

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201015

Docket: A-296-19

Citation: 2020 FCA 171

**CORAM: NEAR J.A.
DE MONTIGNY J.A.
LEBLANC J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

IMPEX SOLUTIONS INC.

Respondent

Heard at Ottawa, Ontario, on September 14, 2020.

Judgment delivered at Ottawa, Ontario, on October 15, 2020.

REASONS FOR JUDGMENT BY:

LEBLANC J.A.

CONCURRED IN BY:

**NEAR J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] Before the Court is an appeal brought under s. 68 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) (Act) from a decision of the Canadian International Trade Tribunal (Tribunal), dated May 27, 2019, regarding the tariff classification of disposable shoe covers (model No. KBCP525) imported by the respondent (Appeal No. AP-2017-065).

[2] The Tribunal found that the goods in issue were classifiable under tariff item No. 3926.20.95 of the Schedule to the *Customs Tariff*, S.C. 1997, c. 36 (Tariff Schedule) as other articles of apparel and accessories, of plastics combined with nonwovens, as opposed to tariff item No. 6307.90.99, which is applicable to other made up articles, including dress patterns, of other textile materials, as determined by the taxing authority, the Canadian Border Services Agency (CBSA).

I. Background

[3] The goods in issue were imported in 2015 and 2016 under tariff item No. 6307.90.99. This classification was in accordance with the CBSA's Trade Compliance Verification Report of April 16, 2014. The applicable tariff for that item is 18%.

[4] In early 2017, the respondent, pursuant to subsections 59(1) and 60(1) of the Act respectively, unsuccessfully sought a redetermination and then a further redetermination of that decision, claiming that the goods in issue ought to be classified under tariff item No. 3926.20.95. Goods imported under that tariff item are subject to a lower tariff of 6.5%.

[5] The parties agree that the goods in issue are composed of a layer of thermally bonded spunbond polypropylene (PP), a textile, laminated on one side to a sheet of chlorinated polyethylene (CPE), a plastic. According to the record, these goods "are produced from a rectangular-shaped cut-out of that material which is folded at the shorter ends and bonded by heat-sealing" and are "designed to be worn over shoes and have applications in clean rooms,

food processing, real estate, health care, construction, manufacturing, energy and research and development” (Tribunal decision at paras. 12-13).

[6] Before addressing the specifics of the case, it is useful to review the background against which tariff classification decisions are made.

[7] The *Customs Tariff* implements Canada’s obligations under the *International Convention on the Harmonized Commodity Description and Coding System* (Convention). The main purpose of the Convention is to provide a standard classification system among state parties so as to “foster stability and predictability in classification practices internationally” while at the same time permitting state parties to set their own rates of duty “in conformance to their individual international trade obligations” (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 at para. 4 (*Igloo Vikski*)).

[8] In order to achieve that goal, the Convention sets out rules of interpretation, as evidenced by sections 10 and 11 of the *Customs Tariff*, which incorporate these rules into Canadian domestic law:

General	Dispositions générales
...	[...]
Classification of goods in the List of Tariff Provisions	Classement des marchandises dans la liste des dispositions tarifaires
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	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

for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.

générales pour l'interprétation du Système harmonisé et les Règles canadiennes énoncées à l'annexe.

...

[...]

Interpretation

Interprétation de la liste des dispositions tarifaires

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 Cooperation 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).

[9] The Harmonized System referred to in subsection 10(1) uses an eight-digit classification system divided into sections and chapters, with each chapter listing goods under headings and subheadings associated to a specific tariff item. Its workings have been illustrated as follows in *Igloo Vikski* (at para. 5):

... 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. 0302.13.40, 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 (0302.13) denote the subheading (“Pacific Salmon”); and the full eight-digit tariff item denotes the specific good (“Sockeye”).

[10] The General Rules for the interpretation of the Harmonized System (General Rules) are, for their part, comprised of six rules. Classification begins with Rule 1, which provides in part that “for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes” (see also *Igloo Vikski* at para. 20). If classification may be determined on an application of Rule 1 alone, then there is no need to consider the other rules (*Igloo Vikski* at para. 21).

[11] Although the Opinions and Explanatory Notes contemplated by section 11 of the Tariff Schedule must be considered in determining the classification of goods imported into Canada, they are not, contrary to Chapter Notes, binding (*Igloo Vikski* at para. 8).

[12] Here, the parties claim that the classification of the goods in issue may be determined on an application of Rule 1 alone and that, therefore, there is no need to consider the remaining interpretative rules of the Harmonized System.

II. The Competing Classification Provisions

[13] Tariff item No. 3926.20.95 – the one found applicable to the goods in issue by the Tribunal – is found in Chapter 39 (Plastics and Articles thereof) of Section VII of the Tariff Schedule (Plastics and Articles thereof; Rubber and Articles thereof), which is comprised of two chapters (39 and 40). It refers more particularly to goods found under subheading No. 3926.20 (Articles of apparel and clothing accessories (including gloves, mittens and mitts)) of heading

No. 39.26 (Other articles of plastics and articles of other materials of headings Nos. 39.01 to 39.14).

[14] The full eight-digit tariff item number (3926.20.95) denotes the specific goods under that tariff item, that is “[o]ther articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt.”

[15] Tariff item No. 6307.90.99 – the one found applicable to the goods in issue by the CBSA – is found in Chapter 63 (Other made up textile articles; sets; worn clothing and worn textile articles; rags) of Section XI of the Tariff Schedule (Textiles and Textiles Articles), which is comprised of fourteen chapters (50 to 63). It refers more particularly to goods found under subheading No. 6307.90 (Other) of heading No. 63.07 (Other made up articles, including dress patterns).

