**36258**

**SUPREME COURT OF CANADA**

**BETWEEN:**

**Attorney General of Canada**

**v.**

**Igloo Vikski Inc.**

**(FC) (Civil) (By Leave)**

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**TRANSCRIPTION OF COMPACT DISC**

Tuesday, March 29, 2016

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**APPEARANCES**

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**TABLE OF CONTENTS**

**PAGE**



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Ottawa, Ontario

--- Upon commencing on Tuesday, March 29, 2016

at 9:30 a.m.

**(0932) MADAM CHIEF JUSTICE:** Thank you; merci. You may be seated.

Attorney General of Canada v. Igloo Vikski Inc.

Jan E. Brongers and Michael Taylor for the Appellant;

Jennifer Klinck and Michael Kaylor and for the Respondent.

Mr. Brongers...?

**ARGUMENT FOR THE APPELLANT**

**ATTORNEY GENERAL OF CANADA**

**(0932) MR. BRONGERS:** Thank you, Chief Justice, Justices.

This is an appeal from a judgment of the Federal Court of Appeal which quashed a decision of the Canadian International Trade Tribunal that dealt with a customs classification dispute involving hockey gloves. The Government of Canada says that these gloves should be classified as textile "gloves, mittens and mitts", while the importer Igloo Vikski says that they should be classified as "other articles of plastic".

The Tribunal found that the gloves do fall under the textile heading and not the plastic heading. The

Federal Court of Appeal, though, felt that this conclusion was unreasonable and sent the matter back for redetermination.

Now, by granting leave to appeal in this case, the Supreme Court has decided that the Federal Court of Appeal's judgment warrants further scrutiny.

Now, this is the first time in almost 40 years that this Court has considered a customs classification dispute and we are grateful the Court has done so as much has changed since that time both in terms of administrative law and customs law, but these disputes still arise regularly and are of importance to the government, importers and, by extension, the public at large.

The judgment below that is the subject of this appeal raises three issues, one broad issue of administrative law and two specific issues that relate to customs law. The administrative law issue is the degree of deference that the Federal Court of Appeal ought to give to customs classification decisions made by the Canadian International Trade Tribunal or, to put that issue in the form of a question: Did the Court err by being insufficiently deferential to this expert tribunal.

Then the first of the customs law issues relates to the General Rules of Interpretation of the Harmonized Commodity Description and Coding System which is

found in the schedule to the *Customs Tariff*. The question here is whether the Federal Court of Appeal erred by not deferring to the Tribunal's understanding of what it means to apply these rules in a cascading manner.

And, finally, the second of the customs law issues relates to the interpretation of a specific *Customs Tariff* heading, the one that relates to "other articles of plastic", and the question here is: Did the Federal Court of Appeal err by not deferring to the Tribunal's understanding of the scope of that heading.

We say that the answer to all three of these questions is yes, that the Federal Court of Appeal did err, that its judgment ought to be set aside and the Tribunal's decision ought to be restored.

Now, in my submissions this morning I will first briefly discuss the background to this appeal; I will then summarize in some detail the decision of the Tribunal and the Federal Court of Appeal; and, finally, I will address in turn the three issues that I have just identified.

So beginning with the background, since the parties are largely in agreement with respect to the facts of this case and the applicable legislative framework I don't intend to add much to what is set out at paragraphs 5 to 34 of our factum, but I do want to stress that it's

important when navigating the somewhat Byzantine universe of customs classification law to not lose sight of what the goods in issue are and what the object of the classification exercise is.

The goods are hockey gloves. Specifically they are hockey goaltender gloves, blockers to be worn on the hands that holds the stick and catchers to be worn on the other hand.

Now, it would be difficult to spend any significant amount of time in this country without having at least some passing familiarity with what hockey gloves look like, either directly by playing hockey or indirectly by watching others play it. It's only a slight exaggeration to say that hockey is one of those things that unites many Canadians and I would suspect that a subconscious reason why this Court granted leave to appeal in this particular case may be because of the quintessentially Canadian subject matter.

And as Canadians we all know generally what hockey gloves look like and if asked what are hockey gloves made of we would be inclined to answer, well, just like ordinary gloves that you would wear to protect your hands from the cold, they are made of textiles, the flexible fibres, either natural or artificial, woven together. Hockey gloves look like textile-made gloves. And according

to the evidence before the Tribunal in this case, the external surface of these gloves was in fact composed of textiles, assembled by stitching that were coated with a plastic layer. It was only the inner padding encased within the external surface that was exclusively made of plastics in the case of the blockers and primarily made of plastics in the case of the catchers. But in spite of the presence of some plastic material, as a matter of first impression one would not be inclined to say that hockey gloves are a type of plastic glove like the kind of doctor might wear when performing surgery or a restaurant worker might wear when preparing food. So leaving aside the minutiae of customs classification --

**MR. JUSTICE GASCON:** I'm sorry to interrupt, I just noted that in terms of the goods that issue at paragraph 10 of the CITT decision they refer to another glove, a sixth one that was classified by the CBSA under 3926. Are we to derive any understanding from that? How come one glove was classified in a given manner and the other five differently?

**MR. BRONGERS:** My understanding from my client is that that glove was classified in error as a plastic glove and the Tribunal tried to -- or the CBSA tried to remedy this by effectively appealing its own decision to the Tribunal. The Tribunal said that that's not permitted and

so that sixth glove was never in issue.

**MADAM JUSTICE CÔTÉ:** And, sir, since we are on the plastic as opposed to textile, would you say that the plastic is more than mere trimming here or not?

**MR. BRONGERS:** Yes, we do concede that for the purposes of the Explanatory Note 62 it is more than mere trimming.

So I stress the importance of not losing sight of what the goods are, because in fact the primary task of the decision-makers entrusted by Parliament to administer the scheme is to decide logically and lawfully how goods are to be classified under the *Customs Tariff* and these decision-makers who are at first instance officials of the CBSA, the Canada Border Services Agency, and then on appeal the Canadian International Trade Tribunal, the CITT, have a legislative mandate to do so exclusively by reference to the *Customs Tariff* regime and without concern for the fiscal consequences of their decisions. As per sections 10 and 11 of the *Customs Tariff*, they are bound to classify imported goods in accordance with the General Rules for the Interpretation of the Harmonized System having regard for the Explanatory Notes and the Classification Opinions that were developed by the World Customs Organization.

Importers, however, are not so constrained, they are free to argue for tariff classification decisions

to be made with a view to attempting to reduce their customs bills. And there's nothing wrong with that. Like all taxpayers they are entitled to arrange their affairs in a way that minimizes their customs obligations and arguably that's what the importer has done in this case.

When they first imported the goods they self-reported them as textile "gloves, mittens and mitts", but this is the tariff category that attracts a 16.5 percent rate of duty, so perhaps not difficult to understand that they then, upon reflection, decided to try and have it classified first as "other articles of equipments for sports", which is the tariff item that has no tariff duty. That item, unfortunately for the importer, did not apply because there is a clear Chapter Note that excludes classification of sport gloves under that heading.

And then the third time around they finally asked that these goods be classified as "other articles of plastic", which is a tariff classification that attracts a 3 percent rate of duty. So not duty-free, but considerably lower than the 16.5 percent for textiles.

Now, this isn't to suggest that the financial motivation of the importer is a reason to discount its arguments, but it is important to contextualize this dispute and acknowledge that customs classification is a unique and unusual area of the law where the parties' incentives are

not in opposition to each other, they are completely unrelated to each other. One is trying to ensure that goods are classified consistently within this technical internationally developed regime, while the other is legitimately trying to reduce its financial obligations.

This is an area of the law whose principles are not drawn from other more general legal fields like contract or tort or even income tax and it's a discrete area of the law whose developments do not have any obvious broader impacts, either on public law or private law. In other words, these individual cases, while of clear importance to the parties don't raise matters of general importance to the Canadian legal system. This should be kept in mind when assessing the deference that should be given to this expert body entrusted by Parliament to adjudicate these disputes, the Canadian International Trade Tribunal, whose decision I will turn to now.

That decision is at Tab 1 of our condensed book. It was written by Tribunal Member Madame Diane Vincent. This was actually the second hockey glove classification case that she had to deal with, the first one being the case of *Sher-Wood Hockey*, which involved hockey gloves worn by forwards and defenseman, not goalies. In fact, the *Igloo Vikski* case was held in abeyance pending the outcome of *Sher-Wood Hockey*, which was done at the request

of the importer made on its behalf by my learned friend Mr. Kaylor who at all times was counsel for both *Igloo Vikski* and *Sher-Wood Hockey*.

Now, *Sher-Wood Hockey* was not successful in persuading the Tribunal that the hockey gloves should be classified as "other articles of plastic" and while it did start an appeal to the Federal Court of Appeal it discontinued that, at which point Igloo Vikski then proceeded with its appeal.

Now, the Tribunal recognized in both *Sher-Wood Hockey* and in *Igloo Vikski* that the question before it was whether hockey gloves are properly classified under tariff heading 62.16 as textile "gloves, mittens and mitts" or under tariff 39.26 as "Other articles of plastics" as claimed by the importer.

The Tribunal conducted its analysis in three parts. First -- and this is at paragraphs 47 to 52 of the decision of the Tribunal -- it assessed whether the hockey gloves are *prima facie* classifiable under the textile heading 62.16 and it found that they are.

Igloo Vikski actually conceded this point, but the Tribunal still satisfied itself that the gloves, whose external surface is primarily composed of textile material, is described within heading 62.16 and the relevant Notes. That was part one.

Part two of the analysis, which is set out at paragraphs 53 to 70 the decision, the Tribunal then assessed whether the hockey gloves are *prima facie* classifiable under 39.26, the plastics heading, and it found that they are not.

Now, the Tribunal had several reasons for this finding, but the key one was the Tribunal's conclusion that this 39.26 "Other articles of plastics" heading, insofar as it pertains to clothing, articles of apparel or clothing accessories, only covers clothing that is made by sewing or sealing sheets plastic as provided by the Explanatory Notes to the heading.

And at the Tribunal hearing Igloo Vikski admitted that the hockey gloves are not made by sewing or sealing sheets of plastic and did not dispute the Tribunal's interpretation of heading 39.26 that requires this specific method of manufacturing in order for plastic clothes to be classified under heading 39.26.

**MR. JUSTICE BROWN:** Is that your submission that it requires that particular type of processing to be included then under 39.26, in other words that it's exclusive, not inclusive?

**MR. BRONGERS:** That is our position, yes.

And this was a very important concession that Igloo Vikski made because it meant that the goods could not be *prima facie* classified under 39.26 by applying Rule 1 of

the Rules, so instead what igloo Vikski did is they tried a different approach. As understood by the Tribunal they submitted that Rule 1 ought to be removed from the classification exercise and instead be done by reference to the other rules and they based this on the Explanatory Note to Chapter 62 that Justice Côté referred to, the one that indicates that when a textile article of apparel has a plastic part that constitutes more than mere trimming, classification has to be done according to the relative Chapter Notes or, failing that, according to the General Interpretive Rules.

The importer urged that if Rule 1 is removed from this analysis, Rule 2(b) then applies to extend the scope of heading 39.26 to cover goods that contain both plastic and textile components. If accepted this argument would then have meant that the Tribunal would have gone to Rule 3(b) and, according to the importer, have classified the goods under 39.26 because it's the plastic padding that gives the goods in issue their essential character of protection.

