



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-025

Masai Canada Limited

v.

President of Canada Border
Services Agency

*Decision and reasons issued
Friday, August 5, 2011*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
PROCEDURAL HISTORY	1
GOODS IN ISSUE.....	2
LEGAL FRAMEWORK.....	2
ANALYSIS	3
Discussion of the Law	3
Application of the Law to the Facts.....	5
DECISION	9

IN THE MATTER OF an appeal heard on April 28, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated May 6, 2010, with respect to a request for review of an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MASAI CANADA LIMITED

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 28, 2011
Tribunal Member:	Serge Fréchette, Presiding Member
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Respondent

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WITNESSES:

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Academy Manager for North America
MBT Footwear

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Professor of biomechanics
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STATEMENT OF REASONS

1. This is an appeal filed by Masai Canada Limited (Masai) with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA), dated May 6, 2010, made pursuant to subsection 60(4).

2. The issue in this appeal is whether the Masai Barefoot Technology (MBT) white therapeutic sport shoes (the goods in issue), in addition to being classified under tariff item No. 6404.11.99 of the schedule to the *Customs Tariff*,² should 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, thereby benefiting from duty-free treatment.

PROCEDURAL HISTORY

3. On June 18, 2009, Masai requested an advance ruling pursuant to subsection 43.1(1) of the *Act* concerning the tariff classification of the goods in issue.³ On August 4, 2009, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) and classified the goods in issue under tariff item No. 6402.91.90 as other footwear with outer soles and uppers of rubber or plastics, covering the ankle, other than sports footwear, without the benefit of duty-free treatment under tariff item No. 9979.00.00.⁴

4. On August 11, 2009, Masai requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.⁵ On May 6, 2010, the CBSA re-determined the tariff classification of the goods in issue under tariff item No. 6404.11.99 as other sports footwear, tennis shoes, basketball shoes, gym shoes, training shoes and the like, without the benefit of duty-free treatment under tariff item No. 9979.00.00.⁶

5. On July 5, 2010, Masai filed an appeal with the Tribunal pursuant to section 67 of the *Act*.⁷

6. On April 28, 2011, the Tribunal held a public hearing in Ottawa, Ontario.

7. Masai called the following four witnesses to testify on its behalf: Dr. Benno M. Nigg, a professor in the Faculties of Kinesiology, Engineering and Medicine at the University of Calgary, was qualified by the Tribunal as an expert in biomechanics; Dr. Ronald Rushforth, a retired general practitioner, was qualified by the Tribunal as an expert in musculoskeletal disorders; Dr. Michael Wodka, a podiatrist with a practice in New York, New York, was qualified by the Tribunal as an expert in the pathology of the foot; Dr. Lori-Anne Yarrow, Academy Manager for North America for MBT Footwear, was qualified by the Tribunal as an expert in the construction and design of the goods in issue.

8. The CBSA called Dr. Grant Lum, a sports medicine physician with a medical practice in Toronto, Ontario, to testify on its behalf. Dr. Lum was qualified by the Tribunal as an expert in sports medicine in the treatment of musculoskeletal injuries.

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

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

3. Tribunal Exhibit AP-2010-025-14.

4. *Ibid.*

5. *Ibid.*

6. Tribunal Exhibit AP-2010-025-01.

7. *Ibid.*

GOODS IN ISSUE

9. The goods in issue are identified as MBT shoes.⁸
10. Two physical exhibits of deconstructed soles of the goods in issue were filed by Masai, identified as a “PU midsole with pivot” and a “MBT-101”.⁹

LEGAL FRAMEWORK

11. In appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in issue in accordance with prescribed interpretative rules.
12. 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 (the Harmonized System) developed by the World Customs Organization.¹⁰ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under 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 of goods.
13. Subsection 10(1) of the *Customs Tariff* provides 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^[11] and the Canadian Rules^[12] set out in the schedule.”
14. 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.¹³ Classification therefore begins with Rule 1, which provides 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.”
15. Section 11 of the *Customs Tariff* provides 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^[14] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[15] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise.¹⁶

8. Tribunal Exhibit AP-2010-025-04A at 2; Tribunal Exhibit AP-2010-025-06A at 4.

9. Exhibits A-01, A-02.

10. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

11. S.C. 1997, c. 36, schedule [*General Rules*].

12. S.C. 1997, c. 36, schedule.

13. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

14. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

15. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

16. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

16. Chapter 99 of the *Customs Tariff*, which includes tariff item No. 9979.00.00, provides special classification provisions that allow certain 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.¹⁷ 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.

