Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-016

Les Industries Touch Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, March 27, 2017

Canada

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IN THE MATTER OF an appeal heard on January 26, 2017, 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 President of the Canada Border Services Agency, dated April 28, 2016, with respect to a request for re-determination pursuant to section 60 of the *Customs Act*.

BETWEEN

LES INDUSTRIES TOUCH INC. **Appellant**

AND

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

DECISION

The appeal is denied.

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 26, 2017
Tribunal Panel:	Jason W. Downey, Presiding Member
Support Staff:	Dustin Kenall, Counsel

PARTICIPANTS:

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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Les Industries Touch Inc. (LIT) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a re-determination of tariff classification by the President of the Canadian Border Services Agency (CBSA) dated April 28, 2016, pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether disposable plastic drinking straws (the goods in issue) are properly classified under tariff item No. 3917.32.90 as other tubes, pipes and hoses not reinforced or otherwise combined with other materials, without fittings, as determined by the CBSA, or should be classified under tariff item No. 3917.22.00 as rigid tubes, pipes and hoses of polymers of propylene, as claimed by LIT.

PROCEDURAL HISTORY

3. The goods in issue were imported in multiple transactions between 2010 and 2011 under tariff item No. 3917.32.90.

4. From September through December 2014, LIT requested re-determinations of the goods in issue under tariff item No. 3917.22.00 by filing refund claims under paragraph 74(1)(e) of the *Act*.[2] In its re-determinations, the CBSA issued Detailed Adjustment Statements under subsection 59(1) of the *Act* denying the refund claims and maintaining the original classification.

5. On May 12, 2015, LIT requested a re-determination under subsection 60(1) of the *Act*.[3] On April 28, 2016, the CBSA issued a final decision denying the request.

6. On July 19, 2016, LIT appealed the CBSA's decision to the Tribunal, pursuant to section 67 of the *Act*. On January 26, 2017, the Tribunal held a public hearing, at which neither party called any witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

7. The goods in issue are plastic drinking straws of various widths made of polypropylene and measuring between 15 and 25 cm in length. The drinking straws are marketed in four categories: "cocktail straws", "straight straws", "jumbo straws", and "flexible straws". The flexible straws have a crimped elbow permitting the top portion of the straw to be adjusted for ease of use.[4]

LEGAL FRAMEWORK

8. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[5] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and tariff items.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2016-002-04A, Appendix 2-8, Vol. 1.
3. Exhibit AP-2016-002-04A, Appendix 2-8, Tab 3, Vol. 1.
4. Exhibit AP-2016-016-04A, Tab 7, Vol. 1.
5. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

9. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[6] and the *Canadian Rules*[7] set out in the schedule.

10. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

11. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[8] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[9] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[10]

12. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.[11]

13. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules . . ." (i.e. Rules 1 through 5) and that "the relative Section and Chapter Notes also apply, unless the context otherwise requires."

14. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that "the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the *General Rules* . . ." and that "the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

TERMS OF RELEVANT HEADINGS AND LEGAL AND EXPLANATORY NOTES

15. The parties agree that the appropriate heading is No. 39.17. The determination of the subheading turns entirely on whether the drinking straws should be characterized as "rigid" and placed in subheading No. 3917.22, as LIT maintains, or not rigid and therefore placed in the residual (other) subheading No. 3917.32, as the CBSA submits. There is also no dispute that the relevant tariff item number under subheading No. 3917.22 is 3917.22.00 and under subheading No. 3917.32 is 3917.32.90.

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6. S.C. 1997, c. 36, schedule [*General Rules*].
7. S.C. 1997, c. 36, schedule.
8. World Customs Organization, 2nd ed., Brussels, 2003.
9. World Customs Organization, 5th ed., Brussels, 2012.
10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.
11. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

16. The relevant tariff nomenclature and notes read as follows:

Section VII

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

Chapter 39

PLASTICS AND ARTICLES THEREOF

39.17	**Tubes, pipes and hoses, and fittings therefor (for example, joints, elbows, flanges), of plastics.**
	-Tubes, pipes and hoses, rigid:
3917.22.00	**- -Of polymers of propylene**
	-Other tubes, pipes and hoses:
3917.32	**- -Other, not reinforced or otherwise combined with other materials, without fittings**
3917.32.90	- - -Other

17. There are no relevant section, chapter, or explanatory notes, or classification opinions. There are also no prior Tribunal decisions classifying drinking straws under a tariff item.

