



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-029

Eastern Division Henry Schein Ash
Arcona Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, May 20, 2014*

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DECISION 11

IN THE MATTER OF an appeal heard on February 27, 2014, pursuant to section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 20 decisions of the President of the Canada Border Services Agency, dated April 29, 2013, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

EASTERN DIVISION HENRY SCHEIN ASH ARCONA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

Gillian Burnett

Gillian Burnett
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 27, 2014
Tribunal Member: Jason W. Downey, Presiding Member
Counsel for the Tribunal: Alexandra Pietrzak
Student-at-Law: Catalin Tripon
Manager, Registrar Programs and Services: Sarah MacMillan
Registrar Officer: Haley Raynor
Acting Registrar Support Officer: Sara Pelletier

PARTICIPANTS:

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Eastern Division Henry Schein Ash Arcona Inc.	Sean Everden
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Kirk G. Shannon

WITNESS:

Naldo DeCicco
Regulatory Manager
Henry Schein

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed by Eastern Division Henry Schein Ash Arcona Inc. (Henry Schein), pursuant to subsection 67(1) of the *Customs Act*,¹ from a final decision dated April 29, 2013, issued by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the *Act*. The final decision of the CBSA confirmed two prior tariff classifications of Henry Schein's goods: one under an advance ruling, and another in connection to a refund request.

2. The issue in this appeal is whether the goods are properly classified under tariff item No. 4015.19.90 as other articles of apparel and clothing accessories (including gloves, mittens, and mitts), for all purposes, of vulcanized rubber other than hard rubber, as contended by the CBSA, or should be classified under tariff item No. 9018.49.00 as other instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments, as argued by Henry Schein.

3. In the original notice of appeal, Henry Schein had submitted, in the alternative, that the goods in issue should be classified under tariff item No. 9977.00.00 as articles for use in instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments. However, by way of a letter dated January 16, 2014, Henry Schein advised that it was no longer pursuing this possible classification.

PROCEDURAL HISTORY

4. On October 17, 2012, Henry Schein applied for an advance ruling on nitrile gloves, under subsection 43.1(1)(c) of the *Act*, requesting to have the nitrile gloves classified under tariff item No. 9018.49.00.

5. On November 8, 2012, the CBSA issued its advance ruling in which it concluded that the nitrile gloves were properly classified under tariff item No. 4015.19.90.

6. Henry Schein filed a dispute notice of the advance ruling, under section 60(2) of the *Act*, on December 3, 2012.

7. On December 31, 2012, Henry Schein submitted a request for refund for latex gloves, pursuant to subsection 74(1) of the *Act*. In the event the request was denied, Henry Schein asked that the latex gloves be treated together with the nitrile gloves classification review already in progress. The CBSA denied the refund request.

8. On March 18, 2013, the CBSA issued a preliminary decision in which it classified the nitrile gloves and the latex gloves under tariff item No. 4015.19.90.

9. On April 9, 2013, the CBSA issued its final decision, pursuant to section 60(4) of the *Act*, and affirmed its assessment to classify the nitrile gloves and the latex gloves under tariff item No. 4015.19.90.

10. On June 26, 2013, Henry Schein filed a notice of appeal, pursuant to subsection 67(1) of the *Act*.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

11. The Canadian International Trade Tribunal (the Tribunal) held a public hearing on February 27, 2014, in Ottawa, Ontario. Henry Schein called Mr. Naldo DeCicco, Regulatory Manager, Henry Schein, as a witness. The CBSA did not call any witnesses.

GOODS IN ISSUE

12. There are two types of gloves which make up the goods in issue:

- Microflex Xceed Nitrile Examination Gloves (nitrile gloves); and
- Diamond Grip Latex Examination Gloves (latex gloves).

13. The goods in issue are single-use protective gloves made of vulcanized rubber, and are used primarily in the dental profession.

14. The goods in issue are not sterile.

LEGAL FRAMEWORK

15. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with the approach prescribed by sections 10 and 11 of the *Customs Tariff*.

16. Subsection 10(1) of the *Customs Tariff* provides that the tariff classification of imported goods is to be determined in accordance with the *General Rules* and the *Canadian Rules*. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed. Rules 1 through 5 apply to classification at the heading, subheading and tariff item levels (they are applicable at the subheading level pursuant to Rule 6 and at the tariff item level pursuant to the *Canadian Rules*).

17. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*² and the *Classification Opinions to the Harmonized Commodity Description and Coding System*³ published by the World Customs Organization. However, the *Explanatory Notes* and the *Classification Opinions* do not apply at the tariff item level.

18. Therefore, the Tribunal must first determine whether the goods in issue can be classified at the heading level in accordance with Rule 1 of the *General Rules* while having regard to any relevant explanatory notes and classification opinions. If the goods in issue cannot be properly classified through the application of Rule 1, then the subsequent rules must be considered.

19. Rule 2(b) directs that goods consisting of more than one material or substance are to be classified according to the principles of Rule 3.

20. Rule 3 of the *General Rules* applies when goods are *prima facie* classifiable under two or more headings, by application of Rule 2(b) or for any other reason.

2. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

3. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

21. Classification of goods by virtue of Rule 3(a) is determined by the heading that provides the most specific description over the heading that provides a more general description. However, when the two or more headings in issue each refer to part only of the materials or substances contained in mixed or composite goods, those headings are to be regarded as equally specific.

22. Rule 3(b) notably governs the classification of composite goods consisting of different materials or made up of different components. It provides that such goods shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

23. Finally, if classification cannot be determined by virtue of Rule 3(a) or 3(b), Rule 3(c) directs that the goods be classified in the heading which occurs last in numerical order.

24. This approach must then be repeated to determine the classification of the goods in issue at the subheading and tariff item levels. However, the *Explanatory Notes* and the *Classification Opinions* do not apply at the tariff item level.

RELEVANT LEGISLATIVE PROVISIONS

25. Henry Schein argued that the following provision of the schedule to the *Customs Tariff*⁴ should apply:

Section XVIII

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; CLOCKS AND WATCHES; MUSICAL INSTRUMENTS; PARTS AND ACCESSORIES THEREOF

Chapter 90

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; PARTS AND ACCESSORIES THEREOF

...

90.18 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

...

9018.49.00 --Other

26. There are no relevant section notes. However, the explanatory notes to Chapter 90 provide as follows:

GENERAL

(I) GENERAL CONTENT AND ARRANGEMENT OF THE CHAPTER

This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterized by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes.

...

4. S.C. 1997, c. 36.

- (C) Instruments and appliances for medical, surgical, dental or veterinary uses, or for related purposes (radiology, mechano-therapy, oxygen therapy, orthopaedy, prosthetics, etc.).

...

27. In addition, heading No. 90.18 contains explanatory notes that read as follows:

This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. Instruments and appliances for anatomical or autoptic work, dissection, etc., are also included, as are, under certain conditions, instruments and appliances for dental laboratories (see Part (II) below). The instruments of the heading may be made of any material (including precious metals).

...

(II) DENTAL INSTRUMENTS AND APPLIANCES

In addition to those common to this and the previous group (such as masks and other dental analgesic apparatus), the main instruments and appliances included in this category are:

- (1) **Surgeons' finger-guards** (whether or not articulated) **and gags; cheek or lip retractors, tongue depressors and clips.**
- (2) **Forceps** of all kinds, **elevators, tweezers** of all kinds (to remove exposed teeth, aligning pivot teeth, etc.), **cutters** (for dissecting, dressing, filling and gouging, etc.), **root forceps.**
- (3) **Instruments for endodontic treatment** (broaches, reamers, files, pluggers, spreaders, etc.).
- (4) **Bone scissors and files; gouges and mallets for resecting the jaw and the maxillary sinus; raspatories; scalpels; special knives and scissors; special dentists' tweezers; "excavators" and probes.**
- (5) **Special instruments for cleaning gums and sockets; scalers for treating dental tartar; scrapers and enamel chisels.**
- (6) **Miscellaneous probes; needles** (abscess, hypodermic, suture, cotton-wool, etc.); **cotton-wool holders and swab holders; insufflators; dental mirrors.**
- (7) **Gold-filling instruments** (pluggers, mallets, etc.); **filling instruments** (cement or resin spatulae, amalgam stoppers and mallets, amalgam-carriers, etc.); **impression compound trays.**
- (8) **Dental burrs, discs, drills and brushes**, specially designed for use with a dental drill engine or handpiece.

