine the proper classification of the goods in issue at the subheading and tariff item levels.

### **Is the Textile Fabric Used in the Goods in Issue Present Merely for Reinforcing Purposes?**

28. Helly Hansen submitted that the *Explanatory Notes* to Chapter 39 provide that a textile fabric will be considered to be "... present merely for reinforcing purposes ...", and, for this reason, classifiable in Chapter 39, if the fabric is a "... unfigured, unbleached, bleached or uniformly dyed [fabric] ..." and if it is applied to one face only of the plastic sheet. According to Helly Hansen, the evidence provided by its witnesses establishes that the fabric used in the goods in issue is "unfigured" and applied to one face of the plastic sheet. In addition, Helly Hansen submitted that a uniformly dyed textile fabric, such as that used in the goods in issue, must also be considered to be "... present merely for reinforcing purposes ..." pursuant to the *Explanatory Notes* to Chapter 39. It further argued that the evidence made it clear that the primary purpose of the fabric is to provide reinforcement to the plastic sheet. Helly Hansen also referred to other rulings made by the CBSA concerning different styles of jackets, other than those in issue, made of textile fabrics and a membrane of cellular plastics, in which such allegedly similar goods were classified in Chapter 39. Based on this evidence, Helly Hansen submitted that the textile fabric used in the goods in issue is "... present merely for reinforcing purposes ...".

29. The CBSA argued that all witnesses acknowledged that the fabric laminated to the plastic membrane of the goods in issue, in addition to reinforcing the membrane of cellular plastics, influences the visual appeal of the jackets, affects their drape and provides wind resistance and some degree of water resistance. Moreover, given that the technology for the moisture transpiration properties of the plastic membrane has been available since the mid-1980s and is used by a number of Helly Hansen's competitors, the CBSA submitted that it is not the primary reason why consumers purchase the goods in issue. In the CBSA's view, it is the nature and appearance of the outside of the fabric that is the principal reason for which consumers purchase such jackets. Therefore, the CBSA submitted that the fabric used in the goods in issue serves a number of purposes and is therefore *not* "... present merely for reinforcing purposes ...".

30. Concerning the *Explanatory Notes* to Chapter 39, the CBSA submitted that these notes clarify that "figured" textile products are regarded as having a function beyond that of mere reinforcement and, thus, are not classifiable in Chapter 39. On this issue, based on the fact that the fabric used to make the goods in issue has a definite pattern and relying on the evidence provided by Mr. Allen, the CBSA argued that the textile fabric in the goods in issue is "figured". The CBSA submitted that Mr. Allen's conclusion on this issue is supported by relevant definitions of textile terms found in textile literature.

31. With respect to Helly Hansen's argument that not only "unfigured" but also "... uniformly dyed textile fabrics ..." are to be considered "... present merely for reinforcing purposes ...", the CBSA submitted that to interpret each of the terms in the *Explanatory Notes* to Chapter 39 (i.e. "unfigured, unbleached, bleached or uniformly dyed textile fabrics") in a disjunctive manner, as is suggested by Helly Hansen, would lead to an absurd result. The CBSA maintains that, in order to be "... present merely for reinforcing purposes ...", the fabric must be "unfigured". The "unfigured" fabric may be bleached, unbleached or uniformly dyed.

32. Finally, the CBSA submitted that the various other rulings made by the CBSA to which Helly Hansen referred should not be given any weight or probative value because these rulings concern goods other than those in issue and whose characteristics are not fully known.

33. Note (d) of the *Explanatory Notes* to Chapter 39, which pertains to plastics and textile combinations, provides assistance in interpreting the relevant headings and Note 2(a)(5) to Chapter 59. It reads as follows:

... The following products are also covered by [Chapter 39]:

...

(d) Plates, sheets and strip of cellular plastics combined with textile fabrics ... where the textile is present merely for reinforcing purposes.

In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles (e.g., by raising) and special products, such as pile fabrics, tulle and lace and textile products of heading 58.11, are regarded as having a function beyond that of mere reinforcement.

...

34. In the case of the goods in issue, it is clear that the textile fabrics are applied to one face only of the plastics. According to the evidence, there is no doubt that an important purpose of the textile fabric is to reinforce the plastic component of the goods in issue.<sup>20</sup> However, the question that the Tribunal must address is whether the fabric is present "merely" for reinforcing purposes.<sup>21</sup>

35. Since the *Explanatory Notes* to Chapter 39 indicate that "unfigured" textile fabrics are regarded as serving "merely" for reinforcing purposes, the parties devoted considerable effort to present evidence and arguments on whether the textile fabric in the goods in issue is "figured" or "unfigured". Helly Hansen argued that it is "unfigured", and the CBSA argued that it is "figured". All witnesses were examined on this issue.

