Federal Court of Appeal | Cour d'appel fédérale

Date: 20130624

Docket: A-306-12

Citation: 2013 FCA 167

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
WEBB J.A.

BETWEEN:

HBC IMPORTS c/o ZELLERS INC.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

Heard at Ottawa, Ontario, on May 14, 2013.

Judgment delivered at Ottawa, Ontario, on June 24, 2013.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
DISSENTING REASONS BY: SHARLOW J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130624

Docket: A-306-12

Citation: 2013 FCA 167

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
WEBB J.A.

BETWEEN:

HBC IMPORTS c/o ZELLERS INC.

Appellant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal arises as a result of a dispute with respect to the tariff classification of a product known as the "Snow Boogie Astra Sled" (Astra Sled). It is a sled and is similar to a toboggan because it is used, and is intended to be used, by a person to slide down a snowy hill. The President of the Canada Border Services Agency concluded that the Astra Sled should be classified under tariff item No. 9506.99.90 of the *Schedule* to the *Customs Tariff*, S.C. 1997, c. 36. That conclusion was upheld on the appeal of the importer ("HBC") to the Canadian International Trade Tribunal pursuant to section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2d Supp.) (Appeal No. AP-2011-018; *HBC Imports c/o Zellers Inc. v. Canada (Border Services Agency, President)*, [2012] C.I.T.T. No.

58). HBC now appeals to this Court pursuant to section 68 of the *Customs Act*. For the reasons that follow, I would dismiss this appeal on the basis that the Tribunal's conclusion is reasonable.

Relevant Classification Provisions

[2] HBC argues that the Astra Sled should be classified under heading 95.03 and not under heading 95.06. These two headings provide as follows:

95.03: Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.	95.03: Tricycles, trottinettes, autos à pédales et jouets à roues similaires; landaus et poussettes pour poupées; poupées; autres jouets; modèles réduits et modèles similaires pour le divertissement, animés ou non; puzzles de tout genre.
[…]	…
95.06: Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.	95.06: Articles et matériel pour la culture physique, la gymnastique, l'athlétisme, les autres sports (y compris le tennis de table) ou les jeux de plein air, non dénommés ni compris ailleurs dans le présent Chapitre; piscines et pataugeoires.

[3] As noted by the Tribunal, since the items included under heading 95.06 do not include items that are "specified or included elsewhere in this Chapter", if the Astra Sled is included in "other toys" under heading 95.03, it would be classified under heading 95.03 and not under heading 95.06.

Standard of review

[4] The question of whether the Astra Sled should be classified under heading 95.03 requires an interpretation of the expression "other toys" as used in this heading and the application of this

interpretation to the Astra Sled. This is a question of mixed fact and law which requires an interpretation of the Tribunal's own statute. The standard of review is reasonableness, which means that deference is to be given to the Tribunal (*Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency* 2011 FCA 242, at paragraph 4; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654).

Analysis

[5] The Tribunal reviewed the headings referred to above and the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the "*Explanatory Notes*"). The Tribunal also noted that "although the *Explanatory Notes* are not binding on the Tribunal, they should be respected unless there is a sound reason to do otherwise" (paragraph 9 of the decision of the Tribunal and *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paragraph 13). An Astra Sled was also submitted to the Tribunal as an exhibit. After reviewing the arguments of the parties, the Tribunal concluded that the Astra Sled should not be included as "other toys" for the purposes of heading 95.03. The Tribunal then determined that it should be classified under heading 95.06.

[6] The Appellant does not take issue with the finding that if the Astra Sled is not to be included as "other toys" for the purposes of heading 95.03, then it is to be included under heading 95.06.

[7] Since the standard of review is reasonableness and the Tribunal is entitled to deference in relation to its decision, the question is not whether the Tribunal was correct in finding that the Astra

Sled is not to be included as "other toys" for the purposes of heading 95.03 but whether its "decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, paragraph 47).

[8] Justice Abella, writing for the Supreme Court of Canada, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 repeated some of the paragraphs from the decision of that Court in *Dunsmuir*. In particular, in paragraph 11, she repeated the paragraph from *Dunsmuir* which stated that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions". Also, Justice Rothstein in paragraph 1 of *Alberta (Information and Privacy Commissioner v. Alberta Teachers' Association*, above, stated that "[c]ourts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals".

