



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-004

Nouveau Americana DBA Nuevo
Americana

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, March 6, 2019*

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DECISION 14

IN THE MATTER OF an appeal heard on November 6 and 7, 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 January 24, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

NOUVEAU AMERICANA DBA NUEVO AMERICANA

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Peter Burn
Presiding Member

Place of Hearing: Ottawa, Ontario
Dates of Hearing: November 6 and 7, 2018
Tribunal Member: Peter Burn, Presiding Member
Support Staff: Elysia Van Zeyl, Counsel
Sarah Perlman, Counsel

PARTICIPANTS:**Appellant**

Nouveau Americana DBA Nuevo Americana

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Nouveau Americana DBA Nuevo Americana (Nuevo) 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 January 24, 2017, made pursuant to subsection 60(4).

2. The issue in this appeal is whether various styles of chairs, stools and benches (the goods in issue) are classifiable under tariff item Nos. 9401.30.10, 9401.61.10, 9401.71.10 and 9401.79.10 of the schedule to the *Customs Tariff*² as seats for domestic purposes, as determined by the CBSA, or should be classified under tariff item Nos. 9401.30.90, 9401.61.90, 9401.71.90 and 9401.79.90 as seats other than for domestic purposes, as claimed by Nuevo.

PROCEDURAL HISTORY

3. The goods in issue were imported by Nuevo between October 25, 2011, and December 20, 2011, through nine separate transactions. On October 20, 2015, Nuevo filed a request for re-determination under section 74 of the *Act*, claiming that the goods in issue should be classified as furniture other than for domestic purposes. On December 2, 2015, the CBSA denied Nuevo's request for re-determination.

4. On February 24, 2015, Nuevo requested a further re-determination under section 60 of the *Act*. The CBSA denied the request on January 24, 2017.

5. On April 18, 2017, Nuevo filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

6. On November 6 and 7, 2018, the Tribunal held a public hearing in Ottawa, Ontario. Nuevo called Mr. Yaneev Ronen, Director, Supply Chain for Nuevo, Mr. Yanick Tremblay, owner of YK Purchasing Group, and Mr. Douglas Leuty, Vice President of Finance for Nuevo as lay witnesses. The CBSA called no witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

7. The goods in issue are various models of chairs, stools and benches, made of metal or wood, upholstered or not. All metal frames are made of 1.5-mm-thick steel, and all wood frames are made of hardwood and are corner-blocked. The upholstery may be made of leather, recycled leather (also known as "bonded leather") or Naugahyde®, and is stuffed with Custom Foam Systems (CFS) foam. In addition, the stools may be equipped with gas lifts, swivel mechanisms and/or footrests.

LEGAL FRAMEWORK

8. 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 (2nd Supp.), c. 1 [*Act*].

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

developed by the World Customs Organization (WCO).³ 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.

9. 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*⁴ and the *Canadian Rules*⁵ set out in the schedule.

10. 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.

11. 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*⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁷ 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.⁸

12. 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.”⁹

13. 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.¹⁰ The final step is to determine the proper tariff item.¹¹ Classification opinions and explanatory notes do not apply to classification at the tariff item level.

14. The relevant tariff nomenclature is as follows:

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

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

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

6. World Customs Organization, 4th ed., Brussels, 2017.

7. World Customs Organization, 6th ed., Brussels, 2017.

8. 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.

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

10. 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.”

11. 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.

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.
9401.30	-Swivel seats with variable height adjustment
9401.30.10	--For domestic purposes
9401.30.90	--Other
	-Other seats, with wooden frames:
9401.61	--Upholstered
9401.61.10	--For domestic purposes
9401.61.90.00	--Other
	-Other seats, with metal frames:
9401.71	--Upholstered
9401.71.10	--For domestic purposes
9401.71.90.00	--Other
9401.79	--Other
9401.79.10.00	--For domestic purposes
9401.79.90.00	--Other

15. There are no relevant chapter or section notes, supplementary notes, explanatory notes or classification opinions.

TRIBUNAL'S ANALYSIS

16. The parties agree that subheadings No. 9401.30, 9401.61, 9401.71 and 9401.79 apply to the goods in issue, as appropriate. The Tribunal finds no reason to disagree. Therefore, the sole issue in this appeal 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

17. As stated in *Canac*,¹² 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

12. *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.

submitted by Nuevo 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.¹³

18. Goods will be “for domestic purposes” where they are primarily intended for domestic or household purposes.¹⁴ 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.¹⁵

19. The test to be applied is that of the *intended* use of the goods in issue, as opposed to their *actual* or *end* use.¹⁶

20. In this matter, Nuevo 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 primarily intended for domestic purposes, and are not primarily intended for non-domestic purposes. The CBSA argued that goods equally intended for domestic purposes and for other purposes imply that they are classifiable in more than one category. Accordingly, the classification of the goods could not be disposed of under Rule 1 of the *General Rules*.¹⁷ The CBSA’s approach cannot be reconciled with the threshold stated above, that for goods to qualify “for domestic purposes”, goods 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 be classified as goods for “other” purposes; it would not be possible to classify the goods in both categories.

