



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2003-045

Norsk Fitness Products Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Thursday, April 6, 2006*

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IN THE MATTER OF an appeal heard on November 8, 2005, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated October 23 and 28, 2003, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**NORSK FITNESS PRODUCTS INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed in part.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

James A. Ogilvy  
James A. Ogilvy  
Member

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: November 8, 2005

Tribunal Members: Pierre Gosselin, Presiding Member  
James A. Ogilvy, Member  
Meriel V. M. Bradford, Member

Counsel for the Tribunal: Reagan Walker

Clerk of the Tribunal: Valérie Cannavino

Appearances: Peter Baron, for the appellant  
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## STATEMENT OF REASONS

1. This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) (now the President of the Canada Border Services Agency [CBSA]), pursuant to subsection 60(4) of the *Act*, concerning the importation of magnetic insoles and a number of magnetic support articles. The magnetic support articles consist of magnetic back supports, magnetic ankle supports, magnetic knee supports and magnetic elbow supports. At the outset of the hearing, Norsk Fitness Products Inc. (Norsk) withdrew its appeal regarding magnetic therapy bracelets and magnetic mattress toppers.

2. The first issue in this appeal is whether the magnetic insoles are properly classified under tariff item No. 6406.99.90 of the schedule to the *Customs Tariff*<sup>2</sup> as other parts of footwear of other materials, as determined by the CCRA, or should be classified under tariff item No. 8505.19.90 as other permanent magnets, as claimed by Norsk.

3. The second issue is whether the magnetic support articles are properly classified under tariff item No. 6307.90.99 as other made up articles of other textile materials, as determined by the CCRA, or should be classified under tariff item No. 8505.19.90 as other permanent magnets, as claimed by Norsk.

4. The relevant nomenclature reads as follows:

...	
63.07	Other made up articles, including dress patterns.
...	
6307.90	-Other
...	
6307.90.99	---Of other textile materials
...	
64.06	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable in-soles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.
...	
6406.99	--Of other materials
...	
6406.99.90	---Other
...	
85.05	Electro-magnets; permanent magnets and articles intended to become permanent magnets after magnetization; electro-magnetic or permanent magnet chucks, clamps and similar holding devices; electro-magnetic couplings, clutches and brakes; electro-magnetic lifting heads.  -Permanent magnets and articles intended to become permanent magnets after magnetization:
...	
8505.19	--Other
...	

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

8505.19.90 ---Other

...

## EVIDENCE

5. Norsk is a Canadian importer of the HoMedics Thera-P™ line of magnetic supports, wraps and insoles. The goods were imported on 15 separate occasions between April 18, 2000, and July 11, 2002. Although none of the imported goods were in evidence, identical physical items were tendered at the outset of the hearing.<sup>3</sup> In addition, packaging and other marketing literature were provided.<sup>4</sup>

6. On behalf of Norsk, Ms. Robin Bratton, Operations Manager, testified that Norsk offers a “Non-Medical Method for the Treatment of Pain,”<sup>5</sup> in the sense that magnetic therapy is an alternative approach to medicine.<sup>6</sup> Therefore, Norsk does not consider itself a medical supply company.<sup>7</sup> Rather, it caters to the home health care departments of London Drugs and Shoppers Drug Mart and to natural product retailers<sup>8</sup> in competition with other magnetic therapy suppliers.<sup>9</sup> Although Norsk’s products are purchased for use in magnetic therapy, they can be used to compress muscle swelling as well.<sup>10</sup>

7. Also on behalf of Norsk, Ms. Eva Navratil, co-owner and Director of Serenity 2000 Inc. (Serenity), testified that Serenity, one of Norsk’s competitors, was in the business of manufacturing and distributing magnetic therapy products.<sup>11</sup> She defined “magnetic therapy” as a treatment that consists of supplying certain parts of the body with a supplementary magnetic field.<sup>12</sup> After viewing and handling Norsk’s physical exhibits, she affirmed that they were similar to Serenity’s products, as well as those of another company, BIONova Medical Inc. (BIONova), in that they all consist of high-quality fabric wraps with embedded magnetic pads.<sup>13</sup> Norsk, Serenity and BIONova all compete with one another in the natural product marketplace.<sup>14</sup>

8. The CBSA filed laboratory and expert reports and called expert witnesses. The CBSA laboratory analysis of the magnetic back support described it as a black and blue, flexible back support that consists of four components: (a) two three-ply textile fabrics; (b) two rubberized fabrics containing 20 magnets and three plastic stays; (c) a woven elastic band; and (d) two open-mesh knit fabrics.<sup>15</sup> Its analysis of the magnetic ankle support described it as a blue, flexible ankle support that consists of three components: (a) a three-ply rubber and nylon fabric; (b) a Velcro hook fastener; and (c) nine round magnets.<sup>16</sup> No laboratory reports were submitted for the remaining imported products.

