Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-005

Mattel Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, June 19, 2019

Canada

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IN THE MATTER OF an appeal heard on November 27, 2018, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 5, 2018, 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 appeal is allowed.

Georges Bujold
Georges Bujold
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 27, 2018
Tribunal Member:	Georges Bujold, Presiding Member
Support Staff:	Elysia Van Zeyl, Counsel Kalyn Eadie, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Mattel Canada Inc.	Michael Sherbo Andrew Simkins

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Elsa Michel

WITNESS:

Kurt Huntsberger
Vice President, Product Design
Fisher-Price

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Mattel Canada Inc. (Mattel) on May 17, 2017, pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA), dated March 5, 2017, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the "Roarin' Rainforest Jumperoo" is properly classified under tariff item No. 9401.71.10 as other upholstered seats, with metal frames, for domestic purposes, whether or not convertible into beds, and parts thereof, as determined by the CBSA, or under tariff item No. 9503.00.90 as "other toys", as claimed by Mattel.

PROCEDURAL HISTORY

3. On June 16, 2017, Mattel requested an advance ruling on the tariff classification of the goods in issue. Mattel's view was that the goods in issue met the requirements to be classified under tariff item No. 9503.00.90.

4. On September 14, 2017, the CBSA issued an advance ruling finding that the goods in issue fall under heading No. 94.01 as "seats (other than those of heading 94.02), whether or not convertible into beds or parts thereof", and in particular under tariff item No. 9401.71.10.

5. On November 9, 2017, Mattel requested a review of the advance ruling under subsection 60(2) of the *Act*.

6. On March 5, 2018, the CBSA affirmed its advance ruling, maintaining that the goods were classified under tariff item No. 9401.71.10.

7. On May 17, 2018, Mattel filed this appeal with the Tribunal.

8. The Tribunal held a public hearing on November 27, 2018. The Tribunal heard testimony from Mr. Kurt Huntsberger, Vice-President of Product Design at Fisher-Price,[2] who was qualified as an expert in the area of the marketing, design, and development of baby gear, including Jumperoos.[3]

9. On February 11, 2019, the Tribunal invited the parties to make post-hearing submissions on the applicability of the Federal Court of Appeal's decision in *Canada (Attorney General) v. Best Buy Canada Inc.*,[4] which was released after the hearing. On February 19 and 26, 2019, the parties made their submissions. Accordingly, the record of this appeal was closed on February 26, 2019.

DESCRIPTION OF THE GOODS IN ISSUE

10. The goods in issue are marketed as the Fisher-Price "Roarin' Rainforest Jumperoo" (Model No. CBV63). Mattel describes this product as an interactive toy equipped with sound (music), bright colours

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Fisher-Price is owned by Mattel: *Transcript of Public Hearing* at 23.
3. *Transcript of Public Hearing* at 21.
4. 2019 FCA 20 [*Best Buy*].

and lights, toys and springs that provide for motion (jumping). According to Mattel, it is an activity centre designed for babies to bounce and play in, and accordingly Mattel refers to the goods in issue as a "toy jumper".[5]

11. The CBSA describes the goods in issue as a "multifunctional infant seat" having a sturdy, free-standing steel frame to which a donut-shaped seat is attached. According to the CBSA, the product is designed to allow an infant who cannot sit independently to sit fully supported and to rotate 360 degrees.[6]

12. While the parties disagree on whether this product should be regarded as a toy or as a seat for tariff classification purposes, it is common ground between them, and the evidence indicates, that it consists of a donut-shaped seat that is suspended by three covered springs from three taller steel posts. These posts are attached to a round steel tubular base.[7]

13. It warrants noting that in *Mattel Canada Inc. v. President of the Canada Border Services Agency*,[8] the Tribunal decided that goods virtually identical to the goods in issue were properly classified under tariff item No. 9503.00.90 as "other toys".[9] Like the goods that were characterized as "jumpers" in that decision, the goods in issue are for use by infants from the time they can hold their heads up unassisted until they are able to walk and climb out of the good.[10]

LEGAL FRAMEWORK

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,[11] which is designed to conform to the *Harmonized Commodity Description and Coding System* (the *Harmonized System*) developed by the World Customs Organization (WCO). 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*[12] and the *Canadian Rules*[13] 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*

5. Exhibit AP-2018-005-04A at paras. 9-11, Vol. 1.
6. Exhibit AP-2018-005-06A at para. 9, Vol. 1.
7. The Tribunal notes that Mattel referred to the seat component as a "harness" in its brief, but Mattel's product information and the box of the product itself, which was filed as a physical exhibit, refers to this component as a "rotating seat". Exhibit AP-2018-005-06B, Vol. 1 at 41-42 and Exhibit AP-2018-005-A-01.
8. (10 July 2014), AP-2013-034 and AP-2013-040 (CITT) [*Mattel I*].
9. In fact, the Tribunal notes that a model of a good identified as the Rainforest Jumperoo was filed as a physical exhibit in *Mattel I*; see para. 13.
10. *Mattel I* at para. 12 and *Transcript of Public Hearing* at 37-39.
11. S.C. 1997, c. 36.
12. S.C. 1997, c. 36, schedule [*General Rules*].
13. S.C. 1997, c. 36, schedule.

Coding System[14] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[15] 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.[16]

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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other General Rules become relevant to the classification process.[17]

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.[18] The final step is to determine the proper tariff item.[19]

Relevant tariff nomenclature, legal and explanatory notes

20. The relevant tariff nomenclature is 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

. . .

14. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
15. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
16. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 [*Suzuki*], at paras. 13, 17; *Best Buy* at para. 4.
17. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.
18. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. 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."
19. 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." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

Chapter 95

TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF

9503.00	**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.**
9503.00.10	- - -Wheeled toys designed to be ridden by children (for example, tricycles, scooters, pedal cars); dolls' carriages
9503.00.90	- - -Other

21. The relevant legal and explanatory notes to Chapter 94 are 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); or

. . .

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

. . .

GENERAL

This Chapter covers, **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.

22. The relevant explanatory notes to heading No. 94.01 are as follows:

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

Lounge chairs, arm chairs, folding chairs, deck chairs, infants' high chairs and children's seats designed to be hung on the back of other seats (including vehicle seats), grandfather chairs, benches,

> couches (including those with electrical heating), settees, sofas, ottomans and the like, stools (such as piano stools, draughtsmen's stools, typists' stools, and dual purpose stool steps), seats which incorporate a sound system and are suitable for use with video game consoles and machines, television or satellite receivers, as well as with DVD, music CD, MP3 or video cassette players.
>
> Seats of this heading may incorporate complementary non-seat components, for example, toy components, a vibration function, music or sound players, as well as lighting features.

23. The relevant explanatory notes to Chapter 95 are as follows:

> **GENERAL**
>
> This Chapter covers toys of all kinds whether designed for the amusement of children or adults. . . .

24. The relevant explanatory notes to heading No. 95.03 are as follows:

> This heading covers :
>
> . . .
>
> (D) **Other toys.**
>
> This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes :
>
> All toys **not included** in **(A)** to **(C)**. Many of the toys are mechanically or electrically operated.

ANALYSIS

25. This appeal involves an apparent conflict between the previously mentioned Tribunal decision with respect to goods that are almost identical to the goods in issue and a classification opinion that was subsequently issued by the WCO. As noted above, in *Mattel I*, the Tribunal determined that goods very similar to the goods in issue were covered by heading No. 95.03, whereas the classification opinion, which is central to the CBSA's position in this appeal, suggests that such goods should be classified as seats of heading No. 94.01.

26. Thus, the dispute between the parties relates to the classification of the goods in issue at the heading level. The key question is whether, at the time of importation, the goods in issue, as a whole, met the terms of heading No. 94.01, as determined by the CBSA, or those of heading No. 95.03, as claimed by Mattel.

27. In *Mattel I*, the Tribunal found that goods cannot, through the application of Rule 1 of the *General Rules*, be *prima facie* classifiable in both headings No. 94.01 and 95.03 by virtue of the relevant explanatory notes. The Tribunal stated the following:

> 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.
>
> 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.[20]

20. *Mattel I* at paras. 37-38.

28. The parties have not disputed this finding in the present appeal nor did they argue that the analysis should follow a different order. Specifically, Mattel submitted that headings No. 94.01 and 95.03 are mutually exclusive, such that if the goods in issue fall within the scope of heading No. 95.03, they cannot be classifiable in heading No. 94.01. For its part, the CBSA submitted that the explanatory notes to Chapter 94 make it clear that this chapter, which includes heading No. 94.01, is restricted to articles not included in more specific headings of the nomenclature. Therefore, the CBSA acknowledged that if the goods in issue are found to be covered under a more specific heading—in this case, heading No. 95.03—then they would be excluded from classification in heading No. 94.01.

29. Accordingly, the Tribunal will first examine whether the goods in issue can be classified in heading No. 95.03 as "other toys". If not, it will be necessary to subsequently examine whether they are covered by heading No. 94.01. As required by section 11 of the *Customs Tariff*, the Tribunal will have regard to the classification opinion relied upon by the CBSA in its analysis.

Heading No. 95.03—Can the goods in issue be classified as "other toys"?

30. Mattel's position is that the Tribunal should follow the analysis set out in *Mattel I* and find that the goods in issue are "other toys" of heading No. 95.03. In *Mattel I*, the Tribunal summarized the applicable test to determine whether a good constitutes a toy within the meaning of heading No. 95.03 as follows:

> 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. For example, the Tribunal has previously held that heading No. 95.03 ". . . covers objects that children . . . play with." Similarly, the Tribunal has viewed "play value" as an ". . . identifying aspect of . . . a toy." In this way, the Tribunal has consistently considered a toy to be an article that amuses people, whether adults or children.
>
> 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. To that end, both the actual and intended uses of the good should be considered, including the manner in which it is marketed, packaged and advertised. 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."[21]
>
> [Emphasis in original and footnotes omitted]

31. The Tribunal went on to find, on the basis of the evidence adduced in that case, that goods very similar to the goods in issue were toys, in a manner consistent with past Tribunal interpretations in that they can amuse children.[22] The Tribunal also found that goods such as "jumpers" were specifically designed and intended by Mattel in such a way as to amuse an infant or child.[23] Finally, the Tribunal found that such goods were marketed, packaged and advertised as toys that amuse and provide play value.[24]

32. In this appeal, the CBSA submitted that note (D) of the explanatory notes to heading No. 95.03 provides that toys are goods that are intended essentially for the amusement of persons, but that the goods in issue are rather essentially intended to provide a secure place for an infant to sit safely and comfortably. According to the CBSA, the goods in issue serve the utilitarian purpose of providing a place for a young

21. *Mattel I* at paras. 39-40.
22. *Mattel I* at 47.
23. *Mattel I* at 51-54.
24. *Mattel I* at 55-57.

child to sit, and any pleasure-giving element of the goods in issue is secondary to this main purpose. Moreover, it argued that the mere presence of toys attached to the goods in issue do not render them toys when they are considered as a whole and, therefore, the goods in issue do not "fully" meet the terms of heading No. 95.03. Finally, the CBSA submitted that the goods in issue are not only marketed as toys, but also as "baby gear".[25]

33. The Tribunal notes that the CBSA made virtually identical submissions in *Mattel I* and that these arguments were rejected. Similarly, in this case, the Tribunal finds that the CBSA's position is not borne out by the evidence on the record, including, in particular, Mr. Huntsberger's expert evidence.

34. Mr. Huntsberger, who is an expert in the design of baby gear, unequivocally stated that the intent of the manufacturer of the goods in issue is to amuse and entertain infants taking their abilities into account.[26] His uncontroverted evidence can be summarized as follows:

- The entertainment of kids is the intention that Fisher-Price had in mind when designing the Roarin' Rainforest Jumperoo.[27]
- The design of the product is all about allowing infants to jump; jumping is the centrepiece of the goods in issue; it is their jumping feature that gives infants the most entertainment and amusement.[28]
- The goods in issue have springs, adjustable straps and are equipped with music, sound and lights that are designed to reward infants as they jump and, in this way, stimulate their senses; Fisher-Price focuses on the jumping in the marketing of this product, as signalled by the name Jumperoo, and all of the other components reinforce that feature.[29]
- The main objective of Fisher-Price in designing the Roarin' Rainforest Jumperoo is not that the infant would sit in it while performing activities other than jumping; this is a secondary feature and not the purpose of the goods in issue. In Mr. Huntsberger's own words, ". . . it's the number one feature . . . it's the number one thing that we advertise on the box and communicate in commercials. It is about the jumping and that's what it's for."[30] The product was created because Fisher-Price wanted to "provide a jumping experience for babies".[31]
- The box in which the goods in issue are sold underscores that they can help to develop motor skills and stimulate an infant's senses while providing entertainment and amusement.
- Like a learning toy, the goods in issue have many developmental aspects as well as the entertainment aspects.[32]
- He has not heard people refer to the goods in issue as seats or as furniture; they are typically identified as entertainers and marketed as such on the internet under Fisher-Price's "baby gear" category of products.[33]

25. Exhibit AP-2018-005-06B, Vol. 1 at 40.
26. *Transcript of Public Hearing* at 34.
27. *Transcript of Public Hearing* at 28.
28. *Transcript of Public Hearing* at 29 and 36.
29. *Transcript of Public Hearing* at 30-33.
30. *Transcript of Public Hearing* at 55-56.
31. *Transcript of Public Hearing* at 60.
32. *Transcript of Public Hearing* at 39-40 and 49.
33. *Transcript of Public Hearing* at 46-48 and 54-55.

35. Mattel also filed in evidence promotional videos that advertise the jumping feature of the goods in issue as providing the entertainment and amusement value. These videos also show images of infants jumping while actually using them. Contrary to the CBSA's submissions, they do not suggest that the essential intent of the goods in issue is to hold a child in an upright position or that it is for this ultimate purpose or function that they are actually used.

36. In view of this evidence, it is simply incorrect to claim, as the CBSA does, that the goods in issue are essentially intended to provide a secure place for an infant to sit safely and comfortably, that their main purpose is utilitarian and that their pleasure-giving features are secondary to this main purpose. The evidence actually indicates that, in a manner consistent with the explanatory notes to heading No. 95.03, the goods in issue are intended essentially for the amusement of children.

37. Likewise, the evidence does not support the CBSA's view that the Roarin' Rainforest Jumperoo is a seat with toys attached to it or that the secondary accessories do not make the entire product a toy. It is the fact that, considered as a whole, the Jumperoo allows infants to jump, thereby providing them with entertainment and amusement, which gives this product its main play value. The accessories and other features of the goods, that may in and of themselves be toys, are designed to reward infants as they jump and assist in the development of their motor skills. Therefore, the Tribunal is unable to accept the CBSA's argument that it is its toy and sound components, not the Roarin' Rainforest Jumperoo itself, that were designed for children to play and interact with and to provide amusement.

38. Turning to the CBSA's argument that the goods in issue are not only marketed as toys, the Tribunal notes that it is primarily based on the fact that, on Fisher-Price's website, the goods in issue are listed in the "Baby Gear" category, and not in the "Interactive Toys" category. In the Tribunal's opinion, in itself, this is insufficient to conclude that the goods in issue are not marketed as a toy in light of the other evidence on the record on this issue. Besides, the information on the website promotes the goods in issue as an "entertainer" allowing infants to "bounce to the moon and back, all in a day's worth of playtime".[34] Clearly, it is the pleasure-giving features of the goods in issue, not the seat component, which are emphasized by the manufacturer.

39. The Tribunal further notes that the "Baby Gear" category on Fisher-Price's website is broken down into multiple sub-categories, two of which are "Baby Floor Seats" and "High Chairs & Boosters". It is noteworthy that the goods in issues are not listed under those subcategories. They are categorized as examples of "Jumperoos & Baby Entertainers." As such, it cannot be said that the goods in issue are marketed as seats.

40. In sum, as was the case in *Mattel I*, 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. The CBSA has not filed any evidence that could persuade the Tribunal to find otherwise in this appeal, nor has it identified one or more elements in the Tribunal's earlier decision in this regard that is wrong as a matter of law or fact.

41. Accordingly, on the basis of the evidence before it and in a manner consistent with past Tribunal cases, the Tribunal should conclude that the goods in issue are classifiable 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. Before reaching this conclusion, the Tribunal must, however, have regard to the WCO classification opinion issued after the Tribunal's decision in *Mattel I* that is relied upon by the CBSA.

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34. Exhibit AP-2018-005-06B, Vol. 1 at 41-42.

Classification opinion

42. Canada is a WCO member and a signatory, that is, one of the "Contracting Parties", to the *International Convention on the Harmonized System* (hereafter the *Convention*). Article 6 of the *Convention* provides for a Harmonized System Committee (hereafter the "WCO Committee") and, at Article 7, empowers this committee to:

> (b) . . . prepare Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System;
>
> (c) . . . prepare recommendations to secure uniformity in the interpretation and application of the Harmonized System;[35]

43. The WCO Committee examines issues on the basis of documents prepared by the WCO Secretariat, which in turn incorporate comments and proposals from the customs administrations of the Contracting Parties.[36] Therefore, the WCO Committee does not engage in an independent fact-finding exercise and relies primarily on the views expressed by the Contracting Parties.

44. It also bears mentioning that while the WCO Committee may be involved in the settlement of tariff classification disputes between Contracting Parties, its terms of reference do not include the review of decisions made by customs administrations of the WCO member countries, much less those of adjudicative bodies like the Tribunal, to ensure their consistency with the explanatory notes, classification opinions or recommendations that it prepares. Indeed, there are no provisions in the *Convention* that compel a Contracting Party to adopt and apply any classification opinion.

45. Following the Tribunal's decision in *Mattel I*, the CBSA sought a WCO Committee opinion on the tariff classification of the four products that were in issue in that case, including "jumpers" very similar to the goods in issue in this appeal. The CBSA claims, even though it did not file any evidence in this regard, that it observed that other WCO *Convention* members classified similar goods in heading No. 94.01 as "other seats". According to the CBSA, its goal was to ensure a harmonized and consistent classification among WCO member states.

46. A review of the letter sent to the WCO Committee by the CBSA indicates that, while a hyperlink to the Tribunal's decision in *Mattel I* was provided to the Committee, the CBSA essentially ignored the findings of fact made by the Tribunal in respect of the jumper and presented to the WCO Committee its case that the goods under consideration were not, in fact, toys when considered as a whole since they only have accessories on them that provide amusement value. The CBSA also submitted, much like it did in *Mattel I*, as well as in this appeal, that the essential purpose of such goods is to provide a safe place to sit a young child. On that basis, it advocated to the WCO Committee its view that the goods in issue were seats that should be classified in heading No. 94.01.[37]

47. The WCO Secretariat was of the opinion that the jumper presented by the CBSA in its letter was essentially designed as a seat and was inclined to classify this product in heading No. 94.01.[38] In March

35. Exhibit AP-2018-005-06B, Vol. 1 at 50.
36. Exhibit AP-2018-005-06B, Vol. 1 at 10; Article 5, *Terms of Reference of the Harmonized System Committee*, online: http://www.wcoomd.org/en/about-us/wco-working-bodies/tarif_and_trade/harmonized_system_committee.aspx.
37. Exhibit AP-2018-005-08A, Vol. 1 at 10-13.
38. Exhibit AP-2018-005-08A, Vol. 1 at 6. It is common ground between the parties that this model is virtually identical to the goods in issue in this appeal.

2015, taking into account the presentation of the delegate of Canada (who most likely reiterated the CBSA's position that was rejected by the Tribunal) and the WCO Secretariat's comments, and after the matter was put to a vote, the WCO Committee instructed the Secretariat to prepare four classification opinions, including one concluding that the jumper should be classified in heading No. 94.01, for examination at the next Committee session.[39]

48. The WCO Committee held its 56th session in September 2015. Four classification opinions, including one with respect to a product virtually identical to the goods in issue, were published on December 1, 2015. The WCO Committee concluded that this product should be classified in heading No. 94.01 (and subheading No. 9401.71) on the basis of Rules 1 and 6 of the *General Rules*.[40]

49. As noted above, section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the classification opinions. It bears emphasizing that the classification opinions are not binding. Nevertheless, following precedents of the Federal Court of Appeal, the Tribunal will apply them unless there is a sound reason to do otherwise. In *Suzuki*, the Federal Court of Appeal found that, in the context of explanatory notes, "[e]xpert evidence can, in some circumstances, provide such a reason".[41] The Tribunal considers that the same principle applies to classification opinions.

50. The issue is whether the Tribunal should apply the aforementioned opinion in the circumstances of this appeal, as requested by the CBSA. In this regard, it submitted that there is no sound reason for the Tribunal to depart from the classification opinion in this case and, conversely, that the classification opinion provides a good reason for the Tribunal to depart from its decision in *Mattel I*. It underlined that the purpose of the Harmonized System is to foster stability and predictability in customs classification practices internationally and that, accordingly, the Tribunal should respect the classification opinion to ensure Canada's practices are in line with those of other members.

51. While the CBSA acknowledged that expert evidence can constitute a sound reason not to apply a classification opinion, it submitted that it is not appropriate to do so in the circumstances of this case. It submitted that *Suzuki* should be interpreted narrowly to stand for the proposition that expert evidence may be useful in providing clarity where there is uncertainty in the interpretation of a classification opinion, or where the relevance of the opinion to the goods in issue is not clear. The CBSA submitted that neither of these conditions is met in this case and that, as a result, favouring expert evidence over the classification opinion would amount to rewriting the classification opinion.

52. Mattel responded that the expert evidence presented by Mr. Huntsberger does provide a sound reason not to apply the classification opinion, as it directly contradicts the opinion and the factual finding that underlies it, i.e. that the Jumperoo is essentially designed as a seat. Mattel submitted that the Tribunal's fact-finding exercise in *Mattel I* also provides a sound reason to depart from the classification opinion. Mattel submitted that the classification opinion is not based on the legal analysis required under the tariff, specifically that it does not address the requirement that, in order to meet the definition of "furniture" in the explanatory notes, the goods in issue must not be more specifically included elsewhere in the nomenclature, or the applicability of heading No. 95.03. Finally, Mattel submitted that the CBSA is asking the Tribunal to

39. Exhibit AP-2018-005-08A, Vol. 1 at 14-15. The Tribunal notes that for the jumper (referred to as "Product 3" in the Committee's decision), 35 delegates voted in favour of its classification in heading No. 94.01 against 4 votes in favour of its classification in heading No. 94.03.
40. Exhibit AP-2018-005-04A, Vol. 1 at 60-61; Exhibit AP-2018-005-06B, Vol. 1 at 263.
41. *Suzuki* at para. 17.

base its decision solely on the classification opinion instead of simply having regard to it as one factor in its analysis; Mattel argued that the Tribunal cannot outsource its factual findings to the WCO Committee in this way.

53. In *Best Buy*, the Federal Court of Appeal provided important guidance on the meaning of the phrase "regard shall be had to [the classification opinions]" in Section 11 of the *Customs Tariff*. It stated as follows:

> The phrase "regard shall be had" under section 11 of the *Customs Tariff* entails that, while not binding, opinions of the WCO must "at least be considered" in determining the classification of goods imported into Canada (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 8, [2016] 2 S.C.R. 80 [*Igloo Vikski*]). Similarly, this Court has examined the definition of "regard" in the context of section 11 of the *Customs Tariff*, and found that it means "to consider, heed, take into account, pay attention to, or take notice of" (*Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at para. 13, [2004] F.C.J. No. 615 [*Suzuki*]). Having "regard" further entails that the Tribunal should respect WCO opinions unless there is "sound reason" to do otherwise (*Suzuki* at para. 13). The Tribunal may ultimately disagree with the Opinions but it must consider them and provide a sound reason as to why it chose not to follow them.[42]

54. Therefore, the Tribunal has carefully considered the relevant classification opinion as well as the background materials and preparatory work that led to its publication. With respect, the Tribunal is unable to agree with the opinion and its underlying rationale. In short, the Tribunal finds that the opinion is inconsistent with the evidence before it and that the WCO Committee's analysis of the relevant tariff classification issues was incomplete. Specifically, the following considerations provide a sound reason not to apply it.[43]

55. To begin with, the Tribunal disagrees with the analysis of the characteristics and essential purpose of a jumper virtually identical to the goods in issue, an analysis which underpins the opinion. As noted above, the WCO Secretariat and Committee accepted the CBSA's view that the Jumperoo is essentially intended to provide a secure place for an infant to sit safely and serves a utilitarian purpose and is, therefore, essentially designed as a seat. To reach this conclusion, the WCO appears only to have relied on the physical description and photos of the goods in issue, together with the statement of Canada's delegate that the pleasure-giving elements of the goods were secondary to the utilitarian function of the goods as seats.

56. However, this conclusion is belied by the evidence, including expert evidence, before the Tribunal. Undoubtedly, Mr. Huntsberger is better qualified to provide an opinion on the essential intent and design of the goods in issue than the Canadian or other delegates sitting on the WCO Committee. In view of his factual knowledge and expertise concerning the design and development of the goods in issue, his undisputed evidence, which directly contradicts the main factual determination that led to the ultimate conclusion of the opinion, must be given significant weight. In light of his evidence, it is simply incorrect to conclude that the goods in issue are essentially designed as seats.

57. As noted above, in *Suzuki*, the Federal Court of Appeal stated that expert evidence may provide a sound reason to depart from the interpretative guidance provided by the *Explanatory Notes*. By the same token, expert evidence that contradicts statements on the characteristics of goods which form the basis of a classification opinion should provide a sound basis not to follow it. After all, the necessity of expert evidence in this context is to assist the Tribunal in the fact-finding process in areas that are outside its

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42. *Best Buy* at para. 4.
43. The Federal Court of Appeal has recognized that there are sound reasons other than contradictory expert evidence to depart from the *Explanatory Notes* and, by extension, the *Classification Opinions*: See *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417, at paras. 8, 10 and 57.

knowledge and experience, such as the design and fundamental purpose of the goods in issue. The role of an expert is not to assist the Tribunal in interpreting a classification opinion or determining its relevance. The Tribunal is therefore not persuaded by the CBSA's argument that expert evidence may only be valuable in this context to provide clarity where there is uncertainty in the interpretation of a classification opinion or where the relevance of an opinion to the goods under appeal is not clear.

58. The Tribunal further notes that it has now twice examined the design, characteristics and purpose of the goods in issue (or very similar goods) and, at the conclusion of an adversarial process during which all the relevant evidence was tested and witnesses subjected to cross-examination, it was unable to accept the CBSA's view that these goods were not toys, but merely seats with toys attached to them. It is clear from a review of the WCO's background materials that the conclusion of the opinion does not rest on a review of hard evidence concerning the design and fundamental nature of the goods in issue. The Tribunal finds that the difference in the type and extent of information considered by the WCO in its decision-making process in this case, in comparison or in contrast with that taken into account by the Tribunal while undertaking its tariff classification exercise, also provides a sound basis not to follow it.

59. Simply put, in order to follow the opinion, the Tribunal would have to disregard the cogent evidence that led it to find that the goods in issue are most specifically described as "other toys", notwithstanding the fact that they demonstrate some of the other characteristics of "seats" set out in the notes to Chapter 94. "Having regard" to a classification opinion should not be interpreted to mean that the Tribunal is obliged to apply it in all circumstances, even when there are, in its view, errors in the description of the characteristics and essential purpose of the product under review or significant flaws in the analysis offered by the WCO.

60. If that were the case, then the Tribunal would essentially have to defer to the views of the WCO Committee and, by implication, to those of WCO's member states, on the tariff classification of goods subject to a classification opinion. This would be tantamount to entrusting the WCO Committee with the final authority to determine the proper tariff classification of goods imported into Canada in certain cases. However, in regard to tariff classification matters, Parliament has passed a law, the *Act*, empowering the Tribunal "to decide certain issues efficiently and once and for all".[44] As such, classification opinions are not decisive. They are one of the many elements that the Tribunal must examine in its tariff classification exercise.

61. In this case, the Tribunal further finds that it is not even clear that the WCO Committee turned its mind to relevant legal questions to determine whether the Jumperoo should be classified in headings No. 94.01 or 95.03. For example, for "Product 3", that is, the Jumperoo, the WCO Committee's document setting out the classification ruling indicates that the HS codes considered were headings No. 94.01 and 94.03. Heading No. 95.03 is not even mentioned.[45]

62. Moreover, a review of the comments from the WCO Secretariat indicates that for the three other products that were analyzed, the issue of whether such goods constituted toys potentially covered by Chapter 95 was expressly considered. There is no reference to the potential relevance and application of heading No. 95.03 in the discussion in the Secretariat's minutes pertaining to Product 3. This suggests that the WCO analysis was incomplete, if not legally flawed.

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44. *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257 [*Bri-Chem*], at para. 42.
45. Exhibit AP-2018-005-04A, Vol. 1 at 59.

63. Indeed, as previously mentioned, to determine if a product is a toy, the explanatory notes to heading No. 95.03 direct a consideration of, *inter alia*, the issue of the essential intent behind the design of the product and the Tribunal has consistently held that the term "designed for" relates to a deliberate intention in the mind of the manufacturer. There is no indication that the WCO examined this issue.[46] Rather, its conclusion that the Jumperoo is essentially designed as a seat was made on the basis of its views on the several purposes that this product can serve. While the potential or actual uses or purposes of the Jumperoo may be relevant in the determination of its tariff classification, one cannot ignore the intent of the manufacturer that designed it, as required by the explanatory notes to heading No. 95.03, in assessing whether goods are classifiable in that heading.

64. As such, the Tribunal can only conclude that the analysis offered by the WCO is incomplete and inconsistent with Canadian jurisprudence.[47] In this regard, there is no evidence that the WCO addressed the issue of whether, even if it could be described as a seat, the Jumperoo could be covered in other more specific headings of the nomenclature.

65. The Tribunal therefore finds that there are many elements in the rationale offered by the WCO which underpins the opinion that are either legally or factually questionable, if not incorrect. For this reason, the Tribunal can only ultimately disagree with the classification opinion and depart from its guidance, as it is clearly entitled to do.[48] On balance, the Tribunal's case law and the specific facts of this case mandate the classification of the goods in issue in heading No. 95.03.

66. Finally, the Tribunal notes that while the *Convention* obligates countries to apply the General Rules, Section, Chapter and Subheading Notes, there is no such obligation with respect to WCO opinions.[49] While the harmonization of tariff classification practises across jurisdictions is a worthy goal, and the Tribunal has accordingly found that the guidance offered by the WCO is "not something that should be easily brushed aside",[50] the fact that the *Explanatory Notes* and *Classification Opinions* are not binding indicates that the *Convention* does not intend that Members would apply this guidance in all circumstances. Accordingly, the Tribunal does not share the CBSA's concern that departing from the guidance offered by a classification opinion, when there is a sound reason to do so, undermines the objective of customs harmonization.

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46. While there is a reference to the explanatory notes to heading No. 94.01 in the relevant parts of the documents, there is no explicit discussion of the explanatory notes to Chapter 95 and heading No. 95.03 in those paragraphs. As mentioned, regarding the references to the terms "toy" and "amusement" in the WCO materials, it is unclear whether they inform the analysis for Product 3. In fact, the analysis for Product 3 mainly addresses the differences between Product 3 and play-pens, which were classified in heading No. 94.03 by previous sittings of the Committee and its predecessor. The Tribunal finds that this issue is not germane to the tariff classification dispute in this appeal. Exhibit AP-2018-005-08A, Vol. 1 at 4-5 (paras. 7-9 and 16-20).
47. The Tribunal notes that in *DSM Nutritional Products Inc.* (2 December 2008), AP-2007-012 (CITT) at para. 63, it decided to depart from the guidance provided by classification opinions on the following grounds: "It is the Tribunal's view, in this case, that the guidance afforded by the *Classification Opinions* is inconsistent with Canadian law. Rather, having considered the *Classification Opinions*, the Tribunal is of the view that its own case law, as well as that of the Federal Court of Appeal, together with the specific facts of this case, mandates the classification of vitamin B12 1% as a medicament under tariff item No. 3003.90.00." The Tribunal's reasons do not indicate that the guidance offered by the classification opinions considered in that case were inconsistent with anything other than Canadian jurisprudence.
48. *Best Buy* at para. 5.
49. The *Convention* can be found at Exhibit AP-2018-005-06B, Vol. 1 at 48-53.
50. *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CITT) at para. 72.

67. Accordingly, the goods in issue are most specifically described as "other toys" and, by virtue of note (A) of the explanatory notes to Chapter 94, they cannot then be classified in Chapter 94.[51]

68. As a final point, the Tribunal deems it worthwhile to address the CBSA's argument that the Agency's regard for the classification opinion in this case is not an attempt to circumvent the Tribunal's decision in *Mattel I*, but an application of the principles set out by the Federal Court of Appeal in *Bri-Chem*. The Tribunal disagrees with this assertion.

69. In *Bri-Chem*, the Court made it clear that the CBSA is an administrator whose action and decisions are regulated by the Tribunal. In short, it must follow the Tribunal's decisions by virtue of the principle of tribunal pre-eminence: "... [T]ribunals bind those who are subject to their jurisdiction, including administrators, subject to any later orders by the reviewing courts."[52] The Court also made it clear that the scheme of the *Act* provides that it is the Tribunal that is empowered to decide tariff classification issues efficiently and definitively and that, in the context of commercial importation and international trade, certainty, predictability and finality matter considerably given that customs brokers and others are deluged every day by millions of goods seeking quick, efficient and predictable entry to the domestic market.[53]

70. The application of these principles militates against the course of action followed by the CBSA in this case. The *Act* does not contemplate that, in situations where the Tribunal has rendered a final decision that has not been challenged before the reviewing courts through its recourse mechanism, the administrator may seek and obtain a classification opinion from the WCO on the same matter and then decide, on that basis, that the Tribunal's decision no longer applies. The CBSA's actions in this case undermine the principles of certainty, predictability, finality and tribunal pre-eminence because they caused a matter that Mattel and other stakeholders had every reason to believe was settled to be relitigated. Again, Tribunal decisions bind the CBSA, not classification opinions issued by the WCO.

71. While it is true that in *Bri-Chem*, the Court stated that there may be cases where an administrator has a *bona fide* concern than an earlier Tribunal decision is flawed and should not be followed, it explained that an administrator can only take a position against this decision if a particular threshold has been crossed. According to the Court, in the case of the administrative regime set out in the *Act*, the administrator must be able to identify and articulate with good reasons one or more specific elements in the Tribunal's earlier decision that in the administrator's *bona fide* and informed view is likely wrong.[54] In the Tribunal's view, the CBSA has not crossed this very high threshold in this case.

72. Indeed, the CBSA took a position against the Tribunal's decision in *Mattel I* before the WCO without identifying and articulating any such flaw in the Tribunal's decision. In this appeal, it attempted to

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51. The Tribunal notes that since *Mattel I*, the explanatory notes to Chapter 94 have been modified to add the following: "Seats of this heading may incorporate complementary non-seat components, for example, toy components, a vibration function, music or sound players, as well as lighting features." This addition does not change the fact that in order to be classified in Chapter 94, seats must not be more specifically described in another more specific heading of the nomenclature, which is not the case for the goods in issue. Moreover, this note does not require that seats incorporating these various components must be placed in this chapter of the nomenclature, to the exclusion of all others. It merely states that seats of Chapter 94 may incorporate non-seat components. In any event, the classification of the goods in issue in heading No. 95.03 does not stem from the presence of toy components. The Tribunal has found that, considered as a whole, the goods in issue are designed to provide amusement and play value to infants.
52. *Bri-Chem* at para. 45.
53. *Bri-Chem* at paras. 42-43.
54. *Bri-Chem* at para. 48-53.

persuade the Tribunal that it should classify the goods in issue in heading No. 94.01 by offering essentially the same submissions and without filing new evidence. The Tribunal fails to see how *Bri-Chem* can be read to allow the CBSA, when a Tribunal decision that it cannot distinguish stands in its way, to seek a classification opinion that concurs with its position and then give precedence to the opinion over an earlier Tribunal decision.

73. To the extent that the CBSA felt that the classification opinion was sufficient to call into question the validity of the Tribunal's decision in *Mattel I*, it could have availed itself of the recourse available under section 70 of the *Act*. This provision allows the CBSA to refer to the Tribunal "for its opinion" any questions relating to, among other issues, the tariff classification of any goods. This course of action would have been less prejudicial to Mattel and taken into account the principle of tribunal pre-eminence.

Subheading and tariff item classification

74. 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. There is only one subheading under heading No. 95.03, which is 9503.00. Pursuant to Rule 6, the goods in issue therefore must be classified in subheading No. 9503.00 as "other toys".

75. There are two tariff items under subheading 9503.00: 9503.00.10, which covers wheeled toys, and 9503.00.90, other. The goods in issue are not wheeled toys and, therefore, pursuant to Rule 1 of the *Canadian Rules*, the goods in issue should be classified under tariff item No. 9503.00.90.

DECISION

76. The appeal is allowed.

Georges Bujold
Georges Bujold
Presiding Member