



Ottawa, Friday, September 25, 1998

Appeal No. AP-97-038

IN THE MATTER OF an appeal heard on February 26, 1998,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated May 28, 1997, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

FONORA TEXTILE INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

Appeal No. AP-97-038

FONORA TEXTILE INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue made under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether certain rectangular pieces of cloth used in industrial applications are properly classified under tariff item No. 6307.10.90 as other floor-cloths, dish-cloths, dusters and similar cleaning cloths, as determined by the respondent, or should be classified under tariff item No. 6307.10.10 as industrial shop towels, as claimed by the appellant.

HELD: The appeal is allowed. The Tribunal finds that the results of the testing of the cloths in issue by the Department of National Revenue showed that they met all but the length and width requirements of tariff item No. 6307.10.10. However, the reliability of the test results was brought into question by the fact that: (1) the ruler used to measure the cloths in issue was on the table as opposed to being on top of the cloths; (2) folds, wrinkles and creases were dealt with by spreading the cloths in issue without any ironing; and (3) only five additional measurements were taken when the samples were found not to meet the width and length requirements. The witness for the respondent agreed that the method of removing the folds is subject to error and that, in terms of the reliability of the test results vis-à-vis the entire lot, the two samples tested were not very representative of the total lot. On balance, the Tribunal is not persuaded of the accuracy of the test results of the width and length of the samples of the cloths in issue.

The only other test results available to the Tribunal are those of the Textile Technology Centre. While the Tribunal recognizes that the samples tested by the Textile Technology Centre did not meet all of the requirements of tariff item No. 6307.10.10, the Tribunal is of the view that the width and length test results, which were within the values set out in tariff item No. 6307.10.10, demonstrate that placing the ruler on top of the cloths in issue and ironing them can increase the measurements. Moreover, the Tribunal is persuaded that, had the Department of National Revenue put the ruler on top of the samples and ironed them, the width and length requirements of tariff item No. 6307.10.10 would likely have been met. Accordingly, the cloths in issue should be classified as industrial shop towels under tariff item No. 6307.10.10.

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 26, 1998
Date of Decision: September 25, 1998

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Raynald Guay, Member
Peter F. Thalheimer, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Margaret Fisher

Appearances: Eric Steinberg, for the appellant
Louis Sébastien, for the respondent

Appeal No. AP-97-038

FONORA TEXTILE INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. In the decision, the Deputy Minister states that “based on the laboratory analysis the towels do not meet the requirements set out in tariff item 6307.10.10.” The issue in this appeal is whether certain rectangular pieces of cloth used in industrial applications are properly classified under tariff item No. 6307.10.90 of Schedule I to the *Customs Tariff*² as other floor-cloths, dish-cloths, dusters and similar cleaning cloths, as determined by the respondent, or should be classified under tariff item No. 6307.10.10 as industrial shop towels, as claimed by the appellant. The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

63.07	Other made up articles, including dress patterns.
6307.10	-Floor-cloths, dish-cloths, dusters and similar cleaning cloths
6307.10.10	--Industrial shop towels, hemmed, of a width of 43 cm or more but not exceeding 56 cm and a length of 43 cm or more but not exceeding 61 cm, of unbleached woven fabrics solely of cotton or of cotton and man-made fibres, measuring per single yarn 420 decitex to 1,000 decitex and having not less than 78 yarns but not more than 133 yarns per 10 cm in the warp and not less than 78 yarns but not more than 137 yarns per 10 cm in the weft, of a weight of 135 g/m ² or more but not exceeding 203 g/m ²
6307.10.90	--Other

Mr. Eric Aronoff, President of Fonora Textile Inc., appeared as a witness, described the appellant’s business and the cloths in issue and discussed the facts surrounding the shipment at issue. Mr. Aronoff described the cloths in issue as pieces of fabric measuring about 17.5 in. × 17.5 in. made of 100 percent cotton with no dyeing or finishing. The fabric is sewn around the edges on three sides. Mr. Aronoff described the production process for the cloths as involving manual cutting and agreed that this could result in irregularities in the cutting. Before being sold in Canada, the cloths in issue are treated or processed in Canada by being laundered and bleached, which results in significant shrinkage of the cloths and inflation of the fibres, making the cloths more absorbent.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

Mr. Aronoff stated that the appellant has been importing the cloths in issue for 8 or 9 years and receives about 15 shipments of approximately 600,000 cloths per year. Mr. Aronoff explained that the appellant receives pre-production samples and tests them for weight, measurements and thread count. In addition, when the imported cloths arrive in Canada, the appellant generally takes a bale at random, opens it up, pulls out some samples and weighs them, measures them and takes their thread count. Aside from one instance when the appellant had a problem with an importation of cloths, from a different supplier, that the Department of National Revenue (Revenue Canada) deemed were too light or too small and the appellant accepted the judgment and paid the applicable duty, the appellant never found that any of the samples from the supplier of the cloths in issue did not meet the requirements of tariff item No. 6307.10.10.

