Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-009

Maples Industries, Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, July 18, 2016

Canada

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IN THE MATTER OF an appeal heard on May 12, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated February 26, 2014, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MAPLES INDUSTRIES, INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 12, 2016
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Peter Jarosz
Student-at-law:	Jessica Spina
Supervisor, Registry Operations:	Haley Raynor
Registrar Support Officer:	Chelsea McKiver

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Maples Industries, Inc.	Greg Kanargelidis Zachary Silver
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Andrew Cameron

WITNESSES:

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Chief Financial Officer
Maples Industries, Inc.

Sabit Adanur
Professor
Auburn University

Jane Batcheller, PhD
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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA) made on February 26, 2014, pursuant to subsection 60(4), in which the CBSA rejected a request for re-determination of origin respecting scatter rugs manufactured by the Maples Industries, Inc. (Maples) during the 2010 fiscal year.

2. The issue in this appeal is whether certain scatter rugs produced by Maples and exported to Canada are entitled to preferential tariff treatment, in particular the United States Tariff (UST), under the *North American Free Trade Agreement*.[2]

3. Maples is a manufacturer and exporter of accent rugs used in homes. Maples was founded in Scottsboro, Alabama, in 1966.

4. The goods in issue are composed of synthetic filament nylon yarn, polypropylene mesh fabric (the backing), natural rubber latex, vulcanizing accelerators, chloride celling agents, nylon filament sewing thread, paints, colours and tints. Two components of the goods in issue, namely, the nylon filament sewing thread and the backing, originate outside of a NAFTA country.[3] The thread is used to serge the edges of the rug and comprises 0.22 percent of the total weight of the finished rug. The backing is made of woven polypropylene strips and comprises 6.71 percent of the total weight of the finished rug.

5. The CBSA conducted a verification of origin under *NAFTA* concerning the origin of rugs imported into Canada by Maples under subheading No. 5703.20 of the schedule to the *Customs Tariff*[4] between January 1 and December 31, 2010. The specific models selected for the purposes of the verification were as follows: Style A 6268 Prestige, Style TK1, Style TK3 and Style TK4.

6. The CBSA issued a final decision on February 26, 2014, pursuant to paragraph 60(4)(b) of the *Act*, with respect to the request for a re-determination of origin. Maples was thereby informed that, although the CBSA had reversed its original position regarding the application of the *de minimis* rule to the nylon filament sewing thread, the *de minimis* rule was not being applied to the backing. Furthermore, the CBSA rejected Maples' self-produced material election made in respect of the tufted fabric, stating that the material had the characteristics of an unfinished carpet of heading No. 57.03 and, thus, did not meet the required tariff chapter change of the applicable rule of origin.

7. On May 23, 2014, Maples filed a notice of appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Act*.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Department of Foreign Affairs, Trade and Development <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng> (entered into force 1 January 1994) [*NAFTA*].
3. The synthetic filament nylon yarn originates in the People's Republic of China and the backing originates in Saudi Arabia.
4. S.C. 1997, c. 36.

PROCEDURAL HISTORY

8. On June 1, 2015, the Tribunal received a request for intervener status filed on behalf of Engineered Floors, LLC. Both Maples and the CBSA objected to the request and, on July 10, 2015, the Tribunal denied the request for intervener status.

9. On January 13, 2016, the Tribunal held a pre-hearing teleconference and requested that parties provide written submissions on constraints in law to the operation of a downward tariff shift from a higher chapter of the schedule to the *Customs Tariff* to a lower chapter and, in the event that constraints were found to exist, submissions on their nature, content and ambit. Maples argued a position which implied a tariff shift from a higher heading of the schedule (which generally describes a more processed product) to a lower one (which theoretically implies less processing). The Tribunal had questions as to whether multi-directional shifts of the sort were permissible in the scheme provided for by the *Customs Tariff*.

10. On January 28, 2016, Maples filed its submission on the permissible direction of tariff shifts and argued that the law does not prohibit a downward tariff shift. The CBSA agreed with Maples' position and provided additional case law in support of this argument on February 11, 2016.

