Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal No. AP-2009-045

Sher-Wood Hockey Inc.

v.

President of the Canada Border Services Agency

*Decision and reasons issued Thursday, February 10, 2011*

Canada

# TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on October 13, 2010, pursuant to 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 June 3, 2009, with respect to a request for further re-determination, pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**SHER-WOOD HOCKEY INC.** **Appellant**

**AND**

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

## DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | October 13, 2010 |
| Tribunal Member: | Diane Vincent, Presiding Member |
| Counsel for the Tribunal: | Georges Bujold |
| Research Director: | Audrey Chapman |
| Research Officer: | Jan Wojcik |
| Manager, Registrar Office: | Michel Parent |
| Registrar Officer: | Julie Lescom |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representative** |
|---|---|
| Sher-Wood Hockey Inc. | Michael Kaylor |
| **Respondent** | **Counsel/Representative** |
| President of the Canada Border Services Agency | Luc Vaillancourt |

**WITNESSES:**

| | |
|---|---|
| Richard Desjardins<br>Product Manager, Players' and Goalers' Protective Equipment<br>Sher-Wood Hockey Inc. | Bastien Jourde<br>Founder and Principal Designer<br>TACTIX Gear Workshop |

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

# STATEMENT OF REASONS

1. This is an appeal filed by Sher-Wood Hockey Inc. (Sher-Wood) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision 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 ice hockey gloves (the goods in issue) are properly classified under tariff item No. 6216.00.00 of the schedule to the *Customs Tariff*[2] as gloves of textile materials not knitted or crocheted, as determined by the CBSA, or should be classified under tariff item No. 3926.20.92 as articles of apparel (non-disposable gloves) of plastics, as claimed by Sher-Wood.

## PROCEDURAL HISTORY

3. On May 11, 2005, Sher-Wood imported the goods in issue under tariff item No. 6216.00.00.[3]

4. On August 19, 2005, Sher-Wood requested a refund of duty pursuant to paragraph 74(1)(*e*) of the *Act*, claiming that the goods in issue should be classified under tariff item No. 9506.99.90 as other articles or equipment for sports. On May 4, 2006, the CBSA issued a re-determination pursuant to paragraph 59(1)(*a*), stating that the goods in issue could not be classified in Chapter 95 as claimed by Sher-Wood and, therefore, denied the request for a refund of duty. The goods in issue remained classified under tariff item No. 6216.00.00.

5. On June 26, 2006, Sher-Wood requested a further re-determination pursuant to subsection 60(1) of the *Act*. While it agreed with the CBSA that the goods in issue could not be classified in Chapter 95, Sher-Wood then claimed that the goods in issue should be classified under tariff item No. 3926.20.92. On June 3, 2009, the CBSA issued its decision pursuant to subsection 60(4).[4] The CBSA held that the goods in issue were properly classified under tariff item No. 6216.00.00, thereby affirming its previous decision in this matter.

6. On August 10, 2009, Sher-Wood filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[5]

7. On October 13, 2010, the Tribunal held a public hearing in Ottawa, Ontario.

8. Sher-Wood called two witnesses. Mr. Richard Desjardins, a product manager and developer employed by Sher-Wood, was qualified by the Tribunal as an expert in the design and marketing of the goods in issue. Mr. Bastien Jourde, Principal Designer for TACTIX Gear Workshop, a firm specialized in the design of sport products, was qualified by the Tribunal as an expert in the area of research, development and design of hockey gloves. The CBSA did not call any witnesses.

---

1. R.S.C. 1985 (2d Supp.), c.1 [*Act*].
2. S.C. 1997, c. 36.
3. Tribunal Exhibit AP-2009-045-10. This exhibit includes the relevant requests and determinations that led to the decision which is being appealed.
4. Tribunal Exhibit AP-2009-045-01.
5. *Ibid.*

## GOODS IN ISSUE

9. The goods in issue are two models of ice hockey gloves, models HG 5030 and HG PMP-X. The gloves are designed to be worn by forwards and defensemen to protect the hands. The evidence indicates that both models are very similar. In fact, the parties agreed that both models are made of the materials described in a report prepared by the CBSA's Laboratory and Scientific Services Directorate concerning model HG 5030.[6]

10. According to this laboratory analysis, which was accepted by both parties, the goods in issue consist of the following two major components sewn together:

> 1. the component that covers the greater surface area [i.e. the outer surface material] consists of black sheets of cellular plastics (polyurethane) combined with textile fabrics woven from yarns of different colours (mixture yarns blended from black fibres, grey fibres and clear, colourless fibres). The fabric is not bleached, unbleached or uniformly dyed. The yarns are composed of 75% by weight of man-made (polyester) fibres and 25% by weight of cotton; and
> 2. the component that covers the lesser surface area [i.e. the inner surface material] consists of an off-white nonwoven consisting of man-made (nylon) fibres impregnated with plastics (polyurethane).[7]

11. The Tribunal notes that the first component covers the back of the hand, the wrist and part of the forearm, whereas the second component covers only the palm of the hand. Thus, the composition of the material on the back of the gloves is different from that of the material on the palm portion. Together, these components form the exterior of the goods in issue. According to the evidence, the goods in issue also contain high-density foam padding and hard plastic padding enclosed inside the outer surface material or back portion.[8]

12. Sher-Wood filed two samples of hockey gloves as physical exhibits with the Tribunal, one of which was disassembled.[9] These samples are not the goods in issue, since the goods in issue, which were imported by Sher-Wood more than five years ago, are no longer sold in Canada. Despite their best efforts, the parties could not retrieve used samples of the goods in issue. However, both parties agreed that the physical exhibits filed with the Tribunal are very similar to the goods in issue. At the hearing, Mr. Desjardins testified that the only significant difference between the glove in complete, finished condition that was filed as a physical exhibit and the goods in issue was the material used to form the "outside shell", that is, the outer surface material covering the greater surface area.[10]

---

6. Tribunal Exhibit AP-2009-045-08.
7. Tribunal Exhibits AP-2009-045-08, AP-2009-045-03A, AP-2009-045-06A.
8. Tribunal Exhibits AP-2009-045-06A, para. 7, AP-2009-045-24B, tab 9; *Transcript of Public Hearing*, 13 October 2010, at 14, 15.
9. Exhibit A-01 is a Sher-Wood hockey glove, model T100, in disassembled condition. Exhibit A-02 is a Sher-Wood hockey glove, model 9950, in complete, finished condition. A pair of boxing gloves was also filed as a physical exhibit by the CBSA (Exhibit B-01).
10. *Transcript of Public Hearing*, 13 October 2010, at 8-9, 34-35, 52. According to Mr. Desjardins's testimony, the material used to cover the palm of the hand (i.e. the inner surface material) on Exhibit A-02 is the same as the inner surface material of the goods in issue, which material is described in the CBSA's laboratory analysis.

