Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-033

Costco Wholesale Canada Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, May 23, 2014

Canada

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IN THE MATTER OF an appeal heard on February 11, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF five decisions of the President of the Canada Border Services Agency, dated June 30 and July 5, 2011, with respect to requests 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 dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Gillian Burnett
Gillian Burnett
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 11, 2014
Tribunal Member:	Pasquale Michaele Saroli, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Costco Wholesale Canada Ltd.	Michael Kaylor Andrew Simkins

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Korinda McLaine

WITNESS:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Costco Wholesale Canada Ltd. (Costco) on September 27, 2011, pursuant to section 67 of the *Customs Act*[1] from five further re-determinations of tariff classification made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) in respect of year 2007 models of the Ski-Doo Powderboard (the goods in issue).

2. In this connection, Costco argues that the goods in issue should be classified in heading No. 95.03 of the schedule to the *Customs Tariff*[2] as other toys, whereas the CBSA determined that they were properly classified in heading No. 95.06 as articles and equipment for general physical exercise, gymnastics, athletics, other sports or outdoor games, not specified or included elsewhere in Chapter 95.

PROCEDURAL HISTORY

3. The goods in issue were imported in five separate shipments between August 21 and November 27, 2006. At the time of their importation, they were classified under tariff item No. 9506.99.90.

4. Costco submitted five requests for re-determination, claiming that the goods in issue should be classified under tariff item No. 9503.90.00 as other toys.

5. The CBSA issued its decisions on November 9, 2010, and June 6, 2011, pursuant to paragraph 74(4)(*d*) of the *Act* indicating that the goods in issue were properly classified under tariff item No. 9506.99.90.

6. In response to Costco's requests for further re-determination of tariff classification, the CBSA, on June 30 and July 5, 2011, issued decisions made pursuant to subsection 60(4) of the *Act*, confirming that the goods in issue were properly classified under tariff item No. 9506.99.90.

7. Costco filed the current appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Act*, but requested that it be held in abeyance pending the Tribunal's decision in *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency*,[3] which concerned the tariff classification of similar goods.

8. On May 16, 2012, Costco filed a request for further abeyance pending the results of the appeal of the Tribunal's decision in *HBC Imports* at the Federal Court of Appeal (FCA). The FCA's decision was issued on June 24, 2013.[4]

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.
3. (11 April 2012), AP-2011-018 (CITT) [*HBC Imports*].
4. *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 (CanLII) [*HBC Imports (FCA)*].

DESCRIPTION OF THE GOODS IN ISSUE

9. The tariff classification of goods is based on an examination of the goods as a whole, as presented for importation.[5] In this regard, it is uncontested that, as presented for importation, the goods in issue are non-motorized vehicles[6] designed for sliding down snowy slopes, each accommodating up to two persons and featuring four handles for optimum control, a foam core for flexibility and a slick skin bottom for speed.[7] These characteristics were confirmed by visual inspection of the physical exhibit of one of the goods in issue.[8]

ANALYSIS

Legal Framework

10. 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).[9] 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.

11. 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*[10] and the *Canadian Rules*[11] set out in the schedule.

12. 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.

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5. 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, explained 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.
6. See *Transcript of Public Hearing*, 11 February 2014, at 29.
7. Exhibit AP-2011-033-20A, tab 1, Vol. 1.
8. Exhibit AP-2011-033-A-01.
9. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
10. S.C. 1997, c. 36, schedule [*General Rules*].
11. S.C. 1997, c. 36, schedule.

13. 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*[12] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[13] published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[14]

14. The Tribunal must therefore first determine whether the goods 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 goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[15]

15. 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 use a similar approach to determine the proper subheading.[16]

16. The final step is to determine the proper tariff item.[17]

Preliminary Issue

17. The CBSA submitted that the goods in issue are remarkably similar to the Snow Boogie® Astra Sled considered by the Tribunal in *HBC Imports* and determined to be properly classified in heading No. 95.06 as an article or equipment for general physical exercise, sport or outdoor game, a determination that was upheld by the FCA on appeal.[18] In this context, the CBSA urged the Tribunal to decline to consider the merits of the present appeal on the basis that the re-litigation of a tariff classification issue that had already been decided in a previous appeal in respect of essentially the same goods would amount to an abuse of Tribunal process.[19]

