



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-066

Wolseley Canada Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, December 11, 2013*

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DECISION 12

IN THE MATTER OF an appeal heard on November 5, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated April 23, 2013, with respect to an advance ruling on tariff classification pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

WOLSELEY CANADA INC.

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 5, 2013
Tribunal Member: Pasquale Michaele Saroli, Presiding Member
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Carrie Vanderveen
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Wolseley Canada Inc. (Wolseley) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA).
2. The appeal is in respect of the tariff classification of a sink, specifically, the TOTO rectangle undercounter lavatory, model LT191G (the good in issue). The good in issue is designed to be installed in bathroom counters so that the sink rests below the level of the counter.
3. The parties agree, and the Tribunal accepts, that the good in issue is properly classified as a ceramic sink under tariff item No. 6910.90.00 of the schedule to the *Customs Tariff*.²
4. The only issue in this appeal is whether the good in issue qualifies for duty-free treatment under tariff item No. 9979.00.00 as a good specifically designed to assist persons with disabilities in alleviating the effects of those disabilities.

PROCEDURAL HISTORY

5. On September 30, 2011, Wolseley requested an advance ruling, pursuant to section 43.1 of the *Act*, on the appropriate tariff classification of the good in issue. In this regard, Wolseley requested that the good in issue be classified under tariff item No. 9979.00.00.
6. On October 20, 2011, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*, determining that the good in issue was properly classified under tariff item No. 6910.90.00 and that tariff item No. 9979.00.00 was not applicable.
7. On November 15, 2011, Wolseley requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.
8. On December 21, 2011, the CBSA informed Wolseley of its preliminary decision affirming the advance ruling.
9. On February 1, 2013, with the CBSA's final decision still pending, Wolseley filed the present appeal, contending that the CBSA's failure to issue a final decision "without delay", as it was required to do under subsection 60(4) of the *Act*, constituted a "non-decision" or a "negative decision" that is deemed to have affirmed the CBSA's advance ruling and which gives rise to appeal rights under subsection 67(1).
10. On April 23, 2013, the CBSA issued a purported decision under subsection 60(4) of the *Act* affirming its preliminary decision.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c .36.

11. On May 15, 2013, the CBSA requested an order dismissing the appeal on the basis that the Tribunal lacked jurisdiction to hear the appeal, on the grounds that the appeal was not properly before it and that the decision that was sought by Wolseley under subsection 60(4) of the *Act* had since been rendered by the CBSA.

12. By order dated June 17, 2013, the Tribunal denied the CBSA's request.

13. On July 17, 2013, the CBSA informed the Tribunal that it had appealed the Tribunal's order to the Federal Court of Appeal. The CBSA also requested that the Tribunal place the present appeal in abeyance pending the decision of the Federal Court of Appeal.

14. On July 22, 2013, the Tribunal denied the CBSA's request to place the present appeal in abeyance, having determined that it was properly seized of the matter and that proceeding with the present appeal would be most conducive to a timely and disposition of the matter. To this date, the Tribunal has not received any direction from the Federal Court of Appeal to stay this proceeding and its decision on the Tribunal's order of July 17, 2013, is still pending.

GOOD IN ISSUE

15. The good in issue is a bathroom sink of vitreous china. In terms of dimensions, the sink is 20 1/2" in length x 12 3/8" in width x 5 5/16" in depth. Both the offset drain and the overflow drain are positioned at the rear of the basin, with the underside of the sink being smooth and free of impediments. The sink is designed to be installed in a bathroom counter, such that the basin rests below the level of the countertop. If installed at the appropriate height and within a certain distance from the front edge of the counter, a person in a wheelchair can readily access the sink.³ That the design features of the good in issue allow for its compliance with the guidelines of the *Americans with Disabilities Act*⁴ pertaining specifically to lavatory sinks was uncontested.

