CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 3, 1999

Appeal No. AP-97-104

IN THE MATTER OF an appeal heard on October 21 and December 15, 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 August 14, 1997, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

TRANSILWRAP OF CANADA, LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Raynald Guay
Raynald Guay
Member

Pierre Gosselin
Pierre Gosselin
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-97-104

TRANSILWRAP OF CANADA, LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is in the graphic arts and packaging business in Scarborough, Ontario. The appellant imports various laminating films from a production unit in the United States. These laminating films are marketed under the name Trans-Kote. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3920.10.00 as non-cellular plastic sheets of polymers of ethylene, as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as non-cellular plastic sheets or films of polyethylene terephthalate, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal considers that the goods in issue are properly classified under tariff item No. 3920.10.00 as non-cellular plastic sheets of polymers of ethylene. The Tribunal comes to this view because the goods in issue were found to be made up of a layer of polyethylene terephthalate and a layer of ethylene, neither of which contributes more than 95 percent or more by weight to the total polymer content. Consequently, the goods in issue are classified in the heading covered by the monomer which predominates by weight, which, in this case, is the ethylene.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	October 21 and December 15, 1998
Date of Decision:	March 3, 1999
Tribunal Members:	Peter F. Thalheimer, Presiding Member Raynald Guay, Member Pierre Gosselin, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Barry P. Korchmar, for the appellant Colleen Mackey, for the respondent

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-97-104

TRANSILWRAP OF CANADA, LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PETER F. THALHEIMER, Presiding Member
RAYNALD GUAY, Member
PIERRE GOSSELIN, 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 dated August 14, 1997, made pursuant to section 63 of the Act.

The appellant is in the graphic arts and packaging business in Scarborough, Ontario. The appellant imports various laminating films from a production unit in the United States. These laminating films are marketed under the name Trans-Kote. At the time of importation, the goods in issue were classified under tariff item No. 3920.62.00 of Schedule I to the *Customs Tariff*[2] as non-cellular plastic sheets of polyethylene terephthalate (PET) and were afforded the benefits of Code 7934 of the schedule to the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*.[3] The goods in issue were subsequently reclassified under tariff item No. 3920.10.00 as non-cellular plastic sheets of polymers of ethylene. The appellant requested a re-determination of these decisions. By means of a decision dated August 14, 1997, the respondent denied the request and confirmed the classification of the goods in issue under tariff item No. 3920.10.00.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3920.10.00 as non-cellular plastic sheets of polymers of ethylene, as determined by the respondent, or should be classified under tariff item No. 3920.62.00 as non-cellular plastic sheets or films of PET, as claimed by the appellant.

The relevant portions of the tariff nomenclature of Schedule I to the *Customs Tariff* read as follows:

39.20	Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.
3920.10.00	-Of polymers of ethylene
	-Of polycarbonates, alkyd resins, polyallyl esters or other polyesters:
3920.62.00	--Of polyethylene terephthalate

The hearing of this appeal began on October 21, 1998. As a result of procedural and evidentiary issues involving, primarily, the expert evidence that the appellant wished to lead, the Tribunal adjourned the appeal with the consent of both parties. In doing so, the Tribunal allowed the filing of supplementary expert

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. SOR/88-74, December 31, 1987, *Canada Gazette* Part II, Vol. 122, No. 2 at 750.

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reports and submissions by both parties. As well, the Tribunal directed the parties to jointly submit a letter identifying which samples in the respondent's analysis[4] correspond to the goods in issue and/or to agree that the predominant monomer, by weight, in the goods in issue is ethylene. The letter was to be filed as soon as possible.

The hearing continued on December 15, 1998. In dealing with preliminary matters, the appellant's representative was asked why he objected to the draft letter relating to the Tribunal's direction of October 21, 1998, provided by counsel for the respondent. The representative explained that the appellant did not object to the fact that, in all the samples tested, the ethylene coating weighed more than the PET. Rather, the appellant objected to the wording of certain headings in the table that the respondent supplied. The representative also advised the Tribunal that he would not be calling one of his expert witnesses, Dr. A.T.P. (Alex) Zahavich, and asked that his report be withdrawn from the record of this appeal.

