



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-024

Toys“R”Us (Canada) Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, July 22, 2016*

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DECISION 9

IN THE MATTER OF an appeal heard on May 26, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency, dated September 2, 2015, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act* and a request for review of an advance ruling on tariff classification pursuant to paragraph 60(4)(b).

BETWEEN

TOYS“R”US (CANADA) LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 26, 2016
Tribunal Member: Serge Fréchette, Presiding Member
Counsel for the Tribunal: Elysia Van Zeyl
Supervisor, Registry Operations: Haley Raynor
Registrar Support Officer: Sara Pelletier

PARTICIPANTS:**Appellant**

Toys“R”Us (Canada) Ltd.

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STATEMENT OF REASONS

SUMMARY

1. This is an appeal filed by Toys“R”Us (Canada) Ltd. with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ in response to a decision made by the President of the Canada Border Services Agency (CBSA) on September 2, 2015.

2. The issue in this appeal is whether Safeway[®] wall mount safety gates are properly classified under tariff item No. 7326.90.90 of the schedule to the *Customs Tariff*² as other articles of iron or steel, as determined by the CBSA, or should be classified under tariff item No. 7308.90.00 as other structures and parts of structures of iron or steel, as submitted by Toys“R”Us.

GOODS IN ISSUE

3. The goods in issue are constructed of tubular steel, are expandable in width from 24.75 inches to 43.50 inches and are used to restrict a child’s access to a staircase or room in order to reduce the probability of a fall or other injury. The goods in issue are intended to be mounted to the baluster or wall at the top of a staircase, but they can also be used in doorways and hallways. One side is hinged allowing the gate portion to open when required. The goods in issue are imported in an unassembled or disassembled state, but come with the hardware required for assembly and mounting. They feature a quick release that allows the gate portion to be removed when not needed, although the mounting hardware remains attached to the wall or baluster.

4. Toys“R”Us filed one physical exhibit, Exhibit A-01, which consists of the Safeway[®] hardware mount installation.

PROCEDURAL HISTORY

5. Toys“R”Us requested a re-determination of the goods in issue in a series of three separate requests submitted to the CBSA, dated November 13, 2014, December 8, 2014, and February 4, 2015.

6. On May 25, 2015, the CBSA issued a preliminary decision with respect to the three requests, in which it classified the goods in issue under tariff item No. 7326.90.90.

7. On September 2, 2015, the CBSA issued a final decision, confirming the classification of the goods in issue under tariff item No. 7326.90.90.

8. On November 27, 2015, Toys“R”Us filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

LEGISLATIVE FRAMEWORK

9. The tariff classification of goods is determined according to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.³

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

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

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

The schedule to the *Customs Tariff* sets out the tariff nomenclature and is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheading and under tariff items.

10. 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 of the Interpretation of the Harmonized System*⁴ and the *Canadian Rules*⁵ set out in the schedule.

11. Rules 1 through 5 of the *General Rules* are structured in sequence. Rule 1 provides that “. . . classification shall be determined according to the terms of the heading and any relative Section or Chapter Notes . . .”, provided such headings or notes do not otherwise require, according to the following rules.

12. In this case, classification cannot be determined solely with reference to Rule 1 of the *General Rules* because the goods in issue are imported in an unassembled or disassembled state. Accordingly, the Tribunal must also consider Rule 2 (a), which provides that “[a]ny reference in a heading to an article shall be taken to . . . include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.”

13. After the appropriate heading has been determined, Rule 6 of the *General Rules* directs 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] . . .”

14. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.⁷ 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.⁸

15. Finally, Rule 1 of the *Canadian Rules* states that “. . . the classification 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 . . .”

RELEVANT CLASSIFICATION PROVISIONS

16. Both parties agree that the goods in issue fall under Chapter 73 as follows:

SECTION XV

BASE METALS AND ARTICLES OF BASE METAL

Chapter 73

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

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

6. World Customs Organization, 4th ed., Brussels, 2007 [*Classification Opinions*].

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

8. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that 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*.

ARTICLES OF IRON OR STEEL

17. The dispute between the parties is at the heading level. Toys“R”Us submitted that the goods in issue should be classified in heading No. 73.08, which provides as follows:

73.08 Structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, lock-gates, towers, lattice masts, roofs, roofing frame-works, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns), of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel.

