



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-001

Louise Paris Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 9, 2019*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 INTRODUCTION 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE..... 2

 LEGAL FRAMEWORK 3

 Relevant tariff nomenclature, legal and explanatory notes..... 4

 PRELIMINARY MATTERS 7

 PARTIES' POSITIONS 8

 TRIBUNAL ANALYSIS..... 9

 Classification at the subheading and tariff item level..... 13

DECISION 14

IN THE MATTER OF an appeal heard on March 21, 2019, 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 January 5, 2017, with respect to a request for re-determination pursuant to subsection 60(1) of the *Customs Act*.

BETWEEN

LOUISE PARIS LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 21, 2019
Tribunal Panel: Peter Burn, Presiding Member
Support Staff: Courtney Fitzpatrick, Counsel

PARTICIPANTS:

Appellant	Counsel/Representative
Louise Paris Ltd.	Sherry L. Singer
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Stephen Kurelek

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 by Louise Paris Ltd. (LP), pursuant to subsection 67(1) of the *Customs Act*,¹ from a re-determination dated January 5, 2017, by the President of the Canada Border Services Agency (CBSA), made pursuant to subsection 60(4), in respect of certain women's garments made of imitation leather (the goods in issue).

2. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6210.50.90 of the schedule to the *Customs Tariff*² as other women's or girls' garments made up of fabrics of heading No. 59.03, as determined by the CBSA, or should be classified under tariff item No. 3926.20.99 as other articles of apparel and clothing accessories of plastics or other materials of headings Nos. 39.01 to 39.14, as claimed by LP.

PROCEDURAL HISTORY

3. The goods in issue were imported by LP between January 1 and December 31, 2014, under tariff item No. 3926.20.99.

4. On March 10, 2016, the CBSA completed a Trade Compliance Verification Report, which concluded that the goods in issue were classified under tariff item No. 6210.50.90.

5. On June 9, 2016, LP submitted a request for further re-determination of the tariff classification of the goods in issue, pursuant to subsection 60(1) of the *Act*, seeking to have the goods in issue classified under tariff item No. 3926.20.99.

6. On January 5, 2017, the CBSA issued a decision pursuant to subsection 60(4) of the *Act*, confirming that the goods in issue were classified under tariff item No. 6210.50.90.

7. LP filed this appeal with the Tribunal on April 3, 2017.

8. On June 19, 2017, at LP's request, this appeal was held in abeyance to allow for the completion of a similar request for further re-determination by the CBSA, which LP indicated could potentially be consolidated with the present appeal. At that time, the Tribunal directed LP to serve and file by September 5, 2017, a list of the style numbers of the garments that it wished to consolidate with the present appeal.

9. On September 5, 2017, LP provided said list and indicated that it had requested a further re-determination with respect to one additional transaction (original import transaction No. 172-02050502-089) and intended to file requests with respect to two other transactions once Detailed Adjustment Statements were issued by the CBSA.

10. On October 6, 2017, the CBSA wrote to the Tribunal stating, among other things, that the parties agreed that LP would limit its request for consolidation to style No. 3921 (original import transaction No. 172-02050502-089) and requesting that the Tribunal continue to hold this matter in abeyance. LP confirmed its agreement with the contents of the CBSA's letter on October 17, 2017.

