Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal No. AP-2010-068

6572243 Canada Ltd. o/a Kwality Imports

v.

President of the Canada Border Services Agency

*Decision and reasons issued*
*Friday, August 3, 2012*

Canada

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IN THE MATTER OF an appeal heard on April 5, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 20 decisions of the President of the Canada Border Services Agency, dated December 23, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**6572243 CANADA LTD. O/A KWALITY IMPORTS** **Appellant**

**AND**

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

## DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | April 5, 2012 |
| Tribunal Member: | Jason W. Downey, Presiding Member |
| Counsel for the Tribunal: | Ekaterina Pavlova |
| Manager, Registrar Programs and Services: | Michel Parent |
| Registrar Officer: | Cheryl Unitt |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representatives** |
|---|---|
| 6572243 Canada Ltd. o/a Kwality Imports | Greg Kanargelidis |
| **Respondent** | **Counsel/Representatives** |
| President of the Canada Border Services Agency | Peter Nostbakken |

**WITNESSES:**

| | |
|---|---|
| Romy Maggo<br>C.E.O. and Director<br>Kwality Imports Ltd. | Antony Polyzotis<br>Director, Strategic Office Planning and Interior Design<br>Design Group Five Partnership |

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# STATEMENT OF REASONS

## BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by 6572243 Canada Ltd. o/a Kwality Imports (Kwality) on March 18, 2011, pursuant to subsection 67(1) of the *Customs Act*.[1]

2. The appeal concerns 20 decisions of the President of the Canada Border Services Agency (CBSA) dated December 23, 2010, with respect to a request for re-determination of the tariff classification of various models of upholstered sofas, loveseats, rockers, recliners, chairs and ottomans with wooden frames[2] (the goods in issue), pursuant to subsection 60(4) of the *Act*.

3. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9401.61.10 of the schedule to the *Customs Tariff*[3] as other upholstered seats with wooden frames *for domestic purposes*, as determined by the CBSA, or should be classified under tariff item No. 9401.61.90 as *other* upholstered seats with wooden frames, as claimed by Kwality.

## PROCEDURAL HISTORY

4. The parties provided joint submissions containing an agreed list and description of the goods in issue, including their model and product names and numbers, suppliers, related original transactions and invoices.[4] The CBSA filed photographs of the goods in issue, as they were found on Kwality's website. Kwality provided photographs showing certain of the goods in issue in various locations in a hotel setting.

5. The Tribunal held a public hearing in Ottawa, Ontario, on April 5, 2012. Two witnesses appeared on behalf of Kwality: Mr. Romy Maggo, C.E.O. and Director, Kwality Imports, and Mr. Antony Polyzotis, Director, Strategic Office Planning and Interior Design, Design Group Five Partnership. The Tribunal qualified Mr. Polyzotis as an expert in interior design.

6. Although the CBSA had filed an expert witness report, no expert witness was produced at the hearing.

## GOODS IN ISSUE

7. The goods in issue consist of various models of upholstered sofas, loveseats, rockers, recliners, chairs and ottomans with wooden frames.

## EVIDENCE

8. Mr. Maggo stated that 40 percent of all Kwality's sales are for seating products similar to the goods in issue. Its total annual sales amount to approximately $5 million. Kwality's client base comprises about 200 customers located across Canada, most of which are large-scale wholesalers and distributors, who, in turn, distribute the goods in issue throughout the retail market. Kwality's direct retail sales are said to be

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Tribunal Exhibit AP-2010-068-03A at paras. 3, 7, 26; Tribunal Exhibit AP-2010-068-05A at paras. 3-5; Tribunal Exhibit AP-2010-068-11A, tab A.
3. S.C. 1997, c. 36.
4. Tribunal Exhibit AP-2010-068-11A, tab A; Tribunal Exhibit AP-2010-068-11B (protected), tab B.

limited to a handful of direct sales to selected customers. Mr. Maggo described Kwality's business model as being "B2B", or, in other words, only involving sales to wholesalers, distributors and other businesses. A retail client would not normally be able to buy directly from Kwality unless they did so through a seller, reseller, wholesaler, distributor or retail outlet that carried Kwality's products in its line-up.

