Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-022

Loblaws Companies Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued
Wednesday, August 3, 2011

Canada

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DECISION 16

IN THE MATTER OF an appeal heard on May 5, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 78 decisions of the President of the Canada Border Services Agency, dated April 22, 23 and 26, 2010, with respect to requests for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

LOBLAWS COMPANIES LIMITED **Appellant**

AND

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

DECISION

The appeal is allowed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 5, 2011
Tribunal Member:	Stephen A. Leach, Presiding Member
Counsel for the Tribunal:	Courtney Fitzpatrick Danielle Lussier-Meek
Research Director:	Matthew Sreter
Research Officer:	Jan Wojcik
Manager, Registrar Office:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
Loblaws Companies Limited	Michael Kaylor

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

WITNESSES:

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Director of Sourcing, Home Division
Home and Leisure
Loblaws Companies Limited

Susan Cohene
Owner
Malibar Costumier

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Loblaws Companies Limited (Loblaws) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from 78 decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether certain Halloween costumes (the goods in issue) are properly classified under tariff item No. 6104.43.00 as women's or girls' knitted or crocheted dresses of synthetic fibres, tariff item No. 6114.30.00 as other knitted or crocheted garments of man-made fibres, tariff item No. 6115.93.00 as knitted socks of synthetic fibres, tariff item No. 6204.43.00 as women's or girls' woven dresses of synthetic fibres or tariff item No. 6211.33.90 as other men's or boys' woven garments, as determined by the CBSA, or should be classified under tariff item No. 9505.90.00 as other festive articles, as claimed by Loblaws.

PROCEDURAL HISTORY

3. From July 24, 2004, to August 28, 2007, Loblaws imported the goods in issue under tariff item Nos. 6104.43.00, 6114.30.00, 6115.93.00, 6204.43.00 and 6211.33.90.[2]

4. Between July 21, 2008, and January 7, 2009, Loblaws applied for refunds of the customs duties paid on the goods in issue pursuant to paragraph 74(1)(*e*) of the *Act*, claiming that the goods in issue should have been classified under tariff item No. 9505.90.00 as other festive articles.[3] Between February 27 and March 9, 2009, the CBSA denied these requests for refunds of duty pursuant to paragraph 59(1)(*a*) and maintained the tariff classifications of the goods in issue.[4]

5. During the period from May 21 through May 26, 2009, Loblaws made requests for further re-determination of the tariff classification of the goods in issue, pursuant to subsection 60(1) of the *Act*.[5] On April 22, 23 and 26, 2010, the CBSA denied the requests for further re-determination pursuant to subsection 60(4) and maintained the tariff classifications of the goods in issue.[6]

6. On July 5, 2010, Loblaws filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[7]

7. On May 5, 2011, the Tribunal held a public hearing in Ottawa, Ontario.

8. Two witnesses appeared on behalf of Loblaws: Ms. Anne-Marie Scott, Director of Sourcing for the Home Division, Home and Leisure, for Loblaws; and Ms. Susan Cohene, owner of Malibar Costumier. The CBSA did not call any witnesses.

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1. R.S.C.1985 (2d Supp.), c. 1. [*Act*].
2. Tribunal Exhibit AP-2010-022-01; Tribunal Exhibit AP-2010-022-10; Tribunal Exhibit AP-2010-022-21.
3. Tribunal Exhibit AP-2010-022-21.
4. *Ibid*.
5. *Ibid*.
6. Tribunal Exhibit AP-2010-022-01; Tribunal Exhibit AP-2010-022-10; Tribunal Exhibit AP-2010-022-21.
7. Tribunal Exhibit AP-2010-022-01; Tribunal Exhibit AP-2010-022-03.

GOODS IN ISSUE

9. The goods in issue are various types of full-body or partial coverage costumes for children and adults, manufactured from either knitted or woven, synthetic, polyester, nylon or nylon/polyester textile material.[8] They are made to resemble animals, super heroes, fictional and historical characters.[9] Some of the goods in issue include plastic or textile accessories to be worn with the costumes or carried by the wearer.[10]

10. Loblaws filed six physical exhibits—four samples of the goods in issue,[11] a dust filter mask and a knight costume from Malibar Costumier.[12] The CBSA filed three physical exhibits.[13]

ANALYSIS

Statutory Framework

11. In appeals pursuant to 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.

12. 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 (WCO).[14] 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.

13. 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[15] and the Canadian Rules[16] set out in the schedule."

14. 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, until classification is completed.[17] 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."

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8. Tribunal Exhibit AP-2010-022-09 at paras. 3, 6.
9. Tribunal Exhibit AP-2010-022-10, tabs 1-4.
10. *Ibid*. at para. 3.
11. Exhibits A-02 to A-05.
12. Exhibits A-01 and A-06.
13. Exhibits B-01 to B-03.
14. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
15. S.C. 1997, c. 36, schedule [*General Rules*].
16. S.C. 1997, c. 36, schedule.
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 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).