## ANALYSIS

### Statutory Framework

13. In 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 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.[11] 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.[12] 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.

15. 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[13] and the Canadian Rules[14] set out in the schedule."

16. 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.[15]

17. Rules 1 and 2 (b) of the *General Rules*, which are of particular relevance in this appeal, provide as follows:

> 1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; 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.
>
> 2. ...
>
> (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

---

11. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
12. The Tribunal notes that section 13 of the *Official Languages Act* 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* in interpreting the tariff nomenclature.
13. S.C. 1997, c. 36, schedule [*General Rules*].
14. S.C. 1997, c. 36, schedule.
15. 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).

18. In turn, Rule 3 (b) of the *General Rules*, which is relied upon by the parties in this appeal, provides as follows:

> 3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> . . .
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

19. 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[16] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[17] 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, as they serve as an interpretative guide to tariff classification in Canada.[18]

20. Thus, the Tribunal must first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings, any relevant section or chapter notes in the *Customs Tariff*, having regard to any relevant *Explanatory Notes* or *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 tariff heading the goods in issue shall be classified.

21. 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 or tariff item, applying Rule 6 of the *General Rules* in the case of the former or Rule 1 of the *Canadian Rules* in the case of the latter.

22. The Tribunal notes that section 13 of the *Official Languages Act* 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* in interpreting the tariff nomenclature.[19]

**Tariff Classification Issues**

23. It is common ground between the parties that the goods in issue are gloves specifically designed and used for the sport of ice hockey. The parties also agree that the goods in issue cannot be classified in Chapter 95, which generally covers sports requisites, including sports or athletic equipment, because note 1(u) to Chapter 95 states the following:

> 1. This Chapter does *not* cover:
>
> . . .
>
> (u) Racket strings, tents or other camping goods, *or gloves*, mittens and mitts (*classified according to their constituent material*); or
>
> . . .
>
> [Emphasis added]

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

24. The Tribunal accepts the parties' submissions on this issue and finds that note 1(u) to Chapter 95 applies to the goods in issue. Since they are excluded from Chapter 95 by virtue of this relevant chapter note, it follows that the goods is issue must be classified elsewhere, according to their constituent material.

25. The nomenclature of the *Customs Tariff*, which Sher-Wood claims should apply to the goods in issue, reads as follows:

**Section VII**

**PLASTICS AND ARTICLES THEREOF;**
**RUBBER AND ARTICLES THEREOF**

. . .

**Chapter 39**

**PLASTICS AND ARTICLES THEREOF**

. . .

| | |
|---|---|
| **39.26** | **Other articles of plastics and articles of other materials of headings 39.01 to 39.14.** |
| . . . | |
| **3926.20** | **-Articles of apparel and clothing accessories (including gloves, mittens and mitts)** |
| . . . | |
| 3926.20.92 | - - - -Mittens;<br>Non-disposable gloves |

26. The nomenclature of the *Customs Tariff*, which the CBSA considers applicable to the goods in issue, reads as follows:

**Section XI**

**TEXTILES AND TEXTILE ARTICLES**

**Chapter 62**

**ARTICLES OF APPAREL AND CLOTHING ACCESSORIES,**
**NOT KNITTED OR CROCHETED**

. . .

| | |
|---|---|
| **6216.00.00** | **Gloves, mittens and mitts.** |

27. Consequently, the dispute between the parties arises at the heading level, and the Tribunal's first task is to determine which heading covers the goods in issue, bearing in mind that they are composed of more than one constituent material.[20]

20. As will be discussed below, in the case of gloves composed of more than one constituent material, the relevant section and chapter notes provide assistance in order to identify which heading properly describes the goods in issue and determine their appropriate classification.

**Preliminary Considerations for Classification in the Context of Opposing Exclusionary Section and Chapter Notes**

28. Sher-Wood submitted that that the goods in issue should be classified in heading No. 39.26 in accordance with the principles of Rule 3 of the *General Rules*, more specifically Rule 3 (b), which provides that composite goods are to be classified as if they consisted of the material or component which gives them their essential character. According to Sher-Wood, the plastic components enclosed in the goods in issue give them their essential character, which is to protect the hands of ice hockey players. Sher-Wood argued that the goods in issue are clearly designed to constitute protective equipment and that, without their plastic components, they could not be used for their intended purpose. In its evidence and argument, Sher-Wood underscored that the single and most important purpose in designing and wearing the goods in issue is protection,[21] that it was the plastic and foam components, i.e. the padding materials enclosed in the goods in issue, that provided their protective function and, thus, gave them their essential character. It therefore submitted that the goods in issue should be classified as articles of plastics, in accordance with Rule 3 (b).

29. The CBSA also submitted that the goods in issue should be classified in accordance with the principles of Rule 3 (b) of the *General Rules*. However, it argued that it is the nature and composition of the material that covers the greater surface area of the goods in issue which gives them their essential character. According to the CBSA, even though they incorporate a substantial amount of padding materials, the goods in issue must therefore be classified based on the nature and composition of their outer surface material. In the CBSA's view, this material is considered a textile article of Section XI. In other words, the CBSA submitted that it is the outer surface material of the goods in issue that is the relevant constituent material for tariff classification purposes and that, since this component is classifiable as an article of textile fabrics (even if, as noted above, it combines plastics and textile fabrics), the goods in issue are properly classified in heading No. 62.16 as gloves made of textile fabrics[22], in accordance with Rule 3 (b).

30. The Tribunal notes that, as a matter of law, classification can only be effected through the application of Rule 3 (b) of the *General Rules* when goods are *prima facie* classifiable in two or more headings. For this reason, the parties' common reliance on Rule 3 (b) suggests that they both consider that the goods in issue are *prima facie* classifiable in the two competing headings and that the goods cannot be properly classified, at the heading level, through the application of Rules 1 and 2. Otherwise, given the cascading nature of the *General Rules*, it would not have been necessary for them to invoke Rule 3 in order to determine in which tariff heading the goods in issue should be classified.

