



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-052

Jardin de Ville

v.

President of the Canada Border
Services Agency

*Decision issued
Friday, March 8, 2019*

*Reasons issued
Friday, March 22, 2019*

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DECISION 16

IN THE MATTER OF an appeal heard on November 13 and 14, 2018, 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 November 8, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

JARDIN DE VILLE

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing: Ottawa, Ontario
Dates of Hearing: November 13 and 14, 2018
Tribunal Panel: Peter Burn, Presiding Member
Support Staff: Helen Byon, Counsel

PARTICIPANTS:**Appellant**

Jardin de Ville

Counsel/RepresentativesJeffrey Goernert
Michael Kaylor**Respondent**

President of the Canada Border Services Agency

Counsel/RepresentativesMélyne Félix
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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by Jardin de Ville (Jardin) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision by the President of the Canada Border Services Agency (CBSA) dated November 8, 2017, made pursuant to subsection 60(4).

[2] The issue in this appeal is whether various high-end outdoor furniture, including seats, loungers, tables and chairs (the goods in issue) are properly classified under tariff item Nos. 9401.69.10, 9401.71.10 and 9401.79.10 of the schedule to the *Customs Tariff*² as seats other than those of heading No. 94.02, whether or not convertible into beds, and parts thereof, for domestic purposes, and tariff item Nos. 9403.60.10, 9403.70.10 and 9403.89.19 as other furniture and parts thereof, for domestic purposes, and tariff item No. 9403.20.00 as other furniture and parts thereof, as determined by the CBSA, or should be classified under tariff item Nos. 9401.69.90, 9401.71.90 and 9401.79.90 as seats other than those of heading No. 94.02, whether or not convertible into beds, and parts thereof, other than for domestic purposes, and tariff items Nos. 9403.60.90, 9403.70.90 and 9403.89.90 as other furniture and parts thereof, other than for domestic purposes, as claimed by Jardin.

PROCEDURAL HISTORY

[3] The goods in issue were imported into Canada between 2012 and 2015 by way of 33 separate transactions.

[4] Between March 2016 and March 2017, Jardin made refund claims for all of the 33 transactions, pursuant to paragraph 59(1)(a) of the *Act*.

[5] Between June 13, 2016, and March 28, 2017, Jardin sought further re-determinations pursuant to subsection 60(1) of the *Act*.

[6] On November 8, 2017, the President of the CBSA issued a decision pursuant to subsection 60(4) of the *Act* denying the requests for further re-determinations.

[7] The appeal was filed with the Tribunal on January 18, 2018.

[8] To clarify the relevant tariff items, the Tribunal requested on October 22, 2018, that Jardin provide a complete list of all proposed tariff classifications for each model of the goods in issue. Jardin filed this list with the Tribunal on November 1, 2018, and November 8, 2018 (Jardin's List).³

[9] On November 13 and 14, 2018, the Tribunal held a public hearing in Ottawa, Ontario. Jardin called Eric Parsons of Gloster Furniture, Inc., Vanessa Lipari of Vanessa Lipari Design Inc. and Johanne Bourque of Jardin to appear as witnesses at the hearing.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.
3. Exhibit AP-2017-052-23A, Vol. 1.

DESCRIPTION OF THE GOODS IN ISSUE

[10] The goods in issue are manufactured by third parties, which Jardin imports and sells either directly or through designers. They are made of various materials, including synthetic wicker, teak, aluminum or stainless steel with sling or upholstery coverings. The parties agree that the goods in issue are high-end furniture for outdoor use.⁴ The suppliers of the goods in issue include Manutti, Gloster Furniture (Gloster), Les Jardins, Royal Botania, P.T. Stephalux (Stephalux), Expormim, Gardenart, and Garden Consultance (also known as Jati & Kebon).

LEGAL FRAMEWORK

[11] 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).⁵ 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.

[12] 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*⁶ and the *Canadian Rules*⁷ set out in the schedule.

[13] 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.

[14] 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*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁰

[15] 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. As the Supreme Court of Canada indicated in *Igloo Vikski*, it is “only

4. Exhibit AP-2017-052-11A, Vol. 1 at para. 4.

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

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

7. S.C. 1997, c. 36, schedule [*Canadian Rules*].

8. World Customs Organization, 4th ed., Brussels, 2017 [*Classification Opinions*].

9. World Customs Organization, 6th ed., Brussels, 2017 [*Explanatory Notes*].

10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20, at para. 4.

where Rule 1 does not conclusively determine the classification of the good that the other General Rules become relevant to the classification process.”¹¹

[16] 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 use a similar approach to determine the proper subheading.¹² The final step is to determine the proper tariff item.¹³

[17] 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.**

. . .

9401.69 - - Other

9401.69.10 - - -For domestic purposes

9401.69.90 - - -Other

-Other seats, with metal frames:

9401.71 - -Upholstered

11. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 21 [*Igloo Vikski*].

12. 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.”

13. 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.

9401.71.10 - - - For domestic purposes

...

9401.71.90 - - -Other

9401.79 - -Other

9401.79.10 - - -For Domestic Purposes

9401.79.90 - - -Other

...

94.03 Other furniture and parts thereof.

...

9403.20.00 -Other metal furniture

...

9403.60 -Other wooden furniture

9403.60.10 - - -For domestic purposes

...

