Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-038

Alliance Mercantile Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, November 3, 2017

Canada

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IN THE MATTER OF an appeal heard on July 11, 2017, 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 October 21, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

ALLIANCE MERCANTILE INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Jean Bédard
Jean Bédard
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 11, 2017
Tribunal Panel:	Jean Bédard, Presiding Member
Support Staff:	Courtney Fitzpatrick, Counsel Anja Grabundzija, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Alliance Mercantile Inc.	David W. Chodikoff Benjamin Mann

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Youri Tessier-Stall

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 Alliance Mercantile Inc. (AMI) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made by the President of the Canada Border Services Agency (CBSA) on October 21, 2016, pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether three styles of boot bottoms (the goods in issue) are properly classified under tariff item No. 6401.10.19 as other waterproof footwear incorporating a metal toe cap as determined by the CBSA, or should be classified under tariff item No. 6406.90.90 as other parts of footwear as submitted by AMI.

PROCEDURAL HISTORY

3. On January 13, 2016, the CBSA re-determined the tariff classification of the goods in issue to be tariff item No. 6401.10.19.[2]

4. On March 18, 2016, AMI requested a review of the CBSA's re-determination pursuant to subsection 60(1) of the *Act*.

5. On October 21, 2016, the CBSA issued a decision pursuant to subsection 60(4) of the *Act* confirming its earlier re-determination that the goods in issue are classified under tariff item No. 6401.10.19.[3]

6. AMI appealed the CBSA's decision to the Canadian International Trade Tribunal (the Tribunal) on January 9, 2017, pursuant to section 67 of the *Act*.

7. On July 11, 2017, the Tribunal held a public hearing in Ottawa, Ontario. No witnesses testified at the hearing. The Tribunal, therefore, relied on the briefs and exhibits filed by the parties, its examination of the three physical exhibits, and the oral arguments presented by counsel for both parties at the hearing.

DESCRIPTION OF THE GOODS IN ISSUE

8. The goods in issue in this appeal are three styles of boot bottoms (article 8061, article 8059 and article 9904) consisting of an outer sole (with heel) affixed to an unfinished and incomplete upper. Each one is composed of a vulcanized rubber upper and sole, and has a steel toe cap and plate. Articles 8059 and 9904 also have a chainsaw-resistant tongue, which is vulcanized into the front section of the boot bottom. The goods in issue have a rand around the opening to allow a leather component to be stitched directly onto the rubber bottom after importation. The goods in issue cover the bottom, sides and top of the foot and do not cover the ankle.

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)

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2016-038-04, tab 7, Vol. 1.
3. Exhibit AP-2016-038-06A, tab 8, Vol. 1.

developed by the World Customs Organization (WCO).[4] 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, subject to subsection 10(2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[5] and the *Canadian Rules*[6] 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*[7] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[8] 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.[9]

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.[10]

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 [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 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.

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4. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
5. S.C. 1997, c. 36, schedule [*General Rules*].
6. S.C. 1997, c. 36, schedule.
7. World Customs Organization, 4th ed., Brussels, 2017.
8. World Customs Organization, 6th ed., Brussels, 2017 [*Explanatory Notes*].
9. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the 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 the classification opinions.
10. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) [*Igloo Vikski*] at para. 21.

POSITIONS OF PARTIES

16. AMI submitted that classification can be determined in accordance with Rule 1 of the *General Rules*. It submitted that the goods in issue are not complete footwear, but rather parts of footwear. It stressed that the goods in issue are unfinished and cannot be worn in their imported state. AMI also submitted that the goods in issue do not have the essential character of footwear and therefore cannot be classified as such pursuant to Rule 2(a) of the *General Rules*.

17. The CBSA submitted that the goods in issue should be classified as waterproof footwear pursuant to Rule 1 of the *General Rules*. In its view, explanatory note H to Chapter 64 directs that boot or shoe bottoms, consisting of an outer sole affixed to an incomplete or unfinished upper, are to be regarded as footwear (and not as parts of footwear). In the alternative, the CBSA submitted that the goods in issue can be classified as waterproof footwear pursuant to Rule 2(a) of the *General Rules*, which would extend the terms of heading No. 64.01 to include incomplete or unfinished footwear provided that it has the essential character of the complete or finished article.

ANALYSIS

18. The crux of this appeal is whether the goods in issue should be classified as waterproof footwear or parts of footwear. This appeal concerns classification at the heading level.

19. At the outset, the Tribunal notes that tariff classification is a fact-driven exercise. As such, while previous Tribunal decisions dealing with one or both of the headings at issue may be instructive, an assessment of those decisions must also consider the particular facts and context of each case.

20. The Tribunal finds that the goods in issue can be classified pursuant to Rule 1 of the *General Rules*. In particular, when the terms of the relevant headings are read in context, and in light of the relevant notes, the goods in issue cannot be classified in heading No. 64.01 as waterproof footwear as determined by the CBSA. Rather, they are classified in heading No. 64.06 as parts of footwear.