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

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

11. On October 23, 2017, the Tribunal advised parties that it would continue to hold the appeal in abeyance and requested that the parties report back to the Tribunal within 30 days of receiving the CBSA's decision with respect to original import transaction No. 172-02050502-089 or, in any event, by April 23, 2018.
12. On April 18, 2018, the CBSA advised the Tribunal that it had issued a decision with respect to original import transaction No. 172-02050502-089, which confirmed the CBSA's initial determination.
13. On April 24, 2018, LP advised the Tribunal that it was ready to proceed with the appeal. On May 3, 2018, LP confirmed that it would not be appealing the CBSA's decision with respect to original import transaction No. 172-02050502-089.
14. On May 7, 2018, the Tribunal resumed this appeal and set down the necessary filing and hearing dates.
15. On September 24, 2018, LP filed its brief.
16. On November 23, 2018, the CBSA filed public and protected versions of its brief, including a report by Dr. Jane Batcheller, a proposed expert in the area of textile analysis. Dr. Batcheller filed a signed Acknowledgment and Undertaking of Proposed Expert Witnesses on December 11, 2018.
17. On December 21, 2018, the CBSA wrote to the Tribunal requesting, with LP's consent, to have the hearing of this appeal proceed by way of written submissions. On December 27, 2018, the Tribunal granted the request and provided LP with the opportunity to file reply submissions by January 25, 2019.
18. On January 25, 2019, LP filed reply submissions. In its submissions, LP took issue with the chain of custody of the garment samples that were analyzed by the CBSA and the CBSA's proposed expert witness. On January 31, 2019, the CBSA wrote to the Tribunal seeking direction as to how to respond to the appellant's reply brief.
19. On February 21, 2019, after seeking the views of LP, the Tribunal directed the CBSA to file affidavits regarding the chain of custody of the garment samples that were in the CBSA's possession, and granted the CBSA's request to file a brief sur-reply regarding the chain of custody of the samples. The Tribunal also requested that the CBSA file the garment samples as physical exhibits in this appeal. The affidavits, sur-reply and physical exhibits were filed with the Tribunal on March 6, 2019.
20. The Tribunal held a file hearing on March 21, 2019.

GOODS IN ISSUE

21. The goods in issue are 27 different styles of women's garments made of imitation leather. The goods in issue were described by LP as follows:

The garments are all ladies 100% polyurethane cellular garments. Most of the subject garments are jackets with 100% rayon backing and linings. Two of the adjustments concern polyurethane coated rompers, jumpsuits and dresses. All of the garments have the look of leather.

22. For the purposes of analyzing the goods in issue, the CBSA grouped them into seven groups on the basis of similar characteristics (i.e. styles, materials, and place of manufacture) and selected seven representative samples.³ These samples can be described as follows:

Style No. 16511-62C: Bomber style jacket made from imitation leather with a separate lining and a rib-knit fabric for the upper portion of the collar. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a plain-weave base fabric.

Style No. 72817: Hip-length jacket with a belt at the waistline and no lining. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a plain-weave base fabric.

Style No. 0803AF14: Short jacket with a separate lining and a rib-knit fabric for the under portion of the sleeves. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a plain-weave base fabric.

Style No. 72745: Hip-length double-breasted jacket with hood and a separate lining. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a plain-weave base fabric.

Style No. 82139: Sleeveless halter-style dress with no lining. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a twill-weave base fabric.

Style No. 82128: Strapless dress with uneven hem, a zipper front closure, and no lining. The imitation leather has a thin top coating of black polyurethane that has been embossed to imitate the grain of real leather and is bonded to a twill weave base fabric.

Style No. 71142: Bomber-style jacket with a zipper front closure and a separate lining. A rib-knit fabric is used for the waistband, cuffs, and collar. The imitation leather material consists of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a plain-weave base fabric.

LEGAL FRAMEWORK

23. 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).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.

24. 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*⁵ and the *Canadian Rules*⁶ set out in the schedule.

3. Exhibit AP-2017-001-24A, Vol. 1 at 26.

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 [*Canadian Rules*].

25. 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.

26. 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 classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.⁹

27. 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 where Rule 1 does not conclusively determine the classification of the good that the other General Rules become relevant to the classification process.”¹⁰

28. 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.¹¹ The final step is to determine the proper tariff item.¹²

Relevant tariff nomenclature, legal and explanatory notes

29. The relevant tariff nomenclature for heading No. 39.26 provides as follows:

SECTION VII

PLASTICS AND ARTICLES THEREOF; RUBBER AND ARTICLES THEREOF

...

Chapter 39

PLASTICS AND ARTICLES THEREOF

...

7. WCO, 4th ed., Brussels, 2017.

8. WCO, 6th ed., Brussels, 2017.

9. 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.

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

11. 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.”

12. 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.

39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14.
...	
3926.20	-Articles of apparel and clothing accessories (including gloves, mittens and mitts)
...	
	--Other:
...	
3926.20.99	---Other

30. The relevant notes to Chapter 39 read as follows:

1. Throughout the Nomenclature the expression “plastics” means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout the Nomenclature any reference to “plastics” also includes vulcanised fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

2. This Chapter does not cover:

...