11. The Tribunal held a public hearing on May 12, 2016. Maples called Dr. Sabit Adanur, Professor in the Department of Mechanical Engineering at Auburn University, in Auburn, Alabama, and requested that he be qualified as an expert witness in the area of polymers and fibres in the manufacture of carpets and rugs. The Tribunal accepted Dr. Adanur as an expert witness.[5] Maples also called Mr. Vito Russo, Chief Financial Officer of Maples, as a lay witness to testify to the production process of carpets and tufted fabrics in Maples' facilities.[6]

12. The CBSA called Dr. Jane Batcheller, Principle Investigator for the Protective Clothing and Equipment Research Facility at the University of Alberta and Instructor in the Department of Human Ecology at the University of Alberta in Edmonton, Alberta. The CBSA sought to qualify Dr. Batcheller as an expert in textile analysis. The Tribunal accepted Dr. Batcheller as an expert witness.[7]

LEGAL FRAMEWORK

13. The relevant provisions of the *NAFTA Rules of Origin Regulations*[8] provide as follows:

> **PART I**
>
> **Definitions and Interpretation**
>
> **2(1)** For purposes of these Regulations,
>
> . . .
>
> **non-originating good** means a good that does not qualify as originating under these Regulations; . . .
>
> **non-originating material** means a material that does not qualify as originating under these Regulations; . . .
>
> . . .
>
> **originating good** means a good that qualifies as originating under these Regulations; . . .

5. *Transcript of Public Hearing*, 12 May 2016, at 61.
6. *Ibid.* at 10.
7. *Ibid.* at 119-20.
8. S.O.R./94-14 [*Regulations*].

originating material means a material that qualifies as originating under these Regulations; . . .

. . .

self-produced material means a material that is produced by the producer of a good and used in the production of that good; . . .

. . .

PART II

Originating Goods

General

. . .

[4]**(2)** A good originates in the territory of a NAFTA country where

> (a) each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of these Regulations;

. . .

[4]**(8)** For purposes of determining whether non-originating materials undergo an applicable change in tariff classification, a self-produced material may, at the choice of the producer of that material, be considered as a material used in the production of a good into which the self-produced material is incorporated.

. . .

De Minimis

. . .

[5]**(6)** A good of any of Chapters 50 through 63, that does not originate in the territory of a NAFTA country because certain fibres or yarns that are used in the production of the component of the good that determines the tariff classification of the good do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries, shall be considered to originate in the territory of a NAFTA country if

> **(a)** the total weight of all those fibres or yarns is not more than seven per cent of the total weight of that component; and
>
> **(b)** the good satisfies all other applicable requirements of these Regulations.

[5]**(7)** For purposes of subsection (6),

> **(a)** the component of a good that determines the tariff classification of that good shall be identified in accordance with the first of the following General Rules for the Interpretation of the Harmonized System under which the identification can be determined, namely, Rule 3(b), Rule 3(c) and Rule 4; and
>
> **(b)** where the component of the good that determines the tariff classification of the good is a blend of two or more yarns or fibres, all yarns and fibres used in the production of the component shall be taken into account in determining the weight of fibres and yarns in that component.

SPECIFIC RULE OF ORIGIN AND RELATED CLASSIFICATION PROVISIONS

14. Schedule I of the *Regulations* establishes specific rules of origin to permit certain non-originating materials to be used in the manufacture of finished goods and for the final goods to be then considered originating in the territory of a NAFTA country.

15. The specific rule of origin for the goods in issue is that any non-originating components used in the production of the goods in issue (scatter rugs are classified in heading No. 57.03) must meet the following requirements:

Chapter 57	**Carpets and Other Textile Floor Coverings**
57.01-57.05	A change to headings 57.01 through 57.05 from any other chapter, except from headings 51.06 through 51.13, 52.04 through 52.12, 53.08 or 53.11, Chapter 54, or headings 55.08 through 55.16.

16. In other words, non-originating components of scatter rugs cannot be classified in Chapter 57 or heading Nos. 51.06 through 51.13, 52.04 through 52.12, 53.08 or 53.11, Chapter 54 or heading Nos. 55.08 through 55.16, in order for the scatter rugs to be considered originating in the territory of a NAFTA country.

17. Accordingly, as is the case with many rules of origin, the origin of goods depends on the classification of their components. In the present appeal, the tariff headings in dispute are heading Nos. 57.03 and 58.02.

18. Both parties agree that the goods in issue fall under Section XI of the *Customs Tariff*. They do not agree on the applicable tariff heading.