Interpretation of Bilingual Explanatory Notes

21. Without getting into the specifics at this juncture, this case raises the issue of how the Tribunal should interpret an explanatory note when the meaning of the English text and the French text differ.

22. The explanatory notes are an interpretive guide to the Harmonized System published and amended from time to time by the WCO, in both English and French, its two official languages.[11] The purpose of the Harmonized System is to attempt "to rationalize and harmonize the classification of all trade commodities among signatory nations"[12] and "[t]o foster stability and predictability in classification practices internationally . . . ."[13]

23. In addition, the *Customs Tariff* is a bilingual federal statute, which applies across Canada. Its objective is to establish tariffs on imported goods, which requires classifying each type of product in *one, and only one*, tariff classification. The *Customs Tariff* also serves to give effect to Canada's obligations under the International Convention on the Harmonized Commodity Description and Coding System.[14]

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11. *Explanatory Notes*, Introduction at 1.
12. *Suzuki* at para. 4.
13. *Igloo Vikski* at para. 4.
14. *Igloo Vikski* at para. 3; *Suzuki* at para. 4; *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA).

24. While the explanatory notes are not part of the *Customs Tariff*, in accordance with section 11 of the *Customs Tariff*, they are to be taken into consideration in its interpretation. Consistent with the purposes of the *Customs Tariff* and of the Harmonized System, this interpretation should be consistent whether an importer chooses to declare goods in English or in French, or whether the goods are cleared at the port of Montréal or that of Vancouver. For these reasons, the Tribunal does not believe that, in a classification exercise pursuant to the *Customs Tariff*, one version should be preferred and the other disregarded without adequate analysis.

25. In determining the meaning of two apparently diverging versions of the same text, the Tribunal finds guidance in this case in the principles of bilingual statutory interpretation.[15] Specifically, in the context of this case, the "shared meaning rule", which holds that the ordinary meaning that is shared by both versions is presumed to be the meaning intended by Parliament, is helpful.[16] Thus, in accordance with section 11 of the *Customs Tariff*, the common meaning between the French and English versions of these notes should be at least considered in determining the classification of the goods in issue. This will ensure a consistent application of the nomenclature regardless of the language in which it is read.

Meaning of Explanatory Note H to Chapter 64

26. Before beginning the tariff classification exercise, the Tribunal will address the scope and meaning of explanatory note H to Chapter 64, which provides as follows:

> Boot or shoe bottoms, consisting of an outer sole affixed to an incomplete or unfinished upper, which do not cover the ankle are to be regarded as footwear (and not as parts of footwear). These articles may be finished simply by trimming their top edge with a border and adding a fastening device.
>
> Sont à considérer comme chaussures (et non comme parties de chaussures) les parties inférieures de bottes ou d'autres chaussures composées d'une semelle extérieure fixée à un dessus incomplet ou non fini ne couvrant pas la cheville mais pouvant être fini en garnissant simplement leur bord supérieur avec un liseré et en ajoutant un dispositif de fermeture.

27. This note, which is relevant at the chapter level and therefore applicable to both headings under consideration, indicates that certain boot or shoe bottoms, consisting of an outer sole affixed to an incomplete or unfinished upper, are regarded as footwear, rather than parts of footwear. This note, and in particular its English version, was a determinative factor in the CBSA's further re-determination.[17]

28. The texts of the English and French versions of explanatory note H reveal a number of differences. In the Tribunal's view, the key difference between the English and French versions of explanatory note H is what the note says about the manner in which the incomplete or unfinished articles are to be finished.

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15. While the principles of statutory interpretation may not strictly apply to explanatory notes, which are not legislation passed by Parliament, they can help reconcile diverging versions of the explanatory notes. See for example *Unitool Inc.* (4 December 2014), AP-2013-060 (CITT) at para. 62. See also, more generally, regarding the interpretation of explanatory notes: *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 (CanLII).
16. *R. v. Daoust* [2004] 1 SCR 217, 2004 SCC 6 (CanLII). Indeed, both parties agreed that the shared meaning rule can helpfully apply to determine the correct meaning of explanatory note H to Chapter 64 in this case, although they disagreed on the results of the exercise. See *Transcript of Public Hearing*, 11 July 2017, at 18, 52.
17. Prior to the Tribunal's hearing in this appeal, the Tribunal directed parties to address the French text of explanatory note H to Chapter 64, as well as the bilingual meaning of this note at the hearing.

29. The English version of explanatory note H indicates that the articles covered *may* be finished simply by trimming their top edge with a border and adding a fastening device. The CBSA argued that the wording of this sentence is permissive, as evidenced by the presence of the word "may", and that it constitutes only one example of the manner in which the shoes or boots could be finished.[18]

30. On the other hand, the ordinary meaning of the words "mais pouvant être fini" in the French version of the explanatory note, and the structure of the sentence in which they are found, indicates that the articles covered by explanatory note H *must* be finished simply by trimming their top edge with a border and adding a fastening device. In other words, the French version of this note appears to be more definitive about the ways in which the articles covered by explanatory note H must be finished.

