

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Attorney General) *v.* Igloo Vikski Inc., 2016 SCC 38, [2016] 2 S.C.R. 80 | **Appeal Heard:** March 29, 2016  **Judgment Rendered:** September 29, 2016  **Docket:** 36258 |

Between:

**Attorney General of Canada**

Appellant

and

**Igloo Vikski Inc.**

Respondent

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 52) | Brown J. (McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring) |

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| **Dissenting Reasons:**  (paras. 53 to 75) | Côté J. |

Canada (Attorney General) *v.* Igloo Vikski Inc., 2016 SCC 38, [2016] 2 S.C.R. 80

Attorney General of Canada Appellant

v.

Igloo Vikski Inc. Respondent

**Indexed as:** Canada (Attorney General) ***v.*** Igloo Vikski Inc.

2016 SCC 38

File No.: 36258.

2016: March 29; 2016: September 29.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the federal court of appeal

*Taxation* — *Customs and excise — International trade — Tariff classification of goods — Importation of hockey gloves — Whether goods should be classified as “gloves, mittens and mitts” or “other articles of plastics and articles of other materials” under Harmonized Commodity Description and Coding System — Whether Canadian International Trade Tribunal’s interpretation and application of Rules 1 and 2 of General Rules for Interpretation of Harmonized System were reasonable — Customs Tariff, S.C. 1997, c. 36, Schedule, General Rules for the Interpretation of the Harmonized System.*

The importer arranged to import hockey gloves made of textiles and plastics, bound together by stitching. The Canada Border Services Agency classified five models of gloves as “gloves, mittens and mitts” under tariff item No. 6216.00.00of the Harmonized Commodity Description and Coding System (“Harmonized System”),incorporated into the Schedule to the *Customs Tariff*. The remaining model was classified under tariff item No. 3926.20.92 as “other articles of plastics”.

The Canadian International Trade Tribunal (“CITT” or “Tribunal”) dismissed the importer’s appeal, concluding that the gloves were classifiable as “gloves, mittens and mitts”. The Federal Court of Appeal, however, allowed the importer’s appeal and remitted the matter back to the CITT.

Held (Côté J. dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon andBrownJJ.: The tariff classification exercise begins with Rule 1 of the General Rules for the Interpretation of the Harmonized System, which directs that the classification of goods must initially be determined with reference only to the headings within a chapter, as well as any applicable Section or Chapter Notes. Where the goods are unfinished or where they are comprised of a mix of materials or substances, Rule 2 is applied in conjunction with Rule 1 to determine the *prima facie* classification of such goods. Rule 2(a) deems unfinished goods to be finished goods, and directs that they be classified using Rule 1 as if they were goods in a complete or finished state. Rule 2(b) applies where a good consists of a mixture of more than one substance, and states that a reference to goods of a given material or substance in a heading shall be taken to include goods consisting wholly or partly of such material or substance. If, having applied Rules 1 and 2, the good is *prima facie* classifiable under only one heading, then the inquiry ends and the good is classified under that heading. If, however, the good is *prima facie* classifiable under more than one heading, then Rule 3 applies, by operation of Rule 2(b), to resolve the classification dispute. If the application of Rules 1, 2 and 3 does not lead to the classification of a good under a single heading, Rules 4, 5 and 6 are applied to determine the classification of the good.

While the General Rulesare commonly described as cascading in nature, this metaphor does not quite capture how the General Rules are to be applied. It is more helpful to understand that order as a function of a hierarchy rather than a cascade. Rule 1 does not lose all relevance where Rule 2 is applied. Where Rule 2 applies, it applies together with Rule 1 to identify the heading(s) under which an incomplete or composite good can be *prima facie* classified.

The CITT concluded that the gloves were not classifiable under heading 39.26 using Rule 1 because they were not made by sewing or sealing sheets of plastic together, as directed by the Explanatory Note to heading 39.26 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*. The CITT found that the gloves met the description of heading 62.16 using Rule 1. Since the gloves contained plastic padding that was more than mere trimming, the CITT applied Rule 2(b) of the General Rules, as directed by the Explanatory Note to heading 62.16, which led the CITT to extend the scope of the heading in order to classify the goods as “gloves, mittens and mitts”.

The Federal Court of Appeal found that the CITT had misinterpreted the General Rules by requiring that the goods must meet the description of a heading by applying Rule 1 before Rule 2(b) can be used to extend that heading to cover goods made of mixed substances. Once the CITT concluded that the goods did not meet the description of the heading in 39.26, it should have applied Rule 2(b) of the General Rules to extend that heading to cover the gloves. Then, because the goods were *prima facie* classifiable under both headings 39.26 and 62.16, Rule 3 should have been employed to determine the proper classification of the gloves.

In concluding that the CITT misapplied the General Rules, the Federal Court of Appeal misapprehended their structure. It did not appreciate the conjunctive nature of the application of Rules 1 and 2 to a determination of the heading(s) under which a good is *prima facie* classifiable. Further, the Federal Court of Appeal erred in supposing that Rule 2(b) can be applied to extend the scope of a heading to include a particular good where no part of that good falls within the heading. While Rule 2(b) deems a reference in a heading to a material to include a mixture of that material with other substances, the Section, Chapter Notes, and Explanatory Notes still apply when classifying that good as if it were made exclusively of the material referenced by the heading. Read as a whole, the CITT’s decision was reasonable. The CITT neither misapplied the General Rules, nor interpreted heading 39.26 and its Explanatory Note in an unreasonable manner.

Per Côté J. (dissenting): The Tribunal’s decision falls well outside the range of reasonable interpretations. It contradicts the cascading nature of the General Rules, it is internally contradictory, and it interprets the Explanatory Notes in a manner that is irreconcilable with their words.

While the standard of review of reasonableness is applicable here, this appeal deals with the interpretation of a statute that was enacted to implement the *International Convention on the Harmonized Commodity Description and Coding System*. Given the *Convention* parties’ intention of creating a uniform classification scheme, the range of reasonable statutory interpretations in this context is narrow.

First, the Tribunal erred by requiring as a condition to the application of Rule 2(b) that the goods must first meet the description in the heading pursuant to Rule 1. The distinction between a conjunctive or hierarchical application of the General Rules as opposed to a cascading application is, in this case, irrelevant. A good does not need to first meet the description in a heading pursuant to Rule 1 in order for Rule 2(b) to apply. Such a reading is inconsistent with the text of Rule 2(b). 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) applies. The function of Rule 2(b) is to extend headings referring to a material under Rule 1 to include goods that are composed only partly of the material.