18. In support of its position, the CBSA noted that a comparison of the promotional literature for the goods in issue[20] and the Snow Boogie® Astra Sled[21] indicates that both:

- are described as "sleds";
- are intended for going down snowy slopes;

12. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].
13. World Customs Organization, 3rd ed., Brussels, 2002 [*Explanatory Notes*].
14. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17, where the FCA interpreted section 11 of the *Customs Tariff* as requiring that the *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 the *Classification Opinions*.
15. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
16. 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."
17. 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." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.
18. *HBC Imports FCA*.
19. Exhibit AP-2011-033-20A at paras. 23-26, Vol. 1.
20. *Ibid.*, tab 1.
21. *Ibid.*, tab 2.

- are designed with a foam core and a slick skin bottom; and
- are covered in graphics;

with the only real differences between the two articles being that:

- whereas the goods in issue are 54 inches long, the Snow Boogie® Astra Sled is 39 inches in length;
- whereas the goods in issue have four handles, the Snow Boogie® Astra Sled has two handles;
- whereas the goods in issue can accommodate up to two persons, the Snow Boogie® Astra Sled was designed for a single rider; and
- whereas the goods in issue can be ridden sitting up or lying down, the Snow Boogie® Astra Sled is intended to be ridden head first, lying down on one's stomach.

19. In this respect, the CBSA contends that, given the slight differences and notable similarities between the two goods, there are no grounds upon which to distinguish the present appeal from *HBC Imports.* That being the case, the CBSA submits that the Tribunal's decision in that case is equally applicable to the goods in issue in the present appeal and that the Tribunal should therefore rule in a similar fashion.[22]

20. However, as was noted by Costco[23] and acknowledged by the CBSA,[24] the Tribunal is not, as a matter of law, bound by its previous determinations, as the common law principle of *stare decisis* does not apply in Tribunal decision-making.

21. As concerns the decision in *HBC Imports (FCA)*, Webb J.A., for the majority, after having restated the standard of review laid out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[25] pursuant to which the relevant question was not whether the Tribunal was correct in its determination, but rather, whether the decision fell within a range of possible, acceptable outcomes which were defensible on the facts and law,[26] found the Tribunal's decision reasonable, as being within the range of acceptable and rational outcomes.[27] Having regard to the *Dunsmuir*-based standard applied by the FCA in the review of Tribunal's decision, and the possibility that a tariff classification of the goods in issue in the present appeal that differs from the classification of similar goods in *HBC Imports* might nonetheless fall within the range of acceptable outcomes, the Tribunal does not consider that *HBC Imports (FCA)*, in and of itself, justifies a decision by the Tribunal to refuse to consider the merits of the present appeal.

22. On the basis of the foregoing, and considering, in particular:

- that there are certain physical differences between the goods in issue in the present appeal and those in *HBC Imports*;
- that the Tribunal is not bound, as a matter of law, by its previous decisions; and
- that a tariff classification of the goods in issue in the present appeal that is different from that in *HBC Imports* might nonetheless fall within a range of outcomes considered acceptable under the prevailing standard of judicial review;

the Tribunal is not prepared to summarily dismiss the present appeal as an abuse of process.

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22. *Ibid.* at para. 29.
23. Exhibit AP-2011-033-14A at para. 7, Vol. 1.
24. Exhibit AP-2011-033-20A at para. 21, Vol. 1.
25. 2008 SCC 9, [2008] 1 SCR 190 [SCC] [*Dunsmuir*].
26. [Per Webb J.A.] *HBC Imports (FCA)* at para. 7.
27. *Ibid.* at para. 23.

Tariff Classification of the Goods in Issue

23. The parties agree,[28] and the Tribunal accepts, that the goods in issue can be classified on the basis of Rule 1 of the *General Rules*, pursuant to which classification is to be determined according to the terms of the headings and any relative section or chapter notes.

24. In this respect, the CBSA submitted that the goods in issue are properly classified in heading No. 95.06 and, specifically, under tariff item No. 9506.99.90 as other articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in Chapter 95, while Costco countered that they fall to be classified in heading No. 95.03 and, specifically, under tariff item No. 9503.90.00[29] as other toys. The Tribunal agrees that these are the only possible headings in which the goods in issue could reasonably be classified.