36. Mr. Collier, who is involved in the design, development and manufacture of Helly Hansen's products, including the selection of fabric, stated that the term "figured fabric" is not a general term that is often used in the industry. He nevertheless expressed the view that the textile fabric in the goods in issue is not figured because it does not have a decorative element.<sup>22</sup> In the Tribunal's view, given that Mr. Collier is not an expert and his acknowledgement of the limited usage of the term "figured" in the industry, he is not in a position to provide an authoritative opinion on whether the fabric used in the goods in issue is "figured".

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20. *Transcript of Public Hearing*, 22 January 2008, at 47, 103-109, 196.

21. The adverb "merely" means "just; only". See *Compact Oxford English Dictionary* (online), [http://www.askoxford.com/concise\\_oed/merely?view=uk](http://www.askoxford.com/concise_oed/merely?view=uk).

22. *Transcript of Public Hearing*, 22 January 2008, at 49, 77-79.

37. The expert witness for Helly Hansen, Ms. Tullio-Pow, stated that figured fabrics may be defined as having both visual and tactile patterns (or motifs) produced in the weave.<sup>23</sup> At the hearing, Ms. Tullio-Pow added that the textile literature uses the terms “figured” and “fancy” interchangeably and that figured fabrics are elaborate combinations of weaves that “quite often” have a distinct tactile and visual pattern woven in the fabric. She testified that the essence of the term “figured” is that it combines more than one of the distinct weaves to create a pattern or motif that is inherent in the fabric. By “distinct” weaves, she appeared to mean the three simple weaves found in fabric production (i.e. plain, twill and satin). She also stated that a rip stop fabric, such as that used in the goods in issue, is a plain weave fabric with one particularity, that is, the insertion of a thicker yarn at intervals in both the warp and the weft. According to her, although this arrangement of yarns in the weave creates a pattern, the fabric is not a “figured fabric” because the classic definition of a figured fabric implies the use of a jacquard loom.<sup>24</sup>

38. Helly Hansen filed in evidence excerpts from certain textile dictionaries or textbooks in support of its view on the meaning of the term “figured”. These included definitions of the following two terms:

**figured fabric**

A fabric in which patterns or motifs are produced by a combination of distinct weaves usually requiring a **dobby** or **jacquard** mechanism.<sup>[25]</sup>

**figured weave** A broad classification, including any weave that produces a patterned fabric. This would include BIRD’S EYE WEAVE, DIAMOND WEAVE, JACQUARD WEAVE.<sup>[26]</sup>

39. Ms. Tullio-Pow indicated that the term “figured” is not one that she uses often in her work<sup>27</sup> and that she used her own interpretation of the textile dictionary definitions, rather than personal experience with its usage, to reach her view of its meaning.<sup>28</sup> She also indicated that, in her view, “. . . the term isn’t as clearly defined as . . . one would expect it to be . . .”<sup>29</sup>

40. The CBSA’s expert witness, Mr. Allen, testified that the textile fabrics used in the goods in issue were figured, in that the weave of each fabric produced a clearly visible pattern. He stated that, in the case of the Sunrise jacket, the yarns are all the same, so that the pattern is formed by the use of a complicated twill weave; whereas in the Lyric jacket, the pattern is formed by the different thicknesses and weight of the yarns inserted in the plain weave used in the fabric. Essentially, Mr. Allen took a broader view of the term “figured”. He considered that it means that there is a pattern in the fabric that is produced by the weave (rather than by the fabric dye, for example).<sup>30</sup>

41. In the Tribunal’s view, the above noted textile dictionary definition of “figured weave” appears to be consistent with Mr. Allen’s view of the term, in that it refers to “any” weave that produces a patterned fabric.

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23. Tribunal Exhibit AP-2006-054-23A, at para. 24.

24. *Transcript of Public Hearing*, 22 January 2008, at 110-14.

25. Tribunal Exhibit AP-2006-054-9B, tab 8.

26. *Ibid.*, tab 9.

27. *Transcript of Public Hearing*, 22 January 2008, at 146-47.

28. *Ibid.* at 134-35, 146-49.

29. *Ibid.* 22 January 2008, at 149.