31. While the position argued by the CBSA is one possible interpretation of the English version of explanatory note H, the English text can also be read in a manner that is consistent with the French version and which allows for a common meaning to be ascertained. In light of the interpretation principles discussed above, the Tribunal retains the shared meaning of the English and French versions of explanatory note H for the purposes of this tariff classification exercise. In other words, explanatory note H applies to incomplete or unfinished articles that meet the terms of the note and which are capable of being finished simply by trimming their upper edge with a border and adding a fastening device.

32. This interpretation of explanatory note H is consistent with the general intent and structure of Chapter 64. The French version of the note describes an almost finished product where the amount of work left to be done is fairly minimal. It indicates that this almost finished article is considered to be footwear pursuant to Rule 1. That such an article would be regarded as footwear is consistent with the descriptions and examples of footwear enumerated elsewhere in the explanatory notes to Chapter 64 (particularly at note A), which are ready to wear. This is also consistent with the logic of explanatory note A(7) to heading No. 64.06 (parts of footwear), which essentially excludes from heading No. 64.06 assemblies of parts constituting footwear or having the essential character of footwear.

33. On the other hand, the broader interpretation proposed by the CBSA would make the manner and amount of finishing that remains to be done on the boot or shoe bottoms irrelevant in the context of explanatory note H.[19] This would mean that, in accordance with explanatory note H, boot or shoe bottoms affixed to incomplete or unfinished uppers would be classified as footwear irrespective of the amount of work in fact required to turn them into finished footwear. Not only would this interpretation render the portion of explanatory note H dealing with the method of finishing essentially meaningless, it would also include in the scope of explanatory note H boot or shoe bottoms that bear little resemblance to the other examples of footwear found in the explanatory notes to Chapter 64.

34. Furthermore, explanatory note H sets out an exception to the classification of boot or shoe bottoms consisting of outer soles affixed to an incomplete or unfinished upper. It provides that such items "are to be regarded as footwear (and *not as parts of footwear*)" [emphasis added]. This language indicates that such goods are normally regarded as parts of footwear in the nomenclature. As is the case for exceptions and exclusions, the Tribunal interprets this note restrictively.

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18. Exhibit AP-2016-038-06A at para. 28, Vol. 1.
19. The CBSA submitted that explanatory note H to Chapter 64 "places no limits on the level of work which would be required to complete or finish the upper, the cost of future components of the upper, or surface area of the upper upon completion relative to the product at the time of importation." Exhibit AP-2016-038-06A at para. 28, Vol. 1.

Heading No. 64.01

35. Heading No. 64.01 provides as follows:

> Waterproof footwear with outer soles and uppers of rubber or of plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes.

36. According to the terms of this heading, in order for the goods in issue to be classified in heading No. 64.01 they must be:

1. footwear;
2. waterproof;
3. have outer soles and uppers of rubber or of plastics; and
4. the uppers must not be fixed to the soles nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes.

37. The second, third, and fourth criteria are undisputed[20] and the Tribunal is satisfied on the basis of the evidence that these conditions are indeed met. However, for the reasons that follow, the Tribunal finds that the goods in issue are not "footwear" and, therefore, cannot be classified in heading No. 64.01 pursuant to Rule 1.

Footwear

38. The term "footwear" is defined in the *Canadian Oxford Dictionary*, 2nd ed., as "anything worn on the feet, e.g. shoes, boots, etc."[21] The *Collins Dictionary*, 11th ed., defines it as "anything worn to cover the feet."[22]

39. The general explanatory notes to Chapter 64 provide that "this Chapter covers, under headings 64.01 to 64.05, various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made." This sentence, however, must be read in the context of the rest of the explanatory notes, which further describe what is covered by the chapter. For instance, explanatory note A provides that "[f]ootwear may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh-boots (the uppers of which cover the leg and thigh, and which may have straps, etc., for fastening the uppers to the waist for better support)."

40. In other words, footwear covered by Chapter 64 can range from the most basic sandal to thigh boots and includes anything in between. In this sense, the Tribunal agrees that the meaning of the term "footwear" is broad.[23]

41. However, as noted above, the examples of footwear provided in explanatory note A to Chapter 64 all point to footwear *that can be worn*. This context, along with the ordinary meaning of the term "footwear", indicates that, as a general rule, the fact that the goods can be worn, and thus used as footwear in

20. *Transcript of Public Hearing*, 11 July 2017, at 41.
21. Exhibit AP-2016-038-04, tab 14, Vol. 1.
22. *Ibid.*
23. *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (12 June 2014), AP-2013-042 at para. 38.

a meaningful way, is a relevant consideration in the context of the classification of footwear pursuant to Rule 1.[24] Indeed, the functionality of the footwear is a significant part of what distinguishes a completed and finished article, which could be classified in heading No. 64.01 pursuant to Rule 1, from an incomplete or unfinished article that may *not* be classified in this heading pursuant to Rule 1.