9. Mr. Maggo claimed that Kwality's goods are marketed both to domestic and commercial outlets but was unable to further substantiate that claim, other than to say that they are mass-produced, low-ticket "generic" items not intended for any specific market sector. When asked for the proportion of the goods in issue that are sold to commercial settings (such as hotels, restaurants, cafés, bistros, offices or healthcare settings), he was unable to provide a clear answer, stating that he did not know who buys these goods from the resellers.

10. Mr. Polyzotis said that he would feel comfortable using the goods in issue in a commercial setting. He explained that comfort used to be equated with residential settings, but that, more and more, companies want to provide employees with comfort and relaxation in their work environment. It would not be unusual to see comfortable furniture in corporate breakout rooms, since it helps to stimulate the generation of ideas.

11. Mr. Polyzotis also used the example of a prominent chain of coffee houses as an example of a company that was replacing stark, Spartan commercial settings with a more comfortable environment for its clients and added that comfort is no longer the exclusive preserve of the private residence.

12. Mr. Polyzotis drew the Tribunal's attention to the existence of another manufacturer who historically has produced furniture for institutional settings but was now replacing the institutional design of its furniture with a more residential "look and feel". He added that this company's products would typically be ordered for a commercial setting even though their recliners are similar to the goods in issue, except for the larger scale of the furniture and its more resistant fabric.

13. Mr. Polyzotis also alluded to the website of another manufacturer known to manufacture institutional furniture, observing that, although their seats have certain attributes that make them suitable for the health care industry, such as the antimicrobial treatment of their fabric, heavy-duty castors and the absence of quilted material on their exterior surfaces (allowing for easier clean-up), they are domestically styled and designed with comfort in mind.

14. Mr. Polyzotis stated that, in the past, commercial furniture typically would have been more expensive than residential furniture, but this was no longer the case, pricing no longer being a clear indicator of quality. According to him, there are as many good quality low-priced items as there are low quality high-priced items in the marketplace today. However, elsewhere in his testimony, Mr. Polyzotis contradicted himself by repeatedly using the phrase "it depends what you want" to denote that, if one were ready to pay a higher price, quality and durability would most probably be added as features. Mr. Polyzotis added that specific industry certification, such as ANSI, BITMA and CSA Green Guard, are only voluntary standards, to which some manufacturers adhere to, particularly for government procurement, insurance or marketing purposes. There was no evidence that the goods in issue meet any such industry standards.

## STATUTORY FRAMEWORK

15. 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).[5] 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.

16. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[6] and the *Canadian Rules*[7] set out in the schedule.

17. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

18. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[8] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[9] published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[10]

19. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[11]

20. 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 use a similar approach to determine the proper subheading.[12] The final step is to determine the proper tariff item.[13]

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5. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
6. S.C. 1997, c. 36, schedule [*General Rules*].
7. S.C. 1997, c. 36, schedule.
8. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
9. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to *Classification Opinions*.
11. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
12. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."
13. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." *Classification Opinions* and *Explanatory Notes* do not apply to classification at the tariff item level.

21. In the instant appeal, there is no disagreement about the classification of the goods in issue at either the heading or the subheading level. Rather, the dispute is focussed on the tariff item level. Disputes of this nature are governed by Rule 1 of the *Canadian Rules*, which provides as follows:

> For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.

## RELEVANT CLASSIFICATION PROVISIONS

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

**Section XX**

**MISCELLANEOUS MANUFACTURED ARTICLES**

**Chapter 94**

**FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS**

| | |
|---|---|
| **94.01** | **Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.** |
| . . . | |
| | **-Other seats, with wooden frames:** |
| **9401.61** | **- -Upholstered** |
| 9401.61.10 | - - -For domestic purposes |
| . . . | |
| 9401.61.90 | - - -Other |

23. There are no relevant section notes, chapter notes or supplementary notes in this appeal.

## EXPLANATORY NOTES

24. Note (A) of the general *Explanatory Notes* to Chapter 94 defines the term "furniture" as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (A) Any "movable" articles **(not included** under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

