



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2019-026

8372683 Canada Inc. d.b.a.
Protect Me – Alert Series

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, August 5, 2022*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 OVERVIEW 1

 FACTUAL BACKGROUND 1

 POSITIONS OF THE PARTIES 3

 Protect Me 3

 CBSA 4

GOODS IN ISSUE..... 6

ANALYSIS..... 6

 Statutory framework 7

DECISION 21

IN THE MATTER OF an appeal heard on November 4, 2021, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 20, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

8372683 CANADA INC. D.B.A. PROTECT ME – ALERT SERIES

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Susan D. Beaubien

Susan D. Beaubien

Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 4, 2021

Tribunal Panel: Susan Beaubien, Presiding Member

Tribunal Secretariat Staff: Heidi Lee, Counsel
Nadja Momcilovic, Counsel
Stephanie Blondeau, Registrar Officer

PARTICIPANTS:

Appellant	Counsel/Representative
8372683 Canada Inc. d.b.a. Protect Me – Alert Series	Ross Corcoran
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Luc Vaillancourt

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
Email: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

OVERVIEW

[1] This appeal pertains to the classification, for the purposes of the *Customs Act*¹ (Act), of goods described as “pet costumes”, which the President of the Canada Border Services Agency (CBSA) has classified as “Other, other, dog coats and the like, of any material” under tariff item 4201.00.90. The appellant, 8372683 Canada Inc. d.b.a. Protect Me – Alert Series (Protect Me)² contests this conclusion and asserts that the goods are properly classified under tariff item 9505.90.00 as “Other, other, festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes”.

FACTUAL BACKGROUND

[2] Protect Me imported various dog jackets, sweaters and T-shirts on November 17, 2014, and September 27, 2016. At the time of importation, Protect Me declared the goods as “other dog coats and the like”, classified under tariff item 4201.00.90.³

[3] On May 4 and 5, 2017, Protect Me sought a refund of the duties that had allegedly been paid in error as a result of the misclassification of the goods in heading 42.01. Protect Me asserted that the goods should have been classified under tariff item 9505.10.00 as “articles for Christmas festivities”.⁴

[4] The CBSA denied Protect Me’s application for a refund and maintained that the goods were properly classified under tariff item 4201.00.90.⁵

[5] Protect Me contested this finding and requested a re-determination from the CBSA, pursuant to subsection 60(4) of the Act, on November 24, 2017.⁶

[6] At issue were a range of pet garments made of textile materials described on invoices as “pongee jackets, urban puffy jackets [with] hood, jacquard sweaters, fleece hoodies, hooded raincoats, varsity jackets [with] screen print, dog socks and harness equipment”.⁷

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² The notice of appeal was styled as identifying the appellant as “Protect Me-Alert Series”, which appears to be a trade name or trademark used by the appellant in the course of its business. This appeal is brought from a decision of the CBSA. The documents before the CBSA show that the goods in issue were imported by, and the contestation of the customs classification was made by, the corporate entity 8372683 Canada Inc. d.b.a. Protect Me – Alert Series. The Tribunal considers that the interests of justice would be served by correcting the obvious misnomer in the notice of appeal and its style of cause and has exercised its discretion pursuant to Rule 5 of the *Canadian International Trade Tribunal Rules* accordingly.

³ Exhibit AP-2019-026-24.A at 112–114, 139.

⁴ *Ibid.* at 139–140.

⁵ *Ibid.* at 142–145.

⁶ *Ibid.* at 147–148.

⁷ Exhibit AP-2019-026-01 at 9.

[7] After reviewing product samples and information, the CBSA applied what it considered to be the relevant and applicable classification rules⁸ and affirmed that the goods should be classified under tariff item 4201.00.90. It issued this decision on June 20, 2019.⁹

[8] Protect Me appealed the CBSA's decision to the Tribunal on September 16, 2019.¹⁰

[9] In support of its appeal, Protect Me filed a brief comprising a copy of the CBSA's decision and written submissions.¹¹

[10] Shortly after Protect Me filed its brief on December 3, 2019, the Tribunal was advised that the parties were engaged in settlement discussions. At the request of Protect Me, the Tribunal placed the appeal in abeyance. The parties requested further extensions of the abeyance to permit settlement discussions to continue. The Tribunal granted those requests.

[11] The settlement discussions apparently served to narrow the goods in issue to "holiday pet and matching complementary human festive, carnival or other entertainment costumes". On May 31, 2021, Protect Me filed an amended brief comprising revised written submissions directed to the tariff classification of these goods. Protect Me maintained its position that these goods are properly classified in heading 95.05.¹²

[12] The CBSA filed its brief on August 20, 2021.¹³

[13] An oral hearing was scheduled for October 21, 2021, but was adjourned, on consent of the parties, as counsel for the respondent was unavailable due to a scheduling conflict with another matter.

[14] The CBSA filed five physical exhibits. Three exhibits are products sold by the appellant under the trademark SILVER PAW and consist of a dog holiday sweater, a human holiday sweater and a dog T-shirt. The other two exhibits are sold in association with the trademark PROTECT ME-ALERT SERIES and consist of two dog holiday sweaters, with different motifs.¹⁴

[15] The Tribunal conducted an oral hearing by way of videoconference on November 4, 2021. No witnesses were called. Both parties were represented and made oral submissions to the Tribunal.

[16] Subsequently, at the request of the Tribunal, the parties made further written submissions concerning whether the goods might be classified in one of headings 61.09, 61.14, 63.07 or any other headings within Chapters 61, 62 and 63 that might be relevant.¹⁵

⁸ General Interpretative Rule 1, Canadian Rule 1 and Explanatory Note 42.01; Exhibit AP-2019-026-01 at 9.

⁹ Exhibit AP-2019-026-01 at 9.

¹⁰ *Ibid.* at 1.

¹¹ Exhibit AP-2019-026-05.

¹² Exhibit AP-2019-026-17.

¹³ Exhibit AP-2019-026-24.A.