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3. Exhibit A-1, magnetic knee support; Exhibit A-2, magnetic elbow wrap; Exhibit A-3, magnetic ankle support; Exhibit A-4, magnetic insole; and Exhibit A-7, magnetic back support.

4. Appellant’s Book of Additional Documents, Tab 1.

5. *Transcript of Public Hearing*, 8 November 2005, at 24.

6. *Ibid.* at 70-71.

7. *Ibid.* at 15.

8. *Ibid.* at 41.

9. *Ibid.* at 38.

10. *Ibid.* at 56-57.

11. *Ibid.* at 78.

12. *Ibid.* at 79.

13. *Ibid.* at 85.

14. *Ibid.* at 88, 94-95.

15. Laboratory and Scientific Services Directorate, Report No. 14283-001, Respondent’s Brief, Tab 3.

16. *Ibid.*

9. In her report, Ms. Lynn Casimiro, Physiotherapist, School of Rehabilitation Sciences, a witness for the CBSA who was qualified as an expert in physiotherapy, supports and orthoses, and orthotic treatment,<sup>17</sup> stated the following:

...  
It is my opinion that the Norsk back, elbow and knee braces present desirable salient feature[s] for many orthopedic conditions. In fact, the construction of the Norsk braces is no different [from] many similar orthopedic products available on the market. The neoprene material, reinforced by velcro™ straps, provides compression and increased circulation due to stored body heat . . . . This may in turn reduce swelling, modulate pain signals and improve healing in the affected area. The width of the bands, the stitching and the use of plastic stays in certain products can provide some stability but more importantly, can provide feedback to the client as to the position and movement of the affected joints in space. These features may help a client control movement within ranges that do not cause pain.

... The magnets are no more an essential characteristic of these braces than is the color . . . .

... It follows that the role [of] the Norsk back, elbow and knee braces is to provide compression and support rather than to hold magnets. If such had been the case, a sleeve of less elaborate construction and with no heat retaining properties would have been sufficient.<sup>18</sup>

...

Ms. Casimiro's report did not cover magnetic ankle supports or magnetic insoles.

10. In her testimony, Ms. Casimiro stated she was a physiotherapist who specialized in rehabilitation, particularly for people with chronic diseases such as arthritis. She confirmed that it was the fit, constituent materials,<sup>19</sup> construction and stitching<sup>20</sup> of the magnetic support articles that gave them therapeutic value, not the presence of magnets,<sup>21</sup> the benefit of which was not supported by reliable scientific proof.<sup>22</sup> Nor would it be fair to characterize the magnetic support articles as anatomical locators, since the magnets can be readily located by self-adhesive material or pocket sleeves,<sup>23</sup> and they do not require an elaborate brace like the Norsk Thera-PT™ simply to hold them in place. She alluded to the definition of "brace", or "orthosis", in her expert report, i.e. "any medical device added to a person's body to support, align, position, immobilize, prevent or correct deformity, assist weak muscles, or improve function",<sup>24</sup> and affirmed that the imported products fell within the scope of the definition.<sup>25</sup> They provide compression,<sup>26</sup> heat and support.<sup>27</sup>

11. In his report, Dr. Fred Lapner, an expert in medical devices,<sup>28</sup> concluded that the imported goods were "Class I medical devices". He added the following: "... Based on the claims made and the evidence provided, the benefits resulting from the use of these goods are derived from the support and warmth

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17. *Transcript of Public Hearing*, 8 November 2005, at 133.

18. Respondent's Expert Witness Report, Exhibit No. AP-2003-045-30A, Tab 1 at 2-3.

19. *Transcript of Public Hearing*, 8 November 2005, at 177.

20. *Ibid.* at 181.

