CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, February 15, 1994

Appeal No. AP-92-303

IN THE MATTER OF an appeal heard on September 10, 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 dated December 9, 17 and 18, 1992, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

KIMBERLY-CLARK CANADA INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
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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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-303

KIMBERLY-CLARK CANADA INC. **Appellant**

and

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

This is an appeal under section 67 of the Customs Act of decisions of the Deputy Minister of National Revenue for Customs and Excise dated December 9, 17 and 18, 1992. The appeal raises two issues. The first issue is whether the appellant's "panty liner" products imported from the United States are properly classified under tariff item No. 4810.40.10 as sanitary towels or tampons, as determined by the respondent, or should be classified under tariff item No. 4818.40.90 as other, as claimed by the appellant. The second issue is whether the panty liners, even if they are sanitary towels, qualify for concessionary duty relief under Code 2519 of Schedule II to the Customs Tariff. The appellant argued that the goods in issue qualify for such relief by virtue of being goods for use in connection with a form of incontinence.

HELD: *The appeal is dismissed. With respect to the first issue, the Tribunal concludes that the panty liners are sanitary towels. In reaching this conclusion, the Tribunal finds that the goods in issue form part of a continuum of goods, all of which are principally used in connection with menstruation. With respect to the second issue, the Tribunal determines that the goods in issue do not qualify for concessionary duty relief under Code 2519 of Schedule II to the Customs Tariff. In making this decision, the Tribunal finds that menstruation is not a form of incontinence.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 10, 1993*
Date of Decision:	*February 15, 1994*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Riyaz Dattu, for the appellant* *Linda J. Wall, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-303

KIMBERLY-CLARK CANADA INC. **Appellant**

and

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

TRIBUNAL: ARTHUR B. TRUDEAU, 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] of decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated December 9, 17 and 18, 1992.

The appellant imports into Canada various feminine hygiene products, including goods described in the trade as "panty liners." The appellant is required to pay customs duty on the panty liners in issue in accordance with Schedule I to the *Customs Tariff*.[2]

The tariff items relevant to this appeal are:

4818.40	*-Sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles*
4818.40.10	*---Sanitary towels and tampons*
4818.40.90	*---Other*

The appellant imported the panty liners in issue into Canada in 14 different transactions between January and November 1991. They were classified by the appellant under tariff item No. 4818.40.90 of Schedule I to the *Customs Tariff*, which is the "Other" category, located in subheading No. 4818.40. Upon importation, the Department of National Revenue for Customs and Excise (Revenue Canada) reclassified the panty liners under tariff item No. 4818.40.10. The appellant filed requests for re-determination for each of the transactions and, by decisions dated December 9, 17 and 18, 1992, the Deputy Minister maintained the classification of the panty liners under tariff item No. 4818.40.10.

There are two issues in this appeal. The first issue is whether the appellant's "panty liner" products imported from the United States are properly classified under tariff item No. 4810.40.10 as sanitary towels or tampons, as determined by the respondent, or should be

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

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classified under tariff item No. 4818.40.90 as other, as claimed by the appellant. The second issue is whether the panty liners, even if they are sanitary towels, qualify for concessionary duty relief under Code 2519 of Schedule II to the *Customs Tariff*.

Reclassification of Panty Liners

Counsel for the appellant contended that the panty liners are not sanitary towels within the meaning of tariff item No. 4818.40.10, but that they are other similar sanitary articles and thus fall under tariff item No. 4818.40.90. In support of his contention, counsel introduced evidence through his witness, Mr. F.W. Mixdorf, who is employed by Kimberly-Clark Corp., the appellant's parent company in the United States. Mr. Mixdorf is the group supervisor of marketing research with Kimberly-Clark Corp., with responsibility for feminine care products.

Mr. Mixdorf testified that, in addition to marketing the goods in issue in Canada, the appellant markets 12 different pad products. The pad products are heavier and have a greater capacity for absorption than do panty liners. The 12 pad products themselves vary in weight, size and absorption capacity. Mr. Mixdorf testified that each of the pad products is designed to be used at different stages of a woman's menstrual cycle, depending on the rate of flow. The products range from "ultra-thin maxis," which are the lightest and least absorbent, to "overnight maxis," which are the heaviest and most absorbent of the pads produced by the appellant.

Mr. Mixdorf testified that the appellant considers its pad products to be sanitary towels, but does not consider panty liners to be sanitary towels. He identified the following differences between panty liners and pads which serve to distinguish the two products from one another:

> (1) name — the appellant has chosen the name "panty liner" for its product and one of its competitors uses the name "panty shield" to describe a similar product, whereas the respective companies use the words "pad" and "towel" to describe their "sanitary towel" products;
>
> (2) use — the primary purpose for which panty liners are used is to protect clothing from a variety of bodily secretions, only one of which is menstrual, whereas the primary purpose of pads is to absorb menstrual flow;
>
> (3) physical characteristics — pads are substantially thicker than panty liners and have up to 12 or 13 times the capacity for absorption;
>
> (4) marketing — the appellant's panty liners are marketed as a product which generally promotes freshness and protects clothing against various secretions and minor urine loss, whereas its pads are marketed specifically with reference to menstrual needs;
>
> (5) packaging — the appellant's panty liners are packaged unseparated in a cardboard box, whereas its pads are individually wrapped and packaged in polyethylene bags; and
>
> (6) corporate organization — for the purposes of research and development budgets, production and marketing, the appellant keeps its activities with respect to pads distinct from those with respect to panty liners.

In support of the appellant's position that pads are used for purposes different from panty liners, counsel for the appellant filed a confidential study prepared for Kimberly-Clark

Canada Inc. by ISL International Survey Limited entitled Usage Diary Study: Feminine Protection Products (Canada)[3] (the study).

The study was designed to provide the appellant with a better understanding of the menstrual and non-menstrual uses of pad and panty liner products by Canadian women. The study revealed that both pads and panty liners were used, in varying degrees, during both menstrual and non-menstrual periods. The study indicated that, in terms of non-menstrual use, the women in the study group used panty liners more frequently than pad products. On the basis of the differences between pads (which the appellant acknowledged are sanitary towels) and panty liners, counsel for the appellant argued that panty liners are not sanitary towels. He submitted that panty liners are other similar sanitary articles to sanitary towels and, thus, should be classified under tariff item No. 4818.40.90.

With respect to the submission of counsel for the appellant that panty liners are not sanitary towels, in argument, counsel for the respondent referred the Tribunal to testimony given by Mr. Mixdorf and by the respondent's witness, Dr. W.J.W. Freeland, M.D.[4] Counsel noted that both Mr. Mixdorf and Dr. Freeland testified that, 30 years ago, women did not have such a wide array of feminine hygiene products from which to choose. They had only thick pads which they used from the very beginning of their menstrual cycle, through the heavy period, to the "petering out" phase at the end. Counsel argued that the fact that new technology has made it possible to make ultra-thin panty liners with super absorbency, which are more appropriate for use during the early and late stages of a woman's menstrual cycle, does not alter the nature of these products. In counsel's submission, all these products do the same thing — they all absorb menstrual flow.

Counsel for the respondent also referred the Tribunal to an illustration which appears on the packaging of the appellant's Kotex brand thin maxipad. The illustration features a band of colour that begins in a shade of pale pink and grows progressively darker to end in a shade of dark pink. During cross-examination, Mr. Mixdorf described this band of colour as a continuum. He also testified that the text corresponding to the continuum recommends the use of panty liners for lighter days and the use of progressively more absorbent pad products as menstrual flow increases. Counsel argued that the illustration provided additional evidence that all of the appellant's panty liner and pad products are products in a continuum, all of which perform the same function.

In conclusion, counsel for the respondent argued that the appellant was, in effect, asking the Tribunal to carve out from a field of products a certain type of product which the appellant had chosen to market differently. She submitted that all of the appellant's products, from panty liners to its thickest maxipad, perform the same function; they just have different levels of effectiveness and absorbency.

The Tribunal is in agreement with the parties that there are only two possible classifications within Schedule I to the *Customs Tariff* under which panty liners could fall,

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3. The appellant requested that the Tribunal treat the study as confidential and, consequently, portions of Mr. Mixdorf's testimony in respect of the study was given *in camera*. No one from ISL International Survey Limited appeared at the hearing to give evidence regarding the study.

4. Dr. Freeland is currently Acting Chief of Device Evaluation within the Bureau of Medical Devices of the Department of Health. He had a general practice in Saskatchewan between 1977 and 1988.

specifically, tariff item No. 4818.40.10, "Sanitary towels and tampons," or tariff item No. 4818.40.90, "Other."

The Tribunal concludes that panty liners are sanitary towels and are, therefore, properly classified under tariff item No. 4818.40.10. The Tribunal reached its decision on the basis of its view that panty liners form part of a continuum of goods which are used by women principally in connection with menstruation. The Tribunal acknowledges that, while there are differences between panty liners and pads, it is of the view that these differences do not serve to alter the fundamentally common nature of the products. The appellant's evidence indicates that all of the products in the continuum may be used for menstrual purposes. The evidence also reveals that, in varying degrees, all of the products may be used by women during a non-menstrual period. However, the Tribunal does not consider it appropriate to arbitrarily establish a rate of use for these products which would serve to qualify or disqualify any of them as sanitary towels.

The Tribunal also notes that the appellant's packaging of Kotex Lightdays panty liners lists five uses for the product. They can be used for light-flow protection, added protection with tampon, just-in-case days, discharge and spotting, and everyday freshness. During cross-examination, Mr. Mixdorf acknowledged that the first three uses listed are menstrual. He also acknowledged that four out of the five uses mentioned are menstrual in nature. Moreover, the use of panty liners as a means of promoting "freshness," which Mr. Mixdorf testified was the basis upon which panty liners are marketed, is last on the list of uses. While not conclusive, the labelling on the appellant's packaging appears to the Tribunal to be inconsistent with the appellant's position that panty liners are principally a product unrelated to menstruation.

The Tribunal finds the fact that the appellant packages its sanitary towel products differently from its panty liner products of no assistance in distinguishing the two products from one another. Similarly, the Tribunal does not find the fact that the appellant and Kimberly-Clark Corp. keep their research efforts regarding panty liners separate from those in relation to pad products of assistance in finding panty liners to be something other than sanitary towels.

Accordingly, in the Tribunal's view, the panty liners are properly classified under tariff item No. 4818.40.10.

Concessionary Duty Relief under Code 2519 of Schedule II to the *Customs Tariff*

Counsel for the appellant submitted that, even if the Tribunal finds that panty liners are sanitary towels and therefore fall under tariff item No. 4818.40.10, they qualify for concessionary duty relief under Code 2519 of Schedule II to the *Customs Tariff*.[5]

With respect to this issue, the Tribunal raised a preliminary question regarding the applicability of Code 2519 to tariff item No. 4818.40.10. The question stemmed from the format employed in Schedule I to the *Customs Tariff*. Subheading No. 4818.40 is set out as follows:

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5. Subsection 68(2) of the *Customs Tariff* provides, among other things, that notwithstanding the fact that a product is subject to duty under Schedule I, if the product falls within one of the categories of goods set out in Schedule II, then the duty on that product will be reduced or removed.

			Potential Codes
4818.40	*-Sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles*		
4818.40.10	*---Sanitary towels and tampons*		
4818.40.90	*---Other*	...	*2519*

The Tribunal questioned the applicability of Code 2519 to tariff item No. 4818.40.10 in light of the fact that Code 2519 appears opposite the "Other" tariff item and not opposite "Sanitary towels and tampons." Moreover, the Tribunal notes that Code 2519 does not appear in the lists of codes in the Notes to Chapter 48 or on the title page of Section X of Schedule I to the *Customs Tariff*, which identify codes which may be applicable to any tariff item within that chapter or section.

With respect to the preliminary question, counsel for the appellant referred the Tribunal to the following warning which appears on the second page of the *Customs Tariff*:

> *Users of this Departmental Consolidation are reminded that it is prepared for convenience of reference only and that, as such, has no official sanction. The original Act and or Removal Order and amendments thereto should be consulted for all purposes of interpreting and applying the law.*

Counsel for the appellant submitted that, in making its decision regarding the applicability of Code 2519 to panty liners, the Tribunal should have regard to the actual legal text of Schedules I and II to the *Customs Tariff*. Counsel submitted that, to the extent that there are differences between the Schedules as they appear in the *Customs Tariff* and the legal text of the Schedules, the legal text should prevail.

Counsel for the appellant referred the Tribunal to the fact that, in the legal text of Schedule I to the *Customs Tariff*, there are no references to potential codes in the Notes to Chapter 48 or on the title page of Section X of Schedule I to the *Customs Tariff*. Furthermore, Schedule I does not contain a "Potential Codes" column. In short, Schedule I contains no references whatsoever to potential codes or to Schedule II. In counsel's submission, Schedule I thus provides no guidance regarding which codes in Schedule II are applicable to any given product. On that basis, counsel argued that the applicability of codes in Schedule II should be determined without reference to Schedule I.

Counsel for the appellant submitted that the applicability of a code in Schedule II to the *Customs Tariff* to a given product must be determined solely by reference to Schedule II. Code 2519 in Schedule II provides concessionary duty relief in respect of:

> *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.*
>
> (Emphasis added)

According to counsel for the appellant, Code 2519 refers, without restriction, to the whole of heading No. 48.18. Therefore, he argued, any product classifiable in heading No. 48.18 can be considered for concessionary duty relief under Code 2519. As panty liners are classifiable in

heading No. 48.18, counsel submitted that they can be considered for concessionary duty relief. In his submission, the only issue to be determined is whether panty liners fall within the class of goods described in Code 2519.

With respect to this preliminary question, the Tribunal concludes that all goods classifiable in heading No. 48.18 can be considered for concessionary duty relief under Code 2519. The Tribunal agrees with the appellant that, where the text in the *Customs Tariff* diverges from the legal text of Schedule I, the legal text must govern.

The Tribunal also agrees with the appellant that, as Schedule I to the *Customs Tariff* does not refer to Schedule II, the applicability of any given code in Schedule II to a product must be determined solely by reference to the text of the code in question in Schedule II. In the Tribunal's view, the text of Code 2519 clearly indicates that this code may apply to any item which is classifiable in heading No. 48.18. The Tribunal, therefore, considers that panty liners, regardless of the subheading in which they fall within heading No. 48.18, may be considered for concessionary duty relief under Code 2519.

Having decided that panty liners may be considered for concessionary duty relief under Code 2519, the remaining issue for the Tribunal to decide is whether panty liners fall within the class of goods described in Code 2519.

In argument on this issue, counsel for the appellant first addressed the meaning of the word "incontinence." The Tribunal's decision in *Jolly Jumper Inc. v. The Deputy Minister of National Revenue for Customs and Excise*[6] formed the primary basis of counsel's submission on this point. In that case, the Tribunal decided that the excessive and spontaneous flow of milk (galactorrhea) experienced by some nursing mothers was a form of incontinence. On that ground, the Tribunal ruled that breast shields used by nursing mothers to protect clothing from such milk flow were for incontinence. Thus, in the *Jolly Jumper* case, the appellant's product qualifies for concessionary duty relief under Code 2519.

Counsel for the appellant submitted that, in the *Jolly Jumper* case, the Tribunal found that a common feature of all medical dictionary definitions of incontinence is the inability to prevent the discharge of any of the natural excretions from the body. He submitted that, absent the use of medication, women are unable to control menstrual and non-menstrual vaginal discharges, both of which represent forms of incontinence. Counsel argued that, as panty liners are designed and used to absorb such discharges, they are incontinence products within the meaning of Code 2519. On that basis, he submitted, the appellant's panty liners qualify for concessionary duty relief.

Counsel for the appellant took issue with Dr. Freeland's views regarding the meaning of incontinence. In his direct testimony, Dr. Freeland expressed the view that, in order for a bodily function to be characterized as incontinence, there must be the ability in the normal course to be continent. In Dr. Freeland's view, incontinence connotes an element of disability. Dr. Freeland was of the view that to describe menstruation as incontinence was inappropriate because there is no capacity in a normal female to be able to be continent with respect to menstrual flow. In rebutting Dr. Freeland's evidence, counsel for the appellant pointed out that none of the dictionary definitions adduced in evidence suggested that there had to be an element of disability in order for incontinence to exist. Counsel also pointed out that the

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6. Appeal No. AP-91-235, September 14, 1992, 5 T.C.T. 1382.

Stedman's Medical Dictionary[7] specifically included galactorrhea as a form of incontinence. During cross-examination, Dr. Freeland agreed that galactorrhea was not a disability.

Counsel for the respondent submitted that the *Jolly Jumper* case was distinguishable from the present case on two grounds. First, she pointed out that, in the *Jolly Jumper* case, the Tribunal did not have the benefit of expert testimony. By contrast, counsel for the respondent submitted that, in this case, the Tribunal had the opinion of Dr. Freeland which, if accepted, would form a basis for deciding that menstruation is not a form of incontinence. According to counsel for the respondent, the *Jolly Jumper* case could also be distinguished on the ground that, in that case, the Tribunal had before it a medical definition which specifically listed galactorrhea as a form of incontinence. Counsel for the respondent argued that, in the present case, none of the definitions adduced by the appellant referred to menstruation as a form of incontinence.

Counsel for the respondent also directed the Tribunal to the fact that Code 2519 provides concessionary duty relief for incontinent briefs, underpants, etc., excluding those of a kind for babies. She submitted that the type of products described in Code 2519 are those that would be used by adults in connection with urinary and fecal incontinence. Counsel pointed out that there is no mention of menstrual products in Code 2519.

Finally, counsel for the respondent submitted that the Tribunal should consider the intention of the drafters of Code 2519 in deciding whether the appellant is entitled to concessionary duty relief. To discover that intention, counsel directed the Tribunal to the *Customs Tariff*[8] as it existed in 1987. She noted that, at that time, sanitary towels were subject to high rates of duty. Counsel submitted that there is nothing in the Schedules to the *Customs Tariff* that would indicate an intention to drastically alter the way that the sanitary towels are treated.

On the question of intention, counsel for the respondent also directed the Tribunal to Customs Notice N-271[9] (Notice N-271). In Notice N-271, the Minister of State (Finance) advised that he had agreed to recommend to Cabinet's Special Committee of Council certain amendments to the *Customs Tariff*. One of the recommended amendments was the addition of Code 2519 to Schedule II. In Notice N-271, the Minister of State (Finance) indicated that the purpose of adding Code 2519 was "[t]o restore the rates of duty to free for ileostomy, colostomy and urinary appliances or articles other than infants' pants and diapers." Counsel submitted that Notice N-271 was further evidence that the reason Code 2519 was added to Schedule II was to remove duty which the Harmonized System[10] would otherwise impose on goods which had been specifically classified as duty-free under the former *Customs Tariff*.

With respect to the meaning of the word "incontinence," the Tribunal is not prepared to accept the appellant's broad definition of incontinence as the inability to prevent the discharge of any of the excretions of the body. It is true that, in the *Jolly Jumper* case, the Tribunal found galactorrhea to be a form of incontinence. However, the evidence presented by the appellant in that case included a definition from a leading medical dictionary that specifically listed galactorrhea as a form of incontinence.

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7. Twenty-fifth ed. (Baltimore: Williams & Wilkins, 1990) at 774.
8. R.S.C. 1970, c. C-41.
9. Department of National Revenue, Customs and Excise, October 3, 1988.
10. Harmonized Commodity Description and Coding System, Customs Co-operation Council, 1st ed., Brussels, 1986.

Notwithstanding the appellant's exhaustive canvass of medical and general use dictionaries, it was unable to locate a definition of incontinence that included menstruation as a form of incontinence. On that basis alone, the present case is distinguishable from the *Jolly Jumper* case. An additional basis on which the *Jolly Jumper* case can be distinguished stems from the fact that, in that case, the Tribunal did not have the benefit of the evidence of a medical doctor, whereas it did in the present case.

Accordingly, in the Tribunal's view, the panty liners in issue do not qualify for concessionary duty relief under Code 2519 of Schedule II to the *Customs Tariff*.

For the foregoing reasons, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member