42. The Tribunal notes that the CBSA relied in part on the Tribunal's decision in *Laxus Products*,[25] arguing that the Tribunal in that case found that goods could be *prima facie* classified as footwear where they had outer soles and uppers, an opening in which to place the foot, and were intended to be worn on the feet. The CBSA argued that the goods in issue meet these criteria.[26] However, the Tribunal's decision in *Laxus Products* does not support the CBSA's position in this case. *Laxus Products* involved the classification of finished slippers (that also met the *prima facie* definition of a toy). In other words, it dealt with products that could be clearly be worn. Contrary to the CBSA's argument, whether or not the goods were finished or whether they could be worn were not questions irrelevant to the Tribunal's decision in *Laxus Products*, but rather formed an integral part of the context of that decision.

43. In this case, the goods in issue have a wide opening (2.75 inches) and do not have any fastening devices or other attachments. The wide opening will accommodate the other components that will be added to the goods in issue in order to obtain the finished product described by AMI.

44. It would be possible for someone to insert his/her foot in the opening of the subject goods and stand still or even potentially take a few awkward steps. This, however, hardly amounts to using the subject goods as waterproof footwear. Wearing footwear generally has a more active connotation, as footwear is generally used to protect or cover the feet in the action of moving around. The fact that the foot can be introduced into the goods in issue and surrounded by them is not, on its own, determinative, and is not, in this case, sufficient for the goods in issue to be considered footwear.

45. The Tribunal will next consider the CBSA's submission that explanatory note H to Chapter 64 specifically describes the goods in issue and directs that they be regarded as footwear. As noted above, the Tribunal finds that the proper interpretation of explanatory note H to Chapter 64 is that boot or shoe bottoms consisting of an outer sole affixed to an incomplete or unfinished upper (and that do not cover the ankle) are to be regarded as footwear only when they are capable of being finished simply by trimming their top edge with a border and adding a fastening device.

46. The evidence before the Tribunal is that the goods in issue do not meet this test. The finishing process described by AMI in its brief is far more complex than simply adding a border and a fastening device. In particular, the goods in issue are finished by stitching a leather component to the boot bottoms, trimming the rand around the opening, spreading a rubber adhesive over the rand to create a waterproof

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24. As the CBSA pointed out, explanatory note H to Chapter 64 shows that there may be situations where a product that may not have full functionality could still be regarded as footwear pursuant to Rule 1. As discussed below, however, the goods in issue do not meet the requirements of explanatory note H.
25. *Laxus Products Ltd.* (11 January 2001), AP-99-117 at 4; *Transcript of Public Hearing*, 11 July 2017, at 62. The CBSA's argument regarding what can *prima facie* be considered footwear on the basis of *Laxus Products* disregards the full context of that case. The Tribunal in that case dealt with childrens' slippers, which also met the *prima facie* definition of a toy. In addition to the elements of the Tribunal's decision identified by the CBSA, the Tribunal also found that the goods in issue were to be "used indoor". This highlights the contextual aspect of the Tribunal's comments in *Laxus Products*, and the fact that those comments cannot readily be transferred as a test to a case dealing with the classification of components of goods that will eventually be finished into a safety boot. Such a partial reading of the Tribunal's decision, devoid of its context, cannot support the CBSA's position.
26. Exhibit AP-2016-038-06A at paras. 24-25, Vol. 1.

barrier between the leather and the rubber bottom and to seal the stitch holes, and then adding a lining to prevent chafing while the boots are being worn.[27]

47. On the basis of the foregoing, the Tribunal finds that the goods in issue are not described by the exception set out in explanatory note H to Chapter 64 and cannot be classified as footwear on that basis.

48. For these reasons, the Tribunal finds that the goods in issue cannot be classified as waterproof footwear of heading No. 64.01 pursuant to Rule 1 of the *General Rules*.

49. As is well established, it is only where Rule 1 does not conclusively determine the classification of the goods in issue that the other general rules may be considered.[28] In particular, as the Supreme Court of Canada clarified, in the case of unfinished or incomplete goods, Rule 2 may be applied in conjunction with Rule 1 to determine the *prima facie* classification of such goods *provided* that no heading specifically describes the unfinished goods as such. Where an incomplete or unfinished good is specifically described by a heading, Rule 1 suffices to classify it.[29] For these reasons, the Tribunal must first consider whether the goods in issue are parts of footwear classifiable under heading No. 64.06 pursuant to Rule 1 before considering the CBSA's alternative argument that the goods in issue should be classified as footwear pursuant to Rule 2(a).

Heading No. 64.06

50. Heading No. 64.06 provides as follows:

> Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable in-soles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.

51. According to the terms of this heading, in order for the goods in issue to be classified in heading No. 64.06 they must be parts of footwear, which may include uppers whether or not attached to soles other than outer soles. The Tribunal will therefore determine whether the goods in issue are described as such by the terms of heading No. 64.06, read in light of the relevant notes.

52. In the context of this case, two notes are particularly relevant to understanding the scope of this heading. The first is explanatory note H to Chapter 64. The other is explanatory note A(7) to heading No. 64.06, which deals with assemblies of parts.

