SUPREME COURT JUSTICES DROP THE GLOVES OVER TARIFF CLASSIFICATION

In wintertime ice hockey is the delight of everyone.

Opening words of the majority decision of the Supreme Court of Canada in *Igloo Vikski*[40]

Canada (Attorney General) v. Igloo Vikski Inc.
2016 SCC 38

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INTRODUCTION

In *Canada (Attorney General) v. Igloo Vikski Inc.*,[41] the Supreme Court of Canada had its first opportunity to consider the appropriate tariff classification of imported goods under the harmonized system schedule ("the HS schedule") to the Customs Tariff.[42] Although it is a given that tax legislation is complex and difficult to interpret, the HS schedule is particularly opaque, perhaps because it reflects the input and wide-ranging interests of more than 180 members of the World Customs Organization (WCO). The *Igloo Vikski* case delves deeply into those complex interpretive rules of tariff classification and provides guidelines on how to apply them.

The issue in this appeal was whether the protective puck-catching and blocking equipment that a hockey goaltender wears on his or her hands (that is, goalie gloves) fell within the tariff classification of "gloves, mittens and mitts" "of any textile fabric" under tariff item 6216.00.00 of the HS schedule, as alleged by the Canada Border Services Agency (CBSA), or "other articles of plastics and articles of other materials" under tariff item 3926.90.90 of the HS schedule, as alleged by Igloo Vikski.[43] There was no dispute that the hockey gloves were made of both textile and plastics, and both types of material were important in the construction of the glove.

40 Paying tribute to the well-known opening of the judgment in *Miller v. Jackson*, [1977] EWCA Civ. 6, per Lord Denning MR: "In summertime village cricket is the delight of everyone."

41 2016 SCC 38.

42 Customs Tariff, SC 1997, c. 36, as amended.

43 As the Supreme Court put it, supra note 41, at paragraph 1, the question is whether the goaltender "blocks and catches the puck with a 'glove, mitten or mitt,' or with an 'article of plastics.'"

At stake was whether Igloo Vikski could claim any refund for duties paid on the imported gloves.

The Canadian International Trade Tribunal (CITT) found in favour of the CBSA and ruled that the hockey goalie gloves were "gloves, mittens and mitts" "of any textile fabric."[44] On appeal, the Federal Court of Appeal found that the CITT misapplied the rules for interpreting the HS schedule and that the goalie gloves prima facie fell within both of the tariff classifications for textiles and plastics. Accordingly, the court sent the matter back to the CITT, instructing the tribunal to apply a tie-breaker rule to determine the correct classification of the articles.[45] In the deciding playoff game before the Supreme Court of Canada, in an 8-1 decision, the court supported the CITT's finding that goalie gloves are properly classified as "gloves, mittens and mitts" "of any textile fabric."

Tariff Classification Regime

In considering the Supreme Court's interpretation of the HS schedule, it is important to have a basic understanding of the structure of the HS schedule. As noted by the court,

> [t]he Harmonized System uses an eight-digit classification system for tariff classifications, which is incorporated into the Schedule to the *Customs Tariff*. That system proceeds, within sections of the Schedule, from general to specific classifications via chapters, headings, subheadings and tariff items. For example, within Section I ("Live Animals; Animal Products") is found the eight-digit tariff item No. 0302.12.40, applicable to fresh or chilled sockeye salmon. The first two digits of that tariff item (03) denote the item as falling within Chapter 3 ("Fish and Crustaceans, Molluscs and Other Aquatic Invertebrates"); the first four digits (03.02) denote the heading ("Fish, fresh or chilled, excluding fish fillets . . ."); the first six digits (0302.12) denote the subheading ("Pacific Salmon"); and the full eight-digit tariff item denotes the specific good ("Sockeye").
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> The Schedule to the *Customs Tariff* also contains "General Rules for the Interpretation of the Harmonized System." Section 10(1) of the *Customs Tariff* directs that "the classification of imported goods under the tariff item shall, unless otherwise provided, be determined in accordance with the General Rules."
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> The General Rules are comprised of six rules governing the classification of goods under the Harmonized System. According to the jurisprudence of the Federal Court of Appeal and the CITT, these rules are to be applied in a "cascading" fashion. . . .
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> In addition to the Harmonized System and the General Rules, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* published and amended from time to time by the World Customs Organization also inform the classification of imported goods. Specifically, s. 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings employed by the Harmonized System, "regard shall

44 *Igloo Vikski Inc. v. President of the Canada Border Services Agency*, 2013 CanLII 4408 (CITT).