The appellant's representative called two witnesses. The first was Mr. Dennis Cline, Marketing Manager with Transilwrap of Canada, Ltd. Mr. Cline has been with the company for 11 years in various capacities, in addition to his present position, including that of production manager. He testified that the goods in issue are imported in rolls which are predominantly between 45 and 60 inches in width and anywhere from 5,000 to 30,000 feet in length. The goods in issue are then resold, either as is or cut to length. He explained that, although the appellant makes a variety of these laminating or polyester films, the goods in issue are Trans-Kote PET-based products identified by the letters "FG" or "MR." The letters do not stand for anything specific, but rather indicate a different degree of performance between products.

Turning to the use of the goods in issue, Mr. Cline stated that the goods in issue are used to laminate a variety of substrates, but mostly paper. Examples of items that are laminated using the goods in issue include restaurant menus, maps and any printed item for art work. He also stated that the goods in issue are known as polyester films, in part because the protection that a user is buying is the protection afforded by the polyester film. Mr. Cline also explained the process by which the goods in issue would be applied to a substrate such as paper and, in particular, noted how the heating of the product allows the ethylene adhesive to perform its function. Once the film and substrate have been formed into a laminated product, that product is cooled.

In cross-examination, Mr. Cline agreed that, in general terms, the goods in issue may be described as "plastics." He also agreed that the goods in issue are not "sticky" in the state in which they are imported. He stated that the polyethylene component of the goods in issue was laid down as an adhesive coating and was not a film to begin with. Having said this, he agreed that the polyethylene portion of Exhibit B-3[5] appears to be a sheet. With respect to the various protection qualities of the goods in issue, Mr. Cline stated that these are primarily provided by the polyester film.

The appellant's second witness was Dr. Zhi Yuan (Wayne) Wang, a professor of organic and polymer chemistry at Carleton University. Dr. Wang was accepted as an expert in polymer chemistry. Dr. Wang described the analysis performed on four of the six samples, which is the subject of his report. He explained that he used a solvent-stripping method to remove the polyethylene, or, what he called, the "coating layer," and then confirmed the components of each layer in the goods in issue. He concluded that the four samples are not copolymers, but rather pure PET films coated with an adhesive which is a copolymer of ethylene and acetate. He also agreed that the polyethylene coating weighed more than the PET film. Dr. Wang distinguished between "copolymers" and blends or mixtures of polymers and cautioned that

4. Tribunal Exhibit AP-97-104-23.
5. An analysis performed on the goods in issue, based on a protocol entitled "Solvent Extraction of Polyethylene Terephthalate In Multi-Layered Films" (for further details, see Dr. Kevser Taymaz's testimony).

the two should not be confused. He stated that a product made of a single copolymer cannot be separated without polymer degradation. The fact that he was able to clearly separate the layers in the samples that he analyzed only proves that the product being analyzed is not a copolymer.

Dr. Wang discussed at length the meaning of the term "plastic." He agreed that polyethylene and PET are plastics, but only in a general sense. He stated that, in polymer chemistry, the term"plastic" usually refers to a final product, a product for sale in a commercial sense, while terms such as "polymers," "copolymers" and "homopolymers" usually describe the materials that make up that product. He also stated that a plastic product, by itself, is not a polymer: it may be a polymer product, but not a single pure polymer. Dr. Wang was also asked questions about the Harmonized System Committee's "Summary of Comments on Chapter 39 and Observations by the Technical Team[6]" (the Technical Team Summary) and, in particular, about paragraphs 11 and 12 of this report. It was his view that the comments in this document refer to materials and not to goods.

Subsequently, Dr. Wang was asked whether he considered the goods in issue polymer materials or goods. He stated that they are goods made up of polymers. He described them as polymeric goods, not polymers, because they are final goods. In cross-examination, Dr. Wang agreed that the goods in issue can be formed by an extrusion process.

Counsel for the respondent called Dr. Kevser Taymaz as a witness. Dr. Taymaz has been a chemist with the Laboratory and Scientific Services Directorate of the Department of National Revenue since 1981 and has been a senior analytical advisor in that directorate since 1992. Counsel requested that Dr. Taymaz be accepted as an expert in polymer chemistry. The appellant's representative objected, primarily, on the basis that Dr. Taymaz's area of expertise appeared to be instrumental and analytical techniques relating to chemistry as opposed to polymer chemistry and because she had not taught a course in polymer chemistry in Canada. The Tribunal accepted Dr. Taymaz as an expert in chemistry with experience in polymer chemistry.