PRELIMINARY ISSUES

18. Before and during the hearing, a number of issues arose that, because they involve evidentiary practices of general importance in customs appeals, the Tribunal takes the opportunity here to review.

19. First, in its brief, LIT challenged the validity and application of the CBSA's 2002 Customs Notice CN-447 (CN-447) to the goods in issue. In its decisions, the CBSA relied on CN-447 as the source of the "bending test" it applied to determine whether the drinking straws were rigid. The test provides that a tube, pipe or hose will be considered not rigid if it can be manually bent 90 degrees without damage.[12] The CBSA found that the drinking straws met this test as, "when bent at a 90 degree angle, they sustain some folds or crimps but no damage in terms of a break, split or crack."[13]

20. LIT argued that CN-447 is invalid and *ultra vires* and that the CBSA's decision relying on it is "defective, erroneous and arbitrary", because CN-447 does not appear on the CBSA's website, there is no method for customs brokers to find it (even though LIT apparently did find it as it included it in its brief), and it has not been integrated in a D-Memorandum.

21. It further submitted the bending test articulated in CN-447 is insufficiently detailed because it does not prescribe how many times a good should be bent, how long it should be kept bent, that a technical expert perform the testing, that the straws be filled with water after testing to discover any punctures. It also complained that the CBSA did not disclose the actual length of straw used in each test, how it measured 90 degrees, what the exact temperature of the testing location was, and that it omitted a picture of a diagram referenced in the test.

12. Exhibit AP-2016-016-04A, Tab 13, Vol. 1.
13. Exhibit AP-2016-016-04A, Tab 4 at 99, Vol. 1.

22. Finally, it argued that the CBSA misapplied CN-447, which also included a spooling test for flexibility that the drinking straws would have failed (demonstrating their rigidity).

23. These arguments, which comprise a significant portion of LIT's submissions, fundamentally misconstrue the role of the Tribunal by asking it to conduct a judicial review of the CBSA's decisions and administrative guidance on grounds of natural justice and reasonableness. The Tribunal is not a reviewing court that scrutinizes the CBSA's decision-making process. Rather, in proceedings before the Tribunal, a party challenging a decision of the CBSA brings a *de novo* appeal in which the appellant bears the burden of proving that it is more likely than not that its proposed tariff classification is correct.[14] This burden will not be discharged by proving that the CBSA's decision is flawed or that its testing of the goods was faulty—the appellant must proactively prove that its own proposed classification is correct. This requires the appellant to bring factual evidence and/or legal authorities to the Tribunal's attention that establish what the appellant submits the correct test is *and* that the goods in question meet that test.

24. This point directly relates to the second issue raised at the hearing. In its submissions, LIT directed the Tribunal to its product specification sheet for the goods in issue, which indicates that the goods contain "10% CaCO3".[15] LIT stated that this was a chemical used as a strengthening agent to increase rigidity; however, it did not call a witness or provide any written evidence to substantiate that proposition. Instead, counsel for LIT simply asserted that it was "common knowledge" that CaCO3 (calcium carbonate) was used to rigidify plastics. In essence, LIT sought for the Tribunal to take some sort of judicial notice of a scientific fact as being beyond dispute, without supporting it with any evidence.

25. Judicial notice allows for the admission of facts "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy".[16]

26. That CaCO3 is the chemical nomenclature for calcium carbonate is a fact of which the Tribunal can take reasonable judicial notice, as it is not subject to debate and is easily verifiable by reference to a dictionary definition of the term.

27. However, the fact that CaCO3 is used as a strengthening agent in plastics and that it was specifically used in these goods to confer rigidity upon the straws is not something of which the Tribunal can take judicial notice. This particular proposition relating to these goods is neither beyond the subject of debate nor verifiable through reference to a source of indisputable accuracy.

28. The submission tendered by counsel may possibly be true, and had LIT filed evidence to that effect, it may have even obtained CBSA's admission to it as a fact, but for the Tribunal to accept it as a fact without any evidence other than counsel's own submissions as to obviousness would be unfair to the CBSA, which had no notice that such a fact would be alleged, and would be contrary to the principle that the appellant bears the burden of proof. Such a flaw in evidence cannot be relieved by simply asking the Tribunal to take judicial notice of facts not properly adduced.

