



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2018-048

Michael Kors (Canada) Holdings  
Ltd.

v.

President of the Canada Border  
Services Agency

*Decision issued  
Thursday, April 8, 2021*

*Reasons issued  
Wednesday, April 28, 2021*

*Corrigendum issued  
Thursday, May 12, 2021*

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IN THE MATTER OF an appeal heard on December 9, 2020, 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 September 25, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**MICHAEL KORS (CANADA) HOLDINGS LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Georges Bujold  
\_\_\_\_\_  
Georges Bujold  
Presiding Member

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

IN THE MATTER OF an appeal heard on December 9, 2020, 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 September 25, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**MICHAEL KORS (CANADA) HOLDINGS LTD.**

**Appellant**

**AND**

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

**Respondent**

**CORRIGENDUM**

The second sentence of paragraph 32 of the Statement of Reasons should read as follows:

Based on its interpretation of the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39, MK argued that a “handbag” for the purposes of the *Customs Tariff* is limited to a bag that is of a type normally used to hold and carry small personal items.

The subheading following paragraph 46 of the Statement of Reasons should read as follows:

The explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39

The first sentence of paragraph 2 of the Annex should read as follows:

The explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 provide as follows:

Georges Bujold

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Georges Bujold

Presiding Member

Place of Hearing: Via videoconference  
Date of Hearing: December 9, 2020  
Tribunal Panel: Georges Bujold, Presiding Member  
Support Staff: Heidi Lee, Counsel

**PARTICIPANTS:****Appellant**

Michael Kors (Canada) Holdings Ltd.

**Counsel/Representative**

Michael Kaylor

**Respondent**

President of the Canada Border Services Agency

**Counsel/Representatives**

David Di Sante  
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**WITNESS:**

Jennifer Jordano  
Vice President Logistics & Customs Compliance  
Capri Holdings Limited

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## STATEMENT OF REASONS

### BACKGROUND

[1] This is an appeal filed by Michael Kors (Canada) Holdings Ltd. (MK) pursuant to subsection 67(1) of the *Customs Act*,<sup>1</sup> from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*.

[2] The issue in this appeal is whether various models of imported bags (the goods in issue) are properly classified under tariff item Nos. 4202.21.00 and 4202.22.90 of the schedule to the *Customs Tariff*,<sup>2</sup> as determined by the CBSA, or should be classified under tariff item Nos. 4202.91.90 and 4202.92.90, as submitted by the MK.

[3] Tariff item No. 4202.21.00 covers handbags with an outer surface of leather or of composition leather. Tariff item No. 4202.22.90 covers handbags with an outer surface made of different materials, including those with an outer surface of sheeting of plastics.<sup>3</sup> As for tariff item Nos. 4202.91.90 and 4202.92.90, they cover certain “Other” articles not specifically named in other tariff items of heading No. 42.02. Such articles fall under either tariff item No. 4202.91.90 or tariff item No. 4202.92.90, depending on the constituent materials of their outer surfaces.<sup>4</sup>

[4] MK disputes the CBSA’s decision to classify the goods in issue as handbags. It claims that since they are not handbags, the goods in issue do not meet the terms of the tariff items deemed applicable by the CBSA. MK therefore contends that the goods in issue should be classified as articles other than handbags under the previously noted residual tariff items, according to the constituent materials of their outer surface. On this issue, MK submitted that it is only in the application of an eventual Tribunal decision allowing the appeal that it would have the obligation, in the course of the resultant duty-refund process, to provide precise information on the outer surface materials of each of the goods in issue.<sup>5</sup>

[5] As such, the issue of the constituent materials of each model of bags in issue is not contested in this appeal. Given the way in which MK chose to present its case, should the Tribunal find that the CBSA correctly determined that the goods in issue constitute handbags rather than other articles classifiable in heading No. 42.02, the appeal will fail on that basis alone. Put differently, in order to dispose of the appeal, the Tribunal must decide whether the goods in issue are handbags, as determined by the CBSA, or “other containers”, as argued by MK.

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

<sup>2</sup> S.C. 1997, c. 36.

<sup>3</sup> Handbags with an outer surface of textile materials would generally be classified under tariff item No. 4202.22.10 (subject to certain conditions). Although this tariff item was not determined to be applicable to any of the goods in issue in the decision appealed from, the CBSA submitted that the outer surface of certain models in issue is made of textile materials and that these models may, therefore, ultimately be properly classified under tariff item No. 4202.22.10. See Exhibit AP-2018-048-22A at paras. 6, 43.

<sup>4</sup> Tariff item No. 4202.91.90 covers certain articles with an outer surface of leather or of composition leather, whereas tariff item No. 4202.92.90 cover articles with an outer surface of sheeting of plastics or of textile materials. The Tribunal notes that in correspondence filed with the Tribunal, MK suggested that another residual tariff item, namely, tariff item No. 4202.99.90, may also cover some of the goods in issue, depending on their constituent materials. See Exhibit AP-2018-048-16 at 1. However, it did not pursue this claim in its amended brief. See Exhibit AP-2018-048-21 at para. 46.

<sup>5</sup> Exhibit AP-2018-048-14 at 1.

## PROCEDURAL HISTORY

[6] Between May 2015 and January 2017, MK imported the goods in issue in numerous transactions,<sup>6</sup> declaring them as other containers with outer surfaces of leather or of sheeting of plastics of tariff item Nos. 4202.91.90 and 4202.92.90.