With respect to the provision of samples of the cloths in issue by the appellant to Revenue Canada, Mr. Aronoff stated that the appellant's customs broker had advised the appellant's controller to obtain samples for Revenue Canada in response to its request in June 1995. Mr. Barry Fortin, Purchasing Agent for Fonora Textile Inc., then pulled samples from the shipment at issue and, in July 1995, sent the samples to Revenue Canada, as well as to the Textile Technology Centre in Saint-Hyacinthe, Quebec, for testing.

Counsel for the respondent referred Mr. Aronoff to a letter to the appellant from Revenue Canada dated June 27, 1995, requesting the appellant to "forward sample(s) of the goods imported and described as: 100% cotton industrial shop towel, art. no. HG4137."³ Attached to the letter is a certificate of identification which states, in part: "I hereby certify that the samples submitted represent goods described above." Mr. Aronoff agreed that this certificate would probably have been signed by the appellant's customs broker on its behalf.

Mr. Fortin also appeared as a witness to give evidence with respect to the provision of samples to Revenue Canada. He indicated that he was advised by the appellant's controller that Revenue Canada required samples and that he went to the imported bales of cloths and obtained, at random, approximately 7 to 10 samples. The appellant's customs broker sent about 4 samples to Revenue Canada around the end of June 1995, and the others were tagged with the company name and the shipment date and filed. Mr. Fortin did not measure the samples before they were sent to Revenue Canada.

The appellant was informed in late September 1995 that the samples had not met Revenue Canada's size requirements. Mr. Fortin then took one of the samples that had been tagged and filed and mounted it on a piece of cardboard measuring 43 cm x 43 cm. The sample was as big as, or in excess of, the dimensions of the cardboard. Of the four samples remaining at that point, two were sent to the Textile Technology Centre, and the results of the testing conducted on those samples indicated that they met the size requirements of tariff item No. 6307.10.10. In order to get a second opinion, the last sample was submitted to the Textile Technology Centre in September 1997 and was also found to have met the size requirements.

Expert witnesses appeared on behalf of the appellant and the respondent to give evidence about their testing of samples of the cloths in issue and the results of those tests. The appellant's expert witness, Mr. Martin Filteau, a mechanical engineer holding the position of Director, R & D Manufacturing Division at the Textile Technology Centre, was accepted by the Tribunal as an expert in the testing of textiles. Mr. Filteau described the Textile Technology Centre as a non-governmental, non-profit organization which has been accredited by the Standards Council of Canada for testing textiles. Mr. Filteau indicated that he was not involved with the tests performed on two samples of the cloths in issue, the results of which were set out

3. Exhibit B-1.

in a report dated October 13, 1995.⁴ However, he actually supervised and approved the testing of the other sample of the cloths in issue, the results of which were set out in a report dated September 11, 1997.⁵

The report dated October 13, 1995, showed that the two samples were tested for textile width using Canadian General Standards Board (CGSB) method CAN/CGSB-4.2, Nos. 4.1-M87⁶ and 4.2-M87,⁷ for mass per unit area, for linear density of yarn from fabric and for fabric count.

For the textile width test, the samples were conditioned at 21°C and at 65 percent relative humidity for 24 hours, and five measurements were taken using a steel ruler away from the corner between the outside of the selvage and the outside of the hem. The results showed a minimum width of 45.5 cm, a maximum of 46.6 cm and an average of 46.0 cm.

For the mass per unit area test, the samples were conditioned at 21°C and at 65 percent relative humidity, and five measurements were taken of 100 cm². The results showed an average mass of 178 g/m².

For the linear density of yarn from fabric test, the samples were conditioned at 21°C and at 65 percent relative humidity, and 10 measurements were taken of a length of yarn of 25 cm with a tension of 15 g. The results showed an average linear density of 68 decitex in the warp with a cotton count of 8.6 and an average linear density of 94 decitex in the weft with a cotton count of 6.3.