31. However, at the hearing, the Tribunal asked the parties to explain the legal basis for their reliance on Rule 3 (b) of the *General Rules* and to comment on the legal implications of their positions. Most notably, the Tribunal asked the parties to confirm whether their common reliance on Rule 3 (b) meant that, in their respective view, the goods in issue were *prima facie* classifiable in the two competing headings. In responding to the Tribunal's questions, Sher-Wood clarified that its primary position is that the goods are not *prima facie* classifiable in heading No. 62.16 because the plastic components enclosed in the goods in issue constitute more than mere trimmings, such that the goods in issue could no longer be considered articles of textile fabrics. Although this argument was not raised in its brief, Sher-Wood submitted that the goods in issue should be classified in heading No. 39.26 pursuant to Rule 1. Sher-Wood further submitted

21. *Transcript of Public Hearing*, 13 October 2010, at 77.
22. More specifically, the CBSA submitted that the outer surface material of the goods in issue consists of a textile fabric coated, covered or laminated with plastics, which is classifiable in heading No. 59.03. Since heading No. 62.16 covers gloves made of textile fabrics of Chapter 59 (which includes fabrics of heading No. 59.03), the CBSA therefore submitted that the goods is issue must be classified in heading No. 62.16.

that its arguments concerning the application of Rule 3 (b) were only made in the alternative, should the Tribunal disagree with its primary argument that the goods in issue should be classified in heading No. 39.26 pursuant to Rule 1 and find that the goods in issue are *prima facie* classifiable in both competing headings. In contrast, the CBSA did not make additional submissions on this issue at the hearing and maintains that Rule 3 (b) is applicable in this appeal. This appears to indicate that, in the CBSA's view, the goods in issue are *prima facie* classifiable in both competing headings.

32. In this instance, the Tribunal considers that there is no legal basis to consider the parties' arguments concerning the application of Rule 3 (b) of the *General Rules* unless it finds that the goods in issue are *prima facie* classifiable in both heading Nos. 39.26 and 62.16. In order to determine whether the goods in issue are *prima facie* classifiable in heading No. 39.26, heading No. 62.16 or, as the case may be, in both headings, the Tribunal must first proceed to examine, on their own merits, the terms of each heading and the relative section or chapter notes in accordance with Rule 1, while also having regard to the relevant *Explanatory Notes*.[23]

33. The notes to Section XI (which includes Chapter 62 and heading No. 62.16) and to Chapter 39 (which includes heading No. 39.26) provide legally binding directions in order to determine the scope of coverage of the relevant headings. First, note 1(h) to Section XI indicates that Section XI (and, thus, Chapter 62 and heading No. 62.16) does not cover "[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39". Second, note 2(m) to Chapter 39, in force at the time of the importation of the goods in issue, stipulates that Chapter 39 (and, thus, 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 appears that Section XI expressly excludes goods of Chapter 39 and vice versa.

34. Considering the above legal notes, a question that arises is whether it is legally possible for the Tribunal to find that the goods in issue are *prima facie* classifiable in *both* heading Nos. 39.26 and 62.16. Indeed, by virtue of these notes, goods meeting the terms of heading No. 39.26, which is part of Chapter 39, appear to be expressly excluded from classification in heading No. 62.16, which is part of Section XI, and vice versa. Put another way, heading Nos. 39.26 and 62.16 are mutually exclusive. Does this situation mean that the goods in issue cannot, *prima facie*, fall within the scope of *both* headings?

35. The Tribunal considered a similar question in *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency*.[24] In that case, the Tribunal determined that the same legal notes made it impossible for goods to be *prima facie* classifiable in both heading No. 39.26 and a heading of Chapter 62.[25] In other words, the Tribunal indicated that, to the extent that an article of apparel or clothing accessory is made of a material combining plastics and textile which is classifiable in heading No. 39.26, such an article cannot also be *prima facie* covered by Chapter 62 as an article of textile fabric. Conversely, the Tribunal's findings in *Helly Hansen* mean that, to the extent that goods meet the terms of a heading of Chapter 62, which is part of Section XI, they cannot also be *prima facie* classifiable in a heading of Chapter 39 and are, therefore, necessarily excluded from classification in heading No. 39.26.

36. The Tribunal further notes that in *Dynamic Furniture Corp. v. President of the Canada Border Services Agency*,[26] it also found that the occurrence of similar opposing exclusionary legal notes meant that the goods in issue in that case were not *prima facie* classifiable in the two competing headings. The Tribunal

23. There are no relevant Classification Opinions concerning ice hockey gloves.
24. (2 June 2008), AP-2006-054 (CITT) at 5 [*Helly Hansen*].
25. The heading of Chapter 62 at issue in *Helly Hansen* was heading No. 62.10.
26. (31 March 2009), AP-2005-043 (CITT) at 8 [*Dynamic Furniture*].

recently made a similar finding in *Rutherford Controls International Corp. v. President of the Canada Border Services Agency*.[27] In that case, the Tribunal determined that the two competing headings, namely, heading Nos. 83.01 and 85.05, were mutually exclusive by virtue of relevant section notes and that, therefore, the goods in issue were not *prima facie* classifiable in both headings. However, in another case, namely, *Calego International Inc. v. Deputy M.N.R.*,[28] the fact that the two competing headings were mutually exclusive by virtue of relevant chapter notes did not prevent the Tribunal from finding that the goods in issue in that case were *prima facie* classifiable in both headings and, hence, from applying Rule 3 of the *General Rules*. However, in that case, the Tribunal remained silent on the relevant wording of the rules and did not expressly discuss the relevance of the opposing exclusionary notes in the classification exercise.

37. The Tribunal finds that the interpretation developed in *Helly Hansen*, *Dynamic Furniture* and *Rutherford Controls* is persuasive. In the Tribunal's opinion, it is logical to conclude that goods cannot be *prima facie* classifiable in two headings that are mutually exclusive by virtue of relevant legal notes.

