Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals AP-2022-004 and AP-2022-017

Medline Canada Corporation

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, January 29, 2024

Corrigendum issued
Tuesday, March 18, 2025

TABLE OF CONTENTS

IN THE MATTER OF appeals heard on April 5, 2023, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*, dated February 4, 2022, and July 11, 2023, with respect to requests for re-determination.

BETWEEN

MEDLINE CANADA CORPORATION **Appellant**

AND

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

DECISION

These appeals are allowed.

Bree Jamieson-Holloway

Bree Jamieson-Holloway
Presiding Member

IN THE MATTER OF appeals heard on April 5, 2023, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*, dated February 4, 2022, and July 11, 2022, with respect to requests for re-determination.

BETWEEN

MEDLINE CANADA CORPORATION **Appellant**

AND

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

CORRIGENDUM

The second introductory paragraph should read as follows:

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*, dated February 4, 2022, and July 11, 2022, with respect to requests for re-determination.

The note under paragraph 32 should read as follows:

[Emphasis added by the FCA]

The first sentence of paragraph 54 should read as follows:

Second, Ms. Hartsell testified that surgical gloves are made to comply with sterilization standards and norms such as the Operating Room Nurses Association of Canada, the Department of Health, the Canadian Standards Association, the Association for the Advancement of Medical Instruments, and the College of Physicians and Surgeons.

[Footnote omitted]

The first sentence of paragraph 76 should read as follows:

In sum, the Tribunal retains from the case law that, in order for a good to be "physically connected" to the host good, the evidence must show that, in the circumstances, the good in question has a "real and effective connection" to the host good.

[Footnote omitted]

Footnote 68 should read as follows:

Sonos at para. 65.

By order of the Tribunal,

Bree Jamieson-Holloway

Bree Jamieson-Holloway
Presiding Member

Place of Hearing:	Via videoconference
Date of Hearing:	April 5, 2023
Tribunal Panel:	Bree Jamieson-Holloway, Presiding Member
Tribunal Secretariat Staff:	Yannick Trudel, Counsel Anja Grabundzija, Counsel Jennifer Mulligan, Expert Paralegal Sarah Sharp-Smith, Registry Officer Lindsay Vincelli, Senior Registry Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Medline Canada Corporation	Riyaz Dattu Mudabbir Tariq
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Blake Van Santen

WITNESSES:

Ruby Hartsell Senior Director National of Clinical & Training Services Medline Canada Corporation	Khristinn Kellie Leitch Associate Professor, School of Medicine, Department of Pediatrics University of Mississippi Medical Center

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
Email: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

OVERVIEW

[1] These appeals were filed by Medline Canada Corporation (Medline) on April 26, 2022, and August 3, 2022, pursuant to subsection 67(1) of the *Customs Act*,[1] from decisions made on February 4, 2022, and July 11, 2022, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the *Customs Act*, with respect to requests for further re-determinations on tariff classification.

[2] The issue in these appeals is whether sterile rubber surgical gloves imported by Medline (the goods in issue), in addition to being classified under tariff item 4015.11.00, may also be classified under tariff item 9977.00.00 as "articles for use in instruments and appliances used in medical, surgical, dental or veterinary sciences", as claimed by Medline.

DESCRIPTION OF THE GOODS IN ISSUE

[3] The goods in issue are sterile surgical gloves. They consist of various models of surgical gloves that are typically 12 inches in length and 8–13 millimetres thick, packaged in pairs (left and right). They are made of polyisoprene, neoprene or latex and designed to be worn during surgery.[2] They are form-fitting and have long cuffs extending to the wearer's forearm.[3]

[4] The evidence indicates that the goods in issue are manufactured to meet the requirements and designed to be used in situations that require a sterile field (i.e., surgery room environments). In order to prevent surgical site infections, the use of sterile surgical gloves is essential and a standard requirement. The gloves function as a protective barrier to prevent the transmission of diseases and bacteria between patients and healthcare professionals during operations.

[5] In Canada, the goods in issue are also subject to the *Medical Device Regulations*.[4] They are regulated by the Department of Health as Class II medical devices and can only be imported into Canada by persons who hold a licence in respect of those devices. Medline Canada is licensed by the Department of Health and therefore authorized to import and market Class II medical devices.

PROCEDURAL HISTORY

[6] From November 2015 to March 2018, the goods in issue were imported by Medline as surgical gloves under tariff item 4015.11.00. At the time, Medline made no claim for duty-free treatment.[5]

---

1 R.S.C., 1985, c. 1 (2nd Supp.).

2 Exhibit AP-2022-004-10 at 264; Exhibit AP-2022-004-10 at para. 28; Exhibit AP-2022-004-12.C (protected) at para. 8.

3 Exhibit AP-2022-004-12.B at para. 2.

4 SOR/98-282.

5 Exhibit AP-2022-004-12.B at para. 10, at note 6. The goods under appeal in case AP-2022-004 were imported and accounted for between November 27, 2015, and August 12, 2017, and the goods under appeal in case AP-2022-017 (now joined to appeal AP-2022-004) were imported and accounted for between June 2016 and March 2018.