- (p) Goods of Section XI (textiles and textile articles);

31. The relevant explanatory notes to Chapter 39 read as follows:

Plastics and textile combinations

Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59. The following products are also covered by this Chapter:

...

- (b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour;

...

- (d) Plates, sheets and strip of cellular plastics combined with textile fabrics (as defined in Note 1 to Chapter 59) felt, or nonwovens, where the textile is present merely for reinforcing purposes.

In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles (e.g., by raising) and special products, such as pile

fabrics, tulle and lace and textile products of heading 58.11, are regarded as having a function beyond that of mere reinforcement.

Plates, sheets and strip of cellular plastics combined with textile fabric on both faces, whatever the nature of the fabric, are **excluded** from this Chapter (generally **heading** 56.02, 56.03 or 59.03).

32. The relevant explanatory notes to heading No. 39.26 read as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

They include:

- (1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.

33. The relevant tariff nomenclature for heading No. 62.10 provides as follows:

**SECTION XI
TEXTILES AND TEXTILE ARTICLES**

...

Chapter 62

**ARTICLES OF APPAREL AND CLOTHING ACCESSORIES,
NOT KNITTED OR CROCHETED**

...

62.10 Garments, made up of fabrics of heading 56.02, 56.03, 59.03, 59.06 or 59.07.

...

6210.50 -Other women's or girls' garments

...

6210.50.90 ---Other

34. The relevant notes to Section XI provide as follows:

1. This Section does not cover:

...

(h) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39;

...

7. For the purpose of this Section, the expression "made up" means:

...

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

35. Note 2 to Chapter 59 provides as follows:

2. Heading 59.03 applies to:

- (a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular) other than:
 - (1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 50 to 55, 58 or 60), for the purpose of this provision no account shall be taken of any resulting change in colour;
 - (2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15 degrees C and 30 degrees C (usually Chapter 30);
 - (3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change in colour (Chapter 39);
 - (4) . . .
 - (5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 30); or
 - (6) . . .

36. The explanatory notes to Chapter 62 provide in relevant part as follows:

GENERAL

. . .

The classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter notes . . . or failing that, according to the General Interpretative Rules.

. . .

The Chapter also excludes:

- (a) Articles of apparel and clothing accessories of **heading** 39.26, 40.15, 42.03 or 68.12.

PRELIMINARY MATTERS

37. The CBSA asked the Tribunal to qualify Dr. Jane Batcheller as an expert witness in the area of textile analysis. This request was accompanied by a list of Dr. Batcheller's qualifications, an expert report and a signed Acknowledgment and Undertaking of Proposed Expert Witnesses.

38. LP did not dispute Dr. Batcheller's qualifications as an expert witness. However, as noted above, LP questioned the chain of custody of the sample garments examined by Dr. Batcheller and submitted that Dr. Batcheller's expert report was therefore inadmissible.

39. On February 21, 2019, after seeking the views of LP, the Tribunal directed the CBSA to file affidavits regarding the chain of custody of the garment samples that were in the CBSA's possession, and granted the CBSA's request to file a brief sur-reply regarding that issue. The Tribunal also requested that the CBSA file the garment samples as physical exhibits in this appeal.

40. On March 6, 2019, the CBSA filed affidavits sworn by Jennifer Tuttosi, Xavier Robillard, William St-Roch, Shelby Murphy and Jane Batcheller attesting to the receipt, storage and delivery of the garment samples at various times between May 28, 2015, and February 28, 2019.¹³ On March 6, 2019, the garment samples were filed with the Tribunal as physical exhibits.

41. Having considered the question of Dr. Batcheller's expert evidence, and noting that LP did not dispute Dr. Batcheller's qualifications as an expert witness, the Tribunal finds that Dr. Batcheller's expert evidence is relevant; necessary; not barred by any exclusionary rule; and tendered by a properly qualified expert.¹⁴ As such, the Tribunal accepts Dr. Batcheller as an expert in textile analysis.¹⁵ Moreover, the Tribunal finds that it has no reason to doubt the truthfulness of the affidavit evidence filed by the CBSA and, therefore, finds that the chain of custody of the garments that were examined by Dr. Batcheller has been established.

