



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-056

Future Product Sales Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, July 8, 2010*

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 DECISION 10

IN THE MATTER OF an appeal heard on May 6, 2010, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated July 22, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

FUTURE PRODUCT SALES INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

André F. Scott
André F. Scott
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 6, 2010

Tribunal Member: André F. Scott, Presiding Member

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WITNESS:

Bernie Jablecki
President
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Future Product Sales Inc. (Future Product) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. This appeal concerns the tariff classification of certain flags, banners and car antenna flags printed with National Hockey League (NHL) team logos (the goods in issue). The CBSA classified the goods in issue under tariff item No. 6307.90.99 of the schedule to the *Customs Tariff*² as other made-up articles, including dress patterns, of other textile materials. Future Product submits that the goods in issue should be classified under tariff item No. 4911.99.90 as other printed matter, including printed pictures and photographs.

PROCEDURAL HISTORY

3. On December 4, 2008, Future Product requested an advance ruling from the CBSA on the tariff classification of the goods in issue. On January 12, 2009, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*. The CBSA determined that the goods in issue were properly classified under tariff item No. 6307.90.99.

4. On March 6, 2009, Future Product requested a re-determination of the advance ruling under subsection 60(2) of the *Act*.³ In its decision dated July 22, 2009, pursuant to subsection 60(4), the CBSA maintained the classification of the goods in issue under tariff item No. 6307.90.99.

5. On October 14, 2009, Future Product appealed the CBSA's decision to the Tribunal, pursuant to subsection 67(1) of the *Act*.⁴

6. On May 6, 2010, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Bernie Jablecki, President of Future Product, testified on its behalf. No witnesses were called by the CBSA.

GOODS IN ISSUE

7. The goods in issue are various 3 ft. x 5 ft. flags, 3 ft. x 5 ft. banners and 6 in. x 9 in. car antenna flags. All the goods in issue are made of 100 percent woven polyester fabric and are hemmed, folded and sewn on all edges. The flags are fitted with grommets and the banners with Velcro strips. The goods in issue are all screen-printed with NHL team logos on one side of the fabric.⁵

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

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

3. Tribunal Exhibit AP-2009-056-03A, tab 3.

4. Tribunal Exhibit AP-2009-056-01.

5. Tribunal Exhibit AP-2009-056-03A, tab 1.

8. Future Product filed the following samples of the goods in issue with the Tribunal:
- Exhibit A-01—3 ft. x 5 ft. flag, screen-printed with the logo of the Toronto Maple Leafs
 - Exhibit A-02—3 ft. x 5 ft. banner, screen-printed with the logo of the Tampa Bay Lightning
 - Exhibit A-03—6 in. x 9 in. car antenna flag, screen-printed with the logo of the Colorado Avalanche⁶

ANALYSIS

Statutory Framework

9. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.

10. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.⁷ 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. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

11. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . 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^[8] and the Canadian Rules^[9] set out in the schedule.”

12. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed.¹⁰ Classification therefore begins with Rule 1, which provides as follows: “. . . for legal purposes, 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 following provisions.”

13. Section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[11] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[12] published by the Customs Co-operation Council (also known as the

6. *Transcript of Public Hearing*, 6 May 2010, at 14, 16, 17.

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

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

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

10. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

11. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

12. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.¹³

14. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

15. Thus, the Tribunal must first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the heading and any relevant section or chapter notes in the *Customs Tariff* and any relevant *Classification Opinions* and *Explanatory Notes*.

Tariff Classification Issues

16. The parties’ opinions differ as to the heading in which the goods in issue should be classified. Future Product claims that the goods in issue should be classified in heading No. 49.11, whereas the CBSA is of the view that the goods in issue are properly classified in heading No. 63.07.

Relevant Classification Provisions Concerning Heading No. 49.11

17. The relevant provisions concerning heading No. 49.11 provide as follows:

Section X

**PULP OF WOOD OR OF OTHER FIBROUS CELLULOSIC MATERIAL;
RECOVERED (WASTE AND SCRAP) PAPER OR PAPERBOARD;
PAPER AND PAPERBOARD AND ARTICLES THEREOF**

Chapter 49

**PRINTED BOOKS, NEWSPAPERS, PICTURES
AND OTHER PRODUCTS OF THE PRINTING INDUSTRY;
MANUSCRIPTS, TYPESCRIPTS AND PLANS**

...

49.11 Other printed matter, including printed pictures and photographs.

...

4911.99 --Other

...

4911.99.90 ---Other

18. The relevant chapter note from Chapter 49 provides as follows:

2. For the purpose of Chapter 49, the term “printed” also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopied, thermocopied or typewritten.

13. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), paras. 13, 17.

19. The relevant *Explanatory Notes* to Chapter 49 provide as follows:

GENERAL

With the few **exceptions** referred to below, this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations.

... Also, printed textile articles such as scarves or handkerchiefs, in which the printing is mainly for decorative or novelty purposes and does not affect the essential character of the goods, embroidery fabrics and prepared tapestry canvases bearing printed designs fall in Section XI.

...

For the purposes of this Chapter, the term "printed" includes not only reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). The term **does not**, however, **include** coloration or decorative or repetitive-design printing.

...

In general the goods of this Chapter are executed on paper but the goods may be on other materials provided they have the characteristics described in the first paragraph of this General Explanatory Note. . . .

Relevant Classification Provisions Concerning Heading No. 63.07

20. The relevant provisions concerning heading No. 63.07 provide as follows:

Section XI

TEXTILES AND TEXTILE ARTICLES

...

Chapter 63

**OTHER MADE UP TEXTILE ARTICLES; SETS;
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS**

...

I. -OTHER MADE UP TEXTILE ARTICLES

...

63.07 **Other made up articles, including dress patterns.**

...

6307.90 **-Other**

...

-- -Other

...

6307.90.99 --- -Of other textile materials

21. The relevant section notes from Section XI provide as follows:

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

- (a) Cut otherwise than into squares or rectangles;
- (b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, table cloths, scarf squares, blankets);
- (c) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unravelling by whipping or by other simple means;

...

Subheading Notes.

1 In this Section and, where applicable, throughout the Nomenclature, the following expressions have the meanings hereby assigned to them:

...

(h) **Printed woven fabric**

Woven fabric which has been printed in the piece, whether or not made from yarns of different colours.

(The following are also regarded as printed woven fabrics: woven fabrics bearing designs made, for example, with a brush or spray gun, by means of transfer paper, by flocking or by the batik process.)

The process of mercerization does not affect the classification of yarns or fabrics within the above categories.

22. The relevant chapter note from Chapter 63 provides as follows:

1. Sub-Chapter I applies only to made up articles, of any textile fabric.

23. The relevant *Explanatory Notes* to Section XI provide as follows:

GENERAL

In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.), semi-manufactured products (such as yarns and woven fabrics) and the made up articles made from those products. . . .

...

(II) CHAPTERS 56 TO 63

Chapters 56 to 63 cover certain kinds of textile fabrics and other textile articles **not** covered by Chapters 50 to 55 They also include (subject to **exclusions** regarding certain articles classified elsewhere than in Section XI) made up textile articles.

...

Chapter 63**OTHER MADE UP TEXTILE ARTICLES; SETS; WORN CLOTHING AND WORN
TEXTILE ARTICLES; RAGS**

...

GENERAL

This Chapter includes:

- (1) Under headings 63.01 to 63.07 (sub-Chapter I) made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are **not** more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature. (The expression “made up textile articles” means articles made up in the sense defined in Note 7 to Section XI (see also Part (II) of the General Explanatory Note to Section XI.)

...

The classification of articles in this sub-Chapter is not affected by the presence of minor trimmings or accessories of furskin, metal (including precious metal), leather, plastics, etc.

...

SUB-CHAPTER I**OTHER MADE UP TEXTILE ARTICLES**

...

63.07 - Other made up articles, including dress patterns.

...

6307.90 - Other

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

It includes, in particular:

...

- (4) Flags, pennants and banners, including bunting for entertainments, galas or other purposes.

...

The heading **excludes** textile articles classified in more specific headings of this Chapter or of Chapters 56 to 62. It further **excludes**:

...

- (c) Printed matter (Chapter 49).

Are the Goods in Issue Other Made-up Textile Articles of Other Textile Materials of Heading No. 63.07?

24. The CBSA argued that the goods in issue are fundamentally flags and banners as provided for in heading No. 63.70. According to the CBSA, the printing of the NHL team logos on the made-up textile articles is primarily for decorative purposes and the printing does not alter their essential nature. In its view, the goods in issue remain flags and banners.¹⁴

14. Tribunal Exhibit, AP-2009-056-06A, para. 24.

25. To substantiate this position, the CBSA relied on the *Explanatory Notes* to Chapter 49, which state that the following are not covered by Chapter 49: "...printed textile articles such as scarves or handkerchiefs, in which the printing is mainly for decorative or novelty purposes and does not affect the essential character of the goods, embroidery fabrics and prepared tapestry canvases bearing printed designs fall in Section XI." In this regard, the CBSA argued that the NHL team logos are strictly decorative.

26. The CBSA further noted that there are several novelty items that can be found on which NHL team logos have been printed but that this does not alter the fundamental nature of such goods, whether they be golf balls or T-shirts.¹⁵ The CBSA adopts the view that, as is the case with such products, the goods in issue can be sold as flags or banners whether or not they are printed with NHL team logos.

27. The CBSA argued that the exclusion for "printed matter" in the *Explanatory Notes* to heading No. 63.07 does not apply in this case because the goods in issue do not constitute "printed matter" within the meaning of Chapter 49. It submitted that there is nothing in heading No. 63.07 that prevents flags, pennants and banners from having printed designs on them and that woven fabric bearing a design is regarded as printed woven fabric regardless of whether it is screen-printed or not.¹⁶

28. Future Product submitted that, in order to classify the goods in issue in heading No. 63.07, two conditions must be met. First, the printing must be primarily for decorative purposes and second, it must not change the essential nature of the goods. In this respect, Future Product submitted that the goods in issue are not used for decorative purposes but used by fans to show support for a specific NHL hockey team.¹⁷

29. The Tribunal notes that the *Explanatory Notes* to Chapter 63 specifically excludes printed matter of Chapter 49. As such, the Tribunal will first examine whether the goods in issue are "printed matter".

Are the Goods in Issue Printed Matter of Heading No. 49.11?

30. Future Product argued that the goods in issue should be classified in heading No. 49.11 as other printed matter, including printed pictures and photographs. Future Product noted that the goods in issue are screen-printed and, as such, constitute "printed matter" as defined in the *Explanatory Notes* to Chapter 49, which specify that, with "... few exceptions ... this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations."¹⁸

31. Future Product submitted that the polyester fabric on which the logos are printed is a printing medium that is no different from paper. In its view, this is consistent with what is set out under the title "General" in the *Explanatory Notes* to Chapter 49, which state as follows: "In general the goods of this Chapter are executed on paper but the goods may be on other materials provided they have the characteristics described in the first paragraph of this General Explanatory Note." As such, Future Product argued that the fact that the printing occurs on a textile medium does not prevent the goods in issue from being classified in Chapter 49.¹⁹

15. *Ibid.*, para. 62.

16. *Ibid.*, para. 44.

17. *Ibid.*, para. 53.

18. Tribunal Exhibit AP-2009-056-03A, para. 26.

19. *Ibid.*, para. 27; *Transcript of Public Hearing*, 6 May 2010, at 73. Future Product noted an analogous situation with respect to plastic articles of Chapter 39.

32. Future Product referred to *Éditions Panini du Canada Ltée v. Deputy M.N.R.C.E.*²⁰ where the Tribunal found that the essential nature of hockey cards was defined by their pictorial content. In that case, the Tribunal found that “. . . a player’s picture is the most important feature [T]he pictorial content of the cards is essential to their use; a retailer could not sell the cards in issue if they did not contain a pictorial representation of a player.”²¹ Future Product argued that the same reasoning applies in this case.

33. Having regard to the chapter notes and the *Explanatory Notes* to Chapter 49, the Tribunal notes that, to qualify for classification in heading No. 49.11, the goods in issue must meet two conditions.

34. First, under Note 2 to Chapter 49, the goods in issue must be considered to be “printed”. In this regard, Mr. Jablecki testified that the goods in issue are made using a mechanical silkscreen printing method.²² The CBSA did not contest this fact. In this respect, the Tribunal finds that the goods in issue meet the first criterion.

35. The second condition is found under “General” in the *Explanatory Notes* to Chapter 49. The English version states that, with “. . . few exceptions . . . this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations.” The French version describes such goods as those that will derive their *raison d’être* from the fact that they contain printing, as follows: “. . . *les articles dont la raison d’être est déterminée par le fait qu’ils sont revêtus d’impressions ou d’illustrations*” [bold added for emphasis].

36. In this respect, Mr. Jablecki testified that the goods in issue perform a specific function. They are used primarily by fans to indicate support for a specific NHL franchisee whose logo appears on them. In addition, Mr. Jablecki submitted that sales of the goods in issue are directly related to each franchisee’s performance, even more so during the play-off season. He further noted that the goods in issue were “useless”²³ without the logos. Mr. Jablecki told the Tribunal that the logo is “key to the entire category”, “essential to the entire line”, that “without the logo you have nothing” (or that “nothing else matters”) and that he would not bother to sell a white piece of blank fabric.²⁴

37. In response to this argument, the CBSA submitted that logos, although printed, are only decorative and incidental to any given number of products on which they appear, including the goods in issue.

38. The Tribunal agrees with the CBSA that a textile flag or banner with printed decorative pictures or designs may be made-up textile articles of Chapter 63. For example, in the Tribunal’s view, a flower design on a textile made-up article is decorative and does not necessarily change the essential nature of the article. However, the Tribunal finds that, in the case of the goods in issue, the evidence shows that the NHL team logos have an importance that is well beyond that of a decoration. First, the Tribunal notes that the pictorial representations of NHL team logos are protected registered trademarks, the use of which are closely controlled by the NHL. In this respect, the Tribunal heard evidence that Future Product holds exclusive rights to the use of these trademarks, which entails strict production and quality control parameters such as the type of base material to which the trademarks can be affixed and the proprietary registered colour

20. (19 March 1993), AP-92-018 (CITT) [*Éditions Panini*].

21. *Éditions Panini* at 3.

22. *Transcript of Public Hearing*, 6 May 2010, at 9, 11, 35-37.

23. *Ibid.* at 9, 11, 43.

24. *Ibid.* at 19-20, 33-34, 42, 43.

numbers that can be used in the manufacturing process.²⁵ Second, as was the case in *Éditions Panini*,²⁶ it is the printed pictorial content of a sports card or, in this case, the printed NHL team logo on the goods in issue that confers the essential nature and use of the goods. Future Product would not sell plain white flags and banners.

39. Given the above, the evidence does not support the contention that the printed NHL team logos are present merely for “decorative or novelty” purposes. Rather, the Tribunal is of the view that the printed NHL team logos provide the essential nature or *raison d’être* of the goods in issue. The Tribunal notes that a distinction must be made between decorative and essential printing. In this case, if the logo is removed, the goods in issue are “blank” made-up textile articles. Put simply, in the case of the goods in issue, the printing is the product and the product is the printing. In the Tribunal’s view, further to the *Explanatory Notes* to Chapter 49, the textile material in this case is the medium on which the NHL team logo is printed.²⁷

40. The Tribunal notes that the *Explanatory Notes* to heading No. 63.07 indicate that the heading includes “[f]lags, pennants and banners . . .”, whereas they specifically exclude “printed matter”, directing classification for such goods to Chapter 49. The Tribunal does not view these provisions as being contradictory. Rather, the Tribunal reads these provisions as directing classification of made-up textile flags in heading No. 63.07; whereas certain “printed matter” is redirected to Chapter 49.

41. The Tribunal notes that the *Explanatory Notes* stress that there will be only “few exceptions” to the general principle that Chapter 49 is to cover all printed matter whose essential nature and use is determined by such representations. As noted by Future Product,²⁸ Chapter 49 does not contain a provision that mirrors the *Explanatory Notes* to heading No. 63.07. Specifically, the two headings at issue are not mutually exclusive. Finally, it is clear that the *Explanatory Notes* to Chapter 49 allow for printing to occur on materials other than paper and for classification of such goods as “printed matter”, provided the essential nature and use are determined by the fact that it is printed with pictorial representations. As explained above, the goods in issue get their essential nature and use from the printed pictorial representations of the NHL team logos.

42. Parties submitted foreign classification rulings in support of their positions. The Tribunal notes that they are administrative rulings drawn from another jurisdiction and that, as such, they do not constitute binding authority in the Canadian context.²⁹ Nevertheless, the Tribunal examined them, but did not ultimately find them persuasive one way or another.

25. *Ibid.* at 22, 23, 26, 32, 38, 39, 40, 41.

26. *Éditions Panini* at 3: “Applying this criterion to the evidence adduced at the hearing, the Tribunal considers that the essential nature of the goods in issue is defined by their pictorial content. Simply put, a player’s picture is the most important feature of the goods in issue. Further, the evidence also clearly establishes that the pictorial content of the cards is essential to their use; a retailer could not sell the cards in issue if they did not contain a pictorial representation of a player.”

27. Tribunal Exhibit AP-2009-056-03A, para. 27.

28. *Transcript of Public Hearing*, 6 May 2010, at 49.

29. *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT), para. 42: “Both parties submitted U.S. classification rulings in support of their positions. The Tribunal notes that these are administrative rulings by government officials and not decisions by an independent quasi-judicial body. Further, even if they were such decisions, since they are drawn from another jurisdiction, they would not constitute valid jurisprudence in the Canadian context. Parties are free to use such rulings to support their positions if they believe that they will be useful in helping to explain their arguments. However, parties should not expect that the Tribunal will give them significant weight in its own decisions.”

43. For the foregoing reasons, in accordance with Rule 1 of the *General Rules*, and the applicable tariff nomenclature identified above, the goods in issue should be classified in heading No. 49.11. Pursuant to the *Canadian Rules*, it follows that the goods in issue should be classified under tariff item No. 4911.99.90 as other printed matter, including printed pictures and photographs.

DECISION

44. The appeal is allowed.

André F. Scott
André F. Scott
Presiding Member