25. The *Explanatory Notes* to heading No. 94.01 and subheading No. 9401.61 provide as follows:

> **Subject** to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:
>
> Lounge chairs, arm-chairs, folding chairs, deck chairs, infants' high chairs and children's seats designed to be hung on the back of other seats (including vehicle seats), grandfather chairs, benches, couches (including those with electrical heating), settees, sofas, ottomans and the like, stools (such as piano stools, draughtsmen's stools, typists' stools, and dual purpose stool-steps).
>
> Armchairs, couches, settees, etc., remain in this heading even if they are convertible into beds.
>
> . . .
>
> **Subheading Explanatory Notes**
>
> **Subheadings 9401.61 and 9401.71**
>
> "Upholstered seats" are those having a soft layer of, for example, wadding, tow, animal hair, cellular plastics or rubber, shaped (whether or not fixed) to the seat and covered with a material such as woven fabric, leather or sheeting of plastics. Also classified as upholstered seats are seats the upholstering materials of which are not covered or have only a white fabric cover which is itself intended to be covered (known as upholstered seats "in muslin"), seats which are presented with detachable seat or back cushions and which could not be used without such cushions, and seats with helical springs (for upholstery). On the other hand, the presence of horizontally-acting tension springs, designed to attach to the frame a steel wire lattice, taut woven fabric, etc., is not sufficient to cause the seats to be classified as upholstered. Similarly seats covered directly with materials such as woven fabric, leather, sheeting of plastics, without the interposition of upholstering materials or springs, and seats to which a single woven fabric backed with a thin layer of cellular plastics has been applied, are not regarded as upholstered seats.

## KWALITY'S POSITION

26. Kwality submitted that the goods in issue are classifiable under tariff item No. 9401.61.90 as *other* upholstered seats with wooden frames on the basis of Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*. The upshot of Kwality's argument was that the goods in issue are used both for domestic and commercial purposes and therefore cannot be said to be used primarily "for domestic purposes" within the meaning of tariff item No. 9401.61.10.

27. In support of its position, Kwality relied on the body of the Tribunal's decisions applying the phrase "for domestic purposes",[14] wherein, in order to be classified as such, goods had to be used *primarily* for domestic purposes, since use was allegedly the determining factor.[15] Kwality argued that, since the goods in issue serve both domestic (i.e. residential) *and* commercial markets (such as hotels and offices), they cannot determinatively be said to be used for domestic purposes and should therefore fall under "other" upholstered seats with wooden frames.

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14. Tribunal Exhibit AP-2010-068-03A at paras. 35-59, tabs A, B, C, D, E, F; *Black & Decker Canada Inc. v. Deputy M.N.R.* (16 December 1992), AP-90-192 (CITT) [*Black & Decker*]; *Costco Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (11 January 2001), AP-2000-015 [*Costco*]; *Alliance Ro-Na Home Inc. v. Commissioner of the Canada Customs and Revenue Agency* (17 September 2002), AP-2001-065 (CITT) [*Ro-Na I*]; *Alliance Ro-Na Home Inc. v. Commissioner of the Canada Customs and Revenue Agency* (25 May 2004), AP-2003-020 (CITT) [*Ro-Na II*]; *Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency* (2 November 2007), AP-2006-038 (CITT) [*Canadian Tire*]; *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) [*Evenflo*]; *Transcript of Public Hearing*, 5 April 2012, at 109-11.
15. *Canadian Tire*.

28. Kwality added that there is no distinction in the physical characteristics, design or price of the goods in issue so as to lend them for use in one or other of the domestic or non-domestic environments.[16] Moreover, Kwality referred to the Tribunal's decisions in *Ro-Na I* and *Ro-Na II*, which dealt with folding chairs and folding chairs with carrying bags, respectively, as authority for the proposition that it is not the physical characteristics, design or price of goods that make them primarily intended for domestic use.

29. Kwality suggested that any evidence of non-domestic use should lead to an inference that the goods are *not* intended "for domestic purposes", absent compelling evidence to the contrary. Kwality also referred to prior decisions of the CBSA, wherein furniture allegedly similar to the goods in issue was classified under tariff item No. 9401.61.90.[17]

30. In the alternative, Kwality submitted that, if the Tribunal was unable to classify the goods in issue on the basis of Rule 1 of the *General Rules*, then neither Rule 3(a) nor Rule 3(b) would be of assistance, and recourse would have to be made to Rule 3(c).[18] Rule 3(c) provides that, "[w]hen goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration", or, in this case, tariff item No. 9401.61.90.

## CBSA'S POSITION

31. The CBSA submitted that the goods in issue should be classified under tariff item No. 9401.61.10, as other upholstered seats with wooden frames *for domestic purposes*, on the basis of Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*.