38. The French version of the *General Rules*, which provides that recourse may be had to Rule 3 "*[l]orsque des marchandises paraissent devoir être classées sous deux ou plusieurs positions . . .*" [emphasis added] ("[w]hen . . . goods are, *prima facie*, classifiable under two or more headings . . ."), supports this conclusion. The Tribunal fails to see how goods could "appear classifiable" or "seem classifiable" ("*paraissent devoir être classées*") in two competing headings when, by virtue of relevant legal notes, goods meeting the terms of one such heading are expressly excluded from classification in the other heading, and vice versa.

39. In this appeal, the Tribunal therefore considers that the terms of the above-noted relevant section and chapter notes make it clear that the goods in issue may be classified in only one of the two headings proposed by the parties. It follows that the goods in issue cannot be *prima facie* classifiable both as articles of plastics of heading No. 39.26 and as gloves made of textile fabrics of heading No. 62.16. By necessary implication, the Tribunal will not need to have regard to Rule 3 of the *General Rules*, which only applies when goods are *prima facie* classifiable in two or more headings, or address the parties' submissions concerning the application of Rule 3 (b), in order to dispose of this appeal.

40. Accordingly, the Tribunal will determine, on the basis of the evidence before it, whether the goods in issue meet the terms of heading No. 39.26 *or* those of heading No. 62.16. The Tribunal will first consider whether the goods in issue are classifiable in heading No. 39.26.

**Are the Goods in Issue Other Articles of Plastics of Heading No. 39.26?**

41. While it stated at the hearing that the goods in issue should be classified in heading No. 39.26 pursuant to Rule 1 of the *General Rules*, Sher-Wood did not make submissions aimed at demonstrating that the goods in issue met the terms of heading No. 39.26. Rather, most of Sher-Wood's arguments and evidence concerned the application of the essential character test under Rule 3 (b). Similarly, the CBSA did not specifically address the issue of whether the goods in issue are *prima facie* classifiable in heading No. 39.26 in its submissions.

42. The Tribunal notes that the *Explanatory Notes* to heading No. 39.26 provide as follows:

> This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

27. (28 January 2011), AP-2009-076 (CITT) [*Rutherford Controls*].
28. (29 May 2000), AP-98-102 (CITT) at 8.

> They include:
>
> (1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.

43. The parties agree that the goods in issue are gloves.[29] Gloves constitute "articles of apparel" or "clothing accessories", under the nomenclature of the *Customs Tariff*. This is made clear by the terms of subheading No. 3926.20, which indicate that "[a]rticles of apparel and clothing accessories" include "gloves, mittens and mitts." Moreover, Chapter 62, which encompasses heading No. 62.16, a heading which also covers certain "[g]loves, mittens and mitts", is entitled "Articles of Apparel and Clothing Accessories, Not Knitted or Crocheted".

44. In accordance with the relevant *Explanatory Notes*, since they are "articles of apparel" or "clothing accessories", the goods in issue must be ". . . made by sewing or sealing sheets of plastics . . ." in order to fall within the scope of heading No. 39.26. In this regard, it bears repeating that, according to the CBSA's laboratory analysis, the goods in issue consist of two major components *sewn* together, and these components are made of materials combining plastics and textiles. According to this uncontroverted evidence, the outer surface material is a combination of cellular plastics and woven textile fabrics, whereas the inner surface material is a nonwoven textile product impregnated with plastics. Therefore, for the purposes of determining whether the goods in issue may be classified in heading No. 39.26 as "articles of plastics", the issue that must be resolved is whether these components are "sheets of plastics" sewn together or, rather, textile products sewn together, taking into account the relevant section or chapter notes.

45. Subject to certain conditions that are not relevant in this appeal, the expression "plastics" is defined in note 1 to Chapter 39 as meaning those materials of heading Nos. 39.01 to 39.14. Thus, in order to meet the terms of heading No. 39.26, the goods in issue must be made by sewing sheets of one of those materials. However, note 1 to Chapter 39 provides the following important exception to the definition of the expression "plastics": "[t]he expression ["plastics"], however, does not apply to materials regarded as textile materials of Section XI."

46. Accordingly, the Tribunal must determine whether the two specific combinations of plastics and textiles used to form the goods in issue are regarded as textile materials of Section XI. If these two components that are sewn together to form the exterior of the goods in issue are considered textile materials, then they cannot constitute "sheets of plastics", which would preclude the Tribunal from finding that the goods in issue are made by sewing "sheets of plastics".

47. The *Explanatory Notes* to Chapter 39 provide additional guidance in order to determine whether the materials combining plastics and textiles used to make the goods in issue are regarded as textile materials of Section XI or as articles of plastics covered by Chapter 39.[30] They provide as follows:

> **Plastics and textile combinations**
>
> Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by Note 1 (h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59. The following products are also covered by this Chapter:
>
> . . .

29. Tribunal Exhibit No. AP-2009-045-03A, para. 2; Tribunal Exhibit AP-2009-045-06A, para. 2; *Transcript of Public Hearing*, 13 October 2010, at 8.
30. The Tribunal notes that "sheets of plastics" are evidently a subset of the broader category of "articles of plastics". Thus, to the extent that the specific combinations of plastics and textile used to form the goods in issue do not constitute "articles of plastics" classifiable in Chapter 39, they are necessarily not "sheets of plastics" within the meaning of the *Explanatory Notes* to heading No. 39.26.

> (b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour;
>
> (c) Textile fabrics, impregnated, coated, covered or laminated with plastics, which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C;
>
> (d) Plates, sheets and strip of cellular plastics combined with textile fabrics (as defined in Note 1 to Chapter 59), felt or nonwovens, 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.
>
> Plates, sheets and strip of cellular plastics combined with textile fabric on both faces, whatever the nature of the fabric, are **excluded** from this Chapter (generally **heading 56.02**, **56.03** or **59.03**).

48. Thus, only certain types of plastics and textile combinations may be classified in heading No. 39.26, which is part of Chapter 39. The *Explanatory Notes* to Chapter 39 clearly direct the Tribunal to consider other section and chapter notes in order to determine the appropriate classification of plastics and textile combinations. The Tribunal has already addressed note 1(h) to Section XI, which provides that Section XI (textiles and textile articles) does not cover "[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39". This note confirms that materials classifiable in Chapter 39 as fabrics, felt or nonwovens, combined with plastics, are *not* regarded as textile materials of Section XI.