But the Tribunal rejected this argument at paragraphs 61 to 64 of its decision and the reason for this is that the Tribunal felt that Rule 1 can't simply be skipped when classifying goods and the Explanatory Note 62 does not change this. The Note says that classification is

to be done according to the General Interpretive Rules, it does not say that classification is to be done by the General Interpretive Rules other than Rule 1. That's clearly set out by the Tribunal at paragraph 62 of its Reasons.

And the Tribunal also explained why heading 39.26 can't be extended to cover the hockey gloves by operation of Rule 2(b) and it said that this was the effect of another Explanatory Note, Explanatory Note XII to Rule 2, which provides that one can't, through Rule 2(b), widen a heading so that it covers goods which cannot be regarded, as required by Rule 1, as answering the description in this heading.

The Tribunal also noted that Igloo Vikski had not presented arguments or filed any evidence to show that the goods in and issue are *prima facie* classifiable under 39.26 as "other articles of plastics" and this of course was consistent with the concession that they had made at the Tribunal.

So just to recap the result of these first two assessments, the Tribunal found that the hockey gloves are *prima facie* classifiable under 62.16, the textile heading, and that the gloves are not *prima facie* classifiable under 39.26, the plastics heading.

Now, arguably that might have been sufficient

to dispose of Igloo Vikski's appeal, but in keeping with the rigour that one would expect from an expert adjudicative body the Tribunal then went on to conduct a third and final assessment at paragraphs 71 to 80. It decided to examine whether Rule 2(b) might possibly exclude hockey gloves from classification under heading 62.16 since the gloves contain plastic padding that's more than mere trimming. But the Tribunal concluded that Rule 2(b) would not have this effect based on the Explanatory Note to the Rule and the Tribunal's finding that the inclusion of plastic padding within the gloves does not deprive the goods of their character as textile gloves. That is at paragraph 75 to 76 of the decision.

To the contrary, the Tribunal found Rule (b) actually confirms that the goods fall squarely within heading 62.16 because so long as the addition of another material does not deprive the goods of their character of goods of the kind mentioned in the heading, the goods are still to be regarded as answering the description in that heading.

Now, the reason I just went through the Tribunal's decision in some detail is because it demonstrates the careful and exacting approach that the Tribunal took to analyzing the tariff classification issue. Member Vincent methodically went through the procedural

history, the goods in issue, the statutory framework, the potential tariff classification categories and then she made a full assessment of the merits of the parties' positions. It was so meticulous that she even went to the pains of addressing why the goods couldn't be classified as under the other sports and athletic equipment category, even though Igloo Vikski was no longer arguing for that.

**MADAM JUSTICE KARAKATSANIS:** Can I ask you this? I'm sorry to interrupt you, but I'm trying to make sense of how the first part of her Reasons and the third part work together. I think this is part of what the Federal Court of Appeal saw as contradictory and perhaps inconsistent, logically inconsistent.

In the first part she says that it falls under the textile gloves without need to go beyond Rule 1, and in fact she said that's conceded. And then in this third part she concludes that in fact it fits under textile gloves using Rule 1 and 3(b).

**MR. BRONGERS:** Right.

**MADAM JUSTICE KARAKATSANIS:** First of all, those two seem at odds and then, to kind of add another layer, what the Federal Court of Appeal says and your friend argues is that the position that she took on the first part, that you don't even look to 2(b) if Rule 1 works is something that she then, you know, did the opposite when it

came to looking at plastic goods, she looked at Rule 2(b) in order to rule it out.

**MR. BRONGERS:** Right.

**MADAM JUSTICE KARAKATSANIS:** So the issue is, is there some logical inconsistency between those three parts?

**MR. BRONGERS:** In our submission there isn't a logical inconsistency. Effectively the third portion of the analysis could be viewed as in the alternative and that's why, as I said, arguably it wasn't necessary to go to the third part of the analysis. But given that the Tribunal did there then becomes, in our submission, absolutely no doubt that the decision that was made here was reasonable since indeed even on my friend's interpretation of Rule 2(b) which allows for the extension of headings, it is certainly permissible to bring textile goods that have a plastic component in them within the textile heading.

The problem with Igloo Vikski's position in this case has always been that the converse wasn't true, you can't bring the gloves within the plastic heading because of that Explanatory Note I mentioned, the one that says that the manufacturing has to be done by sewing or sealing sheets of plastic. And under Rule 1 the Tribunal does have to take into account all of the Explanatory Notes.

**MADAM JUSTICE KARAKATSANIS:** But that brings me

to the difficulty I'm having. The Explanatory Notes to textile gloves says that it doesn't apply where plastic is more than trimming so I'm having some difficulty with the logic. Even conceding a reasonableness review I'm having some difficulty with the logic of how it fit in under textile gloves simply on the basis of Rule 1 when Rule 1 requires that you look at the Explanatory Notes and this Explanatory Note seems to exclude plastic that's more than trimmings.

So if you can answer that question for me, that would be very helpful.

**MR. BRONGERS:** Certainly. The Explanatory Note that you are referring to, the one for Chapter 62, I believe it's in our condensed book at Tab 11. Page 114 of our condensed book, Tab 11, at the bottom of the page there under general, the second paragraph. And if we look at this carefully:

> "The classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal."

So in other words, in fact the goods aren't excluded from classification under the textile heading just because there is plastic in them. So that's the most

important part.

But secondly we see what the Explanatory Note directs the Tribunal to do in the next sentence is:

> "Where, however, the presence of such materials constitutes more than mere trimming the articles are classified in accordance with the relative Chapter Notes..."

And I will skip over the parentheses part:

> "... or failing that, according to the General Interpretative Rules."

So this Explanatory Note is very different from the one that applies to 39.26 where in our submission there is indeed a clear exclusion that the goods, indeed, if they are not made by sewing or sealing sheets of plastic together they can't be categorized under 39.26.

But the Explanatory Note you reference, Madam Justice Karakatsanis, it's not the same Note and indeed, as is said in the first sentence, it is permissible to classify under the textile headings goods that have a plastic component to them.

**MADAM JUSTICE KARAKATSANIS:** What does the second sentence (off microphone)?

**MR. BRONGERS:** That if it's more than mere trimming, then you have to look at

> "... the relative Chapter Notes, particularly Note 4 to Chapter 43 and Note 2(b) to Chapter 67, relating to the presence of furskin and feathers, respectively..."

This did not become relevant in this classification exercise:

> "... or failing that, according to the General Interpretive Rules."

Now, my friends say that this really should be read as according to the General Interpretive Rules other than Rule 1, but that wording isn't there. You still have to look at the full six General Interpretive Rule scheme.

So again, in our submission this note does not take the gloves out of classification under heading 62.16.

**MADAM JUSTICE KARAKATSANIS:** Well, I will ask my final question on this and then leave you alone.

If you apply the other -- sorry, the General Interpretive Rules, including Rule 1, doesn't that take you back to the first sentence?

**MR. BRONGERS:** Well, except again the first sentence says it's fine to classify the goods under the textile heading even if there is some plastic or some feathers or some fur in there.

**MADAM JUSTICE KARAKATSANIS:** Sorry, yes. And I

meant to the first part of that second sentence, that it's more than trim.

**MR. BRONGERS:** Yes, but I don't think you can read that second sentence without going to the end of it and saying that --

**MADAM JUSTICE KARAKATSANIS:** Okay.

**MR. BRONGERS:** -- you need to go through the General Interpretive Rules. Thank you.

**MR. JUSTICE GASCON:** In terms of the Notes to 39.26 you keep on referring to what you call an exclusion, your opponents say it's not an exclusion it's a limitation.

What's your answer to that? Because the wording is that they include and the items made by sewing or sealing doesn't seem to exclude. How do you reach the point from this inclusion to saying it's an exclusion?

**MR. BRONGERS:** Let's look at the Note, Justice Gascon. It's in our consolidated book at Tab 9.

**MR. JUSTICE GASCON:** Yes.

**MR. BRONGERS:** Page 95. This Note contains a list of examples of the types of goods that would be classified under 39.26.

> "This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of

headings 39.01 to 39.14."

Then it says, "They include" and the key Note in our case is indeed No. 1:

"Articles of apparel and clothing accessories (other than toys) made by sewing or sealing sheets of plastics..."

And then it gives examples:

"... aprons, belts, babies' bibs, raincoats, dress-shields..:

Now, we acknowledge that there is the words "they include" at the beginning. There is then this list of 12 items of types of goods that fall within this. It's interesting, some of them are very specific, like the first one, in that it not only speaks of a type of product, basically clothing, plastic clothing, but it also sets out a method of manufacture, that it has to be made by sewing or sealing sheets of plastic.

Not all of them are like that. If we look at No. 2, "Fittings for furniture, coachwork or the like", then I would concede that indeed it doesn't specify a type of manufacturing method so you don't have to worry about that. That's essentially an example.

"Statuettes and other ornamental articles" is similar to that.

4 is a bit more like 1 in that here they also

say that it has to be goods made by "sewing or gluing together sheets of plastics".

So in our submission what occurred here is that the Tribunal interpreted this Note 1 as indeed creating an exclusion in the sense that if we are talking about plastic clothing the only type of plastic clothing that comes within 39.26 is the kind that was made by manufacturing through sewing or sealing sheets of plastics and we say that that is a reasonable interpretation.

When you think that these Notes are drafted by the World Customs Organization and it doesn't make sense of the drafters would go to the trouble of being that specific of saying, you know, the only types of plastic clothing that would be covered under 39.26 are those made by sewing or sealing sheets of plastic unless that were meant to mean something. In fact, we would say it would be an unreasonable interpretation to say, well, that's just an example, it really could be any type of manufacturing.

**MR. JUSTICE GASCON:** So the goods here, it's not in debate that they do not fall within any of these inclusions?

**MR. BRONGERS:** I think that's fair. Our friends have made the same argument that you posited to me, Justice Gascon, that because of the words "they include" at the beginning, this is just an enumeration of examples and

really it could be anything. In our submission that's not a reasonable interpretation of Note 1 because of that incredible specificity that the only types of apparel and clothing accessories that are included in this category are those made by sewing or sealing sheets of plastic. And that was the Tribunal's interpretation and it was a reasonable one.

If I could just go back, I think I was at the Federal Court of Appeal's decision in this case. The Federal Court of Appeal decision stands in sharp contrast to that of the Tribunal's lengthy 83 paragraph decision. They allowed Igloo Vikski's appeal in 13 short paragraphs, essentially on the basis that in the Court's view the Tribunal had an incorrect understanding of the cascading principle of interpretation to the General Rules and what the Court said at paragraph -- I believe it was 11, that:

> "... it is not a prerequisite condition to the application of Rule 2(b) that the goods in issue need first to meet the description in a heading pursuant to Rule 1..."

The Court also explained that in its view because the goods and issue are made up partly of textiles and partly of plastics, while they can't be *prima facie* classifiable under the terms of either heading 62.16 or

39.26, so that means you have to use Rule 2(b) to bring them within both headings and then you have to go to Rule 3 which is this tiebreaker rule when you are dealing with a composite good and look at which element gives the good it's essential character.

