

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150428

Docket: A-360-14

Citation: 2015 FCA 110

**CORAM: DAWSON J.A.
SCOTT J.A.
BOIVIN J.A.**

BETWEEN:

COSTCO WHOLESALE CANADA LTD.

Appellant

and

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

Respondent

Heard at Ottawa, Ontario, on April 28, 2015.
Judgment delivered from the Bench at Ottawa, Ontario, on April 28, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 28, 2015).

DAWSON J.A.

[1] In Appeal No. AP-2011-033, the Canadian International Trade Tribunal concluded that 2007 models of the Ski-Doo Powderboard imported by the appellant were properly classified in heading No. 95.06 under tariff item No. 9506.99.90 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36. In the Tribunal's view, the goods were articles and equipment for general physical

exercise, gymnastics, athletics, other sports or outdoor games, not specified or included elsewhere in Chapter 95. The issue raised on this appeal is whether such classification was reasonable.

[2] In our view, the decision was reasonable and the Tribunal did not err by rejecting the classification proposed by Costco, i.e. that the goods were “other toys” so as to be classified in heading No. 95.03.

[3] We reach this decision for the following reasons.

[4] First, while the Tribunal recognized that the goods could be considered to fall within the ordinary meaning of the word “toy”, the Tribunal reasonably noted that not every object which might otherwise be considered to be a “toy” will be included as “other toys”. This is consistent with the decision of the majority of this Court in *HBC Imports (c.o.b. Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167, 446 N.R. 352, at paragraph 16.

[5] Second, the Tribunal’s reliance on explanatory note 1 to Section XVII was reasonable. This Court has held that explanatory notes should be respected, unless there is a sound reason to do otherwise: *Suzuki Canada Inc. v. Canada (Border Services Agency)*, 2004 FCA 131, 319 N.R. 299, at paragraph 13. In the present case, there was no reason to depart from the explanatory note, which gave rise to the inference that goods found to be “like” the bobsleighs and toboggans of heading No. 95.06 necessarily fell outside the definition of “other toys”.

[6] Third, based on Note (B) of the explanatory notes to heading No. 95.01 the Tribunal reasonably concluded that the goods were distinguishable from non-wheeled toys designed to be ridden by children under heading No. 95.03. The only example given in the explanatory note is a rocking horse. The Tribunal referred to this Court's statement in *HBC Imports* that a reasonable conclusion could be that "toys designed to be ridden by children" were toys like rocking horses. The goods in question were not like rocking horses; while rocking horses are ridden, they do not transport the rider from one place to another.

[7] Finally, there is no merit in Costco's allegation of procedural unfairness. The Tribunal did not shift the burden of proof. The first question the Tribunal directed its analysis to was whether the goods were classifiable as "other toys" within heading No. 95.03.

[8] For these reasons, the appeal will be dismissed with costs.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-360-14

STYLE OF CAUSE: COSTCO WHOLESALE CANADA LTD. v. THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 28, 2015

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
SCOTT J.A.
BOIVIN J.A.

DELIVERED FROM THE BENCH BY: DAWSON J.A.

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