SCC File No. 36258

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT
(Respondent)

- and -

IGLOO VIKSKI INC.

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. At issue on this appeal is a customs tariff classification decision of the Canadian International Trade Tribunal ("CITT") that the Federal Court of Appeal found to be internally contradictory and in direct conflict with a fundamental interpretive principle governing the tariff classification regime.[1] The Attorney General of Canada ("Appellant") appeals to this Court, arguing that judicial deference under a reasonableness standard required the Federal Court of Appeal not to interfere with such a decision. The importer of the goods in issue, Igloo Vikski Inc. ("Respondent"), submits that such a fundamentally flawed administrative decision cannot withstand scrutiny on any standard of review.

2. The decision of the CITT ("*CITT Decision*") dealt with five models of ice hockey goaltender gloves. The five models of gloves (the "goods in issue") include both goaltender catchers and goaltender blockers. Each glove is composed of a combination of distinct components of plastic and textile materials, in varying amounts. The exterior of the gloves is made up of a combination of plastic and textile components, assembled, for the most part, by stitching.[2] The inner padding of the gloves is, for the goaltender blockers, made exclusively of plastic materials; and for the goaltender catchers, made of plastics and lesser amounts of textiles.[3]

3. The Respondent submits that the goods must be classified by the application of codified interpretive principles specifically designed to permit the classification of goods consisting of more than one material or substance. The goods are *prima facie* classifiable as both goods of plastic and goods of textile. Accordingly, their classification must be determined according to the material that gives the goods their essential character.

4. However, the CITT rejected the Respondent's submission based upon (a) contradictory approaches to the two classification headings involved (plastics under heading 39.26 and textiles under heading 62.16); (b) reasoning contrary to the cascading nature of classification scheme's

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[1] *Igloo Vikski Inc v Canada (Border Services Agency)*, 2014 FCA 266, [2014] FCJ No 1134 at paras 9, 11 [*FCA Decision*], Appellant's Record, Tab 2.
[2] *Igloo Vikski Inc. v President of the Canada Border Services* Agency, (25 January 2013), AP-2009-046 (CITT) at para 14 [*CITT Decision*], Appellant's Record, Tab 3.
[3] *Ibid* at para 15.

interpretive rules; (c) and an interpretation of the scheme that is irreconcilable with its words and directly contradicts this Court's jurisprudence.

5. The Respondent therefore submits that there is no reason to interfere with the Federal Court of Appeal's decision, which set aside the *CITT Decision*. The *CITT Decision* was tainted by several hallmarks of unreasonableness, requiring judicial intervention. The Respondents therefore respectfully request that this appeal be dismissed.

B. Statement of Facts

(1) Legislative Framework

6. For the most part, the Respondent does not dispute the Appellant's general overview of the legislative framework of the *Customs Tariff*,[4] including the operation of the *General Rules for the Interpretation of the Harmonized System* (the "*General Rules*"), at paragraphs 5-19 of the Appellant's Factum. However, the Respondent submits that paragraph 14 of the Appellant's Factum reproduces the Tribunal Member's fundamental error in interpreting the scope of permissible extension of a heading pursuant to Rule 2(b). Like the Tribunal Member, the Appellant simply asserts that *Explanatory Notes* (X1) and (XII) provide that goods must be *prima facie* classifiable under Rule 1 for Rule 2(b) to apply. As explained in further detail below, this assertion ignores the very precise distinction between permissible extension and impermissible widening that *Explanatory Notes* (XI) and (XII) establish, as well as the express definition of the point at which the line between the two is crossed that *Explanatory Note* (XII) provides, i.e., "this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading."

7. The Respondent submits that the following *General Rules* and their associated *Explanatory Notes* are relevant to the present appeal:

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	**1.** Le libellé des titres de Sections, de Chapitres ou de Sous-Chapitres est considéré comme n'ayant qu'une valeur indicative, le classement étant déterminé légalement d'après les termes des positions et des Notes de Sections ou de Chapitres et, lorsqu'elles ne

[4] SC 1997, c 36.

do not otherwise require, according to the following provisions.	sont pas contraires aux termes desdites positions et Notes, d'après les Règles suivantes.
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.	**2.** b) Toute mention d'une matière dans une position déterminée se rapporte à cette matière soit à l'état pur, soit mélangée ou bien associée à d'autres matières. De même, toute mention d'ouvrages en une matière déterminée se rapporte aux ouvrages constitués entièrement ou partiellement de cette matière. Le classement de ces produits mélangés ou articles composites est effectué suivant les principes énoncés dans la Règle 3.
Explanatory Notes:	*Notes Explicatives :*
(XI) The effect of the Rule is to extend any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances. The effect of the Rule is also to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance.	XI) L'effet de la Règle est d'étendre la portée des positions qui mentionnent une matière déterminée de manière à y inclure cette matière mélangée ou bien associée à d'autres matières. Cet effet est également d'étendre la portée des positions qui mentionnent des ouvrages en une matière déterminée de manière à y inclure ces ouvrages partiellement constitués de cette matière.
(XII) It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.	XII) Elle n'élargit cependant pas la portée des positions qu'elle concerne jusqu'à pouvoir y inclure des articles qui ne répondent pas, ainsi que l'exige la Règle 1, aux termes des libellés de ces positions, ce qui est le cas lorsque l'adjonction d'autres matières ou substances a pour effet d'enlever à l'article le caractère d'une marchandise reprise dans ces positions.
(XIII) As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if *prima facie* classifiable under two or more headings, must therefore be classified according to the principles of Rule 3.	XIII) Il s'ensuit que des matières mélangées ou associées à d'autres matières, et des ouvrages constitués par deux matières ou plus sont susceptibles de relever de deux positions ou plus, et doivent dès lors être classées conformément aux dispositions de la Règle 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.	**3.** b) Les produits mélangés, les ouvrages composés de matières différentes ou constitués par l'assemblage d'articles différents et les marchandises présentées en assortiments conditionnés pour la vente au détail, dont le classement ne peut être effectué en application de la Règle 3 a), sont classés d'après la matière ou l'article qui leur confère leur caractère essentiel lorsqu'il est possible d'opérer cette détermination.

8. The Respondent submits that the following Sections, Chapters, headings, subheadings, and tariff items, and their associated *Explanatory Notes*, are relevant to the present appeal:

Section VII: Plastics and Articles Thereof; Rubber and Articles Thereof	**Section VII : Matières plastiques ou ouvrages en ces matières; Caoutchouc et ouvrages en caoutchouc**
Chapter 39 – Plastics and articles thereof	**Chapitre 39 - Matières plastiques et ouvrages en ces matières**
39.26 Other articles of plastics and articles of other materials of headings 39.01 to 39.14. *Explanatory Notes:* This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14. They include: (1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.	**39.26 Autres ouvrages en matières plastiques et ouvrages en autres matières des nos 39.01 à 39.14.** *Notes Explicatives :* La présente position couvre les ouvrages non dénommés ni compris ailleurs en matières plastiques (tels qu'ils sont définis à la Note 1 du présent Chapitre) ou en autres matières des n^{os} 39.01 à 39.14. Sont donc notamment compris ici : 1) Les vêtements et accessoires du vêtement (**autres que** les jouets) confectionnés par couture ou collage à partir de matières plastiques en feuilles, notamment les tabliers, les ceintures les bavoirs pour bébés et les imperméable et les dessous-de-bras. Les capuchons amovibles en matières plastiques, présentés avec les imperméables en matières plastiques

	auxquels ils sont destinés, restent classés dans la présente position.
3926.20 Articles of apparel and clothing accessories (including gloves, mittens and mitts)	**3926.20 Autres ouvrages en matières plastiques et ouvrages en autres matières des nos 39.01 à 39.14. - Vêtements et accessoires du vêtement (y compris les gants, mitaines et moufles)**
3926.20.92 Other: - Mittens; Non-disposable gloves	3926.20.92 Autres : - Mouffles (mitaines); Gants non jetables
Section XI: Textiles and Textile Articles	**Section XI : Matières textiles et ouvrages en ces matières**
Chapter 62 - Articles of apparel and clothing accessories, not knitted or crocheted *Explanatory Notes*: The classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes (particularly Note 4 to Chapter 43 and Note 2 (b) to Chapter 67, relating to the presence of furskin and feathers, respectively), or failing that, according to the General Interpretive Rules.	**Chapitre 62 - Vêtements et accessoires du vêtement, autres qu'en bonneterie** *Notes explicatives :* Les articles du présent Chapitre peuvent comporter des parties ou accessoires: en bonneterie, en matière plastique, en cuir, en pelleteries, en métal, en plumes, par exemple. Toutefois, lorsque ces parties **excèdent** le rôle de simples garnitures, les vêtements et accessoires du vêtement sont classés conformément aux Notes spéciales des Chapitres (voir, en particulier, la Note 4 du Chapitre 43 et la Note 2 b) du Chapitre 67 en ce qui concerne respectivement la présence de pelleteries et de parties en plumes) ou, à défaut, conformément aux Règles générales interprétatives.
6216.00.00 Gloves, mittens and mitts.	6216.00.00 Gants, mitaines et moufles.

(2) Appeals of Customs Tariff Classifications

9. The Respondent does not substantially disagree with the Appellant's description of the process by which tariff classifications are made by Canada Border Services Agency ("CBSA") officials and reviewed by the CITT, at paragraphs 20 to 26 of the Appellant's Factum. However,

the Respondent submits that any financial incentives alluded to by the Appellant are irrelevant to this Court's evaluation of whether a decision of the CITT should be reversed on judicial review.

(3) Goods in Issue

10. The Respondent does not dispute the Appellant's description of the goods in issue, nor the various classification decisions made with respect to them. Indeed, these matters were the subject of an Agreed Statement of Facts.[5] They have therefore never been in dispute and were not the subject of any factual findings by the Tribunal Member.

C. Decisions Below

(1) Decision of the Canadian International Trade Tribunal

11. On August 10, 2009, the Respondent filed a notice of appeal to the CITT under s. 67 of the *Customs Act*,[6] seeking to reverse the CBSA decisions classifying the goods in issue as articles of textiles under heading 62.16 and arguing that they should instead be classified as articles of plastics under heading 39.26.