Second, the Tribunal failed to apply Rules 1 and 2(b) consistently to headings No. 39.26 and No. 62.16. The Tribunal had to apply Rule 2(b) in order for heading No. 62.16 to apply to the gloves since the gloves included plastic that constituted more than mere trimming. Therefore, Rule 1 alone was not sufficient to classify the gloves in heading No. 62.16 nor in any heading, and the Tribunal had to resort to Rule 2(b). In this context, the Tribunal’s refusal to apply Rules 1 and 2(b) consistently to both headings No. 39.26 and No. 62.16 is internally contradictory and therefore unreasonable.

Third, the Tribunal’s interpretation of the Explanatory Noteto heading No. 39.26 is unreasonable. While the Explanatory Note contains non‑exhaustive language, the Tribunal concluded that heading No. 39.26 only includes articles of plastics that are made by “sewing or sealing sheets of plastics”. Such a restrictive interpretation was contrary to both an ordinary and contextual reading of the Explanatory Note.

**Cases Cited**

By Brown J.

**Referred to:** *Miller v. Jackson*, [1977] 1 Q.B. 966; *Sher‑Wood Hockey Inc. v. Canada (Border Services Agency, President)* (2011), 15 T.T.R. (2d) 336; *Minister of National Revenue v. Yves Ponroy Canada* (2000), 259 N.R. 38; *Cycles Lambert Inc. v. Canada (Border Services Agency)*, 2015 FCA 45, 469 N.R. 313; *Canada (Border Services Agency) v. SAF‑HOLLAND Canada Ltd.*, 2014 FCA 3, 456 N.R. 174; *Star Choice Television Network Inc. v. Canada (Customs and Revenue Agency)*, 2004 FCA 153; *Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 N.R. 381; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, rev’d 2011 SCC 57, [2011] 3 S.C.R. 572; *Helly Hansen Leisure Canada Inc. v. Canada Border Services Agency*, 2009 FCA 345, 397 N.R. 323; *Canada Customs and Revenue Agency v. Agri Pack*, 2005 FCA 414, 345 N.R. 1; *Funtastic Ltd. v. Chief Executive Officer of Customs*, [2008] AATA 528; *Canada Border Services Agency v. Outils Gladu Inc.*, 2009 FCA 215, 393 N.R. 58; *Rona Corporation Inc. v. Canada (Border Services Agency)* (2008), 12 T.T.R. (2d) 295; *Primaplas Pty. Ltd. v. Chief Executive Officer of Customs*, [2016] FCAFC 40; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029.

By Côté J. (dissenting)

*Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 N.R. 381; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Sher‑Wood Hockey Inc. v. Canada (Border Services Agency, President)* (2011), 15 T.T.R. (2d) 336; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029.

**Statutes and Regulations Cited**

*Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), ss. 59(1)(a), 60(1).

*Customs Tariff*, S.C. 1997, c. 36, ss. 10(1), 11, Schedule, General Rules for the Interpretation of the Harmonized System; tariff items 0302.13.40, 3926.20.92, 6216.00.00, 9506.99.90.

**Treaties and Other International Instruments**

*International Convention on the Harmonized Commodity Description and Coding System*, Can. T.S. 1988 No. 38.

*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 31.

**Authors Cited**

Dryden, Ken. *The Game*. Toronto: Macmillan of Canada, 1983.

*Phipson on Evidence*, 15th ed. by Howard M. N. et al. London: Sweet & Maxwell, 2000.

Prabhu, Mohan. *Canada’s Laws on Import and Export: An Overview*. Toronto: Irwin Law, 2014.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

World Customs Organization. *Explanatory Notes to the Harmonized Commodity Description and Coding System*, 5th ed. Brussels: Customs Co‑operation Council, 2012.

APPEAL from a judgment of the Federal Court of Appeal (Pelletier, Near and Scott JJ.A.), 2014 FCA 266, [2014] F.C.J. No. 1134 (QL), 2014 CarswellNat 4603 (WL Can.), setting aside a decision of the Canadian International Trade Tribunal, 2013 CanLII 4408, [2013] C.I.T.T. No. 4 (QL), 2013 CarswellNat 6770 (WL Can.). Appeal allowed, Côté J. dissenting.

Jan E. Brongers and Michael Taylor, for the appellant.

Michael Kaylor and Jennifer Klinck, for the respondent.

