



Ottawa, Friday, March 19, 1993

Appeal Nos. AP-90-023 and AP-90-127

IN THE MATTER OF two appeals heard on September 25, 1992, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF two re-determinations by the Deputy Minister of National Revenue for Customs and Excise dated March 21 and October 23, 1990, under section 59 of the *Special Import Measures Act*.

BETWEEN

FLETCHER LEISURE GROUP INC.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISIONS OF THE TRIBUNAL

The Tribunal allows Appeal No. AP-90-023 and directs the respondent to determine the normal value of the Scott brand ski poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by S.P.F. S.p.A. to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of the *Special Import Measures Act*.

The Tribunal dismisses Appeal No. AP-90-127.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-90-023 and AP-90-127

FLETCHER LEISURE GROUP INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

These are appeals under section 61 of the Special Import Measures Act of two re-determinations by the respondent assessing anti-dumping duties on ski poles imported into Canada by the appellant and subject to the Anti-dumping Tribunal's material injury finding of May 14, 1984, in respect of alpine ski poles of aluminum alloy, originating in or exported from France and Italy.

HELD: *The Tribunal allows Appeal No. AP-90-023 and directs the respondent to determine the normal value of the Scott brand ski poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by S.P.F. S.p.A. to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of the Special Import Measures Act.*

The Tribunal dismisses Appeal No. AP-90-127.

*Place of Hearing: Ottawa, Ontario
Date of Hearing: September 25, 1992
Date of Decisions: March 19, 1993*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Sidney A. Fraleigh, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Brenda C. Swick-Martin

Clerk of the Tribunal: Janet Rumball

*Appearances: Glenn Cranker, for the appellant
Rosemarie Millar, for the respondent*

Appeal Nos. AP-90-023 and AP-90-127

FLETCHER LEISURE GROUP INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISIONS

These are appeals under section 61 of the *Special Import Measures Act*¹ (SIMA) of two re-determinations by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) assessing anti-dumping duties on ski poles imported into Canada by the appellant and subject to the Anti-dumping Tribunal's material injury finding of May 14, 1984, in respect of alpine ski poles of aluminum alloy, originating in or exported from France and Italy.²

Fletcher Leisure Group Inc. is a Canadian importer and distributor of sporting goods. As part of its business, it is an importer and a distributor of Scott brand ski poles (Scott poles) produced by S.P.F. S.p.A. (SPF) in Italy. During the 1988-89 period, the appellant purchased various models of ski poles from SPF.

Appeal No. AP-90-023

In Appeal No. AP-90-023, anti-dumping duties were assessed on five shipments (approximately 60,000 pairs) of Scott poles imported from SPF during the period from July 18 to November 9, 1988.³ The Deputy Minister decided that the normal value of the Scott poles exceeded their export prices and assessed anti-dumping duties equal to the margin of dumping.

The normal value of the goods for anti-dumping purposes is determined under sections 15 to 23 of SIMA. Section 15 of SIMA provides that the normal value of the goods sold to an importer in Canada be determined on the basis of the price of "like goods" sold by the exporter in the country of export (i.e. Italian market). Section 15 of SIMA provides that:

15. ... where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter ...

1. R.S.C. 1985, c. S-15.

2. The Anti-dumping Tribunal's material injury finding of May 14, 1984, in Inquiry No. ADT-5-84, was continued by the Canadian Import Tribunal on December 23, 1986, in Review No. R-8-86, but expired on December 22, 1991, after the Canadian International Trade Tribunal decided not to conduct a further review in Notice of Expiry No. LE-91-001 dated July 25, 1991.

3. Customs Entry Nos. 13052-39638530-9, 13052-38671390-8, 13052-41555060-9, 13052-43856950-6 and 13052-39638420-6.

(a) to purchasers

*(i) with whom the exporter is not associated at the time of the sale of the like goods,
and*

...

(c) in the ordinary course of trade for use in the country of export under competitive conditions.