[16] The full eight-digit tariff item number (6307.90.99) denotes the specific goods under that tariff item, that is other made up articles, including dress patterns, of other textile materials.

[17] As previously indicated, pursuant to Rule 1, classification is determined *inter alia* according to the terms of any relative Section or Chapter Notes (*Igloo Vikski* at para. 20).

[18] Note 8(a) to Section XI provides as follows:

8. For the purposes of Chapters 50 to 60:

(a) Chapters 50 to 55 and 60, and, except where the context otherwise requires, Chapters 56 to 59 do not apply to goods made up within the meaning of Note 7 above [.]

[19] Note 1 to Chapter 39 specifies that:

1. Throughout the Nomenclature the expression “plastics” means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout the Nomenclature any reference to “plastics” also includes vulcanised fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

III. The Tribunal’s Decision

[20] The Tribunal began its Rule 1 analysis by considering Chapter 64 of Section XII of the Tariff Schedule, as this chapter is specific to footwear. The Tribunal concluded that the goods in issue did not meet the threshold for falling under that chapter because they were without “applied soles”, that is without a separate piece of material attached in some way to the upper (Tribunal decision at para. 37).

[21] Having so concluded, the Tribunal held that the shoe covers had to be classified according to their constituent material. It found, by referring to the definition of “nonwoven” in the Explanatory Notes to heading No. 56.03, that the material of the “upper” of the goods in issue, that is the material “having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet

stays or similar attachments,” was the PP nonwoven and that the constituent material of the “outer sole” was the CPE layer (Tribunal decision at paras. 40-41).

[22] Then, the Tribunal considered whether the goods in issue could be classified under tariff item No. 6307.90.99, as previously done by the CBSA. To that end, it first considered whether the goods fell under heading No. 63.07. For that to be the case, the goods would have to be (a) “made up”, (b) of any textile fabric, and (c) not more specifically described in other chapters of Section XI or elsewhere in the nomenclature (Tribunal decision at para. 43).

[23] The Tribunal agreed with the CBSA that the goods in issue were “made up” articles within the meaning of Note 7(f) to Section XI, that is articles “assembled by sewing, gumming, or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end of two or more textiles assembled in layers, whether or not padded)” (see Tribunal decision at para. 44).

[24] However, the Tribunal dismissed the CBSA’s contention that the second and third conditions had also been satisfied. The CBSA was of the view that the goods’ constituent material – a combination of the PP nonwoven and the CPE layer – could be classified under heading No. 56.03 as “[n]onwovens, whether or not impregnated, coated, covered or laminated,” but that because the goods themselves, on the basis of Note 8(a), were excluded from that heading, they satisfied the third condition for being classified under tariff item No. 6307.90.99, as they were not more specifically described in other chapters of Section XI or elsewhere in the nomenclature.

[25] The Tribunal found otherwise. It held that heading No. 56.03 was not applicable since, pursuant to Note 8(a), Chapters 56 to 59 of Section XI do not apply to the goods in issue as they are “made up” articles. As a result, it determined that any further analysis as to whether the goods’ constituent material could be defined as a nonwoven of heading No. 56.03 was moot because that heading simply did not apply (Tribunal decision at para 47).

[26] Then, the Tribunal considered whether the constituent materials of the goods could nonetheless be classified under heading No. 63.07 as “any textile fabric”. In so doing, it held that consideration ought to be given to the purpose served by the CPE layer, a non-textile fabric. Based on paragraph 1 of the Explanatory Notes to Chapter 63, the Tribunal noted that “made up” articles of textile could contain plastic provided the plastic did not constitute more than mere trimmings or accessories. Being of the view that the CPE layer of the goods in issue played an important role in providing “traction, durability and protection from water” to the shoe covers, it found that said layer constituted more than a mere trimming or accessory (see Tribunal decision at paras. 48-50).

[27] Before making a final decision on the applicability of heading No. 63.07, the Tribunal considered whether the goods in issue could be more specifically described elsewhere in the nomenclature. To that end, it considered the applicability of heading No. 39.26 and found that the shoe covers’ constituent material was comprised of plastics within the meaning of said heading. In concluding as it did on that point, the Tribunal held that the fact that the PP nonwoven was not, as described by paragraph (b) under “plastics and textile combinations” in the Explanatory Notes to Chapter 39, “completely embedded in plastics or entirely coated or

covered on both sides with such material” did not preclude the application of heading No. 39.26 since the list of products of which paragraph (b) is a part is non-exhaustive (see Tribunal decision at paras. 52-55).

[28] After concluding that the constituent material of the goods in issue – a nonwoven laminated with plastics – was more specifically described in heading No. 39.26, the Tribunal determined that the goods came within the purview of tariff item No. 3926.20.95 as other articles of apparel and clothing accessories, of plastics combined with nonwovens and were, pursuant to the Explanatory Notes to Chapter 63, excluded from heading No. 63.07 (see Tribunal decision at paras. 56-58).

IV. Issues and Standard of Review

[29] Pursuant to subsection 68(1) of the Act, tariff classification decisions made under section 60 or 61 of the Act can be appealed to this Court, but on questions of law only.

[30] Recently, in *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151 (*Neptune*), also a tariff classification matter, this Court discussed the impact of the judgment of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*) on statutory appeals, holding that that judgement had “fundamentally changed” how this Court is to conduct such appeals:

[13] The decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) fundamentally changed how this Court is to conduct appeals pursuant to a statutory right of

appeal. The word *appeal* has been restored to its plain and ordinary meaning and the standard of review applicable in judicial review and its associated principles are no longer to be applied to statutory appeals (at paras. 36-38). The appellate standards apply (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) and therefore the standard of review on questions of law is correctness (*Vavilov* at para. 37). Prior jurisprudence which applied judicial review criteria must be carefully examined to determine its degree of continued applicability. [Emphasis in original.]

