

Ottawa, Monday, September 14, 1992

Appeal No. AP-91-235

IN THE MATTER OF an appeal heard on August 10, 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 March 2, 1992, with respect to a request for
re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

JOLLY JUMPER INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-235

JOLLY JUMPER INC.

Appellant

and

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

Respondent

The nursing pads/breast shields imported by the appellant are "similar sanitary articles" within the meaning of the statutory concessionary provisions of Code 2519 of Schedule II to the Customs Tariff.

HELD: *The appeal is allowed.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: August 10, 1992
Date of Decision: September 14, 1992*

*Tribunal Members: Michèle Blouin, Presiding Member
W. Roy Hines, Member
Charles A. Gracey, Member*

Counsel for the Tribunal: Brenda C. Swick-Martin

Clerk of the Tribunal: Janet Rumball

*Appearances: John Armstrong, for the appellant
Meg Kinnear, for the respondent*

Appeal No. AP-91-235

JOLLY JUMPER INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
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Respondent

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

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*.¹

The appellant is an importer of washable nursing pads/breast shields. The goods in issue are designed to be worn inside a brassiere or undershirt by nursing mothers to protect clothing from the leakage of breast milk.

The nursing pads/breast shields in issue were imported by the appellant on October 23, 1990, and were classified under tariff item No. 6307.90.99.90 of the *Customs Tariff*² as "Other made up articles." The issue in this appeal is whether the goods in issue are eligible for the statutory concessionary provisions of Code 2519 of Schedule II to the *Customs Tariff*, as requested by the appellant.

The relevant tariff items and code are as follows:

6307.90.99 ----Of other textile materials

6307.90.99.90 -----Other made up articles

2519 *Incontinent briefs, underpants, panties, napkins (diapers), napkin (diaper) liners and similar sanitary articles of heading No. 48.18, 56.01, 61.07, 61.08 or 63.07, designed to be worn by persons, excluding those of a kind for babies*

Neither the appellant nor the respondent presented witnesses during the hearing.

Counsel for the appellant argued that the goods in issue qualify as "similar sanitary articles" within the meaning of Code 2519. Counsel submitted that Code 2519 includes articles, such as incontinent briefs, underpants, panties, napkins (diapers), napkin (diaper) liners, all of

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

which serve the purpose of either collecting or restricting the release of bodily fluids or bodily waste. Counsel also presented several definitions of the word "incontinence" in support of his argument that the nursing pads/breast shields are used to restrain or withhold the natural bodily fluid of lactose that comes from females who have had children and are, therefore, similar sanitary articles for the purposes of Code 2519.

Counsel for the respondent submitted that the goods in issue are not eligible for the concessionary provisions of Code 2519 for several reasons. First, the breast shields are not specifically listed in Code 2519, and they cannot be considered as "similar sanitary articles" because, unlike the other items listed in Code 2519, breast shields are not for incontinence. Counsel presented several dictionary definitions to support the argument that "incontinence" is usually defined as the inability to retain urine, semen or feces due to loss of sphincter control. Counsel argued that the excretions collected by breast shields are of a different nature, as they are brought on by hormonal changes caused by pregnancy and childbirth and, therefore, could not be equated with incontinence. Second, the breast shields are worn on the upper part of the body; they should be distinguished from all the items listed in Code 2519, which are worn on the lower body in underpants.

The Tribunal has reviewed the evidence and arguments put forth by the parties and finds that the nursing pads/breast shields are "similar sanitary articles" to the items listed in Code 2519. The Tribunal finds that the goods in issue have a sanitary purpose in that they are designed to be worn by persons, other than babies, namely, nursing mothers, to prevent breast milk from leaking onto brassieres or undershirts and blouses.

The Tribunal also finds that the word "incontinent" modifies all the items listed in Code 2519 including "similar sanitary articles." The Tribunal has reviewed the dictionary definitions of "incontinence" and "incontinent" presented by the parties, and relies in particular on those set out in the medical dictionaries. The Dorland's Illustrated Medical Dictionary³ defines "incontinence" as the "inability to control excretory functions, as defecation ... or urination;" the Blakiston's Gould Medical Dictionary⁴ defines the same term as the "Inability to control the natural evacuations, as the feces or the urine; specifically, involuntary evacuation due to organic causes;" and the Illustrated Stedman's Medical Dictionary⁵ defines "incontinence" as the "Inability to prevent the discharge of any of the excretions, especially of urine or feces" (emphasis added), and then lists many different kinds of incontinence, one being "i. of milk, galactorrhea." "Galactorrhea," in turn, is defined in the Blakiston's Dictionary⁶ as the "Excessive or spontaneous flow of milk."

Upon review of these definitions, the Tribunal finds that there can be different types of incontinence and that the term is not limited to urinary or fecal incontinence, but rather includes, as the definition of the term in the Illustrated Stedman's Dictionary indicates, incontinence of milk or galactorrhea. A common feature of all the medical dictionary definitions of the word "incontinence" is the inability to prevent the discharge of any of the natural excretions from the body, which would include breast milk. The breast shields in issue are for incontinence in that they are designed to protect clothing from the excessive and spontaneous flow of milk from a nursing mother caused by the inability to prevent such excretions.

3. Twenty-seventh edition, Philadelphia: W.B. Saunders Company, 1988, p. 829.

4. Fourth edition, New York City: McGraw-Hill Book Company, 1979, p. 669.

5. Twenty-fourth edition, Baltimore: Williams & Wilkins, 1982, p. 701.

6. *Supra*, note 4, at 541.

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member