Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-009

Sigvaris Corporation

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, February 23, 2009

Canada

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IN THE MATTER OF an appeal heard on March 6 and 7, 2008, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated February 7, 2007, with respect to requests for a further re-determination, under subsection 60(4) of the *Customs Act*.

BETWEEN

SIGVARIS CORPORATION **Appellant**

AND

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

DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Diane Vincent
Diane Vincent
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	March 6 and 7, 2008
Tribunal Members:	Serge Fréchette, Presiding Member Ellen Fry, Member Diane Vincent, Member
Counsel for the Tribunal:	Alain Xatruch
Research Director:	Audrey Chapman
Research Officer:	Cathy Turner
Manager, Registrar Office:	Gillian Burnett

PARTICIPANTS:

Appellant	**Counsel/Representative**
Sigvaris Corporation	Michael Kaylor
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Andrew Gibbs

WITNESSES:

Werner Blättler Facharzt für Gefässmedizin FMH	Michel Zummo Medical Doctor Phlebology
Sowmil Mehta Medical Doctor Canadian Circulation Vascular & Vein Surgery Centre	Michael W. Leonard Research and Development Manager Sigvaris, Inc.
Sam Schulman Medical Doctor Professor Department of Medicine McMaster University	Lauran Chittim Program Manager, Health Related Supports Alberta Aids to Daily Living

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Sigvaris Corporation (Sigvaris) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions of the President of the Canada Border Services Agency (CBSA), dated February 7, 2007, made pursuant to subsection 60(4).

2. The issue in this appeal is whether various styles and models of graduated compression hosiery (the goods in issue), in addition to being classified in Chapter 61 of the schedule to the *Customs Tariff*,[2] should also be classified under tariff item No. 9979.00.00 as goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities and thereby benefit from duty-free treatment.

PROCEDURAL HISTORY

3. The goods in issue were imported from the United States into Canada by Sigvaris in 10 separate transactions from October 9, 2003, to October 27, 2004. No duties were paid on these importations, as preferential tariff treatment for the goods in issue was claimed under tariff item No. 9979.00.00.

4. On October 6, 2005, the CBSA issued re-determinations pursuant to subsection 59(1) of the *Act*, whereby it denied Sigvaris entitlement to the benefit of tariff item No. 9979.00.00.

5. In December 2005, Sigvaris filed requests for further re-determinations pursuant to subsection 60(1) of the *Act*.[3] On February 7, 2007, the CBSA issued its decisions under subsection 60(4), which denied Sigvaris entitlement to the benefit of tariff item No. 9979.00.00 and, thereby, confirmed its prior re-determinations.

6. On May 29, 2007, Sigvaris applied to the Canadian International Trade Tribunal (the Tribunal), under section 67.1 of the *Act*, for an order extending the time within which an appeal could be filed. On July 20, 2007, the Tribunal issued an order granting the extension of time and accepting the documents filed by Sigvaris on May 29, 2007, as notices of appeal under subsection 67(1).[4]

7. The Tribunal held a public hearing in Ottawa, Ontario, on March 6 and 7, 2008.

8. Sigvaris called four witnesses to testify on its behalf. Dr. Werner Blättler, of Facharzt für Gefässmedizin FMH, Dr. Sowmil Mehta, of the Canadian Circulation Vascular & Vein Surgery Centre and Dr. Michel Zummo were qualified by the Tribunal as experts in various forms of chronic venous insufficiency. Mr. Michael W. Leonard, Research and Development Manager at Sigvaris, Inc. in the United States, provided testimony regarding the production of the goods in issue.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. In the requests, Sigvaris noted that it wished to appeal the classification of the goods in issue to the Canadian International Trade Tribunal as soon as possible and, therefore, waived reconsideration and requested that the CBSA immediately issue decisions under subsection 60(4) of the *Act* denying the goods in issue the benefit of tariff item No. 9979.00.00.
4. See *Sigvaris Corporation* (20 July 2007), Application No. EP-2007-002 (CITT).

9. The CBSA called Dr. Sam Schulman, a medical doctor and professor at McMaster University, to testify on its behalf. Dr. Schulman was qualified by the Tribunal as an expert in venous thromboembolism, chronic venous insufficiency, vascular disease, compression therapy, and the use and effects of medical compression hosiery. The CBSA also called Ms. Lauran Chittim, Program Manager, Health Related Supports, Alberta Aids to Daily Living, as a witness.

GOODS IN ISSUE

10. The goods in issue are various styles and models of graduated compression hosiery (also referred to as graduated support hosiery), which are part of the SAMSON & DELILAH® series of products from Sigvaris. More specifically, the goods in issue consist of the following nine styles of graduated compression hosiery:

SIGVARIS® DELILAH® maternity graduated support pantyhose (Model 140MD99)
SIGVARIS® DELILAH® graduated support pantyhose (Model 140PB72)
SIGVARIS® DELILAH® queensize support pantyhose (Model 140Q C05)
SIGVARIS® DELILAH® sheer to waist graduated support pantyhose (Model 140SD36)
SIGVARIS® DELILAH® Sculptors® pantyhose (Model 761P)
SIGVARIS® DELILAH® thigh-hi graduated support stockings (Model 140N299)
SIGVARIS® DELILAH® knee-hi graduated support stockings (Model 140CB99)
SIGVARIS® DELILAH® ribbed knee-hi graduated support stockings (Model 141CA00)
SIGVARIS® SAMSON ribbed graduated support socks for men (Model 180CA99)

11. On February 15, 2008, the Tribunal requested that Sigvaris provide physical exhibits of graduated compression hosiery that were identical to, or representative of, the goods in issue. On February 25, 2008, Sigvaris provided the Tribunal with physical exhibits of all the styles of hosiery listed above.[5] except for the SIGVARIS® DELILAH® Sculptors® pantyhose.