For the fabric count test, the samples were conditioned at 21°C and at 65 percent relative humidity, five measurements were taken using method C, and the measuring distance was 5 cm in the warp and 10 cm in the weft. The average thread count was 13.4 ends/cm in the warp, or 34.0 ends/in., and 8.8 picks/cm in the weft, or 22.5 picks/in. Mr. Filteau indicated that the samples did not meet the requirement for thread count in tariff item No. 6307.10.10 in the warp because the requirement is not more than 133 yarns per 10 cm and the samples had a thread count of 134 ends/cm, a difference of less than 1 percent.

The report dated September 11, 1997, showed that one sample was tested for textile width and textile length using CGSB method CAN/CGSB-4.2, Nos. 4.1-M87 and 4.2-M87, for mass of fabrics, for linear density of yarn from fabric and for fabric count.

For the textile width and textile length test, the sample was conditioned at 21°C and at 65 percent relative humidity, and five measurements were taken using procedure I with measurements taken from selvage to seam fold for width direction and from seam fold to seam fold for length direction. The results showed a minimum width direction of 45.0 cm, a maximum of 45.6 cm and an average of 45.2 cm. The results showed a minimum length direction of 45.3 cm, a maximum of 45.7 cm and an average of 45.4 cm.

For the mass of fabrics test, the sample was conditioned at 21°C and at 65 percent relative humidity, and five measurements were taken of 100 cm². The results showed an average mass of 130.9 g/m². Mr. Filteau indicated that the sample weighed about 4.1 g, or 3 percent, less than the required weight.

4. Tribunal Exhibit AP-97-038-13.1.

5. *Ibid.*

6. National Standard of Canada, *Textile Test Methods: Textile Fabrics—Measurement of Width of Pieces*, Canadian General Standards Board, March 1987.

7. National Standard of Canada, *Textile Test Methods: Textile Fabrics—Measurement of Length of Pieces*, Canadian General Standards Board, April 1987.

For the linear density of yarn from fabric test, the sample was conditioned at 21°C and at 65 percent relative humidity, and 10 measurements were taken of a length of yarn of 250 mm with a tension of 15 g. The results showed an average linear density of 68.6 decitex in the warp with a cotton count of 8.6 and an average linear density of 53.9 decitex in weft with a cotton count of 11.0.

For the fabric count test, the sample was conditioned at 21°C and at 65 percent relative humidity, five measurements were taken using method C, and the measuring distance was 5 cm. The average thread count was 11.3 ends/cm in the warp, or 28.8 ends/in., and 8.9 picks/cm in the weft, or 22.7 picks/in.

Mr. Filteau indicated that, for a fabric that is sewn, cut and sewn, it would be virtually always impossible for a company to supply the exact same measurement and that a tolerance of 5 percent is generally acceptable by the industry.

The respondent's expert witness, Mr. Les Allen of the Laboratory and Scientific Services Directorate of Revenue Canada, tested two samples (nos. 118034-001 and 118034-002), as provided by the appellant, using the Laboratory and Scientific Services Directorate method⁸ (Revenue Canada method), and the results of such testing were set out in his report dated September 20, 1995. The report provides that, for the two samples tested for width and length, sample no. 118034-001 had a width of 42 cm and a length of 47 cm, and sample no. 118034-002 had a width of 41 cm and a length of 47 cm. The report further provides that the two samples were also tested for the number of yarns per 10 cm, for fabric weight and decitex. Sample no. 118034-001 had 113 yarns per 10 cm in the warp, 114 yarns per 10 cm in the weft, a fabric weight of 139 g/m², and a decitex of 616 in the warp and 595 in the weft. Sample no. 118034-002 had 112 yarns per 10 cm in the warp, 115 yarns per 10 cm in the weft, a fabric weight of 139 g/m² and a decitex of 607 in the warp and 573 in the weft.

Mr. Allen indicated that, before the samples were measured, they were placed in the "environmental room" for 24 hours which is at a temperature of 20°C and at 65 percent relative humidity. He stated that these are the conditions required in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁹ (the Explanatory Notes). Mr. Allen then described the procedure used to measure the samples. The junior chemist took five measurements and calculated the average. Based on these measurements, the samples did not meet the requirements. Therefore, Mr. Allen took five additional measurements to ensure that the first five were correct.

