Federal Court of Appeal

Cour d'appel fédérale

Date: 20210805

Docket: A-339-19

Citation: 2021 FCA 162

CORAM: **NEAR J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

MATTEL CANADA INC.

Respondent

Heard by online video conference hosted by the Registry on January 19, 2021.

Judgment delivered at Ottawa, Ontario, on August 5, 2021.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GLEASON J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] This is an appeal by the Attorney General of Canada from a decision of the Canadian International Trade Tribunal (CITT), reported as *Mattel Canada Inc.*, 2019 CanLII 110865 (CA CITT), 2019 CarswellNat 14487 (WL Can) [*Mattel 2*]. In that decision, the CITT classified

the Fisher-Price "Roarin' Rainforest Jumperoo" under tariff item No. 9503.00.90 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36, as "other toys". Canada appeals, arguing the goods are more properly classified under tariff item No. 9401.71.10 as "upholstered seats".

[2] This appeal turns on the relationship between the CITT and the World Customs Organization (WCO) Harmonized System Committee (the "WCO Committee"). It requires this Court to again clarify when and why the CITT is entitled to deviate from tariff Classification Opinions produced by the WCO.

[3] The CITT may deviate when it has sound reason to do so. The case law recognizes contradictory expert evidence as a possible sound reason. As such, in my view, the CITT made no error in law when it relied on expert evidence as justification for deviating from an applicable WCO Classification Opinion. I would therefore dismiss the appeal.

II. Background

[4] On June 16, 2017, the respondent, Mattel, requested an advance ruling from the Canada Border Services Agency (CBSA) on the tariff classification of the goods in issue. The product is "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": *Mattel 2* at para. 12.

[5] Mattel sought classification of the goods under tariff item No. 9503.00.00, as "other toys".

[6] The CBSA classified them under heading 94.01, which covers "seats (other than those of heading 94.02), whether or not convertible into beds or parts thereof." Mattel requested a review, however the CBSA maintained its original classification. Mattel appealed the CBSA's decision to the CITT, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

III. The CITT Decision under Appeal

[7] The CITT described the goods in issue and the applicable legal framework. The central issue before the CITT was whether to apply a WCO Classification Opinion that, in the CITT's view, conflicted with the expert evidence before it and with one of its prior decisions.

[8] In that prior decision, reported as *Mattel Canada Inc. v. President of the Canada Border Services Agency*, 2014 CanLII 45224 (CA CITT), 2014 CarswellNat 4715 (WL Can) [*Mattel 1*], the CITT had classified "goods virtually identical to the goods in issue" in *Mattel 2* as toys: *Mattel 2* at para. 13.

[9] The CITT described some of the factual and legal context surrounding the dispute. After receiving an adverse decision, *Mattel 1*, the CBSA had requested the WCO Committee to provide its opinion on the proper classification of the goods. The WCO Committee held a vote amongst its members—representatives of the different signatory customs administrations—and adopted the tariff classification suggested by the CBSA. It published the Classification Opinions on December 1, 2015, classifying products almost identical to the ones at issue in this case under the heading for "furniture": *Mattel 2* at paras. 45–48.

[10] The advance ruling that ultimately led to this appeal was requested in June of 2017, i.e. after the WCO Classification Opinion was released. The CBSA classified the goods in issue in accordance with the WCO Classification Opinion. Mattel appealed to the CITT, which overturned the CBSA's decision.

[11] The WCO Classification Opinion, and the classification adopted by the CBSA, classified the goods under heading 94.01, which covers "[s]eats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof." However, the WCO's Explanatory Notes to Chapter 94 restrict the application of that chapter to goods that are not classifiable in another chapter: *Mattel 2* at paras. 27–28. Thus, according to the CITT, if it was possible to classify the goods as Mattel suggested, under Chapter 95, heading 9503.00, for "[t]ricycles, 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" [emphasis added], then it would be impossible to classify them under heading 94.01, as the WCO and CBSA had done: *Mattel 2* at paras. 27–28.

[12] In the CITT's view, the goods *were* classifiable as "other toys", notwithstanding the CBSA's submissions and the WCO's Classification Opinion. The CITT did not consider itself bound by the WCO Classification Opinion: *Mattel 2* at paras. 17, 53–54. Citing this Court's decision in *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20, 2019 CarswellNat 14679 (WL Can) [*Best Buy 1*], the CITT noted that WCO Classification Opinions ought to be followed absent sound reason to disregard them: *Mattel 2* at para. 53. In the CITT's view, it could not follow the WCO Classification Opinion, for two reasons: (1) because it

contradicted the expert evidence the CITT had before it; and (2) because the WCO's analysis was incomplete: *Mattel 2* at para. 54.

[13] Firstly, the CITT was of the view that the evidence before it, including expert evidence from a product designer, favoured Mattel's suggested classification. This evidence went to the intended use of the goods at issue. The CBSA contended that the goods were intended to serve a utilitarian purpose, by providing a safe and secure place for an infant to sit: *Mattel 2* at para. 32. However, according to the CITT, the evidence before it indicated that the goods at issue were in fact intended essentially for the amusement of persons: *Mattel 2* at paras. 33–35. The intended use was important, according to the CITT, because the Explanatory Notes to heading 95.03 stated that that chapter covers, among other things, "toys intended essentially for the amusement of persons". In the CITT's view, the evidence indicated the goods were covered by this explanatory note, as they were in fact intended primarily for amusement of infants, rather than as a secure place to seat them. Thus, the CITT viewed the evidence before it as providing a sound reason to not classify the goods in accordance with the WCO Classification Opinion.

[14] The second reason the CITT felt it could not classify the goods in accordance with the WCO Classification Opinion was because, according to the CITT, the Classification Opinion, and the process by which it was created, was flawed. According to the CITT, there was no evidence that the WCO Committee had considered the possibility that the product was captured by the Explanatory Note to heading 95.03: *Mattel 2* at para. 62. The CITT reasoned, at paragraph 63 of its decision:

> […] 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 WCO examined this issue.

[15] This was relevant to the CITT because, as noted above, on the evidence the CITT had before it, the jumpers were designed for entertainment, and thus fell into the ambit of heading 95.03, per the Explanatory Note: *Mattel 2* at paras. 36, 63–64.

[16] Further, the CITT questioned whether the WCO Committee's internal processes had permitted it to reach a correct conclusion as to the classification of the goods in issue: *Mattel 2* at para. 55. It found "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": *Mattel 2* at para. 65. In the CITT's view, this was at least in part because of the deliberative nature of the WCO Committee process and the lack of an adversarial process to test the evidence upon which the Committee based its determination: *Mattel 2* at paras. 57–59.

[17] Thus, in the CITT's view, there was sound reason for it to not classify the goods in issue in accordance with the WCO Classification Opinion relied upon by the CBSA. The CITT therefore maintained its own analysis, which held that, being designed primarily for the entertainment of infants, the products were "toys", rather than "seats": *Mattel 2* at para. 74.

[18] Canada subsequently appealed the CITT's decision to this Court.

IV. Issues

[19] The appeal raises the following issues:

a. What is the appropriate standard of review?

b. Did the CITT err in law by not following the WCO Classification Opinion?

V. The Standard of Review

[20] The standard of review on an appeal from a CITT decision on a question of law, by way of section 68 of the *Customs Act*, is now correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 37 [*Vavilov*]; *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151, 2020 CarswellNat 4287 (WL Can) at para. 18 [*Neptune*]; *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171, 2020 CarswellNat 4332 (WL Can) at para. 32; *Attorney General of Canada v. Best Buy Canada Ltd.,* 2021 FCA 161 at para. 22 [*Best Buy 2*].

VI. Analysis

[21] Canada has framed the appeal around what it argues are two questions of law: whether the CITT had authority to, as Canada put it, "reach behind" the WCO Classification Opinion to "overrule" it; and whether the CITT erred in law by failing to interpret the WCO Classification Opinion and the WCO Explanatory Notes to avoid conflict between them.

[22] In my view, the applicable legal principle is clearly established: the CITT has authority to classify a product in contradiction with a WCO Classification Opinion but, when it does so, must demonstrate sound reasons as to why it did not apply the Classification Opinion: *Best Buy 1* at paras. 4–5. This also applies to WCO Explanatory Notes: *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, 319 N.R. 299 at paras. 13, 17 [*Suzuki*].

[23] The issue in this case is whether the CITT had sound reasons to classify the goods as it did, considering the apparently contradictory Classification Opinion relied upon by the CBSA.

[24] Determining whether this case was an appropriate instance for it to not follow the Classification Opinions required the CITT to apply the legal standard created by section 11 of the *Customs Tariff*, which provides that "regard shall be had" to WCO interpretive documents when classifying goods under the tariff schedule. This Court has clarified the legal standard, albeit in broad terms. As this Court put it, in *Best Buy 1*, at paragraph 4:

> 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.

[25] The standard the law requires the CITT meet in order to not apply a Classification Opinion is thus not a rigidly proscriptive one. It cannot simply *disregard* a Classification Opinion; however, the CITT does not have to apply it if it considers there to be sound reason not to.

[26] In *Suzuki*, this Court noted that "[e]xpert evidence can, in some circumstances, provide such a reason": at para. 17. In this case, the CITT relied primarily on expert evidence about the intended purpose of the product to justify classifying it differently than the WCO Classification Opinion suggested. In my view, the CITT made no legal error in relying upon this expert evidence to conclude that there was a sound reason not to classify the goods in issue in the same manner as the WCO Committee.

[27] I note that the CITT did make comments in its reasons about the nature of the WCO Committee's decision making process: *Mattel 2* at paras. 55, 62–63. It also, more problematically, condemned the CBSA for requesting a Classification Opinion from the WCO after the CITT rendered its decision in *Mattel 1*: *Mattel 2* at paras. 68–73.

[28] I disagree with the CITT's analysis on this point. Absent any legal requirements to the contrary, and the CITT referenced none, there is nothing that would prohibit the CBSA from going to the WCO Committee for clarification or guidance on tariff classification matters, whether they have been decided by Canada's domestic tribunal, or not. Providing such guidance is part of the *raison d'être* of the WCO Committee: Terms of Reference of the Harmonized

System Committee at para. 3, Appeal Book p. 273. By requesting it, the CBSA was not engaging in "an attempt to circumvent the Tribunal's decision in *Mattel 1*": *Mattel 2* at para. 68.

[29] To hold otherwise, as the CITT appears to have done, is to imply that once the CITT renders a decision on a specific good, that decision prohibits the CBSA from requesting guidance on the classification from the WCO. In support of this proposition, the CITT cited this Court's decision in *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, 409 D.L.R. (4th) 751: *Mattel 2* at para. 69. While that case did indeed make clear that decisions of the CITT in general bind the CBSA to apply the CITT's tariff classification when the same product is imported in the future, this Court made clear that this general rule admitted of certain exceptions: *Bri-Chem* at paras. 43–46. As Stratas J.A. put it in *Bri-Chem*, at paragraph 47:

> It is uncontroversial that as long as an administrator is acting *bona fide* and in accordance with its legislative mandate, an administrator can assert—where principled and warranted—that an earlier tribunal decision on its facts does not apply in a matter that has different facts.

[30] In my view, the existence of a new WCO Committee opinion dealing with the goods in question is something the CITT must consider in its subsequent review. The WCO Committee's divergence of opinion with the CITT's classification in *Mattel 1* gave the CBSA a principled basis upon which to not apply *Mattel 1*. I see nothing that prevented the CBSA from engaging the WCO Committee, of which the CBSA is a member, in the question of how to properly classify the goods. I also see nothing in the record to suggest the CBSA was not acting in good faith.

[31] Of course, the CITT was in turn not bound to agree with the CBSA that the WCO Committee's Classification Opinion required the CITT to classify the goods before it as "seats". The CITT, in relying on the expert evidence before as to the intended use of the product, found that the jumper was intended primarily to provide amusement, rather than to provide a safe and secure seat in which to place a child. It was this finding of fact that led the CITT to its tariff classification conclusion. In relying on this expert evidence, the CITT made no error in law. As this Court stated in *Suzuki*, when dealing with Explanatory Notes, "the Tribunal is not bound to apply the Explanatory Notes, where there is a sound reason to depart from their guidance. Expert evidence can, in some circumstances, provide such a reason": *Suzuki* at para. 17. In my view, this conclusion is equally applicable to WCO Committee Classification Opinions.

[32] As to Canada's second alleged error of law, I am not convinced that the CITT interpreted the Classification Opinion in a way that put it into contradiction with the Explanatory Notes. Canada's submissions on this point simply repeat and reemphasize the WCO Committee's rationale for classifying the goods before it as "seats", namely that they are included under the tariff heading for seats and thus cannot be included under the heading for "toys". The CITT dealt with this consideration as, to repeat, it concluded based on the evidence before it that the jumpers were designed primarily for amusement of infants and not the utilitarian purpose of safely seating them.

[33] Thus, I am not convinced that the CITT made any reviewable errors of law.

VII. Conclusion

[34] As such, I would dismiss the appeal, with costs.

"D. G. Near"

J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-339-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. MATTEL CANADA INC.
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JANUARY 19, 2021
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GLEASON J.A. LEBLANC J.A.
DATED:	AUGUST 5, 2021

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