21. 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.”¹⁸ In order to make its case, Nuevo 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.”¹⁹

13. *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.”

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

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

16. *Canac* at para. 25; *Stylus* at para. 64; *IKEA* at para. 17; *6572243 Canada Ltd. O/A Kwalita Imports* (3 August 2012), AP-2010-068 [*Kwalita Imports*] at para. 43. Nuevo argued that the CBSA’s *Memorandum D11-8-5* identifies “for” as an end-use expression with regard to Chapter 99 of the *Customs Tariff*, and that the expression “for domestic purposes” should thus be interpreted as an end-use provision. However, *Memorandum D11-8-5* relates to Chapter 99 of the *Customs Tariff*. In the current case, the Tribunal is tasked with the classification of the goods in Chapters 1 to 97, in an entirely different context. The Tribunal has clearly established in the previous cases cited above that the test to be applied is that of the intended use, and it finds no compelling reason to change that test here.

17. Exhibit AP-2017-004-09A, Vol. 1A at 14-15, 17-18, 20, 24 of 450.

18. *Canac* at para. 29.

19. *Canac* at para. 28. See also *IKEA* at para. 18; *Kwalita Imports* at para. 44.

Factors

22. 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.²⁰ In this regard, the *Canac* decision laid out a non-exhaustive illustrative guideline. Any such factors will be considered as a whole.²¹ 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.²²

23. As such, it is prudent to make contemporaneous notes-to-file following meetings with suppliers and commercial customers.

24. 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 provide a level of objectivity that is helpful in establishing that goods are in fact intended for a dual purpose.²³ The question whether or not the goods in issue were intended for domestic purposes is a question of mixed law and fact.²⁴

25. As detailed below, having considered the arguments and evidence before it, the Tribunal finds that the goods in issue are properly classified as seats for other purposes.

Design and Characteristics

26. The goods in issue represent 48 models, each comprised of a number of different styles. As such, the evidence submitted for any single model applies to the various styles attached to that model, other than changes in upholstery.²⁵

– Design

27. Nuevo submitted that, at the time of importation, the goods in issue are designed and built to meet the demands of both residential and commercial users, and meet the standards and specifications of contract furniture.²⁶ Nuevo provided the following definitions of that term: “furniture designed and manufactured for commercial facilities for installation, as in offices, waiting rooms, lobbies or lodging facilities”, and “furniture employed for commercial purposes”.²⁷ According to Nuevo, commercial grade furniture is

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

21. *Canac* at para. 26.

22. *Canac* at para. 30.

23. *Canac* at para. 31.

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

25. *Transcript of Public Hearing* at 25-26, 207; Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59. Nuevo provided a table listing each style of the goods in issue along with its applicable characteristics. The Tribunal notes that the table contains other goods which were withdrawn from this appeal. The current appeal only pertains to 104 of the 114 goods listed therein.

26. Exhibit AP-2017-004-07, Vol. 1 at 8, 13 of 496.

27. Exhibit AP-2017-004-07, Vol. 1 at 242-243, 246-247, 250 of 496.

designed for commercial, high-use settings but may be used in a domestic setting. However, Nuevo argued that the same could not be said, for any length of time, of domestic furniture used in a commercial setting.²⁸

28. For its part, the CBSA argued that the goods in issue are designed for domestic purposes. The CBSA submitted that there is no evidence that the goods in issue were designed with the intent of being used in a commercial setting. The CBSA also submitted that the evidence from the manufacturers “only confirms that the goods are not primarily intended for non-domestic purposes.”²⁹

29. For the reasons set out below, the Tribunal finds that the goods in issue were designed with the intent of being used equally for domestic and non-domestic purposes.