45 *Igloo Vikski Inc. v. Canada (Border Services Agency)*, 2014 FCA 266.

> be had" to the *Explanatory Notes*. While, therefore the *Explanatory Notes* (unlike the Harmonized System and the General rules themselves) are not binding, they must be at least considered in determining the classifications of goods imported into Canada.[46]

The HS schedule also includes chapter notes and section notes that have the force of law and must be applied. Thus, in interpreting the HS schedule, an importer must (1) look to the description of the items in the schedule, as modified by any chapter notes or section notes; (2) apply the six "General Rules for the Interpretation of the Harmonized System" and the related "Canadian Rules";[47] and (3) have regard to the WCO's explanatory notes.[48]

Lower Court Decisions

The CITT Decision

The CITT found that the imported gloves were classifiable under tariff item 6216.00.00 because of the interaction between rules 1 and 2(b) of the general rules.

Under rule 1 of the general rules, "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes" and, generally, if that is not determinative, according to rules 2 through 6.

Under note 1 to chapter 62 of the HS schedule (which includes heading 62.16), chapter 62 "applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles." Because the gloves at issue in *Igloo Vikski* were "made up" in part of textile fabrics other than wadding or knitted or crocheted fabric, the CITT found that this chapter note was satisfied.

In considering whether the gloves could be classified under heading 62.16, the CITT had regard to the WCO's explanatory notes to chapter 62, as required under section 11 of the Customs Tariff. Of note,

> [t]he classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example . . . plastics. . . . Where, however the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes . . . , or failing that, according to the General Interpretive Rules [bold emphasis in original].[49]

The parties acknowledged that the padding, made predominantly of plastics encased in the exterior surface of the gloves, constituted "more than mere trimming." Since the extent of the plastics in the gloves exceeded what was allowed under the WCO's explanatory notes for classification in chapter 62, the CITT decided that it could not classify the gloves under heading 62.16 on the application of rule 1 alone.

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46 *Igloo Vikski* (SCC), supra note 41, at paragraphs 5-8.

47 These rules are set out in a schedule to the Customs Tariff, supra note 42.

48 World Customs Organization, *Explanatory Notes to the Harmonized Commodity Description and Coding System*, 5th ed. (Brussels: WCO, 2012) (herein referred to as "the explanatory notes").

49 Explanatory notes to chapter 62, as quoted in *Igloo Vikski* (CITT), supra note 44, at paragraph 33.

Because "the relative Chapter Notes" did not resolve the classification, the above-quoted portion of the explanatory notes directed the CITT to classify the gloves in accordance with the general rules. Accordingly, the CITT moved to general rule 2(b), which applies to composite goods. Rule 2(b) states:

> 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 material or substances. Any references 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.

Specifically, the CITT applied rule 2(b) to resolve how to classify these goalie gloves, made partly of textile fabrics and partly of plastics. On the basis of its interpretation of the explanatory notes to rule 2(b),[50] the CITT found that this rule could have the effect of extending heading 62.16 beyond gloves of only textile products, to gloves of textile fabrics and plastics, as long as the composite good fit within the description of heading 62.16, as required under rule 1. That is, the addition of the plastics could not deprive the composite good (the goalie glove) of the character of goods of the kind mentioned in the heading.

The CITT found that the addition of the plastics to the textile fabrics did not deprive the composite goods of their essential character as gloves within the description of heading 62.16. The heading encompasses gloves made up of textile fabrics, assembled by stitching or sewing. In the CITT's view, these characteristics gave the gloves their character as goods fitting under this heading. The addition of plastic padding materials for protection did not so fundamentally alter the nature of the goods as to deprive them of their character as goods of the kind described in the heading.[51]

Igloo Vikski contended that the gloves could be prima facie classifiable under both headings 62.16 and 39.26, requiring the application of the tiebreaker rule (general rule 3), specifically rule 3(b), which provides:

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50 In addition to supplying guidance on how to interpret the tariff items described in the HS schedule, the explanatory notes also provide guidance on the interpretation of the General Rules. As explained under explanatory note XI, the effect of general rule 2(b) is to extend a heading referring to a material or substance to a composite good consisting partly of that material or substance. As explained under explanatory note XII, a heading cannot be widened to cover a composite good that does not answer the description in the heading. Where the addition of another material or substance deprives the composite goods of the character of the goods mentioned in the heading, the composite good cannot fit within that heading.