53. As noted above, explanatory note H to Chapter 64 provides that "[b]oot or shoe bottoms, consisting of an outer sole affixed to an incomplete or unfinished upper . . . are to be regarded as footwear (and not as parts of footwear)" if they meet certain conditions, notably with respect to the finishing of the goods. As explanatory note H applies to Chapter 64 in its entirety, it must be considered in construing the scope of heading No. 64.06.

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27. Exhibit AP-2016-038-04 at paras. 6-7, Vol. 1.
28. *Igloo Vikski* at para. 21.
29. *Igloo Vikski* at paras. 22-23. In footnote 4 of its reasons, the Supreme Court of Canada makes a comment of particular interest in the context of this case. It reads as follows: "An example of a heading that specifically describes an unfinished good is *64.06 ("Parts of footwear")* . . . .Where a good falls within one of those headings, there would be no need to apply Rule 2, as the heading specifically contemplates the incomplete or composite nature of the goods in question. Rule 1's direction that the classification of goods should be determined according to the terms of the headings therefore suffices" [emphasis added].

54. When read in context and consistently with the terms of the related headings and the pertinent notes, it is clear that heading No. 64.06, which covers parts of footwear, *prima facie* includes incomplete or unfinished uppers attached to outer soles. The Tribunal therefore cannot agree with the CBSA's argument that the terms of heading No. 64.06[30] expressly exclude from its scope goods such as the ones in issue. If they did, there would be no reason for explanatory note H to Chapter 64 to specify that the boot or shoe bottoms consisting of an outer sole affixed to incomplete or unfinished uppers described therein are *not* to be regarded as parts of footwear.

55. This *prima facie* classification of boot or shoe bottoms consisting of an outer sole affixed to an incomplete or unfinished upper in heading No. 64.06 can be rebutted in two ways. First, where the goods meet the specific conditions of the exception set out in explanatory note H to Chapter 64, which, as discussed above, is not the case for the goods in issue. Second, where the goods do not otherwise meet the conditions of heading No. 64.06, and in particular those set out in explanatory note A(7) to heading No. 64.06 dealing with assemblies of parts. The Tribunal will now turn to this second aspect.

56. In determining whether something is a "part" the Tribunal has previously stated that each case must be determined on its own merits and that there is no universal test.[31] However, the Tribunal has also previously set out the following general criteria for "parts":

- whether the product is essential to the operation of other goods;
- whether the product is a necessary and valid component of other goods;
- whether the product is installed in the other goods in the course of manufacture; and
- common trade usage and practice.[32]

57. Based on the evidence in this case the Tribunal finds that the goods in issue are parts. The goods in issue (e.g. boot bottoms) are a necessary component of footwear and essential to the functioning of the goods as footwear. These components are not generally included in goods other than footwear. Indeed, it is highly improbable that they would be used for anything else. Finally, AMI has explained in detail how the goods in issue are attached to leather uppers and an inner lining in the course of manufacture.

58. Explanatory note A(7) to heading No. 64.06 is also relevant to the classification exercise. Note A(7) provides that heading No. 64.06 includes assemblies of parts (e.g. uppers, whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in headings No. 64.01 to 64.05.

59. Explanatory note A(7) to heading No. 64.06 *excludes* from heading No. 64.06 two types of assemblies of parts: those "constituting . . . footwear"[33] and those "having the essential character of footwear".

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30. Specifically, the words "including uppers . . . attached to soles other than outer soles".
31. *Atomic Ski Canada Inc. v. Deputy Minister of National Revenue* (8 June 1998), AP-97-030 and AP-97-031(CITT) [*Atomic Ski*] at 6.
32. *York Barbell Company Limited v. Deputy Minister of National Revenue for Customs and Excise* (19 August 1991), AP-90-161 (CITT); *Atomic Ski* at 6.
33. As the Tribunal has already determined that the goods in issue do not constitute footwear, it need not consider this exclusion.

60. The Tribunal interprets the second component of explanatory note A(7) to mean that, if an assembly of parts has acquired the essential character of footwear as described in headings No. 64.01 to 64.05, it is no longer considered to be a part.

61. The Tribunal must therefore examine whether the goods in issue have the essential character of footwear as described in headings No. 64.01 to 64.05. The Tribunal notes that this language mirrors the "essential character" language of Rule 2(a)[34] of the *General Rules.* Because the essential character language is the same under explanatory note A(7) and Rule 2(a), previous Tribunal jurisprudence dealing with the test of "essential character" pursuant to Rule 2(a) may also provide guidance in determining whether the goods in issue have acquired the "essential character of footwear" within the meaning of explanatory note A(7) to heading No. 64.06.

62. The Tribunal has considered the "essential character" of an article in a number of previous decisions. Given the specific nature of each article that is the subject matter of a classification appeal, it is virtually impossible to establish a universally applicable test. Each case must be evidence-driven and determined on its own merit. Nevertheless, past Tribunal decisions may point to factors or criteria that may be useful in assessing the essential character of the goods in issue in this case.