When questioned about the differences in the measurements taken by Revenue Canada and those taken for the appellant, Mr. Allen stated that it was obvious that Revenue Canada was measuring different cloths from those measured for the appellant. In Mr. Allen's view, there would not be a difference of 4 cm if the same cloths had been measured by all testers.

According to Mr. Allen, Revenue Canada uses its own method for measuring, as set out in the Revenue Canada method, because there is no standard method for measuring shop towels. This method is based on the CGSB, the International Organization for Standardization (ISO) and the American Society for Testing and Materials (ASTM) methods. In Mr. Allen's opinion, although there are differences between the measuring procedures used by the appellant and Revenue Canada, the differences would not cause a variance in the results. Mr. Allen referred specifically to two differences: (1) the fact that the ruler used to

8. *Textiles - Method for the physical analysis of industrial shop towels (tariff item No. 6307.10.10)*, revised October 1997.

9. Customs Co-operation Council, 1st ed., Brussels, 1986.

measure the cloths is on the table as opposed to being on top of the cloths; and (2) the fact that measurements were rounded to the nearest centimetre, such that actual measurements of 42.2 and 41.3 cm were rounded to 42 and 41 cm respectively. Mr. Allen indicated that the tester would get the folds out by spreading the cloth. He agreed that this method of removing the folds is subject to error.

In cross-examination, counsel for the appellant questioned Mr. Allen about how closely Revenue Canada's procedure had been followed. Counsel referred, in particular, to article 5.1.1 of the Revenue Canada method which requires that the tester "[p]ress the shop towel with an iron to remove all folds, wrinkles and creases," to article 5.2.2 which provides that "no measurements [are to be] taken near the rounded corners" and to articles 5.2.3 and 5.2.4 which set out the number and location of marks for measuring. Mr. Allen stated that he could not remember if the tester had complied with article 5.1.1, but that no measurements were taken near the rounded corners. With respect to the marks, he indicated that the initial tester had made five marks and then, when it was discovered that the cloths had not met the requirements, he made five additional marks and took five new measurements.

Mr. Allen was also referred to provisions in ASTM standard testing method D 3774. In particular, he was referred to article 9.2.1, which states that no measurements are to be taken within one metre of the ends of the roll or bolt, and to article 9.3.1, which provides that measurements are not to be taken closer than 150 mm to the cut ends. He was also referred to article 7.4 which provides, in part, as follows:

Each sample as provided is the unit sample. When a small swatch of fabric is sent to the laboratory to be used as the test specimen, the results are considered to be applicable to the sample only and not necessarily to the lot from which the sample was taken.

When asked, as a scientist, about the reliability of Revenue Canada's test results vis-à-vis the entire lot, Mr. Allen stated that "it's not a good sample." Mr. Allen also agreed that the two samples tested were not very representative of the total lot. However, Mr. Allen stated that it is his understanding that it is up to the importer to send a representative sample.

Counsel for the appellant submitted that the cloths in issue do fall within the prescribed range of "width of 43 cm or more but not exceeding 56 cm" set out in tariff item No. 6307.10.10. Counsel submitted that the independent test results from the Textile Technology Centre showed that the samples of the cloths in issue met the requirements of tariff item No. 6307.10.10. More specifically, the minimum width found was 45.5 cm, the maximum was 46.6 cm and the average was 46.0 cm. Correct conditioning and testing methods and procedures were used by the Textile Technology Centre, as the tests were performed according to CGSB method CAN/CGSB-4.2, Nos. 4.1-M87 and 4.2-M87, which is based on ISO standard 3932-1976. The cloths were conditioned in accordance with the "Standard Atmospheres for Conditioning and Testing of Textiles" contained in the Explanatory Notes to Section XI.

Counsel for the appellant submitted that the tests done on behalf of the respondent were not properly performed and that ASTM standard testing method D 3774 applied by the respondent was the wrong method, as the standard does not contemplate measuring fabric pieces with dimensions as small as the samples in issue. Moreover, counsel submitted that the testing method applied was not properly followed, as the standard does not provide a method for measuring fabric pieces with dimensions as small as the samples in issue. Counsel further submitted that the cloths in issue were found to be deficient by a few millimetres and that, had Revenue Canada testers ironed the samples and placed the ruler on top of the samples when measuring, they might have found that the samples met the size requirements. Alternatively, counsel argued

that, even if the samples tested did not fall within the required width range, this should not be taken as representative of the shipment.

Finally, counsel for the appellant submitted that the cloths in issue were packaged by the appellant as industrial shop towels and were sold as industrial shop towels for retail sale as industrial shop towels. In counsel's view, the cloths in issue should be classified in the heading appropriate for the goods to which they are most akin.

Counsel for the respondent submitted that, assuming all the other requirements can be met, which, counsel submitted, has not been shown, the cloths in issue can be classified under tariff item No. 6307.10.10 only if their width is 43 cm or more but not exceeding 56 cm. Since the width of the cloths in issue is less than 43 cm, counsel submitted that they cannot be classified under tariff item No. 6307.10.10 and must be classified under tariff item No. 6307.10.90. In counsel's view, it is irrelevant whether or not the cloths would actually be used as industrial towels.

Counsel for the respondent submitted that there are three acceptable standards which provide procedures for measuring the width of fabrics: CAN/CGSB-4.2, ASTM D 3774 and ISO 3932-1976. Counsel submitted that the Revenue Canada method used to test the cloths in issue takes into consideration all three standards and that the results obtained using this method would also be equivalent to the results from the other three methods. Counsel submitted that there are no practical differences between the measuring procedure based on CAN/CGSB-4.2, which was used by the Textile Technology Centre on behalf of the appellant, and the measuring procedure which was used by the Laboratory and Scientific Services Directorate on behalf of the respondent. In counsel's view, the appellant has not demonstrated¹⁰ how the testing by Revenue Canada on the cloths in issue was done in error.

With respect to the alleged errors identified by counsel for the appellant, counsel for the respondent submitted, in particular, that there was no evidence that the use of 5 or 10 marks on the cloths would have made a difference and no technical evidence as to the effects of ironing the cloths.

Counsel for the respondent submitted that the appellant was asked to provide representative samples of the cloths in issue. The appellant provided only two samples, and the respondent accepted that these were representative samples. It was submitted by counsel that, without an analysis of each cloth in the shipment, the appellant could not prove that the cloths in issue were incorrectly classified nor could the appellant determine what portion of the shipment may have met the requirements of the tariff item and what portion did not meet the requirements. In counsel's view, although there may have been insufficient evidence of the entire shipment, it was up to the importer to submit more samples, if necessary, to have a good representation of the entire shipment.

10. In support of the requirement that the appellant demonstrate that the tests were done in error, counsel for the respondent referred to the Tribunal's decision in *Hamida Textiles Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-92-226, October 28, 1993, and to the Tariff Board's decision in *Michelin Tires (Canada) Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (1981), 7 T.B.R. 341.

Counsel for the respondent also submitted that the Tribunal should rely on the testing done by Revenue Canada as opposed to the testing done on behalf of the appellant. In support of this argument, he referred to a classification ruling of the U.S. Customs Service.¹¹ The US ruling states, in part, as follows:

In cases such as this, where a party submits an outside report that differs from the Customs laboratory report, the Customs laboratory report cannot be disregarded and, therefore, takes precedence over the outside report... In order to consistently classify products, the same laboratory analysis must be executed throughout Customs. Customs cannot rely on outside reports which may or may not utilize different testing methods and still remain consistent in its tariff classification. Additionally, Customs does not have any evidence that the merchandise tested by the outside laboratory is the same merchandise.¹²

The issue before the Tribunal in this appeal is whether the cloths in issue meet the requirements of classification under tariff item No. 6307.10.10. The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*¹³ (the General Rules) and the *Canadian Rules*.¹⁴ Rule 1 of the General Rules provides that classification is to 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 principles set out in Rules 2 through 6, as well as the *Canadian Rules* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. For the purposes of this appeal, the Tribunal must decide whether the cloths in issue meet the requirements of tariff item No. 6307.10.10, subject to any relative Section or Chapter Notes and taking into account the Explanatory Notes.

The Tribunal observes that the Explanatory Notes to Section XI, which covers “Textiles and Textile Articles,” set out, in part, that testing is to take place in an atmosphere having a relative humidity of 65 percent and a temperature of 20°C to 50°C. Other than these notes, there is no guidance on the appropriate testing method for determining whether goods meet the requirements of tariff item No. 6307.10.10. However, the Tribunal is of the view that the Revenue Canada method, which references other generally accepted testing methods, is an “important factor” in interpreting and applying the requirements of tariff item No. 6307.10.10.¹⁵

The Revenue Canada method requires, in part, the following when testing shop towels: (1) calibrated steel rule (article 3.1); (2) conditioning and testing atmosphere with a relative humidity of 65 ± 2 percent and a temperature of $20 \pm 2^\circ\text{C}$ for a minimum of 24 hours (articles 4.1 and 5.1.2); (3) pressing of the towel with an iron to remove all folds, wrinkles and creases (article 5.1.1); (4) no measurements to be taken near rounded corners (article 5.2.2); (5) five marks at regular intervals along the width and the length if the width is consistently between 43 and 56 cm and the length is consistently between 43 and 61 cm (article 5.2.3); and (6) ten marks at regular intervals along the width and the length if the width is not consistently between 43 and 56 cm and the length is not consistently between 43 and 61 cm (article 5.2.4).

11. Ruling HQ 955020, February 1, 1995, Respondent’s Book of Authorities, Tab 2.

12. *Ibid.* at 3.

13. *Supra* note 2, Schedule I.

14. *Ibid.*

15. See, for example, *Gene A. Nowegijick v. Her Majesty the Queen*, [1983] 1 S.C.R. 29 at 37, in which the Supreme Court of Canada stated that administrative policy and interpretation are not determinative, but are entitled to weight and can be an “important factor” in case of doubt about the meaning of legislation.

The results of the testing of the cloths in issue by Revenue Canada showed that they met all but the length and width requirements of tariff item No. 6307.10.10. However, the reliability of Revenue Canada's test results was brought into question by the fact that: (1) the ruler used to measure the cloths in issue was on the table as opposed to being on top of the cloths; (2) folds, wrinkles and creases were dealt with by spreading the cloths in issue without any ironing; and (3) only five additional measurements were taken when the samples were found not to meet the width and length requirements. The witness for the respondent agreed that the method of removing the folds is subject to error and that, in terms of the reliability of Revenue Canada's test results vis-à-vis the entire lot, the two samples tested were not very representative of the total lot. On balance, the Tribunal is not persuaded of the accuracy of Revenue Canada's test results of the width and length of the samples of the cloths in issue.

The Tribunal was advised by witnesses that the samples of the cloths in issue that were tested by Revenue Canada are no longer available and that the appellant has only one other sample available from the shipment at issue that could be further tested. Accordingly, the Tribunal does not have the option to send this matter back to Revenue Canada and to request that the testing be redone, taking into account the factors affecting the reliability of Revenue Canada's initial test results. The only other test results available to the Tribunal are those of the Textile Technology Centre. While the Tribunal recognizes that the samples tested by the Textile Technology Centre did not meet all of the requirements of tariff item No. 6307.10.10, the Tribunal is of the view that the width and length test results, which were within the values set out in tariff item No. 6307.10.10, demonstrate that placing the ruler on top of the cloths in issue and ironing them can increase the measurements. Moreover, the Tribunal is persuaded that, had Revenue Canada put the ruler on top of the samples and ironed them, the width and length requirements of tariff item No. 6307.10.10 would likely have been met.

The Tribunal notes that, in *Hamida*, the issue was whether certain cloths or towels met the weight requirement of tariff item no. 6307.10.10. In that appeal, the Tribunal stated that the "onus [was] on the appellant to show that the respondent [had] incorrectly classified the goods" and that "the appellant [had] not submitted any specific evidence in support of its case, nor rebutted the evidence contained in the technical reports [of Revenue Canada]."¹⁶ In the Tribunal's view, this appeal is distinguishable on the basis that the appellant did submit evidence in support of its case that the width and length measurements were unreliable.

While the Tribunal is not persuaded of the applicability to this appeal of the US ruling referred to by counsel for the respondent, the Tribunal notes that the methods used by the Textile Technology Centre for measuring the widths and lengths of samples of the cloths in issue, namely, CAN/CGSB-4.2, Nos. 4.1-M87 and 4.2-M87, are specifically referenced in the Revenue Canada method. The Tribunal cannot, therefore, conclude that the testing methods used by the Textile Technology Centre and Revenue Canada were different, as was the case in the US ruling.

Accordingly, the Tribunal allows the appeal. The cloths in issue should be classified as industrial shop towels under tariff item No. 6307.10.10.

16. *Hamida*, *supra* note 10 at 2.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Raynald Guay

Raynald Guay

Member

Peter F. Thalheimer

Peter F. Thalheimer

Member