30. Nuevo submitted letters from the manufacturers of the goods in issue confirming that the models sold to Nuevo are manufactured to meet the demands of residential and/or commercial users.³⁰ Furthermore, at the hearing, Mr. Ronen testified that the goods in issue meet the standard set by Nuevo, namely, that of “commercial viability”, which “basically covers all the standards that would in turn satiate every standard and need required” and would allow furniture to be placed either in commercial or residential settings.³¹ In this regard, Mr. Ronen also testified that Nuevo’s customers are looking for products that are durable yet maintain their look in high-traffic areas.³²

31. Mr. Ronen stated that Nuevo has an industrial designer on staff to work with manufacturers on product development, but that the majority of Nuevo’s goods are designed by the manufacturers themselves. Nevertheless, Mr. Ronen stated that Nuevo is constantly adjusting the specifications of its manufacturers’ products, for example, making seats wider, the steel thicker, or the padding more dense in order to meet its standards. In addition, Nuevo’s own quality control staff circulates through the factories throughout the manufacturing process.³³

32. The CBSA submitted that “the product literature suggests that the goods are designed for look and comfort rather than durability and easy maintenance”, and that furniture designed for domestic purposes tends to emphasize comfort, whereas furniture for commercial purposes tends to sacrifice comfort for added durability.³⁴ However, in this respect, the CBSA solely relied on a statement by the Tribunal in *Canac*, where it found that folding chairs were not for a dual purpose because “the name, look, stability and overall style of the chairs support a conclusion that their intended emphasis is on comfort and aesthetics for use in or around one location, not being transported from place to place.”³⁵ The Tribunal notes that the purpose of folding chairs differs in many respects from that of the goods in issue.

33. Furthermore, as stated in *Stylus*, the Tribunal recognizes that hospitality standards operate across a spectrum, depending on the needs or market range of a particular hospitality client.³⁶ As such, different

28. Exhibit AP-2017-004-07, Vol. 1 at 8-9 of 496.

29. Exhibit AP-2017-004-09A, Vol. 1A at 8, 16-18 of 450; Exhibit AP-2017-004-07A (protected), Vol. 2 at 8-11 of 59.

30. Exhibit AP-2017-004-07A (protected), Vol. 2 at 8-11 of 59.

31. *Transcript of Public Hearing* at 7, 91.

32. *Transcript of Public Hearing* at 8, 50. Mr. Ronen defined “high-traffic area” as a common space where furniture would see a lot of use, such as schools, restaurants, hospitals, or anywhere one would expect large volumes of people to use the furniture.

33. *Transcript of Public Hearing* at 6, 64-65. See also Mr. Leuty’s testimony, *Transcript of Public Hearing* at 174, 181-182.

34. Exhibit AP-2017-004-09A, Vol. 1A at 20 of 450.

35. *Canac* at para. 41.

36. *Stylus* at para. 69.

commercial customers have varying expectations with regard to furniture. Some, as in this case, may prefer high-end models that meet their aesthetic and comfort needs, whereas others may wish to focus on durability. Mr. Ronen's uncontradicted evidence points to this fact. Similarly, Mr. Tremblay of YK Purchasing Group, which purchases on behalf of hotels, restaurants, schools and retirement homes, testified that its needs include aesthetics, solidity, and different criteria for different areas of a hotel, for example.³⁷

34. The CBSA also submitted that there is no evidence that Nuevo was involved in the design of the goods in issue. The CBSA noted that Nuevo's witnesses could not identify which goods were designed by the appellant, which were the result of a collaborative effort, and which were designed solely by the manufacturer. In addition, the CBSA noted that there is no evidence of any agreement between Nuevo and its manufacturers requesting certain specifications, nor was there market research into the needs of either domestic or non-domestic customers.³⁸

35. However, the evidence on the record indicates that Nuevo imported the goods in issue because they represent high-quality furniture that meets the standards of both commercial and residential customers in the market for such furniture. As indicated above, Mr. Ronen and Mr. Leuty testified that Nuevo participated to various extents in the design of some of the goods in issue and generally always had a strategic plan to go upmarket, building products of European quality and design, but also of commercial design.³⁹

36. In sum, having considered the evidence and the parties' arguments, the Tribunal finds that the goods in issue are designed as high-quality furniture that meets the standards of *both* commercial and residential customers in the market for such furniture.

– Upholstery

37. The upholstered goods in issue are upholstered in one of three materials, namely, Naugahyde®, recycled leather, or leather, and are all stuffed with CFS foam.⁴⁰ The Tribunal finds that the evidence shows that the upholstery and stuffing materials of the goods in issue were chosen for their application to both domestic and non-domestic purposes.

38. Nuevo submitted documentation showing that Naugahyde® is a BIFMA-certified⁴¹ textile marketed to the corporate, healthcare, hospitality, marine, recreational, and automotive markets.⁴² Mr. Ronen stated that Nuevo uses Naugahyde® for its look, durability, and cleanliness, and that its lower

37. *Transcript of Public Hearing* at 105, 115.

38. *Transcript of Public Hearing* at 244-246.

39. *Transcript of Public Hearing* at 182-183; Exhibit 2017-004-07A (protected), Vol. 2 at 17 of 59.

40. Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59; Exhibit AP-2017-004-07, Vol. 1 at 12 of 496; *Transcript of Public Hearing* at 44-45. The Tribunal notes that the table and the marketing materials sometimes refer to different upholstery for the same item. However, as the upholstered goods are always upholstered in Naugahyde®, recycled leather or leather, the analysis below still covers all upholstered goods, whether the table refers to the correct type of upholstery for that good or not.

41. BIFMA is the Business and Institutional Furniture Manufacturers Association. BIFMA is described as "the trade association for business and institutional furniture manufacturers" which "has been the voice of the commercial furniture industry" since 1973. Among other things, it "sponsors the development of safety and performance standards". In addition, BIFMA is accredited by the American National Standards Institute (ANSI), and its standards development protocol conforms to ANSI Essential Requirements. BIFMA has developed standards for office seating, lounge and public seating, large occupant office seating, educational seating, healthcare furniture design, etc. (Exhibit AP-2017-004-07, Vol. 1 at 258-260 of 496).

42. Exhibit AP-2017-004-07, Vol. 1 at 12, 345, 349-351 of 496; *Transcript of Public Hearing* at 52.

price point is important for large projects. He also testified that Nuevo's Naugahyde® seats are sold in the corporate and hospitality markets, but also in the residential market as its resistance to abrasion may be attractive to domestic customers, even though the goods in issue were intended for commercial uses.⁴³

39. The CBSA submitted that there was no evidence that the goods in issue are treated with the "BeautyGard protective finish" which would give the Naugahyde® upholstery a higher standard.⁴⁴ However, Nuevo produced evidence that this protective feature was only introduced in April 2014, and Mr. Ronen testified that it is known for its antimicrobial properties, which are mostly attractive to hospitals and medical buildings.⁴⁵ In any event, the Tribunal finds that the evidence indicates that the properties of Naugahyde®, with or without this additional protective finish, may be attractive for both domestic and non-domestic purposes.

40. With regard to recycled leather, Mr. Ronen testified that a customer would choose this material over Naugahyde® simply for its own preferences, and that it is at a lower price point than real leather.⁴⁶ In addition, Nuevo provided evidence that the recycled leather is flame-retardant and passes the California Technical Bulletin 117 (CAL 117) flammability test, which Mr. Ronen submitted is the highest standard in North America.⁴⁷ Mr. Leuty also testified that CAL 117 is the general standard used by everyone in the furniture industry.⁴⁸ As for real leather, Mr. Ronen testified that it may be preferred for its higher status, and that one may expect to see real leather in high-traffic areas, such as in high-end office settings.⁴⁹

41. The CBSA submitted that there is evidence on file indicating that leather is among the top two options for domestic upholstery.⁵⁰ However, this alone falls short of indicating that the leather goods in issue are primarily intended for domestic purposes, and could not equally be intended for non-domestic purposes. On the contrary, Mr. Ronen provided testimony that some hospitality customers purchase leather furniture for questions of preference in terms of look and feel, and submitted a sample of invoices, many of which indicate that leather furniture was sold to hospitality customers.⁵¹

42. Mr. Ronen testified that Nuevo uses CFS foam as padding material in its upholstered goods, as it is one of the best standards, and is associated with both commercial and residential users.⁵² In addition, the evidence shows that the foam used by Nuevo meets a number of standards. Among others, CFS foam is FDA compliant, meets BIFMA standards and also meets the CAL 117 standard.⁵³ As discussed further below, these standards are equally important for domestic and commercial uses.

43. In light of the above, the evidence shows that the upholstery and padding of the goods in issue present characteristics that suggest that the goods in issue are equally intended for both domestic and non-domestic purposes.

43. *Transcript of Public Hearing* at 34, 42, 89-90.

44. Exhibit AP-2017-004-09A, Vol. 1A at 19 of 450; Exhibit AP-2017-004-09B, Vol. 1B at 370 of 409; Exhibit AP-2017-004-07, Vol. 1 at 349-350 of 496.

45. Exhibit AP-2017-004-39, Vol. 1D at 2-3 of 6; *Transcript of Public Hearing* at 34, 38, 52.

46. *Transcript of Public Hearing* at 43, 67.

47. Exhibit AP-2017-004-07, Vol. 1 at 322, 331-340 of 496; *Transcript of Public Hearing* at 24.

48. *Transcript of Public Hearing* at 175, 202.

49. *Transcript of Public Hearing* at 34, 43, 66.

50. Exhibit AP-2017-004-09A, Vol. 1A at 19-20 of 450; Exhibit AP-2017-004-07, Vol. 1 at 324 of 496.

51. *Transcript of Public Hearing* at 43, 66. See, for example, Exhibit AP-2017-004-25A, Vol. 1C at 164, 169, 171-172, 177, 179 of 289.

52. *Transcript of Public Hearing* at 45-46, 71.

53. Exhibit AP-2017-004-07, Vol. 1 at 284 of 496; *Transcript of Public Hearing* at 44.

– Frames

44. The frames of the goods in issue similarly have features that point to dual use.

45. With regard to steel frames, the evidence shows that Nuevo's metal frame chairs and stools are made with stainless, chromed or galvanized steel, most if not all of which use 1.5-mm-gauge steel.⁵⁴ Mr. Ronen testified that this gauge of steel is important since it is of the highest quality, is thicker and structurally sound, does not allow for bending, and is one of the highest gauges in furniture while remaining esthetically pleasing. Mr. Ronen also testified that he would expect to see steel, rather than stainless steel, as well as a lesser gauge, in furniture that is not for contract use.⁵⁵

46. Some goods in issue are made of galvanized steel or have a powder coating.⁵⁶ Mr. Ronen testified that this is to protect them from weather effects, and that this type of steel is used predominantly in restaurants. Mr. Ronen also noted that the galvanized steel models have structure underneath the seat for improved stability.⁵⁷

47. With regard to the wood frames, Mr. Ronen testified that commercial users look for hardwood products, corner-blocked seats, and industrial glue and stapling, among others.⁵⁸ Nuevo provided product documentation showing that the wooden goods in issue are made of hardwood, namely, birch, which is used in furniture that requires strength.⁵⁹ In addition, Mr. Ronen testified that the "Ameri" model of the goods in issue is corner-blocked, and the table provided by Nuevo also lists the "Bethany" model as being corner-blocked.⁶⁰

48. The CBSA submitted that some of the evidence shows that hardwood is commonly used in domestic settings.⁶¹ As with leather upholstery, the Tribunal finds that this alone does not mean that hardwood cannot be equally intended for non-domestic purposes, particularly in light of the other features of the wooden frames highlighted by Mr. Ronen and the product documentation. The CBSA also noted that the care instructions for the wooden goods in issue are long, and that it would not expect restaurants and hotels to engage in such level of care on high-traffic products.⁶² However, when asked about these instructions, Mr. Ronen testified that most of the topics addressed were fairly straightforward, such as how to wipe the furniture.⁶³ In fact, the care instructions submitted by the CBSA address various types of wood and finishes, as well as solutions to different problems, which would explain their length.

49. Nuevo's evidence and witness testimony indicates that all goods with variable height use gas springs tested for contract use, which are BIFMA-certified. All adjustable height stools also have a swivel component, and passed the same test for BIFMA standard.⁶⁴ Mr. Ronen testified that, when sourcing height-

54. *Transcript of Public Hearing* at 28; Exhibit AP-2017-004-07, Vol. 1 at 12, 50-163, 187-216, 296-300 of 496.

55. Exhibit AP-2017-004-07, Vol. 1 at 296-300 of 496; *Transcript of Public Hearing* at 11, 27-28, 62, 92; Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59.

56. Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59; Exhibit AP-2017-004-07, Vol. 1 at 162 of 496; *Transcript of Public Hearing* at 47, 77-78.

57. *Transcript of Public Hearing* at 48, 78.

58. *Transcript of Public Hearing* at 7.

59. Exhibit AP-2017-004-07, Vol. 1 at 165-168, 176-180, 357 of 496.

60. *Transcript of Public Hearing* at 12, 98; Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59.

61. Exhibit AP-2017-004-09A, Vol. 1A at 19-20 of 450; Exhibit AP-2017-004-07, Vol. 1 at 357-359 of 496.

62. *Transcript of Public Hearing* at 251; Exhibit AP-2017-004-09B, Vol. 1B at 398-409 of 409.

63. *Transcript of Public Hearing* at 85-86.