17. The relevant portion of the nomenclature of the *Customs Tariff* provides as follows:

Chapter 99

SPECIAL CLASSIFICATION PROVISIONS – COMMERCIAL

...

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.

18. In accordance with note 3 to Chapter 99, 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. The parties are in agreement that the goods in issue should be classified under tariff item No. 6404.11.99 as other sports footwear, tennis shoes, basketball shoes, gym shoes, training shoes and the like. On the basis of the evidence, the Tribunal accepts this classification.¹⁸ Therefore, for the purposes of this appeal, the Tribunal is of the view that this condition has been met.

19. Consequently, the sole remaining issue before the Tribunal is to determine whether the goods in issue are eligible for the benefit of duty-free treatment under tariff item No. 9979.00.00, i.e. whether they are goods specifically designed to assist persons with disabilities in alleviating the effects of those disabilities, thereby benefiting from duty-free treatment.

ANALYSIS

Discussion of the Law

20. The parties both agreed¹⁹ that, in addressing this matter, the Tribunal should be guided by its decision in *Sigvaris Corporation v. President of the Canada Border Services Agency*.²⁰ In that case, the Tribunal discussed the two requirements that must be examined for determining whether or not goods meet the conditions of tariff item No. 9979.00.00 and stated as follows:

... 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.²¹

[Emphasis in original]

17. 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 Chapter 99 is not mutually exclusive.

18. The Tribunal notes that it is not obliged to conduct its own assessment of whether the goods in issue are *prima facie* classifiable under tariff item No. 6404.11.99, since Masai has not challenged this aspect of the CBSA's decision.

19. *Transcript of Public Hearing*, 28 April 2011, at 143, 151.

20. (23 February 2009), AP-2007-009 (CITT) [*Sigvaris*].

21. *Sigvaris* at para. 26.

21. With respect to the first requirement, the Tribunal notes that documentation that shows a purposeful intent during the design phase of a product would normally constitute the best way of demonstrating such an intent.²² However, the Tribunal also believes that, when such documentation is lacking, proof of such an intent can also be persuasive even if it is documented after the fact, as long as it is reasonable to infer that specific intent was present during the design phase of the product. That evidence must be assessed on a case-by-case basis, but may come from various sources, and it is sufficient that it be probative and convincing.

22. With respect to the second requirement, the Tribunal does not believe that it is necessary to demonstrate the existence of hard-and-fast scientifically verifiable evidence that goods actually alleviate the effects in question. Rather, the Tribunal is of the view that it is sufficient to demonstrate that the design of the goods was specifically aimed at alleviating the effects of identified disabilities and that, even though independent and irrefutable scientific evidence of the disability-alleviating claim need not be provided, there must nevertheless be a rational connection between the design and the claim and at least some credible anecdotal evidence that the intended result has been achieved.

23. The Tribunal is of the view that this interpretation is consonant with the French version of tariff item No. 9979.00.00. Indeed, the French version of that provision speaks of goods, the design of which is to “...*assister les personnes handicapées en allégeant les effets de leurs handicaps*...” [bold added for emphasis].²³ Read together, the Tribunal is of the view that the English and French versions of tariff item No. 9979.00.00 only require satisfactory demonstration of some relief from the effects of a disability.²⁴

24. Put otherwise, the Tribunal believes that *Sigvaris* stands for the proposition that there must be evidence that a design is purposefully related to the alleviation of the effect of disabilities and that there is some evidence that the goods live up to the claim that they make. In addition, the Tribunal must be convinced that the claim is not simply a disguised attempt to gain the benefit of duty-free treatment.

25. The Tribunal will therefore proceed to determine, in light of the evidence on the record, whether the goods in issue (1) are specifically designed to assist persons with disabilities and (2) whether they alleviate the effects of those disabilities.

22. In *Nutricia North America v. President of the Canada Border Services Agency* (18 May 2011), AP-2009-017 (CITT) at para. 122, the Tribunal stated that the adverb “specifically”, in the expression “specifically designed”, as found in tariff item No. 9979.00.00, implied a direct, purposeful connection between the design of goods and the objective of assisting persons with disabilities.

23. Tariff item No. 9979.00.00 reads as follows in French: “*Marchandises conçues spécifiquement pour assister les personnes handicapées en allégeant les effets de leurs handicaps, et articles et matières devant servir dans ces marchandises.*”

24. The following are synonyms of “alleviate”: relieve, lighten, assuage, mitigate, allay (*Merriam-Webster’s Dictionary of Synonyms*). See also the following discussion on the meaning of the word “alleviate” in *Sigvaris* at paras. 57-58:

“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 ...’. 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.” (Footnote omitted)

Application of the Law to the Facts

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

26. The CBSA argued that the goods in issue are not specifically designed to assist persons with disabilities; rather, it takes the view that the goods in issue are designed to boost muscle activity and tone the lower body. The CBSA described the goods as toning shoes, similar to other models of athletic footwear produced by other shoe manufacturers. Furthermore, the CBSA argued that the goods in issue are marketed towards, and are used by, members of the general population and sold both in regular retail shoe stores and online without prescription.

27. In support of its position, the CBSA submitted several online news articles which describe how the goods in issue have designs similar to other toning shoes, in that they are designed to create instability in order to provide a more intense workout for both large and small muscles in the wearer's lower extremities than a regular walking shoe does. In addition, the CBSA claimed that, on the basis of Masai's own product information, the goods in issue are marketed for purposes other than the alleviation of disabilities.

28. Masai argued that the goods in issue were designed to treat musculoskeletal disorders, which can affect the body's muscles, joints, tendons, ligaments and nerves.

29. Dr. Yarrow, who was familiar with the design and construction of the goods in issue, testified that the shoes were introduced into the Canadian market in 2004 as products with a unique technology. Dr. Yarrow stated that this unique technology is designed to create multi-dimensional instability when an individual wears the goods in issue.²⁵

30. Dr. Yarrow further stated as follows:

The man who invented MBT did so with the intention to reduce the damaging impact of walking on hard, flat surfaces, which is what we live in in our modern society, and the damaging effects that that has on the body in terms of creating disabilities.

...

So... his intention was to create a product that would have an effect on the body that would be beneficial to counteract the damaging effects of walking on this surface and the disabilities that people suffer in endemic proportions because of that.²⁶

31. Dr. Yarrow testified that the goods in issue were designed to assist with disabilities that related to the "closed kinetic chain".²⁷ Dr. Yarrow explained this concept, which involves the musculoskeletal connection between the foot and the hipbone, as follows:

... what you do at the foot has an effect as you go up to the ankle, to the knee, to the hip, to the back.

In the human body, we have a relationship where, if you have a problem at the foot, it can then cause a chain reaction up, or if I have a problem further up, I can have a chain reaction down, because we're in contact with the ground.²⁸

25. *Transcript of Public Hearing*, 28 April 2011, at 13.

26. *Ibid.* at 9, 10.

27. *Ibid.* at 14.

28. *Ibid.* at 14.

32. A physical examination of the construction of the soles of the goods in issue by the Tribunal suggests very strongly that Masai's intention in designing the goods in issue was to cause imbalance in the gait of the individual wearing the shoes, as compared to the individual who wears shoes with a more traditional sole construction. Studies submitted by Masai demonstrate that this is exactly what MBT footwear does—it creates imbalance.

33. In one study designed to compare kinematics, kinetics and muscle activity during standing and walking for healthy subjects using unstable test shoes (the goods in issue) and stable control shoes, the results indicated that the goods in issue produced a "... substantial and significant increase in the movement of the center of force, which is a sign for increased instability."²⁹ The study concluded that the goods in issue "... produced changes in kinematic, kinetic and EMG [electromyographic] characteristics that seem to be advantageous for the locomotor system."³⁰

34. Dr. Nigg referred to an unpublished study conducted internally for Masai, which compared MBT footwear with similar competitor products. He explained to the Tribunal that "[t]he excursion of the centre of pressure is basically an indication of the instability, and in these results the MBT shoe had higher values than most other shoes."³¹

35. Furthermore, the evidence on the record contains a number of scientific and technical studies and articles that establish a certain connection between the design, the use of the product and muscle activation through increased instability. In one bulletin entitled "Recent Innovative Footwear Designs" published by Paris Orthotics Ltd., the author cited several of Dr. Nigg's studies, which "reported that the activity of all muscles except the soleus were increased while standing in the MBT footwear. In addition, both studies revealed that postural sway increased while wearing the MBT shoes."³² The bulletin also lists several pathologies where Paris Orthotics Ltd.'s own Professional Advisory Board members described positive clinical outcomes from MBT intervention and recommended that the goods in issue be used by individuals in professions that require standing and by individuals who suffer from plantar heel pain and plantar fasciitis/fasciosis.³³

36. The evidence also establishes a plausible causal relationship between the lack of muscle stimulation in the lower limbs, the effect on the "closed kinetic chain" as described by Dr. Yarrow and the existence of certain disabilities.