[7] Following a trade compliance verification, the CBSA reclassified the goods in issue as handbags with outer surfaces of leather or of sheeting of plastics of tariff item Nos. 4202.21.00 and 4202.22.90. The CBSA issued tariff classification adjustments to this effect on January 3, 2017, which were treated as re-determinations under subsection 59(1) of the *Act*.

[8] On February 17, 2017, MK requested a further re-determination pursuant to subsection 60(1) of the *Act*.

[9] On September 25, 2018, the CBSA issued its decision pursuant to subsection 60(4) of the *Act*, denying the request and maintaining that the goods are handbags classified in tariff item Nos. 4202.21.00 and 4202.22.90.

[10] On November 28, 2018, MK filed its notice of appeal with the Tribunal. The notice appeared to indicate that the goods in issue were limited to two models of bags. These models were identified by MK as representative samples of the various models imported by MK between 2015 and 2017 and covered by the decision under appeal.<sup>7</sup>

[11] On February 18, 2019, the CBSA requested that MK confirm that the appeal was limited to these two models. Further to this request, the parties began discussions to define the range of goods in issue in this appeal.

[12] Ultimately, MK indicated that at issue in this appeal was the tariff classification of the totality of the models of bags that it imported in the 72 transactions impacted by the CBSA's decision attached to its notice of appeal. The CBSA subsequently raised a procedural objection, maintaining that MK failed to provide sufficient information describing the specific characteristics of all models. The CBSA submitted that more information on the particularized features of the various models of bags in issue was necessary to determine their tariff classification. Consequently, on April 2, 2019, it requested that the appeal be held in abeyance until the filing of additional information in this regard by MK.<sup>8</sup>

[13] MK objected to this request and submitted that it was prepared to argue the case based on the two specified representative models.<sup>9</sup> Further to directions from the Tribunal, MK also indicated that it was able to provide detailed information on 25 additional models, as well as physical exhibits of the two models described in the decision under appeal. It also requested permission to file an amended brief to address the similarity of the characteristics of all the models in issue.<sup>10</sup>

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<sup>6</sup> The goods in issue were imported in a total of 72 transactions that are subject to the CBSA's decision under appeal. Exhibit AP-2018-048-01 at 2, 7-9.

<sup>7</sup> Exhibit AP-2018-048-01 at 1-2. In its initial case brief, filed on January 25, 2019, MK similarly stated that there were only two models in issue. Exhibit AP-2018-048-03 at para. 2.

<sup>8</sup> Exhibit AP-2018-048-10; Exhibit AP-2018-048-13.

<sup>9</sup> Exhibit AP-2018-048-12; Exhibit AP-2018-048-14.

<sup>10</sup> Exhibit AP-2018-048-16.

[14] The Tribunal decided not to place the appeal in abeyance and to proceed by permitting MK to file additional information on other models of bags and an amended brief to discuss the evidence on these other models.<sup>11</sup> In its directions to the parties, the Tribunal indicated that the goods in issue included all models of bags subject to the decision under appeal by expressly directing MK to address the similarity of its now proposed 27 representative models to all other models of goods in issue.

[15] On May 13, 2019, MK filed its amended brief as directed. This brief included an annex providing documentary evidence on the particulars of 25 models of the goods in issue, including pictures.<sup>12</sup>

[16] On July 19, 2019, the CBSA filed its case brief. It included a section summarizing the information on the record regarding the characteristics of the 27 models deemed representative of all the goods in issue by MK.<sup>13</sup> In its brief, the CBSA did not allege that additional information remained necessary for it to respond to MK's arguments in this appeal.

[17] Based on this information, the Tribunal was satisfied that the CBSA was able to respond fully to the appeal and that additional information on the goods in issue would not be required to dispose of the issues raised in this appeal. The Tribunal notes that the CBSA did not subsequently object to the manner in which the appeal was brought or otherwise claim that additional information on the goods in issue was required to allow it to make its case in support of the decision under appeal.

[18] After several postponements at the request of the parties, notably to settle the question of the scope of the goods in issue and, as of March 2020, due to safety measures relating to the COVID-19 pandemic, the Tribunal heard the matter by way of videoconference on December 9, 2020.<sup>14</sup>

[19] MK presented a lay witness, Ms. Jennifer Jordano, Vice President, Logistics and Customs Compliance, of Capri Holdings Limited.<sup>15</sup> The CBSA did not call any witnesses.

## **DESCRIPTION OF THE GOODS IN ISSUE**

[20] The goods in issue are numerous models, comprising hundreds of styles, of bags of the MK brand. MK indicated that all the goods in issue are very similar to the 27 models designated as representative goods for the purposes of this appeal. It noted that they are all similar in terms of size, inner compartments, and other basic features. The main difference between them is their outer surface materials, which can be made of leather, plastics or textiles.

[21] The Tribunal closely examined the physical exhibits of two of the models in issue, namely the "Jet Set Saffiano Leather Top-Zip Tote" (style No. 30T5TVT2L) and the "Hamilton Large Logo

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<sup>11</sup> Exhibit AP-2018-048-20. As a result, the hearing, initially set to take place on May 28, 2019, was cancelled.

<sup>12</sup> Exhibit AP-2018-048-21 at 26-47.

<sup>13</sup> Exhibit AP-2018-048-22A at paras. 4-8.

<sup>14</sup> Due to the impossibility to proceed with an in-person hearing during the COVID-19 pandemic, on April 17, 2020, the Tribunal informed the parties that the appeal would be heard by way of written submissions. However, the parties advised that they would prefer to proceed with an in-person hearing. As a result, the hearing scheduled for May 21, 2020, was cancelled (Exhibit AP-2018-04-42). The Tribunal subsequently operationalized its videoconference hearing capabilities and the parties agreed to proceed with this type of hearing.

