Federal Court of Appeal | Cour d'appel fédérale

Date: 20260416

Dockets: A-81-24
A-159-24

Citation: 2026 FCA 74

CORAM: **STRATAS J.A.**
MACTAVISH J.A.
LEBLANC J.A.

Docket: A-81-24

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MEDLINE CANADA CORPORATION

Respondent

Docket: A-159-24

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

MEDLINE CANADA CORPORATION

Respondent

Heard at Ottawa, Ontario, on March 11, 2025.

Judgment delivered at Ottawa, Ontario, on April 16, 2026.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: STRATAS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] These two matters concern a decision of the Canadian International Trade Tribunal (the Tribunal), dated January 29, 2024 in Appeals AP-2022-004 and AP-2022-017, classifying surgical gloves (the gloves or goods at issue) under tariff item 9977.00.00 of the *Customs Tariff*, SC 1997, c. 36 as "for use" in surgical instruments (here, scalpels), such that the gloves can benefit from duty-free importation into Canada (the Decision). One matter (file A-81-24) is an application for judicial review of the Decision. The other (file A-159-24) is an appeal of the Decision pursuant to subsection 68(1) of the *Customs Act*, RSC 1985, c. 1 (2nd Supp) (the Act), which creates a right of appeal to this Court "on any question of law." The two matters were heard together.

[2] The Attorney General of Canada (the Attorney General), who is the applicant/appellant in these matters, contends first and foremost that the Tribunal erred in law in classifying the gloves at issue the way it did and that, therefore, his appeal under paragraph 68(1)(b) of the Act should be granted. In the alternative, that is if the Court finds that the Attorney General's appeal is not captured by paragraph 68(1)(b) of the Act, the Attorney General claims that the Decision is unreasonable on judicial review criteria and should therefore be set aside.

[3] For the reasons that follow, I am of the view that the Attorney General's appeal is properly before this Court as it raises a question of law and that it should be allowed, making it unnecessary, thereby, to deal with the Attorney General's alternative recourse in judicial review.

II. Context

[4] The goods at issue consist of various models of surgical gloves, packaged in pairs (left and right). They are manufactured and designed to be form-fitting and to be worn during medical procedures requiring a sterile field, such as surgery rooms, to prevent site infections and the risk of disease and bacteria transmission between patients and healthcare professionals (Decision at paras. 3-4).

[5] As such, the goods at issue are subject to the *Medical Device Regulations*, SOR/98-282, and can only be imported into Canada by persons holding a licence. The respondent in both matters, Medline Canada Corporation (Medline), holds such a licence (Decision at para. 5).

[6] The goods at issue were imported by Medline between November 2015 and March 2018. They were then classified under tariff item 4015.11.00 as surgical gloves of vulcanized rubber other than hard rubber. That classification is not in dispute.

[7] Some years later, Medline requested duty refunds under section 74 of the Act for these importations, claiming that the goods at issue were eligible for duty relief pursuant to the Special

Classification Provisions (Commercial) set out in Chapter 99 of the *Customs Tariff*, and more particularly in item 9977.00.00.

[8] Tariff item 9977.00.00 reads as follows:

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

[9] Note 4 to Chapter 99 provides that the words and expressions used in that Chapter "have the same meaning as in Chapters 1 to 97." Subsection 2(1) of the *Customs Tariff* defines the expression "for use in," which is central to this case, as follows:

for use in, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.	***devant servir dans*** ou ***devant servir à*** Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d'autres marchandises mentionnées dans ce numéro tarifaire par voie d'ouvraison, de fixation ou d'incorporation.

[10] According to Note 3 to Chapter 99, the gloves at issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97. As we have just seen, the parties agree that the gloves at issue were properly classified under tariff item 4015.11.00 upon entry.

[11] Medline's requests for a refund were denied by the Canada Border Services Agency (the Agency) on the ground that the goods at issue did not meet the requirements to be considered "for use in" the instruments and appliances (here, scalpels) referenced in tariff item 9977.00.00. Medline then sought re-determination of that finding by the Agency's President. That proved unsuccessful as well, which led Medline to appeal the President's decision to the Tribunal pursuant to subsection 67(1) of the Act. There were two appeals, in fact, which were joined. However, this plays no role in what the Court has to decide in the present instance.

III. The Tribunal's Decision

[12] Before the Tribunal, Medline called two witnesses: (i) its senior director of clinical and training services, and (ii) a senior surgeon recognized by the Tribunal as an expert witness in the field of surgery and the use of surgical gloves in an operating room (Decision at para. 20). The Agency did not call any witnesses.

[13] After reviewing the relevant legal framework, the Tribunal held that to determine whether the goods at issue can be classified under tariff item 9977.00.00, it needed to determine whether the goods were: (i) articles; (ii) for use in; and (iii) instruments and appliances used in

surgical, dental or veterinary sciences (Decision at para. 41). Then, the Tribunal noted that the first and third criteria were not at issue, meaning that it was not disputed that the goods at issue were "articles" and that the scalpels – or "host goods" – were instruments used in surgical sciences (Decision at paras. 43-44).

[14] Therefore, the only issue before the Tribunal was whether the goods at issue were "for use in" the scalpels (or host goods). To answer that question, the Tribunal reverted to the *Customs Tariff*'s definition of "for use in" reproduced above and noted that the parties agreed that the gloves at issue were neither "wrought" nor "incorporated into" the scalpels (Decision at para. 45).

[15] As a result, what was left to be decided was whether the gloves at issues were "attached to" scalpels. To make that determination, the Tribunal applied a long-standing two-prong test. According to that test, to be considered as "attached to" surgical instruments, the Tribunal needed to be satisfied that the gloves at issue were both "functionally joined" and "physically connected" to these instruments (Decision at paras. 45-46; see for instance *Best Buy Canada Ltd., P & F USA Inc. and LG Electronics Canada Inc. v. President of the Canada Border Services Agency*, AP-2015-034, AP-2015-036 and AP-2016-001 at para. 77 (*Best Buy*); *Sonos Inc. v. President of the Canada Border Services Agency*, AP-2016-020 at para. 63; *Ubisoft Canada Inc. v. President of the Canada Border Services Agency*, AP-2013-004 at para. 59).

[16] The Tribunal concluded that the gloves at issue met both requirements. On joint functionality, the Tribunal held that the gloves enhanced the function of surgical instruments in

two ways: first, by "providing a necessary layer between the surgical instrument and the surgeon's hand that increases the grip on the instrument, decreases the risk of the instrument slipping from the surgeon's hand, and increases precision through improved tactile feedback"; second, by providing "a sterile barrier to protect both the surgeon and the patient from infection." In sum, for the Tribunal, the gloves at issue allow surgical instruments "to function properly and optimally in the operating room" (Decision at para. 57).

[17] On the physical connection requirement, the Tribunal, based on a brief review of past decisions, held that this requirement was satisfied in the presence of "a real and effective connection" between the goods at issue and the host goods. That connection, according to the Tribunal, need not be permanent, or, in certain instances, such as wireless connections, of a purely physical nature. Based on that, the Tribunal concluded as follows regarding the goods at issue:

> [77] In this case, there is a clearly established functional relationship between the surgical glove and the scalpel, which includes a decreased risk of infection, increased grip (connection) and improved tactile feedback.
>
> [78] Furthermore, the direct contact, albeit temporary, between the surgical glove and scalpel, and the special and mandatory relationship which exists between them for the duration of the surgery denote a real and effective connection. Therefore, the Tribunal finds that the test for physical connection has met the required threshold. The Tribunal is of the view that, in this case, the physical connection suffices to meet the threshold envisaged by Parliament.

IV. Issues

[18] In my view, this case raises three questions.

[19] At the outset, the Court must be satisfied that the Attorney General's appeal falls within the ambit of subsection 68(1) of the Act. Medline claims that it does not.

[20] But if it does, then two questions arise. The first is whether the Tribunal erred in law in concluding that the gloves at issue are "for use in" surgical instruments and are, therefore, properly classified under tariff item 9977.00.00, as contended by Medline. The second question concerns the Attorney General's separate judicial review application and how to dispose of it.

V. Analysis

A. The appeal falls within the purview of paragraph 68(1)(b) of the Act

[21] This Court's jurisdiction under subsection 68(1) of the Act is only triggered where the appeal raises a question of law (*Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151 at para. 14 (*Neptune*)).

[22] Tariff classification matters normally involve the application of a legal scheme to a set of facts, raising, thereby, questions of mixed fact and law (*Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 at para. 41). These do not qualify as questions of law for the purposes of statutory appeals limited to questions of law or jurisdiction (*Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 17 (*Emerson Milling I*)).

[23] However, alleged legal errors include "questions of law that are extricable from (i.e., taint or dominate) questions of mixed fact and law" (*Best Buy Canada Ltd. v. Canada (Border Services Agency)*, 2025 FCA 45 at para. 11 (*Best Buy 2025*), citing *Emerson Milling I* at para. 17). As the Supreme Court stated in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 27 (*Housen*) when discussing the appellate standard of review, "what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law" (see also *Best Buy 2025* at para. 11). In other words, the mere fact that a matter raises questions of mixed fact and law is no bar, in and of itself, to a subsection 68(1) appeal. Besides, a question of law remains a question of that nature even when "factually infused" (*Neptune* at para. 17, citing *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140 at paras. 49-51).

[24] Here, Medline contends that no extricable question of law arises in this case because all that the Tribunal did is to apply a legal standard stemming from established case law to the evidence adduced before it.

[25] I disagree. It is true that discerning extricable questions of law from questions of mixed fact and law may be challenging at times (*Neptune* at para. 16; *Canada (Border Services Agency) v. Danson Décor Inc*., 2022 FCA 205 at para. 13 (*Danson Décor*)). The Court must examine the "essential character" of the appeal by looking at the specific grounds of appeal set out in the notice of appeal (*Emerson Milling I* at para. 29; *Canada (Attorney General) v. Impex Solutions Inc*., 2020 FCA 171 at para. 37 (*Impex*)). The memorandum of fact and law can be used "to construe the notice of appeal." The goal is to "gain 'a realistic appreciation' of the

appeal's 'essential character'" (*Canadian National Railway Company v. Emerson Milling* Inc., 2017 FCA 86 at para.17 (*Emerson Milling II*), citing *Emerson Milling I* at para. 29).

[26] The Court must ultimately ensure that the appeal "in fact raise a question of law, and not questions of fact or of mixed fact and law masquerading as questions of law" (*Neptune* at para. 16).

[27] In his Notice of Appeal, the Attorney General claims that the Tribunal misinterpreted the *Customs Tariff* in concluding that the gloves at issue are "for use in," as defined in subsection 2(1) of the *Customs Tariff*, surgical instruments, like scalpels. The Attorney General says that the Tribunal's conclusion that the gloves were "attached to" scalpels merely by virtue of being held together by a hand is contrary to the modern approach to statutory interpretation, ignores the analytical framework set out in the Tribunal's own jurisprudence and leads to absurd results. As such, the Attorney General pleads, the Tribunal adopted an interpretation that the words of the *Customs Tariff* cannot bear.

[28] The Attorney General's Memorandum of Fact and Law sticks to the grounds of appeal found in the Notice of Appeal by providing a statutory interpretation analysis as well as a review of the case law on the expression "for use in," including the words "attached to" found in the English version of the definition of "for use in." The Attorney General does not take issue with the evidence adduced by Medline except to say that it is of no assistance to the extent that it is intended to support an interpretation that the words of the *Customs Tariff* cannot bear.

[29] In sum, this appeal clearly raises questions of law and not questions of fact or of mixed fact and law masquerading as questions of law. I would add that this is the first case where the concept of human intervention in the interpretation of the words “for use in” is being advanced. This is a pure question of law that is well within the ambit of subsection 68(1) of the Act.

B. The Tribunal erred in law in finding that the gloves at issue are “for use in” scalpels

(1) Standard of review

[30] As this Court held in *Neptune*, the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) “fundamentally changed how this Court is to conduct appeals pursuant to a statutory right of appeal.” Such appeals are no longer reviewed by applying judicial review criteria, as was the case until *Vavilov*. They are now to be reviewed by applying the appellate standard of review set out in *Housen*. Therefore, the standard of review on questions of law is correctness (*Neptune* at para. 13, referring to *Vavilov* at para. 37; *Impex* at para. 30; *Danby Products Limited v. Canada (Border Services Agency)*, 2021 FCA 82 at para. 4; *Danson Décor* at para. 13).

[31] This means that the Court owes no deference to the Tribunal and is “free to replace the opinion of the [Tribunal] with its own” (*Housen* at para. 8; *Canada (Border Services Agency) v. Cooper*, 2026 FCA 27 at para. 4).

(2) The question to be resolved and the underlying rules of statutory interpretation

[32] The question to be resolved here is whether the gloves at issue can be classified under tariff item 9977.00.00. It is not disputed that the gloves are "articles" and that scalpels are "[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences" within the meaning of that tariff item. The sole issue is whether they are "for use in" scalpels, as these words are defined at subsection 2(1) of the *Customs Tariff*, in a context where human intervention is required to ensure a connection between the gloves and the scalpel.

[33] It is well settled that the words of a statue must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para. 21).

[34] When it comes to bilingual enactments, where both the French and English versions are equally authoritative, a three-step methodology must generally be followed. First, both versions must be compared to assess whether any discordance exists between them. Second, if there is any discordance, the Court must look for a meaning common to both versions. Third, if there is a common meaning to both versions, then the Court must ensure that that meaning reflects parliamentary intent, relying on the ordinary rules of statutory interpretation (*Taylor v. Newfoundland and Labrador*, 2026 SCC 5 at paras. 87-90, quoting *R. v. Daoust*, 2004 SCC 6 at paras. 26-31 (*Daoust*)).

(3) The Attorney General's position

[35] The Attorney General contends that the Tribunal improperly expanded the meaning of the expression "for use in", incorrectly determined that the gloves at issue are "attached to" scalpels when held together in a surgeon's hand, and adopted an expansive interpretation of the functionality requirement.

[36] In particular, the Attorney General argues that the Tribunal's interpretation is contrary to the modern approach to statutory interpretation, in that:

(a) The plain and ordinary meaning of the words "attached to" requires some form of independent physical connection between the article (the gloves) and the host goods (the scalpel), an interpretation reinforced by the similarly narrow French version "entrer dans la composition d'autres marchandises […] par voie […] de fixation," the shared meaning of the French and English versions and the presence, in the definition of "for use in" of words like "wrought" and "incorporated into," which, according to the "associated words" rule of interpretation, reflects a high degree of physical incorporation into the host goods that goes beyond merely holding two goods in one's hand;

(b) On the joint functionality requirement, the language of tariff item 9977.00.00, unlike other tariff items, requires classification to be based on the article use in the instruments, not the article's usefulness to a person; put differently, the article must enhance the functionality of the host goods or allow it to acquire additional

capabilities; here, the Tribunal misconstrued the expression "for use in" by conflating the enhancements to the scalpel itself with the benefits to the surgeon's ability; and

(c) The Tribunal's broad interpretation of the words "for use in" is inconsistent with the purpose of Chapter 99, which is to eliminate duties otherwise payable, and which requires, as a result, a more restrictive interpretation to determine which goods should exceptionally benefit from free importation.

[37] The Attorney General further contends that the Tribunal's broad interpretation is inconsistent with established jurisprudence on both components – physical connection and joint functionality – of the expression "attached to."

(4) Medline's preliminary objection

[38] As a sort of preliminary objection, Medline faults the Attorney General for raising for the first time on appeal that the words "attached to" require some form of independent physical connection between the article and the host goods. It claims that this is impermissible as it was prevented from responding to that argument before the Tribunal as was the Tribunal prevented from addressing the argument. I take it that Medline is asking the Court to not consider this alleged new ground of appeal.

[39] This argument is without merit. There is no new ground of appeal. As was the case before the Tribunal, this appeal concerns the interpretation to be given to the definition of "for use in"

for the purposes of determining whether the goods at issue are eligible for duty relief, the key issue being ultimately the human interface in the relationship between the article and the host goods.

[40] With that in mind, I see nothing in the Attorney General's submissions before this Court that fundamentally differs from the position he took before the Tribunal. In other words, I see nothing legally and factually distinct from the issues litigated before the Tribunal. At best, the argument is packaged slightly differently.

[41] But even accepting that the "independent physical connection" argument can be characterized as a new argument, that would be a new argument on an existing issue, not a new issue on appeal. Simply offering different legal arguments on the same issue is not a problem, provided the opposing party has had fair notice of them and has had an opportunity to respond to them (*Nova Chemicals Corporation v. The Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC,* 2020 FCA 141 at paras. 86-87; *Canada (Commissioner of Competition) v. Secure Energy Services Inc*., 2022 FCA 25 at paras. 43-44). Here, Medline had fair notice of the "independent physical connection" argument and did in fact address it fully in its Memorandum of Fact and Law, at paragraphs 31 to 66 under the heading "Appellant's New Ground of Appeal has No Merit."

(5) Medline's position of the merits of the appeal

[42] On the actual merits of the Attorney General's submissions on physical connection, Medline contends that the definition of the expression "for use in" does not support the Attorney General's "independent physical connection" theory. It says that if the words "wrought or incorporated into" suggest that when physically connected, the article and the host goods are no longer independent from one another, this is not necessarily the case where they are "attached to" one another. This will all depend on the end use of the tariff item. Here, the requirement that there be no human intervention would render tariff item 9977.00.00 "without real world application" given that surgical instruments can only be used, due to regulatory requirements, if the surgeon wears the gloves at issue. According to Medline, the fact that the effective connection between the gloves and the scalpel is through human intervention is no ground for denying tariff relief "for products that are limited in their use to surgery applications" (Medline's Memorandum of Fact and Law at para. 61).

[43] On joint functionality, Medline takes issue with the Attorney General's contention that this requirement can only be satisfied when the host goods' function itself is enhanced, irrespective of their use by surgeons given the "clear understanding and expectation that the surgical instruments [sic] capabilities are entirely dependent on human intervention" (Medline's Memorandum of Fact and Law at para. 55).

[44] I disagree. A textual, contextual and purposive analysis of the expression “for use in” can only lead to one result: the gloves at issue are not “for use in” surgical instruments within the meaning of tariff item 9977.00.00.

(6) The gloves at issue are not “for use in” scalpels

(a) *The text*

[45] Again, the expression “for use in” is defined as follows:

for use in, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.	***devant servir dans*** ou ***devant servir à*** Mention dans un numéro tarifaire, applicable aux marchandises qui y sont classées et qui doivent entrer dans la composition d’autres marchandises mentionnées dans ce numéro tarifaire par voie d’ouvraison, de fixation ou d’incorporation.

[46] In the context of tariff item 9977.00.00 and of the goods at issue, to be “for use in” scalpels, the gloves at issue must “be wrought or incorporated into, or attached to” scalpels. According to the French version, they must “entrer dans la composition [des scalpels] par voie d’ouvraison, de fixation ou d’incorporation.”

[47] Medline concedes that the gloves at issue are neither wrought nor incorporated into scalpels. It is quite obvious that they are not, as the ordinary meaning of the expression “goods must be wrought or incorporated into other goods,” in both versions, connotes a high degree of

physical incorporation or integration of the article into the host goods, which is clearly not the case of the gloves at issue and the scalpels. This is evidenced by the following English and French dictionary definitions:

"Wrought": worked into shape by artistry or effort (*Merriam-Webster Dictionary* (online)); created, made; of a material or product: subjected to some process (*Oxford English Dictionary* (online)); made or done in a careful or decorative way (*Cambridge Dictionary* (online)**)**	**« Ouvraison »** : Vient de l'action d'ouvrer, ce qui signifie: travailler. façonner, mettre en œuvre un matériau (*Dictionnaire de l'Académie française* 9th ed. (en ligne)); mettre en œuvre, façonner des matériaux (*Le Petit Robert de la langue française* (en ligne)); travailler, orner des métaux, etc. (*Dictionnaire Larousse* (en ligne))
"Incorporated": united in one body (*Merriam-Webster Dictionary* (online)); united into one body; combined (*Oxford English Dictionary* (online)); to include something as part of something larger (*Cambridge Dictionary* (online))	**« Incorporation »** : Vient de l'action d'incorporer, ce qui signifie : mêler, unir intimement une substance à une autre de manière à obtenir un corps homogène; faire entrer quelque chose dans un ensemble, rattacher une partie à un tout (*Dictionnaire de l'Académie française* 9th ed. (en ligne)); unir intimement (une matière à une autre); faire entrer comme partie dans un tout (*Le Petit Robert de la langue française* (en ligne)); mêler intimement une matière à une ou plusieurs autres matières, de façon qu'elles forment un mélange homogène; faire entrer quelque chose dans un ensemble ;

	intégrer (*Dictionnaire Larousse* (en ligne))
	« Composition » : Action de former un tout, selon un plan déterminé, en assemblant plusieurs éléments ; résultat de cette action (*Dictionnaire de l'Académie française* 9th ed. (en ligne)); action ou manière de former un tout en assemblant plusieurs éléments ; disposition des éléments (*Le Petit Robert de la langue française* (en ligne)); entrer dans la composition de quelque chose : action de composer, de former un tout par assemblage; être un des éléments qui composent quelque chose (*Dictionnaire Larousse* (en ligne))

[48] As we have seen, the dispute in this case concerns the meaning of the words "attached to." Applying the two-prong test set out in the Tribunal's jurisprudence to determine whether goods are "attached to" other goods, Medline claims – and the Tribunal concluded – that the gloves at issue are "attached to" scalpels because they are physically connected to one another and functionally joined. They are physically connected to one another, they say, because there is a "real and effective connection", although temporary, between the gloves and the scalpel resulting from their "special and mandatory relationship" when they are used by surgeons for the duration of a surgery (Decision at para. 78). And they are functionally joined because while the scalpel is being used, the gloves decrease the risk of infection in the operating room, increase the surgeon's grip on the scalpel and improve tactile feedback.

[49] I agree with the Attorney General that this interpretation of the words “attached to” extends their ordinary meaning beyond what is permissible. The verb “to attach” ordinary means “connected, fastened or joined to something” (*Merriam-Webster Dictionary* (online); *Cambridge Dictionary* (online)). The definition of that verb in the *Oxford English Dictionary* is even more explicit: to attach is to “fasten or join (a thing) to another thing, or a place or position, by sticking, tying, stitching, clipping, etc.; to affix” (*Oxford English Dictionary* (online)).

[50] This strongly suggests, as the Attorney General contends, that the ordinary meaning of the words “attached to,” in the context of tariff item 9977.00.00, does require some form of independent physical connection or integration between the article and the host goods, such as tying, stitching, clipping or the like.

[51] But it becomes even clearer when, as mandated by the rules of interpretation of bilingual enactments, one looks at the French version of the definition of “for use in” where the French equivalent of the expression “goods must be […] attached to, other goods” is “entrer dans la composition d’autres marchandises […] par voie […] de fixation.”

[52] As indicated, “entrer dans la composition d’autres marchandises” means to be one of the elements forming a whole through assembly. As to the word “fixation,” it is defined as: “assujettir solidement à ou contre quelque chose”. Being the action of “fixer”, “fixer” is defined as follow: “assujettir un objet à, ou sur, quelque chose au moyen d'une attache, l'y maintenir” (*Dictionnaire Larousse* (online)). Clearly, there is no such interface between the gloves at issue

and scalpels; the gloves are not part of what forms a scalpel, even less by “fixation”, that is through some form of physical attaching mechanism.

[53] In my view, no discordance exists between the two versions. Both versions, based on the ordinary meaning of the words employed therein, require a form of physical connection between the gloves and the scalpel that goes beyond merely being held together in one’s hand. If anything, to the extent that one contends that the English version is somehow ambiguous and could be capable, therefore, of a more generous interpretation, the French version is not, with the result that the meaning common to both versions must be that of the more restricted or limited French version (*Daoust* at para. 29). As we will see, the meaning emanating from the wording of the French version reflects parliamentary intent.

[54] I note that in *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (*Agri Pack*), this Court accepted that the expression “attached to” does not “merely bear its ordinary grammatical meaning” and connotes, therefore, “given the legislative context in which the expression appears,” a functional relationship in addition to a physical relationship. However, the Court observed that by establishing this two-condition interpretation, the Tribunal had “effectively narrowed the meaning of ‘attached to’” (*Agri Pack* at para. 30, citing the Tribunal’s decision) (my emphasis).

[55] It seems to me that by concluding that there is a real and effective connection between the gloves and the scalpel on the basis of their “special and mandatory relationship” when they are

used by surgeons for the duration of a surgery, the Tribunal expanded the meaning of “attached to” well beyond what the words of the Act can bear.

[56] The conclusion that the gloves at issue are not “for use in” scalpels within the ordinary meaning of that expression is reinforced when that expression is read in context.

(b) *Context*

[57] There are two contextual features that support this conclusion. The first is the “associated words” rule invoked by the Attorney General. According to that rule, a term or an expression in a statute should not be interpreted without taking the surrounding terms into account (*Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para. 40 (*Opitz*)). This rule can be invoked, for instance, when two or more terms linked by “and” or “or” serve an analogous or logical function within a provision. This is undoubtedly the case here with the terms “must be wrought or incorporated into, or attached to, other goods” (“doivent entrer dans la composition d’autres marchandises par voie d’ouvraison, de fixation ou d’incorporation”).

[58] In such instances, and similar to a certain extent to what the rules of interpretation of bilingual enactments require, the search for a common feature among the terms serving an analogous function is permitted and can be relied on to resolve an ambiguity or limit the scope of the terms to their broadest common denominator (*Opitz* at para. 41, citing *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 227).

[59] I agree with the Attorney General that the terms “wrought” and “incorporated into” lend colour to the terms “attached to” and that their broadest common denominator, as determined when comparing the English and French versions of these terms, suggests that for the gloves at issue to be considered as “attached to” scalpels, a fairly high degree of physical incorporation or integration into scalpels, going well beyond holding the two goods in one’s hand, is required.

[60] The second contextual feature results from a breakdown of the different terms used in Chapter 99 of the *Customs Tariff* to describe relationships between goods, between goods and specific uses, or between goods and users. In addition to the expression “for use in,” the terms “for use by” (“utilisés par” or “exploités par” or “devant servir à” in the French version) and “for use with” (“utilisés pour” or “pour servir avec” or “pour être utilisés avec” or “à employer avec” in the French version) are also employed in Chapter 99.

[61] The term “for use by” is used in a number of tariff items (for example: tariff items 9927.00.00, 9939.00.00, 9975.00.00, and 9988.00.00). That term is not defined in the *Customs Tariff*, but when it is used, it refers to the user of the goods. For instance, tariff item 9927.00.00 speaks of articles and materials to be employed in the manufacture of host goods that are “for use by printers, lithographers, bookbinders, paper or foil converters, manufacturers of stereotypes, electrotypes or printing plates or rolls, or by manufacturers of articles made from paper, paperboard or foil.” Tariff item 9939.00.00 speaks of items of official uniforms “for use by personnel of militia regiments.”

[62] The expression “for use with” is even more telling. It is not defined in the *Customs Tariff* either but it is used when specifying use in relation to another good. For instance, tariff item 9903.00.00 speaks of machinery for bagging or boxing and weighing “for use with fresh fruit and vegetables”; tariff item 9948.00.00 of chart recorders and other instruments for measuring or checking electrical quantities, “designed for use with automatic data processing machines”; and tariff item 9960.00.00 of machinery, precision instruments and apparatus for the manufacture of cutting tools or parts thereof, “for use with machines, used in the manufacture of motor vehicles, motor vehicle parts or motor vehicle accessories or part thereof.”

[63] A review of the Chapter 99 tariff items that employ the expression “for use in” shows that it is used predominantly in relation to the manufacturing of another good or to repairing a particular good. When it is used in relation to manufacturing, the good at issue essentially forms part of the composition of another good. For instance, tariff item 9920.00.00. speaks of “[m]aterials for use in the manufacture of adhesive or surgical dressings, plasters, slabs or bandages,” etc.; tariff item 9945.00.00 of “[a]rticles and materials, wholly or in chief part of metal” for use in the manufacture of ball or roller bearings, boilers, captive balloons, etc. or parts thereof; and tariff item 9947.00.00 of articles or materials for use in the manufacture of “diodes, transistors and similar semiconductor devices…” (see also tariff items 9932.00.00, 9952.00.00, 9960.00.00, 9972.00.00).

[64] When it is used in relation to the repair of a particular good, the good at issue is effectively “wrought” into the composition of an existing good. Tariff item 9961.00.00 speaks of “air compressors, bushings or sleeve bearings of bronze or powdered metal, commutator

segments of copper," etc. for use in the repair of "road tractors for semitrailers, motor vehicles principally designed for the transport of persons or goods, or fire-fighting vehicles, and parts thereof"; and tariff item 9976.00.00 of "articles for use in the repair or overhaul of gas turbines or parts thereof." (see also tariff items 9901.00.00, 9962.00.00, 9963.00.00, 9975.00.00).

[65] The use, by Parliament, of different language to define relationships between goods, goods and specific uses, or goods and users, is telling as Parliament does not speak in vain, being presumed to not use superfluous, meaningless, or redundant words (*Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 61, citing *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58; *Lawyers' Professional Indemnity Company v. Canada*, 2020 FCA 90 at para. 52; *Contact Lens King Inc. v. Canada*, 2022 FCA 154 at para. 37). As we have seen, when Parliament intended to specify a specific good in relation to another good, it used the expression "for use with," not "for use in." And when it intended to specify a good in relation to specific users, it used the expression "for use by," not "for use in."

[66] Therefore, if Parliament intended to specify a good (the gloves) in relation to another good (scalpels), there is a presumption that it would have used the term "for use with." Also, it could have specified a good (the gloves) in relation to specific users (medical professionals). It did neither. As I said earlier, for the goods at issue, it instead used the term ("for use in") which predominantly appears, in Chapter 99, in relation to the manufacturing of another good or to repairing a particular good.

[67] Ultimately, no matter how we look at it, Medline's claim amounts to seeking duty relief on the basis that the gloves at issue are used with scalpels. Unfortunately for Medline, this is not what tariff item 9977.00.00, both from a text and context statutory interpretation analysis, provides for.

[68] This is further reinforced when one looks at the purpose of Chapter 99.

(c) *Purpose*

[69] Chapter 99 differs from Chapters 1 to 97 of the *Customs Tariff* in that it eliminates or reduces duties otherwise payable under Chapters 1 to 97 respecting specific goods. The Tribunal has adopted a restrictive interpretation of Chapter 99 in keeping with that purpose. In particular, it has set out a test intended to narrow the meaning of the terms "attached to" in the "for use in" definition.

[70] As indicated previously, our Court has accepted that this was a proper approach (*Agri Pack* at para. 30). As a result, tariff item 9977.00.00 is not to be read more broadly than necessary to give effect to Parliament's purpose.

[71] Here, the broad interpretation advocated by Medline, and accepted by the Tribunal, which, for all intents and purposes, invites the Court to read the expression "for use in" as if it meant "for use with", is simply not supported by the language, context and purpose of tariff

item 9977.00.00. The gloves at issue can only benefit from duty relief if they are "for use in", as opposed to "for use with", surgical instruments.

[72] I note that Medline did not address the interpretation of the expression "for use in" using the rules of interpretation applicable to bilingual enactments, except to say that this issue was "carefully canvassed" by the Tribunal in a previous decision, *Sony of Canada Ltd. v. Canada (National Revenue)*, AP-95-262 (*Sony*), where, Medline says, the Tribunal held that the term "'attached to' … did not [require that] goods in issue be incorporated into the host goods." (Medline's Memorandum of Fact and Law at para. 64). However, all the Tribunal did in that case was to accept the testimony of an Assistant university Professor in French Studies stating that both versions of the definition of "for use in" had the same meaning despite having different sentence structures. In that case, the Tribunal accepted that the goods at issue (certain magnetic data cartridges) were physically connected to the host goods (tape drives) on the basis of evidence that tape cartridges were physically integrated into tape drives when they were "drawn into a tape drive" and "secured into place" (*Sony* at p. 4). The gloves at issue are not drawn into scalpels and secured into place; they are not physically integrated into scalpels.

[73] From the perspective of the two-prong test derived from the Tribunal's line of cases used to determine whether an article is "attached to" a host good, neither requirement is met when considering the proper interpretation to be given to the expression "for use in". First, the physical connection criterion cannot be satisfied simply because the gloves at issue are meant to be used with scalpels, their use in an operating room is mandated by public health regulations, and they are being held together in one's hand during a surgical operation. Absent from the interface

between the gloves and the scalpel is any degree of physical incorporation of the gloves into the scalpel. Put differently, the gloves do not enter, to any degree, into the physical composition of the scalpel; their interface requires constant human intervention. There is simply no “real and effective connection” between them within the meaning of the term “for use in”.

[74] Second, Medline’s claim that the gloves at issue enhance the functionality of the scalpel has no merit either. The gloves rather enhance the ability of the surgeon while reducing the risks of infection in the operating room. Again, the joint functionality requirement was meant to narrow the meaning of “attached to”, not to expand it.

[75] Tariff item 9977.00.00 requires that classifications be based on the articles’ use “in” surgical instruments. As indicated previously, it does not apply to articles “for use with” surgical instruments or “for use by” surgeons. It is expressly limited to the articles’ “use in” such instruments, which clearly connotes that the articles at issue must be capable of enhancing the functionality of the surgical instruments themselves. The gloves at issue are without a doubt useful to those who wear them, but they cannot conceivably enhance the functionality of the scalpels themselves. The two – enhancements to the scalpel itself and the benefits of the gloves to surgeons – cannot be conflated without impermissibly expanding the meaning of “for use in”.

[76] Further, as noted by the Attorney General, no prior decisions support the theory that the gloves at issue and scalpels are either physically connected to one another or functionally joined.

[77] The only case referred to by the Tribunal on joint functionality is *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency*, AP-2017-025 (*Canadian Tire*), where the Tribunal found that a chair with a built-in sound system enhanced the function of the host goods (a computer, a DVD player or a video game console) as it allowed these goods "to render audio files in a way that the ear could hear and did so in a manner that delivered an increased sensory experience to the user" (Decision at para. 59).

[78] As with the chairs in *Canadian Tire*, the Tribunal opined that "decreasing the risk of infection for the user and the patient and increasing the grip and tactile feedback to enhance the surgeon's precision during surgery constitute a significant enhancement to the function of surgical instruments" (Decision at para. 60).

[79] I agree with the Attorney General that in *Canadian Tire*, the Tribunal did not substitute benefits to the user experience for enhancements to the host goods' function. Its main finding on joint functionality was that the chairs, "through [their] built-in speakers and subwoofers, enhance[d] the function of the host goods by providing a necessary or complementary sound output for those goods" (*Canadian Tire* at para. 43). While the Tribunal did refer to user experience, it did so when summarizing some of the evidence adduced before it. However, there is no indication that this evidence played any role in the Tribunal's joint functionality conclusion. If user experience had played a role, the *Canadian Tire* decision would have been wrong in law.

[80] Prior decisions on the physical connection criterion all require an independent physical connection or integration between goods and their host goods, whether it be through cable, wire, a hitch, clamped, encased or inserted (*Sony of Canada Ltd. v. the Commissioner of the Canada Customs and Revenue Agency*, AP-2001-097 at p. 2 (*Sony II*); *Best Buy* at paras. 5-6, 79; *Jam Industries Ltd. v. Canada (Border Services)*, AP-2005-006 at para. 8, aff'd *Jam Industries Ltd. v. Canada (Border Services Agency)*, 2007 FCA 210 at para. 7; *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency*, AP-2012-022 at para. 11; *Kverneland Group North America Inc. v. Canada Border Services Agency*, AP-2009-013 at para. 43; *Agri Pack* at paras. 21, 27; *PHD Canada Distributing Ltd. v. the Commissioner of Customs and Revenue*, AP-99-116 at p. 2; *Curve Distribution Services Inc. v. President of the Canada Border Services Agency*, AP-2011-023 at para. 66; *Sony* at p. 3).

[81] As indicated previously, the Tribunal's whole theory on physical connection rests on the view that such a connection need not be permanent and need not be, in all instances, of a purely physical nature, as evidenced by wireless connections. Here, according to the Tribunal, a "real and effective connection" between the gloves at issue and scalpels occurs, albeit temporarily, for two reasons: (i) they are in direct contact through the surgeon's hand during a surgery; and (ii) they have a "special and mandatory relationship" (Decision at para. 78).

[82] However, there is nothing in the case law that supports the idea of a physical connection requirement, be it permanent or temporary, where constant user intervention is required to sustain the connection. The reference to wireless connections is of no assistance. As is the case

for cables, wireless connections hold goods together independently, that is, without constant user intervention to sustain the connection.

[83] For all these reasons, I am of the view that the gloves at issue are not “for use in” surgical instruments within the meaning of tariff item 9977.00.00 and that, therefore, the Attorney General’s appeal under paragraph 68(1)(b) of the Act, is well-founded.

C. The separate judicial review application is not needed and should be dismissed

[84] As indicated at the outset of these reasons, the Attorney General’s separate judicial review application was brought in case the Court would rule that its appeal does not fall within the ambit of paragraph 68(1)(b) of the Act. Here, it does.

[85] As stated in *Best Buy 2025*, it is not because a party can bring an application for judicial review against a *Customs Tariff* classification decision from the Tribunal, that it should, given the limited circumstances in which judicial review is available in such matters in light of the current state of this Court’s jurisprudence (*Best Buy 2025* at para. 11).

[86] Hence, if a separate judicial review application to a paragraph 68(1)(b) appeal is brought by a party, especially, as is the case here, where it essentially adopts the submissions made in the appeal, it is not needed and is doomed to fail on that basis (*Best Buy 2025* at para. 16).

VI. Conclusion

[87] Therefore, I would allow the appeal and set aside the Decision. This is a case where only one result is possible. Thus, in the case of this appeal, we may use our power under paragraph 52(c)(i) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 to make the decision the Tribunal should have made. I would declare the gloves at issue to be not classifiable under tariff item 9977.00.00 of the *Customs Tariff*. I would grant costs in the appeal to the Attorney General.

[88] As for the separate judicial review application, I would dismiss it, without costs.

[89] The original of these reasons will be placed in file A-159-24 and a copy will be placed in file A-81-24.

"René LeBlanc"
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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