Dr. Taymaz was asked to explain the analysis reflected in Exhibit B-3. She explained that she took a portion of the original samples provided to the laboratory and cut them into pieces. She kept one piece as an example of the original product. With another piece, she dissolved the polymer of ethylene layer in a suitable solvent and what remained was the PET layer. With a third piece, she dissolved the PET layer with a suitable solvent and was left with the polymer of ethylene layer. In Dr. Taymaz's view, the goods in issue are 99.9 percent composed of polymers, and, in them, no single monomer composes more than 95.0 percent of the goods.

In cross-examination, Dr. Taymaz described the goods in issue as polymeric goods, that is, goods made of polymers. In response to questions from the Tribunal, she was asked if the layers that were produced as a result of the analysis reflected in Exhibit B-3 were films. She stated that they were.

In argument, the appellant's representative submitted that the evidence shows that, both at the time of importation and subsequently, the goods in issue are films. The expert witnesses also testified that they are goods and not materials. He noted the respondent's agreement that the goods in issue are properly classified in heading No. 39.20 and referred the Tribunal to Chapter Note 1 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[7] to Chapter 39. He submitted that, by virtue of

6. Customs Co-operation Council, Harmonized System Committee, 21st Session, Brussels, 1980, Docu. No. 26.185 E, O. Eng., N8-339. Paragraph 11 of that document states: "In general, [Chapter 39] covers substances called polymers, consisting of molecules which are characterized by the repetition of one or more types of monomer units." The document is further discussed below.
7. Customs Co-operation Council, 1st ed., Brussels, 1986.

this note, the term "plastics" refers to the materials in heading Nos. 39.01 to 39.14 and is not used either to refer to or to mean a product. He further submitted that the goods in issue are goods made from materials, namely, PET and polyethylene. He referred to the testimony of the expert witnesses and stated that the goods in issue happen to be made from polymers, but are not themselves polymers.

The appellant's representative pointed out that the wording of each of heading Nos. 39.01 to 39.14 is conditioned by the words "in primary forms." He submitted that, at the time of importation, the goods in issue are not goods that are in primary forms. He referred the Tribunal to the Technical Team Summary, which, he submitted, provides that Chapter 39 covers "substances," not goods. Therefore, the weight test that the report refers to is only meant to apply to materials or primary forms. He then submitted that Note 4 to Chapter 39 applies to materials in primary forms and that, thus, the weight test in Note 4 applies only to primary forms. As the goods in issue are not polymers in any sense of the word, the respondent incorrectly applied the weight test to them. The representative submitted that the confusion arose because of the consumer's use of the word "plastic." The witnesses testified that PET and polyethylene are themselves plastics, but that is not what is being classified; films are being classified. The goods are polyester films of PET and, therefore, should be classified in subheading No. 3920.62.

The appellant's representative submitted that, if the Tribunal reached Rule 3 (a) of the *General Rules for the Interpretation of the Harmonized System*[8] (the General Rules), then, because the goods in issue are marketed and sold as polyester films and perform a function of polyester film, they are best described as polyester films. He also made comments with respect to Rules 3 (b) and 3 (c) of the General Rules.

The appellant's representative considered the application of Code 7934 to the goods in issue and submitted that, if they are classified under tariff item No. 3920.62.00, then they are not excluded from the application of this code because, at the time of importation, the goods in issue are in widths greater than 15 centimetres.

Finally, the appellant's representative addressed the Tribunal's decision in *Continuous Colour Coat Limited* v. *The Deputy Minister of National Revenue*.[9] He noted that the decision of the Federal Court of Canada - Trial Division[10] (the Trial Division), which upheld the Tribunal's decision, had been appealed to the Federal Court of Appeal.[11] He then referred to the Tribunal's decision and submitted that the issue of whether or not the goods in that case were polymers in their own right had not arisen. In this case, the main issue was whether those goods were copolymers or not, and the evidence in that case left the impression that the goods were new products that were polymers. He submitted that the evidence in that case became confused about what is a polymeric product. He submitted that the same confusion can exist when one considers Note 1 to Chapter 39. He stated that Note 1 deals with materials and that, even though one has a product made of polymers, this does not make the product itself a polymer. Again, if one does not have a polymer, then the weight test of Note 4 to Chapter 39 cannot necessarily be applied.