12. According to the evidence, the goods in issue are composed of nylon and spandex and are designed to apply a specified amount of pressure (expressed in millimetres of mercury [mmHg]) at the ankle and provide a graduated compression.[6] In this respect, the *SAMSON & DELILAH® Product Series Information Guide*, which was also filed as a physical exhibit, states that the goods in issue "... provide support by gently compressing superficial leg veins in a manner that is strongest at the ankle and gently decreases up the leg to counteract the effects of gravity ...."[7] The information guide also states that the goods in issue can "... prevent and treat venous symptoms, reduce ankle swelling, and reduce the progression of varicose veins ...."

13. The packaging of the physical exhibits indicates the level of gradient compression. With the exception of Model 140Q C05, the packaging indicates a level of gradient compression of between 15 and 20 mmHg. The packaging for Model 140Q C05 indicates a level of gradient compression of 18 mmHg. For Model 761P (for which no physical exhibit was submitted), the evidence on the record indicates a level of gradient compression of between 18 and 25 mmHg.[8]

5. Exhibits A-1 to A-8.
6. *Transcript of Public Hearing*, 7 March 2008, at 287, 289.
7. Exhibit A-9.
8. Tribunal Exhibit AP-2007-009-1, Administrative Record.

ANALYSIS

Law

14. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

15. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (Harmonized System) developed by the World Customs Organization.[9] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized under a number of headings, subheadings and tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification.

16. Subsection 10(1) of the *Customs Tariff* reads as follows: ". . . 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[10] and the Canadian Rules[11] set out in the schedule."

17. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[12] Classification therefore begins with Rule 1, which reads as follows: ". . . for legal purposes, 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."

18. Section 11 of the *Customs Tariff* states as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[13] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[14] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."

19. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

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9. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
10. S.C. 1997, c. 36, schedule [*General Rules*].
11. S.C. 1997, c. 36, schedule [*Canadian Rules*].
12. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level.
13. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
14. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

Tariff Classification at Issue

20. In the present appeal, it is agreed upon by the parties that the nomenclature of the *Customs Tariff* that applied to the goods in issue at the time of their importation reads as follows:[15]

> **61.15** **Panty hose, tights, stockings, socks and other hosiery, including stockings for varicose veins and footwear without applied soles, knitted or crocheted.**
>
> **-Panty hose and tights:**
>
> . . .
>
> **6115.12.00** **- -Of synthetic fibres, measuring per single yarn 67 decitex or more**
>
> . . .
>
> **-Other:**
>
> . . .
>
> **6115.93.00** **- -Of synthetic fibres**

21. However, the source of disagreement between the parties—and the issue in this appeal—is whether the goods in issue also fall within the scope of tariff item No. 9979.00.00 and thereby benefit from duty-free treatment. Tariff item No. 9979.00.00 reads as follows:

> **9979.00.00** **Goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, and articles and materials for use in such goods.**

22. Chapter 99, which includes tariff item No. 9979.00.00, provides special classification provisions that allow commercial goods to be imported into Canada with tariff relief. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.[16] Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no *Classification Opinions* or *Explanatory Notes* to consider.

23. The Tribunal notes that there are no section notes to Section XXI (which includes Chapter 99). With respect to chapter notes, the Tribunal is of the view that Note 3 to Chapter 99 is relevant to the present appeal and must therefore be considered for the purposes of determining whether the goods in issue should also be classified under tariff item No. 9979.00.00. It reads as follows:

> 3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin *only after classification under a tariff item in Chapters 1 to 97 has been determined* and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
>
> [Emphasis added]

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15. On January 1, 2007, a number of amendments to the schedule to the *Customs Tariff* took effect. As a result of these amendments, goods that were previously classified under tariff item Nos. 6115.12.00 and 6115.93.00 were classified under tariff item Nos. 6115.10.10 and 6115.10.99, respectively. For the purposes of this appeal, the Tribunal will refer to the tariff nomenclature that was in effect at the time the goods in issue were imported.
16. However, Note 1 to Chapter 99 provides that the rule of specificity in Rule 3(a) of the *General Rules* does not apply to the provisions of Chapter 99. This reflects the fact that classification in Chapters 1 to 97 and in Chapter 99 is not mutually exclusive.

24. In accordance with the preceding note, the goods in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined. As indicated above, the parties agree that the goods in issue are properly classified under tariff items covered by heading No. 61.15. The Tribunal agrees with this conclusion. Therefore, for the purposes of this appeal, the Tribunal is of the view that this condition has been met.