[9] In this case, the decision of the Tribunal is one that is within its area of expertise — the classification of goods for the purposes of the *Customs Tariff*. We should not interfere with this decision unless it is outside the range of acceptable and rational results. There are two possible results: either the Astra Sled will be included as "other toys" for the purposes of heading 95.03,or it will not. Just because there are only two possible outcomes does not mean that any less deference should be shown to the Tribunal. Nor does it mean that only one option is reasonable (hence correct) and the other is not.

[10] In *Alberta (Information and Privacy Commissioner v. Alberta Teachers' Association*, above, the issue was the interpretation of subsection 50(5) of the *Personal Information Protection Act*, S.A.

2003, c. P-6.5. The question, as noted by Justice Rothstein, was "[d]id the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period?" There were only two possible outcomes: either the inquiry automatically terminated or it did not. The Supreme Court of Canada held that the reasonableness standard still applied and deference was to be given to the adjudicator.

[11] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, above, "[t]he issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent" (paragraph 5). There were only two possible outcomes: either such time was to be so credited or it was not. The Supreme Court of Canada held that the standard of reasonableness applied and that deference was to be given to the arbitrator.

[12] In this case, the Tribunal provided its reasons for deciding that the Astra Sled should not be included as "other toys" for the purposes of heading 95.03 at paragraphs 41 to 51 of its decision. The Tribunal noted that the use and intended use of the particular product are relevant and that the manner in which the product is marketed is also to be considered. The Tribunal found that "the essential purpose of the good in issue is to enable children (and adults) to partake in the outdoor activity of sledding or sliding on snowy hills". The Tribunal also reviewed how HBC marketed the Astra Sled.

[13] It seems to me that this decision of the Tribunal is within the range of reasonable outcomes. While it could also be argued that the Astra Sled could be included as "other toys", this does mean that the decision of the Tribunal is unreasonable.

[14] Justice Abella in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, above, also quoted with approval from an article written by Professor Dyzenhaus in which he stated that "… even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them". This last part was emphasized by Justice Abella. In this case, it seems to me that the reasons to support the decision of the Tribunal can be supplemented by referring to paragraph (v) of Note (D) of the *Explanatory Notes* to heading 95.03. While the Tribunal referred to Note (D) it did not refer to paragraph (v) thereof in its reasons.

[15] Note (D) of the *Explanatory Notes* to heading 95.03 provides in paragraphs (i) to (xix) a list of various items that are to be included within the general term "other toys". No items similar to the Astra Sled are included in this list. This list does include the following:

(D) Other toys.	**(D) Les autres jouets.**
[…]	…
These include: […]	Parmi ceux-ci on peut citer : […]
(v) Toys designed to be ridden by children but not mounted on wheels, e.g., rocking horses.	5) Les jouets pouvant être chevauchés par l'enfant, mais qui ne se déplacent pas (chevaux à bascule, par exemple)
(ix) Toy sports equipment, whether or not in sets (e.g., golf sets, tennis sets, archery sets, billiard sets, baseball bats,	9) Les articles de sport ayant le caractère de jouets présentés sous forme de panoplies ou isolément

cricket bats, hockey sticks).	(panoplies de golf, de tennis, de tir à l'arc, de billard, par exemple; battes de base-ball, battes de cricket, crosses de hockey, etc.).
[…]	…
(xix) Hoops, skipping ropes, diabolo spools and sticks, spinning and humming tops, balls (other than those of heading 95.04 or 95.06)	19) Les cerceaux, diabolos, toupies (même musicales), cordes à sauter (munies de poignées), balles et ballons (autres que ceux des n^{os} 95.04 ou 95.06)

[16] The Astra Sled is a form of a sled that is to be ridden down a hill. The only paragraph of Note (D) which specifies items that can be ridden by children is paragraph (v). The Appellant referred to this paragraph in its oral argument. This paragraph will only apply to objects that would otherwise be toys since it starts with "toys". However, since it excludes toys mounted on wheels, it seems to me that this paragraph confirms that not every object which might otherwise be considered to be a "toy" will be included as "other toys".