"Like goods," in turn, are defined in subsection 2(1) of SIMA to mean:

(a) goods that are identical in all respects to the other goods, or

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

The witness for the respondent, Ms. Caterina Ardito, testified that the normal value of the goods sold to the appellant was not determined under section 15 of SIMA because SPF's Italian sales of "like goods" were made to only one related customer. In reaching such a conclusion, the respondent interpreted SPF's sales of "like goods" in the Italian market for the purposes of section 15 of SIMA to mean "goods that are identical in all respects" to the goods imported by the appellant, namely, Scott poles. The respondent was of the view that the remaining pairs of other private brand labels sold to three unrelated customers were not "like" the Scott poles sold by SPF to the appellant in Canada.⁴

Therefore, in light of the foregoing, the normal value of the Scott poles sold to the appellant was determined by the respondent under paragraph 19(b) of SIMA based on the aggregate of (i) the cost of production of the Scott poles manufactured by SPF and sold to Canada, (ii) an amount for administrative, selling and all other costs, and (iii) an amount for profits.⁵

The appellant did not refute the respondent's determination of the cost of production and the amount for administrative, selling and all other costs (subparagraphs 19(b)(i) and (ii) of SIMA). The parties submitted that the issue was whether the Deputy Minister erred in using an amount for profits of 31.6 percent under subparagraph 19(b)(iii) of SIMA in the calculation of the normal value of the goods in issue.

4. Information with respect to quantity, brand names and customers in Italy is confidential and, therefore, cannot be disclosed.

5. Paragraph 19(b) of SIMA provides that:

19. Subject to section 20, where the normal value of any goods cannot be determined under section 15 by reason that there was not, in the opinion of the Deputy Minister, such a number of sales of like goods that comply with all the terms and conditions referred to in that section or that are applicable by virtue of subsection 16(1) as to permit a proper comparison with the sale of the goods to the importer, the normal value of the goods shall be determined, at the option of the Deputy Minister in any case or class of cases, as

...

(b) the aggregate of

(i) the cost of production of the goods,

(ii) an amount for administration, selling and all other costs, and

(iii) an amount for profits.

The respondent determined an amount for profits of 31.6 percent for the purposes of subparagraph 19(b)(iii) of SIMA under subparagraph 11(b)(iii) of the *Special Import Measures Regulations*⁶ (the Regulations) which provide:

11. For the purposes of paragraph 19(b) and subparagraph 20(c)(ii) of the Act,

...

(b) ... the expression "an amount for profits", in relation to any goods, means an amount equal to

...

(iii) where subparagraphs (i) and (ii) are not applicable but there are a number of sales of like goods made by other producers located in the country of export which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales.

(Emphasis added)

In determining an amount for profits under subparagraph 11(b)(iii) of the Regulations, the respondent reviewed the profit earned by another Italian producer of ski poles, Giuseppe Pronzati S.P.A. (Pronzati), on its sales of "like goods" in the Italian market. Ms. Ardito testified that the "like goods" reviewed for the purposes of subparagraph 11(b)(iii) of the Regulations were a little more than 1,000 pairs of Gipron brand ski poles sold by Pronzati in the Italian market that were "identical" to the ski poles exported to Canada by Pronzati. The respondent then determined a profit of 31.6 percent on the sale of 1,204 pairs of Gipron brand ski poles sold by Pronzati to Italian customers. This profit figure was subsequently used for an amount for profits under subparagraph 19(b)(iii) of SIMA in constructing the normal value of the Scott poles sold to the appellant.

The Tribunal finds that the respondent erred in its determination of the normal value of the goods in issue.

Section 15 of SIMA requires the respondent to base the normal value on the price of goods sold in the country of export that are "like" the goods exported to Canada. Therefore, to determine the normal value, the respondent must first attempt to identify goods sold in the Italian market that are identical to the exported goods and, in their absence, to identify goods that closely resemble the exported goods.

In the Tribunal's view, the respondent erred in interpreting SPF's sales of "like goods" in the Italian market under section 15 of SIMA to mean only "identical" goods, namely, Scott poles. Paragraph (b) of the definition of "like goods" under subsection 2(1) of SIMA further defines "like goods", in the absence of "identical goods in all respects," as "goods the uses and other characteristics of which closely resemble" each other. In determining whether goods closely resemble each other, SIMA specifically directs the respondent to consider the "uses and other

6. SOR/84-927, November 22, 1984, Canada Gazette Part II, Vol. 118, No. 25 at 4286.

characteristics" of the goods.⁷ Therefore, having found that identical Scott poles, sold by SPF in the Italian market, were sold to a related distributor, the respondent was required to apply the second prong in paragraph (b) of the statutory definition of "like goods" under subsection 2(1) of SIMA to determine whether there were "like goods" sold by SPF in the Italian market that closely resembled the Scott poles sold to the appellant.