9403.60.90 - - -Other

...

9403.70 -Furniture of plastics

9403.70.10 00 - - -For domestic purposes

9403.70.90 00 - - -Other

-Furniture of other materials, including cane, osier, bamboo or similar materials:

...

9403.89 - -Other

- - -For domestic purposes:

...

9403.89.19 00 - - - -Other

9403.89.90 00 - - -Other

[18] The relevant explanatory notes to heading No. 94.01 read as follows:

Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

Lounge chairs, arm-chairs, folding chairs, deck chairs, infants' high chairs and children's seats designed to be hung on the back of other seats (including vehicle seats), grandfather chairs, benches, couches (including those with electrical heating), settees, sofas, ottomans and the like, stools

[19] The relevant explanatory notes to subheading Nos. 9401.61 and 9401.71 read as follows:

“Upholstered seats” are those having a soft layer of, for example, wadding, tow, animal hair, cellular plastics or rubber, shaped (whether or not fixed) to the seat and covered with a material such as woven fabric, leather or sheeting of plastics. Also classified as upholstered seats are seats the upholstering materials of which are not covered or have only a white fabric cover which is itself intended to be covered (known as upholstered seats “in muslin”), seats which are presented with a detachable seat or back cushions and which could not be used without such cushions, and seats with helical springs (for upholstery). . . .

[20] The relevant explanatory notes to heading No. 94.03 read as follows:

This heading covers furniture and parts thereof, **not covered** by the previous headings. . . .

TRIBUNAL ANALYSIS

[21] The Tribunal has identified several discrepancies between Jardin's List and the list of models and tariff classifications attached to the CBSA's letter of November 8, 2017¹⁴ (the CBSA's List). With respect to some of the goods in issue, Jardin's proposed tariff classification is under a different subheading than the one that was applied by the CBSA. Moreover, Jardin's List includes models of furniture which were not included on the CBSA List and, in certain cases, the CBSA's tariff classification was copied incorrectly. Additionally, certain model item numbers that appear on the CBSA's List do not appear on Jardin's List. No submissions were made by either party explaining these discrepancies. For the purposes of this appeal, and consistent with Jardin's submissions,¹⁵ the goods in issue are limited to only those items identified on the CBSA's List, with the exclusion of the Teak Armrest (item No. KA02260).¹⁶ Accordingly, the Tribunal has omitted consideration of witness testimony and evidence erroneously referring to models of furniture as part of the goods in issue.

14. Exhibit AP-2017-052-01, Vol. 1 at 7-13.

15. Exhibit AP-2017-052-06A, Vol. 1 at para. 3.

16. Jardin did not propose a new tariff classification for this item; it is omitted from Jardin's List.

[22] Furthermore, the CBSA erroneously classified a stool from the Napoli/Antigua model under tariff item No. 9401.70.10.¹⁷ The subheading for this tariff item does not exist in the nomenclature.

[23] The parties agree that only heading Nos. 94.01 and 94.03 are relevant to the goods in issue. In cases where parties agree with respect to the applicability of subheading Nos. 9401.69, 9401.71, 9401.79, 9403.60, 9403.70 and 9403.89, the issue to be determined is the classification of the goods in issue at the tariff item level, which specifically requires determining whether the goods in issue are for domestic purposes or for other purposes.

Burden of proof

[24] As stated in *Canac*,¹⁸ the appellant bears the burden to demonstrate that the CBSA's classification of the furniture as "for domestic purposes" is incorrect. In addition, because the tariff item classifications submitted by Jardin are residual ("other") categories, they "can only apply if the goods in issue cannot be classified under a more specific category", namely the "domestic purposes" category.¹⁹

[25] Goods will be "for domestic purposes" where they are primarily intended for domestic or household purposes.²⁰ An appellant can discharge its burden of showing that the goods are not primarily intended for domestic purposes, and therefore *cannot* be classified in the "domestic purposes" category, in one of two ways:

- by establishing that the goods in issue were equally intended for domestic and non-domestic purposes; or
- by establishing that they were primarily intended for non-domestic purposes.²¹

[26] The test to be applied is that of the *intended* use of the goods in issue, as opposed to their *actual* or *end* use.²²

[27] In this matter, Jardin argued that the goods in issue are equally intended for domestic and non-domestic (i.e. commercial) purposes. For its part, the CBSA submitted that the goods in issue are

17. Exhibit AP-2017-052-01, Vol. 1 at 8. In addition, there is no reference to a stool on Jardin's List that is associated with the model item numbers cited for the stool on the CBSA's List (item No. GJ-50020/21/22). No submissions were made with respect to this discrepancy.

18. *Canac Marquis Grenier Ltée v. President of the Canada Border Services Agency* (28 February 2017), AP-2016-005 (CITT) [*Canac*] at para. 24. See also *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; *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (12 June 2014), AP-2013-042 (CITT) at para. 23.

19. *Canac* at para. 24; *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".

20. *IKEA Supply AG v. President of the Canada Border Services Agency* (18 September 2014), AP-2013-053 (CITT) [*IKEA*] at para. 17.

21. *Canac* at para. 25; *Stylus* at para. 63; *IKEA* at para. 18.