49. With respect to the two other above-referenced governing legal notes, namely, note 3 to Chapter 56 and note 2 to Chapter 59, they mirror the language of the *Explanatory Notes* to Chapter 39 and clarify that, depending on their specific characteristics, plastics and textile combinations, including fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, are to be classified in Chapter 39, 56 or 59. These chapter notes give directions to determine if any given plastics and textile combinations are classifiable as articles of textile of Chapter 56 or 59 or, as the case may be, articles of plastics of Chapter 39.

50. Note 3 to Chapter 56 states the following:

> 3. Headings 56.02 and 56.03 cover respectively felt and nonwovens, impregnated, coated, covered or laminated with plastics or rubber whatever the nature of these materials (compact or cellular).
>
> Heading 56.03 also includes nonwovens in which plastics or rubber forms the bonding substance.
>
> Headings 56.02 and 56.03 do not, however, cover:
>
> . . .
>
> (b) Nonwovens, either completely embedded in plastics or rubber, or entirely coated or covered on both sides with such materials, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39 or 40); or
>
> . . .

51. In turn, note 2 to Chapter 59 states the following:

> 2. 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:
>
> . . .
>
> (2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C (usually Chapter 39);
>
> (3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39);
>
> . . .
>
> (5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 39); or
>
> . . .

52. When they are read together, these notes circumscribe what products combining plastics and textiles are covered by Chapter 39 and those that are not. Simply put, these notes establish that "[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics . . . of Chapter 39" are certain woven textile fabrics, felt or nonwovens impregnated, coated, covered or laminated with plastics that are *not* otherwise covered by Chapter 56 or 59.

53. In summary, applying these provisions, the Tribunal must examine whether the materials combining plastics and textiles used to fashion the goods in issue constitute textile products of either Chapter 56 or 59 (which are both part of Section XI)[31] or whether these materials are "[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics . . . of Chapter 39." Two different materials combining plastics and textiles must be examined, i.e. the inner surface material and the outer surface material of the goods in issue. This exercise will allow the Tribunal to determine whether the goods in issue are made by sewing articles of plastics, including "sheets of plastics", of Chapter 39 or made by sewing textile products of Section XI.

Classification of the inner surface material of the goods in issue

54. According to the CBSA's laboratory analysis, the inner surface material of the goods in issue is a nonwoven impregnated with plastics (polyurethane). Note 3 to Chapter 56 indicates that such nonwovens are classifiable in heading No. 56.03, unless they are either completely embedded in plastics or entirely coated or covered on both sides with such materials, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour, in which case they should be classified in Chapter 39.

---

31. It is worth noting that, by virtue of note 1 to Chapter 59, for the purposes of Chapter 59, the expression "textile fabrics" applies only to certain woven fabrics. However, the *Explanatory Notes* to Chapter 56 make it clear that nonwovens are textile products of a special character and are therefore regarded as textile products or articles of textiles. Otherwise, they would not be part of Section XI.

55. The evidence merely indicates that the inner surface material is a nonwoven "impregnated" with plastics. It does not establish that this component of the goods in issue is *completely embedded* in plastics or *entirely coated or covered on both sides* with plastics. Moreover, after having examined the inner surface material of Exhibit A-02, which, as noted above, is identical to the inner surface material of the goods in issue according to Mr. Desjardins's testimony, the Tribunal is unable to find that this material is completely embedded with plastics. On the contrary, the material on the palm portion of this physical exhibit resembles suede leather and does not have the appearance of a material completely embedded in plastics.

56. For the same reason, even if the inner surface material of the goods in issue was entirely coated or covered on both sides with plastics, a fact which, as noted above, has not been established, it is clear that such coating or covering would not be visible to the naked eye, as is required by note 3 to Chapter 56 for nonwovens coated or covered on both sides with plastics to be classifiable in Chapter 39. Again, the impregnation of this component with plastics is not noticeable when one examines the relevant physical exhibit. There is therefore no evidentiary basis to find that the inner surface material is a type of nonwoven combined with plastics covered by Chapter 39.

57. Accordingly, the Tribunal concludes that the inner surface material of the goods in issue is a textile material of Section XI, more specifically a nonwoven impregnated with plastics of heading No. 56.03. It follows that this component of the goods in issue is neither an article of plastics nor a sheet of plastics classifiable in Chapter 39.

Classification of the outer surface material of the goods in issue

58. According to the CBSA's laboratory analysis, the outer surface material of the goods in issue consists of black sheets of cellular plastics (polyurethane) combined with woven textile fabrics. While this material incorporates "sheets of plastics", it does not necessarily follow that it is classifiable in Chapter 39. Indeed, note 2(a)(5) to Chapter 59, which deals with the classification of sheets of cellular plastics combined with a textile fabric, is directly applicable to this material.

59. Under note 2(a)(5) to Chapter 59 and confirmed by the *Explanatory Notes* to Chapter 39 cited above, whether this material is classifiable in heading No. 59.03 or Chapter 39 depends primarily on the purposes served by its textile component. If the textile fabric combined with the sheets of plastics on this component of the goods in issue ". . . is present merely for reinforcing purposes . . .", this component is not classifiable in heading No. 59.03 and must therefore be classified in Chapter 39. Conversely, if the textile fabric serves a purpose or function that goes beyond that of mere reinforcement, this plastic and textile combination is not classifiable in Chapter 39 and must be classified in heading No. 59.03.

60. Thus, the Tribunal must determine whether the textile fabric on this component of the goods in issue is present merely for reinforcing purposes. On this issue, the evidence indicates that the purpose of the woven textile fabrics is not limited to reinforcing the sheets of plastics. Mr. Desjardins testified that an important purpose of the textile fabric, which is combined with the sheets of plastic on the outer surface material, is to provide the necessary friction in order to prevent the inner foam and hard plastic padding components from moving, thereby allowing the goods in issue to maintain their shape and be used as designed for their intended function.[32] Indeed, according to the evidence, the textile fabric is on the underside of the outer surface material, and the interior padding materials are not glued or otherwise attached to the outer surface material, which forms the shell which encloses the padding. Mr. Desjardins also stated that the problem of maintaining the inner padding component in place will not arise if, instead of

32. *Transcript of Public Hearing*, 13 October 2010, at 45-51, 58-59.

polyurethane, nylon is the material selected to form the outer surface of hockey gloves. Mr. Desjardins explained that, contrary to polyurethane, nylon is not a slippery material and suffices to hold the inner padding materials together.