19. The CBSA submits that the goods in issue are properly classified in heading No. 57.03 as follows:

Section XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 57

CARPETS AND OTHER TEXTILE FLOOR COVERINGS

. . .

57.03 Carpets and other textile floor coverings, tufted, whether or not made up.

20. Note 7 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[9] to Section XI provides as follows:

> For the purposes of this Section, the expression "made up" means:
>
> (a) Cut otherwise than into squares or rectangles;
>
> (b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, table cloths, scarf squares, blankets);

9. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

(c) Cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this Note, but excluding fabrics the cut edges of which have been prevented from unravelling by hot cutting or by other simple means;

(d) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unraveling by whipping or other simple means;

(e) Cut to size and having undergone a process of drawn thread work;

(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers , whether or not padded);

(g) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

21. Note 1 to Chapter 57 provides as follows:

For the purposes of this Chapter, the term "carpets and other textile floor coverings" means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

22. The explanatory notes to Chapter 57 provide as follows:

GENERAL

This Chapter covers carpets and other textile floor coverings in which textile materials serve as the exposed surface of the article when in use. It includes articles having the characteristics of textile floor coverings (e.g. thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other finishing purposes).

The above products are classified in this Chapter whether made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.), in the form of carpet squares, bedside rugs, hearth rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up.

They may also be impregnated (e.g., with latex) or backed with woven or nonwoven fabrics or with cellular rubber or plastics.

23. Maples submits that the goods in issue should be classified in heading No. 58.02, which provides as follows:

Section XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 58

SPECIAL WOVEN FABRICS; TUFTED TEXTILE FABRICS; LACE; TAPESTRIES; TRIMMINGS; EMBROIDERY

. . .

58.02 Terry Towelling and similar woven terry fabrics, other than narrow fabrics of heading 58.06; tufted textile fabrics, other than products of heading 57.03.

-Terry towelling and similar woven terry fabrics, of cotton:

24. Note B of the explanatory notes to heading No. 58.02 provides in part as follows:

> **(B) TUFTED TEXTILE FABRICS**
>
> These fabrics are made by inserting yarns, by means of a system of needles and hooks, into a pre-existing textile ground fabric (woven, knitted or crocheted, felt, nonwoven, etc.) so as to form loops or, if the hooks are combined with a cutting device, tufts of cut pile.
>
> Products of this heading are distinguished from the tufted carpets and floor coverings of heading 57.03 by, for example, their lack of stiffness, thickness and strength which renders them unsuitable for use as floor coverings.

POSITIONS OF PARTIES

25. Maples argued that the goods in issue qualify for preferential tariff treatment pursuant to the UST. In this vein, Maples submitted that the two non-originating materials used in the production of the goods in issue fall below the *de minimis* threshold found in subsection 5(6) of the *Regulations* and should thus be disregarded for the purposes of determining the originating status of the goods in issue. Paragraph 5(6)(a) provides for the first part of the legislative test as being "the total weight of all those fibres or yarns is not more than seven per cent of the total weight of that component . . ."; the goods in issue are composed of weight values of 0.22 percent and 6.71 percent, for a total value of 6.93 percent.

26. In the alternative, Maples' position is that the goods in issue also qualify as originating goods under *NAFTA* by the combination of a "self-produced material" election for the tufted fabric and application of the *de minimis* rule to the monofilament yarn. In this regard, it is Maples' position that the tufted fabric produced in the course of the production process is a "self-produced material", which, if classified in heading No. 58.02, undergoes the necessary transformation into a finished rug of heading No. 57.03. Applying the "self-produced material" election with respect to the tufted fabric, the remaining non-originating material is the monofilament yarn, which the CBSA has accepted as qualifying for the *de minimis* rule.

27. The parties disagree about how the non-originating backing affects the origin of the goods in issue.

28. Maples' position is that fabrics used in the production of the backing qualify under the *de minimis* exception because the fabric is composed of fibres and yarns and its weight combined with the yarn is less than 7 percent. The CBSA argues that the *de minimis* exception applies to fibres or yarns but not to fabrics and that the backing is composed of fabric.