[31] The Court then described the right of appeal established under subsection 68(1) of the Act as “circumscribed”, meaning that in order for the Court’s appellate jurisdiction to be triggered, “[a] question of law must be identified” (*Neptune* at para. 14).

[32] The appellant contends that this appeal raises such questions, as the Tribunal erred in its interpretation of Note 8(a) to Section XI and/or by not considering Note 1 to Chapter 39. It claims that while it has long been considered that the Tribunal’s tariff classification decisions, even when the Tribunal was interpreting the Tariff Schedule, were subject to a standard of reasonableness given its expertise on these matters, those decisions are now reviewable on a standard of correctness as a result of *Vavilov*.

[33] As the respondent submits, the rebuttal of the presumption of reasonableness review, which was crystallized in *Vavilov*, does not automatically engage a correctness standard of review as the presence of a statutory appeal mechanism signals that a reviewing court is to perform an appellate function and apply, in so doing, the standards of review described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 23 (*Housen*). Those standards are the correctness standard for questions of law and the deferential standard of palpable and overriding

error for questions of fact and of mixed fact and law where the legal principle is not readily extricable (*Vavilov* at para. 37).

[34] The Respondent stresses that questions of tariff classification, insofar as they entail the application of a legal scheme to a set of facts, are questions of mixed fact and law, which are reviewable on a deferential standard of review. In support of this assertion, at paragraph 41 of its memorandum, the respondent *inter alia* quotes from paragraph 41 of this Court's decision in *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417, 11 T.T.R. (2d) 449 which reads as follows:

It is not contested that the CITT is an expert tribunal and that, while it does not have the benefit of a privative clause, questions of tariff classification fall squarely within the heart of its expertise. Such questions are questions of mixed fact and law, involving as they do the application of a legal scheme to a set of facts. While the CITT has no relative expertise vis-à-vis the Court in terms of the interpretation of legal texts of general application, it does have the advantage of long experience in applying the Schedule of the *Customs Tariff* to a whole range of goods. On balance, the appropriate standard of review is reasonableness *simpliciter*: see *Yves Ponroy Canada v. Canada (Deputy Minister of National Revenue M.N.R.)*, [2000] F.C.J. No. 1202 (F.C.A), at para. 4 to 6. [Emphasis added.]

[35] The respondent claims that the appellant has failed to identify any readily extricable legal principle on which to base its appeal and trigger the application of a standard of correctness to the Tribunal's interpretation and application of the relevant Tariff Schedule provisions. In the alternative, that is if this Court determines that the correctness standard applies, the respondent contends that the Tribunal's decision is correct and must stand.

[36] As noted above, this Court's appellate jurisdiction is "triggered" by the identification of a question of law. In this type of appeal, the challenge is most often to discern extricable questions of law from questions of mixed fact and law (*Neptune* at para. 16). In *Neptune*, at paragraph 16, the Court reproduced the following passage from *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 (*Emerson Milling*), where the Court had provided examples of what constitutes an extricable question of law embedded in a question of mixed fact and law:

26 [...] Extricable questions of law/legal standards are best regarded as questions of law of the sort intended by Parliament to be reviewed by this Court under subsection 41(1). In a number of cases, this Court determined appeals where extricable questions of law/legal standards (in addition to other legal and jurisdictional questions) were present:

- *Canadian National Railway v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264 (F.C.A.) (CN 2010) and *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 363, 383 N.R. 349 (F.C.A.) (CN 2008). What matters fall into certain defined terms in the Act, triggering the revenue cap in the Act? The extricable legal question was the definition of the defined terms in the Act.
- *Dreyfus*, above at para. 18. Two issues were raised that involve extricable questions of law, namely statutory interpretation. Does the "evaluation approach," a methodology adopted by the Agency for deciding questions under sections 113-116, deviate from the proper interpretation of the sections? Did the Agency fail to consider matters that the statute requires it to consider?
- *Canadian National Railway v. Richardson International Ltd.*, 2015 FCA 180, 476 N.R. 83 (F.C.A.). Do the facts of the case constitute a "line of railway" and a "connection" for the purposes of triggering the carrier's interswitching obligations? The extricable question of law was the meaning of these terms.
- *Canadian National Railway v. Viterra Inc.*, 2017 FCA 6 (F.C.A.). On the facts, were the obligations of the carrier under section 113 triggered? Was the carrier's rationing methodology a confidential contract under subsection 113(4) of the Act?

[37] In determining whether an appeal undertaken under subsection 68(1) of the Act raises an extricable question of law, the appeal's "essential character" or "true substance" must be identified by looking at the notice of appeal and sometimes to the appellant's memorandum of fact and law when the grounds set out in a notice of appeal are articulated in a different way. What ultimately matters is the substance of what is being raised, not the form in which it is presented (*Emerson Milling* at paras. 29-30; see also *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50; and *Neptune* at para. 17).

[38] In *Neptune*, the issues in the appeal concerned the interpretation of heading No. 03.06 of the Tariff Schedule and, in particular, the scope of the words "fit for human consumption". The Court held that those issues "engaged extricable questions of law" that were to be reviewed on a correctness standard (*Neptune* at para. 18).