61. In view of this evidence, the Tribunal finds that the textile fabric on the outer surface material of the goods in issue is not present merely for reinforcing purposes. As such, this material does not appear classifiable in Chapter 39.

62. The Tribunal further notes that the *Explanatory Notes* to Chapter 39 provide that ". . . unfigured, unbleached, bleached or uniformly dyed textile fabrics . . . when applied to one face only of these . . . sheets [of plastics] . . . are regarded as serving merely for reinforcing purposes." On that basis, the CBSA submitted that, since its laboratory analysis specifies that the textile fabric on the outer surface material of the goods in issue is made from yarns of different colours and is *not* bleached, unbleached or uniformly dyed, it follows that this textile component must be regarded as having a function that goes beyond that of mere reinforcement. Consequently, the CBSA submitted that the outer surface of the goods in issue cannot be classifiable in Chapter 39. However, the Tribunal notes that the CBSA did not address the issue of whether the textile fabric is a figured (i.e. not "unfigured") textile fabric. Sher-Wood did not respond to this argument.

63. The Tribunal notes that this argument raises an interpretative issue, namely, whether the mere fact that a textile fabric is not bleached, unbleached or uniformly dyed, without considering the issue of whether it is a figured or an unfigured textile fabric, is sufficient to conclude that such a textile fabric must be regarded as having a function that goes beyond that of mere reinforcement. The Tribunal considered a similar issue in *Helly Hansen*. In that case, the Tribunal did not accept the argument that any "uniformly dyed fabric" should be considered present merely for reinforcing purposes, without taking into account the issue of whether the textile fabric is figured or unfigured.[33] The Tribunal indicated that the first sentence of the second paragraph of item (d) under "Plastics and textile combinations" of the *Explanatory Notes* to Chapter 39 could not be interpreted and applied without taking into account the context provided by the second sentence of that paragraph, which relates to the question of "figured" textile fabrics.

64. If the Tribunal were to accept the CBSA's interpretation of the *Explanatory Notes* to Chapter 39, it would ignore this second sentence, the meaning of which was not debated by the parties in this appeal. In that event, the Tribunal would essentially find that any textile fabric, combined with sheets of plastics, that is *not* bleached, unbleached or uniformly dyed always serves a function that goes beyond that of mere reinforcement and is, therefore, always excluded from classification in Chapter 39, regardless of whether it is a "figured" or "unfigured" fabric.

65. At any rate, given its previous finding that the textile fabric on the outer surface material of the goods in issue is not present only for reinforcing purposes because it has at least another important function, the Tribunal is of the view that it is not necessary to make a decision on the merits of the CBSA's argument in order to determine whether the outer surface component of the goods in issue is classifiable in heading No. 59.03 or in Chapter 39 in this case. Notwithstanding the fact that the textile fabric on the outer surface material of the goods in issue is *not* bleached, unbleached or uniformly dyed, which may or may not exclude this material from classification in Chapter 39 depending on how one interprets the *Explanatory Notes*, what matters is that the evidence clearly demonstrates that the textile fabric on the outer surface material of the goods in issue is *not* present merely for reinforcing purposes. This finding of fact is sufficient to conclude that the outer surface material of the goods in issue does not feature the type of sheets of plastics combined with textile fabric that is classifiable in Chapter 39.

---

33. *Helly Hansen* at 9-10.

66. However, the Tribunal deems it necessary to consider whether the outer surface material of the goods in issue should be classified in Chapter 39 by virtue of the other potentially relevant exceptions, set out in note 2 to Chapter 59, to the classification, in heading No. 59.03, of textile fabrics combined with plastics.[34] The Tribunal notes that the *Explanatory Notes* to heading No. 59.03 provide further guidance in this regard. They provide as follows:

> This heading covers textile fabrics which have been impregnated, coated, covered or laminated with plastics (e.g., poly(vinyl chloride)).
>
> Such products are classified here whatever their weight per $m^2$ and whatever the nature of the plastic component (compact or cellular), **provided**:
>
> . . .
>
> (2) That the products are not rigid, i.e., they can, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C.
>
> (3) That the textile fabric is not completely embedded in, nor coated or covered on both sides with, plastics.
>
> Products not meeting the requirements of subparagraph (2) or (3) above usually fall in **Chapter 39**. However, textile fabric coated or covered on both sides with plastics where the coating or covering cannot be seen with the naked eye, or can be seen only by reason of a resulting change in colour, usually falls in **Chapters 50 to 55, 58** or **60**. Except in the case of textile products of heading 58.11, textile fabrics combined with plates, sheets or strip of cellular plastics, where the textile fabric is present merely for reinforcing purposes, are also classified in **Chapter 39** (see the General Explanatory Note to Chapter 39, part entitled "**Plastics and textile combinations"**, penultimate paragraph).

67. By virtue of note 2(a)(2) to Chapter 59, as clarified by the *Explanatory Notes* to heading No. 59.03, rigid products, defined as textile fabrics impregnated, coated, covered or laminated with plastics which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C, are to be classified in Chapter 39. In this respect, the evidence does not establish that the outer surface material of the goods in issue meet these requirements in order to be considered a rigid product under the above-noted provisions. On the contrary, while the witnesses did not specifically address the issue of whether the goods in issue or their components can be bent, they stated that an important feature of hockey gloves is to be flexible and allow for freedom of movement and mobility.[35] This suggests that their outer surface material must not be a rigid product. Therefore, there is no evidentiary basis to conclude that the outer surface material of the goods in issue is a rigid product excluded form classification in heading No. 59.03.

68. Similarly, the evidence does not establish that the outer surface material of the goods in issue is a product in which the textile fabric is completely embedded in plastics, or entirely coated or covered on both sides with plastics, which should be classified in Chapter 39 according to note 2(a)(3) to Chapter 59. Clearly, the CBSA's laboratory analysis does not state that the textile fabric on the outer surface material of the goods in issue is completely embedded in plastics or entirely coated or covered on both sides with plastics. It only indicates that this textile fabric is "combined" with plastics.