15. 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[18] and the Explanatory Notes to the Harmonized Commodity Description and Coding System[19] published by the Customs Co-operation Council [i.e. the WCO], 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, as they serve as an interpretative guide to tariff classification in Canada.[20]

16. Thus, the Tribunal must first determine in which heading the goods in issue can be classified according to the terms of the headings and any relevant section or chapter notes in the *Customs Tariff*, having regard to any relevant *Explanatory Notes* and *Classification Opinions*. It is only if the Tribunal is not satisfied that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which heading the goods in issue should be classified.

17. The Tribunal notes that section 13 of the *Official Languages Act*[21] provides that the English and French versions of any Act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff*, the *Explanatory Notes* and the *Classification Opinions* in interpreting the tariff nomenclature.

18. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

Relevant Legislative Provisions

19. The relevant provisions of the nomenclature of the *Customs Tariff*, which Loblaws claims should apply to the goods in issue, provide as follows:

Section XX

MISCELLANEOUS MANUFACTURED ARTICLES

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES;
PARTS AND ACCESSORIES THEREOF

. . .

95.05 **Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.**

. . .

9505.90.00 -Other

18. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
19. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
20. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 [*Suzuki*].
21. R.S.C. 1985 (4th Supp.), c. 31.

20. There are no section notes to Section XX. The relevant chapter notes to Chapter 95 provide as follows:

1. This Chapter does not cover:

. . .

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

. . .

21. There are no *Explanatory Notes* to Section XX or Chapter 95. The relevant *Explanatory Notes* to heading No. 95.05 provide as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

. . .

(3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche - **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of Chapter 61 or 62.

. . .

The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

22. Loblaws argued that the following provisions of the nomenclature of the *Customs Tariff* were relevant. They provide as follows:

Chapter 63

**OTHER MADE UP TEXTILE ARTICLES; SETS;
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS**

. . .

I. -OTHER MADE UP TEXTILE ARTICLES

. . .

63.07 **Other made up articles, including dress patterns.**

. . .

6307.90 **-Other**

6307.90.10 . . .
Incontinent napkins (diapers), napkin (diaper) liners and similar sanitary articles, designed to be worn by persons, excluding those of a kind for babies; . . .

. . .

III. -WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS

6309.00 **Worn clothing and other worn articles.**

23. The relevant notes to Chapter 63 provide as follows:

2. Sub-Chapter I does not cover:

(a) Goods of Chapters 56 to 62; or

(b) Worn clothing or other worn articles of heading 63.09.

3. Heading 63.09 applies only to the following goods:

(a) Articles of textile materials:

(i) Clothing and clothing accessories, and parts thereof;

. . .

24. The relevant *Explanatory Notes* to Chapter 63 provide as follows:

This Chapter includes:

(1) Under headings 63.01 to 63.07 (sub-Chapter I) made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are **not** more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature.

. . .

In particular, this sub-Chapter [sub-Chapter I] **does not include**:

. . .

(e) Articles of apparel and clothing accessories of **Chapter 61** or **62**.

. . .

(3) Under heading 63.09 or 63.10 (sub-Chapter III) worn clothing and other worn articles as defined in Chapter Note 3 . . . .

25. The relevant *Explanatory Notes* to heading No. 63.07 provide as follows:

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

It includes, in particular:

. . .

(23) Textile face-masks of a kind worn by surgeons during operations.

26. The relevant *Explanatory Notes* to heading No. 63.09 provide as follows:

In order to be classified in this heading the articles, of which a **limitative** list is given in paragraphs (1) and (2) of this Explanatory Note, must comply with both of the following requirements. If they do not meet these requirements they are classified in their appropriate headings.

(A) **They must show signs of appreciable wear**, whether or not they require cleaning or repair before use.

New articles with faults in weaving, dyeing, etc., and shop-soiled articles are **excluded** from this heading.

(B) **They must be presented in bulk (e.g., in railway goods wagons) or in bales, sacks or similar bulk packings**, or in bundles tied together without external wrapping, or packed roughly in crates.

. . .

Subject to compliance with the above requirements, this heading covers the goods in the following **limitative** list only:

(1) The following articles of textile materials of Section XI: clothing and clothing accessories (e.g., garments, shawls, scarves, stockings and socks, gloves and collars) . . . .

27. The relevant provisions of the nomenclature of the *Customs Tariff*, which the CBSA considers applicable to the goods in issue, provide as follows:

Section XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 61

ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, KNITTED OR CROCHETED

. . .

61.04 **Women's or girls' suits, ensembles, jackets and blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted.**

. . .

-Dresses:

. . .

6104.43.00 **- -Of synthetic fibres**

. . .

61.14 **Other garments, knitted or crocheted**.

. . .

6114.30.00 **-Of man-made fibres**

. . .

61.15 Panty hose, tights, stockings, socks and other hosiery, including stockings for varicose veins and footwear without applied soles, knitted or crocheted.

. . .

-Other:

6115.93.00 --Of synthetic fibres

28. The relevant notes to Section XI provide as follows:

1. This Section does not cover:

. . .

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

. . .