So that's the judgment that's now on appeal before this Court and I would like to first in terms of the issues here speak a bit about standard of review. Again I repeat, this was why I went through the Tribunal's decision in the detail that I did, because in our submission when you have a decision that is this detailed, this considered, this meticulous, so long as it's intelligible, transparent and justifiable, then it is one that the Court of Appeal is not entitled to overturn.

Now, since this Court's decision in *Dunsmuir* in 2008, it's well established there are only two standards of review, correctness and reasonableness. While this Court has not had occasion yet to consider what standard applies to the Tribunal, it cannot seriously be argued that the standard is anything but reasonableness as has been held consistently by the Federal Court of Appeal and we cite at Footnote 58 of our factum, I believe eight post *Dunsmuir* decisions to this effect. And even our learned friends are not suggesting or expressly arguing that the standard should be correctness.

So while there is no issue over what label should be applied to the standard of review, indeed the Federal Court of Appeal said it was applying a reasonableness standard of review, the difficulty lies in how to apply that standard in a customs classification context.

*Dunsmuir* says that reasonableness is a deferential standard or, conversely, it's a standard to be applied to decisions that deserve deference. In our submission, when you compare the detailed decision of the Tribunal with the cursory decision of the Court of Appeal, it's clear that what the Court of Appeal applied here is what you might call a disguised correctness standard of review, that is to say it conducted the review on the basis that there was only one correct answer to the legal question posed to it and since the Tribunal did not come up with the court's idea of what that correct answer is, then the Tribunal's decision is necessarily unreasonable.

But according to the guidance provided by this Court, that is not a permissible standard or permissible approach for a reviewing court to take when reviewing an administrative decision on a reasonableness standard when deference is required. What the court should do is to look into the qualities of the decision that make it reasonable, its justification, its transparency, its intelligibility,

you look at whether the decision falls within a range of possible acceptable outcomes that are defensible in respect of the facts and the law.

And furthermore, this Court has said in the *Newfoundland Nurses'* case that reviewing courts are to:

> "... pay 'respectful attention' to the administrative decision-maker's reasons, and be cautious about substituting their own view of the proper outcome..."

And, finally, courts are supposed to afford: "a margin of appreciation" to administrative tribunals "within the range of acceptable and rational solutions."

What that means is that it's open to an administrative tribunal to choose between alternate interpretations of a statutory provision so long as the decision remains within the realm of reasonableness.

And, with the greatest of respect, the Panel of the Federal Court of Appeal in this case didn't do any of those things. It didn't look into whether the Tribunal's decision fell within a range of possible acceptable solutions, it did not pay respectful attention to the Tribunal's reasons, and it didn't refrain from unjustifiably substituting its own view of how the General Rules of Interpretation ought to be applied. And in so doing we say that the Court ignored Parliament's intention to vest

exclusive jurisdiction over adjudicating customs classification disputes on this expert quasi-independent administrative tribunal as opposed to the courts. That intention can be seen most clearly at sections 67 and 68 of the *Customs Act*, which we have included at Tab 13 of our consolidated book.

Section 67(3) contains a particularly strong privative clause that provides that Tribunal decisions are:

> "... not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except (under) section 68."

And section 68 is the provision that simply provides for a limited right of the statutory appeal from the Tribunal to the Federal Court of Appeal.

**MADAM JUSTICE ABELLA:** I'm sorry, what tools then are we supposed to use in deciding whether or not it's within the range of outcomes, within the reasonable range, even assuming -- since all parties agree that it's reasonableness?

The dispute here seems to be about the application of something called the cascading principle and both the Federal Court of Appeal and, as you say in your factum, the CITT purported to apply the cascading principle --

**MR. BRONGERS:** Yes.

**MADAM JUSTICE ABELLA:** -- which tells me that we have some problems figuring out what exactly that is.

So if for instance we accept the cascading principle as being first Rule 1, if there are two similar options, 2, 3, et cetera. She seemed to ignore, the Tribunal, the possibility that it could be under both categories. What do we do in analyzing her decision if we are persuaded that in fact they can be arguably covered by both 39.26 and 62.16? Where do we go in the scrutiny we give to her? Do we then do the cascading principles and end up at the deal-breaker which you say is Rule 3 and if her outcome is satisfied to Rule 3 we're okay? Or do we say she was unreasonable in refusing to consider that both categories could apply and therefore the outcome is cast into doubt?

**MR. BRONGERS:** Yes.

**MADAM JUSTICE ABELLA:** So accepting that we have to be respectful of the expertise, if something jumps out at us that seems to be inconsistent with the language of her enabling mandate, how do we process that?

**MR. BRONGERS:** That's certainly a fair description of a judicial review on a reasonableness standard, but the starting point has to be to -- with an open mind looking at the Tribunal's Reasons for Decision,

understanding the reasons and seeing whether the conclusion reached in the reasoning was reasonable.

And that's why, as I said earlier, if you look through the Tribunal's decision, they weren't closed minded to the notion that the goods could be classified under 62.16 and 39.26, they looked at both and they provided reasons why these goods could be classified under 62.16, but not 39.26, particularly the Explanatory Note.

Then the question is: Is that an unreasonable interpretation of the Explanatory Notes, an unreasonable understanding of the cascading principle, which the Tribunal set out its understanding of the cascading principle in accordance with what the Federal Court of Appeal itself had said in previous decisions as to how that principle is to be applied and this might be a good time to go to those decisions.

**MR. JUSTICE BROWN:** Before you do that -- and you can answer it now or answer it later -- but I would like to know how you think reasonableness review is affected were we to disagree with you on your reading of the Explanatory Note to 39.26. In other words, if we decide that that the word "include" is doing a lot more work than you concede, then how does that change things?

**MR. BRONGERS:** I would say that this Court would have to be satisfied not only that it would have

preferred that the other interpretation, that these goods can be included within 39.26, but the Court has to go beyond that, it has to say that that other interpretation that the Tribunal came up with was unreasonable, there is no justification for it, it's not intelligent.

But that is what classic difference is about, it is, again accepting, as was said by the Court in *Newfoundland Nurses'*, that there can be more than one reasonable interpretation. So long as the one that the administrative decision-maker came up with was reasonable, then it's not up to the Court to then substitute its own view. That is our concern here, that with the Federal Court of Appeal's decision, it's so brief and so curse, it just simply says that this is an unreasonable decision, it's contradictory, there's no reason you have to fit the goods under Rule 1 when it's a composite good, you can go straight to 2(b), without explaining: Well, okay, you prefer that interpretation, but what is so incorrect? What is so unreasonable about the Tribunal's assessment of this cascading principle?

That's why I will again -- what's so surprising about this decision of this Panel of the Federal Court of Appeal is that this is the first time that it seems to have taken the view that you don't have to start at Rule 1. You can in the case of composite goods go to Rule 2 and

following. There are four judgments of the Federal Court of Appeal rendered in previous years in which the Court has said the opposite.

When the Federal Court of Appeal says that a certain interpretation of the *Customs Tariff* is reasonable, then the Tribunal logically should be able to use that interpretation when it is making its decisions without fear of them being overturned by another Panel of the Federal Court of Appeal that feels differently.

**MADAM JUSTICE KARAKATSANIS:** I'm still trying to find where the Tribunal came to the conclusion that it fit under the gloves heading under Rule 1 alone. I'm looking at paragraphs 47, 48, 49 where it seems to say that it falls -- it's classifiable under heading 62.16. Are you there yet?

**MR. BRONGERS:** Yes, thank you.

**MADAM JUSTICE KARAKATSANIS:** But then it says in paragraph 50 and 51 and then 52, but the real issue is whether that heading note -- sorry, the Explanatory Notes takes it out of Rule 1. And where is that question ever answered?

I know you have said the third part is an alternative, but that's where it seems to say it's going to answer that question, but the third part clearly deals with Rule 1 and Rule 2(b).

So I'm still looking for where it actually provides any reasons for the conclusion that it fits under that gloves heading under Rule 1 alone. Because I'm just looking at those paragraphs and it says the real issue is what we do with the Explanatory Note and it never answers that.

**MR. BRONGERS:** Yes.

**MADAM JUSTICE KARAKATSANIS:** So if you can help me with that I would be grateful.

**MR. BRONGERS:** I will, Justice Karakatsanis.

The starting point actually is at paragraph 40 of the judgment where we see that Igloo Vikski actually conceded that the goods are classifiable under the textile heading of 62.16. We Note that the second sentence:

> "Igloo Vikski argued that the presence of plastics as more than mere trimming is not sufficient to deprive the goods in issue of the character of a textile glove under heading No. 62.16, but that it has the effect of requiring the *prima facie* application of heading No. 39.26 to the goods in issue."

So there was a concession by Igloo Vikski that yes, the goods are classifiable under the textile heading 62.16.

Then the Tribunal essentially repeats that at 47.

> "Igloo Vikski did not take issue with the CBSA's contention that the goods in issue meet the terms of heading No. 62.16 and of the relative section and chapter notes that must be considered in accordance with Rule 1 of the General Rules and that, as a result, the goods in issue meet the conditions to be *prima facie* classifiable in that heading as gloves of textile fabrics."

So I think that's the sentence you were looking for, Madam Justice Karakatsanis.

As I said earlier, what the Tribunal did, though, is they didn't just rest on the fact that these goods are *prima facie* classifiable under Rule 1 --

**MADAM JUSTICE KARAKATSANIS:** I'm sorry, just to be clear, so your answer to me is that it fits under that heading with Rule 1 alone --

**MR. BRONGERS:** Yes.

**MADAM JUSTICE KARAKATSANIS:** -- based on the concession?

**MR. BRONGERS:** That is that it is possible to fit them under Rule 1 alone based on the concession and the

finding of fact here that that heading, textile, gloves, mittens and mitts describe the goods and there is no Explanatory Note that takes the goods out of that classification.

But the Tribunal was careful, because it realized that an argument was being made by Igloo Vikski with respect to the potential application of 2(b) to this analysis so they also justified the decision for classifying it under 62.16 by using Rule 2(b), by saying that in any event you can extend the heading.

**MADAM JUSTICE KARAKATSANIS:** Okay. I understand the alternative argument.

Your position then is that the question in paragraph 50:

> "The central issue in this appeal is whether the Explanatory Notes to Chapter 62 have the effect of requiring the Tribunal to consider the General Rules other than Rule 1..."

**MR. BRONGERS:** Right.

**MADAM JUSTICE KARAKATSANIS:** Is answered...?

**MR. BRONGERS:** In the final section of the analysis at paragraphs 71 to 76.

**MADAM JUSTICE KARAKATSANIS:** So it couldn't be done just under Rule 1, it required other rules?

**MR. BRONGERS:** I think it would be clearer --

**MADAM JUSTICE KARAKATSANIS:** I'm just trying to follow the logic of the decision and I'm having some difficulty.

**MR. JUSTICE BROWN:** Another is, was it alternative or was it mandatory that they proceed to 2(b) since the plastic is more than mere trimming?

**MR. BRONGERS:** In our submission the Court doesn't have to answer the question because the Tribunal did look at both. And certainly there is no doubt that perhaps another decision-maker could have written the judgment differently, or the decision differently by putting the analysis of part 3 within part 1 and then it would be absolutely clear that: Look, this is why the goods fell within 62.16, they are described in the heading and there are no Explanatory Notes that take it out of that and my friends concede that it is under 62.16.

