

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150302

Docket: A-121-14

Citation: 2015 FCA 58

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

BETWEEN:

SKECHERS USA CANADA INC.

Appellant

and

**THE PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY**

Respondent

Heard at Ottawa, Ontario, on December 2, 2014.

Judgment delivered at Ottawa, Ontario, on March 2, 2015.

REASONS FOR JUDGMENT BY:

NEAR J.A.

CONCURRED IN BY:

**DAWSON J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] Skechers USA Canada Inc. (Skechers Canada) appeals from the December 13, 2013 decision of the Canadian International Trade Tribunal (AP-2012-073) upholding seven decisions – one for each of the years 2005 through 2011 – of the respondent, the President of the Canada

Border Services Agency (CBSA), made under subsection 60(4) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the Act).

[2] The decisions of the respondent concerned the value for duty of footwear of various styles imported by the appellant (the goods in issue). The respondent determined that payments made by the appellant to the vendor, its parent company Skechers USA Inc. (Skechers USA), for research, development, and design expenses (the R&D payments) must be included, in their entirety, in the price “paid or payable” for the goods in issue, and, accordingly, their value for duty for the purposes of the Act.

[3] For the reasons that follow, I would dismiss the appeal.

II. Background

A. *Legislative Framework*

[4] When goods are imported into Canada, their value for duty is determined according to sections 47 to 55 of the Act.

[5] Subsection 47(1) provides that the primary method for appraising value for duty is the “transaction value” of the goods, as determined under section 48. A number of preconditions must be met before this method can be applied (see para. 46, Tribunal decision). Otherwise, recourse must be had to another valuation method, as determined under section 47. The parties agree, however, that the transaction value is the proper valuation method for the goods in issue.

[6] Subsection 48(4) provides that the transaction value for goods will be determined based on the “price paid or payable” for the goods when they are sold for export:

Determination of transaction value

(4) The transaction value of goods shall be determined by ascertaining the **price paid or payable** for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

Détermination de la valeur transactionnelle

(4) Dans le cas d’une vente de marchandises pour exportation au Canada, la valeur transactionnelle est le **prix payé ou à payer**, ajusté conformément au paragraphe (5).

(emphasis added)

[7] Subsection 45(1) defines “price paid or payable” as the aggregate of all payments made “in respect of” the goods in issue:

“price paid or payable”, in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, **in respect of the goods** by the purchaser to or for the benefit of the vendor;

« prix payé ou à payer » En cas de vente de marchandises pour exportation au Canada, la somme de tous les versements effectués ou à effectuer par l’acheteur directement ou indirectement au vendeur ou à son profit, **en paiement des marchandises**.

(emphasis added)

[8] Certain adjustments may be made to the “price paid or payable”. For example, an adjustment can be made when the purchaser “assists” in the production of the goods, as described in clause 48(5)(a)(iii)(D):

Adjustment of price paid or payable

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the

Ajustement du prix payé ou à payer

(5) Dans le cas d’une vente de marchandises pour exportation au Canada, le prix payé ou à payer est ajusté :

a) par addition, dans la mesure où ils n’y

extent that each such amount is not already included in the price paid or payable for the goods, equal to

ont pas déjà été inclus, des montants représentant :

...

...

(iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a reduced cost for use in connection with the production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles:

(iii) la valeur, déterminée de façon réglementaire et imputée d'une manière raisonnable et conforme aux principes de comptabilité généralement acceptés aux marchandises importées, des marchandises et services ci-après, fournis directement ou indirectement par l'acheteur des marchandises, sans frais ou à coût réduit, et utilisés lors de la production et de la vente pour exportation des marchandises importées :

...

...

(D) engineering, development work, art work, design work, plans and sketches undertaken elsewhere than in Canada and necessary for the production of the imported goods,

(D) travaux d'ingénierie, d'étude, d'art, d'esthétique industrielle, plans et croquis exécutés à l'extérieur du Canada et nécessaires pour la production des marchandises importées,

...

...

[9] Subsection 152(3) of the Act sets out the burden of proof for proceedings relating to the payment of duties:

Burden of proof on other party

Preuve à la charge de l'autre partie

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any question relating to

(3) Sous réserve du paragraphe (4), dans toute procédure engagée sous le régime de la présente loi, la charge de la preuve incombe, non à Sa Majesté, mais à l'autre partie à la procédure ou à l'inculpé pour toute question relative, pour ce qui est de marchandises :

(a) the identity or origin of any goods,

a) à leur identité ou origine;

(b) the manner, time or place of importation or exportation of any goods,

b) au mode, moment ou lieu de leur importation ou exportation;

(c) the payment of duties on any goods, or c) au paiement des droits afférents;

(d) the compliance with any of the provisions of this Act or the regulations in respect of any goods d) à l'observation, à leur égard, de la présente loi ou de ses règlements.

lies on the person, other than Her Majesty, who is a party to the proceeding or the person who is accused of an offence, and not on Her Majesty.

B. *Facts*

[10] The core business of the appellant and of its sole shareholder Skechers USA is the sale of Skechers-brand footwear. Skechers USA designs the various styles of footwear, which are manufactured offshore by third parties. The appellant purchases footwear from Skechers USA for re-sale in Canada.

[11] When the appellant purchases the goods in issue from Skechers USA, the transfer price includes: the factory price paid by Skechers USA to the manufacturers; the cost of shipping the goods to the United States and warehousing them in Skechers USA's distribution centre; and an arm's-length profit.

[12] The appellant also makes payments to Skechers USA pursuant to a Cost-Sharing Agreement (CSA). Under the CSA, the appellant provides compensation for costs which Skechers USA incurs for activities necessary to the development and maintenance of the Skechers brand and to the sale of footwear. Such activities include research, development, design, advertising, and marketing.

[13] The amount that the appellant pays under the CSA is a percentage of Skechers USA's total costs for these activities. Each year, this percentage is determined according to a formula based on the ratio of the appellant's anticipated operating profit to the total anticipated operating profits of all participants to the CSA.

[14] The payments at issue in this appeal – the R&D payments – consist of a portion of the payments made by the appellant under the CSA; only costs relating to research, design, and development are included.

[15] Skechers USA undertakes significant research, design, and development activities to create its footwear. Each season, the process involves researching trends to develop themes and concepts, which are translated into designs for its various product lines. These designs are eventually developed into prototype samples. Of the 40,000 to 50,000 prototype samples that are produced each year, approximately 5,000 become “successful” footwear styles available for sale. The appellant usually markets approximately 1,700 of these styles.

[16] The price that Skechers USA pays to the manufacturers of the successful styles includes compensation for the prototypes, moulds, samples, etc. leading to the production of these styles. However, this price does not include compensation for costs incurred by the manufacturer relating to the unsuccessful styles; such compensation is provided through a separate payment.

[17] As a result, the transfer price the appellant pays to Skechers USA for the goods in issue includes the costs of the moulds and samples leading to the production of the styles which are

being imported. However, this price does not include the costs of the moulds and samples of unsuccessful styles and styles not imported into Canada. It also does not include general research and design costs (such as the salaries of Skechers USA's research and design staff).

[18] A licensing agreement also exists between the appellant and Skechers USA: the Canadian Intellectual Property and Proprietary Information License Agreement of 2005 (Canadian Licensing Agreement). Under this Agreement, the appellant has the right, for a lump sum, to exploit in Canada all intellectual property rights in the Skechers brand, including the right to sub-license the brand to third parties.

C. *CBSA Decisions*

[19] In 2006, the CBSA initiated an audit of the value for duty of the goods in issue based on the value that the appellant had declared for these goods in 2005. On March 25, 2008, the CBSA issued a decision stating that for the 2005 calendar year, a portion of the R&D payments should be included in the "price paid or payable".

[20] On December 27, 2012, in response to a request from the appellant for re-determination, the respondent issued seven decisions under subsection 60(4) of the Act finding that the R&D payments, in their entirety, should be included in the "price paid or payable" by the appellant for the goods in issue for the calendar years 2005 through 2011.

III. Tribunal Decision

[21] The Tribunal dismissed the appellant's appeal from these decisions. The Tribunal concluded that the R&D payments, in their entirety, were "in respect of" the goods in issue and accordingly, must be included in their value for duty purposes.

[22] The Tribunal first set out that when determining whether a payment is "in respect of" imported goods, the central question is whether a sufficient link exists between the payment and the goods in issue (at paras. 62-63). The Tribunal then analyzed this question in several parts.

A. *The R&D Costs are not Related to Intangibles*

[23] The Tribunal rejected the appellant's argument that the R&D costs were not "in respect of" the goods in issue but rather were in respect of "intangibles", namely the Skechers brand.

[24] The appellant had argued that the R&D costs are not necessary for the production of the goods in issue or for the basic use of the goods in issue as footwear. However, the Tribunal found this argument to be untenable based on the evidence, which demonstrated that the purpose of the research, design, and development process is the development of footwear. In the Tribunal's view, the goods in issue could not have been produced without this process. Furthermore, the brand is intimately related to the imported goods, and so the R&D payments are "inseparable from the footwear products themselves" (at para. 72).

[25] The appellant had relied on a previous decision of the Tribunal, *Simms Sigal & Co. Ltd v. The Commissioner of the Canada Customs and Revenue Agency* (27 May 2003), AP-2001-016 (CITT) [*Simms Sigal*] in support of its argument. However, the Tribunal distinguished the case at bar from *Simms Sigal* on the basis that the payment at issue in *Simms Sigal* – a distribution fee – was tied to the marketing and sale of the goods after their importation and not to their production.

B. *The Entire R&D Process is “In Respect of” the Goods in Issue*

[26] The Tribunal also rejected the appellant’s argument that only part of the R&D payments are “in respect of” the goods in issue. The Tribunal concluded that the entire research and development process is required to produce the successful styles of footwear. It found that “the different steps of the research and development process are all interrelated into a common effort towards producing a shoe that customers wish to buy” (at para. 76).

C. *The R&D Payments are Not General Payments*

[27] The Tribunal also did not accept the appellant’s argument that the R&D payments were “general payments”, unaffected by the imported goods. The Tribunal found that the link between the R&D payments and the goods in issue was apparent.

[28] The Tribunal rejected the notion that the R&D payments are not affected by the goods in issue because the appellant would still have to make these payments even if it did not purchase any footwear from Skechers USA. The Tribunal determined that the majority of the appellant’s

profit from the relevant period came from the sale of the goods in issue. The record indicated that the appellant's core business was exploiting the Skechers brand to sell footwear, as opposed to licensing the brand to third parties. Furthermore, while it was possible for the appellant to purchase footwear from a source other than Skechers USA, all of the footwear that it sold during the relevant period was in fact sourced from Skechers USA.

[29] The Tribunal also rejected the appellant's argument that the R&D costs are not "in respect of" the goods in issue because they are paid periodically, rather than at the time of importation. The Tribunal found that the timing of the payments "is of no import" because the definition of "price paid or payable" in subsection 45(1) refers to all payments "made or to be made" (at para. 87).

D. *The Assists Clause is not Relevant*

[30] The Tribunal further concluded that clause 48(5)(a)(iii)(D), the "assists" clause, had no application to the case at bar (at para. 95). The Tribunal agreed with the parties that the R&D costs are not true "assists" since the appellant is not providing assistance, in the form of goods or services free of charge or at a reduced cost, for the production of the goods.

[31] The Tribunal did not accept the appellant's argument that the assists clause should nevertheless be applied because the R&D payments consist of an indirect provision of development and design work by the appellant through Skechers USA to the offshore manufacturers (at para. 92). The Tribunal found that the appellant had not given it any good reason to apply the clause outside of its intended scope.

E. *The R&D Costs Cannot be Further Apportioned*

[32] Finally, the Tribunal rejected the appellant's argument that only a portion of the R&D costs should be included in the "price paid or payable" for the goods in issue. The Tribunal noted that it had already determined that the R&D payments were attributable, in their entirety, to the goods in issue because the entire research process was necessary to create the successful styles of footwear. It also noted that the amount of the R&D payments was already tied to the appellant's profit, which varies according to its importations.

[33] The Tribunal pointed out that the very purpose of the CSA is to apportion to each party its share of the costs incurred by Skechers USA. According to the CSA's own terms, operating profits are the best way to calculate the share borne by each party. Thus, the amount of the payments which the appellant makes already represents the value of research and design work that has benefited the goods in issue.

IV. Standard of Review

[34] The standard of review applicable to this appeal is reasonableness. The Tribunal's decision involved the application of a set of facts to a statute in which it has particular expertise (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 53-55, [2008] 1 S.C.R. 190, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at para. 10, 444 N.R. 120). Moreover, this Court has consistently applied the reasonableness standard to decisions of the Tribunal interpreting the *Customs Tariff*, S.C. 1997, c. 36, another statute in which the

Tribunal has particular expertise (*Igloo Viski Inc. v. Canada (Border Services Agency)*, 2014 FCA 266 at para. 2, [2014] F.C.J. No. 1134 (QL)).

V. Positions of the Parties

[35] The appellant submits that the Tribunal's decision is unreasonable. The appellant alleges that the Tribunal erred in the following respects: by imposing on it an improper burden of proof; by misinterpreting both the Act and the CSA; and by failing to properly apply the relevant authorities (including a decision of the World Trade Organization's Committee on Customs Valuation, case law, and Tribunal jurisprudence).

[36] The appellant's primary position is that the R&D payments should not be included at all in the "price paid or payable" for the goods in issue. Its alternative position is that only a portion of the R&D costs should be so included: pure research costs and costs relating to styles of footwear not imported into Canada should be excluded.

[37] The respondent submits that the Tribunal's decision is reasonable.

VI. Issue

[38] Was it reasonable for the Tribunal to conclude that the R&D payments should be included, in their entirety, in the "price paid or payable" for the goods in issue?

VII. Analysis

[39] In its submissions, the appellant points to a host of alleged errors in the Tribunal's decision. I will deal with each of the appellant's arguments in turn. However, ultimately, this Court's task is to determine whether the Tribunal reached a conclusion reasonably open to it based on the evidence. In my view, it did.

A. *Burden of Proof*

[40] The appellant submits that the Tribunal's decision is inherently flawed because the Tribunal imposed on it an improper burden of proof.

[41] The Tribunal described the burden of proof applicable to its decision as follows:

...[T]he more specific question in this appeal is whether Skechers Canada has convinced the Tribunal that the CBSA erred in concluding that the R&D payments are "in respect of" the goods in issue. In other words, Skechers Canada must demonstrate that the R&D payments are *not* "in respect of" the goods in issue.

(at para. 66)

[42] The appellant argues that the Tribunal effectively reversed the burden of proof by requiring it to prove that the CBSA's interpretation was erroneous, rather than simply demonstrating that its interpretation was consistent with the Act.

[43] I disagree. I see no error in the Tribunal's description or application of the burden of proof. The Tribunal properly stated that the appellant was required to prove that the R&D

payments were not “in respect of” the goods in issue. If the appellant had proven this, it would have necessarily proven that the CBSA’s converse position – that the payments *were* “in respect of” the goods – was erroneous.

B. *Finding that the R&D Payments are “In Respect of” the Goods in Issue*

[44] The appellant submits that the Tribunal’s conclusion is unreasonable for a number of reasons involving the Tribunal’s interpretation of the Act and its apprehension of the evidence, including the CSA.

[45] The appellant argues that the Tribunal erred in stating that the determination of whether a particular payment is “in respect of” the goods in issue is a question of fact (at para. 63, Tribunal decision). The appellant contends that this question is one of law. That is not the case. Determining whether a particular payment meets the legal standard for the statutory phrase “in respect of” is a question of mixed fact and law, heavily dependent on the factual circumstances.

[46] The appellant also argues that the Tribunal’s interpretation of the Act is unreasonable because the phrase “in respect of” refers to goods that are sold for export to Canada. On this basis, the appellant submits that the costs associated with unsuccessful styles and styles never imported into Canada cannot be included in the price “paid or payable” for the goods in issue. The appellant contends that under the Tribunal’s interpretation, all payments made to a vendor, regardless of whether they are “in respect of” goods sold for export to Canada, must be included in the “price paid or payable” for the goods. In the appellant’s view, such an interpretation would

render the assists provision, which allows certain amounts to be added to the “price paid or payable”, redundant.

[47] The appellant relies on this Court’s decision in *Charley Originals Ltd., division of Algo Group Inc. v. Canada (Deputy Minister of National Revenue – M.N.R.) (2000)*, 257 N.R. 174, 2000 CarswellNat 971 (WL Can) (F.C.A.) [*Charley Originals*] in support of these arguments. However, *Charley Originals* does not assist the appellant. That case concerned the applicability of the assists provision and the interpretation of the term “benefit” in the definition of “price paid or payable”. In the case at bar, the appellant has conceded that the R&D payments are not assists within the meaning of clause 48(5)(a)(iii)(D) (at para. 90, Tribunal decision), and the Tribunal was not interpreting the phrase “benefit”.

[48] Moreover, the Tribunal explicitly considered and rejected the appellant’s argument that the costs associated with models not imported into Canada should be excluded (at paras. 74, 80, 81, Tribunal decision). The Tribunal found that the research, design, and development process is a seamless, interrelated process, the whole of which is required to produce the goods in issue.

[49] The appellant disagrees with this finding, and submits that the Tribunal ignored evidence which set out the breakdown of time spent on research, development, and design. The appellant also submits that the Tribunal should have taken into account that most research and development is style-specific, and that that the purpose of this process is not only the production of footwear, but also the development of the Skechers brand.

[50] In my view, the Tribunal's conclusion that the entire research, design, and development process was required to produce the goods in issue is one that was reasonably open to it based on the evidence. Reasonableness requires this Court to defer to the Tribunal's factual findings and to its conclusions that are reasonable based upon those facts.

[51] The appellant further argues that the Tribunal erred when it stated that the timing of the R&D payments was of no import (at para. 87, Tribunal decision). The appellant contends that in doing so, the Tribunal ignored the wording of subsection 48(4) of the Act, which states that the "price paid or payable" must be ascertainable at the time of sale.

[52] In my view, the Tribunal committed no such error. At the hearing of this appeal, the appellant conceded that the amount of the R&D costs was ascertainable at the time of importation. Further, as the Tribunal noted, subsection 48(4) of the Act encompasses the present situation, as subsection 45(1) defines the phrase "paid or payable" as being all payments "made or to be made" (at para. 87, Tribunal decision).

[53] Finally, the appellant raises a number of issues relating to its argument before the Tribunal that the purpose of the CSA is to apportion the costs of developing intangibles, namely the Skechers brand. The appellant contends that the R&D payments permit it to use and exploit Skechers intangibles – to which it holds the exclusive Canadian license – and that these intangibles "by definition, are not goods and are not linked to imported goods" (at para. 64, appellant's Memorandum). The appellant therefore submits that the Tribunal made the following errors: finding that the appellant's operating profits directly reflect footwear sold; failing to

address the fact that the appellant is required to make R&D payments even if it does not import any footwear; and failing to consider the impact of the Canadian Licensing Agreement.

[54] I am not persuaded by the appellant's arguments on this issue. Largely, it is repeating arguments which were already considered and rejected by the Tribunal. Moreover, the appellant begs the question when it states that the R&D payments relate to intangibles and, thus, "by definition" are not linked to imported goods. The very issue before the Tribunal was whether the R&D payments are sufficiently linked to the goods in issue.

[55] In my view, the Tribunal's conclusion that the Skechers brand is "intimately related to the imported goods", and therefore that the "R&D payments remain inseparable from the footwear products themselves" (at para. 72, Tribunal decision) is one that was reasonably open to it based on the evidence. As the respondent notes, the appellant has not provided any evidence of revenue arising from a source other than the sale of footwear imported from Skechers USA. Furthermore, contrary to the appellant's contention, the Tribunal considered the Canadian Licensing Agreement (at paras. 36-38, Tribunal decision).

C. *Use of Authorities*

[56] The appellant also submits that the Tribunal made several errors in its use of authorities.

(a) *Decision 5.1 of the WTO's Committee on Customs Valuation*

[57] The appellant argues that the Tribunal erred in failing to follow Decision 5.1 of the World Trade Organization's Committee on Customs Valuation. In this Decision, adopted May 12, 1995, the Committee determined that costs incurred solely for research do not constitute "development or design work" within the meaning of Article 8.1(b)(iv) of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the *Customs Valuation Agreement*). Canada is a signatory to this Agreement, of which Article 8.1(b)(iv) is substantially the same as the assists provision found in clause 48(5)(a)(iii)(D) of the Act.

[58] The appellant contends that, in light of Decision 5.1, the Tribunal erred in finding that the full amount of the R&D costs was "in respect of" the goods in issue when the evidence before it demonstrated that 60% of the R&D costs relate to "pure research".

[59] This argument must be rejected. As mentioned above, the appellant conceded that the R&D payments are not actually assists. Decision 5.1 therefore had no direct application to the case at bar, and the Tribunal was under no obligation to consider it.

(b) *Case Law*

[60] The appellant also argues that the Tribunal erroneously relied on *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, a decision of the Supreme Court of Canada which defined the phrase "in respect of" in the context of the *Indian Act*, R.S.C. 1970, c. I-6.

[61] I find no error in the Tribunal's reliance on *Nowegijick v. The Queen*. The Tribunal cited this case as ancillary support for its finding that the phrase "in respect of" has been interpreted

broadly in Tribunal jurisprudence; it relied on *Simms Sigal* as the main authority (at para. 61). The Tribunal also explicitly acknowledged that the Supreme Court's interpretation of this phrase was in a different statutory context. Further, I agree with the respondent that the Supreme Court's observation in *Nowegijick v. The Queen* on the breadth of the phrase "in respect of" was generic and equally applicable outside of the context of the *Indian Act*.

(c) *Tribunal Jurisprudence*

[62] The appellant also argues that the Tribunal erred in relying on two of its decisions: *Mexx Canada Inc. v. The Deputy Minister of National Revenue*, (16 February 1995), AP-94-035, AP-94-042, and AP-94-165 (CITT) [*Mexx Canada*]; and *Chaps Ralph Lauren, a Division of 131384 Canada Inc. and Modes Alto-Regal, Inc. v. The Deputy Minister of National Revenue*, (22 December 1997), AP-94-212 and AP-94-213 (CITT) [*Chaps Ralph Lauren*]. The appellant submits that both of these decisions are distinguishable from the case at bar.

[63] In *Mexx Canada*, the Tribunal found that payments made to cover the cost of unused fabric must be included in the "price paid or payable" for imported garments. The appellant contends that the R&D payments relate to intangibles, and not to items necessary for the basic use of the imported items as such, like in *Mexx Canada*. Alternatively, the appellant argues that *Mexx Canada* supports its argument for apportionment because, in that case, distributors only made payments relating to the product lines which they had purchased.

[64] In *Chaps Ralph Lauren*, the Tribunal found that royalty payments based on net sales of imported clothing were "in respect of" the goods. The appellant argues that the case at bar is

distinguishable because the R&D payments are not based on net sales of imported footwear. Rather, they are based on anticipated operating profit, which could include profit from licensing the Skechers brand to third parties.

[65] I cannot find any error in the Tribunal's application of its previous decisions. The distinctions that the appellant is attempting to draw are based on arguments that the Tribunal considered and rejected – namely, that the R&D payments relate to intangibles, and that these payments could be based on profit from the licensing of the Skechers brand rather than the sale of footwear. As I have outlined above, I believe that the Tribunal's rejection of these arguments was reasonable.

[66] The appellant further contends that the Tribunal erred in failing to rely on its decision *Simms Sigal*. In that case, the Tribunal found that a distribution fee paid by Canadian importers to Anne Klein & Company for samples, showrooms, sales aids, etc., were not “in respect of” imported garments. The Tribunal found that the distribution fee was a payment for exclusive distribution rights and services, not a payment to purchase the goods. The appellant argues that the case at bar is analogous because the R&D payments – which it must make whether or not it purchases footwear – are made pursuant to the CSA, the purpose of which is to apportion the cost of intangibles.

[67] Again I cannot find any error in the Tribunal's application of its jurisprudence. It was reasonable for the Tribunal to distinguish *Simms Sigal* on the basis that the R&D costs relate to the creation of the goods in issue, rather than their subsequent marketing and sale.

D. *Summary*

[68] In my view, it was reasonable for the Tribunal to conclude that the R&D payments are, in their entirety, “in respect of” the goods in issue.

[69] At the hearing of this appeal, the appellant acknowledged that the Tribunal’s description of the legal test was correct: when determining whether a payment is “in respect of” certain goods, the central question is whether a sufficient link exists between the payment and the goods (at para. 62, Tribunal decision).

[70] The Tribunal concluded that the link between the R&D payments and the footwear imported by the appellant was sufficient. Based on the evidence before it, the Tribunal concluded that the research, design, and development process is an interrelated process, the whole of which is required to produce the goods in issue. By the same token, the Tribunal rejected the appellant’s argument that the R&D costs relate to “intangibles”. As outlined above, it is my view that these conclusions are reasonable.

[71] Having accepted these conclusions as reasonable, and in view of the appellant’s concession that the amount of the R&D costs was ascertainable at the time of importation, I cannot accept any of the arguments advanced by the appellant as to how the R&D costs are not “in respect of” the goods in issue, or alternatively, why these costs should be further apportioned.

VIII. Conclusion

[72] In large measure, the appellant has asked this Court to re-weigh the evidence that was before the Tribunal. Doing so would be beyond the scope of this Court's role, which is to assess the reasonableness of the Tribunal's decision.

[73] The Tribunal's decision is reasonable: it is transparent, intelligible, and justifiable. Moreover, its conclusion falls within the range of possible, acceptable outcomes, defensible in respect of the facts and the law (*Dunsmuir* at para. 47).

[74] I would therefore dismiss the appeal, with costs.

"David G. Near"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-121-14

APPEAL TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTION 68 OF THE *CUSTOMS ACT*, R.S.C. 1985, c. 1 (2nd Suppl.) AS AMENDED, FROM THE DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED DECEMBER 13, 2013, APPEAL NO. AP-2012-073.

STYLE OF CAUSE: SKECHERS USA CANADA INC.
v. THE PRESIDENT OF THE
CANADA BORDER SERVICES
AGENCY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 2, 2014

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

DATED: MARCH 2, 2015

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FOR THE RESPONDENT