CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, January 25, 1996

Appeal No. AP-94-351

IN THE MATTER OF an appeal heard on August 30, 1995, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated January 20, 1995, with respect to requests for re-determination under section 58 of the *Special Import Measures Act*.

BETWEEN

ZELLERS INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

GROUPE PROCYCLE INC. AND VICTORIA PRECISION INC. **Interveners**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

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ZELLERS INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

GROUPE PROCYCLE INC. AND VICTORIA PRECISION INC. **Interveners**

This is an appeal under section 61 of the Special Import Measures Act of re-determinations of the Deputy Minister of National Revenue that bicycles imported by the appellant are goods of the same description as the goods to which the Tribunal's finding in Bicycles and Frames Originating in or Exported from Taiwan and the People's Republic of China applies and are, therefore, subject to the imposition of anti-dumping duties.

***HELD**: The appeal is allowed. The Tribunal is of the view that the precise measurement of "16 inches (40.64 cm) and greater" used to define the lower end of the range of sizes of bicycles covered by its finding in Bicycles, which on its face is clear and unambiguous, must be interpreted literally. The Tribunal finds the fact that the metric equivalent of 16.0 in. (40.64 cm) was specified in the finding to the nearest one tenth of a millimetre persuasive evidence that diameters within 0.5 in. of 16.0 in. were not envisaged. The Tribunal also believes that it is significant that the appellant advertised and sold the bicycles with wheel diameters of 15.5 in. as such and did not try to pass them off as bicycles with wheel diameters of 16.0 in. In the Tribunal's view, as the imported bicycles appeared in the marketplace, they were not, in fact, "goods of the same description" as the goods to which the Tribunal's finding applies. This view is supported by the Department of National Revenue's laboratory reports which compare the bicycles in issue with bicycles with wheel diameters of 16.0 in. made by the same Chinese manufacturer and marketed at the same time by the appellant and which note significant differences between the two, including the fact that "[t]he tires marked 15½ inches were too small and impossible to install on the rims from which the tires marked 16 inches came."*

The Tribunal further finds that the imported bicycles are not covered by the phrase "and frames thereof" in the finding in Bicycles, as this phrase covers importations of frames, alone, that have yet to be used as components of bicycles.

Place of Hearing: *Ottawa, Ontario*
Date of Hearing: *August 30, 1995*
Date of Decision: *January 25, 1996*

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Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Lyle M. Russell, Member* *Anita Szlazak, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Richard S. Gottlieb, for the appellant* *Stéphane Lilkoff, for the respondent* *C.J. Michael Flavell, Q.C., and Paul M. Lalonde, for the interveners*

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-351

ZELLERS INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

GROUPE PROCYCLE INC. AND VICTORIA PRECISION INC. **Interveners**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
LYLE M. RUSSELL, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] (SIMA) of re-determinations of the Deputy Minister of National Revenue (the Deputy Minister) that bicycles described as having wheel diameters of 15.5 in. (39.37 cm) imported by the appellant are goods of the same description as the goods to which the Tribunal's finding in *Bicycles and Frames Originating in or Exported from Taiwan and the People's Republic of China*[2] applies and are, therefore, subject to the imposition of anti-dumping duties.

Counsel for the appellant initially challenged the participation of Groupe Procycle Inc. and Victoria Precision Inc. as interveners in this appeal, but conceded at the hearing that subsection 61(2) of SIMA contemplates their participation. However, counsel objected to the lateness of their appearance and filing of a brief and asked the Tribunal to reserve the appellant's right to comment further in writing on the brief, if required. The Tribunal decided to give the appellant one week to make written submissions in response to the brief, following which the interveners were given one week to reply to those submissions. Submissions from both parties were received on September 8 and 15, 1995, and taken into account by the Tribunal as part of the record of this appeal.

At the outset of the hearing, the Tribunal heard argument from counsel concerning the issue of whether the Deputy Minister's decision to impose anti-dumping duties on the bicycles in issue constituted a re-determination under section 57 of SIMA and was, therefore, properly the subject of an appeal to the Tribunal under section 61 of SIMA.