12. The Tribunal Member began by finding that the goods in issue could not be classified in Chapter 95, which generally covers sports requisites, including sports or athletic equipment, but rather had to be classified according to their constituent material because Note 1(u) to Chapter 95 provides:

> 1. This Chapter does not cover:
>
> (u) Racket strings, tents or other camping goods, or gloves, mittens and mitts (classified according to their constituent material); or[7]

13. The Tribunal Member then proceeded to consider whether the goods in issue should be classified as textiles (under heading 62.16, as "gloves, mittens and mitts") or plastics (under heading 39.26, as "other articles of plastics").

14. The Respondent had argued that the goods in issue were "goods consisting of more than one material or substance" – namely textiles and plastics – within the meaning of Rule 2(b). The

[5] Appellant's Record, Tab 6.
[6] Agreed Statement of Facts, Appellant's Record, Tab 6 at 75.
[7] *CITT Decision*, *supra* note 2 at paras 24-25, Appellant's Record, Tab 2.

Respondent submitted that, by the application of Rule 2(b), the goods in issue were *prima facie* classifiable under both headings 39.26 and 62.16, such that Rule 3(b) applied. Thus, the goods in issue would have to be classified according to the material that gave them their essential character.

15. The Tribunal Member rejected the Respondent's submission based upon a number of justifications that the Respondent submits were unreasonable and contradictory.

16. In concluding that the goods in issue were not *prima facie* classifiable as articles of plastic under heading 39.26, the Tribunal Member reasoned in the following manner.

17. First, the Tribunal Member rightly pointed out that classification can only be effected through the application of Rule 3(b) when goods are *prima facie* classifiable in two or more headings.[8] However, the Tribunal Member found that *because* the goods in issue could not be classified under heading 39.26 applying *only* Rule 1 of the *General Rules*, the goods were not *prima facie* classifiable under heading 39.26 for the purpose of applying Rule 3(b).[9]

18. Second, in relation to heading 39.26, the Tribunal Member asserted that Rule 2(b) could not operate to extend a heading beyond its scope under Rule 1. According to the Tribunal Member, "in the absence of a demonstration that the goods in issue answer the description in heading No. 39.26 pursuant to Rule 1 of the *General Rules*, Rule 2(b) cannot extend the scope of that heading to include the goods in issue."[10]

19. Third, although the Tribunal Member made no finding that the presence of textile materials in the gloves deprived them of their character as articles of plastics, the Tribunal Member concluded that the goods in issue did not answer the description of "[o]ther articles of plastics" in heading No. 39.26. The core justification for this conclusion was the Tribunal Member's assertion that "as it relates to articles of apparel and clothing accessories […], heading No. 39.26 only includes articles that are made by '. . . sewing or sealing sheets of plastics . . .'"[11]

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[8] *CITT Decision, supra* note 2 at para 53, Appellant's Record, Tab 2.
[9] *Ibid* at para 54-55.
[10] *Ibid* at para 69.
[11] *Ibid* at paras 55, 70, citing *Sher-Wood Hockey Inc. v Canada (Border Services Agency, President)*, (10 February 2011), AP-2009-045 (CITT) at para 72 [*Sher-Wood*].

Flowing from this core premise, the Tribunal Member also added two subsidiary assertions: (a) "heading No. 39.26 does not describe articles of apparel or clothing accessories that are made up of textile fabrics;" and, (b) "the presence of plastic padding in […] articles of apparel [made up of textile fabrics] is not relevant."[12] Each of these propositions was drawn from the Tribunal Member's earlier decision in *Sher-Wood*.[13]

20. According to the Tribunal Member, because the goods in issue were "not articles of apparel or clothing accessories made by '. . . sewing or sealing sheets of plastics . . .' of heading No. 39.26," they could not be "a type of plastic and textile combination covered by Chapter 39."[14] Thus, the goods in issue were found not to answer the description or to meet the terms of heading 39.26 because they were not articles of apparel or clothing accessories made by sewing or sealing sheets of plastics.

21. In concluding that the goods in issue ought to be classified as articles of textile, under heading 62.16, the Tribunal Member reasoned in the following manner.

22. First, although the Tribunal Member had held, in relation to heading 39.26, that Rule 2(b) could not extend the scope of the heading to include goods that were not already classified under that heading pursuant to Rule 1, the Tribunal Member drew the opposite conclusion in relation to heading 62.16. Adopting a line of reasoning directly contradictory to that applied to heading 39.26, the Tribunal Member found that, in this case, resort to Rule 2(b) was required to extend heading 62.16 to cover the goods in issue: "[t]he Tribunal agrees with the CBSA that the goods in issue are properly classified in heading No. 62.16 applying Rule 2(b)."[15]

23. At the same time, the Tribunal Member's reasons for why the goods in issue were classifiable under heading 62.16, applying the *General Rules*, are not easily summarized because they are unclear and internally inconsistent. In the just quoted passage, the Tribunal Member affirmed that it was Rule 2(b) that enabled the goods in issue to be classified under heading 62.16. Elsewhere, however, the Tribunal Member equivocated as to whether the goods could be

[12] *CITT Decision, supra* note 2 at para 55, Appellant's Record, Tab 2, citing *Sher-Wood, supra* note 11 at paras 72-73.
[13] *Sher-Wood, ibid.*
[14] *CITT Decision, supra* note 2 at para 56, Appellant's Record, Tab 2.
[15] *Ibid* at paras 71, 77.

classified applying Rule 1 alone, affirming that "to the extent that Rule 1 of the General Rules is insufficient to definitively classify the goods in issue in heading No. 62.16, resort may be had to the remaining rules."[16] Then, at paragraph 81, the Tribunal Member held that classification under heading 62.16 was based on *both* Rules 1 and 2(b): "on the basis of Rules 1 and 2 (b) of the *General Rules*, the Tribunal concludes that the goods in issue are gloves of textile materials classified in heading No. 62.16."[17]

24. Second, the Tribunal Member held that even though the goods in issue were composed of plastics and textiles, and the plastics "constitute[d] more than mere trimming" within the meaning of the *Explanatory Notes* to Chapter 62, this did not entail that classification under heading 62.16 could only be effected by way of *General Rules* other than Rule 1. According to the Tribunal Member, it was still necessary to begin the classification exercise with Rule 1.[18] Again, however, the Tribunal Member's reasoning on this point is confusing and inconsistent as she later affirmed:

> the goods in issue may remain classified in heading No. 62.16 as gloves of textile fabrics even if they consist only partly of textile fabrics. If the presence of another material in the goods in issue constitutes more than mere trimming, the question becomes, under Rule 2 (b) of the *General Rules*, whether the goods in issue can still be regarded as answering the description in heading No. 62.16."[19]

25. Thus, the Tribunal Member affirmed *both* that where the plastics constitute more than mere trimming (1) the classification exercise must nevertheless begin with Rule 1, and (2) the question becomes whether Rule 2(b) enables the goods to be classified under heading 62.16.

26. Third, in relation to heading 62.16, the Tribunal affirmed that "Notes XI and XII of the Explanatory Notes to Rule 2(b) of the General Rules also indicate that, to the extent that the addition of another material does not deprive the goods in issue of the character of goods of the kind mentioned in the heading, the goods should still be regarded as meeting the description in the heading under consideration."[20] Contrary to her approach in relation to heading 39.26 (where

[16] *Ibid* at para 71.
[17] *Ibid* at para 81.
[18] *Ibid* at paras 62-64.
[19] *Ibid* at para 74.
[20] *Ibid* at para 75.

the Tribunal Member did not consider the question at all), the Tribunal Member found that the presence of plastics did not deprive the goods of their character as gloves of textile fabrics.[21]

27. The Tribunal Member therefore concluded that the goods in issue were classifiable under heading 62.16, as extended by Rule 2(b). At the same time, she found that the goods could not be classified under heading 39.26 under Rule 1. Since she found that the goods were only classifiable under one heading, she held that Rule 3 was not applicable – and the goods could simply be classified under heading 62.16.

(2) Decision of the Federal Court of Appeal

28. The Respondent appealed the Tribunal Member's decision to the Federal Court of Appeal, pursuant to the s. 68 *Customs Act*[22] right of appeal. In its decision,[23] the Federal Court of Appeal held that the Tribunal Member's decision was reviewable on a reasonableness standard.[24] The Court concluded that the Tribunal Member's decision was unreasonable because it was internally contradictory and because it contradicted the cascading nature of the *General Rules*.

29. First, the Tribunal Member's decision was unreasonable because it was internally contradictory. The Tribunal Member's explanation for rejecting the Respondent's argument that the goods in issue were *prima facie* classifiable under heading 39.26 directly contradicted her explanation for why the goods were *prima facie* classifiable under heading 62.16. The Tribunal Member rejected the Respondent's argument that, although the goods in issue did not meet the description in heading 39.26 under Rule 1 (since the textile material is separate from the plastic material), they can be described *prima facie* in the extended terms of heading 39.26 under Rule 2(b). At the same time, however, "having concluded that the plastic material in the goods in issue was more than mere trimming, the *Explanatory Notes* to Chapter 62 precluded the goods from classification in heading 62.16 under Rule 1. Consequently, it is the application of Rule 2(b) and its *Explanatory Notes* (XI) to (XIII) that extended the terms of heading 62.16 to include the goods in issue: gloves partly of textile material and partly of plastic material."[25]

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[21] *Ibid* at para 81.
[22] RSC 1985, c1 (2nd Supp).
[23] *FCA Decision*, *supra* note 1, Appellant's Record, Tab 3.
[24] *Ibid* at para 2.
[25] *Ibid* at paras 7-9.

