CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, May 4, 1992 **Appeal No. AP-91-130**

IN THE MATTER OF an appeal heard on February 11, 1992, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) as amended;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated August 13, 1991, with respect to a request for a re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

C.J. MICHAEL FLAVELL **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The majority of the Tribunal believes that, given the scheme of the *Customs Tariff*, a houseboat was imported into Canada and properly classified by the respondent under tariff item No. 8903.92.00. The value for duty of the houseboat should be set at $20,000 as requested by the appellant. The Tribunal does not have the jurisdiction to determine whether the appellant qualified for duty relief pursuant to the "Canadian Goods Abroad" provisions, being section 88 to 92, of the *Customs Tariff*. (Member Gracey dissenting)

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-91-130

C.J. MICHAEL FLAVELL **Appellant**

and

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

A new marine engine was installed in New York on a Canadian-manufactured houseboat. The appellant claimed that he imported an inboard-outboard marine engine, classifiable under tariff item No. 8407.29.10 as an inboard-outboard marine propulsion engine. He claimed that the value of that engine was $6,056.15. In the alternative, he claimed that the value of the houseboat including the engine, at the time of importation, was $20,000. Counsel for the respondent argued that goods originating in Canada and exported therefrom may re-enter Canada duty free under tariff item No. 9813.00.00 if they are returned without having been advanced in value or improved in condition by any process of manufacture or other means, or combined with any other article abroad. However, because the engine was installed in the houseboat while it was in the United States, the goods are excluded from that tariff item. Counsel submitted that the goods are properly classified under tariff item No. 8903.92.00 as a motorboat, other than an outboard motorboat. The respondent assessed the boat's value for duty at $33,465.

HELD: *The appeal is allowed in part. The majority of the Tribunal believes that, given the scheme of the Customs Tariff, a houseboat was imported into Canada and properly classified by the respondent under tariff item No. 8903.92.00. The value for duty of the houseboat should be set at $20,000 as requested by the appellant. The Tribunal does not have the jurisdiction to determine whether the appellant qualified for duty relief pursuant to the "Canadian Goods Abroad" provisions, being sections 88 to 92, of the Customs Tariff. (Member Gracey dissenting)*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 11, 1992*
Date of Decision:	*May 4, 1992*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Michèle Blouin, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*C.J.M. Flavell and G. Kubrick, for the appellant* *H. Baker, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-130

C.J. MICHAEL FLAVELL **Appellant**

and

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

TRIBUNAL: W. ROY HINES, Presiding Member
MICHÈLE BLOUIN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal pursuant to section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) made pursuant to section 63 of the Act. As the decision of the Deputy Minister was limited to a consideration of tariff classification and value for duty, an appeal of that decision is also limited to the issues of tariff classification of the imported goods and their value for duty.

In their briefs, the parties raised several issues concerning the scope of this Tribunal's jurisdiction on an appeal under section 67 of the Act. At the beginning of the hearing, counsel acknowledged that the Tribunal did not have the jurisdiction to determine whether the appellant qualified for duty relief under section 88 of the "Canadian Goods Abroad" provisions of the *Customs Tariff*.[2] As such, the issues were narrowed and the parties proceeded on that basis. The majority of evidence and argument was directed to the issue of what was, in fact, imported for purposes of tariff classification. As the Tribunal must decide the tariff classification of the imported goods in issue, it considered itself seized with the jurisdiction to determine what was imported for purposes of proper tariff classification.

There is no dispute between the parties that a new marine engine was installed in New York on a Canadian-manufactured houseboat. The appellant claimed that he imported an inboard-outboard marine engine, classifiable under tariff item No. 8407.29.10 as an inboard-outboard marine propulsion engine. He claimed that the value of that engine was $6,056.15. In the alternative, he claimed that the value of the houseboat including the engine, at the time of importation, was $20,000. Counsel for the respondent claimed that a 40-foot houseboat was imported from the United States because a new inboard-outboard marine engine was installed, thus adding value to the boat and disqualifying it from classification under tariff item No. 9813.00.00. Counsel submitted that the goods are properly classified under tariff item No. 8903.92.00 as a motorboat, other than an outboard motorboat. The respondent assessed the boat's value for duty at $33,465.

