

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20091126

Docket: A-428-08

Citation: 2009 FCA 345

**CORAM: EVANS J.A.
SHARLOW J.A.
RYER J.A.**

BETWEEN:

HELLY HANSEN LEISURE CANADA INC.

Appellant

and

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

Respondent

Heard at Toronto, Ontario, on November 26, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on November 26, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 26, 2009)

RYER J.A.

[1] This is an appeal by Helly Hansen Leisure Canada Inc. (“Helly Hansen”) from a decision ([2008] C.I.T.T. No. 35) of the Canadian International Trade Tribunal (the “Tribunal”), dated June 2, 2008, which confirmed the decision of the President of the Canada Border Services Agency (the “CBSA”) with respect to the classification of certain women’s jackets under the schedule (the “Schedule”) to the *Customs Tariff*, S.C. 1997, c. 36 (the “Tariff”).

[2] The appeal was brought under subsection 68(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the “Act”), which permits appeals of decisions of the Tribunal made under section 67 of the Act on questions of law.

[3] The jackets are constructed with an outer shell of plastic material with which a textile fabric is laminated. The issue is whether those jackets should be classified under Tariff item No. 6210.300 (other garments made up of fabrics of heading No. 59.03 of the type described in subheading Nos. 6202.11 to 6202.19) as found by the CBSA, or under Tariff item No. 3926.20.95 (other articles of apparel and clothing accessories of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt) as asserted by Helly Hansen.

[4] The nomenclature of the Tariff that CBSA determined to be applicable to the jackets and that Helly Hansen asserts to be applicable to the jackets is reproduced in the appendix to these reasons. Also reproduced in the appendix are the relevant portions of the General Rules in the schedule and the Section and Chapter Notes.

[5] The Tribunal determined that the classification of the jackets was to be made by reference to Rule 1 of the General Rules in the Schedule and the applicable Section or Chapter notes, in particular Note 2 (m) to Chapter 39, Note 1(h) to Section XI, Note 2(a)(5) to Chapter 59 and a portion of the Chapter 39 Explanatory Notes.

[6] The Tribunal also determined that the jackets were required to be classified under heading No. 59.03, as asserted by the CBSA, unless the textile fabric that was laminated with the plastic material was “present merely for reinforcing purposes”.

[7] In paragraph 34 of its reasons, the Tribunal determined that “an important purpose of the textile fabric is to reinforce the plastic component of the goods in issue” (our emphasis). However, the Tribunal held that because the fabric was woven with a visual pattern, it was “figured” as contemplated by Note (d) under the heading “Plastics and textile combinations” in the Explanatory Notes to Chapter 39. As a result, the Tribunal concluded that the textile fabric had a function beyond mere reinforcement of the plastic component. This conclusion was further supported, according to the Tribunal in paragraph 51 of its reasons, by evidence that

the appearance and colour of the textile fabric, its waterproof and water-repellent characteristics, and its role in the drape and visual appeal of the garment are all clearly of interest to potential buyers.

These findings led the Tribunal to conclude that the textile fabric that was laminated with the plastic material was not present “merely for reinforcing purposes” and that the CBSA’s classification of the jackets was correct.

[8] The Tribunal also held that the fact that the CBSA may have given different rulings with respect to the classification of the similar goods was not relevant and such rulings were not binding upon it.

[9] The standard of review that this Court must apply in relation to the appeal of the Tribunal's decision is reasonableness. (See *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210, 367 N.R. 89.) With respect to the application of the reasonableness standard, the Supreme Court of Canada stated at paragraph 47 of its reasons in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] In this appeal, Helly Hansen argues that the Tribunal erred in law by not considering the purpose of the presence of the textile fabric and specifically that the Tribunal ignored the “overwhelming evidence that the jackets were designed not for fashion purposes including drape or visual appeal, but rather for the performance characteristics” (appellant's factum paragraph 27). In our view, these arguments cannot be accepted.

[11] The Tribunal interpreted Note 2(a)(5) to Chapter 59 as requiring the exclusion from Heading 59.03 of a textile fabric laminated with plastic unless the textile fabric is present only for the purpose of reinforcing the plastic material. In our view, this interpretation is reasonable.

[12] The Tribunal then went on to determine whether the presence of the textile fabric served only to reinforce the plastic material or whether it had other functions. Accordingly, it cannot be

said that the Tribunal failed to consider whether the presence of the textile fabric served a single or multiple purposes.

[13] In making its determination on this issue, the Tribunal considered the evidence of the witnesses put forward by both parties. The Tribunal did not accept the evidence of Helly Hansen's witnesses or accord to their evidence the weight that Helly Hansen would have liked. However, that does not indicate that the Tribunal ignored evidence of Helly Hansen's witnesses.

[14] The Tribunal's evidentiary findings to the effect that the textile fabric was "figured", in the sense that it had a decorative pattern produced by the weave, clearly indicate that it concluded that there was a purpose for the presence of the textile fabric other than merely to reinforce the plastic material. In our view, having regard to the evidence that was put before the Tribunal, that conclusion was reasonable.

[15] Relying on section 6 of the *Tariff Classification Advance Ruling Regulations*, SOR/2005-256, Helly Hansen also argued that the Tribunal should be bound by prior rulings that were given by the CBSA in circumstances which Helly Hansen believes to be sufficiently similar to those under consideration. That provision reads as follows:

Advance Ruling

6. An officer shall give consistent advance rulings with respect to applications for advance rulings based on facts and circumstances that are identical in all material respects.

[16] In our view, that provision applies to the officer who gives advance rulings, not to the Tribunal. The determination by the Tribunal of whether the CBSA erred in any particular decision cannot be dependent upon prior decisions of the CBSA. In this case, the Tribunal was required to base its decision upon its assessment of the applicable law, and was not bound by prior CBSA decisions. In reaching its decision on this basis, the Tribunal committed no error.

[17] Finally, Helly Hansen argues that the Tribunal erred by not considering Rule 3(b) of the General Rules in the Schedule. In reaching its decision, the Tribunal found that the classification of the jackets could be made on the basis of Rule 1 alone. And, as previously noted, we have not been persuaded that any error on the part of the Tribunal has been made out in that regard. Accordingly, given the cascading nature of the General Rules in the Schedule (see *Agri Pack v. Canada (Customs and Revenue Agency)*, 2005 FCA 414 at paragraph 14, 345 N.R. 1), it was not necessary for the Tribunal to have regard to any Rule other than Rule 1.

[18] In conclusion, we have not been persuaded that the Tribunal made any error of law in reaching its decision that Helly Hansen's jackets were properly classified under Tariff item No. 6210.30.00 (other garments made up of fabrics of heading No. 59.03 of the type described in subheading Nos. 6202.11 to 6202.19). Accordingly, the appeal will be dismissed with costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-428-08

An appeal from the Order of the Canadian International Trade Tribunal (CITT), dated June 2, 2008, in CITT File No.: AP-2006-054

STYLE OF CAUSE: HELLY HANSEN LEISURE
CANADA INC. v.
THE PRESIDENT OF THE
CANADA BORDER SERVICES
AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 26, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (EVANS, SHARLOW & RYER
J.J.A.)

DELIVERED FROM THE BENCH BY: RYER J.A.

APPEARANCES:

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APPENDIX

Relevant Provisions in the List of Tariff Provisions

...	
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14.
...	
3926.20	-Articles of apparel and clothing accessories (including gloves, mittens and mitts)
...	
3926.20.95	---Other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt
...	
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14.
...	
3926.20	-Articles of apparel and clothing accessories (including gloves, mittens and mitts)
...	
3926.20.95	---Other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt
...	
59.03	Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 59.02.
...	
62.02	Women's or girls' overcoats, car-coats, capes, cloaks, anoraks (including ski-jackets), wind-cheaters, wind-jackets and similar articles, other than those of heading 62.04.
	-Overcoats, raincoats, car-coats, capes, cloaks and similar articles:
...	
6202.11.00	--Of wool or fine animal hair
...	
6202.12.00	--Of cotton
...	
6202.13.00	--Of man-made fibres
...	
6202.19.00	--Of other textile materials
...	

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

...

6210.30.00 -Other garments, of the type described in subheadings 6202.11 to 6202.19.

...

Notes to Chapter 39 of the List of Tariff Provisions

...

2. This Chapter does not cover:

...

(m) Goods of Section XI (textiles and textile articles);

...

Notes to Section XI of the List of Tariff Provisions

1. This Section does not cover:

...

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

...

Notes to Chapter 59 of the List of Tariff Provisions

...

2. Heading 59.03 applies to:

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

...

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

...

Explanatory Notes to Chapter 39 of the List of Tariff Provisions

...

Plastics and textile combinations

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

...

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

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

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

...

Relevant Provisions of the General Rules for the Interpretation of the Harmonized System and the Tariff

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; 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.
2.
 - (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 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.
3.
 - (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.

...