CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, September 4, 1998

Request No.: MP-97-001

IN THE MATTER OF a ruling under section 90 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended, on the question of which of two persons is the importer in Canada of:

FRESH GARLIC ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

IMPORTER RULING

The Canadian International Trade Tribunal conducted an inquiry, pursuant to section 90 of the *Special Import Measures Act*, relative to a request by the Deputy Minister of National Revenue, on behalf of D & L Business Canada Ltd., for a ruling on the question of which of two persons is the importer in Canada of fresh garlic originating in or exported from the People's Republic of China.

The Canadian International Trade Tribunal hereby rules that the importer in Canada of the said goods is D & L Business Canada Ltd. (Member Gracey dissenting).

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

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
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STATEMENT OF REASONS

BACKGROUND

On December 1, 1997, the Deputy Minister of National Revenue (the Deputy Minister) made a request to the Canadian International Trade Tribunal (the Tribunal) for a ruling, pursuant to subsection 89(1) of the *Special Import Measures Act*[1] (SIMA), on who is the importer in Canada of fresh garlic originating in or exported from the People's Republic of China (China). This request was initiated on behalf of D & L Business Canada Ltd. (D & L).

On March 21, 1997, the Tribunal found, pursuant to subsection 43(1) of SIMA, that the dumping in Canada of fresh garlic originating in or exported from China had caused material injury to the domestic industry.[2] The finding applies only to fresh garlic imported into Canada from China from July 1 to December 31, inclusive, of each calendar year.

The Deputy Minister's request concerns two importations of fresh garlic in late 1996 when provisional anti-dumping duties were payable. At the time of importation, D & L was identified as the importer of record, and this position was not questioned by the Department of National Revenue (Revenue Canada). On September 8, 1997, a partial refund of the provisional anti-dumping duties was paid in accordance with section 55 of SIMA. However, the Pacific Region Customs Investigations Division of Revenue Canada investigated the importations and concluded that D & L made false statements in accounting for the goods and that, by overvaluing the declared value for duty, it had avoided payment of provisional anti-dumping duties. As a result, a penalty of some $335,000 was assessed against D & L, which appealed the assessment and, in conjunction with this appeal, contended that the importer of the two shipments was Shengli Group U.S.A. (Shengli), the exporter of record, and not D & L. As a consequence, D & L requested that the question of who is the importer of the goods be referred to the Tribunal under paragraph 89(1)(*b*) of SIMA.

On December 11, 1997, the Tribunal issued a notice of request for a ruling. It invited interested parties to file written submissions containing relevant facts, documents and arguments in support of any views pertinent to the making of the ruling by January 19, 1998. Notices of appearance, as well as declarations and undertakings, were to be filed with the Secretary on or before January 12, 1998. The Tribunal received public submissions and notices of appearance from the Deputy Minister, D & L and Shengli. The Tribunal also received confidential submissions from the Deputy Minister and D & L.

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1. R.S.C. 1985 c. S-15, as amended.
2. *Fresh Garlic Originating in or Exported from the People's Republic of China*, Inquiry No. NQ-96-002, *Finding*, March 21, 1997, *Statement of Reasons*, April 7, 1997.

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On February 26, 1998, the Tribunal notified counsel and parties that it would hold a public hearing in Vancouver, British Columbia, on May 4, 1998. Parties intending to participate in the hearing had to advise the Secretary on or before April 14, 1998. At the same time, parties were invited to file with the Tribunal their witness statements and any additional submissions. The Deputy Minister and D & L informed the Tribunal that they would participate in the hearing. They also filed additional submissions.

FACTS

Two witnesses testified at the hearing: Mr. Robert Head, an investigator with the Pacific Region Customs Investigations Division of Revenue Canada; and Mr. Dodge D. Li, one of the owners of D & L. The relevant facts in the present case can be summarized as follows.

On November 21, 1996, provisional anti-dumping duties were imposed on fresh garlic imported from China. In January 1997, an officer assigned to the Trade Administration Services Unit in Vancouver received a complaint from a local importer/wholesaler that D & L was offering Chinese garlic for sale in the Vancouver area at a price which did not reflect the anti-dumping duties in effect at the time. D & L is a small consulting firm located in Vancouver, which specializes in facilitating business exchanges between persons in China and Canada. It is operated from the residence of its two directors, Mr. Li and his wife, Ms. Queen Qing Deng.

The investigation revealed that 11 containers of garlic were exported from China in July 1996 to the state of California. However, the garlic never entered the US market. It was kept in cold storage for four months. In late November 1996, the 11 containers were trucked across the Canadian border. The garlic was subsequently kept in cold storage in Vancouver, after the anti-dumping duties were paid by D & L. Over a four-month period, namely, between December 1996 and March 1997, the garlic was sold in the Vancouver area to retailers, wholesalers and restaurants. The garlic was marketed by a US resident named Ms. Flora Lee, an employee of both Mayland Enterprises (U.S.A.), Inc. (Mayland) and Shengli, the exporter of record.

On April 29, 1997, a number of documents, including records of sales, bank deposits, records of telephone conversations, solicitations to sell garlic to various Canadian retailers and cold storage documents, were seized at the residence of the principals of D & L. Bank records showed that over $200,000 had been deposited into a bank account, which was set up by Mr. Li and Ms. Lee. The account was opened in the name of D & L Business Canada Limited (U.S.) on November 28, 1996, with a $15,000 cheque drawn in the name of Mayland and made payable to D & L. At the insistence of Mr. Li, cheques drawn from the account required two signatures, namely, those of Mr. Li and Ms. Lee. Most of the money was wired to bank accounts in California, either to Shengli or to Mr. Jian Guo Xu, a principal of Shengli.

The customs cargo control document, which is one of several documents included with the customs entry, identified Shengli as the shipper and D & L as the consignee, while the Customs Automated Data Exchange (CADEX) lead sheets, which are submitted to Revenue Canada by the customs broker to facilitate the clearance of the goods, identified D & L as the importer. The invoices also indicated that the goods were to be shipped and billed to D & L. Correspondence dated November 18, 1996, between a Vancouver area cold storage facility and Quinn Li of D & L, explaining such things as quotes for cold storage and shipping and receiving hours, was also seized.

Documents showed that payments by Vancouver area purchasers of the imported garlic were made to D & L. The money was deposited into the D & L Business Canada Limited (U.S.) bank account. Because

there was no evidence of a sale of the garlic from Shengli to D & L, a value for duty opinion was requested from an evaluation specialist. This resulted in a notice of ascertained forfeiture to D & L, which demanded payment of $335,571.67, representing the total difference between the normal value of $1.91/kg then in effect and the true value for duty of the goods of $0.97/kg, plus a penalty.

At no time, prior to asking the Deputy Minister to request a ruling from the Tribunal, did D & L question or object to its status as the importer of the subject garlic.

Both Mr. Li and Ms. Deng were born and educated in China. On November 17, 1996, Ms. Lee, who had met Ms. Deng in China, contacted her to advise her that she was now in the United States working for Mayland, a sister company to Shengli. Ms. Lee indicated that she needed a Canadian company to import garlic for Mayland into Canada. She also asked Ms. Deng to make inquiries concerning storage arrangements for the garlic. When in Canada, she asked Ms. Deng and Mr. Li to drive her around Vancouver so she could familiarize herself with the city and also meet prospective purchasers of the garlic. Mr. Li testified that Ms. Lee knew all of the customers before she came to Vancouver and that he and his wife did not introduce her to any of them. Mr. Li and Ms. Deng also agreed to let her use their office facilities in order to conduct her business. In exchange for these services, D & L received a commission of US$2,000. The D & L Business Canada Limited (U.S.) bank account, to which D & L made no contribution, was used to pay Ms. Lee's expenses and to receive the proceeds of sales. It was used to pay for cold storage and all of the expenses associated with the importation. For example, the D & L cheque used to pay the anti-dumping duties was signed by Ms. Lee and Mr. Li.

On or about November 25, 1996, an Agreement on Sales Assistance in Canada (the Agreement) was concluded between Mayland and D & L. It was signed by Mr. Li, on behalf of D & L, and Mr. Xu, on behalf of Mayland. The Agreement provided that: Mayland would arrange for the export of the goods to Vancouver; Mayland would open a checking account in D & L's name through which all sales transactions would be made; Mayland would be responsible for import duties and all the relative expenses caused by the sale; D & L would offer its best assistance and help during the sales process; and Mayland would pay US$2,000 to D & L as a commission for offering all the assistance possible upon the termination of the sales in Vancouver.

POSITION OF PARTIES

Deputy Minister

The Deputy Minister's position is that D & L is the importer of the subject garlic. Counsel for the Deputy Minister submitted that D & L is the only one that the Tribunal may determine to be the importer in Canada of the goods for the purposes of SIMA. Pursuant to subsection 2(1) of SIMA, "importer" is defined, "in relation to any goods," as "the person who is in reality the importer of the goods." Counsel referred to the following statement of Jackett J. in *Her Majesty the Queen* v. *The Singer Manufacturing Company*:

> The essential feature ... is that the exporter must be the person in the foreign country who sends the goods into Canada and the importer must be the person to whom they are sent in Canada.[3]

According to counsel for the Deputy Minister, in making a ruling under subsection 89(1) of SIMA, the only option available to the Tribunal is to arrive at a ruling by determining which of the two or more persons is the importer in Canada, and the Tribunal has no jurisdiction to determine that a person outside

3. [1968] 1 Ex. C.R. 129 at 136.

Canada is the importer in Canada. In counsel's view, the entire scheme of SIMA revolves around the concept that goods imported into Canada must have an importer in Canada. Counsel referred to a number of sections in SIMA which contain the words "importer in Canada" in support of his argument. He argued that the simple fact that Parliament has given jurisdiction to the Tribunal to determine who is the importer in Canada is indicative of the fact that there must be an importer in Canada of dumped goods.

Counsel for the Deputy Minister noted that, in the present case, among the three candidates put forward for the Tribunal's determination, namely, D & L, Shengli and Mayland, and the eventual purchasers of the subject garlic, it is clear that D & L is the only one in Canada that can be the importer. The evidence is clear that Shengli, a US-based company, exported the goods to Canada and, therefore, as the exporter under SIMA, Shengli cannot be the importer. Regarding the eventual purchasers of the subject garlic, counsel argued that they cannot be the importer, as the evidence clearly shows that, before they even heard of the garlic, it was already in Canada. Counsel reviewed the evidence which, in his view, supports the Deputy Minister's position that D & L is in reality the importer. Counsel argued that, if the Tribunal rules that a company other than D & L is the importer, a substantial amount of anti-dumping duties will have been evaded in a manner which could easily be repeated by others to the detriment of both domestic producers and other importers.

Counsel for the Deputy Minister argued that the business relationship between D & L and Shengli was structured in such a way that any company buying the subject garlic would assume that it was dealing with a local supplier, namely, D & L. He argued that this supports his argument that D & L was the importer and that it had control and management of the garlic. Counsel submitted that D & L could not have escaped liability vis-à-vis third parties by virtue of its private arrangement with Shengli. He argued that D & L would have been liable to third parties for any problems regarding non-payment of bills, for example.

Counsel for the Deputy Minister reminded the Tribunal that its mandate is not to determine whether the ascertained forfeiture is appropriate. It is simply to determine who of two persons is the importer of the subject garlic. He noted that a ruling that D & L is the importer does not necessarily mean that Mr. Li and Ms. Deng are going to lose their house. He also noted that an appeal of the ascertained forfeiture has been filed by Mr. Li and Ms. Deng and that there exists a possible recourse against Shengli for execution of the Agreement. Counsel also reminded the Tribunal that the Deputy Minister has discretion in deciding whether to enforce an ascertained forfeiture and to actually collect the money owed.

Finally, counsel for the Deputy Minister noted that Revenue Canada does recognize non-resident importers under SIMA, however, only on rare occasions and usually in advance of importation to accommodate highly unique situations. The arrangements always include a commitment from the non-resident importer to sell to Canada at export prices or above the normal values so as to eliminate dumping. If the export sales are to be made at dumped prices, then there is a commitment from the non-resident importer to pay the anti-dumping duties and to pass them on to the purchasers in Canada and to provide supporting documentation to Revenue Canada. Counsel noted that no such arrangement was made in the present case between Shengli and Revenue Canada.

D & L

Counsel for D & L argued that non-resident importers are permitted under SIMA. In his view, the fact that Revenue Canada recognizes them in certain circumstances proves that they are permitted. Counsel referred to a number of Tribunal findings where Revenue Canada has recognized non-resident importers. In addition, he noted that non-resident importers are recognized under the *Customs Act*.[4] He also noted that

4. R.S.C. 1985, c. 1 (2nd Supp.).

the customs and tax departments of Revenue Canada do business with non-resident importers. In counsel's view, to suggest that there can be non-resident importers for the purposes of customs and taxes but not for the purposes of SIMA sends the wrong message to Canada's trading partners. He argued that the definition of "importer" in SIMA has no residency requirement. If Parliament had intended that importers be limited to those who reside in Canada, it would have said so. Regarding *Singer*, counsel argued that, in practice, the importer is not always the person to whom the imported goods are sent in Canada. He noted that a company in Vancouver can be the importer, even though the goods are sent to a company in Toronto. In counsel's view, international trade has evolved to the point where the exporter and the importer can be the same person.

In the view of counsel for D & L, if the "real" importer is the one that caused the goods to be imported, then, in the present case, the real importer can only be Shengli. Counsel acknowledged that, for purposes of the *Customs Act*, D & L was the importer of record; however, when reviewing the facts in the present case, it is obvious that the "real" importer of the garlic was Shengli. Counsel added that Revenue Canada could make arrangements with Shengli for payment of the anti-dumping duties. As a consequence, payment of the duties would not be evaded as suggested by counsel for the Deputy Minister. In conclusion, counsel for D & L submitted that, given the circumstances of this case, to determine that D & L is the importer and to require payment of $335,571.67 where it only realized a commission of US$2,000 would be a travesty of justice. In view of the evidence before the Tribunal, counsel asked that the Tribunal rule that the importer of the imported garlic is Shengli and not D & L.

Shengli

Shengli's representative did not appear at the hearing. In his written submission, he argued that Shengli was both the owner and exporter of the garlic and that it enlisted the service of D & L to assist with customs formalities and subsequent re-sale activity, believing that it needed to be a resident in order to import into Canada. Further, he submitted that, at all times, Shengli retained title and control of the garlic up to the point of resale in Canada and that all profits resulting from the sales were for its benefit and not for the benefit of D & L.

DECISION

In making a ruling under section 90 of SIMA as to who of two persons is the importer in Canada of imported goods, the Tribunal must take into account the object and purpose of the statute. In an importer ruling, in Request No. IR-2-86,[5] the Canadian Import Tribunal (the CIT) stated the following:

> The liability for payment of anti-dumping duties is placed on the importer of dumped goods. That is part of the general scheme to deal with the mischief of dumping, to discourage it. The object of the statute is to protect Canadian producers of goods from injurious importations of dumped goods, and that is achieved by imposing the burden of the special duty on the importer. If the exporter, through its agent, pays the duty, the object of the statute is not being achieved.[6]

The word "importer" is defined in subsection 2(1) of SIMA as "the person who is in reality the importer of the goods." In *Graphite Electrodes*, the CIT was of the view that this definition implied that the simple designation of a person or firm on the customs entry documents as the so-called importer of record

5. *Certain Artificial Graphite Electrodes and Connecting Pins Originating in or Exported from the United States of America*, Canadian Import Tribunal, *Importer Ruling* and *Statement of Reasons*, May 1, 1987.
6. *Ibid*. at 5.

had little meaning. The CIT stated that "the statute, in this process of identification [of the real importer], has concern for substance as opposed to form.[7]"

In the present case, the Tribunal is faced with a difficult situation. In the view of the majority of the Tribunal, the evidence shows that D & L simply acted as an agent for Shengli in Canada. There was no "real" transaction between these two companies. Mr. Li and Ms. Deng simply permitted Ms. Lee to use their company's name to conduct her business in Canada on behalf of Shengli. D & L did not pay for the imported garlic nor did it ever take actual possession of it. Other than the US$2,000 commission, D & L did not profit from the resale of the subject garlic to distributors, wholesalers and restaurants. The evidence also shows that the importation was arranged by Shengli, and in particular its employee, Ms. Lee. All that D & L was to provide was its best assistance and help during the sales process pursuant to the terms of the Agreement.

In *Graphite Electrodes*, the CIT was faced with a similar situation, except that it had further evidence which showed that numerous discussions had been held between a third party and the exporter prior to importation. Indeed, this third party had placed the actual purchase order for the imported goods in question. On the basis of this evidence, the CIT found that the third party was the "real" importer. The CIT held that the so-called "importer of record" was simply a "paper intermediary," i.e. an agent for the exporter. There is no such evidence in the present case. The Tribunal has two parties before it, namely, D & L (the acknowledged importer of record) and Shengli, one of which must be identified as the "real" importer of the subject garlic. Although the evidence shows that the subject garlic was eventually sold to retailers, wholesalers and restaurants in Canada, there is no evidence of any dealings between any of these entities and Shengli prior to importation.

Consequently, after having heard and reviewed all of the evidence, including all of the documents which were filed by both parties to this inquiry, the majority of the Tribunal is of the view that, between D & L and Shengli, it has no choice but to find that D & L is the importer in Canada of the subject garlic. In the view of the majority of the Tribunal, to rule otherwise and to find that Shengli is the importer in Canada of the subject garlic would be contrary to the object of SIMA. Although certain arrangements may be made between Revenue Canada and non-resident importers with respect to the payment of anti-dumping duties, as occurred in Inquiry No. NQ-91-006,[8] unfortunately for D & L, no such arrangement was made in the present case.

Accordingly, pursuant to section 90 of SIMA, the majority of the Tribunal hereby rules that the importer in Canada of the subject garlic is D & L.

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

Raynald Guay
Raynald Guay
Member

7. *Ibid.*
8. *Machine Tufted Carpeting Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, *Finding*, April 21, 1992, *Statement of Reasons*, May 6, 1992.

DISSENTING OPINION OF MEMBER GRACEY

I respectfully dissent from the majority decision in this matter for the following reasons.

It is not necessary to repeat all of the known facts in this case. They have been adequately summarized in the majority decision, and it is merely necessary for me to identify and emphasize those facts and circumstances which have led to my dissent.

At issue in this inquiry is the question of who was the real importer of the subject goods. In my view, the evidence points to the conclusion that the real importer was Shengli and that D & L was, at most, an agent of the importer.

I shall begin by making reference to the Agreement, which sets out five terms which, in my view, are relevant to the outcome of this case. Those terms are as follows:

- Party A [Mayland] will arrange the export of the goods to Vancouver.
- Party A will open a checking account under Party B's name and all the sales transaction[s] will be made through this account.
- Party A will be responsible for import duties and all the relative expenses caused by the sales.
- Party B will offer its best assistance and help during the sales process.
- Party A should pay $2,000 to Party B as commission for offering all the assistance possible upon the finish of the sales in Vancouver.

The garlic was imported into Canada in two shipments and placed in storage, and sales to customers commenced. All import documents appeared to be in order, and it is relevant to note that the release dates on the two customs entries/invoices were November 29 and December 5, 1996. This is relevant for two reasons. First, it is noted that the first date of shipment was a scant 11 days after the first contact with D & L. Second, the two invoices prepared by Shengli, purportedly Mayland's export arm, state "SHIP & BILL TO: D & L Business Canada Ltd." Each invoice bears the signature of Mr. Xu, the same person who signed the Agreement. Clearly the instruction to bill D & L is at variance with the stated intent of the Agreement. The next observation is that the invoices state that the "[d]ate of order" was November 2, 1996, which predated the first contact between Ms. Lee and Ms. Deng by about two weeks. Certainly there is no reason to disbelieve Mr. Li's claim that the first contact was made on November 17, 1996. As the authorities had seized records, if there had been a contact earlier than November 17, 1996, it would have been put on the record. It is apparent that plans to export the goods to Canada were well advanced, even before the initial contact was made with D & L. In light of such unrefuted evidence, it is clear that Shengli initiated and arranged for the importation.

The dates on the customs entries/invoices are also important, inasmuch as they are subsequent to the date of the preliminary determination of dumping made by Revenue Canada. But the date on the invoices was November 20, 1996, one day before the issuance of the preliminary determination of dumping.

The Deputy Minister, in my view, has a weak case. Fundamentally, the case is weakened by the uncontested facts that D&L:

- did not initiate the importation;
- did not order the goods;
- did not ever pay for or take ownership or even physical possession of the goods;

- did not sell the goods;
- did not receive into its own hands any of the proceeds from the sale of the goods.

All that D & L realized was a very modest commission.

The Deputy Minister, however, takes the view that, in lending its name to the activities, D & L became the importer of record. Indeed, the name D & L appears on the import document as the importer of record. However, it is obvious that the name of the importer of record on import documents is not conclusive, though it is surely indicative. But we are asked to determine who in reality was the importer of the goods. I would argue that Shengli was in reality the importer of the goods. In support of that conclusion, it need only be noted that Shengli made the initial contact with D & L and did not offer to sell it the goods. Rather, it retained ownership of the goods and at no time relinquished control of the goods to D & L. Shengli conceived and executed the importation and the subsequent sale.

The Deputy Minister has relied heavily on the meaning to be given, under SIMA, to the term "importer." Counsel for the Deputy Minister argued that, under SIMA, the importer must be an importer in Canada. In my view, this overlooks the fact and the very common practice of non-resident importers. Counsel referred to several excerpts from SIMA, including sections in which the phrase "importer in Canada" appears. No definition of the term was offered, therefore, it falls to the Tribunal to determine its meaning from the context in which it appears. Indeed, the central question is the distinction, if any, between the term "importer in Canada" and the simple noun "importer." This question is complicated by the fact that the term "*importateur*" ("importer") is unqualified by any reference to "*au Canada*" ("in Canada") in the French version.

Revenue Canada also relies upon the customs cargo control documents, the CADEX lead sheets and the invoices, all of which indicate that D & L is the importer or at least the importer of record. This is surely *prima facie* evidence that merits further investigation. That is why the Tribunal was asked to hear this case. The *prima facie* evidence is quite strong, but not so strong as to remove all doubt. In fact, as the Tribunal looked into the matter, it became apparent that the customs cargo control documents, the CADEX lead sheets and, of course, the invoices were all prepared by Shengli or the import broker. There was no evidence adduced that D & L had any knowledge of the information placed on those documents and, as has been seen, some of that information was false. It was Shengli that entered the instructions to "SHIP & BILL TO: D & L" and that falsely declared the "[d]ate of order." The date declared, incidentally, is demonstrably wrong on two counts. First, the goods were not ordered, they were sent. Second, of course, the date is several days before the date of the first contract made by Shengli to Ms. Deng and, thus, appears to have been a fabrication.

The record is clear that the entire project was conceived and executed by Shengli and that Ms. Lee exploited an earlier friendship with Ms. Deng to make the arrangements and then to leave D & L in a vulnerable position. In my view, the principals of D & L were victims of a gross deception conceived and executed under the pretext of a friendship by Ms. Lee of Shengli.

That D & L was not the real importer should be obvious. If, for example, D & L had attempted to receive into its own hands the proceeds of sales, Shengli would have had no difficulty in proving that it had never sold the goods to D & L and that it had no right to the proceeds of sales. Indeed, but for the prudent insistence of Mr. Li, the bank account would have borne and required only the signature of Ms. Lee. That D & L was foolish to lend its company name to the enterprise is now apparent. But this is the only very tenuous link to any claim that D & L was, in fact, the importer and, in my view, it does not have as much

weight as the facts already recounted. The reason for a hearing was to sort out what appeared, at first, to be a complex mix of events. However, the evidence received at the hearing persuaded me that the real importer of the subject goods was Shengli and that D & L was no more than its paid agent.

Accordingly, pursuant to section 90 of SIMA, I hereby rule that the importer of the subject goods is Shengli.

Charles A. Gracey
Charles A. Gracey
Member