<sup>15</sup> MK intended to call Mr. Matthew LaFargue, Senior Vice President, Accessories, of Michael Kors, but decided not to do so at the hearing.



Tote” (style No. 30T2GHMT3B) (the Jet Set Tote and the Hamilton Tote, respectively). It also carefully reviewed the information on the 25 additional models filed by MK. This evidence indicates that, in general, the goods in issue have the following common characteristics: two carry straps, a top zipper or magnetic closure, an oval-shaped firm bottom, an inner lining of textile materials, small inner pockets or compartments (e.g. a cellular phone pocket or small wall pockets) and, in some cases, zippered pockets on the outer surface.

[22] At the hearing, Ms. Jordano stated that the goods in issue are tote bags designed to provide “a big open space” to allow a user to carry a variety of items. She also indicated that, while the goods in issue may not always have all the features noted above, for the most part, they have carry straps, an oval- or rectangular-shaped bottom and a combination of small interior or exterior pockets.<sup>16</sup>

## 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 developed by the World Customs Organization (WCO). 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 (General Rules)* and the *Canadian Rules* set out in the schedule.

[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* and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*, published by the WCO. While the classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>17</sup>

[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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.<sup>18</sup>

[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

<sup>16</sup> *Transcript of Public Hearing* at 16-18, 26-29.

<sup>17</sup> See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 [Best Buy] at para. 4.

<sup>18</sup> *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

subheading. Rule 6 of the *General Rules* provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

[29] The final step is to determine the proper tariff item. 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.”

[30] The relevant tariff nomenclature is as follows:

## Chapter 42

### ARTICLES OF LEATHER; SADDLERY AND HARNESS; TRAVEL GOODS, HANDBAGS AND SIMILAR CONTAINERS; ARTICLES OF ANIMAL GUT (OTHER THAN SILK-WORM GUT)

**42.02** Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverage bags, toilet bags, rucksacks, handbags, shopping bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.

-Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels and similar containers:

...

-Handbags, whether or not with shoulder strap, including those without handle:

**4202.21.00** - -With outer surface of leather or of composition leather

**4202.22** - -With outer surface of sheeting of plastics or of textile materials

4202.22.10 - - -With outer surface of textile materials (other than of abaca), containing less than 85% by weight of silk or silk waste.

4202.22.90 - - -Other

...

-Articles of a kind normally carried in the pocket or in the handbag:

...

**-Other:**

**4202.91 - -With outer surface of leather or of composition leather**

...

4202.91.90 - - -Other

**4202.92 - -With outer surface of sheeting of plastics or of textile materials**

...

4202.92.90 - - -Other

[31] The explanatory notes and classification opinion relied upon by the parties and considered by the Tribunal are discussed below and set out in the Annex to these reasons.

## **POSITIONS OF THE PARTIES**

[32] MK submitted that the goods in issue are tote bags, which do not constitute “handbags” within the meaning of the *Customs Tariff*. Based on its interpretation of the explanatory notes to subheadings No. 4202.31, No. 4202.31 and No. 4202.39, MK argued that a “handbag” for the purposes of the *Customs Tariff* is limited to a bag that is of a type normally used to hold and carry small personal items. According to MK, given that tote bags are larger bags designed to carry larger items, they cannot be classified as handbags and it follows that they must be classified as “other containers”.

[33] The CBSA submitted that the goods in issue are designer handbags that are advertised as such by MK. It argued that they have the same common characteristics and functions of a handbag, as they meet the description of a handbag provided in classification opinion No. 4202.21/1 and are designed to carry everyday personal items. The CBSA submitted, in the alternative, that if the Tribunal found that the goods were not handbags, that they are at least “similar containers” to handbags and should remain classified as handbags on that basis.

## **TRIBUNAL’S ANALYSIS**

[34] It is common ground between the parties, and the Tribunal agrees, that the goods in issue are properly classified in heading No. 42.02. The terms of heading No. 42.02 and the explanatory notes thereto make it clear that the heading covers *only* the articles specifically named therein and “similar containers”.

[35] These terms imply that the goods covered by heading No. 42.02, including the articles specifically named therein, are all “containers”. Indeed, the explanatory notes to heading No. 42.02 generally describe the goods covered by this heading as follows: “These *containers* may be rigid or with a rigid foundation, or soft and without foundation” [emphasis added]. As such, heading No. 42.02 covers only containers of different kinds. Some of these containers are specifically named articles, while other containers are brought within its ambit by the phrase “and similar containers”.

[36] The Tribunal notes that heading No. 42.02 is divided by a semicolon into two distinct parts. Both the first and second parts consist of a list of specific articles (i.e. containers) followed by the phrase “and similar containers”. However, while the first part of the heading covers articles of any material, the second part only covers articles of certain specified materials, which include sheeting of leather, plastics or textile materials.

[37] The CBSA’s main argument is that the goods in issue are “handbags”, a type of containers specifically named in the second part of heading No. 42.02, and expressly covered by subheadings No. 4202.21 or No. 4202.22, depending on the constituent materials of their outer surface.<sup>19</sup> For its part, MK claimed that the goods in issue are not specifically named in either of the two parts of heading No. 42.02. Rather, MK argued that they are “other” containers that should be classified in residual subheadings No. 4202.91 or No. 4202.92, depending on their outer surface materials.