¹⁴ Exhibit AP-2019-026-34; Exhibit AP-2019-026-35.

¹⁵ Exhibit AP-2019-026-41; Exhibit AP-2019-026-45; Exhibit AP-2019-026-46; Exhibit AP-2019-026-47.

POSITIONS OF THE PARTIES

Protect Me

[17] Protect Me points out that heading 42.01 covers equipment for all kinds of animals made of leather, composition leather, furskin, textiles or other materials. Although this heading includes saddles and harness,¹⁶ it excludes, *inter alia*, fittings or trimmings for harnesses.

[18] As note 2(l) to Chapter 42 states that goods of Chapter 95 are excluded, Protect Me submits that the classification analysis must begin with a consideration as to whether the goods are “festive articles” of heading 95.05. Referring to note 1(e) of Chapter 95, Protect Me contends that three conditions must be met in order for goods to be excluded from classification in Chapter 95, namely that the goods must be:

- (i) articles of fancy dress;
- (ii) composed at least in part of textiles; and
- (iii) apparel or clothing accessories of Chapter 61 or Chapter 62.

[19] As Chapters 61 and 62 do not include clothing for animals, Protect Me argues that the goods are not excluded from classification in heading 95.05 and that the festive and whimsical attributes of the goods cause them to be aptly classified in heading 95.05.

[20] Protect Me describes the goods in issue as “ugly Christmas sweaters”. The sweaters are characterized by winter or Christmas themes and are intended to be worn in association with a Christmas occasion, event or gathering. As such, the goods are not utilitarian but are marketed and sold during a limited period in association with the festive season of Christmas.

[21] Goods that are explicitly referable to a specific holiday event or season are distinguishable from regular clothing, which is utilitarian. Protect Me analogizes the “ugly” Christmas sweaters to Halloween costumes that the Tribunal has previously found to be classifiable in heading 95.05 as “festive, carnival or other entertainment” articles.¹⁷

[22] Protect Me argues that “ugly” Christmas sweaters are not designed or intended for a practical use, but rather for a festive, transient purpose during a limited period of time. As the goods are predominantly decorative, they are not intended for a utilitarian purpose. They are marketed and sold as holiday items and are deeply discounted after the holiday season.

[23] Just as the public distinguishes Halloween costumes from regular clothing and its utilitarian purpose, Protect Me submits that the “ugly” Christmas sweaters in issue are similarly distinguishable and should be consequently classified in heading 95.05.

¹⁶ This includes reins, bridles and traces for saddle, draught and pack animals; knee pads, blinkers and boots for horses; decorated trappings for circus animals; muzzles for any animal; collars, leads and trappings for dogs and cats; saddle cloths, saddle cushions and saddle bags; horse blankets specially shaped for the purpose; and coats for dogs.

¹⁷ See *Loblaws Companies Limited v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) [*Loblaws*].

[24] Protect Me placed great emphasis on the aspect of the holiday design motif that characterizes the goods. In its view, this ornamental characteristic places the goods, for classification purposes, in heading 95.05. According to Protect Me, the holiday theme negates any utilitarian aspect of the product.

[25] With respect to the Tribunal's request for submissions concerning the potential applicability of headings 61.09, 61.14, 63.07 or others within Chapters 61, 62, and 63, Protect Me advised the Tribunal that it viewed these headings as being irrelevant to the goods at issue. It maintained that the goods should be classified in heading 95.05.

CBSA

[26] The CBSA's brief comprises copies of: the commercial invoices and import documents relevant to the goods at issue;¹⁸ printouts from the appellant's website;¹⁹ the request for reconsideration of the CBSA's classification decision that was submitted on behalf of Protect Me²⁰ and the CBSA's decision;²¹ excerpts from online dictionaries pertaining to definitions for the word "vêtement";²² a corporate search from the Quebec government corporations register pertaining to the appellant;²³ precedents reflecting classification decisions in the United States with respect to holiday and pet costumes;²⁴ excerpts from the *Customs Act* and the *Customs Tariff*;²⁵ and written submissions.²⁶

[27] In its brief, the CBSA indicates that only five "models" of goods described as "dog jackets, sweaters and t-shirts" remain in dispute. It characterizes these goods as being made of textile and "specifically designed to be worn by different sizes [of dog], covering their backs, chests and front legs". All models, except for one, feature what the CBSA describes as a "Christmas motif".

[28] The CBSA points out that Protect Me also "does business as Silver Paw", selling "year-round textile-based dog jackets, sweaters, and t-shirts, with and without a Christmas or festive motif". These goods are advertised as being washable apparel for keeping dogs "warm and toasty". Accordingly, the CBSA considers that the presence of a Christmas motif on the goods in issue does not change their inherent nature and function.

[29] As note 2(l) to Chapter 42 excludes "articles of Chapter 95" and note 1(v) to Chapter 95 excludes "apparel and similar articles having a utilitarian function" with no explicit or corresponding exclusion of "dog coats and the like" from Chapter 95, the CBSA submits that heading 95.05 is the starting point for the analysis.

[30] Relying on note 1(v) to Chapter 95, in the CBSA's view, the goods are excluded from Chapter 95 because they are "similar articles to apparel having a utilitarian function". Referring to the word "vêtement" as the French language equivalent to the word "apparel" as used in the

¹⁸ Exhibit AP-2019-026-24.A at 112–114, 139.

¹⁹ *Ibid.* at 116–136.

²⁰ *Ibid.* at 147–148.

²¹ *Ibid.* at 150–156.

²² *Ibid.* at 82–84.

²³ *Ibid.* at 105–110.

²⁴ *Ibid.* at 86–103.

²⁵ *Ibid.* at 31–53.

²⁶ *Ibid.* at 4–24.

Customs Tariff, the CBSA submits that the terminology is referable to clothing used to cover the human body and does not specifically extend to dog apparel. As such, the goods are “similar” to apparel, as they are indistinguishable, in terms of function and durability, to other products sold by Protect Me as “apparel” for dogs that is “good for up to 100 washes”.