32. Citing the Tribunal's decision in *Wal-Mart Canada Corporation v. President of the Canada Border Services Agency*,[19] the CBSA argued that the appellant bears the initial onus of proving that the CBSA's tariff classification decision is incorrect.[20]

33. The CBSA did not dispute that the body of decided Tribunal cases had found that the words "for domestic purposes" denoted goods that were primarily intended for domestic or household use and that this implied that they must be used in or around the home or in other domestic settings, or primarily in such settings. The CBSA emphasized, however, that the word "primarily" does not appear in the tariff nomenclature.[21] Further, the CBSA argued that, because the Tribunal has recognized that domestic settings were not restricted to the "four walls" of a private dwelling or household, they might also include similar locations, such as hotel rooms.[22]

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16. Tribunal Exhibit AP-2010-068-03A at paras. 27-32; Tribunal Exhibit AP-2010-068-03B (protected), tabs 5, 6, 7, 8.
17. Tribunal Exhibit AP-2010-068-03A at paras. 33, 34; Tribunal Exhibit AP-2010-068-03B (protected), tabs 8, 9.
18. Tribunal Exhibit AP-2010-068-03A at para. 61. Rules 3(a) and 3(b) of the *General Rules* provide as follows:

    > 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:
    >
    > (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
    >
    > (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. (13 June 2011), AP-2010-035 (CITT) [*Wal-Mart*] at para. 35; Tribunal Exhibit AP-2010-068-05A at 35.
20. Tribunal Exhibit AP-2010-068-05A at paras. 63-67, tab 10.
21. *Transcript of Public Hearing*, 5 April 2012, at 131.
22. *Ro-Na I*; *Costco*; *Ro-Na II*; *Evenflo*; Tribunal Exhibit AP-2010-068-05A at paras. 26-31, tabs 11, 12, 13, 14.

34. The CBSA pointed to the factors relied upon by the Tribunal in the body of its previous decisions for determining whether or not goods are intended primarily for use in domestic settings, namely, the characteristics of the goods, their design, pricing and marketing.[23] In this regard, the CBSA noted that the goods in issue are designed to provide comfortable seating for extended periods of time, that several models have reclining or rocking movements that provide an even greater level of comfort and that others still, such as those designed for home-theaters, even have matching ottomans. In the CBSA's submission, the goods in issue are specifically designed and intended to serve as home furniture and are priced and marketed accordingly.[24]

35. The CBSA submitted that the words "for domestic purposes", as found in tariff item No. 9401.61.10, do not create an end-use provision and, therefore, that the goods in issue need not be used exclusively for domestic purposes. According to the CBSA, if tariff item No. 9401.61.10 were to be interpreted in the restrictive manner suggested by Kwality, the words "for domestic purposes" would be deprived of their meaning, because it could not be said with any certainty that any seats of subheading No. 9401.61.10 are used exclusively for domestic purposes.[25]

36. The CBSA submitted that the goods in issue are the sort of recliners, rockers and ottomans[26] that provide the comfort typically associated with household, as opposed to commercial, settings.[27]

37. In the alternative, the CBSA argued that, if the Tribunal was unable to classify the goods in issue on the basis of Rule 1 of the *General Rules*, then they should still be classified under tariff item No. 9401.61.10 on the basis of Rule 3(a).[28]

## ANALYSIS

38. The only issue before the Tribunal is whether the goods in issue are upholstered seats with wooden frames "for domestic purposes" (within the meaning of tariff item No. 9401.61.10), as determined by the CBSA, or whether they are "other" upholstered seats with wooden frames (within the meaning of tariff item No. 9401.61.90), as argued by Kwality.

### Burden of Proof

39. The Tribunal notes that, in appeals before it, the appellant is the party that bears the onus of proving that the CBSA's tariff classification of the goods is incorrect.[29] In the Tribunal's view, Kwality has not met that burden.

40. Kwality anchored its submission on the notion that, because the goods in issue can be put to multiple uses, including both domestic and commercial, they are not therefore exclusively used for domestic purposes, cannot have been intended primarily "for domestic purposes" and must fall into the residual "other" category. There are several difficulties inherent in this argument.