25. Consequently, the Tribunal must now determine whether the goods in issue meet the conditions of tariff item No. 9979.00.00. In other words, the Tribunal must determine whether the goods in issue are "specifically designed to assist persons with disabilities in alleviating the effects of those disabilities".

26. In the Tribunal's view, the language makes it clear that the following two conditions must be met in order for the goods in issue to be classified under tariff item No. 9979.00.00: (1) the goods in issue must be *specifically designed to assist persons with disabilities*; and (2) the goods in issue must be specifically designed to assist such persons in *alleviating the effects of those disabilities*. Accordingly, the focus of the legal test under consideration is the design of the goods in issue.

27. However, before proceeding to determine whether the goods in issue satisfy these two conditions, the Tribunal will address two issues pertaining to the interpretive approach that should be adopted by the Tribunal in this appeal and the weight that should be given to Customs Notice N-419,[17] which outlines the CBSA's administrative policy regarding the tariff classification of compression or support hosiery and the entitlement of these goods to the benefits of tariff item No. 9979.00.00.[18]

28. On the interpretive approach, Sigvaris, relying on various court decisions,[19] including a Supreme Court of Canada decision, argued that, since tariff item No. 9979.00.00 can be construed as "social" or "benefits-conferring" legislation, it ought to be interpreted in a broad and generous manner and that any doubt arising from the language of the tariff item should be resolved in favour of Sigvaris. Both parties also submitted that, where the words of a tariff item are clear, they should be applied as such.[20]

29. The Tribunal notes that it was not disputed that the proper approach to statutory interpretation is the modern contextual approach, which provides that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[21] Following this approach, the Tribunal is of the view that, unlike provisions of legislation pertaining to employment standards, employment insurance and pension benefits, which, if Sigvaris is correct, have been interpreted by the courts in a broad and generous manner,[22] there is nothing particular about tariff item No. 9979.00.00, or the law concerning tariff classification in general, that would require such a liberal interpretation. Like most other tariff-related provisions, tariff item No. 9979.00.00 is such that the Tribunal is satisfied that emphasis should be placed on the grammatical and ordinary sense of the provision and that neither an overly liberal nor an overly strict interpretation is warranted.

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17. CBSA, "Tariff Classification of Compression or Support Hosiery and Tariff Item 9979.00.00" (20 December 2001).
18. This document provides that support hosiery that has a minimum level of gradient compression of 20 mmHg and exerts compression both horizontally and vertically (radial/tangential) is entitled to the benefits of tariff item No. 9979.00.00.
19. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo & Rizzo*]; *Villani v. Canada (Attorney General)*, [2002] 1 F.C. 130; *Yellow Cab Co. Ltd. v. Canada (Minister of National Revenue)* 2002 FCA 294 (CanLII); *Bartsch v. The Queen*, 2001 CanLII 449 (T.C.C.).
20. Sigvaris relied on the decision of the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, as support for this proposition, while the CBSA relied on the decision of the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.
21. Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), cited in *Rizzo & Rizzo* at 41.
22. See court decisions cited earlier.

30. With respect to Customs Notice N-419, the Tribunal notes that, while it may serve as an aid in the interpretation of tariff item No. 9979.00.00 for the parties in circumstances other than proceedings in front of the Tribunal, it does not have any legal effect in determining the issue before the Tribunal. It merely records the CBSA's administrative policy, correct or incorrect, on how the tariff item should be interpreted. Moreover, the Tribunal is in agreement with the case law submitted by Sigvaris, which states that there can be no justification for using an administrative policy as a means of resolving a doubt in favour of the very department that formulated the policy.[23]

31. With these considerations in mind, the Tribunal will now proceed to determine, in light of the evidence on the record, whether the goods in issue are *specifically designed to assist persons with disabilities* and to *alleviate the effects of those disabilities.*

Are the Goods in Issue Specifically Designed to Assist Persons With Disabilities?

32. The CBSA argued that the goods in issue that provide a level of gradient compression below 20 mmHg, are designed for comfort, support and prevention of certain physical impairments, but not to assist persons with disabilities. This position is consistent with the CBSA's administrative policy, as set forth in Customs Notice N-419, which provides that ". . . [s]upport hosiery designed or intended to be worn by persons with a venous or circulatory disorder generally has a level of gradient compression greater than 20 mmHg and exerts compression both horizontally and vertically (radial/tangential) . . . ."[24]

33. The CBSA submitted that the phrase "specifically designed to assist persons with disabilities" means that the goods in issue, from their conception and original design, must be intended for use by persons with disabilities. The CBSA added that the word "specifically" imposes a restriction on the word "designed", which therefore excludes general purpose goods from entitlement to the benefits of tariff item No. 9979.00.00. In the CBSA's view, in order to be entitled to the benefits of tariff item No. 9979.00.00, goods must have been originally designed to be used by an individual with a disability and must exhibit design features, qualities and capabilities that are specifically intended to address the various effects of those disabilities.

34. In support of its position, the CBSA noted that the packaging of the goods in issue indicates that a level of gradient compression of 15 to 20 mmHg is recommended by doctors for use by persons afflicted with tired aching legs, persons who stand or sit for prolonged periods, long distance travellers, persons who are pregnant and persons who wish to prevent venous diseases. It submitted that these conditions are more accurately described as "impairments" and not as "disabilities".

35. Sigvaris argued that the goods in issue are specifically designed to assist persons suffering from chronic venous insufficiency, whose most prominent symptoms are varicose veins and edema. Concerning the purpose for which something was "designed", Sigvaris submitted that one must look to the intention of the original manufacturer.[25]

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23. See *Canadian Occidental U.S. Petroleum Ltd. v. The Queen*, 2001 CanLII 461 (T.C.C.), cited in *Silicon Graphics Ltd. v. Canada (C.A.)*, [2003] 1 F.C. 447.
24. Customs Notice N-419 at para. 5.
25. Sigvaris cited the Tariff Board's decision in *Reference by the Deputy Minister of National Revenue for Customs and Excise as to his Administration of Tariff Item 326e*, 1 T.B.R. 192, as support for this proposition.

36. Mr. Leonard testified that the goods in issue were specifically designed to exert pressure in both the vertical and the horizontal stretch direction.[26] Mr. Leonard stated that the goods in issue were designed to deliver a pressure of 15 to 20 mmHg at the ankle and to provide a graduated compression and that this pressure has been shown in the marketplace to alleviate achy, tired and itchy legs, as well as to alleviate edema and chronic venous insufficiency in their beginning stages.[27] He further testified that the goods in issue have been tested to ensure delivery of the optimum compression, i.e. within the range of 15 to 20 mmHg.[28]

37. The Tribunal notes that there appears to be no argument between the parties as to whether the goods in issue were specifically designed with the intent to assist persons with certain leg conditions. The issue in respect of the first condition turns on whether the design was specifically intended to assist persons with "disabilities". In essence, the CBSA argued that the conditions that are treated with the goods in issue are not "disabilities", but rather conditions that are less severe. Accordingly, the point of contention for deciding this issue is the meaning that is to be ascribed to the word "disabilities". Once that is determined, the Tribunal will examine whether, in fact, the conditions for which the goods in issue were designed to assist persons, are indeed "disabilities".

38. Sigvaris argued that the term "disability" must be given its ordinary meaning and that, because of the absence of any restrictions on this term (e.g. that the disability be "severe" or "chronic"), it was Parliament's intention that there be the minimum number of restrictions for someone to avail themselves of the benefits of tariff item No. 9979.00.00. Sigvaris also made reference to the Supreme Court of Canada's decision in *Granovsky v. Canada (Minister of Employment and Immigration)*,[29] whereby the Supreme Court of Canada gave a broad meaning to the term "disability".

39. The CBSA argued that "disabilities" are different from "diseases" and that, in the context of tariff item No. 9979.00.00, a "disability" must lead to a significant limitation in some aspect of people's lives. Relying on a report prepared by the federal government which provides a review of definitions of "disability",[30] the CBSA also argued that definitions of "disability" used for general policy discussions and in human rights legislation are broader and more inclusive than the definitions used for entitlement to benefits.[31]

40. The Tribunal notes that the word "disability" is defined in the *Canadian Oxford Dictionary* as follows: ". . . **1 a** a physical or mental handicap, either congenital or caused by injury, disease, etc. . . . ."[32] In order to have a complete understanding of that definition, it is essential to examine the meaning of the word "handicap", which is defined as follows: ". . . **3** a thing that makes progress or success difficult. **4** a physical or mental disability . . . ."[33] When putting those two definitions together in the context of the provision that is being examined, it is reasonable to conclude that the ordinary meaning of the word "disability" is that of "a physical condition that makes progress or success difficult".

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26. *Transcript of Public Hearing*, 7 March 2008, at 289.
27. *Ibid.*
28. *Ibid.* at 293.
29. [2000] 1 S.C.R. 703 [*Granovsky*].
30. See Appellant's Book of Authorities, tab 3.
31. *Transcript of Public Hearing*, 7 March 2008, at 499-501.
32. Second ed.
33. *Canadian Oxford Dictionary*, 2d ed.

41. The meaning of the word "disability" has also been the subject of consideration by the World Health Organization (WHO).[34] In its *International Classification of Impairments, Disabilities and Handicaps: A Manual of Classification Relating to the Consequences of Disease*, the WHO defines the word "disability" as follows: ". . . any restriction or lack of ability to perform an activity in a manner or within the range considered normal for a human being. The term disability reflects the consequences of impairment *in terms of functional performance and activity* by the individual; disabilities thus represent disturbances at the level of the person . . . ."[35] [Emphasis added]

42. Both parties have relied on the WHO's definition of "disability" to support their representations to the Tribunal. The definition is consistent with the one from the *Canadian Oxford Dictionary* examined above, but is more precise. It refers to the physical condition of a person in terms of its effects, i.e. in terms of functional performance and activity by the individual. It also describes the physical condition in question in terms of a "restriction or lack of ability to perform an activity in a manner or within the range considered normal for a human being". In other words, according to the WHO, a "disability" is a condition that affects the ability of a human being to perform his or her normal activities. The definition further stipulates that disabilities "represent disturbances at the level of the person". The Tribunal understands this to mean that the existence of a disability is something that is assessed by considering whether the specific individual that is the subject of the assessment is restricted or is lacking ability to perform his or her normal activities.

