



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2018-059

Imagination Hobby & Collection  
Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, October 22, 2019*

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IN THE MATTER OF an appeal heard on July 11, 2019, 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 October 30, 2018, with respect to a request for re-determination pursuant to subsection 60(1) of the *Customs Act*.

**BETWEEN**

**IMAGINATION HOBBY AND COLLECTION INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed.

Randolph W. Heggart  
Randolph W. Heggart  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: July 11, 2019  
  
Tribunal Panel: Randolph W. Heggart, Presiding Member  
  
Support Staff: Sarah Perlman, Counsel

**PARTICIPANTS:****Appellant**

Imagination Hobby and Collection Inc.

**Counsel/Representatives**Marco Ouellet  
Jeffrey Goernert**Respondent**

President of the Canada Border Services

**Counsel/Representatives**Luc Vaillancourt  
David Di Sante**WITNESS:**Daniel Boyer  
Co-Owner  
Imagination Hobby and Collection Inc.

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## STATEMENT OF REASONS

### INTRODUCTION

1. This is an appeal filed by Imagination Hobby and Collection Inc. (Imagination) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision by the President of the Canada Border Services Agency (CBSA) dated October 30, 2018, made pursuant to subsection 60(4).

2. The issue in this appeal is whether seven models of figurines (the goods in issue) are properly classified under tariff item No. 3926.40.10 or 3926.40.90 of the schedule to the *Customs Tariff*<sup>2</sup> as statuettes or other ornamental articles of plastics as determined by the CBSA, or under tariff item No. 9503.00.90 as other dolls, toys, reduced-size (“scale”) models and similar recreational models, working or not, as claimed by Imagination.

### PROCEDURAL HISTORY

3. Imagination imported the goods in issue through various transactions between February 2014 and June 2017 under tariff item Nos. 9503.00.90 and 9703.00.00. The CBSA performed a compliance audit and concluded on August 24, 2017, that the goods should be classified under tariff item No. 3926.40.10.

4. On May 2, 2018, Imagination requested a further re-determination under section 60 of the *Act*, claiming that the goods should be classified as dolls or other reduced-size (“scale”) models under tariff item No. 9503.00.90. The CBSA denied the request on October 30, 2018.

5. On January 17, 2019, Imagination filed this appeal with the Tribunal under subsection 67(1) of the *Act*.

6. On July 11, 2019, the Tribunal held a public hearing in Ottawa, Ontario. Imagination called one witness, Daniel Boyer, who is a co-owner of Imagination. The CBSA did not call any witnesses.

### GOODS IN ISSUE

7. The goods in issue are seven models of Premium Format 1:4 scale figures made of polystone, and which may contain accessories made of textile, rubber or plastic. The models are: 3002632 (Classic Catwoman), 300169 (Daredevil), 300159 (Predator 2), 300378 (Thor, The Dark World), 902309 (Bumblebee), 300395 (The Executioner), and 300449 (Skratch: Hound of the Executioner). Each model requires some assembly and is anchored to a solid base.

### LEGAL FRAMEWORK

8. 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>3</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

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

9. 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>4</sup> and the *Canadian Rules*<sup>5</sup> set out in the schedule.

10. 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.

11. 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>6</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>7</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>8</sup>

12. 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. As the Supreme Court of Canada indicated in *Igloo Vikski*, 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”.<sup>9</sup>

13. 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>10</sup> The final step is to determine the proper tariff item.<sup>11</sup>

14. The nomenclature for tariff item Nos. 3926.40.10 and 3926.40.90, the classification proposed by the CBSA, reads as follows:

**SECTION VII: PLASTICS AND ARTICLES THEREOF; RUBBER AND ARTICLES THEREOF**

**Chapter 39**

**PLASTICS AND ARTICLES THEREOF**

...

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

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

6. World Customs Organization, 4th ed., Brussels, 2017.

7. World Customs Organization, 6th ed., Brussels, 2017.

8. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 at para. 4.

9. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

10. 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 [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

11. 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.

**39.26 Other articles of plastics and articles of other materials of headings 39.01 to 39.14.**

...

**3926.40 -Statuettes and other ornamental articles****3926.40.10 - -Statuettes****3926.40.90 - -Other ornamental articles**

15. Note 2(y) to Chapter 39 reads as follows:

1. This Chapter does not cover:

...

(y) Articles of Chapter 95 (for example, toys, games, sports requisites); . . .

16. The nomenclature for tariff item No. 9503.00.90, the classification supported by Imagination, reads as follows:

**SECTION XX: MISCELLANEOUS MANUFACTURED ARTICLES****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.**

...

**9503.00.90 - -Other**

**POSITIONS OF THE PARTIES****Imagination**

17. Imagination submitted that the goods in issue are toys, where "toy" is defined as "a model or miniature replica of a thing, esp. as a plaything (toy boat)."<sup>12</sup> Furthermore, Imagination submitted that the fact the manufacturer of the goods in issue is called "Sideshow Toys" (Sideshow) shows its intent to offer limited edition "toys" or "dolls".<sup>13</sup> Mr. Boyer, Imagination's witness, submitted that the goods in issue are marketed as "collectibles" so that they can be sold for higher prices, but that they are nevertheless toys, albeit expensive ones.<sup>14</sup>

18. Imagination also argued that the goods in issue are "dolls", where doll is defined as "a usu. small model of a human figure, esp. for use as a toy."<sup>15</sup> Imagination further defined the goods in issue as "action figures", where the word "figure" is used "to suggest a human's form."<sup>16</sup> Imagination noted that the goods in issue come with various accessories similar to ones found on dolls, such as leather belts, textile capes, etc.

12. Exhibit AP-2018-059-03, Vol. 1 at 16; *Transcript of Public Hearing* at 77.

13. Sideshow was originally called "Sideshow Productions", later became "Sideshow Toy" and is now called "Sideshow Collectibles"; Exhibit AP-2018-059-03, Vol. 1 at 345.

14. Exhibit AP-2018-059-11A, Vol. 1 at 13 of 85; *Transcript of Public Hearing* at 17.

15. Exhibit AP-2018-059-03, Vol. 1 at 15, 25, 133, 173, 176, 183; *Transcript of Public Hearing* at 76.

16. Exhibit AP-2018-059-03, Vol. 1 at 13, 126-132, 184-185.

19. Imagination submitted that the explanatory notes to heading No. 95.03 include dolls that have only a decorative purpose.<sup>17</sup> Imagination submitted that the goods in issue are decorative.<sup>18</sup> However, Mr. Boyer testified that the goods in issue also have play value through the assembly, positioning, displaying, etc., of the completed figure.<sup>19</sup> Imagination submitted that the goods in issue are for the amusement of adults, and that they would therefore be played with differently than toys for children. Imagination submitted that the goods in issue bring amusement by changing some of the accessories and, for the Bumblebee model, playing with the lights, for example.

20. According to Imagination, not only can the goods in issue be classified as toys and dolls, they can also be classified as “reduced-size (‘scale’) models” because they meet the definition of “toy” cited above, which lists miniature replicas as toys. Mr. Boyer submitted that model tanks or planes are extremely fragile but are nevertheless classified in the toy category.<sup>20</sup>

21. Finally, Imagination submitted that the goods in issue are not statues or statuettes of heading No. 39.26. Imagination defined statues as “carved” or “cast” figures of a person or animal, especially ones that are life-size or larger, made of one piece and which require no assembly, have no moving parts or accessories, have no play value and are for ornamental purposes only.<sup>21</sup> In addition to the above, Imagination submitted that the goods in issue are made from several molded parts, not of one part, and are therefore not statues or statuettes.