[17] The only example given in paragraph (v) is a rocking horse. It must be remembered that the question in this appeal is whether the decision of the Tribunal is reasonable, not whether it is correct. Because the only example of "toys designed to be ridden by children" is a rocking horse, a reasonable conclusion could be that only "toys designed to be ridden by children" that are like rocking horses are the toys that are to be included as "other toys" under this paragraph. While a rocking horse is ridden, the rocking horse will not transport the child from one place to another. The Astra Sled is easily distinguished from a rocking horse and therefore, a reasonable conclusion is that the Astra Sled, even if it is a toy, is not to be included as "other toys" under this paragraph. Since this paragraph is the only paragraph of Note (D) that specifically refers to toys designed to be ridden

by children, it also seems that it is reasonable to conclude that the Astra Sled, even if it is a toy, is not to be included in "other toys" for the purposes of heading 95.03.

[18] The Astra Sled is also easily distinguishable from the items listed as examples in paragraph (ix) and from the items listed in paragraph (xix) as none of these can be ridden by a child (or by an adult).

[19] The Tribunal, in rendering its decision, also referred to the marketing materials and additional documents submitted by HBC. The Tribunal also noted that HBC was conflicted about how to classify the Astra Sled as it marketed it as a "snow toy" but it also sold it under the categories of "winter sports", "winter sports equipment" and "snow sports".

[20] In reviewing the Chapter Notes, the Tribunal noted that Note 1 to Section XVII (Vehicles, aircraft, vessels and associated transport equipment) of the *Schedule* to the *Customs Tariff* provides that:

1. This Section [XVII] does not cover articles of heading 95.03 or 95.08, or bobsleighs, toboggans or the like of heading 95.06.	1. La présente Section [XVII] ne comprend pas les articles des n^{os} 95.03 ou 95.08, ni les luges, bobsleighs et similaires (n^{o} 95.06).

[21] The only particular products identified in Heading 95.06 (referred to above) are swimming pools and paddling pools. It is not entirely clear whether this Note 1 to Section XVII should be read as indicating that all toboggans should be included in heading 95.06. Since toboggans are not specified in heading 95.06, the classification of toboggans would be subject to the same analysis as the Astra Sled. If it is included as "other toys" under heading 95.03, then it would be classified

under that heading. Since this note could be read as indicating that all toboggans (regardless of their design or intended use) are to be classified under heading 95.06, it does not seem unreasonable that the Astra Sled should be classified under the same heading as toboggans. The Astra Sled is more like a toboggan than it is like any of the other items listed in any of the notes intended to clarify what is to be included as "other toys" for the purposes of heading 95.03.

[22] In another decision of the same Tribunal member (*Canadian Tire Corp. Ltd. v. Canada (Border Services Agency, President)* [2012] C.I.T.T. No. 57) that was released April 12, 2012 (which was the date between the date that the decision in this case was released and the date that the reasons in this case were released), the Tribunal found that "a trampoline with a safety enclosure for use by children" (paragraph 2) which was clearly marketed to children with its "bright colours and the printed pictures of Dora or Diego" (paragraph 41), was not to be included as "other toys" for the purposes of heading 95.03 but was to be included under heading 95.06.

[23] As a result, it seems to me that the decision of the Tribunal is reasonable as it is within the range of acceptable and rational outcomes. I would dismiss the appeal, with costs.

"Wyman W. Webb"

J.A.

"I agree,
J.D. Denis Pelletier J.A."

SHARLOW J.A. (Dissenting)

[24] For the reasons that follow, I am unable to agree that classifying the Astra Sled under tariff item No. 9506.99.90 is within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, paragraph 47).

[25] The Tribunal found, and it is now undisputed, that the Astra Sled is designed for sliding down a snowy hill and is something like a toboggan. It is also undisputed that in the *Schedule* to the *Customs Tariff*, the Astra Sled falls within Section XX, entitled "Miscellaneous Manufactured Articles", and also within Chapter 95 of Section XX, entitled "Toys, Games and Sport Requisites; Parts and Accessories Thereof". That is because it is reasonable to infer, from Note 1(n) of Chapter 95, that Chapter 95 includes toboggans and the like. Note 1(n) reads as follows:

1. This Chapter [95] does not cover:	1. Le present Chapitre [95] ne comprend pas :
(n) Sports vehicles (other than bobsleighs, toboggans and the like) of Section XVII.	n) les véhicules de sport de la Section XVII, à l'exclusion des luges, des bobsleighs et similaires;

[26] The Tribunal was required to locate the Astra Sled within Chapter 95. That is, it was required to determine, by interpreting the headings in Chapter 95, into which of those headings the Astra Sled could fall. There are two possible candidates, heading 95.03 and heading 95.06.