29. The relevant notes to Chapter 61 provide as follows:

1. This Chapter applies only to made up knitted or crocheted articles.

. . .

3. For the purpose of headings 61.03 and 61.04:

. . .

(b) The term "ensemble" means a set of garments (other than suits and articles of heading 61.07, 61.08 or 61.09), composed of several pieces made up in identical fabric, put up for retail sale, and comprising:

- one garment designed to cover the upper part of the body, with the exception of pullovers which may form a second upper garment in the sole context of twin sets, and of waistcoats which may also form a second upper garment, and
- one or two different garments, designed to cover the lower part of the body and consisting of trousers, bib and brace overalls, breeches, shorts (other than swimwear), a skirt or a divided skirt.

All of the components of an ensemble must be of the same fabric construction, style, colour and composition; they also must be of corresponding or compatible size. The term "ensemble" does not apply to track suits or ski suits, of heading 61.12.

30. The relevant *Explanatory Notes* to Section XI provide as follows:

In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.), semi-manufactured products (such as yarns and woven fabrics) and the made up articles made from those products. However, it **excludes** a certain number of materials and products such as those mentioned in Note 1 to Section XI, the Notes to certain Chapters or in the following Explanatory Notes on headings in the Section.

31. The relevant *Explanatory Notes* to Chapter 61 provide as follows:

This Chapter covers made up knitted or crocheted men's boys', women's or girls' articles of apparel and made up knitted or crocheted accessories for articles of apparel. It also includes made up knitted or crocheted parts of apparel or clothing accessories. However, it **does not include** brassières, girdles, corsets, braces, suspenders, garters or similar articles or parts thereof, knitted or crocheted (**heading 62.12**).

32. The relevant *Explanatory Notes* to heading No. 61.04 provide as follows:

The provisions of the Explanatory Note to heading 61.03 [covers only men's or boy's knitted or crocheted suits and ensembles, jackets, blazers, trousers, breeches and shorts (other than swimwear) and bib and brace type overalls] apply *mutatis mutandis* to the articles of this heading.

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

This heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter.

34. The relevant *Explanatory Notes* to heading No. 61.15 provide as follows:

This heading covers the following knitted or crocheted goods, without distinction between those for women or girls and those for men or boys:

. . .

35. The relevant provisions of the nomenclature of the *Customs Tariff*, which the CBSA considers applicable to the goods in issue, provide as follows:

Chapter 62

ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, NOT KNITTED OR CROCHETED

. . .

62.04 **Women's or girls' suits, ensembles, jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear).**

. . .

-Dresses:

. . .

6204.43.00 **- -Of synthetic fibres**

. . .

62.11 **Track suits, ski suits and swimwear; other garments.**

. . .

-Other garments, men's or boys'

. . .

--Of man-made fibres

. . .

6211.33.90 - - -Other

36. The relevant notes to Chapter 62 provide as follows:

1. This Chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 62.12).

37. The relevant *Explanatory Notes* to Chapter 62 provide as follows:

This Chapter covers men's, women's or children's articles of apparel, clothing accessories and parts of apparel or of clothing accessories, made up of the fabrics (excluding wadding but including felt or nonwovens) of Chapters 50 to 56, 58 and 59. With the **exception** of the articles of heading 62.12, articles of apparel, clothing accessories and parts made of knitted or crocheted material are **excluded** from this Chapter.

38. The relevant *Explanatory Notes* to heading No. 62.04 provide as follows:

The provisions of the Explanatory Note to heading 61.04 apply, *mutatis mutandis*, to the articles of this heading.

39. The relevant *Explanatory Notes* to heading No. 62.11 provide as follows:

The provisions of the Explanatory Note to heading 61.12 concerning track suits, ski suits and swimwear and of the Explanatory Note to heading 61.14 concerning other garments apply, *mutatis mutandis*, to the articles of this heading. However, the track suits of this heading may be lined.

Positions of Parties

Loblaws

40. Loblaws submitted that the goods in issue should be classified in heading No. 95.05 as festive articles on the basis of Rule 1 of the *General Rules*. It argued that the goods in issue are flimsy, non-durable textile costumes sold only for Halloween and worn for festive purposes or as disguises.[22]

41. Loblaws contended that note 1(e) to Chapter 95 sets out the following three conditions that must be met in order for goods to be excluded from classification in Chapter 95: the goods must be (1) fancy dress; (2) composed at least in part of textiles; and (3) apparel or clothing accessories of Chapter 61 or 62.[23] Loblaws argued that the third condition that requires that the goods in issue not be goods of Chapter 61 or 62 renders note 1(e) to Chapter 95 inapplicable in this case.