43. Although neither the definition of the *Canadian Oxford Dictionary* nor the WHO refers to the condition of disability as one of a particular degree of severity, both describe the condition as one that affects the performance of the individual concerned. In that respect, the Tribunal notes that the Supreme Court of Canada in *Granovsky* also considered the definition of "disability" provided by the WHO, although in a context different from the one now being considered by the Tribunal.[36] While considering the different components or aspects of disability, the Supreme Court of Canada equated the concept of "disability" used by the WHO in the medical context with that of "functional limitations".[37] In so doing, the Supreme Court of Canada suggested that "[n]ot all physical or mental impairments (first aspect) give rise to functional limitations (second aspect)".[38] To illustrate its thinking, the Supreme Court of Canada used the example of an individual who is slightly colour-blind and who, unless he or she chooses to undertake employment where an ability to differentiate colours precisely is important, may not notice any functional limitations.[39] In other words, there may be a restriction or lack of ability (i.e. impairment) that does not necessarily constitute a disability.

44. The definitions of the *Canadian Oxford Dictionary* and the WHO, as well as the guidance provided by the Supreme Court of Canada in *Granovsky* (although in a somewhat different context), constitute the basis upon which the Tribunal will examine the application of tariff item No. 9979.00.00. Nothing in the tariff item itself or in Chapter 99 provides any additional context that would influence the ordinary meaning of the word "disability" as examined above. Moreover, in the Tribunal's view, it is reasonable to assume that, if Parliament had wanted to restrict the meaning given to the term "disability", it would have said so in explicit and precise terms as it has done, for example, in the *Canada Pension Plan*.[40]

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34. The WHO is the directing and coordinating authority on international health within the United Nations system.
35. Respondent's Book of Documents and Authorities, tab 13.
36. In *Granovsky*, the Supreme Court of Canada considered whether the contribution requirements for disability benefits in the *Canada Pension Plan*, R.S.C. 1985, c. C-8, were contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.
37. *Granovsky* at 724.
38. *Ibid.*
39. *Ibid.* at 725.
40. Paragraph 42(2)(*a*) of the *Canada Pension Plan* provides as follows: "a person shall be considered to be disabled only if he is determined in prescribed manner to have a *severe* and *prolonged* mental or physical disability . . . ." [Emphasis added]

45. The Tribunal notes that a great deal of the evidence presented in this appeal was of a scientific or medical nature. However, generally speaking, both parties agreed that graduated compression hosiery providing a level of gradient compression of 15 to 20 mmHg is used for conditions that are less severe than those that are treated with hosiery that provides a level of gradient compression above 20 mmHg.

46. Sigvaris submitted a scientific article published by the American Heart Association entitled "Investigation of Chronic Venous Insufficiency: A Consensus Statement",[41] which reads as follows:

> . . .
>
> Chronic venous insufficiency of the lower limbs (CVI) is characterized by symptoms or signs produced by venous hypertension as a result of structural or functional abnormalities of veins. Symptoms may include aching, heaviness, leg-tiredness, cramps, itching, sensations of burning, swelling, the restless leg syndrome, dilatation or prominence of superficial veins, and skin changes. Signs may include telangiectasia, reticular or varicose veins, edema, and skin changes such as pigmentation, lipodermatosclerosis, eczema, and ulceration.
>
> . . .

47. Dr. Blättler, who testified on behalf of Sigvaris, generally agreed with the above-cited excerpt. Dr. Blättler stated that it is known from everyday experience, as well as from clinical studies, that a high proportion of those who seek medical advice for symptoms and signs of venous disease have conditions that fall within the C0 to C3 levels of the CEAP classification,[42] i.e. symptoms of mild chronic venous insufficiency conditions.

48. In a comparative study submitted by Sigvaris and entitled "Efficacy of Class 1 elastic compression stockings in the early stages of chronic venous disease: A comparative study" (the Benigni study), it was concluded that ". . . [t]he regular wearing of Class 1 [10-15 mmHg at the ankle] graduated elastic compression stockings during a 15-day period results in a significant improvement in the symptomatology of early-stage chronic venous disease, i.e., in the relief of global painful discomfort as well as in quality-of-life criteria . . . ."[43] The Tribunal notes that the individuals who were examined in the Benigni study were individuals with symptoms of mild chronic venous insufficiency conditions (i.e. C0 to C3). Sigvaris also submitted a meta-analysis of randomized controlled trials that was conducted by Dr. Blättler and which included the Benigni study.[44] At the hearing, Dr. Blättler was asked by the CBSA whether his meta-analysis offered any data or conclusions with respect to handicapped persons. Dr. Blättler responded in the following manner:

> . . .
>
> Well, these people are "*handicapées*" [handicapped]. If they come home after work and they have to lay down first before they can go and prepare dinner, they are handicapped . . . .
>
> . . .

