



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-005

Canac Marquis Grenier Ltée

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, February 22, 2017*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 INTRODUCTION 1

 PROCEDURAL HISTORY 1

 DESCRIPTION OF THE GOODS IN ISSUE 1

 LEGAL FRAMEWORK 2

 TERMS OF REFERENCE AND LEGAL AND EXPLANATORY NOTES 3

 EVIDENCE..... 3

 TRIBUNAL ANALYSIS..... 5

 Burden of Proof in Appeals Regarding Whether a Good is for “For Domestic Purposes” 5

 Multiposition Chairs 8

 Bistro Chairs 11

DECISION 14

IN THE MATTER OF an appeal heard on November 15, 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 April 14, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CANAC MARQUIS GRENIER LTÉE

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 15, 2016
Tribunal Panel: Jean Bédard, Presiding Member
Support Staff: Eric Wildhaber, Counsel
Dustin Kenall, Counsel

PARTICIPANTS:

Appellant	Counsel/Representatives
Canac Marquis Grenier Ltée	Marco Ouellet Jeffrey Goernert
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Patricia Nobl

WITNESS:

Éric Lacasse
Director of Finance
Groupe Laberge Inc.

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Canac Marquis Grenier Ltée (Canac) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a re-determination of tariff classification by the President of the Canada Border Services Agency (CBSA) dated April 14, 2016, made pursuant to subsection 60(4).

2. The issue in this appeal is whether non-upholstered, folding metal-frame multiposition, lounge chairs (Multiposition Chairs) and bistro chairs (Bistro Chairs) (collectively, the goods in issue) are properly classified under tariff item No. 9401.79.10 of the schedule to the *Customs Tariff*² as other seats, with metal frames, for domestic purposes, as determined by the CBSA, or should be classified under tariff item No. 9401.79.90 as other seats, with metal frames, not primarily for domestic purposes, as claimed by Canac.

PROCEDURAL HISTORY

3. On December 17, 2010, the goods in issue were imported under tariff item No. 9401.79.10 as chairs “for domestic purposes”. On August 6, 2014, Canac filed a request for re-determination under section 74 of the *Act*, claiming that the goods in issue should be classified under tariff item No. 9401.79.90. On December 29, 2014, the CBSA denied Canac’s request for re-determination.

4. On January 26, 2015, Canac appealed the denial to the CBSA under section 60 of the *Act*. The CBSA denied the appeal on April 14, 2016. On May 18, 2016, Canac filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

5. On November 15, 2016, the Tribunal held a public hearing.

DESCRIPTION OF THE GOODS IN ISSUE

6. The goods in issue are multiposition, lounge chairs and stackable bistro chairs for outdoor use. The Multiposition Chairs (marketed as “Zero Gravity” or “Relax” multiposition chairs under, *inter alia*, Canac product item No. 7010117) are made of steel, with woven textile fabric on the seat and back, and a detachable head cushion.³ They weigh 16.5 pounds, have dimensions of 44” – 30” x 25^{1/2}” x 30” and, while they are foldable, they have no handles, straps or bags for transportation.⁴

7. The Bistro Chairs (sold by Canac in a paired set under, *inter alia*, Canac product item Nos. 102348 and 7011933) likewise have metal frames and woven textile seats and backs. They weigh 6.8 pounds, are stackable for storage and have dimensions of 21” x 26” x 28^{3/4}”.⁵ They are generally sold with a small glass-topped, steel-framed table (Canac product item No. 7011934).⁶

8. Along with multiple colour photographs, one sample of each of the Multiposition and Bistro Chairs was filed with and examined by the Tribunal.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. Exhibit AP-2016-005-13B, tab 1 at 4, 9, 11, Vol. 1B.

4. Exhibit AP-2016-005-11A, tab 21 at 153, Vol. 1A.

5. Exhibit AP-2016-005-13B, tab 2 at 46, 50, Vol. 1B.

6. *Ibid.*, tab 3 at 100-101.

LEGAL FRAMEWORK

9. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁷ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

10. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁸ and the *Canadian Rules*⁹ set out in the schedule.

11. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

12. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹⁰ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,¹¹ published by the WCO. While the classification opinions and the explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹²

13. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. It is only where Rule 1 does not conclusively determine the classification of the goods that the other General Rules become relevant to the classification process.¹³

14. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

15. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis*

7. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

8. S.C. 1997, c. 36, schedule [*General Rules*].

9. S.C. 1997, c. 36, schedule.

10. World Customs Organization, 2nd ed., Brussels, 2003.

11. World Customs Organization, 5th ed., Brussels, 2012.

12. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.

13. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

mutandis, to the [General Rules] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

16. The relevant tariff nomenclature provides as follows:

Section XX	
MISCELLANEOUS MANUFACTURED ARTICLES	
Chapter 94	
FURNITURE, BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS	
. . .	
94.01	Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.
. . .	
	- Other seats, with metal frames:
. . .	
9401.79	--Other
9401.79.10	-- -For domestic purposes
9401.79.90	-- -Other

17. There are no legal notes, supplementary notes, explanatory notes or classification opinions addressing the term “for domestic purposes” at the section, chapter, heading, sub-heading or item level for the goods in issue.