37. The testimonies of Dr. Wodka and Dr. Rushforth have established, to the Tribunal's satisfaction, the possible connection between the functional limitations that result from certain health conditions—disabilities—and the lack of muscle stimulation.

38. When asked by Masai about the conditions of his patients for whom he has prescribed the goods in issue, Dr. Wodka stated as follows:

... as I said, heel spurs in plantar fasciitis is a very big concern, but also metatarsalgia, the inflammation of the metatarsals, the bones by the knuckle of the joints that we referred to, as well as the big toe joint. As we walk we push off on the big toe. People who have a limitation of motion there, patients who have arthritis there, post-traumatic conditions, people with gout, there's a lot of inflammation as that big toe is flexing and getting us off the ground.

The benefit of the MBT is it limits the necessity for that to do so and by wearing the MBT those patients are not challenging that joint as much and they receive significant benefit.³⁴

29. Tribunal Exhibit AP-2010-025-13C, tab 7.

30. *Ibid.*

31. *Transcript of Public Hearing*, 28 April 2011, at 59; Tribunal Exhibit AP-2010-025-13C, tab 12.

32. Tribunal Exhibit AP-2010-025-13C, tab 4.

33. *Ibid.*

34. *Transcript of Public Hearing*, 28 April 2011, at 71-72.

39. Dr. Rushforth described to the Tribunal many of the conditions (foot, knee, leg, hip and back problems)³⁵ that he has seen in his patients and stated as follows:

In my personal opinion, the MBT footwear restores alignment, increases muscular and core body strength, leading to increased mobility, sense of well-being with improvements in pain threshold, circulation, digestive and respiratory function, because the person is standing more upright and more erect, and a general greater enjoyment of life. That's what I found with my patients.³⁶

40. Although the above evidence is not contemporaneous to the actual design of the goods in issue, it is reasonable to conclude that, when considered as a whole, it indicates that the goods in issue were specifically designed to assist individuals with disabilities. Put otherwise, considering the plausible connection between the lack of muscle stimulation in the lower limbs and the existence of certain disabilities, and considering that the purposeful intent of the design was to stimulate muscles in the lower limbs, the Tribunal concludes that it is reasonable to conclude that the design was specifically intended to assist persons with disabilities.

41. The Tribunal is also of the view that, even if the goods in issue are, in fact, marketed and used by individuals who do not suffer from disabilities, this does not negate the fact that the goods in issue were designed specifically to address a condition that may be associated with the cause of various disabilities.

42. For the foregoing reasons, the Tribunal finds that the goods in issue are specifically designed to assist persons with disabilities within the meaning of tariff item No. 9979.00.00.

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

43. In this matter, the Tribunal is looking for evidence that the individual who designed the goods in issue specifically intended for the increase in instability and muscle stimulation, and the resulting increase in control of the foot and ankle caused by the design and use of the goods in issue, to alleviate the effects that are caused by the disabilities mentioned above.

44. Dr. Yarrow indicated that the intent of the individual who invented MBT footwear was to create a product that would be "... beneficial to counteract the damaging effects of walking on [hard flat surfaces] and the disabilities that people suffer in epidemic proportions because of that."³⁷ In other parts of her testimony and in her expert witness report, Dr. Yarrow refers to the elimination or reduction of pain associated with these disabilities, including heel and forefoot pain, knee arthritis and mechanical low back pain.³⁸

45. In addition, Dr. Yarrow testified that "... what we're doing is we are now stimulating the body to work muscles that have previously become lazy and weak. ... So a big part of the benefit of instability is to create this muscle contraction and help to unload the joint."³⁹ Furthermore, Dr. Yarrow stated that the goods in issue reduce the load pressure on the joint and that this reduction in load pressure has an influence on pain:

[Dr. Yarrow] ... we have pain receptors in our tissues, including our joints and our ligaments and our tendons and they work on a simple mechanism, these joint pain receptors, technically called nociceptors, but they're pain receptors, and if they're squished, they fire. So if you decrease the pressure and the loading, they don't fire.

[Mr. Kaylor] And the MBT helps to relieve that load pressure?

[Dr. Yarrow] Correct.⁴⁰

35. *Ibid.* at 80-82; Tribunal Exhibit AP-2010-025-13F.

36. *Transcript of Public Hearing*, 28 April 2011, at 83-84.