25. In appeals under section 67 of the *Act*, the appellant, by operation of law, bears the burden of demonstrating that the respondent incorrectly classified goods.[30] In this case, the onus of demonstrating that the goods in issue were incorrectly classified in heading No. 95.06 and should instead be classified in heading No. 95.03 resides with Costco.

26. Given:

- the inclusion of the "not specified or included elsewhere in this Chapter" proviso in heading No. 95.06; and
- Note (B) of the explanatory notes to heading No. 95.06, which explicitly excludes from its ambit, ". . . **toys** . . . of **heading 95.03**";

the Tribunal considers it appropriate to take, as its analytical point of departure, a consideration of whether or not the goods in issue are classifiable in heading No. 95.03, as submitted by Costco.

Are the Goods in Issue Classifiable as Other Toys of Heading No. 95.03?

27. Heading No. 95.03 covers "*[o]ther toys*; reduced-size ('scale') models and similar recreational models, working or not; puzzles of all kinds" [emphasis added].

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28. *Transcript of Public Hearing*, 11 February 2014, at 65-66.
29. As a matter of law, and as recognized by the parties at the hearing, the goods in issue must be classified in accordance with the schedule to the *Customs Tariff* in force at the time of importation (i.e. the 2006 version). See *Transcript of Public Hearing*, 11 February 2014, at 52-53. In this respect, the parties erroneously referred to later versions of the schedule to the *Customs Tariff* in their briefs and in oral argument, which, although not materially different in substance, differ in numbering and organization when compared to the 2006 version. Throughout these reasons, the Tribunal will refer to the relevant provisions of the 2006 version of the schedule to the *Customs Tariff*. The structural change to the *Customs Tariff* also warrants that the Tribunal refer to the *Explanatory Notes* in effect at the time of importation (i.e. the third edition). However, as will be further noted below, the Tribunal does not consider, and the parties did not argue, that there are any relevant differences in substance between the third edition of the *Explanatory Notes* and later versions of same.
30. 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 Costco. See, for example, *Costco* at para. 23*; Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII).

28. According to the explanatory notes to heading No. 95.03, the expression "other toys" encompasses "[a]ll toys not included in **headings 95.01** and **95.02**", with heading Nos. 95.01 and 95.02 covering, respectively, "[w]heeled toys designed to be ridden by children (for example, tricycles, scooters, pedal cars); dolls' carriages" and "[d]olls representing only human beings".

29. The word "toy", however, is not itself defined in the *Customs Tariff*. Consequently, the question of whether the goods in issue fall within the expression "other toys" is one of mixed law and fact,[31] turning on both the interpretation of the word "toys" in heading No. 95.03 and the characteristics of those goods.

30. Turning first to the issue of the meaning to be ascribed to the word "toys", it is well settled through a line of Supreme Court of Canada decisions that the correct approach to statutory interpretation is the modern contextual approach pursuant to which the words of an Act are to 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.[32]

31. In this connection, the relevant legal notes and explanatory notes form an integral part of the interpretative context.[33] With respect to the former, Rule 1 of the *General Rules* explicitly states that, "for legal purposes", classification shall be determined according to not only the terms of the headings but also ". . . any relative Section or Chapter Notes . . . ." As to the latter, while the *Explanatory Notes* (unlike legal notes) are not themselves legally binding, the FCA, in *Suzuki*,[34] indicated that ". . . the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. *To satisfy their interpretive purpose, . . . the Explanatory Notes should be respected unless there is a sound reason to do otherwise*"[35] [emphasis added].

32. The word "toy" is defined in the *Canadian Oxford Dictionary*[36] as follows: ". . . **1 a** a plaything, esp. for a child . . . **2 a** a thing, esp. a gadget or instrument, regarded as providing amusement or pleasure." The *Collins English Dictionary*[37] defines "toy" as follows: "**1** an object designed to be played with". *Webster's Third New International Dictionary*[38] offers the following more detailed definition: ". . . **3 a :** something designed for amusement or diversion rather than practical use **b :** an article for the playtime use of a child either representational (as of persons, creatures or implements) and intended esp. to stimulate imagination, mimetic activity, or manipulative skill or nonrepresentational (as balls, tops and jump ropes) and intended esp. to encourage manual and muscular dexterity and group integration . . . ."

33. The "designed for amusement" element of the above definitions is consistent with both:

- the explanatory notes to Chapter 95, which provide that:

> This Chapter covers toys of all kinds whether designed *for the amusement of children or adults*.
>
> [Emphasis added]

and

31. [Per Webb J.A.] *HBC Imports FCA* at para. 4.
32. See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.
33. See, for example, *Costco* at para. 24.
34. *Suzuki* at para. 13.
35. *Ibid.*
36. Second ed., *s.v.* "toy".
37. Canadian Edition, *s.v.* "toy".
38. *S.v.* "toy".

- the explanatory notes to heading No. 95.03, which provide as follows in relation to "other toys":

> This heading covers toys intended essentially *for the amusement of persons (children or adults).*
>
> [Emphasis added]

34. Moreover, the reference to the encouragement of manual and muscular dexterity is consistent with the observation that certain toys ". . . may involve significant physical activity (such as toy kites, hoops and skipping ropes)."[39]

35. Consistent with this contextual backdrop, the Tribunal's jurisprudence has considered play or amusement value as an ". . . identifying aspect of . . . a toy."[40]

36. It is uncontested, and the Tribunal accepts, that the goods in issue provide amusement and, as such, have play value. Accordingly, they can be considered to fall within the ordinary meaning of the word "toys".

37. It remains to be determined, however, whether the goods in issue also fall within the meaning of the expression "other toys", in the specific context of heading No. 95.03.

38. In this regard and as previously explained by the Tribunal, while play value is viewed as an identifying feature of a toy, the provision of amusement does not, in and of itself, make an object a "toy" for the purpose of tariff classification.[41] Indeed, if amusement value alone were sufficient to render a good a "toy", all sorts of articles and equipment for sports and games would be classifiable as "toys", even though this would run counter to the clear intention of Parliament as manifested, in particular, by the inclusion of heading Nos. 95.04, 95.05 and 95.06, which cover a range of articles and equipment that can be said to have amusement value.[42] Indeed, the majority in *HBC Imports (FCA)*, in noting that ". . . not every object which might otherwise be considered to be a 'toy' will be included [in heading No. 95.03] as 'other toys'"[43], recognized that the contextual meaning of the expression "other toys" in heading No. 95.03 was somewhat narrower than the ordinary meaning of that term.

39. In discerning the definitional scope of the expression "other toys" in heading No. 95.03, one must necessarily read the tariff heading itself within its broader statutory context. In this respect, following the presumption of internal statutory coherence, it must be presumed that the provisions of enactments are meant to work together as parts of a functioning whole, with the parts fitting together logically to form a

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39. [Per Sharlow J.A. (dissenting)] *HBC Imports (FCA)* at para. 37, commenting on the explanatory notes to heading No. 95.03.
40. *Havi Global Solutions (Canada) Limited Partnership v. President of the Canada Border Services Agency* (10 October 2008), AP-2007-014 (CITT) at para. 30; *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT) [*Franklin*] at para. 15; *N.C. Cameron & Sons Ltd. v. President of the Canada Border Services Agency* (14 June 2007), AP-2006-022 (CITT) [*N.C. Cameron*] at para. 15; *Zellers Inc. v. Deputy M.N.R.* (29 July 1998), AP-97-057 (CITT); *Regal Confections Inc. v. Deputy M.N.R.* (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].
41. *Regal*; *Franklin* at para. 15; *N.C. Cameron* at para. 15; *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (12 April 2012), AP-2011-020 (CITT).
42. *HBC Imports* at para 46. Heading No. 95.04 covers "[a]rticles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment"; heading No. 95.05 covers "[f]estive, carnival or other entertainment articles, including conjuring tricks and novelty jokes."
43. *HBC Imports (FCA)* at para. 16.

rational, internally consistent framework and with the legislature presumed not to have adopted legislation that contains internal contradictions, inconsistencies or conflicts.[44]

40. As noted earlier, the *General Rules* form an integral part of Canada's tariff classification regime by virtue of subsection 10(1) of the *Customs Tariff*. Rule 1 of the *General Rules* requires that classification be determined according to the terms of the headings and any relative[45] section or chapter notes. In this connection, Note 1 to Section XVII (Vehicles, Aircraft, Vessels and Associated Transport Equipment) provides as follows:

> 1. This Section does not cover articles of heading 95.01, 95.03 or 95.08, or bobsleighs, *toboggans* or the like of heading 95.06.
>
> [Emphasis added]

41. On the basis of the presumptive internal coherence of statutes and the status of relative section notes as legally binding in the tariff classification of goods, one can logically infer from Note 1 to Section XVII that goods determined to be "like" bobsleighs and toboggans of heading No. 95.06 necessarily fall outside the definitional reach of the expression "other toys"—an inference accepted by both parties.[46]

42. It is well established in jurisprudence that the test for determining whether goods are like other goods is not a strict one. In order for goods to be considered "like" other goods, they need not be identical thereto, it being sufficient that they share important physical and functional characteristics.[47]

43. The *Merriam-Webster's Collegiate Dictionary*[48] defines "toboggan" as ". . . a long flat-bottomed light sled, made usu. of thin boards curved up at one end with usu. low handrails at the sides", while the *Canadian Oxford Dictionary*[49] defines that term as ". . . a long narrow sled without runners, bent or curled upwards at the front, which may be drawn by a rope over compacted snow or ice or used to coast down hills."

44. The following table compares the essential features of the goods in issue (based upon, among other things, the Tribunal's visual inspection of same) and the general characteristics of toboggans, as identified in the above-cited dictionary definitions.

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44. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. at 223. See, for example, *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at paras. 206-208 [L'Heureux-Dubé J., concurring]; *Mackeigan v. Hickman*, [1989] 2 SCR 796 [McLachlin J.].
45. In the Tribunal's view, "relative" section or chapter notes include not only the legal notes to sections or chapters directly in play in the classification of goods but also notes located elsewhere in the nomenclature that nonetheless bear upon the proper classification of those goods.
46. See, for example, *Transcript of Public Hearing*, 11 February 2014, at 72-75.
47. *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT); *Nailor Industries Inc. v. Deputy M.N.R.* (13 July 1998), AP-97-083 and AP-97-101 (CITT); *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at para. 82; *Kinedyne Canada Limited v. President of the Canada Border Services Agency* (5 July 2011), AP-2010-027 (CITT); *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (23 November 2011), AP-2010-069 (CITT).
48. Eleventh ed., *s.v.* "toboggan".
49. Second ed., *s.v.* "toboggan".

GENERAL CHARACTERISTICS OF TOBOGGANS	CHARACTERISTICS OF GOODS IN ISSUE
(a) long sled	(a) described in related marketing material as both a "powderboard" and a "sled"[50]
(b) flat-bottomed (i.e. without runners)	(b) feature a slick skin bottom[51]
(c) usually (although not necessarily) of thin boards	(c) have a soft foam core and plastic backing[52]
(d) curved upward at the front end	(d) curved upward at the front end
(e) usually with low hand rails for gripping	(e) have four handles for gripping[53]
(f) drawn by a rope over compacted snow/ice or used to coast down snowy hills	(f) are designed for sliding down snowy hills[54] and can also be drawn by a rope[55]

45. On the basis of the above comparison, the Tribunal is satisfied that the goods in issue are "like" toboggans, as ordinarily defined.

46. There remains however the question of whether the reference to bobsleighs and toboggans of heading No. 95.06 in Note 1 to Section XVII encompasses all bobsleighs and toboggans regardless of their design and intended use, or only a subset thereof. In this respect, Costco asserted that bobsleighs and toboggans of heading No. 95.06 were those intended essentially for sporting or competition, to the exclusion of toy toboggans, intended essentially for amusement,[56] while the CBSA contended that the reference must be taken to cover the universe of toboggans, which is not restricted to toboggans intended for competitive sporting use.[57]

47. The explanatory notes to heading No. 95.06 appear to lend support to Costco's assertion that the reference is not all-encompassing, with the toboggans covered by that heading being restricted to those in the nature of sports vehicles.[58] Specifically, the explanatory notes to heading No. 95.06 indicate that toboggans and the like that are in the nature of sports vehicles are exempted from the general exclusion of sports vehicles from the coverage of heading No. 95.06:

> The heading **excludes**:
>
> . . .
>
> (ij) Sports craft (such as marine jets, canoes and skiffs) and *sports vehicles* (*other than* bobsleighs (bobsleds), *toboggans and the like*), of **Section XVII**.
>
> [Emphasis added]

50. Exhibit AP-2011-033-20A, at Tab 1. The Tribunal notes that the description of the goods in issue as a "sled" is consistent with dictionary definitions of that term. The definition of "sled" in the *Canadian Oxford Dictionary*, 2nd ed., for instance, includes: ". . . any of various devices made of moulded plastic, used esp. by children to coast down hills for amusement."
51. Exhibit AP-2011-033-20A at para. 5; tab 1, Vol. 1.
52. *Transcript of Public Hearing*, 11 February 2014, at 14.
53. Exhibit AP-2011-033-20A at para. 4; tab 1, Vol. 1.
54. Exhibit AP-2011-033-14A at para. 2, Vol. 1; Exhibit AP-2011-033-20A at para. 5, Vol. 1.
55. *Transcript of Public Hearing*, 11 February 2014, at 10, 15.
56. *Ibid.* at 41-43, 67-68, 73.
57. *Ibid.* at 67-69.
58. *Ibid.* at 41-43, 67-68, 73.

48. The Tribunal notes that the word "sports" is used in the above explanatory notes as an adjective modifying the noun "vehicles". In this respect, *Merriam Webster's Collegiate Dictionary*[59] defines the word "sports" as follows, when used adjectivally: ". . . of, relating to, or suitable for sports . . . ." The word "sport", used as a noun, is in turn defined to mean, among other things, "**1 a:** a source of diversion: RECREATION . . . **c** (1): physical activity engaged in for pleasure . . . ."[60] The *Canadian Oxford Dictionary*[61] ascribes the following attributive meaning to the term "sport": ". . . **2** . . . recreation, amusement, diversion, fun (*sport hunting*) . . . ."

49. As to the meaning of "vehicle", the *Canadian Oxford Dictionary*[62] defines the term as ". . . any conveyance for transporting people, goods, etc., esp. on land", while the definition in *Merriam Webster's Collegiate Dictionary*[63] includes ". . . **4**: a means of carrying or transporting something (planes, trains and other [vehicles]) . . . ."

50. On the basis of the foregoing generally accepted definitions, the Tribunal is of the view that "sports vehicles" are conveyances used in physical activities engaged in by persons for amusement, recreation, diversion or fun (amusement).

51. That being the case, and having regard to both the scheme and presumptive internal coherence of the *Customs Tariff* and the schedule thereto, the Tribunal finds that toboggans and the like that are specifically designed for use by persons in outdoor physical activities for amusement must be taken to fall outside the definitional reach of the expression "other toys" in heading No. 95.03, given that they are already specifically indicated for classification in heading No. 95.06 by virtue of Note 1 to Section XVII.

52. The Tribunal is further satisfied that the goods in issue, which have already been determined by the Tribunal to be "like" toboggans, can also be described as being in the nature of "sports vehicles", given that they are intended for recreational use.[64] This view is consistent with related marketing literature on the record, which explicitly describes the goods in issue as being "snow sport"[65] toys.

53. That being the case, the Tribunal finds that the goods in issue fall squarely within the phrase "toboggans or the like of heading 95.06" and, therefore, outside the definitional scope of the phrase "other toys" in heading No. 95.03.

54. The Tribunal notes, in this regard, that classification of the goods in issue in heading No. 95.06 is consistent with Note B(14) of the explanatory notes to that heading, which indicate as follows:

> This heading covers:
>
> . . .
>
> (B) **Requisites for other sports and outdoor games** (other than toys presented in sets, or separately, of heading 95.03), e.g.:
>
> . . .

59. Eleventh ed., *s.v.* "sports".
60. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "sport".
61. Second ed., *s.v.* "sport".
62. *Ibid.*, *s.v.* "vehicle".
63. Eleventh ed., *s.v.* "vehicle".
64. Toboggans are also used for more utilitarian purposes, such as, transporting people and goods (including heavy equipment and supplies) over flat, snow/ice covered, terrain. Exhibit AP-2011-033-20A, tab 5, Vol. 1.
65. Exhibit AP-2011-033-20A, tab 1, Vol. 1.

> (14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; skate boards; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; *bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice*.
>
> [Emphasis added]

55. Although the word "toboggans" is omitted, since explanatory notes cannot amend legally binding section notes, it is the Tribunal's view that the reach of the phrase "similar non-motorised vehicles for sliding on snow or ice" must be taken to encompass the "toboggans and the like" referred to in Note 1 to Section XVII.[66]

56. In the Tribunal's view, the conclusion that the goods in issue fall outside the definitional scope of the phrase "other toys" in heading No. 95.03 is further supported by the explanatory notes to that heading. As recognized by the majority in *HBC Imports (FCA)*, no item similar to a sled or toboggan is included in the list of items referred to in the explanatory notes to heading No. 95.03.[67]

57. Costco argued that the goods in issue are described by Notes A(4) and A(8) of the explanatory notes to heading No. 95.03,[68] which read as follows:

> . . . The heading includes:
>
> (A) All toys not included in **headings 95.01** and **95.02**. . . . These include:
>
> . . .
>
> (4) Toy vehicles (**other than** those of **heading 95.01**), trains (whether or not electric), aircraft, boats, etc., and their accessories (e.g., railway tracks, signals).
>
> . . .
>
> (8) Toy sports equipment, whether or not in sets (e.g., golf sets, tennis sets, archery sets, billiard sets; baseball bats, cricket bats, hockey sticks).

58. However, with respect to Note (A)(4) of the explanatory notes to heading No. 95.03, the Tribunal is of the view that the goods in issue are articles that are "like" toboggans rather than merely being toy versions of same, as they are rendered capable, by design, of being used for essentially the same snow sport activities as toboggans of heading No. 95.06 (i.e. sliding down snowy slopes), and thus are not merely representational items intended to stimulate imagination or mimetic activity. Indeed, that the goods in issue are snow sport vehicles in their own right rather than toys is evident from the marketing literature's focus on built-in features for "optimum control", "flexibility" and "speed".[69] In this connection, the Tribunal agrees

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66. Indeed, Note (C)(ij) of the explanatory notes to heading No. 95.06, cited above, in stating that the heading excludes "sports vehicles (**other than** bobsleighs (bobsleds), *toboggans* and the like)," [emphasis added] confirms that toboggans are considered non-motorized vehicles for sliding on snow or ice similar to bobsleighs and luges.
67. *HBC Imports (FCA)* at para. 15. While the FCA was discussing the 2007 version (4th ed.) of the explanatory notes to heading No. 95.03, the Tribunal considers the same conclusion applicable to the 2002 version (3rd ed.) of the explanatory notes to heading No. 95.03 relevant in this appeal. The substance of the two versions does not differ in any respects material to this appeal.
68. See, for example, *Transcript of Public Hearing*, 11 February 2014, at 28-30. The Tribunal notes that Costco actually referred to Notes (D)(iv) and (D)(ix) of the 2007 version (4th ed.) of the explanatory notes to heading No. 95.03. As noted earlier, the references in the Tribunal's reasons are to the 2002 version (3rd ed.) of the *Explanatory Notes*. In any event, there are no relevant differences of substance between the two versions.
69. Exhibit AP-2011-033-20A, tab 1, Vol. 1.

with the CBSA that the "toy vehicles" being referred to in Note (A)(4) of the explanatory notes to heading No. 95.03 are in the nature of reproductions or replicas of actual items,[70] as is apparent from a contextual reading of the "toy vehicles" listed in example, in conjunction with the listed accessories thereto (e.g. railway tracks and signals).

59. Similarly, the Tribunal considers that Note (A)(8) of the explanatory notes to heading No. 95.03 does not include the goods in issue. First, based on an *ejusdem generis* reading of the illustrative list of examples of sports equipment, this category does not include any "toy" sports *vehicles*. Second, even if the goods in issue could be characterized as "sports equipment", in the Tribunal's view, they could not come within the scope of Note (A)(8), as they would constitute sports equipment in their own right, rather than a toy version thereof.

60. Finally, in the Tribunal's view, Note (B) of the explanatory notes to heading No. 95.01[71], which provides that the heading excludes ". . . toys designed to be ridden by children but not mounted on wheels, e.g., rocking horses (**heading 95.03**)", also does not support the view that heading No. 95.03 is intended to cover the goods in issue. While Note (B) implies that heading No. 95.03 includes non-wheeled toys designed to be ridden by children, the Tribunal agrees with the CBSA's view that the example of "rocking horses" provides relevant interpretative context. Indeed, in *HBC Imports FCA*, the majority of the FCA found that ". . . a reasonable conclusion could be that only 'toys designed to be ridden by children' that are like rocking horses are the toys that are to be included . . . under this paragraph."[72] In the Tribunal's view, the goods in issue are distinguishable from the goods covered by Note (B) on the basis that they are not stationary toys, akin to a rocking horse, but, instead, are vehicles that actually transport the rider from one location (i.e. the top of a slope) to another (the bottom of the slope).

61. On the basis of the foregoing analysis, the Tribunal finds that Costco has not discharged the onus of establishing that the goods in issue were not properly classified in heading No. 95.06 and that they should instead be classified in heading No. 95.03.

Classification of the Goods in Issue in Heading No. 95.06

62. While not necessary to the disposition of the current appeal, the Tribunal will briefly review the basis for the classification of the goods in issue in heading No. 95.06.

63. Heading No. 95.06 refers to "[a]rticles and equipment *for general physical exercise*, gymnastics, athletics, other sports (including table-tennis) *or outdoor games, not specified or included elsewhere in this Chapter* . . ." [emphasis added]. It follows therefore that, in order to be classifiable in that heading, a good must meet the following criteria: (a) it must be an article or equipment; (b) it must be for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games; and (c) it must not be specified or included elsewhere in Chapter 95.

70. *Transcript of Public Hearing*, 11 February 2014, at 63.
71. Heading No. 95.01 covers "[w]heeled toys designed to be ridden by children".
72. At para. 17. The FCA discussed Note (D)(v) of the 2007 version (4th ed.) of the explanatory notes to heading No. 95.03. While the location of this note within the *Explanatory Notes* is different from the 2002 version (3rd. ed.) of the *Explanatory Notes*, there is no difference, in substance, of relevance to this case. The Tribunal therefore considers that the FCA's reasoning applies equally to Note (B) of the explanatory notes to heading No. 95.01 relevant in this appeal.

64. As to the first criterion, an "article" has been defined broadly in the Tribunal's jurisprudence,[73] consistent with its dictionary meaning of ". . . **1** a particular or separate thing . . . ."[74] That the goods in issue can be described as "articles" is not disputed by the parties and is accepted by the Tribunal.

65. As to the second criterion, the Tribunal is satisfied that the goods in issue are intended for outdoor use in a manner involving an element of physical exertion.[75]

66. As to the third criterion, with the goods in issue not being classifiable as "other toys" of heading No. 95.03 for reasons already explained, the Tribunal is satisfied that they are not specified or included elsewhere in Chapter 95.

67. On the basis of the foregoing analysis, the Tribunal finds that the goods in issue are properly classified in heading No. 95.06 and, specifically, under tariff item No. 9506.99.90 as other articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in Chapter 95.

68. As a final observation, the Tribunal finds it interesting to note that U.S. authorities have arrived at the same result in the classification of several articles similar to the goods in issue.[76]

DECISION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

73. See, for example, *HBC Imports* at para. 54; *Curve Distribution Services Inc. v. President of the Canada Border Services Agency* (15 June 2012), AP-2011-023 (CITT) at para. 63.
74. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "article".
75. *Transcript of Public Hearing*, 11 February 2014, at 15. See also *HBC Imports (FCA)* at para. 28, where Sharlow J.A., in her dissent, recognized, in respect of goods that were very similar to the goods in issue, that "[t]he Astra Sled, being something like a toboggan, is exercise or sports equipment . . . ."
76. Exhibit AP-2011-033-20A, tab 10, Vol. 1.