ANALYSIS

Statutory Framework

16. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁵ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

3. As shown in the product specifications found at Exhibit AP-2012-066-05, Vol. 1A at tab 1.

4. The *Americans with Disabilities Act* (the *ADA*) is a U.S. statute providing standards which address, and try to eliminate, discrimination against individuals with disabilities in different settings, such as transportation, housing etc. The related *ADA Accessibility Guidelines for Buildings and Facilities* (the *ADA Guidelines*) provide technical specifications to be applied during the design, construction and alteration of different products or buildings, to ensure compliance with the *ADA*. The *ADA Guidelines* specifically address sinks. See Exhibit AP-2012-066-05 at tabs 14, 15.

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

17. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁶ and the *Canadian Rules*⁷ set out in the schedule.

18. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

19. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.¹⁰

20. The Tribunal must therefore first determine whether the good in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. If the good in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹¹

21. Once the Tribunal has used this approach to determine the heading in which the good in issue should be classified, the next step is to use a similar approach to determine the proper subheading.¹² The final step is to determine the proper tariff item.¹³

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

7. S.C. 1997, c. 36, schedule.

8. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

9. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

10. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to *Classification Opinions*.

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

12. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

13. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” *Classification Opinions* and *Explanatory Notes* do not apply to classification at the tariff item level.

Tariff Classification

22. As indicated above, the parties agree, and the Tribunal accepts, that the good in issue is properly classified under tariff item No. 6910.90.00 as follows:

Chapter 69

CERAMIC PRODUCTS

...

69.10 Ceramic sinks, wash basins, wash basin pedestals, baths, bidets, water closet pans, flushing cisterns, urinals and similar sanitary fixtures.

...

6910.90.00 -- -Other

23. As also noted above, the only issue in this appeal is whether the good in issue qualifies for duty-free treatment under tariff item No. 9979.00.00, which provides as follows:

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...

9979.00.00 *Goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and articles and materials for use in such goods.*

[Emphasis added]

24. Chapter 99, which includes tariff item No. 9979.00.00, provides special classification provisions that generally allow certain goods to be imported into Canada duty-free. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

Wolseley's Position

25. Wolseley maintains that the good in issue was specifically designed to assist disabled persons confined to wheelchairs. In support of this claim, Wolseley asserted (i) that the good in issue was specifically designed to meet the *ADA Guidelines*, which are themselves directed at the elimination of discrimination by ensuring that persons with disabilities have access to various facilities, including sinks,¹⁴ and (ii) that TOTO's design process includes testing at its universal design centre in Japan to ensure that its products conform to the principle of "universal design", whereby products can be used by persons with and without disabilities.¹⁵

26. In this regard, Wolseley pointed to particular design features of the good in issue that facilitate its use by persons with disabilities and which conform to specific *ADA Guidelines* in respect of sinks. For example, (i) the 5 5/16" depth of the sink falls within the ADA-prescribed maximum of 6.5", which is

14. Exhibit AP-2012-066-05, Vol. 1A at paras. 34-36; *Transcript of Public Hearing*, Vol. 1, 5 November 2013, at 16.

15. Exhibit AP-2012-066-05, Vol. 1A at paras. 27-28.

intended to ensure that persons in wheelchairs are able to reach the bottom of the bowl,¹⁶ (ii) the location of both the offset drain and overflow drain toward the rear of the sink facilitates conformity with the *ADA Guidelines* requiring that exposed drain pipes be configured in a manner that allows for appropriate knee clearance,¹⁷ and (iii) the underside surface of the sink is smooth and non-abrasive.¹⁸

27. Wolseley further asserted that, by allowing disabled persons to perform normal everyday activities (e.g. washing one's hands and brushing one's teeth), it can be said that the good in issue alleviates the effects of the disabilities of those persons.¹⁹ Finally, Wolseley contended that, because the *ADA Guidelines* are themselves intended to alleviate the effects of disabilities, it follows, by necessary implication, that goods conforming to those guidelines are specifically designed to alleviate those same effects.²⁰

