



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal Nos. AP-2013-034 and  
AP-2013-040

Mattel Canada Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Thursday, July 10, 2014*

*Corrigendum issued  
Friday, October 17, 2014*

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IN THE MATTER OF appeals heard on April 8, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated June 3, 5, 6, 11, 12 and 24, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**MATTEL CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeals are allowed.

Ann Penner  
Ann Penner  
Presiding Member

Randolph W. Heggart  
Randolph W. Heggart  
Acting Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: April 8, 2014  
  
Tribunal Member: Ann Penner, Presiding Member  
  
Counsel for the Tribunal: Alexandra Pietrzak  
  
Student-at-law: Kalyn Eadie  
  
Acting Senior Registrar Officer: Haley Raynor

**PARTICIPANTS:****Appellant**

Mattel Canada Inc.

**Counsel/Representatives**Michael Sherbo  
Andrew Simkins**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Leah Garvin

**WITNESSES:**Kurt Huntsberger  
Senior Director, Product Design  
Fisher-Price, Inc.Christopher Fennell  
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## STATEMENT OF REASONS

### BACKGROUND

1. This matter involves two appeals filed by Mattel Canada Inc. (Mattel) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from decisions dated June 3, 5, 6, 11, 12 and 24, 2013, issued by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in these appeals is whether the goods in issue are properly classified under tariff item Nos. 9401.71.10 and 9401.80.10 of the schedule to the *Customs Tariff*<sup>2</sup> as seats (other than those of heading No. 94.02), whether or not convertible into beds, and parts thereof, as determined by the CBSA, or whether they should be classified under tariff item No. 9503.00.90 as other toys, as claimed by Mattel.

### PROCEDURAL HISTORY

3. From May 16, 2005, to May 6, 2009, Mattel imported 30 different models of certain goods (the imported goods), 20 of which have become the subject of these appeals.

4. Between May 14, 2009, and April 15, 2013, Mattel submitted simultaneous applications for a refund of duties paid and filed requests for re-determination of the tariff classification of the imported goods. Mattel contended that the imported goods should be classified under tariff item No. 9503.00.90.

5. Between October 5, 2010, and April 24, 2013, the CBSA issued re-determinations pursuant to subsection 59(1) of the *Act*, in which it held that the imported goods were properly classified under either tariff item No. 9401.71.10 or tariff item No. 9401.79.10.

6. On May 23, 2011, the CBSA issued further re-determinations under subsection 60(4) of the *Act*, in which it revised its earlier decision, and found that the imported goods were properly classified under either tariff item No. 9401.71.10 or tariff item No. 9401.80.10.

7. On July 25, 2013, Mattel filed a notice of appeal (Appeal No. AP-2013-034) pursuant to subsection 67(1) of the *Act* for one model of the imported goods.

8. On August 28, 2013, Mattel filed a notice of appeal (Appeal No. AP-2013-040) for 19 other models of the imported goods.

9. On October 9, 2013, pursuant to a request from the CBSA and after hearing the views of both parties, the Canadian International Trade Tribunal (the Tribunal) decided that the two appeals should be joined and heard together.<sup>3</sup>

10. The Tribunal held a public hearing on April 8, 2014, in Ottawa, Ontario. Mattel called Mr. Kurt Huntsberger, Senior Director, Product Design, at Fisher-Price, Inc. and requested that he be qualified as an expert witness in the area of the design and development of the goods in issue. The Tribunal denied this request on the grounds that Mr. Huntsberger's status as an employee of Mattel<sup>4</sup> could bias his expert opinion evidence and that his testimony as an expert would not be necessary to enable the Tribunal to

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

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

3. Exhibit AP-2013-040-10, Vol. 1.

4. Fisher-Price, Inc. is a subsidiary of Mattel. See *Transcript of Public Hearing*, 8 April 2014, at 61.

understand the facts. However, Mr. Huntsberger was invited to testify as a lay witness and give testimony arising from his personal knowledge of the design and development process of the goods in issue.<sup>5</sup>

11. The CBSA called Dr. Christopher Fennell, Associate Professor at the University of Ottawa, as an expert witness in the area of infant cognitive development.<sup>6</sup> The Tribunal accepted Dr. Fennell's qualifications.<sup>7</sup>

## GOODS IN ISSUE

12. There are 20 different models of the goods in issue. Both parties have categorized the goods in issue into one of the following three groups based on their characteristics:

- *Jumpers* (models K6070, M8930, P0291)—Mattel describes these as "... interactive toy[s] ... equipped with: sound (music), bright colors and lights, plush animals and springs which provide for motion (jumping)."<sup>8</sup> The CBSA describes them as "... seats that consist of an upholstered plastic donut shaped seat ring that is suspended by three covered springs from three taller steel posts ... attached to a round steel tubular base. The seats have toy components attached to the plastic seat ring that are suspended from overhead. The seat can rotate."<sup>9</sup> The jumpers are for use by infants from the time that they can hold their heads up unassisted until they are able to walk<sup>10</sup> (i.e. between approximately 3 and 12 months).<sup>11</sup>
- *Bouncers* (models J6900, C639I, H2T34, K2564, M2660, M4766, G4828, H0785, H9479, K5501, N6008, N8158, P2286)—Mattel describes these as "... interactive toy[s] ... equipped with: sound (music), bright colors and lights, plush animals and a wire frame which provide for motion (bouncing)."<sup>12</sup> The CBSA describes them as "... seat[s] that have an upholstered covering over a metal wire frame. Each bouncer has a removable toy bar and a vibration mechanism that soothes the baby with calming vibrations. [Some of the models] also play music."<sup>13</sup> The bouncers are for use by infants from birth until they are able to sit up unassisted<sup>14</sup> (i.e. from approximately 0 to 7 months).<sup>15</sup>
- *Rockers* (models C1787, K5502, H0640, M5598)—Mattel describes these as "... interactive toy[s] ... equipped with: sound (music), bright colors and lights, plush animals and a frame which provide for a rocking motion."<sup>16</sup> The CBSA describes them as "... infant seats that convert into a rocking chair for toddlers. The goods have a textile upholstered cover over a metal frame ... The bottom portion of the frame (legs) [is] curved to allow the seat to rock. The chair can be locked into a non-rocking position. Each rocker has a removable toy bar and a

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5. *Transcript of Public Hearing*, 8 April 2014, at 8-11.

6. *Ibid.* at 83.

7. *Ibid.* at 91-93.

8. Exhibit AP-2013-034-12 at 5, Vol. 1.

9. Exhibit AP-2013-034-15A at para. 4, Vol. 1A.

10. Exhibit AP-2013-034-15B, tabs 46-48, Vol. 1C.

11. Exhibit AP-2013-034-04, tab 1, Vol. 1.

12. Exhibit AP-2013-034-12 at 5, Vol. 1.

13. Exhibit AP-2013-034-15A at para. 4, Vol. 1A.

14. Exhibit AP-2013-034-15B, tabs 33-34, Vol. 1B; Exhibit AP-2013-034-15B, tabs 35-45, Vol. 1C.

15. *Transcript of Public Hearing*, 8 April 2014, at 94-95.

16. Exhibit AP-2013-034-12 at 5, Vol. 1.

vibration mechanism that soothes the baby with calming vibrations. [Two of the models] also play music.”<sup>17</sup> The rockers are for use by infants from birth until toddlerhood.<sup>18</sup>

13. Mattel filed physical exhibits of three of the goods in issue: the Rainforest Jumperoo, the Rainforest Bouncer and the Newborn to Toddler Rocker.

## LEGAL FRAMEWORK

14. 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).<sup>19</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.

15. 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*<sup>20</sup> and the *Canadian Rules*<sup>21</sup> set out in the schedule.

16. 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.

17. 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*<sup>22</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>23</sup> 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.<sup>24</sup>

18. 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.<sup>25</sup>

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17. Exhibit AP-2013-034-15A at para. 4, Vol. 1A.

18. Exhibit AP-2013-034-15B, tabs 29-32, Vol. 1B.

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

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

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

22. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

23. World Customs Organization, 2nd ed., Brussels, 2003 [*Explanatory Notes*].

24. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17 where the Federal Court of Appeal 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*.

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

19. 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.<sup>26</sup>

20. The final step is to determine the proper tariff item.<sup>27</sup>

## RELEVANT LEGISLATIVE PROVISIONS

21. The CBSA argued that the goods in issue are properly classified in heading No. 94.01 as follows:

### 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

9401.71.10 -- -For domestic purposes

...

**9401.80** -Other seats

9401.80.10 -- -For domestic purposes

22. Note 1 to Chapter 94 provides as follows:

1. This Chapter does not cover:

...

(l) Toy furniture or toy lamps or lighting fittings (heading 95.03), billiard tables or other furniture specially constructed for games (heading 95.04), furniture for conjuring tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 95.05).

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.

26. 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."

27. 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.



23. The explanatory notes to Chapter 94 provide as follows:

**GENERAL**

This Chapter covers, **subject** to the exclusions listed in the Explanatory Notes to this Chapter:

- (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, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

24. Mattel argued that the goods in issue should be classified in heading No. 95.03. However, the Tribunal notes that heading No. 95.03 was revised in 2007. Since the goods in issue were imported between 2005 and 2009, both the pre-2007 and post-2007 versions of the heading will be provided. The Tribunal notes however that the term “other toys” appears in both versions of the nomenclature.<sup>28</sup>

25. The pre-2007 version of heading No. 95.03 provided as follows:

**Section XX**

**MISCELLANEOUS MANUFACTURED ARTICLES**

**Chapter 95**

**TOYS, GAMES AND SPORTS REQUISITES;  
PARTS AND ACCESSORIES THEREOF**

...

- 95.03 Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.**

...

- 9503.90.00 -Other**

26. The relevant explanatory notes to Chapter 95 provide as follows:

This 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.

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28. At the hearing, the Tribunal sought Mattel’s views on which version would be applicable to this case. In its view, the differences between the pre- and post-2007 versions of the *Customs Tariff* were inconsequential to the outcome of the appeal. See *Transcript of Public Hearing*, 8 April 2014, at 153-54.

27. The relevant explanatory notes to heading No. 95.03 provided as follows:

This heading covers toys intended essentially for the amusement of persons (children or adults). . . . The heading includes:

- (A) All toys not included in **headings 95.01 and 95.02**. Many of the toys of this heading are mechanically or electrically operated. These include:

. . .

- (12) Dolls' houses and furniture, including bedding.

28. The post-2007 version of heading No. 95.03 provides as follows:

**SECTION XX**

**MISCELLANEOUS MANUFACTURED ARTICLES**

**Chapter 95**

**TOYS, GAMES AND SPORTS REQUISITES;  
PARTS AND ACCESSORIES THEREOF**

. . .

- 95.03- Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.**

. . .

9503.00.90 -- -Other

29. The relevant explanatory notes to heading No. 95.03 provide as follows:

This heading covers:

. . .

- (D) **Other toys.**

This group covers toys intended essentially for the amusement of persons (children or adults). . . . This group includes:

All toys **not included** in (A) to (C). Many of the toys are mechanically or electrically operated.

These include:

. . .

- (v) Toys designed to be ridden by children but not mounted on wheels, e.g., rocking horses.

. . .

- (xiii) Dolls' houses and furniture, including bedding.

30. Since the importations at issue occurred between 2005 and 2009, both versions of the tariff nomenclature will be considered. However, for ease of reference, the Tribunal will refer mainly to the post-2007 version of the *Customs Tariff*, as that is the version currently in force.

## POSITIONS OF PARTIES

### Mattel

31. Mattel argued that the goods in issue should be classified as other toys in heading No. 95.03 in accordance with the explanatory notes to Chapter 95, which provide that toys are items that are "... designed for the amusement of children or adults." In support of this position, Mattel submitted that the goods in issue "amuse" children, as they "... divert the attention of so as to deceive ... to entertain or occupy in a light, playful, or pleasant manner", as per dictionary definitions of the term.<sup>29</sup> Moreover, Mattel pointed out that the goods in issue are intentionally designed to amuse, engage and occupy children, and are marketed and sold as such.

32. Mattel contended that the CBSA erred when classifying the goods in issue in heading No. 94.01. Specifically, Mattel maintained that the CBSA misinterpreted the Tribunal's ruling in *Elfe Juvenile Products v. President of the Canada Border Services Agency*<sup>30</sup> by applying it only to goods that had a function similar to the swinging function of the goods at issue in that case and by stating that the Tribunal held that the visual and auditory stimulation were secondary to the swinging function. Mattel suggested that the Tribunal's ruling in *Elfe* was based on a review of the goods as a whole, not on the basis of any one component or function.

33. Finally, Mattel stated that the goods in issue could not be classified in heading No. 94.01 because the definition of "furniture" in the explanatory notes to Chapter 94 specifically state that the heading does not include goods which are more specifically described elsewhere in the nomenclature. Mattel maintained that, as the goods in issue are more specifically described by heading No. 95.03, they are therefore precluded from being classified in heading No. 94.01.

### CBSA

34. The CBSA contended that the goods in issue are "seats" within the meaning of heading No. 94.01 because they are similar to other types of seats listed in the explanatory notes, such as infants' high chairs and children's seats designed to be hung on the back of other seats. The CBSA also stated that the goods in issue fall within the ordinary meaning of "seat", which is a "... thing made or used for sitting on, such as a chair or stool".<sup>31</sup> The CBSA maintained that, on the basis of the product literature, consumer reviews, the marketing of the goods and the design of the goods, the goods in issue meet this definition.

35. The CBSA conceded that the goods in issue can, and do, amuse children to a certain degree.<sup>32</sup> Nevertheless, the CBSA argued that the amusement value is secondary to the essential character of the goods in issue. Therefore, while the CBSA agreed that the goods cannot be classified in heading No. 94.01 as furniture if they are more specifically described elsewhere in the nomenclature, it argued that the goods in issue cannot be said to be more specifically described in heading No. 95.03 as other toys because, when examined as a whole, their essential character stems from the fact that they are seats.

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29. Exhibit AP-2013-034-04, tab 4, Vol. 1.

30. (15 June 2012), AP-2011-029 (CITT) [*Elfe*].

31. Exhibit AP-2013-034-15A at para. 55, Vol. 1A.

32. *Ibid.* at para. 48; *Transcript of Public Hearing*, 8 April 2014, at 93.

36. Further, the CBSA stated that the goods in issue meet the six components of the definition of “furniture” as set out in the explanatory notes to heading No. 94.01. Specifically, the CBSA argued that:

- the goods are movable;
- the goods are articles;
- the goods are constructed for placing on the floor;
- the goods are used mainly with a utilitarian purpose;
- the goods are used to equip private dwellings (or other buildings); and
- the goods must not be included under other more specific headings of the nomenclature.

## ANALYSIS

37. As indicated above, the explanatory notes to Chapter 94 restrict the scope of that chapter to furniture (i.e. movable articles not included in other more specific headings of the nomenclature). Accordingly, if the goods in issue are articles included in a heading that is more specific, they cannot be classified in heading No. 94.01.

38. Therefore, in accordance with Rule 1 of the *General Rules*, the Tribunal will begin its analysis by determining whether the goods in issue can be classified in heading No. 95.03 as other toys. If so, the Tribunal will not go any further in its analysis, as it will be clear that heading No. 95.03 provides a more specific description of the goods in issue than heading No. 94.01. If not, the Tribunal will consider the applicability of heading No. 94.01.

### Can the Goods in Issue be Classified as Other Toys?

39. The Tribunal notes that the nomenclature does not define the term “toy”. However, the Tribunal has consistently interpreted the term “toy” broadly to encompass a wide range of articles that provide amusement or play value in accordance with the explanatory notes to Chapter 95 and note (D) of the explanatory notes to heading No. 95.03.<sup>33</sup> For example, the Tribunal has previously held that heading No. 95.03 “. . . covers objects that children . . . play with.”<sup>34</sup> Similarly, the Tribunal has viewed “play value” as an “. . . identifying aspect of . . . a toy.”<sup>35</sup> In this way, the Tribunal has consistently considered a toy to be an article that amuses people, whether adults or children.

40. The Tribunal has also been consistent that the determination of whether an item is a toy is a factual one which should be made on the basis of the evidence in a particular case at hand.<sup>36</sup> To that end, both the actual and intended uses of the good should be considered, including the manner in which it is marketed,

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33. *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); *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT); *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) [*Korhani*]; *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (12 April 2012), AP-2011-020 (CITT).

34. *Korhani* at para. 32.

35. *Havi Global Solutions (Canada) Limited Partnership v. President of the Canada Border Services Agency* (10 October 2008), AP-2007-014 (CITT) [*Havi*] at para. 30.

36. See for example, *Havi; N.C. Cameron & Sons Ltd. v. President of the Canada Border Services Agency* (14 June 2007), AP-2006-022 (CITT).

packaged and advertised.<sup>37</sup> With respect to intended uses, the Tribunal has found that “...the term ‘designed for’ relates to a deliberate intention in the mind of the manufacturer of the system (or goods) as to the nature of its ultimate use or ultimate function”<sup>38</sup> [emphasis added].

41. When determining whether the goods in issue can be classified in heading No. 95.03, the Tribunal must therefore consider whether the goods in issue are toys and, as such, whether they are designed or intended to amuse children. More specifically, as the jumpers are designed to be used by children between the ages of approximately 3 to 12 months, the bouncers for children from birth and to approximately 5 to 7 months of age, and the rockers for children from birth to toddlerhood, the Tribunal must consider whether the goods in issue, taken together, can amuse children between birth and toddlerhood.

### **Can the Goods in Issue Amuse Infants and Children?**

42. *Merriam-Webster’s Collegiate Dictionary* defines “amuse” as follows: “...to divert the attention . . . to occupy the attention . . . DISTRACT . . . to entertain or occupy in a light, playful, or pleasant manner . . . .”<sup>39</sup> The *Canadian Oxford Dictionary* defines “amuse” as follows: “. . . cause (a person) to laugh or smile . . . interest or occupy; keep (a person) entertained.”<sup>40</sup>

43. The Tribunal will use these definitions as the basis for its consideration of whether the goods in issue can be said to amuse infants or children. In other words, the Tribunal will consider whether the goods in issue can be said to amuse infants or children by distracting, entertaining, interesting or occupying them in a pleasant manner.

44. The Tribunal notes that, in a video presented by Mr. Hunstberger during the hearing, infants reacted positively to the goods in issue and, in some cases, physically interacted with them.<sup>41</sup> In this sense, it is clear that the goods in issue can indeed have some effect on infants, and the Tribunal must therefore determine whether the shown reactions demonstrate that the goods in issue “amuse” children, as defined above.

45. In this respect, the Tribunal finds the testimony of Dr. Fennell particularly significant, as he testified as to whether infants can be “amused” on the basis of scientific research in the area of cognitive development. Dr. Fennell explained that amusement can be defined in different ways along a continuum or graduating scale. For example, he testified that infants aged 6 months or older were “definitely” capable of the “highest” form of amusement (i.e. smiling or laughter),<sup>42</sup> while the “lowest” form of amusement (i.e. distraction) is present even before birth.<sup>43</sup>

46. When asked specifically whether the goods in issue can amuse infants, Dr. Fennell agreed. While he noted that amusement and distraction are not always considered synonymous concepts in the literature, the goods in issue can be said to amuse infants if the Tribunal accepted that distraction was a form of amusement.<sup>44</sup> Furthermore, he noted that “. . . past the age of six months, I would be comfortable saying that these objects could provoke amusement at that higher level of smiling and laughing.”<sup>45</sup>

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37. *Korhani*.

38. *Union Tractor Ltd. v. M.N.R.* (8 September 1993), AP-92-213 (CITT) at 3.

39. Eleventh ed., s.v. “amuse”.

40. Second ed., s.v. “amuse”.

41. *Transcript of Public Hearing*, 8 April 2014, at 50.

42. *Ibid.* at 97-98, 108, 114, 123.

43. *Ibid.* at 99.

44. *Ibid.* at 100, 118, 123-24.

45. *Ibid.* at 127-28.

47. When put into the context of the definitions of “amuse” as noted above, Dr. Fennell’s remarks demonstrate that the goods in issue can amuse children.<sup>46</sup> By virtue of the ability of the goods in issue to move, and the accompanying lights, sounds and plush toys, the Tribunal is satisfied that they can “... divert the attention ... occupy the attention ... DISTRACT ... [and/or] entertain or occupy in a light, playful, or pleasant manner” and “... cause (a person) to laugh or smile ...” In this sense, the goods in issue are “toys” in a manner consistent with past Tribunal interpretations of the term.

### **Were the Goods in Issue Intentionally Designed to Amuse Infants and Children?**

48. As noted above, the Tribunal has also considered whether a good is toy on the basis of the manner in which it is designed or intended to be used. In that respect, the evidence presented in the case at hand leads the Tribunal to accept that the goods in issue were specifically designed or intended to amuse infants and offer play value.

49. According to Mr. Huntsberger, the goods in issue were specifically and intentionally designed to appeal to the abilities and interests of infants at various stages of development. He highlighted a document prepared for the U.S. Consumer Product Safety Commission titled “Which Toy for Which Child” to draw linkages between the abilities and interests of infants and the ways in which the goods in issue were designed.<sup>47</sup>

50. Mr. Huntsberger noted that the abilities of infants from 0 to 6 months of age cause them to be interested in “... explor[ing] the world with eyes and ears ... hands and feet”, “... rocking, bouncing”, “... creating effects in the environment by own actions”,<sup>48</sup> “... holding, batting, turning ... kicking ...”, seeing “... bright primary colours, high contrast, simple designs...” and moving “... hanging objects ... by ... their own activity”.<sup>49</sup> Accordingly, he stressed that Mattel intentionally designed the goods in issue with those abilities and interests in mind.

51. The Tribunal finds that the goods in issue contain several design elements that closely mirror the activities and interests described in “Which Toy for Which Child”. For example, jumpers have “... lots of toys and bright-coloured characters”,<sup>50</sup> some of which are “... spinners, some are clickers, some are fine ... motor development kind of things where you’re manipulating buttons.”<sup>51</sup> The jumpers are also all equipped with the following:

springs that create this jumping movement so it’s a dynamic play. They have electronics that are in them that reward the babies, so motion sensors that, as baby jumps, they are rewarded with light pattern and music to stimulate them.<sup>52</sup>

52. Similarly, bouncers are also “brightly coloured” and “... have toys overhead that the children can bat at”, some of which “... have lights and movement” and some of which “... have rattles, some have fabric components with crinkle inside, some have electronics that actually have songs and tunes in them.”<sup>53</sup>

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46. This conclusion is consistent with the Tribunal’s finding in *Elfe*, in which the Tribunal held that an infant swing provided some measure of amusement for babies and, in so doing, equated amusement with distraction. *Elfe* at para. 45.

47. Exhibit AP-2013-034-22 at 21-30, Vol. 1D; *Transcript of Public Hearing*, 8 April 2014, at 21-27.

48. Exhibit AP-2013-034-22 at 27, Vol. 1D; *Transcript of Public Hearing*, 8 April 2014, at 23.

49. Exhibit AP-2013-034-22 at 27, Vol. 1D; *Transcript of Public Hearing*, 8 April 2014, at 25.

50. *Transcript of Public Hearing*, 8 April 2014, at 28.

51. *Ibid.* at 28.

52. *Ibid.* at 28.

53. *Ibid.* at 29.

53. Even more, rockers “. . . have toys overhead, electronics, sound effects, gross movements can have the baby get the product to rock. And then finite toys and stimulation of colours and characters and faces . . . .”<sup>54</sup>

54. In this way, the Tribunal finds that the goods in issue were designed and intended to be used in such a way as to amuse an infant or child.

### **Are the Goods in Issue Marketed, Packaged and Advertised as Toys That Amuse Infants and Children?**

55. Likewise, the Tribunal finds that the goods in issue are also marketed, packaged and advertised as toys that amuse and provide play value. In terms of marketing, Mr. Huntsberger noted that the goods in issue are generally sold by major retailers in the “bouncer/entertainer” aisle,<sup>55</sup> as Mattel’s retailers and consumers “expect us to be the play brand in the [baby gear] space . . . .”<sup>56</sup>

56. As for packaging, Mr. Huntsberger demonstrated that the boxes in which the goods in issue are sold underscore that the jumpers, bouncers and rockers can help to develop motor skills and stimulate an infant’s senses to ultimately amuse an infant. For example, the text and graphics highlight the interactive features of the goods in issue (e.g. sounds, lights, movement) and refer to them in terms such as “fun”, “entertains”, etc.<sup>57</sup> The product literature and packaging also include such statements as “Encourages Developing Motor Skills”, “Stimulates Senses”, and “Enhances Learning Through Discovery”.<sup>58</sup>

57. Similarly, the product literature for the goods in issue emphasizes such features as a “. . . three stage developmental system of toys designed to bring out baby’s full potential in that first year”<sup>59</sup> and “. . . helps baby reach new milestones with customizable areas of sight, sound, and touch.”<sup>60</sup> In terms of advertising, Fisher-Price, Inc.’s Web site, for example, lists a bouncer as a “type of toy” for a 4-month-old child.<sup>61</sup>

### **CONCLUSION**

58. Therefore, in a manner consistent with past Tribunal jurisprudence and on the basis of the evidence before it, the Tribunal concludes that the goods in issue should be classified in heading No. 95.03 as other toys because they can amuse infants and children, were intentionally designed for this purpose and are accordingly marketed, packaged and advertised as such.

59. Put another way, the goods in issue are most specifically described as other toys, notwithstanding the fact that they demonstrate some of the other characteristics of “seats” as set out in the notes to Chapter 94 (i.e. they are moveable articles, constructed for placing on the floor or ground and used mainly with a utilitarian purpose to equip private dwellings). By virtue of Note (A) of the explanatory notes to Chapter 94, then, the goods in issue cannot be classified in Chapter 94.

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54. *Ibid.* at 29.

55. *Ibid.* at 29.

56. *Ibid.* at 65.

57. *Ibid.* at 33, 41.

58. Exhibit AP-2013-034-12 at 17, 18, 19, Vol. 1; *Transcript of Public Hearing*, 8 April 2014, at 34, 48.

59. Exhibit AP-2013-034-12 at 37, Vol. 1.

60. *Ibid.* at 28.

61. *Ibid.* at 41; *Transcript of Public Hearing*, 8 April 2014, at 45, 58.

**Classification at the Subheading and Tariff Item Levels**

60. By application of Rule 1 of the *General Rules*, the Tribunal finds that the goods in issue should be classified in heading No. 95.03. Pursuant to Rule 6, the goods in issue must be classified in subheading No. 9503.90<sup>62</sup> as other toys, as no other first-level subheading under heading No. 95.03 describes the goods in issue.

61. By virtue of Rule 1 of the *Canadian Rules*, the goods in issue should be classified under tariff item No. 9503.90.00.<sup>63</sup>

**DECISION**

62. The appeals are allowed.

Ann Penner

Ann Penner

Presiding Member

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62. For the goods in issue imported after 2007, the applicable subheading is No. 9503.00.

63. For the goods in issue imported after 2007, the applicable tariff item is No. 9503.00.90.



IN THE MATTER OF appeals heard on April 8, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated June 3, 5, 6, 11, 12 and 24, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**MATTEL CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**CORRIGENDUM**

In paragraph 12, model H2T34 should be H2134, and model C639I should be C6391.

Ann Penner

Ann Penner

Presiding Member