Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2020-020

Canadian Tire Corporation Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, November 9, 2021

Corrigendum issued
Monday, March 14, 2022

Canada

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IN THE MATTER OF an appeal heard on May 4, 2021, 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 August 7, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CANADIAN TIRE CORPORATION LIMITED **Appellant**

AND

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

DECISION

The appeal is dismissed.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

IN THE MATTER OF an appeal heard on May 4, 2021, 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 August 7, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CANADIAN TIRE CORPORATION LIMITED **Appellant**

AND

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

CORRIGENDUM

The first sentence of paragraph 51 of the Statement of Reasons should read as follows:

Legal note 7 to Chapter 59 reads as follows:

The first sentence of paragraph 78 of the Statement of Reasons should read as follows:

Accordingly, in order to be classified under heading 63.07, three conditions must be met.

The first two sentences of paragraph 82 of the Statement of Reasons should read as follows:

Legal note 8 to Section XI provides as follows:

8. For the purposes of Chapters 50 to 60:

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

Place of Hearing:	Via videoconference
Date of Hearing:	May 4, 2021
Tribunal Panel:	Susan D. Beaubien, Presiding Member
Tribunal Secretariat Staff:	Michael Carfagnini, Counsel Sarah Shinder, Counsel Nadja Momcilovic, Student-at-Law Kim Gagnon-Lalonde, Registry Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Canadian Tire Corporation Limited	Michael Sherbo Andrew Simkins
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Adrian Johnston

WITNESS:

Jean-Francois Favreau
Senior Market Manager/Product Development/Global Sourcing
UAP Inc.

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STATEMENT OF REASONS

OVERVIEW

[1] Canadian Tire Corporation Ltd. (Canadian Tire) appeals from a decision of the Canada Border Services Agency (CBSA) with respect to the classification under the *Customs Tariff*[1] of goods described as "marine winch straps".

[2] The marine winch straps are intended to be used with hand-operated winches to pull and/or secure a load (such as a boat) onto a trailer or other platform. The winches and winch straps are sold separately.

[3] The CBSA has classified the marine winch straps under heading 63.07 as "Other made up articles, including dress patterns". Canadian Tire contends that the correct classification is under heading 59.11 as "Textile products and articles, for technical uses, specified in Note 7 to this Chapter".[2]

FACTUAL BACKGROUND

[4] Canadian Tire sought an advance ruling from the CBSA on December 29, 2019, pursuant to section 43.1 of the *Customs Act* (*Act*). In doing so, it submitted that the marine winch straps should be classified under tariff item 5911.90.00 as "Textile products and articles, for technical uses, specified in Note 7 to this Chapter - Other".

[5] The CBSA issued its Advance Ruling[3] on February 25, 2020, finding that the goods were instead classifiable under tariff item 6307.90.99. Canadian Tire then requested a review of the Advance Ruling, as it was permitted to do pursuant to section 60(2) of the *Act*.

[6] Following its review of the Advance Ruling, the CBSA issued a decision on August 7, 2020, which confirmed its previous finding that the marine winch straps should be classified under tariff item 6307.90.99.

[7] On October 29, 2020, Canadian Tire appealed the CBSA's decision to the Tribunal.[4]

CBSA's decision

[8] After reproducing the relevant provisions of the *Customs Tariff* and summarizing Canadian Tire's objections to the Advance Ruling, the CBSA noted that heading 63.07 is of much broader scope than heading 59.11.

[9] The CBSA also referred to the Tribunal's decisions in *Rui Royal International Corp. v. President of the Canada Border Services Agency*[5] and *Kinedyne Canada Limited v. President of the*

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1 S.C. 1997, c. 36.
2 Exhibit AP-2020-020-03 at para. 3.
3 *Ibid.* at 24-26; Advance Ruling No. C-2019-008509, TRS No. 284426.
4 Exhibit AP-2020-020-01.
5 *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) [*Rui Royal*].

Canada Border Services Agency.[6] In those cases, the CBSA observed that goods similar to the ones at issue had been found to be classifiable under heading 63.07. The CBSA stated that, as an administrative decision maker, it is obligated to follow the Tribunal's previous decisions.