29. On another note, the Tribunal was confronted with the peculiarity that neither party presented specific scientific or otherwise technical evidence which could have helped it in assessing any special characteristics of the goods in issue. Other than the admission that these were straws and that they were

14. *Customs Act*, subs. 152(3); *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 21-22.
15. Exhibit AP-2016-016-04A, Tab 7, Vol. 1.
16. *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 (CanLII) at para. 20.

made of plastic, the Tribunal was not invited to consider much more tangible evidence which could have helped it in exercising its mandate in the present appeal. Rather, it was presented with the straws themselves and invited to manipulate them in order to discover their characteristics. From this operation, parties essentially invited the Tribunal to find subsequent guidance in dictionary definitions. Such was the essence of the present case. This elementary manner may result from the simplicity of the goods at issue; it may also be the consequence of other reasons to which the Tribunal is not privy. Either way, this is the means by which the Tribunal was invited to proceed to classification in the present appeal.

30. As such, the Tribunal examined the goods as exhaustively as possible, manipulating them, bending them, folding them, bowing them and crumpling them repeatedly in order to best assess their characteristics.

TRIBUNAL'S ANALYSIS

31. Now, this appeal does for the first time present the question of the legal meaning of the term "rigid" as used under heading No. 39.17 in the phrase "Tubes, pipes and hoses, rigid". The word "rigid" is undefined in the schedule, and there are no relevant notes or classification opinions providing guidance. Therefore, its meaning for tariff classification purposes is a matter of statutory interpretation, which requires consideration of its ordinary or dictionary meaning and the statutory context.[17]

32. LIT relies on dictionary definitions of "rigid" as "not flexible" or "not changing or adjusting to different conditions or problems" and definitions of "flexible" (not exhibited in its brief) as "capable of being changed or adjusted to particular or varied needs" to incorporate a functionality requirement into the term "rigid".[18] LIT submits that the plastic drinking straws, though they can obviously be bent easily by hand, are nonetheless rigid because, when bent, one cannot draw liquid through them as is their intended use. It also submits that the creasing resulting from bending the straws is a form of permanent "damage". As such, it points to the innovation of the bendable elbow straws as evidence that the straight straws are not themselves flexible. Finally, it also submitted one page of a 2009 chemical manufacturing article, which describes polypropylene as having the physical characteristic of "rigidity".

33. The CBSA submits the goods are properly characterized as not rigid. The CBSA adduces several dictionary definitions of "rigid", "flexible", "bend", "break", and "pliable", which it submits in essence reveal that, to be flexible, a good must be able to bend easily and repeatedly without breaking.

34. The CBSA submits that the goods all easily meet this definition—they can be repeatedly flexed without incurring any permanent damage that inhibits their function. They can even be used while partially bent or bowed, which simply diminishes but does not stop all flow of liquid.

35. The CBSA argues that LIT cites no authority for the proposition that the term "rigid" should capture goods that cannot be fully used while bent. The definitions LIT proposes are defective because they were pulled from an online free website called *FreeDictionary.com*, which specifically contains a disclaimer that its content should not be considered complete, up-to-date, or used to provide legal advice. The definitions LIT chose are also tendentious because they are not the primary definitions of "rigid" which appear in *FreeDictionary.com* but secondary definitions having more to do with state of mind of people rather than material properties of objects.

17. *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 (CanLII) at para. 30.
18. Exhibit AP-2016-016-04A at 8, Vol. 1.

36. The CBSA also observes that adopting LIT's definition would deprive the subheading "other tubes, pipes and hoses" of any meaning, as most such (non-rigid) goods would then fall under the subheading "tubes, pipes and hoses, rigid". As an example, the CBSA notes that, under LIT's definition, a garden hose would not be considered flexible because when tangled or bent water will not flow through it.

37. The Tribunal finds that the CBSA's interpretation of "rigid" best suits the text of the tariff nomenclature and most accurately represents the common dictionary definitions of the term applicable to materials. Here, the definitions of "rigid", as a whole, support an interpretation of the word as meaning *unable to bend without breaking.* The first definition of "rigid" in the *Canadian Oxford Dictionary*[19] is "not flexible; that cannot be bent (*a rigid frame*)"; the first definition of "flexible" is "able to bend without breaking; pliable; pliant"; the first definition of "bend" is "force or adapt (esp. something straight) into a curve or angle"; and, finally, the first definition of "break" is "separate into pieces under a blow or strain; shatter; fracture".[20]

38. The Tribunal is therefore confronted with two opposing concepts: that of "flexible", "able to bend without breaking", and that of "rigid", defined in opposition as "not flexible or cannot be bent".

39. As mentioned above, the goods in issue were available for inspection for the Tribunal and the parties at the hearing. The parties and the Tribunal examined them together and it was agreed that the goods could be easily bowed by hand into an arc or (more fully) into an angle.[21] This resulted in some creasing effect in the plastic and, after repeated bending, somewhat degraded the strength of the straws; notwithstanding, the goods always returned to their original straight, firm position and there was no evidence of punctures or actual breakage in the straws.[22]

40. Counsel for LIT suggested that it would be necessary to test if there were any micro punctures by drawing air or liquid through the straws. Counsel however provided no such evidence of such punctures before the Tribunal, other than mere speculation.

41. LIT's definition requires the Tribunal to read into the tariff nomenclature a functionality, use, or purposive aspect to "rigid" that is not supported in the primary dictionary definitions relating to materials (rather than state of mind) or the nomenclature appropriate for the level of analysis at which this classification is being conducted, i.e. Rule 1 of the *General Rules* and the *Canadian Rules*.

42. There is nothing in the nomenclature which suggests that to be flexible a tube must be fully functional when bent (continue to allow flow of gas or liquid), or that such functionality must be assessed at an angle of 90 or more degrees rather than at a smaller degree of bowing (in which condition the straws would still be functional in conduction). Indeed, the second definition of "break" in the *Canadian Oxford Dictionary*[23] is "make or become inoperative, esp. from damage (*the toaster broke*)."[24] As noted above, the goods return to their original erect form and remain functional even after repeated bending.

43. Additionally, the fact that certain of the goods have accordion-type hinges allowing one to manipulate the mouth-end of the straw does not necessarily imply that the straws are otherwise rigid (therefore necessitating a specific flexion point). Such a hinge would make them more useful and certainly

19. *Canadian Oxford Dictionary*, 2nd ed., s.v. "*rigid*".
20. Exhibit AP-2016-016-06A, Tab 11, Vol. 1.
21. *Transcript of Public Hearing*, 26 January 2017, at 18-19, 30-37.
22. *Ibid.*
23. *Canadian Oxford Dictionary*, 2nd ed., s.v. "break".
24. Exhibit AP-2016-016-06A, Tab 11, Vol. 1.

more locally flexible (at the hinge point) than the other straws, but that does not make the straight straws on their own account rigid. The straws certainly have a firm shape sufficient to support themselves, unlike a garden hose, for example, which can be spooled, but the dictionary definitions provided demonstrate that "rigid" means more than simply firm—it means *unable* to bend without breaking; one can easily bend, ply and deform the goods in issue.

44. The Tribunal also finds that LIT relies on inapplicable definitions of "rigid" in its submissions. LIT draws as support the secondary definitions of "rigid" having to do with state of mind or mental character, not the primary definition dealing with materials. LIT's proposed definition of "not changing or adjusting to different conditions or problems" is, further, the third listed definition of rigid, providing as an example "a rigid thinker; a rigid hierarchy".[25] Such a definition relates to a state of mind, not material properties. It is, therefore, not suitable in the circumstances.

45. By contrast, and consistent with the definitions cited by the CBSA, all of the primary definitions in LIT's evidence reference flexibility and bending ("not flexible or pliant"; "not bending"; "unable to bend or be forced out of shape; not flexible") and materials ("a rigid material"; "a rigid piece of plastic"; "a rigid strip of metal").[26]

46. Given that the goods in issue all bend easily without breaking and are, thus, not rigid, they are therefore properly classified under tariff item No. 3917.32.90 as other tubes, pipes and hoses not reinforced or otherwise combined with other materials, without fittings.

DECISION

47. The appeal is dismissed.

Jason Downey
Jason Downey
Presiding Member

25. Exhibit AP-2016-016-06A, Tab 11, Vol. 1.
26. Exhibit AP-2016-016-04A, Tab 17, Vol. 1.