EVIDENCE

18. Canac called Mr. Éric Lacasse, Director of Finance at Gestion Laberge Inc. (Canac’s parent company), as a lay witness to testify to Canac’s business model, including pricing, the purchase and inspection process, and the characteristics of the goods in issue.¹⁴ Mr. Lacasse testified that he is a Chartered Professional Accountant. He is responsible for, among other duties, maintaining the tariff classification database used by Canac when importing goods.¹⁵

19. Mr. Lacasse testified that Canac serves clients both in the retail and in the commercial segments of the market.¹⁶ He said that Canac’s main competitors are the likes of The Home Depot, Rona and Lowes.¹⁷

14. Although Mr. Lacasse provided his testimony (and was questioned) in French, the parties’ written briefs and oral arguments at the hearing were in English (as per Canac’s preference). *Transcript of Public Hearing*, 15 November 2016, at 3-4.

15. *Ibid.* at 8-9.

16. *Ibid.* at 37-38.

17. *Ibid.* at 9.

He described Canac's business model as a "cost plus" strategy whereby, to compete against much larger retailers, Canac tries to minimize its margins by having a margin that will allow the business to be profitable and to continue its expansion.¹⁸ Mr. Lacasse compared Canac's pricing model to Costco's.¹⁹ Mr. Lacasse mentioned that price is an important consideration in Canac's overall business strategy.²⁰

20. Mr. Lacasse also explained that as part of its overall competitive strategy, Canac directly imports goods itself, thus avoiding an intermediary.²¹ Mr. Lacasse further testified that, at the same time, Canac maintains a certain level of quality in its products in order to meet the requirements of its commercial clients who are an essential market to Canac. He said that Canac was using a scale of 1 to 5 to determine the level of quality and that they were aiming at sourcing goods which would be in a range of between 3 and 4.²² Under cross-examination, he explained that level 1 would be "the most residential" ("le plus résidentiel") while level 5 would be "the most commercial" ("le plus commercial").²³ Mr. Lacasse also confirmed that this scale is not found in any business document but is simply his own way of explaining the quality of the goods Canac purchases.²⁴

21. Mr. Lacasse confirmed that the sample chairs filed were of the same materials and construction as those of the goods in issue, subject to different colouring.²⁵ He also confirmed that the pre-inspection reports that were filed were also those of the goods in issue.²⁶ He testified that the Textilene[®] fabric for the Multiposition Chairs was chosen because of its qualities for outdoor use, namely, that it dries rapidly, does not change colour and is flame resistant.²⁷ He also confirmed that the Multiposition Chairs are rated to support up to 150 kilograms. Likewise, Mr. Lacasse said that a powder coating is applied to the Bistro Chairs to increase their resistance to scratches, corrosion and weather damage.²⁸ He also said that the Bistro Chair uses an impermeable synthetic wicker seat to increase longevity.²⁹

22. Under cross-examination, Mr. Lacasse confirmed that Canac does not manufacture the goods in issue. He also confirmed that he was not the buyer at Canac responsible for directly selecting and purchasing them. Finally, he also said that the same powder coating would be used for an outdoor chair exclusively for residential use (because of Canac's commitment to customer satisfaction).³⁰

23. The CBSA called no witnesses.

18. *Ibid.* at 10.

19. *Ibid.*

20. *Ibid.* at 10, 38-39.

21. *Ibid.* at 9.

22. *Ibid.* at 11, 37-38.

23. *Ibid.* at 47.

24. *Ibid.* at 47-48.

25. *Ibid.* at 19.

26. *Ibid.* at 17-18.

27. *Ibid.* at 24.

28. *Ibid.* at 31.

29. *Ibid.* at 32.

30. *Ibid.* at 42, 49, 76.

TRIBUNAL ANALYSIS

Burden of Proof in Appeals Regarding Whether a Good is for “For Domestic Purposes”

“For Domestic Purposes”

24. The only tariff item term relevant to this appeal is the term “for domestic purposes”. As the appellant, Canac bears the burden to demonstrate that the CBSA’s classification of the chairs as “for domestic purposes” is incorrect.³¹ Moreover, because in this case tariff item No. 9401.79.90 is a residual (“other”) category, it can only apply if the goods in issue cannot be classified under a more specific category, i.e. tariff item No. 9401.79.10.³²

25. Canac can discharge its burden by establishing either that the goods in issue were equally intended for domestic and non-domestic purposes or that they were primarily intended for non-domestic purposes.³³ Non-domestic purposes often involve business or commercial purposes but can encompass any purpose away from the home, e.g. camping, sporting, performances or other recreational events.³⁴ The test to be applied is the *intended* use of the goods in issue, as opposed to their *actual* use.³⁵ In the context of this case, and in view of the nature of the goods in issue, the test for determining whether the goods in issue are “for domestic purposes” encompasses not only a principal residence such as a home, but also extends to a secondary residence such as a cottage.