[10] The CBSA then summarized the legal framework and principles for classification of goods pursuant to the *Customs Tariff*. It started its substantive analysis by considering the classification criteria for heading 59.11, including the applicable legal notes and explanatory notes.

[11] In order for the marine winch strap to be classified under heading 59.11, the CBSA noted that two criteria must be satisfied. The goods must be both (1) a textile article and (2) of a kind used for technical purposes.

[12] The CBSA found that the marine winch strap comprises webbing that is able to safely support a workload of 454 kg and has a break strength of 1361 kg. As it is also made for use in combination with a hand-operated winch, the marine winch strap is consequently "for technical uses". However, the article must remain "essentially an article of textile" in order to be classified under heading 59.11.

[13] The marine winch strap comprises both a textile strap (webbing) and a forged metal hook at one end of the strap. The hook is used to fasten the strap to the load that is to be moved by operation of the winch. The CBSA found the hook to be sturdy and essential to the use of the goods. In order to pull a load, the strap must have a fastening device that is as strong as the strap can support. Without such a fastening device, the marine winch strap cannot be used for its intended purpose.

[14] As such, the CBSA concluded that the marine winch strap is a composite good and is accordingly not "essentially an article of textile" that qualifies for classification under heading 59.11.

[15] The CBSA found that the marine winch strap meets the definition of "made up article" found in legal note 7 to Section XI, and that legal note 8 to Section XI excludes "made up articles" from the scope of Chapter 59.

[16] Turning to a consideration of Chapter 63, the CBSA noted that headings 63.01 to 63.07 apply only to "made up articles, of any textile fabric". After considering the relevant legal notes and explanatory notes, the CBSA analyzed the requirements for classification under heading 63.07 – "Other made up articles, including dress patterns".

[17] The CBSA noted that in order to be classified under heading 63.07, a good must be (1) a "made up" article (2) of any textile fabric, (3) a webbing carrier strap or similar article, and (4) not included more specifically elsewhere in the Nomenclature.

[18] The CBSA observed that the marine winch strap is a "made up article" and comprises textile fabric, namely woven polyester fabric, albeit in combination with a hook. Relying upon the Tribunal's reasoning in *Rui Royal* and *Kinedyne*, the CBSA found that the marine winch strap is a "similar article" to a webbing carrier strap. As the good is not particularly included elsewhere in the *Customs Tariff*, the CBSA concluded that the marine winch strap was classifiable under heading 63.07.

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6 *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (5 July 2011), AP-2010-027 (CITT) [*Kinedyne*].

Additional evidence on appeal

[19] In support of its appeal, Canadian Tire filed copies of the Advance Ruling of February 25, 2020, the President's decision of August 7, 2020, and photographs of a representative marine winch strap at issue.[7]

[20] Canadian Tire also gave notice that it intended to call Jean-Francois Favreau as a witness at the public hearing of the appeal.

[21] By way of respondent's brief, the CBSA filed a printout from Canadian Tire's Web site with respect to the marine winch strap, a product specification sheet provided to the CBSA by Canadian Tire and associated correspondence.

[22] Both parties also submitted written arguments, together with copies of relevant statutory authorities and jurisprudence being relied upon.

Public hearing

[23] A public hearing was held by way of videoconference on May 4, 2021. Both parties were represented throughout and made submissions to the Tribunal.

Jean-Francois Favreau

[24] Canadian Tire called Jean-Francois Favreau as a witness. Mr. Favreau is a Senior Market Manager for UAP Inc. (UAP), which is an automotive company dealing with automotive parts, including products for trucks, and heavy-duty trucks and trailers.[8]

[25] Mr. Favreau's job responsibilities include the oversight of product development and the manufacturing of some of UAP's products.[9] That product line includes winch straps, although not the specific winch straps at issue in this appeal.[10]

[26] Although Mr. Favreau was presented as a fact witness, he conceded that he had no personal experience with the goods at issue or with marine winch straps more broadly. He did, however, have work experience with winch straps generally.[11]

[27] The CBSA pointed out that Mr. Favreau had not been qualified as an expert witness and urged that any relevance or weight accorded to his testimony be limited to winch straps in general, consistent with Mr. Favreau's personal experience. Beyond that, the CBSA objected to any weight being given to any evidence from Mr. Favreau insofar as it pertains to specific characteristics of the goods at issue.