64. Exhibit AP-2017-004-07, Vol. 1 at 302-319 of 496; Exhibit AP-2017-004-25, Vol. 1C at 49-71 of 220; *Transcript of Public Hearing* at 14-24; Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59.

adjustable stools, Nuevo insists on both BIFMA- and DIN-rated components because they are the industry standard, and what its customers inquire about.⁶⁵

50. Some of the goods in issue also include stretchers or footrests.⁶⁶ Mr. Ronen testified that “[a] stretcher is a horizontal bar that supports two vertical up-rights” which “allows for product strength and integrity and keeps it in place”, such that they would be expected in furniture used in high-traffic areas, but also in home furniture.⁶⁷ Stability tests to the BIFMA standard were provided as evidence for some of the models of the goods in issue.⁶⁸ Mr. Ronen stated that stability tests ensure that goods will not fall apart in high-traffic areas, where people may not be dispersing their weight solely to the middle of a chair.⁶⁹

51. Finally, Mr. Ronen stated that most of the goods in issue are imported fully assembled, as “the integrity and the structure of someone like you or me putting something together won’t have the same potential strength” and “the likelihood of the product withstanding is better than you and I putting it together.” Mr. Ronen testified that, for domestic products, he would expect to see furniture that requires assembly by the customer.⁷⁰

52. The Tribunal finds that the evidence above again shows that the goods in issue incorporate elements which are equally intended for domestic and non-domestic purposes. The various elements cited seem to point to more demanding standards, which, according to the evidence on the record, are appropriate for non-domestic uses.

– Standards

53. With regard to most of the standards claimed by Nuevo above, the CBSA argued that the evidence does not indicate that the goods in issue are intended for commercial purposes, and submitted that Nuevo failed to link the standards cited to particular commercial standards. For example, the CBSA argued that the CAL 117 standard is a residential standard and has been the industry standard for a long time. However, all parties seem to agree that CAL 117 has become a general standard in the furniture industry.⁷¹ This further supports Nuevo’s position that the goods in issue are equally intended for domestic and non-domestic purposes.

54. The CBSA also submitted that the tests provided are not specifically associated with the goods in issue, and that they were only performed recently. The CBSA submitted that it would have expected Nuevo to confirm the standards of its furniture prior to the time of importation. Instead, the tests were completed in 2017, which is *ex post facto* evidence. The CBSA submitted that such evidence is not instructive when the test to be met relates to the intended purpose of the goods in issue at time of importation, namely, 2011.⁷²

55. As indicated above, Nuevo has shown that it has sought to meet the highest standards of the industry in order to attract customers interested in high-end furniture, such as hotels, restaurants or offices, as well as residential customers. There is not one set of standards that may be applied to such a broad range of customers. However, the evidence on the record indicates that the standards sought by Nuevo are equally relevant to furniture for domestic and non-domestic purposes.

65. *Transcript of Public Hearing* at 20, 23-24, 78. DIN is the German Institute for Standardization.

66. Exhibit AP-2017-004-07A (protected), Vol. 2 at 3-6 of 59; *Transcript of Public Hearing* at 10.

67. *Transcript of Public Hearing* at 9-10, 89.

68. Exhibit AP-2017-004-25, Vol. 1C at 73-78, 91-110 of 220.

69. *Transcript of Public Hearing* at 30.

70. *Transcript of Public Hearing* at 9, 82, 92.

71. *Transcript of Public Hearing* at 70, 175, 202, 248.

72. Exhibit AP-2017-004-09A, Vol. 1A at 20-23 of 450; *Transcript of Public Hearing* at 248-249.

56. Furthermore, the tests provided by Nuevo merely confirm that the goods in issue meet the standards sought. The Tribunal is convinced by Mr. Ronen's testimony that a cross-section of the goods were chosen to test the various standards of the goods in issue. As the goods selected for testing share the same internal construction as the other goods in issue, there was no need for Nuevo to test all the models of the goods in issue, which would have been cost-prohibitive.⁷³ Although Nuevo did not have the goods in issue tested in 2011, Mr. Ronen testified that it relied on the information garnered from its suppliers on the goods in issue, and that it has been buying the same products, made with the same materials, for some 15 years.⁷⁴ Nuevo provided invoices dating as far back as 2008 for some of the goods in issue, which further supports Mr. Ronen's position.⁷⁵

– Warranty

57. With regard to warranty, the CBSA noted that some retailers of the goods in issue have warranties which are void if they are used in commercial applications. The CBSA argued that this shows that the goods are not intended to be used primarily in a commercial setting, as they would otherwise be protected by a warranty guaranteeing their durability.⁷⁶

58. At the hearing, Mr. Leuty testified that each retailer has its own warranty for liability purposes, but that Nuevo's warranty would cover all segments of Nuevo's business.⁷⁷ Mr. Leuty testified that all goods in issue carry the same manufacturer's warranty, which covers all uses, with caveats for change and abuse. This warranty is of one year for parts, breakage and damage for all market segments.⁷⁸

59. The Tribunal understands that Nuevo has little control over the warranties offered by resellers, and that Nuevo provides coverage for its furniture whether it is used for domestic or non-domestic purposes. The Tribunal also finds that the broad terms of the warranty offered by Nuevo is an indication that the goods in issue are intended for a broad customer base which can include both domestic and non-domestic uses. The fact that a third party's warranty does not flow down Nuevo's terms to end customers does not take away from the intent of the goods themselves.