18. The relevant portions of the explanatory notes to heading No. 73.08 provide as follows:

This heading covers complete or incomplete metal structures, as well as parts of structures. For the purpose of this heading, these structures are characterised by the fact that once they are put in position, they generally remain in that position. They are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding, etc. Such structures sometimes incorporate products of other headings such as panels of woven wire or expanded metal of heading 73.14. Parts of structures include clamps and other devices specially designed for assembling metal structural elements of round cross-section (tubular or other). These devices usually have protuberances with tapped holes in which screws are inserted, at the time of assembly, to fix the clamps to the tubing.

Apart from the structures and parts of structures mentioned in the heading, the heading also includes products such as:

Pit head frames and superstructures; adjustable or telescopic props, tubular props, extensible coffering beams, tubular scaffolding and similar equipment; sluice-gates, piers, jetties and marine moles; lighthouse superstructures; masts, gangways, rails, bulkheads, etc., for ships; balconies and verandahs; shutters, *gates*, sliding doors; assembled railings and fencing; level-crossing gates and similar barriers; frameworks for greenhouses and forcing frames; large-scale shelving for assembly and permanent installation in shops, workshops, storehouses, etc.; stalls and racks; certain protective barriers for motorways, made from sheet metal or from angles, shapes or sections.

[Emphasis added]

19. The CBSA argued that the goods in issue are properly classified in heading No. 73.26, which provides as follows:

73.26 Other articles of iron or steel.

20. The relevant explanatory notes to heading No. 73.26 provide as follows:

This heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in Chapter 82 or 83 or more specifically covered elsewhere in the Nomenclature.

POSITIONS OF PARTIES

Toys“R”Us

21. Toys“R”Us submitted that the goods in issue should be classified as structures or part of structures under tariff item No. 7308.90.00, primarily on the basis that the explanatory notes to heading No. 73.08 specifically mention “gates”. Toys“R”Us argued that the goods in issue are sold and marketed as gates and,

thus, as a factual matter, are properly considered to be gates. Toys“R”Us also referred to an *Oxford Dictionary* definition which describes a gate as “[a] hinged barrier used to close an opening in a wall, fence, or hedge”.⁹ According to Toys“R”Us, the parties agree that the goods in issue are designed to be mounted on a wall, with the supplied hardware, and to act as barriers.

22. Toys“R”Us alleged that the CBSA made factual and legal errors in finding that the goods in issue were properly classified in heading No. 73.26. According to Toys“R”Us, the CBSA erred in holding that the goods must be permanently installed in order to fall within heading No. 73.08. According to Toys“R”Us, in doing so, the CBSA impermissibly read in a permanency requirement that does not exist in the heading or the explanatory notes. Toys“R”Us was of the view that, where there is a permanency requirement in the explanatory notes to heading No. 73.08, it is explicitly stated, for example, “. . . large-scale shelving for assembly and permanent installation in shops . . .” It also argued that permanency cannot be required for all items under this heading, given the nature of certain items (e.g. scaffolding) which are clearly designed for temporary use. Moreover, Toys“R”Us drew the Tribunal’s attention to the use of the word “generally” in the explanatory notes (“. . . these structures are characterised by the fact that once they are put in position, they *generally* remain in that position”) as further support for its argument that the goods in issue need not always be permanently installed in order to be classified in heading No. 73.08.

23. Furthermore, Toys“R”Us claimed that, even if there was a permanency requirement, the goods in issue would still fall within heading No. 73.08 because their marketing materials refer to the them as intended for permanent installation.

24. In addition, Toys“R”Us suggested that the CBSA artificially restricted heading No. 73.08 to goods that provide “support”, although no such requirement is explicitly stated in the heading or explanatory notes and that there are other examples of goods within the heading that would not meet any such requirement (e.g. shutters).

CBSA

25. The CBSA acknowledged that the explanatory notes to heading No. 73.08 list gates; however, it argued that not all gates would fall under heading No. 73.08. In particular, the CBSA submitted that the scope of the heading requires such a gate to be either a structure or part of a structure. In the CBSA’s view, the goods in issue are neither structures nor parts of structures.

26. In support of its position that the goods in issue are not structures, the CBSA relied on several dictionary definitions of the term “structure”. In general, these definitions denote buildings and edifices, or something built or constructed. In addition, the CBSA pointed to the Tribunal’s decision in *Krueger International Canada Inc. v. Deputy M.N.R.*¹⁰ to reinforce its argument that the goods in issue are not structures because they cannot support themselves and provide no support to the stairway or wall to which they are attached. Further, the CBSA relies on jurisprudence identifying the typical characteristics of structures, such as considerable size or imposing appearance and a certain degree of permanence or immovability.¹¹

9. Exhibit AP-2015-024-04A at para. 28, Vol. 1.

10. (14 February 1996), AP-94-357 (CITT) [*Krueger*].

11. *British Columbia Forest Products Ltd. v. Minister of National Revenue*, [1972] SCR 101, 1971 CanLII 156 (SCC) at 109; *Canadian Imperial Bank of Commerce v. Alberta (Assessment Appeal Board)*, 1990 CanLII 5566 (AB QB) at paras. 24-27; *R. v. Bedard* [1976] O.J. No. 833 at para. 31; *Springman v. The Queen*, [1964] SCR 267, 1964 CanLII 69 (SCC) [*Springman*] at 273.

27. Not only are the goods in issue not considered structures, according to the CBSA, neither are they appropriately considered parts of structures. The CBSA pointed to the Tribunal's decision in *Les Industries et Équipements Laliberté Ltée v. Deputy M.N.R.*¹² as setting out a three-part test to determine whether a good is considered a part of a structure for the purposes of heading No. 73.08, which it describes as follows: (1) is the good incorporated into the structure?; (2) is the good a necessary and integral part of the structure?; and (3) common trade usage or practice.

28. It was the CBSA's position that the goods in issue failed to meet parts (2) and (3) of the above test. In the CBSA's opinion, a child safety gate is neither an integral nor a necessary part of a wall or staircase baluster to which it is attached and, further, its inclusion is generally not contemplated when the wall, staircase or house is constructed. Further, it is not common trade practice to include a child safety gate in the construction of a wall or staircase. Rather, it tends to be added only by a parent or guardian, after construction, when children are present in the home.

29. Having concluded that the goods in issue are not structures or parts of structures, the CBSA argued that heading No. 73.26 is an appropriate heading, given that the goods are "articles" and are comprised of steel.

ANALYSIS

30. In determining the appropriate tariff classification of the goods in issue, the Tribunal will consider both Rules 1 and 2 (a) of the *General Rules*.

31. As noted by both parties, heading No. 73.26 is a residual heading. The Tribunal therefore agrees that it must begin its analysis by considering whether the goods in issue may be classified in heading No. 73.08. It is only if the Tribunal is satisfied that the goods in issue are not properly classified in heading No. 73.08 that it will proceed to examine whether they they should be classified in heading No. 73.26.

Heading No. 73.08

32. Although a "gate" is mentioned in the terms of heading No. 73.08, it is clear that a gate is referenced simply as an *example* of a part of a structure. In the Tribunal's view, it is not sufficient for a good to be considered a gate to be appropriately classified in this heading; rather, that gate must be considered a structure or a part of a structure.

33. The explanatory notes to heading No. 73.08 do not provide a specific definition for the term "structure". As the Tribunal noted in *Krueger*, the explanatory notes provide a starting point from which to begin considering what constitutes a structure (for example, they are usually made up from bars, rods, tubes, angles, etc.), and dictionary definitions are helpful in understanding the usual and ordinary meaning of the term.

34. The *Shorter Oxford English Dictionary* defines a structure as follows:

4 That which is built or constructed; a building or edifice of any kind, esp. of considerable size and imposing appearance.¹³

12. (23 December 1998), AP-97-070 (CITT) [*Laliberté*].

13. Exhibit AP-2015-024-07B at 194, Vol. 1A.

35. The *Dictionary of Architecture and Construction* defines a structure as follows:
1. A combination of units constructed and so interconnected, in an organized way, as to provide rigidity between its elements.
 2. Any edifice.¹⁴
36. *Black's Law Dictionary* defines a structure as follows:
1. Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together, <a building is a structure>.¹⁵
37. The *Random House Unabridged Dictionary* defines a structure as follows:
1. Mode of building, construction or organization;
 2. Something built or constructed, as a building, bridge or dam.¹⁶
38. The Tribunal will also rely on jurisprudence which sheds light on the scope of the term “structure”. An excerpt that has been relied upon by the Supreme Court of Canada¹⁷ comes from Denning L.J. in *Cardiff Rating Authority v. Guest Keen Baldwin's Iron & Steel Co.* wherein he states as follows:
- A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be moveable, as for instance, about a pivot. Thus, a windmill or a turntable is a structure.¹⁸
- [Emphasis in original]
39. With these definitions in mind, the Tribunal finds that the goods in issue have not been constructed or built in the same sense as a building, a bridge, a dam or a windmill, nor are they of a substantial size.
40. Furthermore, in *Krueger*, the Tribunal was of the view that a key characteristic of a structure is its ability to support something else. In this case, the goods in issue do not support anything. Indeed, in order to function as intended, the goods in issue need to be attached to a wall or baluster, which provides support to them, rather than vice versa.
41. With regard to the concept of permanency, the Tribunal agrees that this is not a rigid requirement in the explanatory notes, but rather an indicator that something may be considered a structure. This is clear from the language of the explanatory notes, “. . . once [the goods] are put in position, they *generally* remain in that position” [emphasis added]. Had permanency been intended to be a strict requirement, the explanatory notes would have instead indicated that, once the goods were put in position, they always remain in that position. In this way, the explanatory notes recognize that it is theoretically possible for a structure to be moved, although under most circumstances, it would remain in a single place either permanently or with some degree of permanency.
42. Considering the physical characteristics of the goods in issue, which include their size, the fact that the goods in issue do not support anything, and considering the fact that they do not have a similar degree of

14. *Ibid.* at 162.

15. *Ibid.* at 157.

16. *Ibid.* at 188.

17. *Springman; British Columbia Forest Products Ltd. v. Minister of National Revenue*, [1972] SCR 101, 1971 CanLII 156 (SCC).

18. *Springman* at 273.

permanency as a building, edifice, bridge or the like, the Tribunal concludes the goods in issue are not structures, in and of themselves.

43. As to whether the goods in issue are parts of structures, the Tribunal's decision in *Laliberté* sets out a meaningful framework for the Tribunal to consider whether the goods in issue are parts of structures. Accordingly, the Tribunal will consider the following indicia: (1) whether the goods in issue are incorporated into a structure; (2) whether the goods in issue are necessary and integral to that structure; and (3) common trade usage and practice.

44. Although the CBSA has referred to the three criteria listed above as the "test" from *Laliberté*, the Tribunal wishes to clarify that these factors are more appropriately described as indicia that a particular good is a part of a structure. None of these indicia are determinative. Further, that a particular good might not meet one of the indicia is not necessarily fatal to the argument that the good is part of a structure. There may be some goods that do not seem to meet a particular indicium but, when considered alongside the explanatory notes, they may be appropriately classified in heading No. 73.08.

45. It should be borne in mind that the criteria established in *Laliberté* were based on previous Tribunal cases that dealt with "parts" of various types of machinery. The Tribunal expressly recognized the absence of a universal test to determine whether one product is a part of another, indicating that each case must be determined on its own merits.¹⁹

46. On the merits of this appeal and as discussed below, the evidence indicates that the goods in issue are not parts of structures and cannot be classified as such in heading No. 73.08.

Whether Incorporated into a Structure

47. In order to be used, the goods in issue must be installed into a staircase baluster or attached to the wall of a house.²⁰ It is by virtue of this installation that Toys"R"Us argued that the goods in issue are incorporated into a structure. Prior to the hearing, the CBSA did not contest this point.

48. At the hearing, the CBSA argued that the goods in issue are not incorporated into a wall in the same sense as shutters, doors and door thresholds. In particular, although the goods in issue are attached to the wall or baluster, they are easily removed. Toys"R"Us submitted at the hearing that the fact that the goods in issue are bolted into a staircase or wall is sufficient for them to be considered "incorporated into" a structure.

49. The evidence indicates that the goods in issue are designed to be physically mounted to a wall or baluster, or other area of the house that is structurally sound using the supplied hardware. According to the user guide, screws are provided for mounting the goods in issue directly into wood; however, different hardware may need to be used depending on the surface onto which the goods in issue are to be mounted.²¹ In some circumstances, it may be necessary for the individual mounting the goods in issue to drill pilot holes in order to properly mount the goods in issue. The swinging portion of the goods in issue may be temporarily removed with relative ease by pressing back on a lock tab on the bottom hinge; however, even where this part of the goods in issue is removed, the hardware generally remains in place. If the goods in issue were completely removed, including the mounting, there would likely be some damage to the wall or baluster, unlike the office partitions in *Krueger*, which were specifically designed to be installed, uninstalled and moved from one location to another with ease and without causing any lasting damage to the ceiling or floor.

19. *Laliberté* at para. 12.

20. *Transcript of Public Hearing*, Vol. 1, 26 May 2016, at 7.

21. Exhibit AP-2015-024-07B at 166, Vol. 1A.

50. In this case, although the goods in issue are not necessarily permanent installations (in other words, they may very well be moved by the owner of the house or removed when they are no longer required for the safety of any children in the home), there is a sufficient degree of integration with the wall or baluster, and thus with the house itself, to satisfy the Tribunal that the goods in issue can be considered incorporated into a structure.

Whether Necessary and Integral to the Structure

51. The second component of the indicia applied by the Tribunal in *Laliberté* involves a consideration of whether the good is “necessary and integral” to the structure.

52. In the Tribunal’s view, although parents or guardians may consider the goods in issue helpful in safeguarding their children from potential injury, a child safety gate is not a necessary or integral part of a wall or staircase baluster, or of a house.

53. From a physical perspective, the goods in issue impede access to a stairway or hall in much the same way as a gate in a fence impedes access to a property; however, there exists an important distinction between these two types of gates. The function of a fence is to enclose a property from unauthorized access, and the fence gate contributes to that function by blocking what would otherwise be an opening in the fence. In contrast, the goods in issue do not make a contribution to the function of a staircase, baluster or the house as a whole. In other words, without the goods in issue, the staircase, baluster or the house would function in much the same way as it does with the goods in issue, albeit with an added measure of safety.

Common Trade Usage and Practice

54. Houses are not generally designed with the inclusion of child safety gates in mind. Rather, a child safety gate would normally be installed by a parent or guardian at some time after the construction of a home. In some cases, this installation could occur many years after the house is constructed. There are also many situations in which a child safety gate would never ultimately be installed in a home, for example, homes where no small children are present.

55. Moreover, no special modifications to the house, staircase or wall need to be made in order to accommodate the installation of the goods in issue. To the contrary, the fact that the goods in issue are adjustable indicates that they may be adapted to suit many different widths of doorways or staircases.

56. The goods in issue are not essential to the functioning of the house, staircase or wall, nor are they commonly considered by their trade usage and practice to be part of a staircase, wall or house.

57. For the above reasons, after considering the indicia set out in *Laliberté*, the Tribunal concludes that the goods in issue are not parts of structures and, therefore, cannot be classified in heading No. 73.08.

Heading No. 73.26

58. Having found that the goods in issue are not classifiable in heading No. 73.08, the Tribunal will now examine whether they are classifiable in heading No. 73.26.

59. As discussed above, heading No. 73.26 is a residual category into which goods may be classified only when they are not covered by another heading. The Tribunal is of the view that the only other possibility is heading No. 73.08. Having concluded that the goods in issue are not classifiable in heading

No. 73.08, the Tribunal concludes that they are not more specifically covered elsewhere in the nomenclature.

60. The goods are comprised of steel. There is no dispute about this fact.

61. The Tribunal has interpreted the phrase “articles” to mean “any finished or semi-finished product, which is not considered to be a material”.²² In this case, the goods in issue meet that definition.

62. Accordingly, the goods in issue are properly classified in heading No. 73.26.

63. As there is no subheading that is specific to the goods in issue, the Tribunal finds that the goods in issue are properly classified under tariff item No. 7326.90.90 as other articles of iron or steel.

DECISION

64. The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

22. *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-019 (CIIT) at para. 57.