[28] The Tribunal found Mr. Favreau to be a cooperative witness. However, the essence of his testimony was essentially confirmatory of the documentary evidence already filed by the parties with

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7 Exhibit AP-2020-020-03 at 13-14.
8 *Transcript of Public Hearing* at 8.
9 *Ibid.*
10 *Ibid.* at 8-9.
11 *Ibid.* at 9, 15-16.

respect to describing the composition of the goods. Except where otherwise indicated, the Tribunal assigns relatively little weight to Mr. Favreau's evidence.

[29] The CBSA called no witnesses.

[30] Following the testimony given by Mr. Favreau at the hearing, both parties submitted oral arguments to the Tribunal.

POSITIONS OF THE PARTIES ON APPEAL

Canadian Tire

[31] In its written submissions, Canadian Tire argued that *only* two conditions need be met for a good to be classified under heading 59.11, namely, that the good be:

1. a textile article;
2. of a kind used for technical purposes.[12]

[32] Both of those conditions are fulfilled in the present case, according to Canadian Tire. It relied on previous Tribunal decisions concerning the criteria that must be met for a good to be an "article" and the CBSA's admission that the goods are "of a kind used for technical purposes".

[33] According to Canadian Tire, all textile articles "of a kind used for technical purposes" must be classified in Chapter 59, having regard to the explanatory notes for that chapter. It contests the CBSA's finding that "made up" articles are necessarily excluded from heading 59.11. Canadian Tire further submits that the wording of the explanatory notes allows for contextual exceptions, which apply to the goods at issue and operate to place them, for classification purposes, under heading 59.11.

[34] At the hearing, Canadian Tire further noted a third requirement for classification under heading 59.11, namely that the goods be specified in Legal Note 7 to Chapter 59.[13]

CBSA

[35] The CBSA agrees that the goods must be (1) a "textile article" and (2) for technical purposes, in order to be classified under heading 59.11. However, it contends that the terms of the relevant legal notes and explanatory notes operate to exclude the goods from heading 59.11.

[36] According to the CBSA, the marine winch straps are composite goods by virtue of the functional aspects of the metal hook. Accordingly, they are not "essentially articles of textile", as required for classification under heading 59.11 pursuant to explanatory note (B) to heading 59.11.[14]

[37] The CBSA relies heavily on previous Tribunal decisions which concluded that winch straps are properly classified under heading 63.07.

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12 Exhibit AP-2020-020-03 at 6.
13 *Transcript of Public Hearing* at 37, 43.
14 AP-2020-020-09 at 70.

ANALYSIS

[38] Subsection 67(1) of the *Act* provides that a "person aggrieved" by a decision of the CBSA may appeal that decision to the Tribunal by filing a notice of appeal within the prescribed timeframe. There is no dispute that these requirements have been met and that Canadian Tire is a "person aggrieved".[15]

[39] On appeal to the Tribunal, there is a legal burden on the appellant to show that the CBSA has adopted an incorrect tariff classification.[16]

[40] The Tribunal owes no deference to the CBSA's decision.[17] Appeals to the Tribunal are determined *de novo*, even though one or both parties may elect to carry forward all or part of the record at first instance, to supplement that record with new evidence or create a new one. The Tribunal must reach its own decision concerning the correct tariff classification of the goods. In doing so, the Tribunal is free to assess the record before it, up to and including reweighing evidence placed before the CBSA and giving new consideration to any new evidence that may be presented on appeal.