26. In order to determine the intended use, the Tribunal considers factors such as the design and characteristics, marketing, and pricing of the goods in issue.³⁶ In making its analysis, the Tribunal will consider these factors as a whole. The determination of whether a good is intended “for domestic purposes” is a question of mixed law and fact.³⁷

Evidentiary Burden in Appeals

27. Appeals before the Tribunal are on a *de novo* basis. This means that the Tribunal can accept new evidence and hear new arguments during the appeal.³⁸ The appellant is not confined to the facts and arguments that were initially presented to the CBSA. This, however, does not absolve the appellant from meeting the burden of proof set out in subsection 152(3) of the *Customs Act*,³⁹ which applies here since duty

-
31. *Stylus Sofas Inc., Stylus Atlantic, Stylus Ltd. and Terravest (SF Subco) Limited Partnership v. President of the Canada Border Services Agency* (19 August 2015), AP-2013-021, AP-2013-022, AP-2013-023 and AP-2013-024 (CITT) [*Stylus*] at para. 62.
 32. *Cycles Lambert Inc. v. President of the Canada Border Services Agency* (28 November 2013), AP-2012-060 (CITT) at para. 29; *Partylite Gifts Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (16 February 2004), AP-2003-008 (CITT) at 8, noting that a “residual tariff item . . . would only be used if there were no other appropriate tariff items for classification.”
 33. *Stylus* at para. 63.
 34. *Ibid.* at paras. 60-61 (recognizing goods as for “domestic purposes” even if found away from the home, as long as they have “as a primary purpose, use by individuals in a domestic setting”).
 35. *Ibid.* at para. 64.
 36. *Ibid.* at para. 65.
 37. *IKEA Supply AG v. President of the Canada Border Services Agency* (18 September 2014), AP-2013-053 (CITT) [*IKEA*] at para. 19.
 38. *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (12 June 2014), AP-2013-042 (CITT) [*Canadian Tire Corp.*] at para. 23.
 39. *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII); *Jakks Pacific Inc. v. President of the Canada Border Services Agency* (30 March 2016), AP-2015-012 (CITT) at para. 33; *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CITT) [*J. Cheese*] at para. 63.

liability on imported goods depends upon their tariff classification, and tariff classification is a question “relating to” the payment of duties on goods, within the meaning of paragraph 152(3)(c).⁴⁰ Failure to discharge the evidentiary burden on a balance of probabilities will be fatal to Canac.⁴¹

28. To meet its burden in a case such as this one, an appellant is expected to submit evidence that provides a solid factual basis for the Tribunal to find that the record demonstrates that non-domestic use of the goods is more than merely potential, incidental, occasional or ancillary.⁴² Because Canac is primarily asking the Tribunal to make findings of fact and apply meaning to those findings on the basis of evidence rather than to answer a pure question of law, it is vital that Canac bring a well-founded case before the Tribunal. It must amount to more than pictures and dictionary definitions.

29. In particular, when an appellant asks the Tribunal to find that the intended purpose of a good is dual (equally domestic and non-domestic), it is asking the Tribunal to make a finding involving the market for a good where the domestic and other uses of that good may overlap in some respects.⁴³ In order to gauge that level of overlap and determine whether it is substantial enough to be characterized as equal, the Tribunal needs concrete factual evidence of the design, characteristics, marketing and pricing of the good.

30. If the purpose of the goods is truly dual, the Tribunal would expect to see at least some traces of a corroborating historical paper trail. This could take several forms, including business plans, supplier and vendor correspondence or meetings, marketing materials, design documents, financial and sales records, or other relevant contemporary documentation showing that Canac or other parties manufacturing and/or selling the goods actively considered and focused their attention on both the market where the goods are intended for domestic purpose and markets where the goods are intended for purposes other than domestic.⁴⁴

31. Additionally, often, the most helpful testimonial evidence will be that of witnesses with direct personal knowledge of the goods, such as a manufacturer, designer, or customer.⁴⁵ The evidence of witnesses with independent industry or expert knowledge can also provide a level of objectivity and specialist assistance helpful to establish that a good has a dual purpose in fact and not merely in theory. In sum, in preparing its case, Canac must exercise some minimal level of due diligence in investigating the facts in the marketplace with respect to the goods in issue and then present the results of that investigation to the Tribunal.

40. *Ibid.*

41. It should also be noted that the Tribunal is not required to choose between the tariff classification determined by the CBSA and the one proposed by Canac. The Tribunal may, on the basis of the evidence before it, classify goods in issue under a different tariff classification.

42. *Canadian Tire Corp.* at para. 23; *6572243 Canada Ltd. o/a Kwality Imports v. President of the Canada Border Services Agency* (3 August 2012), AP-2010-068 (CITT) [*Kwality*] at para. 44.

43. *IKEA* at para. 38, discussing work chairs designed for any environment whether business or domestic; *Kwality* at para. 46, discussing suitability of mass-produced, low-ticket generic residential furniture for discount hotels and coffee shops.