41. Appellant's Book of Experts' Reference Materials, tab 6.
42. The CEAP classification provides a system for documenting the severity of chronic venous insufficiency by addressing the clinical (C), etiological (E), anatomic (A) and pathophysiological (P) mechanisms of chronic venous insufficiency. The clinical classification is denoted with a "C" followed by a grade ranging from "0" (no visible or palpable signs of venous disease) to "6" (important skin changes with active ulceration) (see Appellant's Book of Experts' Reference Materials, tab 6 at 20). According to Dr. Blättler, the CEAP classification does not take into consideration a patient's own feelings—it is purely descriptive of what can be seen (see *Transcript of Public Hearing*, 6 March 2008, at 11). Throughout the hearing, the parties made reference to the CEAP clinical classifications as C0, C1, C2 and so on up to C6.
43. Appellant's Book of Experts' Reference Materials, tab 7.
44. *Ibid.*, tab 8.

> . . . when you think that people who have to lay down after a day's work, that is not normal, then it is not normal.
>
> And the French-- and that is a French study -- they are clearly of the opinion that someone who has an edema getting home, feeling bad, is not healthy.[45]
>
> . . .

49. The Tribunal questioned Dr. Blättler about the nature of the limitations or the impairments that the symptoms of individuals treated with graduated compression hosiery providing 15 to 20 mmHg of compression would impose. He responded as follows:

> . . .
>
> This is very dependent on the personality. I mean, some people can stand the edema. I know people who have edema and they would rather have edema than wear a stocking. That happens.
>
> However, the majority of people who have that kind of symptoms and edema, they feel restricted. They cannot go shopping after a working day, for instance. They have to go home first and then go shopping, or [they] cannot pick up their children from kindergarten because they just have too much pain in their leg and they have to do something to alleviate that; maybe go home and have [their] feet up first or do things like that before they can resume their activities.[46]
>
> . . .

50. The Tribunal is of the view that Dr. Blättler's testimony establishes quite clearly that the existence of chronic venous insufficiency conditions that fall within the C0 to C3 levels on the CEAP classification cause certain individuals to have physical restrictions or limitations in their daily activities. It is clear that this is not the case for every person in those categories, but it is also clear from his testimony that it is the case for a certain percentage of those persons.

51. This aspect of Dr. Blättler's testimony is supported by similar testimony provided by Dr. Mehta. Dr. Mehta is in private practice and is an adjunct professor at the University of Western Ontario. In his testimony, Dr. Mehta stated that, among the patients he sees who are in the C0 to C3 categories, ". . . [s]ome might come with more heaviness, aching, tired legs; some came with more edema and the fact that they have pain all the time . . . ."[47] Dr. Mehta also stated as follows:

> . . .
>
> What you are seeing is people focusing on that pain. They are focusing on their legs. They are losing days at work for coming to either visit me in the office or taking days off work because they cannot stand for eight hours.
>
> . . .
>
> What is happening to them every day is there is significant focus on those legs or those symptoms which is detracting from their ability to do what they need to do, as well as the symptoms and signs are also detracting from their ability to do with their daily living.
>
> . . .
>
> . . . Some people, a fair amount, would just go through their day . . . perhaps one-third of the people.

45. *Transcript of Public Hearing*, 6 March 2008, at 133.
46. *Ibid.* at 146-47.
47. *Ibid.* at 206.

> Another third of the people, well, you know, they don't like it, it hurts, they can't really work, they find they are slowing down. So they are working but their level of output is diminished.
>
> That is perhaps more than a third; that is probably half of the patients.
>
> Then another 10 to 15 per cent of patients are taking days off work because they just can't go in. Their legs are too heavy, too tired, too painful. They are having trouble performing at work and that becomes a cycle.
>
> . . .
>
> A lot of times we get more ladies than men would say I'm gaining weight, because when I get home I'm too tired. I can't go to the gym to work out. My legs are heavy. They won't move and I'm falling asleep at eight of nine o'clock in the evening, the same time as the kids do, and I can't do anything more. Or they can't get their groceries as they would, those sort of very subtle changes in their life and that becomes a focus for them.
>
> So a fair significant portion of patients do have something happening. Whether it is subtle or quite a big impact, everybody has something.[48]
>
> . . .

52. Dr. Zummo, who also testified for Sigvaris, made similar comments. However, they were made in respect of reaching a diagnosis for the patient's condition.[49]

53. In light of the evidence submitted by Drs. Blättler, Mehta and Zummo, the Tribunal is persuaded that there is a clear relationship between C0 to C3 levels of chronic venous insufficiency conditions and the existence of physical restrictions or limitations that affect the daily lives of certain patients. When this evidence is considered in the context of the two definitions of the word "disability" examined earlier, the Tribunal is convinced that mild chronic venous insufficiency conditions constitute a disability for certain patients. Drs. Blättler, Mehta and Zummo have convincingly testified that it is not possible for certain individuals with mild chronic venous insufficiency conditions to go about their normal daily activities. They described situations where patients have difficulty going to the daycare at the end of their working day or stopping at the grocery store on the way home without suffering. The Tribunal is of the view that this type of condition falls within the dictionary definition of the word "disability" and also within the WHO's definition of "disability". These individuals are definitely suffering from the consequences of their chronic venous insufficiency conditions, in that they are restricted or limited in their ability to perform an activity in a manner, or within a range, that would be considered normal. Furthermore, the Tribunal is convinced that these functional limitations, unlike the examples given by the Supreme Court of Canada in *Granovsky*, are noticeable and have an important impact on the affected individuals.