[7] Between November 2019 and July 2021, Medline submitted 395 requests for refunds under section 74 of the *Customs Act* on the basis that the goods are eligible for conditional duty relief under tariff item 9977.00.00 as "articles for use in … instruments and appliances used in medical, surgical, dental or veterinary sciences".[6]

[8] Between September 22, 2021, and October 12, 2021, the CBSA issued re-determinations under paragraph 59(1)(a) of the *Customs Act*. The CBSA denied Medline's refund requests on the grounds that the goods do not meet the requirements to be considered "for use in" the instruments and appliances referenced in tariff item 9977.00.00.[7]

[9] On January 28, 2022, Medline requested further re-determinations under subsection 60(1) of the *Customs Act*, arguing that the goods met the "for use in" criterion. Specifically, Medline argued that the goods are "attached to"—meaning physically connected and functionally joined to—the relevant instruments and appliances.[8]

[10] On February 4, 2022, and July 11, 2022, in two further re-determinations made under paragraph 60(4)(b) of the *Customs Act*, the CBSA affirmed its earlier determination that the goods are not classifiable under tariff item 9977.00.00 because they do not meet the "for use in" criterion.[9]

[11] On April 26, 2022, and August 3, 2022, Medline filed the present appeals with the Canadian International Trade Tribunal under subsection 67(1) of the *Customs Act*.[10] Upon filing its second appeal, Medline requested that both appeals be joined.[11]

[12] On August 8, 2022, the Tribunal granted Medline's request and joined the two appeals.[12]

[13] On November 14, 2022, Medline filed its appellant's brief.[13]

[14] On January 13, 2023, the CBSA filed its respondent's brief.[14]

[15] On March 6, 2023, Medline filed an expert report prepared by Dr. Khristinn Kellie Leitch pertaining to the use of sterile surgical gloves.[15]

[16] On March 24, 2023, the CBSA filed a revised version of its respondent's public and confidential briefs to amend certain confidentiality designations.[16]

---

6 Exhibit AP-2022-004-12.C (protected) at 45–52; Exhibit AP-2022-004-12.B at para. 11.
7 Exhibit AP-2022-004-12.B at para. 12.
8 *Ibid.* at para. 13.
9 *Ibid.* at para. 14.
10 Exhibit AP-2022-004-01; Exhibit AP-2022-017-01; Exhibit AP-2022-004-12.B at para. 15.
11 Exhibit AP-2022-004-12.B at para. 15.
12 Exhibit AP-2022-017-02.
13 Exhibit AP-2022-004-10; Exhibit AP-2022-004-10.A (protected).
14 Exhibit AP-2022-004-12; Exhibit AP-2022-004-12.A (protected).
15 Exhibit AP-2022-004-20; Exhibit AP-2022-004-20.A.
16 Exhibit AP-2022-004-12.B; Exhibit AP-2022-004-12.C (protected).

[17] The hearing was held by way of videoconference on April 5, 2023. Medline called two witnesses, including one that it asked the Tribunal to qualify as an expert. The CBSA did not call any witnesses.

Expert witness Dr. Khristinn Kellie Leitch

[18] Medline's proposed expert witness, Dr. Khristinn Kellie Leitch, is a qualified surgeon. Medline asked the Tribunal to qualify Dr. Leitch as an expert in the field of surgery and having the expertise to testify on the history, design, composition, engineering and mechanics of surgical gloves; their use in surgical operations; safety procedures in the operating room; and the use of surgical instruments while wearing surgical gloves.[17]

[19] At the hearing, the CBSA indicated that it did not intend to challenge Dr. Leitch's qualification as an expert witness in the field of surgery but challenged her qualification with regard to the specific fields related to the history, mechanics, engineering, design and manufacturing of surgical gloves.[18]

[20] Having reviewed Dr. Leitch's résumé and considered submissions at the hearing from both parties on the issue of the areas of her qualification as an expert witness, the Tribunal accepted the qualification of Dr. Leitch as an expert witness in the field of surgery and the use of surgical gloves in an operating room.[19]

LEGAL FRAMEWORK

[21] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,[20] which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.[21] 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.

[22] 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*[22] (General Rules) and the *Canadian Rules*[23] set out in the schedule.

[23] 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.