[38] At the hearing, MK submitted that it was not necessary for it to identify to which of the specific articles expressly listed in heading No. 42.02 the goods in issue were “similar containers”. However, as previously noted, if the goods in issue are not specifically named, they can only be classified in heading No. 42.02 if they are held to be containers that are similar to the articles specifically named in the heading. Therefore, for MK’s argument to prevail, the goods in issue must be found to be similar to at least one of the containers specifically named in either the first or second part of heading No. 42.02.

[39] In response to the CBSA’s submissions on this issue, MK argued that the goods in issue may be similar containers to a “travel bag”, an article which appears to be listed in the second part of heading No. 42.02.<sup>20</sup> If the goods in issue are found to be such containers, they would ultimately be classified as “other” containers in one of the residual subheadings, as argued by the appellant.

[40] Consequently, the dispute between the parties arises at the subheading level. The Tribunal must determine, according to Rules 1 and 6 of the *General Rules*, the first-level subheading that applies to the goods in issue.

[41] Heading No. 42.02 contains the following four first-level (one dash) subheadings:

**-Trunks, suit-cases, vanity-cases, executive-cases, brief-cases, school satchels and similar containers:**

...

**-Handbags, whether or not with shoulder strap, including those without handle:**

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<sup>19</sup> The CBSA’s alternative position is that the goods in issue are, at the very least, containers similar to handbags and, on that basis, would remain classifiable in subheadings No. 4202.21 or No. 4202.22.

<sup>20</sup> *Transcript of Public Hearing* at 91, 95-96. The second part of heading No. 42.02 lists “travelling-bags” as one of the articles specifically named. Similar containers to “travelling-bags” would therefore be covered by heading No. 42.02 and, in the absence of a specific subheading describing such goods, by one or more the residual subheadings covering “other” containers. While nothing turns on this issue, given that the appellant argued that the goods in issue should be classified in different subheadings and tariff items depending on their constituent materials, the Tribunal understood the appellant’s position to be that the goods in issue were containers similar to the articles specifically named in the second part of heading No. 42.02 (such as travelling-bags, shopping bags or sports bags).

...

**-Articles of a kind normally carried in the pocket or in the handbag:**

...

**-Other:**

[42] The first of the four first-level subheadings (i.e. “trunks, suitcases, vanity-cases, executive-cases, brief-cases and school satchels and similar containers”) is not relevant to this appeal. Indeed, it covers some, but not all, of the articles specifically named in the first part of heading No. 42.02. The parties agree that only articles listed in the second part of heading No. 42.02 could describe the goods in issue.<sup>21</sup> Moreover, both parties acknowledged at the hearing that there was insufficient evidence to conclude that the goods in issue would be akin to any of the goods listed in the first of the four first-level subheadings.<sup>22</sup> In addition, neither party argued that the goods in issue should be classified in the third first-level subheading.

[43] The Tribunal must therefore first determine whether the goods in issue are properly classified in the second first-level subheading, that is, whether they are “[h]andbags, whether or not with shoulder strap, including those without handle.” As the fourth first-level subheading “other” is a residual provision that is less specific, the Tribunal’s analysis will begin by determining whether the goods in issue are properly classified as “handbags” of the second first-level subheading, as argued by the CBSA.

[44] If the Tribunal finds that the goods are so classified, there would be no need to consider the residual first-level subheading. In other words, the competing tariff classification provisions of the nomenclature in this case are mutually exclusive. The goods in issue cannot be *prima facie* classifiable *both* as handbags and as goods other than handbags. Thus, the Tribunal will only turn to the residual subheadings proposed by the appellant if the Tribunal is satisfied that the goods in issue are *not* properly classified in subheading No. 4202.21 or 4202.22 as “handbags”.

[45] For the following reasons, the Tribunal is not persuaded by MK’s submissions that the goods in issue are not handbags for tariff classification purposes. The appeal can be dismissed on this basis.

**The goods in issue are handbags**

[46] The term “handbag” is not expressly defined in either the *Customs Tariff* or the explanatory notes. In order to determine its meaning in the context of the tariff nomenclature, the Tribunal had regard to the explanatory notes to subheading Nos. 4202.31, 4202.32 and 4202.39 relied upon by MK and to the classification opinion invoked by the CBSA.

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<sup>21</sup> “Handbags” or similar containers according to the CBSA; containers similar to “travelling-bags” according to MK.

<sup>22</sup> *Transcript of Public Hearing* at 88-89.

The explanatory notes to subheading No. 4202.31, No. 4202.32 and No. 4202.3

[47] The crux of MK's case is that the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39, which provide guidance on the type of containers that constitute "articles of a kind normally carried in the pocket or in the handbag", amount to an internal definition of the term "handbag" for tariff classification purposes. According to MK, these explanatory notes restrict the meaning of this term to bags that are smaller than the goods in issue. More specifically, MK interpreted these explanatory notes as meaning that, under the *Customs Tariff*, handbags are limited to goods that are intended to only carry small personal items such as purses, wallets, key-cases, etc.

[48] Based on this interpretation, MK submitted that the goods in issue are not handbags because they "are designed to carry larger items such as towels, laptops, iPads and running shoes which are not normally carried in a pocket or in a handbag".<sup>23</sup> Rather, MK argued that the goods in issue are tote bags, which it considers to be distinct from handbags. According to MK, the functionality of tote bags is different from that of handbags, namely that tote bags carry larger items, whereas handbags carry smaller items. Altogether, MK submitted that the term "handbag" is too restrictive to describe the goods in issue.