[39] Here, the appellant claims in the material it filed before the Court that the Tribunal erred in law by interpreting Note 8(a) to Section XI in such a way as to prevent reference to Chapters 50 to 60, and in particular to Chapter 56, when determining whether the constituent material of the goods in issue can be classified as articles of textile under Chapters 61 to 63. It further contends that the Tribunal committed yet another error of law by failing to take into account Note 1 to Chapter 39, which provides that "any reference to 'plastics' ... does not apply to materials regarded as textile materials of Section XI," when it classified the goods in issue as articles of plastics.

[40] I am satisfied that the first issue raises a question of law as the appellant does not merely dispute the way the Tariff Schedule was applied to the shoe covers; it takes issue, primarily, with the way in which the Tribunal construed Note 8(a) to Section XI. The appellant submits in that regard that while “made up” goods cannot be classified under Chapters 50 to 60 by virtue of Note 8(a), those chapters, contrary to the Tribunal’s view, can be considered when assessing the goods’ constituent material. In other words, the central issue to be resolved is whether the terms “do not apply” in Note 8(a) only preclude “made up” goods from being classified under Chapters 50 to 60, or whether they bar any reference to those chapters in the assessment of the goods’ constituent material. This, in my view, is, as was the case in *Neptune*, a pure question of statutory interpretation subject to a correctness standard, as it concerns the contours of the legal analytical framework applicable to the tariff classification of imported goods.

[41] I am also satisfied that the appellant’s second ground of appeal, which concerns the Tribunal’s alleged failure to consider Note 1 to Chapter 39 upon determining that the goods in issue were articles of plastics, raises a question of law. The appellant contends that this Note directed the Tribunal to determine first whether the goods’ constituent material was a textile defined in Section XI, and more particularly a nonwoven defined in the Explanatory Notes to heading No. 56.03, before even considering whether Chapter 39 covered the goods in issue. In refusing or in neglecting to do so, the argument goes, the Tribunal overlooked a crucial analytical step prescribed by Note 1 to Chapter 39.

[42] This second issue requires the Court to determine whether Note 1 to Chapter 39 entails that the goods’ constituent material must be assessed in light of Section XI before turning to

Chapter 39. In other words, the issue is whether the logic and structure of the Tariff Schedule require that a constituent material that combines textiles and plastics be assessed in a specific order. If they do, then it is an error of law not to assess that material in that order. This, again, is a question of law reviewable on a standard of correctness.

V. Analysis

A. *Did the Tribunal err in its interpretation of Note 8(a) to Section XI?*

[43] The appellant contends that the Tribunal's interpretation of Note 8(a) as preventing the use of Chapter 56 in the assessment of the goods' constituent material is fundamentally flawed for three reasons.

[44] First, the appellant submits that the Tribunal's interpretation is contrary to the modern approach to statutory interpretation as it essentially ignores the plain meaning of the text of Note 8(a) and the scheme of the Tariff Schedule as a whole. In essence, the appellant contends that a plain reading of Note 8(a) unequivocally reveals that the limitation embodied in Note 8(a) only concerns made up goods, as opposed to the material the goods are made of. Note 8(a) does not state, says the appellant, that the chapters subject to that limitation (Chapters 50 to 60) are not relevant for determining whether the constituent material of the goods is a textile.

[45] This means, according to the appellant, that a proper analysis of whether goods are of "textile" requires an assessment of whether the material from which they are made can be

classified as a textile in Chapter 56. In other words, contrary to the Tribunal's interpretation, Note 8(a) does not preclude reference to Chapter 56 as part of the classification analysis, even though the goods themselves cannot be classified under that chapter because of Note 8(a). This approach, claims the appellant, is consistent with the scheme, object and logic of the Tariff Schedule, where sections and chapters generally begin with materials and progress to articles or goods made from those materials. Hence, it submits, the only way to determine whether a good is an article "of textile" or "of plastics" is by referring to how those materials are defined and classified in earlier parts of the relevant section or chapter, something the Tribunal did not do in the present case.

[46] Second, the appellant claims that by misinterpreting Note 8(a), the Tribunal departed from the correct analytical framework established by its own jurisprudence for determining the classification of textile and plastics combinations. According to that framework, argues the appellant, the classification of "made up" goods composed of material that combines textile and plastics requires prior reference to how that material is defined in the relevant chapters.

[47] Lastly, the appellant submits that the Tribunal's interpretation of Note 8(a), if allowed to stand, may lead to absurd results and, accordingly, to the misclassification of numerous goods made up of materials combining textile and plastics, especially in light of the fact that under the Tariff Schedule, numerous textiles incorporate plastics in some form.

[48] The respondent contends that the appellant's position rests on a mischaracterization of the finding of fact made by the Tribunal as to the goods' constituent PP nonwoven and CPE

materials. It submits, in this regard, that the combination of these materials results in an “intermediate material” that, just like the goods in issue, is “made up”, as it is comprised of a “single sheet [of plastics]” that is further worked by being cut to its final shape (Memorandum of Fact and Law of the Respondent at para. 57). This, according to the respondent, triggers their exclusion from classification under heading No. 56.03. In the respondent’s words, “[w]hile the PP layer of the materials may be classified by reference to Chapter 56 of the *Customs Tariff*, the ‘constituent materials’ are excluded from classification by virtue of being combined with a plastic and then further worked (cut to shape)” (Memorandum of Fact and Law of the Respondent at para. 57).

[49] The respondent claims that this finding is evidenced in footnote 26 of the Tribunal’s reasons, which, according to the respondent, emphasizes the further working done to create the goods’ “constituent materials”. Footnote 26 reads as follows:

The explanatory notes to heading No. 56.03 also read as follows: “**Except** where they are covered more specifically by other headings in the Nomenclature, the heading covers nonwovens in the piece, cut to length or simply cut to rectangular (including square) shape from larger pieces *without other working ...*” [emphasis added by Tribunal].

[50] The respondent further submits that the Tribunal’s case law upon which the appellant relies (*Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*, 15 T.T.R. (2d) 336, 2011 CarswellNat 7159 (WL Can) (*Sher-Wood*) and *Louise Paris Ltd. v. President of the Canada Border Services Agency*, AP-2017-001, 2019 CanLII 110897 (CA CITT) (*Louise Paris*)), is distinguishable. It argues that in those cases, the Tribunal, contrary to its findings in the present case, “did not define the ‘constituent materials’ as [an] intermediate product” but

rather undertook an analysis as to whether the constituent materials of the goods in issue in those cases met the definition of a textile classifiable under heading No. 56.03 (Memorandum of Fact and Law of the Respondent at para. 63). The starting point of the analysis in those cases was therefore not the same as in the case at bar.

[51] Before turning to what I consider to be the correct interpretation of Note 8(a), I must first observe that the respondent's entire position rests on a mischaracterization of the Tribunal's findings. This mischaracterization lies in the assertion that the Tribunal found the goods' constituent material to be an intermediate "made up" material, that is a material comprised "of a single sheet of PP nonwoven and CPE plastic *cut to shape* and sealed to create a *sheeting of plastics*" (emphasis in original; Memorandum of Fact and Law of the Respondent at para 51), thereby excluding, even having regard to the interpretation of Note 8(a) advanced by the appellant, any consideration of heading No. 56.03 in the assessment of the goods' constituent material.

[52] I see no statement in the Tribunal's reasons supporting such an assertion. Nowhere is the word "intermediate" used in those reasons and the term "made up" seems to be used exclusively in relation to the finished goods, not their constituent material. While the Tribunal, upon determining that the goods in issue were without "applied soles" and could not, therefore, be classified under Chapter 64 of Section XII as footwear articles, stated that the goods were "made of 'sheeting of plastics'", it held that the next step in its Rule 1 analysis was to classify the goods according to their constituent material, implying thereby that the goods' constituent material had not yet been identified (Tribunal decision at para. 38).

[53] As indicated previously, the Tribunal later found the constituent material of the upper to be the PP nonwoven, and that of the outer sole to be the CPE layer (Tribunal decision at para. 41), and that the classification of the goods in issue required, therefore, consideration of those two constituent materials (Tribunal decision at footnote 25).

[54] There is, therefore, no indication whatsoever in the Tribunal's findings of the existence of an "intermediate material" of the kind put forward by the respondent, *i.e.* a material that is "made up" because it is "further worked" by being "cut to shape". This is further evidenced by the Tribunal's main conclusion that heading No. 56.03 does not apply to the classification of the goods' constituent materials, which rests on its finding that the goods themselves (the shoe covers), as opposed to their constituent materials, are "made up within the meaning of Note 7" (Tribunal decision at para. 47). This could not be clearer.

[55] Turning now to the Tribunal's interpretation of Note 8(a), I find its approach to be incorrect in law to the extent that it prevents the application of Chapter 56 to the constituent material of the goods because the goods themselves are "made up" within the meaning of Note 7. In doing so, the Tribunal, in my view, conflated two distinct steps of the classification analysis and failed, as a result, to draw a distinction between the determination of the goods' constituent material on the one hand, and the goods' classification on the other.

[56] While it is clear that the combined effect of Notes 7 and 8(a) to Section XI prevents the goods themselves from being classified under Chapter 56 because they are "made up", I agree with the appellant that Chapter 56 remains relevant as an aid to the assessment of the goods'

constituent materials and that the Tribunal's contrary view incorrectly departs from the modern approach to statutory interpretation.

[57] Although the rules governing the interpretation of the Tariff Schedule, both internationally and domestically, have been said to be “unique” (*Canada (Minister of National Revenue) v. Schrader Automotive Inc.*, 87 A.C.W.S. (3d) 287, 1999 CanLII 7719 (FCA) at para. 5), there are indications in the case law that the modern approach to statutory interpretation remains relevant in tariff classification matters (*Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 at para. 41; *A & R Dress Co. Inc. v. Canada (Minister of National Revenue)*, 2005 FC 681, [2006] 3 F.C.R. D-11 at 2; *A&R Dress Co. Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] 4 F.C.R. 192, 13 T.T.R. (2d) 540 at para. 21). This means that, as any other legislative provisions, Note 8(a) to Section XI must “be read in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21, quoting Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87).

[58] Note 8(a) provides that unless the context requires otherwise, Chapters 56 to 59 do not apply to “made up” goods within the meaning of Note 7. It does not state that those chapters are not to be applied for determining whether the goods' constituent material is of textile. Yet, once the first step of a Rule 1 analysis proves inconclusive of the goods' classification, as was the case here, the analysis, as properly determined by the Tribunal, shifts to the goods' constituent

material. As such, I agree with the appellant that a proper analysis of whether the goods in issue are “of other textile materials”, as contemplated by Chapter 63, requires an assessment of whether the material from which these goods are made can be classified as a textile in Chapter 56.

[59] Nothing in the wording of Note 8(a) prevented the Tribunal from undertaking such an analysis. Quite the contrary, prior reference to Chapters 50 to 60, which define textile fabrics, was crucial to determining whether or not the “made up” shoe covers were “of textile materials”.

[60] Perhaps more importantly, this interpretation is, in my view, consistent with the scheme and structure of the Tariff Schedule. As pointed out by the appellant, chapters belonging to a specific section generally progress from materials in their primary forms to articles or goods made from those materials. This logic prevails in Section XI, which first encompasses textile fibres and woven fabrics (Chapters 50 to 55); then nonwovens, carpets, tapestries, coated fabrics and knitted fabrics (Chapters 56 to 60); and lastly “made up” textile articles (Chapters 61 to 63). The fact that Note 8(a) begins with the phrase “[f]or the purposes of Chapters 50 to 60” further reinforces the distinction between two different sets of chapters within Section XI: Chapters 50 to 60, which cover textile materials, and Chapters 61 to 63, which cover “made up” textile articles.

[61] I agree with the appellant that, if this Court were to uphold the Tribunal’s interpretation of Note 8(a), one would wonder how a “made up” article, whose constituent material is a

combination of textile and plastics classified as a textile in Section XI, could ever be classified as a textile itself. This is not a result that could possibly have been contemplated by Parliament.

[62] The Tribunal's error in interpreting Note 8(a) vitiated the remainder of its analysis. Having concluded that "textile fabric", for the purposes of applying heading No. 63.07, was not circumscribed to headings of Section XI, the Tribunal undertook an alternate analysis by considering the purpose served by the CPE layer, a plastic. It held that since that material constituted more than mere trimmings or accessories, the goods in issue had to be classified in accordance with the General Rules, which required it to consider whether the goods' constituent materials could be classified elsewhere in the nomenclature, including in Chapter 39 of Section VII (Tribunal decision paras. 49-51).

[63] While this analysis may have been justified and supported by the Explanatory Notes to Chapter 63, it was no proper replacement for prior consideration of Chapters 50 to 60 in relation to the constituent material. In other words, the Tribunal proceeded from an incorrect interpretation of Note 8(a) that had the effect of ousting consideration of those chapters.

[64] The Tribunal's error is further exacerbated by the fact that, as contended by the appellant, it took an approach that departs from the analytical framework set out in *Sher-Wood* and *Louise Paris* for determining the classification of textile and plastics combinations. According to that framework, the Tribunal must first examine how the constituent material would be classified before then classifying the goods themselves.

[65] In *Sher-Wood*, the issue was whether ice hockey gloves were to be classified as gloves of textile materials under tariff item No. 6216.00.00 or as articles of apparel of plastics under tariff item No. 3926.20.92. The Tribunal first ascertained the materials – a textile fabric of heading No. 59.03 for the outer surface and a nonwoven of heading No. 56.03 for the inner surface – before turning to the classification of the goods themselves. Given its conclusion that the materials were textiles within the ambit of Chapters 56 and 59, the Tribunal found that the gloves were classifiable in heading No. 62.16. Therefore, Note 8(a) was not construed in that case as preventing consideration of Chapters 50 to 60 when assessing the goods’ constituent materials.

[66] That approach was reiterated in *Louise Paris*, which was decided after the Tribunal’s decision in the present case. The goods in issue in *Louise Paris* were certain women’s garments made from particular combinations of textile and plastic materials. The issue in that case was whether those combinations, used in the garments, were to be classified as textiles or as plastics. Being satisfied that the constituent material was a textile described in Chapter 59, the Tribunal held that the articles made from said material were to be classified under Chapter 62.

[67] The respondent claims that those two cases must be distinguished from the case at bar on the basis that the analysis found therein proceeds from different “starting points”, that is from different chapters of the Tariff Schedule, and rests on different factual findings regarding the characteristics of the goods’ constituent materials. The respondent further contends that there is no basis for the appellant’s argument as the Tribunal is not, as a matter of law, bound by its previous determinations.

[68] I disagree. Again, these alleged distinctions essentially rest on the assertion that the Tribunal, contrary to what was the case in *Sher-Wood* and *Louise Paris*, defined the constituent material as an “intermediate” product and then undertook an analysis based on that finding. As I have already held, this assertion proceeds from a serious mischaracterization of the Tribunal’s findings. It is therefore not a valid basis for distinguishing the present matter from those two cases.

[69] *Sher-Wood* and *Louise Paris* illustrate, in my view, how materials of goods “made up” from a combination of textiles and plastics may be assessed, on a proper interpretation of Note 8(a), with reference to Chapters 50 to 60. Both cases were ultimately decided on the basis of the constituent material of the goods in issue. In *Sher-Wood*, the Tribunal first considered whether the goods could fall under Chapter 95, which generally covers sports requisites, including sports or athletic equipment. The Tribunal found that they could not because gloves are not covered by Chapter 95. It then proceeded to classify the goods according to their constituent material. Contrary to the respondent’s contention, this reasoning is akin to that of the case at bar, where the Tribunal proceeded to identify the constituent materials after having concluded that the goods in issue could not be classified under Chapter 64.

[70] In *Louise Paris*, the Tribunal classified the goods according to their constituent material without prior reference to a specific chapter. The fact that the goods were *a priori* classifiable in a specific chapter both in *Sher-Wood* and in the case at bar while they were not in *Louise Paris* has no bearing, in my view, on how constituent materials are to be assessed. In both *Sher-Wood* and *Louise Paris*, Note 8(a) was not an impediment to Chapters 56 to 59 being considered as part

of the analytical framework. This constitutes further evidence of the respondent's misinterpretation of Note 8(a).

[71] Finally, while I agree that the Tribunal is not bound by its previous determinations, the respondent omits to mention that "later [Tribunal] panels should not depart from the decisions of earlier panels unless there is good reason" (*Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, [2017] 3 F.C.R. 123 at para. 44). This means that the impugned decision, as it stands, may have a bearing on the determination of future cases. It also means that the Tribunal, in reaching that decision, could not depart from past decisions unless there was good reason to do so. No such reason was provided by the Tribunal in the present matter.