21. *Ibid.* at 156.

22. *Ibid.* at 175.

23. *Ibid.* at 182.

24. Respondent's Expert Witness Report, Exhibit No. AP-2003-045-30A, Tab 1 at 2.

25. *Transcript of Public Hearing*, 8 November 2005, at 167.

26. *Ibid.* at 166.

27. *Ibid.* at 163.

28. *Ibid.* at 106.

provided by the textiles used in their manufacture. The earth (static) magnets sewn into the textile appear to serve a cosmetic function only, and should be regarded as a marketing tool.”<sup>29</sup>

12. In his testimony, Dr. Lapner testified that static magnets with claims of specific therapeutic benefits would be considered as Class I medical devices under the *Medical Devices Regulation*.<sup>30</sup> Even though the imported goods claim to be effective for the relief of pain and in enhancing the body’s healing process for injured areas,<sup>31</sup> he submitted, none of the studies reviewed by the Department of Health (Health Canada) support anything “. . . other than generic claims of well-being or . . . improving health, for example . . .”<sup>32</sup> He further testified that the imported goods are “. . . essentially support garments, which have a traditional use in medicine to protect an injured area, to generate warmth, to protect healing and to remind the user . . . not to stress or strain the injured area . . .”<sup>33</sup>

## ARGUMENT

### Magnetic Insoles

13. Norsk argued that the magnetic insoles should be classified under tariff item No. 8505.19.90 as other permanent magnets. It based its contention on the fact that the entire article is a “one-piece magnet”, although Norsk conceded that it also imports a two-ply insole that comprises the one-piece magnet and a cushioned covering.<sup>34</sup> The CBSA replied that the magnetic insoles were properly classified under tariff item No. 6406.99.90 as other parts of footwear of other materials, under Rule 1 of the *General Rules for the Interpretation of the Harmonized System*.<sup>35</sup> The CBSA pointed out that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>36</sup> to heading No. 64.06 read as follows: “. . . This heading covers: . . . (B) The following fittings (of any material **except** asbestos) which may be worn inside the footwear: removable in-soles . . .”

### Magnetic Support Articles

14. Regarding the magnetic support articles, Norsk argued that they should be classified under tariff item No. 8505.19.90 as other permanent magnets. It claimed that the magnetic support articles are composite goods that consist of both permanent magnets and neoprene supports or wraps. It invoked Rule 3 (b) of the *General Rules*, which states the following: “. . . composite goods . . . shall be classified as if they consisted of the . . . component which gives them their essential character . . .” Norsk claimed that the magnets give the magnetic support articles their essential character, since customers buy them for the purpose of magnetic therapy, in the belief that magnetic fields, applied to an injured area, will improve blood flow and enhance the body’s natural healing processes.

15. Norsk submitted that the magnetic support articles are presented for sale as magnetic therapy products designed “to promote healing and relieve pain”. These messages are prominently displayed on the packaging and on the instructions for use of the goods. In addition, there are cautions relating to the magnetic aspects of the product. There are also references to the beneficial effects of the neoprene, but these

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29. Respondent’s Expert Witness Report, Exhibit No. AP-2003-045-30B at 002/002.

30. S.O.R. 98/282.

31. Appellant’s Book of Authorities, Tab 1; *Transcript of Public Hearing*, 8 November 2005, at 110.

32. *Transcript of Public Hearing*, 8 November 2005, at 109.

33. *Ibid.* at 113.

34. *Transcript of Public Argument*, 8 November 2005, at 54.

35. *Supra* note 2, schedule [*General Rules*].

36. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].



are far less prominent. The packaging and literature make no claim of support for the targeted part of the body, but the goods in issue are more expensive than plain elastic bandages.<sup>37</sup> In making the argument, Norsk relied on the Tribunal's decision in *BIONova Medical Inc. v. Commissioner of the CCRA*,<sup>38</sup> claiming that the magnetic support articles in issue are "like" those at issue in that case.

16. The CBSA replied that the magnetic support articles are excluded from heading No. 85.05 by virtue of the *Explanatory Notes* to that heading. The final portion of the notes, under the title "Parts", reads as follows:

...

The heading **does not cover**

...

(b) Electro-magnets, permanent magnets or magnetic devices of this heading, when presented with machines, apparatus, toys, games, etc., of which they are designed to form part (classified with those machines, apparatus, etc.).