---

17 Exhibit AP-2022-004-20 at 2; Exhibit AP-2022-004-20.A at 8; *Transcript of Public Hearing* at 70–71.
18 *Transcript of Public Hearing* at 75–76.
19 *Transcript of Public Hearing* at 84.
20 S.C. 1997, c. 36.
21 Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
22 S.C. 1997, c. 36, schedule.
23 *Ibid.*

[24] 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.24 The final step is to determine the proper tariff item.[25]

[25] As noted above, the parties in these appeals agree that the goods in issue are classifiable under tariff item 4015.11.00 as rubber surgical gloves. The only issue in these appeals is whether the goods in issue may also be classified under tariff item 9977.00.00 and thereby benefit from duty-free treatment.

[26] The relevant tariff classification provisions are as follows:

Chapter 99	**Chapitre 99**
SPECIAL CLASSIFICATION PROVISIONS - COMMERCIAL	**DISPOSITIONS DE CLASSIFICATION SPÉCIALE - COMMERCIALES**
…	[…]
9977.00.00 Articles for use in the following:	9977.00.00 Articles devant servir dans ce qui suit :
…	[…]
Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments;	Instruments et appareils pour la médecine, la chirurgie, l'art dentaire ou l'art vétérinaire, y compris les appareils de scintigraphie et autres appareils électromédicaux ainsi que les appareils pour tests visuels pour tests visuels;
…	[…]

[27] Chapter 99, which includes tariff item 9977.00.00, provides special classification provisions that generally allow certain goods to be imported into Canada duty-free. The provisions of this chapter are not standardized at the international level.

[28] As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, rules 1 through 5 of the General Rules in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e., for the exclusive use of individual countries), there are no classification opinions or explanatory notes to consider.

---

24 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."

25 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.

[29] Notes 3 and 4 in Chapter 99 are relevant to the present appeals. These notes provide as follows:

> 3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
>
> 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

[30] Subsection 2(1) of the *Customs Tariff* defines the expression "for use in", which appears in tariff item 9977.00.00, as follows:

> ***for use in***, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

[31] The French version of the text reads as follows:

> ***devant servir dans*** ou ***devant servir à*** Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d'autres marchandises mentionnées dans ce numéro tarifaire par voie d'ouvraison, de fixation ou d'incorporation.

[32] In the context of this case, in order to determine whether the goods in issue can be classified under tariff item 9977.00.00, the Tribunal must determine if the goods are (1) articles; (2) for use in; and (3) instruments and appliances used in surgical, dental or veterinary sciences.

POSITIONS OF THE PARTIES

Medline Canada Corporation

[33] Medline argues that the goods in issue are classifiable under tariff item 9977.00.00, as they are articles "for use in" instruments and appliances used in surgical, dental or veterinary sciences, such as scalpels. Medline's position focuses on the two criteria set out in the Tribunal's jurisprudence that are necessary for goods to be found to be "attached to" other (or host) goods: the goods must be "physically connected" and "functionally joined" to the host goods.

[34] Medline submits that the goods in issue are specifically designed and manufactured to be used by surgeons requiring specifically designed rubber gloves that are sterile, meet Canadian industry standards, and allow the wearer to maintain a high degree of sensitivity when the gloves are worn over the hand's sensory receptors. Medline further argues that many surgical instruments, such as scalpels, cannot be properly used without surgical gloves and, consequently, that the goods in issue are functionally connected to surgical instruments. According to Medline, since the goods in issue are necessary to allow surgeons to use surgical instruments such as scalpels, they meet the requirements of being "physically connected" and "functionally joined" to scalpels.

[35] Medline also submits that the goods in issue and the surgical instruments are physically connected when held in the hand of and used by a surgeon.

Canada Border Services Agency

[36] The CBSA argues that the goods in issue are not classifiable under tariff item 9977.00.00, as they are neither "physically connected" nor "functionally joined" to the host goods identified under that tariff item.

[37] The CBSA submits, first, that the physical relationship between surgical gloves and scientific instruments like scalpels is one of mere surface-level contact rather than connection. The CBSA argues that the goods need to be fixed, inserted or clamped to the host goods in order to be physically connected.[26]

[38] Second, the CBSA argues that surgical gloves are not required for scalpels to perform their function of cutting flesh, nor do rubber gloves provide scalpels with additional functions beyond the function of cutting; therefore, the goods in issue are not functionally joined to the host goods.

ANALYSIS

[39] The parties agree that the goods in issue are properly classified under tariff item 4015.11.00 as surgical gloves of vulcanized rubber other than hard rubber.[27] The Tribunal sees no reason to find otherwise.

[40] The question on appeal is thus whether the goods in issue can also be classified under tariff item 9977.00.00 as articles for use in instruments and appliances used in surgical sciences.

[41] As noted above, for the goods in issue to be classifiable under tariff item 9977.00.00 and thereby benefit from duty-free treatment, they must be (1) "articles"; (2) "for use in"; and (3) goods referred to in that tariff item (i.e., "instruments and appliances used in medical, surgical, dental or veterinary sciences").