[72] In sum, I am satisfied that the Tribunal erred in its interpretation of Note 8(a) to Section XI and that this error vitiated the analytical framework that led to the decision at issue. As the appellant puts it, it was open to the Tribunal to assess whether the goods' constituent material, consisting of a combination of textile and plastics, either was or was not a textile under Chapter 56. It was not open, however, for the Tribunal to sidestep that analysis entirely. In doing so, the Tribunal committed an error of law.

[73] I further find that the Tribunal's departure from the approach it took in *Sher-Wood* to assessing the constituent materials of goods made of a combination of textile and plastics with reference to Chapters 50 to 60, an approach reaffirmed in *Louise Paris*, provides further indication that the Tribunal erred in its interpretation of Note 8(a), and thus failed to apply the proper analytical framework.

[74] This would normally suffice to set the Tribunal's decision aside but the appellant, as we have seen, further contends that Note 1 to Chapter 39 was also part of the analytical framework and that by ignoring it, the Tribunal compounded its incorrect interpretation of Note 8(a).

B. *Did the Tribunal err in law in not considering Note 1 to Chapter 39?*

[75] Note 1 to Chapter 39 provides that any reference to the expression "plastics" throughout the Nomenclature does not apply to materials regarded as textile materials of Section XI. The appellant contends that the Tribunal also erred in law in failing to take into consideration that exclusion, which, according to the appellant, required the Tribunal to ascertain first whether the goods' constituent material was a textile as defined by the chapters in Section XI, before turning its mind to Chapter 39.

[76] The respondent submits that Note 1 to Chapter 39 could have no bearing on or relevance to the Tribunal's analysis as it had already determined, as a matter of fact, that the constituent material of the shoe covers was not a textile.

[77] Both Section XI and Chapter 39 are subject to mutually exclusive section or chapter Notes. Indeed, the combined effect of Notes 1 and 2(p) to Chapter 39 excludes both textile materials and goods of Section XI from the ambit of that chapter. Conversely, Note 1(h) to Section XI excludes from the ambit of that Section "[w]oven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39."

[78] The issue here is whether the presence of these mutually exclusive clauses suggests that the steps involved in deciding whether goods combining textiles and plastics fall under Section XI or Chapter 39 should follow a specific order, with the first step in the analysis being whether the goods are textiles.

[79] In my view, Note 1 to Chapter 39 does provide for that specific order in which materials, and by extension, goods are to be assessed. A review of the exclusionary clauses at issue shows that the broad exclusionary rule found in Notes 1 and 2(p) to Chapter 39, which covers both textile materials and goods of Section XI, has no equivalent in said Section. This means that while textile materials of Section XI are not to be considered plastics within the meaning of heading Nos. 39.01 to 39.14, the converse is not necessarily true, as plastic materials of Chapter 39 could possibly be considered textiles within the meaning of Section XI. This, in my view, is why the Tribunal must first determine whether the materials are textiles and then, and only then, if it finds they are not, further consider whether they are plastics as defined in Chapter 39.

[80] This is the approach that the Tribunal appears to have followed in *Sher-Wood*:

[45] Subject to certain conditions that are not relevant in this appeal, the expression "plastics" is defined in note 1 to Chapter 39 as meaning those materials of heading Nos. 39.01 to 39.14. Thus, in order to meet the terms of heading No. 39.26, the goods in issue must be made by sewing sheets of one of those materials. However, note 1 to Chapter 39 provides the following important exception to the definition of the expression "plastics": "[t]he expression ["plastics"], however, does not apply to materials regarded as textile materials of Section XI."

[46] Accordingly, the Tribunal must determine whether the two specific combinations of plastics and textiles used to form the goods in issue are regarded as textile materials of Section XI. If these two components that are sewn together to form the exterior of the goods in issue are considered textile materials, then

they cannot constitute "sheets of plastics", which would preclude the Tribunal from finding that the goods in issue are made by sewing "sheets of plastics".

[81] As indicated previously, the respondent submits that reliance on Note 1 to Chapter 39 was not required in this case since the Tribunal had already determined that the goods' constituent material was not a textile. I do not agree.

[82] I believe it is fair to say that the Tribunal, upon determining, based on the Explanatory Notes to Chapter 63, that the CPE layer constituted more than mere trimmings or accessories, did not formally reject the constituent materials' proposed characterization as textiles. Indeed, the incorporation of plastics to an extent that goes beyond mere trimming or accessories does not automatically preclude the goods from classification under heading No. 63.07. The Explanatory Notes to Chapter 63, as observed by the Tribunal, simply direct it to classify the goods "in accordance with the relative Section or Chapter Notes (General Interpretative Rule 1), or in accordance with the other General Interpretative Rules as the case may be" (see paragraph 1 of the Explanatory Notes to Chapter 63 and the Tribunal's decision at paragraph 49).

[83] The Tribunal did not undertake such an analysis before considering whether the goods in issue were more specifically described by heading No. 39.26 (Tribunal decision at para. 51). In so doing, the Tribunal relied on the approach supposedly taken in *Rui Royal International Corp. v. Canada Border Services Agency*, 15 T.T.R. (2d) 485, 2011 CarswellNat 7151 (WL Can) at paragraph 85 (*Rui Royal*) (Tribunal decision at footnote 33).