...

17. The CBSA referred to the fact that one of the dictionary meanings of "*appareil*" (apparatus) used in the French version of the above notes is something that maintains or supports a body part.<sup>39</sup>

18. The CBSA maintained that the magnetic support articles were properly classified under tariff item No. 6307.90.99 as other made up articles of other textile materials under Rule 1 of the *General Rules*. It alluded to the *Explanatory Notes* to heading No. 63.07, which read as follows:

...

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

It includes, in particular:

...

(27) Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrists) or muscles (e.g., thigh muscles), **other than** those falling in other headings of Section XI.

19. The CBSA added that the term "made up", which appears in the chapeau of the *Explanatory Notes* to heading No. 63.07, is defined in Note 7 to Section XI as meaning the following: "... (e) [a]ssembled by sewing, gumming or otherwise . . ."; it submitted that the definition describes the magnetic support articles. It also referred to the fact that the *Explanatory Notes* state that the heading mentions support articles of the kind referred to in Note 1 (b) to Chapter 90 and argued that this chapter note also describes the magnetic support articles. It reads as follows:

Supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles) (Section XI).

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37. *Transcript of Public Hearing*, 8 November 2005, at 49.

38. (24 February 2004), AP-2002-111 (CITT) [*BIONova*].

39. *Le Petit Robert*, 1995, s.v. "*appareil*".

20. In the alternative, the CBSA argued that the magnetic support articles should, as composite goods, still be classified in heading No. 63.07 under Rule 3 (b) of the *General Rules*. The CBSA contended that it is the textile/neoprene fabric that provides compression and support to the injured area and that gives the magnetic support articles their essential character, not the magnets, which have little, if any, proven effect. In support of the contention, it referred to Ms. Bratton's admission that the magnetic support articles were used to compress muscle swelling and to the fact that the packaging for Exhibit A-7 describes the article as a "back support".<sup>40</sup>

## DECISION

### Conclusions of Fact

21. Based on the evidence, the Tribunal finds that the relevant facts are the following. The magnetic cushioned insoles consist of insoles designed to be placed inside a pair of shoes. Each insole is made of a thin, single-ply, moulded, rubber-like, magnetic material with interspersed perforations (vent holes). One surface is smooth and contains white lines that show where the insole can be cut to fit into the shoe. It also contains a thin, removable plastic flap over the portion supporting the phalanges of the foot. The other side has a "nubby" surface that contains intermittent wavy, flat channels. The magnetic insoles are designed to slip directly into the shoe, or, if bending or curling occurs, to be cut to fit the shoe, much like any other insole.<sup>41</sup>

22. The magnetic support articles all consist of a band or sleeve of elastic fabric, which wraps around the targeted muscles and is held in place through the use of Velcro fasteners. The fabric consists of neoprene covered with a nylon abrasion-resistant material. Inside, the goods contain a number of strategically placed permanent magnets in a rubberized material.

23. The magnetic support articles, although superficially similar to rehabilitative braces and other orthotic devices used in physiotherapy, are different in several important ways. First, they contain magnets; second, they are less elastic; and third, they are marketed differently. Rather than being offered for sale primarily at drugstores and orthotic specialty stores, they are sold through Shoppers HomeHealthCare, natural product stores and other "alternative medicine" outlets. Based on the inconclusiveness of published scientific articles on the subject, Health Canada has not yet accepted magnetic therapy as having any specific proven therapeutic effect. However, it does allow magnetic therapy products to be sold without pre-market approval as Class I medical devices. Customers are willing to pay a substantial premium over the price of conventional orthotic supports for the magnetic support articles.

24. In arriving at these conclusions of fact, the Tribunal has given no weight to the expert report or transcript in *BIONova*.<sup>42</sup> In a tariff classification case, the Tribunal's duty is to determine the proper classification of the actual goods under appeal. This may be done by examining the actual or identical goods or, if such examination is not possible, by examining images and descriptions of the goods. Whether or not the imported goods are "like" goods to those examined in *BIONova*, as Norsk argued, is not determinative, since the Tribunal must base its decision on its personal examination of the goods before it in the appeal.

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40. *Transcript of Public Argument*, 8 November 2005, at 44.

41. Appellant's Book of Additional Documents, Tab 1.

42. *Ibid.*, Tab 4.

## Analysis

### Magnetic Insoles

25. As mentioned, there are two issues in this appeal. The first is whether the magnetic insoles are properly classified under tariff item No. 6406.99.90 as other parts of footwear of other materials, as determined by the CBSA, or should be classified under tariff item No. 8505.19.90 as other permanent magnets, as claimed by Norsk.

26. In appeals under section 67 of the *Act* concerning tariff classification, the Tribunal hears the matter and determines the proper classification of the goods under appeal in accordance with the *General Rules* and the *Canadian Rules*.<sup>43</sup> Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>44</sup> and the *Explanatory Notes*. The *General Rules* are structured in cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. The *Canadian Rules* state that the classification of goods under a tariff item shall also be determined according to the *General Rules*.

27. In the Tribunal's opinion, the magnetic insoles are correctly classified under tariff item No. 6406.99.90 as other parts of footwear of other materials, as determined by the CBSA. Note I(B) of the *Explanatory Notes* to heading No. 64.06 explains that the heading covers removable insoles of any material other than asbestos. The goods were marketed and sold as magnetic *insoles*, and there was no evidence that they were anything but insoles. The fact that they were made of magnetic material is not enough to remove them from the heading, since only if they were made of asbestos would they be classified elsewhere. Therefore, the Tribunal finds that the magnetic insoles are classifiable in the above heading under Rule 1 of the *General Rules*.

28. Norsk argued that the magnetic insoles should be classified under tariff item No. 8505.19.90 as other permanent magnets, since the entire objects were, in effect, magnets. The Tribunal disagrees. Even if the Tribunal were to accept, for the sake of argument, that they were *prima facie* classifiable in both heading No. 64.06 and heading No. 85.05, the Tribunal would still be of the opinion that heading No. 64.06 provides the most specific description. Therefore, the magnetic insoles are classifiable in that heading under Rule 3 (a) of the *General Rules* as well.

29. There are four subheadings under heading No. 64.06: No. 6406.10 (Uppers and parts thereof, other than stiffeners); No. 6406.20 (Outer soles and heels, of rubber or plastics); No. 6406.91 (Of wood); and No. 6406.99 (Of other materials). It is self-evident that the magnetic insoles do not fit under the first three subheadings and, therefore, are properly classified in subheading No. 6406.99.

30. The above subheading contains three tariff items: No. 6406.99.10 (Crampons for climbing or mountaineering; Steel toe-caps); No. 6406.99.20 (Gaiters or leggings of textile material); and No. 6406.99.90 (Other). Again, it is self-evident that the magnetic insoles do not fit under the first two tariff items and, therefore, are properly classified in subheading No. 6406.99.90 as other parts of footwear of other materials, as determined by the CBSA.

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43. *Supra* note 2, schedule.

44. Customs Co-operation Council, 1st ed., Brussels, 1987.

### Magnetic Support Articles

31. The second issue is whether the magnetic support articles are properly classified under tariff item No. 6307.90.99 as other made up articles of other textile materials, as determined by the CBSA, or should be classified under tariff item No. 8505.19.90 as other permanent magnets, as claimed by Norsk.

32. The CBSA's position is that the magnetic support articles are "other made up articles" within the meaning of heading No. 63.07 and the relevant section or chapter notes. It contends that, according to Note 1 (b) to Chapter 90, "[s]upporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, . . . supports for joints or muscles) . . ." must be classified in Section XI, which includes the above heading.<sup>45</sup>

33. In addition, Note 7 to Section XI, which includes heading No. 63.07, states that, for purposes of the Section, "made up" means the following: "(e) [a]ssembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded) . . ."

34. Therefore, the CBSA urges the Tribunal to find that heading No. 63.07 is the correct classification, by virtue of Rule 1 of the *General Rules*.<sup>46</sup>

35. The CBSA also urges the Tribunal to abide by the *Explanatory Notes* unless it has a compelling reason to depart therefrom,<sup>47</sup> as stated by the Federal Court of Appeal in *Canada (Attorney General) v. Suzuki Canada Inc.*<sup>48</sup> The Tribunal notes that the *Explanatory Notes* to heading No. 63.07 cover "made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature" and include, in particular, "(27) Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrists) or muscles (e.g., thigh muscles), **other than** those falling in other headings of Section XI."