29. The parties also disagree on the tariff classification of the tufted fabric in its role as a self-produced material.[10] Maples submitted that it is classified in heading No. 58.02 as a tufted fabric. According to the CBSA, the tufted fabric is an "unfinished carpet" that has all the characteristics of a floor covering and its textile materials serve as the exposed surface of the tufted fabric when in use. The fabric should therefore be classified in heading No. 57.03 as a carpet or other textile floor covering. As such, it is the CBSA's position that the tufted fabric does not undergo the required change in tariff classification in order to allow the goods in issue to qualify for preferential tariff treatment.

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10. If classified in heading No. 57.03, the tufted fabric could not undergo the required tariff shift and, therefore, the finished goods would be non-originating; if the tufted fabric was classified in heading No. 58.02, the finished goods would be originating.

TRIBUNAL'S ANALYSIS

30. As set out above, two of the individual components, i.e. the sewing thread and the backing, originate outside a NAFTA country. Both goods are classified in Chapter 54, which is one of the chapters excluded by the specific rules of origin for heading No. 57.03; therefore, neither component meets the requirements of the specific rules of origin for the goods in issue. For this reason, the Tribunal must examine whether origin is conferred on the final goods, through an exception, in this case being either the *de minimis* rule or the self-produced material designation.

Only the Monofilament Thread is Eligible for de minimis Treatment under NAFTA

31. As stipulated above and as indicated in subsection 5(6) of the *Regulations*, goods shall be considered to originate in the territory of a *NAFTA* country if the total weight of the non-originating *fibres or yarns* does not exceed 7 percent of the total weight of the component of the goods that is determinative of the tariff classification of the goods.[11]

32. In this case, no single component of the goods determines its classification. Both parties agree with this proposition.

33. Both parties also agree that the thread meets the *de minimis* requirement, as it comprises 0.22 percent of the total weight of the finished rug and a thread is a "fibre" for the purposes of tariff classification. The Tribunal does not take issue with this.

34. The Tribunal does not however agree that the other component, namely, the backing can be considered to be a *fibre or a yarn*. The backing is a mesh fabric made of woven flat polypropylene strips. It is not specifically a fibre or yarn and was manufactured into a fabric before its importation into Canada.

35. Maples also argued that the backing was a "flat" type of interwoven fibre, as the polypropylene itself was a yarn or fibre. This interpretation advanced by Maples would result in reading new terms into the provision, namely, a new understanding of the concept of a fibre, amounting to the inclusion of the word "fabric" where it does not exist; this would be contrary to the established rules of statutory interpretation. Accordingly, the *de minimis* provisions of subsection 5(6) of the *Regulations* do not apply to the backing.

The Self-produced Material Meets the Tariff Shift Rule for NAFTA Origin

36. The *Regulations* provide another exception for certain non-originating materials, which are made into an intermediate material in an originating country and ultimately incorporated into the final good.

37. As indicated above, the *Regulations* define self-produced material as ". . . a material used in the production of a good into which the self-produced material is incorporated" for determining whether a non-originating material undergoes a change in tariff classification.

38. This exception allows a material, if self-produced from non-originating materials, to be the material considered going forward as to the required change in tariff classification.

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11. Subsection 5(6) of the *Regulations*. This provision applies only to certain textile goods.

39. The parties are in agreement that the tufted fabric is made of nylon yarn, tufted into the backing and that it is therefore composed in part of tufted materials. Maples has elected to classify the "tufted fabric" as a self-produced material and has submitted that it be classified in heading No. 58.02 as ". . . tufted textile fabrics, other than products of heading 57.03."

40. On the basis of the evidence before it, the Tribunal is of the view that the tufted fabric should be classified in heading No. 58.02.

Tariff Classification of the Self-produced Material

41. Heading. No. 58.02 is a residual heading. The Tribunal must therefore first determine whether or not the tufted fabric may be classified in heading No. 57.03. It is only if the Tribunal is satisfied that the tufted fabric is not properly classified in heading No. 57.03 that it will proceed to examine whether or not it should be classified in heading No. 58.02.

– Can the Tufted Fabric be Classified in Heading No. 57.03?

42. To determine whether the tufted fabric can be classified in heading No. 57.03, the Tribunal must determine whether the tufted fabric is a carpet, or other textile floor covering, that are tufted, whether or not made up.

43. Neither the CBSA nor Maples has argued that the tufted fabric, as presented, is a "carpet", and the Tribunal does not view the tufted fabric as a carpet.