[84] However, I find that that decision offers little support for what the Tribunal did in the present case. First, in *Rui Royal*, the Tribunal could consider whether the goods were more specifically described by one heading or the other because the headings in issue were not mutually exclusive. Second, and perhaps more importantly, the Tribunal reiterated the view that the Explanatory Notes to Chapter 63 do not necessarily exclude from classification in that chapter goods where the presence of non-textile materials constitutes more than minor trimmings or accessories (*Rui Royal* at para. 69). In other words, such a finding does not preclude classification, under Chapter 63, of goods composed of a combination of textile and plastics and therefore does not require automatic consideration of the applicability of Chapter 39, which is what the Tribunal did in the present matter.

[85] Had the Tribunal properly undertaken the analysis prescribed by the Explanatory Notes to Chapter 63, it may have found that the goods were to be classified as articles of textiles under heading No. 63.07. If so, by virtue of Note 2(p) to Chapter 39, the goods would have been excluded from classification under heading No. 39.26, as was the case in *Canadian Tire Corp. v. Canada (Border Services Agency, President)*, 14 T.T.R. 631, 2010 CarswellNat 5292 (WL Can) at paragraph 52.

[86] In the context of mutually exclusive headings such as heading Nos. 63.07 and 39.26, Note 1 to Chapter 39 provides, in my view, a specific order in which materials and, by extension, goods are to be assessed. In light of the above, I find that the Tribunal did not properly dismiss the appellant's proposed characterization of the goods' constituent material as a textile before finding that the goods were made of plastics. In so doing, it failed to apply Note 1 to Chapter 39.

C. *The remedy*

[87] The appellant asks that the matter be remitted to the Tribunal for redetermination in accordance with the Court's reasons for judgement.

[88] Being on the losing end of this appeal, the respondent exhorts the Court to supplant the Tribunal's decision with its own and to uphold the classification of the goods in issue in heading No. 39.26, as permitted by subsection 68(2) of the Act, which empowers the Court to "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 [Tribunal] for re-hearing."

[89] Recognizing that remitting the matter is normally the most appropriate course of action, the respondent claims that several considerations, as set out in *Vavilov*, such as the nature of the regulatory regime, the proper administration of justice, the goal of expedient and cost-effective decision-making and the inevitability of the outcome, support the remedy it seeks.

[90] The recent jurisprudence of this Court on remedy in the administrative justice context cautions that directing an administrative decision maker on how to decide an issue within its jurisdiction – or rendering the decision in its place – ought to be exercised only in the "clearest of circumstances" and where the evidence can lead only to one result (*D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 239 A.C.W.S. (3d) 532 at para. 16 (*D'Errico*); *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, 294 A.C.W.S. (3d) 299 at para. 28; *Canada (Attorney General) v. Allard*, 2018 FCA 85, 293 A.C.W.S. (3d) 398 at paras. 44-45).

[91] In *Vavilov*, the Supreme Court “briefly address[ed] the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court’s reasons” (emphasis added; *Vavilov* at para. 139). In so doing, it provided a reminder that remitting the matter to the decision maker to have it reconsider the decision would “most often be appropriate” (*Vavilov* at para. 141).

[92] Referring to *D’Errico*, the Supreme Court underscored the fact that there were “limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended,” pointing to factors such as “concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources” as being relevant in the exercise of a court’s discretion to remit a matter (*Vavilov* at para. 142).

[93] Here, relying mainly on *D’Errico*, the respondent submits, in essence, that remitting the matter to the Tribunal would have an undue negative impact on its interests in terms of further delays and non-compensable costs. It further claims that such a course of action would serve no useful purpose as this Court has before it the exact same record as the one that was before the Tribunal.

[94] I am not satisfied that this case is illustrative of one of those “limited scenarios” where the Court should make its own assessment on the record before it and direct the result that should follow on the facts and the law. In particular, I do not believe that *D'Errico* is of much assistance to the respondent. In *D'Errico*, the record showed the prejudice that would have been caused by further delay, which is not the case here. The nature of the benefits that were at issue in *D'Errico*, which were meant to address a very serious condition preventing the earning of meaningful income to sustain oneself, was an important consideration that led the Court to conclude that Parliament could not have intended the final disposition of disability benefits in those circumstances to take eight years (*D'Errico* at para. 19).

[95] Clearly, the respondent – a commercial corporation involved in the importation and sale of goods – is not facing this kind of hardship.

[96] This is a matter where the usual course of action should be followed in terms of remedy. The Tribunal is found to have applied the wrong legal analytical framework. The facts of the case, which include expert evidence and which do not lead to only one clear result, now have to be reassessed against the appropriate framework. This is a matter, therefore, better left to the Tribunal, which Parliament entrusted with making such assessments.

[97] I propose, therefore, that the Tribunal’s decision be set aside and that the matter be remitted to a different panel of the Tribunal for redetermination in accordance with these reasons.

[98] The appellant seeks its costs. Given the outcome of this appeal, this request will be granted and the costs will be assessed on a party-and-party basis in accordance with column III of the table to Tariff B, as provided for in rule 407 of the *Federal Courts Rules*, SOR/98-106.

[99] In exercising my discretion on this issue, I have considered, but dismissed, the respondent's request that each party bear its own costs because, it claims, the Tribunal took a different approach than the one advocated by both parties before it. There were other – and more cost-effective – avenues available to the respondent in this appeal, for example by consenting to judgment, which could have resulted in the matter being remitted to the Tribunal more promptly for a redetermination on the basis of the proper approach. There are no indications before the Court that such avenues were considered by the respondent.

“René LeBlanc”

J.A.

“I agree
D. G. Near J.A.”

“I agree
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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