[27] According to the language of heading 95.06, exercise and sports equipment is within heading 95.06 unless it is "specified or included" elsewhere in Chapter 95. Heading 95.06 reads as follows (my emphasis):

Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools.	Articles et matériel pour la culture physique, la gymnastique, l'athlétisme, les autres sports (y compris le tennis de table) ou les jeux de plein air, non dénommés ni compris ailleurs dans le présent Chapitre; piscines et pataugeoires.

[28] The Astra Sled, being something like a toboggan, is exercise or sports equipment within the opening words of heading 95.06. But if it is specified or included within heading 95.03, it is excluded from heading 95.06 even though it is exercise or sports equipment. Heading 95.03 reads as follows (my emphasis):

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.	Tricycles, trottinettes, autos à pédales et jouets à roues similaires; landaus et poussettes pour poupées; poupées; autres jouets; modèles réduits et modèles similaires pour le divertissement, animés ou non; puzzles de tout genre.

As the Tribunal explained at paragraph 40 of its reasons, products that are "other toys" cannot be classified under heading 95.06.

[29] Thus, the specific question for the Tribunal was whether the Astra Sled is a "toy" within the meaning of that word as used in the *Schedule* to the *Customs Tariff*. The question for this Court is whether it was reasonable for the Tribunal to conclude that for tariff classification purposes, the Astra Sled is not a toy.

[30] The word "toy" is not defined in the *Customs Tariff*. Therefore, its meaning for tariff classification purposes is a matter of statutory interpretation, which requires consideration of its ordinary or dictionary meaning, and the statutory context.

[31] Although the Tribunal referred to various dictionaries to aid its understanding of a number of words that were relevant to the dispute in this case (including "sled", "bobsleigh", and "toboggan"), it did not refer to any dictionary definitions of the word "toy". I assume that is because its ordinary meaning was not a matter of controversy before the Tribunal. For completeness, I reproduce below the relevant parts of the definition of the noun "toy" from *The Canadian Oxford Dictionary* (Oxford University Press, 1998):

> […] a plaything, esp. for a child.
> […] a model or miniature replica of a thing, esp. as a plaything (toy boat).
> […] a thing, esp. a gadget or instrument, regarded as providing amusement or pleasure.

[32] It is mandatory, because of section 11 of the *Customs Tariff*, to consider certain publications of the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time. Section 11 reads as follows:

11. In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended	11. Pour l'interprétation des positions et sous-positions, il est tenu compte du Recueil des Avis de classement du Système harmonisé de désignation et de codification des marchandises et des Notes explicatives du Système harmonisé de désignation et de codification des marchandises et de leurs modifications, publiés par le Conseil de coopération douanière (Organisation mondiale des douanes).

from time to time.

[33] In this case, the only relevant publication of the Customs Co-operation Council is the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (the "*Explanatory Notes*"). This Court has held, and the Tribunal correctly noted, that although the *Explanatory Notes* are not binding on the Tribunal, they must be respected unless there is a sound reason to do otherwise (*Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131).

[34] The *Explanatory Notes* relating to Chapter 95 suggest one element of the intended meaning of "toy", namely, that it is something intended for amusement:

This Chapter [95] covers toys of all kinds whether designed for the amusement of children or adults.	Le présent chapitre [95] comprend les jouets et les jeux pour l'amusement des enfants et la distraction des adultes[…]

[35] This statement is consistent with the ordinary meaning of the word "toy", except that it requires consideration of the use intended by its producer ("designed for"), as opposed to any potential or possible use. Thus, as recognized by the Tribunal in the jurisprudence summarized later in these reasons, an ordinary cardboard box is not a toy for tariff classification purposes because it is not designed for use as a toy, even though a child may play with it.