30. *Ibid.* at 190-95, 197-98, 220-21.

42. The textile dictionary definition of “figured fabric” is less clear. It does not indicate whether a “distinct” weave merely refers to a weave that is distinct in the normal meaning of the term as defined in the *Canadian Oxford Dictionary*, which states as follows: “. . . **a** not identical; separate; individual. **b** different in kind or quality; unlike . . .”.<sup>31</sup> to a “figured weave”, or to a weave that is distinct in the sense that it is one of the three simple weaves referred to by the expert witness for Helly Hansen.

43. The Tribunal notes that, contrary to Ms. Tullio-Pow’s testimony, the definitions on the record do not refer to “tactile patterns” produced in the weave. They simply refer to “patterns” or “motifs” and “patterned fabric”. Accordingly, in the Tribunal’s view, as long as visual patterns are produced in the weave of a fabric, such a fabric may be figured, based on the wording of the definitions. Furthermore, the definitions do not establish that, as was suggested by Ms. Tullio-Pow, a figured fabric implies the use of a jacquard loom. The definition of “figured fabric” filed in evidence merely states that the production of a figured fabric “usually” requires a dobby or jacquard mechanism. This only indicates that the production of a figured fabric generally or frequently requires a jacquard mechanism or loom. The definition does not state that the production of a figured fabric necessarily requires a jacquard mechanism or loom.

44. Therefore, after a thorough examination of all the evidence and arguments presented, and given the lack of precision in the definitions of “figured” on the record, the Tribunal considers that the CBSA’s wider view of the term “figured fabric” is a more accurate view of the meaning of the term than Helly Hansen’s narrower view, and that a figured fabric is one that has a pattern created by the weave (or combination of weaves) of the fabric.

45. Both expert witnesses acknowledged that the weave in the textile fabric of the goods in issue produces a pattern.<sup>32</sup> The Tribunal’s examination of the jackets, which were filed as physical exhibits, also indicates that both jackets have a pattern in the fabric that is produced by the weave. Therefore, the Tribunal concludes that the fabric for both jackets is figured.

46. The Tribunal is unable to accept Helly Hansen’s argument that any “uniformly dyed fabric” should be considered present merely for reinforcing purposes based on the first sentence of the second paragraph under “Plastics and textile combinations” of the *Explanatory Notes* to Chapter 39. The Tribunal is of the view that Helly Hansen’s interpretation is flawed because it does not take into account the context provided by the second sentence of that paragraph. The second sentence unequivocally states that “figured” fabrics are regarded as having a function beyond that of mere reinforcement. According to the evidence, figured fabrics may also be uniformly dyed. For example, Ms. Tullio-Pow stated that fabrics that are clearly figured, such as lace, could also be uniformly dyed.<sup>33</sup> The Tribunal considers that accepting Helly Hansen’s interpretation of Note (d) of the *Explanatory Notes* to Chapter 39 would render the second sentence meaningless because this interpretation entails that uniformly dyed “figured” fabrics could be deemed present merely for reinforcing purposes, contrary to the clear language of the second sentence, which indicates that any figured textile fabric should be regarded as having a function beyond that of mere reinforcement.

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31. Second ed., s.v. “distinct”.

32. *Transcript of Public Hearing*, 22 January, 2008, at 132, 197-98. During cross-examination, Ms. Tullio-Pow agreed that the plain weave in a “rip stop” fabric produces a pattern. Mr. Allen also stated that there is a pattern produced by the weave in both jackets. He explained that, in the case of the Sunrise jacket, the yarns used in the fabric are all the same and that, as a result, the pattern is due exclusively to the twill weave that was used. With respect to the Lyric jacket, he explained that the pattern was due to the use of different, heavier yarns in the plain weave used. Thus, the evidence is clear that the pattern in both jackets is produced by the weave rather than by a print or fabric dye.

33. *Transcript of Public Hearing*, 22 January 2008, at 143.

47. This interpretation of the context is supported by looking at the treatment of bleached and unbleached fabrics in the same grammatical structures in the *Explanatory Notes*. The first sentence indicates that both bleached and unbleached fabrics are regarded as serving merely for reinforcing purposes. Since all the fabrics in Chapter 39, by definition, are either bleached or unbleached, the second sentence of the *Explanatory Notes* would be meaningless if merely being bleached or unbleached were sufficient to render a fabric as serving merely for reinforcing purposes. In the Tribunal's view, the reasonable interpretation is that the first sentence covers fabrics where the state of the finishing of the fabric is confined to the finishing processes described in that sentence (unfigured, unbleached, bleached or uniformly dyed). In instances where the fabric has also been finished more elaborately as described in the second sentence, it is to be "...regarded as having a function beyond that of mere reinforcement..." Consequently, because the fabric in issue is figured, in the Tribunal's view, it should be regarded as "...having a function beyond that of mere reinforcement..."

48. The Tribunal also considers that the textile fabric used in the goods in issue is a "...more elaborately worked [textile]", as described in the *Explanatory Notes*. Although Note (d) of the *Explanatory Notes* to Chapter 39 is not entirely clear, as outlined above, the Tribunal is of the view that its intent is to make a distinction between plainer fabrics ("...unfigured, unbleached, bleached or uniformly dyed textile fabrics...") and more elaborate fabrics ("...[f]igured, printed or more elaborately worked textiles...").

49. In the Tribunal's opinion, the "rip stop" and "broken rip stop" features of the fabrics make them "more elaborately worked" compared to the plainer types of fabrics contemplated in the first sentence of the *Explanatory Notes*. In this regard, the Tribunal accepts Mr. Allen's evidence that the Sunrise jacket features a "complicated weaving process" and that the method used to achieve the "rip stop" effect of the Lyric jacket requires elaborate work. Mr. Allen noted that most rip stop fabrics would just have squares of one size, as opposed to a pattern of small and large squares, such as the fabric used in the Lyric jacket.<sup>34</sup>

50. Similarly, the Tribunal considers that the textile fabrics are "special products", as contemplated by Note (d) of the *Explanatory Notes* to Chapter 39, because of their special performance characteristics. The fabrics are "rip stop", as noted above, and were specially selected, among other things, for their strength and abrasion resistance.<sup>35</sup> Mr. Collier indicated that Helly Hansen is very selective when it chooses its fabrics.<sup>36</sup> In addition, Ms. Tullio-Pow indicated that this type of textile fabric would not be available in a generic fabric store, but would need to be purchased in a specialized fabric store that sells fabric for outerwear.<sup>37</sup>

51. The Tribunal also notes that, according to the evidence, the appearance and colour of the textile fabric, its windproof and water-repellent characteristics, and its role in the drape and visual appeal of the garment are all clearly of interest to potential buyers. This indicates to the Tribunal that the textile fabric used in the goods in issue is not present merely for reinforcement purposes.

52. Finally, the Tribunal notes that the various other rulings made by the CBSA concerning jackets other than the goods in issue are not relevant to this appeal. The Tribunal's task is to determine the proper tariff classification of the goods in issue, following the methodology prescribed by law. The consistency or lack of consistency in the CBSA's previous decisions is not relevant to this determination, regardless of whether these rulings concern goods that have the same characteristics as those of the goods in issue.

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34. Tribunal Exhibit AP-2006-054-21A; *Transcript of Public Hearing*, 22 January 2008, at 220.

35. *Transcript of Public Hearing*, 22 January 2008, at 30.

36. *Ibid.* at 30-31.

37. *Ibid.* at 144.

53. Accordingly, given that the textile fabric in the goods in issue is properly classified in heading No. 59.03, the goods in issue are properly classified in heading No. 62.10, as garments made up of fabrics of heading No. 59.03. As discussed above, this means that they are excluded from Chapter 39.

#### **Classification at the Subheading and Tariff Item Levels**

54. Having determined that the goods in issue are properly classified in heading No. 62.10, the Tribunal must now turn to the classification at the subheading and tariff item levels. The Tribunal notes that there can be no dispute over the fact that the goods in issue are “[o]ther garments, of the type described in subheadings 6202.11 to 6202.19”, which are covered by subheading No. 6210.30 and tariff item No. 6210.30.00. Specifically, the goods in issue are women’s jackets “[o]f man-made fibres” (i.e. nylon), a type of goods described in subheading No. 6202.13.

55. Thus, pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, based on the terms of the relevant subheadings and tariff items listed in the *Customs Tariff*, the Tribunal finds that the goods in issue are properly classified in subheading No. 6210.30 and under tariff item No. 6210.30.00.

#### **DECISION**

56. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 6210.30.00 as other garments made up of fabrics of heading No. 59.03 of the type described in subheading Nos. 6202.11 to 6202.19.

57. The appeal is therefore dismissed.

Ellen Fry  
Ellen Fry  
Presiding Member