37. *Ibid.* at 10.

38. *Ibid.* at 15; Tribunal Exhibit AP-2010-025-13D at 6-7.

39. *Transcript of Public Hearing*, 28 April 2011, at 16-17.

40. *Ibid.* at 19.

46. Dr. Nigg also testified as follows:

[Dr. Nigg] The second most important function of that shoe is that we try to stabilize at the ankle joint level. You can stabilize up here with the arms or you can stabilize with the hip or with the knee or with the ankle. When you stabilize at the ankle joint you are at the origin of the instability, so you can react faster. You can use, if the muscles are strong, small muscles that reduce the forces in the joints.

[Mr. Kaylor] And by reducing those forces what is the effect on pain?

[Dr. Nigg] Then you reduce pain.⁴¹

47. As a matter of logic, the Tribunal does not believe that it is necessary, nor helpful, to dissociate a disability from its effects when inquiring into the specific intent of the designer of the goods in issue.

48. A disability and its resulting effects, practically speaking, are both so closely interrelated that it is difficult to imagine how someone who purposely designs a product with the objective of assisting a person with a given disability would be doing so without purposely intending to alleviate the effects of that disability.

49. Drs. Wodka and Rushforth explained in their testimonies how limiting pain can be in the daily activities of an individual who is living with some of the disabilities that are associated with poor muscle strength and the lack of stimulation in the lower limbs. In particular, Dr. Rushforth stated as follows:

I was in general practice for 43 years and I found that loss of function caused by pain and musculoskeletal mal-alignments often cause severe emotional distress and even depression in people because they can't do the things they want to do, and this further accentuates pain and focuses attention on the disability. When you're concentrating on the pain all the time, it definitely becomes worse. If something can distract you from that pain, you often don't notice the pain as much, such as would happen with a happy occurrence in your life.

In my personal opinion, the MBT footwear restores alignment, increases muscular and core body strength, leading to increased mobility, sense of well-being with improvements in pain threshold, circulation, digestive and respiratory function, because the person is standing more upright and more erect, and a general greater enjoyment of life. That's what I found with my patients.⁴²

50. Even though it is anecdotal, the Tribunal found this evidence to be credible and to show a convincing nexus between the disabilities and their effects, and the objective of the goods in issue of alleviating their effects with the view of assisting persons by making them more functional in their daily activities. Dr. Wodka stated the following in his testimony:

[Dr. Wodka] . . . by wearing the MBT those patients [who have a limitation of motion] . . . receive significant benefit.

[Mr. Kaylor] And in what form does the benefit come?

[Dr. Wodka] Limited pain, increased ability to ambulate. It doesn't, as was said earlier, change underlying conditions of the arthritic nature of the deformities that I'm treating, but it does enable the patient to *function* better than the traditional solid heel, non-rocker-bottom shoe.⁴³

[Emphasis added]

41. *Ibid.* at 65.

42. *Ibid.* at 83-84.

43. *Ibid.* at 72.

51. In the Tribunal's view, although the matter is not settled as a matter of science, there is evidence that suggests that the goods in issue may alleviate some of the effects caused by the disabilities associated with walking on hard flat surfaces. Dr. Yarrow produced a study, in her expert witness report, that concluded that MBT footwear could "... have a role to play in the management of musculoskeletal disorders ...".⁴⁴ Other studies on the record indicate that the goods in issue are capable of "... alleviating pain at specific joints"⁴⁵ and that "... MBT shoes are effective in reducing knee pain in people with knee OA [osteoarthritis] after 3, 6, and 12 [weeks] of wear."⁴⁶

52. Both Dr. Rushforth and Dr. Wodka testified as to the anecdotal evidence found in their own personal experience and in some of their patients', showing that there had been improvement in the condition of their patients attributed to, in their respective views, a direct result of using the goods in issue.

53. Therefore, the Tribunal finds that the goods in issue meet the second requirement of tariff item No. 9979.00.00.

DECISION

54. For the foregoing reasons, the Tribunal concludes that the goods in issue meet both requirements of tariff item No. 9979.00.00. The Tribunal finds that they are "specifically designed to assist persons with disabilities in alleviating the effects of those disabilities" and that they therefore qualify for the benefit of duty-free treatment.

55. The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

44. Tribunal Exhibit AP-2010-025-13D, tab 4.

45. Tribunal Exhibit AP-2010-025-13B, tab 1.

46. Tribunal Exhibit AP-2010-025-13C, tab 10.