CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 9, 1993

Appeal No. AP-92-075

IN THE MATTER OF an appeal heard on February 19, 1993, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated July 3, 1992, pursuant to section 59 of the *Special Import Measures Act* with respect to requests for re-determination under section 58 of the *Special Import Measures Act*.

BETWEEN

M & M TRADING INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed (Presiding Member Macmillan dissenting).

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-075

M & M TRADING INC. **Appellant**

and

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

This is an appeal under section 61 of the Special Import Measures Act from two decisions of the Deputy Minister of National Revenue for Customs and Excise dated July 3, 1992, under section 59 of the Special Import Measures Act. The issue is whether the respondent correctly imposed anti-dumping and countervailing duties on footwear imported from Brazil by the appellant. The duties were imposed on the basis of the Tribunal's injury finding dated May 3, 1990, under section 42 of the Special Import Measures Act, which stated that the dumping and subsidizing of certain boots and shoes had caused, were causing and were likely to cause material injury to the production in Canada of like goods. Sandals were among the goods specifically excluded from the said finding. In considering whether the respondent correctly imposed the duties, it must therefore be determined whether the imported subject goods are sandals, as submitted by the appellant, and are, thereby, exempt from the imposition of anti-dumping and countervailing duties resulting from the Tribunal's finding, or whether they are shoes, as determined by the respondent, and therefore subject to the duties.

HELD: *The appeal is allowed. The footwear imported by the appellant satisfies the general physical criteria for sandals. The inclusion of the word "generally" in the above-mentioned criteria established by the Tribunal in its statement of reasons dated May 18, 1990, to the above-mentioned finding suggests that footwear that does not meet all of the stated criteria may still be considered to be sandals. Therefore, the footwear in question is excluded from the Tribunal's injury finding and is not subject to anti-dumping and countervailing duties (Presiding Member Macmillan dissenting.)*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 19, 1993*
Date of Decision:	*September 9, 1993*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk for the Tribunal:	*Dyna Côté*
Appearances:	*Michael Kaylor, for the appellant* *Christine Hudon, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-075

M & M TRADING INC. **Appellant**

and

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

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] (SIMA) from two decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated July 3, 1992, pursuant to section 59 of SIMA. The issue is whether the respondent correctly imposed anti-dumping and countervailing duties on footwear imported from Brazil by the appellant. The duties were imposed on the basis of the Tribunal's injury finding[2] (the Tribunal's finding) dated May 3, 1990, under section 42 of SIMA, which stated that the dumping and subsidizing of certain boots and shoes had caused, were causing and were likely to cause material injury to the production in Canada of like goods. Sandals were among the goods specifically excluded from the Tribunal's finding. In considering whether the respondent correctly imposed the duties, it must therefore be determined whether the imported subject goods are sandals, as submitted by the appellant, and are thereby exempt from the imposition of anti-dumping and countervailing duties resulting from the Tribunal's finding, or whether they are shoes, as determined by the respondent, and therefore subject to the duties.

At issue in this appeal are two separate importations of ladies' leather footwear. The first under consideration is referred to as Entry A and consisted of 275 cartons, out of a total shipment of 1,199 cartons which entered Canada under Canada Customs Coding Form No. 12351-040047441 dated March 1, 1991. Entry B consisted of a shipment by air of 62 cartons which entered Canada under Canada Customs Coding Form No. 12351-040041902 dated January 30, 1991. The relationship between the two entries is that they were separate parts of the same original order placed with the Brazilian supplier, Jacy Comércio e Exportação Ltda. (Jacy).

The shipment containing the 1,199 cartons was found, upon arrival, to consist of two components. Of the 1,199 cartons entered, 924 were declared to be "sandals" and had been purchased from a Brazilian manufacturer called Kalce. The 275 remaining cartons were declared to be "shoes" and had been purchased from Jacy. The goods in the 924 cartons imported from

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1. R.S.C. 1985, c. S-15.
2. *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; Statement of Reasons dated May 18, 1990.