28. In Wolseley's view, that the good in issue can also be used by non-disabled members of the general public does not detract from the fact that it is "specifically designed" for use by persons with disabilities.²¹ It submitted that the good in issue was designed on the basis of "...the principle of universal design... [according to which] goods should be designed in such a way that all potential users may use the product."²² Wolseley described this principle as the prevailing means of designing goods for persons with disabilities.²³ It contended that adherence to this design principle also allows persons with disabilities to not be segregated from the general public by their use of certain goods²⁴ and, instead, to be accommodated without the need for dedicated facilities.²⁵

29. Wolseley submitted that Parliament did not intend the phrase "specifically designed" in tariff item No. 9979.00.00 to be limited to goods "solely designed" to assist persons with disabilities, to the exclusion of goods based on the principles of universal design.²⁶ It claimed that the purpose of that provision was to offer duty-free treatment for certain goods for persons with disabilities in order to improve their lives.²⁷ In this connection, Wolseley contended that, although, "...from a legal perspective, the idea of inclusive design... is consistent with [t]he Canadian Charter of Rights and Freedoms... [t]he Respondent wants to limit [tariff item No. 9979.00.00] to goods which would only be used by persons with

16. Exhibit AP-2012-066-05, Vol. 1A at para. 44.

17. Exhibit AP-2012-066-05, Vol. 1A at para. 45.

18. A letter from the manufacturer of the good in issue indicates that TOTO takes into consideration specification requirements under various standards, including those prescribed under the *ADA*, when designing sinks. This includes ensuring that there is no part of the sink interfering with barrier-free access, that the underside surface is non-abrasive and that the bowl is not more than 6 1/2" in depth. See Exhibit AP-2012-066-05, Vol. 1A at para. 3; Exhibit No. AP-2012-066-05, Vol. 1A at tab 17.

19. Exhibit AP-2012-066-05, Vol. 1A at para. 48.

20. Exhibit AP-2012-066-05, Vol. 1A at paras. 48-50.

21. In support of its position, Wolseley referred to the Tribunal's decision in *Masai Canada Limited v. President of the Canada Border Services Agency* (5 August 2011), AP-2010-025 (CITT) [*Masai*] at para. 41, in which the Tribunal stated as follows: "The Tribunal is also of the view that, even if the goods in issue are, in fact, marketed and used by individuals who do not suffer from disabilities, this does not negate the fact that the goods in issue were designed specifically to address a condition that may be associated with the cause of various disabilities".

22. Exhibit AP-2012-066-05, Vol. 1A at para. 27.

23. Exhibit AP-2012-066-05, Vol. 1A at para. 27.

24. Exhibit AP-2012-066-05, Vol. 1A at para. 27.

25. Exhibit AP-2012-066-05, Vol. 1A at para. 27.

26. *Transcript of Public Hearing*, Vol. 1, 5 November 2013, at 27-29; Exhibit AP-2012-066-05, Vol. 1A at paras. 16-20.

27. Exhibit AP-2012-066-05, Vol. 1A at para. 30.

disabilities . . . [implying that] [w]e have to segregate.”²⁸ In furtherance of its submission, Wolseley referred to the admonition of the Supreme Court of Canada in *Eaton v. Brant County Board of Education*²⁹ regarding the need to “fine-tune” society in favour of inclusiveness and the integration of disabled persons.³⁰

30. Finally, Wolseley asserted that the installation requirements that must be followed in order for the good in issue to actually comply with the *ADA Guidelines* are not relevant to the question of classification under tariff item No. 9979.00.00 because they do not speak to the design of the good in issue as it exists at the time of importation.³¹ Wolseley further underlined that there is no end use requirement in tariff item No. 9979.00.00, with the issue of whether the good in issue is actually installed in a given manner, or whether it is actually used by persons with disabilities, being irrelevant.³²

CBSA’s Position

31. The CBSA maintains that the good in issue has not been specifically designed to assist persons with disabilities because it is “. . . merely of a design that may, in certain circumstances and if installed in a certain way, be used by a person with a disability.”³³