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23. Tribunal Exhibit AP-2010-068-05A at paras. 31, 32-42, 43-45, 46-52.
24. Tribunal Exhibit AP-2010-068-05A at paras. 32-52, tab 10. The CBSA referred to *Wal-Mart* at para 99.
25. *Transcript of Public Hearing*, 5 April 2012, at 145.
26. Tribunal Exhibit AP-2010-068-05A, tab 16.
27. Unlike the goods in issue, the folding chairs in *Ro-Na I* and *Ro-Na II* offer temporary seating, which is often done in circumstances outside of the house. They are not designed for sitting for any extended period of time and do not offer the same look, comfort, stability, ergonomics, fire safety, etc., that one would expect of a domestic seat.
28. Tribunal Exhibit AP-2010-068-05A at paras. 71-77.
29. *Unicare Medical Products Inc. v. Deputy M.N.R.C.E.* (21 June 1990), 2437, 2438, 2485, 2591 and 2592 (CITT); *Wal-Mart*.

41. First, it leads to illogical conclusions: any item having multiple uses would automatically be assigned to the "other" category, regardless if it is destined for domestic purposes. This would strip the term "for domestic purposes" of any meaning, leaving it as a hollow shell.

42. It is a trite rule of statutory interpretation that every word in an enactment has a sensible reason for being there and must be given a meaning.[30] Moreover, the Tribunal must always strive to interpret the words and expressions used in the tariff schedule in a manner that promotes inherent coherence and consistency.[31] The Tribunal has previously held that the phrase "for domestic purposes" should be interpreted broadly.[32]

43. Second, because the words "for domestic purposes" do not create an end-use provision, actual use of the goods in issue is not the dispositive factor to be considered for classification purposes. The end-use requirement was eliminated when the current wording of the tariff item came into force. Previously the tariff item read "of a kind *used* for domestic purposes"[33] [emphasis added] It is the intended, and not actual, use that matters.

44. Third, in the Tribunal's body of past decisions,[34] evidence of items being *primarily* intended for domestic purposes created a rebuttable presumption in favor of classification under tariff item No. 9401.61.10. However, the Tribunal has never accepted evidence of mere occasional or potential use in a non-domestic situation, as is the case here, as being sufficient to rebut the presumption.

45. Based on the testimony of the witnesses, the documentation produced concerning the goods in issue, the sales and promotional material (including the online material and retail sellers' catalogues in CD format), the pictures showing the goods in domestic settings and the Tribunal's review of the remaining evidence (including descriptions of the goods that included phrases such as "comfortable and relaxing"), the Tribunal finds that the goods in issue are primarily used for household purposes but can incidentally also be used in commercial settings calling for comfortable seating.

46. All that Kwality has proven is that the goods in issue can be suitable for commercial purposes involving low-priced or low-end items, if at all. (An example of a low-priced requirement would be for discount hotels, where there is a high turnover of furniture. An example of a low-end requirement would be chairs for coffee shops, where minimally comfortable seating is required.)

47. There are no decisions of the courts or of the Tribunal interpreting the meaning of "for domestic purposes" other than to apply the phrase to the facts of each case[35]. In the end, therefore, whether or not the goods in issue are intended "for domestic purposes" is a question of mixed law and fact and will vary according to the facts of the case. The Tribunal is of the view that, in this case, the characteristics, design, pricing and marketing of the goods in issue will be indicative of their proper tariff classification.[36]

30. Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 184.
31. *Evenflo* at para. 69.
32. *Black & Decker* at 3-4; *Costco* at 4; *Ro-Na I* at 5; *Ro-Na II* at para. 10.
33. See *Costco*.
34. *Costco* at 4; *Ro-Na I* at 5; *Ro-Na II* at para. 16; *Evenflo* at para. 68.
35. *Ro-Na II* at paras. 12-14.
36. *Partylite Gifts Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (16 February 2004), AP-2003-008 (CITT).

**Design and Physical Characteristics**

48. Mr. Maggo testified that the goods in issue are low-ticket, mass-produced "very generic commoditized sort[s] of products".[37] According to Mr. Maggo, no differences exist in the manufacturing, design or characteristics[38] of the goods in issue, whether they are intended for residential or commercial environments.[39]

49. As mentioned, Mr. Polyzotis testified that he "would feel very comfortable" using the goods in issue in a commercial environment. In his view, they are "crossover products", in that they are equally acceptable in both the commercial and residential realms. According to Mr. Polyzotis, "[t]he differentiation [between residential and commercial furniture] would be based on *cost* and aesthetics"[40] [emphasis added].