Statutory framework

[41] Sections 10 and 11 of the *Customs Tariff* prescribe the analytical approach that the Tribunal must adopt when determining how goods are to be classified:

> **10 (1)** Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.
>
> **(2)** Goods shall not be classified under a tariff item that contains the phrase "within access commitment" unless the goods are imported under the authority of a permit issued under section 8.3 of the Export and Import Permits Act and in compliance with the conditions of the permit.
>
> **11** In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

[42] The *General Rules for the Interpretation of the Harmonized System*[18] referred to in subsection 10(1) are intended to be applied pursuant to a sequential, hierarchical analysis of the goods, as described by the Supreme Court of Canada in *Igloo Vikski*.[19]

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15 *Danson Décor Inc. v. President of the Canada Border Services Agency* (25 September 2019), AP-2018-043 (CITT) [*Danson Décor*] at paras. 75-79.

16 Section 152 of the *Act*.

17 *Danson Décor* at paras. 82-93.

18 S.C. 1997, c. 36, schedule [*General Rules*].

19 *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [*Igloo Vikski*] at paras. 19-29.

[43] 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.

[44] The first step in the analysis is to determine whether the goods fall, *prima facie*, within the scope of language used in a particular heading. Next, the Tribunal must consider whether there are any chapter or section notes that preclude the heading from being applied to the goods.

[45] The Tribunal will then consider the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[20] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[21] published by the World Customs Organization (WCO), for further guidance concerning the proper classification. The Tribunal should respect the guidance of the *Explanatory Notes* unless there is good reason to depart from it.[22]

[46] Once the Tribunal has used this approach to determine the heading in which the goods at issue should be classified, the next step is to use a similar approach to determine the proper subheading.[23] The final step is to determine the proper tariff item.[24]

[47] The provisions of the *Customs Tariff* relevant to this appeal are as follows:

Section XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 59

IMPREGNATED, COATED, COVERED OR LAMINATED TEXTILE FABRICS; TEXTILE ARTICLES OF A KIND SUITABLE FOR INDUSTRIAL USE

. . .

59.11 Textile products and articles, for technical uses, specified in Note 7 to this Chapter.

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20 WCO, 4th ed., Brussels, 2017.

21 WCO, 6th ed., Brussels, 2017.

22 *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 [*Suzuki*].

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

24 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.

. . .

5911.90.00 **-Other**

. . .

Chapter 63

OTHER MADE UP TEXTILE ARTICLES; SETS;
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS

. . .

63.07 **Other made up articles, including dress patterns.**

. . .

6307.90 **-Other**

. . .

---Other:

. . .

6307.90.99 ----Of other textile materials

[48] There is no dispute between the parties concerning the nature, composition, and intended use of the marine winch straps. The goods are described as consisting of a "black polyester strap fitted with a steel snap hook at one end. The strap is a woven textile (webbing) of 20 ft (6.1 m) long and 2 inches (~5.5 cm) wide. It is made to operate with hand-operated winches (sold separately) to pull and/or secure a load (e.g. a boat) onto a trailer or other platform".[25]

[49] The sole issue for decision is whether the goods at issue should be classified in either heading 59.11 or heading 63.07. Once the goods are placed in the correct heading, the parties do not dispute the applicable subheading or specific tariff item.

[50] The parties further agree that the analysis must start with a consideration of whether the goods at issue fall within heading 59.11 as "Textile products and articles, for technical uses, specified in Note 7 to this Chapter".

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[25] Exhibit AP-2020-020-01 at 9.

[51] Legal note 7 to Section XI of Chapter 59 reads as follows:

> 7. Heading 59.11 applies to the following goods, which do not fall in any other heading of Section XI:
>
> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 59.08 to 59.10), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
>
> (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
>
> (v) Textile fabrics reinforced with metal, of a kind used for technical purposes;
>
> (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;
>
> *(b) Textile articles (other than those of headings 59.08 to 59.10) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).*
>
> [Emphasis added]

[52] The wording of legal note 7 prescribes that only goods falling within either Note 7(a) or Note 7(b) may be classified under heading 59.11. The marine winch strap is not listed or otherwise described in Note 7(a).

[53] The Tribunal notes that Note 7(a)(v) refers to "Textile fabrics reinforced with metal". The marine winch strap is comprised of polyester webbing fitted at one end with a metal hook. However, the function of the metal hook is to serve as a fastener to connect one end of the strap to the equipment being moved while the other end of the strap engages the winch. The metal hook is a component of the good. It does not function to reinforce the textile component by, for example, incorporating metal strands or fibers as part of the weave or webbing of the textile component, for the purposes of adding tensile strength.