44. See, for example, *Stylus* at para. 66 in which the Vice-President of Sales and Marketing (Residential and Hospitality) of the appellant (a furniture manufacturer) testified about meeting with hospitality clients to determine their needs and developing a line of furniture to target the mid- to low-end segment of that market.

45. See, for example, *Stylus* at para. 26 in which the appellant filed a report from and called as a witness the director of supply for a hotel chain to which the appellant supplied furniture.

Canac's Evidence

32. In this matter, Canac does not argue that the goods in issue are primarily intended for non-domestic purposes but rather that they are equally intended for domestic and non-domestic purposes.

33. To prove this proposition, in addition to an eight-page brief, the only evidence Canac has filed, beyond samples of the chairs themselves, are the following:

- (i) for the Bistro Chairs: six pages of excerpts from internet blogs discussing the origin of the word “bistro”; an online dictionary’s definition of the words “bistro” and “portable”; seven pages of photographs of the outdoor dining sections of restaurants; twelve sales invoices for 56 of the Bistro Chairs to hotels and other non-domestic customers;
- (ii) for the Multiposition Chairs: a printout regarding the fabric used in the Multiposition Chairs from the fabric’s manufacturer and an online dictionary’s definition of the words “bistro” and “portable”; and
- (iii) for both goods in issue: several annotated photos detailing Canac’s inspection process for the goods before their importation.

34. In summary, the physical evidence consists for the most part of mere physical samples and photos of the goods, dictionary definitions of the relevant tariff terms and a sample of invoices to commercial customers. This is not evidence of a sufficient type, quantity or persuasiveness to discharge Canac’s burden of proving on the balance of probabilities (i.e. that it is more likely than not) that the goods are equally intended for non-domestic purposes. Canac essentially asked the Tribunal to make inferences based on terminology (e.g. the branding of the Bistro Chairs as simply “bistro” rather than “bistro style” chairs) or on purported characteristics not supported by the evidence (e.g. describing the Multiposition Chairs weighing over fifteen pounds as easily “portable”).

35. Canac also relies, as previously mentioned, on the testimony of the Director of Finance of its parent company. While the witness is familiar with Canac’s business model, which he described as competitive on price and quality, he had little, if any, direct involvement in the procurement of the goods in issue. Mr. Lacasse testified credibly, knowledgeably and usefully in terms of explaining Canac’s overall business strategy and importation procedures, but he did not have any unique knowledge (either based on personal experience, corporate responsibilities or his own investigation) regarding the manufacture, design, characteristics, marketing or ultimate (non-domestic) purchasers of the goods in issue. Crucially, he did not provide any evidence on which the Tribunal could compare the goods in issue with other goods intended for primarily domestic, primarily non-domestic or dual purposes. With respect to the goods in issue, his testimony was anecdotal and general rather than being specific and based on personal knowledge. Therefore, although his testimony usefully described the quality of goods Canac sells and its market niche, it did not substantiate either qualitatively or quantitatively the actual level of domestic versus non-domestic purposes, applications and uses of the goods in issue.

36. For the reasons that follow, the Tribunal finds that, at most, Canac has proven that the goods have occasionally been sold to non-domestic customers—principally in the hospitality industry. Canac has not proven that it is more likely than not that the goods are equally intended for non-domestic purposes.

Multiposition Chairs

Design and Characteristics

37. Canac submits that the Multiposition Chairs are foldable, compact, lightweight and easily stored; therefore, they are portable anywhere away from the home (e.g. camping, beach, public parks, picnics, etc.).⁴⁶ It submits that the Multiposition Chairs are, thus, analogous to the portable folding chairs in Appeal No. AP-2003-020.⁴⁷ In that case, the Tribunal found that the goods—which were designed to allow for temporary seating in place of standing—were suitable for use anywhere because they could be collapsed and stored in a bag like an umbrella.⁴⁸

38. The CBSA observes that the Multiposition Chairs weigh 16.5 pounds, do not have carry handles, straps or bags to facilitate transport, and are larger than the foldable chairs in *Ro-Na*. The fact that the chairs are foldable does not make them portable—it simply makes them easier to store (i.e. in a shed) during winter.⁴⁹ Further, they are designed for comfort (hence the name “Zero Gravity”), not portability. In its decision, the CBSA noted that the Multiposition Chairs were designed to be “comfortable and ergonomic recliner chairs for sitting at home for extended periods of time”, citing the original manufacturer’s (Lafuma Mobilier) Web site.⁵⁰ They are also more expensive than the cheaper portable chairs on Canac’s own Web site, e.g. between CAD\$33 and CAD\$46 versus CAD\$6.99 for a “chaise pliante” (“folding chair”).⁵¹ The CBSA has also pointed out that none of the characteristics of a commercial-use good are evidenced here, e.g. durability, low maintenance, higher price, larger size, antibacterial treatment or any other unique specifications.⁵²

39. For the reasons set out below, the Tribunal finds that the Multiposition Chairs’ weight and dimensions make them foldable for winter storage purposes but not portable for use away from the vicinity of the home or cottage.

40. The Multiposition Chairs weigh more than 15 pounds each and have dimensions designed to accommodate an adult person in a reclining position. They cannot be folded into a carrying bag like the chairs in *Ro-Na*. Canac argues that Multiposition Chairs could be brought on a camping trip, for a picnic or to the beach. However, Canac presented no evidence supporting that view—i.e. no marketing materials, no beach or campsite photographs, no customer testimonials—besides a Venn diagram which Canac’s counsel created simply on the basis of their own conclusory inferences.⁵³ This Venn diagram may be considered an “aid to argument” but does not constitute evidence. Given their size, the Multiposition Chairs are not the type of folding chairs that can be easily carried over anything but short distances around the home or cottage (even singly, but especially in multiples) or accommodated in a family vehicle without inconveniently displacing other luggage or equipment. While it is not impossible to carry those chairs, the Tribunal finds that this is not their purpose.

46. Exhibit AP-2016-005-06A at 5, Vol. 1.

47. *Alliance Ro-Na Home Inc. v. Commissioner of the Canada Customs and Revenue Agency* (25 May 2004) [*Ro-Na*].

48. Exhibit AP-2016-005-06A at 5, Vol. 1.

49. Exhibit AP-2016-005-11A at paras. 37-39, Vol. 1A.

50. Exhibit AP-2016-005-06A, tab 1 at 3, Vol. 1 (“Fruit d’une collaboration étroite avec le corps médical, il a été spécialement conçu pour offrir à ses utilisateurs la position idéale de relaxation dans un format fauteuil pliable”).

51. Exhibit AP-2016-005-06A, tab 7 at 123, Vol. 1.

52. Exhibit AP-2016-005-11A at para. 61, Vol. 1A, citing *Kwality* at para. 54.

53. *Transcript of Public Hearing*, 15 November 2016, at 63.

41. Moreover, while Canac describes these goods as “folding” chairs in its brief, they are in fact described in the import cartons, product tag and marketing materials by Canac only as “multiposition” (which references the chairs’ different reclining positions), *not* “foldable” or “collapsible”. Indeed, Canac’s online catalogue reserves the French term “pliante” (“folding”) for the type of generic, thin, lightweight and cheaper chairs closer to those considered in *Ro-Na*.⁵⁴ The Tribunal finds that the name, look, stability and overall style of the chairs support a conclusion that their intended emphasis is on comfort and aesthetics for use in or around one location, not being transported from place to place.

42. Canac’s witness pointed to the fact that the Multiposition Chairs incorporate Textilene[®] fabric which, because it dries rapidly, does not change colour and is flame resistant, makes it suitable for outdoor settings. Canac also submitted a Web site printout from Twitchell Corporation, the manufacturer of Textilene[®], including a page showing a photographic sample of the fabric and a CS-191-53 & CA 117 E flammability standard and a CS10/500 abrasion standard. Canac also stated that the chair was rated for 150 kilograms. Canac did not, however, present any evidence to establish the meaning or significance of these standards, in particular, whether they are considered commercial standards (acceptable by hospitality businesses), or whether other outdoor multipositional, lounge chairs are designed to lower standards.⁵⁵ By itself, this evidence does not support an inference of use in a setting other than at home or at the cottage, such as their use by a hotel or a camping ground around a swimming pool. In the absence of evidence related to commercial standards, the Tribunal finds that these features merely establish a design for exterior use, such as on a residential patio or deck.⁵⁶

43. Canac also relied on the one-year warranty accompanying the goods as a sign of quality. The terms of the warranty, however, actually weigh against a finding of non-domestic purpose, because they expressly provide that the warranty does not apply “where the Product is used for other purposes than residential ones or for other purposes than those determined by the Manufacturer.”⁵⁷ When asked about it, Canac’s witness had no knowledge of purposes other than residential that would have been determined by the manufacturer.⁵⁸ As the warranty is provided by Novelca,⁵⁹ which is a business name used by Canac,⁶⁰ the terms of the warranty are within Canac’s control. In view of the foregoing, the Tribunal finds that the text of the warranty, which expressly excludes coverage for purposes other than residential, is a very strong indicia that the design of the good is not intended for other purposes.

44. In sum, the design and characteristics of the Multiposition Chairs do not evince a dual purpose, because evidence that a chair can be folded and carried and put in the trunk of a car is not the same as evidence that it is designed to be portable and used for seating away from the home or cottage. Likewise, evidence that a chair is built to withstand exterior environmental conditions is not in itself evidence that it is designed for non-domestic purposes for the hospitality or other industries. Even if Canac had conclusively established that the goods in issue are high-end chairs made for domestic purposes, this fact alone would not, in and by itself, lead to a finding that they are also intended for another purpose.

54. Exhibit AP-2016-005-06A, tab 7 at 123, Vol. 1; Exhibit AP-2016-005-13B, tab 1 at 4, 9, Vol. 1B.

55. *Transcript of Public Hearing*, 15 November 2016, at 53-54.

56. In *Stylus*, the Tribunal found that a flammability rating of CAL 117 (the relevance of which was explained by knowledgeable witness testimony) supported a finding that the goods were for hospitality purposes, but the goods in that case were a variety of styles of high-end furniture including sofas, accent chairs, dining chairs/stools and ottomans—not outdoor furniture made with synthetic solar-resistant fabric for exterior use.

57. Exhibit AP-2016-005-13B, tab 1 at 10, Vol. 1B.

58. *Transcript of Public Hearing*, 15 November 2016, at 50, 77.

59. Exhibit AP-2016-005-13B, tab 1 at 10, Vol. 1B.

60. *Transcript of Public Hearing*, 15 November 2016, at 40-41.

Marketing

45. Canac submits that the Multiposition Chairs are marketed as outdoor furniture, with no indication as to the intended use.⁶¹ Canac's Web site is designed to attract as many potential buyers as possible. As in *Stylus* (high-end sofas, accent chairs, stools, etc.), the chairs are not marketed ". . . specifically for domestic purposes."⁶²

46. The CBSA observes that the Multiposition Chairs are sold through Canac's general hardware retail store, selling directly to residential consumers in numerous locations. The Multiposition Chairs are advertised on its Web site under the key words "ameublement d'extérieur" ("outdoor furnishings") and "saisonnier" ("seasonal").⁶³ There is no evidence that the Multiposition Chairs are marketed for a purpose other than residential use.

47. The Tribunal finds here, too, that Canac has failed to meet its burden of proof. Canac has presented no evidence of marketing of the chairs beyond its retail stores or its Web site. The Tribunal accepts Mr. Lacasse's evidence that Canac has a commercial client base in addition to its retail business.⁶⁴ This does not mean, however, that all products carried and sold by Canac are intended to be both for domestic and non-domestic purposes. The Tribunal accepts that some non-domestic customers (small businesses, contractors, etc.) shop at Canac's stores and may have purchased some of the goods for non-domestic purposes. The Tribunal, however, cannot rely on general assumptions about customer transactions unlinked to concrete evidence regarding the goods in issue. The mere fact that commercial and institutional customers have access to a general Web site and shop at a local store is not sufficient, in and by itself, to conclusively establish that the goods shown on the Web site or available at a local store are intended for domestic and non-domestic use.⁶⁵

48. The Tribunal also accepts Mr. Lacasse's testimony to the effect that not every commercial or institutional transaction can be identified when some institutional or commercial customers pay in person using a credit card at the checkout rather than through business-to-business invoicing and purchase orders. However, unlike the evidence submitted regarding the Bistro Chairs, not a single invoice was submitted by Canac from its commercial and institutional clients' database regarding sales of the Multiposition Chairs. Canac is essentially asking the Tribunal to take a leap of faith and assume that a number of Multiposition Chairs were purchased by institutional or commercial customers using their credit card. This does not meet the standard of evidence required to meet the burden set out in the *Customs Act*.

49. Canac also might have established equal purpose by submitting specific evidence illuminating the requirements of hospitality customers or evidence of specific marketing efforts directed at commercial or institutional customers. None of this was presented to the Tribunal. Therefore, the Tribunal finds that Canac has not met its burden on marketing.

61. Exhibit AP-2016-005-06A at para. 28, Vol. 1.

62. *Ibid.* at paras. 28-30.

63. Exhibit AP-2016-005-11A, tab 23 at 164, Vol. 1A.

64. *Transcript of Public Hearing*, 15 November 2016, at 11.

65. *Kwality* at para. 64.

Pricing

50. Canac submits that the Multiposition Chairs are “. . . half the price of non-portable lounge chairs and fall within the price range of folding chairs . . .”.⁶⁶

51. In fact, the evidence on pricing shows that the Multiposition Chairs are priced above cheap, portable, folding chairs but well below reclining chairs sold to hospitality customers. Canac’s Web site shows the Multiposition Chairs priced between CAD\$33 and CAD\$46, while it sells the smaller, collapsible, folding chairs between CAD\$6.50 and CAD\$24.⁶⁷ The evidence shows that chairs sold by a hotel supply company are priced between CAD\$200 and CAD\$400.⁶⁸ Canac’s price points are consistent with Multiposition Chairs being used primarily at the home or cottage for comfortable but affordable seating.

52. The Tribunal recognizes that Canac does not consider itself as directly competing against higher-priced retailers, and that its business model may allow it to sell at a lower price point than distributors catering to the hospitality industry. However, this alone, in the absence of satisfactory evidence concerning the design, characteristics and marketing of the Multiposition Chairs, is not sufficient to meet the onus that Canac needs to discharge in order to be successful in its appeal.

Conclusion

53. Therefore, considering the foregoing evidence as a whole, the Tribunal finds that Canac has not met its burden regarding the Multiposition Chairs.

Bistro Chairs

Bistro Chairs or Bistro-Style Chairs

54. Canac submits that the Bistro Chairs are designed to be small, stackable and lightweight with a protective powder coat finish—all of which is consistent with their “bistro” designation and use in an outdoor bistro setting, i.e. at a small restaurant, tavern, etc. The CBSA submits that “bistro” simply refers to a style of chair. Just as an “Adirondack” chair is a style of chair and not a chair intended for use in the Adirondack region, a bistro chair is a style of chair based on fashion, not an intended setting. The CBSA also observes that “bistro”—when referring to patio furniture—often simply means a set of two chairs paired with a small table. The CBSA supported this view by filing Web site printouts from various retailers. The CBSA also submits that there is no evidence that the Bistro Chairs are designed with increased strength, durability or other features to meet commercial and/or hospitality needs beyond the requirements of the residential market.

55. At the beginning of the hearing, Canac objected to the characterization of the chairs as “bistro-style” chairs rather than simply “Bistro Chairs”. Canac provided dictionary definitions of the word “bistro”.⁶⁹ One of the definitions provides as follows: “1. a small, modest, European-style restaurant or café.”⁷⁰ Another definition refers to a “small restaurant”.⁷¹ The documentary evidence filed by Canac also

66. Exhibit AP-2016-005-06A at para. 31, Vol. 1.

67. *Ibid.*, tab 7 at 123.

68. Exhibit AP-2016-005-11A, tab 26 at 180-185, Vol. 1A.

69. Exhibit AP-2016-005-06A, tab 9, Vol. 1.

70. *Ibid.* at 133.

71. *Ibid.* at 135.

includes a short history of bistro furniture (“Petite histoire des meubles bistro”), which provides an interesting history of the evolution of bistro-style furniture.⁷²

56. The theory of Canac’s case is essentially that because a bistro is a small restaurant, therefore, a bistro chair is a chair intended to be used in a small restaurant and, thus, a bistro chair is by definition a chair intended for a use other than domestic. The Tribunal notes, however, that there is no evidence that the Bistro Chair is the only model of chair used in small restaurants or that all small restaurants use the Bistro Chair or chairs of a similar model.

57. The history of bistro furniture, which is also part of Canac’s documentary evidence,⁷³ provides an overview of the evolution of the bistro style over the years. According to the article, the bistro style, as we now know it, was developed at the end of the 19th century at around the same time as the Paris Exposition of 1889. It is at that time that the style, which was reminiscent of the Belle Époque, became popular in Parisian establishments. Furthermore, the article refers to various models of chairs and tables that are used in Parisian establishments which have adopted the bistro style.⁷⁴ In that regard, the Tribunal also notes that the excerpts from Canac’s Web site filed by Canac as part of its documentary evidence show different models of chairs and tables as part of its offering of bistro sets.⁷⁵ This is consistent with the view that bistro refers to a style. The Tribunal finds that the evidence found in the short history of bistro furniture is more compelling than the dictionary definitions provided by Canac, as it is more in harmony with the general understanding of “bistro” furniture in North America in the 21st century.

58. For these reasons, the Tribunal finds that the Bistro Chairs are chairs designed in the bistro-style aesthetic and that the use of the word “bistro” does not imply an intended use. Consequently, Canac still has to prove the intended use of the chairs in order to succeed in its appeal.

Design and Characteristics

59. At the hearing, Canac’s counsel stated that the Bistro Chairs are rated for 150 kilograms. However, there is no documentary evidence of this in the record for the Bistro Chairs as opposed to the Multiposition Chairs.⁷⁶ Canac also provided certain generic pictures of restaurant patios showing bistro-style furniture. Canac did not, however, provide any evidence as to the requirements of the hospitality or restaurant industry for bistro-style chairs and if the Bistro Chairs meet those requirements. All that the Tribunal is left with is the subjective 1-to-5 rating already discussed in connection with the Multiposition Chairs.

60. While the evidence supports the assertion that the design of the Bistro Chairs is consistent with a design that is used by restaurants on their outside patios, there is no evidence regarding the characteristics that would support a finding that the Bistro Chairs are equally intended for a use other than domestic use. The only evidence provided concerning the characteristics relate to the fact that the Bistro Chairs can withstand exterior environmental conditions. As already discussed with the Multiposition Chairs, this is not, in itself, evidence that the chairs are designed for non-domestic purposes for the hospitality or other industries. Even had Canac conclusively established that the Bistro Chairs are high-end chairs made for domestic purposes, this fact alone would not, in and by itself, lead to a finding that they are also intended for another purpose.

72. *Ibid.*, tab 8 at 128-132.

73. *Ibid.*

74. *Ibid.* at 129.

75. *Ibid.* at 124-125.

76. *Transcript of Public Hearing*, 15 November 2016, at 85.

Marketing

61. The fact that Bistro Chairs can be purchased from residential retailers such as Canadian Tire, Rona and Walmart is irrelevant, according to Canac's submission, because of the Tribunal findings and decision in *IKEA*, which involved work chairs.

62. The CBSA observes that the Bistro Chairs are marketed through Canac's general consumer Web site under the key words "ameublement d'extérieur" ("outdoor furnishings") and "meubles de jardin" ("patio furniture"). There is no evidence of marketing for non-residential use. The only evidence of commercial sales is a few invoices for an over two-year period from 2011 to 2013, totalling only an insignificant percentage of all the imported goods.⁷⁷

63. The mere fact that commercial and institutional customers have access to a general Web site and shop at a local store is not sufficient, in and by itself, to conclusively establish that the goods shown on the Web site or available at the store are intended for domestic and non-domestic use. In this case, the evidence discloses that the marketing was primarily consumer focused. In that regard, the Tribunal notes that Canac's documentary evidence shows that the Bistro Chairs are marketed as part of the seasonal furniture and appear between various folding chairs for children and balcony sets.⁷⁸

64. Thus, this case is quite distinct from *Stylus*, where the appellant showed it had cultivated relationships with hospitality buyers, interior designers and hotel owners, attended trade shows and responded to specification packages sent by potential clients (and included numerous copies of those packages and purchase orders in the record). This case is also distinct from *IKEA*, where the appellant pointed out to the Tribunal that the goods in issue were marketed both in the consumer section and in the commercial section of its Web site.⁷⁹

65. The Tribunal also notes that no evidence has been provided regarding the warranty covering the Bistro Chairs. The only documents on the record are a warranty for the Multiposition Chairs (discussed above) and a warranty for the bistro tables. It is not clear whether there is a warranty for the chairs.

66. As further evidence of marketing to commercial and institutional buyers, Canac has included 12 invoices of sales made to commercial and institutional accounts. The Tribunal notes that the quantities invoiced are small (mostly 2-3 sets per order; one invoice for 25 sets) and stretch over a long period (2011-2013).⁸⁰ It is not necessary for an appellant to submit all purchase orders or invoices, but if it is going to submit only a small sample with this little quantity involved over such a wide period, it needs to supplement the submission with additional evidence (e.g. a database summary) to help the Tribunal at least establish a range or rough proportion that shows that the sales to non-domestic customers are significant relative to sales to domestic customers. The evidence presented to the Tribunal in this case is at best anecdotal and cannot form the basis of a finding on a balance of probabilities. Accordingly, the Tribunal finds that Canac has not discharged its burden in connection with the marketing of the Bistro Chairs.

77. Exhibit AP-2016-005-11B (protected) at paras. 64-65, tab 27 at 188, Vol. 2.

78. Exhibit AP-2016-005-06A, tab 7 at 124-125, Vol. 1.

79. *IKEA* at paras. 28-30.

80. Exhibit AP-2016-005-06A, tab 12, Vol. 1.

Pricing

67. Canac argues that price and ultimate purchasers are not relevant. The CBSA submits that bistro-style chairs sold to hospitality customers are higher priced than those sold to domestic consumers citing, for comparison, the lowest priced bistro-style chair at restaurant-furniture.ca priced at CAD\$47 versus the Bistro Chairs set (including two chairs and a small table) priced at Canac for CAD\$69.⁸¹ The CBSA's decision argued that the fact that the Bistro Chairs were sold as a set, with the small table selling for only US\$21 (at the time—they were imported six years ago), shows they are not “. . . manufactured to withstand a heavy use as required by commercial standards.”⁸² The CBSA has also submitted Web site printouts from other home retailers that show a wide range of bistro set prices, e.g. CAD\$336 (Walmart); CAD\$109 (Réno-Dépôt); CAD\$129.99 (Home Hardware); and CAD\$198 (The Home Depot).⁸³

68. Here, too, Canac has chosen to rely solely on its evidence regarding its business model and did not submit any evidence of comparative prices for either domestic or non-domestic Bistro Chairs. The CBSA's pricing evidence is not comprehensive or compelling either. It does suggest, however, that Canac's pricing for the Bistro Chairs lies at the lower end of the market, which is, absent any evidence to the contrary, generally consistent with domestic but not commercial pricing.⁸⁴

69. The facts presented by Canac regarding its business model and its pricing strategy apply equally to the Multiposition Chairs and to the Bistro Chairs. Accordingly, the Tribunal's findings are identical in that regard. The Tribunal recognizes that Canac's business model may allow it to sell at a lower price point than distributors catering to the hospitality industry. However, in the absence of satisfactory evidence concerning the design, characteristics and marketing of the Bistro Chairs, the evidence submitted regarding the business model and the pricing strategy is not, in and by itself, sufficient to meet the onus that Canac needs to discharge in order to be successful in its appeal.

Conclusion

70. Therefore, considering the foregoing evidence as a whole, the Tribunal finds that Canac has not discharged its burden regarding the Bistro Chairs.

DECISION

71. Canac has failed to meet its burden of proof on any of the relevant factors for any of the goods in issue.

72. Therefore, the appeal is dismissed.

Jean Bédard
Jean Bédard
Presiding Member

81. Exhibit AP-2016-005-11A at para. 57, Vol. 1A.

82. Exhibit AP-2016-005-06A, tab 1 at 3, Vol. 1.

83. Exhibit AP-2016-005-11A, tab 15 at 134, tab 16 at 136, tab 17 at 139 and tab 20 at 144, Vol. 1A.

84. *Kwalita* at para. 54; *IKEA* at paras. 32-36, describing evidence supporting the finding that the retailer targeted cost-conscious business customers.