[42] The first and third conditions are not at issue in this case. There was no controversy in this case that the goods in issue are "articles".[28] The parties also agree that the host goods (e.g., surgical instruments such as scalpels) which Medline argues the goods in issue are "for use in" qualify as host goods of tariff item 9977.00.00.

[43] The Tribunal will review the remaining second condition.

---

26 *Transcript of Public Hearing* at 150–151.

27 Exhibit AP-2022-004-10 at para. 3; Exhibit AP-2022-004-12.B at para. 3.

28 Exhibit AP-2022-004-10 at para. 20; Exhibit AP-2022-004-12.B at para. 26.

Whether the goods in issue are "for use in" the host goods

[44] As explained above, subsection 2(1) of the *Customs Tariff* defines the expression "for use in" as follows: "wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be *wrought* or *incorporated into*, or *attached to*, other goods referred to in that tariff item" [emphasis added].

[45] The parties agree that the goods in issue are not "wrought" or "incorporated into" surgical instruments such as surgical scalpels. Therefore, the Tribunal must decide whether the goods in issue are "attached to" surgical instruments.

[46] The Tribunal has long applied a two-prong test to determine whether goods are "attached to" other goods.[29] First, the goods must be "physically connected" to the host goods; and second, the goods must be "functionally joined" to the host goods.[30]

[47] The Tribunal will analyze both criteria of the two-tier test below.

The goods in issue are functionally joined to the host goods

[48] First, the Tribunal will examine whether the goods in issue are "functionally joined" to the host goods. This has been understood to mean that the goods in issue must enhance or complement

---

29 See *Best Buy Canada Ltd., P & F USA Inc. and LG Electronics Canada Inc. v. President of the Canada Border Services Agency* (27 February 2017), AP-2015-034, AP-2015-036 and AP-2016-001 (CITT) [*Best Buy*] at para. 77; *Kverneland Group North America Inc. v. President of the Canada Border Services Agency* (30 April 2010), AP-2009-013 (CITT) [*Kverneland Group*] at para. 40; *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency* (21 June 2013), AP-2012-022 (CITT) [*Andritz Hydro*] at para. 36; *Contech Holdings Canada Inc. v. President of the Canada Border Services Agency* (17 May 2012), AP-2010-033 and AP-2010-042 (CITT) at para. 43; *Sonos Inc. v. President of the Canada Border Services Agency* (24 October 2017), AP-2016-020 (CITT) [*Sonos*] at para. 63; *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) at para. 65; *Ubisoft Canada Inc. v. President of the Canada Border Services Agency* (28 January 2014), AP-2013-004 (CITT) [*Ubisoft Canada*] at para. 59.

30 Medline appears to argue at para. 27 of its brief (AP-2022-004-10) that "… as provided for in tariff item 9977.00.00, the surgical gloves must be conjoined or, as stated by the Tribunal in AP-2013-029R, are 'intended for use in conjunction with' the surgical instruments". See also *Transcript of Public Hearing* at 143–144, 161. The CBSA responded to this assertion at para. 39 of its revised brief (AP-2022-004-12.B), stating: "The Appellant only provides an erroneous discussion of the word 'conjoined', which does not appear in the wording of tariff item 9977.00.00 nor in any part of the case law test for establishing that a good is 'for use in' a host good identified in tariff item 9977.00.00". The Tribunal agrees with the CBSA that the word conjoined does not appear in the wording of tariff item 9977.00.00 nor in case law relating to the expression "for use in". In *Eastern Division Henry Schein et al. v. President of the Canada Border Services Agency* (15 August 2016), AP-2013-029R (CITT), referenced by Medline, the question before the Tribunal was whether the goods in issue may be considered instruments or appliances used in medical, surgical or veterinary sciences of heading 90.18. The expression "for use in" does not appear in heading 90.18.

the function of the host goods by helping the host goods to execute their functions or by allowing them to acquire additional capabilities.[31]

[49] In this case, the parties disagree on whether the goods in issue enhance or complement the relevant host goods (which, in this case, include surgical scalpels). After considering the evidence on the record, the Tribunal concludes that the goods in issue are functionally joined to surgical scalpels.

[50] At the hearing, both witnesses testified that, although they share similarities with general rubber gloves, sterile rubber gloves such as those in issue are designed, engineered and manufactured with specific characteristics to be used in operating rooms and to conduct surgery.[32]

[51] The evidence on the record suggests that surgical rubber gloves enhance the use of surgical instruments, such as scalpels, in three different manners.