PARTIES' POSITIONS

42. LP submitted that the textile backings of the goods in issue are present merely for reinforcing purposes. LP referred to note (d) of the explanatory notes to Chapter 39 and submitted that the textile fabrics are not figured, printed or more elaborately worked textiles or special fabrics, nor are they tulle or lace or textile products of heading No. 58.11. LP submitted that as the textile fabrics of the goods in issue do not have any of these features, they should be regarded as serving a mere reinforcement purpose.

43. The CBSA acknowledged that the textile fabrics present in the goods in issue reinforce the polyurethane plastic sheet. However, it submitted that the textile fabrics also have a function that extends beyond mere reinforcement. In support of its position, the CBSA relied on Dr. Batcheller's conclusion that the textile fabric has been lightly brushed to raise some of the fibres over the fabric surface and submitted that this renders the fabric more elaborately worked, in accordance with explanatory note (d) to Chapter 39. In addition, the CBSA relied on Dr. Batcheller's conclusions that the exposed surface of the textile fabric contributes to the following:

- the feel of the composite material when it is manipulated in one's hand;
- the visual aesthetic qualities of the composite material; and,
- when the textile fabric is used on the interior surface of a garment, to the comfort of the garment by providing softness against the skin as well as moisture absorption and thermal insulation.

44. In reply, LP submitted that the CBSA has improperly broadened the meaning of "merely for reinforcing purposes" and took issue with a number of the conclusions in Dr. Batcheller's report.

13. Exhibit AP-2017-001-34, Vol. 1.

14. *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC) at 20.

15. The Tribunal notes that it has previously qualified Dr. Batcheller as an expert in textile analysis. See *Maples Industries Inc. v. President of the Canada Border Services Agency* (18 July 2016), AP-2014-009 (CITT) at para. 12.

TRIBUNAL ANALYSIS

45. As the appellant, LP bears the burden of demonstrating that the CBSA's classification of the goods was incorrect.¹⁶

46. As stated above, the Tribunal must begin its analysis with Rule 1 of the *General Rules*. The goods in issue, as described above, are various styles of women's garments made of imitation leather. The parties agree that the imitation leather portions of the goods in issue consist of a combination of plastic (polyurethane) and woven textile fabrics. The central issue is whether the particular combinations of plastic and textile materials used in the goods in issue are to be classified as textiles or plastics.

47. Heading No. 62.10 covers "[g]arments, made up of fabrics of heading . . . 59.03 . . .". As such, in order to determine the proper tariff classification, it is necessary to consider the terms of heading No. 59.03 in addition to the terms of heading Nos. 39.26 and 62.10, and the relevant section or chapter notes, taking into account the relevant explanatory notes.

48. The notes of Section XI (which includes Chapters 59 and 62), Chapter 59 and Chapter 39 provide guidance for the Tribunal's analysis. Note 1(h) to Section XI provides that Section XI does not cover "woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39". In turn, note 2(p) to Chapter 39 (which includes heading No. 39.26) stipulates that Chapter 39 does not cover "[g]oods of Section XI (textiles and textile articles)".

49. These section and chapter notes indicate that the competing headings in this appeal are mutually exclusive. As a result, the goods in issue cannot be *prima facie* classifiable in both heading No. 39.26 and heading No. 62.10, and this appeal should be resolved by application of Rule 1 (and, if necessary, Rule 2) of the *General Rules*.¹⁷

50. The classification of material consisting of a combination of plastics and textile material is guided by note 2 to Chapter 59 and the explanatory notes to Chapter 39.

51. Note 2 to Chapter 59 reads, in relevant part, as follows:

Heading 59.03 applies to:

- (a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular), *other than*:

...

- (5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 39).

[Emphasis added]

16. Subsection 152(3) of the *Act*; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21; *Jakks Pacific Inc. v. President of the Canada Border Services Agency* (30 March 2016), AP-2015-012 (CITT) at para. 33.

17. This is consistent with the approach taken by the Tribunal in *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT) [*Helly Hansen*] at para. 24.

52. The explanatory notes to Chapter 39 read, in relevant part, as follows:

The following products are also covered by [Chapter 39]:

...

