



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-038

Cardinal Health Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, July 8, 2019*

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 DECISION 7

IN THE MATTER OF an appeal heard on April 18, 2019, 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 July 6, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CARDINAL HEALTH CANADA INC.

Appellant

AND

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

Respondent

DECISION

This appeal is dismissed.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 18, 2019
Tribunal Panel: Jean Bédard, Q.C., Presiding Member
Support Staff: Laura Colella, Counsel
Eric Wildhaber, Counsel

PARTICIPANTS:**Appellant**

Cardinal Health Canada Inc.

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Sabrina Bandali
Ethan Gordon**Respondent**

President of the Canada Border Services Agency

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STATEMENT OF REASONS

SUMMARY

1. This concerns an appeal filed by Cardinal Health Canada Inc. (Cardinal Health) under subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA) on July 6, 2018, pursuant to subsection 60(4) of the *Custom's Act* (the *Act*).
2. The appeal is in regards to an advance ruling regarding the tariff classification of disposable rubber gloves (the goods in issue). The parties agree that the goods in issue are classifiable under No. 40.15. Their dispute is at the subheading level: whether the goods in issue fall under subheading No. 4015.11 (-gloves --surgical) (-*gants --pour chirurgie*), as classified by the CBSA, or into subheading No. 4015.19 (-gloves --other) (-*gants --autres*), as argued by Cardinal Health.
3. For the reasons that follow, the Canadian International Trade Tribunal (the Tribunal) finds that the goods in issue are surgical gloves of subheading No. 4015.11, as classified by the CBSA.

PROCEDURAL HISTORY

4. On January 9, 2018, Cardinal Health requested an advance ruling from the CBSA on the tariff classification of Protexis Latex Surgical Gloves, product code series 2D72 and 2D73. The CBSA issued a ruling classifying the goods in issue under subheading No. 4015.11.
5. On May 16, 2018, Cardinal Health filed a request for review of the advance ruling.
6. On July 6, 2018, the CBSA issued a decision, pursuant to subsection 60(4) of the *Act*, confirming the original advance ruling.
7. On October 4, 2018, Cardinal Health filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.
8. The Tribunal held a hearing, in Ottawa, Ontario, on April 18, 2019.
9. Cardinal Health called the following witnesses: Lianne MacMillan, Director, Specialty Marketing for Cardinal Health; Fernando J. Pica, Chief Financial Officer at Cardinal Health; and Cathy Whitehead, Nurse Consultant for Devon Healthcare Marketing Ltd. Cardinal Health asked the Tribunal to qualify Dr. Terry Nadasdi, Full Professor of Linguistics at the University of Alberta, as expert witness. After considering his qualifications and experience, the Tribunal recognized Dr. Nadasdi as an expert in linguistics.² The CBSA did not call any witnesses.

DESCRIPTION OF THE GOODS IN ISSUE

10. The goods in issues are described as follows:

The goods are six (6) models of sterile latex powder-free surgical gloves listed under the brands "Protexis Latex" and "Ultrafree Max". Packaged into dispenser boxes of 40 or 50 pairs depending on the model, each pair of gloves is individually packed into sterile paper envelopes that are

1. R.S.C. 1985 (2nd Supp.), c. 1.
2. Exhibit 3C, Vol. 1, Tab 10A (CV).

vacuum-sealed. They are said to “provide exceptional protection and precision performance so wearers can perform confidently on their patients in surgical elements”.³

11. The parties agree that these models of goods are the subject of the present appeal:

Sample	Product Code	Model
1	2D72LS55-2D72L290	Protexis Latex Hydrogel
2	2D73TP55-2D73TP90	Protexis Latex with Neu-Thera
3	2D72N55X-2D72N90X	Protexis Latex Classic
4	2D72NS55X-2D72NS90X	Protexis Latex
5	2D72NT55X-2D72NT90X	Protexis Latex Micro
6	2D72901-2D72971	Ultrafree Max

LEGAL FRAMEWORK

12. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,⁴ 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 and subheadings and under tariff items.

13. 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.

14. 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.

15. 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

16. 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

3. Appellant’s Request for Advance Ruling, 9 January 2018, Exhibit 16A, Vol. 1, Tab 2.

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

5. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

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; *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 (CanLII), at para. 4.

explanatory notes. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹¹

17. 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 use a similar approach to determine the proper subheading.¹² The final step is to determine the proper tariff item.¹³

18. Both parties agree that the goods in issues are classified under heading No. 40.15 as “articles of apparel and clothing accessories (including gloves, mittens and mitts) for all purposes, of vulcanized rubber other than hard rubber.”

19. The relevant tariff nomenclature and explanatory notes are reproduced in both English and French because the issue in this appeal centers on purported differences between both versions.

20. The relevant portions of the schedule to the *Customs Tariff* are as follows:

Chapter 40	Chapitre 40
RUBBER AND ARTICLES THEREOF	CAOUTCHOUC ET OUVRAGES EN CAOUTCHOUC
<p>40.15 Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.</p> <p style="padding-left: 40px;">-Gloves, mittens and mitts:</p> <p>4015.11.00 --Surgical</p> <p>4015.19 --Other</p> <p>4015.19.10 -- -Protective gloves to be employed with protective suits in a noxious atmosphere</p>	<p>40.15 Vêtements et accessoires du vêtement (y compris les gants, mitaines et moufles) en caoutchouc vulcanisé non durci, pour tous usages.</p> <p style="padding-left: 40px;">-Gants, mitaines et moufles :</p> <p>4015.11.00 --Pour chirurgie</p> <p>4015.19 -- -Autres</p> <p>4015.19.10 -- -Gants de protection, devant être utilisés avec scaphandres de protection dans l'air empoisonné</p>

21. The relevant explanatory notes are 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:

Qu'ils soient assemblés par collage, par couture ou autrement obtenus, cette position comprend les vêtements et accessoires du vêtement (y compris les gants, mitaines et moufles) par exemple les vêtements, gants, tabliers, etc., de protection pour chirurgiens et radiologues, les vêtements pour scaphandriers, etc. :

11. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

12. 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 [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

13. 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.

- | | |
|---|--|
| <p>(1) Wholly of rubber.</p> <p>(2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, other than those falling in Section XI (see note 3 to Chapter 56 and Note 4 to Chapter 59).</p> <p>(3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.</p> <p>...</p> | <p>1) Entièrement en caoutchouc.</p> <p>2) En tissus, étoffes de bonneterie, feutres et non-tissés, imprégnés, enduits, recouverts ou stratifiés avec du caoutchouc autres que ceux relevant de la Section XI (voir la Note 3 du Chapitre 56 et la Note 4 du Chapitre 59).</p> <p>3) En caoutchouc combiné avec des parties en matières textiles, pour autant qu'ils concernent leur caractère essentiel d'articles en caoutchouc.</p> <p>...</p> |
|---|--|

Subheading 4015.11

Surgical gloves are thin, highly tear-resistant articles manufactured by immersion, of a kind worn by surgeons. They are generally presented in sterile packs.

N° 4015.11

Sont considérés comme gants pour chirurgie les articles minces du type de ceux portés par les chirurgiens, fabriqués par immersion, qui présentent une grande résistance à la déchirure. Ils sont généralement présentés en emballages stériles.

POSITIONS OF PARTIES

22. Essentially, to ground its case, Cardinal Health attempted to impart determinative meaning to a difference in the wording of the English and French versions of subheading No. 4015.11. The French version of the *Customs Tariff* contains the preposition “*pour*” followed by the noun “*chirurgie*” (“*pour chirurgie*”) whereas the English version contains only the adjective “surgical” (as in “surgical gloves”).

23. In Cardinal Health’s estimation, that difference would mean that subheading No. 4015.11 is reserved for only those gloves that are used *exclusively for* surgery (i.e. “*pour chirurgie*”).

24. For Cardinal Health, subheading No. 4015.11 would therefore contain an “end use” condition because of the presence of the word “*pour*” in its French version. Cardinal Health argued that, because they can also be used for applications *other than* surgery alone,¹⁴ the goods in issue cannot be classified in subheading No. 4015.11, and therefore they must be classified under subheading No. 4015.19 as “other” gloves.

25. Ultimately, Cardinal Health argues that the goods in issue should be classified under tariff item No. 4015.19.10 because, in addition to being used by surgeons, they are also “protective gloves to be employed with protective suits in a noxious atmosphere.”

26. The CBSA argued that the goods in issue meet the requirements of subheading No. 4015.11, which contains no end-use requirement.

TRIBUNAL’S ANALYSIS

27. To support its view of subheading No. 4015.11, Cardinal Health sought the opinion of an expert in linguistics, Dr. Nadasdi. The CBSA did not object to his qualification as an expert (French linguistics, semantics, grammar, sociolinguistics), and Dr. Nadasdi had travelled from Alberta to Ottawa for the

14. Appellant Case Brief at 4; Exhibit 03D, Vol. 2, Tabs 2, 4, 5; Exhibit 05A, Vol. 1, Tabs 2, 3.

purposes of testifying in these proceedings. In light of that context, but suspecting that his testimony would be of little, if any, relevance to the resolution of this matter, the Tribunal accepted to qualify Dr. Nadasdi as requested by Cardinal Health. However, given its concerns as to whether his testimony would have any relevance to the resolution of this matter, the Tribunal let its reluctance be known by advising that Dr. Nadasdi's testimony would be given the weight that it deserved.

28. Before proposing an expert witness on the subject of linguistics, parties appearing before the Tribunal should carefully consider the law related to the admissibility and relevance of expert witness testimony as set out by the Supreme Court of Canada in *R. v. Mohan*.¹⁵ They should also carefully consider whether purported expert witness testimony in linguistics infringes upon the Tribunal's prerogative of statutory interpretation. Simply put, they should ask themselves whether the Tribunal needs a language expert to read the law. In the present appeal, Cardinal Health should have answered that question in the negative.

29. The Tribunal, presided here by a bilingual member, was perfectly able to decipher the meaning of the tariff nomenclature in issue in this matter, without the aid of a linguistic expert. The Tribunal is of the view that this will typically be the case in almost every matter that it hears. The Tribunal underscores that "the ordinary meaning of the language used in legislation, and whether it is plain or ambiguous, have been considered facts that every competent speaker either knows or can readily look up"¹⁶ such that the Tribunal will usually be able to rely on linguistic intuition and dictionaries when discharging its work.¹⁷ The Tribunal also remarks that bilingual drafting is as much an art as it is a science, and sometimes more of the former than the latter, such that oftentimes seemingly different terms from one language to another actually mean exactly the same thing.¹⁸

30. Dr. Nadasdi's testimony may have had some value when examining words on their own, or from an academic perspective. Such a view, however, is typically of little, if any, guidance to the Tribunal. The Tribunal's role in tariff classification appeals is to examine the ordinary meaning of words in their context, to consider the legislative framework of the *Act*, and to have regard for other sources, specifically the explanatory notes and the classification opinions. In the Tribunal's view, tariff classification by CBSA agents at the border, by customs brokers, or by the Tribunal itself, should be a practical exercise that does not require the assistance of a linguist.

31. Ultimately, Dr. Nadasdi's view was that the words "*pour chirurgie*" would mean "for the purpose of performing surgery".¹⁹ The Tribunal recognizes that the word "*pour*" could be read as connoting a purpose. The Tribunal is of the view, however, that no explicit purpose is contained in the words "-gloves --surgical". The Tribunal does not read any implicit purpose in the English text, other than perhaps by reference to the word "*pour*" in the French text. Conversely, the Tribunal could also read the French "*pour chirurgie*" as being devoid of any intention of purpose or end use when read in conjunction with the English text given that the latter contains no explicit end-use connotation.

15. 1994 SCC 80, [1994] 2 SCR 9 at 10.

16. Sullivan at 36.

17. The Tribunal consulted the following dictionaries for the definitions of the words "surgical", "*chirurgie*", "for," and "pour": *The Collins Dictionary*, *The Oxford Dictionary*, *The Cambridge English Dictionary*, *The Merriam Webster Dictionary*, *Larousse*, *Le Petit Robert*, *L'Office de la langue française du Québec*, *Le portail lexical de l'Académie française*, *Le Littré*.

18. See the *Canadian International Trade Tribunal Act* where "permanent member" is "*titulaire*" in French; "temporary member" is "*vacataire*" in French; see also the *Special Import Measures Act* where "domestic industry" is "*branche de production nationale*" in French.

19. *Transcript of Public Hearing* at 136.

32. The Tribunal also had difficulty with Cardinal Health's position because it amounted to arguing that the English version of the word "surgical" ought to be replaced by the word "surgery" and that word prefaced with the addition of the words "for the purposes of performing"; that is tantamount to redrafting the English text of the version of the subheading without there being any explicit intention from the drafters of the tariff to do so. When read in a vacuum, another equally unfounded argument based on speculation would be to believe that the French adjective "*chirurgicaux*" ought to have been used to render the English adjective "surgical".²⁰

33. From the preceding development and Dr. Nadasdi's testimony, the Tribunal retains this: when it comes to statutory or regulatory interpretation, linguistic exegesis alone can be a very unreliable interpreter.

34. The issue in this appeal remains: Did Parliament intend the words "-gloves --surgical" and "*pour chirurgie*" to contain the end-use condition that such gloves had to be used by surgeons for the exclusive purpose of performing surgery to be classified in subheading No. 4015.11?

35. In the Tribunal's view, the answer to that question is "no" for two reasons.

36. First, had Parliament intended an end-use condition it could or would have expressed itself explicitly as it did elsewhere in heading No. 40.15, and specifically in tariff item No. 4015.19.10, which is where Cardinal Health proposes classification of the goods in issue. Tariff item No. 4015.19.10 contains, very explicitly, and in no uncertain terms, the double for-use conditions of "to be employed [i.e. for use] [1] with protective suits [2] in a noxious atmosphere". No such end-use language is found in subheading No. 4015.11 in either its English or French versions.

37. Second, the explanatory note to subheading No. 4015.11 eliminates any doubt whatsoever as to the issue of end use.

38. Cardinal Health argued that the explanatory notes to subheading No. 4015.11 were not helpful to classifying the goods in issue. The Tribunal could not disagree more emphatically. In fact, the explanatory notes to subheading No. 4015.11 provide all the guidance that is necessary to dispose of this appeal. "Surgical gloves are . . . of a kind worn by surgeons." In French: "*Sont considérés comme gants pour chirurgie les articles . . . du type de ceux portés par les chirurgiens . . .*" [underlining added for emphasis]. Here, there is no linguistic discrepancy whatsoever: the English and French versions of this explanatory note say exactly the same thing. The context and interpretative guidance that they provide therefore perfectly informs the reader of how to understand the terms of subheading No. 4015.11 in either official language.

39. The Tribunal reads the explanatory note to subheading No. 4015.11 as stating that the goods in issue need simply to resemble what ordinary people would commonly recognize as gloves of the *kind* used by surgeons ("*[s]ont considérés comme gants pour chirurgie les articles . . . du type de ceux portés par les chirurgiens . . .*")²¹.

20. As examined below, the explanatory note to subheading No. 4015.11 allays any possible confusion whatsoever: gloves need only be "*of the kind worn by surgeons*" to fall under subheading No. 4015.11. As such, the explanatory note to subheading No. 4015.11 in fact instructs that the words "*pour chirurgie*" ought really to be read as meaning "*chirurgicaux*" so as to eliminate, or diminish, any notion of end use that might otherwise be implicit in the French version of the tariff (and to concord with the French version of the explanatory note that specifies that such gloves "*[s]ont . . . [d]es articles . . . du type de ceux portés par les chirurgiens . . .*" Put otherwise in the other official language: *ce sont des gants du type de ceux portés par des chirurgiens mais, pour fins de classement tarifaire, il n'y a aucune condition ou exigence que ces gants soient portés uniquement par des chirurgiens* (or: *que ces gants ne soient portés que par des chirurgiens*).

21. While also satisfying the other conditions set out in the explanatory note.

40. As Cardinal Health demonstrated, the goods in issue are indeed used for a variety of applications, in numerous settings, and by all sorts of people. There is no doubt in the Tribunal's mind that they are of the "kind" ("*du type de ceux*") worn by surgeons ("*portés par les chirurgiens*"). The fact that the goods in issue are used in surgery and in a variety of other applications, and contexts, by surgeons and by persons other than surgeons was confirmed by Ms. Whitehead in her testimony.²²

41. The explanatory note to subheading No. 4015.11 instructs that "-gloves --surgical" need only be of the kind worn by surgeons. As such, the goods in issue need not be used only by surgeons while performing surgery, or not even only by surgeons. Therefore, irrespective of by whom they are ultimately used, or for what purpose, "thin, highly tear-resistant [gloves] manufactured by immersion" fall under subheading No. 4015.11 as soon as such a good is recognized as being of the kind worn by surgeons. Consequently, end use is irrelevant for classification purposes.²³

42. Cardinal Health seized upon a slight difference between the English and French texts of subheading No. 4015.11 to find meaning where none existed. It ignored the clear guidance provided by the explanatory note to subheading No. 4015.11. The goods in issue are of the kind worn by surgeons. Consequently, they are properly classified in subheading No. 4015.11, and in tariff item No. 4015.11.00.

DECISION

43. The appeal is dismissed.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

22. *Transcript of Public Hearing* at 115-116.

23. Again, had the drafters of the explanatory note to subheading No. 4015.11 intended it to contain an end-use condition they would have said so explicitly by writing simply "gloves . . . worn by surgeons" instead of the terms that they used: "gloves . . . of a kind worn by surgeons" [emphasis added]. The Tribunal cannot ignore the words "of a kind" and their equivalent in French.