– Conclusion

60. The evidence shows that the design and characteristics of the goods in issue make them strong and durable while having an attractive look, that these characteristics are of interest to both domestic and non-domestic customers, and that, for that reason, the goods in issue were deliberately sourced and chosen by Nuevo based on the requirements of its customers operating in both the domestic and non-domestic market segments. Furthermore, the evidence shows, on balance, that the goods in issue meet industry standards that are equally applicable to commercial and residential uses. In light of the above, the Tribunal finds that the design and characteristics of the goods in issue indicate that they were equally intended for domestic and non-domestic purposes.

73. *Transcript of Public Hearing* at 32, 101. For example, Mr. Ronen testified that the Naugahyde® used on the "Jack" model of the goods in issue, which was tested for abrasion resistance, is the same used on other models, albeit perhaps in different colours (*Transcript of Public Hearing* at 36; Exhibit AP-2017-004-25, Vol. 1C at 72-74).

74. *Transcript of Public Hearing* at 63.

75. Exhibit AP-2017-004-25A, Vol. 1C at 156-196 of 289.

76. Exhibit AP-2017-004-09A, Vol. 1A at 20 of 450; Exhibit AP-2017-004-09B, Vol. 1B at 375 of 409.

77. *Transcript of Public Hearing* at 198-199, 203.

78. *Transcript of Public Hearing* at 177, 203.

Marketing

61. Nuevo submitted a strategic overview document and witness testimony stating that it markets and sells the goods in issue to various types of purchasers, such as brick-and-mortar stores, designers, architects, builders, specifiers, restaurants, hospitality or residential equipment suppliers, hotels, commercial and trade suppliers, and hospitality design groups, among others.⁷⁹ In addition, Nuevo provided customer lists and descriptions, as well as invoices, marketing materials and pictures of the goods in issue in use in commercial settings to demonstrate that it was successful in its plan to sell these goods to commercial customers.⁸⁰ Mr. Leuty also testified that Nuevo's sales to commercial business, hospitality and designer users are not sporadic, but rather ongoing, and that they account for around 30% of the goods in issue.⁸¹ Moreover, Mr. Tremblay testified that YK Purchasing Group has been a customer of Nuevo's since 2007-2008, and that all of its sales of Nuevo models have been to commercial users.⁸²

62. The CBSA argued that the invoices submitted by Nuevo are outside of the period of importation.⁸³ However, the Tribunal finds that the intent at 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 market of those goods.⁸⁴ In addition, the Tribunal notes that the invoices submitted by Nuevo cover a broad period, from as early as 2008 to 2017, which not only includes the period of importation, but also shows that Nuevo has consistently sold the goods in issue in the hospitality market, among others.⁸⁵

63. Mr. Leuty testified that Nuevo participates in shows and exhibitions which are important to the commercial or hospitality market.⁸⁶ Mr. Tremblay confirmed that he had seen representatives of Nuevo at various exhibitions.⁸⁷ With regard to Nuevo's website, Mr. Leuty testified that it is geared towards retailers, purchasers for web-based "e-tailers", designers and individuals, but that individuals cannot buy directly from Nuevo. He stated that Nuevo's products can end up in the residential market through in-store or designer purchases. In addition, Mr. Leuty testified that Nuevo's current biggest customer, Wayfair, provides its customers with commercially rated products, as well as home furnishings.⁸⁸

64. The CBSA submitted that the goods in issue are sold through online retailers targeting mass markets of home furnishings, and that this demonstrates that the goods in issue are intended to be used as

79. Exhibit AP-2017-004-07A (protected), Vol. 2 at 13-16, 22 of 59; *Transcript of Public Hearing* at 119-120. Nuevo submitted that subsequent dealers also market and sell the goods in issue as suitable for both commercial and residential spaces (Exhibit AP-2017-004-07, Vol. 1 at 13-14, 33, 370-427 of 496; Exhibit AP-2017-004-07A (protected), Vol. 2 at 13-19 of 59; *Transcript of Public Hearing* at 50).

80. Exhibit AP-2017-004-07, Vol. 1 at 431-433 of 496; Exhibit AP-2017-004-25, Vol. 1C at 204-220 of 220; Exhibit AP-2017-004-25A, Vol. 1C at 5-283 of 289.

81. *Transcript of Public Hearing* at 173.

82. *Transcript of Public Hearing* at 110, 113.

83. *Transcript of Public Hearing* at 254-257.

84. *Stylus* at para. 88.

85. Exhibit AP-2017-004-25A, Vol. 1C at 156-186, 188, 194, 199, 201, 269-280 of 289.

86. *Transcript of Public Hearing* at 146, 186-189. Mr. Leuty listed, among others, the High Point Hospitality Market show, the International Contemporary Furniture Fair (ICFF), and the HG Expo in Las Vegas (see also Exhibit AP-2017-004-07, Vol. 1 at 13, 387-427 of 496; Exhibit AP-2017-004-25, Vol. 1C at 141-142, 168 of 220).

87. *Transcript of Public Hearing* at 111, 114.

88. *Transcript of Public Hearing* at 121-122, 132-133, 169.

home furnishings.⁸⁹ In addition, the CBSA submitted that Nuevo's goods cannot be treated as a whole; Nuevo cannot discharge its burden by stating that it has both domestic and non-domestic customers, and that their products are therefore all intended for both domestic and non-domestic use.⁹⁰

65. As indicated above, it is the *intended use* of the goods in issue that must be proven, not their actual use. Although actual sales are not determinative, they do represent a manifestation of that intent.⁹¹ Accordingly, the customer lists, invoices and witness testimonies in relation to Nuevo's sales show Nuevo's success in selling the goods in issue to both domestic and non-domestic consumers. Although Nuevo may not have provided invoices for each of the goods in issue, the Tribunal finds that the evidence does support Nuevo's position that the goods are intended for a dual purpose.

66. In order to find that the goods in issue are equally intended 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.⁹² Here, the volume of the goods in issue sold to customers in the commercial sector is significant. The Tribunal also finds that Nuevo has clearly cultivated relationships with hospitality buyers and interior designers, among others, through participation and presence at trade shows, long-term partnerships, and repeated sales.⁹³

67. On the basis of the foregoing, the Tribunal finds that the goods in issue were equally marketed to commercial and residential customers, which is further evidence that the goods in issue were equally intended for domestic and non-domestic purposes.

Pricing

68. Although Nuevo argued that little weight should be given to pricing, it submitted that it does not compete on a price basis. Rather, it purchases high-quality, upmarket products which it sells at prices on the higher end for furniture.⁹⁴ For its part, the CBSA submitted that the pricing of the goods in issue is within the acceptable price range for high-quality furniture.⁹⁵ However, the CBSA does not further address what this suggests as to the intended use of the goods.

69. The Tribunal finds that the pricing of the goods in issue is consistent with Nuevo's position. The Tribunal finds that Nuevo's goods are sold on the higher end of the pricing spectrum, which is a reflection of their quality and consistent with Nuevo's argument above that it sells high-quality furniture that meets the standards of both commercial and residential customers.⁹⁶

Conclusion

70. The Tribunal finds that Nuevo has provided sufficient evidence to discharge its burden of establishing that the CBSA incorrectly classified the goods in issue under tariff item Nos. 9401.30.10 (swivel seats with variable height adjustment), 9401.61.10 (other upholstered seats with wooden frames),

89. Exhibit AP-2017-004-09A, Vol. 1A at 18-19, 33-450 of 450.

90. *Transcript of Public Hearing* at 243-244, 258.

91. *Stylus* at para. 88.

92. *Canac* at para. 28.

93. *Stylus* at paras. 82, 86, 88.

94. Exhibit AP-2017-004-07, Vol. 1 at 14 of 496; *Transcript of Public Hearing* at 215, 219.

95. Exhibit AP-2017-004-09A, Vol. 1A at 19 of 450.

96. *Stylus* at para. 90.

9401.71.10 (other upholstered seats with metal frames) and 9401.79.10 (other seats with metal frames), for domestic purposes. In particular, the evidence regarding Nuevo's intentional sourcing of specific design elements and characteristics, as well as its marketing and pricing of the goods, show that the goods in issue were intended to be equally used for domestic and non-domestic purposes.

DECISION

71. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item Nos. 9401.30.90 (swivel seats with variable height adjustment), 9401.61.90 (other upholstered seats with wooden frames), 9401.71.90 (other upholstered seats with metal frames) and 9401.79.90 (other seats with metal frames), other than for domestic purposes.

72. The appeal is allowed.

Peter Burn
Presiding Member