

Ottawa, Wednesday, December 22, 1993

**Appeal No. AP-92-180**

IN THE MATTER OF an appeal heard on April 14, 1993,  
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1  
(2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy  
Minister of National Revenue for Customs and Excise made  
under section 63 of the *Customs Act*.

**BETWEEN**

**NOMAD EAST DISTRIBUTION CORPORATION**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-180**

**NOMAD EAST DISTRIBUTION CORPORATION**

**Appellant**

**and**

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

**Respondent**

*The appellant imported scooters and their related parts into Canada. Scooters are used by individuals who have ambulatory problems. The issue in this appeal is whether the imported scooters are "of a class or kind not made in Canada ... and parts thereof" such that they fall within the purview of tariff code 2530 of Schedule II to the Customs Tariff. The classification of these goods is not in dispute.*

**HELD:** *The appeal is dismissed. The Tribunal has not been convinced that any of the differences between the imported goods and the scooters produced in Canada are sufficiently significant for these imported goods to be considered as scooters "of a class or kind not made in Canada."*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: April 14, 1993*  
*Date of Decision: December 22, 1993*

*Tribunal Members: Charles A. Gracey, Presiding Member*  
*Arthur B. Trudeau, Member*  
*Lise Bergeron, Member*

*Counsel for the Tribunal: Robert Desjardins*

*Clerk of the Tribunal: Dyna Côté*

*Appearances: Carol A. McGlennon, for the appellant*  
*Ian McCowan, for the respondent*

**Appeal No. AP-92-180**

**NOMAD EAST DISTRIBUTION CORPORATION** Appellant

and

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

TRIBUNAL: CHARLES A. GRACEY, Presiding Member  
ARTHUR B. TRUDEAU, Member  
LISE BERGERON, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from decisions of the Deputy Minister of National Revenue for Customs and Excise made under section 63 of the Act.

Manufactured in the United States by Ortho-Kinetics, Inc. (Ortho-Kinetics), the goods in issue in this appeal are electric scooters, Triumph Model 4390, and their related parts. Scooters are used by individuals who have ambulatory problems. Buyers include, for instance, elderly people suffering from arthritis or from respiratory problems. The scooters were imported into Canada by the appellant and classified under tariff item No. 8713.90.00, and their related parts under tariff item No. 8714.20.00, both with the benefit of tariff code 2530 of Schedule II to the *Customs Tariff*.<sup>2</sup> This code provides for invalid chairs "of a class or kind not made in Canada ... and parts thereof." Subsequently, in a series of decisions, the respondent removed the benefit of tariff code 2530 from the goods in issue.

The issue in this appeal is straightforward, namely, whether the goods in issue are "of a class or kind not made in Canada" such that they fall within the purview of tariff code 2530. The classification of the goods in issue is not disputed by the parties.

The appellant's first two witnesses were Messrs. Thomas Villiesse and Kevin Knapp who are employed by Ortho-Kinetics as an electrical engineer and an international sales manager, respectively. Mr. Villiesse's testimony centred on a test conducted by Ortho-Kinetics on three scooters, namely, the ones in issue and two Canadian-made scooters — the Carrette 1000 and the Fortress 2001LX (manufactured by Everest & Jennings Canadian Limited [Everest & Jennings] and Fortress Scientific Limited [Fortress], respectively). A video relating to this test was shown to the Tribunal. The purpose of the test was to look at the comparative maximum climbing ability of these scooters. The test results indicated, according to Mr. Villiesse, that the imported scooters manufactured by Ortho-Kinetics performed better in terms of climbing ability. On the same point, Mr. Knapp testified that the Triumph Model 4390 can climb a

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

25-degree grade with a 100-lb. rider. During cross-examination, Mr. Knapp told the Tribunal that the maximum weight capacity of the standard seat of the scooter is 250 lbs.

Mr. John S. Vincent, President of the appellant, also testified on its behalf. He described, in general terms, the scooters in issue, saying that they can climb a "little higher with a heavier load" than can the other scooters, that they are cosmetically attractive and that they are at the leading edge of technology within the scooter industry. He also underlined the shorter turning radius of the scooters in issue. In addition, he said that the scooter industry is a very competitive industry. As indicated during cross-examination, Mr. Vincent considers the appellant to be within the same market niche as the Canadian maker, Fortress.

Mr. Steve Elder was the respondent's first witness. Mr. Elder is currently Director of Biomedical Engineering at Victoria Hospital in London, Ontario, and Chairman of the Board of Directors of the Canadian Adaptive Seating and Mobility Association. He is responsible for the Mobility Devices Evaluation Program. The purpose of this program is to evaluate scooters which are in the marketplace, with an aim to ensuring compliance with the standards of the Ontario Ministry of Health and, thus, qualifying for an approved funding list for scooters. Mr. Elder explained in detail the standardized testing regime for scooters. Some of these standards relate to the climbing ability of the scooters, such as dynamic and static stability. Mr. Elder would not recommend the operation of a scooter at a 20- or 25-degree incline for an individual with mobility difficulties. In his experience, most people feel very uncomfortable on inclines exceeding 12 to 14 degrees. As to the purpose of the scooters, Mr. Elder indicated that most scooters are intended as pedestrian vehicles to supplement an ambulatory dysfunction, and not as all-terrain or recreational vehicles.

Mr. William Zerter was the respondent's second witness. Mr. Zerter is Vice-president of Finance for Fortress. He described the main features of the Fortress 2001LX scooter. In his view, his company and the appellant are competing for the same market. He noted that the appellant's products are similar to those of Fortress in many respects. He also testified that European standards for scooters are higher than North American standards. As to the climbing ability, the Dutch standard is a 12-degree incline. After pointing out that the Dutch standards are the highest, he underlined that his company's scooter was rated the best in Holland in 1987. As to the weight capacity of the Fortress 2001LX, Mr. Zerter indicated that it was in excess of 400 lbs, provided the rider had a wider seat. To deal with this kind of heavier rider could require the customizing of either the scooter's seat or the scooter's gearing ratio.

The respondent's last two witnesses were Mr. Drew Gibney, Manager of Research and Development and Product Engineering for Everest & Jennings and Mr. Gregg McBurnie, President of Ranger Scooters Ltd. (Ranger). Both witnesses testified briefly about their companies' products. It may be noted that Ranger sources some of the parts for its scooters from outside Canada. It sells most of its products in British Columbia, where it has approximately 20-25 percent of the market.

The appellant's representative argued that the decision of the Tariff Board in *Aisco Industrial Safety Apparel v. The Deputy Minister of National Revenue for Customs and Excise*<sup>3</sup> is very similar to this case, as it involved the same type of goods. In that case, the Tariff Board found that there were significant differences between the goods in issue and the Canadian goods, namely, weight, power and traction. The appellant's representative submitted that the

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3. (1987) 12 T.B.R. 247.

evidence shows that there is clearly a significant difference between the imported scooters and the Canadian scooters with respect to climbing abilities. In her view, in instances where a rider is a larger person or his environment means that a scooter faces higher inclines than normal (e.g. hilly terrain) or requires a smaller turning radius, that rider has no choice but to purchase the imported scooter. In addition, she invited the Tribunal to consider whether Ranger can be considered a Canadian manufacturer of scooters.

Counsel for the respondent contended that the appellant has the onus to demonstrate clearly that the goods in issue fall within the exception specified in tariff code 2530. In his view, the language of the *Aisco* case is determinative in this case. Thus, the appellant has to prove that the goods in issue are, by virtue of significantly different attributes, a different kind of scooter. He argued that, on the basis of the independent evidence before the Tribunal, no such differences can be found in this case. There may be differences in the quality offered by the various scooters mentioned during the hearing, but these differences are not of a nature that would make the better scooter a different scooter. Finally, as to the issue of Ranger, counsel for the respondent argued that there was nothing in the evidence to suggest that this company is not a manufacturer.

Having reviewed the evidence and considered the arguments, the Tribunal is of the opinion that the appeal must be dismissed. As stated before, the issue in this appeal is a narrow one, that is, whether the characteristics of the scooters in issue are sufficiently different from domestically produced scooters, as to invoke the benefit of tariff code 2530. It should be noted here that there was no dispute as to the production in Canada of scooters in a quantity sufficient to satisfy the requirements set out in subsection 12(1) of the *Customs Tariff*<sup>4</sup> and in the relevant Order-in-Council<sup>5</sup> made pursuant to subsection 12(2) of the *Customs Tariff*. As to the point made by the appellant's representative concerning Ranger, the Tribunal is satisfied, on the basis of the evidence before it, in particular Mr. McBurnie's explanations of the company's activities, that this company manufactures goods.

The Tribunal is of the view that this case can be distinguished from the *Aisco* case. As pointed out by counsel for the respondent, the scooters currently manufactured or produced in Canada are more advanced products than those in the *Aisco* case. In this regard, also, the evidence adduced during the hearing on features of the Canadian-made scooters leaves little doubt as to their capabilities.

In addition, the Tribunal has not been convinced that any of the differences between Ortho-Kinetics' Triumph Model 4390 and the scooters produced in Canada are sufficiently significant for the goods in issue to be considered as scooters of a class or kind not made in Canada. Undoubtedly, there are differences between these goods and, in that respect, it may well be that the success of the Triumph Model 4390 in the Ontario marketplace over the last couple of years rests upon these differences (e.g. better cosmetic appearance). However, these differences are not, in the Tribunal's view, of a nature sufficient to turn the Triumph Model 4390 into a different kind of scooter. The goods in issue and the Canadian-made scooters are fairly similar products that serve the same type of customer. Referring to Mr. Vincent's candid words,

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4. Subsection 12(1) of the *Customs Tariff* provides that "[f]or the purposes of this Act, goods shall be deemed not to be of a class or kind of goods made or produced in Canada unless goods of that class or kind are made or produced in Canada in substantial quantities."

5. Substantial Quantity of Goods Percentage Order, 1987, SOR/88-81, December 31, 1987, Canada Gazette Part II, Vol. 122, No. 2 at 843.

it can safely be said that the Triumph Model 4390 competes within the same market niche as Canadian-made scooters.

As to the climbing ability of the Ortho-Kinetics' Triumph Model 4390, on which the appellant essentially rests its whole case, the Tribunal would like to point out that it is more concerned with the climbing ability within a range of inclines that are considered safe for riders who typically have mobility and agility limitations. In this regard, the expert testimony of Mr. Elder as to the intended and actual use of most scooters (i.e. pedestrian rather than all-terrain vehicles) and as to the safe range of inclines for operation of these vehicles was particularly important in this case. As noted by Mr. Elder, the Ontario Ministry of Health standard requires that the scooter must be able to climb, start and maintain a 9-degree incline. All Canadian models discussed at the hearing, except for one, were tested under the Mobility Devices Evaluation Program and found to meet the criteria relating to climbing ability. Also persuasive, in the Tribunal's view, was the fact that scooters made by Fortress met some of the most stringent European requirements applicable to scooters.

In light of the foregoing, the appeal is dismissed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Lise Bergeron  
Lise Bergeron  
Member