CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 6, 1998

Appeal Nos. AP-96-211, AP-96-212, AP-96-216, AP-96-223, AP-96-237 to AP-96-239, AP-97-001, AP-97-004 to AP-97-008 and AP-97-024 to AP-97-026

IN THE MATTER OF appeals heard on July 7 and 8, 1997, 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 made between November 28, 1996, and May 13, 1997, with respect to a request for re-determination under section 58 of the *Special Import Measures Act*.

BETWEEN

2703319 CANADA INC. O/A VWV ENTERPRISES, 168700 CANADA INC. O/A SACHA LONDON, ALDO SHOES (1993) INC., TRANSIT (A DIVISION OF ALDO SHOES) AND GLOBO (A DIVISION OF ALDO SHOES)

Appellants

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Raynald Guay
Raynald Guay
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-96-211, AP-96-212, AP-96-216, AP-96-223, AP-96-237 to AP-96-239, AP-97-001, AP-97-004 to AP-97-008 and AP-97-024 to AP-97-026

2703319 CANADA INC. O/A VWV ENTERPRISES, 168700 CANADA INC. O/A SACHA LONDON, ALDO SHOES (1993) INC., TRANSIT (A DIVISION OF ALDO SHOES) AND GLOBO (A DIVISION OF ALDO SHOES) **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

On May 3, 1990, the Tribunal made findings of material injury concerning the dumping in Canada and subsidizing of women's leather boots and shoes originating in or exported from certain countries. The Tribunal indicated in the findings that "sandals" were excluded. The issue in these appeals is whether certain women's shoes imported into Canada are goods of the same description as those to which the Tribunal's findings apply. Counsel for the appellants submitted that, as sandals, the shoes are excluded from the findings.

HELD: The appeals are dismissed. The Tribunal is of the view that sandals which do not meet the extended definition of "sandals" contained in the Tribunal's statement of reasons in Inquiry No. NQ-89-003 are not sandals for purposes of the findings and are, therefore, goods of the same description as those to which the Tribunal's findings apply.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	July 7 and 8, 1997
Date of Decision:	February 6, 1998
Tribunal Members:	Charles A. Gracey, Presiding Member Patricia M. Close, Member Raynald Guay, Member
Counsel for the Tribunal:	John L. Syme
Clerks of the Tribunal:	Margaret Fisher and Gillian Burnett
Appearances:	Brenda C. Swick-Martin, Marcia A. Green, Donald Petersen and Michael Wagen, for the appellants Louis Sébastien, for the respondent

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-96-211, AP-96-212, AP-96-216, AP-96-223, AP-96-237 to AP-96-239, AP-97-001, AP-97-004 to AP-97-008 and AP-97-024 to AP-97-026

2703319 CANADA INC. O/A VWV ENTERPRISES, 168700 CANADA INC. O/A SACHA LONDON, ALDO SHOES (1993) INC., TRANSIT (A DIVISION OF ALDO SHOES) AND GLOBO (A DIVISION OF ALDO SHOES) **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
PATRICIA M. CLOSE, Member
RAYNALD GUAY, Member

REASONS FOR DECISION

INTRODUCTION

These are appeals under section 61 of the *Special Import Measures Act*[1] (SIMA) from decisions of the Deputy Minister of National Revenue that the sandals in issue are subject to the Tribunal's findings in Inquiry No. NQ-89-003[2] (the findings).

In Inquiry No. NQ-89-003, the Tribunal found, among other things, that the dumping and subsidizing of certain shoes and boots from the subject countries had caused, were causing and were likely to cause material injury to production in Canada of like goods. At the conclusion of its findings, the Tribunal identified certain types of shoes which were not included in the findings.[3] The final paragraph of the Tribunal's findings reads as follows:

> The aforementioned findings do not include sandals, slippers, sports footwear, waterproof rubber footwear, waterproof plastic footwear, safety footwear incorporating protective metal toe caps, orthopedic footwear, wooden shoes, disposable footwear, bowling shoes, curling shoes, moto-cross racing boots and canvas footwear. (Emphasis added)

---

1. R.S.C. 1985, c. S-15.
2. *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan, Findings*, May 3, 1990, *Statement of Reasons*, May 18, 1990.
3. Inquiry No. NQ-89-003 was conducted following the issuance by the respondent of a preliminary determination of dumping and subsidizing on January 3, 1990. Specifically excluded from the respondent's product definition were "sandals, slippers, sports footwear, waterproof rubber footwear, waterproof plastic footwear, safety footwear incorporating protective metal toe caps, orthopedic footwear, wooden shoes, disposable footwear, bowling shoes, curling shoes, moto-cross racing boots and canvas footwear."