The Tribunal is of the view that the Scott poles imported by the appellant are not "identical in all respects" to the private brand ski poles sold by SPF to unrelated distributors in Italy. However, applying the second prong in paragraph (b) of the definition of "like goods" under subsection 2(1) of SIMA, the Tribunal finds that the private brand ski poles sold by SPF in the Italian market closely resemble the Scott poles sold to the appellant and are, therefore, "like goods" for the purposes of section 15 of SIMA. Both Scott poles and private brand ski poles manufactured by SPF closely resemble each other in their physical appearance, in that they are both comprised of an aluminum alloy shaft and grip, strap and basket. Both brands of ski poles serve the same end use, i.e. alpine skiing. Both brands of ski poles are sold by the same types of retailers to the same types of customers, namely, people who do alpine skiing. Although the Tribunal recognizes that there may be quality differences between the Scott poles and private brand ski poles, it is of the view that they compete with each other in the alpine ski pole market and are, to a certain degree, substitutable for each other.

For the foregoing reasons, the Tribunal allows the appeal and directs the respondent to determine the normal value of the Scott poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by SPF to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of SIMA.

Appeal No. AP-90-127

The second appeal concerns the assessment of anti-dumping duties on one shipment of alpine ski poles carrying the Kastle brand name (Kastle poles) imported by the appellant from SPF in Italy on August 21, 1989.⁸ The Kastle poles were produced by SPF for another company, Kastle Austria.

Because of insufficient cost information in the opinion of the respondent, anti-dumping duties were assessed on the Kastle poles on September 20, 1989, using the normal value determined by advancing the export price of the goods by 47 percent, in accordance with the ministerial specification issued under subsection 29(1) of SIMA, which reads as follows:

29.(1) Where, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28, the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies.

7. *Sarco Canada Limited. v. Anti-dumping Tribunal*, [1979] 1 F.C. 247 (F.C.A.).

8. Customs Entry No. 13052-00727567-7.

At issue in this appeal is whether the respondent erred in advancing the export price of the goods by 47 percent in accordance with the ministerial specification or whether a specific normal value should have been determined for the goods in issue. The appellant requested that the respondent re-determine the normal value of the Kastle poles on the basis of new cost information adduced during this appeal proceeding.

The documentary evidence and testimony revealed that at no time prior to their importation in August 1989 was the normal value of the Kastle poles requested by SPF or any other party. Mr. Jim Quarles, Vice-president of the appellant company, testified that it did receive some requests from the Department of National Revenue (Revenue Canada) for additional information to establish the normal value of the Kastle poles, and that the appellant contacted Kastle Austria to have them respond to such requests.

After the assessment of anti-dumping duties in September 1989, Mr. Louis Nadon, who was Customs Attaché at the Canadian Mission in Brussels at that time, testified, on behalf of the respondent, that several unsuccessful attempts had been made to obtain the information required to calculate a specific normal value of the goods in issue from both Kastle Austria and SPF. In early January 1990, an official from Revenue Canada's headquarters in Brussels contacted a representative from Kastle Austria, by telephone and letter, asking him to provide basic information concerning the sales of Kastle poles in order to determine the normal value. Mr. Nadon further testified that additional attempts were made to obtain the information required to calculate a specific normal value of the Kastle poles from both SPF and Kastle Austria during a general re-investigation initiated on April 4, 1990. As part of the re-investigation, a questionnaire was sent to SPF to obtain information concerning the Kastle poles. However, such an attempt proved fruitless when Revenue Canada received a letter on May 2, 1990, from Mr. Stendhall of Scott Europe advising that the questionnaire would not be completed.⁹ Kastle Austria was also advised by Revenue Canada in early April 1990 of the normal value review of the goods in issue and later declined to provide the information requested in order to determine the normal value of the Kastle poles manufactured by SPF and exported to Canada. Both Kastle Austria and SPF were thereafter advised by Revenue Canada that the normal value of the Kastle poles would be established under ministerial specification, given the lack of sufficient information.

The appellant, in turn, acknowledged that sufficient information regarding the cost of production for the Kastle poles was not furnished on a timely basis, but that SPF was prepared to provide adequate cost information with respect to the Kastle poles that would permit the determination of a normal value under paragraph 19(b) of SIMA.

In the case of subsection 29(1) of SIMA, the manner so prescribed is applicable only "[w]here, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28" of SIMA. In the Tribunal's view, the Deputy Minister is constituted as the judge of whether the preliminary conditions for the application of the prescription exist. Ample opportunity was given to both SPF and Kastle Austria to explain why the prescription was not

9. Witnesses testified during the hearing that SPF is owned by Scott Europe.

applicable and to provide further information to enable the calculation of a specific normal value of the Kastle poles, which they chose not to pursue at that time.

For the foregoing reasons, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member