51 In this regard, the CITT adopted its analysis from *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (February 10, 2011), docket no. AP-2009-045 (CITT). In that case, the CITT considered the tariff classification of hockey goalie gloves and blockers similar to those at issue in the *Igloo Vikski* case.

> 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: . . .
>
> (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.

According to Igloo Vikski, the plastic padding gave the gloves at issue "their main protective attributes or essential character, thus making them fall in heading No. 39.26 pursuant to Rule 3(b)."[52] However, the CITT found that resort to rule 3(b) was not necessary since, consistent with its decision in *Sher-Wood Hockey*,[53] it found that the hockey goalie gloves were not prima facie classifiable under heading 39.26. The CITT interpreted the explanatory notes to heading 39.26 as restricting this heading to certain apparel or clothing accessories of plastics covered by headings 39.01 to 39.14—specifically those made by sewing or sealing plastic sheets. Since the plastic components in the hockey goalie gloves were not made by sewing or sealing plastic sheets, the CITT found that the gloves could not fit within heading 39.26.

However, after finding that the plastics in the gloves did not meet the criteria of heading 39.26, thus effectively resolving the issue, the CITT went on to make the following unfortunate comments about the manner in which general rules 1 and 2 were to be applied:

> Therefore, the Tribunal finds that, as a matter of law and on the facts of this appeal, the *Explanatory Notes* to Chapter 62 and Rule 2 of the *General Rules* cannot have the effect of broadening the scope of heading No. 39.26 contrary to the terms of and notes relative to that heading. In other words, heading No. 39.26 cannot become relevant in the classification at issue only by virtue of the *Explanatory Notes* to Chapter 62 and Rule 2(b).[54]

To the extent that the CITT's intended meaning is that, if no part of a composite good meets the description of a heading in the HS schedule, there is no scope for the application of rule 2(b), this statement seems uncontroversial. However, if the intended meaning is that, unless a composite good prima facie fits within a heading

52 *Igloo Vikski* (CITT), supra note 44, at paragraph 42.

53 *Sher-Wood Hockey*, supra note 51. In *Sher-Wood Hockey*, the CITT referred to a line of jurisprudence dealing with cases where two mutually exclusive legal notes apply, and held that the goods in issue could not be prima facie classifiable under the two competing headings. In *Sher-Wood Hockey*, as in *Igloo Vikski*, note 1(h) to section XI (which includes chapter 62 and heading 62.16) excludes from this section "[w]oven fabrics, felt or nowovens, impregnated, coated, covered, or laminated with plastics, or articles thereof, of Chapter 39." Note 2(m) to chapter 39 (in effect at the time of the importations and currently found in note 2(p) to chapter 39) excludes from this chapter (containing heading 39.26) "[g]oods of Section XI (textiles and textile articles)." See in particular paragraphs 33-40 of *Sher-Wood Hockey*.

54 *Igloo Vikski* (CITT), supra note 44, at paragraph 68.

description in the HS schedule, rule 2(b) cannot be applied, the statement appears to be contrary to both the language of the rule and the manner in which it was applied by the CITT in interpreting heading 62.16. If that view were to prevail, rule 2(b) could not expand upon the limitations of rule 1, rendering rule 2(b) meaningless and without any practical effect.

The Federal Court of Appeal Decision

The Federal Court of Appeal found that

> the CITT's interpretation of Rule 2(b) is 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. This reasoning contradicts the cascading nature of the General Rules.[55]

In the Court of Appeal's view, the plastic materials in the gloves did not need to meet the description found in heading 39.26 under rule 1. The court (and the dissenting opinion in the Supreme Court decision, discussed below) sided with Igloo Vikski's view that the goalie gloves were prima facie classifiable under both headings 62.16 and 39.26, and accordingly held that the CITT should have applied the tie-breaker rule in general rule 3 to determine the classification of the gloves. The court allowed Igloo Vikski's appeal, set aside the CITT's decision, and referred the case back to the CITT for adjudication in accordance with the court's analytical framework.