54. Therefore, because the goods in issue are specifically designed to assist persons with achy legs, tired itchy legs, beginning stages of edema and beginning stages of chronic venous insufficiency, as indicated by Mr. Leonard—which corresponds generally to the condition of individuals that fall within the C0 to C3 levels on the CEAP classification—and because such conditions can translate into restrictions or inabilities for certain individuals who suffer from those conditions with regard to performing their normal daily activities, the Tribunal is convinced that the goods in issue are "specifically designed to assist persons with disabilities" within the meaning of tariff item No. 9979.00.00.

48. *Ibid.* at 206, 207, 262-63, 263-64.
49. *Ibid.* at 240.

55. The Tribunal notes that there was some evidence presented at the hearing that the goods in issue are also being used to assist persons with more severe disabilities, such as those with a chronic venous insufficiency condition falling above the C3 level who are not tolerating, or who simply refuse to wear, hosiery providing a higher level of compression (i.e. above 20 mmHg).[50] Another example given was where hosiery providing a lower level of compression was utilized in hospitals to reduce acute swelling in patients who have acute thrombosis (blood clot).[51] According to the evidence presented, hospitals do not want to prescribe hosiery providing a higher level of compression, which is more expensive, as it would be too large once the swelling has subsided. While these facts do not necessarily indicate that the goods in issue were also "specifically designed" to assist persons with more severe disabilities, it nonetheless demonstrates to the Tribunal that they were designed in a manner which has resulted in their use in a wide variety of circumstances.

Are the Goods in Issue Specifically Designed to Alleviate the Effects of Disabilities?

56. Sigvaris argued that the word "alleviate" merely means "lessen", not "cure". It argued that Parliament chose the word "alleviate" intentionally and, had it wanted to, could have utilized "cure" or any similar word. On this basis, Sigvaris submitted that tariff item No. 9979.00.00 only requires that graduated compression hosiery be designed to provide some alleviation of the effects of disabilities and that, according to the experts, goods with a level of gradient compression between 15 and 20 mmHg do provide some relief to people with chronic venous insufficiency conditions that fall within the C1 to C3 levels on the CEAP classification.

57. The CBSA generally agreed with Sigvaris regarding the meaning that is to be given to the word "alleviate". In this respect, it referred to *The Oxford English Dictionary*, which defines "alleviate" as follows: ". . . to lighten, or render more tolerable, or endurable . . . ."[52] However, it argued that, in order for the goods in issue to alleviate the effects of disabilities, a person must already have an actual disability. In other words, to "alleviate" is not to prevent from happening or arising; it is actually to "alleviate" once there is a disability.

58. As the Tribunal has already determined that the conditions for which the goods in issue are designed to assist persons are "disabilities", it need only determine whether the goods in issue are designed to alleviate the effects of those disabilities. To examine this issue, it is relevant to consider whether doctors, in treating patients, do in fact use the goods in issue for this purpose.

59. Witnesses during the hearing established that there is no consensus or firm medical pronouncement in Canada on the *difference in the nature of relief* that is provided by graduated compression hosiery providing a level of gradient compression above 20 mmHg and that providing a level of gradient compression of below 20 mmHg. In order to reach its conclusion on the second part of its analysis, the Tribunal relied on the testimony provided by the witnesses in terms of their practical experience, as well as on medical publications and research material submitted by the parties.

60. The closest evidence on the record as to the existence of a consensus on the use of certain levels of compression to treat specific conditions comes from the American College of Chest Physicians, which makes the case for a higher level of compression to prevent the occurrence of more severe chronic venous

50. *Ibid.* at 29-32, 165; *Transcript of Public Hearing*, 7 March 2008, at 400.
51. *Transcript of Public Hearing*, 7 March 2008, at 425.
52. Second ed.

insufficiency conditions, e.g. 30 to 40 mmHg for the prevention of post-thrombotic syndrome.[53] In his testimony, Dr. Schulman also referred to several phlebology societies which, according to him, generally recommend a level of compression above 18 mmHg, or 20 mmHg for more severe chronic venous insufficiency conditions.[54] However, these pronouncements do not indicate the effectiveness of various compression levels for less severe chronic venous insufficiency conditions. They do not establish that the goods in issue alleviate, or do not alleviate, the effects of a disability, as defined by the Tribunal.

61. On the other hand, there appears to be emerging scientific evidence that supports the proposition that graduated compression hosiery providing a low level of compression can be effective in alleviating less severe cases of chronic venous insufficiency and even more severe cases when a patient cannot tolerate higher compression or during recovery from an operation for ulcers and phlebitis.