42. In Loblaws's view, the Tribunal's decision in *Thinkway Trading Corporation v. Deputy M.N.R.*,[24] in which the Tribunal determined that the goods in that appeal, which Loblaws contended were similar to the goods in issue, were fancy dress of textile materials, did not apply to the goods in issue. Loblaws submitted that, in *Thinkway Trading*, the Tribunal applied only two of the three conditions found in note 1(e) to Chapter 95, namely, that the goods in that appeal (1) must be fancy dress and (2) must be of textile material, and that it failed to take into account whether the goods were apparel or clothing accessories "of Chapter 61 or 62". Loblaws further argued that the Tribunal erred in its interpretation that the list of articles of fancy dress covered by heading No. 95.05 was limited to face disguises.[25]

43. Loblaws referred to the Federal Court of Appeal's decision in *Shaklee Canada Inc. v. The Queen*[26] to support its position that the language of Chapters 61 and 62, such as "apparel or clothing", should be given its common and ordinary meaning as perceived by the consumer.[27] It argued that the goods in issue are not worn for the same purposes as clothing, for example, adornment, protection, modesty, status or comfort, nor are they designed or intended for repeated washing and wearing.[28] Loblaws distinguished the goods in issue from Exhibit A-06, the knight costume from Malibar Costumier, and argued that the knight costume is fancy dress of textiles of Chapter 61 or 62 because it is clothing designed for repeated use over a long period of time.[29] Loblaws further contended that the goods in issue are not intended to protect the body, as clothing generally does, as they are worn over regular clothing or a coat, as confirmed by the testimony of Loblaws's witness.[30]

44. Loblaws relied on the Supreme Court of Canada's decision in *Canada Trustco Mortgage Co. v. Canada*[31] to support its position that the text and context of the *Customs Tariff* are relevant for the purposes of determining the types and characteristics of clothing and wearing apparel that are classified in Chapter 61

22. Tribunal Exhibit AP-2010-022-04A at para. 2; *Transcript of Public Hearing*, 5 May 2011, at 51, 68.
23. Note 1(e) to Chapter 95 provides as follows: "This Chapter does not cover: . . . (e) Sports clothing or fancy dress, of textiles, of Chapter 61 or 62".
24. (19 March 1996), AP-95-080 (CITT) [*Thinkway Trading*].
25. *Transcript of Public Hearing*, 5 May 2011, at 67, 68.
26. [1985] 1 F.C. 593.
27. *Transcript of Public Hearing*, 5 May 2011, at 50, 53, 90-91.
28. Tribunal Exhibit AP-2010-022-04A at paras. 22, 26; *Transcript of Public Hearing*, 5 May 2011, at 51.
29. *Transcript of Public Hearing*, 5 May 2011, at 87-88.
30. *Ibid.* at 8, 41, 51.
31. [2005] S.C.R. 601.

or 62.[32] Loblaws also referred to the Tribunal's decision in *Trudell Medical Marketing Limited v. Deputy M.N.R.*[33] and argued that Chapters 61 and 62 are reserved for traditional clothing, whereas other clothing, such as disposable clothing (surgeons' masks and gowns) worn once or twice and discarded, worn clothing and rags, that do not exhibit the characteristics attributable to clothing, are not classified in Chapter 61 or 62 but in heading Nos. 63.07, 63.09 and 63.10 respectively.[34]

45. Loblaws submitted that a decision of the United States Court of Appeals, Federal Circuit, in *Rubie's Costume Company v. United States*,[35] dealt with goods similar to the goods in issue and would be instructive in the present appeal. It submitted that the majority of that U.S. court determined that the goods in that appeal, although they were fancy dress of textiles, were generally not recognized as normal articles of wearing apparel. They were costumes worn for Halloween, were of a flimsy material and construction, and lacked durability. The U.S. court determined that the goods were excluded from the headings of Chapter 61 and 62 and classified them in heading No. 95.05 as festive articles.[36]

46. The dissenting judge's opinion in *Rubie's*, according to Loblaws, was based on the fact that the provisions of the *Harmonized Tariff Schedule of the United Sates* (*HTSUS*) do not distinguish disposable clothing from clothing generally, whereas the provisions of the *Customs Tariff* make such a distinction. Loblaws submitted that, had the provisions of the *HTSUS* been the same as those of the *Customs Tariff*, the dissenting judge would have sided with the majority rather than offer a dissenting opinion.[37]

47. The relevance of *Rubie's* to the Tribunal, according to Loblaws, is similar to the relevance of the Federal Court of Appeal's decisions in *Suzuki* and *Arctic Cat Sales Inc. v. Canada (Canada Border Services Agency)*,[38] in that it is the decision of a high court and that its decision advances the predictability of the law and consistency in application of the Harmonized System.[39]

48. Loblaws also referred to an exclusionary paragraph in the *Explanatory Notes* to heading No. 95.05, which provides as follows: "The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen." Loblaws argued that the goods in issue, being purely festive in nature with no utilitarian function, are not excluded from heading No. 95.05.[40]

49. Referring to the minutes of the Harmonized System Committee of the WCO about the discussion concerning a change in the *Explanatory Notes* to heading No. 95.05 to exclude "utilitarian" articles with a festive design from classification in heading No. 95.05, Loblaws argued that heading No. 95.05 covers articles designed for festive occasions and not for regular use.[41] Furthermore, it argued that the heading covered articles that have a utilitarian function, such as tableware, kitchenware, toilet articles, carpets and other textile floor coverings, and apparel;[42] articles with no utilitarian function are not covered and therefore not excluded from heading No. 95.05.

32. *Transcript of Public Hearing*, 5 may 2011, at 53, 54.
33. (24 July 1997), AP-96-016 (CITT).
34. Tribunal Exhibit AP-2010-022-04A at paras. 28-32, 38; *Transcript of Public Hearing*, 5 May 2011, at 54-55.
35. [2003] 337 F.3d 1350 [*Rubie's*].
36. Tribunal Exhibit AP-2010-022-04A at para. 55; *Transcript of Public Hearing*, 5 May 2011, at 61-62.
37. *Transcript of Public Hearing*, 5 May 2011, at 62-65.
38. 2007 FCA 277 (CanLII).
39. Tribunal Exhibit AP-2010-022-04A at para. 56; *Transcript of Public Hearing*, 5 May 2011, at 65-66.
40. Tribunal Exhibit AP-2010-022-04A at paras. 61, 62; *Transcript of Public Hearing*, 5 May 2011, at 59.
41. *Transcript of Public Hearing*, 5 May 2011, at 57-59.
42. *Ibid.* at 89.

50. Loblaws concluded that note 1(e) to Chapter 95 did not exclude the goods in issue from heading No. 95.05 and argued that heading No. 95.05 covered the goods in issue. It referred to the *Explanatory Notes* to heading No. 95.05, which provide as follows: "This heading covers: (A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material." It also referred to the French version of the same *Explanatory Notes*, which provide as follows: "*La présente position couvre : A) Les **articles pour fêtes, carnaval ou autres divertissements** qui, compte tenu de leur utilisation, sont généralement de fabrication simple et peu robuste*". It argued that the goods in issue are goods of heading No. 95.05 because they are constructed in a flimsy manner (*fabrication simple et peu robuste* [simple construction and not durable]), designed for limited use, worn once or twice for Halloween, and then replaced with a new style for the next Halloween.[43]

CBSA

51. The CBSA argued that the goods in issue are excluded from classification in Chapter 95, as they are fancy dress composed of either knitted or woven, synthetic, polyester, nylon or nylon/polyester textile material, and that they are "of Chapter 61 or 62" because they are clothing that is worn on the body whether over or under any other clothing, and that clothing is classified in Chapter 61 or 62.[44] In further support of this argument, the CBSA referred to the *Canadian Oxford Dictionary* which defines "fancy dress" as a "costume".[45]

52. The CBSA disagreed with Loblaws's interpretation of *Thinkway Trading* and argued that the Tribunal correctly concluded that the goods in issue in that appeal were properly classified in Chapter 61 or 62 as "fancy dress of textile materials, of Chapter 61 or 62" and were therefore excluded from classification in heading No. 95.05.[46] The CBSA further submitted that the Tribunal did not err in *Thinkway Trading*, as suggested by Loblaws, because the issues of durability and frequency of wear were not raised.

53. The CBSA further argued that frequency of wear and durability are not factors in determining whether the goods in issue are festive articles.[47] Furthermore, according to the CBSA, the goods in issue may be worn for other purposes during the year besides for Halloween and, on the basis of the washing and care instructions on the clothing tags and packaging, they may be cleaned and worn many times.[48] The CBSA also argued that neither the types of fastenings nor the manner of construction distinguish the goods in issue from clothing of Chapter 61 or 62.[49]

54. The CBSA argued that Loblaws's criteria that a fancy dress is designed and intended for repeated wearing and fulfills the purposes of protection, adornment, modesty, status or comfort and, thus, is considered clothing to be classified in Chapter 61 or 62, is not found in the provisions of the *Customs Tariff* or the *Explanatory Notes*. Furthermore, it argued that there are no definitions of "clothing" or "wearing apparel" in the *Customs Tariff* or the *Explanatory Notes* to support Loblaws's position.[50]

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43. Tribunal Exhibit AP-2010-022-04A at para. 40; *Transcript of Public Hearing*, 5 May 2011, at 52, 57.
44. Tribunal Exhibit AP-2010-022-09 at paras. 3-7, 20-21, 26; *Transcript of Public Hearing*, 5 May 2011, at 70.
45. Tribunal Exhibit AP-2010-022-09 at para. 22; *Transcript of Public Hearing*, 5 May 2011, at 70.
46. *Transcript of Public Hearing*, 5 May 2011, at 71, 72.
47. *Ibid.* at 72, 73.
48. Tribunal Exhibit AP-2010-022-09 at para. 38; *Transcript of Public Hearing*, 5 May 2011, at 76.
49. *Transcript of Public Hearing*, 5 May 2011, at 78, 79.
50. Tribunal Exhibit AP-2010-022-09 at paras. 35, 36.

55. In response to Loblaws's arguments, the CBSA argued that *Rubie's* is not binding on the Tribunal. Furthermore, the CBSA argued that Loblaws's argument about the effect of the difference in the tariff classification of disposable clothing between the *Customs Tariff* and the *HTSUS* on a dissenting judge's decision was speculation.[51]

56. With respect to the goods in issue that contain a textile costume and plastic accessories, such as masks or other goods, the CBSA submitted that they are properly classified in Chapter 61 or 62 according to Rule 3 (b) of the *General Rules* as goods put up in sets for retail sale.[52] It noted that articles of fancy dress, such as face masks, wigs, false ears and noses, are classified in heading No. 95.05 but fancy dress of Chapter 61 or 62 is excluded, on the basis of the *Explanatory Notes* to heading No. 95.05.[53] The CBSA further referred to the Tribunal's decision in *Thinkway Trading* and argued that the articles in that appeal were all facial coverings.[54] According to the CBSA, the goods in issue that are sets are viewed as a whole as fancy dress, and their essential character is determined by the textile costume, with accessories viewed within the context of the costumes as a whole. Thus, it argued that the goods in issue that are sets are considered fancy dress and are properly classified in Chapter 61 or 62.[55]

57. Finally, the CBSA argued that the goods in issue, which contain plastic accessories, are not ensembles covered by note 3(b) to Chapter 61, which provides as follows:

> 3. For the purpose of headings 61.03 and 61.04:
>
> . . .
>
> (b) The term "ensemble" means a set of garments (other than suits and articles of heading 61.07, 61.08 or 61.09), composed of several pieces made up in identical fabric, put up for retail sale, and comprising:
>
> - one garment designed to cover the upper part of the body, with the exception of pullovers which may form a second upper garment in the sole context of twin sets, and of waistcoats which may also form a second upper garment, and
> - one or two different garments, designed to cover the lower part of the body and consisting of trousers, bib and brace overalls, breeches, shorts (other than swimwear), a skirt or a divided skirt.
>
> All of the components of an ensemble must be of the same fabric construction, style, colour and composition; they also must be of corresponding or compatible size. The term "ensemble" does not apply to track suits or ski suits, of heading 61.12.

It argued that ensembles consist of two pieces made of identical fabric, whereas the accessories of the goods in issue are made of plastic and, thus, do not have the same composition as the textile in the costume.[56]

Tariff Classification of the Goods in Issue

58. The issue in this appeal is whether the goods in issue are properly classified in heading No. 61.04, 61.14, 61.15, 62.04 or 62.11 as the apparel specified by the terms of each heading or should be classified in heading No. 95.05 as other festive articles.

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51. *Transcript of Public Hearing*, 5 May 2011, at 80.
52. Tribunal Exhibit AP-2010-022-09 at paras. 29, 30; *Transcript of Public Hearing*, 5 May 2011, at 80, 81.
53. *Transcript of Public Hearing*, 5 May 2011, at 84-85.
54. *Ibid.* at 86.
55. *Ibid.* at 86-87.
56. *Ibid.* at 81-84.

59. According to Rule 1 of the *General Rules*, the Tribunal must first determine whether the goods in issue are classified in a particular heading, taking into account the terms of the heading and any relevant notes to the section or chapter.

60. The Tribunal will first determine whether the goods in issue are festive articles of heading No. 95.05, as argued by Loblaws, and will then proceed to review each heading on the basis of its own merits.

Preliminary Consideration for Classification in the Context of an Exclusionary Note

61. Note 1(e) to Chapter 95 sets out the following three conditions that must be met in order for goods to be excluded from classification in Chapter 95: the goods must be (1) fancy dress; (2) composed at least in part of textiles; and (3) apparel or clothing accessories of Chapter 61 or 62.

62. In this case, it is uncontested that the goods in issue are costumes and fancy dress.[57] The Tribunal notes however that there is no definition of the term "fancy dress" in the *Customs Tariff* or the *Explanatory Notes*. In the absence of a definition of the term found in the provisions of the legislation, the Tribunal may rely on dictionary definitions for assistance and turns to the *Canadian Oxford Dictionary* which defines "fancy dress" as "costume".[58] The Tribunal is satisfied that the terms "fancy dress" and "costumes" are synonymous and, therefore, concludes that the goods in issue are fancy dress and meet the first condition of note 1(e) to Chapter 95.

63. The second condition that must be met in order for goods to be excluded from classification in Chapter 95 is that goods be composed "of textiles". Again, it is uncontested that the goods in issue are composed of textile materials.[59] The Tribunal accepts the parties' agreement in this regard and concludes that the goods in issue are composed of textiles. Consequently, the goods in issue meet the second condition of note 1(e) to Chapter 95.

64. The third and final condition refers to apparel "of Chapter 61 or 62." The *Explanatory Notes* to Chapters 61 and 62 indicate that the chapters cover men's, women's or children's articles of apparel;[60] however, there is no definition of "apparel" in the *Customs Tariff* or the *Explanatory Notes.* In the absence of a definition of this term in the provisions of the relevant legislation, the Tribunal will refer to other sources that may assist it in determining the meaning of this word in the context of the *Customs Tariff*, including the common and ordinary meaning as found in dictionary definitions and case law of Canada and the United States.

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57. Tribunal Exhibit AP-2010-022-04A at para. 2; Tribunal Exhibit AP-2010-022-09 at paras. 3, 22, 24; *Transcript of Public Hearing*, 5 May 2011, at 53.
58. Second ed., *s.v.* "fancy dress".
59. Tribunal Exhibit AP-2010-022-04A at para. 2; Tribunal Exhibit AP-2010-022-09 at para. 2.
60. The Tribunal notes that the *Explanatory Notes* to Chapters 61 and 62 indicate that the chapters also cover men's, women's or children's accessories for articles of apparel or clothing accessories respectively. As there was no dispute between the parties as to whether the goods in issue constituted apparel or clothing accessories, the Tribunal will not address this issue.

65. The *Canadian Oxford Dictionary* defines “apparel” as “clothing”,[61] “clothing” as “clothes collectively”[62] and “clothes” as “**1** garments worn to cover the body.”[63] The *Gage Canadian Dictionary* defines “wearing apparel” as “clothes”.[64] On the basis of these definitions, the Tribunal finds that the terms “apparel”, “wearing apparel” and “clothing” are synonymous.

66. The Tribunal remarks that the findings of the majority in *Rubie’s* are helpful when considering the issues arising in this case. In *Rubie’s*, the majority found that the context in the *HTSUS* in which the term “fancy dress” is to be used circumscribes, qualifies and limits the type of “fancy dress” to which Chapters 61 and 62 apply.[65] The Tribunal also notes that Loblaws’s submission regarding the opinion of the dissenting judge in *Rubie’s* is factually correct.[66]

67. The Tribunal acknowledges that the *Customs Tariff* distinguishes numerically between apparel that is classified in the headings of Chapters 61 and 62, and textile articles, such as disposable clothing (e.g. surgeon’s masks or incontinence articles) classified in heading No. 63.07 and worn clothing classified in heading No. 63.09. The Tribunal views this differentiation as reinforcing the idea that, had Parliament intended the terms of the headings of Chapters 61 and 62 to cover goods which have some elements of apparel, it would have stated so explicitly in the terms of a heading. Instead, the Tribunal notes that articles of fancy dress and disposable clothing are properly classified in the headings of chapters other than Chapters 61 and 62.

68. The *Explanatory Notes* to heading No. 95.05 cover “**[f]estive, carnival or other entertainment articles**, which in view of their intended use are generally made of *non-durable material*” [italics added for emphasis]. During the hearing and in argument, both parties focused on the factors of the durability of the textile composition (physical characteristics) of the goods in issue, as well as the use of the goods in issue (the reasons for wearing the goods in issue and their frequency of wear).[67] The parties disagree on the effect of the durability and the repeated wear of the goods in issue on their tariff classification.[68]

69. While the Tribunal agrees with the CBSA that the issues of durability or the repeated wear of the goods in issue were not raised in *Thinkway Trading* and that, therefore, the Tribunal’s decision in that case was not in error, the Tribunal finds that those issues are squarely before it in the present appeal and that the decision in *Thinkway Trading* is therefore distinguishable on this basis. The Tribunal also notes that it is not bound by its previous decisions. The Federal Court of Appeal has indicated that differing interpretations of a single provision by the Tribunal is not an independent ground of judicial review, provided the language of the statute can support each interpretation.[69]

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61. Second ed., *s.v.* “apparel”.
62. Second ed., *s.v.* “clothing”.
63. Second ed., *s.v.* “clothes”.
64. 1983, *s.v.* “wearing apparel”.
65. In *Rubie’s* at 1357, the United States Court of Appeals, Federal Circuit, stated as follows: “The words in Note 1(e) ‘of textiles, of chapter 61 or 62’ immediately following ‘fancy dress,’ establish the context in which the term ‘fancy dress’ is to be applied, and thereby circumscribe, qualify, and limit the type of ‘fancy dress’ that was intended by the drafters to be excluded from Chapter 95, HTSUS, to textile costumes falling within the purview ‘of chapter 61 or 62.’ Thus, based on the common meaning of ‘fancy dress’ and the ensuing language in Note 1(e), this court concludes that the exclusion to Chapter 95, HTSUS, encompasses textile costumes that are classifiable as ‘wearing apparel’ under Chapter 61 or 62.”
66. *Transcript of Public Hearing*, 5 May 2011, at 63-64.
67. Tribunal Exhibit AP-2010-022-04A at paras. 2, 22, 23, 27; Tribunal Exhibit AP-2010-022-09 at paras. 2, 35; *Transcript of Public Hearing*, 5 May 2011, at 51, 52, 76, 77.
68. *Transcript of Public Hearing*, 5 May 2011, at 53, 77.
69. *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210 (CanLII).

70. Nevertheless, the Tribunal finds that, while issues of durability and repeated wear are important, they are not determinative of the classification of the goods in issue. With proper care and maintenance, the goods in issue may be regarded as durable or capable of repetitive use. Indeed, while Ms. Scott testified that the goods in issue, when compared to rental costumes, would likely be worn only a few times because they either fall out of fashion or easily wear out, Ms. Scott also testified that it was possible for the goods in issue to be worn more frequently, for other occasions or for a subsequent Halloween.[70]

71. On the basis of the foregoing, the Tribunal finds that the goods in issue are not "of Chapter 61 or 62" and, thus, do not meet the third condition of note 1(e) to Chapter 95. As the goods in issue have not met all the conditions, the Tribunal concludes that the goods in issue are not excluded from classification in Chapter 95.

72. The Tribunal must now consider whether the goods in issue meet the terms of heading No. 95.05.

Are the Goods in Issue Classifiable in Heading No. 95.05?

73. Heading No. 95.05 covers "**[f]estive, carnival or other entertainment articles**". According to the terms of the heading, in order for the goods in issue to be classified in heading No. 95.05, the Tribunal must determine that the goods in issue are "festive" and "articles".

74. In this regard, the Tribunal observes that both parties agreed that the goods in issue are worn for Halloween[71] and that the use of the goods in issue for Halloween as disguises indicates their festive value, as reasoned in *Rubie's*.[72] Therefore, the Tribunal is satisfied that the goods in issue are festive.

75. With respect to whether the goods in issue are "articles", the Tribunal notes that the term "article" is not defined for the purposes of Chapter 95 or heading No. 95.05. It has previously accepted that this term generally means ". . . any finished or semi-finished product, which is not considered to be a material."[73] Moreover, the ordinary meaning of the word "article" is "**1** a particular or separate thing, esp. one of a set . . . ."[74] The evidence indicates that the goods in issue are finished products that are ultimately sold at the retail level. Therefore, the Tribunal is satisfied that the goods in issue are finished products, as opposed to a material, and are therefore "articles". The Tribunal is also satisfied that the ordinary meaning of the word "article" is sufficiently broad to encompass the goods in issue.

76. As previously stated, the Tribunal views the findings of the majority in *Rubie's* as helpful in the context of this appeal. The Tribunal considers that the terms of heading No. 95.05, "Festive . . . articles" are not limited to cover only the articles of fancy dress, such as masks, false ears and noses, wigs, false beards and moustaches and paper hats, listed in the *Explanatory Notes* to heading No. 95.05. The Tribunal considers nothing in the terms of heading No. 95.05 as limiting the heading to cover only accessory items.

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70. *Transcript of Public Hearing*, 5 May 2011, at 11, 15-16.
71. *Ibid.* at 51.
72. In *Rubie's* at 1358, the United States Court of Appeals, Federal Circuit, stated as follows: "Rather, the Halloween costumes for consumers have enormous 'make believe' or festive value during appropriate occasions such as Halloween . . . ."
73. *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT) at para. 25.
74. *Canadian Oxford Dictionary*, 2d ed., *s.v.* "article".

77. Furthermore, the Tribunal notes the use of the term "e.g." in the list of articles of fancy dress in the *Explanatory Notes* to heading No. 95.05. The Tribunal interprets the term "e.g." as introducing as non-exhaustive illustrative list. Therefore, as the Tribunal has already determined that the goods in issue are not fancy dress of textile materials of Chapter 61 or 62, the Tribunal finds that the *Explanatory Notes* to heading No. 95.05 are sufficiently broad to cover the goods in issue.

78. The Tribunal finds that the testimony of both witnesses and the comparison of the goods in issue with Exhibit A-06, the knight costume, supports the conclusion that the goods in issue are made of non-durable material.[75] The Tribunal also accepts the testimony from both witnesses about the respective value of the goods in issue.[76] The Tribunal views the value of the goods in issue is indicative of their quality and of their primary use for festive occasions, such as Halloween, and not for use as "everyday apparel".

79. Finally, the Tribunal recognizes that most people would likely distinguish Halloween costumes from regular clothing. The Tribunal finds that the goods in issue clearly have a festive value and finds that any elements similar to apparel are only of secondary importance.

80. On the basis of the foregoing reasons, the Tribunal finds that the goods in issue are properly classified in heading No. 95.05 as festive, carnival or other entertainment articles.

Are the Goods in Issue Classifiable in Heading No. 61.04, 61.14, 61.15, 62.04 or 62.11?

81. As the Tribunal has determined that the goods in issue should be classified in heading No. 95.05 and are, as such, articles of Chapter 95, the goods in issue are therefore excluded from classification in Section XI, by virtue of note 1(t) to that section. It is not necessary for the Tribunal to address the CBSA's arguments that the goods in issue meet the requirements of heading No. 61.04, 61.14, 61.15, 62.04 or 62.11.

Classification at the Subheading and Tariff Item Levels

82. According to the evidence, the goods in issue are primarily marketed, sold and worn for Halloween. As heading No. 95.05 has no specific subheading and tariff item pertaining to articles for Halloween, pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, it follows that the goods in issue should be classified under tariff item No. 9505.90.00 as other festive articles.

DECISION

83. Therefore, the appeal is allowed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

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75. *Transcript of Public Hearing*, 5 May 2011, at 8, 37.
76. *Ibid.* at 10, 35.