---

34. As noted above, note 2 to Chapter 59 also excludes, under certain conditions, the following products from classification in heading No. 59.03: products which cannot, without fracturing, be bent manually and products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material.
35. *Transcript of Public Hearing*, 13 October 2010, at 39, 62.

69. Moreover, as discussed above, this textile fabric is on the underside of the outer surface material of the goods in issue and comes in contact with their interior padding materials. According to the evidence, it serves the purpose of providing friction in order to ensure that the interior padding materials remain in place, a function that the plastics component could not fulfil. This confirms that the textile fabric on the outer surface material of the goods in issue is not completely embedded in plastics and that plastics only cover one side of this fabric.

70. On the basis of the foregoing analysis, the Tribunal concludes that the outer surface material of the goods in issue is a textile material of Section XI, more specifically, a textile fabric impregnated, coated, covered or laminated with plastics of heading No. 59.03.[36] It follows that this component of the goods in issue is neither an article of plastics nor sheets of plastics classifiable in Chapter 39.

Summary and conclusion of the Tribunal's analysis of heading No. 39.26

71. In summary, the Tribunal finds that both materials that are sewn together to form the exterior of the goods in issue are textile materials of Section XI. The outer surface material is a textile fabric of heading No. 59.03, whereas the inner surface material is a nonwoven of heading No. 56.03. Those two headings are part of Section XI.

72. For this reason, the goods in issue are not articles of apparel or clothing accessories made by "sewing or sealing sheets of plastics" of heading No. 39.26. Rather, they are articles of apparel or clothing accessories made by sewing textile products. As such, they do not meet the terms of heading No. 39.26, as these terms must be interpreted taking into account the relevant section and chapter notes and the *Explanatory Notes*.

73. The fact that the goods in issue contain foam and hard plastic padding materials does not affect this conclusion. The *Explanatory Notes* to heading No. 39.26 make it clear that, as it relates to articles of apparel and clothing accessories, heading No. 39.26 only includes certain articles of plastics, i.e. those that are made by "sewing or sealing sheets of plastics". There is no language in the *Explanatory Notes* to heading No. 39.26 that suggests that the terms "other articles of plastics" includes articles of apparel and clothing accessories made by sewing together textile products, but that incorporate plastic components in the form of padding materials. Thus, the terms of heading No. 39.26 do not describe the goods in issue.

74. Moreover, the applicable legal notes and *Explanatory Notes*, discussed in detail in the Tribunal's analysis, indicate that only certain specific plastics and textile combinations may be covered by Chapter 39 and, thus, by heading No. 39.26. By virtue of note 1(h) to Section XI, such combinations are restricted to certain "[w]oven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof . . ." that are classifiable in Chapter 39 and are not classifiable in Section XI. As the goods in issue are not made of such materials, it follows that they are not "articles of plastics".

---

36. There is insufficient evidence to precisely determine whether this textile fabric is "impregnated", "coated", "covered" or "laminated" with plastics, since the CBSA laboratory analysis merely states that this outer surface material consists of sheets of cellular plastics "combined" with textile fabrics, and the expert witnesses were not able to respond to the Tribunal's questions in this regard (see *Transcript of Public Hearing*, 13 October 2010, at 70-72). However, note 2 to Chapter 59 makes it clear that certain textile fabrics "combined" with plates, sheets or strips of cellular plastics are classifiable in heading No. 59.03, which, according to its terms, covers various textile fabrics "impregnated, coated, covered or laminated" with plastics. Therefore, textile fabrics "combined" with sheets of cellular plastics are necessarily either "impregnated", "coated", "covered" or "laminated" with plastics. Otherwise, they would not be classifiable in heading No. 59.03. For this reason, the Tribunal is not required to determine the specific process by which the plastics and the textile were "combined" in the outer surface material of the goods in issue in order to conclude that they are classifiable in heading No. 59.03.

75. Accordingly, the Tribunal concludes that the goods in issue are not "other articles of plastics" classifiable in heading No. 39.26.

**Are the Goods in Issue Gloves of Heading No. 62.16?**

76. Since it is beyond dispute that the goods in issue are gloves, the question before the Tribunal is whether they are gloves that answer the description in heading No. 62.16.

77. Note 1 to Chapter 62 (which includes heading No. 62.16) provides 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).

78. The *Explanatory Notes* to Chapter 62 are also informative in order to determine the scope of this heading. They 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.
>
> The classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes (particularly Note 4 to Chapter 43 and Note 2 (b) to Chapter 67, relating to the presence of furskin and feathers, respectively), or failing that, according to the General Interpretative Rules.

79. The *Explanatory Notes* to heading No. 62.16 are also relevant. They provide as follows:

> This heading covers gloves, mittens and mitts, of textile fabrics (including lace) **other than** knitted or crocheted fabric.
>
> The provisions of the Explanatory Note to heading 61.16 apply, *mutatis mutandis*, to the articles of this heading.
>
> The heading also covers gloves used for protection in industry, etc.

80. Thus, heading No. 62.16 clearly includes gloves that are (1) "made-up" articles (2) of any textile fabric (3) other than knitted and crocheted fabric. If certain conditions are met, gloves of heading No. 62.16 may also contain parts or accessories of other materials.

81. Are the goods in issue "made-up" articles? The Tribunal notes that the expression "made-up" is defined in note 7 to Section XI to mean, *inter alia*, "[a]ssembled by sewing, gumming or otherwise . . . ."[37] In this regard, the CBSA's laboratory analysis unequivocally states that the goods in issue consist of two major components *sewn* together. In view of this evidence, which establishes that the goods in issue have been assembled by sewing, and considering its previous finding that the goods in issue are articles of apparel or clothing accessories, the Tribunal finds that the goods in issue are "made-up" articles.

---

37. The Tribunal notes that note 7 to Section XI defines the expression "made-up" to mean six different methods of production or processes of fabrication of textile products. The Tribunal considers that the only logical and reasonable interpretation of this legal note is that an article will be considered a "made-up" article to the extent that it is made through the use of one such method or process. After having carefully reviewed note 7 to Section XI, the Tribunal is of the view that paragraph (e), "assembled by sewing or gumming", is the relevant part of the definition in this appeal.