44. The phrase "floor coverings" is not defined in the *Customs Tariff*. Consequently, the question of whether the tufted fabric falls within the expression "floor coverings" is one of mixed fact and law, turning on the interpretation of the phrase "floor coverings" in Chapter 57 and the characteristics of those goods.[12]

45. Turning first to the issue of the meaning to be ascribed to the phrase "floor coverings", it is well settled that the correct approach to statutory interpretation is the modern contextual approach pursuant to which the words of an act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act and the intention of Parliament.[13]

46. In this respect, the relevant legal notes and explanatory notes form an integral part of the interpretative context. In particular, Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[14] explicitly states that, ". . . for legal purposes, classification shall be determined according to the terms of the headings *and* any relative Section or Chapter Notes . . ." [emphasis added].

47. While the *Explanatory Notes* (unlike legal notes) are not themselves legally binding, the Federal Court of Appeal has indicated that ". . . the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose . . . the Explanatory Notes should be respected unless there is a sound reason to do otherwise."[15]

12. *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 (CanLII) at para. 4.
13. *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para. 21.
14. S.C. 1997, c. 36, schedule.
15. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at para. 13.

48. According to the legal notes to Chapter 57, the expression "carpets and other textile floor coverings" encompasses ". . . floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of floor coverings but intended for use for other purposes." The explanatory notes to Chapter 57 expand on this and provide in part that the Chapter includes ". . . articles having the characteristics of textile floor coverings (e.g. thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other finishing purposes)."

49. It is uncontested, and the Tribunal accepts, that textile materials serve as the exposed surface of the tufted fabric. In particular, the tufted yarn is the textile material that makes up its exposed surface.

50. It remains to be determined, however, whether the tufted fabric has the characteristics of textile floor coverings. Accordingly, the Tribunal will now address whether (a) the tufted fabric has the thickness, (b) the stiffness and (c) the strength of textile floor coverings, as prescribed by the explanatory notes to Chapter 57.

51. The term "thickness" is not defined in the *Customs Tariff*, but it is defined in *Fairchild's Dictionary of Textiles*[16] as "[i]n a fabric, the distance between upper and lower surfaces as measured under a specific pressure."[17]

52. Given the definition of "thickness" and the evidence before it, the Tribunal finds that the tufted fabric, as presented, does not have the thickness characteristic of textile floor coverings.

53. The Tribunal notes that the expert witnesses were in agreement with the definition of "thickness" as it is stated in *Fairchild's Dictionary of Textiles*. They indicated that the thickness of a fabric is measured by the distance between the top of the yarns and the bottom of the fabric, including the coating or any secondary backing.[18]

54. In this case, the tufted fabric is made of surface yarns and primary backing. Although the surface yarn has been tufted through the backing, the tufted fabric has not yet been coated in latex. The Tribunal notes that the expert witnesses agreed that a coating of any kind would add such a required degree of thickness to the tufted fabric[19] and that, without a latex coating or a secondary backing, the tufted fabric could not be functionally used as a textile floor covering. Given that the tufted fabric has not been coated, and in light of the foregoing, it follows that the thickness of the tufted fabric, or the distance between the upper and lower surfaces, is necessarily less than that of a usable textile floor covering.

55. As noted above, the Tribunal also considered whether the tufted fabric has the stiffness characteristic of a textile floor covering. The evidence presented leads the Tribunal to conclude that the tufted fabric does not have the stiffness characteristic of a textile floor covering.

16. Exhibit AP-2014-009-21B, Vol. 1A. *Fairchild's Dictionary of Textiles* contains over 14,000 definitions of fibres and fabrics, and laws and regulations affecting textile materials and processing, inventors of textile technology, and business and trade terms relevant to textiles.
17. Exhibit AP-2014-009-21B at 178, Vol. 1A.
18. *Transcript of Public Hearing*, 12 May 2016, at 76, 137.
19. *Ibid.* at 113.

56. The term "stiffness" is not defined in the *Customs Tariff*. *Fairchild's Dictionary of Textiles* defines stiffness as "[r]esistance to bending or to deformation under a load. Antonym of Flexibility. Critical textile characteristic in relation to hand, drape, and comfort."[20]

57. According to Dr. Adanur, the tufted fabric as presented does not have the stiffness expected of a textile floor covering, as it is not ". . . dimensionally stable."[21] During the hearing, he demonstrated that the material is easily bent and can be manipulated into other forms and that, if extended, the fabric does not hold its shape and its edges curl in. For her part, Dr. Batcheller stated that the stiffness and dimensional stability of the tufted fabric will increase once a coating has been applied to it.[22]

58. The Tribunal finds that the stiffness of the tufted fabric is less than the stiffness expected of a textile floor covering.