Counsel for the respondent first submitted that no authority had been presented by the appellant's representative for his novel interpretation of Note 1 to Chapter 39. She agreed that it was true that Note 1 contains, for purposes of this case, the only relevant definition of the term "plastics." However, she disagreed that this definition only applies to plastics in their primary form. Counsel submitted that it was clear from the

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8. *Supra* note 2, Schedule I.
9. Appeal Nos. AP-93-274 and AP-93-294, August 31, 1994.
10. *Continuous Colour Coat Limited* v. *The Deputy Minister of National Revenue for Customs and Excise*, (1997), 138 F.T.R. 135, Court File No. T-2831-94, October 27, 1997.
11. *Continuous Colour Coat Limited* v. *The Deputy Minister of National Revenue*, Court File No. A-854-97.

wording of Note 1 that this definition applies throughout the nomenclature, i.e. both inside and outside Chapter 39.

Counsel for the respondent submitted that Note 1 to Chapter 39 requires that the goods in issue be formed out of the primary materials identified, that they be formed under a process such as, in this case, extrusion and that they hold their shape once they have been formed under that process. Counsel submitted that the testimony of both experts confirmed that the goods in issue are comprised of polymers of ethylene, which is listed in heading No. 39.01, and of PET, which is listed in heading No. 39.07. Both experts also confirmed that the goods in issue had been formed by extrusion and retain their shape after removal of the external influence, which could be either heat or pressure. Therefore, within the meaning of Note 1 to Chapter 39, the goods in issue are plastics.

With respect to the nature of the goods in issue, counsel for the respondent submitted that it is clear that they no longer remain in their primary form, but have been formed into sheets. She suggested that this is evident from looking at a sample and that, if there was need for further proof, the respondent's second test, which divided each portion of a sample and showed that what was left was in the form of a sheet or film, proved conclusively that the goods in issue are multi-layered sheets. Furthermore, this was the type of product considered by the Tribunal in *Continuous Colour*.

Counsel for the respondent submitted that, as the outcome of the appeal to the Federal Court of Appeal is not known, the present law is the decision of the Trial Division, which upheld the Tribunal's decision. More specifically, the Trial Division upheld the concept that each polymer layer in a multi-layered product contributes to the "total polymer content of the product." She submitted that this is an interpretation of Notes 1 and 4 to Chapter 39. Counsel submitted that the evidence shows that the total polymer content of the goods in issue is comprised of both the PET layer and the polymer of ethylene layer and that no single monomer contributes 95 percent or more by weight of these goods.

Counsel for the respondent submitted that the appellant's representative's only attempt to distinguish this case from *Continuous Colour* was found in the expert's report that the appellant had withdrawn. She returned to the decision of the Trial Division and submitted that it had specifically concluded that Note 4 to Chapter 39 provides an inclusive definition of the term "copolymer," a broader definition than the scientific one, and that this definition is now binding on the Tribunal. Counsel also made submissions with respect to the application of Rule 3 of the General Rules.

In reply, the appellant's representative submitted that it was Dr. Taymaz's testimony, as reflected in the Tribunal's decision in *Continuous Colour* describing the goods in that case as a "polymeric product," which led to counsel for the respondent's confusion when she suggested today that the goods in issue are polymeric products. He noted that both experts were asked whether a new polymer had been created and whether the goods in issue may be described as polymers at the time of importation and that they replied to both questions in the negative. He also reiterated his submission that the weight test in Note 4 to Chapter 39 cannot be applied to a product and that it can only be applied to a polymer, copolymer or homopolymer. Finally, he submitted that the Tribunal is not bound by its previous decisions and that each case is to be considered on its own merits.

The Tribunal considers that the goods in issue are properly classified under tariff item No. 3920.10.00 as non-cellular plastic sheets of polymers of ethylene. The Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the General Rules, that must govern the classification of the goods in issue. As noted by the Tribunal in *York Barbell Co. Ltd.* v. *The Deputy Minister of National Revenue for Customs*

and Excise,[12] Rule 1 of the General Rules is of the utmost importance when classifying goods. Rule 1 states that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. In addition, Rule 6 states, in part, that classification at the subheading level is to be determined according to the terms of the relevant subheadings and any related Subheading Notes and, *mutatis mutandis*, Rules 1 through 5 of the General Rules. In addition, in this case, the Tribunal comes to this conclusion based on the decision of the Trial Division in *Continuous Colour*, which is discussed below.

The Tribunal notes that the parties agree that the goods in issue are properly classified in heading No. 39.20. The Tribunal agrees with counsel for the respondent that Note 1 to Chapter 39 provides a definition of the term "plastics" that applies throughout the nomenclature, i.e. both inside and outside Chapter 39. The Tribunal is persuaded that the evidence shows that the goods in issue satisfy this definition and, therefore, that the goods in issue should be considered sheets of plastic.

The Tribunal is persuaded not only that the goods in issue are sheets of plastic, but also that they are made up of two layers of polymers. As Exhibit B-3 clearly demonstrates, the goods are composed of a layer of PET and a layer of polyethylene. It was noted earlier that Dr. Wang described the goods in issue as goods made up of polymers and as polymeric goods; Dr. Taymaz described them in very similar terms. The Tribunal agrees with counsel for the respondent that these descriptions are similar to those of the goods that the Tribunal classified in *Continuous Colour* in that the latter are also made from layers of different polymers.

This brings the Tribunal to consideration of Note 4 to Chapter 39, which provides, in part:

> For the purpose of this Chapter, except where the context otherwise requires, copolymers … and polymer blends are to be classified in the heading covering polymers of that comonomer which predominates by weight over every other single comonomer, comonomers whose polymers fall in the same heading being regarded as constituting a single comonomer.
>
> The expression "copolymers" covers all polymers in which no single monomer contributes 95% or more by weight to the total polymer content.

In *Continuous Colour*, the Tribunal stated that Note 4 to Chapter 39, in conjunction with Subheading Note 1 to Chapter 39, provides a broader definition of the terms "copolymer" and "polymer" than the dictionary definitions of these terms offered in evidence. The Tribunal continued by stating that "the third paragraph of Note 4 offers a specific definition of the term 'copolymer' that is meant to facilitate the classification of the products covered by Chapter 39." The Tribunal then went on to say that it found this view reasonable because it felt that it was consistent with the statement in the Technical Team Summary that, "for purposes of the definition in the third paragraph of Note 4, copolymers may also be termed 'polymers'.[13]"

In considering this part of the Tribunal's decision in *Continuous Colour*, Joyal J. stated, in part:

> The principal question that needs to be addressed in the present case concerns the interpretation given by the Tribunal to Note 4 to Chapter 39 of Schedule I of the **Tariff** in regards to the appellant's goods.

12. 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.

13. *Supra* note 9 at 6.

> Appellant's counsel submits that the Tribunal erred by considering that a product made of two separate and distinct layers of polymer was a copolymer. The Tribunal came to that conclusion after opting for a broad definition of "copolymer" given by Note 4 and Subheading Note 1 to Chapter 39 of Schedule I, in conjunction with the HS Committee's statement.
>
> When reading the definitions in the **Gage Canadian Dictionary** of the words "polymer" … "copolymer" … and "polymerize" … one is inclined to conclude that a copolymer is not a polymer until it undergoes polymerization. That narrow definition, confirmed by the scientific testimony, could be designated as a more "scientific approach" as to the qualification of what constitutes a copolymer product. But when the pertinent dispositions are read as whole, Note 4 does provide an inclusive definition of the term "copolymer" which "covers all polymers […]".
>
> In this instance, I am not convinced that the Tribunal's interpretation was in anyway unreasonable. Faced with contradictory evidence as to the definition of polymer, the Tribunal opted for the broader interpretation given by the **Act**, instead of a more restrictive "scientific" one. This conclusion respects the established rules of interpretation and is by no means less reasonable than the one submitted by the appellant.[14]

In the Tribunal's view, this is a statement of the law with respect to the interpretation of the words "copolymer," "polymer" and "homopolymer" for purposes of the Act. The Tribunal wishes to reiterate its statement in *Continuous Colour* that, in its view, Note 4 to Chapter 39 is drafted in a particular manner that is meant to facilitate the classification of the products covered by Chapter 39 and that, as acknowledged by the Trial Division, this view is reflected in the Technical Team Summary.

In light of the fact that the goods in issue have been found to be made up of a layer of PET and a layer of ethylene, neither of which contributes more than 95 percent or more by weight to the total polymer content of the goods in issue[15] in accordance with Note 4 to Chapter 39, the goods in issue are properly classified in the heading covered by that monomer which predominates by weight, which, in this case, is the ethylene. Therefore, the goods in issue are properly classified under tariff item No. 3920.10.00.

Accordingly, the appeal is dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Raynald Guay
Raynald Guay
Member

Pierre Gosselin
Pierre Gosselin
Member

14. *Supra* note 10 at 138 and 139.
15. *Supra* note 4.