50. Mr. Polyzotis expressed the view that the comfort and look of residential furniture are no longer exclusively reserved for residential spaces. He testified that the commercial and institutional look have traditionally been associated with utilitarian, strictly functional pieces of furniture.[41] He stated that today's commercial furniture is much more comfortable than it has been traditionally, in order to provide a sense of ease and familiarity to commercial spaces akin to that found in the home, and added that this approach has been adopted in various corporate and institutional settings.[42] With respect to the size of the furniture, Mr. Polyzotis affirmed that ". . . if something is over-scaled . . . it would most likely be geared toward a commercial space . . . ."[43]

51. Kwality adduced evidence that recliners, rockers or ottomans specifically destined for commercial settings would have additional attributes that distinguish them from products primarily intended for domestic use.

52. As an example to illustrate this point, reference was made to products from the Knightsbridge Furniture Company, such as the York Standard Manual Recliner and the Butler Manual Recliner (both of these goods not being at issue here). The first product is said to be equipped with a "heavy duty castor supplied as standard", while the second is "treated with Hygiene+ antimicrobial lacquer to eliminate infection control issues" and benefits from the "non quilted seat and one piece back [which] allow easy cleaning".[44]

53. Kwality also referred to the website for Dor-Val Mfg. Ltd. (a manufacturer whose products, again, are not at issue), which was introduced into evidence in an attempt to indicate that products intended for commercial and institutional settings are larger, use different fabrics and cater to a design aesthetic other than that of the goods in issue.[45]

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37. *Transcript of Public Hearing*, 5 April 2012, at 11-12.
38. In this respect, Mr. Maggo relied on several letters from suppliers filed on the record. Tribunal Exhibit AP-2010-068-03B (protected), tab 5; *Transcript of In Camera Hearing*, 5 April 2012, at 6-10.
39. *Transcript of Public Hearing*, 5 April 2012, at 11, 25
40. *Transcript of Public Hearing*, 5 April 2012, at 60-61.
41. Mr. Polyzotis stated the following: "When we say institutional, they seem to be very utilitarian, functional pieces of furniture or seating that really is just there for a functional basis. It's easy to maintain, it's easy to clean, it's easy to take care of but not aesthetically the most pleasing." *Transcript of Public Hearing*, 5 April 2012, at 67.
42. *Transcript of Public Hearing*, 5 April 2012, at 61-67, 78, 105-106.
43. *Transcript of Public Hearing*, 5 April 2012, at 87.
44. Tribunal Exhibit AP-2010-068-24, tab 1.
45. *Transcript of Public Hearing*, 5 April 2012, at 68.

54. The Tribunal is of the view that commercial products, including those with a "residential look", will have specific characteristics that set them apart from those intended for domestic purposes, namely, durability and low-maintenance, higher price, larger sizes, antibacterial treatments and other specifications that will vary depending on particular uses.

55. The Tribunal observed no such characteristics in the goods in issue. It is true that Mr. Polyzotis testified that there was no distinction in physical or design characteristics based on anticipated use in domestic or non-domestic settings. However, as mentioned above, he contradicted himself by admitting that "you get what you pay for" in the commercial environment, in terms of added features, such as size and durability. Moreover, the literature filed concerning other furniture manufacturers clearly indicates that commercial seats are distinguished by defining characteristics, including their size and durability; none of these features was demonstrated to be present with the goods in issue.

**Pricing**

56. Mr. Maggo testified that the price of the goods in issue is identical regardless of whether the goods are sold to residential or commercial customers. The evidence on the record established that the goods in issue are "high volume, low ticket, mass produced products".[46]

57. Mr. Maggo stated that Kwality's direct commercial sales represent a "significant amount" of its business but was unable to give an account of what this actually represents. In fact he did not provide any details of specific outlets, market segments, accounts or even B2B resellers with a more commercially inclined clientele, which could have substantiated his claim.