30. Second, the Tribunal Member's decision was unreasonable because her reasoning with respect to heading 39.26 contradicted the cascading nature of the *General Rules*. In particular, "the CITT's interpretation of Rule 2(b) [wa]s unreasonable since it is not a prerequisite condition to the application of Rule 2(b) that the goods in issue need first to meet the description in a heading pursuant to Rule 1 as stated in paragraph 66 of its reasons."[26] Rather, on a proper application of the cascading nature of the *General Rules*, it is because "the goods in issue contain a textile material which is separate from the plastic material" that "they do not meet the description found in heading 39.26 under Rule 1."[27] It is also "for this very reason that Rule 2(b) and, more precisely, *Explanatory Note* (XI) to that Rule must then be applied." When Rule 2(b) is applied, it "extends the terms of heading 39.26 to encompass articles partly of plastic material and partly of textile material. The goods in issue then fall under the description found in the extended terms of heading 39.26."[28]

31. The Federal Court of Appeal therefore also addressed the Tribunal Member's inconsistent affirmations about whether Rules 1 and 2(b) together, or Rule 2(b) alone, enabled the goods in issue to be included within the terms of heading 62.16. According to the Federal Court of Appeal, once it was shown that the plastic materials were more than mere trimming, the goods could not be classified under heading 62.16 by the application of Rule 1 – and resort had to be had to the other *General Rules*. Moreover, it was precisely because Rule 1 does not permit a classification that Rule 2(b) must be relied upon to extend the scope of a heading. Thus, it was only the application of Rule 2(b) that extended the terms of heading 62.16 to include the goods in issue.

32. Thus, according to the Federal Court of Appeal, had the Tribunal Member consistently and properly applied Rule 2(b), she would have found that "the goods in issue became classifiable *prima facie* under two headings, headings 62.16 and 39.26, thereby leading to the application of Rule 3 of the *General Rules* pursuant to *Explanatory Note* (XIII)," which the Tribunal Member unreasonably failed to apply.[29] The Federal Court of Appeal accordingly allowed the appeal and referred the matter back to the CITT for "adjudication based on an

[26] *Ibid* at para 11.
[27] *Ibid* at para 12.
[28] *Ibid* at para 12.
[29] *Ibid* at para 12.

analysis which takes into account the complete application of Notes (XI) to (XIII) of the *Explanatory Notes* to Rule 2(b)."[30]

PART II – QUESTIONS IN ISSUE

33. The Respondent submits that the questions in issue in the present appeal are the following:

(1) How does the contextual reasonableness standard apply to the CITT's interpretation of the customs tariff classification scheme established by the *Customs Tariff* in this case?

(2) Was it unreasonable for the Tribunal Member to conclude that the goods in issue could not be *prima facie* classified under both headings 39.26 and 62.16, by the application of *General Rule* 2(b), and to therefore decide that it was not necessary to evaluate under *General Rule* 3(b) whether their plastic component or their textile component gave them their essential character?

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

(1) On Appeal from a Judicial Review, it is the Tribunal's Decision, not that of the Reviewing Court, that is at Issue

34. The Respondent submits that the Federal Court of Appeal's decision identified ample grounds for finding the Tribunal Member's decision unreasonable. Contrary to the Appellant's suggestion,[31] reasonableness review does not mandate that the reviewing court provide protracted reasons. Here, the Federal Court of Appeal succinctly and more than adequately articulated why the Tribunal Member's decision was unreasonable.

35. In any event, however, this Court's task on appeal from a judicial review involves "'step[ping] into the shoes' of the lower court" such that the "focus is, in effect, on the

[30] *Ibid* at para 13.
[31] Appellant's Factum at paragraph 71.

administrative decision"[32] and not on the decision of the Federal Court of Appeal. Accordingly, before this Court, the Respondent relies not only on those unreasonable aspects of the Tribunal Member's decision explicitly addressed by the Federal Court of Appeal, but also on other fundamental defects in the Tribunal Member's analysis that render it unreasonable.

(2) The Qualities that make a Decision Reasonable or Unreasonable

36. The nature of reasonableness review was clearly set out in *Dunsmuir v New Brunswick*[33] (*Dunsmuir*). Pursuant to *Dunsmuir*,

> 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.[34] (emphasis added)

37. As the majority in *Dunsmuir* further explained, deference under the reasonableness standard "does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view."[35] Thus, *Dunsmuir* itself is a case where the decision was found to be unreasonable because "[t]he reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations."[36]

38. The Respondent submits that the *CITT Decision*, like the decision under review in *Dunsmuir*, was deeply flawed and therefore unreasonable. As the Federal Court of Appeal found, and the Respondent argues in detail below, the *CITT Decision* fundamentally lacks the qualities that make a decision reasonable. Expanding upon *Dunsmuir*, Paul Daly has identified various indicia of an unreasonable decision. According to Daly, "[i]llogicality, inconsistency with

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[32] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 46 [*Agraira*], citing *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 at para 247 (per Deschamps J).
[33] 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].
[34] *Ibid* at para 47.
[35] *Ibid* at para 48 (emphasis added).
[36] *Ibid* at para 72.

statutory purpose or underlying values, differential treatment and unexplained changes in policy are all examples of such indicia that imperil the rule of law and good administration."[37]

39. Here, the *CITT Decision* falls well outside the range of reasonable outcomes. It is unintelligible, illogical, and inconsistent with the customs tariff classification scheme because (a) it is internally contradictory; (b) it contradicts an essential interpretive principle upon which the customs tariff classification regime turns (the cascading nature of the *General Rules*); and (c) it interprets the language of the *Explanatory Notes* in a manner that is irreconcilable with their words and this Court's jurisprudence.

(3) The Value of Consistency in Administrative Decision-Making Does Not Support, But Rather Undermines, the Reasonableness of the *CITT Decision*

40. The Appellant invokes consistency in administrative decision-making as a relevant consideration for a court conducting reasonableness review. In particular, the Appellant affirms that "[i]t is reasonable for a tribunal to follow a prior interpretation of statutory provisions in later cases, particularly when a reviewing court has previously found that prior interpretation to be reasonable."[38]

41. Moreover, without citing any authority, the Appellant claims that "a court reviewing a tribunal's legal interpretation that has previously been approved as reasonable in one case should not determine that same interpretation to be unreasonable in another case without compelling reasons"[39] as this would create uncertainty and threaten *stare decisis*.

42. The Respondent submits that the Appellant's claims concerning consistency in administrative decision-making are ill-conceived and inapplicable to the present case. Rather, considerations relating to consistency in administrative decision-making indicate that the *CITT Decision* is unreasonable.

43. First, the Appellant asserts that the Federal Court of Appeal's "interpretation is contrary to prior Federal Court of Appeal jurisprudence that had found similar CITT customs tariff

[37] Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233 at 260.
[38] Appellant's Factum at para 63.
[39] Appellant's Factum at para 64.

classification determinations to be reasonable."[40] However, the Appellant does not point to any prior Federal Court of Appeal jurisprudence that is directly relevant to the classification determination at issue in this case.

44. The only case to which the Appellant refers – vaguely – as being "a classification dispute remarkably similar to the case at bar"[41] is *Canadian Tire Corp. v Canada (Border Services Agency)*.[42] However, that case involved the completely different textile heading 63.07, which had an *Explanatory Note* indicating that it specifically included the goods at issue, namely, life-jackets. Moreover, unlike sports gloves (which pursuant to Note 1(u) to Chapter 95 must be classified according to their constituent material), nothing "limit[ed] the classification of goods as 'life-jackets' based on the materials from which those goods were made."[43] These particular features of heading 63.07 enabled the goods to be classified under that heading, applying only Rule 1. Conversely, in this case, as argued in further detail below, a classification applying only Rule 1 was not possible.

45. Given the peculiar features of heading 63.07, *Canadian Tire* is a much less relevant Federal Court of Appeal decision than *Mon-Tex Mills Ltd. v Canada (Customs and Revenue Agency)*[44] (*Mon-Tex*), an earlier Federal Court of Appeal decision involving the classification of goods consisting of plastic and textile components. That case involved shower curtains consisting of a plastic component of heading 39.24 and a textile component of heading 63.03. In that case, Rothstein, Nadon and Sharlow JJA unanimously held that the goods were *prima facie* classifiable under both headings and therefore had to be classified according to which component gave them their essential character, pursuant to *General Rule* 3(b); and that it was the plastic component that gave the goods their essential character, being their "raison d'être or fundamental nature […] to prevent the outflow of water."[45]

46. The only directly relevant precedent relied upon by the Appellant is the prior decision of the same Tribunal Member in *Sher-Wood*, which was never the subject of a Federal Court of

[40] Appellant's Factum at para 55.
[41] Appellant's Factum at para 82.
[42] 2011 FCA 242, [2011] FCJ No 1309.
[43] *Ibid* at para 11.
[44] 2004 FCA 346, [2004] FCJ No 1712 [*Mon-Tex*].
[45] *Ibid* at paras 14-16.

Appeal decision. The mere fact that the same Tribunal Member decided similarly in an earlier case cannot transform an otherwise unreasonable decision into a reasonable one.

47. Second, while it is true that inconsistency in administrative decision-making is an indication of an unreasonable decision,[46] consistency alone is not necessarily a good indication that a decision is reasonable. An unreasonable decision does not become reasonable by mere repetition. Indeed, "judicial review is constitutionally guaranteed in Canada" and even a privative clause cannot oust judicial review.[47] Yet, if a tribunal could insulate itself from reasonableness review simply by repeating itself, that constitutional guarantee would be hollow.

48. Tellingly, the Appellant cites no authority for the untenable proposition that a tribunal's statutory interpretation that follows a prior tribunal decision is automatically reasonable.[48] The only case relied upon by the Appellant for this proposition is *Gladu Tools Inc. v Canada (Border Services Agency)* (*Gladu*).[49] That case involved a CITT decision that had previously been successfully appealed and remitted to the CITT with directions from the Federal Court of Appeal to consider the proper classification in accordance with its decision.[50] In the appeal of the remitted decision, the Federal Court of Appeal noted (in the paragraph relied upon by the Appellant) that the CITT "was bound by this Court's direction."[51] The proposition that a tribunal deciding a remitted issue is bound by the remitting court's specific directions provides no support to the Appellant's position and is entirely irrelevant to the present case.