But even if you go under the Rule 2(b) analysis, then you can see that at that point you extend the heading so as to make it there absolutely no doubt that simply because there is some plastic padding in the product it is classified under 62.16.

**MADAM JUSTICE ABELLA:** But if you don't see it as extending the heading, if you go back just to the argument you accept that 39.26 may also apply, I mean I

think that's where we're getting a little bit hung up.

**MR. BRONGERS:** Right.

**MADAM JUSTICE ABELLA:** If the cascading principle is you only go down if you have met or not met Rule 1, why is she using Rule 2(b)?

**MR. BRONGERS:** Yes.

**MADAM JUSTICE ABELLA:** It's not clear to me why she needs it, unless she thinks there may be some question that 39.26 could also apply, in which case you get to 2(b).

But I'm also not clear of how 2(b) answers the question of why "mitts" referred to in 39 -- "mitts and gloves" referred to in 39.26 are different from "mitts and gloves" referred to in 62.16.

**MR. BRONGERS:** Right. Well, the difference of course again is that Explanatory Note to 39.26 which says that the only type of plastic clothing that can be classified within that are plastic clothing made by sewing or sealing sheets of plastic, which wasn't the case here.

But, again, what the Tribunal did in this case is it looked at the 62.16 classification issue both on its own purely under Rule 1 and found that it could be classified under 62.16 by using Rule 1 alone, but it also looked at the question of: Well, what happens if you apply Rule 2(b) given that there is an extension to the heading? Well, then the goods also remain classified within that

heading.

Is this the most elegant way of crafting a decision; perhaps not. It perhaps would have been clearer if indeed the number three -- the part 3 analysis were tacked on at the bottom of part one.

But that's when we come back to the *Newfoundland Nurses'* principle, that one shouldn't look at these decisions with a view to conducting a line-by-line treasure hunt for error or difficulties with the reasoning just because as a judge one might have done a clearer job of setting out the reasons for a classification.

The reasons are still intelligible and, as I said in a nutshell, these goods are *prima facie* classifiable under 62.16, textile gloves, they are not *prima facie* classifiable under 39.26, plastic gloves, because of that Explanatory Note.

That leaves you with just one heading and under Rule 2(b) you can only go to Rule 3 if you have two or more headings under which the goods are *prima facie* classifiable. That is a reasonable decision. Could another decision-maker have perhaps viewed this differently and said, "No, you have to go to Rule 3"; possibly.

**MADAM JUSTICE CÔTÉ:** Sir, in paragraph 6 of your factum you say, talking about the General Rules:

> "These rules are designed to ensure that

each individual imported good is classified within one, and only one, heading and subheading."

So you say that. So if it is the case am I allowed to think that any classification other than the one and the only one would be unreasonable?

**MR. BRONGERS:** No. The point is that at the end of the day, at the end of the analysis the decision-maker does have to come up with only one category. The rules do provide for the possibility that there could be *prima facie* classifiable goods under two or more headings and that's when you get to Rule 3 and the tiebreaker rule. But no, at the end of the day there still has to be a classification done on under only one heading.

**MADAM JUSTICE CÔTÉ:** Yes, say that in the context, you say that worldwide it's very important that each good is classified the same way. So to me you have to have a correct classification and any classification which would be different, that one classification would be considered unreasonable.

**MR. BRONGERS:** No, with respect, we don't say that just because this is an international treaty that has set out these classification categories and the Rules of Interpretation that the analysis that must be done by the Federal Court of Appeal is somehow different and that a

correctness standard should be applied.

Parliament still has entrusted the Canadian International Trade Tribunal to be the expert body to ensure that classification is done properly in accordance with the General Interpretive Rules. And again, while there is room for the Federal Court of Appeal to overturn an unreasonable decision, it cannot overturn a decision just because its idea of how the General Rules of Interpretation should be applied is different from that of the Tribunal.

And again what was -- I see my limited time. What was striking with the Federal Court of Appeal's decision is not just that it had a different notion of the cascading principle, that it's fine you can skip over Rule 1 essentially in the case of composite goods, but the fact that no mention was made of that critical Explanatory Note to 39.26 which said that the only type of plastic clothing that gets classified under "other articles of plastic" is plastic clothing made by sewing and sealing sheets of plastic.

And indeed, again just because of my limited time, it's interesting, I note that my friends have raised a new argument, one that I don't think they raised at the Federal Court of Appeal, certainly not at the Tribunal, they found a European Court of Justice decision from 2010 called *Roeckl Sporthandschuhe* in which the Court of Justice dealt

with the classification of horse riding gloves and found that they were classified under the plastics heading rather than the textile heading and their argument, as I understand it, is ergo the European Court of Justice classified these goods in that way, therefore the Tribunal's decision must necessarily be unreasonable.

And our response to that submission is that if you look through the *Roeckl Sporthandschuhe* case, the European Court of Justice decision, you will see that there is no mention made again of this key Explanatory Note, Note 39.26, with respect to the importance of manufacturing the plastic clothing from sewing and sealing sheets of plastic and that, from our submission, is a key explanation as to why the Court of Justice apparently reached a different decision.

But it's interesting, even if these cases were not materially distinguishable, on what sound legal basis can it be assumed that the European Court of Justice's decision should be preferred to the Canadian one? Why must the Canadian decision being necessarily unreasonable and the foreign one obviously correct, particularly when the Canadian decision has been rendered by an expert Tribunal that specializes in customs law as opposed to the European Court of Justice which is a court of general jurisdiction?

And just as this case involves a

stereotypically Canadian good, this argument hints of another stereotypically Canadian trait, that of humility sometimes bordering on a sense of inferiority. While humility is an admirable personal trait, Canadian administrative law has never accepted the notion that the reasonableness of our administrative decision-makers has to be assessed by the extent to which foreign decision-makers have made similar decisions and it certainly hasn't accepted the notion that if the decisions don't match then it's the Canadian decision that must be unreasonable.

I see I have a little over four minutes left.

So again, if it isn't abundantly clear it is indeed our position that the standard that ought to be applied by the Federal Court of Appeal to Tribunal decisions is that of reasonableness with a wide margin of appreciation again given Parliament's clear legislative intent as set out in sections 67 and 68 of the *Customs Act* with that very strong privative clause and only a limited right of appeal to the Federal Court of Appeal.

We say that the Tribunal's decision was reasonable and that the Federal Court of Appeal ought not to have substituted its own view of the cascading principle of interpretation of the General Rules.

**MR. JUSTICE CROMWELL:** Can you help me with one thing? As I understand it the Federal Court referred the

matter back to the Tribunal. The Federal Court, as I read the section in the *Customs Act*, had the ability to classify the goods. There were two possibilities, the Federal Court found one was unreasonable. Can you assist me at all with why they would have chosen to send it back in those circumstances?

**MR. BRONGERS:** I have difficulty trying to explain the reasons because they are so brief, but I will try my best.

Essentially as I understand it, the Federal Court of Appeal felt that these composite goods, because they are composite goods necessarily can fit under any heading that seems to describe one of the materials from which the goods are composed. So you have these two headings, the plastic heading and the textile heading, they both must apply on a *prima facie* basis and that then brings you into looking at Rule 3. They did not feel that they wanted to make that assessment themselves as to how the goods should ultimately be classified. Under Rule 3(b) you then look at which material provides the goods with their essential character. So that I think is why they sent it back, they didn't have the benefit of a Tribunal's analysis of what might be the essential character.

In our submission, though, they were wrong to go that far, again because of the clear Explanatory Note to

heading 39.26. So unless the --

**MR. JUSTICE MOLDAVER:** Could you help me with one thing, please? Could you go to paragraphs, I guess 55 and 56 of the Tribunal's decision? I just am trying to understand what concessions the Tribunal felt that Igloo had made.

She refers to the *Sher-Wood* decision in 55 and she says the Tribunal considered the scope of the heading 39.26:

> "... the Tribunal determined that, as it pertains to articles of apparel ... such as goods in issue ... is limited to those that are made by '... sewing...'"

**MR. BRONGERS:** Yes.

**MR. JUSTICE MOLDAVER:** Right? And do you take that -- Igloo, they didn't contest that or did they concede it? Did they not -- what's the status of this?

**MR. BRONGERS:** Yes. The concession is actually at paragraph 54.

**MR. JUSTICE MOLDAVER:** Okay.

**MR. BRONGERS:** The Tribunal took pains to quote, I believe the words of Mr. Kaylor from the transcript in that indented portion.

> "In this regard, Igloo Vikski indicated during the hearing that, applying Rule 1

> of the *General Rules*, the goods in issue would not be *prima facie* classifiable in Heading 39.26 as articles of plastics."

Then we have Mr. Kaylor's words:

> "It's quite true that the gloves in issue would not fall in heading 39.26, but only because of the application of Rule 1. Because, as the Tribunal said [in *Sher-Wood*] when it read the Explanatory Notes to heading 39.26, in order to fall in that heading, the Explanatory Note said that it had to consist of articles of plastic, i.e., those that are made by sewing or sealing sheets of plastic. That doesn't describe the goods in issue."

So there is the concession, Justice Moldaver. And that was important. The Tribunal came up with its own reasons why 39.26 don't apply and those are set out in 55. There is not just the fact that there is the Explanatory Note, they also say:

> "... conversely, heading 39.26 does not describe articles of apparel or clothing accessories that are made up of textile fabrics."

and they quote. The footnote refers to the *Sher-Wood*

analysis at paragraph 72.

And finally:

"In addition, the presence of plastic padding in such articles of apparel is not relevant in this regard."

So there was a very strong finding as to why 39.26 doesn't apply. And the Federal Court of Appeal didn't deal with those at all, it didn't explain why are these findings so unreasonable, particularly when they were admitted by Igloo Vikski. And, in our submission, if the Federal Court of Appeal had looked at that, then they would have logically come to the conclusion that, okay, this is reasonable, it can't be under 39.26, you're only left with 62.16, therefore the goods have to be classified there

**MR. JUSTICE MOLDAVER:** Thank you very much

**MR. BRONGERS:** Thank you.

**(1023) MADAM CHIEF JUSTICE:** Thank you.

The Court will rise for its morning recess.

--- Upon recessing at 10:23 a.m.

--- Upon resuming at 10:49 a.m.

**(1049) MADAM CHIEF JUSTICE:** Thank you.

Ms Klinck...?

**ARGUMENT FOR THE RESPONDENT**

**IGLOO VIKSKI INC.**

**(1049) MS KLINCK:** Thank you, Chief Justice, Justices.

This case is the judicial review of the Canadian International Trade Tribunal's interpretation of the *Customs Tariff*. More specifically, the decision under review is the Tribunal's interpretation of the Schedule to the *Customs Tariff* which incorporates into Canadian law the *International Convention on the Harmonized Commodity Description and Coding System*, an international convention aimed at achieving uniformity and harmonization in *Customs Tariff* classifications across jurisdictions.

This case requires the Court to consider two main issues. First, how do the principles of judicial review apply to such a statutory interpretation? And second, does the decision of the Tribunal in this case withstand scrutiny on the applicable standard of review?

My submissions will primarily address the first issue dealing with the principles of judicial review; my co-counsel Mr. Kaylor will deal specifically with the Tribunal's interpretation in this case.

Ultimately, the respondent's submission is that the Tribunal's interpretation is not reasonable because it is internally contradictory, irreconcilable with the words, the purpose and the interpretive principles of the statutory scheme and it is unsupportable by any coherent chain of reasoning that is consistent with the statute.

Before I begin my main submissions I would like

to address a number of questions that were raised during the appellant's submissions.

One question which was raised by both Justice Abella and Justice Cromwell was if this Court were to accept the respondent's submission that the decision of the Tribunal was unreasonable what should the outcome be? The respondent's position is that in order to provide adequate deference to the Tribunal a finding that the Tribunal's decision was unreasonable in this case would lead to the case being remitted to the Tribunal so that the Tribunal itself can conduct an essential character determination under Rule 3(b). So it can look at the gloves in issue and determine whether it is the plastic component or the textile component that gives the gloves their essential character as is intended by the General Interpretive Rules.

I would also like to address an aspect of the appellant's submissions and it was also raised in a question by Justice Moldaver. The appellant has emphasized a concession in the Tribunal. It's important for the respondent to clarify that the respondent's submission in the Tribunal was that the goods should be classified by the application of Rule 3(b).

This leads to two consequences. First, the respondent said that a classification under heading 39.26 could not be achieved by applying Rule 1 alone because of

the presence of the textile portion of the gloves. And similarly the respondent's position was that the goods were not deprived of their character of textile goods by the mere presence of the plastics. Again, in both cases these so-called concession simply flow from the respondent's position which was that an essential character determination under Rule 3(b) was required.

**MADAM JUSTICE KARAKATSANIS:** But that's not what the Reasons say. The Reasons say that you conceded that they could be classified using Rule 1 alone as gloves and textile.

Are you disagreeing with the statement in the Reasons of the Tribunal?

**MS KLINCK:** I don't believe that the Reasons state that our position was that they could be finally classified using Rule 1 alone. Certainly if a statement -- my co-counsel can speak in more detail of what was said in the Tribunal, but --

**MADAM JUSTICE KARAKATSANIS:** Okay. Thank you.

**MADAM CHIEF JUSTICE:** But the words are *prima facie*. It's paragraph 54.

**MS KLINCK:** Yes.

**MADAM CHIEF JUSTICE:** And they would not be *prima facie* classifiable under 39.26 so that raises the question: Do you stop at that *prima facie* level and say

*prima facie* they are under 62.16, they are not under 39.26, that resolves the problem, or do you nevertheless have to cascade down and go into 2(b).

That's the way I'm seeing the issue in my mind and I think you're saying, and said below, that even if *prima facie* it's not under 39 and is *prima facie* under 62 you still have to cascade down using 2(b).

That's what I have in my head as the framework, please correct me if I'm wrong.

**MS KLINCK:** That is not the respondent's submission.

Certainly there may have been some -- in the course of Tribunal proceedings I'm sure a number of things are said, but I don't think it was intended to be a concession that there was an exclusion from heading 39.26 by virtue of that Explanatory Note, and certainly our position with respect to the judicial review of that decision is that the Explanatory Note to heading 39.26 does not exclude from heading 39.26 articles of apparel that aren't made by sewing or sealing, that it doesn't require the presence of a seam in order to be treated in this residual basket clause for articles of plastic that includes very inclusive language.

And a detailed analysis of heading 39.26 and the Explanatory Note will be provided by my co-counsel, but our position is that there is no exclusion from heading

39.26 by virtue of that Explanatory Note.

**MADAM CHIEF JUSTICE:** *Prima facie* or (off microphone)?

**MS KLINCK:** No, they are *prima facie* classifiable under both headings.

**MR. JUSTICE BROWN:** So just to be clear, the reference in paragraph 54 of the Tribunal's decision says:

> "... Igloo Vikski indicated during the hearing that, applying Rule 1 of the *General Rules*, the goods in issue would *not* be *prima facie* classifiable..."

Is that correct or is that incorrect?

**MS KLINCK:** That would --

**MR. JUSTICE BROWN:** -- or should we wait for your colleague?

**MS KLINCK:** I think I can address it.

**MR. JUSTICE BROWN:** Okay.

**MS KLINCK:** I think the understanding may have been -- it was probably meant to mean that it is not excluded, but the position of the respondent is not that within the language of Rule 3(b) that deals with *prima facie* -- because our position was that a classification under 3(b) was needed and the words of 3(b) are clear that it only applies when it's *prima facie* classifiable under two headings, it's evident that the respondent's submission

overall was that it was *prima facie* classifiable.

I think there may have been some miscommunication between the Tribunal and the respondent in this exchange, but most fundamentally before this Court the respondent is entitled to raise any argument in support of the judgment below and so we take the position that 39.26 is not limited to articles of apparel made by sewing and sealing sheets of plastic together.

**MADAM JUSTICE ABELLA:** Can I just stop you there, because one of the other things that wasn't clear to me was in assessing the reasonableness of the decision. The Tribunal clearly relied on the analysis that it had set up on exactly this issue in *Sher-Wood* and she says at paragraph 41 that you are disputing the conclusion in *Sher-Wood*.

So it's a two-part question. The first is: Can you have a collateral attack on *Sher-Wood*? But the second question is: To what extent is *Sher-Wood* binding on her and you, having been a determination in exactly the same kind of circumstances?

So where do we put that in our reasonableness review?

**MS KLINCK:** Well, the first point I believe is that the decision in *Sher-Wood* is not binding insofar as it also applied an unreasonable interpretation of the heading.

It is certainly not binding on a reviewing court simply because there is one previous Tribunal decision by the same Tribunal Member that had the same finding.

This is a very different case from *Irving* where there were years of consistent arbitral jurisprudence. This is one single case and it can't be that an irrational decision is now allowed to stand simply because it was never judicially reviewed.

**MADAM JUSTICE ABELLA:** By choice. So the remedies weren't exhausted, so was she unreasonable -- as I understand it, was she unreasonable to rely upon a previous decision dealing with the same issues? It's not was she bound by it, was it unreasonable for her to look at what was decided in that case?

**MS KLINCK:** The reasoning itself was unreasonable and therefore her reliance on a prior unreasonable decision can't somehow -- well, not correct, but can't remedy the unreasonableness of her decision in this case. So if you rely on a prior decision that is inconsistent with the words of the statute and that's internally contradictory, those fundamental hallmarks of unreasonableness don't disappear because that earlier decision wasn't judicially reviewed for whatever reason. That an importer didn't feel it was worth it to proceed to the Federal Court of Appeal, that doesn't somehow allow an

irrational reading of the *Customs Tariff* to proceed.

**MADAM CHIEF JUSTICE:** Also on how we apply reasonableness, going back to this matter of the concession, if indeed -- you told us a moment ago that it doesn't matter what was conceded that basically you can argue the case on any basis, but how does that factor into reasonableness? And if indeed there was a concession, as at least it seems to me there may have been in paragraph 54 to the contrary of what you're saying now on 39.26, then the question I have for you is: Is not the arbitrator, the decision-maker, entitled to rely on that and don't we have to look at that concession in determining whether what she did is reasonable? In other words, we don't start with *tabula rasa* and say what we think should be the interpretation, we have to say, "This was what was before the Tribunal", including the concession.

Yes, just that's my question. Sorry.

**MS KLINCK:** Yes. I believe that a concession -- my understanding is that it's not possible to make a concession on a rule of law because parties can't change the meaning of the law by their concessions.

But, in any event, a concession of that kind would have to be of the most clear nature and there could not have been such a concession in this case when the entire argument of the respondent was that 3(b) applied and 3(b)

applies when the goods are *prima facie* classifiable under two headings, which was the main submission.

**MR. JUSTICE MOLDAVER:** I'm sorry to interrupt, but just to follow up on that, remember, a concession in this area is not necessarily a concession that the interpretation in *Sher-Wood* was correct, but that it's one that was open to and reasonable. So I think we have to be careful here when we talk about irrational, and so on and so forth.

As I understand it, *Sher-Wood* was not appealed; is that correct?

**MS KLINCK:** Yes, that's correct.

**MR. JUSTICE MOLDAVER:** Right. And so by conceding something that this interpretation -- that it has to be sewn goods, or whatever it is, is there and it's one that this Tribunal could follow doesn't mean you are conceding that it was correct, it just would mean that you're conceding that it was a rational -- a reasonable conclusion available to the Tribunal in *Sher-Wood*.

I mean we have to be real careful what we're dealing with here if you're talking about reasonableness, and so on.

**MS KLINCK:** Absolutely. And I'm prepared to discuss what the respondent's submissions are on how the reasonableness standard should apply in this type of case,

but -- and I think that that will clarify some of the issues.

**MADAM JUSTICE KARAKATSANIS:** Just before you do that I just want to make sure that I have your position on another concession and that's in paragraph 47, the first sentence.

> "Igloo Vikski did not take issue with the CBSA's contention that the goods in issue meet the terms of heading No. 62.16 and of the relative section and chapter notes that must be considered in accordance with Rule 1..."

**MS KLINCK:** Yes. Again, I think the most important point is that the respondent's primary submission throughout was that there were two distinct components, plastic and textile, the goods therefore couldn't be classified under heading 39.26 or heading 62.16 by the application of Rule 1 alone.

**MADAM JUSTICE KARAKATSANIS:** So you're saying that's incorrect --

**MS KLINCK:** No.

**MADAM JUSTICE KARAKATSANIS:** -- that's not a concession that I read there in paragraph 47?

**MS KLINCK:** So the implication -- when we're dealing with a three -- our position was that the goods

could only be classified applying 3(b) and the implication of a Rule 3(b) essential character determination -- well, there are two. One is that the goods must be *prima facie* classifiable under both headings, and two is that the goods are not deprived their essential character, which is the 2(b) requirement. So you go under Rule 1 you say: Is it classifiable under a heading? It's not classifiable under either heading because of the presence of the other material.

**MR. JUSTICE BROWN:** Well, isn't that what 2(b) is about?

**MS KLINCK:** Yes.

**MR. JUSTICE BROWN:** Right. So Rule 1 is are you even in the ballpark, right, but the presence of an -- so on this theory this product would fit *prima facie* within Chapter 62 because it's a glove, because it's a textile, *prima facie* then, carrying this hypothesis further, it might fit within 39 because it's a plastic. But the presence of the textile on the plastic, the presence of the plastic on the textile means you have to take it further and that goes to 2(b) and then you consider whether the presence of the other changes the essential character of the product such that it can no longer be fit within the general description of the heading.

Am I right?

**MS KLINCK:** That's absolutely right. So at 1 can we absolutely classify --

**MR. JUSTICE BROWN:** Right.

**MS KLINCK:** -- we can't. At 2(b) we extend both of the headings to goods that are made only partly of the material identified in the one --

**MR. JUSTICE BROWN:** But you have to fit *prima facie* within both for that analysis.

**MS KLINCK:** 2(b) will not extend only in the case where the extension would deprive the goods of the character of the goods in issue.

**MR. JUSTICE BROWN:** But does 2(b) allow you -- if let's say instead that it was only *prima facie* within Chapter 62 and not within Chapter 39, but the presence of the plastic then requires you to consider whether it still fits properly within 62, does that then allow you to shoehorn Chapter 39 in, even if it didn't fit *prima facie* within the description?

**MS KLINCK:** The only reason that one wouldn't apply 39.26 to the goods in issue were if there were a clear exclusion at the Rule 1 stage. So if at the Rule 1 stage it said something in the heading or in one of the Section Notes, you know -- well, had it said this heading applies only to articles of apparel made by sewing and sealing sheets of plastic together, then there would be a clear

limitation, clear limitation you can't proceed to Rule 2(b) because by extending the heading you would -- well, actually not even that, it wouldn't even fall within the language of Rule 1 and you would be able to finish the classification exercise at that point.

But that's not our case, there is no such exclusive language in the Explanatory Note to heading 39.26. The language is broad and inclusive, it deals with the basket clause, it's a list of examples that are illustrative that follow, it's general language followed by language of inclusion, there couldn't be a clearer direction that it's not intended to restrict the scope of the basket clause that is 39.26, which indeed finds itself at the end of the 39 Chapter which deals with plastic. So it's meant to be a residual category. It would be very surprising to find an absolute restriction preventing the extension under 2(b) from that kind of broad inclusive language.

And then we get to 3(b) and just to return to Justice Karakatsanis' point, this is why because the respondent said Rule 3(b) had to apply we both had to say yes it was *prima facie* classifiable, it could be extended, heading 39.26 could be extended applying Rule 2(b), and we also had to take the position that that didn't deprive the goods of their character as textile goods, because had it deprived -- had the presence of plastics deprived the

character, the relevance of textile would have been stopped at the 2(b) stage.

Getting to 3(b) means that it's *prima facie* classifiable under both headings --

**MR. JUSTICE BROWN:** Right.

**MS KLINCK:** -- and that has always been the respondent's submission.

**MADAM JUSTICE ABELLA:** Can I take you, then, if we're in 3(b) one of the words -- the key word in 3(b) and it's mentioned in 2(b) as well is "goods". Am I right?

> "Mixtures, composite goods consisting of different materials ... and goods put up in sets for retail sale ... as if they consisted of the material or component which gives them..."

The goods:

> "... their essential character..."

Am I right --

**MS KLINCK:** Yes.

**MADAM JUSTICE ABELLA:** -- that it's the essential character of the goods?

**MS KLINCK:** Yes. So here we have --

**MADAM JUSTICE ABELLA:** What is the essential character of these goods?

**MS KLINCK:** The respondent's submission is that

the essential character is conferred by the protective element, the plastic portion, but that's not before --

**MADAM JUSTICE ABELLA:** But what are they?

**MS KLINCK:** The goods are the gloves.

**MADAM JUSTICE ABELLA:** Okay.

**MS KLINCK:** And the component --

**MADAM JUSTICE ABELLA:** Why doesn't that end the inquiry?

**MS KLINCK:** The goods are the gloves and they are made up partly of textile and partly of plastic.

**MADAM JUSTICE ABELLA:** But they're still gloves.

**MS KLINCK:** 3(b) allows us to determine whether the textile or the plastic portion -- I'm not sure I'm fully understanding.

**MADAM JUSTICE ABELLA:** Okay. So I know that your argument is they are protective and that's the main characteristic of the goods.

**MS KLINCK:** Yes.

**MADAM JUSTICE ABELLA:** How does that relate back to what they consist of?

**MS KLINCK:** They consist of plastic and textile, which is why the essential character determination as to whether -- is it the textile material on the exterior --

**MADAM JUSTICE ABELLA:** That makes it --

**MS KLINCK:** -- or the plastic on the interior that confers the essential character?

**MADAM JUSTICE ABELLA:** Of protectiveness.

**MS KLINCK:** And that's a matter -- yes. And that's a matter that the respondent says remains to be decided by the Tribunal because the Tribunal never allowed itself to get to the 3(b) assessment that was required in this case.

**MADAM JUSTICE ABELLA:** Did they in *Sher-Wood*?

**MS KLINCK:** No.

**MADAM JUSTICE ABELLA:** They never got to what the character of the goods was in *Sher-Wood*?

**MS KLINCK:** No.

**MADAM JUSTICE ABELLA:** Because...?

**MS KLINCK:** Of the Explanatory Note to 39.26 and the restrictive reading of the inclusive language contained therein.

**MADAM CHIEF JUSTICE:** But you say anyway that's not before us because we should send it back to the Tribunal for the 3(b).

**MS KLINCK:** The essential character determination under Rule 3(b), the respondent's position is that that's a matter showing appropriate deference to the Tribunal to allow the Tribunal to decide on the basis of

evidence with what is -- what is more important, is it the exterior portion of the glove or is it the padding portion, which our position is that's what makes it a glove that has any purpose in providing protection and it's the padding itself that does that, but this element, I mean while it may be open to this Court to decide that, our position is that it should simply be remitted to the Tribunal to perform the assessment that should have been performed.

If I may return to the --

**MR. JUSTICE GASCON:**

But before we go to 3(b) under Explanatory Note XIII of 2(b), don't we have to go first through Explanatory Note XII? And why is it not discussed at all in the Federal Court decision?

**MS KLINCK:** This actually takes me to a very important point on the administrative law question which I would like to address.

It's important to remember that this Court in *Agraira* decided that on an appeal of a judicial review it is the administrative decision that is under review, not the appellate court -- sorry, the judicially reviewing court. So what the appellate court does is it puts itself in the shoes of the judicial review court and examines whether the administrative decision withstands scrutiny on the applicable standard of review.

So while there may have been -- while ideally the Federal Court of Appeal may have addressed additional reasons why the Tribunal's decision was unreasonable, apart from the ones it already identified, that's not really the focus at this stage. At this stage the focus is: Is the administrative decision reasonable? Does it withstand -- reasonable or indeed correct based upon the fact that this is legislation incorporating an International Convention aimed at achieving uniformity and harmonization in *Customs Tariff* classifications.

So I think that's an important point, which is that really the focus has to be on the Tribunal's decision.

**MR. JUSTICE GASCON:** But are you saying that the Tribunal did not look at Explanatory Note XII under 2(b) in their analysis of 39.26?

**MS KLINCK:** 39.26, yes, our position is that she didn't consider 2(b) at all because she just relied on 39.26 to find that it couldn't possibly be classified as a plastic.

So the Tribunal ignored the General Interpretive Rules that are specifically designed to allow for the classification of goods composed of different materials, plastic and textile, by refusing to apply 2(b) and 3(b) to heading 39.26.

**MADAM JUSTICE CÔTÉ:** Ms Klinck, when we read

the whole 3 it starts by saying:

"When by application of Rule 2(b) or for any other reason, goods are, *prima facie*, classifiable..."

**MS KLINCK:** Yes...?

**MADAM JUSTICE CÔTÉ:** Can you give me an example of "for any other reason"?

--- Pause

**MS KLINCK:** I would prefer to leave that question to my co-counsel.

**MADAM JUSTICE CÔTÉ:**

**MS KLINCK:** But it may be the case that some headings appear to apply to both without needing -- perhaps if it's a specific language in one and the other is material it might --

**MADAM JUSTICE CÔTÉ:** Mr. Kaylor will be able to --

**MS KLINCK:** Yes. Preferably.

So on the administrative law issue I would like to make three main submissions.

First, I will review the qualities that make a decision reasonable and the associated baseline requirements for an administrative decision to withstand scrutiny on a reasonableness standard.

Second, I will address the specific limits on

reasonableness that apply to a tribunal's statutory interpretation, including the interpretation of its home statute.

And third, I will argue that in the particular context of legislation directly incorporating Canada's international treaty obligations either the standard of review is correctness or the range of reasonable interpretations must be particularly narrow.

First, with respect to the qualities that make a decision reasonable the respondent's core submission is that an administrative decision cannot withstand scrutiny on the reasonableness standard if the decision is based on contradictory reasons that are irreconcilable with the statute and the decision produces an outcome unsupportable by any coherent line of reasoning that is consistent with the statute.

As this Court held in *Dunsmuir*, which is reproduced at Tab 1 of the respondent's condensed book at paragraph 47, reasonableness is concerned with two elements. First, justification, transparency and intelligibility within the decision-making process and, second, whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

Now, in this Court's decision in *Newfoundland*

*and Labrador Nurses' Union*, which is found at Tab 2 of our condensed book, this Court clarified that the type of review envisaged by *Dunsmuir* is an organic exercise.

When a Court reviews a decision for reasonableness, the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. Therefore the Tribunal's reasons need not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, nor is a decision-maker required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion.

Therefore on a reasonableness standard the standard is not perfection. Deference under a reasonableness standard means that a Court may look to the record and supplement the Tribunal's reasons in order to assess whether the decision falls within a range of reasonable outcomes.

However, this Court has also established clear limits on the amount of deference that may be shown under a reasonableness standard.

Most fundamentally, in *Dunsmuir*, again at Tab 1 of our condensed book, here at paragraphs 41 and 42, this Court abandoned the distinction between patent

unreasonableness and reasonableness *simpliciter* in favour of a single reasonableness standard because it is "inconsistent with the rule of law to retain an irrational decision."

The Court went on:

> "Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough."

What this means is that reasonableness may require the Court to have a degree of engagement with the Tribunal's decision in order to determine whether it is reasonable. And even if the irrationality does not jump out from the reasons but requires that level of engagement, the decision still cannot be allowed to stand.

A Tribunal's decision cannot be reasonable when its reasons are irreconcilable with the words of the scheme, violate the interpretive principles of the scheme or frustrate its purpose or the reasons are internally contradictory. Similarly, it cannot be reasonable when the outcome is unsupportable by any coherent line of reasoning

that is consistent with the statute.

And if I turn this Court's attention to our Tab 3, it's this Court's decision in *John Doe*. At paragraph 53 the Court found that the decision was unreasonable because it was inconsistent with the words of the statute:

> "This decision was based on definitions of 'advice' and 'recommendations' that left no room for the terms to have distinct meanings."

In this Court's decision in *Dionne* at Tab 4 of the respondent's condensed book, the Court found that the decision was unreasonable because it was inconsistent with the purpose of the statutory scheme. Again these are paragraphs 1 and 45.

In the Alberta Court of Appeal's decision Atco -- leave to appeal to this Court refused -- which is at Tab 5 of the respondent's condensed book -- there the Court found in related decisions -- and if we look at paragraph 24 -- that in these related decisions dealing with a similar issue -- or not dealing with a similar issue, it was actually the same fact pattern, just related decisions -- that the Tribunal had found first that historical uses were not relevant, or largely irrelevant, then had found that historical uses were the primary reason

for a decision. So the Alberta Court of Appeal concluded that the reasoning in the two decisions is inconsistent, making the overall conclusion unreasonable, which means internal contradictions cannot be found to be reasonable.

The concept of --

**MR. JUSTICE BROWN:** But in Atco, those were internal contradictions going to the very result, weren't they?

**MS KLINCK:** Yes.

**MR. JUSTICE BROWN:** Right.

**MS KLINCK:** And indeed we have these kinds of contradictions here and, as my co-counsel will explain in greater detail, the Tribunal in fact took a very restrictive reading of an Explanatory Note to heading 39.26 while at the same time -- and if I draw the Court's --

**MR. JUSTICE BROWN:** But the restrictiveness is not the threshold here.

**MS KLINCK:** It's inconsistency. So if you look at the restrictive approach to inclusive language and you compare it to our Tab 16, which reproduces a Note to Chapter 62, Chapter 62 being the relevant textile chapter for heading 62.16, the first Note states:

> "This Chapter applies only to made up articles of any textile fabric..."

Et cetera. That is restrictive language, or at

least it could be seen as restrictive language, and yet in the face of this type of restrictive language the Tribunal found no restriction, and in the face of inclusive language in the Explanatory Note to heading 39.26 the Tribunal found a firm exclusion.

So whether or not taken by themselves we could interpret this provision reasonably as not excluding the goods in issue, which are not just textiles, but are textiles and plastics, that is a reasonable interpretation of that provision taken by itself. And even if you could imagine that the interpretation of heading 39,26's Explanatory Note could be reasonable in the abstract, it can't be reasonable when set beside much clearer language of exclusion relating to the textile heading.

This is the theme that comes throughout the Tribunal's decisions, that its approach to heading 39.26 is irreconcilable and contradictory to its approach and 62.16. So it took a highly restrictive approach to an Explanatory Note in 39.26 when the Explanatory Note uses -- and we can look at it if that's of assistance, the Explanatory Note to Chapter 39.26 is at Tab 17 of our condensed book and so you have a heading with very general language. Heading 39.26:

> "Other articles of plastics and articles of other materials of headings 39.01 to 39.14".

Very broad basket clause in the language of the heading itself that comes at the end of a chapter on plastic, so it's meant to capture -- well, it's meant to capture any articles of plastic that weren't otherwise classified.

Then we look to the Explanatory Note and the first thing the Explanatory Note says is:

> "This heading covers articles, not elsewhere specified or included, of plastics ... or of other materials of headings 39.01 to 39.14."

Very general language. Then the words "They include" and a list of illustrative examples. These illustrative examples can't be found to produce a restriction and I think a couple of examples may help to clarify why that's the case.

First, if you look at the example (1), and it's described in some level of specificity with respect to the examples, "made by sewing or sealing sheets of plastic". The interpretation suggested by the Tribunal would mean that classification under this broad residual heading of an article of apparel would depend upon the existence of a seam, and so if you had for example a moulded plastic baby's bib as opposed to one made of sheets of plastic sewn together, it would be unclassifiable under 39,26, despite

the fact -- excuse me?

**MADAM CHIEF JUSTICE:** (Off microphone)?

**MS KLINCK:** Excuse me, sewing or sealing. Sewing or sealing

**MADAM CHIEF JUSTICE:** (Off microphone).

**MR. JUSTICE BROWN:** (Off microphone).

**MS KLINCK:** I see. Well, in any event there's a joinder of some type and in a moulded plastic baby's bib there would be no such joinder, it will be one piece of moulded plastic and yet it would be -- on this extremely narrow interpretation of the general language it would be excluded.

Another example within this list also shows that this would be an absurd interpretation of 39.26. If we look at item (9) it provides as an example:

> "Plastic containers filled with carboxymethylcellulose (used as ice-bags)."

If the Tribunal's interpretation of these illustrative examples is that any description contained therein means that no other article of that type can be captured within the residual heading, it would mean that any plastic container not filled with this substance could not be viewed as an article of 39.26.

These are just to show that these Explanatory

Notes are meant to provide guidance, to illustrate the types of examples that can definitely be classified under the heading. They are not meant to provide an exclusion.

**MADAM JUSTICE ABELLA:** I guess we would have to be satisfied that it was unreasonable for her to interpret a provision which is called "articles of plastics", defines how when it applies to clothing it is limited in plastics, everywhere else it talks about furniture, paperweights, et cetera, versus what is covered by 62.16 --

**MS KLINCK:** Yes...?

**MADAM JUSTICE ABELLA:** -- and we would have to say it's unreasonable for her to conclude that because the word "textiles" does not appear and 39.26 it was not meant to cover these articles.

So I'm not saying -- it's a big, big leap to say it's an unreasonable interpretation since that keyword is missing from 39.26 and that's what she pinned it on. She said, even though it includes -- when you look at a list of "it includes items" it's *sui generis*, what are the other items in that list. None of them is anything that has textiles in them; 62.16 does.

So why is it unreasonable? I appreciate that you don't agree with it, but why is her conclusion an unreasonable one based on the wording of this provision?

**MS KLINCK:** The respondent's position is that

the conclusion is unreasonable because this Explanatory Note is clearly from its words intended to be inclusive and not restrictive.

**MADAM JUSTICE ABELLA:** No, but look:

> "This heading covers articles ... of plastics ... or of other materials .... They include:"

And then the list of what it includes is definitely not clothing, except in a very limited way Article (1).

So we can't expand. I guess you may -- if she had come to the conclusion that 39.26 also applied we may agree with you, I don't know, but is it unreasonable of her to say looking at the Explanatory Note for 39.26 and what it was meant to cover that it's not these goods?

**MS KLINCK:** There are two reasons why it is in fact unreasonable.

The first reason is that it ignores the fact that these items listed come after very general language and the word "include". So if we think again of this moulded plastic baby's bib, no sewing or sealing sheets of plastic, how would we classify it, it's not under example (1), it just falls within the general language that precedes the list. So it is a heading -- it's:

> "... articles, not elsewhere specified or

included, of plastics ... or of other materials of headings...."

And the same reasoning would apply to a container of the type of example (9) that wasn't filled with carboxymethylcellulose. You could have a plastic container and just because it doesn't fit within the specific description that the World Customs Organization thought would be helpful in order to illustrate the types of things that are definitely classifiable, that doesn't prevent a baby's bib with no sewing or sealing sheets of plastic from falling within the general language that comes before "they include", nor does it prevent a plastic container that doesn't have the substance in it from similarly falling within the general language.

**MR. JUSTICE CROMWELL:** But it may not necessarily prevent it, but is it necessarily unreasonable?

**MS KLINCK:** And it's necessarily unreasonable because this is an extremely restrictive interpretation of inclusive language taken beside, again, Tab 16, Chapter Notes 62.01 and it says:

"This Chapter applies only to made up articles of any textile fabric..."

This is not an article of textile fabric, it's an article of textile and plastic.

Moreover, if we look at Tab 10 of the

respondent's condensed book to the General Interpretive Rules, and if we look at Explanatory Note V, it specifically deals with the situations where the application of 2(b) might not be possible. So it says:

> "The expression 'provided such headings or Notes do not otherwise require' is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate only to particular goods."

"Only", which is the same wording that appears in Chapter 62, Note 1.

So the central point is this: What the Tribunal had before it was, under the textile heading, wording consistent with the restriction and under the plastic heading wording inconsistent with a restriction, inclusive wording. It read a restriction into the inclusive list and it found no restriction when there was at least a strong indication of one.

So the fundamental point is, yes, under a reasonableness standard we can find that Chapter 62, Note 1

doesn't prevent the application of a textile heading to these gloves, fine. We could even possibly in the abstract read such an inclusive list, although I would find it difficult given the words. But even if you were going to read this inclusive list so restrictively, how could you do that while at the same time reading the restrictive wording in Chapter Note 61 so expansively?

That's the fundamental and reasonableness. It's not about an individual -- an individual interpretation of a particular Explanatory Note or a Chapter Note, what's unreasonable is the contradictory approaches to both. I think that's what's truly fundamentally important, is that the Tribunal did not apply a consistent approach to heading 39.26 and headings 62.16.

And I would just like to provide a few final submissions on the standard of review.

One is that in addition to the fundamental baseline requirements of reasonableness in any case which we have discussed, it can't be internally contradictory, it can't be contrary to the words of the statutory scheme. And again, the respondent's position is that the interpretation is contrary to the clearly inclusive words of 39,26.

And it can't be contrary to the purpose because another effect of the Tribunal's approach is that it frustrates the application of Rules 2(b) and 3(b) that are

designed to deal with exactly this case.

Contrary to the appellant's submission, this is not a glove just of textile, case closed, this is a glove with a textile component and a plastic component.

**MADAM CHIEF JUSTICE:** Yes. It sounds to me like you're arguing the merits here rather than reasonableness, but --

**MS KLINCK:** Okay, excuse me. So --

**MADAM CHIEF JUSTICE:** You were going to leave some time for your friend, but I'm not sure whether your plan has changed.

**MS KLINCK:** I might leave less time because I feel I may have addressed many of his points, but I guess the only two things that I would like to draw the Court's attention to are that when applying a reasonableness standard to a tribunal's interpretation of a statute or its home statute, the Court itself must apply the modern approach to statutory interpretation in order to determine whether the interpretation of the Tribunal was reasonable.

That appears clearly from this Court's decision in *John Doe*. That's at Tab 3 of the respondent's condensed book and if you just look at paragraphs 17 and 18 it makes clear that the standard of review is reasonableness and then the Court proceeds in order to assess the reasonableness to apply the modern approach to statutory interpretation.

Similarly, in this Court's decision in Canadian Human Rights Commission at Tab 8 of the respondent's condensed book, paragraph 34, this Court found:

> "When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion."

Again, language of the modern approach to statutory interpretation.

**MADAM JUSTICE ABELLA:** So that's my next question, looking at purposive. Your arguments, as set out in the Reasons and as we discussed earlier, were the main attribute of these goods is protective.

Would you tell me where the word "protective" appears in either 39.26 or in 62 and why it's of any relevance?

**MS KLINCK:** That point will be relevant at the stage of an essential character determination. And if we look --

**MADAM JUSTICE ABELLA:** But how?

**MS KLINCK:** If we look at the Federal Court of Appeal's decision in *Mon-Tex*, which is reproduced actually at our book of authorities, I believe it's Tab --

**MADAM JUSTICE ABELLA:** You argued this, though, didn't you, in front of her? Your argument was about

Rule 3(b) before the Tribunal.

**MS KLINCK:** Yes. And it requires an essential character determination --

**MADAM JUSTICE ABELLA:** Right.

**MS KLINCK:** -- and that can be based upon a number of factors. It can --

**MADAM JUSTICE ABELLA:** Right. But where is the word "protective"? When you say, look, we're under 39.26 because of the protective nature, where does that language or any analogous language appear in 39.26?

You're asking us to do statutory interpretation so I'm trying to figure out what the relevance is of that word in the context of 39.26.

**MS KLINCK:** We are under 39.26 by virtue of the presence of the plastics and that's at the Rule 1 stage, but if the Tribunal had gotten to 3(b) and had to perform an essential character determination --

**MADAM JUSTICE ABELLA:** Right.

**MS KLINCK:** -- it would consider a number of factors, it could be functionality, it could be appearance, and those would be the sorts of things that it would have to take into account.

So is the essential character conferred by the protective function, is it conferred by the graphics on the exterior of the textile, is it mostly a --

**MR. JUSTICE BROWN:** Who gets to decide?

**MS KLINCK:** The Tribunal, after it allows itself to get to the 3(b) determination, which he didn't in this case because it completely discounted the presence of the plastics.

**MR. JUSTICE BROWN:** (Off microphone).

**MS KLINCK:** That the goods are not deprived, their character --

**MR. JUSTICE BROWN:** (Off microphone) the function might not reflect its character. A hat protects people from the sun, but that doesn't necessarily mean that that's what we need to look at.

**MS KLINCK:** And maybe the hats essential function is as an article of -- is to be fashion.

**MR. JUSTICE BROWN:** I mean my son is a goalie, he would tell you the function of the glove is to catch the puck.

**MS KLINCK:** And that would be all part of the assessment that would have to be made once we get to the essential character determination at 3(b). So which of these, was it the plastic in the blocker or the textile in blocker or --

**MR. JUSTICE BROWN:** But you have to do it at 2(b) as well, don't you?

**MS KLINCK:** Yes. Yes, you do. In 2(b) the

question is: Does the presence of the other material deprive the article of its character?

**MR. JUSTICE BROWN:** Of its essential character.

**MS KLINCK:** Yes. It's a sort of -- it's a higher threshold, depriving of the character --

**MR. JUSTICE BROWN:** Yes, but you still need to know what the character is to know if it's being deprived. So that character determination needs to be made long before you get to 3(b), if indeed you get there.

**MS KLINCK:** Yes. 3(b) would be a balancing, whereas -- so which is the dominant character under 3(b) and whether the character has been completely deprived under 2(b).

**MR. JUSTICE BROWN:** Is it dominant character or is it essential character?

**MS KLINCK:** Well, which confers the essential character. We have found that the presence of neither deprives of the character, right, so it's still potentially classifiable as both. And then, once we get to 3(b), both plastic and textile headings remain relevant and then we determine, okay, is at the textile or is it the plastic that confers the essential character. So we can get to 3(b).

**MR. JUSTICE BROWN:** So we have to determine whether something is deprived before we determine what the essential character is?

**MS KLINCK:** Yes.

**MR. JUSTICE BROWN:** Okay. You're running out of time and I just want to signal to you I'm not following that submission at all.

**MS KLINCK:** Okay. Well, I think the most important point is that the unreasonableness of the Tribunal's decision happened at the Rule 1 stage --

**MR. JUSTICE BROWN:** Right.

**MS KLINCK:** -- and then it would be necessary to make a determination as to whether the presence of the textile deprived the goods of their character as goods of plastic, which was not done so there was no determination, we don't know what the Tribunal would have said. And then, assuming that the presence of the textile did not deprive the goods of their character as articles of plastic, as extended under 2(b), you could then, assuming the textile continued to apply, determine whether it was the textile or the plastic that conferred the essential character. So which is most important.

I think I have dealt with the necessity of applying the modern approach to statutory interpretation. In some cases that will lead to a single reasonable interpretation, in other cases it may lead to more than one reasonable interpretation, but certainly an interpretation that's not reconcilable with the modern approach to

statutory interpretation is not reasonable.

And the final submission is that this Court in fact has not decided then has explicitly left open whether the correctness standard must apply to a Tribunal's interpretation of legislation directly implementing Canada's international treaty obligations.

In the recent case of *B010*, which is found at Tab 1 of the respondent's condensed book, this Court specifically declined to decide whether the fact that a specialized Tribunal -- here it was an immigration and -- well, refugee Tribunal -- interpreting the provisions of an International Convention should be held to a correctness standard. The issue hasn't been decided.

Similarly here we are dealing with directly incorporated into Canadian law provisions of International Convention. The respondent's submission is that there are good reasons to apply a correctness standard, namely that the very purpose of the convention and the purpose of the legislation itself is to achieve uniformity and consistency in customs classification decisions and that purpose is inconsistent with the animating principle of reasonableness review, which is that certain questions do not lend themselves to one specific particular result. That's *Dunsmuir* Tab 1 at paragraph 47. So this idea -- reasonableness means there is no single result and yet the

very purpose of the convention is to ensure across jurisdictions that there will be one uniform result.

But, in any event, our submissions do not depend on the application of a correctness standard, our submission is that the Tribunal's interpretation was unreasonable because it was internally contradictory and contrary to the words of the statute, its interpretive principles and its purpose.

I will leave a few moments for my colleague to address any additional questions.

**ARGUMENT FOR THE RESPONDENT**

**IGLOO VIKSKI INC.**

**(1140) MR. KAYLOR:** Chief Justice, Justices, my co-counsel has in fact taken up most of my thunder so I will reserve only some very short comments.

The Tribunal, even though in its decision it reproduced Note 1(u) to Chapter 95 -- and that can be found at the Tribunal decision, appellant's record Volume 1, Tab 1 at paragraph 24. So it was in the Tribunal's decision and it says that insofar as Chapter 95 which generally covers sports requisites, including sports or athletic equipment because Note 1(u) to Chapter 95 provides as follows:

> "This Chapter does not cover:
>
> ...
>
> (u) Racket strings, tents or other camping

goods, or gloves, mittens and mitts (classified according to their constituent material)".

So that I think constitutes a specific direction that insofar as sports clubs of the kind that are concerned the drafters were clearly concerned with classification being based on the components of the glove in issue.

So by turning to Chapter 62.15 they clearly have taken into account the textile component, notwithstanding that in heading 62.16 there is no specific mention as to why the textile component is there, it's simply there. It doesn't say that the textile component has to be protective or any other reason in order to merit consideration of 62.16.

Likewise, the same thing can be said for 39.26, the heading merely refers to articles of plastic without any reference to the function, if you will, of the plastic over form and by unreasonably reading the Explanatory Notes to heading 39.26 in a manner which limited the scope of that heading to the gloves in issue being accessories of clothing to those that were made only by sewing or sealing sheets of plastic, the Tribunal effectively concluded the application of 39.26 and consideration as a result of the plastic component.

Both the plastic and the textile component are -- I don't know whether they are equally important, but they are important components and based on Chapter 95 Note 1(u) it's necessary I think to have a mechanism by which both can be evaluated. That mechanism is through the use of Note 2(b) by extending both headings to the point where they capture both of the goods in issue and then of course, as we said, by moving to a consideration of Rule 3(b).

And the fact that under Rule 2(b), I think it's Explanatory Note XII, it does require you to determine whether the addition of the second material -- so in the case of 39.26, if the Tribunal had gotten to Rule 2, they would have had to ask themselves whether the presence of the textile material deprived of the goods of the quality of a plastic good. They never got that far, we don't know what the answer would be, but that certainly would be one task that would remain for them to do.

**MADAM JUSTICE ABELLA:** Isn't that essentially what they decided? Isn't that essentially what they decided, that textiles, mixed textiles, mixed components can exist under 62, but everything in 39 is plastic and there's no reference to textiles, so implicitly you could argue that they already decided that question, didn't they?

**MR. KAYLOR:** I don't think so because everything -- well, under Rule 1 it may be true that

everything in those two headings is composed of a single material, but the whole purpose of that is to then extend -- where the good in issue consists of more than one material to extend the two headings so that you can then ultimately compare the two materials that are truly at issue, namely the plastic and the textile and, in virtue of Rule 3, decide which one gives it its essential character, whether one is heavier than the other, more plentiful than the other.

There are a number of criteria in Rule 3 by which you can judge as to how to attribute the characteristic that's most important to the glove and hence give it its tariff classification and the Tribunal stopped short of doing that and did so really in contradiction. They did it by virtue of an Explanatory Note to heading 39.26 when, as my friend said, that the Explanatory Notes to Rule 1 -- which are found together with their Explanatory Notes in the condensed book of the respondent -- the Explanatory Note V clearly gives the direction that when we wish to prevent the application of Rule 2(b) to a particular good we know how to do it and this is the way we are going to do it. We will do it by making specific mention, either in the heading or in the section or in the Chapter Note that this heading effectively applies only to certain goods.

So if in terms of 39.26 it had been the intention of Parliament to preclude the application of

Rule 2(b) it would have been a simple matter in the section or Chapter Notes to Chapter 39 to say that: This Chapter applies only to goods that are made by way of sewing -- not sewing sheets of plastic together. That way the signal would have been clearer.

The Tribunal had all these rules in front of it and yet instead of looking for language such as I have just mentioned in the section and Chapter Notes which would have provided clear direction that they were not to extend 39.26, they moved through the indirect method through the Explanatory Note to somehow arrive at the same conclusion by excluding the goods in issue being made of sheets of plastic from the heading and once they were excluded from the heading of course Rule 2(b) could no longer apply to them.

**MADAM JUSTICE ABELLA:** Aren't they mandated to do that by section 11, the interpretation provision of the *Customs Tariff* Act which says you look at, among other things, the Explanatory Notes?

**MR. KAYLOR:** Yes.

**MADAM JUSTICE ABELLA:** So that's their interpretive guide, sections 10 and 11, so they are not doing anything they are not permitted to do, they are directed to look at those Explanatory Notes.

**MR. KAYLOR:** They are directed to look to those Explanatory Notes, you're right, however the Explanatory

Notes do not have legally binding status. The Chapter and Section Notes do have legally binding status and that is exactly why this directive about using the word "only" appears in General Interpretive Rule 1, in the Explanatory Note to that General Interpretive Rule, and does not appear in the Explanatory Note 2, heading 39.26.

So if there is ever any contest between an Explanatory Note and a legally binding section or Chapter Note, notwithstanding that due regard must be had -- or not due regard, just regard must be had for an Explanatory Note, when a conflict arises we must turn to a text of the legally binding portion of the document and basically disregard or not apply the Explanatory Note.

So here the Tribunal did just the opposite, the Tribunal read the Explanatory Notes to 39.26, in my respectful submission did so unreasonably and so restricted the scope of the heading, and never looked, as far as I can determine, there is certainly nothing in the judgment which says that they ever looked to the section or Chapter Notes at Chapter 39 in order to see whether wording of the sort that's indicated in Note 5 to General Rule 1 was there. If that wording had been there then certainly they would have been entitled to restrict the scope of the heading, but absent wording in the right place as mandated by Parliament, to go in a circuitous fashion and read into the broadest

possible language that you could have, as my co-counsel was saying, when you look at the Explanatory Notes to 39.26, both the opening paragraph and the phrase "they include" are meant based on the jurisprudence to be non-exhaustive. And to read such open-ended non-exhaustive language in a narrow sense so as to exclude goods which are named there, it just seems to be unreasonable when we know how Parliament does it and it gave an express directive to watch for.

Thank you.

**(1149) MADAM CHIEF JUSTICE:** Thank you.

Mr. Brongers...?

**REPLY ARGUMENT FOR THE APPELLANT**

**ATTORNEY GENERAL OF CANADA**

**(1149) MR. BRONGERS:** Thank you, Chief Justice.

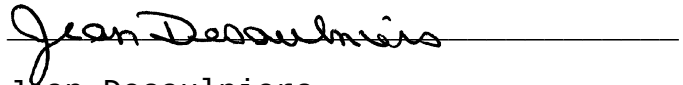
I have no further submissions in reply; thank you.

**(1149) MADAM CHIEF JUSTICE:** Thank you.

The Court will reserve its decision in this matter and the Court adjourns.

--- Whereupon the hearing adjourned at 11:49 a.m.

I HEREBY CERTIFY that I have accurately transcribed the foregoing to the best of my skill and ability from the audio provided.



Jean Desaulniers
Verbatim Court Reporter