22. *Canac* at para. 25; *Stylus* at para. 64; *IKEA* at para. 17; *6572243 Canada Ltd. o/a Kwaliti Imports v. President of the Canada Border Services Agency* (3 August 2012), AP-2010-068 [*Kwaliti Imports*] at para. 43.

intended for domestic purposes. Additionally, the CBSA argued that as the non-domestic tariff item is a residual category, it can only apply if the goods in issue cannot be classified under a more specific category, namely the tariff item “for domestic purposes”.²³ In other words, the goods cannot be equally intended for domestic and non-domestic purposes. In the Tribunal’s view, the CBSA’s approach cannot be reconciled with the threshold stated above, that for goods to qualify “for domestic purposes”, they must be *primarily* intended for domestic or household purposes. If this threshold is not met, because the goods are *equally* intended for both domestic and non-domestic purposes, they would properly fall under the residual category for “other” purposes. The goods in issue cannot be classified under both categories.

[28] The Tribunal must thus “make a finding involving the market for a good where the domestic and other uses of that good may overlap in some respects”.²⁴ In order to make its case, Jardin must “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”.²⁵

Factors

[29] In order to determine the intended use of imported goods, the Tribunal will consider factors such as the design, characteristics, marketing and pricing of the goods.²⁶ In this regard, the *Canac* decision laid out a non-exhaustive illustrative guideline. Any such factors will be considered as a whole.²⁷ Where an appellant argues that the goods are intended equally for domestic and non-domestic purposes, concrete factual evidence of the aforementioned factors could include, for example:

business plans, supplier and vendor correspondence or meetings, marketing materials, design documents, financial and sales records, or other relevant contemporary documentation showing that [the appellant, the manufacturer or the seller] 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.²⁸

[30] As such, it is prudent to make contemporaneous notes-to-file following meetings with suppliers and commercial customers. While evidence of all of the above-mentioned factors may not be available at the time of importation, nevertheless, the available evidence must be sufficient to discharge the burden of proving on a balance of probabilities (i.e. more likely than not) the intended use of the goods. This cannot be established from a “visual examination of the goods in issue”, as purported by Jardin.²⁹

[31] While the Tribunal would expect to see at least some traces of a corroborating historical paper trail, testimonial evidence from witnesses with direct personal knowledge of the goods, such as a manufacturer, designer or customer, that have independent industry knowledge or expertise can

23. *Transcript of Public Hearing* at 177.

24. *Canac* at para. 29.

25. *Canac* at para. 28; see also *IKEA* at para. 18; *Kwality Imports* at para. 44.

26. *Canac* at para. 26; *Stylus* at para. 65; *IKEA* at para. 19.

27. *Canac* at para. 26.

28. *Canac* at para. 30.

29. Exhibit AP-2017-052-11A, Vol. 1 at paras. 45-47.

provide a level of objectivity that is helpful in establishing that goods are in fact intended for a dual purpose.³⁰ The question as to whether or not the goods in issue were intended for domestic purposes is one of mixed law and fact.³¹

[32] As detailed below, having considered the arguments and evidence before it, the Tribunal finds that the goods in issue were intended equally for domestic and non-domestic purposes, and are therefore classifiable under the residual “other” tariff item under the applicable subheading.

Design and characteristics

Materials

[33] Jardin submitted that the materials used in the furniture are of high quality for the purpose of ensuring the furniture is durable and suitable for outdoor use.

[34] Teak is a hardwood that is exceptionally durable, highly impervious to rotting and degradation from outdoor use due to its high oil content.³² Several models of the goods in issue are made of teak, including the Lorenzo and Lund by Garden Consultance, all of the models of furniture by Gloster (with the exception of the Vista model), and all of the models by Les Jardins (with the exception of the Yolo). Powder coated aluminum tube frames are used as they are more durable, lightweight and do not rust in a seaside environment (due to the salt air).³³ Models of the goods in issue made from aluminum include all of the models by Expormim, the Deva/Easygoing, Bari, Chanoy Sac, Pisa, Sevilla, Coco/Let’s Play, and Hydra II, by Garden Consultance, the Vista³⁴ by Gloster, the Yolo by Les Jardins, the Aspen, Quarto, Fuse, Helios, Liner and Zendo³⁵ by Manutti, and all of the models by Gardenart (with the exception of the Biarritz [item No. CARS643]).

[35] Stainless steel is also used due to its resistance to corrosion.³⁶ Models of the goods in issue made from this material include the Edmonton, Lismore and Domino by Garden Consultance, the Mood by Manutti, the Grace³⁷ by Gardenart, as well as the Saffron (Head Forward)³⁸ by Stephalux, and the Ninix and Ozone by Royal Botania.

[36] Synthetic wicker/rattan (made of a high-density polyethylene thermoplastic) is UV tested, weather-resistant, waterproof, tested for ignitability, resistant to moulds, and easy to clean.³⁹ The goods in issue made of synthetic wicker include, the Napoli/Antigua and Valencia by Garden

30. *Canac* at para. 31.

31. *Canac* at para. 26; *IKEA* at para. 19; *Kwality Imports* at para. 47.

32. *Transcript of Public Hearing* at 8; Exhibit AP-2017-052-10C, Vol. 1 at 35; Exhibit AP-2017-052-10D, Vol. 1 at 8.

33. *Transcript of Public Hearing* at 9; Exhibit AP-2017-052-10C, Vol. 1 at 20, 40; Exhibit AP-2017-052-10H, Vol. 1 at 158.

34. Exhibit AP-2017-052-10C, Vol. 1 at 16-18, 20.

35. Exhibit AP-2017-052-10B, Vol. 1 at 47.

36. Exhibit AP-2017-052-10I, Vol. 1 at 82.

37. Exhibit AP-2017-052-10H, Vol. 1 at 160.

38. Exhibit AP-2017-052-10F, Vol. 1 at 19.

39. Exhibit AP-2017-052-10B, Vol. 1 at 36; Exhibit AP-2017-052-10F, Vol. 1 at 38-42; *Transcript of Public Hearing* at 102.

Consultance, the Saffron (Head Forward) and Jasmine by Stepalux, the Mood,⁴⁰ the San Diego and Aspen by Manutti, and the Nautica Swing Chair by Expormim.

[37] The unique properties of the materials used to cover the furniture were described by Jardin.⁴¹ Nautic leather, imitation leather upholstery based on PVC, is specifically developed for outdoor use and is resistant to UV, fading, and water.⁴² Nautic leather was used in the Zendo and Liner models by Manutti.⁴³ QuickDryFoam[®] is used in upholstered seating for its antimicrobial properties, ability to drain water, circulate air and dry easily; seats made by Expormim, Manutti and Stepalux used this material.⁴⁴ Sling fabrics, described by the manufacturers as Batyline[®] and by Jardin as Textilene[®], have properties that make them fade-resistant, low maintenance and weather-, UV- and flame-resistant.⁴⁵ Batyline[®] is rated for light fastness and abrasion.⁴⁶ Sling seats were made by Expormim, Garden Consultance, Gloster, Les Jardins, Gardenart and Manutti. Seats imported from Expormim were also covered with 3D Mesh Omega[®], which is described as a strong, self-supporting fabric with a very high Martindale value (rub test), that is highly resistant to weather and UV.⁴⁷ Other fabrics used for seating products include Sunbrella[®] a fabric made of acrylic that resists fading, mildew, UV, water and is easy to maintain⁴⁸ and Olefin, which is also water repellent, UV- and weather-resistant.⁴⁹

[38] The CBSA did not dispute that the goods in issue are of high quality made for outdoor use but submitted that this did not imply that the goods were precluded from being intended for domestic purposes. As stated above, the test for demonstrating that goods are not for a domestic purpose does not require the appellant to show that the goods in issue are not intended for domestic purposes. Rather, it is sufficient to demonstrate that the goods are equally intended for domestic and non-domestic purposes; this is Jardin's position.

Standards

[39] To assess whether the materials described above are indicative of the goods in issue being equally intended for commercial use, the Tribunal must consider the relevant standards applicable to outdoor furniture for commercial purposes. In this regard, the Tribunal heard testimonial evidence from Ms. Bourque of Jardin, Ms. Lipari of Vanessa Lipari Design Inc. and Mr. Parson of Gloster. The Tribunal finds that each of the witnesses had direct personal knowledge relevant to this appeal.

40. Exhibit AP-2017-052-10B, Vol. 1 at 71.

41. Jardin described other material that is used in outdoor furniture, including a high pressure decorative laminate (HPL, also known as Trespa[®]) that may be used with tables as a decorative top. While the Tribunal notes that this material is used by some of the suppliers of the goods in issue, based on the available evidence, it could not determine that this was used in respect of the goods in issue.

42. Exhibit AP-2017-052-10B, Vol. 1 at 35-36.

43. *Ibid.* at 47; Exhibit AP-2017-052-01 Vol. 1 at 13.

44. *Ibid.* at 7, Exhibit AP-2017-052-10G, Vol. 1 at 23-27; Exhibit AP-2017-052-10A, Vol. 1 at 33-34; Exhibit AP-2017-052-10B, Vol. 1 at 35; Exhibit AP-2017-052-10F, Vol. 1 at 27; *Transcript of Public Hearing* at 95, 101.

45. *Ibid.* at 12-13, 94-96; Exhibit AP-2017-052-10A, Vol. 1 at 35; Exhibit AP-2017-052-10B, Vol. 1 at 34-35; Exhibit AP-2017-052-10C, Vol. 1 at 36; Exhibit AP-2017-052-10H, Vol. 1 at 158.

46. Exhibit AP-2017-052-10G, Vol. 1 at 48.

47. *Ibid.* at 51.

48. *Transcript of Public Hearing* at 98; Exhibit AP-2017-052-10B, Vol. 1 at 35; Exhibit AP-2017-052-10D, Vol. 1 at 15.

49. Exhibit AP-2017-052-10D, Vol. 1 at 15, Exhibit AP-2017-052-10I, Vol. 1 at 52-56.

[40] With respect to Ms. Bourque, her role at Jardin includes doing the “preseason buying” and taking care of general operations.⁵⁰ She has also worked with suppliers of the goods in issue in designing furniture.⁵¹ The CBSA submitted that her testimony regarding her collaboration with suppliers was not relevant as it did not confirm Jardin’s involvement in the designing or manufacturing of all the goods in issue at the time of import for the purposes of selling them to the non-domestic market.⁵² In the Tribunal’s view, Ms. Bourque’s collaborative work with suppliers of outdoor furniture is indicative of her knowledge of the market. Ms. Lipari is a designer who works exclusively with condo developers. She indicated that she recommends Jardin’s products “all the time” to her commercial clients and uses products from Manutti, Jati & Kebon and Royal Botania.⁵³ As president of Gloster, Mr. Parsons has knowledge of products manufactured by Gloster as well as the market for outdoor furniture.⁵⁴

[41] Based on the evidence below, the Tribunal finds that the commercial market seeks high-quality furniture in terms of its durability and suitability for various outdoor conditions. As the end user of the furniture is not known at the time it is imported,⁵⁵ Ms. Bourque indicated that the furniture needs to be a “very strong build” and that the best brands (i.e. Batyline[®] or Textilene[®]) are sought for contract furniture to ensure that it can resist five or ten years of wear.⁵⁶ Ms. Lipari testified that aluminum and Textilene[®] are used in both commercial and residential projects for their “easy maintenance” and “resistance”.⁵⁷ Ms. Lipari described furniture carried by Jardin as being “high-end, tough quality resistance for a lot of traffic areas, like condo projects and hotels”.⁵⁸

[42] Mr. Parsons stated that Gloster manufactures premium outdoor furniture that is intended for residential and commercial markets.⁵⁹ He indicated that in the United States, where the company is located, there are no specific standards from which to build contract-grade outdoor furniture.⁶⁰ There is a European standard for outdoor contract furniture, EN 581,⁶¹ against which Gloster tests its furniture, notwithstanding whether the furniture is intended for the domestic or commercial market; Gloster does not have two separate product lines for the commercial and residential markets.⁶² Mr. Parson also explained that where there is no standard for a particular item, Gloster creates a standard that is consistent with the European standard and test products accordingly. In his view, this is

50. *Transcript of Public Hearing* at 128.

51. For example, the Let’s Play by Garden Consultance and the 3D by Stephalux. See *Transcript of Public Hearing* at 129-135.

52. *Ibid.* at 180.

53. *Ibid.* at 147, 150.

54. Mr. Parsons indicated that Les Jardins is a competitor of Gloster, given that they manufacture from the same materials and sell to the same customers. See *Transcript of Public Hearing* at 26.

55. For its part, the CBSA contended that Jardin’s lack of knowledge with respect to the customer at the time of importation was evidence that it had no specific intent to sell the goods to commercial clients. Insofar as goods may be *equally* intended for domestic and non-domestic purposes, the Tribunal does not agree that Jardin must have specific knowledge of the end user at the time of importation. Moreover, the Tribunal also heard testimony from Ms. Bourque that, in some cases, items are imported after a specific order has been taken. See *Transcript of Public Hearing* at 123.

56. *Ibid.* at 140, 142, 145.

57. *Ibid.* at 151, 153.

58. *Ibid.* at 156.

59. *Ibid.* at 6.

60. *Ibid.* at 18-19, 35.

61. Exhibit AP-2017-052-10G, Vol. 1 at 38-40.

62. *Transcript of Public Hearing* at 18-19.

necessary to have confidence in the company's product warranty.⁶³ The Tribunal notes that Gloster's warranty statement has specific terms for furniture used in a commercial setting; different terms apply where the furniture is for residential use.⁶⁴

[43] Jardin submitted letters from the suppliers of the goods in issue indicating that the models sold to Jardin meet or exceed the requirements for contract furniture used in commercial settings.⁶⁵ For its part, the CBSA submitted that the letters are mere allegations and that they did not imply that the goods were not intended for domestic purposes. First, as explained above, Jardin does not need to demonstrate that the goods were not intended for domestic purposes, only that they were *equally* intended for both domestic and non-domestic purposes. Second, although the letters do not refer to specific requirements applicable to the furniture, the Tribunal accepts these letters in the context that, as stated in Mr. Parson's testimony, there are minimal official or regulated requirements that apply to commercial outdoor furniture. In other words, they reflect intent by the suppliers to manufacture furniture that would be used in a commercial setting.

[44] Jardin also submitted a product certificate issued by the ADIMA Technology Institute with respect to Expormim's outdoor and indoor furniture found in its collection catalogues. According to the certificate, certain regulatory requirements for "seats of public use" were met.⁶⁶ Mr. Parsons of Gloster also testified that every piece of furniture undergoes testing, "as there is too much liability not to test it". The testing done by Gloster includes cycle testing, tip-over testing, UV testing, salt-air testing, etc.⁶⁷ In other words, tests that replicate the use of the furniture in real-life applications.

[45] The evidence described above shows that high quality in terms of durability and resistance to exterior environmental conditions are key standards for the non-domestic market for high-end outdoor furniture. The Tribunal finds that these standards are not different for high-end outdoor furniture sought by domestic consumers. The goods in issue were manufactured using the materials described above, such that these industry standards would be met. It is for this reason that the goods in issue were deliberately sourced by Jardin. In light of the above, the Tribunal finds that on balance, the design and characteristics of the goods in issue indicate that they were equally intended for domestic and non-domestic purposes.

Marketing

[46] The CBSA submitted that Jardin's marketing literature demonstrates that the goods are "intended as home furnishings" and that the fact that the goods are sold to consumers through Jardin's website or in-store clearly establishes that the goods were not "primarily designed for commercial application".⁶⁸ As Jardin's position is that the goods are equally intended for domestic and non-domestic purposes, it does not need to establish that the goods are primarily for commercial applications or that the goods are precluded from being sold as home furnishings.

63. *Ibid.* at 35-36.

64. Exhibit AP-2017-052-10C, Vol. 1 at 44, 55; *Transcript of Public Hearing* at 33.

65. Exhibit AP-2017-052-10B, Vol. 1 at 17; Exhibit AP-2017-052-10C, Vol. 1 at 53; Exhibit AP-2017-052-10D, Vol. 1 at 10; Exhibit AP-2017-052-10E, Vol. 1 at 6; Exhibit AP-2017-052-10F, Vol. 1 at 6; Exhibit AP-2017-052-10G, Vol. 1 at 6; Exhibit AP-2017-052-10H, Vol. 1 at 18; Exhibit AP-2017-052-10I, Vol. 1 at 8.

66. Exhibit AP-2017-052-10G, Vol. 1 at 44.

67. *Transcript of Public Hearing* at 10.

68. Exhibit AP-2017-052-11A, Vol. 1 at paras. 34 and 38.

[47] Several aspects of Jardin's marketing strategy demonstrate its intent to sell products equally for domestic and non-domestic purposes.⁶⁹ Jardin's advertisements depict its products in both commercial and residential settings.⁷⁰ Jardin also participated in trade shows which showcase furniture to both residential and commercial clientele.⁷¹ Ms. Bourque also explained that Jardin has two categories of sales representatives: representatives that serve regular customers and dedicated staff that work with designers that can specify Jardin's products.⁷² Management of inventory also indicates an intention to serve the commercial market. As explained by Ms. Bourque, while large commercial sales would be ordered for shipment, Jardin maintains sufficient inventory so as to serve both individual consumers and businesses, such as small cafés or bistros, that need faster delivery.⁷³ With respect to Jardin's website, Ms. Bourque confirmed that it can be used by any type of customer; but that it is developed with the designer in mind, who has to refer quickly to it for measurements.⁷⁴ Mr. Parsons testified that Jardin provides Gloster with access to the interior design trade and commercial customers and, as such, Jardin is its only distributor in Quebec.⁷⁵

[48] Jardin submitted customer lists from 2013 to 2017 showing sales of products by supplier names to commercial entities, such as real estate associations, property developers,⁷⁶ designers, banks, contractors, casinos, spas, hotels, restaurants, golf clubs, tennis clubs, etc.⁷⁷ Invoices showing sales from 2013 to 2017 of various models from among the goods in issue by Jardin, including the Kabu, Bari, Chanoy, Coco Plate (Let's Play),⁷⁸ Deva (Easy Going), Edmonton, Hydra II, Boston (Hydra), Let's Play, Lorenzo, Napoli (Antigua), Lodi (Pisa), Apollo, Artimes (Director), California, Golf, Luis, Rosyland, Aroma, Bay, Vista, Niki, Tekura (Kura), Valtek, Yolo, Aspen, Liner, Mood, Quarto, San Diego, Zendo, Flowing (3D), Jasmine, Lacaruna (Tea Time),⁷⁹ Saffron (Head Forward), Ninix and Ozone.⁸⁰ In some cases, the quantity of items purchased was also indicative of a non-

69. *Transcript of Public Hearing* at 72, 86 116, 117, 124.

70. Exhibit AP-2017-052-10A, Vol. 1 at 27-31; *Transcript of Public Hearing* at 114-116. Jardin also submitted evidence of advertisements in various newspapers: Exhibit AP-2017-052-10A, Vol. 1 at 23-25. The Tribunal was not able to determine whether this material was for the non-domestic market.

71. *Transcript of Public Hearing* at 136-137.

72. *Ibid.* at 107.

73. *Ibid.* at 143-145.

74. *Ibid.* at 135.

75. *Ibid.* at 23-24.

76. Ms. Bourque of Jardin indicated that 24 development projects or developers were reflected in the two volumes of commercial invoices submitted to the Tribunal. *Transcript of Public Hearing* at 117.

77. Exhibit AP-2017-052-10J (protected), Vol. 2 and Exhibit AP-2017-052-10L, Vol. 1 at 3-4; *Transcript of Public Hearing* at 41, 42.

78. Jardin's product name is noted in parenthesis for clarity regarding model items.

79. Exhibit AP-2017-052-10F, Vol. 1 at 33.

80. Exhibit AP-2017-052-10J (protected), Vol. 2 and Exhibit AP-2017-052-10L, Vol. 1 at 5-7, 10-12, 19, 22-23, 29, 30, 36, 39, 42-43, 47, 55, 56, 59-60, 64-68, 73-75, 77, 79-81, 83, 84, 86, 89, 91, 93, 95; Exhibit AP-2017-052-10K (protected), Vol. 2 and Exhibit AP-2017-052-10M, Vol. 1 at 21-22, 27, 30, 31, 34, 41, 42, 44-46, 51, 52, 56, 57, 60, 65, 67, 70, 71, 75, 79, 81, 82, 84, 85, 87, 90, 104, 106, 118, 123, 128, 134, 137, 138, 146, 149, 157-159, 165, 171, 189, 197, 210, 211, 213, 215, 219, 228, 229, 238, 245, 260, 265-267, 269, 272, 274, 277, 282, 285, 287, 288.

domestic purpose.⁸¹ Ms. Bourque of Jardin testified that Jardin's sales to commercial business accounted for approximately 20 percent of all market sales in the last few years.⁸²

[49] For its part, the CBSA did not dispute that Jardin had commercial clients. Nevertheless, it questioned the sufficiency of the documentation supporting Jardin's relationship with the non-domestic market, contending that it is impossible to establish a ratio between the sales to non-domestic customers and domestic customers. In *Canac*, the Tribunal discussed the limited inferences that can be drawn with respect to the proportion of sales to non-domestic customers relative to domestic customers where the sample size of purchase orders or invoices is small and over an extended period.⁸³ In these circumstances, the Tribunal needs other evidence to determine the significance of the appellant's relationship with the non-domestic market. This discussion does not amount to establishing a minimum ratio of sales between domestic and non-domestic customers. In order for evidence of sales to be indicative of an equal intention for domestic and non-domestic purposes, commercial sales need not be equal to residential sales. However, they must be more than occasional, and they must be sufficient to make a significant and meaningful financial contribution to the appellant.

[50] The Tribunal also disagrees with the CBSA's position that invoices were illustrative of actual use rather than intended use. Although actual sales are not determinative, they do represent a manifestation of intent.⁸⁴ Accordingly, the customer lists, invoices and witness testimonies in relation to Jardin's sales show its success in selling the goods in issue to both domestic and non-domestic consumers. With respect to submissions that evidence of commercial sales and marketing strategies outside of the period of importation are irrelevant,⁸⁵ the Tribunal finds that the intent at the time of importation can be inferred from evidence acquired subsequently. Indeed, as in *Stylus*, the Tribunal finds that, even though some of the invoices submitted are outside of the years in which the goods in issue were imported, they are nonetheless useful to understand the marketing of those goods.⁸⁶ In addition, the Tribunal notes that the invoices submitted by Jardin cover a broad period, from as early as 2013 to 2017, which not only includes the period of importation, but also shows that Jardin has consistently sold its products for commercial purposes.

[51] Marketing material from suppliers also reflected the intended dual purpose of their furniture. Several suppliers participated in trade shows for residential and commercial clientele.⁸⁷ Les Jardins describes its company as providing furnishings to hotels, resorts and private residences.⁸⁸ Gardenart indicated on its website that its collections are appropriate for both residential and contract environments.⁸⁹ Manutti described its furniture as being for professional and residential use; this was

81. For example, 90 Aroma chairs were purchased on one invoice; see Exhibit AP-2017-052-10J (protected), Vol. 2 and Exhibit AP-2017-052-10L, Vol. 1 at 39; *Transcript of Public Hearing* at 153-154.

82. *Transcript of Public Hearing* at 126, 139.

83. *Canac* at para. 66. During the hearing, Ms. Bourque noted that Midwest from Stephalux was a model relevant to the goods in issue. However, the Tribunal was not able to confirm this from the list of items submitted by Jardin.

84. *Stylus* at para. 88.

85. *Transcript of Pubic Hearing* at 178, 185.

86. *Stylus* at para. 88.

87. Exhibit AP-2017-052-10H, Vol. 1 at 96, Exhibit AP-2017-052-10E, Vol. 1 at 28-29, 31; Exhibit AP-2017-052-10D, Vol. 1 at 13.

88. *Ibid.* at 13.

89. Exhibit AP-2017-052-10H, Vol. 1 at 94, 111-112.

also evidenced in its “project list”.⁹⁰ Stephalux’s website indicated that its furniture was “. . . good for any setting, be it in the garden, in the patio or events”.⁹¹ Expormim’s website referred to “covering fully” the needs of residential and major hospitality facilities and featured pictures of products, such as the Nautica swing chair, being used in various commercial settings.⁹² Royal Botania named dozens of commercial projects in its marketing material.⁹³

[52] The Tribunal also heard testimony regarding Gloster’s targeted marketing strategy to the non-domestic market. For instance, Mr. Parsons of Gloster indicated that the company uses different sales representatives specifically for hospitality contract markets as they need to know more about the use of the product, among other things.⁹⁴ Moreover, Gloster’s website allows users to self-identify as a “Specifier/Contract”, where “specifier” refers to a designer specifying for a commercial property, to allow targeted communications that would not otherwise be sent to a residential designer.⁹⁵

[53] Jardin also submitted third party marketing material referencing suppliers of the goods in issue. For example, various Gardenart furniture models, including models of the goods in issue, were displayed in the catalogue of Archipel, a foreign distributor that specializes in designer furniture for the hospitality industry (i.e. hotels, restaurants, cafés, etc.).⁹⁶ According to their websites, Cape Cod Refinishing Company, which provides commercial outdoor furniture services, recommended Gloster as a supplier and Hotel Spec’s recommended suppliers included Jati & Kebon, Gloster, Manutti and Expormim.⁹⁷

[54] However, the Tribunal found some evidence submitted by Jardin to be of limited relevance. For instance, pictures of furniture in outdoor settings without any context regarding the commercial entity using the furniture in its marketing were not persuasive as evidence of the non-domestic purpose of the furniture.⁹⁸ Moreover, in cases where a commercial entity is using the goods in issue in its advertisement to market other products or services,⁹⁹ the intended user of the product or services, i.e. a residential or commercial consumer, is relevant to determining whether the depicted furniture is for domestic or non-domestic purposes, or both. Similarly, absent greater context regarding advertisements depicting the goods in issue in indoor environments,¹⁰⁰ the Tribunal was not able to determine its relevance in an appeal dealing exclusively with outdoor furniture.

[55] That said, on balance, the Tribunal finds, based on the evidence above, that the goods in issue are marketed to both commercial and residential consumers, which further indicates that the goods in issue are equally intended for domestic and non-domestic purposes.

90. Exhibit AP-2017-052-10B, Vol. 1 at 15, 21, 22, 26, 27.

91. Exhibit AP-2017-052-10F, Vol. 1 at 26.

92. Exhibit AP-2017-052-10G, Vol. 1 at 3, 9-11.

93. Exhibit AP-2017-052-10E, Vol. 1 at 16-27.

94. *Transcript of Public Hearing* at 14.

95. Exhibit AP-2017-052-10C, Vol. 1 at 46-47; *Transcript of Public Hearing* at 17.

96. Exhibit AP-2017-052-10H, Vol. 1 at 54-90.

97. Exhibit AP-2017-052-10C, Vol. 1 at 49, 51; *Transcript of Public Hearing* at 19-20; Exhibit AP-2017-052-10I, Vol. 1 at 15, 19, 38.

98. See reference to Golf dining chairs depicted on “what seems to be a cruise ship”, *Transcript of Public Hearing* at 110; Exhibit AP-2017-052-10H, Vol. 1 at 72; Exhibit AP-2017-052-13, Vol. 1 at 179.

99. *Transcript of Public Hearing* at 108, 112, 113; Exhibit AP-2017-052-13, Vol. 1 at 179, 189, 197.

100. *Transcript of Public Hearing* at 110-111; Exhibit AP-2017-052-13, Vol. 1 at 92, 135.

Pricing

[56] Jardin submitted that there is no price distinction between the goods in issue intended for domestic use or commercial purposes. Moreover, the price range for the goods in issue is at the very high end and, therefore, the goods are intended for a limited segment of both the domestic and commercial markets. For comparison, Jardin referred to products of Canadian Tire as an example of low-priced products.¹⁰¹ The Tribunal is of the view that absent concrete evidence of prices of other products in the marketplace, general statements with respect to price are not persuasive. That said, the fact that prices for Jardin's products are on the high end was uncontroverted. For its part, the CBSA submitted that high-end prices do not imply that the goods are equally intended for domestic and non-domestic purposes.

[57] The Tribunal finds that the pricing of the goods in issue is consistent with Jardin's position. The goods are sold on the higher end of the pricing spectrum, which is a reflection of their quality and is consistent with Jardin's position that the high-quality furniture it sells meets the standards of both commercial and residential customers.

Conclusion

[58] The Tribunal finds that with respect to the issue that was the subject of this appeal, Jardin has properly discharged its burden of establishing that the goods in issue were equally intended for domestic and non-domestic purposes and that the CBSA incorrectly classified the goods in issue using the tariff item for "domestic purposes" under the relevant subheading. On balance, Jardin's evidence with respect to design and characteristics, marketing and pricing, demonstrated the intended dual purpose of the goods in issue.

[59] With respect to the Slim Footstool/Ottoman¹⁰² by Expormim (Item No. C6560095), the CBSA classified this item under tariff item No. 9403.20.00. There is no reference in tariff item No. 9403.20.00 to uses for domestic purposes. Moreover, in accordance with the explanatory note to heading No. 94.03, this heading cannot apply if the furniture is covered under heading No. 94.01. This footstool/ottoman is made of an aluminum frame and is covered with QuickDryFoam[®].¹⁰³ In accordance with the *General Rules* and the explanatory notes to heading No. 94.01 and subheading No. 9401.71, this item is properly classified under subheading No. 9401.71, as proposed by Jardin.

[60] With respect to the Napoli/Antigua stool, the Tribunal finds that, in accordance with the *General Rules*, the correct subheading for this item is No. 9401.79 as the stool is not upholstered.¹⁰⁴

[61] With respect to the balance of the goods in issue for which Jardin has proposed classification under a different subheading than the one applied by the CBSA, no submissions were made in this regard. The Tribunal finds that Jardin has not properly discharged its burden in showing that the CBSA's classification under the relevant subheading was incorrect.

101. *Transcript of Public Hearing* at 168-170.

102. Item No. C656; Exhibit AP-2017-052-23A, Vol. 1 at 2.

103. Exhibit AP-2017-052-10G, Vol. 1 at 33.

104. As stated previously by the Tribunal, to ensure that goods are properly classified, the Tribunal is not constrained by the tariff headings proposed by the parties. See *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) at para. 48.

DECISION

[62] For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item Nos. 9401.69.90, 9401.71.90 and 9401.79.90 as seats other than those of heading No. 94.02, whether or not convertible into beds, and parts thereof, other than for domestic purposes, and tariff item Nos. 9403.60.90, 9403.70.90 and 9403.89.90 as other furniture and parts thereof, other than for domestic purposes.

[63] The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member