32. According to the CBSA, the evidence falls short of establishing that the design of the good in issue was purposefully related to assisting persons with disabilities in alleviating the effects of disabilities. It argued that the sink, being of “universal design”, is not “specifically” designed for persons with disabilities; rather, it is designed for use by a broad consumer demographic, with disabled persons being only one of the markets being targeted by the manufacturer.³⁴ In this connection, it points to a letter by a senior official of TOTO USA, Inc. confirming that the design of the good in issue took into consideration a variety of standards extending beyond those prescribed by the ADA and a wide range of markets, including the consumer demographic comprised of persons with disabilities.³⁵

28. *Transcript of Public Hearing*, Vol. 1, 5 November 2013, at 18, 20.

29. [1997] 1 S.C.R. 241.

30. *Transcript of Public Hearing*, Vol. 1, 5 November 2013 at 20.

31. It is well established in law that the tariff classification of goods is based on an examination of the goods as a whole, as presented for importation. In this regard, the Supreme Court of Canada, in *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, indicated that the time for determining tariff classification was at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada’s customs legislation in 1955, it is the Tribunal’s view that the principle set out in that case remains valid today despite various amendments by Parliament to Canada’s customs legislation in the intervening years. See, in this regard, *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case. See, also, *Sealand of the Pacific Ltd. v. Deputy M.N.R.* (11 July 1989), 3042 (CITT); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) at para. 29; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) at para. 29; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 22; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) [*Costco*] at para. 16.

32. Exhibit AP-2012-066-05, Vol. 1A, at para. 39.

33. Exhibit AP-2012-066-24A, Vol. 1C at para 1.

34. Exhibit AP-2012-066-24A, Vol. 1C at para. 19.

35. This is a reference to the November 11, 2011, letter of the Senior Vice-President – Americas Sales Division of TOTO USA, Inc. stating as follows: “. . . TOTO takes into consideration specification requirements for various standards including those in the Americans with Disabilities Act (ADA) when designing sinks for retail sale” which “allows TOTO to sell its products to a wider market and ensure that it maximizes its potential sales.” See Exhibit AP-2012-066-05, Vol. 1A at tab 17.

33. In support of its position, the CBSA pointed to a Canada Mortgage and Housing Corporation document titled “Accessible Housing by Design—House Designs and Floor Plans”, which defines “universal design” as follows: “The design of products and environments to be usable by all people, to the greatest extent possible, *without the need for adaptation or specialized design*” [emphasis added].³⁶

34. The CBSA added that the *ADA* standard to which Wolseley referred—being an U.S. standard—is irrelevant and that it was unclear from the evidence whether the good in issue met the Canadian Standards Association (CSA) accessibility standard.³⁷ In any case, the good in issue only becomes compliant with the *ADA*, according to the CBSA, if it is mounted in accordance with certain measurements, meaning that it may never be used by a person with disabilities.

35. The CBSA argued that the good in issue, being of “universal design”, is not “specifically” designed for persons with disabilities; rather, it is designed for use by a broad market demographic, with disabled persons being only one of the markets being targeted by TOTO.³⁸

36. The CBSA claimed that the classification of goods of universal design under tariff item No. 9979.00.00 would effectively render the phrase “specifically designed” in that tariff item meaningless.³⁹

Tribunal’s Analysis

37. In appeals under section 67 of the *Act*, the appellant, by operation of law, bears the burden of demonstrating that the CBSA incorrectly classified the goods in issue.⁴⁰ This means that the onus of demonstrating that the conditions of tariff item No. 9979.00.00 are met by the good in issue resides with Wolseley.

38. As already noted, tariff item No. 9979.00.00 covers “[g]oods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and articles and materials for use in such goods”.

36. Exhibit AP-2012-066-05, Vol. 1A at tab 9.

37. Exhibit AP-2012-066-24A, Vol. 1C at para. 21. The CSA standard is provided in Exhibit AP-2012-066-06, Vol. 1B at tab 16.

38. Exhibit No. AP-2012-066-24A, Vol. 1C at para. 19.

39. Exhibit AP-2012-066-24A, Vol. 1C at para. 28. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 26, Iacobucci J. sets out the principle of statutory interpretation that an interpretation may not render some aspect of a statute pointless or futile. This principle was reaffirmed in *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at para. 48 where the Supreme Court of Canada states that all words in a statute must be given meaning.

40. In this regard, subsection 152(3) of the *Act* provides as follows: “. . . in any proceeding under this Act, the burden of proof in any question relating to . . . (c) the payment of duties on any goods . . . lies on the person, other than Her Majesty, who is a party to the proceeding . . .” The present appeal is a proceeding under subsection 67(1). Moreover, because duty liability on imported goods depends upon their tariff classification, tariff classification is a question “relating to” the payment of duties on goods, within the meaning of paragraph 152(3)(c). With the conditions of paragraph 152(3)(c) having been met, the burden of proof therefore resides with Wolseley. See, for example, *Costco* at para. 23.

39. There are no notes to Section XXI (which includes Chapter 99). Note 3 to Chapter 99 is however relevant to the issue of whether the good in issue is classifiable under tariff item No. 9979.00.00. It provides as follows:

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

[Emphasis added]

40. According to the first requirement of Note 3 to Chapter 99, the good in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 is effected. With the Tribunal having accepted that the good in issue is properly classified under tariff item No. 6910.90.00 as other ceramic sinks, wash basins, wash basin pedestals, baths, bidets, water closet pans, flushing cisterns, urinals and similar sanitary fixtures, this condition has been met.

41. According to the second requirement of Note 3 to Chapter 99, the classification of the good in issue under tariff item No. 9979.00.00 is contingent on the conditions of that provision having been met. In this regard, the Tribunal, in *Sigvaris Corporation v. President of the Canada Border Services Agency*,⁴¹ stated as follows:

26. In the Tribunal's view, the language makes it clear that the following two conditions must be met in order for the goods in issue to be classified under tariff item No. 9979.00.00: (1) the goods in issue must be *specifically designed to assist persons with disabilities*; and (2) the goods in issue must be specifically designed to assist such persons in *alleviating the effects of those disabilities*. Accordingly, the focus of the legal test under consideration is the design of the goods in issue.

[Emphasis in Original]

42. In *Nutricia North America v. President of the Canada Border Services Agency*,⁴² the Tribunal, in distinguishing between "disabilities" on the one hand, and their "effects" on the other, explained that "... 'disabilities' refer to the functional limitations resulting from a disease, ailment or other impairment, with the 'effects of those disabilities' being the inability to perform activities in a manner, or within the range, considered normal."⁴³

43. The evidence indicates that, in the context of its universal design, the good in issue responds to specifications under various codes and standards, including those prescribed under the *ADA*⁴⁴ in respect of lavatory sinks, which can be summarized as follows:

41. (23 February 2009), AP-2007-009 (CITT) [*Sigvaris*].

42. (18 May 2011), AP-2009-017 (CITT) [*Nutricia*].

43. *Nutricia* at para. 120.

44. Exhibit AP-2012-066-05, Vol. 1A at tab 1. In this connection, the Tribunal rejects the CBSA's contention that compliance with the *ADA* standards pertaining specifically to lavatory sinks is of no relevance to the question of whether the good in issue, as presented for importation into Canada, is designed to assist persons with disabilities in alleviating the effects of those disabilities. See Exhibit AP-2012-066-24A at para. 21. While the good in issue is apparently only explicitly marked to compliance with U.S. accessibility standards in the product literature, this, in and of itself, is indicative of the fact that the good in issue is specifically designed to accommodate persons with disabilities.

4.24 – Sinks

Guideline No.	Subject	Specification Relevant to Goods in Issue as Presented for Importation	Specification Relevant to Post-Importation Installation, etc.	Compliance
4.24.2	Height	Not applicable	Sinks shall be mounted with the counter or rim no higher than 34 in. (865 mm) above the finish floor.	
4.24.3	Knee Clearance	Not applicable	Knee clearance that is at least 27 in. (685 mm) high, 30 in. (760 mm) wide, and 19 in. (485 mm) deep shall be provided underneath sinks.	
4.24.4	Depth	Each sink shall be a maximum of 6 1/2 in. (165 mm) deep.		The sinks in issue are only 5 5/16 in. deep.
4.24.5	Clear Floor Space	Not applicable	A clear floor space at least 30 in. by 48 in. (760 mm by 1220 mm) complying with 4.2.4 shall be provided in front of a sink to allow forward approach. The clear floor space shall be on an accessible route and shall extend a maximum of 19 in. (485 mm) underneath the sink.	
4.24.6	Exposed Pipes and Surfaces	Hot water and drain pipes exposed under sinks shall be insulated or otherwise configured so as to protect against contact. There shall be no sharp or abrasive surfaces under sinks.		Both the offset drain and overflow drain are positioned at the rear of the sink to allow pipes to be configured so as to protect against contact. The underside of the sink is smooth and free of abrasive surfaces..
4.27.4	Faucets	Not applicable	Faucets shall comply with 4.27.4. Lever-operated, push-type, touch-type, or electronically controlled mechanisms are acceptable designs.	

44. As a result, the good in issue, appropriately installed, is accessible to, among others, persons confined to wheelchairs by reason of disease, ailment or other impairment. In so doing, the good in issue facilitates the performance by such persons of certain activities (e.g. the washing of hands and the brushing of teeth) in essentially a normal manner. The Tribunal is therefore satisfied that the design of the good in issue assists persons with disabilities in alleviating the effects of those disabilities.

45. There remains however the question of whether the good in issue is “specifically” designed for such purpose, within the intended meaning of that word in tariff item No. 9979.00.00. Stated differently, does the fact of universal design necessarily preclude the possibility of a finding of specific design?

46. The Tribunal, in *Sigvaris*, stated that, unlike the provisions of certain social policy legislation which may have been read by the courts in a broad and generous manner, there is nothing particular about tariff item No. 9979.00.00 that would require it to be given a liberal interpretation, and that, like for most other tariff-related provisions, the emphasis should be placed on the grammatical and ordinary sense of the provision.⁴⁵

47. In *Masai*, the Tribunal commented that the specific intent required by the phrase “specifically designed” is best established by evidence of a “purposeful intent”.⁴⁶ Returning to the present case, it is the Tribunal’s view that universal design and purposeful intent to accommodate the special requirements of a particular group of persons are not mutually exclusive objectives. A product based on the principle of universal design that includes, among its features, those intended to assist persons with disabilities, is specifically designed for that purpose, notwithstanding the fact that others can also avail themselves of it. Indeed, one could reasonably argue that universal design necessarily implies a purposeful intent in the design of goods to accommodate the specific needs and requirements of each of the groups comprising the universe of potential users of those goods.

48. The definition of the term “specifically” in the *Oxford English Dictionary*⁴⁷ includes the following: “2: In a specific or definite form or manner . . . 4. In a special manner”. In the same vein, the definition of that term in *Webster’s Third International Dictionary*, includes the following: “2. . . in a definite manner.” In the Tribunal’s view, the fact that goods are designed in a specific or definite form or manner to fulfill a particular purpose (for example, to assist persons with disabilities in alleviating the effects of those disabilities) does not imply, by virtue of that fact alone, the singularity of purposeful intent—it being conceivable that a particular purpose could be fulfilled without a commitment by design to the exclusive fulfillment of that singular purpose and, instead, within a broader conceptual paradigm, such as universal design.

49. This view is consistent with the Tribunal’s decision in *Masai*. In that case, the Tribunal found that the shoes in issue, which were designed to alleviate certain disabilities associated with a lack of muscle stimulation in the lower limbs, were specifically designed to assist persons with disabilities,⁴⁸ even though they were, in fact, also marketed to, and used by, individuals who did not suffer from those disabilities. In

45. *Sigvaris* at para. 29. Indeed, that the approach to the interpretation of tariff item No. 9979.00.00 was intended to be essentially the same as for the other tariff provisions in the Nomenclature is supported by Note 4 to Chapter 99, which provides as follows: “The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.”

46. *Masai* at para. 21.

47. Second ed., Vol. XVI.

48. See *Masai* at para. 40.

arriving at its conclusion, the Tribunal stated that “. . . even if the goods in issue are, in fact, marketed and used by individuals who do not suffer from disabilities, this does not negate the fact that the goods in issue were designed specifically to address a condition that may be associated with the cause of various disabilities.”⁴⁹

50. The Senior Vice-President – America’s Sales Division of TOTO USA, Inc., in his letter of November 11, 2011, indicated that, in order to sell the products to a wider market that includes the demographic comprised of disabled persons, “TOTO takes into consideration specification requirements for various standards including those in the Americans with Disabilities Act (ADA) when designing sinks”⁵⁰

51. Indeed, the specific features incorporated into the universal design of the good in issue, as set out in product literature and related schematic drawings and specifications⁵¹, evince, in the Tribunal’s view, a clear and purposeful intention on the part of the designers of the good in issue to assist, within a universal design paradigm, persons with disabilities in alleviating the effects of those disabilities by facilitating their access to, and usage of the sink in the carrying out of normal, everyday ablutions.⁵²

52. Turning to the CBSA’s assertion that, “. . . while the sink may be used by a person with a disability when it is installed in a particular way, the sink is not designed specifically for a person with a disability . . .”,⁵³ with “. . . it [being] the construction of the cabinetry that determines whether or not it will be accessible to disabled persons”,⁵⁴ and with “[t]he sink at the time of importation and/or after importation [being] a common sink for commercial or residential use . . .”,⁵⁵ the Tribunal agrees with Wolseley that the fact that the good in issue only actually achieves the objective of being accessible to persons in wheelchairs when it is installed according to certain specifications is irrelevant for the purposes of tariff item No. 9979.00.00. As already noted, it is well established in law that the tariff classification of goods is based on an examination of the goods as a whole, as presented for importation. As presented for importation, the good in issue is, in the Tribunal’s view, and for reasons already discussed, specifically designed to assist persons confined to wheelchairs by reason of disability in alleviating the effects of those disabilities by facilitating their access to, and use of the sink in the carrying out of normal, everyday ablutions. That this specific design intent might be frustrated by the manner in which the sink is ultimately installed after importation does not bear upon the classification of the good in issue at the time of importation. Indeed, as recognized by the CBSA,⁵⁶ the text of tariff item No. 9979.00.00 requires the goods falling within its ambit to be *designed* to assist persons with disabilities but does not require the goods to be *used* by those with disabilities.

53. On the basis of the foregoing analysis, the Tribunal finds that the good in issue is properly classified under tariff item No. 9979.00.00.

49. See *Masai* at para. 41.

50. Exhibit AP-2012-066-05, Vol. 1A at tab 17.

51. AP-2012-066-05, Vol. 1A at tab 1.

52. As already noted, these features relate to the shallow depth of the bowl, the rear placement of the offset and overflow drains, and the smooth and non-abrasive underside of the sink.

53. Exhibit AP-2012-066-24A, Vol. 1C at para. 20.

54. Exhibit AP-2012-066-05, Vol. 1A at tab 2.

55. Exhibit AP-2012-066-05, Vol. 1A at tab 2.

56. See, for example, *Transcript of Public Hearing*, 5 November 2013, at 46.

54. Given its finding, the Tribunal does not feel compelled to address Wolseley's arguments based on the *Canadian Charter of Rights and Freedoms*.

DECISION

55. The appeal is allowed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member