



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-022

N.C. Cameron & Sons Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, June 14, 2007*

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IN THE MATTER OF an appeal heard on February 5, 2007, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated May 12, 2006, with respect to a request for re-determination of an advance ruling under subsection 60(4) of the *Customs Act*.

BETWEEN

N.C. CAMERON & SONS LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed (Member Fry dissenting).

Serge Fréchette
Serge Fréchette
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 5, 2007
Tribunal Members:	Serge Fréchette, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Eric Wildhaber
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Appearances:	Trent Cosgrove, for the appellant Jennifer Francis, for the respondent

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from a decision made on May 12, 2006, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the “All About Dance BLONDE JAZZ GIRL Figurine” (the good in issue) should be classified under tariff item No. 9502.10.00 of the schedule to the *Customs Tariff*² as a doll representing only a human being, whether or not dressed, as claimed by N.C. Cameron & Sons Ltd. (N.C. Cameron), or whether it is properly classified under tariff item No. 3926.40.10 as a statuette and other ornamental article, as determined by the CBSA.

3. With the consent of the parties, the Tribunal decided to hold a hearing by way of written submissions pursuant to rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.³ In accordance with rule 36.1, a notice to this effect was published in the January 13, 2007, edition of the *Canada Gazette*.⁴ The Tribunal invited N.C. Cameron to submit a reply brief by January 17, 2007, which it did on January 11, 2007.

4. A physical exhibit of the good in issue was filed with the Tribunal.

5. The relevant nomenclature from the *Customs Tariff* reads as follows:

...

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

...

3926.40 -Statuettes and other ornamental articles

3926.40.10 00 ---Statuettes

3926.40.90 00 ---Other ornamental articles

...

95.02 Dolls representing only human beings.

9502.10.00 00 -Dolls, whether or not dressed

ANALYSIS

6. For the purposes of this appeal, the Tribunal must follow section 10 of the *Customs Tariff*, which provides that the tariff classification of goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁵ and the *Canadian Rules*.⁶ 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 General Rules ...” The *General Rules* comprise six rules structured in

1. R.S.C. 1985 (2d Supp.) c. 1 [Act].

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

3. S.O.R./91-499.

4. C. Gaz. 2007.I.54.

5. *Supra* note 2, schedule [General Rules].

6. *Supra* note 2, schedule.

cascading form. If the classification of goods cannot be determined in accordance with Rule 1 of the *General Rules*, then regard must be had to Rule 2 of the *General Rules* and so on, until classification is completed.

7. In addition, the Tribunal is guided by section 11 of the *Customs Tariff*, which provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁷ and to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁸

8. In reaching its decision, the Tribunal must first determine whether the section or chapter notes require that the good in issue be classified in a particular heading. Chapters 39 and 95 contain no legal notes that expressly pertain to the good in issue. That being said, note 2 to Chapter 39 provides a list of exclusions from that chapter. The list includes the following exclusion: “. . . (v) Articles of Chapter 95 (for example, toys, games, sports requisites)” It is therefore necessary for the Tribunal to determine whether the good in issue can be considered a toy and, more specifically, whether it can be considered a doll representing only a human being, whether or not dressed.

9. N.C. Cameron argued that heading No. 95.02 for “[d]olls representing only human beings” is more descriptive than heading No. 39.26 for “[o]ther articles of plastics and articles of other materials of headings 39.01 to 39.14.” N.C. Cameron also argued that justification for the good in issue being classified in heading No. 95.02 is found in the *Explanatory Notes* to Chapter 95, which read as follows: “. . . [Chapter 95] covers toys of all kinds whether designed for the amusement of children or adults. . . . The articles of [Chapter 95] may, in general, be made of any material” In support of its position, N.C. Cameron also relied on the *Explanatory Notes* to heading No. 95.02, which read as follows: “. . . [Heading No. 95.02] includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes Dolls are usually made of rubber, plastics”

10. The *Concise Canadian Oxford Dictionary* defines a “doll” as “a [usually] small model of a human figure, [usually] a child or woman, [especially] for use as a toy. . . .”⁹ In other words, a “doll” is a “toy” in the form of “a small model of a human figure”. In the Tribunal’s view, there is no doubt that the good in issue qualifies as a small model of a human figure. The remaining question that must be answered is whether it is especially for use as a toy.

11. In *Franklin Mint Inc. v. President of the Canada Border Services Agency*,¹⁰ the Tribunal was faced with an issue that was similar to the issue in this appeal. Indeed, in that case, the Tribunal had to decide whether figurines that evoked the memory of particular scenes in the movie *The Wizard of Oz* should be classified as other toys under tariff item No. 9503.90.00 or whether they were properly classified as statuettes of plastics and other materials under tariff item No. 3926.40.10.

7. World Customs Organization, 2d ed., Brussels, 2003.

8. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

9. 2005, s.v. “doll”.

10. (13 June 2006), AP-2004-061 (CITT) [*Franklin Mint*].

12. In *Franklin Mint*, the Tribunal considered the “play value” of an object as an identifying aspect of it being a toy. This marked a further refinement of the pronouncements that the Tribunal had previously made in *Zellers Inc. v. Deputy M.N.R.*¹¹ and *Regal Confections Inc. v. Deputy M.N.R.*¹² The following is the relevant excerpt from *Franklin Mint*:

...

13. In *Zellers*, the Tribunal gave the following description of a toy:

In essence, a toy is something from which one derives amusement or pleasure. Toys can replicate things or animals or have forms of their own. They can be of hard or stiff construction, or be soft and cuddly. They can be designed for manipulation or for display on a shelf. They can be cute and friendly in presentation, or be fierce and frightening. They can be designed for rough and tumble use or require careful handling. Their value is often small in cash terms, although some toys, such as miniature electric train sets, can easily cost thousands of dollars. This is all to say that toys cover a world of products, some of which are readily identified as toys and some of which are recognizable as toys only upon closer inspection.

14. In *Regal*, the Tribunal supplemented its reasoning by saying the following:

Regarding toys generally, and in light of *Zellers*, the Tribunal notes that, in *Zellers*, the Tribunal referred to the essence of a toy as being amusement. *That does not mean, however, merely because a product provides amusement value, that it should necessarily be classified as a toy.* It is common knowledge that a child will play for hours with an empty cardboard box, a paper bag or a stick. *Thus, the Tribunal is of the view that amusement alone does not make an object a toy for the purpose of tariff classification.*

[Emphasis added]

15. Applying Rule 1 of the *General Rules*, the Tribunal finds that the goods cannot be classified in heading No. 95.03. In light of the Tribunal’s jurisprudence, and in particular *Regal*, the Tribunal does not consider the goods to be toys. The Tribunal acknowledges that, although they may have an amusement value, this factor is not determinative and does not make them toys for the purpose of tariff classification. “Play value” is an identifying aspect of toys, and the testimony focussed on the visual aesthetic value of these items as the pleasure-giving element and, in fact, de-emphasized any play value that they might have. The goods are not sold as toys, are usually not played with by children and are not designed to be manipulated. This is particularly true of the bell jars. Moreover, the testimony of Franklin’s witness indicated that the goods were marketed as collector’s items rather than toys in order to fetch a higher price in the market.

...

[Footnotes omitted]

13. Considering these previous decisions and the particular facts of this appeal, the Tribunal is of the opinion that it is the aesthetic value of the good in issue that provides it with its pleasure-giving element. This view is supported by the manufacturer’s own marketing material which focuses entirely on this particular aspect of the good. In fact, the aesthetic value, the construction and the design of the good de-emphasized almost entirely any potential “amusement value” or “play value” that the good might have. The Tribunal agrees with the view advanced by the CBSA that the good in issue is highly fragile and, therefore,

11. (29 July 1998), AP-97-057 (CITT) [*Zellers*].

12. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].

not suitable for being played with or frequently manipulated as a toy or doll would be.¹³ Nothing in the evidence submitted to the Tribunal suggests that the good in issue is sold as a toy or that it is designed to be played with or to be manipulated as such.

14. In support of its position, N.C. Cameron also invoked the fact that the *Explanatory Notes* to heading No. 95.02 state that goods of that heading include "...not only dolls designed for the amusement of children, but also *dolls intended for decorative purposes* ..." [emphasis added] and that any such "[d]olls are usually made of rubber, plastics ..." Although the Tribunal accepts the proposition that the good in issue may have a certain decorative element considering its aesthetic value, on balance, the Tribunal believes that its construction and design are such that it is clearly not meant to be played with in the same way as a doll would normally be or meant to provide amusement. The good in issue is permanently rigid because it is cast from a moulding and is mounted on a base. As such, the good in issue is not a doll and whether it is intended for decorative purposes or not is therefore irrelevant for the purpose of the *Explanatory Notes*. The Tribunal is therefore of the view that the *Explanatory Notes* cited by N.C. Cameron are of no application in this case. Consequently, the Tribunal is of the view that the good in issue does not fall in heading No. 95.02.

15. The Tribunal must now examine whether the good in issue is properly classified in heading No. 39.26. The *Explanatory Notes* to that heading specify that it includes "...[s]tatuettes and other ornamental articles..." The Tribunal notes that the manufacturer of the good in issue describes it as a figurine and that the dictionary definition of "figurine" referred to by the CBSA defines that word as "a small moulded or carved figure; a statuette".¹⁴ As such, the Tribunal finds that the good in issue falls under the description of heading No. 39.26, that, at the subheading level, it falls in subheading No. 3926.40 for "[s]tatuettes and other ornamental articles" and that it is classifiable under tariff item No. 3926.40.10 because it is a statuette.

DECISION

16. For the foregoing reasons, the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

13. Respondent's brief at para. 11.

14. *Ibid.* at para. 10.

DISSENTING OPINION OF MEMBER FRY

17. With respect, I disagree with my colleagues and consider that the good in issue should be classified under tariff item No. 9502.10.00 as a doll, whether or not dressed.

18. I agree with my colleagues that the evidence indicates that the good in issue is not intended for use as a toy. The issue is whether that prevents it from being considered a “doll” within the meaning of the tariff item.

19. As indicated by my colleagues, the *Concise Canadian Oxford Dictionary* defines “doll” as “a [usually] small model of a human figure, [usually] a child or woman, [especially] for use as a toy. . . .” Thus, in ordinary usage, the word “doll” usually refers to a toy, but an item that is not a toy can also be considered a doll.

20. The *Customs Tariff* does not define “doll”. The *Explanatory Notes* to Chapter 95 provides that : “[t]his Chapter covers toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for indoor or outdoor games, appliances and apparatus for sports, gymnastics or athletics, certain requisites for fishing, hunting or shooting, and roundabouts and other fairground amusements. . . .”

21. If the *Explanatory Notes* were intended to provide an exhaustive description of the contents of Chapter 95, they would indicate that dolls must be toys in order to be covered by Chapter 95. However, in my view, the wording of these *Explanatory Notes* does not indicate that they are intended to provide an exhaustive description. This conclusion is supported by the *Explanatory Notes* to heading No. 95.02, which provide as follows:

...

The heading includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes (e.g., boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.

...

22. Thus, the *Explanatory Notes* to heading No. 95.02 specifically indicate that heading No. 95.02 includes both dolls that are toys (“designed for the amusement of children”) and dolls that are not toys (“dolls intended for decorative purposes”).

23. I note that the title of Chapter 95 is “Toys, Games and Sports Requisites; Parts and Accessories Thereof”. However, Rule 1 of the *General Rules* provides that “[t]he titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes” Thus, the fact that the title of Chapter 95 refers to “toys” cannot be used to assist in interpreting the term “dolls” in heading No. 95.02.

24. The good in issue is a small model of a human figure and thus, in my view, as discussed above, is a “doll”. I agree with my colleagues that the evidence indicates it is the aesthetic value of the good in issue that provides it with its pleasure-giving element. Thus, in my view, the good in issue is “intended for decorative purposes”. Accordingly, in my view, the good in issue is classifiable under tariff item No. 9502.10.00.

25. As my colleagues indicate, paragraph (v) of Note 2 to Chapter 39 provides that articles of Chapter 95 are not included in Chapter 39. Therefore, it is not necessary to consider whether the good in issue could also be classifiable as a statuette, as contemplated by subheading No. 3926.40.

Ellen Fry

Ellen Fry

Member