49. This is not to say that consistency is never relevant. This Court found in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.* (*Irving*), that the fact that a labour arbitration board's decision was consistent with a consensus in the arbitral jurisprudence spanning over 20 years "help[ed] inform why its decision was reasonable"[52] A longstanding and consistent administrative jurisprudence can shape the

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[46] *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 AR 183 at para 24, leave to appeal refused [2008] SCCA No 347; *Besse v Alberta (Assured Income for the Severely Handicapped)*, 2015 ABQB 678, [2015] AJ No 1150 at para 92.
[47] *Dunsmuir*, *supra* note 33 at para 31.
[48] Appellant's Factum at para 63.
[49] *Gladu Tools Inc. v Canada (Border Services Agency)*, 2009 FCA 215, FCJ No 816 [*Gladu*].
[50] *Ibid* at para 2.
[51] *Ibid* at para 8.
[52] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458 at paras 4-5, 8, 32, 42 [*Irving*].

expectations of regulated parties and is properly a relevant (although not determinative) factor in the reasonableness assessment. However, a single prior decision made by the same Tribunal Member – as the current case presents – can hardly establish a relevant consensus for this Court to consider. This case is nothing like *Irving*.

50. Third, the Appellant's invocation of *stare decisis*[53] is misplaced in the context of an appeal to this Court where, as here, this Court has not previously considered the issues that are the subject of the appeal. Plainly, this Court is not bound by decisions of lower courts which find an administrative tribunal's decision to be reasonable (even if there were a relevant lower court decision to which the Appellant could point).

51. Fourth, as elaborated below, the Tribunal Member's analysis is internally contradictory. Thus, considerations of consistency in administrative decision-making indicate that the *CITT Decision* was unreasonable.

(4) The Range of Reasonable Interpretations of Legislation Directly Implementing Canada's International Obligations to Conform to Uniform Standards Must be Narrow

52. Moreover, the Respondent submits that the range of reasonable interpretations available to the Tribunal Member was narrow in this case. As argued in detail below, as a result of several fundamental defects in the Tribunal Member's decision, her interpretation fell well outside the range of reasonable outcomes.

53. As this Court has held, "[r]easonableness is a single standard that takes its colour from the context."[54] What reasonableness requires "must be assessed in the context of the particular type of decision making involved and all relevant factors."[55] For example, when an administrative decision maker makes a discretionary policy decision, there may be a wide range of reasonable decisions available;[56] conversely, when interpreting a statute, the range of reasonable decisions may be significantly constrained.[57]

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[53] Appellant's Factum at para 64.
[54] *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 18.
[55] *Ibid* at para 18.
[56] See, for example, *Agraira*, *supra* note 32 at paras 42, 49, 50.
[57] See, for example, *Dunsmuir*, *supra* note 33 at para 75 and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* 2011 SCC 53, [2011] 3 SCR 471 at para 34 [*Canadian Human Rights Commission*].

54. The subject of the judicial review on this appeal is the Tribunal Member's interpretation of the *Customs Tariff*.

55. The Tribunal Member in this case was not exercising a broad policy discretion. Nor did the Tribunal Member's decision involve any findings of fact (all of which were agreed).

56. Rather, the Tribunal Member was interpreting the terms of the *Customs Tariff* – legislation which directly implements Canada's international treaty obligations. As the Appellant states, the *Customs Tariff* "was adopted in order to give legal effect to Canada's obligations under the [International] Convention [on the Harmonized Commodity Description and Coding System]"[58] (the "Convention"). The aim of the Convention was to achieve international harmonization in customs classifications. As the Appellant further explains, "the Convention requires [signatories] to classify all imported goods in a uniform manner."[59]

57. Canada's customs tariff classification system, for the most part, simply incorporates the Harmonized Commodity Description and Coding System. Thus, Sections, Chapters, headings, sub-headings, and their associated Notes in the *Customs Tariff* are precisely those from the Harmonized Commodity Description and Coding System. The *Explanatory Notes* are the official interpretation of the Harmonized Commodity Description and Coding System given by the World Customs Organization. Only the individual tariff items, the last step in the tariff classification exercise, are domestically determined.

58. Moreover, the *Customs Tariff* itself makes clear that its aim is to enable Canada to comply with its international obligations to conform to uniform international customs tariff classifications. The long title to the *Customs Tariff* expresses this purpose:

> An Act respecting the imposition of duties of customs and other charges, <u>to give effect to the International Convention on the Harmonized Commodity Description and Coding System</u>, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof

[58] Appellant's Factum at para 5. See also: *Proctor-Silex Canada v Canada Border Services Agency*, 2014 FCA 116 at para 5.
[59] Appellant's Factum at para 6.

59. The aim of conforming to uniform international customs tariff classifications is also apparent from the interpretive provisions at ss. 10(1) and 11 of the *Customs Tariff*:

> **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.
>
> **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.

60. Even the Canadian Rules indicate that classification of goods in domestically determined tariff items is to be according to internationally determined interpretive principles, and that where Canadian and international terms conflict, the *international* term shall take precedence:

> **1**.For legal purposes, 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 for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.
>
> **2.**Where both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence.

61. Thus, the Tribunal Member was interpreting Canada's international treaty obligations, and the treaty and its implementing legislation are specifically aimed at achieving uniformity across jurisdictions. The Respondent submits that, in this context, the range of reasonable interpretations of the *Customs Tariff* must be narrow.[60]

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[60] Indeed, relying upon this Court's decision in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 (at paragraphs 42-50), the Federal Courts have strongly suggested that interpretations of statutory provisions incorporating Canada's international treaty obligations are matters of general law outside the tribunal's unique expertise, which are reviewable on a correctness standard (*Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678, [2014] 1 FCR 295 at para 26, cited with approval in *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 261, [2013] FCJ No 283 at paras 32-34; see also *Hernandez Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, [2014] 2 FCR 224 at paras 22-25, aff'd 2014 SCC 68). This Court judicially reviewed a specialized refugee tribunal's interpretations of statutory provisions incorporating Canada's international obligations to refugees in the post-*Dunsmuir* decisions of *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 and *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68,

(5) For the Specific Interpretive Question in this Case, there was only One Reasonable Interpretation

62. As the majority of this Court affirmed in *McLean v British Columbia (Securities Commission)*,

> Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance.[61]

In that case, the majority cited *Dunsmuir*[62] and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*[63] as two examples where there was only one reasonable interpretation and no degree of deference could justify accepting the administrative decision maker's unreasonable interpretation.

63. As argued in detail below, the Respondent submits that this case is one where the Tribunal Member simply could not reasonably have interpreted the *Customs Tariff* as she did. As the Federal Court of Appeal held,[64] there was only one reasonable interpretation: the gloves are not classifiable applying *General Rule* 1; they are *prima facie* classifiable under both headings 39.26 and 62.16, by the application of *General Rule* 2(b); and they must therefore "be classified as if they consisted of the material or component which gives them their essential character" pursuant to *General Rule* 3(b).

B. The Tribunal Member's Decision Was Unreasonable

64. The Respondent submits that the Tribunal Member's analysis involved several fundamental flaws that rendered her decision unreasonable.

[2014] 3 SCR 431. In those cases, this Court did not indicate whether the correctness or the reasonableness standard applied. However, its independent and detailed interpretation did not suggest that there was a wide range of reasonable options from which the tribunal could choose.

[61] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 38 [*Mclean*].

[62] *Dunsmuir*, *supra* note 33 at para 75, cited in *McLean, ibid* at para 38.

[63] *Supra* note 57 at para 34, cited in *McLean ibid* at para 38.

[64] *FCA Decision, supra* note 1 at para 12, Appellant's Record, Tab 3.

(1) The Tribunal Member's Finding that it is a Pre-Condition to the Application of Rule 2(b) that the Goods in Issue Must First meet the Description in the Heading Pursuant to Rule 1 is Unreasonable

(a) *The Tribunal Member's interpretation of Rule 2(b), in relation to heading 39.26, contradicts the cascading nature of the General Rules*

65. As the Court of Appeal held,[65] the Tribunal Member's interpretation of Rule 2(b), in relation to heading 39.26, contradicts the cascading nature of the *General Rules*.

66. According to the consistent explanation of the cascading nature of the *General Rules* in Federal Court of Appeal jurisprudence, "[t]he General Rules are structured in cascading form: if and only if Rule 1 does not resolve the classification, then regard must be had to Rule 2, and so on as necessary."[66] This is precisely the formulation of the cascading nature of the *General Rules* adopted by the Appellant in its Factum.[67]

67. Thus, pursuant to the cascading nature of the *General Rules*, Rule 2(b) only applies after it has been found that the goods in issue do not meet the description in heading 39.26 pursuant to Rule 1.

68. However, at paragraphs 66, 67, 69, and 79 the Tribunal Member held that goods have to meet the terms of a heading under Rule 1 before Rule 2(b) is invoked. For example, at paragraph 69 of the *CITT Decision*, the Tribunal Member affirmed:

> In summary, in the absence of a demonstration that the goods in issue answer the description in heading No. 39.26 pursuant to Rule 1 of the General Rules, Rule 2 (b) cannot extend the scope of that heading to include the goods in issue. (emphasis added)

69. This affirmation directly contradicts the plain words of the *Explanatory Note* XI to Rule 2 (b), which provides that "The effect of the Rule is […] to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance" (emphasis added).

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[65] *Ibid*. at paras 11-12.
[66] *Gladu*, *supra* note 49 at para 7, citing *Agri Pack v Canada (Customs and Revenue Agency)*, 2005 FCA 414, [2005] FCJ No 2059 at para 14.
[67] Appellant's Factum at paras 10, 80-82.

70. Furthermore, it contradicts the cascading nature of the *General Rules*. As explained by the Federal Court of Appeal,[68] it is precisely because certain goods consisting of more than one material or substance cannot be classified under a heading using Rule 1 alone that Rule 2(b) operates to extend the scope ("étendre la portée" in the French version of *Explanatory Note* XI to Rule 2(b)) of the heading to include goods consisting partly of a material or substance of a heading.

71. If the goods met the description in heading 39.26 under Rule 1, they would be classified in heading 39.26 under Rule 1, and there would be no basis to apply Rule 2(b) to classify the goods in issue in heading 39.26.

72. As the Federal Court of Appeal's explanation shows, the Appellant's submission that the Federal Court of Appeal's approach offends the cascading nature of the *General Rules* is without merit. The Appellant submits that "[t]he Federal Court of Appeal's approach to tariff classification would effectively permit skipping over Rule 1, then classifying goods by operation of Rule 2 and following under headings that do not *prima facie* describe the goods in issue."[69] With respect, the Federal Court of Appeal's approach does not permit "an adjudicator to skip over the first rule"[70] as the Appellant claims.

73. Rather, it is the very essence of a cascading set of rules that, if a question is not resolved by one rule, the adjudicator must proceed to the next rule – and so on.[71] Far from ignoring, or skipping over Rule 1, the Federal Court of Appeal considered Rule 1 and found that because the goods in issue did not meet the description in heading 39.26 under Rule 1, it was necessary to proceed to Rule 2(b).[72] The Federal Court of Appeal's application of the cascading nature of the *General Rules* in this case is squarely in line with its past decisions on the subject.

74. It was therefore unreasonable for the Tribunal Member to find that it is a prerequisite condition to the application of Rule 2(b) that the goods in issue must first meet the description in the heading pursuant to Rule 1. Indeed, the cascading nature of the *General Rules* mandates the

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[68] *FCA Decision, supra* note 1 at para 12, Appellant's Record, Tab 3.
[69] Appellant's Factum at para 77.
[70] Appellant's Factum at para 78.
[71] *Gladu, supra* note 49 at para 7, citing *Agri Pack v Canada (Customs and Revenue Agency)*, 2005 FCA 414, [2005] FCJ No 2059 at para 14.
[72] *FCA Decision, supra* note 1 at para 12, Appellant's Record, Tab 3.

exact opposite conclusion: it is a prerequisite condition to the application of Rule 2(b) that the goods do not meet the description found in heading 39.26 under Rule 1.

(b) *The Tribunal Member's interpretation of Rule 2(b) ignores the distinction between permissible extension and impermissible widening*

75. The Tribunal Member's reasons demonstrate that she completely ignored the distinction between permissible extension and impermissible widening upon which the application of Rule 2(b) turns.

76. This essential distinction is outlined in *Explanatory Notes* XI and XII to Rule 2 (b) as follows:

(XI) The effect of the Rule is to extend any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances. The effect of the Rule is also to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance. (XII) It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading. (emphasis added)	XI) L'effet de la Règle est d'étendre la portée des positions qui mentionnent une matière déterminée de manière à y inclure cette matière mélangée ou bien associée à d'autres matières. Cet effet est également d'étendre la portée des positions qui mentionnent des ouvrages en une matière déterminée de manière à y inclure ces ouvrages partiellement constitués de cette matière. XII) Elle n'élargit cependant pas la portée des positions qu'elle concerne jusqu'à pouvoir y inclure des articles qui ne répondent pas, ainsi que l'exige la Règle 1, aux termes des libellés de ces positions, ce qui est le cas lorsque l'adjonction d'autres matières ou substances a pour effet d'enlever à l'article le caractère d'une marchandise reprise dans ces positions. (nos soulignements)

77. Ignoring this distinction, the Tribunal Member affirmed, at paragraph 66 of the *CITT Decision*, that "Rule 2 (b) […] can be invoked to establish that the scope of a given heading referring to a material or substance is widened to include mixtures or combinations of that material or substance with other materials or substances or goods consisting partly of that

material or substance" (emphasis added). Contrary to this statement, *Explanatory Notes* XI and XII to Rule 2(b) are clear: Rule 2(b) may extend, but it may not widen a heading.

78. Moreover, the Tribunal Member's error is not merely semantic. Not only do *Explanatory Notes* XI and XII articulate a distinction between permissible extension and impermissible widening, *Explanatory Note* XII precisely defines the point at which the line between the two is crossed. Yet, this definition was also ignored by the Tribunal Member.

79. In discussing the limits on permissible extension under Rule 2(b) at paragraph 65 of the *CITT Decision*, the Tribunal Member only made reference to the first part of *Explanatory Note* XII (before the semi-colon). Based on this incomplete reading of *Explanatory Note* XII, the Tribunal Member unreasonably concluded, at paragraph 66, that Rule 2(b) can only be invoked after it has been established that the goods in issue answer the description in the heading under Rule 1.

80. It was not reasonable for the Tribunal Member to ignore the second half of *Explanatory Note* XII, particularly since it is clear that this part of *Explanatory Note* XII defines the point at which the line between permissible extension and impermissible widening is crossed.

81. Specifically, pursuant to *Explanatory Note* XII, impermissible widening of "the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading" "occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading" (emphasis added). Thus, pursuant to *Explanatory Note* XII, for the purpose of applying Rule 2(b), one can only conclude that goods do not answer the description in the heading, as required under Rule 1, where the addition of another material or substance deprives them of their character of goods of the kind mentioned in the heading. Indeed, the first half of *Explanatory Note* XII has no effect or meaning independent of the second half, which defines the circumstances that amount to impermissible widening.

82. Contrary to the Tribunal Member's reasons, *Explanatory Note* XII does not make classification under Rule 1 a precondition for the application of Rule 2(b). It rather makes deprivation of the character of goods of the kinds mentioned in the heading the test for the outer limit of permissible extension under Rule 2(b).

83. It is therefore the Tribunal Member's failure to consider the second half of *Explanatory Note* XII that led her to unreasonably conclude that goods first had to be described under Rule 1 before Rule 2(b) could be invoked. In turn, it was this unreasonable interpretation that led her to conclude, at paragraph 67, that "[s]ince the goods in issue do not answer the description in heading No. 39.26 (i.e. they are not "[o]ther articles of plastics . . ." within the meaning of the terms of heading No. 39.26), Rule 2(b) cannot widen the scope of that heading to cover them."

84. Moreover, the Tribunal Member's failure to consider the second half of *Explanatory Note* XII diverted her from considering the proper question: "did the addition of textile material deprive the goods in issue of their character as articles of plastics under heading 39.26?" Indeed, the Tribunal Member made no such finding, which was required to conclude that the goods in issue were not *prima facie* classifiable under heading 39.26, applying Rule 2(b).

85. Given the absence of a factual finding by the Tribunal Member that the presence of the textile deprives the goods in issue of the character of articles of plastics, Explanatory Note XII is not relevant in the context of the present appeal. Thus, absent such a factual finding, it is not possible to conclude that classifying the goods in issue under heading 39.26 would amount to an impermissible widening of that heading.

(2) <u>The Tribunal Member's Decision is Unreasonable Because it is Internally Contradictory</u>

86. Not only did the Tribunal Member unreasonably interpret Rule 2(b) as outlined above, she also applied contradictory interpretations of Rule 2(b) with respect to heading 39.26 and heading 62.16. Whereas the Tribunal Member found that Rule 2(b) extended heading 62.16 in order to cover goods partly of textile and partly of plastic, she refused to apply the same reasoning to extend heading 39.26 to cover goods partly of plastic and partly of textile.

(a) *Any suggestion by the Tribunal Member that the goods could be classified under heading 62.16 by the application of Rule 1 was unreasonable*

87. The Respondent submits that the Tribunal Member's apparent equivocation on whether classification under Rule 1 was possible is not a permissible application of the *General Rules*. The Tribunal Member stated, at paragraph 71, "consistent with the *Explanatory Notes* to Chapter

62, to the extent that Rule 1 of the *General Rules* is insufficient to definitively classify the goods in issue in heading No. 62.16, resort may be had to the remaining rules."[73]

88. However, the binary principle applies to tariff classification of goods under Rule 1: a good is either classified in a heading under Rule 1 or it is not. If it is classified by applying Rule 1, no further consideration of the *General Rules* is required. If it is not classified by applying Rule 1, the other *General Rules* must be considered in turn.

89. Moreover, the Tribunal Member's reliance on paragraph 91 of her decision in *Sher-Wood*, at paragraph 76 of the *CITT Decision*, could be read to suggest that the goods in issue are classifiable under heading 62.16, applying only Rule 1. In the quoted paragraph, the Tribunal Member stated:

> Moreover, the *Explanatory Notes* to heading No. 62.16 provide that "[t]his heading also covers gloves for protection in industry, etc." While this provision is not directly applicable to the goods in issue, it confirms that heading No. 62.16 covers certain protective gloves. The Tribunal considers that this implies that heading No. 62.16 may cover gloves that incorporate materials that have protective attributes, such as foam and plastics. The Tribunal therefore finds that the goods in issue remain gloves of textile fabrics of heading No. 62.16 even if the foam and plastic padding parts that they contain appear to constitute more than mere trimming. (emphasis added)

90. Based on the quoted portion of the *Explanatory Notes*, the Tribunal Member asserts that "heading No. 62.16 may cover gloves that incorporate materials that have protective attributes, such as foam and plastics," which suggests that it would cover such goods applying Rule 1 alone.

91. This would be a wholly unreasonable interpretation. First, as the Tribunal Member partially recognized, *Explanatory Notes* dealing with gloves used for protection in industry are *irrelevant* to the classification of gloves for use in sport. Second, the quoted portion of the *Explanatory Notes* says nothing about gloves for protection in industry that incorporate materials *other* than textile. It is not reasonable to construe the quoted portion of the *Explanatory Notes* as broadening the scope of heading 62.16, under Rule 1, to protective gloves that incorporate materials other than textile when it says nothing to that effect. The only reasonable inference is that it clarifies that heading 62.16 covers gloves for protection in industry that are made of

[73] *CITT Decision*, *supra* note 2 at para 71, Appellant's Record, Tab 2.

textile, applying Rule 1. It is Rule 2(b) that may extend heading 62.16 to gloves (for industry and for sport) made of a combination of textiles and plastics. The quoted portion of the *Explanatory Notes* is irrelevant to the classification of the goods in issue and it was unreasonable to rely upon it for any purpose.

92. As the Federal Court of Appeal held, any suggestion by the Tribunal Member that the goods were classifiable under heading 62.16 by the application of Rule 1 was unreasonable. The Tribunal Member having concluded that the plastic material in the goods in issue was more than mere trimming,[74] the *Explanatory Notes* to Chapter 62 precluded the goods from classification in heading 62.16 under Rule 1.[75]

(b) *The goods were prima facie classifiable under heading 62.16 by the application of Rule 2(b) because they were not classifiable under Rule 1*

93. As the Federal Court of Appeal further held, and consistent with the cascading nature of the *General Rules*, it was the application of Rule 2(b) and its *Explanatory Notes* (XI) to (XIII) that extended the terms of heading 62.16 to include the goods in issue: gloves partly of textile material and partly of plastic material.[76]

94. That the goods in issue were classified under heading 62.16 by the application of Rule 2(b) is further confirmed by the fact that the Tribunal Member found that "the presence of the plastic components in the goods in issue d[id] not deprive them of their character as gloves of textile fabrics."[77] This finding established that *Explanatory Note* (XII) was not engaged. Thus, under Rule 2(b), a permissible extension of heading 62.16 pursuant to *Explanatory Note* (XI) enabled the goods to be classified under that heading. At the same time, such classification did not result in an impermissible widening pursuant to *Explanatory Note* (XII).

95. Consistent with the Tribunal Member's findings of fact and the cascading nature of the *General Rules*, there can only be one reasonable outcome and one reasonable interpretation of the Tribunal's Reasons with respect to heading 62.16: the goods in issue were *prima facie*

[74] *Ibid* at para 51.
[75] *FCA Decision*, *supra note* 1 at para 9, Appellant's Record, Tab 3.
[76] *Ibid*.
[77] *CITT Decision*, *supra* note 2 at para 81, Appellant's Record, Tab 2.

classifiable in heading 62.16 by the application of Rule 2(b) because they were precluded from being classified in heading 62.16 under Rule 1.

96. Indeed, the Tribunal Member ultimately concluded that "on the basis of Rules 1 and 2(b) of the *General Rules*, […] the goods in issue are gloves of textile materials classified in heading No. 62.16."[78]

(c) *The Tribunal Member's extension of heading 61.16 by the application of Rule 2(b) directly contradicted her approach to heading 39.26*

97. However, based on the Tribunal Member's reasoning with respect to heading 39.26, at paragraph 66, Rule 2(b) can only apply after it is found that the goods in issue meet the description in a heading under Rule 1. In dealing with heading 39.26, the Tribunal Member refused to invoke Rule 2(b) on the basis that she had found that the goods did not meet the description in heading 39.26 under Rule 1.[79]

98. The Tribunal Member's approach to heading 62.16 therefore directly contradicted her approach to heading 39.26. The Federal Court of Appeal rightly found that this contradictory analysis rendered the *CITT Decision* unreasonable.[80]

(3) <u>In the Alternative, any Implied Justifications for why Rule 2(b) Could Not Extend Heading 39.26 to Include the Goods in Issue are Unreasonable</u>

99. The Respondent submits that the Federal Court of Appeal properly found the *CITT Decision* unreasonable based upon the above ways in which the *CITT Decision* was unintelligible, illogical, contradictory, and inconsistent with the interpretive principles and language of the customs tariff classification scheme. However, even if the *CITT Decision* is read in its most generous light, to suggest further justifications for why Rule 2(b) could not extend heading 39.26 to include the goods in issue, any such justifications are also unreasonable.

100. The Tribunal Member provided three interrelated justifications for why the goods in issue did not "meet the description"[81] of "[o]ther articles of plastics" in heading No. 39.26. The first

[78] *Ibid* at para 81.
[79] *Ibid* at paras 55, 69.
[80] *FCA Decision, supra* note 1 at para 9, Appellant's Record, Tab 3.
[81] *CITT Decision, supra* note 2 at para 70, Appellant's Record, Tab 2.

core justification for this conclusion was the Tribunal Member's assertion that "as it relates to articles of apparel and clothing accessories […], heading No. 39.26 only includes articles that are made by '. . . sewing or sealing sheets of plastics . . .'"[82] The Tribunal Member also added the following two subsidiary assertions, which are directly dependent upon the first core justification: "heading No. 39.26 does not describe articles of apparel or clothing accessories that are made up of textile fabrics;" and "the presence of plastic padding in […] articles of apparel [made up of textile fabrics] is not relevant."[83] Each of these propositions was drawn from the Tribunal Member's earlier decision in *Sher-Wood*.[84]

101. These propositions are unreasonable. Because the propositions do not withstand scrutiny on a reasonableness standard, they could not justify the Tribunal Member's refusal to extend heading 39.26, by the application of Rule 2(b), to cover the goods in issue.

(a) *The Tribunal Member Unreasonably Interpreted Language of Inclusion as Establishing a Limitation*

102. At paragraph 55 of the *CITT Decision*, the Tribunal Member affirmed:

> In *Sher-Wood*, where the Tribunal had occasion to consider the scope of that heading fully, the Tribunal determined that, as it pertains to articles of apparel or clothing accessories, such as the goods in issue, heading No. 39.26 is limited to those that are made by ". . . sewing or sealing sheets of plastics . . ." (emphasis added)

103. On this basis, the Tribunal Member concluded that the goods in issue do not "meet the description" in heading 39.26.[85]

104. Since the Tribunal Member simply referred to her own reasons in *Sher-Wood*, it is necessary to examine those reasons to identify the justification for the proposition that, as it pertains to articles of apparel or clothing accessories, heading No. 39.26 is limited to those that are made by ". . . sewing or sealing sheets of plastics . . ."[86]

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[82] *Ibid* at paras 55, 70, citing *Sher-Wood, supra* note 11 at para 72. See also Appellant's Factum at para 88.
[83] *CITT Decision, ibid* at para 55, Appellant's Record, Tab 2, citing *Sher-Wood*, *ibid* at paras 72-73. See also Appellant's Factum at para 88.
[84] *Sher-Wood, ibid.*
[85] *CITT Decision, supra* note 2 at paras 55, 70, Appellant's Record, Tab 2.
[86] Since a court conducting a reasonableness review may generally have reference to prior administrative tribunal decisions (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654,

105. In *Sher-Wood*, the Tribunal Member reasoned as follows:

> The *Explanatory Notes* to heading No. 39.26 make it clear that, as it relates to articles of apparel and clothing accessories, heading No. 39.26 only includes certain articles of plastics, i.e. those that are made by 'sewing or sealing sheets of plastics'"[87] (emphasis added).

106. As support for this conclusion, the Tribunal Member quoted the following portion of the *Explanatory Notes* to heading 39.26:[88]

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14. They include:	La présente position couvre les ouvrages non dénommés ni compris ailleurs en matières plastiques (tels qu'ils sont définis à la Note 1 du présent Chapitre) ou en autres matières des n^{os} 39.01 à 39.14. Sont donc notamment compris ici :
(1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.	2) Les vêtements et accessoires du vêtement (**autres que** les jouets) confectionnés par couture ou collage à partir de matières plastiques en feuilles, notamment les tabliers, les ceintures les bavoirs pour bébés et les imperméable et les dessous-de-bras. Les capuchons amovibles en matières plastiques, présentés avec les imperméables en matières plastiques auxquels ils sont destinés, restent classés dans la présente position.

The *Explanatory Notes* to heading 39.26 then go on to list numerous other articles as examples of what is included under heading 39.26.

107. The Tribunal Member's interpretation of the *Explanatory Notes* to heading 39.26 is not reasonable. It unreasonably transforms express language of inclusion into a limitation.[89] Such an

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2011 SCC 61 at para 56), it is particularly appropriate to examine *Sher-Wood* here, where the Tribunal Member expressly relied on her own reasons in that earlier case.

[87] *Sher-Wood*, *supra* note 11 at para 73.

[88] *Ibid* at para 42, only the English version is quoted.

[89] Similarly, in *Canadian Human Rights Commission*, *supra* note 57, this Court held that an administrative interpretation of a statutory provision that ignored the structure of the provision and this Court's guidance on the applicable principles of interpretation (specifically the presumption against tautology) was unreasonable (at paras 35, 38).

interpretation is irreconcilable with the words of the *Explanatory Notes* and contradicts this Court's jurisprudence.

108. When interpreting a standard mortgage clause in which a general term was followed by a list of specific examples, the majority reasons of LaForest J., in *National Bank of Greece (Canada) v Katsikonouris*,[90] explained that the words "include" and "including" are words of extension, not limitation:

> […] the very language used to introduce the list of omissions and misrepresentations confirms that it would be erroneous to view them as exhaustive. In the English version of the clause, the term "including" precedes the list of examples of omissions and misrepresentations, while the term "notamment" is used in the French text. I note that the Concise Oxford Dictionary (7th ed. 1982) defines "include" as "comprise or embrace (thing etc.) as part of a whole", while the Petit Robert 1 (1987) says of "notamment" that it "sert le plus souvent à attirer l'attention sur un ou plusieurs objets particuliers faisant partie d'un ensemble précédemment désigné ou sous-entendu". This meaning finds confirmation in legal lexicons as well: the entries under "include" and "including" in Stroud's Judicial Dictionary (5th ed. 1986) to take but one example, again make it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and, not, to limit them.
>
> As I have noted, the natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.[91] (emphasis added)

109. As such, the Tribunal Member's core justification for why Rule 2(b) could not be invoked to permit the extension of heading 39.26 to include the goods in issue cannot withstand scrutiny on a reasonableness standard.

(b) *The Tribunal Member's subsidiary justifications depend upon the unreasonable interpretation of an inclusion as establishing a limitation*

110. The Tribunal Member's two subsidiary rationales for why the goods in issue do not "meet the description" in heading 39.26 were that "heading No. 39.26 does not describe articles of apparel or clothing accessories that are made up of textile fabrics"[92] and "the presence of plastic padding in […] articles of apparel [made up of textile fabrics] is not relevant."[93] These

[90] [1990] 2 SCR 1029.
[91] *Ibid* at 1041.
[92] *CITT Decision*, *supra* note 2 at para 55, Appellant's Record, Tab 2.
[93] *Ibid* at para 55, citing *Sher-Wood*, *supra* note 11 at paras 72-73. See also Appellant's Factum at para 88.

justifications are also drawn from the Tribunal Member's reasons in *Sher-Wood*[94] and are not reasonable.

111. First, as a preliminary matter, the Respondent submits that the Tribunal Member mechanically applied her conclusions in *Sher-Wood* to the present case, unreasonably ignoring the facts in this case. She affirmed:

> the Tribunal sees no reason to depart from its finding in Sher-Wood that the terms '[o]ther articles of plastics . . .' do not include articles of apparel and clothing accessories made by sewing together *textile* products, but that incorporate plastic components in the form of padding materials.[95]

112. In her analysis, the Tribunal Member stated that "[t]he agreed statement of facts submitted by the parties indicates that the goods in issue are gloves made up of textile fabrics, assembled mostly by stitching. The gloves contain padding made of plastics encased within the external surface."[96]

113. However, the Tribunal Member's description of the goods in issue in her analysis contradicted the Agreed Statement of Facts and the Tribunal Member's own summary of the Agreed Statement of Facts, provided earlier in her reasons. According to the Agreed Statement of Facts – as summarized by the Tribunal Member at paragraph 14 of the same reasons – "the laboratory reports describe the external components of the goods in issue as several pieces of material, composed of varying combinations of textiles and plastics, assembled, for the most part, by stitching."[97] It was therefore not accurate to describe the goods in issue as articles made by sewing together textile products.

114. Second, the language used by the Tribunal Member is confusingly vague. The Tribunal Member may have meant by these two justifications that articles of apparel or clothing accessories that are made up of textile fabrics cannot be classified under heading 39.26 – under Rule 1 – and that the presence of plastic padding in such articles could not change the Rule 1 analysis. These are perfectly unobjectionable propositions – articles consisting of plastic and

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[94] *Sher-Wood*, *ibid* at para 72.
[95] *CITT Decision*, *supra* note 2 at para 57, Appellant's Record, Tab 2.
[96] *Ibid* at para 76 (emphasis added).
[97] *Ibid* at para 14 (emphasis added), citing for the most detailed description per model, Tribunal Exhibit AP-2009-046-20A, Agreed Statement of Facts, Appellant's Record, Tab 6 at 117-133.

textile components cannot be classified under Rule 1. However, if this is what the Tribunal Member meant, these propositions could have provided no justification for refusing to apply Rule 2(b) to extend heading 39.26. Rather, these are precisely the circumstances in which Rule 2(b) *must* effect such an extension, unless a factual finding of deprivation of character is made.

115. If, however, these propositions were meant to justify why Rule 2(b) could not extend heading 39.26 to include the goods in issue, they rest upon an unreasonable foundation. The only rationale suggested for why Rule 2(b) can never extend heading 39.26 to articles of apparel that include components made by sewing together textiles, and that the presence of plastic padding is irrelevant, was the Tribunal Member's unreasonable interpretation of the list of examples provided in *Explanatory Notes* to heading 39.26 as drastically limiting the scope of that heading.

116. In *Sher-Wood*, the Tribunal Member asserted:

> The *Explanatory Notes* to heading No. 39.26 make it clear that, as it relates to articles of apparel and clothing accessories, heading No. 39.26 only includes certain articles of plastics, i.e. those that are made by "sewing or sealing sheets of plastics". There is no language in the *Explanatory Notes* to heading No. 39.26 that suggests that the terms "other articles of plastics" includes articles of apparel and clothing accessories made by sewing together textile products, but that incorporate plastic components in the form of padding materials. Thus, the terms of heading No. 39.26 do not describe the goods in issue.[98]

117. However, this entire analysis depends upon the Tribunal Member's unreasonable interpretation of an inclusion as establishing a limitation.

(c) *The Tribunal Member's narrow interpretation of the Explanatory Note to heading 39.26 conflicts with foreign jurisprudence*

118. The Tribunal Member's assertion that, as it relates to articles of apparel and clothing accessories, heading No. 39.26 only includes those articles of plastics that are made by 'sewing or sealing sheets of plastics'" also conflicts with previously decided foreign jurisprudence. The interpretation of Canada's international obligations under the Convention, which the *Customs Tariff* implements, is governed by the *Vienna Convention on the Law of Treaties*[99] ("*Vienna Convention*"). As this Court affirmed in *Yugraneft Corp. v Rexx Management Corp.*, article

[98] *Sher-Wood, supra* note 11 at para 73.
[99] 23 May 1969, Can TS 1980 No 37.

31(3) of the *Vienna Convention* requires that treaty interpretation "must take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[100] Indeed, the Tribunal Member's decision conflicting with foreign jurisprudence is particularly significant given the purpose of the Convention and the *Customs Tariff* of achieving international harmonization of customs tariff classifications.[101]

119. In its 2010 decision in *Roeckl Sporthandschuhe GmbH & Co. KG v Hauptzollamt München*[102](*Roeckl*) the Court of Justice of the European Union considered whether riding gloves composed of a combination of textiles and plastics should be classified as articles of plastics under heading 39.26 or as articles of textiles under heading 61.16. The riding gloves at issue in that case were manufactured from a composite material made of crocheted fabric and a layer of plastic. During their manufacture the support layer was raised on one side and the raised side was then completely covered with a layer of polyurethane foam. The side of the crocheted fabric that was in contact with the wearer's skin was not raised.[103]

120. For the purpose of the present appeal, the salient features of the *Roeckl* decision are that the riding gloves were articles of apparel, but they were not made by sewing or sealing sheets of plastics. Thus, on the Tribunal Member's interpretation, they could not answer the description in heading 39.26. However, applying Rule 3(b), the ECJ concluded that the riding gloves should be classified under heading 39.26 because "it [was] the layer of polyurethane that g[ave] the riding gloves at issue […] their essential character rather than the textile material."[104] Thus, the gloves were ultimately classified under heading 39.26, by the application of Rule 3(b). This result is completely at odds with the Tribunal Member's interpretation of heading 39.26.

121. The Respondent submits that the fact that the Tribunal Member's decision brings Canadian customs tariff classifications out of step with foreign jurisprudence frustrates the harmonizing purpose of the *Customs Tariff*. This inconsistency with foreign jurisprudence further indicates that the Tribunal Member's decision is unreasonable.

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[100] *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19, [2010] 1 SCR 649 at para 21.
[101] See *Mon-Tex, supra* note 44 at paras 9, 16.
[102] C-123/09 [2010] ECR I-04065 [*Roeckl*].
[103] *Ibid* at para 19.
[104] *Ibid* at paras 41-44.

C. Conclusion

122. Based on the foregoing submissions, the Respondent submits that the *CITT Decision* was unreasonable and therefore properly set aside by the Federal Court of Appeal. The Respondent therefore respectfully submits that the Federal Court of Appeal's decision should be upheld and this appeal dismissed.

PART IV – SUBMISSIONS ON COSTS

123. The Respondent submits that it is entitled to costs pursuant to s. 47 of the *Supreme Court Act*.

PART V – ORDERS SOUGHT

124. The Respondent respectfully requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February, 2016.

Michael Kaylor

for Jennifer Klinck

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

Case Law	Paras Cited
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Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 SCR 559.	35, 53
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Yugraneft Corp. v Rexx Management Corp., 2010 SCC 19, [2010] 1 SCR 649.	118
Doctrine	**Paras Cited**
Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory notes*, Fifth edition (2012), Volume 1: General rules for the interpretation of the harmonized system	6, 7, 69, 70, 76, 77, 78, 79, 80, 84, 85, 93, 94
Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233 at 260.	38

PART VII – STATUTES AND LEGISLATION

***Customs Act* RSC 1985, c. 1 (2nd Supp).**	***Loi sur les douanes*, S.R.C 1985, c. 1 (2e suppl.)**
Appeal to the Canadian International Trade Tribunal 67 (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.	*Appel devant le Tribunal canadien du commerce extérieur* 67 (1) Toute personne qui s'estime lésée par une décision du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.
Publication of notice of appeal (2) Before making a decision under this section, the Canadian International Trade Tribunal shall provide for a hearing and shall publish a notice thereof in the Canada Gazette at least twenty-one days prior to the day of the hearing, and any person who, on or before the day of the hearing, enters an appearance with the Canadian International Trade Tribunal may be heard on the appeal.	*Publication de l'avis d'appel* (2) Avant de se prononcer sur l'appel prévu par le présent article, le Tribunal canadien du commerce extérieur tient une audience sur préavis d'au moins vingt et un jours publié dans la Gazette du Canada, et toute personne peut être entendue à l'appel si, au plus tard le jour de l'audience, elle a remis un acte de comparution au Tribunal.
Judicial review (3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.	*Recours judiciaire* (3) Le Tribunal canadien du commerce extérieur peut statuer sur l'appel prévu au paragraphe (1), selon la nature de l'espèce, par ordonnance, constatation ou déclaration, celles-ci n'étant susceptibles de recours, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 68**.**
Appeal to Federal Court 68 (1) Any of the parties to an appeal under section 67,namely, (a) the person who appealed,	*Recours devant la Cour d'appel fédérale* 68 (1) La décision sur l'appel prévu à l'article 67 est,dans les quatre-vingt-dix jours suivant la date où elle est rendue, susceptible de recours devant la Cour

(b) the President, or (c) any person who entered an appearance in accordance with subsection 67(2), may, within ninety days after the date a decision is made under section 67, appeal therefrom to the Federal Court of Appeal on any question of law. *Disposition of appeal* (2) The Federal Court of Appeal may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing.	d'appel fédérale sur tout point de droit, de la part de toute partie à l'appel, à savoir : a) l'appelant; b) le président; c) quiconque a remis l'acte de comparution visé au paragraphe 67(2). *Issue du recours* (2) La Cour d'appel fédérale peut statuer sur le recours, selon la nature de l'espèce, par ordonnance ou constatation, ou renvoyer l'affaire au Tribunal canadien du commerce extérieur pour une nouvelle audience.
***Customs Tariff*, S.C. 1997, c. 36**	***Tarif des douanes*, L.C. 1997, c. 36**
Classification of goods in the List of Tariff Provisions 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.	*Classement des marchandises dans la liste des dispositions tarifaires* 10 (1) Sous réserve du paragraphe (2), le classement des marchandises importées dans un numéro tarifaire est effectué, sauf indication contraire, en conformité avec les Règles générales pour l'interprétation du Système harmonisé et les Règles canadiennes énoncées à l'annexe.
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.	11 Pour l'interprétation des positions et sous-positions, il est tenu compte du Recueil des Avis de classement du Système harmonisé de désignation et de codification des marchandises et des Notes explicatives du Système harmonisé de désignation et de codification des marchandises et de leurs modifications, publiés par le Conseil de coopération douanière (Organisation mondiale des douanes).

CUSTOMS TARIFF – SCHEDULE: General Rules for the Interpretation of the Harmonized System (the "General Rules")	*TARIF DES DOUANES – ANNEXE: Règles générales pour l'interprétation du système harmonisé*
Classification of goods in the Nomenclature shall be governed by the following principles:	Le classement des marchandises dans la Nomenclature est effectué conformément aux principes ci-après :
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.	1. Le libellé des titres de Sections, de Chapitres ou de Sous-Chapitres est considéré comme n'ayant qu'une valeur indicative, le classement étant déterminé légalement d'après les termes des positions et des Notes de Sections ou de Chapitres et, lorsqu'elles ne sont pas contraires aux termes desdites positions et Notes, d'après les Règles suivantes.
2. (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.	2. a) Toute référence à un article dans une position déterminée couvre cet article même incomplet ou non fini à la condition qu'il présente, en l'état, les caractéristiques essentielles de l'article complet ou fini. Elle couvre également l'article complet ou fini, ou à considérer comme tel en vertu des dispositions qui précèdent, lorsqu'il est présenté à l'état démonté ou non monté.
(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.	b) Toute mention d'une matière dans une position déterminée se rapporte à cette matière soit à l'état pur, soit mélangée ou bien associée à d'autres matières. De même, toute mention d'ouvrages en une matière déterminée se rapporte aux ouvrages constitués entièrement ou partiellement de cette matière. Le classement de ces produits mélangés ou articles composites est effectué suivant les principes énoncés dans la Règle 3.

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:	3. Lorsque des marchandises paraissent devoir être classées sous deux ou plusieurs positions par application de la Règle 2 b) ou dans tout autre cas, le classement s'opère comme suit :
(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 refer 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.	a) La position la plus spécifique doit avoir la priorité sur les positions d'une portée plus générale. Toutefois, lorsque deux ou plusieurs positions se rapportent chacune à une partie seulement des matières constituant un produit mélangé ou un article composite ou à une partie seulement des articles dans le cas de marchandises présentées en assortiments conditionnés pour la vente au détail, ces positions sont à considérer, au regard de ce produit ou de cet article, comme également spécifiques même si l'une d'elles en donne par ailleurs une description plus précise ou plus complète.
(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.	b) Les produits mélangés, les ouvrages composés de matières différentes ou constitués par l'assemblage d'articles différents et les marchandises présentées en assortiments conditionnés pour la vente au détail, dont le classement ne peut être effectué en application de la Règle 3 a), sont classés d'après la matière ou l'article qui leur confère leur caractère essentiel lorsqu'il est possible d'opérer cette détermination.
(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.	c) Dans les cas où les Règles 3 a) et 3 b) ne permettent pas d'effectuer le classement, la marchandise est classée dans la position placée la dernière par ordre de numérotation parmi celles susceptibles d'être valablement prises en considération.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.	4. Les marchandises qui ne peuvent pas être classées en vertu des Règles visées ci-dessus sont classées dans la position afférente aux articles les plus analogues.
5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:	5. Outre les dispositions qui précèdent, les Règles suivantes sont applicables aux marchandises reprises ci-après :
(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character.	a) Les étuis pour appareils photographiques, pour instruments de musique, pour armes, pour instruments de dessin, les écrins et les contenants similaires, spécialement aménagés pour recevoir un article déterminé ou un assortiment, susceptibles d'un usage prolongé et présentés avec les articles auxquels ils sont destinés, sont classés avec ces articles lorsqu'ils sont du type normalement vendu avec ceux-ci. Cette Règle ne concerne pas, toutefois, les contenants qui confèrent à l'ensemble son caractère essentiel.
(b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.	b) Sous réserve des dispositions de la Règle 5 a) ci-dessus, les emballages contenant des marchandises sont classés avec ces dernières lorsqu'ils sont du type normalement utilisé pour ce genre de marchandises. Toutefois, cette disposition n'est pas obligatoire lorsque les emballages sont susceptibles d'être utilisés valablement d'une façon répétée.
6. For legal purposes, 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, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.	6. Le classement des marchandises dans les sous-positions d'une même position est déterminé légalement d'après les termes de ces sous-positions et des Notes de sous-positions ainsi que, mutatis mutandis, d'après les Règles ci-dessus, étant entendu que ne peuvent être comparées que les sous-positions de même niveau. Aux fins de cette Règle, les Notes de Sections et de Chapitres sont également applicables sauf dispositions contraires

CANADIAN RULES	RÈGLES CANADIENNES
1. For legal purposes, 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 for the Interpretation of the Harmonized System, on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.	1. Le classement des marchandises dans les numéros tarifaires d'une sous-position ou d'une position est déterminé légalement d'après les termes de ces numéros tarifaires et des Notes supplémentaires ainsi que, mutatis mutandis, d'après les Règles générales pour l'interprétation du Système harmonisé, étant entendu que ne peuvent être comparés que les numéros tarifaires de même niveau. Aux fins de cette Règle, les Notes de Sections, de Chapitres et de sous-positions sont également applicables sauf dispositions contraires.
2. Where both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence.	2. Lorsqu'un terme canadien et un terme international apparaissent tous deux dans cette Nomenclature, la signification et la portée du terme international auront la préséance.
3. For the purpose of Rule 5 (b) of the General Rules for the Interpretation of the Harmonized System, packing materials or packing containers clearly suitable for repetitive use shall be classified under their respective headings.	3. Au sens de la Règle 5 b) pour l'interprétation du Système Harmonisé, les emballages susceptibles d'être utilisés valablement d'une façon répétée sont classés dans leurs positions respectives.
CUSTOMS TARIFF – SCHEDULE: **Section VII: Plastics and Articles Thereof; Rubber and Articles Thereof**	***TARIF DES DOUANES – ANNEXE:*** **Section VII : Matières plastiques ou ouvrages en ces matières; Caoutchouc et ouvrages en caoutchouc**
Chapter 39 – Plastics and articles thereof	**Chapitre 39 - Matières plastiques et ouvrages en ces matières**
39.24 Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics.	39.24 Vaisselle, autres articles de ménage ou d'économie domestique et articles d'hygiène ou de toilette, en matières plastiques.
39.26 Other articles of plastics and articles of other materials of headings 39.01 to 39.14.	**39.26 Autres ouvrages en matières plastiques et ouvrages en autres matières des nos 39.01 à 39.14.**

3926.20 Articles of apparel and clothing accessories (including gloves, mittens and mitts)	**3926.20 Autres ouvrages en matières plastiques et ouvrages en autres matières des nos 39.01 à 39.14. - Vêtements et accessoires du vêtement (y compris les gants, mitaines et moufles)**
3926.20.92 Other: - Mittens; Non-disposable gloves	3926.20.92 Autres : - Mouffles (mitaines); Gants non jetables
Section XI: Textiles and Textile Articles	**Section XI : Matières textiles et ouvrages en ces matières**
Chapter 62 - Articles of apparel and clothing accessories, not knitted or crocheted	**Chapitre 62 - Vêtements et accessoires du vêtement, autres qu'en bonneterie**
6216.00.00 Gloves, mittens and mitts.	6216.00.00 Gants, mitaines et moufles.
Chapter 63 - Other made up textile articles; sets; worn clothing and worn textile articles; rags	**Chapitre 63 - Autres articles textiles confectionnés; assortiments; friperie et chiffons**
63.03 Curtains (including drapes) and interior blinds; curtain or bed valances.	63.03 Vitrages, rideaux et stores d'intérieur; cantonnières et tours de lits.
63.07 Other made up articles, including dress patterns.	63.07 Autres articles confectionnés, y compris les patrons de vêtements.
Section XX: Miscellaneous Manufactured Articles	**Section XX : Marchandises et produits divers**
Chapter 95 - Toys, games and sports requisites; parts and accessories thereof	**Chapitre 95 - Jouets, jeux, articles pour divertissements ou pour sports; leurs parties et accessoires**
1. This Chapter does not cover: … (u) Racket strings, tents or other camping goods, or gloves, mittens and mitts (classified according to their constituent material); or	1. Le présent Chapitre ne comprend pas : … u) les cordes pour raquettes, les tentes, les articles de campement et les gants, mitaines et moufles, en toutes matières (régime de la matière constitutive);

***Vienna Convention on the Law of Treaties* 23 May 1969,Can. T.S. 1980 No. 37 (à verifier)**	***Convention de Vienne sur le droit des traités,* 23 May 1969 Can. T.S. 1980 No. 37**
Article 31 General rule of interpretation 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.	Article 31. Règle générale d'interprétation 1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but. 2. Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus : a) Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité; b) Tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité. 3. Il sera tenu compte, en même temps que du contexte : a) De tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions; b) De toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité; c) De toute règle pertinente de droit international applicable dans les relations entre les parties.

4. A special meaning shall be given to a term if it is established that the parties so intended	4. Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties.