



Ottawa, Tuesday, September 1, 1992

Appeal No. AP-91-188

IN THE MATTER OF an appeal heard on May 13 and 14, 1992, pursuant to section 61 of the *Special Import Measures Act*, R.S.C., 1985, c. S-15, as amended;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise pursuant to section 59 of the *Special Import Measures Act* with respect to a request under section 58 of the *Special Import Measures Act*.

**BETWEEN**

**J.V. MARKETING INC.**

**Appellant**

**AND**

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

**Respondent**

**AND**

**AVRECAN INTERNATIONAL INC.**

**Intervenor**

**AND**

**THE SHOE MANUFACTURERS' ASSOCIATION OF CANADA**

**Intervenor**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Charles A. Gracey  
Charles A. Gracey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

*UNOFFICIAL SUMMARY*

Appeal No. AP-91-188

**J.V. MARKETING INC.**

**Appellant**

and

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

**Respondent**

and

**AVRECAN INTERNATIONAL INC.**

**Intervenor**

and

**THE SHOE MANUFACTURERS' ASSOCIATION OF CANADA** **Intervenor**

*On May 3, 1990, the Tribunal made a finding of material injury concerning the dumping in Canada of women's leather boots and shoes originating in or exported from certain countries including Taiwan. The Tribunal indicated in the finding that "sports footwear" was excluded. The issue in this appeal is whether certain women's shoes imported into Canada from Taiwan are goods of the same description as those to which the Tribunal's finding applies. Counsel for the appellant claimed that the shoes are excluded from the finding as sports footwear.*

**HELD:** *The appeal is dismissed.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: May 13 and 14, 1992*  
*Date of Decision: September 1, 1992*

*Tribunal Members: Desmond Hallissey, Presiding Member*  
*Sidney A. Fraleigh, Member*  
*Charles A. Gracey, Member*

*Counsel for the Tribunal: David M. Attwater*

*Clerk of the Tribunal: Dyna Côté*

*Appearances: Richard A. Wagner, for the appellant*  
*Brian Saunders, for the respondent*  
*Donald A. Kubesh, for the intervenor, Avreca International Inc.*  
*G.P. MacPherson, for the intervenor, The Shoe Manufacturers'*  
*Association of Canada*

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**J.V. MARKETING INC.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE  
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**Intervenor**

**and**

**THE SHOE MANUFACTURERS' ASSOCIATION OF CANADA**

**Intervenor**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member  
SIDNEY A. FRALEIGH, Member  
CHARLES A. GRACEY, Member

**REASONS FOR DECISION**

On May 3, 1990, the Tribunal made a finding<sup>1</sup> of material injury concerning the dumping in Canada of women's leather boots and shoes originating in or exported from certain countries including Taiwan. The Tribunal indicated in the finding that "sports footwear" was excluded. This was elaborated on in the Tribunal's statement of reasons where it was stated that:

*Sports footwear was generally defined as footwear which was designed for a sporting activity and had, or had provision for, the attachment of spikes, sprigs, stops, clips, bars or the like. It also included skating boots, ski boots, cross-country ski footwear, wrestling boots, boxing boots, cycling boots, bowling shoes, curling shoes and moto-cross racing boots. For purposes of this inquiry, sports footwear also referred to tennis shoes, jogging shoes and running shoes.<sup>2</sup>*

Pursuant to section 3 of the *Special Import Measures Act*<sup>3</sup> (SIMA), an anti-dumping duty shall be paid on all dumped goods imported into Canada in respect of which the Tribunal has made a finding that the dumping of goods of the same description has caused, is causing or is likely to cause material injury. The issue in this appeal is whether certain women's shoes

1. Women's leather boots and shoes originating in or exported from Brazil, the People's Republic of China and Taiwan; women's leather boots originating in or exported from Poland, Romania and Yugoslavia; and women's non-leather boots and shoes originating in or exported from the People's Republic of China and Taiwan, Inquiry No. NQ-89-003, May 3, 1990; 2 T.T.R. 251.
2. *Ibid.*, Inquiry No. NQ-89-003, at 4.
3. R.S.C., 1985, c. S-15, as amended.

imported into Canada from Taiwan are goods of the same description as those to which the Tribunal's finding applies. Counsel for the appellant claimed that the shoes are excluded from the finding as sports footwear.

The most complete description of the shoes is found in the appellant's brief. The shoes are the Saucony InStep 6220 fitness walking shoes. There are three basic parts to the shoes, being the upper, the sole unit and the insole. The upper is made of leather. The sole unit consists of single density ethylene vinyl acetate in the mid sole, a Hytrell support shank, a nylon motion control device in the heel and a rubber outsole with flex tread pattern. The insole of the shoes is a patented and trademarked device made of blown polyurethane and Hytrell and the heel cup. The appellant submitted that the goods are highly engineered shoes designed for fitness walking.

Counsel for the appellant argued that it is the Tribunal's finding that is determinative of whether the goods are subject to an anti-dumping duty, not the preliminary or final determination of dumping made by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), nor the evidence that was submitted to the Tribunal during the injury inquiry, nor any departmental policy of the Deputy Minister. Counsel referred to sections 3 and 43 of SIMA and to decisions from both the Tribunal<sup>4</sup> and the Federal Court of Appeal<sup>5</sup> as authority for this proposition. In reply, he clarified this by stating that reference can be made to the statement of reasons to help interpret the finding.

Counsel submitted that the finding excludes all sports footwear. He noted that the Tribunal's inquiry was directed against dress and casual footwear and that sports footwear was not addressed during the inquiry. He also referred to the explicit wording of the finding that included no qualification or limitation on the term "sports footwear." Counsel submitted that the extended definition provided in the Tribunal's statement of reasons was not meant to be all inclusive. Similarly, the finding was not meant to exclude sports footwear as defined in Chapter 64 of the Harmonized Commodity Description and Coding System (the Harmonized System) of tariff classification contained in Schedule I to the *Customs Tariff*.<sup>6</sup> If so, it would have been stated. This definition is very narrow and does not include many of the shoes specifically named in the statement of reasons.

Counsel argued that, to determine what constitutes sports footwear, reference should be made to the ordinary and trade definitions of that term. Counsel noted the definition of "sport" in The Oxford English Dictionary<sup>7</sup> and submitted that "sports footwear" means footwear used for sports or for games of an exercise and athletic character involving some kind of bodily exercise. With regard to the trade meaning, counsel referred to the evidence of several witnesses involved in different aspects of the trade. He noted that the consistent response was that the goods were designed for a sporting activity, with the proper support, cushioning and flexibility required for that activity.

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4. *Nikka Industries Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal No. AP-90-018, August 20, 1991.

5. *The Deputy Minister of National Revenue for Customs and Excise v. Trane Company of Canada, Limited*, [1982] 2 F.C. 194.

6. R.S.C., 1985, c. 41 (3rd Supp.).

7. Oxford: Clarendon Press, 1989, Volume XVI.

Counsel argued that the Saucony InStep 6220 fitness walking shoes are sports footwear. The shoes are designed and used for fitness walking, which, he submitted, is a sport. Also, the U.S. importer and the appellant are members of sporting goods associations, the invoices for the goods describe them as athletic footwear, all marketing materials for the shoes introduced into evidence were consistent in being aimed to the sports market and the shoes are sold through sports stores and not ordinary shoe stores. Counsel further submitted that the shoes cannot be considered dress or casual women's footwear as they are not designed for cosmetic appeal.

Referring to the definition of sports footwear in the Tribunal's statement of reasons, counsel argued that the shoes have "bars," being the flex pattern found on the rubber outsole.

Counsel for Avreca International Inc., the first intervenor, adopted the position and arguments of the appellant. Referring to the grammatical structure of the statement of reasons, it was stressed that the definition of sports footwear was not all inclusive. As further support, counsel noted the use of the phrase "or the like" in the Tribunal's statement of reasons which suggests that sports footwear contains components not specifically listed.

Counsel submitted that the Tribunal must construe the term "sports footwear" the same way that it would construe a statute. As such, any evidence as to what was intended in the investigation or inquiry is irrelevant. It is the words themselves, within the context of the statement of reasons and the finding, which must be strictly interpreted. With regard to the relationship between the phrase "sports footwear" in the finding and the definition found in the statement of reasons, it was submitted that the latter should be used as an interpretative guide or source of construction for the finding.

With regard to whether fitness walking is a sport, counsel advocated the definition of "sport" provided by his witness, Mr. Mark Fenton, who was a competitive fitness walker with both academic and professional experience in the activity. He suggested that a sport is an activity undertaken in leisure for exercise or medical benefit, which activity can be drawn to a competitive level, including self-competition.

Counsel for the respondent noted that the term "sports footwear," as used in the Tribunal's finding, is ambiguous and cited authority<sup>8</sup> for referring to the extended definition found in the Tribunal's statement of reasons. He submitted that to qualify for the exclusion as sports footwear, the goods must be specifically named or meet two conditions. First, they must be designed for a sporting activity. Second, they must have, or have provision for the attachment of, spikes, sprigs, stops, clips, bars or the like.

Counsel noted that there is no authoritative definition of a fitness walking shoe, nor are there any trade standards that would distinguish a fitness walking shoe from a casual walking shoe. He submitted that there was insufficient evidence to distinguish the two and to establish that the goods in issue are fitness walking shoes or, indeed, sports footwear. He submitted that all shoes designed for walking are not sports footwear. Simply because the shoes are manufactured by an athletic shoe manufacturer does not make them sports shoes. Nor is that status obtained if the shoe is marketed through a retail sporting goods store. He denied that fitness walking was a sport, as a sporting activity would involve some form of competition between two or more people. Rather, it should be viewed as a form of exercise.

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8. *Supra*, footnote 5, at 205-06.

Counsel argued that the second condition of the test was not met. He noted that the specifications of the goods that accompanied the appellant's brief did not describe the flex pattern on the outsole as a "bar." Nor was it described as such in any literature. He argued that the term "bar" is defined as a "strap" in a technical dictionary and manual of shoemaking introduced by the witness for The Shoe Manufacturers' Association of Canada (SMAC).

Counsel for SMAC, the second intervenor, adopted the arguments of the respondent. He noted that SMAC, the complainant that initiated the inquiry leading to the 1990 finding of the Tribunal, suggested the exclusion for sports footwear based on the Harmonized System of tariff classification. It was that definition that was adopted by the Deputy Minister in the final determination of dumping and used by the Tribunal in its statement of reasons. Counsel argued that, under the Harmonized System, sports footwear is classified under subheading Nos. 6403.11 and 6403.19. He noted that the shoes in issue, on importation into Canada, were classified under tariff item No. 6403.99.00.91. Therefore, they were not classified as sports footwear under the Harmonized System definition adopted by the Tribunal in its statement of reasons. Counsel concluded by stating that the subject shoes could only be excluded from the finding of the Tribunal as sports footwear if they met the Harmonized System definition of such or were specifically named in the Tribunal's statement of reasons.

In interpreting the meaning of "sports footwear" as used in the 1990 finding of the Tribunal, reference was made to the extended definition of such footwear as found in the accompanying statement of reasons. The Tribunal agrees with the test advocated by counsel for the respondent to determine whether the model of shoes in issue qualifies for an exclusion from that finding as sports footwear. The shoes must be specifically named in the extended definition or meet two conditions. They must be designed for a sporting activity and have, or have provision for the attachment of, spikes, sprigs, stops, clips, bars or the like.

The Tribunal notes that walking shoes, for fitness or otherwise, are not named in the extended definition of sports footwear. Of those that are named, the Tribunal considered the shoes in issue to be similar to jogging shoes or running shoes. However, in examination and on questions from the Tribunal, several of the appellant's witnesses indicated that walking shoes are distinct from running or jogging shoes. For instance, Mr. Neil Slepian, who is the manager of Research and Development for Hyde Athletic Industries, Inc., testified that the shoes in issue would have made better running shoes than those sold for that purpose 20 years ago. He indicated, however, that in his opinion the fitness walking shoes are not running shoes. Similarly, Mr. John Vicario, who is president and part owner of the appellant company, testified that walking shoes require features different from running shoes, which are not right for fitness walking. Again, Ms. Susan A. Fawcett, who both fitness walks and jogs, indicated that she would not go jogging in her pair of fitness walking shoes. The Tribunal also received evidence on the biomechanical design of the Saucony InStep 6220 fitness walking shoes that uniquely adapts them to the mechanics of fitness walking. The Tribunal concludes, therefore, that the walking shoes are not jogging or running shoes, which are excluded from its 1990 finding.

With regard to the two-condition test, the Tribunal did not find it necessary to conclude whether fitness walking qualified as a sporting activity. It acknowledges the difficulty in determining what constitutes a sport or sporting activity as opposed to an athletic activity. The Tribunal concluded that the flex tread pattern found on the outsole of the shoes did not constitute a bar. Rather, it adopted the definition presented on behalf of SMAC, where a bar was defined as a strap. The appellant did not convince the Tribunal that the shoes had, or had provision for the attachment of, spikes, sprigs, stops, clips or bars. Nor was the Tribunal

persuaded to believe that the tread pattern or any other feature of the shoes would be encompassed by the phrase "or the like."

Accordingly, the appeal is dismissed.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Charles A. Gracey  
Charles A. Gracey  
Member