Counsel for the appellant argued that section 57 of SIMA, which speaks of a re-determination by a designated officer, requires as a precondition that a determination be previously made. In particular, he pointed out that section 57 reads that a designated officer may re-determine any determination referred to in

1. R.S.C. 1985, c. S-15.
2. Inquiry No. NQ-92-002, Finding, December 11, 1992, Statement of Reasons, December 29, 1992.

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subsection 56(1) in any case within two years after the determination. He submitted that there was no determination as contemplated by subsection 56(1). It was further submitted that the words "in accordance with any representations made by the person accounting for the goods at the time of the accounting" in subsection 56(2) could relate only to representations of the importer as to the export price or normal value, since the importer does not make any representations as to whether or not goods are of the same description as goods to which a Tribunal finding applies.

Counsel for the respondent and for the interveners submitted that it was necessary to look at subsection 56(2) of SIMA, which provides that, if at the time of entry of any imported goods there is no determination, the determination will be deemed to have been made on the 30th day after the goods were accounted for and in accordance with any representations made by the person accounting for the goods at the time of the accounting. In support of their argument, counsel referred to the following statement of Martin, J. of the Federal Court of Canada, Trial Division, in *Toshiba International Corp. v. The Deputy Minister of National Revenue for Customs and Excise*:[3]

> *In my view, for the purposes of this application, there is no difference between a determination made pursuant to s. 56(1) and s. 56(2) and, for the purposes of this application, a determination made pursuant to s. 56(2) is a determination made pursuant to s. 56(1).*

Counsel submitted that it is impossible for the Deputy Minister to make a determination in respect of every importation and that many determinations are made under subsection 56(2) of SIMA.

The Tribunal's jurisdiction to hear an appeal and to render a decision thereon under section 61 of SIMA is circumscribed by the fact that the appeal must be brought by a "person who deems himself aggrieved by a re-determination of the Deputy Minister made pursuant to section 59 with respect to any goods." Section 59 gives the Deputy Minister the power to "re-determine any ... re-determination referred to in section 55, 56 or 57 made by a designated officer." Thus, a re-determination under section 59 may relate to a re-determination under any of the provisions of section 56. The Tribunal is persuaded that section 56 provides both for situations when a determination is made at the time of importation and accounting for goods and for situations when no such determination is made. Subsection 56(1) covers the former, while subsection 56(2) covers the latter. Contrary to the submission of counsel for the appellant, the Tribunal is of the view that the phrase "in accordance with any representations made by the person accounting for the goods at the time of the accounting" in subsection 56(2) does not relate only to representations regarding normal value and export price. Subsection 56(2) relates to determinations referred to in subsection 56(1), which include not only determinations as to normal value and export price but also determinations as to whether imported goods are goods of the same description as goods to which a Tribunal finding applies.

The issue in this appeal is whether the Deputy Minister correctly re-determined that imported bicycles described by the appellant as having wheel diameters of 15.5 in. are goods of the same description as the goods to which the Tribunal's finding in *Bicycles* applies. In *Bicycles*, the Tribunal made the following finding:

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3. (1991), 44 F.T.R. 31 at 34.

> *Pursuant to subsection 43(1) of the Special Import Measures Act, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater, originating in or exported from Taiwan and the People's Republic of China ... has caused, is causing and is likely to cause material injury to the production in Canada of like goods, and that the dumping in Canada of the subject bicycle frames, originating in or exported from the aforementioned countries, has not caused, is not causing, but is likely to cause material injury to the production in Canada of like goods.*[4]

Mr. Robert Watt, Senior Buyer for the Sporting Goods Department of Zellers Inc. since 1991, explained that the bicycles in issue, model BMX with wheel diameters of 15.5 in., were designed to be smaller in size than the same model bicycles with wheel diameters of 16.0 in. He referred to the diagram included in the appellant's confidential brief and to the physical description in the appellant's public brief which outline the different measurements of the frames of the BMX model bicycles with wheel diameters of 15.5 and 16.0 in. When questioned about the motivation for the appellant's decision to purchase the BMX model bicycles with wheel diameters of 15.5 in., he stated that the vendor had approached him with the design. He confirmed that the appellant had not previously imported BMX model bicycles with wheel diameters of 15.5 in. and admitted that he was not aware that bicycles with wheel diameters of 15.5 in. were being sold in Canada. However, he stated that he had been told by the vendor that bicycles with wheel diameters of 15.5 in. were being sold in the United States and that, based on the short time frame between the placing of the order and delivery, he believed that the vendor already had been producing bicycles with wheel diameters of 15.5 in. and had not changed its moulds in order to fill the appellant's order.

Focussing specifically on the bicycles with wheel diameters of 15.5 in., Mr. Watt stated that the diameter would be measured from one outside edge of the tire to the other outside edge of the tire when fully inflated. He was surprised at the suggestion that the wheels on bicycles with wheel diameters of 15.5 in. might not measure 15.5 in. and stated that he expected that such wheels would measure exactly 15.5 in. He believed, based on a cross-section of quality tests, that the wheels on the BMX model bicycles measured, in fact, 15.5 in. He referred to the reports of the Laboratory and Scientific Services Directorate, Research and Development Section, of the Department of National Revenue (Revenue Canada) entitled "Determination of Wheel, Tire and Frame Dimensions and Wheel/Tire Interchangeability of Two Chinese Bicycles," dated July 1993 (the July 1993 report), and "Determination of Wheel and Tire Dimensions and Wheel/Tire Interchangeability of Two Chinese Bicycles," dated August 9, 1994 (the August 9, 1994, report). He stated that these reports indicate that 16.0-in. wheels do not fit on bicycles with wheel diameters of 15.5 in., nor do 15.5-in. wheels fit on bicycles with wheel diameters of 16.0 in. Moreover, the appellant carries a stock of 15.5-in. tires and tubes.

Mr. Philip Stanimir, President and Chief Executive Officer of Victoria Precision Inc. and President of the Canadian Bicycle Manufacturers' Association, appeared on behalf of the respondent, accompanied by Mr. Daniel Pharand, Plant Manager of Victoria Precision Inc. Mr. Stanimir explained that the wheel sizes available in the Canadian market are regulated by the world market. They differ by 2-in. increments and include 12, 14, 16, 18, 20, 24, 26 and 27 in. and 700 mm. Generally speaking, the 12-in. wheel is used by 2-1/2- to 3-year-olds, the 16-in. by 4-year-olds, the 20-in. by 5- to 6-year-olds, the 24-in. by 8- to

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4. *Supra*, note 2.

14-year-olds and the 26-in. by persons over 14 years of age. During cross-examination by counsel for the appellant, Mr. Stanimir acknowledged that Victoria Precision Inc. markets bicycles with wheel diameters of 13.0 in. He indicated that the decision to market such bicycles was based on the fact that the plastic wheels that it wanted to use were available only in diameters of 13.0 in. Bicycles with wheel diameters of 13.0 in. are marketed to the same age range as bicycles with wheel diameters of 12.0 in., that is, to 2-1/2- to 3-year-olds. Mr. Stanimir also acknowledged, after reviewing marketing information from various wheel manufacturers, that they offer 12.5-in. wheels for certain bicycles, not including BMX model bicycles.

Mr. Stanimir stated that, although there are standard sizes, there are nominal deviations from these standard sizes. By way of illustration, he showed the Tribunal a bicycle wheel manufactured by Victoria Precision Inc. which indicated that it measured 16.0 in., but which, when measured across the diameter by Mr. Stanimir, measured only 15.5 in. Mr. Pharand indicated that the measurement for a wheel with a 16.0-in. diameter is based largely on the rim diameter and that it is actually the tire width which varies.

Mr. Stanimir testified that he had been approached by Mr. Watt to produce bicycles with wheel diameters of 15.5 in. He did not agree to produce bicycles with wheel diameters of 15.5 in. for the appellant, as he believed that the appellant wanted him to provide a quotation to support its evasion of the Tribunal's finding in *Bicycles*. Mr. Stanimir disagreed with Mr. Watt's testimony that a 16.0-in. wheel would not fit on a 15.5-in. rim and stated that, if Victoria Precision Inc. had wanted to quote on the appellant's business, it simply would have had to change the tire marking from 16.0 in. to 15.5 in.

Referring to an excerpt from Sutherland's Handbook for Bicycle Mechanics[5] (Sutherland's Handbook), Mr. Pharand stated that the Canadian standard, the one used by Victoria Precision Inc., is found in the column entitled "Hooked-edge (Decimal), Schwinn, and Canadian" in the tire and rim size charts. He was not aware of any bicycle wheel manufacturers around the world that produce 15.5-in. wheels other than as custom-made wheels. He pointed out that there is no reference to bicycles with wheel diameters of 15.5 in. in the column entitled "Hooked-edge (Decimal), Schwinn, and Canadian."

Mr. Pharand stated that, in accordance with the European Tyre and Rim Technical Organization (ETRTO) standards, which have been approved by the International Organization for Standardization (ISO), wheel size is determined by the bead seat diameter. The bead seat diameter is where the tire sits on or hooks onto the rim and is very close to the rim outside diameter. Therefore, the width or height and the extent of inflation of the tire may cause the outside wheel diameter to vary. Mr. Pharand stated that, in the case of tires and rims, Victoria Precision Inc. follows the ETRTO standards.

Counsel for the interveners led evidence through Mr. Ephrem Busque, Vice-President of Operations for Groupe Procycle Inc. Mr. Busque stated that he is familiar with the standards for the bicycle industry and confirmed that the standards published in Sutherland's Handbook, which are the ETRTO standards adopted as the international standards in 1988, are the ISO standards.

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5. Fifth ed. (Emeryville: Sutherland Publications, 1990).

Mr. Busque was asked to explain what is meant by the following excerpt from Sutherland's Handbook:

> *Bead and bead seat diameter are much more important dimensions than outside diameter because they determine tire/rim fit. (Unfortunately, most tires are still marked with the nominal outside diameter....)*

In response, he stated that it is better to measure the diameter of the rim in relation to where the tire sits on the rim. Thus, if one wants bicycles with wheel diameters of 16 in., one really wants bicycles with bead seat diameters of 305 mm. He further stated that the tolerance between the tire and the rim should be less than 1 mm. Otherwise, there will be a problem with the fit and function between the tire and the rim. To avoid this problem, all tire and rim manufacturers refer to the ISO standards to ensure that there is a good fit and function between the tire and the rim.

Mr. Busque referred to the measurements set out in Sutherland's Handbook for Schwinn and Canadian wheels with hooked-edge measurements of "16 x 1.75 in." and stated that the "16" represents the "nominal outside diameter." He also pointed out that the bead seat diameter for that wheel is 305 mm and indicated that this is the measurement from where the tire sits on the rim, in other words, the bead seat diameter. He explained that, within the 305-mm category, there is a range of outside diameter measurements depending on the width of the tire. By way of illustration, he referred to the "tire outside radius" measurements which range from 194 to 203 mm. He calculated that the equivalent imperial diameter measurement for a tire outside radius of 194 mm is 15.5 in., while that for a tire outside radius of 203 mm is 16.0 in. He stated that he had never heard of a 15.5-in. wheel prior to this appeal.

Mr. William D. Berry, Manager, Machinery, Transportation and Electrical Products, Anti-dumping and Countervailing Division of Revenue Canada, also appeared as a witness at the hearing. Mr. Berry identified a memorandum to file dated May 28, 1993, relating to a discussion that he had had with Mr. Stanimir and a complaint by Raleigh Industries of Canada Limited (Raleigh). Counsel for the appellant referred Mr. Berry to the fact that the memorandum suggests that there was concern that the appellant was advertising for sale bicycles with wheel diameters of 16.0 in. as bicycles with wheel diameters of 15.5 in. Counsel also referred Mr. Berry to the following excerpt from that memorandum:

> *As bicycles with wheel sizes under 16" are not subject to the finding, the Canadian producers are concerned that the tire marking is being used as a means of circumventing the finding.*

Mr. Berry commented that he had made the statement because he was of the view that the finding covered bicycles with nominal wheel diameters of 16.0 in.

Mr. Berry also identified two reports of studies that he had requested be conducted by the Research and Development Section of the Laboratory and Scientific Services Directorate of Revenue Canada. The July 1993 report sets out the results of an analysis of two bicycles manufactured in the People's Republic of China: a blue boys' bicycle with wheel diameters of 15.5 in. under the brand name "Venture" and a pink girls' bicycle with wheel diameters of 16.0 in. under the brand name "Venture - Mountain Tour." The report indicates that, although the tires from the 16.0-in. wheels were not interchangeable safely for the tires on the

15.5-in. wheels, the wheels, themselves, with the appropriate size of tire mounted thereon, were easily interchangeable. The August 9, 1994, report was made following a request from Revenue Canada for a re-examination of the bicycles with wheel diameters of 15.5 and 16.0 in., as well as the examination of three additional wheels: two wheels marked 16.0 in. from Raleigh and one marked 15.5 in. from the appellant. The findings in this report were similar to those in the first report. In the opinion of the laboratory, the 16.0-in. tires could be installed on the 15.5-in. rims under certain conditions. However, it was not possible to install the 15.5-in. tires on the 16.0-in. rims. Finally, the 15.5- and 16.0-in. wheels, when mounted with the appropriate size of tire, were interchangeable.

Counsel for the appellant submitted that the issue before the Tribunal is whether the bicycles imported by the appellant have, or do not have, wheel diameters of 16.0 in. or greater. Counsel argued that it has been acknowledged by the respondent that the imported bicycles have wheel diameters of 15.5 in. and that they are, therefore, not goods of the same description as the goods to which the Tribunal's finding in *Bicycles* applies. Moreover, counsel submitted that the 15.5-in. tires cannot be installed on rims which fit 16.0-in. tires and that the imported bicycles have other features, namely, the frame size and the overall wheel base, which differentiate them from the bicycles to which the Tribunal's finding applies.

It was the position of counsel for the appellant that the Deputy Minister is bound by the description of the goods in the Tribunal's finding and had no authority to expand the scope of the Tribunal's finding. In support of this argument, counsel relied on the two decisions of the Federal Court of Appeal concerning the Anti-dumping Tribunal's finding in *Integral Horsepower Induction Motors, One Horsepower (1 H.P.) to Two Hundred Horsepower (200 H.P.) Inclusive ... Originating in or Exported from the United States of America*:[6] *Deputy Minister of National Revenue for Customs and Excise v. Trane Company of Canada, Limited*[7] and *The Deputy Minister of National Revenue for Customs and Excise v. General Electric Canada Inc.*[8]

Counsel for the respondent submitted that, in interpreting section 61 of SIMA, the Tribunal should apply the teleological approach to statutory interpretation. The teleological approach provides that the interpretation of tax legislation should follow the ordinary rules of interpretation and that a legislative provision should be given a strict or liberal interpretation depending on the underlying purpose, as determined from the context of the statute, its objective and the legislative intent.[9] Moreover, only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the presumption in favour of the taxpayer. Counsel further submitted, based on the decision of the Federal Court of Appeal in *J.V. Marketing Inc. v. Canadian International Trade Tribunal*,[10] that these same rules of statutory interpretation should apply in the interpretation of a Tribunal finding and statement of reasons.[11]

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6. Inquiry No. ADT-8R-78, Finding and Statement of Reasons, April 15, 1983. This finding was continued by the Tribunal in Review No. RR-89-013 on October 10, 1990.
7. [1982] 2 F.C. 194.
8. Unreported, File No. A-388-93, June 1, 1994.
9. See *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3 at 20; and *Elizabeth C. Symes v. Her Majesty the Queen*, [1993] 4 S.C.R. 695.
10. Unreported, File No. A-1349-92, November 29, 1994.
11. *Ibid.* at 6.

Applying this approach to the interpretation of the Tribunal's finding in *Bicycles*, counsel for the respondent submitted that the purpose of the Tribunal's finding was to protect production in Canada of goods destined for a specific market audience, namely, children who purchase bicycles with wheel diameters of 16 in. and greater. In counsel's view, the wheel diameters of 16 and 20 in. were used because they are internationally recognized sizes and are common reference points used by the industry. However, he submitted that, for the purposes of enforcement of the Tribunal's finding, if the imported bicycles are destined for the same market audience as that of Canadian bicycles with wheel diameters of 16 and 20 in., the imported bicycles are "of the same description" as the goods to which the Tribunal's finding applies.

It was further submitted by counsel for the respondent that the phrase "wheel diameters of 16 inches (40.64 cm) and greater" is vague in the sense that it is not clear whether it is referring to rim size, wheels with or without fully inflated tires, etc. For that reason, counsel submitted that the Tribunal should look to the statement of reasons for assistance in interpreting the finding. Counsel submitted that the statement of reasons indicates that the phrase "wheel diameters of 16 inches" is a sort, kind or class of bicycles. In support of this proposition, counsel referred to the fact that, in the statement of reasons, the Tribunal states that the effect of import competition has been focussed on children's bicycles,[12] that the imported bicycles come in junior, adult and male/female categories, and that they can be further categorized according to wheel size.[13]

In reply, counsel for the appellant submitted that the Federal Court of Appeal in *J.V. Marketing* stated that further inquiry into the meaning of words in a finding is to take place only where there is ambiguity.[14] He submitted that there is no ambiguity in the description of the goods in the finding in *Bicycles*. Counsel stated that the description of the goods in both the finding and the statement of reasons is the same. Counsel denied that the purpose of the finding was to protect the production in Canada of goods destined for a specific market audience, in this case, children who purchase bicycles with wheel diameters of 16 in. and greater. Rather, the finding protects the production of bicycles with wheel diameters of 16 in. and greater. Moreover, counsel submitted that market considerations are irrelevant, as the Tribunal, in an appeal under section 61 of SIMA, is to determine whether the imported goods are goods of the same description as those to which the Tribunal's finding applies and not whether the imported goods are "like goods."

Counsel for the interveners argued that, based on the Supreme Court of Canada's decision in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*,[15] in an appeal under section 61 of SIMA, the Tribunal, as the reviewing body, should not interfere with the finding of fact of the Deputy Minister unless there is no evidence to support such a finding or if the finding is perverse or capricious or made without regard to the material before the Deputy Minister. It was submitted by counsel that there is ample evidence to support the Deputy Minister's reasonable finding of fact that the bicycles in issue are "goods of the same description" as the goods to which the Tribunal's finding in *Bicycles* applies.

Counsel for the interveners submitted that the wheel size designations of the bicycles are standard, nominal sizes, not precise measurements of actual wheel sizes, and that, from the point of view of the consumer, the bicycles in issue and bicycles with wheel diameters of 16 in. of the same make and model are

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12. *Supra*, note 2, Statement of Reasons at 13.
13. *Ibid.* at 2.
14. *Supra*, note 9 at 5.
15. [1989] 1 S.C.R. 1722.

so similar as to be, in effect, identical and, for all practical purposes, "goods of the same description." Counsel submitted, based on the testimony of Messrs. Stanimir, Pharand and Busque and on the physical exhibits, that the actual size of a wheel often fluctuates an inch or so from the marked size and that the diameter may vary according to the extent to which the tire is inflated.

It was counsel for the interveners' position that it is a well-established principle of legal interpretation that, where measurements are used in a legal document, *de minimus* or insignificant deviations from the measurements are acceptable, unless a clear contrary intention appears.[16] Applying that principle to this appeal, counsel submitted that the Tribunal, in interpreting the meaning of "16 inches" in the finding in *Bicycles*, should read in the words "more or less" or "approximately." Moreover, counsel argued that the courts have recognized that trade usage which allows for deviations from a measurement or standard should be adopted[17] and that, in this appeal, pursuant to recognized trade usage, the bicycles in issue should be categorized as bicycles with wheel diameters of 16 in.

It was further submitted by counsel for the interveners that the importations of the bicycles in issue were "sham" transactions and that the Tribunal should look at the substance of the importations at issue rather than at the form. Moreover, counsel submitted that, even if it is argued that the rules of interpretation that apply to taxing statutes do not apply to SIMA, the relevant provisions of SIMA should be given a common sense and purposive interpretation. It was counsel's position that, in interpreting SIMA in that way, the appellant should not be permitted to evade an injury finding by a technicality such as the size stamped on the side of a bicycle tire and the fabrication of a new size category not before known in the industry.

Counsel for the interveners submitted that, in determining whether the imported bicycles are goods of the same description as the goods to which the Tribunal's finding in *Bicycles* applies, the Tribunal should consider the perspective of the end user, as it did in its decision in *Nomad East Distribution Corporation v. The Deputy Minister of National Revenue for Customs and Excise*.[18] In counsel's view, from the perspective of the end user, there is no difference between the bicycles imported by the appellant and the bicycles with wheel diameters of 16 in. manufactured by the interveners.

Finally, counsel for the interveners submitted that, in the alternative, since the description of the goods in the finding in *Bicycles* includes "frames thereof," even if the Tribunal accepts the appellant's position, the frames of the bicycles in issue are covered by the finding and are, therefore, subject to anti-dumping duties.

In the past, in interpreting statutes, the courts have distinguished between taxing statutes and other statutes and applied different rules or principles of statutory interpretation depending on the nature of the statute. It is clear that this is no longer the prevailing view and that the interpretation of all statutes, including taxing statutes, is subject to the ordinary rules of statutory interpretation.[19] Thus, whether or not SIMA is

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16. *Shipton, Anderson & Co. v. Weil Brothers & Co.*, [1912] 1 K.B. 574; and *Arcos, Limited v. E. A. Ronaasen and Son*, [1933] A.C. 470 at 479 (H.L.).
17. *Montague L. Meyer, Ltd. v. Vigers Bros., Ltd.*, [1939] 63 L.L.L.R 10; and *Arcos, ibid.*
18. Appeal No. AP-92-180, December 22, 1993, at 3-4.
19. See *Stubart Investments Limited v. Her Majesty the Queen*, [1984] 1 S.C.R. 536; and *Québec (Communauté urbaine)*, *supra*, note 8.

considered, in whole or in part, to be a taxing statute, it is subject to the ordinary rules of interpretation. The ordinary rules of statutory interpretation provide that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[20]" The Tribunal observes that there is nothing in SIMA which indicates that the Tribunal is to consider an importer's intention when making a decision under section 61. Moreover, unlike the *Income Tax Act*[21] and the *Excise Tax Act*,[22] SIMA does not contain explicit anti-avoidance or anti-circumvention provisions.

Pursuant to section 61 of SIMA, the Tribunal is to hear appeals from re-determinations of the Deputy Minister made pursuant to section 59 of SIMA and to make such order or finding as the nature of the matter may require, including declaring what duty is payable on imported goods or that no duty is payable. For the purposes of this appeal, the re-determinations at issue relate to re-determinations made under subsection 56(2) of SIMA that the imported bicycles are goods of the same description as the goods to which the Tribunal's finding in *Bicycles* applies. As the body hearing the appeal from these re-determinations, the Tribunal is, therefore, to make a decision as to whether the bicycles in issue are goods of the same description as the goods to which the finding in *Bicycles* applies, that is, whether the imported bicycles are goods of the same description as "bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater." In the Tribunal's view, the issue to be resolved in making this determination is whether regard should be had to the actual diameter of the wheel or to a "nominal" diameter which may measure more or less than 16 in.

The reference in the Tribunal's finding in *Bicycles* to "bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater" is used to define the lower end of the range of sizes of bicycles. The upper end of the range is not defined. However, clearly, a range of sizes is covered, namely, all bicycles with wheel diameters of 16 in. and greater. When a precise measurement such as "16 inches (40.64 cm)" is used to define the lower end of a range of sizes of goods covered by a finding, such as in the finding in *Bicycles*, the Tribunal is of the view that it must be interpreted literally. To do anything else is to invite confusion and uncertainty in the administration of the finding and, as pointed out by counsel for the appellant, leads to the result that the coverage of the finding can be varied virtually at the discretion of the Deputy Minister. The Tribunal interprets the jurisprudence with regard to trade usage to mean that it may be relied upon to give clear meaning to otherwise ambiguous clauses in customs legislation or regulations. To rely on it in the present case would, in the Tribunal's view, serve the contrary purpose of rendering ambiguous a text which, on its face, is clear.

The Tribunal cannot accept that, because bicycles with wheel diameters of less than and greater than 16.0 in. are commonly represented and sold as bicycles with wheel diameters of 16.0 in., its finding in *Bicycles* should be interpreted as applying to bicycles with wheel diameters of 16.0 in. "more or less," as argued by counsel for the interveners. The Tribunal finds the fact that the metric equivalent of 16.0 in. (40.64 cm) was specified in the finding to the nearest one tenth of a millimetre persuasive evidence that diameters within 0.5 in. of 16.0 in. were not envisaged.

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20. *Québec (Communauté urbaine)*, *supra*, note 8 at 17.
21. R.S.C. 1985, c. 1 (5th Supp.), s. 245.
22. R.S.C. 1985, c. E-15, s. 274, as amended by S.C. 1990, c. 45, s. 12.

The Tribunal also believes that it is significant that the appellant advertised and sold the bicycles with wheel diameters of 15.5 in. as such and did not try to pass them off as bicycles with wheel diameters of 16.0 in. The possibility that they may have been purchased by consumers instead of bicycles with wheel diameters of 16.0 in. is, in the Tribunal's view, irrelevant. They were not, in fact, "goods of the same description" as they appeared in the marketplace. The Revenue Canada laboratory reports which compare the bicycles in issue with bicycles with wheel diameters of 16.0 in. made by the same Chinese manufacturer and marketed at the same time by the appellant noted significant differences between the two, including the fact that "[t]he tires marked 15½ inches were too small and impossible to install on the rims from which the tires marked 16 inches came.[23]" These reports must, in the Tribunal's view, be given considerably more weight than the comparisons which witnesses for the interveners made at the hearing between the bicycles in issue and a later model of a bicycle with wheel diameters of 16.0 in. from Thailand.

Both the complainants in Inquiry No. NQ-92-002 regarding imports of bicycles and the Revenue Canada officials who drafted the preliminary and final determinations of dumping could, in the Tribunal's view, have foreseen a move to "non-standard" sizes in the event of an injury finding and the imposition of anti-dumping duties on imports of bicycles with wheel diameters of 16 in. If this had been a concern, the Revenue Canada officials could have structured the description of the goods in the preliminary and final determinations so as to cover all bicycles with wheel diameters greater than what was then the next smallest "standard" size, i.e. all bicycles with wheel diameters greater than 14 in., or the complainants could have raised the matter during proceedings before the Tribunal prior to the issuance of its finding. Not having done so, they cannot try now to expand the Tribunal's finding by defining 16 in. to mean something else.

With respect to the alternative argument of counsel for the interveners that the imported bicycles are covered by the phrase "and frames thereof" in the finding in *Bicycles*, the Tribunal is of the view that this phrase covers importations of frames, alone, that will be used as components of bicycles. As the goods in issue are bicycles, the Tribunal is of the view that they are not covered by the phrase "and frames thereof."

Counsel for the interveners submitted that the Tribunal should find that the appellant's importations of the bicycles in issue constituted "sham" transactions. The term "sham transaction" was defined by Lord Diplock in *Snook v. London and West Riding Investments Ltd.*[24] as follows:

> *[A] "sham," ... means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*[25]

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23. Revenue Canada report dated July 1993 at 1.
24. [1967] 2 Q.B. 786.
25. *Ibid.* at 802; and, in part, *Stubart*, *supra*, note 18 at 572.

The Tribunal finds an absence of evidence in this appeal that the appellant intended to deceive Revenue Canada officials through the importations of the bicycles in issue or that the appellant was attempting to create legal rights and obligations arising from the importations different from those legal rights and obligations that would actually flow from the importations. On the contrary, the appellant openly imported bicycles described as having wheel diameters of 15.5 in. and was subject to the re-determinations of officials of Revenue Canada as to the rights and obligations that would flow from the importations and, in particular, the amount of duty that might be payable. In the Tribunal's view, these facts are not sufficient to constitute the importations at issue "sham" transactions.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member