The Supreme Court Decision

The Majority

The Supreme Court disagreed with the Federal Court of Appeal's analytical guidance and applied the CITT's reasoning. In particular, the court fundamentally disagreed with the Court of Appeal's view that the general rules should be applied in a "cascading" fashion, stating that

> the term "cascading" does not quite describe their application. While it is the case that the General Rules are to be applied in a set order, it is more helpful to understand that order as a function of a hierarchy rather than a cascade.[56]

The Supreme Court set out a detailed framework for applying the general rules. Where the application of rule 1 on its own did not conclusively determine the classification of the imported gloves, the other general rules became relevant for the classification process. Since the gloves were made of a mix of materials or substances (textiles and plastics), and no heading specifically describes the composite good,

55 *Igloo Vikski* (FCA), supra note 45, at paragraph 11.

56 *Igloo Vikski* (SCC), supra note 41, at paragraph 7.

rule 2 should be applied *in conjunction with* rule 1 to determine the (possibly prima facie) classification of such goods.

As noted above, rule 2(b) applies where goods (such as the gloves at issue) consist of more than one substance or material, and states that a reference in a heading 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 composite good is classified, at least prima facie, as if it were a uniform good (without regard to the other material or substance). Explanatory notes XI to XIII to rule 2(b) extend any heading to include goods consisting partly of that material or substance, as long as the addition of the other material or substance does not deprive the goods of their essential character for the purposes of fitting within that heading.

If, after the application of rules 1 and 2, the good is found to be prima facie classifiable under only one heading, the inquiry ends and the good is classified under that heading. That is how the CITT arrived at its classification of the gloves under heading 62.16, and the Supreme Court agreed with this reasoning. Rule 2(b) could not be used to extend the application of heading 39.26 to the gloves where no part of the gloves, specifically the embedded protective plastics, could fit within the description of heading 39.26 *applying rule 1*. In this regard, the Supreme Court specifically took issue with the Federal Court of Appeal's decision.

If goods are prima facie classifiable under more than one heading under rules 1 and 2, then by operation of rule 2(b), rule 3 would be applied to resolve the classification conflict. Resort to general rule 3 was unnecessary in this case, according to the CITT and the majority of the Supreme Court, because the goods were not prima facie classifiable under heading 39.26.[57]

The Dissenting Opinion

In dissent, Côté J agreed with the Federal Court of Appeal and found that the function of rule 2(b) was to include the gloves prima facie under heading 39.26 because the plastic component fit, in part, within the description in that heading. In Côté J's view, the CITT's finding "that Rule 1 must be satisfied as a prerequisite to the application of Rule 2(b) is contrary to the Explanatory Notes to Rule 2(b) and is therefore unreasonable."[58]

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57 The last sentence of rule 2(b) states, "The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3." However, the first sentence of rule 3 clearly provides that its operation is conditional, stating that the rule applies only "[w]hen by application of Rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings." Since the Supreme Court confirmed that classification of composite goods can be resolved by general rule 2(b) alone, this interpretation deprives the last sentence of rule 2(b) of any effect. While this interpretation is contrary to the canon of construction that every term in a provision should be given meaning, given the inconsistent guidance provided in the last sentence of rule 2(b) and the first sentence of rule 3, in my view the Supreme Court's interpretation resolves this conflict appropriately and is correct.

58 *Igloo Vikski* (SCC), supra note 41, at paragraph 66.

Rather, the CITT should have considered

> whether Rule 2(b) could extend [heading 39.26] to include the gloves (per Explanatory Note (XI) to Rule 2(b)), and whether doing so would impermissibly widen the heading to cover goods that cannot be regarded as answering the description in the heading (per Explanatory Note (XII)).[59]

Extending the heading in this manner would be impermissible if the addition of the textile part deprived the gloves of the character of goods mentioned in heading 39.26.

According to Côté J, the CITT's error in not applying rule 2(b) to extend heading 39.26 was inconsistent with the tribunal's approach in using rule 2(b) to extend heading 62.16 to allow the gloves to fit under this heading. Since the plastics used in the gloves constituted more than mere trimming, rule 1 alone was insufficient to classify the gloves under either heading 62.16 or any other heading. The CITT had to resort to rules 1 and 2(b) to extend heading 62.16 to the gloves, and it should have taken the same approach with respect to heading 39.26.[60]

Finally, Côté J found that the CITT's interpretation of the explanatory notes to heading 39.26, to the effect that the heading applied only to plastic components made by "sewing or sealing plastic sheets," was unreasonable. The relevant part of the explanatory notes reads as follows:

> 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:
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> (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 plastic raincoats to which they belong [bold emphasis in original, underline added by the court].[61]

The CITT interpreted this note to mean that only those items specifically listed in the note could be included in the category. Côté J took a contrary view and found that the list was inclusive and not exhaustive. She noted that under the usual canons of interpretation, the words "include" and "including" are "terms of extension, designed to enlarge the meaning of preceding words, and not to limit them."[62] She also pointed out that elsewhere in the explanatory notes, where the intention was to exclude goods from a heading, express language was used, such as "[h]eadings 39.01

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59 Ibid.