63. In *Renelle Furniture*, the Tribunal defined "essential character" as follows: "The word 'essential' is defined in the *Canadian Oxford Dictionary* as 'of or constituting the essence of a person or thing'. The word 'character' is defined as 'the collective qualities or characteristics . . . that distinguish a person or thing'".[35]

64. Furthermore, the Tribunal has held that an incomplete or unfinished article has the essential character of the complete or finished article when it is recognizable or identifiable as the complete or finished article.[36] In addition, since *Outdoor Gear*,[37] it is settled that an article can have the essential character of a complete and finished article while lacking some components and therefore not being fully operational.

65. Among the elements considered in determining whether an article has the essential character of a finished article, the Tribunal has considered, for instance, whether the goods look like the complete or finished article.[38] It has also considered whether the goods possessed the essential features of the complete or finished article.[39] In one instance, the manner in which the article was marketed was a factor taken into consideration.[40] In another, the Tribunal also considered the question of whether the value that is added to the goods in issue after importation is of such a considerable proportion as to render absurd the claim that those goods as imported have the essential character of the finished or complete goods.[41]

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34. Rule 2(a) states that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article."
35. *Renelle Furniture Inc. v. Canada Border Services Agency* (23 March 2017), AP-2005-028 (CITT) [*Renelle*] at para. 18.
36. *Renelle* at para. 22; *Outdoor Gear Canada* (21 November 2011), AP-2010-060 (CITT) [*Outdoor Gear*] at para. 41.
37. *Outdoor Gear* at para. 44. In this aspect, the Tribunal reaffirmed earlier decisions in *Renelle* and *Bauer Nike Hockey Inc. v. Deputy M.N.R.* (14 February 2001), AP-99-092 (CITT) [*Bauer*].
38. *Outdoor Gear* at para. 45.
39. *Bauer* at 4-5; *Ulextra Inc. v. President of the Canada Border Services Agency* (15 June 2011), AP-2010-024 (CITT) at para. 87.
40. *Outdoor Gear* at para. 45. As there is no evidence regarding the marketing of the goods in issue as imported, the Tribunal will not consider this aspect.
41. *Viessmann Manufacturing Company Inc. v. Deputy Minister of National Revenue* (14 November 1997), AP-96-196 to AP-96-198 (CITT) [*Viessmann*] at 6-7.

66. In *Renelle*, the Tribunal provided an illustration of an article that would be recognizable or identifiable as the finished product: "[I]f an automobile were imported without wheels, it could be classified in heading No. 87.03 for automobiles, because it is recognizable as the finished product. However, an automobile frame only (without motor, wheels, etc.) would be classified in heading No. 87.08 (parts and accessories of motor vehicles)."[42] In the present case, the goods in issue cannot be compared to the automobile imported without wheels. Too much remains to be done before they can become the finished and complete product. The goods in issue in their current state are more akin to the automobile frame.

67. Indeed, after examining the physical exhibits in this case and reviewing the evidence, the Tribunal finds that the form and shape of the goods in issue indicate that the resulting product will be footwear. They are, however, nothing more than the "frame" of the complete or finished product. The complete and finished product may take many forms and contain many features that are not present in the goods in issue. Looking at the goods in issue on their own, it would take a great deal of imagination to envision what the finished article will be like.

68. In addition, the level and type of transformation performed on the goods in issue after importation distinguishes the goods in issue from the types of goods the Tribunal has found to have acquired the essential character of the finished products. For instance, the goods in issue are distinguishable from the ones in *Bauer*, where the Tribunal found unfinished skating boots had the essential character of the finished articles where all that remained to be done in order to finish the imported goods was to add insoles.[43] This is substantially different from the situation of the goods in issue.

69. The goods in issue are also distinguishable from those in *Viessmann* wherein the Tribunal's consideration went beyond the monetary value of work and components necessary to transform the parts into a finished product, and instead looked at the nature and extent of the work that was involved. The Tribunal takes the same approach in this case.[44]

70. The process of assembling the leather component with the goods in issue was described in some detail by AMI:

> To allow the leather component to be attached, the bottoms have a rand around the opening of 2.75 inches where the leather overlaps on the rubber bottom. This allows the leather to be stitched directly onto the rubber bottom. This rand is then modified by trimming, specifically at the heel area to ensure the rubber lip does not protrude after the leather upper is attached. A rubber adhesive is spread over this rand to provide a waterproof barrier between the leather and the rubber bottom and

42. At para. 22.
43. While the insoles could only be added once the boots had been turned into in-line skates, the Tribunal decided that they still had the essential character of a skating boot. The Tribunal also noted that skating boots and in-line skates are two different products in the tariff nomenclature.
44. AMI indicated that it produces a leather component in Canada that will be added to the goods in issue after importation in order to make them into a finished product. The cost of this leather component represents between 55% to 60% of the total cost of the boot. The Tribunal notes that, in *Viessmann*, the Tribunal asked itself whether the value that is added to the goods in issue after importation is of such a considerable proportion as to render "absurd" the claim that the goods as imported have the essential character of the finished or complete goods. The Tribunal is not convinced that the wording used in *Viessmann*, to the effect that the claim had to be absurd, establishes a test that needs to be met in future cases. The Tribunal, however, does not need to answer this question in the context of this case, given the Tribunal's finding that the nature and extent of work done to the goods following their importation are sufficient to conclude the goods in issue, at the time of importation, do not have the essential character of footwear.

> seal the stitch holes. The process takes between 1 hour and 15 minutes to 2 hours per boot pair to finish.
>
> In attaching the leather portion to the bottom, a lining, which is attached to the leather portion, is also inserted at the heel of the boot bottom in order to allow the boot to be donned and worn without chaffing from the rubber lip or stitched section of the boot. Without the lining a person could not be able to wear the boot without incurring injury, discomfort or pain.[45]

71. The Tribunal notes that AMI's statements as to the manner of finishing of the goods in issue were not disputed by the CBSA, which recognizes that following importation a leather component is added to form the shaft of the boot.[46] The Tribunal has also confirmed by visual inspection that the inside of the goods in issue is rough and does not bear any kind of finishing. As such, the Tribunal finds that they are not meant or intended to be worn in their current state. While the Tribunal does not ascribe much weight to the exact cost or duration of the work performed on the goods in issue in the absence of supporting evidence, the Tribunal considers that it is the type of work, rather than its exact cost component, that is relevant to the classification exercise at hand.

72. The Tribunal finds that the process described by AMI leads to the creation of a product which is substantially different from either of its two main components. In addition, the process does not relate to activities such as assembly or testing, but rather alters essential features of the goods in issue.

73. Having considered the evidence of the nature and the extent of the work done to the goods after importation, the Tribunal is satisfied that the goods in issue do not have the essential character of the finished footwear.

74. On the basis of the evidence and the reasons outlined above, the Tribunal finds that the goods in issue lack the essential character of footwear as described in headings No. 64.01 to 64.05. Therefore, the goods in issue meet the requirements of explanatory note A(7) to heading No. 64.06 and are classified in that heading in accordance with Rule 1 of the *General Rules*.

Classification at the Subheading and Tariff Item Levels

75. Having found that the goods in issue should be classified in heading No. 64.06, the Tribunal must determine the appropriate subheading and tariff item. Heading No. 64.06 has three subheadings: uppers and parts thereof, other than stiffeners; outer soles and heels, or rubber or plastics; and other. As the goods in issue consist of both an upper and an outer sole, the Tribunal finds that, in accordance with Rule 6 of the *General Rules*, the goods in issue are to be classified in subheading No. 6406.90 as other parts of footwear. Subheading No. 6406.90 has three tariff items, but it is clear that only one is applicable. As such, on the basis of Rule 1 of the *Canadian Rules*, the goods in issue are classified under tariff item No. 6406.90.90 as other parts of footwear.

DECISION

76. The appeal is allowed.

Jean Bédard
Jean Bédard
Presiding Member

45. Exhibit AP-2016-038-04 at paras. 6-7, Vol. 1.
46. Exhibit AP-2016-038-06A at para. 9, Vol. 1.

APPENDIX

TERMS OF HEADINGS, SECTION, CHAPTER AND EXPLANATORY NOTES

Section XII

FOOTWEAR, HEADGEAR, UMBRELLAS, SUN UMBRELLAS, WALKING-STICKS, SEAT-STICKS, WHIPS, RIDING-CROPS AND PARTS THEREOF; PREPARED FEATHERS AND ARTICLES MADE THEREWITH; ARTIFICIAL FLOWERS; ARTICLES OF HUMAN HAIR

Chapter 64

FOOTWEAR, GAITERS AND THE LIKE; PARTS OF SUCH ARTICLES

64.01	**Waterproof footwear with outer soles and uppers of rubber or of plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes.**
6401.10	**-Footwear incorporating a protective metal toe-cap**
	- - -Of rubber:
6401.10.19	- - - -Other
64.06	**Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable in-soles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.**
6406.90	**-Other**
6406.90.90	- - -Other

There are no relevant section notes. The relevant legal notes for Chapter 64 provide as follows:

> 3. For the purposes of this Chapter:
>
> (a) the terms "rubber" and "plastics" include woven fabrics or other textile products with an external layer of rubber or plastics being visible to the naked eye; for the purpose of this provision, account should be taken of any resulting change of colour . . . .
>
> 4. Subject to Note 3 to this Chapter:
>
> (a) The material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments;
>
> (b) The constituent material of the outer sole shall be taken to be the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements such as spikes, bars, nails, protectors or similar attachments.

The relevant explanatory notes to Chapter 64 provide as follows:

GENERAL

> With certain **exceptions** (see particularly those mentioned at the end of this General Note) this Chapter covers, under headings 64.01 to 64.05, various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made.

For the purposes of this Chapter, the term "footwear" **does not**, however, **include** disposable foot or shoe coverings of flimsy material (paper, sheeting of plastics, etc.) without applied soles. These products are classified according to their constituent material.