The judgment of McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

Brown J. —

1. Introduction
2. In wintertime ice hockey is the delight of everyone.[[1]](#footnote-1) Across the country, countless players of all ages take to ice rinks and frozen ponds daily to shoot pucks at the net. Often the puck is stopped or turned aside by a goaltender blocking it with a blocker or catching it with a catcher. This is notoriously difficult business.[[2]](#footnote-2) The goaltender’s attention must remain fixed on the play, and not on off-ice matters. His or her focus must not drift to thoughts of the crowd, missed shots or taunts from opponents. And, certainly, the goaltender should strain to avoid being distracted by the question before the Court in this appeal — being whether, for customs tariff classification purposes, he or she blocks and catches the puck with a “glove, mitten or mitt”, or with an “article of plastics”.
3. Having considered this question, the Canadian International Trade Tribunal (“CITT”) concluded that certain blockers and catchers imported by the respondent Igloo Vikski Inc. were each classifiable as a “glove, mitten or mitt”. The Federal Court of Appeal, however, held that those blockers and catchers are also classifiable, *prima facie*, as “articles of plastics”. It referred the matter back to the CITT so that it could apply what the Court of Appeal considered the appropriate analysis for resolving duplicative *prima facie* classifications. For the reasons that follow, I am of the respectful view that, in so doing, the Federal Court of Appeal erred. I would therefore allow the appeal and restore the decision of the CITT.
4. Overview of Facts and Proceedings
   1. Background
      1. Canada’s System of Tariff Classification
5. This appeal presents the Court’s first opportunity to consider the *Customs Tariff*, S.C. 1997, c. 36, which implements Canada’s obligations as a party to the *International Convention on the Harmonized Commodity Description and Coding System*, Can. T.S. 1988 No. 38. The *Convention* governs the Harmonized Commodity Description and Coding System (the “Harmonized System”) by which approximately 5,000 commodity groups of imported goods are classified.
6. The Harmonized System was developed by the World Customs Organization, an intergovernmental body of which Canada is a member. To foster stability and predictability in classification practices internationally, it is used as a standard tariff classification system by all parties to the *Convention*, including Canada: see *Customs Tariff*, s. 10(1) and the Schedule thereto. At the same time, it permits states parties to set their own rates of duty on those goods in conformance to their individual international trade obligations: M. Prabhu, *Canada’s Laws on Import and Export: An Overview* (2014), at p. 79.
7. The 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. 0302.13.40, 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”).
8. 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 a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules”.
9. 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. As I explain below, however, 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: Prabhu, at p. 82.
10. In addition to the Harmonized System and the General Rules, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (5th ed. 2012) 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 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.
    * 1. Facts of This Appeal
11. Between November 2003 and December 2005, Igloo Vikski imported six models of ice hockey goaltender gloves, comprising three models of “blockers” (designed to be worn on the same hand used by the goaltender to hold his or her hockey stick) and three models of “catchers” (designed to be worn on the goaltender’s other hand). Externally, the gloves are composed of various types of textiles and plastics, bound together by stitching. While the inner padding of the blockers consists mainly of plastic, the inner padding of the catchers is composed of both plastic and textiles.
12. The Canada Border Services Agency (“CBSA”) classified the gloves under tariff item No. 6216.00.00 as “[g]loves, mittens [or] mitts”. Igloo Vikski applied for a refund of a portion of the duties paid on these gloves, arguing they should have been classified under tariff item 9506.99.90, which applies to various types of sporting equipment. In response, the CBSA issued re-determinations under s. 59(1)(a) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), stating that the gloves could not be classified as proposed by Igloo Vikski. It further affirmed that four models of the gloves were properly classified under tariff item 6216.00.00, while the two other models should be classified under tariff item 3926.20.92 as mittens or non-disposable gloves.
13. Igloo Vikski then requested a further re-determination pursuant to s. 60(1) of the *Customs Act*, arguing that all of the gloves should be classified under tariff item 3926.20.92, the heading of which (39.26) refers to “[o]ther articles of plastics and articles of other materials of headings 39.01 to 39.14”. The CBSA rejected this request for reclassification, determining this time that five of the gloves were properly classified under tariff item 6216.00.00, while the remaining model was classified under tariff item 3926.20.92. Igloo Vikski appealed the CBSA’s classification decisions to the CITT.
    1. Decision of the CITT
14. The CITT dismissed Igloo Vikski’s appeal: 2013 CanLII 4408. Relying upon the Explanatory Note to heading 39.26, it interpreted heading 39.26 as capturing only articles of apparel or clothing accessories made by sewing or sealing sheets of plastic together. The same tribunal member had adopted this interpretation in another case involving the customs classification of hockey gloves, and followed that reasoning in this case: see *Sher-Wood Hockey Inc. v. Canada (Border Services Agency, President)* (2011), 15 T.T.R. (2d) 336. Since the gloves at issue were not made by sewing or sealing sheets of plastic together, the CITT concluded they were not classifiable under heading 39.26.
15. The CITT then considered whether the gloves were classifiable under heading 62.16. While it found that they conformed to the type of goods (“[g]loves, mittens [or] mitts”) described in that heading, it recognized that the Explanatory Note to heading 62.16 directed it to apply the General Rules if the articles contained non-textile material that constituted “more than mere trimming”. Since the hockey gloves contained plastic padding that was more than mere trimming, the CITT applied Rule 2(b) of the General Rules (which, as I will explain, applies where a good consists of a mixture of more than one substance), which led the CITT to “extend the scope” of the heading in order to classify the goods as “[g]loves, mittens [or] mitts” (paras. 74-75 and 77). It therefore affirmed the CBSA’s classification and dismissed the appeal.
    1. Federal Court of Appeal
16. The Federal Court of Appeal (Scott J.A.; Pelletier and Near JJ.A. concurring) allowed Igloo Vikski’s appeal: 2014 FCA 266. Applying the standard of review of reasonableness, it found the CITT’s decision to be unreasonable because it misapplied the General Rulesand contained logical contradictions.
17. More particularly, the Court of Appeal found that the CITT had erred by stating that the goods must meet the description of a heading by applying Rule 1 before Rule 2(b) can be used to extend that heading to cover goods made of mixed substances. It said that this contradicted the “cascading” nature of the General Rules: para. 11 (CanLII). In the Court of Appeal’s view, because the gloves were made of mixed substances, once the CITT concluded that the goods did not meet the description of the heading in 39.26, it should have applied Rule 2(b) of the General Rules to extend that heading to cover the hockey gloves. Then, because the goods were *prima facie* classifiable under both headings 39.26 and 62.16, Rule 3 (which, as discussed below, is employed to resolve the classification of goods which are *prima facie* classifiable under two or more headings) should have been employed to determine the proper classification of the gloves. The Court of Appeal therefore remitted the matter back to the CITT so that it could undertake that Rule 3 analysis.
18. Analysis
    1. Standard of Review
19. The Federal Court of Appeal has uniformly held, and neither party disputes, that the standard of review applicable to a tariff classification decision of the CITT is reasonableness: see, e.g., *Minister of National Revenue v. Yves Ponroy Canada* (2000), 259 N.R. 38 (F.C.A.), at para. 4; *Cycles Lambert Inc. v. Canada (Border Services Agency)*, 2015 FCA 45, 469 N.R. 313, at paras. 18-19; *Canada (Border Services Agency) v. SAF-HOLLAND Canada Ltd.*, 2014 FCA 3, 456 N.R. 174, at para. 5.
20. I agree that reasonableness is the applicable standard of review here. As the Federal Court of Appeal has noted, the CITT has specific expertise in interpreting “the very complex customs tariff and the international and national rules for its interpretation”: *Star Choice Television Network Inc. v. Canada (Customs and Revenue Agency)*, 2004 FCA 153, at para. 7 (CanLII). The questions of law at issue in this appeal are of “a very technical nature” which the CITT will often be better equipped than a reviewing court to answer: *Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 N.R. 381 (F.C.A.), at para. 5.
21. Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit “justification, transparency and intelligibility within the decision-making process”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal’s reasons is not on its own a discrete basis for judicial review, the reasons should “adequately explain the bases of [the] decision”: *Newfoundland Nurses*, at para. 18, quoting from *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev’d 2011 SCC 57, [2011] 3 S.C.R. 572.
    1. The Structure of the General Rules
22. This appeal ultimately turns on the application of the General Rules when determining the classification of goods under the Harmonized System. The General Rules operate as follows.
23. The classification exercise begins with Rule 1, which directs that the classification of goods must initially be determined with reference only to the headings within a chapter, as well as any applicable Section or Chapter Notes.[[3]](#footnote-3)
24. Classification may be determinable on an application of Rule 1 alone. For example, if one wished to import a live cow into Canada, the cow would be classified under heading 01.02 (“Live bovine animals”) based solely on Rule 1. There would be no need to consider the other Rules when determining the appropriate classification of the cow. It is, therefore, only where Rule 1 does not conclusively determine the classification of the good that the other General Rules become relevant to the classification process: see, e.g., *Helly Hansen Leisure Canada Inc. v. Canada Border Services Agency*, 2009 FCA 345, 397 N.R. 323, at para. 17; *Canada Customs and Revenue Agency v. Agri Pack*, 2005 FCA 414, 345 N.R. 1, at para. 41; *Funtastic Ltd. v. Chief Executive Officer of Customs*, [2008] AATA 528, at para. 48 (AustLII).
25. In some cases, applying Rule 1 alone does not settle the classification of a good. Where the goods are unfinished or where they are comprised of a mix of materials or substances (and where no heading specifically describes the unfinished or composite good as such),[[4]](#footnote-4) Rule 2 is applied in conjunction with Rule 1 to determine the *prima facie* classification of such goods.
26. Rule 2 is a deeming provision. Rule 2(a) deems unfinished goods to be finished goods, and directs that they be classified using Rule 1 as if they were goods in a complete or finished state.[[5]](#footnote-5) Explanatory Notes (III) and (V) to Rule 1 elaborate upon this process:

(III) The second part of [Rule 1] provides that classification shall be determined:

* + - * 1. according to the terms of the headings and any relevant Section or Chapter Notes, and
        2. where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5.

. . .

(V) In provision (III) (b):

(a) The expression “provided such headings or Notes do not otherwise require” is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate **only** to particular goods. Consequently those headings cannot be extended to include goods which otherwise might fall there by reason of the operation of Rule 2 (b).

(b) The reference to Rule 2 in the expression “according to the provisions of Rules 2, 3, 4 and 5” means that:

(1) goods presented incomplete or unfinished (e.g., a bicycle without saddle and tyres), and

(2) goods presented unassembled or disassembled (e.g., a bicycle, unassembled or disassembled, all components being presented together) whose components could individually be classified in their own right (e.g., tyres, inner tubes) or as “parts” of those goods,

are to be classified as if they were those goods in a complete or finished state, **provided the terms of Rule 2 (a) are satisfied and the headings or Notes do not otherwise require**. [Emphasis in original.]

The effect of these Explanatory Notes is two-fold. They reiterate that Rule 1 requires that the headings and Section or Chapter Notes are the first consideration in determining classification. And, they explain that Rule 2(a) requires that incomplete goods are classified based on the headings and Section or Chapter Notes as if they were completed goods (assuming they are not classifiable under Rule 1 as falling within a heading that specifically describes unfinished goods).

1. Rule 2(b) applies where a good consists of a mixture of more than one substance, and states that a reference to goods of a given material or substance in a heading shall be taken to include goods consisting wholly or partly of such material or substance.[[6]](#footnote-6) This Rule therefore applies in conjunction with Rule 1 to determine the heading(s) under which the composite good is *prima facie* classifiable.
2. Explanatory Notes (XI) to (XIII) to Rule 2(b) explain the effect of this Rule:

(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.

(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.

1. In brief, Rule 2(b) deems the reference in a heading to a material or substance to be a reference to a combination of that material or substance with other materials or substances. This is, however, subject to the *caveat* in Explanatory Note (XII) that Rule 2(b) does not extend (“widen”) a heading so as to cover goods which cannot be regarded as answering the description in the heading. The mixed or composite good is therefore “described” by that heading unless the addition of the other material or substance would deprive the good of the character of goods of the kind described in the heading.
2. Applied conjunctively, Rules 1 and 2 determine the heading(s) under which an unfinished or (as here) a composite good is *prima facie* classifiable. If, having applied Rules 1 and 2, the good is *prima facie* classifiable under only one heading, then the inquiry ends and the good is classified under that heading. If, however, the good is *prima facie* classifiable under more than one heading — either because it is described by more than one heading under Rule 1 or because it is *prima facie* classifiable under more than one heading by applying Rules 1 and 2 together — then Rule 3 applies, by operation of Rule 2(b), to resolve the classification dispute.[[7]](#footnote-7) Rule 3(a) states that, where by application of Rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, then the heading with the most specific description is to be preferred. If applying Rule 3(a) does not resolve the classification (because the headings are equally specific), Rule 3(b) provides that classification must occur according to the material or component that gives the goods their essential character. And, if that does not lead to a single classification, then Rule 3(c) states that the goods must be classified under the heading which occurs last in numerical order among those under consideration.
3. If the application of Rules 1, 2 and 3 does not lead to the classification of a good under a single heading, Rule 4 provides a failsafe “likeness” rule, by which the good is classified under the heading that is appropriate to the good to which it is “most akin”.[[8]](#footnote-8) Rule 5 deals with classification of cases and packing materials, and is not relevant to this appeal. Rule 6 applies once goods are classified under a heading, and directs the application of the General Rules when classifying goods under a subheading within that heading. Again, that concern does not arise here.
4. The General Rulesare commonly described as “cascading” in nature: see, e.g., *Agri Pack*, at para. 14; *Canada Border Services Agency v. Outils Gladu Inc.*, 2009 FCA 215, 393 N.R. 58, at para. 7. But this metaphor does not quite capture how the General Rules are to be applied. A “cascade” tends to suggest that the analysis progresses in a single, sequential direction — for example, first, to Rule 1, then (where Rule 1 fails to resolve the matter) to Rule 2, without returning to Rule 1. While the General Rules are hierarchical in the sense that any classification exercise must begin with Rule 1 (since Explanatory Note (V) to Rule 1 describes its classification methodology as “paramount”), Rule 1, as I have explained, does not lose all relevance where Rule 2 is applied. Nor is it an error to consider whether a good meets the description of a heading — that is, to apply Rule 1 — when Rule 2 is also applied. Indeed, Rule 2 would have no purpose were it not applied in conjunction with Rule 1, since its function is to guide the application of Rule 1 when the good in question is incomplete or a composite of different materials. Where Rule 2 applies, it applies together with Rule 1 to identify the heading(s) under which an incomplete or composite good can be *prima facie* classified. The terms of the heading(s) and any relevant Section or Chapter Notes are thereby applied to the incomplete or composite good as if it were a complete or uniform good, and it is classified as such: see, e.g., *Rona Corporation Inc. v. Canada (Border Services Agency)* (2008), 12 T.T.R. (2d) 295, at pp. 300 et seq.; *Primaplas Pty. Ltd. v. Chief Executive Officer of Customs*, [2016] FCAFC 40, at para. 51 (AustLII).
   1. The CITT’s Reasoning
5. As the Federal Court of Appeal has noted, the *Customs Tariff* bears little resemblance to ordinary legislation and care must be taken when reviewing decisions of the CITT interpreting its unique and complex scheme:

[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 should be aware that they have a tough hill to climb. [*Schrader Automotive*, at para. 5]

Considerable prudence must therefore be exercised when reviewing the CITT’s interpretation and application of the *Customs Tariff*.

1. The CITT considered whether the gloves could be classified under heading 62.16 (as determined by the CBSA) or heading 39.26 (as submitted by Igloo Vikski). Igloo Vikski had argued that the classification must be resolved using Rule 3(b) which, as the preceding discussion shows, would necessarily require that the hockey gloves were *prima facie* classifiable under *both* headings 62.16 and 39.26 — that is, as gloves, mittens or mitts, *and* as articles of plastics.
2. The CITT found that the hockey gloves met the description of heading 62.16 as “[g]loves, mittens and mitts”. It went on to consider whether the Explanatory Note to heading 62.16 should direct it to consider any other Rule when classifying the goods (paras. 49-50). Before doing so, however, it first addressed Igloo Vikski’s arguments relating to heading 39.26.
3. Igloo Vikski had conceded before the CITT that the gloves were not *prima facie* classifiable under heading 39.26 using Rule 1 alone (para. 54). Instead, it argued that the gloves were *prima facie* classifiable under heading 39.26 using a combination of Rules 1 and 2(b). To be clear, I do not view this concession as binding Igloo Vikski in any legal sense, but rather as an acknowledgement of the obvious fact that the gloves — which are composed of a mixture of plastics and textiles — are not composed solely of plastics and are therefore not classifiable under heading 39.26 using Rule 1 alone.
4. The CITT rejected Igloo Vikski’s argument, stating that the Explanatory Note to heading 39.26 precluded the gloves from being *prima facie* classifiable under that heading. The relevant portion of the Explanatory Note to heading 39.26 states:

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. [Emphasis in original.]

The Explanatory Note goes on to list 11 more examples of what is included in heading 39.26, none of which is relevant to this appeal.

1. The CITT interpreted this Explanatory Note to mean that an article of apparel and clothing accessories may only be classified in this heading if it is made by sewing or sealing sheets of plastic together (para. 55). The gloves at issue were not made by sewing or sealing sheets of plastic together (para. 56). Therefore, despite the presence of plastics in the gloves, Rule 2(b) could not be used to extend heading 39.26 to cover the gloves because the Explanatory Note precluded their classification under this heading (paras. 61 and 66-67).
2. The CITT then returned to heading 62.16. As I have already noted, the Explanatory Note to heading 62.16 states that the presence of additional materials in the goods does not affect their classification in this heading so long as the additional materials do not constitute “more than mere trimming”. Where additional materials constitute more than mere trimming, the Explanatory Note directs that classification proceed according to the General Rules.[[9]](#footnote-9)
3. Having already found that the hockey gloves met the description of heading 62.16, the CITT recognized that the Explanatory Note directed it to apply Rule 2(b) to assess whether that heading could be extended to cover the gloves notwithstanding the inclusion of plastic materials, since they constituted more than mere trimming (para. 71). It considered Explanatory Note (XII) to Rule 2(b), observing that “Rule 2 (b) does not allow extending the terms of a heading to the point where Rule 1 is ignored” (para. 79), but ultimately concluded — employing the language of Explanatory Note (XII) — that “the presence of the plastic components in the goods in issue does not deprive them of their character as gloves of textile fabrics” (para. 81). The gloves were not *prima facie* classifiable as articles of plastics under heading 39.26, but they were classifiable under heading 62.16 as gloves, mittens or mitts. And, since heading 62.16 was the *only* heading under which the gloves were *prima facie* classifiable, the CITT held that this was the appropriate classification for the gloves, and it dismissed Igloo Vikski’s appeal.
   1. The Alleged Errors
4. The Federal Court of Appeal identified what it considered to be errors in the CITT’s reasoning which, it said, renders the decision unreasonable. Specifically, it held that the CITT had misapplied the General Rules by requiring that a good be described by a heading using Rule 1 before Rule 2 can be applied. Igloo Vikski adopts this argument on appeal, and also says that the CITT misinterpreted the Explanatory Note to heading 39.26.
   * 1. Misapplication of the General Rules
5. The Federal Court of Appeal held that the CITT misapplied the General Rules by requiring as “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” (para. 11). It also found that the CITT had erred by failing to apply Rule 2(b) to extend heading 39.26 to cover the gloves, and that the CITT’s decision was therefore unreasonable.
6. In reaching this decision, the Federal Court of Appeal in my respectful view misapprehended the structure of the General Rules. More precisely, it did not appreciate the conjunctive nature of the application of Rules 1 and 2 to a determination of the heading(s) under which a good is *prima facie* classifiable.
7. As I have already explained, Rules 1 and 2 are not mutually exclusive classification rules. Rule 1 simply provides that classification must be done according to the headings and relevant Section and Chapter Notes. Rule 2 deems that certain references in headings include unfinished goods or goods composed of different materials. Where Rule 2 applies, it informs the content of the headings by which Rule 1 directs that the appropriate classification is to be determined.
8. While in some respects the CITT’s reasons lack perfect clarity, reasonableness review does not require perfection. The CITT’s decision is reasonable if its reasons “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”: *Newfoundland Nurses*, at para. 16.
9. My review of the CITT’s reasons satisfies me that they meet this standard. Those reasons show:

The CITT considered whether the gloves fell within either heading 62.16 (as “[g]loves, mittens and mitts”) or heading 39.26 (as “articles of plastics”), and it found that they met the description of heading 62.16.

The CITT recognized that the Explanatory Note directed it to Rule 2(b) because of the presence of plastics in the gloves constituting more than mere trimming.

In considering whether the goods met the description of heading 39.26 as articles of plastics, the CITT concluded — having reference to the Explanatory Note to heading 39.26 — that only items of clothing or accessories which were made by sewing or sealing sheets of plastic together could be classified under heading 39.26. As the gloves could not meet the description in the heading, so understood, there was therefore no basis for applying Rule 2(b) to extend that heading.

1. This is a reasonable application of the General Rules. Further, the Federal Court of Appeal erred in supposing that Rule 2(b) can be applied to extend the scope of a heading to include a particular good where no part of that good falls within the heading. While Rule 2(b) deems a reference in a heading to a material to include a mixture of that material with other substances, the Section, Chapter Notes, and Explanatory Notes still apply when classifying that good as if it were made exclusively of the material referenced by the heading. Yet, the Federal Court of Appeal’s statement that “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” (para. 11) implicitly suggests otherwise, as does my colleague, Côté J. This is because it holds open the possibility that a good could be classified by operation of Rule 2(b) under a heading (here, heading 39.26), even though — when the Explanatory Note thereto or the relevant Section or Chapter Notes are accounted for — the good does not meet the description of the heading (as an “articl[e] of plastics”) and is therefore not *prima facie* classifiable under Rule 1.
2. With respect, this reasoning is contrary to the application of the General Rules. For Rule 2(b) to apply, the goods under consideration must, in accordance with Rule 1, meet the description contained in that heading in whole or in part (once the relevant Chapter, Section, or Explanatory Notes are taken into account) — in this case, as “[g]loves, mittens [or] mitts” under heading 62.16, or as “articles of plastics” under heading 39.26. To be clear, a good *must* be described in whole or in part by a heading — even if it may ultimately not be classified under that heading because of its unfinished or composite nature — before Rule 2 can be applied. This is consistent with the process of reasoning applied by the CITT to this case, and the reasonableness of its decision is unassailable on this basis.
   * 1. Misinterpretation of the Explanatory Note to Heading 39.26
3. This leaves Igloo Vikski’s objection to the CITT’s interpretation of the Explanatory Note to heading 39.26. Igloo Vikski says that the CITT’s interpretation was unreasonable because it transformed language of “inclusion” into language of “exclusion”. It submits that this error led the CITT to treat heading 39.26 differently from heading 62.16, thereby resulting in an unreasonable decision as a whole.
4. I do not agree. While an alternate interpretation to that given by the CITT to the Explanatory Note is available, this does not mean that the CITT’s interpretation was necessarily unreasonable.
5. Certainly, the Explanatory Note to heading 39.26 contains inclusive language. Having stated that the heading covers articles “of other materials of headings 39.01 to 39.14”, it then proceeds to describe those “other materials”:

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, . . . . [Emphasis in original.]

1. The Explanatory Note *overall* begins with inclusive language (“[t]hey include”), but para. (1) of the Note *specifically* does not. The examples listed in para. (1) (“e.g., aprons, belts, . . .”) illustrate the types of articles that meet the criteria of “[a]rticles of apparel and clothing accessories . . . made by sewing or sealing sheets of plastics”. The addition of such examples does not, however, render those criteria non-exhaustive. In *Sher-Wood*, the CITT interpreted para. (1) as exclusive in nature — that is, only those articles of clothing or accessories which can meet the general description in para. (1) are classifiable under heading 39.26. In this case, the CITT adopted the same interpretation (para. 55), meaning that only articles of clothing or accessories made by sewing or sealing sheets of plastic together may be classified under heading 39.26, because that is the only type of clothing or accessories described. This led ultimately to the CITT’s conclusion that it could not use Rule 2(b) to extend heading 39.26 to cover the gloves (paras. 55 and 66-69): *even if* the gloves were comprised entirely of plastics, they could not be classified under heading 39.26 as they were not made by sewing or sealing sheets of plastic together.
2. While another interpretation of the effect of the inclusive language preceding the list of 12 items in the Explanatory Note was available to the CITT (specifically, that it directs that the description contained within each list item is non-exclusive, as well as the list itself), the CITT’s interpretation is far from unreasonable. Even accepting that the term “include” typically denotes that a non-exhaustive list is to follow (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1041, per La Forest J.), which the CITT does not deny in its reasons, the non-exhaustive quality of each list item in this case can reasonably be seen as a distinct matter. It is reasonable to interpret that list item as stating exhaustively its own criteria — meaning, in this case, that if an article of clothing or accessories is to be classified in heading 39.26, it must be made by sewing or sealing sheets of plastic together.
3. Conclusion
4. Read as a whole, the CITT’s decision classifying the gloves under heading 62.16 was reasonable. The CITT neither misapplied the General Rules, nor interpreted heading 39.26 and its Explanatory Note in an unreasonable manner. I would allow the appeal and restore the classification decision of the CITT.
5. The Attorney General of Canada is entitled to her costs in this Court and at the Federal Court of Appeal.