36. The Tribunal accepts that, based on the express terms of heading No. 63.07, as well as on related "legal" notes and *Explanatory Notes*, an argument may be made that the magnetic support articles are properly classified in that heading. But there are two difficulties with the argument. First, Note 1 (b) to Chapter 90, which is incorporated by reference into the *Explanatory Notes* to the heading, describes ". . . support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity . . ." The evidence established that buyers pay a considerable premium over the price of an ordinary elastic support bandage for one that contains magnets.<sup>49</sup> Moreover, there was extensive evidence that the magnetic support articles were marketed as providing magnetic therapy, not traditional orthotic support.<sup>50</sup> Hence, the Tribunal accepts Norsk's contention<sup>51</sup> that the intended effect of the magnetic support articles is *not* derived from their elasticity, but rather from the presence of the therapeutic magnets.

37. The second problem is that it is only partially correct to describe the magnetic support articles as "other made up articles" of textile material. To do so ignores the fact that therapeutic magnets comprise a significant component. The evidence indicated that, when developing a new magnetic therapeutic support

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45. Respondent's Brief at 9.

46. *Ibid.*

47. *Transcript of Public Argument*, 8 November 2005, at 36.

48. 2004 FCA 131.

49. *Transcript of Public Hearing*, 8 November 2005, at 69-70.

50. See, for example, Appellant's Book of Additional Documents, Tab 1.

51. *Transcript of Public Argument*, 8 November 2005, at 9.

product, the first step is to determine the type of magnetic material to be used, together with the strength and size of the magnets.<sup>52</sup> In the face of this evidence, the Tribunal cannot simply ignore the importance of these components and find that “other made up articles of other textile materials” soundly describes the imported goods.

38. The Tribunal thus disagrees with the CBSA that Rule 1 of the *General Rules* requires it to classify the magnetic support articles in heading No. 63.07. In reality, the magnetic support articles are composite goods that contain both a textile component and a magnetic component, i.e. the strategically placed magnets. At first blush, heading Nos. 63.07 and 85.05 would both appear to apply to the magnetic support articles, but neither one does so more specifically than the other.

39. Rule 2 of the *General Rules* stipulates the following: “. . . (b) . . . The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.” Rule 3 states the following:

When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description . . . .

40. In the Tribunal’s view, neither “other made up articles” nor “permanent magnets” specifically describes the magnetic support articles. Each term is equally specific, and each term is equally general. The Tribunal must therefore turn to Rule 3 (b) of the *General Rules*, which reads as follows:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

41. The nub of the issue is therefore whether, under Rule 3 (b) of the *General Rules*, the essential character of the magnetic support articles is derived from their use in magnetic therapy as magnetic supports or from their use in physiotherapy as braces.

42. As mentioned, Norsk’s main argument for classification in heading No. 85.05 is based on the presentation of the goods as magnetic therapy products designed “to promote healing and relieve pain”, which role allegedly constitutes the essential character of the goods. These promotional messages are prominently displayed on the packaging of the goods and in their instructions for use. In addition, there are cautions relating to the magnetic aspects of the product. It is true that there are also references to the beneficial effects of the neoprene contained in the goods, but these are far less prominent. The packaging and literature make no claim of support for the targeted part of the body. Also, in support of the claim that the goods are more than elastic bandages is the evidence that they are more expensive than plain bandages.<sup>53</sup>

43. The Tribunal agrees that the magnetic support articles should be classified in heading No. 85.05. As mentioned above, the root of the issue is whether the essential character of these composite goods is their use in physiotherapy as orthotic supports, for compression, heat and pain reduction, or their use in magnetic therapy as anatomical locators to bring the healing effects of the magnetic fields to targeted parts of the body. There was extensive evidence that the so-called “anatomical locators” were constructed of high-quality materials, including neoprene, which would bring a certain measure of compression and support to

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52. *Transcript of Public Hearing*, 8 November 2005, at 94.

