



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2008-031

Costco Wholesale Canada Ltd.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Wednesday, January 20, 2010*

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IN THE MATTER OF an appeal heard on November 17, 2009, pursuant to section 67 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 December 19, 2008, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**COSTCO WHOLESALE CANADA LTD.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed.

Stephen A. Leach  
Stephen A. Leach  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: November 17, 2009  
Tribunal Member: Stephen A. Leach, Presiding Member  
Counsel for the Tribunal: Nick Covelli  
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Manager, Registrar Office: Michel Parent  
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**PARTICIPANTS:**

<b>Appellant</b>	<b>Counsel/Representative</b>
Costco Wholesale Canada Ltd.	Michael Sherbo
<b>Respondent</b>	<b>Counsel/Representative</b>
President of the Canada Border Services Agency	Lorne Ptack

**WITNESS:**

Kevin Heasley  
Co-owner/Technician  
Ek's Repair

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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed by Costco Wholesale Canada Ltd. (Costco) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision of the President of the Canada Border Services Agency (CBSA), dated December 19, 2008, with respect to a request for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether items imported by Costco under the name “3 in 1 Creeper Seat with Tray” (the goods in issue) are properly classified under tariff item No. 9403.20.00 of the schedule to the *Customs Tariff*<sup>2</sup> as other metal furniture, as determined by the CBSA, or should be classified under tariff item No. 9401.71.90 as other upholstered seats with metal frames or, in the alternative, under tariff item No. 8716.80.10 as other vehicles, not mechanically propelled, for the transport of persons, as claimed by Costco.

### PROCEDURAL HISTORY

3. On November 27, 2007, the CBSA made an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act* concerning the tariff classification of the goods in issue. The CBSA ruled that the goods in issue were properly classified under tariff item No. 9403.20.00.

4. On December 11, 2007, Costco requested that the CBSA review the advance ruling, arguing that the goods in issue should be classified under tariff item No. 9401.71.90 or, in the alternative, under tariff item No. 8716.80.10 pursuant to subsection 60(2) of the *Act*.

5. On December 19, 2008, the CBSA issued a decision pursuant to subsection 60(4) of the *Act*, confirming classification of the goods in issue under tariff item No. 9403.20.00.

6. On March 09, 2009, Costco filed an appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

7. The Tribunal held a public hearing in Ottawa, Ontario, on November 17, 2009.

8. Mr. Kevin Heasley, co-owner/technician, Ek’s Repair, testified on behalf of Costco.

### GOODS IN ISSUE

9. The goods in issue, item No. 131951, are made with metal frames, upholstered with leather, fitted with castor wheels and equipped with trays. These multi-function goods can be converted into roller seats with trays, seat style creepers and laydown creepers.

10. Costco did not provide a physical exhibit.

11. The CBSA submitted a “3 in 1 Creeper Seat with Tray” as an exhibit.

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

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

## ANALYSIS

### Law

12. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.

13. 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 developed by the World Customs Organization.<sup>3</sup> 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. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

14. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System<sup>[4]</sup> and the Canadian Rules<sup>[5]</sup> set out in the schedule.”

15. For the purpose of this appeal, the Tribunal must follow section 10 of the *Customs Tariff*, which provides that the classification of imported goods shall be determined in accordance with the *General Rules* and the *Canadian Rules*.

16. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.<sup>6</sup> Classification therefore begins with Rule 1, which provides as follows: “. . . for legal purposes, 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 following provisions.”

17. Section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System<sup>[7]</sup> and the Explanatory Notes to the Harmonized Commodity Description and Coding System,<sup>[8]</sup> published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.<sup>9</sup>

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3. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
  4. S.C. 1997, c. 36, schedule [*General Rules*].
  5. S.C. 1997, c. 36, schedule.
  6. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).
  7. World Customs Organization, 2d ed., Brussels, 2003.
  8. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
  9. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

18. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

### Tariff Classification at Issue

19. For the purposes of this appeal, the relevant nomenclature of the *Customs Tariff* reads as follows:

#### Section XVII

#### VEHICLES, AIRCRAFT, VESSELS AND ASSOCIATED TRANSPORT EQUIPMENT

...

#### Chapter 87

#### VEHICLES OTHER THAN RAILWAY OR TRAMWAY ROLLING-STOCK, AND PARTS AND ACCESSORIES THEREOF

...

**87.16** Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof.

...

**8716.80** -Other vehicles

8716.80.10 --- For the transport of persons

...

#### Section XX

#### MISCELLANEOUS MANUFACTURED ARTICLES

#### Chapter 94

#### FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS, CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE; PREFABRICATED BUILDINGS

...

**94.01** Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof.

...

-Other seats, with metal frames:

**9401.71** -- Upholstered

...

9401.71.90 --- Other

...

**94.03** Other furniture and parts thereof.

...

**9403.20.00** -Other metal furniture

### Classification of the goods in issue

20. In order to determine the proper tariff classification of the goods in issue, the Tribunal must first determine whether the section or chapter notes of the schedule to the *Customs Tariff* require that the goods in issue be classified in a particular heading in accordance with Rule 1 of the *General Rules*.

21. Both parties agree that the goods in issue can be used as upholstered seats with metal frames and as non-mechanically propelled vehicles for the transport of people.<sup>10</sup>

22. The CBSA argues that the goods in issue are classifiable only in heading No. 94.03. According to the CBSA, the goods in issue meet the definition of “[s]eats” in heading No. 94.01 and the definition of “[o]ther furniture” in heading No. 94.03, and they also meet the description of “not mechanically propelled” vehicles in heading No. 87.16. The CBSA argued that each heading describes a function of the goods in issue and that no single function is more specific than the others in accordance with Rule 3 (a) of the *General Rules*. The CBSA also submits that no single function defines the essential character of the goods in issue as required by Rule 3 (b). Therefore, the CBSA submits that the correct classification of the goods in issue, in accordance with Rule 3 (c), is in the heading which occurs last in numerical order, that is, heading No. 94.03.<sup>11</sup>

23. Costco submits that the goods in issue meet the terms of tariff item No. 9401.71.90 as other upholstered seats with metal frames, in accordance with Rule 1 of the *General Rules*. Costco adds that heading No. 94.01 covers all seats and that the goods in issue are not excluded from the heading. The goods in issue are marketed and sold as seats. The goods in issue cannot be classified in heading No. 94.03 as other furniture because they are already provided for in heading No. 94.01, and heading No. 94.03 specifically covers furniture not covered by any previous headings. In the alternative, Costco suggests that the goods in issue are classifiable in heading No. 87.16 as hand-propelled vehicles, as they are used to transport persons from one location to another by pushing with the hands and feet.<sup>12</sup>

24. The Tribunal heard evidence from Mr. Heasley who testified on behalf of Costco. Mr. Heasley explained to the Tribunal how he uses an item similar to the goods in issue, on a day-to-day basis, to move around a vehicle, to do bodywork and other long-term repairs on the side of a car. Mr. Heasley testified that the goods in issue are found in all garages and that they provide mobility and comfort. They are upholstered, have a headrest, and are fitted with castor wheels and trays to carry small parts and tools. Mr. Heasley said that, on a daily basis, he makes use of the goods in issue more often than not in the laydown position, although he uses the two other modes, seat and stool, almost as frequently.<sup>13</sup>

25. In order to determine the proper classification of the goods in issue, for legal purposes, the Tribunal considered Rule 1 of the *General Rules* with reference to the terms of the headings and the relevant section notes or chapter notes.

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10. Appellant’s brief at 7, 12; respondent’s brief at 9.

11. The CBSA initially proposed an alternative classification for the goods in issue under tariff item No. 9401.71.10 as upholstered seats with metal frames for domestic purposes, but advised, before the hearing, that it no longer wished to propose an alternative classification. Respondent’s brief at 21.

12. Appellant’s brief at 9, 12.

13. *Transcript of Public Hearing*, 17 November 2009, at 8, 10, 13, 14.



26. The Tribunal considered the following *Explanatory Notes*:

**SECTION XVII**

**VEHICLES, AIRCRAFT, VESSELS AND ASSOCIATED TRANSPORT EQUIPMENT**

...

**CHAPTER 87**

**VEHICLES OTHER THAN RAILWAY OR TRAMWAY  
ROLLING-STOCK, AND PARTS AND ACCESSORIES THEREOF**

...

**GENERAL**

This Chapter covers the following vehicles . . .

...

7) Trailers and semi-trailers, and other vehicles, not mechanically propelled, i.e., vehicles for towing by another vehicle, pushing or pulling by hand or drawing by animals (heading 87.16).

...

**87.16 - Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof.**

...

**8716.80 - Other vehicles**

...

This heading covers a group of **non-mechanically** propelled vehicles (**other than** those of the preceding headings) equipped with one or more wheels and constructed for the transport of goods or persons. . . .

...

(B) **Hand- or foot-propelled vehicles.**

This group includes:

(1) Trucks and trolleys of various kinds including those specialised for use in particular industries (in the textile or ceramic industries, in dairies, etc.).

27. Both parties agree that the goods in issue are classifiable as vehicles according to the *Explanatory Notes* to heading No. 87.16.

28. Costco also bases its submission on a dictionary definition of “vehicle”: “A means of carrying or transporting something”.<sup>14</sup>

29. The CBSA agrees that users of the goods in issue can manoeuvre by pushing it with the hands or feet and can transport themselves from one place to another, as per the *Explanatory Notes* to heading No. 87.16 for non-mechanically propelled vehicles.<sup>15</sup>

30. The Tribunal is in agreement with both parties and considers that the goods in issue are classifiable in heading No. 87.16 as other vehicles, not mechanically propelled, for the transport of persons.

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14. Appellant’s brief, para. 49.

15. Respondent’s brief, paras. 43-45.

31. The Tribunal then analyzed the following *Explanatory Notes*:

**SECTION XX**

**MISCELLANEOUS MANUFACTURED ARTICLES**

**CHAPTER 94**

**FURNITURE; BEDDING, MATTRESSES, MATTRESS SUPPORTS,  
CUSHIONS AND SIMILAR STUFFED FURNISHINGS; LAMPS AND  
LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR  
INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES  
AND THE LIKE; PREFABRICATED BUILDINGS**

...

- 2.- The articles (other than parts) referred to in headings 94.01 to 94.03 are to be classified in those headings only if they are designed for placing on the floor or ground.

...

**GENERAL**

This Chapter covers . . .

- (1) All furniture and parts thereof (headings 94.01 to 94.03).

...

For the purposes of this Chapter, the term “furniture” means:

- (A) Any “movable” articles (**not included** under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose . . .

...

Headings 94.01 to 94.03 cover articles of furniture **of any material** (wood, osier, bamboo, cane, plastics, base metals, glass, leather, stone, ceramics, etc.). Such furniture remains in these headings whether or not stuffed or covered . . . or on castors, etc.

...

- 94.01 -Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof (+).**

...

**-Other seats, with metal frames:**

**9401.71 -- Upholstered**

...

**Subject** to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

Lounge chairs, arm-chairs, folding chairs, deck chairs, infants’ high chairs and children’s seats designed to be hung on the back of other seats (including vehicle seats), grandfather chairs, benches, couches (including those with electrical heating), settees, sofas, ottomans and the like, stools (such as piano stools, draughtsmen’s stools, typists’ stools, and dual purpose stool-steps).

32. Costco submits that, as per the descriptive literature, illustrations, assembling instructions and materials, the goods in issue are sold and marketed as seats, more specifically as seat-style creepers and roller seats.

33. Costco submits that, according to the *Explanatory Notes* to heading No. 94.01, all seats are provided for in this heading, including seats with dual purposes, such as seats convertible into beds. Accordingly, Costco argues that the goods in issue are *prima facie* classifiable as seats in heading No. 94.01.<sup>16</sup>

34. The CBSA submits that the goods in issue meet the definition of “furniture” in the *Explanatory Notes* to Chapter 94. However, the CBSA submits that the goods in issue are a combination of an automotive creeper and a seat with tray and that, while provided for in Chapter 94, the CBSA does not support their classification in heading No. 94.01.

35. The Tribunal agrees with Costco’s position above and, therefore, finds the goods in issue are also classifiable in heading No. 94.01 as other upholstered seats with metal frames.

36. The *Explanatory Notes* to heading No. 94.03 state as follows:

**94.03 -Other furniture and parts thereof.**

...

**9403.20 -Other metal furniture**

...

This heading covers furniture and parts thereof, **not covered** by the previous headings.

37. The CBSA argues the creeper function of the goods in issue is covered in heading No. 94.03, as no other furniture item describes the goods in issue.

38. The Tribunal is of the opinion that heading No. 94.03 does not apply to the goods in issue because this particular heading provides for furniture not covered by previous headings. As the Tribunal has already found that heading No. 94.01 would apply, the Tribunal will not consider heading No. 94.03 in its analysis.

39. Accordingly, the Tribunal considers that the goods in issue are classifiable in more than one heading.

40. Since the goods in issue are *prima facie* classifiable in two headings, Rule 3 (a) of the *General Rules* must be applied. The first sentence of Rule 3 (a) states that “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.”

41. The CBSA submits that the goods in issue possess two functions: that of articles of furniture and that of vehicles to move either under an object, using the creeper, or around and along the sides of an object while sitting on the roller-seat. The CBSA believes that no single function is superior to the other and, as such, it argues that Rule 3 (c) of the *General Rules* should be used to classify the goods in issue last in numerical order, namely, in heading No. 94.03.

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16. Appellant’s brief, paras. 20, 24-26.

42. The CBSA supports its position by relying on *Calego International Inc. v. Deputy M.N.R.*,<sup>17</sup> where the Tribunal classified plush articles according to Rule 3 (c) of the *General Rules* and stated as follows:

... the Tribunal is of the view that the goods in issue function both as rucksacks, having a carrying function, and as toys, having an amusement function. Because the description in each of the headings under consideration mentions only one of these functions, the Tribunal considers that both headings are equally descriptive for the purposes of Rule 3 (a).<sup>18</sup>

43. The CBSA also submits that, in *Zellers Inc. v. Deputy M.N.R.*,<sup>19</sup> pillow buddies were classified according to Rule 3 (c) of the *General Rules* and that the Tribunal stated as follows:

Although the Tribunal's analysis of the evidence leads it to conclude that the goods in issue are more like a toy than a pillow or a cushion, one description is no more specific or no more accurate than the other. On balance, therefore, the Tribunal cannot resort to Rule 3 (a) of the *General Rules* to resolve this matter.<sup>20</sup>

44. Costco relies on *Praher Canada Products Ltd. v. Deputy M.N.R.C.E.*<sup>21</sup> concerning various valve parts to stress the specific description of the goods in issue. In that decision, the Tribunal stated as follows:

The Tribunal is of the opinion that the tariff item proposed by the respondent for the classification of the parent valves, being "Hand operated or activated," is more specific than the residual tariff item "Other" proposed by the appellant. Accordingly, on the basis of Rule 3 (a) of the *General Rules* and Rule 1 of the Canadian Rules, the Tribunal finds that the parent valves are classifiable under tariff item No. 8481.80.91.<sup>22</sup>

45. The Tribunal is of the opinion that, although the goods in issue have multiple functions, they are more specifically described in heading No. 94.01 as upholstered seats with metal frames, for other purposes. The Tribunal does not find any *Explanatory Notes* that would exclude the goods in issue from this classification.

46. The Tribunal considered Mr. Heasley's evidence that no one position or use (sitting, moving, storing, laying down) is primary, as mechanics have a wide variety of uses for the goods in issue. According to Mr. Heasley, the goods in issue are valued by mechanics because of their comfort (providing back support while using them as stools, seats or laydown creepers) and mobility (using the castors to easily move them from one place to another around or under a motor vehicle).<sup>23</sup>

47. The Tribunal finds that, if the goods in issue are used equally as stools, seats and laydown creepers, as stated by Mr. Heasley, then the most specific description of the goods in issue is seats (two of the three potential positions of the goods in issue are found in heading No. 94.01), which are convertible into beds (laydown creepers).

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17. (29 May 2000), AP-98-102 (CITT).

18. *Ibid.* at 6.

19. (29 July 1998), AP-97-057 (CITT).

20. *Ibid.* at 10.

21. (31 August 1993), AP-92-112 (CITT).

22. *Ibid.* at 5.

23. *Transcript of Public Hearing*, 17 November 2009, at 10, 14.

48. In *Smith & Nephew Inc. v. Deputy M.N.R.C.E.*,<sup>24</sup> the Tribunal found that “operating table” was a more specific description than “other” medical or surgical furniture and stated as follows:

Having found that birthing beds are *prima facie* classifiable under two or more tariff items as required by Rule 3 of the General Rules, Rule 3 (a) provides that the heading which provides the most specific description is to be preferred to headings providing a more general description. In the Tribunal’s view, “operating table” is a more specific description than “other” medical or surgical furniture.<sup>25</sup>

49. In *Lexus Products Ltd. v. Commissioner of the Canada Customs and Revenue Agency*,<sup>26</sup> the Tribunal found that the term “other footwear” was more specific than the term “toys” in reference to children’s slippers shaped as animals and stated the following:

The Tribunal is of the view that, while the term “toy” covers a wide variety of goods, the term “footwear” is limited to goods that are worn on the feet.<sup>27</sup>

50. Therefore, pursuant to Rule 3 (a) of the *General Rules*, the Tribunal determines that the most specific description of the goods in issue is found in heading No. 94.01, “Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof” and that the goods in issue should be classified under tariff item No. 9401.71.90 as other upholstered seats with metal frames, for other purposes.

## DECISION

51. Based on the foregoing, the appeal is allowed.

Stephen A. Leach  
Stephen A. Leach  
Presiding Member

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24. (10 January 1994), AP-92-073 (CITT).

25. *Ibid.* at 4.

26. (11 January 2001), AP-99-117 (CITT).

27. *Ibid.* at 5.