[52] First, the expert witness, Dr. Leitch, explained that the goods in issue are intended to hold and maintain a firm grasp on the host goods (e.g., scalpels).[33] The evidence indicates that, without the surgical gloves, it would be difficult for a surgeon to maintain a firm grasp on the surgical instruments during an operation.[34]

[53] Ms. Ruby Hartsell, senior director of national clinical and training services at Medline,[35] which produces the goods in issue, testified that surgical gloves are designed to enhance the grip on surgical instruments, allowing the instrument to be manipulated during surgery, where blood and other bodily fluids can make the instruments slippery.[36]

[54] Second, Ms. Hartsell testified that surgical gloves are made to comply with sterilization standards and norms such as the Operating Room Nurses Association of Canada, the Department of Health, the Canadian Standards Association, the Association for Advancement of Medical Instruments, and the College of Physicians and Surgeons.[37] Both Ms. Hartsell and Dr. Leitch testified that the wearing of surgical gloves is necessary when using surgical instruments to carry out surgery without posing the risk of bacterial infection.[38] The witnesses also testified that, while a scalpel can be used to cut without wearing surgical gloves, as suggested by the CBSA, doing so in a surgical context without wearing sterile surgical gloves generates high risk of infection for both the patient and the surgeon.[39] Dr. Leitch went on to testify that the wearing of surgical gloves is a mandatory

---

31 See *Sonos* at para. 63; *Best Buy* at para. 77; *Andritz Hydro* at para. 36, affirmed in *Andritz Hydro Canada Inc. v. Canada (Border Services Agency)*, 2014 FCA 217; *Ubisoft Canada* at para. 59, affirmed in *Ubisoft Canada Inc. v. Canada (Border Services Agency)*, 2014 FCA 254; *Kverneland Group* at para. 47; *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT) [*Jam Industries*] at paras. 42–45, affirmed in *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210; *Sony of Canada Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT); *Imation Canada Inc. v. The Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency* (2 November 2004), AP-2003-010 (CITT) [*Agri-Pack*] at para. 31.

32 *Transcript of Public Hearing* at 32, 98–99; Exhibit AP-2022-004-20.A at 3–4, 6.

33 *Transcript of Public Hearing* at 98–99; Exhibit AP-2022-004-20.A at 3–4.

34 *Transcript of Public Hearing* at 102–103.

35 Exhibit AP-2022-004-33 at para. 1.

36 *Transcript of Public Hearing* at 10, 17–19, 56.

37 Exhibit AP-2022-004-10 at 4–5, 156–157; *Transcript of Public Hearing* at 28–30.

38 *Transcript of Public Hearing* at 43, 45, 96–97.

39 *Transcript of Public Hearing* at 35, 44–45, 68–69, 71, 96–97; Exhibit AP-2022-004-20.A at 4, 6.

protocol and not wearing surgical gloves while operating on a patient would result in the loss of hospital privileges.[40]

[55] Lastly, the evidence showed that the surgical gloves in issue in these appeals are designed to have minimal interference on tactile feedback. The expert report and Dr. Leitch's testimony confirmed that the surgical gloves provide a high degree of sensitivity by allowing the hand to interact with surgical instruments during surgery with minimal interference from the glove.[41] The surgical gloves allow for the hand's sensory receptor to receive sensory information from the instruments and surrounding environment. In turn, this allows surgeons to perform surgery while wearing two layers of gloves, a common practice that is intended to decrease the risks of infection in the event that the first layer of the glove is punctured or torn during the surgical procedure.[42]

[56] In sum, the witnesses' evidence indicates that the function of the host goods (e.g., surgical scalpels) is to assist the surgeon during the surgery by, for instance, performing precise incisions on the human body.[43] The surgical gloves, for their part, enhance the functionality of the host goods in the operating room by preventing transmission of bacteria and disease while maintaining the tactile feedback necessary to use surgical instruments with precision.

[57] Therefore, in light of the evidence and as submitted by Medline, the Tribunal finds that the goods in issue enhance the function of surgical instruments by providing a necessary layer between the surgical instrument and the surgeon's hand that increases the grip on the instrument, decreases the risk of the instrument slipping from the surgeon's hand, and increases precision through improved tactile feedback. The surgical glove also provides a sterile barrier to protect both the surgeon and the patient from infections. The Tribunal finds that the goods in issue provide significantly improved functionality to the surgical instruments, allowing them to function properly and optimally in the operating room.

[58] The Tribunal thus finds that the goods in issue are functionally joined to instruments and appliances used in medical or surgical sciences.

[59] The Tribunal's conclusion is consistent with previous findings. In *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (*Canadian Tire*), the Tribunal found that a chair with a built-in sound system enhanced the function of the host goods, as it allowed the host goods (e.g., a computer, DVD player or video game console) to render audio files in a way that the ear could hear and did so in a manner that delivered an increased sensory experience to the user.[44]

[60] In the Tribunal's view, there is no doubt that decreasing the risk of infection for the user and the patient and increasing the grip and tactile feedback to enhance the surgeon's precision during surgery constitute a significant enhancement to the function of surgical instruments.