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1. R.S.C., 1985, c. 1 (2nd Supp.).
2. R.S.C., 1985, c. 41 (3rd Supp.).

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The appellant is the owner of a 40-foot houseboat known as "Marmalade Skies" that is managed and operated out of a marina on Wolfe Island, near Kingston, Ontario. The houseboat, which is equipped for 12 or more passengers, is rented out to corporations and/or individuals on a daily, weekend or weekly basis. The owner of the marina and manager of the houseboat is Mr. Bob Halliday. The appellant receives a percentage of revenues for rental of the houseboat, the balance going to Mr. Halliday for his services as manager.

In July 1989, the inboard-outboard marine propulsion engine (the "marine engine") of the houseboat was damaged beyond repair while out on rental. The boat was towed to the nearest port at Clayton, New York, and fitted with a temporary engine. The temporary engine was supplied as part of the transaction to supply a new engine. Similarly, the marina kept the damaged engine as part consideration for the transaction. In the interim, the vessel continued to be used on the St. Lawrence River.

After installation of the new engine, Mr. Halliday reported to customs officials who took the position that the entire houseboat was imported into Canada. They classified the houseboat under tariff item No. 8903.92.00 as a motorboat, other than an outboard motorboat. The appellant was held liable for duty on the entire value of the houseboat, which was originally assessed at $60,000.

The appellant requested a re-determination under section 60 of the Act, which was allowed in part. The value for duty of the boat was reduced to $33,465, but the tariff classification remained unchanged. On a further re-determination under section 63, the Deputy Minister confirmed the tariff classification and value for duty.

For purposes of this appeal, the relevant provisions of the *Customs Tariff*[3] are as follows:

84.07	Spark-ignition reciprocating or rotary internal combustion piston engines.
	-Marine propulsion engines:
8407.29	--Other
8407.29.10	---Inboard-outboard engines
- -	
89.03	Yachts and other vessels for pleasure or sports; rowing boats and canoes.
	-Other:
8903.92.00	--Motorboats, other than outboard motorboats

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

The appellant argued that everything that crosses the international border is not exported or imported.[4] Reference was made to dictionary definitions of the words "export" and "import." It was argued that the definitions imply that there must be more than an accidental or temporary transition from one country to the other.

The appellant further argued that the Deputy Minister lacks the statutory authority to charge duty on Canadian goods being returned to Canada except to the extent that value is added to these goods. The legislative scheme of the *Customs Tariff* and *Customs Act* is aimed at imposing duty on goods that originate outside of Canada and are imported into Canada. It was not the intention of Parliament to empower the Deputy Minister to assess duty on goods produced, taxed, bought and paid for in Canada, by Canadian owners, which are temporarily taken outside of the country for necessary repairs. Any legislative intent to grant such a broad and unchecked taxing power requires clear and express wording to that effect.

In cases where there exists reasonable uncertainties or ambiguities in the provisions of a taxing statute, courts and tribunals will adopt an interpretation of the statute that favours the taxpayer.[5] This principle is equally applicable to cases where the uncertainty or ambiguity results from the interplay of several legislative instruments.[6] Counsel argued that there is no clear and unambiguous language in the relevant legislation to support the contentions of the respondent.

With regard to the value of the boat, counsel for the appellant referred to exhibit A-8, being a letter signed by Mr. Tim Cunningham who has been the President and General Manager of Rideau Marina for over five years. Mr. Cunningham testified that he is familiar with the appellant's houseboat and is knowledgeable as to the market value of such boats. He testified that the market value of Marmalade Skies was $20,000 at the time of re-entry into Canada.

The appellant stated that tariff item No. 9813.00.00, which is relied upon by the respondent, is not a taxing provision, rather, it is an exempting provision. Also, the use of the General Rules for the Interpretation of the Harmonized System[7] (the General Rules) by the respondent, for purposes of concluding that a boat was imported as opposed to a motor, is incorrect. Such rules are used for tariff classification purposes and not to determine what was imported.

Counsel for the respondent argued that goods originating in Canada and exported therefrom may re-enter Canada duty free under tariff item No. 9813.00.00 if they are returned without having been advanced in value or improved in condition by any process of manufacture or other means, or combined with any other article abroad. However, because the engine was installed in the houseboat while it was in the United States, the goods are excluded from that tariff item. Counsel referred to the "Canadian Goods Abroad" provisions, being sections 88 to 92, of the *Customs Tariff*, arguing that Parliament considers sending goods outside of Canada for repairs to be an exportation of the goods and their return to be an importation.

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4. See, e.g. *H.S. Shergill v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 3062, June 23, 1989.
5. *Johns-Manville Canada Inc. v. Her Majesty the Queen*, [1985] 2 S.C.R. 46 at 72.
6. *Mattabi Mines Ltd. v. The Minister of Revenue (Ontario)*, [1988] 2 S.C.R. 175 at 197-8.
7. *Customs Tariff*, Schedule I.

Classification of goods shall be determined according to the terms of a heading and any relevant section or chapter notes. Counsel relied on Note 3(b) of the General Rules arguing that where goods are composite goods made up of different components, they shall be classified according to the component that gives them their essential character. Counsel argued that the essential character of the goods is that of a houseboat. Heading No. 89.03 provides for vessels used for recreational purposes and tariff item No. 8903.92.00 provides for inboard-outboard motorboats exceeding six metres in length. Accordingly, the respondent properly classified the goods.

Mr. Kenneth Sorensen, who is presently the Senior Programs Officer with the Valuation Division of Canada Customs, testified that he determined the value of the houseboat applying section 50 of the Act in a flexible manner pursuant to section 53 of that Act. Rocko Marina of Kamloops, British Columbia, who is a houseboat manufacturer, valued a houseboat similar to the appellant's at $33,465. Go Vacations of Toronto, who buy and sell houseboats, appraised the value at $35,000. The witness stated that, on this basis, the respondent appraised the value of the appellant's houseboat at the lower of the two values. Mr. Sorensen and the valuators never saw the appellant's boat.

The Tribunal heard evidence to the effect that the Marmalade Skies experienced engine failure and was towed to the nearest marina, being at Clayton, New York. Mr. Flavell testified that, because of commitments for rentals of the houseboat in the following weeks and because a suitable motor was not available at the marina, a temporary motor was installed until one could be obtained from Sweden. The invoice between the parties suggests that these activities were all part of a single transaction relating to the emergency, although the new engine was installed some weeks later.

There is no dispute that the Marmalade Skies is a product of Canada that was repaired in the United States after being exported for the declared purpose of repairs (it had to be returned to the New York marina both to return the temporary motor and have the new motor installed). In testimony, the appellant noted that the repairs could not be carried out by Canadian marinas within reasonable proximity of where the emergency occurred. Based on submissions of the respondent, it appears that the vessel was not exported in the prescribed manner, that is, under Canada Customs supervision and documented on the appropriate forms. Obviously, this technicality could not have been met at the time of the failure of the original motor although some effort might have been made to alert Customs officials to the situation. The first contact with Canada Customs was to report the new motor immediately following its installation.

At the outset of the hearing, the Tribunal noted that it did not have the jurisdiction to determine whether or not the appellant met the requirements for duty relief under section 88 of the "Canadian Goods Abroad" provisions of the *Customs Tariff*. As a practical matter, however, this Tribunal accepts that what was brought into Canada was a new motor as declared by the appellant at Canada Customs. There was no attempt to deceive the authorities or misrepresent the goods involved. On the contrary, the appellant entered into a contractual obligation to borrow a temporary motor and purchase a new motor as a direct consequence of an emergency situation over which it had no control.

Central to the resolution of this appeal is the meaning of the term "export" or "import" as used in the *Customs Act* or *Customs Tariff*. Neither Act gives the terms a special definition. The *Customs Act* defines "export" to mean "export from Canada," and "import" to mean "import

into Canada." The *Customs Tariff* adopts these definitions. In *Harris Bell v. Her Majesty The Queen*,[8] McIntyre, J., at pages 488-9 of the decision, stated:

> *... I do not find it necessary to make extensive reference to dictionaries in order to define the word "import". In my view, since the Narcotic Control Act does not give a special definition of the word, its ordinary meaning should apply and that ordinary meaning is simply to bring into the country or to cause to be brought into the country....*

The majority believes that the ordinary meaning of the word "import" is applicable to the *Customs Act* and *Customs Tariff*. It adopts this definition of "import," meaning to bring into the country or cause to be brought into the country.

In defining the word "export," reference is made to *Old HW-GW Ltd. v. Canada*,[9] where Strayer, J. stated:

> *The two most pertinent Canadian cases involving interpretation of "goods exported" or "goods ... for export", expressions used there to describe goods exempted from certain sales taxes, both expressed the view that "export" normally involves the transfer of goods from one country to another.*

After referring to dictionary definitions of the verb "to export," Strayer, J. went on to state:

> *... It would appear from these definitions that apart from the literal meaning of its Latin roots, ex portare, meaning to carry out or away, the most natural meaning in a commercial context for the term "export" or "exportation" is the sending of goods from one country to another, foreign, country.*

The majority believes that the ordinary meaning of the word "export" is also applicable to the *Customs Act* and the *Customs Tariff*. It adopts the definition of "export," meaning to send out from one country and into another or cause to be sent out from one country and into another.

The scheme of the Act clearly establishes that Canadian goods may be returned to Canada free from customs duty under tariff item No. 9813.00.00 where they have not been advanced in value or improved in condition or combined with any other article. It also provides that where Canadian goods have been repaired, work has been done or equipment added, outside Canada, relief may be provided from customs duties otherwise payable. Subsection 88(1) of the *Customs Tariff* deals with situations where goods have been exported in the prescribed manner for the purpose of having the repairs, work done or equipment added. Relief under this subsection does not include those duties payable on the value of the repairs, work done or equipment added; and duties are payable at the rate applicable to the imported goods. Subsection 88(2) deals with situations where emergency repairs to aircraft, vehicles or vessels were required to ensure their safe return to Canada. Relief under this subsection is provided for the whole of the duties that would otherwise be payable on the imported goods.

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8. [1983] 2 S.C.R. 471.
9. File Nos. T-560-87, T-602-87 and T-690-87, unreported, April 17, 1991, Federal Court of Canada - Trial Division.

Pursuant to section 19 of the *Customs Tariff*, when goods enumerated in Schedule I of that Act are imported into Canada, customs duties at the rates set out in that Schedule must be paid. When the Marmalade Skies left Canadian territorial waters, technically, it was exported from Canada. Similarly, when it returned to Canada it was, technically, imported. Therefore, pursuant to section 19, the boat had to be classified under Schedule I. The evidence is clear that the houseboat returned to Canada in an improved condition, possessing a new motor. As such, it was not classifiable under tariff item No. 9813.00.00. As stated above, the Tribunal does not have the jurisdiction to determine whether the appellant qualified for duty relief under section 88 of the *Customs Tariff*. Consequently, customs duties are payable on the full value for duty of the vessel.

With regard to the value for duty, since no transaction occurred in respect of the houseboat *per se*, a value had to be established using the best information available. Mr. Sorensen based his decision on quotations from two independent Canadian firms while the appellant asserts that the value suggested by Mr. Cunningham would be more appropriate. We note that the value for duty was applied under the residual provisions of section 53 of the Act. As such, the value assigned to the Marmalade Skies may have been higher than that which would have been obtained by considering the sale of a similar vessel of the same vintage built in the United States. Indeed, the record suggests that no effort was made to determine the value of a similar vessel in the United States. Nor was Mr. Sorensen familiar with the particular vessel in issue. On the other hand, Mr. Cunningham testified that he had dealt with Three Buoys houseboats, was knowledgeable as to their market value and estimated that one of these boats in January 1990 would have a market market value of $20,000 if in good condition. Given this evidence, the majority believes that Mr. Cunningham's estimate provides a better indication of the value of the houseboat in the Thousand Islands area than that provided by the sources relied on by Revenue Canada.

The appeal is allowed in part. The majority of the Tribunal believes that, given the scheme of the *Customs Tariff*, a houseboat was imported into Canada and properly classified by the respondent under tariff item No. 8903.92.00. The value for duty of the houseboat should be set at $20,000 as requested by the appellant. The question of relief from taxes, and duties pursuant to the "Canadian Goods Abroad" provisions, being sections 88 to 92 of the *Customs Tariff*, is a subject of consideration by the Federal Court or other appropriate authorities as the Tribunal does not have the jurisdiction to determine whether the appellant qualified for duty relief under those provisions.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

DISSENT OF MEMBER GRACEY

I respectfully dissent from the majority decision and would find for the appellant for the following brief reasons.

The facts of this case are not in dispute and are adequately set out by the majority.

The scheme of the Act and the apparent intent of Parliament favours the appellant in this matter.

The Act defines "import" to mean "import into Canada." Given this rather unilluminating definition, recourse to dictionaries is necessitated. Such definitions are replete with references to commerce or to the fact that the goods come from a foreign source. Thus, while a superficial definition might imply that anything that enters Canada is imported, I cannot disregard the more complete meaning. For example the Shorter Oxford English Dictionary defines "import" as:

> *Import -* *1. To bring in; to introduce from abroad, or from one use or connection to another 2. To bring in (goods or merchandise) from a foreign country, in international commerce.*

It would appear, therefore, that there is a better description than "imports" for goods of Canadian origin returned to Canada. The definitive term would be "goods returned;" and indeed the *Customs Tariff* uses that term for purposes of duty relief.

I am therefore persuaded that since importation implies goods originating from a foreign source, and since there was clear evidence that the houseboat itself was of Canadian origin, the only good that was imported was the marine engine.

I am also persuaded that the scheme of the *Customs Act* and the *Customs Tariff* and the intent of Parliament is to only apply an import duty to foreign goods entering Canada. Certainly the right exists in law to apply duty to goods of Canadian origin if, and to the extent that, it cannot be established that they were of Canadian origin. But where proof exists that the goods at issue are partly of Canadian origin, I see no express intent anywhere in the legislation to exact a duty on their return to Canada. There are measures, to be sure, that provide for the proper notices and prescribed procedures for Canadian goods returned that have been advanced in value. However, these procedures are very clearly intended to enable Customs officials to determine to what extent Canadian goods were advanced in value in order to collect duty on that advanced value, again affirming the intent of Parliament. One appreciates the need for these provisions, but one should also appreciate their purpose, that being to establish clearly that which is dutiable.

The cautionary clauses in subsections 88(1) and (2) which that " ... relief shall be granted from ... the duties ... that, but for this section, would be payable in respect of goods ... vehicles ... returned to Canada" have been construed to mean that goods returned to Canada are automatically dutiable. My view is that they are dutiable only where it cannot be established that they are, in fact, Canadian goods returned. The prescribed measures serve that purpose, and failure to follow them to the letter need not be fatal where alternative and sufficient proof of Canadian origin and value added has been provided. In the case before us there was uncontroverted evidence that the houseboat was of Canadian origin and that a new engine was

installed following an engine failure. The fact that the engine was installed has also been adequately explained as a matter of practical necessity.

As it was the intention of Parliament to make foreign goods entering Canada dutiable and ample evidence was presented that only a marine engine of foreign origin was installed in a Canadian houseboat, it is my opinion that duty should be payable only on that engine. The marine engine should be classified as argued by the appellant. Secondly, I hold that even if it had been determined that a houseboat had been imported, the scheme of the Act is clear that any duty should apply only to the advanced value.

Charles A. Gracey
Charles A. Gracey
Presiding Member