82. Turning to the issue of whether the goods in issue are made up of textile fabric, the Tribunal notes that the *Explanatory Notes* to Chapter 62 provide that this chapter covers articles of apparel and clothing accessories made up of the fabrics of Chapters 50 to 56, 58 or 59. Consequently, for the purposes of Chapter 62, the expression "textile fabrics" includes woven fabrics of Chapter 59 and nonwovens of Chapter 56. There is no legal note similar to note 1 to Chapter 59, which, for the purposes of Chapter 59 only, defines the expression "textile fabrics" as applying only to certain woven fabrics. Since note 1 to Chapter 59 does not apply throughout the nomenclature and in view of the clear terms of the *Explanatory Notes* to Chapter 62, the Tribunal finds that the term "textile fabrics" in the context of Chapter 62 includes both nonwovens of heading No. 56.03 and woven fabrics of heading No. 59.03.

83. The Tribunal has already found that the two components sewn together to form the goods in issue are materials of heading Nos. 56.03 and 59.03. Therefore, the goods in issue are gloves of textile fabrics.

84. The evidence also indicates that the goods in issue are not knitted or crocheted. In this regard, it bears repeating that, according to the CBSA's laboratory analysis, they consist of a woven textile fabric combined with plastics and a nonwoven impregnated with plastics assembled by sewing. Accordingly, the goods in issue fall squarely within the terms of heading No. 62.16.

85. The only remaining issue that needs to be addressed concerning heading No. 62.16 is whether the goods in issue should be excluded from classification in that heading because they contain foam and plastic padding materials. On this issue, Sher-Wood submitted that the goods in issue could not, *prima facie*, be classified in heading No. 62.16, since the padding materials enclosed in the goods in issue constitute more than mere trimming. In particular, Sher-Wood submitted that the language in the *Explanatory Notes* to Chapter 62 meant that, when the presence of non-textile materials in an article amounts to more than mere trimming, it is that non-textile component or material (in this case, the plastic padding material) that "drives" or determines the tariff classification of the goods. According to Sher-Wood, the goods in issue should therefore be classified in Chapter 39 on the basis of Rule 1 of the *General Rules*.

86. The Tribunal is unable to accept this argument. In the Tribunal's opinion, the *Explanatory Notes* to Chapter 62 do not state that goods are necessarily excluded from classification in Chapter 62 (and thus in heading No. 62.16) where the presence of non-textile materials constitutes more than mere trimming. In such situations, the *Explanatory Notes* first point in the direction of two chapter notes (that are not relevant in this appeal) as governing provisions to effect the classification. These notes then dictate classification of the goods ". . . according to the General Interpretative Rules."

87. In this regard, the Tribunal notes that Rule 2 (b) of the *General Rules*, which has not been addressed by Sher-Wood, becomes highly relevant.[38] According to Rule 2 (b), a reference in a heading to goods of a given material shall be taken to include a reference to goods consisting wholly or partly of such material.

88. In addition, notes XI to XII of the *Explanatory Notes* to Rule 2 (b) provide relevant explanations concerning the meaning and effect of Rule 2 (b). They read as follows:

> (XI) The effect of the Rule is to extend any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances. The effect of the Rule is also to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance.

38. When goods cannot be classified in accordance with Rule 1 of the *General Rules*, the next rule to consider, in sequence, is Rule 2 (a) which deals with incomplete or unfinished articles and articles presented unassembled but which is not relevant in this appeal. The next rule to consider is Rule 2 (b).

> (XII) It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.
>
> (XIII) As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if *prima facie* classifiable under two or more headings, must therefore be classified according to the principles of Rule 3.

89. Accordingly, gloves may remain classifiable in heading No. 62.16 as gloves of textile fabrics, even if they consist partly of textile materials. If the presence of another material in the goods in issue constitutes more than mere trimming, the question becomes, under Rule 2 (b) of the *General Rules*, whether the goods in issue can still be regarded as answering the description in heading No. 62.16. The *Explanatory Notes* to Rule 2 (b) also indicate that, to the extent that the addition of another material does *not* deprive the goods in issue of the character of goods of the kind mentioned in the heading, the goods should still be regarded as answering the description in the heading under consideration.

90. In the Tribunal's view, the addition or insertion of high-density foam and hard plastic pads inside the goods in issue does not "depriv[e] the goods of the character" of those of the kind mentioned in heading No. 62.16. It is the textile fabrics sewn together to form the goods in issue that results in them being gloves. Thus, the addition of the foam and plastic padding materials does not transform them into goods that can no longer be regarded as answering the description in the heading.

91. Moreover, the *Explanatory Notes* to heading No. 62.16 provide that "[t]his heading also covers gloves for protection in industry, etc." While this provision is not directly applicable to the goods in issue, it confirms that heading No. 62.16 covers certain protective gloves. The Tribunal considers that this implies that heading No. 62.16 may cover gloves that incorporate materials that have protective attributes, such as foam and plastics. The Tribunal therefore finds that the goods in issue remain gloves of textile fabrics of heading No. 62.16 even if the foam and plastic padding parts that they contain appear to constitute more than mere trimming.

92. The Tribunal further notes that the last sentence of Rule 2 (b) of the *General Rules* provides that goods consisting of more than one material shall be classified according to the principles of Rule 3. However, note XIII to the *Explanatory Notes* to Rule 2 (b) clarifies that this can occur only if the goods are *prima facie* classifiable under two or more headings. The Tribunal has already determined that the goods in issue are not *prima facie* classifiable in heading No. 39.26 and that the insertion of the foam and plastic padding material in the goods in issue is not sufficient for them to be regarded, as required by Rule 1, as goods answering the description or meeting the terms of heading No. 39.26. Thus, Rule 3 is not applicable in this appeal, as the goods are not *prima facie* classifiable in the two competing headings.

93. In light of the above, based on Rules 1 and 2 (b) of the *General Rules*, the Tribunal concludes that the goods in issue are gloves of textile materials classifiable in heading No. 62.16.

94. As heading No. 62.16 is not divided at the subheading or tariff item level, the Tribunal need not consider Rule 6 of the *General Rules* or Rule 1 of the *Canadian Rules* to determine the proper classification at the subheading and tariff item levels. Thus, the goods in issue are properly classified under tariff item No. 6216.00.00.

## DECISION

95. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 6216.00.00 as gloves of textile materials not knitted or crocheted, as determined by the CBSA.

96. Therefore, the appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member