---

40 *Transcript of Public Hearing* at 119.

41 Exhibit AP-2022-004-20.A at 3–4; *Transcript of Public Hearing* at 102–103.

42 Exhibit AP-2022-004-20.A at 5.

43 Exhibit AP-2022-004-10 at para. 31.

44 *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (24 August 2018), AP-2017-025 (CITT) [*Canadian Tire*] at paras. 42–43.

The goods in issue are physically connected to the host goods

[61] Having found that the goods are functionally joined to the host goods, the Tribunal turns to the second criterion of the two-tier test to determine whether the goods in issue are "attached to" the host goods within the meaning of the expression "for use in", as defined in subsection 2(1) of the *Customs Tariff*. As such, in accordance with the two-tier test, the Tribunal will next consider whether the goods in issue are physically connected to the host goods.

[62] In this case, Medline argued that, when worn by a surgeon in an operating room, the surgical gloves are physically connected to surgical instruments used by the surgeon while the activity is being performed. In particular, Medline's position was that nothing in the statutory language requires the goods to fit somehow into the host goods in order to be attached to those goods. Medline submitted that the CBSA's suggestion that the physical connection of the "attached to" test requires some level of insertion of the goods into the host goods confuses the "attached to" criterion in the definition of "for use in" with the "incorporated into" criterion and adds restrictions not found in the statutory language. Medline relied on the Tribunal's decision in *Sonos Inc. v. President of the Canada Border Services Agency* (*Sonos*), submitting that "attached to" simply requires "some level of connection, some attachment" (in addition to improved functionality).[45] It submitted that the Tribunal's decision in *Sonos* suggests that the connection need not be physical but could be digital, although in the present case, there is in Medline's submission a clear physical connection between the gloves and host goods.[46] Medline also relied on the Tribunal's decision in *Sony of Canada Ltd. v. The Deputy Minister of National Revenue* (*Sony I*), highlighting the importance of the test set out therein for something to be considered "attached to". Medline submitted that *Sony I* established that there must be a physical attachment and a functional relationship between the article and the host goods, and that the attachment need not be permanent, nor does it require that one good be inserted or incorporated into the other.[47]

[63] The CBSA argued that the connection between surgical gloves and surgical instruments is one of mere surface-level contact that does not meet the "physically connected" test.[48] It argued that, while a glove and scalpel may touch while both worn and held by a person, they are not fixed, clamped or inserted into one another, as was the case in previous cases brought before the Tribunal.[49] The CBSA therefore argues that the level of physical connection between the goods in issue and the host goods does not meet the level of attachment envisaged by the text of the *Customs Tariff*.

[64] The Tribunal must therefore determine whether holding a surgical scalpel in one's hand while wearing the surgical gloves creates the kind of connection envisaged by the expression "for use in" included in the *Customs Tariff*.

[65] The Tribunal agrees with the appellant.

---

45 *Transcript of Public Hearing* at 132–133; see also Exhibit AP-2022-004-10 at para. 23; *Transcript of Public Hearing* at 128–129, 142–143, 157–161.

46 *Transcript of Public Hearing* at 144.

47 *Sony of Canada Ltd. v. The Deputy Minister of National Revenue* (12 December 1996), AP-95-262 (CITT) [*Sony I*]; *Transcript of Public Hearing* at 81, 130, 133–135.

48 *Transcript of Public Hearing* at 149–151.

49 *Transcript of Public Hearing* at 150–151.

[66] The Tribunal is cognizant of the fact that, since it first elaborated the two-tier test in *Sony I*,[50] in the majority of cases where the Tribunal has had to conduct the two-tier test, most revolved around the issue of joint functionality.[51] As a result, while the Tribunal has had the opportunity to clearly set out the requirements for goods to be considered "functionally joined" to their host goods, the Tribunal has had fewer opportunities to define the requirements for goods to be deemed "physically connected" to their host goods. The Tribunal thus finds it useful to briefly review some past cases where it found goods to be physically connected.

[67] In *Sony I*, the Tribunal considered whether certain tape cartridges qualified as articles for use in magnetic tape drives. The Tribunal noted that, to store information onto a tape cartridge, the tape cartridge must be inserted into a tape drive. The extent to which the tape cartridges became physically connected and functionally joined to the tape drives satisfied the Tribunal that they became "attached to" the tape drives within the meaning of the definition of "for use in" applicable at the time. In coming to this conclusion, the Tribunal considered the expression "for use in" as defined at the time in section 4 of the *Customs Tariff*.[52] It rejected the argument that the English version of section 4 is ambiguous or that the French version more clearly denotes the meaning of section 4. The Tribunal was of the view that both versions convey the same meaning of the expression "for use in", which was that goods must be wrought into, attached to or incorporated into certain other goods. The Tribunal rejected the view that the goods must necessarily enter into the composition of the other goods to satisfy the definition of "for use in".

[68] In *PHD Canada Distributing Ltd. v. The Commissioner of Customs and Revenue*, the Tribunal found that CDs placed on a spindle in the CD-ROM drive (host good) and clamped into place in order to be played were physically connected to the CD-ROM drive, whether or not the physical connection is temporary.[53]

[69] In *Sony of Canada Ltd. v. The Commissioner of the Canada Customs and Revenue Agency*,[54] the Tribunal found that certain models of an integrated circuit recorder and a portable minidisk recorder were physically attached to the host goods (i.e., computers) through cables, even though the

---

50 *Sony I*.

51 For instance, the parties agreed or did not contest that the goods in issue were physically joined in *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *Kverneland Group* at para. 42; *Best Buy* at para. 79.

52 The Tribunal, in *Sony I*, noted as follows:

> The English version of section 4 states:
>
> 4. The expression "for use in", wherever it occurs in a tariff item in Schedule I or a code in Schedule II in relation to goods, means, unless the context otherwise requires, that the goods must be wrought into, attached to or incorporated into other goods as provided for in that tariff item or code.
>
> The French version of section 4 states:
>
> *4. Les expressions «devant servir dans» et «devant servir à», mentionnées en regard d'un numéro tarifaire de l'annexe I ou d'un code de l'annexe II, signifient que, sauf indication contraire du contexte, les marchandises en cause entrent dans la composition d'autres marchandises par voie d'ouvraison, de fixation ou d'incorporation, selon ce qui est indiqué en regard de ce numéro ou code.*

53 *PHD Canada Distributing Ltd. v. The Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT).

54 *Sony of Canada Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT).

physical connection was not permanent. On the other hand, other models of the goods, which used a memory stick, not a cable, to perform the interface functions with the computer, were not found to be physically connected to the host goods. The Tribunal reasoned that these models were not "attached to" a computer, as they did not have a physical connection to the computer either temporarily or directly through a cable.

[70] In *Agri-Pack v. Commissioner of the Canada Customs and Revenue Agency*,[55] the Tribunal found that certain onion bags were physically connected to onion bagging machines, as they were held securely in place until filled and removed. The Federal Court of Appeal (FCA) affirmed the Tribunal's decision on this point.[56] Before the FCA, the appellant argued that the words "attached to" on which the Tribunal relied must be read with the preceding words which require that the articles be "wrought or incorporated into" qualified machinery. The appellant also argued that the requirement for the existence of a form of incorporation is reinforced by the French text, which indicates that the article must become part of the machinery. The appellant before the FCA submitted that the Tribunal failed to read the words in context when it held that the bags were "attached to" the machinery merely by virtue of being clamped onto the machinery during the bagging process. However, the FCA found that the Tribunal had understood the words "attached to" in context and had highlighted that they require more than a mere physical attachment. The FCA indicated as follows:

> [30] … The CITT understood that the words "attached to" were to be read in context and that mere physical attachment was not enough. It said at paragraph 31 of its Reasons:
>
> > Given the above-quoted definition of "for use in", the Tribunal must determine whether the goods are "wrought or incorporated into" (which they are not) or "*attached to*" the other goods mentioned in the above tariff item. In past cases, the Tribunal has effectively narrowed the meaning of "attached to" to mean that the goods must be physically connected and functionally joined to the goods listed in the tariff item. The "functionally joined" condition is derived from a long line of Tribunal cases where the Tribunal noted that the expression "attached to" does not merely bear its ordinary grammatical meaning. Indeed, given the legislative context in which the expression appears, it also connotes a functional relationship. [Emphasis added]
>
> [31] Applying this legal test, the CITT concluded that the onion bags (other than the master bags) were both physically and functionally attached to the bagging machine (Reasons, paragraph 32). In my view, it cannot be said that the CITT failed to read the expression "attached to" in light of the preceding words and in harmony with the provision as a whole.
>
> [32] Beyond this, there was evidence to support the CITT's conclusion that there was both a physical and a functional connection between the bags and the machines. The machines cannot function without the bags being attached to them, and there is a clear interaction between the bags and machines during the bagging process.
>
> [Emphasis in original]

---

55 *Agri-Pack* at para. 32.

56 *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 at paras. 29–33.

[71] In *Curve Distribution Services Inc. v. President of the Canada Border Services Agency*,[57] the Tribunal found that cell phone cases specifically designed and shaped to fit cell phones are physically connected to those cell phones (the host goods), as they covered and were in direct contact with the cell phones.

[72] In *Sonos*, the goods in issue (i.e., wireless speakers) could use Ethernet cables or wireless technology to connect to a computer, a phone, another digital device or each other. The Tribunal, satisfied that the goods were physically connected, noted that, "[a]lthough invisible, this digital connection is a real and effective connection". The Tribunal noted, moreover, that the goods have an Ethernet port which could be used to connect a router directly.[58]

[73] In *Canadian Tire*, mentioned above, the Tribunal found that a chair with a built-in sound system was physically connected to the host goods (e.g., a computer, DVD player or video game console) via a Bluetooth connection or cables.[59]

[74] Finally, in *Jam Industries Ltd. v. President of the Canada Border Services Agency*, which the CBSA relied on in this case,[60] the Tribunal noted that "the French version of the definition of 'for use in' makes it clear that the goods in issue must enter into the composition of the host goods"[61] but further considered that this required the goods in issue to exhibit a special relationship to the host goods, in the sense that the goods "for use in" the host goods complement the function of the host goods.[62] The Tribunal found that the goods in issue did not complement the functions of the computer (the host good) by virtue of their connection to the computer and did not comment on the physical connection part of the test.[63] This decision was found to be reasonable by the FCA.[64]

[75] Tribunal jurisprudence has demonstrated a need to examine the words of the *Customs Tariff* having regard to the context in which they are being interpreted. More recent decisions demonstrate that, for the physically connected threshold to be met, the connection can be one of direct contact; however, in certain instances the connection need not be one of a purely physical nature. For example, a wireless connection would suffice where the connection is both real and effective, with an emphasis on the necessity of the existence of a functional relationship.[65] In addition, Tribunal case law has also established that, unless otherwise provided in a tariff item, the definition of the expression "for use in" does not require that goods be for the sole or exclusive use in the host

---

57 *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT).
58 *Sonos* at para. 65.
59 *Canadian Tire* at paras. 34, 43.
60 Exhibit AP-2022-004-12.B at para. 36.
61 *Jam Industries* at para. 41.
62 *Jam Industries* at para. 44.
63 *Jam Industries* at para. 45.
64 *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210.
65 *Sonos* at para. 65.

goods,[66] nor is there a requirement for the attachment to be permanent.[67] In other words, a temporary attachment would suffice.

[76] In sum, the Tribunal retains from the case law that, in order for a good to be "physically connected" to the host good, the evidence must show that, in the circumstances, the good in question has a "real and effective connection to the host good".[68] In the affirmative, then the test is satisfied. In the negative, then it cannot be found to be physically connected to the host good. In addition, a functional relationship must be clearly established between the good in issue and the host good.

[77] In this case, there is a clearly established functional relationship between the surgical glove and the scalpel, which includes a decreased risk of infection, increased grip (connection) and improved tactile feedback.

[78] Furthermore, the direct contact, albeit temporary, between the surgical glove and scalpel, and the special and mandatory relationship which exists between them for the duration of the surgery denote a real and effective connection. Therefore, the Tribunal finds that the test for physical connection has met the required threshold. The Tribunal is of the view that, in this case, the physical connection suffices to meet the threshold envisaged by Parliament.

CONCLUSION

[79] For the reasons above, the Tribunal finds that the goods in issue are properly classified as "articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber; gloves, mittens and mitts; surgical" under tariff item 4015.11.00.

[80] Furthermore, the goods in issue are articles for use in instruments and appliances used in medical, surgical, dental or veterinary sciences and qualify for tariff relief under tariff item 9977.00.00.

---

66 *Sonos* at para. 64; *Best Buy* at para. 78; *Agri-Pack* at paras. 19–20, 33–35, appeal allowed on other grounds in *Canada (Customs and Revenue Agency) v. Agri Pack* (12 December 2005), 2005 FCA 414; *Entrelec Inc. v. The Deputy Minister of National Revenue* (28 September 1998), AP-97-029 (CITT), which was set aside and referred back to the Tribunal for a new adjudication in *Entrelec Inc. v. Canada (Minister of National Revenue)* (14 September 2000), A-755-98 (FCA). Upon second review in *Entrelec Inc. v. Commissioner of the Canada Customs and Revenue Agency* (17 March 2003), AP-2000-051 (CITT), the Tribunal determined that some of the goods were considered "for use in", a decision which the FCA saw no reason to interfere with; see *Entrelec Inc. v. Canada (Commissioner of the Canada Customs and Revenue Agency)* (19 April 2004), A-270-03 (2004 FCA 159).

67 *Agri-Pack* at paras. 19, 35, appeal allowed on other grounds in *Canada (Customs and Revenue Agency) v. Agri Pack* (12 December 2005), 2005 FCA 414; *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (14 November 2011), AP-2008-012R (CITT) at para. 23.

68 *Sonos* at para. 75.

DECISION

[81] The appeals are allowed.

Bree Jamieson-Holloway

Bree Jamieson-Holloway
Presiding Member