

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121016

Docket: A-418-11

Citation: 2012 FCA 260

**CORAM: SHARLOW J.A.
PELLETIER J.A.
STRATAS J.A.**

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Appellant

and

MASAI CANADA LIMITED

Respondent

Heard at Ottawa, Ontario, on October 16, 2012.

Judgment delivered from the Bench at Ottawa, Ontario, on October 16, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121016

Docket: A-418-11

Citation: 2012 FCA 260

CORAM: SHARLOW J.A.
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Appellant

and

MASAI CANADA LIMITED

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on October 16, 2012)

STRATAS J.A.

[1] The President of the Canada Border Services Agency appeals to this Court from a decision dated August 5, 2011 of the Canadian International Trade Tribunal (appeal no. AP-2010-025).

[2] The Tribunal concluded that certain imported therapeutic sport shoes should be classified under tariff item no. 9979.00.00 under the *Customs Tariff*, S.C. 1997, c. 36, as goods specifically designed to assist persons with disabilities in alleviating the effect of those disabilities. As a result of this classification, the shoes benefited from duty-free treatment.

[3] The parties agree that the standard of review of the Tribunal's decision in this Court is reasonableness. We agree. This is a deferential standard.

[4] Relying in part on its own jurisprudence, the Tribunal interpreted the text of tariff item no. 9979.00.00 and, specifically the requirement therein that the goods be "specifically designed to assist persons with disabilities" in "alleviating the effects of those disabilities." It then applied its interpretation to the evidence before it.

[5] On the issue whether the shoes were specifically designed to assist persons with disabilities, the Tribunal stated (at paragraphs 40-41):

Although the above evidence is not contemporaneous to the actual design of the goods in issue, it is reasonable to conclude that, when considered as a whole, it indicates that the goods in issue were specifically designed to assist individuals with disabilities. Put otherwise, considering the plausible connection between the lack of muscle stimulation in the lower limbs and the existence of certain disabilities, and considering that the purposeful intent of the design was to stimulate muscles in the lower limbs, the Tribunal concludes that it is reasonable to conclude that the design was specially intended to assist persons with disabilities.

The Tribunal is also of the view that, even if the goods in issue are, in fact, marketed and used by individuals who do not suffer from disabilities, this does not negate the fact that the goods in issue were designed specifically to address a condition that may be associated with the cause of various disabilities.

[6] The appellant suggested that in paragraph 40 of its decision the Tribunal illogically inferred that the shoes were specifically designed for disabilities from the fact the shoes caused general physiological effects. But before the Tribunal was a nexus of evidence tying the general physiological effects to the alleviation of specific disabilities, a nexus that, in its judgment, allowed it to infer that the shoes were specifically designed for disabilities. The Tribunal was alive to the

dangers of making faulty inferences, noting (at paragraph 21) that evidence must be assessed on a “case-by-case basis” and must be “probative and convincing.”

[7] On the issue whether the shoes were specifically designed to alleviate the effects of disabilities, the Tribunal stated (at paragraph 43):

In this matter, the Tribunal is looking for evidence that the individual who designed the goods in issue specifically intended for the increase in stability and muscle stimulation, and the resulting increase in control of the foot and ankle caused by the design and use of the goods in issue, to alleviate the effects that are caused by the disabilities mentioned above.

[8] Reviewing the evidence of four doctors, the Tribunal was satisfied that this test was met. In paragraph 50, the Tribunal stated:

Even though it is anecdotal, the Tribunal found this evidence to be credible and to show a convincing nexus between the disabilities and their effects, and the objective of the goods in issue of alleviating their effects with the view of assisting persons by making them more functional in their daily activities.

[9] We conclude that the Tribunal has reached an outcome that is acceptable and defensible on the evidence and law before it and, thus, made a reasonable decision.

[10] Therefore, despite the able submissions of Mr. Gibbs, we will dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-418-11

**APPEAL FROM A DECISION OF THE CANADIAN INTERNATIONAL TRADE
TRIBUNAL DATED AUGUST 5, 2011, NO. AP-2010-025**

STYLE OF CAUSE: The President of the Canada Border
Services Agency v. Masai Canada
Limited

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 16, 2012

REASONS FOR JUDGMENT OF THE COURT BY: Sharlow, Pelletier, Stratas JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

Andrew Gibbs FOR THE APPELLANT

Michael Kaylor FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan FOR THE APPELLANT
Deputy Attorney General of Canada

Lapointe Rosenstein Marchand Mélançon, LLP FOR THE RESPONDENT
Montreal, Quebec