[54] This leaves Note 7(b) as being applicable to the goods at issue.

[55] According to Canadian Tire, there are two features which must be present in order to classify the marine winch straps under heading 59.11, having regard to the content of legal note 7. The goods must be both a "textile article" and a good that is used for "technical purposes". The wording used in heading 59.11 is "technical uses". However, the relevant portion of legal note 7, namely Note 7(b), uses the term "technical purposes". The Tribunal finds, in the context of the present appeal, that the distinction in meaning as between the words "purposes" and "uses" is inconsequential.

[56] Otherwise, the parties agree that the marine winch strap is an "article" and that it is used for technical uses or purposes. From Canadian Tire's perspective, this is dispositive.

[57] However, the CBSA contends that the guidance provided by the explanatory notes to heading 59.11 require that the goods remain "essentially articles of textile", in order to fall within the scope of heading 59.11. The relevant portion of the explanatory notes reads as follows:

> The textile articles of this heading may incorporate accessories in other material **provided** the articles remain essentially articles of textile.

[58] Accordingly, the issue is whether the goods can be described as being "essentially articles of textile", having regard to the fact that a marine winch strap is comprised of a textile component (webbing) and a non-textile component (metal hook).

[59] Canadian Tire characterizes the metal hook as being a mere accessory to the strap. It argues that, as an accessory, the hook is merely ancillary to the good and does not change its character as "essentially" an article of textile.

[60] The function and method of using the marine winch strap was undisputed. The metal hook is used to attach the winch strap to the boat. The other end of the strap is fed into the hand-operated winch. As the crank of the winch is turned, the strap is rolled in (and out) of the winch, the boat may be rolled onto (and off) a trailer. This practical outcome cannot be achieved without a means to securely fasten the strap to the boat. Although other types of fastening devices could be used, they are not interchangeable with the hook that is a component of the goods at issue. It was conceded by all parties that the hook is permanently affixed, by means of sewing, to the webbing portion of the good. The hook cannot be removed and replaced with another type of fastener.

[61] For those reasons, the Tribunal finds that the marine winch strap is a composite good having two essential components, namely the textile webbing and the metal hook. Those components define an operable combination which functions synergistically to produce a result that could not be achieved by one component in the absence of the other. Accordingly, the Tribunal agrees with the argument presented by the CBSA that the marine winch strap is not "essentially" an article of textile.

[62] In order for the goods to be "essentially" an article of textile, the metal hook would have to be optional, incidental or a mere accessory to the goods. The Tribunal has previously considered the nature of an "accessory" as follows:

> The ordinary meaning of "accessory" is "an additional or extra thing . . . a small attachment or fitting". In its body of decided cases, the Tribunal has added that there is no need for an accessory to be necessary to the operation of the product to which it relates, only that it

> perform a function that supports the primary function of the object; an accessory is something contributing in a subordinate degree to a general result or effect.[26]
>
> [Footnotes omitted]

[63] As noted above, the hook is not subordinate to the function of the goods at issue. The metal hook is neither incidental nor peripheral to the intended use of the goods. Rather, it is essential to the operable functionality of the marine winch strap. Although the strap could, in theory, perform the same function using another type of fastener, such an alternative is not contemplated by the design of the product.

[64] Some products may be designed to permit the use of interchangeable parts and fittings. That is not the case here. Indeed, this was confirmed on cross-examination by Mr. Favreau.[27]

[65] In order to remove the hook and replace it with an alternative fastener, the sewed loop of webbing which securely affixes the hook to the strap would have to be cut and a new attachment for securing an alternative fastener would have to be affixed to the strap. In essence, the consumer would have to break the article and construct a new one.

[66] This type of action is clearly not contemplated by the product as marketed and indeed, would likely compromise the overall structural integrity of the article in any event. There is no dispute that the strap must have sufficient resilience and break strength to support the load being moved by operation of the winch. A marine winch strap that has been adapted for use with a different, or alternative fasteners, would be a different article.

