CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, August 27, 1993

Appeal No. AP-92-243

IN THE MATTER OF an appeal heard on May 17, 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, pursuant to section 59 of the *Special Import Measures Act*, with respect to requests for re-determination made under section 58 of the *Special Import Measures Act*.

BETWEEN

HOWMARK OF CANADA **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Lise Bergeron
Lise Bergeron
Presiding Member

John C. Coleman
John C. Coleman
Member

W. Roy Hines
W. Roy Hines
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-243

HOWMARK OF CANADA **Appellant**

and

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

The appellant is in the business of importing and distributing footwear throughout Canada. The transactions at issue deal with three shipments of the subject goods produced in Brazil, which are covered by an injury finding. When the subject goods were released by customs officers, the sale price for each shipment was converted to Canadian currency on the basis of the date of shipment because of the lack of information available to customs officers with regard to the date of sale. On re-determination, the respondent used the dates of purchase orders that the appellant's agent issued to the Brazilian factories which produced the goods, for the purpose of re-determining the applicable rate of exchange under section 44 of the Special Import Measures Regulations. As a result, additional anti-dumping duties were assessed. This appeal raises two issues: first, whether in making a decision on re-determination, the respondent may use information not available at the time that the subject goods were released to establish the date of sale; and second, whether the placement of the purchase orders by the appellant's agent constituted a "sale."

HELD: *The appeal is allowed in part. The Tribunal is of the view that the word "shall" in section 45 of the Special Import Measures Regulations should not be interpreted so restrictively that either the respondent or importers are prevented from using information obtained subsequent to the time that the goods are released from customs possession to show when the date of sale actually took place. The Tribunal is of the opinion that, in the circumstances of this case, acceptance of the contract is manifested on the earliest date that the evidence reveals that the factory is producing or has produced the subject goods. The evidence before the Tribunal, and before the respondent on re-determination, indicates when the goods were provided to the appellant's freight forwarder for shipment, but not when the actual production of the shoes began. Therefore, the Tribunal is of the opinion that on re-determination, the respondent should have used the freight forwarder's receipts as the best evidence of the date of sale and not the date of the purchase orders from the appellant's agent to the factories involved.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 17, 1993*
Date of Decision:	*August 27, 1993*
Tribunal Members:	*Lise Bergeron, Presiding Member* *John C. Coleman, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Darrell H. Pearson, for the appellant* *Frederick Woyiwada, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP- 92-243

HOWMARK OF CANADA **Appellant**

and

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

TRIBUNAL: LISE BERGERON, Presiding Member
JOHN C. COLEMAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal pursuant to section 61 of the *Special Import Measures Act*[1] (SIMA) from three decisions made by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), confirming the re-assessment and application of anti-dumping duties in respect of certain women's leather footwear originating in Brazil and imported by the appellant. The subject goods are goods of the same description as those described in the Tribunal's finding in Inquiry No. NQ-89-003, dated May 3, 1990.

The appellant is a partnership registered under the laws of Ontario, having its offices in Toronto, Ontario. The appellant is in the business of importing and distributing footwear throughout Canada. The transactions at issue deal with three shipments of the subject goods produced in Brazil. When the subject goods were released by customs officers, the sale price for each shipment was converted to Canadian currency on the basis of the date of shipment because there was not sufficient information available to customs officers to allow them to convert on the basis of the exchange rate on the date of sale, as directed by sections 44 and 45 of the *Special Import Measures Regulations*[2] (the Regulations). On or about October 17, 1991, the appellant paid anti-dumping duties for each of the shipments in question, in accordance with section 45 of the Regulations.

Subsequently, the appellant requested re-determinations of the amounts paid, for reasons that are distinct from the issues in this appeal. In the course of those re-determinations, the respondent obtained copies of the purchase orders which the appellant's agent issued to the Brazilian factories that produced the goods in question. The respondent considered these purchase orders to be evidence of the date of sale of the subject goods and used these dates for the purpose of re-determining the applicable rate of exchange under section 44 of the Regulations. As a result, additional anti-dumping duties were assessed. The appellant requested further re-determinations. By the decisions referenced above, the respondent confirmed the re-determinations.

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1. R.S.C. 1985, c. S-15.
2. SOR/84-927, November 22, 1984, Canada Gazette Part II, Vol. 118, No. 25 at 4286.

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This appeal raises two issues: first, whether in making a decision on re-determination, the respondent may use information that was not available at the time that the subject goods were released from customs possession to establish the date of sale; and second, if the first issue is answered in the affirmative, whether the placement of the purchase orders by the appellant's agent constituted a "sale" for purposes of the Regulations.

The definition of the word "sale" in section 2 of SIMA reads as follows:

> *"sale" includes leasing and renting, an agreement to sell, lease or rent and an irrevocable tender.*

Sections 44 and 45 of the Regulations read as follows:

Currency Conversion

> *44. Subject to section 45, where an amount used or taken into account for any purpose in the administration or enforcement of the Act is expressed in the currency of a country other than Canada, the equivalent dollar value of that amount shall be calculated by multiplying that other currency amount by the exchange rate prevailing on the date of sale expressed in terms of the dollar.*
>
> *45. Where sufficient information has not been furnished or is not available at the time goods have been released from customs possession or entered for warehouse, whichever is the earlier, to enable the calculation under section 44 to be made on the basis of the date of sale, the date of shipment to Canada shall be used in place of the date of sale for the purpose of that section.*

Counsel for the appellant called one witness, Mr. Jerry Rosenbloom, Treasurer of Howmark of Canada. Mr. Rosenbloom explained that the appellant, a partnership of four corporations registered in the province of Ontario, is an importer and national distributor of footwear. The appellant also owns a majority interest in a shoe manufacturing company located in Toronto, Ontario.

Mr. Rosenbloom described the general nature of the three transactions which are the subject of this appeal. He stated that each of the transactions was essentially conducted in the same manner. He explained that, first, the appellant and its agent, Trade Winds Importing Company (Trade Winds), jointly develop and cost a footwear model which the appellant wishes to be produced in Brazil and then sold in the Canadian market. The appellant takes samples of the footwear to prospective customers and solicits orders based on the quoted prices and the dates for delivery specified by these customers. The appellant then provides its agent with written instructions to place an order with factories in Brazil which will make the type of product needed, for the price stated and by the dates required. After receiving these instructions, the appellant's agent approaches a number of factories in an effort to place the order. The witness stated that, unless there was a problem, such as not being able to place the order at the price offered or not placing it at all, the appellant would not hear further about the order until it was advised that the product was being shipped. Mr. Rosenbloom explained that, often, a Canadian order would be bumped by larger orders from Europe or the United States, not only because it was small but also because of the additional need to complete anti-dumping questionnaires and to deal with visits from officers of the Department of National Revenue (Revenue Canada). He also stated that, if the original order was bumped and the agent found another factory to produce the order by the specified date, it would not contact the appellant.

In the course of this testimony, counsel for the appellant filed, on a confidential basis, a copy of the "Buying Agent Agreement" between the appellant and Trade Winds. Mr. Rosenbloom identified the document and stated that, pursuant to the agreement, Trade Winds undertook to act as the appellant's buying agent in Brazil.

Mr. Rosenbloom next explained that a completed order is paid for by means of a letter of credit that could be drawn upon when the goods were shipped. The documents on which a letter of credit could be drawn include a designated forwarder's receipt or a bill of lading. The appellant would be advised of receipt of the goods by means of a facsimile from its forwarding agent. The witness noted that the appellant's customers were aware of the possibility that their orders may not be filled and that, in most instances, the nature of these agreements was such that the appellant did not face liability for non-delivery. The witness also observed that the appellant could cancel its order with the Brazilian factory at any time before the factory actually began to produce the goods.

The witness stated that the footwear in question was purchased in U.S. dollars and converted to Canadian dollars for the purpose of calculating the amount of anti-dumping duties payable on the date of shipment. He explained that the date of shipment, and not the date of sale, was used for this purpose because the appellant did not have information about the date of sale and, thus, used the best information that it had.

During cross-examination, Mr. Rosenbloom confirmed that the nature of these transactions was such that, when the appellant places an order with Trade Winds, it is not sure that the order will be filled. The witness also stated that the specified date for delivery provided in its instructions to Trade Winds could be anywhere from two to five months and that the letter of credit that it sets up is in the name of Trade Winds, so that Trade Winds can transfer it to the name of the factory that makes the product.

In response to questions from the Tribunal, Mr. Rosenbloom indicated that the appellant bears the costs associated with any defects in the goods and considers this part of the risk of doing business in Brazil. He also stated that the appellant considers that it takes ownership of the goods when they are delivered to its forwarding agent, and a receipt for the goods is given to the factory that produced them.

Counsel for the respondent called one witness, Mr. Michel Desmarais, Senior Program Officer, Textiles and Consumer Products, Assessment Programs (Anti-Dumping and Countervail), Revenue Canada. Mr. Desmarais stated that he has been with this division for over 15 years and that he was directly involved in the calculation of anti-dumping duties in this case. The witness explained the process by which these duties were calculated, highlighting the effect of high inflation in Brazil and the subsequent depreciation in the value of the cruzeiro on the calculation of normal values. He stated that the respondent chose the date that purchase orders were placed with factories by Trade Winds as the date for calculating the exchange rate, i.e. the date of sale, because it was on this date that the parties had, in the respondent's view, agreed on price, quantity and date on which the goods would be shipped. Mr. Desmarais emphasized that, in these cases, the Brazilian factories do not sell from stock, but only produce to order. He also stressed that, as the respondent is making his investigations retrospectively, he is always dealing with a completed transaction and, therefore, focuses on the factual events that made up that transaction. Mr. Desmarais confirmed that, at the time that the goods cleared customs, the only information available to the customs officer was the date of shipment and that the information relating to the purchase orders from Trade Winds was obtained from the Brazilian factories during the re-investigation.

During cross-examination, Mr. Desmarais confirmed that the respondent had not obtained any documents from the factories in question confirming that they had accepted the purchase orders from Trade Winds, but stated that such confirmations are not issued in Brazil.

In response to questions from the Tribunal, the witness stated that the respondent did not use the documentation, which the factories issued when they shipped the goods, as evidence of the date of sale because the goods had already been produced. Mr. Desmarais agreed that, depending on the documents relied on to establish the date of sale, there could be a significant difference in the amount of anti-dumping duties assessed because of the exchange rate fluctuations in Brazil. Finally, in response to requests by the Tribunal, the witness filed additional documentation relating to the transactions in question, including bills of lading and freight forwarders' receipts for each of the transactions.

In argument, counsel for the appellant submitted that the respondent's reliance on purchase orders as evidence of the date of sale may have been, in part, attributable to the respondent's view that Trade Winds was a principal, not an agent, in these transactions. Counsel suggested that the "Buying Agent Agreement" and the testimony of Mr. Rosenbloom confirmed that Trade Winds acted as an agent. Counsel also noted that the respondent's witness stated that confirmation orders were not customary in these transactions, consistent with the appellant's version of how these transactions functioned. Further, counsel submitted that the evidence showed no attempt by the respondent to analyze the steps in these transactions to show why the date of the purchase orders is the same as the date of sale. Counsel stated that the respondent was, in effect, treating the offers by the appellant's agent as if they were an irrevocable tender or a unilateral contract, either of which was inconsistent with Mr. Rosenbloom's testimony that the appellant (and the factory) could cancel the order up to the time that production commenced. Counsel submitted that an offer does not become an agreement until acceptance is manifest. He subsequently referred to legal texts on the law of contracts to support this submission. Counsel also observed that, if the Tribunal used the date of production or the date of receipt by the appellant's freight forwarder as the date of sale, it would, therefore, have to be convinced that one or the other of these dates reflected a clear intention on the part of the factory to accept the order.

With respect to the wording of section 45 of the Regulations, counsel for the appellant submitted that the word "shall" in that section should be read as being mandatory and not permissive. Counsel stated that the implication of this interpretation would be that, if the information discussed in section 44 of the Regulations is not available at the time that the goods are to be released, the date of shipment must, therefore, be used in the currency exchange calculations, and there is no opportunity to go back to the date of sale thereafter. Counsel suggested that, if Parliament had intended to provide for the interpretation being asserted by the respondent, it would not, therefore, have written the Regulations in such a restrictive manner.

Turning to the definition of "sale," counsel for the appellant stated that the examples set out in the definition all shared the common characteristic of being contracts and agreements and, therefore, under the *ejusdem generis* rule, the Tribunal should consider all sales to be agreements or contracts and thus, by implication, something more than mere offers.

Finally, counsel for the appellant referred to case law to support various points in his argument. These references included the case of *Re Hudson Fashion Shoppe Ltd.*,[3] which he submitted supports the position that, in the present case, there was only a contract or sale when the factories making the footwear delivered it to the F.O.B. Brazil destination, from which they were shipped to Canada.

Counsel for the respondent began his argument by suggesting that counsel for the appellant had overlooked two of the most important aspects of the case. First, he stated that the purpose of SIMA is to prevent or, at least, to reduce material injury to Canadian producers. Second, he referred to the peculiar and unique context in which these transactions take place. Counsel submitted that the subject transactions represented agreements in which a deal was considered to have been made, unless a rejection of the deal was communicated or, in other words, the orders were considered to be sales until they were rejected by the person with whom the order was placed.

With respect to the interpretation of sections 44 and 45 of the Regulations, counsel for the respondent stated that the key word in section 45 is the word "shall." He noted that the section does not say that the date of shipment is "deemed" to be the date of sale, but that the wording of the section reinforces the importance of the date of sale in calculating currency exchange. Counsel observed that SIMA contains lengthy provisions relating to appeals and re-determinations and that these proceedings are clearly to be conducted on the most informed basis possible, i.e. on the basis of the information available when they take place. Counsel also noted that, often, the best information about the date of sale is provided by the importer that obtains that information subsequent to the release of the goods in question and that can then obtain a re-determination to its advantage. Such an outcome would not be possible under the appellant's approach.

Counsel for the respondent then turned to the case law raised by the appellant. With respect to the decision of the Federal Court of Appeal in *Ansaldo, S.p.A. v. The Deputy Minister of National Revenue for Customs and Excise*,[4] counsel submitted that this decision made clear that, in interpreting definitions set out in SIMA, one must consider the overall purpose of the legislation. Counsel suggested that references in that decision to the phrase "sale price" could be replaced by the phrase "date of sale" and the decision could be read as being directly applicable to the instant case. This would lead to rejecting a technical meaning for "date of sale" and, rather, to giving it a broad meaning consistent with the purpose of the legislation, which would include recognizing that injury to Canadian production occurs at the time that the order is placed, i.e. when the sale is made. Counsel submitted that the *Re Hudson* case could be distinguished from this case because, in that case, it was clear that, for the contract to have been completed, the party receiving the order was required to communicate its approval which is not the case here.

Finally, with respect to the Tribunal's decision in *Direct Import Dico Corporation v. The Deputy Minister of National Revenue for Customs and Excise*,[5] counsel for the respondent stated that this case supports the proposition that information obtained subsequent to the release of goods from customs can be used on a re-determination.

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3. (1925), 58 O.L.R. 130 (C.A.).
4. (1986), 11 C.E.R. 289, Court File No. A-879-83, April 29, 1986.
5. Appeal No. 3053, January 16, 1992.

In reply, counsel for the appellant reiterated his previous point that the respondent's position represents treating the purchase orders as if they were unilateral contracts, which is inconsistent with the evidence of the appellant's witness. He submitted that this evidence is uncontradicted by the respondent's evidence. With respect to the respondent's discussion of the *Ansaldo* case, counsel suggested that there would only be injury to Canadian production at the time that the offer is made, if it were actually a unilateral contract. Counsel also suggested that the Federal Court of Appeal, in the *Ansaldo* case, dealt with a broader issue than this case, namely, what should be covered in terms of the overall objectives of SIMA and how to interpret the phrase "sale price" in that context. In regard to the *Dico* case, counsel stated that this case should be seen as a special case, without precedential value, because it was decided by an order drafted by the parties pursuant to a settlement that they reached and because the appellant's position was that, at all relevant times, it had furnished sufficient information.

As to the issue of whether, on re-determination, the respondent may use information that was not available at the time that the subject goods were released from customs possession to establish the date of sale, the Tribunal agrees with the respondent that it can. The Tribunal is of the view that the word "shall" in section 45 of the Regulations should not be interpreted so restrictively that either the respondent or importers are prevented from using information obtained subsequent to the time that the goods are released from customs possession to show when the date of sale actually took place. The Tribunal also agrees with the respondent that sections 44 and 45 of the Regulations are drafted in a manner that emphasizes the importance of the date of sale in currency exchange calculations and that to deny the use of information received subsequent to the release of goods would subvert this purpose. The Tribunal notes that, in many instances, the information in question is simply not available when the goods are otherwise ready to be released from customs possession and, also, that it is of a nature that it would be received by an importer. It is difficult to believe that Parliament intended to penalize importers, and their customers in Canada, by preventing recourse to subsequent information, when the overall purpose of SIMA is not clearly advanced by doing so.

With respect to its previous decision in *Dico*, the Tribunal recognizes that the circumstances of that case were unique and, thus, does not rely directly on it in coming to this decision. However, by its decision herein, the Tribunal clearly indicates that it agrees with the reasoning in the *Dico* case.

Turning to the issue of the actual date of sale, the Tribunal is of the view that a sale could only have occurred when a clear acceptance of the appellant's offer was manifested by the Brazilian factory that would produce the goods in question. The Tribunal acknowledges that the contractual circumstances of this case are indeed "peculiar and unique." Nevertheless, these circumstances do not vitiate the need to establish when the parties actually entered into a contract of sale. The Tribunal believes that the purchase orders submitted by the appellant's agent do not, in and of themselves, represent a binding agreement because the evidence of the appellant's witness was clear and uncontradicted that either of the parties, the appellant or the factory, could, after an offer was made, cancel that order if production had not begun.

The question thus becomes: When do the factories manifest their acceptance of the purchase orders? The Tribunal is of the opinion that, in the circumstances of this case, such acceptance would be manifested on the date that a factory begins to produce the goods. This date would, thus, become the date of sale for purposes of section 44 of the Regulations. The evidence before the Tribunal, and before the respondent on re-determination, does not, however, indicate on which date production began for each transaction in question. The Tribunal is of the view that the appellant's freight forwarder's receipt, which reflects the

freight forwarder's acceptance of delivery of the goods from a factory, represents the best evidence before the Tribunal of a factory's acceptance of the purchase orders. The evidence relating to these receipts shows not only that the factories deliver the footwear to the freight forwarder as soon as possible after production, because they require the forwarder's receipt to facilitate payment under the letter of credit facility, but also that the appellant first becomes aware that it actually has an agreement when it is informed of the issuance of these receipts. For these reasons, the Tribunal is of the opinion that, in the absence of more specific evidence as to the date on which production began, the respondent should have used the date of the freight forwarder's receipts as the date of sale.

Accordingly, the appeal is allowed to the extent that the basis for the respondent's calculation of anti-dumping duties on re-determination is rejected. The matter is referred back to the Deputy Minister so that the anti-dumping duties may be calculated using the date of the freight forwarder's receipts as the date of sale. The appellant is to be reimbursed for any overpayment of anti-dumping duties that are determined as a result of these recalculations.

Lise Bergeron
Lise Bergeron
Presiding Member

John C. Coleman
John C. Coleman
Member

W. Roy Hines
W. Roy Hines
Member