58. The Tribunal did not either find it particularly credible that, with annual sales of $5 million (or $20 million in total since 2008), which, at a given of 40 percent of its total business, should theoretically amount to sales of $8 million for the goods in issue, Kwality did not produce evidence for sales to the commercial market for more than $5,000. In other words, the Tribunal does not find Mr. Maggo's evidence to the effect that price is not a factor in differentiating between the domestic and commercial market sectors to be either credible or compelling.

59. Mr. Polyzotis was of the view that price *may* be indicative of quality, but not necessarily so, and that different categories of furniture attract different prices, but that in the end it is customer budgets and, to some extent, design factors that direct purchasing decisions. As already mentioned, he repeatedly contradicted himself by admitting that "you get what you pay for" when it comes to commercial furniture. He used, as an illustration, a discount hotel chain, which might in effect "borrow" (through low-cost purchases) furniture destined for a household setting versus a luxury hotel, which would likely order high-end custom furniture and thereby pay a price premium; this, in fact, is a distinction between both markets.

60. Similarly, Kwality produced evidence that, in an office environment, certain domestic qualities, such as comfort and relaxation, are sometimes sought after in order to stimulate the generation of ideas on the part of the office staff. Again, to make the investment attractive in an environment where affordability and profit are closely related, the price of the furniture could certainly be of importance. The Tribunal is however of the view that the mere fact that the goods in issue may be used in an office environment does not denude them of their inherent domestic qualities. On the contrary, the very purpose of placing them in an office is a clear attempt to imitate and draw upon those very qualities.

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46. *Transcript of Public Hearing*, 5 April 2012, at 11.

**Marketing and Advertising**

61. Kwality's website, like other materials filed on the record, showed the goods in issue in purely domestic, or home, settings, and this is how they were identified.[47] The goods in issue are marketed towards individuals, at low, entry-level price points. As mentioned above, they are designed for the domestic market, and there is nothing to make them particularly suited for the commercial market.

62. In *Ro-Na I*, the issue was whether certain folding chairs were intended "for domestic purposes" or commercial purposes. The Tribunal found that their primary purpose was to be used in a commercial environment. They were larger (by two inches) than domestic chairs, stronger (with welded joints, rather than rivets) and cost more ($38 versus $10). In addition, their marketing materials were aimed at the commercial market. Moreover, since they were inherently uncomfortable and not useful for sitting in for extended periods of time, they were unsuitable for domestic use. That case stands in stark contrast to the instant appeal, in which all the indicia point towards domestic purposes.

63. In *Canadian Tire*, the issue was whether or not the goods (heat guns) were primarily used for domestic purposes. In the face of evidence of "*significant* use of the goods in issue for commercial purposes" [emphasis added], the Tribunal found that the evidence failed to establish that they were primarily intended for domestic purposes. In the instant appeal, the converse is true. There is significant evidence that the goods in issue are intended for domestic purposes, but no such significant use in commercial settings was shown.

64. It is not merely because Kwality, in its business model, sells some of the goods to the commercial market that they would lose their domestic quality as such. Evidence of such occasional use in other non-domestic settings does not shift the onus to prove the correct classification back to the CBSA.

65. Even if Kwality had established that the domestic and commercial markets were equal in importance, which it clearly has not done, the onus would still not shift to the CBSA to disprove its classification. Another importer might import identical goods and sell them exclusively to the domestic market. Kwality had to prove, on a preponderance of evidence, that the goods in issue are *intended* for use in the commercial market. By Mr. Maggo's own admission, Kwality cannot attest as to what is the ultimate destination of the goods.

66. Accordingly, the Tribunal is of the view that Kwality has failed to demonstrate that its marketing or advertising of the goods in issue is aimed at commercial, rather than domestic, purposes.

67. In summary, in the instant case, it is clear that the goods in issue possess none of the additional qualities needed to make them suitable or destined for the commercial market. Rather, their generic construction, greater comfort, lower price points and targeted marketing approach make them particularly attractive to domestic buyers. The fact that other market segments, to some extent, effectively "borrow" such goods from the domestic market does not as such change their overall nature.

68. On the basis of Rule 1 of the *General Rules* and Rule 6 of the *Canadian Rules*, the goods in issue are properly classified under tariff item No. 9401.61.10 as other upholstered seats with wooden frames for domestic purposes.

47. Tribunal Exhibit AP-2010-068-05A, tabs 3, 18.

## DECISION

69. For the foregoing reasons, the appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member