[67] It is well established that the Tribunal must consider the goods as they exist at the time of importation.[28] In order to conclude, as urged by Canadian Tire, that the hook is an accessory to the strap, the Tribunal would have to hypothesize and consider an article having different components or features, as opposed to the goods that have actually been imported.

[68] As the goods are not "essentially an article of textile", they are thus excluded from heading 59.11, having regard to the wording of the explanatory notes. As held by the Tribunal in *Suzuki*, the Explanatory Notes are intended by Parliament to be an interpretative guide to tariff classification. As such, the Tribunal is required to consider the Explanatory Notes unless there is a "sound reason" to depart from the guidance provided therein.[29] In doing so, the Tribunal cannot ignore or rewrite the terms of the Explanatory Notes.

[69] The Federal Court of Appeal has indicated that expert evidence may, in some instances, provide evidential grounds that would justify a departure from the Explanatory Notes.[30] Neither party tendered expert evidence in this case. The only witness, Mr. Favreau, testified concerning his understanding of the marine winch strap, its construction and functional use. However, he was not put forward as an expert witness and was not qualified as such. Moreover, to the extent that

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26 *Accessoires SportRacks Inc. de Thule Canada Inc v. Canada Border Services Agency* (13 January 2012), AP-2010-036 (CITT) at para. 28.

27 *Transcript of Public Hearing* at 19.

28 *Tri-Ed Ltd. v. President of the Canada Border Services Agency* (27 February 2017), AP-2014-041 (CITT) at para. 69.

29 *Suzuki* at para. 13.

30 *Ibid.* at para. 17.

Mr. Favreau's evidence is relevant, it is merely corroborative of the evidence that is already of record.

[70] The Tribunal finds no probative evidence in this case that could justify a departure from the guidance provided by the explanatory notes. For the reasons given above, the goods at issue are not "essentially articles of textile", having regard to the composition, construction and function of the marine winch strap. In order to find otherwise, the Tribunal would have to interpret the terms of the explanatory notes in a manner that their words cannot reasonably bear.

[71] Canadian Tire also argued that the wording of legal note 7(b) to Chapter 59 supported classification under heading 59.11 because its terms contemplate textile articles fitted with linking devices. As the metal hook serves to connect or "link" the strap to the boat, Canadian Tire submitted that this served to make the marine winch strap a "textile article of a kind used for technical purposes fitted with a linking device", for the purpose of classification under heading 59.11.

[72] However, on closer review, the wording of legal note 7(b) does not support this interpretation. In order for this term of the legal note to apply, the article must not only be of a kind used for technical purposes and be fitted with a linking device, it must further be "*of a kind used in paper-making or similar machines*" [emphasis added]:

> Textile articles (other than those of headings 59.08 to 59.10) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

[73] The marine winch strap is not "of a kind" used for paper-making machines. Nor is there any evidence before the Tribunal that would support the conclusion that the hand-operated winch that is used in conjunction with the goods is "similar" to a paper-making machine.

[74] The relevant terms of the explanatory notes impose the *condition* that the goods at issue be "essentially articles of textile", in order for the goods at issue to be classifiable under heading 59.11, even on a *prima facie* basis. As that condition is not met, the Tribunal finds that the marine winch strap cannot be classified under heading 59.11.

[75] The Tribunal now turns to a consideration of heading 63.07, which covers "[o]ther made up articles, including dress patterns".

[76] The legal notes to Chapter 63 limit the application of headings 63.01 to 63.07 inclusive to "made up articles, of any textile fabric".

[77] The Explanatory Notes to Chapter 63 further specify goods falling within the scope of that chapter must not be "more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature.".

[78] Accordingly, in order to be classified under heading 63.07, four conditions must be met. The marine winch strap must be:

(a) A "made up" article;

(b) Of any textile fabric; and

(c) Not included or more specifically described elsewhere in the Tariff.[31]

[79] Furthermore, explanatory note 15 to heading 63.07 indicates that goods meeting the definition of "webbing carrier straps and similar articles" are properly classified under that heading.