The heading also covers tools and instruments of a kind used in prosthetic dentistry either by the practitioner himself or by a dental technician, for example: knives; spatulae and other modelling tools; miscellaneous pliers and tweezers (for fixing clamps and crowns, cutting pivots, etc.); saws; shears; mallets; files; chisels; scrapers; burnishers; metal formers, for the manufacture, by beating, of metal dental crowns. The heading also covers dental casting machines, dental milling machines, and dental trimmers for trimming models of dentures. The heading **does not**, however, **include** tools or other articles of general use (furnaces, moulds, soldering tools, melting ladles, etc.); these are classified in their respective headings.

...

28. The CBSA argued that the following provisions of the schedule to the *Customs Tariff* should apply to the goods in issue:

Section VII

PLASTICS AND ARTICLES THEREOF; RUBBER AND ARTICLES THEREOF

...

Chapter 40

RUBBER AND ARTICLES THEREOF

...

40.15 Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.

-Gloves, mittens and mitts:

...

4015.19 --Other

...

4015.19.90 ---Other

29. The explanatory notes to Section VII have no relevance to heading No. 40.15. The explanatory notes to Chapter 40 read as follows:

Chapter 40

Rubber and articles thereof

Notes.

...

2.- This Chapter does not cover:

...

(e) Articles of Chapter 90, 92, 94 or 96; or

...

30. The explanatory notes to heading No. 40.15, covering items included in tariff item No. 4015.19.90, read as follows:

This heading covers articles of apparel and clothing accessories (including gloves, mittens and mitts) e.g., protective gloves and clothing for surgeons, radiologists, divers, etc., whether assembled by means of an adhesive or by sewing or otherwise obtained. These goods may be:

(1) Wholly of rubber.

...

POSITIONS OF THE PARTIES

Henry Schein

31. Henry Schein argued that the goods in issue should be classified in heading No. 90.18 as instruments and appliances used in medical, surgical, dental or veterinary sciences. More specifically, Henry Schein maintained that the goods in issue are used by dentists in order “to make a diagnosis, to prevent or treat an illness or to operate”, as set out in the explanatory notes to Chapter 90.

32. In support of this position, Henry Schein stated that, according to various medical academic sources, medical “device” is a synonym for medical “appliance”,⁵ and that the goods in issue are therefore covered by the explanatory notes to heading No. 90.18 as “appliances which, in the vast majority of cases, are used only in professional practice”. In addition, Mr. DeCicco testified that the goods in issue were classified as Class II medical devices, which are required to meet certain testing criteria in order to be granted a licence from Health Canada.⁶ Mr. DeCicco stated that the gloves are designed for dentists to wear as a protective barrier to prevent fluids from transferring from the patient to the dentist.⁷

33. Henry Schein contended that the goods in issue cannot be classified in heading No. 40.15 as they are not *prima facie* classifiable in Chapter 40, since chapter note 2(e) specifically states that Chapter 40 does not cover articles of Chapter 90. Furthermore, Henry Schein argued that, since the goods in issue cannot be re-used, they are not apparel or clothing as described in heading No. 40.15. In support of this position, Henry Schein pointed to the decision in *Trudell Medical Marketing Limited v. Deputy MNR* in which the Tribunal found that shoe covers, which are disposable in nature, should not be described as apparel or clothing articles.⁸

34. Finally, Henry Schein argued that the goods in issue are not “for all purposes”, as contemplated by heading No. 40.15. On this point, Henry Schein claimed that the Tribunal must determine whether the goods in issue can be classified in that heading regardless of their purpose after being imported, given that the goods in issue are intended for single-use only. This, Henry Schein maintained, is consistent with the fact that “used gloves” for medical or dental purposes are specifically listed under a note to an entirely different heading (note 6 to Chapter 38). Thus, Henry Schein maintained that, since the *Customs Tariff* apparently recognizes a distinction between “used” gloves and unused gloves, the fact that the goods in issue are intended for single-use only should mean they are not considered to be “for all purposes” as stated in heading No. 40.15.

CBSA

35. The CBSA argued that “[a]ll gloves, irrespective of their purpose, made of vulcanized rubber other than hard rubber are classified under heading 40.15”⁹ In support of this position, the CBSA pointed to the explanatory notes to the heading, which states the following:

This heading covers articles of apparel and clothing accessories (including gloves, mittens and mitts) e.g., protective gloves and clothing for surgeons, radiologists, divers, etc.