62. In his testimony, Dr. Blättler concluded that 10 to 20 mmHg of compression is effective for less severe forms of chronic venous insufficiency (i.e. C1 to C3). He referred to the results of his meta-analysis, which examined the connection between levels of compression and symptoms of mild to moderate venous insufficiency and which concluded that 10 to 20 mmHg of compression is an effective treatment for these conditions.[55] The meta-analysis also concluded that less pressure is ineffective and that higher pressure may be of no additional benefit. Dr. Blättler stated without hesitation that graduated compression hosiery providing such levels of compression provides benefits to patients by alleviating their symptoms.[56] In particular, Dr. Blättler testified that these goods alleviate edema or make it disappear.[57]

63. Drs. Mehta and Zummo also provided similar testimony. When the CBSA asked Dr. Mehta what type of compression hosiery he prescribed, Dr. Mehta replied that his prescriptions were almost equally distributed between hosiery providing 15 to 20 mmHg of compression and hosiery providing 20 to 30 mmHg of compression and that, while hosiery providing 20 to 30 mmHg of compression is more commonly used, doctors are now seeing that one can get similar benefits from hosiery providing 15 to 20 mmHg of compression and perhaps better compliance from patients who wear it.[58] Dr. Zummo testified that, in his practice, he notices that a lower level of compression will work just as well as a higher level of compression for less severe forms of chronic venous insufficiency.[59]

64. Dr. Schulman, who testified on behalf of the CBSA, admitted that, although he believes that compression hosiery is only effective for the treatment of chronic venous insufficiency when above the 20 mmHg threshold, "in desperation", he would suggest the use of hosiery providing 15 to 20 mmHg of compression in certain cases. When specifically asked whether he would prescribe those goods for chronic venous insufficiency conditions that fall within the C1 to C3 levels on the CEAP classification, he stated the following: ". . . [i]f it is deep venous insufficiency, I would like them to have a compression stocking [i.e. above 20 mmHg]. . . . But if they have aching in the evening, if they have dullness or so, yes, and it's just the superficial system, that's fine . . . they can use the 15 to 20 millimetres . . . ."[60]

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53. See Respondent's Book of Expert's Reference Materials, tab 5 at 411S, 412S; *Transcript of Public Hearing*, 7 March 2008, at 465, 466.
54. *Transcript of Public Hearing*, 7 March 2008, at 400, 401, 447, 448.
55. Appellant's Book of Experts' Reference Materials, tab 8.
56. *Transcript of Public Hearing*, 6 March 2008, at 26, 27, 147, 148, 171.
57. *Ibid.* at 35.
58. *Ibid.* at 215.
59. *Ibid.* at 250.
60. *Transcript of Public Hearing*, 7 March 2008, at 436.

65. Based on the above, the Tribunal concludes that there is sufficient evidence that the goods in issue can be used and are being used to alleviate the symptoms of less severe chronic venous insufficiency conditions that are causing disabilities and, in some circumstances, more severe conditions of chronic venous insufficiency.

66. Therefore, the Tribunal finds that the goods in issue are specifically designed to alleviate the effects of disabilities within the meaning of tariff item No. 9979.00.00.

67. The Tribunal notes that part of the CBSA's argument in this appeal was that a minimum threshold of 20 mmHg is required for entitlement to tariff item No. 9979.00.00, which reflects, *inter alia*, insurance industry standards, government programs and the current customs practice of the United States. In this respect, the CBSA provided several examples of Canadian insurance plans and government programs which provide coverage for the purchase of graduated compression hosiery providing a minimum compression of 20 mmHg. It also referenced two U.S. classification rulings involving eight of the nine goods in issue that were imported by Sigvaris Inc. in the United States.[61] It noted that, in both instances, the goods were denied a preferential rate of customs duty normally available for "surgical panty hose with graduated compression for orthopedic treatment" as the goods exerted less than 20 mmHg and were not prescribed by a physician to prevent or correct bodily deformities and the consequences associated with venous disease. The CBSA submitted that persuasive weight should be given to these U.S. rulings, since they dealt with the same goods and a similar statutory scheme designed to provide tariff relief to persons with disabilities.

68. The Tribunal is of the view that, while certain insurance plans and government programs may have chosen to provide coverage only for graduated compression hosiery providing a minimum compression of 20 mmHg, this is in no way indicative of whether the goods in issue satisfy the conditions of tariff item No. 9979.00.00. This 20 mmHg threshold does not translate into a consideration of "disability" and could clearly have been chosen for reasons that are unrelated to the issues faced by the Tribunal in this appeal (e.g. financial considerations in providing a broader coverage). In addition, the disparity of approaches in health programs and insurance plans within Canada does not offer a clear commonality of Canadian practices that would support the CBSA's contention for the efficacy of a threshold at 20 mmHg. As indicated earlier, there is no clear medical pronouncement or agreed standards in Canada that would support a given cut-off point of 20 mmHg for effective relief from the various levels of severity of chronic venous insufficiency conditions.

69. As for the U.S. classification rulings, the Tribunal notes that these are administrative rulings by government officials and not decisions by an independent quasi-judicial body. While parties are free to refer to such rulings to support their positions, they should not expect that the Tribunal will give them significant weight in arriving at its own decisions.[62] In any event, the Tribunal observes that the U.S. rulings provided by the CBSA concern tariff language that is somewhat different from that of tariff item No. 9979.00.00 and that the rulings themselves were quite brief and gave no indication that an in-depth analysis involving detailed evidence and submissions similar to those received in the current appeal was undertaken.

61. Respondent's Brief, tabs H and I.
62. See *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at 7.

DECISION

70. For the foregoing reasons, the Tribunal concludes that the goods in issue are "specifically designed to assist persons with disabilities in alleviating the effects of those disabilities" and are therefore entitled to the duty-free treatment provided by tariff item No. 9979.00.00.

71. The appeal is therefore allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Diane Vincent
Diane Vincent
Member