## CBSA

22. The CBSA submitted that the terms of heading No. 95.03 provide a list of goods and “other toys” which strongly suggests that the listed goods, such as dolls, are toys. The CBSA submitted that the term “toys” should be interpreted liberally and covers a wide range of articles that have play or amusement value.<sup>22</sup> Although the CBSA did not dispute the amusement value of the goods in issue, it submitted that toys must have play value, and that amusement does not constitute play value.

23. The CBSA submitted that the goods in issue are not toys because they do not have play value: they are rigid and mounted on a base to rest in a fixed or semi-fixed position once assembled, they weigh between 5 and 20 lbs, and they are marketed as collectible items, not as toys.<sup>23</sup> The CBSA further submitted that the assembly of the goods does not constitute play value as it is simple and done only once.

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17. The explanatory notes provide that heading No. 95.03 includes dolls, and that “[t]his group includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes (e.g., boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.”

18. Imagination submitted the following definition of “decorative”: “1 serving to decorate. 2 ornamental rather than operational.” Exhibit AP-2018-059-03, Vol. 1 at 182.

19. Exhibit AP-2018-059-11A, Vol. 1 at 14, 18-77; *Transcript of Public Hearing* at 8, 10-13, 35, 41.

20. Exhibit AP-2018-059-11A, Vol. 1 at 13.

21. Exhibit AP-2019-059-03, Vol. 1 at 14, 20, 156, 175, 186; see *N.C. Cameron & Sons Ltd. v. President of the Canada Border Services Agency* (14 June 2007), AP-2006-022 (CITT) [*N.C. Cameron*] at para. 15; *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT) [*Franklin Mint*] at para. 35.

22. *Mattel Canada Inc. v. President of the Canada Border Services Agency* (10 July 2014), AP-2013-034 and AP-2013-040 (CITT) [*Mattel*] at para. 39.

23. *N.C. Cameron* at para. 14; *Franklin Mint* at para. 15.

24. Furthermore, the CBSA submitted that play or amusement value alone is not sufficient for goods to be toys, and that “visual aesthetic value” de-emphasizes the play or amusement value of goods when it is the main pleasure-giving element.<sup>24</sup>

25. The CBSA submitted that the goods in issue are not dolls as they are neither small<sup>25</sup> nor models of a human figure. The CBSA also submitted that the goods in issue are not reduced-size (“scale”) models because the scope of that term is narrowed by the examples provided in the explanatory notes to heading No. 95.03 to include “models of a kind mainly used for recreational purposes, for example, working on scale models of boats, aircraft, trains, vehicles, etc.” The CBSA submitted that the goods in issue are not similar or analogous to such goods and that they are prepainted, premoulded and require very simple assembly, unlike the listed reduced-size (“scale”) models.

26. The CBSA submitted that polystone is a plastic composite, and that the goods in issue are therefore articles of plastics.<sup>26</sup> The CBSA submitted that the goods in issue cannot be classified in any specific heading of Chapter 39 and should thus be classified in the residual heading No. 39.26.

27. The CBSA submitted that the goods in issue are statuettes of tariff item No. 3926.40.10 as they are three-dimensional figures that represent mythical life forms and are smaller than life-size statues.<sup>27</sup> In the alternative, the CBSA submitted that the goods in issue are other ornamental articles of tariff item No. 3926.40.90. According to the CBSA, the explanatory notes to heading No. 83.06 provide a liberal description of metal “statuettes and other ornaments” as a “wide range of ornaments of base metal . . . of a kind designed essentially for decoration”.<sup>28</sup> The CBSA submitted that, as stated by Imagination, the goods in issue are decorative in nature and therefore meet the definition of “ornamental article”.

## ANALYSIS

28. The parties agree that the goods of Chapter 95 are excluded from Chapter 39 through note 2(y) to Chapter 39 and that the Tribunal should therefore begin its analysis with Chapter 95. Therefore, to classify the goods in issue, the Tribunal will first look at Chapter 95.<sup>29</sup>

29. As the goods in issue are complete but presented disassembled, they should be classified in accordance with Rules 1 and 2(a).

### **The goods in issue are classifiable under heading No. 95.03**

30. The explanatory notes to Chapter 95 provide that “[t]his Chapter covers toys of all kinds whether designed for the amusement of children or adults.” The Tribunal agrees with the CBSA that the term “toys” should be interpreted liberally and covers a wide range of articles that have play or amusement value as an

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24. *Franklin Mint* at para. 15; *N.C. Cameron* at para. 13.

25. The goods in issue measure up to 25 inches; Exhibit AP-2018-059-03, Vol. 1 at 40, 44, 53, 57, 61, 68, 72.

26. According to the CBSA’s Trade Compliance Verification Final Report, polystone is a compound of polyurethane resin mixed with powdered stone as a filler; Exhibit AP-2018-059-09A, Vol. 1 at 197.

27. Exhibit AP-2018-059-09A, Vol. 1 at 14, 221.

28. The CBSA submitted that this definition of “statuettes and other ornaments” of heading No. 83.06 should be equally applied to “statuettes and ornamental articles” of heading No. 39.26.

29. *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (3 March 2014), AP-2013-013 (CIIT) [*Philips*] at para. 54.

identifying aspect.<sup>30</sup> The determination of whether an item is a toy is a factual issue to be determined on a case-by-case basis. In order to determine whether a good is a toy, “its intended use and its actual use must both be considered, including the manner in which it is marketed, packaged and advertised.”<sup>31</sup>

31. In *Regal Confections Inc. v. Deputy M.N.R.*,<sup>32</sup> the Tribunal stated as follows:

Regarding toys generally, and in light of *Zellers*, the Tribunal notes that, in *Zellers*, the Tribunal referred to the essence of a toy as being amusement. *That does not mean, however, merely because a product provides amusement value, that it should necessarily be classified as a toy.* It is common knowledge that a child will play for hours with an empty cardboard box, a paper bag or a stick. *Thus, the Tribunal is of the view that amusement alone does not make an object a toy for the purpose of tariff classification.* [emphasis added]

32. In *Regal*, the Tribunal used the examples of an empty cardboard box, paper or stick *not* to imply that amusement value was *not* the essential characteristic of a toy, but to show that amusement value may not be the essential primary characteristic of a product that has multiple uses or more than one essential characteristic.

33. In addition, the examples provided do not address the portion of the explanatory notes to Chapter 95 that refers to a product being for the amusement of *adults*. The Tribunal is of the view that, if a product is designed with amusement as its essential characteristic, it does qualify as a toy for the purpose of tariff classification.

34. In comparing the goods in issue to, for example, the Star Wars action figures referred to by Mr. Boyer, which include humanoids and other imaginary creatures, the main differences at first glance appear to be who they are marketed to and their price point. As indicated by Mr. Boyer, these action figures are typically marketed to children and cost considerably less than the goods in issue. The amusement factor for these action figures could be derived through direct play, setting up scenes or dioramas, or simply posing them and enjoying the aesthetic value. Mr. Boyer’s testimony indicated that the goods in issue are purchased and enjoyed in a similar manner, perhaps with the exception of limited direct play. However, amusement could and would be different for adults.<sup>33</sup>

35. As indicated above, the CBSA submits that the goods in issue do not have play value because they are rigid and mounted on a base to rest in a fixed or semi-fixed position once assembled, they weigh between 5 and 20 lbs, they are marketed as collectible items and not as toys, and their assembly is simple and done only once. The CBSA also submitted that the presence of two disclaimers on the box of the Daredevil model, one regarding recommended age restrictions and the other one warning of sharp edges, means that the goods in issue are not compatible with play value.<sup>34</sup>

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30. *Zellers Inc. v. The Deputy Minister of National Revenue* (29 July 1998), AP-97-057 (CITT) [*Zellers*] at 7; *Mattel* at para. 39; *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (12 April 2012), AP-2011-020 (CITT) [*Canadian Tire*] at para. 39; *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (11 April 2012), AP-2011-018 (CITT) [*HBC Imports*] at para. 41.

31. *Mattel* at para. 40; *Philips* at para. 58; *Canadian Tire* at para. 42; *HBC Imports* at para. 44; *Havi Global Solutions (Canada) Limited Partnership v. President of the Canada Border Services Agency* (10 October 2008), AP-2007-014 (CITT) at para. 30; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at para. 33.

32. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].

33. *Transcript of Public Hearing* at 8, 10-15, 35-43, 74.

34. *Transcript of Public Hearing* at 62-63, 91. The disclaimers read: “Not suitable for children under 14 years of age” and “Contains small parts. Some of the components may have sharp edges and/or points.”

36. Dealing first with assembly, it appears that the goods in issue are shipped disassembled mainly because that will protect them from damage. Due to the simple and limited steps involved in the assembly of the goods in issue, the Tribunal does not believe that they are sold like airplane models or Lego sets where the primary source of amusement is initially in the action of assembly.<sup>35</sup> In that sense, although some amusement value may be in the assembly of the goods in issue, that action is primarily a by-product of a shipping decision and does not in itself make the goods toys.

37. The Tribunal does not agree that the other reasons provided by the CBSA prevent the goods in issue from being considered toys, particularly as toys for adults. As stated by Mr. Boyer, amusement for adults is different than for children. The fact that something is fixed or semi-fixed, heavy, has disclaimers on age or sharp edges, or is marketed as a collectible does not necessarily preclude it from falling under the tariff classification for toys. Neither does visual aesthetic value necessarily de-emphasize the play or amusement value of goods; many toys have visual aesthetic value whether or not that is their intended primary use.

38. In *Franklin Mint*, the Tribunal noted that where the visual aesthetic is the pleasure-giving element, it may de-emphasize the play value of a good, especially where the good is not sold as a toy, is not intended to be played with, is not designed to be manipulated, and is marketed as a collector's item rather than as a toy in order to fetch a higher price.<sup>36</sup> Unlike the items analysed at paragraph 15 of *Franklin Mint*, namely, "the Wizard of Oz" statuettes and bell jars, the goods in this case are intended to be manipulated after assembly. In this case, the Tribunal finds that the goods in issue are intended to be played with by adults as testified by Mr. Boyer, such as by setting them up in scenes or dioramas and by posing them. Their visual aesthetic contributes to this play value, and their high price point is a function of their quality and the fact that they are marketed to adults rather than children.<sup>37</sup>

39. While the goods in issue are scale models of imaginary characters, they are primarily figures that represent non-human creatures that have been created for the amusement of adults. The explanatory notes to heading No. 95.03 provide that "other toys" includes among others toys for the amusement of adults representing "non-human creatures even if possessing predominantly human physical characteristics (e.g., angels, robots, devils, monsters)". As such, the Tribunal finds that the goods in issue are toys and should be classified as "other toys" under tariff item No. 9503.00.90.

40. As the goods of Chapter 95 are excluded from Chapter 39, it is not necessary to consider the application of Chapter 39.

## DECISION

41. The appeal is allowed.

Randolph W. Heggart  
Randolph W. Heggart  
Presiding Member

35. Exhibit AP-2018-059-03, Vol. 1 at 65; *Transcript of Public Hearing* at 48-49, 53, 58.

36. *Franklin Mint* at para. 15; see also *N.C. Cameron* at para. 13.

37. *Transcript of Public Hearing* at 15, 24, 38. The goods in issue range in prices between \$149.99 and \$1299.99; Exhibit AP-2018-059-03, Vol. 1 at 39, 43, 51, 56, 60, 66, 71.