[49] The Tribunal is not persuaded by this argument. Even accepting that the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 may be relevant to the tariff classification exercise in this appeal,<sup>24</sup> the Tribunal finds that MK's position misconstrues the purpose, meaning and effect of these notes.

[50] These explanatory notes merely indicate that, among the containers specifically named in heading No. 42.02 and not covered by its first two first-level subheadings, certain articles, namely, containers of a kind normally carried in the pocket or in the handbag, are to be classified in subheadings No. 4202.31, No. 4202.32 or No. 4202.39. The explanatory notes specify that these articles include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches. In accordance with the terms of heading No. 42.02, "similar containers", that is, containers of the same kind as those expressly listed in these explanatory notes, would also fall to be classified in subheadings No. 4202.31, No. 4202.32 or No. 4202.39. Indeed, the list of goods set out in the explanatory notes is not exhaustive, as signalled by use of the word "include" before the list of examples provided.

[51] As such, the explanatory notes relied upon by MK simply direct the tariff classification of smaller containers listed in heading No. 42.02 and similar containers that are "of a kind normally carried in the pocket or the handbag" into subheadings No. 4202.31, No. 4202.32 or No. 4202.39. These notes only provide guidance on the tariff classification of such *containers*, nothing more. In the Tribunal's view, their purpose is clearly not to exhaustively define the universe of articles that are

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<sup>23</sup> Exhibit AP-2018-048-21 at para. 5.

<sup>24</sup> On this issue, the CBSA correctly noted that these explanatory notes do not apply to "handbags", as this term is used in the second of the four first-level subheadings of heading No. 42.02. The Tribunal agrees that, fundamentally, these notes are a guide to the interpretation of other terms of the heading. As such, the Tribunal finds that these notes do not provide directly applicable assistance for the interpretation of the phrase of the nomenclature at issue (i.e. "[h]andbags, whether or not with shoulder strap, including those without handles"). Nevertheless, even if, on their face they do not appear to provide decisive guidance in this matter, given that they were central to MK's position, the Tribunal had regard to these explanatory notes in its analysis.

“of a kind normally carried in . . . the handbag”, nor is it to provide guidance on the meaning of the term “handbags” for the purposes of the *Customs Tariff*.

[52] There is no other indication elsewhere in the explanatory notes or in the nomenclature that the term “handbags” should be defined by the nature and size of the containers that they are normally used to carry. Accordingly, the Tribunal is not persuaded that the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 provide a legal basis or, as argued by the appellant, an “internal directive”<sup>25</sup> to define in any particular manner what constitutes a handbag for tariff classification purposes.

[53] In any case, even accepting the containers of the kind covered by subheadings No. 4202.31, No. 4202.32 and No. 4202.39 are small, it does not follow that *only* such small items are normally carried in a handbag or, as posited by MK, that the term “handbags”, for tariff classification purposes, is limited to a bag which is of a smaller type designed to hold and carry small personal items of this sort. Put another way, the fact that the articles covered by those subheadings are of a kind normally carried in the pocket or in the handbag does not mean that handbags are used exclusively to carry such smaller items or similar articles.

[54] In fact, it is undeniable that handbags may be used to carry larger items than the smaller containers covered by heading No. 42.02. As argued by the CBSA, the Tribunal agrees that their function is to carry everyday personal items, not merely smaller containers or items similar in size to the items listed in the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39. In this regard, the Tribunal notes that there is authority for the proposition that the third first-level subheading of heading No. 42.02 is too restrictive to describe certain larger goods that are designed to be carried in a handbag.

[55] In *The Source (Bell Electronics Inc.)*,<sup>26</sup> at issue was the tariff classification of leather covers or cases designed for the Kindle Touch, which is a hand-held device on which to read electronic versions of books, newspapers, etc. (also known as an e-reader). The Tribunal found that such containers, while notably designed to be carried in a handbag, were too large to be classified as “articles of a kind normally carried in the pocket or the handbag”, as follows:

With the exception of a suit pocket, it is unlikely that the goods would be carried in a pocket, due to their size. Additionally, as confirmed by both the product description and a physical inspection of the goods in issue, while they could be carried in a handbag, they are not limited to being carried as such. Rather, the goods in issue are designed to be carried in handbags, briefcases and other bags. As such, the Tribunal finds that the third first-level subheading is too restrictive to describe the goods in issue.<sup>27</sup>

[Footnote omitted]

[56] Based on this precedent, the Tribunal is satisfied that the purpose and function of handbags are not limited to carrying articles of the kind of smaller containers referred to in the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39. For example, there would be no

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<sup>25</sup> *Transcript of Public Hearing* at 47-49.

<sup>26</sup> *The Source (Bell Electronics Inc.) v. President of the Canada Border Services Agency* (20 January 2016), AP-2015-002 (CITT) [*The Source (Bell Electronics Inc.)*].

<sup>27</sup> *Ibid.*, at para. 53.

reason that other items of similar size to the Kindle Touch cases and covers, such as the actual e-reader devices, cameras, note pads or even books, could also not be carried in a handbag. As such, these explanatory notes are too restrictive to describe all items typically carried in handbags, and the Tribunal finds that the explanatory notes do not indicate that items normally carried in a handbag are necessarily small.