[80] The criteria for a "made up article" are satisfied if the goods meet one or more of the conditions prescribed by legal note 7 to Section XI. The applicable portion of legal note 7 is reproduced below:

> For the purpose of this Section, the expression "made up" means:
>
> (f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);

[81] There is no disagreement that the goods fall within this description. The marine winch strap is assembled by the sewing of a resin-coated woven strip of polyester textile so as to secure a metal hook at one end of the textile strap. As such, the goods are "made up" articles.

[82] Legal note 8 to Section XI of Chapter 59 provides as follows:

> 8. For the purposes of Chapters 50 to
>
> (a) Chapters 50 to 55 and 60 and, except where the context otherwise requires, Chapters 56 to 59 do not apply to goods made up within the meaning of Note 7 above; and . . .

[83] As the goods are "made up articles" within the meaning of legal note 7, the terms of legal note 8 thus operate to *prima facie* exclude the goods from Chapter 59, and thus from being classified under heading 59.11. Canadian Tire purports to distinguish this exclusion by contending that Explanatory Note (B) to heading 59.11 requires that all textile articles having technical uses fall to be classified under heading 59.11, with the exception of those falling within the provisions of headings 59.08 to 59.10 which are inapplicable to the goods at issue. According to Canadian Tire, a finding that the goods are articles of textile for technical uses is readily dispositive of the classification issue.

[84] Canadian Tire further contends that legal note 8 does not apply to heading 59.11 as "the context otherwise requires". There is no probative evidence before the Tribunal concerning the nature of any context that would render legal note 8 inapplicable or irrelevant to the goods at issue or to the classification analysis.

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31 *Kinedyne* at para. 54.

[85] With respect to the second requirement for classification under heading 63.07, Canadian Tire asserts that the goods are not of "textile fabric" because the metal hook renders that particular description as being inapplicable.

[86] In *Rui Royal* and *Kinedyne*, the Tribunal has previously found that the presence of a metal component does not preclude a composite good comprising textile fabric from being classified under heading 63.07:

> 67. In *Rui Royal International Corp. v. President of the Canada Border Services Agency*, the Tribunal expressed the opinion that the *Explanatory Notes* to Chapter 63 do not provide that goods are excluded from classification in Chapter 63 (and thus in heading No. 63.07) where the presence of non-textile materials constitutes more than minor trimmings or accessories. Rather, the *Explanatory Notes* to Chapter 63 provide that, in such situations, the classification of goods is to be determined ". . . in accordance with the relative Section or Chapter Notes (General Interpretative Rule 1), or in accordance with the other General Interpretative Rules . . . ." The Tribunal has taken a similar approach in previous cases.
>
> 68. The Tribunal has reviewed the notes to Section XI and Chapter 63 and does not consider that there are any notes to heading No. 63.07 which preclude a textile article with a metal component from being classified in heading No. 63.07.
>
> 69. The Tribunal has also reviewed the terms of heading No. 63.07, which provides for the classification of "[o]ther made up articles, including dress patterns." The Tribunal notes that the *Explanatory Notes* to heading No. 63.07 expressly include, within this heading, *inter alia*, ". . . webbing carrier straps and similar articles . . ." The Tribunal finds that it must determine whether the goods in issue are webbing carrier straps or similar articles, as these goods have been specifically provided for in the *Explanatory Notes* to that heading. Therefore, if the goods in issue are found to be webbing carrier straps or similar articles, they may be classified in heading No. 63.07, under Rule 1 of the *General Rules*, regardless of the metal components.[32]
>
> [Footnotes omitted]

[87] Canadian Tire further argues that *Kinedyne* is distinguishable because classification under heading 53.11 was not considered by the Tribunal in that case. However, this argument has no traction once a heading 59.11 analysis is carried out and the goods are found to be excluded from the ambit of that heading, as found above.

[88] In addition, Canadian Tire submits that the reasoning in *Kinedyne* has been superseded by the decision of the Supreme Court of Canada in *Igloo Vikski*.

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[32] *Kinedyne* at paras. 67-69.

[89] Unlike the case in this appeal, *Igloo Vikski* did not involve a general exclusion of certain types of goods from one of the chapters under consideration. The majority of the Supreme Court in *Igloo Vikski* found that the Tribunal had reasonably determined that the goods were excluded from heading 39.26 (at issue in that case) on the basis that the goods were not captured by the specific examples listed in the explanatory notes to that heading. Here, the legal notes define an exclusion from Chapter 59 for made up goods which applies "except where the context requires otherwise". The issue in this appeal deals with a legal question that is inherently distinct from the legal issue in *Igloo Vikski*, where the Court considered whether non-inclusion in a non-exhaustive list of examples in the explanatory note was sufficient to preclude, on that basis alone, a finding that the goods were *prima facie* classifiable under the related heading. As such, this argument does not assist Canadian Tire.

[90] Canadian Tire contends that the CBSA is advancing inherently contradictory definitions for articles of textile for the purposes of headings 59.11 and 63.07. This argument appears to be premised on the fact that the metal hook excludes the marine winch strap from the ambit of heading 59.11 while allowing the goods to remain under heading 63.07 while both headings pertain to textile articles.

[91] However, this overlooks that the exclusion from heading 59.11 is underpinned by the questions of whether the article is "essentially" an article of textile as opposed to being an article of textile. A non-textile component (such as the metal hook) may, by virtue of the composition, construction or functionality of the article, lead to the conclusion that the article is more than, or not merely an article of textile – i.e. that it is not "essentially" an article of textile but something else, such as a composite good.

[92] On the other hand, heading 63.07 does not impose the qualifier "essentially" with reference to the analysis as to whether an article is (or is not) a textile article. The presence of some non-metal content is not necessarily significant or transformative if it does not materially affect the composition or functionality of the goods. For the reasons given above, the metal hook is not merely "minor trimmings or accessories". Instead, it is essential, not peripheral, to the inherent nature and functional use of the article.

[93] It is undisputed that the goods incorporate textile fabric, namely a resin coated polyester strap. As such, the Tribunal concludes that the goods are "of textile fabric".

[94] *Kinedyne* dealt with the classification of goods described as "winch straps". The Tribunal concluded that those goods were similar to webbing carrier straps and should be classified under heading 63.07. There is no evidence before the Tribunal that the marine winch straps at issue in this case are sufficiently different from the winch straps in *Kinedyne*. In the absence of factual differences that would operate to distinguish the principles applied in *Kinedyne*, the principle of judicial comity requires the Tribunal to follow its own precedents.[33]

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[33] *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257 at paras. 42-45; X(Re), 2016 CanLII 151453 (CA IRB) at paras. 29-31; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 19.

[95] In reaching this conclusion, the Tribunal adopts the definitions outlined in *Rui Royal*[34] and *Kinedyne*[35] that are relevant to webbing carrier straps and similar articles, as follows:

> . . . the Tribunal finds that the goods in issue share sufficient characteristics with webbing carrier straps in both make and functionality to allow them to be classified under heading No. 63.07. The goods in issue closely resemble a webbing carrier straps in that both products are made of strong narrow woven fabric and both straps are capable of withstanding strain. In addition, the goods in issue and webbing carrier straps perform similar functions, as mentioned above.
>
> [Footnote omitted]

[96] As such, the Tribunal finds that the marine winch strap is an article similar to a webbing carrier strap. As such, that basis for classification under heading 63.07 is accordingly met.

[97] There is no dispute that the goods at issue are more particularly described elsewhere in the *Customs Tariff*. The only issue is whether the goods are classifiable under either heading 59.11 or heading 63.07. As the Tribunal has concluded that heading 59.11 does not apply, the third requirement for classification under heading 63.07 is also met.

[98] At the hearing, each party confirmed that they did not contest their opponent's arguments in this regard. The Tribunal accepts this position with regard to classification at the heading level.[36] As such the Tribunal concludes that the marine winch straps should be classified under tariff item 6307.90.99.90.

DECISION

[99] For the foregoing reasons, the appeal is dismissed.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

34 *Rui Royal* at para. 83.
35 *Kinedyne* at para. 78.
36 *Transcript of Public Hearing* at 69, 114.