[31] The CBSA distinguishes the Tribunal’s decision in *Loblaws Companies Limited v. President of the Canada Border Services Agency*.²⁷ It further submits that regard must be had to the predominant features of the goods in order to assess whether the goods have a “utilitarian function”. Except for the holiday motif, the goods are indistinguishable, in terms of their function, to other dog apparel items sold by Protect Me at other times of the year. If the goods in issue were intended to be worn by humans, the CBSA submits that they would not be classified within Chapter 95, holiday motif notwithstanding, because the predominant features are those of an article of clothing. As such, there is no basis to find otherwise for dog apparel.

[32] According to the CBSA, as the predominant feature of the goods is not decorative or ornamental, they are excluded from Chapter 95 and aptly fall within the ambit of Chapter 42, which covers a broad range of equipment for animals, made of any material.

[33] As the goods are specifically designed to be worn to cover the body of a dog to provide comfort and protection against the elements, the CBSA considers that they are specifically described by the terminology, “dog coats and the like”. The dog T-shirts likewise fall in heading 42.01, as they may be characterized within the generalized wording, “and the like”, having regard to the *ejusdem generis* rule, as they share the same general physical and functional characteristics as the dog sweaters and coats.

[34] The CBSA further argues that Protect Me has not provided any evidence concerning the nature of the goods and has accordingly not met the burden of demonstrating that the CBSA’s classification of the goods is incorrect.

[35] In response to the Tribunal’s invitation for additional submissions concerning headings 61.09, 61.14, 63.07 or any other potentially relevant headings within Chapters 61, 62 and 63, the CBSA submits that the goods cannot be classified in either heading 61.09 or heading 61.14. In its view, the Notes and Explanatory Notes limit the garments of Chapter 61 to those that are worn by humans (men, boys, women and girls).

[36] The CBSA concedes that the goods could be classified in heading 63.07 if they meet each of the three conditions of being: (1) “made up” articles; (2) of any textile fabric; and (3) not included more specifically in headings elsewhere in the *Customs Tariff*.

[37] The goods fulfill the first two of these conditions, but the remaining issue is whether they are included more specifically elsewhere in the *Customs Tariff*. The CBSA refers to the Explanatory Notes of heading 63.07, which exclude goods of heading 42.01 and the toys, games and entertainment articles of Chapter 95. In the CBSA’s view, the goods could therefore be classified in heading 63.07, but only if they cannot be classified in heading 42.01, as otherwise argued by the CBSA. Heading 63.07 must be regarded as a residual heading and, if applicable, the goods should be classified as “other” under tariff item 6307.90.99.

²⁷ *Loblaws*.

GOODS IN ISSUE

[38] The original scope of goods imported by Protect Me comprised hundreds of items of dog apparel. As noted above, the parties have reached an agreement concerning most of these items, both before and during the course of this appeal. Only five models of product remain in issue. The CBSA has described them as follows:

Quilted Jackets, Mock Neck (PCPJ1614):

- Described by the manufacturer as 100% polyester;
- Sizes: XS, S, M, L, and XL;
- Described by the manufacturer as dog jackets.

Holiday Sweaters (WP4C293):

- Declared by the importer as textile (unspecified);
- Sizes: XS, S, M, and L;
- Described by the manufacturer as pet clothes.

Ugly Xmas Sweaters, Jacquard Pattern (PCPW2065):

- Described by the manufacturer as 100% acrylic;
- Sizes: XS, S, M, L, and XL;
- Described by the manufacturer as dog sweaters.

Penguin Xmas Sweaters (PCPW1626):

- Described by the manufacturer as 100% acrylic;
- Sizes: XS, S, M, L, and XL;
- Described by the manufacturer as dog sweaters.

Elf Xmas Jersey Knit (PCPH1801):

- Described by the manufacturer as 100% polyester;
- Sizes: XS, S, M, L, and XL;
- Described by the manufacturer as dog jackets.²⁸

ANALYSIS

[39] Subsection 67(1) of the Act provides that a “person aggrieved” by a decision of the CBSA may appeal that decision to the Tribunal by filing a notice of appeal within the prescribed timeframe. There is no dispute that these requirements have been met and that Protect Me is a “person aggrieved”.²⁹

[40] On appeal to the Tribunal, there is a legal burden on the appellant to show that the CBSA has adopted an incorrect tariff classification.³⁰

²⁸ Exhibit AP-2019-026-24A at 5. Protect Me has agreed with the CBSA’s description of the various models that remain in issue. See Exhibit AP-2019-026-27.

²⁹ *Danson Décor Inc. v. President of the Canada Border Services Agency* (25 September 2019), AP-2018-043 (CIIT) [*Danson Décor*] at paras. 75–79.

³⁰ Section 152 of the Act.

[41] The Tribunal owes no deference to the CBSA's decision. Appeals to the Tribunal are determined *de novo*, even though one or both parties may elect to carry forward all or part of the record at first instance, to supplement that record with new evidence or create a new one. The Tribunal must reach its own decision concerning the correct tariff classification of the goods. In doing so, the Tribunal is free to assess the record before it, up to and including reweighing evidence placed before the CBSA and giving new consideration to any new evidence that may be presented on appeal.³¹

Statutory framework

[42] Sections 10 and 11 of the *Customs Tariff* prescribe the analytical approach that the Tribunal must adopt when determining how goods are to be classified:

10 (1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.

Classification of “within access commitment” goods

(2) Goods shall not be classified under a tariff item that contains the phrase “within access commitment” unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act* and in compliance with the conditions of the permit.

Interpretation

11 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 Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

[43] The *General Rules for the Interpretation of the Harmonized System*³² (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.

[44] The General Rules are intended to be applied pursuant to a sequential, hierarchical analysis of the goods, as described by the Supreme Court of Canada in *Canada (Attorney General) v. Igloo Vikski Inc.*³³

[45] Accordingly, the Tribunal must determine whether the goods 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*. In doing so, the Tribunal must consider any relevant classification opinions and explanatory notes. The Tribunal is not bound to apply the Explanatory Notes but should only depart from the guidance provided by the Explanatory Notes when there is

³¹ *Danson Décor* at paras. 82–93.

