



Ottawa, Friday, September 8, 1995

Appeal No. AP-91-188 (R)

IN THE MATTER OF an appeal heard on June 21 and July 17, 1995, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated November 7, 1991, with respect to a request for re-determination under section 58 of the *Special Import Measures Act*.

BETWEEN

J.V. MARKETING INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

AND

**AVRECAN INTERNATIONAL INC. AND
THE SHOE MANUFACTURERS' ASSOCIATION OF CANADA**

Intervenors

DECISION OF THE TRIBUNAL

The appeal is allowed.

Raynald Guay
Raynald Guay
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

UNOFFICIAL SUMMARY

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Interveners

The issue in this appeal is whether Saucony InStep 6220 fitness walking shoes are sports footwear and, thus, excluded from findings of material injury made by the Canadian International Trade Tribunal (the Tribunal) in 1990. In resolving this issue on rehearing, the Federal Court of Appeal instructed the Tribunal to consider two issues. It must be determined whether the walking shoes were designed for a sporting activity and whether fitness walking is such an activity.

HELD: *The appeal is allowed. The Tribunal considers fitness walking to be a sport, in that it is an athletic activity involving more or less vigorous bodily exertion for the purposes of exercise. The numerous features built into the walking shoes, making them suitable for fitness walking, establish that they are designed for fitness walking. As the walking shoes are designed for fitness walking and fitness walking is a sport, the Tribunal concludes that the walking shoes are sports footwear and excluded from the 1990 findings.*

*Place of Hearing: Ottawa, Ontario
Dates of Hearing: June 21 and July 17, 1995
Date of Decision: September 8, 1995*

*Tribunal Members: Raynald Guay, Presiding Member
Arthur B. Trudeau, Member
Lise Bergeron, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Anne Jamieson

*Appearances: Richard A. Wagner, for the appellant
Brian Saunders, for the respondent
Donald A. Kubesh, for the intervener, Avreca International Inc.*

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Interveners

TRIBUNAL: RAYNALD GUAY, Presiding Member
ARTHUR B. TRUDEAU, Member
LISE BERGERON, Member

REASONS FOR DECISION

In findings dated May 3, 1990,¹ the Canadian International Trade Tribunal (the Tribunal) found that the dumping of women's boots and shoes from Taiwan had caused, was causing and was likely to cause material injury to the production in Canada of like goods (the 1990 findings). The 1990 findings excluded various footwear, including "sports footwear."

On November 7, 1991, the respondent made a decision that the goods in issue, Saucony InStep 6220 fitness walking shoes (the walking shoes), which were produced in Taiwan, were included within the ambit of the 1990 findings and subject to anti-dumping duties. In an appeal from the respondent's decision,² the Tribunal held that the walking shoes did not meet the definition of "sports footwear" set out in the 1990 findings. Thus, they were not excluded from the 1990 findings and were subject to anti-dumping duties.

In its analysis, the Tribunal referred to the "extended definition" of sports footwear found in the statement of reasons of the 1990 findings. The Tribunal concluded that this definition was exhaustive, meaning that footwear would be excluded from the 1990 findings as sports footwear only if it met one of the two branches of the extended definition. The Tribunal found that the walking shoes did not meet either branch of the extended definition.

1. *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan*, Canadian International Trade Tribunal, Inquiry No. NQ-89-003, Findings, May 3, 1990, Statement of Reasons, May 18, 1990.

2. *J.V. Marketing Inc. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. AP-91-188, September 1, 1992.

On appeal to the Federal Court of Appeal,³ the Court articulated several issues, one of which was whether the Tribunal properly construed the extended definition of sports footwear and correctly treated it as exhaustive. The Court concluded that the extended definition of sports footwear was merely illustrative and not exhaustive. The Court noted that the issue of whether the walking shoes are sports footwear is a question of fact best determined by the Tribunal. As such, it declined to declare that the walking shoes are sports footwear and excluded from the 1990 findings. Thus, the appeal was allowed, the Tribunal's decision was set aside, and the matter was remitted to the Tribunal for reconsideration in a manner consistent with the reasons of the Court.

The issue for rehearing is whether the walking shoes are excluded from the 1990 findings as sports footwear. In resolving this issue, the Tribunal must determine whether the walking shoes were designed for a sporting activity and whether fitness walking is such an activity.

For purposes of proceeding, the parties agreed to adopt the evidence and arguments from the original hearing into the record of the rehearing. Thus, the rehearing was limited to reviewing a video, Exhibit A-10, reviewing portions of the evidence from the original hearing and hearing argument as counsel considered necessary.

Counsel for the appellant referred to the transcript from the original hearing for a description of the walking shoes. The upper part of the walking shoes is made of leather, with some reinforcement for lateral support. The midsole is made of ethylene vinyl acetate, which provides cushioning and shock absorption. The outsole is made of carbon rubber for long wear. In addition, the sole has flex bars for added flexibility, a heel counter made of moulded thermoplastic for support and a plastic motion control device to enhance the counter. The insole, known as the InStep support device, is a patented and trademarked device that provides arch support and cushioning for the heel.

Reference was made to Exhibits A-10 and A-11 to illustrate the biomechanics of fitness walking, the needs of an athlete and the features of the walking shoes that serve those needs, which include cushioning, stability, motion control, support, chafe protection, pressure dispersion, flexibility and durability. In support of the proposition that the walking shoes were designed and marketed for fitness walking, reference was made to the testimony of several witnesses at the original hearing. Mr. Neil Slepian, Manager of Research and Development at Hyde Athletic Industries, Inc., the manufacturer of the walking shoes, testified that the walking shoes were developed for the sport of fitness walking. Mr. E. Bruce Trigg, a buyer of athletic footwear for Athletes World, Division of Bata Industries Limited, a chain of sports retail stores, told the Tribunal that sports footwear can be distinguished from casual or dress shoes as they are designed to meet athletic or sports needs. He referred to specific design and construction aspects of the walking shoes, including the support features engineered around the heel, to support his opinion that the walking shoes are sports footwear. Mr. John Vicario, President of J.V. Marketing Inc., testified that a minimum of 95 percent of the walking shoes are sold to sporting goods stores, with the balance sold to orthopaedic shoe specialists. He told the Tribunal that sports footwear is footwear that is designed, engineered and manufactured to meet the particular needs of the sport for which it is intended. Mr. Vicario opined that fitness walking is a sport and that the walking shoes are sports footwear.

3. *J.V. Marketing Inc. v. Canadian International Trade Tribunal, et al.*, unreported, Court File No. A-1349-92, November 29, 1994.

In addition to Mr. Vicario, Mr. Trigg and Mr. Slepian, Mr. Mark Fenton and Ms. Susan A. Fawcett, both fitness walkers, and Mr. John Eberle, Associate Product Manager, The Rockport Company, testified that fitness walking is a sport. Ms. Fawcett, for instance, distinguished walking as a means of locomotion from fitness walking as a means of exercise. She told the Tribunal that fitness walking involves an active, quick pace and long strides to increase the heart rate and body temperature.

Counsel for the intervener, Avreca International Inc.,⁴ submitted that the legal test to be applied in determining whether fitness walking is a sport should be consistent with the broad, common-sense approach used by the Tribunal in *APR Imports Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.⁵ In that case, the Tribunal referred to several dictionary definitions of the word “sport” to examine its grammatical and ordinary meaning. In summary, counsel submitted that a sport is an athletic activity, involving exercise and some skill, that can be raised to a competitive level. Counsel referred to several publications in the record of the original hearing that described fitness walking as a sport.

Counsel for the respondent submitted that the walking shoes are casual footwear and subject to the 1990 findings. Furthermore, walking for pleasure or exercise, the activities for which the walking shoes were designed, are not sporting activities.

Referring to testimony from the original hearing, counsel for the respondent submitted that there is no clear demarcation between casual shoes and sports footwear, nor are there industry standards to distinguish between the two categories of shoes. Relying on the testimony of Mr. Vicario, counsel submitted that, if a shoe were marketed as a casual walking shoe, it would not qualify as sports footwear. Furthermore, as sporting goods stores sell both casual shoes and sports footwear, a shoe cannot be classified as sports footwear merely because it is sold in such a store.

After referring to the Saucony brochures, counsel for the respondent submitted that the walking shoes, whether characterized as fitness walking shoes or simply walking shoes, are designed and marketed for the large number of people who walk for pleasure and exercise, and not for sport. Relying on the testimony of Mr. Eberle, counsel submitted that they are a continuation of the casual shoes that people wore to walk for exercise prior to the introduction of the so-called “walking shoes.” As such, the walking shoes should be characterized as casual shoes and subject to the 1990 findings.

Though prepared to acknowledge that race walking is a sport, counsel for the respondent submitted that fitness walking or walking for exercise is not a sport.

The issue in this appeal is whether the walking shoes are sports footwear and, thus, excluded from the 1990 findings. In resolving this issue on rehearing, the Federal Court of Appeal instructed the Tribunal to consider two issues. It must be determined whether the walking shoes were designed for a sporting activity and whether fitness walking is such an activity.

4. Now called Reebok Canada Inc.

5. Appeal No. AP-93-141, February 28, 1994.

With regard to the question of whether fitness walking is a sporting activity, the Tribunal believes that it should look to the grammatical and ordinary meaning of the word “sport.” In *APR Imports*, the Tribunal stated:

“Sport” has been defined as “a game, contest or other pastime requiring some skill and a certain amount of exercise ...” “an athletic activity requiring skill or physical prowess and often of a competitive nature, as racing, baseball, tennis, golf, bowling, wrestling, boxing, hunting, fishing, etc. ...” and “an activity requiring more or less vigorous bodily exertion and carried on according to some traditional form or set of rules, whether outdoors, as football, hunting, golf, racing, etc., or indoors, as basketball, bowling, squash, etc.”⁶

Clearly, the word “sport” has been defined in many ways, reflecting the broad range of human activities considered to be sports in the grammatical and ordinary sense of the word. Relying, in part, on the testimony of Ms. Fawcett, the Tribunal considers fitness walking to be a sport, in that it is an athletic activity involving more or less vigorous bodily exertion for the purposes of exercise. This conclusion is consistent with the Tribunal’s finding in *APR Imports* where jogging and running were found to be sports.

With regard to the question of whether the walking shoes were designed for a sporting activity, being fitness walking in this case, the Tribunal was persuaded, primarily by Exhibits A-10 and A-11 and the testimony of Mr. Slepian, that they were so designed. The Tribunal believes that, if a shoe is designed or manufactured for a particular sporting activity or activities, the users’ particular needs for that or those sporting activities will be reflected in the features of the shoe. As such, the Tribunal focussed its attention on the features of the walking shoes to determine whether they were, in fact, designed for fitness walking.

In testimony at the original hearing, Mr. Slepian reviewed Exhibit A-11, which summarized the design features of the walking shoes. After briefly explaining the biomechanics of fitness walking, Mr. Slepian identified the needs of an athlete through the walking gait cycle. These included cushioning, stability, motion control, support, chafe protection, pressure dispersion, flexibility and durability.

It is clear from the evidence that the walking shoes have particular features that serve the biomechanical needs of a fitness walker. For instance, with respect to cushioning, the walking shoes have the patented InStep support device composed of polyurethane and a midsole made of ethylene vinyl acetate. For stability, the InStep support device is designed with a heel cup, and the shoes have a heel counter made of rigid plastic built into the heel section. The shoes are “board lasted,” meaning that they are built with a semi-firm board to prevent the foot from rolling. In addition, the shoes have a motion control device that is designed to hold a fitness walker’s heels in place. For support, the InStep device includes a firm plastic component, and there is a second firm plastic component built into the sole of the shoes to assist the muscles on the bottom of the foot. In addition, the upper shoe is made of a firm leather material designed with “medio-lateral stability straps” that wrap around and over the front of the foot where they tie into the lacing system. Furthermore, many of these features and more serve the other needs of the fitness walker.

6. *Ibid.* at 4.

The Tribunal is persuaded that the walking shoes are designed for fitness walking. The extent to which the above-mentioned features have been built into the walking shoes, making them suitable for fitness walking, establishes that they are more than just casual shoes. As the walking shoes are designed for fitness walking and fitness walking is a sport, the Tribunal concludes that the walking shoes are sports footwear and excluded from the 1990 findings.

Accordingly, the appeal is allowed.

Raynald Guay
Raynald Guay
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member