[36] Further guidance on the meaning of "toy" for tariff classification purposes is found in Note (D) of the *Explanatory Notes* relating to the meaning of "other toys" in heading 95.03:

(D) Other toys.	**(D) Les autres jouets.**
[…]	[…]
These include: […]	Parmi ceux-ci on peut citer : […]

(vii) Toy balloons and toy kites.	7) Les ballonnets et les cerfs-volants.
[…]	[…]
(ix) Toy sports equipment, whether or not in sets (e.g., golf sets, tennis sets, archery sets, billiard sets, baseball bats, cricket bats, hockey sticks).	9) Les articles de sport ayant le caractère de jouets présentés sous forme de panoplies ou isolément (panoplies de golf, de tennis, de tir à l'arc, de billard, par exemple; battes de base-ball, battes de cricket, crosses de hockey, etc.).
[…]	[…]
(xix) Hoops, skipping ropes, diabolo spools and sticks, spinning and humming tops, balls (other than those of heading 95.04 or 95.06).	(19) Les cerceaux, diabolos, toupies (même musicales), cordes à sauter (munies de poignées), balles et ballons (autres que ceux des n^{os} 95.04 ou 95.06).

[37] Note (D) does not address directly the classification of a child's sled or toboggan. However, the parts of Note (D) quoted above indicate that the word "toy" includes a play version of sports equipment and other items that may involve significant physical activity (such as toy kites, hoops and skipping ropes). Generally, those provisions are consistent with the notion that a child's toy sled is a toy for tariff classification purposes.

[38] The jurisprudence of the Tribunal in tariff classification cases relating to toys also is consistent, generally speaking, with the dictionary definition of "toy". The leading case is *Zellers Inc. v. Canada (Deputy Minister of National Revenue – M.N.R.)*, [1998] C.I.T.T. No. 53 (AP-97-057), a tariff classification case involving "Pillow Buddies". That product could function as either a toy or a pillow, but for tariff classification purposes it was found to be a toy based in part on the following reasoning (at paragraph 41, page 7 of the official report):

> In essence, a toy is something from which one derives amusement or pleasure. Toys can replicate things or animals or have forms of their own. They can be of hard or stiff construction, or be soft and cuddly. They can be designed for manipulation or for display on a shelf. They can be cute and friendly in presentation, or be fierce and frightening. They can be designed for rough and tumble use or require careful handling. Their value is often small in cash terms, although some toys, such as miniature electric train sets, can easily cost thousands of dollars. This is all to say that toys cover a world of products, some of which are readily identified as toys and some of which are recognizable as toys only upon closer inspection.

[39] In other cases the Tribunal has recognized, consistently with the *Explanatory Notes* referred to above relating to Chapter 95, that amusement or play value is not necessarily determinative if the product in issue is primarily designed for some other purpose.

[40] For example, *Regal Confections Inc. v. Canada (Deputy Minister of National Revenue - M.N.R.)*, [1999] C.I.T.T. No. 51 (Appeal Nos. AP-98-043, AP-98-044 and AP-98-051), involved the classification of three products: candy-filled miniature baby bottles, clear plastic toy banks in the shape of a duck that were intended to be filled with candy before sale, and blister cards containing a motorized candy dispenser and two packages of PEZ candy. All of these products had some play value, but the baby bottles and toy banks were held not to be toys because their play value was secondary to their principal function as confectionery or containers for confectionery. The PEZ product was found to be a toy because the dispenser had play value that was significantly more important than the included confectionery. The principle that guided the Tribunal in *Regal* is stated as follows at paragraph 23 (page 8 of the official report):

> 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.

[41] Following *Regal*, the Tribunal determined in *Korhani Canada Inc. v. President of the Canada Border Services Agency*, [2008] C.I.T.T. No. 79 (Appeal No. AP-2007-008) that interactive play mats were toys rather than carpets because they were designed to have significant play value, and there was evidence that children played with them. The same principles were cited in *Franklin Mint Inc. v. Canada (Border Services Agency)*, [2006] C.I.T.T. No. 63 (Appeal No. AP-2004-061), but with a different outcome. Figurines and bell jars depicting various characters and personalities were held not to be toys. Part of the result in that case is set out in paragraph 15 (page 4 of the official report), which reads as follows:

> Applying Rule 1 of the General Rules, the Tribunal finds that the goods cannot be classified in heading No. 95.03. In light of the Tribunal's jurisprudence, and in particular *Regal*, the Tribunal does not consider the goods to be toys. The Tribunal acknowledges that, although they may have an amusement value, this factor is not determinative and does not make them toys for the purpose of tariff classification. "Play value" is an identifying aspect of toys, and the testimony focussed on the visual aesthetic value of these items as the pleasure-giving element and, in fact, de-emphasized any play value that they might have. The goods are not sold as toys, are usually not played with by children and are not designed to be manipulated. This is particularly true of the bell jars. Moreover, the testimony of Franklin's witness indicated that the goods were marketed as collector's items rather than toys in order to fetch a higher price in the market.