60 Ibid., at paragraph 67.

61 Explanatory notes to heading 39.26, as quoted in *Igloo Vikski* (SCC), supra note 41, at paragraph 68.

62 *Igloo Vikski* (SCC), supra note 41, at paragraph 71, quoting *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 SCR 1029, at 1041.

to 39.11 apply only to goods of a kind produced by chemical synthesis [underline added by the court]."[63] Côté J found that

> read in context, the term "include" does not demonstrate an intention to restrict the heading to the list that follows. In other words, just because the gloves are not made by "sewing or sealing sheets of plastics" does not mean they are excluded from heading No. 39.26. The Tribunal's restrictive interpretation was contrary to both an ordinary and contextual reading of the Explanatory Note and is therefore unreasonable.[64]

COMMENT

In my view, the main difference between the reasons of the minority and the majority in the Supreme Court's judgment lies in their respective approaches to the CITT's interpretation of the explanatory notes to heading 39.26. Côté J applied the normal statutory canons of interpretation and found the CITT's interpretation of the word "including" as meaning "only" to be unreasonable. The majority found that the CITT properly considered the canons of interpretation and held that, while other interpretations were open to the CITT, its finding, based on the structure of the explanatory notes, that the listing in the note was intended to be exhaustive, "is far from unreasonable."[65]

The majority's decision to accept the CITT's interpretation of the explanatory notes was likely informed by the Federal Court of Appeal's view, expressed in another case, that the Customs Tariff

> is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the court is being asked to give legal meaning to technical words that are well beyond its customary mandate. Furthermore, there are unique Canadian and international rules of interpretation applicable to the *Customs Tariff* that bear little resemblance to the traditional canons of statutory construction. Therefore, considerable deference should be accorded to the Tribunal's decisions and litigants who appeal tariff decisions to this court [the Federal Court of Appeal] should be aware that they have a tough hill to climb.[66]

Although the majority and the minority of the Supreme Court appear to approach the application of general rule 2(b) differently, in my view their approaches are fundamentally the same, and the difference in opinion arose from their differing views as to whether the plastics used in the goalie gloves fell within the description found in heading 39.26, as modified by the explanatory notes to this heading.

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63 *Igloo Vikski* (SCC), supra note 41, at paragraph 72.

64 Ibid., at paragraph 74.

65 Ibid., at paragraph 50.

66 *Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 NR 381, at paragraph 5 (FCA), quoted in *Igloo Vikski* (SCC), supra note 41, at paragraph 30.

In any event, we now have clear guidance on the correct interpretation of what is meant by the statement in general rule 2(b) that "[a]ny references 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."

As determined by the CITT and the Supreme Court majority, this sentence is intended to impart the following meaning: A heading (such as 62.16) includes not only goods that, in their entirety, meet the description in the heading, but also a composite good (such as a goaltender's glove made up of textile products and embedded plastic) consisting of a particular material or substance (textiles) that, when taken alone, fits within that heading, irrespective of whether the composite good (the glove) fits within that description. That is, the heading can be extended to the composite good provided that another material or substance (such as embedded plastic) does not deprive the good of the character of goods of the kind mentioned in the heading.

However, if a composite good has a characteristic, material, or substance (such as plastic) that is identified in a heading (such as 39.26), but no part of the composite good (such as the embedded plastic) would in its entirety (viewed alone) fit within the description in the heading, then rule 2(b) cannot extend the heading to apply to the composite good. In the case at hand, since the embedded protective plastic was not made by sewing or sealing plastic sheets, the plastic portion could not fit within heading 39.26, pursuant to the narrow reading of the explanatory notes to heading 39.26 as applied by the CITT and supported by the Supreme Court majority, exercising considerable deference toward the CITT's interpretation.

Jamie Wilks