Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-011

GCP Elastomeric Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, April 4, 2011

Canada

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IN THE MATTER OF an appeal heard on January 18, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency, dated March 4, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

GCP ELASTOMERIC INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 18, 2011
Tribunal Member:	Serge Fréchette, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber
Research Director:	Matthew Sreter
Research Officer:	Gary Rourke
Manager, Registrar Office:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
GCP Elastomeric Inc.	Trent Cosgrove
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	David Aaron

WITNESS:

Allan Granville
Senior Chemist
Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by GCP Elastomeric Inc. (GCP) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from two decisions made by the President of the Canada Border Services Agency (CBSA) on March 4, 2010, pursuant to subsection 60(4).

2. The issue in this appeal is whether rubber mats and sheets, model Nos. NES-CSS-B70, NES-CSS-B60 and CHT-SS-B60[2] (the goods in issue), are properly classified under tariff item No. 4008.21.90 of the schedule to the *Customs Tariff*[3] as other plates, sheets and strip of non-cellular rubber, as determined by the CBSA, or should be classified under tariff item No. 4003.00.00 as reclaimed rubber in primary forms or in plates, sheets or strip, as submitted by GCP.

PROCEDURAL HISTORY

3. The goods in issue were imported by GCP on August 23, 2006, and March 4, 2007.

4. On September 10, 2008, pursuant to paragraph 59(1)(*b*) of the *Act*, the CBSA re-determined the tariff classification of the goods in issue under tariff item No. 4008.21.90 as other plates, sheets and strip of non-cellular rubber.

5. On November 12, 2008, pursuant to section 60(1) of the *Act*, GCP requested a further re-determination of tariff classification.

6. On March 4, 2010, pursuant to subsection 60(4) of the *Act*, the CBSA issued decisions confirming the classification of the goods in issue under tariff item No. 4008.21.90.

7. On May 31, 2010, GCP appealed the CBSA's decisions to the Tribunal, pursuant to section 67 of the *Act*.

8. On January 18, 2011, the Tribunal held a public hearing in Ottawa, Ontario.

9. Mr. Allan Granville, a senior chemist for the CBSA, appeared as a witness for the CBSA. The Tribunal qualified Mr. Granville as an expert in the analysis of polymer and rubber products. No witnesses were called by GCP.

GOODS IN ISSUE

10. The goods in issue are three models of flexible, non-cellular, vulcanized compounded rubber in sheets of various sizes.[4]

11. The CBSA filed four physical exhibits, three of which were samples of the goods in issue;[5] the fourth was a sample of soft rubber.[6]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Tribunal Exhibits AP-2010-011-19, AP-2010-011-20.
3. S.C. 1997, c. 36.
4. Tribunal Exhibit AP-2010-011-05A, tab 2.
5. Exhibits B-01, B-02, B-03.
6. Exhibit B-04.

ANALYSIS

Statutory Framework

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

13. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.[7] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

14. Subsection 10(1) of the *Customs Tariff* provides 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[8]and the Canadian Rules[9] set out in the schedule."

15. The *General Rules* comprise 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.[10] Classification therefore begins with Rule 1, which provides 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."

16. Section 11 of the *Customs Tariff* provides 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[11] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[12] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.[13]

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7. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
8. S.C. 1997, c. 36, schedule [*General Rules*].
9. S.C. 1997, c. 36, schedule.
10. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).
11. World Customs Organization, 2d, Brussels, 2003.
12. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
13. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes

17. The relevant provisions of the *Customs Tariff* provide as follows:

Section VII

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

. . .

Chapter 40

RUBBER AND ARTICLES THEREOF

. . .

4003.00.00 Reclaimed rubber in primary forms or in plates, sheets or strip.

. . .

40.08 Plates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber.

. . .

-Of non-cellular rubber:

4008.21 - -Plates, sheets and strip

. . .

4008.21.90 - - -Other

18. There are no relevant section notes to Section VII.

19. The relevant note to Chapter 40 reads as follows:

> 9. In headings 40.01, 40.02, 40.03, 40.05 and 40.08, the expressions "plates", "sheets" and "strip" apply only to plates, sheets and strip and to blocks of regular geometric shape, uncut or simply cut to rectangular (including square) shape, whether or not having the character of articles and whether or not printed or otherwise surface-worked, but not otherwise cut to shape or further worked.

20. The *Explanatory Notes* to Chapter 40 provide the following guidance in regard to the general arrangement of the headings:

> (b) Headings 40.03 and 40.04 cover reclaimed rubber in primary forms or in plates, sheets or strip, and waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom.
>
> . . .
>
> (e) Headings 40.07 to 40.16 cover semi-manufactures and articles of vulcanised rubber other than hard rubber.

21. In addition, the *Explanatory Notes* to Chapter 40 give a specific meaning to the term "vulcanised" that is used in the nomenclature and read as follows:

> The term "vulcanised" refers in general to rubber (including synthetic rubber) which has been cross-linked with sulphur or any other vulcanising agent (such as, sulphur chloride, certain oxides of polyvalent metals, selenium, tellurium, thiuram di- and tetrasulphides, certain organic peroxides and certain synthetic polymers), whether or not using heat or pressure, or by high energy, radiation so that it passes from a mainly plastic state to a mainly elastic one. . . .

> For the purpose of vulcanisation, in addition to vulcanising agents, certain other substances are also normally added, such as accelerators, activators, retarders, plasticisers, extenders, fillers, reinforcing agents or any of the additives mentioned in Note 5 (B) to this Chapter. Such vulcanisable mixtures are regarded as compounded rubber and are classified in heading 40.05 or 40.06 depending upon the form in which they are presented.

22. The *Explanatory Notes* to heading No. 40.03 read as follows:

> Reclaimed rubber is obtained from used rubber articles, especially tyres, or from waste or scrap, of vulcanised rubber, by softening ("devulcanising") the rubber and removing some of the unwanted matter by various chemical or mechanical means. The product contains residues of sulphur or other vulcanising agents in combination and is inferior to virgin rubber, being more plastic and more tacky than virgin rubber. It may be put up in sheets dusted with talc or separated by polyethylene film.
>
> This heading covers reclaimed rubber in primary forms or in plates, sheets or strip, whether or not mixed with virgin rubber or other added substances, provided that the product has the essential character of reclaimed rubber.

Tariff Classification of the Goods in Issue

23. The dispute in this matter concerns the heading in which the goods in issue should be classified. GCP is of the view that the goods in issue should be classified in heading No. 40.03. The CBSA argues for classification in heading No. 40.08. The parties, therefore, both agree that the goods in issue are *prima facie* classifiable in only one heading of the *Customs Tariff* in accordance with Rule 1 of the *General Rules*. Therefore, the Tribunal will examine the terms of the competing headings, and any relative notes to Section VII or Chapter 40, in order to determine the heading in which the goods in issue are classifiable.

24. GCP argued that the goods in issue are ". . . vulcanized reclaimed rubber sheets . . ."[14] that should be classified in heading No. 40.03. GCP referred to the definition of "reclaimed rubber" found in the *Explanatory Notes* to heading No. 40.03 and argued that, since the goods in issue are manufactured from used tires and have been subject to a devulcanization process, they have the essential character of reclaimed rubber. In support of its position, GCP submitted a document from the producer of the goods in issue, the Beijing Rubber Company, which detailed the manufacturing process of the goods in issue, and argued that the goods in issue had been manufactured by a process using reclaimed rubber tires, stripped of their steel and fabric elements, shredded and reduced to a fine crumb, and subjected to a devulcanising process.[15]

25. The CBSA argued that the *Explanatory Notes* to heading No. 40.03 require that the goods in issue have the essential character of devulcanized reclaimed rubber. According to the CBSA, the evidence regarding the manufacturing process of the goods in issue indicates that they were subjected to a vulcanising process (the addition of pressure and heat to sheets of reclaimed rubber) by the manufacturer and, therefore, did not have the essential character of devulcanized reclaimed rubber.

26. The CBSA submitted that the goods in issue are made of vulcanized rubber, are non-cellular and are presented in sheets and that they therefore meet the conditions for classification in heading No. 40.08. GCP provided no argument to refute the CBSA's view that the goods in issue are classifiable in heading No. 40.08.

14. *Transcript of Public Hearing*, 18 January 2011, at 4.
15. Tribunal Exhibit AP-2010-011-03A, tab 7; *Transcript of Public Hearing*, 18 January 2011, at 4.

27. GCP referred to several U.S. Customs Services rulings, in which rubber flooring material and rubber mats were classified in heading No. 40.03.[16] On that point, the CBSA submitted that the Tribunal is not bound by these rulings and that there is no evidence that the goods in issue subject to the U.S. Customs Services rulings contained reclaimed rubber. With respect to the goods in issue, the Tribunal agrees with the CBSA and recalls its long-standing view on the relative usefulness of such rulings.[17]

28. The Tribunal notes that, according to the terms of heading No. 40.08, in order for the goods in issue to be classified in this heading, they must, at the time of importation into Canada, be (1) plates, sheets, strip, rods or profile shapes (2) of vulcanized rubber (3) other than hard rubber.

29. The description of the goods in issue indicates that they are composed of rubber and are presented in the form of sheets. In addition, neither the CBSA nor GCP claimed that the goods in issue are made of hard rubber, which would have excluded them from classification in heading No. 40.08. The resolution of this appeal therefore turns on whether the goods in issue were made of vulcanized rubber, as claimed by the CBSA, or whether they were made of reclaimed rubber, as claimed by GCP.

30. The record shows that, at one stage of their manufacturing process, the goods in issue would have gone through a devulcanization process that purportedly would have qualified them as being made of "reclaimed rubber", as described in the *Explanatory Notes* to heading No. 40.03. That point was not contested by the CBSA. However, GCP did not contest the CBSA's assertion that there is no scientific method which would allow this intermediary transformation step to be verified by analyzing the goods in issue.[18] In any event, as previously indicated, the Tribunal is concerned exclusively with the nature of the goods in issue at the time of importation.[19]

31. Mr. Granville testified that he tested the tackiness and plasticity of the goods in issue in order to determine whether they were composed of virgin, reclaimed or vulcanized rubber.[20] The test, which involved dissolving the goods in issue in a universal solvent, toluene, indicated that they were ". . . highly cross-linked or . . . highly vulcanized . . . ."[21] Mr. Granville testified that the higher the cross-linkage, the more vulcanization there is, and vice versa.[22] A further test, involving an odour analysis, indicated that the goods in issue contained benzothiazole, a ". . . chemical that is the residue of vulcanizing accelerators used in rubber vulcanization",[23] as well as other strong amounts of antioxidants used in rubber vulcanization. On the basis of the results of these tests, Mr. Granville determined that the goods in issue were composed of vulcanized rubber.

16. Tribunal Exhibit AP-2010-011-03A, tabs 15, 16.
17. See *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at 7.
18. *Transcript of Public Hearing*, 18 January 2011, at 23.
19. See *Sealand of the Pacific Ltd. v. Deputy M.N.R.* (11 July 1989), 3042 (CITT) at 7, where the Tribunal stated as follows: "It is well established in customs law that goods must be classified according to their nature at the time of importation. This principle was stated by the Supreme Court of Canada in *The Minister of National Revenue v. MacMillan and Bloedel Ltd. et al., [1965] S.C.R. 366* and has been affirmed on many occasions since that time."
20. *Transcript of Public Hearing*, 18 January 2011, at 12.
21. *Ibid.* at 15.
22. *Ibid.* at 30.
23. *Ibid.* at 16.

32. Mr. Granville further compared the physical properties of the goods in issue with a sample of reclaimed rubber[24] to determine whether they were tacky and exhibited plasticity in comparison to known standards. Mr. Granville demonstrated this test by pulling on the sample of reclaimed rubber while holding it in his hands, which resulted in a deformation, normally associated with reclaimed rubber. Mr. Granville testified that the goods in issue did not have ". . . any of the tack associated with reclaimed rubber."[25]

33. Mr. Granville referred to the document from the Beijing Rubber Company in his testimony and stated that there were, in his expert opinion, three distinct processes identified therein. The first described a grinding process of rubber, the second described a devulcanization process, and the third described a vulcanization process. In response to a question by the Tribunal, Mr. Granville referred to the document, which described the end of the devulcanization process as follows: "The resultant devulcanized rubber is cooled and pressed into crude 0.5 inch sheets on two roll mills."[26] The start of the vulcanization process is described as follows: "The devulcanized rubber is combined with chemical curatives and fillers as required in an internal rubber mixing machine (500 Kgm) or on a tow roll mill by hand labour (100 Kgm)."[27]

34. Although it is clear that the goods in issue, at the beginning stages of their manufacture, were subjected to a process that could be described as devulcanization, it is also clear, through the testimony of Mr. Granville and the documentary evidence, that the goods were further subjected to a process wherein additives were combined with the goods and that pressure and heat were applied to cure them into high-density solid sheets of rubber. The goods in issue were further processed by being surface coated with talcum powder to reduce tackiness, trimmed and cut to required lengths, and packaged for shipping. This further processing corresponds to a vulcanization process. Consequently, the Tribunal finds that the goods in issue are made of vulcanized rubber.

35. The Tribunal notes that the scientific information on the record would indicate that there is no such thing as being partially vulcanized or devulcanized. In other words, a product is either vulcanized or it is not. Accordingly, the Tribunal is ready to accept that, when virgin rubber is subjected to the transformation process known as vulcanization, the resultant product is vulcanized rubber. Conversely, when vulcanized rubber is subjected to the transformation process known as devulcanization, the resultant product is devulcanized or reclaimed rubber. In addition, nothing in the schedule to the *Customs Tariff* allows the Tribunal to conclude that a product is, or is not, vulcanized, on the basis of the degree or extent of vulcanization. This finding is supported by the testimony of Mr. Granville who stated that any chemical reaction that decreases the plasticity of virgin rubber by "cross linking" the molecules is defined as vulcanization.[28] When specifically asked by the Tribunal if a ". . . 1 per cent vulcanization process . . ." would be sufficient to describe a product as vulcanized, Mr. Granville stated that "[i]t would make it a vulcanized product . . . yes."[29]

36. Even if the Tribunal is mistaken in its understanding of the vulcanization process, in light of Mr. Granville's testimony of the high degree of cross-linkage between molecules of the goods in issue, the Tribunal is convinced that the evidence is such that the goods in issue are nevertheless made of vulcanized rubber.

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24. Exhibit B-04; *Transcript of Public Hearing*, 18 January 2011, at 20.
25. *Transcript of Public Hearing*, 18 January 2011, at 19.
26. Tribunal Exhibit AP-2010-011-17A, tab 2 at para. 5.
27. *Ibid.* at para. 6.
28. *Transcript of Public Hearing*, 18 January 2011, at 31.
29. *Ibid.* at 35.

37. For the foregoing reasons, the Tribunal finds that the goods in issue are made of vulcanized rubber and are therefore properly classified in heading No. 40.08. It follows that they are properly classified under tariff item No. 4008.21.90 as other plates, sheets and strip of non-cellular vulcanized rubber, other than hard rubber.

DECISION

38. The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member