53. *Ibid.* at 61-62.

the body with or without the magnets. But there was also evidence that the magnetic support articles were less elastic than orthotic supports and that clients demanded high-quality textile wraps and supports for their magnets. Moreover, Ms. Casimiro admitted that she did *not* prescribe the magnetic support articles in her physiotherapy practice.<sup>54</sup>

44. There was evidence that the studies that support the efficacy of magnetic therapy in the relief of pain were inconclusive and that none of the studies reviewed by Health Canada supported anything other than generic claims of well-being or improved health. However, in its packaging and product literature, the manufacturer made express and prominent claims that the magnetic support articles were effective in relieving pain and enhancing the body's healing process in injured areas. The evidence indicated that there was a market for such "alternative" healing products. In the Tribunal's view, the effectiveness of the magnetic therapy administered through the application of the magnetic support articles is not relevant to its determination, particularly in light of the evidence of their actual acceptance in the natural products marketplace as a *non*-medical method for the treatment of pain.

45. The CBSA argued against classification in heading No. 85.05 on the basis that the *Explanatory Notes* to the heading exclude "... permanent magnets ... when presented with machines, apparatus, toys, games, etc., of which they are designed to form a part (classified with those machines, apparatus, etc.) ... ." Basing its argument on these notes, the CBSA contended that the magnets are properly classified with the apparatus of which they are a "part," i.e. the textile support articles of heading No. 63.07.<sup>55</sup>

46. Norsk replied that the magnets are not "parts" of the wraps or supports, but rather their paramount component. The magnets are patented products which are designed long before the wraps into which they can be strategically inserted, so as to hold them in place close to the skin, are contemplated. In the magnetic support articles, the magnet is the principal element of the device or apparatus. Without it, there would be no magnetic therapy, and the magnetic support article would simply be a wrap. Having already found that it is the presence of the magnets which gives the magnetic support articles their essential character, the Tribunal agrees that a magnet cannot give a product its essential character and, at the same time, be one of its contributing parts.

47. As mentioned above, the CBSA also argued against classification in heading No 85.05 by reason of Note 1 (b) to Chapter 90, which is included by reference in the *Explanatory Notes* to heading No. 63.07, the heading in which it classified the magnetic support articles. It submits that the wording of the chapter note fully applies to the magnetic support articles, i.e. "[s]upporting belts or other support articles of textile material, whose *intended effect* on the organ to be supported or held *derives solely* from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles) (Section XI)" [emphasis added].

48. The Tribunal does not accept the argument. As mentioned, it is true that there was evidence of some elasticity in the textile fabric of the magnetic support articles. However, there was also evidence that the magnetic support articles were not *as* elastic *as* ordinary orthotic supports.<sup>56</sup> Moreover, there was no evidence that the intended effect of the magnetic support articles was derived *solely* from their elasticity. On

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54. *Ibid.* at 155.

55. The CBSA's publications define a "part" as follows: "an identifiable component of an article, machine, apparatus, equipment, appliance or specific good which is integral to the design and essential to the function of the product in which it is used". Canada Border Services Agency, Memorandum D10-0-1, "Classification of parts and accessories in the Customs Tariff" (24 January 1994).

56. *Transcript of Public Hearing*, 8 November 2005, at 60.

the contrary, there was ample evidence that their intended effect came from the presence of the magnets. Moreover, given the thrust of the advertising and product literature, as well as the attempts at achieving some degree of scientific legitimacy, it is clear that the magnetic support articles are purchased for the therapeutic effect of the magnets and not as simple wraps. This is further evidenced by the significant difference in price between the magnetic support articles and ordinary orthotic supports.<sup>57</sup>

49. The magnetic support articles should therefore be classified in heading No. 85.05. This heading contains one tariff item and four subheadings: No. 8505.11.00 (Of metal); No. 8505.19 (Other); No. 8505.20 (Electro-magnetic couplings, clutches and brakes); No. 8505.30 (Electro-magnetic lifting heads); and No. 8505.90 (Other, including parts). Norsk claimed that the magnetic support articles should be classified in subheading No. 8505.19 as other permanent magnets. However, no evidence was proffered to prove that the magnets were made of a *non*-metallic substance. On the contrary, in her testimony, Ms. Bratton stated they were made of neodymium. The Tribunal takes notice of the periodic table used throughout the study of chemistry, which categorizes this element as a rare earth metal. The Tribunal therefore finds that the magnetic support articles should be classified under tariff item No. 8505.11.00 as permanent magnets of metal.

50. The appeal is allowed in part.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

James A. Ogilvy  
James A. Ogilvy  
Member

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Member

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57. *Ibid.* at 61.