5. Exhibit AP-2013-029-06A, Vol. 1 at para. 51, referring to *The Doubleday Roget’s Thesaurus in Dictionary Form*, revised edition (New York: Doubleday, 1987), s.v. “appliance”.

6. *Transcript of Public Hearing*, 27 February 2014, at 32.

7. *Ibid.* at 33-34.

8. (24 July 1997), AP-96-016 (CITT) [*Trudell*] at 4-5.

9. Exhibit AP-2013-029-08A, Vol. 1C at para. 1.

As the parties agree that the goods in issue are “protective gloves”, the CBSA argued they fall squarely within the description provided in the explanatory notes.

36. Furthermore, the CBSA argued that the goods in issue meet the three criteria necessary to be classified in heading No. 40.15. In particular, the goods in issue, according to the CBSA, are:

- i) articles of apparel and clothing accessories (including gloves, mittens and mitts);
- ii) for all purposes; and
- iii) of vulcanized rubber other than hard rubber.¹⁰

37. The CBSA contended that the disposable nature of the goods in issue is not a relevant consideration, as neither the text of the schedule to the *Customs Tariff* nor the legal notes to heading No. 40.15 restrict the expression “for all purposes” to only items designed for repetitive use.

38. The CBSA argued that the goods in issue cannot be classified in heading No. 90.18, as claimed by Henry Schein, as they are not “instruments” or “appliances” within the meaning of that heading. In support of its position, the CBSA pointed to the *Bionova Medical Inc. v. Commissioner of the Canada Customs and Revenue Agency* case, in which the Tribunal examined the meaning of the words “instruments” and “appliances” in heading No. 90.18 and stated as follows:

In the Tribunal’s view, “instrument”, as used in this category, suggests a device capable of delicate or precise work, while “appliance” appears to refer to a more complex tool or instrument, e.g. a kidney dialysis apparatus.¹¹

Moreover, the CBSA pointed to explanatory note II, “Dental Instruments and Appliances”, which lists, among instruments, items such as bone scissors, gold-filling instruments, dental burrs, discs, drills and brushes. None of these items, the CBSA argued, are akin to the goods in issue.

39. Finally, the CBSA contended that, according to Tribunal jurisprudence, Henry Schein cannot rely on Health Canada’s classification of generic medical examination gloves as “medical devices” to show that the goods in issue are “instruments” or “appliances” within the meaning of heading No. 90.18, since the term “medical device” is not synonymous with the terms “instrument” and “appliance” within the meaning of the *Customs Tariff*, and because this specific argument was rejected by the Tribunal in the *Bionova* case.

ANALYSIS

Preliminary Issue: Qualification of Mr. DeCicco

40. Henry Schein submitted an expert report prepared by Mr. DeCicco, the Regulatory Manager of Henri Schein, and requested that the Tribunal qualify him as an expert in regulatory and quality control practices, with respect to the distribution of the goods in issue.¹² During the qualification process, Henry Schein’s counsel led Mr. DeCicco through his credentials, followed by questions put to Mr. DeCicco by the Tribunal.¹³

10. *Ibid.* at para. 16.

11. (24 February 2004), AP-2002-111 (CITT) [*Bionova*] at 6-7.

12. Exhibit AP-2013-029-13, Vol. 1D; *Transcript of Public Hearing*, 27 February 2014, at 8, 14-15.

13. *Ibid.* at 8-15.

41. Counsel for the CBSA objected to Mr. DeCicco being qualified as an expert. During cross-examination, Mr. DeCicco acknowledged that he was representing the company in his regular capacity, and had not been contracted to testify as an expert witness.¹⁴ Mr. DeCicco also agreed that he did not have expertise in engineering, or the textile industry, and that his experience in the dentistry field was limited to knowledge of the products Henry Schein sold to that industry.¹⁵

42. The test for the admissibility of expert evidence was set out by the Supreme Court of Canada in *R. v. Mohan*. The court enunciated the following four criteria to consider when assessing the admissibility of expert evidence: relevance, necessity in assisting the trier of fact, absence of any other exclusionary rule of evidence, and a properly qualified expert.¹⁶

43. In the courts, expert evidence may be excluded if its probative value is outweighed by the danger that it will be misused or will distort the fact-finding process.¹⁷ Such a danger may arise where the expert's opinion would be unreliable as a result of his or her bias.¹⁸ Instead of being allowed to advocate for one of the parties or to promote his or her own vested interest in the outcome of the case, the expert should be independent from the exigencies of litigation and provide assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise.¹⁹

44. Although the rules for qualification of an expert witness are more flexible before an administrative or quasi-judicial body than before the courts,²⁰ the Tribunal has previously found that it is inappropriate to qualify a witness as an expert where the witness's lack of objectivity or bias may impact on the Tribunal's confidence in the reliability of the expert's testimony.²¹

45. In the present case, though the Tribunal had no issue with the professional qualifications of the witness,²² the Tribunal had concerns regarding the independence of the witness, due to his direct involvement in the management of the company that imports the goods in issue. In particular, Mr. DeCicco testified that he was bound to meet specific marketing objectives every year that are associated with a financial bonus.²³ The Tribunal found that it would be improper to place Mr. DeCicco in a situation where he may have to express an expert opinion on the very regulatory and quality control practices in which he had financial interest by way of his performance bonus.²⁴

14. *Ibid.* at 17.

15. *Ibid.* at 19-20.

16. [1994] 2 SCR 9 [*Mohan*] at para. 17.

17. *Mohan* at paras. 18, 19.

18. *United City Properties Ltd. v. Tong*, 2010 BCSC 111 (CanLII).

19. *Fellowes, McNeil v. Kansa General International Insurance Co.*, 1998 CanLII 14856 (ON SC), referring to *The "Ikarian Reefer"*, [1993] 2 Lloyd's Rep. 68.

20. R.W. Macaulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 1988) Vol. 2 at 17-3.

21. *Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (23 December 2010), PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058 (CITT).

22. *Transcript of Public Hearing*, 27 February 2014, at 29.

23. *Ibid.* at 29-31.

24. *Ibid.* at 29.

46. In addition, the Tribunal recognized that a dual role as an employee at Henry Schein and as an expert witness testifying for the benefit of Henry Schein could place Mr. DeCicco in a position of being both an expert witness and an advocate for Henry Schein. Although it is by no means certain that Mr. DeCicco would have acted in such a way, the risk is such that it compromises his appearance as an independent witness.

47. In light of the above, the Tribunal declined to qualify Mr. DeCicco as an expert.²⁵ Instead, the Tribunal invited Henry Schein to call upon Mr. DeCicco to testify solely as witness of fact.²⁶

Classification of the Goods in Issue

May the Goods in Issue Be Classified in Heading No. 90.18?

48. The Tribunal will begin its analysis by determining whether the goods in issue may be classified in heading No. 90.18 as instruments and appliances used in medical, surgical, dental or veterinary sciences.

49. Both the *Merriam-Webster's Collegiate Dictionary (Merriam-Webster's)* and the *Canadian Oxford Dictionary* provide several definitions of the relevant terms at issue. In particular, *Merriam-Webster's* states as follows:

instrument 2 b : one used by another as means or aid : DUPE, TOOL. **3** : IMPLEMENT; *esp* : one designed for precision work.²⁷

implement 2 : a device used in the performance of a task...*syn* IMPLEMENT, TOOL, INSTRUMENT, APPLIANCE, UTENSIL mean a relatively simple device for performing work.²⁸

appliance 2 a : a piece of equipment for adapting a tool or machine to a special purpose . . . **b** : an instrument or device designed for a particular use or function . . .²⁹

apparatus 1 a : a set of materials or equipment designed for a particular use³⁰

tool 1 a : a handheld device that aids in accomplishing a task **2 a** : something (as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession . . .³¹

50. Similarly, the *Canadian Oxford Dictionary* provides as follows:

instrument 1 a tool or implement, *esp.* for delicate scientific work.³²

implement 1 a tool, instrument, or utensil.³³

tool 1 a any device or implement used to carry out mechanical functions whether manually or by a machine. **2** a thing used in an occupation or pursuit . . .³⁴

25. *Ibid.* at 31.

26. *Ibid.* at 31. Though Mr. DeCicco testified as a fact witness, his experience in the field of quality control and day-to-day corporate operations was recognized.

27. *Merriam-Webster's*, 11th ed., s.v. "instrument".

28. *Ibid.*, s.v. "implement".

29. *Ibid.*, s.v. "appliance".

30. *Ibid.*, s.v. "apparatus".

31. *Ibid.*, s.v. "tool".

32. *Canadian Oxford Dictionary*, 2nd ed., s.v. "instrument".

33. *Ibid.*, s.v. "implement".

34. *Ibid.*, s.v. "tool".

51. A review of these definitions reveals not only that they are interrelated terms, but also that they are largely synonymous with one another.

52. In a very general sense, the goods in issue may be instruments, apparatus, and appliances. The goods in issue are a type of tool or implement used in professional capacity to provide a barrier between the dentist and patient. Mr. DeCicco also testified that the goods in issue may be textured in order to assist the professional in accomplishing dental tasks.³⁵ It is therefore not impossible to conclude that the goods in issue could be captured by the general terms of heading No. 90.18, especially when combined with the explanatory notes to Chapter 90 and heading No. 90.18, which, respectively, state as follows:

This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterized by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes.

This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc.

53. The Tribunal acknowledges that the goods in issue are effectively used by dentists as tools, or devices, to diagnose, treat, or prevent illness when working on a patient. Moreover, the Tribunal accepts that dentists wear the goods in issue not just for protection, but also because of the intrinsic qualities of the goods in issue which apply to dental care. However, it must be emphasized that this is only so on the most generic understanding of heading No. 90.18.

Are the Goods in Issue Properly Classified in Heading No. 40.15?

54. Turning to heading No. 40.15, the CBSA argued that the goods in issue are more specifically described as articles of apparel and clothing accessories, for all purposes, of vulcanized rubber.

55. In response, Henry Schein contended that the goods in issue cannot be considered clothing, as they are disposable.³⁶ In support of this argument, Henry Schein referred to the Tribunal's decision in *Trudell* in which it found that footwear classified in heading No. 62.17 as other made-up clothing accessories, parts of garments or of clothing accessories, other than those of heading No. 62.12, did not include disposable footwear.

56. Nonetheless, the present case must be distinguished from the Tribunal's finding in *Trudell*. In *Trudell*, the Tribunal was tasked with determining whether certain types of footwear were classifiable in heading No. 62.12. Heading No. 62.12 is not at issue here. In addition, the Tribunal must have reference to language of the heading and related explanatory notes in issue in this appeal when evaluating the goods in issue. Therefore, while reference to previous Tribunal jurisprudence may be helpful on occasion, an interpretation or definition contained in an unrelated case of a different tariff classification cannot trump the actual wording of the tariff nomenclature and related explanatory notes in issue.

57. On this point, heading No. 40.15 states that it includes "articles of apparel and clothing accessories (*including gloves, mittens or mitts*), *for all purposes*, of vulcanized rubber other than hard rubber" [emphasis added]. Furthermore, the explanatory notes to heading No. 40.15 provide as follows:

35. *Transcript of Public Hearing*, 27 February 2014, at 33.

36. *Ibid.* at 78; see also *Trudell*.

This heading covers articles of apparel and clothing accessories (*including gloves, mittens and mitts*) e.g., *protective gloves* and clothing for surgeons, radiologists, divers, etc., whether assembled by means of an adhesive or by sewing or otherwise obtained. These goods may be:

- (1) Wholly of rubber.

...

[Emphasis added]

58. In *Canada (Attorney General) v. Suzuki Canada Inc.*, the Federal Court of Appeal stated as follows:

... the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international community, the *Explanatory Notes should be respected unless there is a sound reason to do otherwise.*³⁷

[Emphasis added]

Therefore, the Tribunal must have regard to the explanatory notes to heading No. 40.15 when determining the proper classification of the goods in issue.

59. As a result of the foregoing, the Tribunal understands that the legislator has deemed that “gloves, mittens and mitts”, “for all purposes”, made “wholly of rubber”, such as “protective gloves... for surgeons” are deemed to be “articles of apparel and clothing” for classification purposes.

60. Henry Schein has acknowledged that the goods in issue are gloves made wholly of rubber, and that they are usually used by dentists due to their protective qualities.³⁸ Thus, while the goods in issue may appear to be classifiable in heading No. 90.18 in a very generic sense, the Tribunal finds that they are more specifically described by heading No. 40.15, and the related explanatory notes.

CONCLUSION

61. On the basis of the foregoing analysis, the Tribunal finds that the goods in issue are properly classified in heading No. 40.15, specifically under tariff item No. 4015.19.90, as other articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.

DECISION

62. The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

37. 2004 FCA 131 (CanLII) at para. 13.

38. Exhibit AP-2013-029-06A, Vol. 1 at para. 10.