[42] All of these cases were cited by the Tribunal in the present case. The Tribunal found as a fact that the Astra Sled is intended to provide and does provide amusement and play value for children. Therefore, it would appear to fall within the ordinary meaning of the word “toy” in accordance with the *Explanatory Notes* and the Tribunal’s own jurisprudence. Why then did the Tribunal reach the opposite conclusion?

[43] As I understand the Tribunal's reasons, its conclusion is based substantially on paragraph 47 of its reasons, which reads as follows (footnote omitted):

> According to note (D) of the *Explanatory Notes* to heading No. 95.03, toys are "... intended essentially for the amusement of persons (children or adults)." In focussing on the pleasure-giving element, HBC has in fact omitted that the essential purpose of the good in issue is to enable children (and adults) to partake in the outdoor activity of sledding or sliding on snowy hills. It is this same sliding on the snow which, in turn, provides amusement.

[44] In other words, the Tribunal concluded that even though the Astra Sled is intended for amusement, it is not a *toy* for tariff classification purposes because the amusement results from using the product for sliding on a snowy hill. The apparent premise underlying the Tribunal's reasoning is that something that is intended to be used for physical activity or exercise, however amusing the result, cannot be a toy for tariff classification purposes.

[45] However, that premise is not based on any provision of the *Customs Tariff* or any of the jurisprudence cited by the Tribunal. It is not easily reconcilable with the parts of Note D from the *Explanatory Notes* that are quoted above. It is not supported by any evidence on the record.

[46] Most importantly, that premise led the Tribunal to reach a conclusion that is not consistent with the analytical framework mandated by the *Customs Tariff*. Consider this analogy. If tariff heading A includes all four wheeled vehicles designed for highway travel except vehicles specifically included in another heading, and tariff heading B includes all cars, then a car cannot be within tariff heading A even though it is designed for highway travel. And yet, by the logic of this case, the Tribunal would have concluded that a car is within tariff heading A. The Tribunal's reasoning in this case, taken to its logical conclusion, would deny tariff classification under heading

95.03 to any number of items that clearly belong there including, as suggested above, play versions of sports equipment (including balls), toy kites, hoops and skipping ropes.

[47] The difficulty is that the Tribunal has interpreted a word in heading 95.03 – the word "toy" – by reference to a defining characteristic of sports and exercise equipment. In doing so, the Tribunal addressed the wrong question. The relevant question is whether, even though the Astra Sled is fairly described by a term found under heading 95.06 (exercise or sports equipment that is something like a toboggan or something that is designed to slide on a snowy hill), it should be classified under heading 95.03 because it is a *toy* designed to slide on a snowy hill. Once the Tribunal found as a fact that the Astra Sled is designed to provide amusement and play value for the children for whose use it was intended, it could not reasonably conclude that the Astra Sled is anything but a toy for tariff classification purposes.

[48] For these reasons, I conclude that the Tribunal's decision is not based on a defensible interpretation and application of the *Customs Tariff*, and therefore it is not reasonable. It follows that the Astra Sled should have been classified under tariff item No. 9503.00.90. I would allow this appeal with costs, set aside the decision of the Tribunal and the determination of the President, and direct the President to issue a new determination in accordance with these reasons.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-306-12
STYLE OF CAUSE:	**HBC IMPORTS c/o ZELLERS INC.** **and** **PRESIDENT OF THE CANADA BORDER SERVICES AGENCY**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 14, 2013
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A.
DISSENTING REASONS BY:	SHARLOW J.A.
DATED:	June 24, 2013

APPEARANCES:

Michael Kaylor	FOR THE APPELLANT
Korinda McLaine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lapointe Rosenstein Marchand Melançon LLP Montreal, Quebec	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT