



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

---

## DECISION AND REASONS

Appeal No. AP-2013-029R

Eastern Division Henry Schein Ash  
Arcona Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Monday, August 15, 2016*

**TABLE OF CONTENTS**

DECISION..... i

STATEMENT OF REASONS ..... 1

    BACKGROUND ..... 1

    PRELIMINARY ISSUE ..... 1

    ANALYSIS..... 1

        Heading No. 90.18 ..... 2

        Heading No. 40.15 ..... 3

CONCLUSION ..... 3

DECISION ..... 3

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 a decision of the Federal Court of Appeal dated October 20, 2015, which set aside the decision of the Canadian International Trade Tribunal in Appeal No. AP-2013-029, and remitted the matter back to the Canadian International Trade Tribunal.

**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

Place of Hearing: Ottawa, Ontario  
Date of Hearing: July 8, 2016  
Tribunal Member: Jason W. Downey, Presiding Member  
Counsel for the Tribunal: Alexandra Pietrzak  
Registrar Officer: Sara Pelletier

**PARTICIPANTS:**

<b>Appellant</b>	<b>Counsel/Representative</b>
Eastern Division Henry Schein Ash Arcona Inc.	Michael Kaylor
<b>Respondent</b>	<b>Counsel/Representative</b>
President of the Canada Border Services Agency	Kirk Shannon

Please address all communications to:

The Registrar  
Secretariat to the Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario K1A 0G7  
Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [citt-tcce@tribunal.gc.ca](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

### BACKGROUND

1. This remand is further to a judgment<sup>1</sup> of the Federal Court of Appeal (the Court) dated October 20, 2015, concerning the decision of the Canadian International Trade Tribunal (the Tribunal) in *Eastern Division Henry Schein Ash Arcona Inc. v. President of the Canada Border Services Agency*.<sup>2</sup> In its decision, the Tribunal dismissed the appeal and held that the two types of single-use protective gloves made of vulcanized rubber<sup>3</sup> (the goods in issue) were properly classified under tariff item No. 4015.19.90 of the schedule to the *Customs Tariff*<sup>4</sup> as other articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.

2. Eastern Division Henry Schein Ash Arcona Inc. (Henry Schein) filed an appeal of the Tribunal's decision with the Court on August 14, 2014.

3. On October 20, 2015, the Court allowed the appeal on the basis that the Tribunal did not consider Note 2(e) to Chapter 40 and that it was unclear whether the Tribunal concluded that the goods in issue did not fall in Chapter 90.<sup>5</sup>

4. As a result, the Court remitted the matter back to the Tribunal with the direction that the appeal be re-determined on the basis of the existing record.

### PRELIMINARY ISSUE

5. On November 16, 2015, Henry Schein requested that the parties be able to file written representations concerning the issues identified by the Court in its October 20, 2015, decision.

6. On November 19, 2015, the President of the Canada Border Services Agency (CBSA) wrote to object to Henry Schein's request. The CBSA noted that, in sending this matter back to the Tribunal, the Court specified that the Tribunal make a re-determination on the basis of the existing record. The CBSA argued that the Tribunal was therefore not permitted to accept any new evidence or argument from the parties.

7. On November 20, 2015, after considering the submissions from the parties together with the Court's direction, the Tribunal wrote to notify the parties that it would not accept any further written representations. The Tribunal noted that the Court clearly directed the Tribunal to re-determine the appeal "based on the existing record". The Tribunal found that admitting further written submissions onto the record would directly contradict the Court's explicit instructions.

### ANALYSIS

8. The issue in this remand is whether the Tribunal correctly determined that the goods in issue were properly classified under tariff item No. 4015.19.90.

- 
1. *Eastern Division Henry Schein Ash Arcona Inc. v. Canada (Border Services Agency)*, 2015 FCA 220 (CanLII).
  2. (20 May 2014), AP-2013-029 (CITT) [*Eastern Division*].
  3. The types of gloves are Microflex Xceed Nitrile Examination Gloves and Diamond Grip Latex Examination Gloves.
  4. S.C. 1997, c. 36.
  5. *Eastern Division* at para. 2.

9. To begin, Note 2(e) to Chapter 40 provides as follows:

2. This Chapter does not cover:

...

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

10. As such, if the goods in issue are classified in Chapter 90, they cannot also be classified in Chapter 40 by virtue of Note 2(e) to Chapter 40. The Tribunal has previously stated that, where there is a relevant exclusionary note precluding the *prima facie* classification of goods in two different chapters or two different headings, the analysis should begin with the chapter and subsequent heading that is excluded.<sup>6</sup> Therefore, the Tribunal's analysis must begin with the suggested classification under heading No. 90.18.

### Heading No. 90.18

11. As noted in the original decision, in order to be classified in heading No. 90.18, the goods in issue must be “[i]nstruments and appliances used in medical, surgical, or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.” Moreover, the explanatory notes to heading No. 90.18 state that the “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.” [emphasis added]. Thus, while the goods in issue appear to be used primarily by dentists for examinations done in their professional practice, the crucial question is whether the goods in issue may be considered *instruments* or *appliances*.

12. The *Customs Tariff* does not contain a general definition of what constitutes an “instrument or appliance”. However, the terms “instrument” and “appliance” are defined in the *Merriam-Webster's Collegiate Dictionary*<sup>7</sup> as follows:

**instrument 2 b** : one used by another as means or aid : DUPE, TOOL. **3** : IMPLEMENT; *esp* : one designed for precision work.<sup>8</sup>

**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 . . .<sup>9</sup>

The terms “tool” and “implement” are defined as follows:

**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 . . .<sup>10</sup>

**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.<sup>11</sup>

---

6. *Oceaneering Canada Limited v. President of the Canada Border Services Agency* (28 February 2014), AP-2012-017 (CITT) at para 29; *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) at paras. 41-74; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para. 47.

7. Eleventh ed.

8. *S.v.* “instrument”.

9. *S.v.* “appliance”.

10. *S.v.* “tool”.

11. *S.v.* “implement”.

13. The *Canadian Oxford Dictionary*<sup>12</sup> essentially has similar definitions of “instrument” and “appliance”, while the terms “tool” and “implement” are defined as follows:

**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 . . .<sup>13</sup>

**implement 1** a tool, instrument, or utensil.<sup>14</sup>

14. In the Tribunal’s view, the definitions noted above demonstrate that an “instrument” is a tool or implement capable of delicate or precision work, while “appliance” refers to a more complex tool or instrument.<sup>15</sup> The terms “tool” and “implement” appear to be quite synonymous whereas the term “tool” on its own appears to be defined by a handheld device used in accomplishing a specific task, even mechanically.

15. As stated by the witness for Henry Schein during the hearing of February 27, 2014, the goods in issue are designed for dentists to wear as a protective barrier to prevent fluids from transferring from the patient to the dentist during dental work; they do not do the work themselves.<sup>16</sup> Thus, the Tribunal finds that the goods in issue are not devices or instruments designed for precision work, nor appliances or tools within the meaning of heading No. 90.18. While the goods in issue may be intended for use in conjunction with dental instruments, implements or tools, they themselves are not such devices.

16. Having examined the evidence on the existing record, the Tribunal finds that the goods in issue cannot be classified in heading No. 90.18.

#### **Heading No. 40.15**

17. For the reasons set out in its decision of May 20, 2014, the Tribunal finds that the goods in issue are properly classified in heading No. 40.15 as other articles of apparel and clothing accessories (including gloves, mittens, and mitts), *for all purposes, of vulcanized rubber other than hard rubber.*

#### **CONCLUSION**

18. In accordance with Rule 1 of the *General Rules*, 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 articles of apparel and clothing accessories (including gloves, mittens, and mitts), *for all purposes, of vulcanized rubber other than hard rubber.*

#### **DECISION**

19. The appeal is dismissed.

Jason W. Downey  
Jason W. Downey  
Presiding Member

---

12. Second ed.

13. *S.v.* “tool”.

14. *S.v.* “implement”.

15. This is consistent with the Tribunal’s analysis in *Bionova Medical Inc. v. Commissioner of the Canada Customs and Revenue Agency* (24 February 2004), AP-2002-111 (CITT) at 6-7.

16. *Transcript of Public Hearing*, 27 February 2014, at 33-34.