- (d) Plates, sheets and strip of cellular plastics combined with textile fabrics (as defined in note 1 to Chapter 59) . . . where the textile is present merely for reinforcing purposes.

In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles (e.g., by raising) and special products, such as pile fabrics, tulle and lace and textile products of heading 58.11, are regarded as having a function beyond that of mere reinforcement.

53. According to these notes, a textile fabric that is impregnated, coated, covered or laminated with plastic is classified in heading No. 59.03, unless the fabric consists of plates, sheets or strips of *cellular* plastics, combined with textile fabric, *where the textile fabric is present merely for reinforcing purposes*, in which case it would be classified in Chapter 39.

54. As discussed above, the goods in issue incorporate one or more layers of polyurethane that have been bonded to a woven textile fabric. Six of the seven styles of the goods in issue have been made by a transfer coating process and consist of three layers: a very thin top-coat layer of black polyurethane embossed to imitate the grain of real leather; a middle tie-coat layer of porous polyurethane; and a woven fabric base.¹⁸ The other style (style No. 82128) was made by either a transfer coating or direct coating process and consists of two layers: a thin top coating of black polyurethane that has been embossed to imitate the grain of real leather; and a twill-weave base fabric.¹⁹ As such, the Tribunal is satisfied that the goods in issue consist of textile fabrics that have been coated with plastics.

55. The Tribunal will next consider whether the textile fabrics used in the goods in issue are present merely for reinforcing purposes. The answer to this question will determine which of the competing headings properly describes the goods in issue.²⁰

56. Note (d) of the explanatory notes to Chapter 39 provides guidance as to the meaning of “merely for reinforcing purposes”. In *Helly Hansen*, the Tribunal considered the meaning of that note and concluded as follows:

... [T]he first sentence covers fabrics where the state of the finishing of the fabric is confined to the finishing processes described in that sentence (unfigured, unbleached, bleached or uniformly dyed). In instances where the fabric has also been finished more elaborately as described in the second sentence, it is to be “... regarded as having a function beyond that of mere reinforcement”²¹

57. The Tribunal went on to state that, in its view, the intent of note (d) of the explanatory notes to Chapter 39 was to distinguish between plainer fabrics (“... unfigured, unbleached, bleached, or uniformly

18. This applies to style Nos. 16511-62C, 72817, 0803AF14, 72745, 82139 and 71142; see Exhibit AP-2017-001-24A, Vol. 1 at 76-80, 82.

19. This applies to style No. 82128; see Exhibit AP-2017-001-24A, Vol. 1 at 81.

20. With respect to style No. 82128, there is no reference in Dr. Batcheller’s report to this garment containing any porous or cellular plastic. As such, style No. 82128 cannot be classified in Chapter 39, as it does not meet the requirements of note 2(a)(5) to Chapter 59, regardless of the role played by the textile fabric. See Exhibit AP-2017-001-24A, Vol. 1 at 76-82.

21. *Helly Hansen* at para. 47.

died fabrics...”) and more elaborate fabrics (“...[f]igured, printed or more elaborately worked textiles...”).²²

58. In addition to this guidance, the Tribunal has considered other factual evidence in determining whether a textile fabric is present merely for reinforcing purposes (i.e. evidence other than whether the textile fabric is plain or more elaborate). In *Sher-Wood Hockey*, the Tribunal accepted that the textile fabric component of the outer surface material of the goods was not merely for reinforcing purposes because it had another important function: to provide the necessary friction to prevent the inner foam and hard plastic padding components from moving, which allowed the goods to maintain their shape and be used as designed for their intended function.²³

59. Dr. Batcheller provided her view as to when a textile fabric serves the purpose of merely reinforcing plastic material:

Textile fabrics that are impregnated, coated covered or laminated with plastics are considered merely for reinforcement purposes when the textile fabric is thin and open structured, and becomes completely enclosed in the plastic substance or when the plastic substance fully penetrates the fabric, such that the textile is not accessible on either surface of the composite material. The enclosed or impregnated fabric acts as reinforcement and influences the mechanical properties of the composite material, but these properties are dominated by the mechanical properties of the plastic substance.²⁴

60. Dr. Batcheller’s view is consistent with note 2(a)(3) to Chapter 59, which states that textile fabrics which are completely embedded in plastics or entirely coated or covered with plastics on both sides²⁵ are to be classified in Chapter 39. However, the notes to Chapter 59, which the Tribunal must apply when classifying goods, provide a broader list of instances where textile fabric combined with plastic are to be classified in Chapter 39. In particular, note 2(a)(5) to Chapter 59 directs that plates, sheets or strips of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes, are to be classified in Chapter 39. In light of this, the Tribunal finds that adopting Dr. Batcheller’s interpretation of the phrase “merely for reinforcing purposes” would render note 2(a)(3) to Chapter 59 essentially meaningless. As such, the Tribunal has taken a broader interpretation of the phrase “merely for reinforcing purposes” in accordance with the relevant notes and the Tribunal’s decisions in *Helly Hansen* and *Sher-Wood Hockey*.

61. The Tribunal finds that the textile fabrics of the goods in issue have a function beyond that of mere reinforcement. As such, the textile fabrics are fabrics of heading No. 59.03. In reaching this conclusion, the Tribunal relied on Dr. Batcheller’s expert evidence. Even though the Tribunal has not adopted Dr. Batcheller’s interpretation of the phrase “merely for reinforcing purposes”, Dr. Batcheller’s expert evidence as to the composition and function of the textile and plastic components of the goods in issue was not limited to the question of whether the textile fabrics were completely enclosed in, or fully penetrated by, the plastic, and was therefore relevant and helpful to the Tribunal’s analysis.

62. Dr. Batcheller’s report indicated that the textile fabrics used in each of the goods in issue have been “worked through brushing (raising) to lift the fibres over the fabric surfaces”.²⁶ The report explained that the

22. *Ibid.* at para. 48.

23. *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CIIT) [*Sher Wood Hockey*] at paras. 60, 65.

24. Exhibit AP-2017-001-24A, Vol. 1 at 74.

25. Provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour.

26. Exhibit AP-2017-001-24A, Vol. 1 at 76-83.

raised fibres increase the thermal insulation and moisture absorption of the composite fabric and contribute to properties that will influence the comfort of the imitation leather garment.²⁷ In addition, the report stated that the brushing has been done on the exposed surfaces of these fabrics to create a soft, smooth inner surface to the imitation leather fabric.²⁸

63. The Tribunal accepts that this brushing renders the textile fabrics “more elaborately worked”. Thus, in accordance with note (d) to the explanatory notes to Chapter 39, these more elaborately worked textiles are to be regarded “as having a function beyond that of mere reinforcement”.

64. In addition, it was Dr. Batcheller’s opinion that the textile fabric adds thickness and mass to the composite material and contributes to the leather-like feel of the material by influencing the flexibility and compression of the composite structure.²⁹ In *Helly Hansen*, the Tribunal considered the role of a textile fabric in the drape and visual appeal of the garments to be an indicator that the textile fabric was not present merely for reinforcement purposes.³⁰ Similarly, the Tribunal relies on Dr. Batcheller’s evidence regarding the feel, flexibility and compression of the goods in issue, as well as its own visual inspection of the physical exhibits, in concluding that the textile fabrics are *not* present merely for reinforcing purposes.

65. As noted above, LP disputed a number of Dr. Batcheller’s conclusions regarding the role of the textile fabric. In particular, LP submitted that the addition of any fabric would add thickness and mass to a structure, and that this alone does not indicate that the fabric is for a purpose other than reinforcement. In addition, according to LP, the report did not explain how or why the thickness and mass of the fabric contribute to the leather-like feel of the material; a phrase which LP submitted is vague. According to LP’s submission, the report also failed to explain whether the brushing of the textile fabrics may have been done to remove loose fibres as part of the finishing process. Further, LP noted that the brushing was minimal and ineffective for style No. 82139 as the middle layer of polyurethane could still be seen between the interlaced yarns of the fabric. Finally, LP noted that four of the sample goods in issue had linings and questioned the role of the textile fabric for those garments.

66. The Tribunal finds that LP’s submissions are not a sufficient basis for disregarding Dr. Batcheller’s evidence. First, the Tribunal notes that LP provided no evidence to demonstrate that the textile fabrics are present merely for reinforcement purposes. Such evidence could have included documentation from the manufacturer, testimonial evidence from a witness with knowledge of the goods (e.g. a manufacturer or designer) or expert evidence.

67. Moreover, Dr. Batcheller’s report clearly states that the textile fabric adds thickness and mass to the structure *and contributes to the leather-like feel of the material by influencing the flexibility and compression of the composite structure*. As discussed above, the Tribunal is satisfied that, contrary to LP’s submission, Dr. Batcheller’s evidence is that the thickness and mass of the particular textile fabrics used in the goods in issue contribute to the realistic appearance of the imitation leather. A thinner fabric, for example, may not contribute to the appearance of real leather to the same extent.

68. Regarding the brushing of the textile fabric, Dr. Batcheller’s report indicated that the brushing raised the fibres over the fabric surfaces to “create a soft, smooth inner surface to the imitation leather fabrics”, “increase the thermal insulation and moisture absorption of the composite structures” and to

27. *Ibid.*

28. *Ibid.*

29. *Ibid.* at 76-82.

30. *Helly Hansen* at para. 51.

“contribute to . . . the comfort of the garment”.³¹ This indicates that the brushing played a role beyond the removal of loose fibres.

69. Regarding style No. 82139, that the middle layer of polyurethane could still be seen between the interlaced yarns of the fabric does not change the Tribunal’s conclusion with respect to the role played by the textile fabric. Dr. Batcheller’s report clearly stated that the textile fabric of style No. 82139 had been lightly brushed and that the raised fibres created a soft inner surface.³² In fact, for that particular garment, Dr. Batcheller explicitly noted that the textile fabric acts as the garment lining and forms a soft and attractive inner surface for the dress, yet another function served by the textile fabric beyond mere reinforcement.³³

70. Finally, Dr. Batcheller’s report acknowledged that four styles of the goods in issue included separate linings. While the Tribunal accepts that the textile fabrics are not acting as the lining of those particular garments, the other functions noted by Dr. Batcheller, namely that textile fabric adds thickness and mass and that the brushing of the fabric increases the thermal insulation and moisture absorption of the composite structures, do not depend on the textile fabric also acting as the garment lining.

71. Having determined that the textile fabrics of the goods in issue are fabrics of heading No. 59.03, the Tribunal must consider whether the goods in issue meet the other conditions for classification in heading No. 62.10. It is not disputed that the goods in issue are garments. It is also not disputed that the goods in issue have been assembled by sewing and, as such, they qualify as “made up” articles in accordance with note 7(f) to Section XI.

72. Four of the garments include linings and three of the four lined garments also include rib-knit collars, cuffs or waistbands.³⁴ Neither party addressed how the addition of these features might affect the classification of the goods in issue. The explanatory notes to Chapter 62 provide that “[t]he classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter notes . . . or failing that, according to the General Interpretative Rules”. In this case, the Tribunal finds that the addition of the lining and/or rib knit collars, cuffs or waistbands constitute “mere trimming” and, hence, the presence of the linings, collars, cuffs and waistbands does not affect the classification of those goods.

73. For these reasons, the Tribunal finds that the goods in issue are classified in heading No. 62.10.

Classification at the subheading and tariff item level

74. Having determined that the goods in issue are properly classified in heading No. 62.10, the Tribunal must now determine classification at the subheading and tariff item levels, pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*.

31. Exhibit AP-2017-001-24A, Vol. 1 at 83.

32. *Ibid.* at 80.

33. *Ibid.* The Tribunal notes that the textile fabric also serves as the lining of the garment for style Nos. 72817 and 82128.

34. The lined garments are style Nos. 16511-62C, 0803AF14, 72745 and 71142.

75. There is no dispute that the goods in issue are women's garments³⁵ and, as such, the goods in issue are properly classified in subheading No. 6210.50 as "other women's or girls' garments" and under tariff item No. 6210.50.90 as "other".

DECISION

76. For the foregoing reasons, the Tribunal finds that the goods in issue are properly classified under tariff item No. 6210.50.90 as other women's or girls' garments made up of fabrics of heading No. 59.03.

77. The appeal is therefore dismissed.

Peter Burn

Peter Burn
Presiding Member

35. See Exhibit AP-2017-001-24A, Vol. 1 at 29.