The following are the reasons delivered by

1. Côté J. (dissenting) — I apply the same standard of review as my colleague Brown J., i.e. reasonableness, however, I disagree with his conclusion that the Canadian International Trade Tribunal’s interpretation is reasonable. Indeed, I find that the Tribunal’s decision falls well outside the range of reasonable interpretations. It is not justifiable because it contradicts the cascading nature of the General Rules for the Interpretation of the Harmonized System (comprised in the Schedule to the *Customs Tariff*, S.C. 1997, c. 36), it is internally contradictory, and it interprets the World Customs Organization’s *Explanatory Notes to the Harmonized Commodity Description and Coding System* in a manner that is irreconcilable with their words. Consequently, I would dismiss the appeal.
2. At issue in the present appeal is the classification of five models of ice hockey goaltender gloves. Igloo Vikski Inc. (“Igloo Vikski”) had initially contested the classification of six models of gloves. On further redetermination, however, the Canada Border Services Agency (“CBSA”) reclassified one model (GBX5) as “Other articles of plastics” under tariff item No. 3926.20.92, which is titled “Mittens; Non-disposable gloves” and includes the item “Gloves, specially designed for use in sports”. The CBSA concluded that the remaining five models were properly classified under tariff item No. 6216.00.00, which is titled “Gloves, mittens and mitts”. Igloo Vikski appealed the classification of the remaining five models on the basis they should also be reclassified under tariff item No. 3926.20.92 as “Gloves, specially designed for use in sports”.
3. Standard of Review
4. The standard of review of reasonableness is applicable in this case since it is well established that the Canadian International Trade Tribunal is a highly specialized tribunal and the question before this Court falls within its expertise. As I will discuss below, the *Customs Tariff* is a technical piece of legislation that involves unique Canadian and international rules of interpretation (*Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.* (1999), 240 N.R. 381 (F.C.A.), at para. 5). That being said, I wish to say a couple of things about reasonableness review that will be relevant to my review of the merits.
5. My colleague acknowledges that reasonableness review is concerned with two aspects: “. . . the reasonableness of the substantive outcome of the decision, and . . . the process of articulating that outcome” (para. 18). These two aspects were described by a majority of this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190:

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. [para. 47]

The majority in *Dunsmuir* further explained that 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” (para. 48). An indefensible process of reasoning cannot be saved by the mere fact that the outcome itself may be, in the end, an available one. In *Dunsmuir*, the majority concluded that the decision was unreasonable because the reasoning process was “deeply flawed” and “relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations” (para. 72).

1. Moreover, while reasonableness is a single standard of review, it takes its colour from the context (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59) and “must be assessed in the context of the particular type of decision making involved and all relevant factors” (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18). In the statutory context, for example, “[w]here 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” (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 38).
2. In the present case, we are dealing with the interpretation of a statute that was enacted to implement the *International Convention on the Harmonized Commodity Description and Coding System*, Can. T.S. 1988 No. 38. The *Convention* is aimed at achieving uniformity and consistency in tariff classifications across jurisdictions and provides a set of rules the states parties must apply when classifying imported goods. The Attorney General states that “[t]hese rules are designed to ensure that each individual imported good is classified within one, and only one, heading and subheading. The signatories to the Convention recognized that it would be beneficial to have a common international system for classifying goods that can be used to establish customs tariffs and to compile trade statistics. In particular, such a system facilitates negotiations between nations on customs and tariffs” (A.F., at para. 6 (footnote omitted)). Given the *Convention* parties’ intention of creating a uniform classification scheme, I find that the range of reasonable statutory interpretations in this context is narrow.
3. My colleague points out that this appeal deals not with the interpretation of the *Customs Tariff*, but rather “the application of the General Rules when determining the classification of goods under the Harmonized System” (para. 19). The General Rules are part of the *Customs Tariff* (see s. 10(1) of the *Customs Tariff* and the Schedule), and they cannot be applied in this context without first being interpreted. My colleague’s discussion of the hierarchical rather than cascading nature of the General Rules at para. 29 suggests as much.
4. Concession
5. Before turning to the merits, I will first address the matter of Igloo Vikski’s concession. The Tribunal concluded that “Igloo Vikski conceded that the terms of heading No. 39.26 do not describe the goods in issue” (2013 CanLII 4408, at para. 66). My colleague, at para. 33, says that Igloo Vikski had conceded before the Tribunal “that the gloves were not *prima facie* classifiable under heading 39.26 using Rule 1 alone. Instead, it argued that the gloves were *prima facie* classifiable under heading 39.26 using a combination of Rules 1 and 2(b)” (citation omitted).
6. The Tribunal member in the present case had previously considered the tariff classification of ice hockey skater gloves in a similar case, *Sher-Wood Hockey Inc. v. Canada (Border Services Agency, President)* (2011), 15 T.T.R. (2d) 336. In *Sher-Wood*, she concluded 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’” (p. 362). Before the same Tribunal member, Igloo Vikski did not dispute this interpretation of heading No. 39.26 (paras. 54-55).
7. A concession, to be considered as such, has to be of a clear nature. Assuming — without deciding — that it is a concession, it should be accorded little to no weight in the context of these proceedings as it was merely Igloo Vikski’s opinion on a matter of law (*Phipson on Evidence* (15th ed. 2000), at para. 28-11), namely the proper interpretation of heading No. 39.26. In addition, Igloo Vikski’s position throughout these proceedings has been that the gloves should be classified pursuant to Rule 3(b), which requires in this case that the gloves be *prima facie* classifiable under both headings No. 39.26 and No. 62.16. The issue of whether the gloves are classifiable under heading No. 39.26 was the subject of a fulsome debate in the proceedings below and before this Court, and should be addressed.
8. The Tribunal’s Decision Was Unreasonable
9. The Tribunal’s decision falls outside the range of reasonable interpretations because, as I already said, it contradicts the cascading nature of the General Rules, it is internally contradictory, and it interprets the *Explanatory Notes* in a manner that is irreconcilable with their words.
10. Turning to the first error in the Tribunal’s reasons, as identified by the Federal Court of Appeal, with respect, my colleague mischaracterizes the issue in this case. The distinction between a conjunctive or hierarchical application of the General Rules as opposed to a cascading application is, in this case, irrelevant. The issue is not whether an application of Rule 2(b) requires that Rule 1 be forgotten. I agree with my colleague that this is not an available interpretation of the General Rules since Rule 2(b) functions to extend the headings under Rule 1 and, therefore, cannot operate independently of Rule 1. Rather, the error, as identified by the Federal Court of Appeal, is that the Tribunal required as a prerequisite condition to the application of Rule 2(b) that the goods must first meet the description in the heading pursuant to Rule 1.
11. I agree with the Federal Court of Appeal that this is an error because a good does not need to first meet the description in a heading pursuant to Rule 1 in order for Rule 2(b) to apply. Such a reading is inconsistent with the text of Rule 2(b). 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) applies. The function of Rule 2(b) is to extend headings referring to a material under Rule 1 to include goods that are composed only partly of the material. In this regard, I agree with my colleague’s finding that “[f]or Rule 2(b) to apply, the goods under consideration must, in accordance with Rule 1, meet the description contained in that heading in whole or in part” (para. 45 (emphasis added)). In this case, it is clear that the gloves were composed “in part” of plastics; it was accepted by the parties that the padding in the gloves was made predominantly of plastics (Tribunal’s decision, at para. 51).
12. Despite this, the Tribunal failed to follow the line of inquiry described in the Explanatory Notesto Rule 2(b). The Tribunal did not apply Rule 2(b) to heading No. 39.26 to determine whether Rule 2(b) could extend the heading 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)). According to Explanatory Note (XII), such impermissible widening would occur if the addition of another material deprived the gloves of the character of the goods of the kind mentioned in the heading. Instead of conducting this analysis, the Tribunal treated Rule 1 as a prerequisite to Rule 2(b), and simply concluded that since the gloves did not answer the description in heading No. 39.26 pursuant to Rule 1 alone, Rule 2(b) could not extend the scope of the heading to include the gloves (para. 69). The Tribunal’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.
13. The Tribunal’s error in failing to apply Rule 2(b) to extend heading No. 39.26 is made even more apparent when compared to the Tribunal’s application of Rule 2(b) to extend heading No. 62.16. This brings me to the second error identified by the Federal Court of Appeal. As my colleague observes, the Tribunal had to apply Rule 2(b) in order for heading No. 62.16 to apply to the gloves since the gloves included plastic that constituted more than mere trimming (paras. 36-37). In other words, Rule 1 alone was not sufficient to classify the gloves in heading No. 62.16 nor in *any* heading, and the Tribunal had to resort to Rule 2(b). In this context, the Tribunal’s refusal to apply Rules 1 and 2(b) consistently to both headings No. 39.26 and No. 62.16 is internally contradictory and therefore unreasonable.
14. Third, the Tribunal’s interpretation of the Explanatory Noteto heading No. 39.26 is unreasonable. That Explanatory Note reads:

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. [Bold emphasis in original; underlining added.]

1. The Tribunal relied on its own interpretation in *Sher-Wood*, where it concluded that as it relates to articles of apparel and clothing accessories, heading No. 39.26 only includes articles of plastics that are made by “sewing or sealing sheets of plastics” (*Sher-Wood*, at pp. 351 and 362).
2. In my view, the Tribunal’s interpretation is unreasonable as it is contrary to the words of the Explanatory Note. On a plain reading, the words “they include” (in French “*sont . . . notamment compris*”) clearly indicate that what follows is a non-exhaustive list. The list does not limit what can be classified under heading No. 39.26; it merely describes what types of articles are included.
3. In *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, this Court had to interpret a standard mortgage clause. La Forest J., writing for the majority, considered the meaning of the word “including” (in French, “*notamment*”) where it follows a general term and is used to introduce a list of specific examples. La Forest J. held that “include” or “including” are “terms of extension, designed to enlarge the meaning of preceding words, and not to limit them” (p. 1041). He further explained that “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” (p. 1041). Similarly, Professor Ruth Sullivan states that “[t]he purpose of a list of examples following the word ‘including’ is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included” (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 74).
4. A contextual interpretation of the Explanatory Note to heading No. 39.26, consistent with the *Vienna Convention on the Law of Treaties*,Can. T.S. 1980 No. 37, which informs the interpretation of international instruments, further supports this view. According to Article 31 of the *Vienna Convention*, “[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.” When the Explanatory Note to heading No. 39.26 is read in relation to other Explanatory Notes, it is evident that the drafters used clearly restrictive language where they intended to exclude goods from a heading. Take, for example, the Explanatory Note 3 to Chapter 39, one of the chapters that is presently at issue:

3. Headings 39.01 to 39.11 apply only to goods of a kind produced by chemical synthesis, falling in the following categories:

* + - * 1. Liquid synthetic polyolefins of which less than 60 % by volume distils at 300 °C, after conversion to 1,013 millibars when a reduced-pressure distillation method is used (headings 39.01 and 39.02);
        2. Resins, not highly polymerised, of the coumarone-indene type (heading 39.11);
        3. Other synthetic polymers with an average of at least 5 monomer units;
        4. Silicones (heading 39.10);
        5. Resols (heading 39.09) and other prepolymers. [Emphasis added.]

1. Another example is the Explanatory Note 1(u) to Chapter 95 (“Toys, games and sports requisites; parts and accessories thereof”):

This Chapter does not cover:

. . .

(u) Racket strings, tents or other camping goods, or gloves, mittens and mitts (classified according to their constituent material); . . . . [Emphasis added.]

1. Unlike the expressions “apply only” and “does not cover”, the term “include” in the Explanatory Note to heading No. 39.26 is open-ended and non-exhaustive. Therefore, 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.
2. For the above reasons, I would dismiss the appeal and confirm the decision of the Federal Court of Appeal to refer the matter back for adjudication, based on an analysis which takes into account the complete application of Explanatory Notes (XI) to (XIII) to Rule 2(b).

*Appeal allowed with costs,* Côté J. *dissenting.*

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondent:  Lapointe Rosenstein Marchand Melançon, Montréal; Power Law, Vancouver.

1. “In summertime village cricket is the delight of everyone” (*Miller v. Jackson*, [1977] 1 Q.B. 966 (C.A.), at p. 976, per Lord Denning M.R.). [↑](#footnote-ref-1)
2. Ken Dryden, *The Game* (1983). [↑](#footnote-ref-2)
3. Rule 1 states:

   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. [↑](#footnote-ref-3)
4. An example of a heading that specifically describes an unfinished good is 64.06 (“Parts of footwear”), and an example of a heading that specifically describes a composite good is 59.06 (“Rubberized textile fabrics”). Where a good falls within one of those headings, there would be no need to apply Rule 2, as the heading specifically contemplates the incomplete or composite nature of the good in question. Rule 1’s direction that the classification of goods should be determined according to the terms of the headings therefore suffices. [↑](#footnote-ref-4)
5. Rule 2(a) states:

   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. [↑](#footnote-ref-5)
6. 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 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. [↑](#footnote-ref-6)
7. Rule 3 states:

   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:

   (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.

   (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.

   (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. [↑](#footnote-ref-7)
8. Rule 4 provides:

   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. [↑](#footnote-ref-8)
9. The Explanatory Note to heading 62.16 states:

   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. [Emphasis in original.] [↑](#footnote-ref-9)