(A) Footwear may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh-boots (the uppers of which cover the leg and thigh, and which may have straps, etc., for fastening the uppers to the waist for better support). The Chapter includes:

(1) Flat or high-heeled shoes for ordinary indoor or outdoor wear.

(2) Ankle-boots, half-boots, knee-boots and thigh-boots.

(3) Sandals of various types, "espadrilles" (shoes with canvas uppers and soles of plaited vegetable material), tennis shoes, jogging shoes, bathing slippers and other casual footwear.

(4) Special sports footwear which is designed for a sporting activity and has, or has provision for, the attachment of spikes, sprigs, stops, clips, bars or the like and skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes (see Subheading Note 1 to the Chapter).

Roller-skating or ice-skating boots with skates fixed to the soles, are, however, **excluded (heading 95.06)**.

(5) Dancing slippers.

(6) House footwear (e.g., bedroom slippers).

(7) Footwear obtained in a single piece, particularly by moulding rubber or plastics or by carving from a solid piece of wood.

(8) Other footwear specially designed to protect against oil, grease, chemicals or cold.

(9) Overshoes worn over other footwear; in some cases, they are heel-less.

(10) Disposable footwear, with applied soles, generally designed to be used only once.

. . .

Within the limits of the Chapter itself, however, it is the constituent material of the outer sole and of the upper which determines classification in headings 64.01 to 64.05.

(C) The term "outer sole" as used in headings 64.01 to 64.05 means that part of the footwear (other than an attached heel) which, when in use, is in contact with the ground. The constituent material of the outer sole for purposes of classification shall be taken to be the material having the greatest surface area in contact with the ground. In determining the constituent material of the outer sole, no account should be taken of attached accessories or reinforcements which partly cover the sole (see Note 4 (b) to this Chapter). These accessories or reinforcements include spikes, bars, nails, protectors or similar attachments (including a thin layer of textile flocking (e.g., for creating a design) or a detachable textile material, applied to but not embedded in the sole).

In the case of footwear made in a single piece (e.g., clogs) without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface.

(D) For the purposes of the classification of footwear in this Chapter, the constituent material of the uppers must also be taken into account. The upper is the part of the shoe or boot above the sole. However, in certain footwear with plastic moulded soles or in shoes of the American Indian moccasin type, a single piece of material is used to form the sole and either the whole or part of the upper, thus making it difficult to identify the demarcation between the outer sole and the upper. In such cases, the upper shall be considered to be that portion of the shoe which covers the sides and top of the foot. The size of the uppers varies very much between different types of footwear, from those

covering the foot and the whole leg, including the thigh (for example, fishermen's boots), to those which consist simply of straps or thongs (for example, sandals).

If the upper consists of two or more materials, classification is determined by the constituent material which has the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, protective or ornamental strips or edging, other ornamentation (e.g., tassels, pompons or braid), buckles, tabs, eyelet stays, laces or slide fasteners. The constituent material of any lining has no effect on classification.

. . .

(H) Boot or shoe bottoms, consisting of an outer sole affixed to an incomplete or unfinished upper, which do not cover the ankle are to be regarded as footwear (and not as parts of footwear). These articles may be finished simply by trimming their top edge with a border and adding a fastening device.

The relevant explanatory notes for tariff item No. 64.01 provide as follows:

This heading covers waterproof footwear with both the outer soles and the uppers (see General Explanatory Note, paragraphs (C) and (D)), of rubber (as defined in Note 1 to Chapter 40), plastics or textile material with an external layer of rubber or plastics being visible to the naked eye (see Note 3 (a) to this Chapter), **provided** the uppers are neither fixed to the sole nor assembled by the processes named in the heading.

The heading includes footwear constructed to protect against penetration by water or other liquids and would include, inter alia, certain snow-boots, galoshes, overshoes and ski-boots.

Footwear remains in this heading even if it is made partly of one and partly of another of the specified materials (e.g., the soles may be of rubber and the uppers of woven fabric with an external layer of plastics being visible to the naked eye; for the purpose of this provision no account should be taken of any resulting change of colour).

The relevant explanatory notes for heading No. 64.06 provide as follows:

This heading covers:

(A) The various component parts of footwear; these parts may be of any materials **except** asbestos.

Parts of footwear may vary in shape according to the types or styles of footwear for which they are intended. They include:

(1) Parts of uppers (e.g., vamps, toecaps, quarters, legs, linings and clog straps), including pieces of leather for making footwear cut to the approximate shape of uppers.

(2) Stiffeners. These may be inserted between the quarters and lining, or between the toecap and lining, to give firmness and solidity at these parts of the footwear.

(3) Inner, middle and outer soles, including half soles or patins; also in-soles for glueing on the surface of the inner soles.

(4) Arch supports or shanks and shank pieces (generally of wood, leather, fibreboard or plastics) for incorporation in the sole to form the curved arch of the footwear.

(5) Various types of heels made of wood, rubber, etc., including glue-on, nail-on and screw-on types; parts of heels (e.g., top pieces).

(6) Studs, spikes, etc., for sports footwear.

(7) Assemblies of parts (e.g., uppers, whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in headings 64.01 to 64.05.