59. Finally, the Tribunal finds that the tufted fabric does not have the strength of a textile floor covering. The *Customs Tariff* does not define "strength", but it is defined in *Fairchild's Dictionary of Textiles* as "[r]esistance to deformation or breakage caused by application of a force."[23]

60. During the hearing, both Mr. Russo and Dr. Adanur physically demonstrated the ease with which yarns could be removed from the backing by simply pulling at its ends. Without a latex backing, or any other coating which would lock those fibres into place, the tufted fabric, at this stage of production, does not have the strength or dimensional stability expected of a textile floor covering. Dr. Adanur testified that there is little to keep the tufted yarn from unravelling from the backing and that it is clearly not resistant to breakage caused by the application of force.

61. Both expert witnesses were in agreement that, unless coated, this type of tufted fabric does not have the strength to be used as a textile floor covering.[24]

62. The Tribunal finds that, whether or not made up, the tufted fabric itself does not have the characteristics of a textile floor covering.

63. The Tribunal recognizes that the explanatory notes to Section XI define the expression "made up" as meaning, among other things, ". . . (a) [c]ut otherwise than into squares or rectangles; (b) [p]roduced in the finished state, ready for use . . . ; (c) [c]ut to size and with at least one heat-sealed edge . . . ." In this regard the CBSA advanced the position that, although the goods in issue are arguably not "made up" because they have not yet been "finished", i.e. coated with latex, cut to size and serge trimmed, they nevertheless fall within the description of goods covered in Chapter 57 and, in particular, heading No. 57.03.

64. The Tribunal finds that, although the explanatory notes to Chapter 57 provide for the classification of goods "whether or not made up", goods classified in Chapter 57 must nonetheless have the characteristics of textile floor coverings. The Tribunal is of the view that the tufted fabric does not have the characteristics of a textile floor covering at this stage of production because it does not have the thickness, stiffness and strength expected of a textile floor covering. On this basis, the Tribunal finds that the tufted fabric cannot be classified in heading No. 57.03.

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20. Exhibit AP-2014-009-21B at 176.
21. *Transcript of Public Hearing*, 12 May 2016, at 72-73.
22. *Ibid.* at 140.
23. Exhibit AP-2014-009-21B at 177.
24. *Transcript of Public hearing*, 12 May 2016, at 55, 72, 151-52.

– Can the Tufted Fabric be Classified in Heading No. 58.02?

65. Heading No. 58.02 provides in part for the classification of ". . . tufted textile fabrics, other than products of heading 57.03." Heading No. 58.02 is a residual heading and goods are only classifiable in this heading if they are not first classifiable in heading No. 57.03. For the aforementioned reasons, the Tribunal finds that the tufted fabric is not classifiable in heading No. 57.03. Following the evidence filed as to Maples' production process, visual inspection of the goods in issue and the harmonious testimony of both experts as to the physical characteristics and properties of the tufted fabric itself, the Tribunal finds that it clearly meets the terms of heading No. 58.02. By application of Rule 1 of the *General Rules*, the Tribunal concludes that the tufted fabric should be classified in heading No. 58.02 as ". . . tufted textile fabrics, other than products of heading 57.03."

SUMMARY

66. On the basis of the foregoing, the Tribunal finds that the self-produced material (referred to as the "tufted fabric") is classifiable in heading No. 58.02. In accordance with subsection 4(8) and Schedule I of the *Regulations*, the tufted fabric therefore meets the tariff shift requirement to heading No. 57.03 which is necessary for the goods in issue to qualify for UST treatment.

67. As set out above, with regard to the monofilament yarn used in the serging or finishing process of the goods in issue, it qualifies for *de minimis* treatment under subsection 5(6) of the *Regulations*, as its weight (0.22 percent) is below 7 percent of the total weight of the component of the good that is determinative of its tariff classification.

68. Therefore, by virtue of the *de minimis* provision in subsection 5(6) of the *Regulations* and the exception for self-produced materials under subsection 4(8), the goods in issue qualify for UST treatment.

DECISION

69. The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member