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

In a section of its statement of reasons in Inquiry No. NQ-89-003 (the statement of reasons) entitled "The Product," the Tribunal set out the following extended definition of "sandals":

> For further clarification, sandals were generally defined as an open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment, in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, did not exceed two centimetres.[4]

The issue in these appeals is whether the sandals in issue are goods of the same description as those to which the Tribunal's findings apply.

POSITION OF PARTIES

The appellants' first witness was Mr. Marc Benchimol, Secretary-Treasurer of 168700 Canada Inc. o/a Sacha London. Mr. Benchimol testified that Sacha London imports women's footwear from a number of countries, including Spain, the People's Republic of China, Brazil and Thailand. It sells most of its imports to Canadian footwear retailers. Through Mr. Benchimol, counsel for the appellants introduced a number of shoes as physical exhibits. The respondent had determined that certain of these shoes were excluded from the findings, whereas others were not. In terms of construction and design, the shoes were very similar to one another. Mr. Benchimol testified that heel height was the only feature which served to distinguish the sandals excluded from the findings from those which were not so excluded.

Mr. Laurie Weston, President of VWV Enterprises, was the second witness. Mr. Weston testified that VWV Enterprises imports footwear from all over the world, which it sells to Canadian retailers. He further testified that the goods in issue relevant to VWV Enterprises' appeals were found to be subject to anti-dumping duties on the basis that they did not satisfy the extended definition of sandals and, in particular, the two-centimetre requirement therein.

In cross-examining Mr. Weston, counsel for the respondent referred him to a letter dated October 4, 1990, from the Footwear Importers of Canada, a group within the Canadian Importers Association Inc., to its members. Mr. Weston was on a committee, comprised of footwear importers and representatives of the Retail Council of Canada, The Canadian Shoe Retailers' Association Incorporated, the Shoe Manufacturers' Association of Canada and the Canadian Shoe Traveller's Association, which was formed to create general guidelines for determining what is a sandal for purposes of the Tribunal's findings. The letter states, in part, as follows:

> Following discussions and meetings with Revenue Canada, tentative agreement has been reached to revise the general guidelines for determining what is a sandal for purposes of administering dumping duties on women's footwear as follows:
>
> 1) For purposes of this investigation, footwear for which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, exceeds two centimetres, cannot be classified as a sandal.[5]

4. *Supra* note 2, *Statement of Reasons* at 4.
5. Respondent's brief, Appeal Nos. AP-96-216, AP-96-223 and AP-97-007, Tab 11.

On November 30, 1990, the respondent issued Customs Notice N-541 entitled "Women's Leather & Non-Leather Footwear - General Guidelines Utilized For Determining What is a Sandal." The guidelines reproduce in its entirety paragraph 1) of the October 4, 1990, letter of the Footwear Importers of Canada.

Mr. Weston acknowledged that, under the guidelines agreed to by the Footwear Importers of Canada, the goods in issue would not be considered sandals for purposes of the Tribunal's findings. However, on questioning from the Tribunal, Mr. Weston explained that the Footwear Importers of Canada had agreed to paragraph 1) as a compromise.

The appellants' third witness was Ms. Barbara Stevens, a women's footwear buyer with KMart Canada Limited. Ms. Stevens testified that, in the past, she had purchased shoes from VWV Enterprises. Ms. Stevens provided the Tribunal with a description of KMart's shoe business, with particular emphasis on sandals. A number of the goods in issue were shown to Ms. Stevens. She indicated that she considered them all to be sandals and that heel height would not affect her view as to whether or not a particular shoe is a sandal.

The appellants' next witness was Mr. Robert Raven, Vice-President of Finance for Aldo Group Inc., which owns and operates six retail shoe chains across Canada, including Aldo Shoes (1993) Inc., Transit (A Division of Aldo Shoes) and Globo (A Division of Aldo Shoes). Using photographs of displays of footwear from the appellants' retail outlets, Mr. Raven described the various types of shoes sold by the appellants. Mr. Raven noted that in some displays, a variety of sandals were set out, some with high heels, others with low heels. He testified that all styles of sandals, regardless of heel height, are displayed together so that customers looking for sandals can locate them all in one place. In Mr. Raven's view, heel height is irrelevant to the classification of a shoe as a sandal or some other type of footwear; heel height is a function purely of fashion. Mr. Raven testified that the goods in issue are sandals. They were purchased as sandals, advertised as sandals and sold as sandals.

The appellants' last two witnesses were Mr. Phillip Nutt, who was qualified by the Tribunal as an expert in footwear design, and Mr. Everett Gray, who was qualified by the Tribunal as an expert in shoe construction. They provided the Tribunal with a testimony concerning the history of footwear design and construction. Mr. Nutt testified that a sandal is a shoe which possesses two out of three of the following elements: an open toe, an open back or an open waist (or shank).

The respondent's first witness was Mr. Ken Gilbertson, President of Brown Shoe Company of Canada, Ltd., a Canadian footwear manufacturer. Mr. Gilbertson testified that Brown Shoe makes a variety of styles of women's footwear in Canada, including sandals. Mr. Gilbertson used a series of posters containing photographs of footwear to indicate the various styles of shoes manufactured by Brown Shoe. Mr. Gilbertson expressed the view that a sandal is an "opened up" shoe. He testified that he would have difficulty being more specific. Mr. Gilbertson expressed the view that it is the customer who makes the purchasing decision and who is in the best position to categorize various types of shoes.

The respondent's second witness was Ms. Karen Humphries, Senior Program Officer with the Anti-dumping and Countervailing Directorate of the Department of National Revenue. Ms. Humphries had worked on the respondent's original investigation with respect to footwear and has been involved with the administration of the Tribunal's findings.

Ms. Humphries explained that, when shoes are imported into Canada, to determine whether or not they are subject to anti-dumping duties, the respondent first determines whether the footwear in question is women's leather or non-leather boots or shoes from a subject country. If so, the respondent goes on to consider whether the footwear is excluded from the Tribunal's findings under any of the exclusions contained therein. For example, are the shoes sandals? In considering that question, the respondent would refer to the extended definition of sandals in the Tribunal's statement of reasons. Ms. Humphries testified that the respondent would first consider whether, in broad terms, a given shoe could be described as a sandal. For example, was it constructed with an open shank and did it employ narrow straps as a means of attaching the sole to the wearer's foot? Ms. Humphries stated that, in considering this first broad question, the respondent would consider all of the characteristics of the given shoe. If the shoe was determined to be a sandal in the broad sense, then the respondent would consider whether the shoe satisfied the two-centimetre requirement in the second part of the extended definition of sandals. Ms. Humphries agreed that, in general terms, all of the goods in issue are sandals. However, she stated that, from the respondent's perspective, that was not the relevant issue. Ms. Humphries framed the issue as follows:

> Our issue is: Do they meet the extended definition in the finding? Are they subject goods or are they non-subject goods, not whether they are a sandal or not a sandal.[6]

Counsel for the appellants argued that, if the Tribunal was satisfied that the goods in issue are sandals, whether using Mr. Nutt's definition or otherwise, the appellants must prevail in light of the fact that sandals are specifically excluded from the Tribunal's findings. Counsel argued that the Tribunal should only go beyond its findings and consider the extended definition of sandals in its statement of reasons if it is of the view that the term "sandals" is ambiguous. Given the unanimity among parties as to the characterization of the goods in issue as sandals, counsel submitted that the Tribunal need not consider arguments concerning the extended definition.

Counsel for the appellants argued that, even if the Tribunal did consider the extended definition, the appellants should still prevail. Counsel submitted that the exemption for sandals created by the extended definition is very broad, in that it is prefaced with the words "sandals were generally defined as." In counsel's submission, the use of those words indicates that the Tribunal intended the definition to be illustrative and not exhaustive. In support of that position, counsel referred the Tribunal to the Federal Court of Appeal's decision in *J.V. Marketing Inc.* v. *Canadian International Trade Tribunal*,[7] a case in which the Federal Court considered the meaning of the extended definition of "sports footwear" in the Tribunal's statement of reasons. Counsel also cited the Tribunal's decision in *M & M Trading Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[8] a case in which the Tribunal was called upon to decide whether certain imported shoes were goods of the same description as those to which the Tribunal's findings applied. Counsel submitted that *M & M* stands for the proposition that shoes may be sandals within the meaning of the Tribunal's findings, notwithstanding the fact that they do not meet all the physical characteristics set out in the extended definition.

Counsel for the respondent argued that, in giving meaning to the word "sandals" in the findings, the Tribunal should be mindful that the primary purpose of SIMA is to protect the relevant domestic industry

---

6. *Transcript of Public Hearing*, July 7, 1997, at 309.
7. Unreported, Court File No. A-1349-92, November 29, 1994.
8. Appeal No. AP-92-075, September 9, 1993.

from injury from the effects of dumping or subsidizing. In that connection, counsel directed the Tribunal to the testimony of Mr. Gilbertson. Counsel submitted that Mr. Gilbertson testified that a substantial portion of his company's production would be injured if the goods in issue were not subject to anti-dumping duties. Moreover, counsel argued that the goods in issue were not excluded from the Tribunal's findings because they failed to satisfy the two-centimetre condition set out in the extended definition.

DECISION

The Tribunal considers that there are two aspects to its decision in this matter. The first relates generally to the nature of the Tribunal's findings. The second relates to the Federal Court of Appeal's decision in *J.V. Marketing*.

Tribunal's Findings

SIMA establishes a bifurcated regime which provides Canadian industry relief from material injury, retardation and threat of material injury caused by the effects of dumping and subsidizing. In simple terms, the respondent is responsible for investigating and determining whether dumped or subsidized goods are being imported into Canada. The respondent may initiate an investigation on its own initiative or when it receives a complaint. Subject to certain exceptions, within 90 days after initiating an investigation, the respondent is required to make a "preliminary determination of dumping or subsidizing with respect to the goods [subject to the investigation].[9]" When the respondent makes a preliminary determination, he is required to file with the Tribunal "written notice of the determination, stating the reasons therefor, together with such other material relating to the determination as may be required under the rules of the Tribunal.[10]"

Section 42 of SIMA provides, in part, as follows:

> 42. (1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:
>
> (*a*) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods
>
> (i) has caused injury or retardation or is threatening to cause injury. (Emphasis added)

It is clear, based on the plain wording of the relevant sections of SIMA and, more generally, on the bifurcated regime established under SIMA, that it is the respondent who defines what goods are subject to an investigation and what goods will ultimately form the starting point for the Tribunal's inquiry.[11]

Ninety days after making a preliminary determination, the respondent, if satisfied that the goods "in respect of which the investigation is made" have been dumped or subsidized, is required to make a final determination of dumping or subsidizing with respect to the goods.[12] Subsection 43(1) of SIMA provides the

9. Subsection 38(1) of SIMA.
10. Paragraph 38(3)(*b*) of SIMA.
11. See *DeVilbiss (Canada) Ltd.* v. *Anti-dumping Tribunal*, [1983] 1 F.C. 706.
12. Subsection 41(1) of SIMA.

Tribunal with the jurisdiction to make an order or finding in respect of the goods to which the final determination applies.[13]

In this case, on August 25, 1989, the respondent initiated an investigation with respect to women's footwear from certain countries. Certain shoes, including sandals, were not subject to the investigation. Sandals were defined by the respondent as any "open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment, in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, does not exceed two centimetres." On January 3, 1990, the respondent made a preliminary determination of dumping and subsidizing in respect of the shoes under investigation.

The Tribunal's notice of commencement of inquiry was issued on January 9, 1990, and published in the January 20, 1990, edition of the *Canada Gazette*, Part I. After referencing the respondent's preliminary determination, the Tribunal's notice stated, in part, as follows:

> Pursuant to section 42 of the *Special Import Measures Act*, the Tribunal has initiated an inquiry to determine whether the dumping and/or subsidizing of the above-mentioned goods have caused, are causing or are likely to cause material injury. (Emphasis added)

In the Tribunal's view, it is clear that the "above-mentioned goods" were those goods to which the preliminary determination applied.

On April 3, 1990, the respondent made a final determination of dumping and subsidizing in respect of women's footwear from the subject countries. In the reasons accompanying the final determination, it was noted that certain footwear, including sandals, had been excluded from the investigation, and it was indicated that guidelines concerning the product definition could be found in Appendix C. The definition of "sandals" which was contained in the preliminary determination was reproduced in Appendix C. Again, by necessary implication, sandals not meeting that definition would have been included within the final determination.

On May 3, 1990, the Tribunal issued its findings. The findings provided, in part, as follows:

> The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry consequent upon the issue by the Deputy Minister of National Revenue for Customs and Excise of a preliminary determination … and of a final determination … respecting the dumping … and respecting the subsidizing of [certain women's leather boots and shoes]. (Emphasis added)

In the Tribunal's view, it is clear that, from the time the respondent initiated his investigation respecting women's footwear, certain sandals were excluded. It is also clear that, at the outset, the respondent defined "sandals" in a specific manner. It follows that women's shoes which did not meet the

---

13. Subsection 43(1) reads: "In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall, forthwith after the date of receipt by the Secretary of notice of final determination of dumping or subsidizing with respect to any of those goods, but, in any event, no later than one hundred and twenty days after the date of receipt by the Secretary of notice of a preliminary determination with respect to the goods, make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies." (Emphasis added)

respondent's definition of "sandals" were not excluded from the respondent's investigation. In other words, by necessary implication, the respondent's investigation and preliminary determination included, *inter alia*, those sandals which did not meet that definition. When the Tribunal initiated its inquiry, it made specific reference to the preliminary determination and then stated that it had initiated an inquiry in respect of the "above-mentioned goods." Under subsection 42(1) of SIMA, the Tribunal could not of course conduct an inquiry regarding the effects of a class of goods narrower or broader than those found by the respondent to have been dumped and subsidized.

The Tribunal found, pursuant to subsection 43(1) of SIMA, that the dumping and subsidizing of the footwear were causing material injury to the production in Canada of like goods. As noted above, subsection 43(1) of SIMA provides the Tribunal with the jurisdiction to make a finding with respect to the goods to which the final determination applies. In this case, the final determination applied to those same imports that were subject to the respondent's investigation and that had been found to be dumped or subsidized. Finally, in its statement of reasons, the Tribunal confirmed that, for purposes of its inquiry, it had adopted the respondent's extended definition of "sandals."

Based on the foregoing, the Tribunal is of the view that sandals not meeting the respondent's extended definition of "sandals" were: (1) the subject of the respondent's investigation and preliminary determination; (2) the subject of the Tribunal's inquiry; (3) the subject of the respondent's final determination; and (4) the subject of the Tribunal's findings under subsection 43(1) of SIMA.

J.V. Marketing

There is a marked similarity between the issues raised in these appeals and those raised in *J.V. Marketing*. The Tribunal's findings provided that the findings did not include, among other shoes, "sports footwear." The issue in *J.V. Marketing* was whether certain imported "walking shoes" were "sports footwear" and, thus, whether they were goods of the same description as those to which the Tribunal's findings applied. In the Tribunal's decision, in considering that question, the Tribunal began by examining the extended definition of "sports footwear" set out in its statement of reasons, which provides as follows:

> Sports footwear was generally defined as footwear which was designed for a sporting activity and had, or had provision for, the attachment of spikes, sprigs, stops, clips, bars or the like. It also included skating boots, ski boots, cross-country ski footwear, wrestling boots, boxing boots, cycling boots, bowling shoes, curling shoes and moto-cross racing boots. For purposes of this inquiry, sports footwear also referred to tennis shoes, jogging shoes and running shoes.

The Tribunal found that, for shoes to qualify as "sports footwear," they would have to be either specifically named in the extended definition (e.g. wrestling boots) or designed for a sporting activity and must have, or have provision for, the attachment of spikes, sprigs, stops, clips, bars or the like. Walking shoes are not specifically named in the extended definition. Moreover, the Tribunal found that the walking shoes did not have, or have provision for, the attachment of spikes, sprigs, etc. On these grounds, the Tribunal found that the walking shoes did not fall within the extended definition of sports footwear and were, therefore, not excluded from the Tribunal's findings.

In its decision in *J.V. Marketing*, the Federal Court of Appeal identified the following three issues. First, did the Tribunal err in referring to the extended definition of sports footwear? Second, if reference to the extended definition was proper, did the Tribunal properly construe it and correctly treat it as exhaustive?

Third, if the Tribunal erred, should the Federal Court declare that the walking shoes fall within the exemption? Only the first two issues are relevant to the present appeals.

Regarding the first issue, the Federal Court of Appeal found that the Tribunal did not err in referring to the extending definition. In its decision, the Federal Court stated:

> With respect to the first issue, it has been settled by this Court that it is perfectly acceptable to refer to a separately issued Statement of Reasons in order to interpret an otherwise ambiguous finding of the Tribunal; *Deputy Minister of National Revenue for Customs and Excise v. Trane Company of Canada, Limited*, [1982] 2 F.C. 194 (C.A.). Hence, the immediate question is whether the meaning of the term "sports footwear" in the Dumping Finding is clear on its face. The reality is that the category of "sports footwear" is a trade term of indeterminate meaning which connotes a broad range of footwear. For example, it would be difficult to distinguish between some athletic and leisure shoes. I conclude, therefore, that the term "sports footwear", standing alone, is ambiguous. Such ambiguity justifies, as it did in *Trane*, that it is "permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal."[14]

Having reached that conclusion, the Federal Court of Appeal went on to consider the second issue (i.e. whether the Tribunal had properly interpreted the extended definition of "sports footwear"). The Federal Court noted that the Tribunal's statement of reasons contained six extended definitions. It also noted that some of these definitions, for example, the definition of "sports footwear," were prefaced with the words "generally defined as," whereas others, for example, the definition of "orthopedic footwear," were prefaced with the words "was defined as." The Federal Court found that this difference in language indicated that the Tribunal had made a conscious decision to prescribe an exhaustive definition for some exempted goods (e.g. orthopedic footwear) and a non-exhaustive definition for others (e.g. sports footwear). In the Federal Court's view, had the Tribunal intended to create an exhaustive definition for sports footwear, it would have simply stated: "Sports footwear <u>was</u> defined as." The Federal Court found that the Tribunal had erred in construing the extended definition of sports footwear as exhaustive.

The Tribunal considers that the "first issue" identified by the Federal Court of Appeal in *J.V. Marketing* provides the starting point for its analysis. In other words, is the term "sandals" in its findings ambiguous. If so, the Tribunal may have resort to the extended definition of that term contained in its statement of reasons. Counsel for the appellants argued that these appeals are distinguishable from *J.V. Marketing* because, while in *J.V. Marketing* the parties did not agree that the walking shoes were "sports footwear," in these appeals, all parties agree that the goods in issue are sandals. However, the Tribunal is of the view that the key issue is whether the goods in issue are "sandals" within the meaning of the Tribunal's findings.

As noted above, Mr. Nutt testified that a sandal is a shoe which possesses two out of three of the following elements: an open toe, an open back or an open shank. Other definitions of "sandal" are as follows:

> sole with open-work (or no) upper, attached to foot by thongs passing over instep and around ankle; strap for fastening low shoe, passing over instep and around ankle[15]

14. *Supra* note 7 at 5.
15. *The Concise Oxford Dictionary of Current English*, 7th ed. (Oxford: Clarendon Press, 1982) at 927.

> 1: a shoe consisting of a sole strapped to the foot 2: a low-cut shoe that fastens by an ankle strap 3: a strap to hold on a slipper or low shoe 4: a rubber overshoe cut very low[16]
>
> a kind of open shoe consisting of a sole kept on the foot by means of any of various arrangements of straps over the toes or instep and often around the heel and ankle.[17]

While these definitions contain some common elements, such as the "open" nature of sandals and the use of straps or thongs to affix them to the wearer, in the Tribunal's view, they do not present uniform or wholly overlapping definitions of the term "sandal." A shoe that might be considered a sandal under one definition might not be a sandal under another definition. The Tribunal is of the view that the term "sandal" is ambiguous and, on that basis, that it may, and indeed should, have reference to the extended definition of "sandals" in its statement of reasons.

The extended definition provides as follows:

> For further clarification, sandals were generally defined as an open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment, in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, did not exceed two centimetres.[18]

Counsel for the appellants submitted that, in keeping with the Federal Court of Appeal's decision in *J.V. Marketing*, the use of the words "were generally defined as" in the extended definition indicates that the Tribunal did not intend that definition to be exhaustive. The Tribunal agrees. However, the fact that the extended definition is not exhaustive does not end the matter. A definition may be non-exhaustive, but nonetheless exclude certain things from its ambit. For example, the following proposed definition, while non-exhaustive, is restrictive: "For further clarification, household furniture is generally defined as beds, chairs and tables, in which the clearance between the ground or floor and the lower most horizontal part of the furniture exceeds 16 centimetres."

Clearly, pieces of household furniture other than beds, chairs and tables could qualify for the exemption. In that sense, the definition is non-exhaustive. However, for any household article to qualify as household furniture, it would have to satisfy the 16 centimetre condition. A futon, which lies flat on the floor, while a type of bed, would not qualify under the above definition as household furniture.

The definition of "sandals" contains two distinct parts. The first part of the definition is comprised of the words "were generally defined as an open shank footwear employing narrow ribbons, straps or thongs to form the upper and attachment." This first part is non-exhaustive, in that a variety of different shoes could fall within it, even those without "an open shank … employing narrow ribbons, straps or thongs to form the upper and attachment."[19]

The second part of the definition is comprised of the words "in which the difference between the combined height of the sole and any heel in the heel area, and the height of the sole in the forward area, did not exceed two centimetres." It is restrictive in that it contains a condition with respect to height, which applies to all shoes which fall within the first part of the definition. In other words, any shoe which may

16. *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield: Merriam-Webster, 1993) at 1034-5.
17. *Gage Canadian Dictionary* (Vancouver: Gage Educational Publishing, 1997) at 1296.
18. *Supra* note 4.
19. See *supra* note 8.

properly be called a sandal under the first part of the definition, whether specifically described in the first part of the definition or not, may be considered a sandal for purposes of the Tribunal's findings, provided it satisfies the height requirement in the second part of the definition.[20]

In the Tribunal's view, while the extended definition of "sandals" in its statement of reasons is not exhaustive, it is restrictive. Sandals, for purposes of the findings, have been defined as flat or almost flat shoes. In the Tribunal's view, had it intended to extend the definition of "sandals" to all sandals, regardless of height, it would simply have omitted the two-centimetre requirement from the extended definition. To read the extended definition of sandals as being without any restriction with respect to height would be, in the Tribunal's view, to ignore and give no meaning to an express requirement set out in that definition. In the Tribunal's view, the direct reference to a two-centimetre difference in heel and sole height is too precise to ignore or characterize as a "general" requirement.

The basis upon which the goods in issue were determined by the respondent not to be "sandals" was that they failed to satisfy the height requirement in the second part of the extended definition. The appellants have not challenged that factual determination. In light of that fact and in light of the Tribunal's view that sandals not meeting the respondent's extended definition of "sandals" are subject to the Tribunal's findings, the Tribunal concludes that the goods in issue are goods of the same description as those to which the Tribunal's findings apply.

For the foregoing reasons, the appeals are dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Raynald Guay
Raynald Guay
Member

20. In *M & M*, the sandals, while not specifically described in the first part of the definition of "sandals," satisfied the second part (i.e. the two-centimetre requirement). The Tribunal found that the sandals were excluded from the findings.