WHAT IS THE ESSENCE OF A SHOWER CURTAIN SET?

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In *Mon-Tex Mills Ltd. v. Canada (Commissioner of Customs & Revenue Agency)*,[1] the Federal Court of Appeal (the FCA) allowed an importer's appeal of a CITT decision[2] that had affirmed the Canadian customs tariff classification made by the former CCRA.[3] The FCA substituted the importer's tariff classification for that of the CCRA.

The decisions are instructive as to the legal requirements for appropriately classifying goods imported into Canada under the Harmonized Tariff System (HTS) and the appropriate boundaries for judicial review of tariff classification decisions made by the CITT.

Issue

The imported goods in issue were shower curtain sets put up for retail sale. The various shower curtain sets considered consist-

1 *Mon-Tex Mills Ltd. v. Canada* (Commissioner of Customs & Revenue Agency), 2004 CarswellNat 3626, 2004 FCA 346 (F.C.A.)

2 *Mon-Tex Mills Ltd. v. Canada* (Commissioner of Customs & Revenue Agency), (2003) [2003] C.I.T.T. No. 81, 2003 CarswellNat 4822, 8 T.T.R. (2d) 419 (C.I.T.T.)

3 The customs functions formerly undertaken by the CCRA transferred to the Canada Border Services Agency (the CBSA) on December 12, 2003.

ed of four types of goods: (1) vinyl plastic liner, (2) decorative polyester shower curtain, (3) tiebacks for the curtains, and (4) two wall hooks. The importer had classified the goods within the HTS in Chapter 39 "Plastics and Articles Thereof" under the heading 39.24 "Tableware, kitchenware, other household articles and toilet articles, of plastics" (specifically tariff item 3924.90.00). The CCRA had classified the goods within Chapter 63 "Other Made Up Textile Articles; Sets; . . ." under heading 63.03 "Curtains (including drapes) and interior blinds; curtain or bed valances" (specifically tariff item 6303.92.90).

CITT Decision

The CITT's line of reasoning for its decision went as follows. In accordance with section 10 of the Customs Tariff,[4] "the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule." Those rules, hereinafter referred to as the General Interpretive Rules (the GIR), apply in cascading order. That is, the importer should apply the first available rule when considered in descending order. If Rule 1 does not apply, then Rule 2 needs to be considered, and so on.

Rule 2(b) provides, in part, as follows:

> "The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3."

Rule 3(a) is known as the rule of relative specificity. Where two HTS headings can apply, the more specific heading shall apply in classifying the imported goods. The CITT found that Rule 3(a) was inapplicable (presumably because the two competing headings each only refer to one item in the set, so neither could be said to be more specific than the other).

The CITT classified the imported goods according to Rule 3(b) of the GIR and quoted the following relevant excerpt from that interpretive rule:

> "goods put up in sets for retail sale . . . shall be classified as if they consisted of . . . the component which gives them their essential character, insofar as the criterion is applicable."

So the narrow issue before the CITT came down to determining the "essential character" of the shower curtain sets. Or, if you like, Immanuel Kant, Jean-Paul Sartre, meet Canadian customs tariff classification. Serious financial stakes underlie this philosophical conundrum. The current Most Favoured Nation (MFN) duty rate for tariff item 6303.92.90, as determined by the CCRA, is 18%, whereas the corresponding duty rate for tariff item 3924.90.00, as determined by the importer, is 6.5%.

In interpreting headings and subheadings of the HTS, section 11 of the *Customs Tariff*[5] says that regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System* and the *Explanatory Notes* published by the World Customs Organization. Note VIII of the *Explanatory Notes* to Rule 3(b) provides:

> "(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

In other words, it **depends** (on the particular circumstances). There is no "hard and fast" rule for determining the "essential character" of a combination of goods put up in sets for retail sale. The importer argued that the essential character of the imported shower curtain set was derived from its functionality – to prevent water leakage – which pointed to a classification based on the vinyl shower liners. On this point, the CITT found that "all shower curtains are designed to prevent water from going beyond the shower/bathtub area." For that reason alone, the CITT could have said that the essential universal characteristic of shower curtains is to prevent water leakage.

The CITT, however, sided with the CCRA and found that the essential feature of the shower curtains was their decorative element. The CITT said:

> "A simple examination of the goods in issue clearly shows that it is their fashion elements and decorative nature that distinguish them from simple vinyl shower liners. The Tribunal was not convinced by the evidence adduced at the hearing that the utilitarian nature of the goods in issue is of greater importance than their decorative properties."

The CITT looked to the promotional materials and packaging for the shower curtain sets in supporting its conclusion. They emphasized the decorative aspects of the shower curtain. Furthermore, the CITT found that the weight and value of the shower curtains were substantially greater than those of the vinyl liner, regardless of the price of the various sets.

The FCA Decision

The FCA agreed with the importer's tariff classification and allowed the appeal. It went through the same analytical approach as the CITT, but reached the opposite conclusion. The FCA believed that the shower curtain sets derived their essential character from the plastic liner. While acknowledging that the United States (US) case in *Better Home Plastics Corp. v. U.S.*[6] was not legally binding on the CITT (and the FCA), the FCA proceeded to apply it.

US Case Law Applied

That US case considered exactly the same issue as in *Mon-Tex Mills Ltd. v Canada (Commissioner of Customs & Revenue Agency)*. US Customs argued that the decorative outer curtain

[4] Customs Tariff, S.C. 1997, c. 36, as amended.

[5] Ibid.

[6] *Better Home Plastics Corp. v. U.S.*, 20 C.I.T. 221, 916 F.Supp 1265, 18 ITRD 1279.

could always be featured in the bathroom and that the relative cost of the curtain was greater than the plastic liner so that the curtain gave the set its essential character. The US Court of International Trade was not persuaded. It found that "it is the plastic liner that provides the indispensable property of preventing water from escaping the shower enclosure."

US Customs argued that the legal Notes in Chapter 39 prevented rule 3(b) of the GIR from applying. Rule 1 of the GIR says 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 following provisions" in the GIR [emphasis added]. Chapter 39 Notes 1 and 2 exclude goods covered by Section XI of the US Customs Tariff.[7] On that basis, US customs argued that Rule 3(c) of the GIR would require classification under tariff item 6303.92.90. Rule 3(c) of the GIR is a residual rule to Rules 3(a) and (b), such that where the latter rules are inapplicable, the goods shall be classified under "the heading which occurs last in numerical order".

The US Court of International Trade did not accept this logic. In the court's opinion, Rule 3(b) is a deeming rule that treats the whole set as if it is a plastic liner. The US Court of Appeals affirmed the decision of the US Court of International Trade.

Proper Standard of Judicial Review by the FCA of the CITT Decision

In *Deputy Minister of National Revenue v. Mattel Canada Inc.*,[8] the Supreme Court of Canada explained the different standards of judicial review that could apply to a customs or trade law decision made by the CITT. It said that the standards ranged "from patent unreasonableness at the more deferential end of the spectrum, through reasonableness *simpliciter*, to correctness at the more exact end of the spectrum."[9]

The FCA in *Mon-Tex Mills Ltd. v. Canada (Commissioner of Customs and Revenue Agency)* purported to apply the leading case concerning the appropriate standard of judicial review of a tariff classification decision made by the CITT. This case is *Deputy Minister of National Revenue (Customs and Excise) v. Schrader Automotive Inc.*[10] According to this case, the appropriate standard of judicial review is reasonableness *simpliciter*.

Arguably, the FCA applied the more exacting standard of legal correctness in reviewing the CITT's decision (the standard of review actually applied in *Mattel* to determine whether the CITT interpreted "condition of sale" in accordance with sale of goods law). The FCA said:

"It is possible to imagine a case in which the decorative elements of a useful consumer product, even one as inexpensive as this one, are so predominant that it would be reasonable for the CITT to conclude that the product is primarily decorative even though it also happens to be useful. If the CITT believed this to be such a case, it was incumbent on the CITT to provide a cogent explanation for reaching that conclusion. . . . However, a careful review of the reasons and the record discloses no basis upon which the CITT could reasonably reach the conclusion it did."[11]

Although the FCA purports to allow the CITT broad latitude in reaching its decision, the FCA actually seems to provide no judicial deference to the CITT's reasoning. It appears to apply the most exacting standard of legal correctness to the CITT's decision.

The reason for providing a certain amount of judicial deference to the CITT is important. Only the CITT had the benefit of hearing the evidence and seeing the exhibits put into evidence, including samples of the shower curtain sets themselves. The CITT had said that based on a "simple examination of the goods", it was apparent to the CITT that the decorative elements of the shower curtain distinguished the shower curtain sets. Even if the FCA reached the right decision, it probably should not have interfered with the CITT's decision. It was probably reasonable for the CITT to reach the conclusion that it did, based on the evidence before it.

Both the FCA in *Mon-Tex Mills Ltd. v. Canada (Commissioner of Customs and Revenue Agency)* and the US Court of International Trade were circumspect in the scope of their decisions, and carefully limited their decisions to their own specific facts. Their decisions place great importance on the fact that the shower curtains were "inexpensive" and "at the low end of the shower curtain market." They left open the possibility that with higher-end consumer products, the decorative features could be the distinguishing characteristic that gives the products their "essential character".

What the cases reveal is that there are two competing theories as to what gives consumer products their "essential character". The one adopted by the CITT focuses on the decorative elements that distinguish the shower curtain sets ***from other products within the same class of goods***. The one adopted by the FCA and in the US case of *Better Home Plastics Corp. v. U.S.* focuses on the utilitarian feature that distinguishes the shower curtain sets ***from other classes of goods***.

7 The Chapter 39 legal notes in the HTS parallel the US Customs Tariff Chapter 39 notes in this regard. See the last sentence of Note 1 and Note 2(m) in Chapter 39 of the HTS.

8 Deputy Minister of *National Revenue v. Mattel Canada Inc.*, 2001 CarswellNat 1032, 2001 CarswellNat 1033 [2001] S.C.J. No. 37, [2001] 2 S.C.R.100 (S.C.C.) (hereinafter "Mattel").

9 Ibid, paragraph 24.

10 *Deputy Minister of National Revenue (Customs & Excise) v. Schrader Automotive Inc.* (1999), 1999 CarswellNat 333, [1999] F.C.J. No. 331 (Fed. C.A.) at paragraph 4.

11 Supra Note 1, paragraph 16.