[57] Therefore, it is the Tribunal's view that these explanatory notes do not limit the size and type of goods which a container can hold or carry to qualify as a handbag. Simply put, these notes do not address this broader and different issue. One cannot validly infer, from explanatory notes indicating in which subheadings certain *containers* covered by heading No. 42.02 should be classified, the conclusion that the *Customs Tariff* delineates or restricts the size and type of the broad variety of goods that are normally carried in a handbag. Consequently, the Tribunal fails to see how these notes can be interpreted to establish a limit on the size of goods that may constitute handbags for tariff classification purposes.

[58] In the Tribunal's opinion, the appellant erroneously reads into the explanatory notes a distinction between "handbags" and containers like the goods in issue that does not exist. These notes do not *a priori* restrict handbags to smaller bags or otherwise exclude larger bags designed to also carry larger items, such as laptops, electronic tablets or shoes, from the scope of the term "handbags".<sup>28</sup> Rather, they simply indicate that some of the containers covered by heading No. 42.02 are normally carried in a pocket or a handbag. The mere fact that these containers are small does not provide reason to believe that Parliament intended to give a restrictive meaning to the term "handbags". In other words, there is no implied exclusion of any goods from the term "handbags" arising from these explanatory notes.

[59] For these reasons, the Tribunal is unable to find that the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 provide conclusive guidance on the meaning of the term "handbags". As argued by the CBSA, the Tribunal finds that, while the articles covered by these subheadings may be small, nothing in these explanatory notes suggests that "handbags" themselves are, by implication, small.

[60] The Tribunal must therefore turn to other interpretative aids to determine the meaning of the term "handbags" in heading No. 42.02 and decide whether it includes the goods in issue.

#### Other relevant considerations

##### – WCO classification opinion

[61] As noted above, section 11 of the *Customs Tariff* requires that "regard shall be had" to opinions published by the WCO when interpreting headings and subheadings under the tariff classification system. "Having regard" entails that the Tribunal should respect WCO opinions unless there is "sound reason" to do otherwise.<sup>29</sup>

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<sup>28</sup> The evidence indicates that the goods in issue are designed to accommodate *both* small items of the kind of those covered by subheadings No. 4202.31, No. 4202.32 or No. 4202.39 and larger articles. *Transcript of Public Hearing* at 10, 29-31.

<sup>29</sup> *Best Buy* at para. 4.



[62] Relevant to this appeal is a WCO classification opinion for subheading No. 4202.21, which describes a “handbag” with an outer surface of leather. This opinion provides as follows:

**1. Handbag**, consisting of stamped leather on the outer surface and textile materials on the inner surface (dimensions approximately 35 × 22.5 × 17 cm), with an oval-shaped firm bottom. A zipper closure opens to the fully lined inner compartment with a zippered pocket, a small wall pocket and a cell phone pocket. It has two leather carrying straps. The leather has been treated with a very thin plastic coating merely to provide a protective finish. The coating is not visible to the naked eye.

### **Application of GIRs 1 and 6.**

[63] The evidence indicates that the goods in issue share these characteristics, with some minor differences. In terms of approximate dimensions, according to the information available on the size of the goods in issue, the CBSA estimated that they are approximately 10 percent larger than the dimensions of the handbag described in the classification opinion.<sup>30</sup> The Tribunal also notes that, in some cases, the goods in issue are in fact of a very similar total size.

[64] For example, of the 25 additional models identified by the appellant, the “MD Snap Pocket Tote” has approximate dimensions of 34.29 cm × 23.49 cm × 12.7 cm and the “TZ Pocket Tote” has approximate dimensions of 35.56 cm × 26.67 cm × 12.7 cm.<sup>31</sup> The Tribunal also notes that the Hamilton Tote, a physical exhibit examined by the Tribunal, is similar in size to these models, though not identical.<sup>32</sup> By and large, the Tribunal finds that the minimal size difference between the goods in issue and the handbag described in the classification opinion is immaterial and does not render the former factually distinguishable from the latter.

[65] As a result, the Tribunal finds that the classification opinion confirms that the term “handbags” for tariff classification purposes includes larger bags, which are of a size that is very comparable to the goods in issue. This provides further support for the view that, under the *Customs Tariff*, handbags include containers that are designed to carry items larger than the small articles referred to in the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39.

[66] At the hearing, the witness for MK acknowledged that the goods in issue have an oval-shaped bottom, two carrying straps and, for the most part, either a magnetic or a zipper closure. She also indicated that the majority of the models have small pockets or compartments (e.g. that can serve to store a cellular phone) on the inside or the outside, and a textile inner lining.<sup>33</sup> Furthermore, a visual inspection of the two physical exhibits filed with the Tribunal, on which the appellant relied as being representative of all the goods in issue and on which it was prepared to rest its case,<sup>34</sup> revealed that they also closely resemble the handbag described in the classification opinion in terms of features such as shape, inner materials, outside or inner compartments, zippered pockets and carrying straps.

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<sup>30</sup> MK did not dispute the CBSA’s assessment in this regard.

<sup>31</sup> Exhibit AP-2018-048-21 at 26-27 (models No. 1 and No. 7). The Tribunal converted into centimeters the dimensions in inches found in the evidence.

<sup>32</sup> Exhibit AP-2018-048-22A at 143. While the Hamilton Tote is wider than the handbag in the classification opinion (35.56 cm v. 22.5 cm), it is smaller in terms of height (33 cm v. 35 cm) and depth (15 cm v. 17 cm).

<sup>33</sup> *Transcript of Public Hearing* at 26-29.

<sup>34</sup> See the appellant’s correspondence at Exhibit AP-2018-048-12 at 2; Exhibit AP-2018-048-14 at 1.

[67] For example, the Jet Set Tote has a fully lined polyester inner compartment, two leather handles, a zipper closure, two side pockets on the exterior, a zip pocket, a phone pocket and three slit pockets on the interior walls.<sup>35</sup> The Hamilton Tote features two top handles and, inside, one zip pocket, three open pockets and one phone pocket.<sup>36</sup> Its inner compartments are also fully lined with textile materials.

[68] Based on this evidence, the Tribunal finds that the goods in issue are, in all material respects, essentially the same as the handbag described in the classification opinion. As directed by the Federal Court of Appeal in *Best Buy*, the Tribunal finds that the specific or additional characteristics of the goods in issue do not constitute significant distinguishing factors and do not change the nature of the goods.<sup>37</sup> As such, the classification opinion describes and classifies goods that are materially the same as those before the Tribunal.

[69] Following *Best Buy*, the Tribunal further finds that the minor difference between the goods in issue and the handbag described in the classification opinion does not provide a “sound reason” to disregard the classification opinion. In this regard, the Tribunal notes that MK failed to provide a compelling argument or other reasons to persuade the Tribunal to diverge from the guidance provided in the classification opinion.

[70] MK submitted that the classification opinion does not discuss the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 and the purported distinction between the size of the items that a handbag is designed to carry as opposed to the items that a tote bag is designed to carry, and as a result, submitted that “logic is missing” in the classification opinion. The appellant argued that the Tribunal should not rely on the classification opinion because it is impossible to understand the reasons why the WCO reached its conclusion that the bag under consideration was a handbag.

[71] However, even assuming, for the sake of argument, that they inform the meaning of the term “handbags”, it has not been established that the WCO did not consider the explanatory notes to subheadings No. 4202.31, No. 4202.32 and No. 4202.39 in the decision-making process that led to the relevant classification opinion in this case. In the absence of evidence on this process, the Tribunal cannot conclude that these notes were ignored by the WCO. In any event, the Tribunal has already found that these explanatory notes do not have the legal effect claimed by the appellant (i.e. they do not limit the size and type of goods which a container can hold and carry to qualify as a handbag, or restrict the size of goods that may constitute handbags under the *Customs Tariff*). Consequently, MK’s arguments that these explanatory notes should prevail over the classification opinion are inapposite.

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<sup>35</sup> The characteristics of this model are listed in Exhibit AP-2018-048-22A at 141.

<sup>36</sup> Exhibit AP-2018-048-22A at 143. The Tribunal notes that the presence of separated inner pockets or compartments in this model is inconsistent with Ms. Jordano’s testimony that “tote bags” such as the goods in issue only have one big compartment or one large compartment inside that may be used as a “dumping ground” (see *Transcript of Public Hearing* at 9-10, 28-29). While this may be the case for some or even the majority of the models in issue, MK clearly advertises, as “tote bags”, goods that are configured differently and designed to accommodate the carrying of small personal items such as a phone, keys, etc., just like typical handbags.

<sup>37</sup> *Best Buy* at paras. 4-6.

– Function and marketing

[72] As discussed above, the appellant’s position is that handbags are bags designed to carry smaller personal items. The appellant emphasized that the goods in issue were tote bags, which, in its view, have a different functionality compared to handbags. While it is true that tote bags are designed to carry larger items, this does not detract from the fact that the goods in issue are also designed to carry smaller items such as keys and mobile phones. As noted above, the goods in issue have pockets or compartments to facilitate the retrieval of such smaller items. In this regard, Ms. Jordano stated at the hearing, commenting on the design of the Jet Set Tote, as follows:

. . . that little piece on the side where it looks like there’s a pocket, it’s just a slim pocket where you could maybe put your phone or something, right? Something that you would need to grab easy, because you know, this is a large tote bag, and you know, you’re putting a lot of stuff in it. So if it’s something, say the phone that you needed to grab easily. And that’s just the whole concept. It’s – it opens nice and big.

...

So that’s the whole thing, you know, we know that this is a tote. It’s intended to carry a lot of items. So any woman who’s ever used a tote will tell you things get, you know, it’s hard to find your keys. So that’s what that’s for, so you can easily find your keys. It’s designed to make it convenient to carry a lot of stuff, but still get easy access to the critical things.<sup>38</sup>

[73] Overall, the evidence demonstrates that tote bags, such as the goods in issue, are equally designed to allow users, primarily women, to carry smaller objects on a day-to-day basis. Therefore, notwithstanding their larger size, the Tribunal finds that tote bags have a similar function as handbags. In that sense, they meet Ms. Jordano’s own definition of a handbag, namely, a product used “to carry smaller objects on a day-to-day basis, their wallet, their lipstick, their car keys, you know, your everyday little essential items that you need with you on the run to move around.”<sup>39</sup> The fact that they are also designed to carry larger articles does not alter or detract from this fundamental function.

[74] In addition, the Tribunal notes that the term “tote bag” does not appear in the nomenclature, but may be broadly defined as a “large roomy handbag or shopping bag” or a “large, open handbag of cloth, straw, etc., used to carry small items.”<sup>40</sup> Meanwhile, “handbag” can be broadly defined as “a bag, usually of leather or cloth, held in the hand or hung by a strap from the arm or shoulder and used, esp. by women, to carry money, keys, and personal effects.”<sup>41</sup> There is therefore little support in the ordinary meanings of these term for MK’s proposed distinction between a “tote bag” and a “handbag”. In the Tribunal’s view, these definitions suggest that tote bags are a type of handbag.

[75] The Tribunal also notes that although Ms. Jordano opined at the hearing that a handbag is generally smaller and has different compartments, whereas a tote bag is one big open bag that can fit

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<sup>38</sup> *Transcript of Public Hearing* at 19-20.

<sup>39</sup> *Ibid.* at 8-9.

<sup>40</sup> Online: Collins <<https://www.collinsdictionary.com/dictionary/english/tote-bag>>. See also the definitions listed at Exhibit AP-2018-048-15 at para. 22. These definitions also suggest that a tote bag is a subset of the broader category of handbags.

<sup>41</sup> Webster’s New World College Dictionary, 4<sup>th</sup> Edition. Copyright © 2010 by Houghton Mifflin Harcourt.

bigger and bulkier items, this distinction is not evident on the MK's retail website.<sup>42</sup> According to the website, tote bags such as the goods in issue are categorized and advertised by MK as a type of handbag.

[76] Ms. Jordano explained that this reflects a merchandising decision made by MK to facilitate the customer's navigation of the website and to display a broader range of products than merely handbags. However, this evidence further indicates that tote bags are a subset of handbag or are commonly understood by customers as a type or style of handbag. Otherwise, it would be pointless to advertise them under the generic category of handbags. For this reason, the Tribunal is not persuaded by Ms. Jordano's evidence that, unlike other categories or, to use Ms. Jordano's term, "styles" of handbags listed on MK's website (e.g. satchels, crossbody bags, convertible shoulder bags), tote bags do not constitute handbags.

[77] In summary, Ms. Jordano's evidence suggests that handbags may be described commercially in a variety of ways, depending on their specific style and features, but there is no indication that these descriptions have a standard industry meaning such that they should be determinative in the Tribunal's tariff classification exercise. In and of themselves, those marketing terms do not indicate any material differences in the nature of the goods, nor do they change the fact that, for tariff classification purposes, a good that has the basic characteristics of the container described in the classification opinion should be considered a handbag.

[78] On balance, the Tribunal is satisfied that the evidence supports the view that, in the popular sense, the term "handbags" is capable of being construed as including "tote bags" such as the goods in issue. The CBSA also provided authority for the proposition that if a statute contains language that is capable of being construed in a popular sense, as is the case here, there is a presumption in favour of this ordinary, non-technical meaning.<sup>43</sup> The Tribunal therefore accepts the CBSA's submissions that, in the popular or common sense, the term "handbags" as used in the *Customs Tariff* is broad enough to describe the goods in issue.<sup>44</sup>

#### – Conclusion

[79] In sum, considering the characteristics and function of the goods in issue, the Tribunal finds that the preponderant evidence indicates that they are relatively expensive designer handbags. The Tribunal also finds that MK's narrow interpretation of the term "handbags" is inconsistent with a relevant classification opinion and the ordinary meaning of this term.

[80] Accordingly, the Tribunal concludes that the goods in issue are properly classified as "handbags" of the second of the four first-level subheadings of heading No. 42.02. As such, they cannot be classified as "Other" containers in the residual first-level subheading.

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<sup>42</sup> *Transcript of Public Hearing* at 11-13.

<sup>43</sup> *R v. Mansour*, [1979] S.C.J. No. 77, [1979] 2 S.C.R. 916 at 921 (S.C.C.); *TransCanada Pipelines Ltd. v. Manitoba*, 2013 MBCA 88 at para. 53.

<sup>44</sup> While the appellant argued that the Tribunal should not give to the term "handbag" the meaning as found in dictionaries, other than the previously addressed submissions based on the explanatory notes, the appellant did not provide a basis for the Tribunal to disregard the ordinary meaning of this term.

**Specific classification at the subheading and tariff item levels**

[81] There was no dispute between the parties that, once the first-level subheading classification is determined, the second-level subheading and tariff item classification of each specific model in issue depends entirely on the constituent materials of its outer surface. Therefore, pursuant to Rules 1 and 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the various models of the goods in issue are properly classified as follows:

- Models with outer surface of leather or of composition leather are classified in subheading No. 4202.21 and tariff item No. 4202.21.00.
- Models with outer surface of sheeting of plastics or of textile materials are classified in subheading No. 4202.22 and in tariff items No. 4202.22.10 or 4202.22.90 as appropriate.

**DECISION**

[82] The appeal is dismissed.

Georges Bujold  

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Georges Bujold  
Presiding Member

**ANNEX**

- [1] The explanatory notes to heading 42.02 provide in relevant part as follows:

This heading covers **only** the articles specifically named therein and similar containers.

These containers may be rigid or with a rigid foundation, or soft and without foundation.

...

The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper (the foundation may be of wood, metal, etc.). For this purpose, the expression “of leather or of composition leather” includes, inter alia, patent leather, patent laminated leather and metallised leather. The expression “similar containers” in this second part includes note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewellery rolls, shoe-cases, brush-cases, etc.

- [2] The explanatory notes to subheadings No. 4202.31, No. 4202.31 and No. 4202.39 provide as follows:

These subheadings cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches.

- [3] The WCO classification opinion for subheading No. 4202.21, provides as follows:

**1. Handbag**, consisting of stamped leather on the outer surface and textile materials on the inner surface (dimensions approximately 35 × 22.5 × 17 cm), with an oval-shaped firm bottom. A zipper closure opens to the fully lined inner compartment with a zippered pocket, a small wall pocket and a cell phone pocket. It has two leather carrying straps. The leather has been treated with a very thin plastic coating merely to provide a protective finish. The coating is not visible to the naked eye.

**Application of GIRs 1 and 6.**