³² S.C. 1997, c. 36, schedule.

³³ *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 [*Igloo Vikski*] at paras. 19–29.

sound reason to do so. The Tribunal has no authority to ignore or rewrite the Explanatory Notes by redefining their terms.³⁴

[46] Where Rule 1 does not conclusively determine the classification of the goods, the other General Rules become relevant to the classification process and are considered.³⁵ 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.³⁶ The final step is to determine the proper tariff item.³⁷

[47] The Tribunal concurs with the parties that the starting point for the analysis is heading 95.05 of Chapter 95:

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

95.05 Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.

[48] According to Rule 1, the Tribunal must first determine whether the goods fall within the scope of heading 95.05 as “festive, carnival or other entertainment articles”.

[49] Protect Me stresses that the decorative pattern on the goods is referable to the Christmas season, which means that the goods are inherently “festive”. The CBSA’s argument is underpinned by the premise that the goods are functional, not decorative or ornamental. As the goods are advertised as protecting dogs from the elements, the CBSA contends that they are inherently functional articles, not festive ones.

[50] According to Protect Me, the dog items may be matched and sold together with a sweater or other garment having the same pattern or motif that is designed and made to fit the dog’s human owner. Indeed, the excerpt from Protect Me’s website includes reference to the “mission” of Silver Paw as “bringing dogs and humans together through the fun, playful and technical application of their products”.³⁸ The Tribunal notes that this passage refers to “Silver Paw”, while the goods in issue are associated with the trademark PROTECT ME. However, there is evidence³⁹ that the

³⁴ *Canada (Attorney General) v. Suzuki Canada Inc.* (2 April 2004), 2004 FCA 131 [*Suzuki*] at paras. 13, 17.

³⁵ *Igloo Vikski* at para. 21.

³⁶ Rules 1 through 5 of the General Rules apply to classification at the heading level. Rule 6 of the General Rules provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e., Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

³⁷ 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.

³⁸ Exhibit AP-2019-026-24A at 117, 119.

³⁹ *Ibid.* at 109–110.

appellant asserts ownership of several trademarks, including SILVER PAW and PROTECT ME and/or does business using these styles as trade names. Although the products sold in association with these trademarks may differ in some respects, the goods are items of apparel that are designed to be purchased by pet owners as fashion clothing for their dogs. As such, the Tribunal considers that the goods still have the same essential characteristics, regardless of the particular brand name that has been selected and used.

[51] Upon reviewing images of the goods in issue, the Tribunal concludes that they are, in essence, articles of fashion intended to be purchased by pet owners to dress their dogs. In that sense, the intended use of the goods is the amusement and enjoyment of pet owners who derive pleasure from anthropomorphizing their pets.

[52] The notes to Chapter 95 provide that “Fancy dress of textiles, of Chapter 61 or 62” are excluded from Chapter 95 and consequently, from the ambit of heading 95.05.

[53] As such, the issue is whether the goods meet each of the three conditions that would exclude them from being classified in Chapter 95, namely whether the goods are: (1) fancy dress; (2) composed at least in part of textiles; and (3) apparel or clothing accessories of Chapter 61 or Chapter 62.⁴⁰

[54] The Explanatory Notes to heading 95.05 further provide as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

...

(3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche – **heading 67.04**) and paper hats. However, the heading excludes fancy dress of textile materials, of Chapter 61 or 62 . . .

The heading excludes:

...

(b) Articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, toilet linen, kitchen linen.

[55] In *Loblaws*, the Tribunal considered the meaning of the term “fancy dress”. Relying upon dictionary definitions, the Tribunal concluded that “fancy dress” was synonymous with “costume”.⁴¹ However, in *Loblaws*, it was uncontested that the goods were “costumes” for Halloween. In this case, the nature of the goods imported by Protect Me may be less categorically described, so the Tribunal considers that the meaning of the word “costume” and its scope should be examined.

⁴⁰ *Loblaws* at para. 61.

⁴¹ *Loblaws* at para. 62.

[56] The *Merriam-Webster Dictionary* defines the noun “costume” as follows:

- 1: the prevailing fashion in coiffure, jewelry, and apparel of a period, country, or class
- 2: an outfit worn to create the appearance characteristic of a particular period, person, place, or thing, i.e. Halloween *costumes*
- 3: a person’s ensemble of outer garments *especially*: a woman’s ensemble of dress with coat or jacket⁴²

[Emphasis in original]

[57] Having regard to photographs of the goods and photographs on the Protect Me’s website showing dog sweaters worn by canine models,⁴³ the Tribunal is persuaded that the goods are “costumes”. They are outfits used by pet owners to clothe their dogs to portray a fashionable or whimsical appearance. Indeed, advertising material published by Protect Me indicates that the goods may complement, or even match, clothing that is worn by the dog’s human owner.

[58] As it is uncontested that the goods are made of textile, the Tribunal is also satisfied that the goods are articles of fancy dress that are made of textile.

[59] Before turning to consider whether the goods are of Chapters 61 or 62, the Tribunal will briefly address the parties’ arguments as to whether the goods are made of “non-durable” material.

[60] The CBSA stresses that Protect Me sells dog apparel that has been chemically treated to allow the product to be washed “hundreds” of times. Protect Me contests this premise on the basis that the specific goods in issue are not chemically treated, ostensibly to invite the conclusion that the goods are “non-durable”, thus falling within the ambit of heading 95.05, which contemplates goods that are made of “non-durable” material.

[61] Although the Explanatory Notes indicate that goods in heading 95.05 are “generally” made of “non-durable material”, the Tribunal does not find this specification to be conclusive or dispositive. The use of the word “generally” indicates that, although most “festive, carnival or entertainment articles” are made of non-durable material, nothing precludes articles made of durable material from being so classified, so long as the requirements of heading 95.05 are otherwise met.

[62] On the facts of this case, the Tribunal does not consider “durability” to be dispositive. The goods need not be disposable or limited to “one-time” use to be classified within Chapter 95. Indeed, in *Loblaws*, the Tribunal concluded, in relation to Halloween costumes, as follows:

Nevertheless, the Tribunal finds that, while issues of durability and repeated wear are important, they are not determinative of the classification of the goods in issue. With proper care and maintenance, the goods in issue may be regarded as durable or capable of repetitive use. Indeed, while Ms. Scott testified that the goods in issue, when compared to rental costumes, would likely be worn only a few times because they either fall out of fashion or

⁴² *Merriam-Webster Dictionary*, online: <<https://www.merriam-webster.com/dictionary/costume>>.

⁴³ Exhibit AP-2019-026-24A at 116, 117, 123.

easily wear out, Ms. Scott also testified that it was possible for the goods in issue to be worn more frequently, for other occasions or for a subsequent Halloween.⁴⁴

[63] The Tribunal considers the above reasoning in *Loblaws* to be applicable to the goods in issue. The presence of a Christmas decorative motif does not preclude the goods from having sufficient durability such that they may be used on multiple occasions during the holiday period, or even used during a subsequent Christmas season.

[64] The analysis will now turn to whether the goods are excluded from heading 95.05 because they are articles of apparel of either Chapter 61 or Chapter 62:

Chapter 61 - Articles of apparel and clothing accessories, knitted or crocheted

Chapter 62 - Articles of apparel and clothing accessories, not knitted or crocheted

[65] The CBSA contended that the dictionary meaning of the word “apparel” is limited to clothing items that are worn by humans. The Tribunal does not consider dictionary definitions of the word “apparel” to be persuasive in these circumstances. The meaning ascribed to the word “apparel” by the cited dictionary is unduly restrictive, having regard to how the goods are described, on both the customs documentation and in marketing material.⁴⁵

[66] In arguing that both Chapters 61 and 62 are limited to articles of apparel that are to be worn by humans and thus excluding pet clothing, the CBSA points to Chapter Note 9 of Chapter 61 and Chapter Note 8 of Chapter 62. Respectively, these read as follows:

9. Garments of this Chapter designed for left over right closure at the front shall be regarded as men’s or boys’ garments, and those designed for right over left closure at the front as women’s or girls’ garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.

Garments which cannot be identified as either men’s or boys’ garments or as women’s or girls’ garments are to be classified in the headings covering women’s or girls’ garments.

8. Garments of this Chapter designed for left over right closure at the front shall be regarded as men’s or boys’ garments, and those designed for right over left closure at the front as women’s or girls’ garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.

Garments which cannot be identified as either men’s or boys’ garments or as women’s or girls’ garments are to be classified in the headings covering women’s or girls’ garments.

[67] These particular Notes are the only ones from either Chapter 61 or Chapter 62 that are relevant in the present circumstances. As these Notes use adjectives (men’s, boys’, women’s, and girls’) that are commonly used to denote gender of human beings, the CBSA invites the Tribunal to

⁴⁴ *Loblaws* at para. 70.

⁴⁵ Exhibit AP-2019-026-24A at 112–114, 135–136.

conclude that the overall scope of Chapters 61 and 62 must consequently be read as being confined to human apparel.

[68] Indeed, there are numerous specific headings within both Chapters 61 and 62 that are specifically prescribed to apply to items of men's, women's, boys' or girls' apparel. By way of example, these include the following:

- 61.01 Men's or boys' overcoats, car-coats, capes, cloaks, anoraks (including ski-jackets), wind-cheaters, wind-jackets and similar articles, knitted or crocheted, other than those of heading 61.03.
- 61.02 Women's or girls' overcoats, car-coats, capes, cloaks, anoraks (including ski-jackets), wind-cheaters, wind-jackets and similar articles, knitted or crocheted, other than those of heading 61.04.
- 61.05 Men's or boys' shirts, knitted or crocheted.
- 61.06 Women's or girls' blouses, shirts and shirt-blouses, knitted or crocheted.
- 62.03 Men's or boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear).
- 62.04 Women's or girls' suits, ensembles, jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear).
- 62.05 Men's or boys' shirts.
- 62.06 Women's or girls' blouses, shirts and shirt-blouses.

[69] By their very nature, at least some of these items of apparel are analogous, in many respects, to the pet garments that are in issue, except that those goods are designed and adapted for the body of a dog.

[70] To the extent that the Chapter Notes address the wearer of apparel, they do so by referencing garments that are designed for directional "closure", which is deemed to be "left over right" for male apparel and "right over left" for female apparel. These provisions of the Chapter Notes do not apply where the "cut of the garment clearly indicates that it is designed for one or other of the sexes". If the cut of the garment "clearly indicates" that it is intended to be worn by males or by females, the design or cut of the garment is dispositive for classification purposes. In the alternative, the directional closure of the garment is determinative.

[71] The Chapter Notes also state that "garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girls' garments". It presupposes a garment that cannot be identified as being an item of male apparel or female apparel. In such circumstances, the heading pertaining to women's or girls' garments becomes the default heading for classification purposes.

[72] Notwithstanding, there are headings within Chapter 61 that contain no reference to the adjectives "men's", "women's", "boys'" or "girls'" describing garments that would not necessarily contain closure mechanisms, such as the following:

61.09 T-shirts, singlets and other vests, knitted or crocheted.

61.10 Jerseys, pullovers, cardigans, waistcoats and similar articles, knitted or crocheted.

[73] The absence of adjectives such as “men’s”, “women’s”, “boys” or “girls” in headings 61.09 and 61.10 must be read as a direction that the gender of the person intended to wear the garments is irrelevant for the purposes of classification within those headings. To the extent that the presence of an adjective selected from “men’s”, “women’s”, “boys” or “girls” is said to signal that the goods are limited to human apparel, the converse must also be true.

[74] This is consistent with general principles of statutory interpretation, which require a contextual and purposive reading of the provision, giving consideration to the ordinary meaning of the words used and the overall context.⁴⁶ There is a presumption that the legislature uses language carefully and consistently in a statute or other legislative instrument. As such, the same words should be read as having the same meaning and different words should be given different meanings. The decision to use the adjectives “men’s”, “women’s”, “boys” or “girls” in some headings, but not others, thus signals that a different scope and semantic meaning is intended with respect to defining the intended wearer of the garment, for the purpose of those headings.⁴⁷

[75] The Tribunal considers that headings 61.09 and 61.10 describe the goods at issue, to the extent that they are knitted or crocheted. This wording is consistent with how the goods are sold, marketed, described and would be perceived by the general public, namely as fashionable apparel for dogs that are analogous to, or complementary to, items of apparel worn by the dog’s owner.

[76] There are no relevant, or analogous headings within Chapter 62, so further analysis must be limited to Chapter 61.

[77] A General Explanatory Note to Chapter 61 provides as follows:

This Chapter covers made up knitted or crocheted men’s boys’, women’s or girls’ articles of apparel and made up knitted or crocheted accessories for articles of apparel.

[78] Unlike the Chapter Notes which form part of the tariff and thus frame the context for consideration of relevant headings, Explanatory Notes are an interpretative guide to tariff classification. The Tribunal is required to take their content into account when determining classification, unless there is sound reason to depart from the guidance provided by the Explanatory Notes.⁴⁸

[79] At this stage of the analysis, the Tribunal is determining whether the goods are categorically excluded from classification in heading 95.05 because they are fancy dress of textiles of Chapter 61. For the reasons given above, there is some ambiguity, concerning whether the goods are classifiable within a heading of Chapter 61.

⁴⁶ *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 [*Canada Trustco*] at para. 10; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paras. 117–123.

⁴⁷ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 81; *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44.

⁴⁸ *Suzuki* at paras. 13, 17.

[80] The wording of the General Explanatory Note restates the issue discussed in relation to the Chapter Note but does not *prima facie* resolve it, having regard to the wording used in headings 61.09 and 61.10.

[81] As such, the Tribunal cannot conclude that the goods are necessarily excluded from Chapter 61 on the basis that this Chapter is restricted to items of human apparel. To the extent that there may be sound reason (or not) to depart from the guidance of the General Explanatory Note will be addressed after the Tribunal considers a further ground of possible exclusion from heading 95.05 and the alternative classification proposed by the CBSA.

[82] Note (v) to Chapter 95 provides a further basis for exclusion from heading 95.05, namely:

This Chapter does not cover:

...

(v) Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

[83] The relevant Explanatory Note to heading 95.05 also indicates that articles having a “utilitarian” function are intended to be excluded from heading 95.05.

The heading also excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

[84] With one possible exception, each model of pet clothing in issue may be viewed as an item that may include, or be decorated with, a festive, seasonal or holiday motif, but which also has a functional purpose, especially in a domestic setting.

[85] Protect Me has argued that the goods are not utilitarian because they are only sold within a limited time period corresponding to the retail season for Christmas. After that, the goods are sold at a deep discount. However, there is no evidence showing that this consideration is unique to the pet clothing in issue. Tableware, linens and other items referenced in Note (v) and having a seasonal or decorative motif may also be expected to have a retail shelf life or desired use that is limited to the holiday period. However, this is not determinative of the function of the product or how it is used, even where that use is time limited.

[86] The Tribunal accepts that the goods in issue may, in some cases, be used for entertainment or whimsical purposes, such as, for example, when the dog apparel is worn only indoors. However, the nature of the goods also reflects that they can, and do, serve the utilitarian function to shield a dog from exterior elements of cold and snow during weather conditions that are associated with the Christmas season. This being said, such a use is dependent on the weather conditions and if the goods are actually worn outdoors, which is a choice made by the consumer. It can be inferred that a dog sweater may provide some protection for dogs living in parts of Canada where conditions of heavy snow and cold temperatures may prevail during the Christmas season. The same conclusion is more difficult to draw if the purchaser lives in a part of Canada where the weather is milder or more

temperate, even during the holiday period. The Tribunal is required to determine a single classification that applies nationally.

[87] In *Rona Inc. v. President of the Canada Border Services Agency*,⁴⁹ the Tribunal considered the meaning of “utilitarian function” in the context of heading 95.05. The Tribunal adopted the following dictionary definition: “designed to be practically useful rather than attractive, functional”.⁵⁰ Further, the Tribunal held that:

In assessing whether the goods perform a utilitarian function, the Tribunal should consider whether the utilitarian function is the predominant aspect of the product. Goods that are utilitarian may nonetheless possess other secondary features, such as amusement value, aesthetic properties or decorative effects.⁵¹

[88] The issue of utilitarian function was also considered in *Avon Canada Inc. v. Deputy Minister of National Revenue*,⁵² where the Tribunal concluded that holiday melody clocks were not classified in heading 95.05. In doing so, the Tribunal stated that although “the goods in issue have a decorative or ornamental role during the Christmas season, they also serve a very utilitarian function. In the Tribunal’s view, the predominant feature of the goods in issue is the timekeeping component.”

Articles with a utilitarian function that have design or ornamentation appropriate to a specific holiday, or articles which are themselves not specifically holiday-related and can be used year round, should be classified in their specific heading and not in heading No. 95.05. Goods that should be excluded from this heading would include those “goods in which the **utilitarian function predominates** and designed in a variety of patterns (which may be festive, amusing, or unusual), such as bathroom coordinates, dishes, mugs, glassware”.⁵³

[Bold in original, footnotes omitted]

[89] On balance, there is insufficient evidence for the Tribunal to conclude that either the entertainment and ornamental use of the goods or their functional use is clearly predominant. As such, the circumstances are distinguishable from those in *Rona*, where the goods were clearly designed and intended for a predominant use, namely outdoor lighting effects, and *Avon*, where the timekeeping function of the goods was their predominant feature.

[90] For the reasons given above, the application of Rule 1 alone does not clearly lead to the conclusion that the goods should be classified in heading 95.05. By the same token, the analysis does not lead to the conclusion that the goods are excluded from heading 95.05.

[91] The Tribunal accordingly turns to a consideration of the CBSA’s argument that goods should be classified in heading 42.01 as “dog coats and the like”.

⁴⁹ (18 October 2019), AP-2018-053 (CITT) [*Rona*].

⁵⁰ *Rona* at para. 113.

⁵¹ *Rona* at para. 114.

⁵² (30 August 2000), AP-99-074 (CITT) [*Avon*] at 3.

⁵³ *Avon* at 1.

Chapter 42

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

42.01 Saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material.

[92] The relevant Chapter Notes to Chapter 42 provide as follows:

This Chapter does not cover:

...

(l) Articles of Chapter 95 (for example, toys, games, sports requisites)

[93] In essence, if the goods fall within heading 95.05, they are excluded from heading 42.01. On the other hand, if the goods are excluded from heading 95.05, the CBSA submits that heading 42.01 is the correct destination within the tariff.

[94] According to the CBSA, the goods should be classified within heading 42.01 as “dog coats and the like (of any material)”. As with apparel, the goods serve to cover dogs in order to keep them warm and provide protection from the elements.

[95] However, that argument isolates the wording “dog coats and the like” from its overall context within heading 42.01. The wording “dog coats and the like” is presented as one item, within a non-exhaustive list, that exemplifies “saddlery and harness for any animal”. In order to find that the goods should be classified in heading 42.01, the Tribunal must be satisfied that the goods have the attributes of “saddlery and harness”. Otherwise, the general wording of the heading would be overwritten by narrower wording that is intended to be demonstrative, not definitive.

[96] The *Merriam-Webster Dictionary* defines “saddlery” as: “the trade, articles of trade, or shop of a saddler”.⁵⁴ In turn, the word “saddler” is defined as “one that makes, repairs, or sells saddles and other furnishings for horses”⁵⁵ and the word “saddle” is defined as: “(1): a girthed usually padded and leather-covered seat for the rider of an animal (such as a horse); (2): a part of a driving harness comparable to a saddle that is used to keep the breeching in place; b: a seat to be straddled by the rider of a vehicle (such as a bicycle)”.⁵⁶

[97] From their appearance and construction, the goods in issue are clearly not “saddles”. They are not designed as a seat, padded or otherwise, that would enable a person or load to be carried on the back of a pet dog, as may be done with a horse.

[98] The *Merriam-Webster Dictionary* defines “harness” as: “(a) the equipment other than a yoke of a draft animal (b): gear, equipment *especially*: military equipment for a horse or man”.⁵⁷ A draft

⁵⁴ *Merriam-Webster Dictionary*, online: <<https://www.merriam-webster.com/dictionary/saddlery>>.

⁵⁵ *Merriam-Webster Dictionary*, online: <<https://www.merriam-webster.com/dictionary/saddler>>.

⁵⁶ *Merriam-Webster Dictionary*, online: <<https://www.merriam-webster.com/dictionary/saddle>>.

⁵⁷ *Merriam-Webster Dictionary*, online: <<https://www.merriam-webster.com/dictionary/harness>>.

animal is a working animal, typically one that pulls a load. These circumstances are highly dissimilar to those of a pet dog who is outfitted with a sweater, coat or T-shirt.

[99] The relevant Explanatory Notes to heading 42.01 provide as follows:

This heading covers equipment for all kinds of animals, of leather, composition leather, furskin, textiles or other materials.

These goods include, *inter alia*, saddles and harness (including reins, bridles and traces) for saddle, draught and pack animals, knee pads, blinkers and boots for horses, decorated trappings for circus animals, muzzles for any animal, collars, leads and trappings for dogs or cats, saddle cloths, saddle cushions and saddle bags, horse blankets specially shaped for the purpose, coats for dogs.

[100] The goods listed as being as referable to heading 42.01 share the common attribute of being needed or required for the purpose of using or protecting a working animal. The goods either protect or cushion the animal from a load to be transported or carried, or otherwise serve as a restraint to enable the animal's movements to be controlled or guided. This interpretation is underpinned by the general description in the Explanatory Note which prescribes that the heading "covers *equipment* for all kinds of animals" [emphasis added].

[101] The goods in issue do none of these things nor can they be described as "equipment". As noted in *Keurig Canada Inc. v Canada (Border Services Agency)*, the "appearance, design, best use, marketing and distribution of a good can be used as indicative factors in classification".⁵⁸ In this case, the goods are described and marketed as apparel or fashion items for household pets. Although the goods may have a functional attribute of shielding a dog from the effects of snow and cold during the winter weather associated with the Christmas season, those benefits are optional for a pet dog and indeed are dependent upon the preferences of the pet owner and winter conditions where that person resides.

[102] In contrast, the items described by heading 42.01 and its associated notes pertain to equipment that is required to protect an animal from injury under working conditions or to otherwise control the animal while it is working. In that respect, the goods at issue are entirely dissimilar. There is no evidence showing that the dog wear at issue is designed, used, or marketed for working animals. While the use of a muzzle, collar or lead is not limited to working animals, that consideration is irrelevant here. The goods in issue cannot be described as, nor do they comprise, any feature such as a muzzle, collar, leash or lead that serves to restrain or control the animal.

[103] With respect to the terminology "dog coats and the like", the Tribunal considers that this wording must be examined in its overall context. Having regard to the *ejusdem generis* rule, the dog clothing in issue is quite dissimilar to the items included within heading 42.01. The difference becomes more striking when dog sweaters, jerseys or T-shirts (as opposed to a "quilted jacket") are compared with the goods of heading 42.01. Those items are characterized as "equipment", which is not a word that aptly describes a sweater or jersey.

⁵⁸ *Keurig Canada Inc. v. Canada (Border Services Agency)* (2 June 2022), 2022 FCA 100.

[104] Although one item in issue is described as a “quilted jacket”, the appearance, features, product description and marketing of the product are more analogous to an item of clothing or fashion, as opposed to an item of “equipment”.

[105] There may be circumstances where “dog coats”, such as those intended for use by sled dogs, service or other working dogs, or, for that matter, other types of dogs, may well be aptly classified in heading 42.01. Those circumstances do not arise on the facts of this particular case.

[106] Accordingly, the Tribunal finds that the goods cannot be classified in heading 42.01.

[107] Having invited the parties to address possible headings for classification in Chapters 61, 62 or 63, the Tribunal now turns to the CBSA’s argument that the goods may be classified in the residual heading of 63.07.

[108] The Tribunal agrees with the CBSA that three conditions must be met in order for the goods to be classified in heading 63.07.⁵⁹ Two of those conditions are met. The goods are “made up” articles⁶⁰ and they are of textile fabric. The third condition, namely whether the goods are more specifically described elsewhere in the tariff is contingent on the Tribunal’s analysis of other remaining possible headings for classification.

[109] As such, at this point in the analysis, the Tribunal is left with the following options for classification:

- (i) Heading 95.05, because the goods are not excluded by reason of being ineligible for classification in Chapter 61 (or Chapter 62);
- (ii) Headings 61.09 or 61.10, whose wording aptly describes the goods but is arguably inconsistent with the direction provided in the General Explanatory Notes to Chapter 61;
or
- (iii) The residual heading of 63.07.

[110] In view of the foregoing, classification cannot be effected using Rule 1 alone. The Tribunal accordingly turns to the other General Rules, which must be applied in a hierarchical manner, as directed by *Igloo Vikski*.

[111] Rule 2 provides as follows:

- (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.
- (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference

⁵⁹ *Canadian Tire Corporation Ltd v. Canada Border Services Agency* (22 May 2012), AP-2011-024 (CITT).

⁶⁰ *Rui Royal International Corp v. Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT).

to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

[112] No issue arises from the goods being incomplete or unfinished or otherwise arising from any composite aspect of the goods. As such, Rule 2 is not of assistance.

[113] The Tribunal now turns to the provisions of Rule 3, which read as follows:

3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refers to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

[114] Applying Rule 3(a), the Tribunal considers that the residual heading of 63.07 is less specific than headings 61.09, 61.10 or 95.05.

[115] The Tribunal now considers whether the ambiguity surrounding eligibility for classification in either heading 61.09 or 61.10 can be resolved. As noted above, the Tribunal considers that the goods are most aptly described by headings 61.09 and 61.10 by reason of their appearance, description, attributes and marketing. However, such a classification may be precluded if classification within Chapter 61 is limited to apparel worn by humans and excludes animal apparel.

[116] This determination is contingent on whether the Explanatory Notes are worded sufficiently broadly to allow for dog apparel to be classified in Chapter 61, or, in the alternative, whether there is sound reason for the Tribunal to depart from the guidance provided by the Explanatory Notes.

[117] The Tribunal considers that general principles of statutory interpretation should guide its interpretation of the relevant Explanatory Note.⁶¹

[118] When the General Explanatory Note is read in overall context, the absence of open-ended language such as “includes” is significant. The Note reads:

⁶¹ *Canada Trustco* at para. 10; *Vavilov* at paras. 117–123.

This Chapter covers made up knitted or crocheted men's boys', women's or girls' articles of apparel and made up knitted or crocheted accessories for articles of apparel.

[119] The term "articles of apparel" is modified and thus limited in scope by the use of the adjectives "men's boys', women's or girls'". Without the presence of those adjectives, the word "apparel" or the term "articles of apparel" would be broad enough, standing alone, to extend to apparel for non-humans.

[120] Nor does the Explanatory Note use language that is suggestive of an open-ended definition of "articles of apparel". The Note does not say that the Chapter 61 "includes" apparel for men, boys, women or girls. Had this been the case, the use of that inclusive wording would signal the possibility that other types of apparel (i.e. for non-humans) was contemplated. By using the word "cover", as opposed to open-ended and less categorical language such as "includes", the Explanatory Note communicates that the scope of Chapter 61 is limited to apparel for humans.

[121] As such, the Tribunal would have to depart from the Explanatory Note to classify the goods in either heading 61.09 or 61.10.

[122] In *Canada (Attorney General) v. Suzuki Canada Inc.*, the Federal Court of Appeal indicated that expert evidence may provide a foundation that could support a departure from the wording of Explanatory Notes. No such evidence has been filed by either party in this case.

[123] In order to find that the goods could be classified in either heading 61.09 or 61.10, the Tribunal would be effectively redrafting the wording of the General Explanatory Note to substitute the word "includes" for "covers". Such an approach would contravene the principles in *Suzuki*:

[17] As indicated in paragraph 13 of these reasons, the Tribunal is not bound to apply the Explanatory Notes, where there is a sound reason to depart from their guidance. Expert evidence can, in some circumstances, provide such a reason. However, even in a case where the Tribunal could reasonably choose not to apply the Explanatory Notes, it does not have the authority to rewrite or ignore such Notes by redefining their terms.

[124] As such, the goods cannot be classified in either heading 61.09 or 61.10.

[125] Even if the General Explanatory Note could be considered ambiguous with respect to their application to headings 61.09 or 61.10, this would still leave the Tribunal to weigh classification as between two alternatives of equal merit, neither of which is fully adequate to define the goods. At that point, the provisions of Rule 3(c) would come into play and would direct the Tribunal to classify the goods "under the heading which occurs last in numerical order among those which equally merit consideration". In this case, that heading is 95.05.

[126] The parties do not contest their respective positions with respect to subheadings or tariff item. The sole issue in this appeal is determining the appropriate heading.

[127] For all the reasons given above, the Tribunal finds that the goods should be classified in heading 95.05 and under tariff item 9505.90.00.

DECISION

[128] The appeal is allowed.

Susan D. Beaubien

Susan D. Beaubien

Presiding Member