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Kalce were determined by officials of the Department of National Revenue (Revenue Canada) to be shoes and were seized on the basis that they were misdeclared as sandals. The contents in the remaining 275 cartons (the subject goods), which were considered properly declared as shoes, were processed under Canada Customs Coding Form No. 12351-040048088 dated March 27, 1991, (Entry A) and released to the appellant upon payment of anti-dumping and countervailing duties.

On June 5, 1991, the appellant filed revised customs documentation describing the subject goods in Entry A as ladies' leather sandals, along with a sample identified by the appellant as being style number 6009, and requested a re-determination on the basis that the subject goods were sandals, not shoes. On September 19, 1991, under section 57 of SIMA, a designated officer of Revenue Canada re-determined that the subject goods of both Entries A and B were women's leather shoes. On November 5, 1991, Mr. S. Salvatore, the appellant's customs broker, filed a request for re-determination which was subsequently denied. Finally, in response to a further request for re-determination by the appellant, the Deputy Minister issued a notice of re-determination under section 60 of SIMA on July 3, 1992, which stated that the subject goods of both Entries A and B were women's leather shoes.

Since the parties do not dispute that the goods in Entries A and B are part of the same original order placed with Jacy, the Tribunal believes that a determination of the nature of the goods in Entry A also settles the matter for the goods in Entry B.

At the commencement of the hearing, the witness for the appellant, Mr. Joerg Peschlow, President of M & M Trading Inc., identified footwear bearing a label marked style 6009 as a sample of the subject goods which the appellant imported under both Entries A and B and which are the subject of this appeal. He confirmed that the subject goods were purchased from Jacy in Brazil, that the only product that Jacy manufactured for the appellant was style 6009 and that Entries A and B relate to the one and only purchase that the appellant made from Jacy.

Mr. Peschlow stated that the subject goods in the 275 cartons (Entry A) were misdescribed as shoes and that Jacy was responsible for this misdescription. He explained that this type of error is not uncommon since the exporters do not speak English and do not distinguish between shoes and sandals. He referred to the Canada Customs invoices which were all signed by a representative of Jacy and which described the subject goods as shoes. He explained that these invoices would in turn be used by the broker to prepare the Canada Customs coding form and, in some instances, by the forwarding company to prepare the shipping documents.

To support his view that the goods were misdescribed by the exporters, Mr. Peschlow identified four purchase orders for various customers: A4562, A4563, A4558 and A4576, which he cross-referenced to the corresponding Canada Customs invoices and invoices from Jacy. He pointed out that all of the purchase orders described the subject goods as sandals and that the footwear that he had identified as style 6009 was the same as the subject goods that the appellant imported in the 275 cartons under Entry A and described as sandals in the invoices.

Mr. Peschlow brought with him an unopened box which, he stated, contained some of the unsold stock originally imported as part of the 275 cartons of Entry A. He cross-referenced the numbers on the box with the numbers on the packing list from Jacy dated January 17, 1991, and confirmed that style 6009, purchase order numbers A4562 and A4563 and stock numbers 131104 and 135104 were marked on the box and were the same as the numbers on the

packing list. He then opened the box and identified the contents as being the same as the footwear that he had earlier identified as style 6009.

Mr. Peschlow stated that Mr. Salvatore made the declaration at the time of the importation, but that he would not have been certain of the contents of the cartons and would have relied on the documentation accompanying the cartons.

Two witnesses appeared on behalf of the respondent. The first witness, Ms. Nancy Létourneau, Tariff and Value Administrator for Revenue Canada, stated that her function is to determine the classification and origin of goods, and whether anti-dumping duties are to be imposed. She stated that she had examined samples of the subject goods declared under the original Canada Customs Coding Form No. 12351-040047441 dated March 1, 1991, which, according to her report, consisted of shoes of styles 6063, 6089X, 6377, 6379 and 6009. She stated that, in her opinion, the footwear identified by Mr. Peschlow as style 6009 was a sandal, but was not the same as the style of footwear that she had examined as part of Entry A.

During cross-examination by counsel for the appellant, Ms. Létourneau stated that she had not personally viewed the container in which the subject goods were shipped and had only been asked to examine the five samples brought to her by other officials to determine whether they were shoes or sandals.

The second witness for the respondent, Mr. Robert Derome, an investigator for Revenue Canada, stated that he was in charge of the investigation concerning the importation of the 1,199 cartons of which the 275 cartons, subsequently referred to as Entry A, were a part. He confirmed that the container was found to contain five different styles of footwear. He entered samples of four of these styles as exhibits, all of which had been described as sandals, but were actually shoes. The fifth sample was, in Mr. Derome's opinion, correctly described as a shoe, and the cartons were, therefore, released and no sample of the subject goods was retained.

Mr. Derome stated that he had advised Mr. Salvatore that the 275 cartons containing the subject goods would be released upon the payment of anti-dumping and countervailing duties since they had been accurately declared to be shoes and were, therefore, subject to the Tribunal's finding. He confirmed that the declaration provided that the subject goods in the 275 cartons were style 6009, but that the footwear that he had examined relating to the shipment did not resemble the footwear identified by Mr. Peschlow to be style 6009.

Mr. Derome stated that he had not personally opened any of the cartons. He explained that customs officers opened the cartons. To his knowledge, not all of the cartons were opened. The officers normally examine the labels on the cartons to see what style of footwear is contained therein and then remove a sample from the carton. The officers then open another carton bearing a label referring to the same style and remove a sample from that carton. If, after having compared the two samples, the officers are satisfied that they are the same, the officers will normally conclude that all cartons bearing the same label contain the same style of product.

Mr. Derome confirmed that, at the time of importation of the 62 cartons of footwear by air under Entry B, no examination was made. He stated that, since the footwear related to purchase order number A4558, part of which was imported under Entry A, it was reasonable to assume that the footwear under Entry B was the same as the footwear under Entry A that had been examined and determined to be shoes.

Mr. Derome stated that, had he examined the footwear removed from the carton at the hearing and identified by Mr. Peschlow to be style 6009, he would have classified it as a sandal.

Counsel for the appellant submitted that Mr. Peschlow's testimony, as well as the unopened box containing footwear identified by Mr. Peschlow to be style 6009, and which showed numbers corresponding to one of the purchase orders in issue, demonstrates that what was actually imported by the appellant were sandals of style 6009. Counsel further pointed out that the uncertainty over how many cartons were actually opened and the failure to keep a sample of the item now in dispute, or even to describe that sample, lead to the conclusion that the most reliable evidence before the Tribunal was the testimony of Mr. Peschlow and the physical presentation of the unopened box.

Counsel for the respondent submitted that Revenue Canada correctly applied the anti-dumping and countervailing duties to the importations of the subject goods on the basis of the appellant's initial declarations at the time of importation and the verification of these declarations by customs officers that the subject goods were shoes. Counsel referred to the decision of the Federal Court of Canada, Trial Division, in *The Queen v. Caisses Enregistreuses Métro Canada Ltée*[3] which, she submitted, stands for the principle that a declarant, under the *Customs Act*,[4] has the burden of proving good faith, a lack of blameworthy conduct and efforts to ensure accuracy, where a mistake is made in a declaration. In counsel's view, this principle is equally applicable to this appeal.

Counsel also referred to the decision of the Federal Court of Canada, Trial Division, in *André Noël and André Noël Limitée v. The Queen*[5] and, in particular, to the statements of Justice Addy that, after the goods are released, there is no way for customs inspectors to establish whether the shipment did or did not contain all of the items covered by the declarations.

Finally, counsel argued that there is doubt as to the conclusiveness of the appellant's evidence. Counsel specifically referred to the alleged misdescriptions of the subject goods by two different manufacturers at the same time, to the fact that Mr. Peschlow did not actually see the subject goods before their release and, finally, to the fact that Mr. Salvatore had declared the subject goods to be shoes, and knew the shipment had been released on that basis, in support of this argument.

In this appeal, the appellant must demonstrate that the Deputy Minister incorrectly re-determined that the subject goods were of the same description as the goods to which the Tribunal's statement of reasons to the above-mentioned finding applies.

Mr. Peschlow provided copies of the documentation relating to both Entries A and B, namely, the purchase orders, the bills of lading, the shipping documents, the invoices and the customs documentation. He was able to cross-reference the subject goods referred to on the customs documentation back to their purchase orders which described the subject goods as "Ladies Leather Buffalo Sandal." He then produced one of the cartons that was processed under

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3. 11 C.E.R. 192, unreported, Federal Court of Canada (Trial Division), Appeal No. T-1682-85, April 2, 1986.
4. R.S.C. 1985, c. 1 (2nd Supp.).
5. 6 C.E.R. 72, unreported, Federal Court of Canada (Trial Division), Appeal No. T-3777-80, December 1, 1983.

Entry A and removed footwear that was the same as the footwear that he had identified as being style 6009. The witnesses for the respondent were unable to produce a sample of the subject goods to contradict Mr. Peschlow's evidence.

Mr. Peschlow produced a letter dated April 11, 1991, in which Jacy apologized for the misdescription of the subject goods and provided corrected copies of the invoices, which, as Mr. Peschlow stated, relate to the one and only purchase that the appellant made from Jacy. He also produced a letter dated May 10, 1991, in which Mr. Salvatore referred to Entry A and stated that style 6009 is a sandal.

The Tribunal is satisfied that the appellant has established, on a balance of probabilities, that the subject goods correspond to what Mr. Peschlow identified as being style 6009 and which he removed from a box showing information that was cross-referenced to the customs documentation.

Having found that the subject goods are style 6009, the Tribunal must consider whether they are of the same description as the goods to which the Tribunal's statement of reasons to the above-mentioned finding applies. In this appeal, that question can best be answered by determining whether the subject goods are sandals which are specifically excluded from the Tribunal's finding. The witnesses for the respondent and counsel for the respondent stated that, if the subject goods are what Mr. Peschlow identified as style 6009, there is no question that the subject goods are sandals. The Tribunal agrees with this conclusion. The criteria for determining whether footwear is a sandal are those set out in the Tribunal's statement of reasons to the above-mentioned finding, namely:

> *[S]andals were generally defined as an open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment, in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, did not exceed two centimetres.*[6]

The Tribunal finds that the subject goods meet these general physical criteria.

The majority of the Tribunal, therefore, allows the appeal.

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

6. *Supra*, note 2 at 4.

DISSENTING OPINION OF PRESIDING MEMBER MACMILLAN

In my opinion, the resolution of this appeal does not turn on whether the goods identified by Mr. Peschlow as style 6009 are sandals. I accept, as did counsel for the respondent and the respondent's witnesses, that the item produced at the hearing, as style 6009, is a sandal. The real issue is whether the goods imported in March 1991 are the same as the style 6009 introduced at the hearing and now pronounced to be sandals.

Counsel for the appellant attached great weight to the fact that the witnesses for the respondent could not produce a sample of the subject goods which they had examined and released as shoes. I do not consider this unusual, given the circumstances leading up to the release of the goods. The goods were labelled as shoes by the exporter and had been so identified by the appellant's agent, Mr. Salvatore, when he signed the customs declaration. Further, the evidence indicated that Mr. Salvatore met, on several occasions, with customs officials before the release of the goods to discuss discrepancies in labelling and that he had been present for the emptying of the container. The officers had no reason to keep a sample of the goods since they had examined them and determined that they were shoes.

To require Revenue Canada to retain a sample of each product imported into Canada in case the importer later changes its mind on what was actually imported imposes, in my view, an unreasonable burden on citizens and customs officials. It follows that, if an importer does change its mind after making such a declaration, it, and not Revenue Canada officials, faces the onus of establishing that it had misdeclared the goods.

I do not believe that the appellant discharged its onus in this case. It did not produce any witnesses (such as Mr. Salvatore) who actually viewed the subject goods at the time that they were removed from the container and could identify them as the same sandals produced at the hearing. Nor did we hear from Sears Canada Inc. or any other retailer that ordered and took delivery of style 6009 and could match them to the sandals before the Tribunal. On the other hand, we had the sworn evidence of two Revenue Canada officials who testified that the goods labelled as style 6009 that they viewed in March 1991 were not the same goods as the sandals that Mr. Peschlow identified as style 6009 at the hearing.

Accordingly, I would dismiss this appeal.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member