CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, February 21, 1991

Appeal No. 2936

IN THE MATTER OF an appeal heard on January 10, 1990, pursuant to section 61 of the *Special Import Measures Act*, S.C. 1984, c. 25;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated December 10, 1987, with respect to requests for re-determinations filed pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

MADISON INDUSTRIAL EQUIPMENT LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The Tribunal maintains the decision of the Deputy Minister of National Revenue for Customs and Excise to treat open drip-proof motors imported by the appellant and totally enclosed fan-cooled motors as "like goods" as the expression is defined in section 2 of the *Special Import Measures Act*. Except for the question of warehousing, the Tribunal maintains the decision of the Deputy Minister to reject the requests for further adjustments in the assessment of normal value under section 15 of the *Special Import Measures Act* and the *Special Import Measures Regulations*. Member Bertrand dissents in part. The Tribunal allows the appeal with respect to adjustments sought on warehousing expenses, subject to the related conditions enumerated in the Reasons for Decision as expressed by Members Fraleigh and Hines, and refers the matter back to the Deputy Minister for re-determination. The Tribunal rejects the appeal in respect of the question of warranty coverage as a settlement with the respondent has been reached on that question.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Michel Granger
Michel Granger
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 2936

MADISON INDUSTRIAL EQUIPMENT LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

Special Import Measures Act (the Act) - Whether open drip-proof (ODP) motors and totally enclosed fan-cooled (TEFC) motors are "like goods" for the purposes of determining normal value pursuant to section 15 of the Act - Whether the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) should have determined normal value pursuant to section 15 or 19 of the Act - Special Import Measures Regulations (the Regulations) - Adjustments pursuant to sections 3 to 13 of the Regulations - Whether warehousing, warranties, bad debts and certain general activity expenses are conditions of sale.

This is an appeal under section 61 of the Act from a decision of the Deputy Minister determining the normal values of six importations by the appellant of ODP and TEFC polyphase induction motors and assessing anti-dumping duties accordingly. The Deputy Minister determined that ODP motors and TEFC motors were "like goods" as the expression is defined in section 2 of the Act and, in assessing the normal value of ODP motors and TEFC motors, made some of the adjustments claimed by the appellant as allowed by the Regulations and refused other adjustments with respect to warehousing, warranties, bad debts and certain general activity expenses.

The appellant seeks a declaration that ODP motors and TEFC motors are not "like goods." It also requests the Tribunal to declare that the other adjustments claimed are allowable under the Act and Regulations.

***HELD**: The Tribunal declares that ODP motors and TEFC motors are "like goods" as the expression is defined in section 2 of the Act. Except for the question of warehousing, the Tribunal maintains the decision of the Deputy Minister to reject the requests for further adjustments in the assessment of normal value under section 15 of the Act and Regulations thereunder. Member Bertrand dissents in part. The Tribunal allows the appeal with respect to adjustments sought on warehousing expenses, subject to the related conditions enumerated in the Reasons for Decision as expressed by Members Fraleigh and Hines, and refers the matter back to the Deputy Minister for a re-determination. The Tribunal rejects the appeal in respect of the question of warranty coverage as a settlement with the respondent has been reached on that question.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*January 10 and 11, 1990*
Date of Decision:	*February 21, 1991*
Tribunal Members:	*Robert J. Bertrand, Q.C., Presiding Member* *Sidney A. Fraleigh, Member* *W. Roy Hines, Member*

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Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Peter Kirby and Darrel Pearson, for the appellant* *Joseph de Pencier, for the respondent*
Intervenors:	*Michael Flavell, for Toshiba companies* *Geoffrey Kubrick, for Toshiba International Corporation* *Mary-Helen Murdock, for V.J. Pamensky Canada Inc.*
***Statutes and Regulations Cited**:*	*Special Import Measures Act, sections 2, 15, 19 and 20, R.S.C., 1985, c. S-15; Special Import Measures Regulations, sections 3 to 13, SOR/84-927, Canada Gazette, 1984, Part II, p. 4286.*
***Cases Cited**:*	*Graco Childrens Products Canada Limited v. The Deputy Minister of National Revenue for Customs and Excise (1982) 8 T.B.R. 375; Sarco Canada Limited v. Anti-dumping Tribunal [1979] 1 F.C. 247; Noury Chemical Corporation et al. v. Pennwalt of Canada Ltd. (1982) F.C.A. (4 C.E.R. 53).*
***Other Reference Cited**:*	*Driedger, E.A., Construction of Statutes, 2nd Ed., 1983.*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 2936

MADISON INDUSTRIAL EQUIPMENT LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal by Madison Industrial Equipment Ltd. (Madison), pursuant to section 61 of the *Special Import Measures Act*[1] (the Act), of the re-determinations of normal value and the assessment of anti-dumping duties made by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) with respect to six importations made by the appellant on November 6, 12 and 22, 1985, February 27 and 28, 1986, and May 7, 1986, of polyphase induction motors, 1 HP to 200 HP inclusive, originating in or exported from Taiwan.

THE FACTS

The appellant is an importer and national distributor of polyphase induction motors that are either open drip-proof (ODP) motors or totally enclosed fan-cooled (TEFC) motors, originating in or exported from Taiwan. The producer and exporter of the motors imported by Madison is Teco Electric & Machinery Co., Limited (Teco).

On October 11, 1985, the Canadian Import Tribunal, in Inquiry No. CIT-6-85, concluded that the dumping of polyphase induction motors, 1 HP to 200 HP inclusive, originating in or exported from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom had caused, was causing and was likely to cause material injury to the Canadian production of "like goods."

Subsequent to the issuance of that finding, the Department of National Revenue for Customs and Excise (the Department) undertook an investigation pursuant to section 55 of the Act to establish normal values and export prices in respect of goods released from Customs during the period between June 14, 1985, and October 11, 1985, inclusively.

On April 11, 1986, the Department announced the establishment of new normal values pursuant to section 55 of the Act and stated that the new normal values were to apply to all polyphase induction motors covered by the finding and imported on or after June 14, 1985, and would continue to apply until such time as another normal value review was conducted.

1. S.C. 1984, c. 25; now R.S.C., 1985, c. S-15.

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Anti-dumping duties were assessed on the six importations of polyphase induction motors by Madison. For purposes of assessment, the duties were calculated by reference to normal values established pursuant to section 15 of the Act under the conditions set out in that section, and adjusted as prescribed by the *Special Import Measures Regulations*[2] (the Regulations).

On or about January 29, 1987, a Dominion Customs appraiser re-determined these determinations pursuant to section 57 of the Act. As ODP motors are not sold in Taiwan, the Department determined that TEFC motors and ODP motors were "like goods" as the expression is defined in section 2 of the Act. The normal values were calculated by reference to the normal value of TEFC motors sold in Taiwan for purposes of the assessment.

Pursuant to section 58 of the Act, Madison appealed the re-determinations to the Deputy Minister who, on December 10, 1987, issued new re-determinations pursuant to section 59 of the Act. The Deputy Minister determined that ODP motors and TEFC motors were "like goods" and, in assessing the normal value of ODP motors and TEFC motors, made some of the adjustments claimed by the appellant as allowed by the Regulations and refused other adjustments with respect to warehousing, warranties, bad debts and certain administrative expenses.

On January 7, 1988, Madison appealed the re-determinations to the Tariff Board pursuant to section 61 of the Act. The appeal, being a continuation of proceedings commenced before the *Canadian International Trade Tribunal Act*[3] came into force, is taken up by the Canadian International Trade Tribunal by virtue of section 60 of that statute.

The appellant seeks a declaration that ODP motors and TEFC motors are not "like goods" and requests that the Tribunal declare that the other adjustments claimed are allowable under the Act and the Regulations.

The hearing was held in Ottawa, Ontario, on January 10 and 11, 1990.

The appellant called one witness in support of its case, Mr. Erik Furstrand, a mechanical engineer with a master's degree in business administration, who has worked for Madison Equipment/Armature Electric since 1980 and is now President of Madison Industrial Equipment Ltd.

The respondent called two witnesses in support of his case, Mr. Karl D. Mackay, an employee of Revenue Canada, and Mr. Tom Johnson, a certified engineering technologist, who is employed at Westinghouse Motor Company Canada Ltd. (Westinghouse) as product manager for the medium motors group as well as marketing manager for the entire range of electric motors sold by Westinghouse throughout the world. Mr. Johnson is also a representative of the Electrical and Electronic Manufacturers' Association of Canada, an electrical manufacturers' association of which one section, the motor-generator group, is composed of member companies such as Reliance Electric Limited, General Electric Canada Inc., Leroy-Somer Canada Ltd./Leroy-Somer Motors Canada Ltd., Emerson Electric Canada Ltd. and Westinghouse.

The appellant initially claimed that the cost of determining warranty coverage claimed by customers with respect to sales in Taiwan forms a proper basis for an adjustment under section 9 or, alternatively, section 5 of the Regulations. At the hearing, the Tribunal was informed by counsel for the appellant that a settlement of that issue had been reached to its satisfaction. The wording of that agreement or settlement has not been filed with the Tribunal, which takes note of the appellant's desire not to pursue the matter further.

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2. SOR/84-927, Canada Gazette, 1984, Part II, p. 4286.
3. R.S.C., 1985, c. 47 (4th Supp.).

THE LEGISLATION

The relevant statutory provisions are as follows:

Special Import Measures Act[4]

2. (1) In this Act,

...

"like goods", in relation to any other goods, means

(a) goods that are identical in all respects to the other goods, or

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods;

...

15. Subject to sections 19 and 20, where goods are sold to an importer in Canada, the normal value of such goods is the price of like goods when they are sold by the exporter of the first mentioned goods

(a) to purchasers

(i) with whom the exporter is not associated at the time of the sale of the like goods, and

(ii) who are at the same or substantially the same trade level as the importer;

(b) in the same or substantially the same quantities as the sale of goods to the importer,

(c) in the ordinary course of trade for use in the country of export under competitive conditions,

(d) during such period of sixty days that ends in the interval commencing with the first day of the year preceding the date of the sale of the goods to the importer and ending on the fifty-ninth day after such date as is selected by the Deputy Minister or, where, in the opinion of the Deputy Minister, the nature of the trade in those goods or the fact that they are sold to the importer for future delivery requires that sales of like goods by the exporter during a period other than a period of sixty days that ends in that interval be taken into account, during such period of sixty days or longer

(i) that precedes the date of the sale of the goods to the importer, or

4. *Supra*, footnote 1.

(ii) where the goods are sold to the importer for future delivery, that precedes the date of the sale of the goods to the importer or within the year that precedes the date of the delivery of the goods to the importer

as the Deputy Minister specifies for those goods or for goods of the class to which those goods belong, and

(e) at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,

adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter.

Special Import Measures Regulations[5]

...

5. For the purposes of sections 15, 19 and 20 of the Act, where the goods sold to the importer in Canada and the like goods differ

(a) in their quality, structure, design or material,

(b) in their warranty against defect or guarantee of performance,

(c) in the time permitted from their date of order to the date of their scheduled shipment, or

(d) in their conditions of sale, other than the conditions referred to in paragraphs (b) or (c) or any conditions that result in any adjustment being made pursuant to any other section of these Regulations,

and that difference would be reflected in a difference between the price of the like goods and the price at which goods that are identical in all respects, including conditions of sale, to the goods sold to the importer in Canada would be sold in the country of export, the price of the like goods shall be adjusted

(e) where the price of the like goods is greater than the price of the identical goods, by deducting therefrom the estimated difference between those prices, and

(f) where the price of the like goods is less than the price of the identical goods, by adding thereto the estimated difference between those prices.

...

5. *Supra*, footnote 2.

9. For the purposes of sections 15 and 19 and subparagraph 20(c)(i) of the Act, where purchasers of like goods who are at the trade level nearest and subsequent to that of the importer in Canada have been substituted for purchasers who are at the same or substantially the same trade level as that of the importer, the price of the like goods shall be adjusted by deducting therefrom

(a) the amount of any costs, charges or expenses incurred by the vendor of the like goods in selling to purchasers who are at the trade level nearest and subsequent to that of the importer that result from activities that would not be performed if the like goods were sold to purchasers who are at the same or substantially the same trade level as that of the importer; or

(b) in the absence of information relating to the costs, charges and expenses mentioned in paragraph (a), an amount not exceeding the discount that is generally granted on the sale of like goods by other vendors in the country of export to purchasers who are at the same or substantially the same trade level as the importer.

THE ISSUE

The first issue in this appeal is whether ODP motors and TEFC motors are "like goods."

If ODP motors and TEFC motors are "like goods," the second issue is whether the Deputy Minister should have granted Teco's claims for additional adjustments to the selling prices in Taiwan of TEFC motors under section 15 of the Act and pursuant to the Regulations.

If ODP motors and TEFC motors are not "like goods," the next issue is whether the Deputy Minister should have determined the normal values of ODP motors pursuant to paragraph 19(*a*) or, alternatively, paragraph 19(*b*) of the Act.

Should the Deputy Minister have determined the normal value of ODP motors pursuant to paragraph 19(*b*) of the Act, the remaining issue is what amount for profit should be aggregated, pursuant to paragraph 11(*b*) and section 13 of the Regulations, with the cost of production and administration, sale and all other costs in relation to the ODP motors.

ARGUMENTS

The Question of "Like Goods"

The appellant argued that all the characteristics (including market considerations, substitutability, physical similarity, end use and manufacturing specifications, as recognized in *Sarco Canada Limited v. Anti-dumping Tribunal*[6]) of the goods must be considered in determining whether two classes of goods are "like goods."

The witness for the appellant explained that, within the broad classification of polyphase induction motors, there exist several general categories of motors classified on the basis of motor enclosure, including ODP motors and TEFC motors. These two enclosure classifications are divided into a number of specific types and sizes. These types and sizes are further divided on the basis of

6. [1979] 1 F.C. 247.

electrical and mechanical designations including horsepower rating, voltage, phase, cycle, RPM, insulation and frame size.

Mr. Furstrand argued that ODP motors and TEFC motors are not "like goods" and do not meet either of the tests set out in the statutory definition because these motors do not share the same physical characteristics and have distinct and specific designs and different end uses and markets.

The witness stated that ODP motors and TEFC motors are manufactured separately and that a TEFC motor takes longer to manufacture. He added that the physical characteristics of each motor are truly distinguishable and that the difference is apparent just by looking at the motors. The length of the shaft is different, as well as the enclosure. Another difference has to do with rotor lamination: lesser laminations are used in an ODP motor and less copper is therefore needed in its manufacture. The outside of a TEFC motor is ribbed and finned because the cooling of the machine is done by a fan-mounted on the back of the motor. The casing of an ODP motor will not fit a TEFC motor.

The witness affirmed that an ODP motor is designed to be used in clean and dry environments while a TEFC motor is designed to be used in wet and dirty environments. The totally enclosed motor is specifically designed to eliminate contamination by outside air of the electrical coils inside the motor. The TEFC motor is directed to a market different from the ODP motor; TEFC motors and ODP motors are marketed in separate catalogues, for use by different customers.

The respondent argued that ODP motors and TEFC motors are "like goods" and that a motor is a motor. Counsel stated that the basic and the central functions of electric motors, as reflected in the NEMA definition, have to do with the conversion of electrical energy into mechanical energy. What is important, argued the respondent, is the ability to provide mechanical power, the basic use to which a motor is put, and not the modifications that permit electric motors to be adapted and employed in what has been described as a myriad of environments and applications. In that regard, ODP motors and TEFC motors share the same physical characteristics.

Mr. Johnson stated that the NEMA standards, except for definitions, do not deal with the subject of enclosures, although they provide for various standards of design, dimensions, tolerances and other criteria. The different enclosures are a response to differing environmental conditions. Enclosures, like bearings and other modifications, are add-ons depending on an application. Of course, the enclosure is absolutely necessary for an electric motor to be used, as are the bearings. They are what makes an electric motor appropriate for a particular use, but they are not the essence of the electric motor itself.

The respondent contended that differences in applications are not essential. Customers make choices based on price differences, and the choice of an enclosure can be a matter of some judgment and trade-offs. Substitution is possible because the customer can make the necessary calculation in respect of the risk of what a substitution might cost compared to the cost of the other motor, matters of standardization within a plant and any other factor that is relevant in deciding on the best choice of motor and motor enclosure.

In the opinion of the respondent, the categorization of electric motors by features such as enclosure could lead to the recognition of a multiplicity of types of motors. If classified by horsepower and speed, given, for example, three choices of enclosure, there would be 171 classes of motors. If the enclosure were viewed as a determinative factor, many types of motors would result. He argued that if the enclosure were relevant and determinative, then so would be the presence of brakes or bearings, or special lubrication methods. To adopt this approach, he said, would result in a totally unworkable multiplicity of motor types. This would render meaningless the statutory definition of "like goods" that refers to " ... identical ... or ... uses and other characteristics of which closely resemble...."

The Question of Adjustments

The appellant argued that the additional adjustments claimed should be granted to reflect the difference in doing business incurred by Madison. Pursuant to section 5 or 9 of the Regulations, adjustments for warehousing, bad debts, verification of warranty expenses and certain general activity expenses incurred by Teco on domestic sales should have been made to the domestic selling price of the TEFC motors chosen by the Deputy Minister in determining normal values for the ODP motors imported by Madison.

The appellant contended that the expression "conditions of sale" found in section 15 of the Act and the Regulations should be interpreted broadly to include all the adjustments sought by the appellant, and that the same liberal interpretation should apply to adjustments that may be granted under section 19 of the Act.

The appellant asserted that section 9 of the Regulations, when it refers to "any cost, charges or expenses incurred by the vendor of the like goods in selling to purchasers," should be interpreted to include any incremental costs of a general nature incurred in selling, and should not be restricted to "sales expenses."

The appellant claimed that the fact that the exporter is required to maintain and warehouse an inventory for sales made in Taiwan, but is not required to maintain such an inventory for sales to Canada constitutes a difference in the conditions of sale between the two countries and an extra expense that must be assumed. The motors destined for Canada are placed in a staging area, rather than inventory, until a sufficient quantity is accumulated to fill a shipping container. As sales in Taiwan are conditional upon there being sufficient inventory to make daily deliveries, this becomes an implicit "condition of sale" imposed by the purchaser in Taiwan on the manufacturer-exporter. This warehousing cost should qualify as an adjustment under the words "any cost" of section 9 of the Regulations. The adjustment could alternatively be allowed under section 5 of the Regulations as a "condition of sale."

Teco alleged that it is obliged to maintain an administrative infrastructure to support its sales activities in Taiwan and that such an infrastructure and related expenses are not required to the same extent with respect to its sales to a national distributor in Canada. Consequently, an adjustment should be allowed either as "any cost" under section 9 of the Regulations or costs related to "conditions of sale" under section 5 of the Regulations.

Teco also alleged that it sells TEFC motors to customers in Taiwan without guarantee of payment and that, in contrast, payment for ODP motors imported by Madison is guaranteed by letter of credit. The appellant claimed that an adjustment for bad debt expense could be allowed pursuant to section 5 of the Regulations, considering that an adjustment for payment term differences has been allowed. An adjustment for bad debt would only extend the adjustment for payment term differences and could, in its opinion, be viewed as a "condition of sale," as is normally the case in general sales and administration accounts.

It was argued that verification of warranty claims would not be performed in Canada by Madison if Teco sold directly to Canadian distributors or consumers and that the costs incurred for such verification should, alternatively, be allowed as "conditions of sale" under paragraph 5(*d*) of the Regulations.

The appellant concluded that, whether section 15 or section 19 of the Act is used to determine the normal value, the question of adjustments should be viewed liberally and that the expression

"conditions of sale" should be interpreted to include all the adjustments sought by the appellant in this case. The intent of the Act is done violence when a less liberal interpretation is adopted. It added that section 9 of the Regulations also should be interpreted liberally to cover all the costs implicit in the differences of trade level.

On the question of adjustments, the respondent argued that the Regulations do not purport to cover all the costs of doing business. Sections 5 and 9 of the Regulations are couched in terms of selling and are related to selling. He affirmed that his decision with respect to warehousing, general expenses, verification of warranty and bad debt expenses is the correct interpretation of the Act and Regulations, and he pointed out that section 9 of the Regulations applies to activities that would not be performed with respect to goods for export.

The respondent also argued that there is nothing in this case to indicate that the exercise of any judgment in not granting an adjustment was unfounded, unwarranted or an improper exercise of discretion, whether accorded formally by the Act or as a matter of administrative practice.

On the question of warehousing, the respondent stated that common sense dictates that the product has to be somewhere for an average of 10 to 15 days and that there is a cost associated with the storage. The respondent submitted that there is warehousing with respect to Teco's sales in Taiwan and to its export products. This export warehousing may be necessitated by certain economics of shipping in a container load, but there is no evidence that it is necessitated by a condition of sale. Under those circumstances, the Deputy Minister and his delegates have exercised their discretion and have refused the adjustment on the basis of the specific wording of paragraph 9(*a*) of the Regulations.

On the question of general activities and expenses, the respondent stated that Teco has general expenses associated with supplying Madison, which are very much like the general expenses it has for its own domestic users.

On the question of bad debt expenses, the respondent pointed out that under paragraph 5(*d*) of the Regulations the expenses cannot be considered as a "condition of sale" or an "activity:" it is a cost of business that is not contemplated by the wording of paragraph 5(*d*) or section 9 of the Regulations.

The Applicability of Paragraph 19(*a*) or 19(*b*) of the Act

Having argued that ODP motors and TEFC motors are not "like goods," the appellant asked that the Tribunal determine the normal value by using section 19 of the Act. It added that the Deputy Minister, in choosing between the specifications of paragraphs 19(*a*) and 19(*b*) of the Act, should apply paragraph 19(*a*) in preference to paragraph 19(*b*) because paragraph 19(*a*) should produce a more favorable result for the importer. It argued that if a more favorable result can be arrived at by using one method over another, then it is more equitable for the Deputy Minister to refer to this method.

FINDING OF THE TRIBUNAL

All Members

The Question of "Like Goods"

The Tribunal clearly recognizes, on the basis of all the evidence, that ODP motors and TEFC motors are not identical goods, their appearance, for one, being different. That being the case, the question is whether ODP motors and TFC motors are "like goods."

Prior to the proclamation of the Act, "like goods" were defined as follows in section 2 of the *Anti-dumping Act*[7]:

> *2. (1) In this Act*
>
> ...
>
> *"like goods" in relation to any goods means*
>
> *(a) goods that are identical in all respects to the said goods, or*
>
> *(b) in the absence of any goods described in paragraph (a), goods the characteristics of which closely resemble those of the said goods;*

The approach to interpret the expression "like goods" was outlined in the classic decision of the Federal Court of Canada in *Sarco Canada Limited v. Anti-dumping Tribunal*[8] and several other court decisions[9] reiterating the decision of the Court in the *Sarco* case. According to this case law, the Anti-dumping Tribunal had to consider all the characteristics of the goods in question in order to determine whether they were "like goods" within the meaning of the statutory definition.

With the proclamation of the *Special Import Measures Act*, the definition of "like goods" was amended to read as follows:

> *2. (1) In this Act,*
>
> ...
>
> *"like goods", in relation to any other goods, means*
>
> *(a) goods that are identical in all respects to the other goods, or*
>
> *(b) in the absence of any goods described in paragraph (a), goods <u>the uses and other</u> characteristics of which closely resemble those of the other goods;* (Emphasis added)

The Tribunal is of the view, on the basis of the specific wording of the applicable statutory definition of "like goods," that, in order to determine whether goods are "like goods," it must consider all the characteristics of the goods in question, but, first, it must consider the characteristic highlighted by Parliament: the uses of the goods in question.

A great deal of contradictory evidence was presented at the hearing on the question of uses of the motors. The Tribunal has heard the appellant's views that ODP motors and TEFC motors are not for the same uses. The Tribunal is of the view that a distinction must be made between uses and applications. While the fundamental use to which a motor is put concerns the transformation of electricity into horsepower, this fundamental use of motors can find many applications. The Tribunal

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7. R.S.C., 1970, C. A-15.
8. *Supra*, footnote 6.
9. Airless Paint Spray Units (1980) ADT-2-80 (2 C.E.R. 122); Hand Held Portable Electric Drills (1980) ADT-12-79 (2 C.E.R. 64); Stainless Steel Plate (1983) ADT-18-82 (5 C.E.R. 266); Commodity Hardboard (1981) ADT-4-81; *R & H Products Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1975), 6 T.B.R. 257 (Tariff Board); *Noury Chemical Corporation et al. v. Pennwalt of Canada Ltd.* (1982), 4 C.E.R. 53 (F.C.A.).

has come to the conclusion that fundamentally, ODP motors and TEFC motors have the same use: the motors transform electricity into mechanical power. The applications, however, may differ, generally depending on clean and dry environments as opposed to wet and dirty environments.

The Tribunal is of the view that the components and features of electrical motors that have to do with the provision of mechanical power and the basic use to which the motors are put are more significant than the many structural modifications that permit electric motors to be adapted and employed in what has been described as a myriad of environments and applications.

The environment may make one motor more suitable than another for durability or maintenance reasons and may lead to the preferred choice of the user for one motor over the other, for one casing and cooling system over another. But the same could be said about size, shaft size, primary input current, RPM, phases, which depend on the particular application envisaged by the user. In the opinion of the Tribunal, such differences are peripheral and non-determinative with respect to the question of close similarity.

The Tribunal has reached the conclusion that the differences in casing and therefore, generally, in applications, do not detract from the overall conclusion that ODP motors and TEFC motors have the same uses, and it believes that the distinguishing feature of the casing is not an essential difference. Furthermore, the Tribunal is convinced that the categorization of electric motors by features such as enclosure would lead to the recognition of a multiplicity of types of motors, thus rendering unworkable and meaningless the definitions set out in the Act.

The appellant argued that ODP motors and TEFC motors are not interchangeable and that the non-interchangeability is evidenced by the fact that the motors are directed to different markets. It is not evident to the Tribunal that TEFC motors are directed to a different market despite the fact that these motors are marketed in a separate catalogue. Marketing of the motors is of peripheral importance to the question of determining whether the two motors are "like goods." In any event, the respondent has convinced the Tribunal that there are many examples of descriptions of shared applications in brochures. Given the same horsepower, interchangeability, in the opinion of the Tribunal, means that a TEFC motor could be used instead of an ODP motor for all applications. Although the converse might not be true in applications where durability and maintenance are of consideration, an ODP motor could nonetheless be used to transform electricity into mechanical power.

With respect to the design and manufacturing of ODP motors and TEFC motors, the evidence has convinced the Tribunal that, in most aspects, the design and manufacturing of the two motors are the same. The same bearings and the same rotor punching will be used in both motors. The same equipment is used to manufacture the brackets and the frame, and to dyecast the rotor. The same engineering department is used to design the different enclosures and motors for all the small motors.

Keeping all of the above in mind, the Tribunal has come to the conclusion that the physical characteristics of ODP motors and TEFC motors are generally the same. The essential parts of an electric motor are the coils of wire that are wrapped around the core iron laminations. The electricity passes through these coils of wire creating a circulating magnetic field that produces rotation. The only evident physical difference between the two motors has to do with the casing of the motors that differs in ODP motors and TEFC motors. The Tribunal takes the view that the casing is merely a container through which no electricity runs and that, regardless of the enclosure used, the essential physical characteristics of a motor are the rotor and the stator, which are found in ODP motors and TEFC motors.

For all of those reasons, the Tribunal has come to the conclusion that both ODP motors and TEFC motors are "like goods" as the expression is defined in section 2 of the Act.

The Applicability of Section 19 of the Act in the Determination of Normal Value

All Members

The appellant asked that the question of normal value be determined pursuant to paragraph 19(*a*) or 19(*b*) of the Act, on the basis that ODP motors and TEFC motors are not "like goods." As the Tribunal considers that ODP motors and TEFC motors are "like goods," it follows that normal value should be determined pursuant to section 15 of the Act. The Tribunal, therefore, need not consider the questions of the interpretation of section 19 of the Act or the adjustments allowable under that section.

The Question of Adjustments

Members Fraleigh and Hines

The purpose of sections 15 to 20 of the Act and of Part I of the Regulations is to prescribe the rules concerning the establishment of normal values to be compared with export prices in order to determine if, and to what extent, dumping has occurred and, consequently, the amount of anti-dumping duties to be levied. What is sought is the usual domestic price in the country of export for the subject goods, taking into account prices charged on sales for like quantities under competitive conditions at arm's length in that country, to purchasers at a trade level similar to that of the Canadian importer, such prices to be adjusted to reflect "the differences in terms and conditions of sale, in taxation and other differences relating to the price comparability between the goods sold to the importer and the like goods sold by the exporter." The manner and circumstances of such adjustments are prescribed in the Regulations.

The question of adjustments relates primarily to the meaning given to the expression "conditions of sale" in section 5 of the Regulations. The wording of that section differs somewhat from the wording of the Act, in that the Act provides for adjustments in respect of

> ... *other differences relating to price comparability* ...

but the Regulations allow adjustments where the goods sold to the importer in Canada and the "like goods" differ

> ... *in their conditions of sale, other than the conditions referred to in paragraphs (b) or (c) or any conditions that result in any adjustment being made pursuant to any other section of these Regulations* ... (Emphasis added).

In other words, if there are conditions of sale not provided for specifically in the Regulations that result in a price difference between the domestic sales and the export sales, an adjustment is permitted for such differences that may result in a higher or lower normal value, depending on the particular situation.

The words "conditions of sale" must be considered in the context of the modern rule of construction that has been expressed by E.A. Driedger[10] in the following manner:

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10. Construction of Statutes, 2nd Ed., 1983.

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

It seems to the Tribunal that the scheme and object of the Act, as well as the intent of Parliament, were to provide, where possible, rules to be followed in examining domestic market sales to establish normal values and, accordingly, the Tribunal sought guidance on the meaning of the expression "conditions of sale" in the context of the Act and Regulations as a whole. In this connection, it is instructive to note that the Act and Regulations are quite specific in prescribing how the Deputy Minister is to deal with matters such as differences in quantities, trade levels, the domestic market sales to be considered in terms of time, place and frequency, quality, structure, design or material, discounts, delivery costs, taxes, etc. In other words, while seeking to provide for price comparability in situations where circumstances surrounding domestic market and export market sales differ, the Act and Regulations impose certain constraints on which adjustments are to be allowed. Furthermore, as these specific provisions qualify the concept of "price comparability," it appears to the Tribunal that the words "in their conditions of sale" in paragraph 5(*d*) of the Regulations were included to deal with unforeseen circumstances. In this connection, the use of the word "their" serves to underline that, in establishing which adjustments are to be allowed, one is confined to examining differences between sales to the importer in Canada and sales of "like goods" in the exporter's domestic market, which may result in something less than full price comparability under all circumstances.

In addition, paragraph 5(*d*) of the Regulations incorporates another clause that excludes adjustments for conditions provided for elsewhere in the Regulations. The words "other than" cover matters such as warranty, time of shipment, discounts, delivery changes, taxes and duties, all of which are normally found, either explicitly or implicitly, in a sales agreement.

Having this in mind, and recognizing that section 15 of the Act situates the other circumstances surrounding domestic sales used in determining normal value, the Tribunal concludes that there is no basis to assume that Parliament and the Governor in Council intended the expression "conditions of sale" to encompass anything beyond what is usually associated with selling in the plain and ordinary sense of that commercial activity. Indeed, the Tribunal concurs with the view put forward by counsel for the respondent, namely, that the relevant provisions of the Act and Regulations are couched in terms of sales and activities relating to selling, not of the general conduct of business.

In giving the interpretation that all adjustments relating to selling are allowable, the Tribunal is mindful of the need for parties seeking adjustments to support such claims by appropriate and substantiating evidence. The application of the Regulations and their interpretation cannot be derived in a vacuum. To claim adjustments, evidence allowing a full examination of all the circumstances and the accounting relating to the claim for adjustments must be submitted. In the Tribunal's opinion, adjustments may only be allowed where the adjustments sought are sufficiently pertinent to the sales for which the adjustments are requested. In contrast, adjustments related to a general cost of doing business or circumstances of doing business in general should not be allowed. Clearly, an element of discretion has been conferred to the Deputy Minister in this connection, whose decision can only be appealed to this Tribunal based on the facts and evidence in any particular case.

One test to determine whether the circumstances surrounding a particular transaction are pertinent to the sale for which the adjustments are sought is to distinguish between circumstances directly related, and circumstances indirectly related, to the sales at issue. Under this test, the only adjustments allowable under the Regulations would be those where circumstances are directly related to the sale at issue, that is, those for which there is sufficient evidence to indicate that the expenses

were relevant to the transaction at issue, and not a general cost of doing business or circumstances of doing business in general. Indirect circumstances of doing business in general would, in the opinion of the Tribunal, be more akin to doing business in general. Claims under this last rubric would not, in the Tribunal's opinion, be adjustments allowable under the present scheme of the Act.

Firms in all countries face certain costs, charges and expenses relating to the production and sale of goods regardless of where or to whom the goods are sold. One might refer to these as the general cost of doing business, which is spread over all sales of each firm. It seems obvious that the scheme of the Regulations does not contemplate allowing, regardless of the trade level involved, adjustments for all such activities in determining normal values.

Under normal accounting procedures, one would expect that the general sales and administration factor respecting the exported goods would incorporate an amount to cover the general cost of doing business by the exporting firm and, as such, would be included in the export price. To conclude that the general cost of doing business by the exporting firm is not attributable to the exported goods would result in a situation in which the adjusted export price would always be lower than the price in the domestic market - a situation that the Tribunal does not believe was contemplated by the Act and Regulations.

Much of the evidence and argument before the Tribunal dealt with differences in trade level between the Canadian importer and the customers of Teco in Taiwan. The Canadian importer is a national distributor whereas Teco sells in its home market directly to regional distributors - a trade level subsequent to that of the importer - and carries out some of the same functions as Madison does in Canada. The Deputy Minister made an adjustment for this factor, under section 9 of the Regulations, in the calculation of the normal value, but did not allow all the adjustments sought by the appellant. Paragraph 9(*a*) of the Regulations provides for an adjustment to offset any costs, charges or expenses incurred by the vendor to domestic purchasers of "like goods" who are at the trade level nearest and subsequent to that of the importer that result from activities that would not be performed if the goods were sold to firms at the same trade level as the importer. The wording of that section is rather straightforward and, accordingly, where claims for adjustments specifically relating to trade level differences rather than to the general cost of doing business can be justified and documented, these claims should be viewed favorably by the Deputy Minister.

Administrative expenses and bad debts, in the opinion of the Tribunal, fall within the category of general business costs. Bad debts are a cost of doing business across the full range of a firm's activity and cannot be identified with any particular domestic sales that may be used as the basis for determining normal value. Payment made by the Canadian importer by means of a letter of credit is, in the opinion of the Tribunal, irrelevant to the issue of bad debts and should be treated in much the same way as cash sales for which a cash discount is usually provided. Regardless of trade level, administrative expenses are also normally applied across all sales and are not broken down in respect of individual sales.

The question of warehousing may fall into a somewhat different category. Mr. Furstrand, in his evidence, noted that Teco did not put goods in inventory for Madison, but, rather, placed the motors in a staging area as they came off the production line until there was a sufficient number of motors to fill a shipping container. This collection period lasted normally between 10 to 15 days. To that extent, warehousing is performed in respect of both the sales in Taiwan and the sales to Canada, and one could conclude that there is a functional relationship between sales in Taiwan and sales to Canada, although the costs in each case may be substantially different. Where such a difference exists, and there is evidence to verify that the staging is significantly different from the warehousing in respect of sales in Taiwan, the Tribunal is of the view that a claim for adjustment may be allowed under

section 9 of the Regulations if that claim is justified on the basis of trade level rather than as a condition of sale.

Reasons for Member Bertrand Dissenting in Part

I am in agreement with my colleagues on the issue of "like goods." I consider, for the reasons given above, that ODP motors and TEFC motors are "like goods" for the purpose of the Act and the Regulations and, consequently, that section 19 of the Act is not applicable.

Having determined that there was a sufficient number of sales in Taiwan that met the basic conditions laid out in section 15 of the Act, the Deputy Minister must proceed to adjust the domestic selling prices to achieve price comparability with the export prices. Regulations adopted under section 15 provide for the manner and circumstances in which adjustments are made to take into account differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter in its domestic market.

In the present case, adjustments were granted under various sections of the Regulations with respect to differences in quality, terms of payment, freight, trade level, advertisement, salesmen's salaries, entertainment, technical advice, sales commissions and bonuses, and for internal taxes and duties. The Deputy Minister rejected the appellant's claims for adjustment with respect to warehousing, cost of determining warranty coverage, bad debt expenses and certain general activity expenses.

Since the appellant based its claims for adjustment alternatively on paragraph 5(*d*) or section 9 of the Regulations, it is necessary, at the onset, to determine the interrelationship of those two sections.

An analysis of the wording of paragraph 5(*d*) leads to the conclusion that it is intended to serve as a mechanism to avoid double counting and as a residual clause allowing adjustments for any differences in conditions of sale or other conditions not granted under other sections of the Regulations. The use of the expression "adjustment being made" instead of "adjustment provided for" clearly establishes the order according to which adjustments should be considered. If the facts lead to an adjustment being made under a specific section of the Regulations, a similar adjustment will not be granted under paragraph 5(*d*) even if those facts involve different conditions of sale or other conditions reflected in price differences. It is therefore necessary to first interpret section 9 and apply it to the facts of the present case. If an adjustment is warranted under that section, the question is settled. Should, on the other hand, the facts not justify such an adjustment, it may still be possible to justify an adjustment if the conditions of paragraph 5(*d*) are satisfied.

Section 9 provides for adjustments to the domestic price of like goods for differences in the trade level at which the importer and the domestic purchasers operate. To claim adjustment under that section, it must be established that the domestic sales by the exporters are made or take place at the trade level nearest and subsequent to that of the importer in Canada. Mr. Furstrand, a witness for the appellant, testified that Madison acts as Teco's national distributor, selling Teco motors to other distributors in Canada and performing functions generally associated with that trade level. For instance, Madison has to maintain a large inventory to meet the demand of the regional distributors and it has to assess warranty claims for the purpose of validating or rejecting them. The witness testified that Teco performs similar activities in Taiwan and acts as its own national distributor, selling to many regional distributors in that country and shipping to them on a daily basis. The respondent did not challenge that evidence and, consequently, it must be accepted that Teco's sales of like goods in Taiwan take place at the trade level nearest and subsequent to that of the sales to Madison, the importer in Canada. It follows, therefore, that if the other requirements of section 9 are met, Teco is

entitled to an adjustment in the determination of normal value, adjustment that takes the form of a deduction from the selling price to its regional distributors. The amount of such deductions is to be determined according to paragraph 9(*a*) or 9(*b*), as the case may be. Under paragraph 9(*a*), Teco is entitled to deduct any costs, charges or expenses incurred in selling to regional distributors that result from activities that would not be performed if the sales were made to a national distributor, that is, at the same trade level as that of the importer. Taken in isolation, the expression "in selling" may be interpreted to refer only to direct sales expenses. I am of the view that this expression should be interpreted in the context of the whole section as requiring a causal link between a specific expense and the fact that the sales take place at the trade level subsequent and nearest to that of the importer.

The use of the expression "would not be performed" attaches a character of specificity to an activity and disqualifies under that paragraph an expense of a general nature that is really a cost of doing business rather than a cost of doing business at a trade level different from that of the importer. Whether a particular activity has that character of specificity is a question of fact that must be determined in the light of all the circumstances of the case. In that respect, consideration should be given to the customs and practices generally followed in trading in the particular goods, both in the country of export and in Canada. A comparison of the activities carried on respectively by the exporter and the importer may reveal which activities are trade level specific.

The meaning of the word "activities" is critical to the utilization of that section to justify an adjustment. If a generic or broad description is used, very few activities, if any, would be trade level specific. For instance, selling activities are carried on irrespective of the trade level at which the sales take place. In my view, that section must contemplate either a degree of refinement in the classification of activities into subactivities, allowing a relationship with a trade level to be established, or, alternatively, the section must contemplate the possibility of allocating expenses incurred in carrying out broadly defined activities.

The extent of the coverage of paragraph 9(*a*) may be defined by reference to paragraph 9(*b*), which provides an alternative method to determine the adjustment allowed. Under that paragraph, the adjustment is limited to the functional discount granted by domestic competitors of the exporter on their domestic sales to the same trade level as that of the importer. This alternative method should lead to approximately the same amount of adjustment, since it is to be used when lack of information makes it impossible to use the preferred cost method provided in paragraph 9(*a*). Counsel for the appellant suggested that adjustments computed on the basis of paragraph 9(*b*) should normally be lower than if computed under paragraph 9(*a*), since, otherwise, a more favorable treatment would be given to an exporter that does not provide the neceswary information. I do not find that argument persuasive since a generally granted functional discount would normally allow the beneficiary not only to recoup the cost of carrying out the assigned function or activity, but also to make a profit. The profit element is absent in paragraph 9(*a*), which only refers to costs, charges and expenses. It is clear, however, that since a trade level discount allows the beneficiary to cover not only its direct selling expenses, but all the costs associated with the carrying out of the assigned responsibilities or activities, that a paragraph 9(*a*) adjustment could be made not only for selling expenses, but also for other expenses that are necessarily incurred by the exporter because its sales in the home market are made at a subsequent trade level.

The appellant claims that some warehousing expenses should be allowed under paragraph 9(*a*) as trade level related. The appellant submitted that Teco manufactures to order for the export market, warehouses the motors until the order is completed and ships one container at a time, while it maintains an inventory for domestic sales purposes and ships to regional distributors on a daily basis. Counsel further submitted that such expenses are a direct consequence of the fact that Teco acts as its own national distributor. Counsel for the respondent submitted that since warehousing expenses are

incurred both for domestic and export sales, they are general activities expenses and not trade level specific. To the extent that information supplied by the exporter on its costs and its *modus operandi* allows a reasonable allocation of expenses by function, activity or subactivity, I am of the view that an adjustment should be granted under paragraph 9(*a*) if the other conditions of that paragraph are met. To hold otherwise would mean that if the exporter were to carry its national distributorship functions as a profit centre in a distant location quite distinct from its manufacturing activities, it would not be allowed to claim an adjustment for its easily determinable costs of warehousing the finished products to be supplied from that location to its regional distributors. Such a result would undoubtedly be contrary to the purpose of section 9 of the Regulations, the activity being clearly demonstrated and resulting from selling at a different trade level.

If that conclusion is valid with respect to the costs of warehousing finished products at a distant location for the performance of a trade level specific function, I fail to see why, *a priori*, a reasonable allocation of warehousing expense by function, activity or subactivity could not be made. The principle of cost and expense allocation is fundamental to the scheme of the Act and the Regulations and should be followed in the determination of adjustments under paragraph 9(*a*) whenever generally recognized cost accounting principles would justify a reasonable application in the particular circumstances. To the extent that the facilities are used to keep an inventory of raw material, components or semi-finished products, warehousing expenses pertain to the manufacturing or production function and are general in nature as opposed to trade level specific. To the extent that the facilities are used to keep an inventory of finished products that, given its volume, turnover and comprehensiveness, is demonstrably maintained in order to satisfy the daily requirements of regional distributors as opposed to a small inventory of finished products, made to order, earmarked for a specific customer and awaiting shipments to a national distributor, the warehousing expenses could reasonably be regarded as incurred as a direct result of selling at a different trade level from that of the importer. In order to achieve a reasonable allocation of warehousing expenses, attempts should be made to identify the volume of inventory that corresponds to what would normally be kept by the manufacturer awaiting shipment to a national distributor. According to Mr. Furstrand's oral evidence, it appears that Teco produces to order for national distributors abroad and ships one or two container loads at a time, that is, by implication, in such volume as to conveniently minimize transportation cost. It could be reasonable to assume that Teco would act in similar fashion vis-à-vis a national distributor in Taiwan. Taking into consideration the minimum load or volume that can conveniently be shipped by the cheapest mode of ground transportation in Taiwan, be it container, truck or railcar load, and that would ensure the lowest cost of transportation, it should be possible to determine which part of the inventory of finished goods for sales in the domestic market exceeds that minimum volume for shipping to a national distributor. A comparison of that part of the total inventory kept for domestic sale purposes would provide a rational basis to allocate part of the warehousing expense to the function of national distributor. Part of Mr. Furstrand's testimony on behalf of Madison seems to suggest that the motors earmarked for export are not put in the warehouse, but rather stored on the floor, in a staging process, awaiting shipment 10 to 15 days after production. If this is so, then Teco's particular method of doing business could justify an allocation of warehousing expenses on the basis of the space devoted to the storage of finished products to the extent of that part that is trade level specific and on the basis of the space devoted to the storage of raw material and semi-finished products, with no warehousing expense allocated to export sales.

My views with respect to warehousing expenses may be summarized as follows. To the extent that warehousing expenses are incurred for production purposes or for the storage of an inventory of finished products used undiscriminatingly to fill orders from domestic and foreign customers as, and when, received, such expenses would relate to production or to selling activities that bear no relationship to the trade level at which the sales take place and are more in the nature of a cost of doing business. However, an adjustment under paragraph 9(*a*) could be granted to the extent that a

reasonable allocation can be made for that part of the total warehousing expenses that is specifically and necessarily incurred by the exporter because its sales in the home market are made at a subsequent trade level to that of the importer. It appears to me that the cost or expense of warehousing that portion of the inventory of finished goods intended for domestic sales exceeding the level of inventory normally kept by Teco for sale to a national distributor abroad could reasonably be attributed to the carrying on of the functions of a national distributor in Taiwan. Assuming that proper accounting records are kept, and considering that the goods intended for sale to each national distributor abroad are produced to order and physically segregated, it should be possible for Teco to establish a reasonable method of allocating warehousing expenses, considering its business practices in manufacturing and shipping goods for sale at a national distributor level abroad and considering the sale and shipping environment in the home market.

The expense thus allocated could provide the basis for an adjustment under paragraph 9*(a)*. As the parties have agreed that the determination of the exact amount of the adjustment under that paragraph for warehousing expenses would present no difficulties once their admissibility is recognized, I would refer the matter back to the Deputy Minister for re-determination.

In addition to warehousing and warranty expenses, the appellant raised the issue of whether certain general activity expenses should be admissible for the purpose of an adjustment under section 9 of the Regulations. Such expenses relate to the administrative infrastructure necessary to support domestic sales activities. On the question of admissibility of such selling expenses, both counsel couched their argument along the same lines as their respective positions on the question of warehousing expenses. It was argued, on the one hand, that such expenses are, in part, a direct consequence of trade level differences and, on the other, that they are so general in nature that they are incurred for domestic as well as for export sales and, consequently, are not incurred for activities that are trade level specific.

The analysis and interpretation of section 9 adopted above with respect to warehousing expenses is applicable *mutatis mutandis* to general activity expenses pertaining to the administrative and selling functions. It is not disputed that the exporter makes its domestic sales to purchasers at the trade level nearest and subsequent to that of the importer. The appellant maintains that a portion of its general administrative and selling expense would not have been incurred if the sales had been made at a national distributor level. The respondent's position reflects the belief that an activity must be regarded as a whole and not subdivided or broken down into parts or subactivities according to their specific objectives, raison d'être, purposes, justification, etc. The appellant argued that the approach most consistent with the scheme of the Act and the Regulations should involve or rest upon a marginal or incremental analysis of the expenses associated with an activity while the respondent maintains that general selling and administrative expenses, because of their global character, are not a proper subject of allocation on any basis whatsoever. I am of the view that the word "charges" in paragraph 9(*a*), as used by accounting professionals, contemplates an allocation of an amount to an account on any basis consistent with generally accepted cost accounting principles and practices. Consequently, the characterization of an expense as a general selling and administrative expense for the purpose of an income or profit and loss statement does not automatically disqualify it for the purpose of an adjustment under paragraph 9(*a*). The permissible use of allocation methodology for the purpose of that paragraph can also be inferred from the existence of the alternative method of determining an adjustment that may be used at the option of the Deputy Minister. As in the case of warehousing expenses, the two methods provided for in section 9 should lead to approximately the same amount for adjustment. Such a result could only be achieved through an allocation of the general selling and administrative expense on a basis that would permit the segregation not only of the part of such expenses that pertains to domestic sales from that pertaining to export sales, but also of that part of the latter that could be allocated on a reasonable basis to the function of a national distributor. The

evidence at the hearing mostly concerned warehousing expenses and little was produced on the relationship between trade level and administrative and selling expenses besides argumentative statements by counsel. Reference was made by the witness for Madison to the greater cost of dealing with numerous regional distributors rather than with one national distributor, to the disparity in the number of transactions associated with the respective levels of trade and to the necessary consequences on the infrastructure required.

Due to insufficient information, it is difficult to determine whether a rational basis can be developed in the present case to justify an allocation of those selling and administrative expenses to the function of a national distributor. The costs incurred in carrying out that activity in Taiwan undoubtedly exist and are borne by Teco. To recognize that fact is one thing, but to measure it is another. The difficulty of making a proper allocation does not justify rejecting in principle the consideration of any allocation whatsoever. The appellant should be allowed to supply sufficient information, facts or records to support a rational basis for allocating administrative and selling expense to its national distributor function. Essentially, the appellant should be allowed to present a "what if" analysis of its general administrative and selling expenses in order to assess which part of such expense is, on an incremental basis, directly attributable to its national distributor function. Admittedly, a business enterprise needs an executive as well as an administrative infrastructure, irrespective of whether it is involved in domestic or export sales and irrespective of the trade levels at which those sales are made. It is equally plausible that such an infrastructure, and the expenses associated with it, would not be as large if the domestic sales were taking place at the same trade level as that of the importers. What is required is a two-tiered allocation of those expenses, first, to determine a base level for such expenses and then, subsequently, to determine the increment that is trade level specific. It is clear that a simple allocation on the basis of sales volume between domestic and export sales would not be sufficient since it would allocate proportionally both those general administrative and selling expenses that are trade level specific and those that are not. Rather, by using export sales made to purchasers at the same trade level as Madison and the number of such transactions, it may be possible to calculate the average value of a representative transaction at that trade level. From that value and the total domestic sales, it is possible to estimate the number of transactions that would have taken place if such sales had been made in Korea at the same trade level as that of Madison. Within the broad classification of general administrative and selling expenses, some expenses are entirely or partially dependent upon the number of transactions or individual sales. Expenses associated with salesmen activities, customer order confirmation, invoicing, monthly statement, account receivable, bank deposit, inventory and shipping control would fall in that category. Others, such as payroll accounting, personnel and general office expenses would be related only indirectly to the number of sale transactions by being dependent on a number of workers or amount of expenses, which themselves are directly related to the number of transactions. Other expenses would not appear to depend on the number of sale transactions, for instance production cost control, government and shareholder relation expenses, and, consequently, should not be considered.

On the basis of the aggregate of the expense directly or indirectly dependent on the number of transactions, it is possible to obtain the cost per actual transaction. Applying the amount thus obtained to the number of transactions that would have taken place if the sales had been made at the same trade level as that of Madison, it is possible to determine the total cost of such estimated volume of transactions. The difference between that notional cost and the total actual cost of domestic transactions could reasonably be attributed to selling at a different trade level from that of Madison and thus should be considered in the determination of an adjustment under section 9.

The above computation, using the number of transactions, is only an illustration of the kind of rational basis that may be developed for an allocation of general administrative and selling expenses to a trade level. There are others such as time spent that may be reasonable. It should be left to the

exporter to demonstrate a rational basis for allocation and establish the amount of claimed adjustment on the basis of its records and information. I am fully aware that the Deputy Minister is under a strict time constraint and has to follow a tight schedule to issue his preliminary and final determinations within the statutory deadline. This only puts a heavier burden on the exporter to supply the necessary information in a timely fashion, but should not prevent it from supplying such information as would allow the establishment of a rational basis to determine which and to what extent general administrative and selling expenses are trade level specific. Failure to do so would justify refusal by the Deputy Minister to make an adjustment under paragraph 9(*a*). That refusal should be based on a consideration of all the circumstances rather than an outright refusal to consider the issue, based on theoretical grounds. The question of an adjustment under paragraph 9(*a*) for some general, administrative and trade specific selling expenses should be referred to the Deputy Minister for re-determination in light of the above comments.

Having disposed of the issues of whether warehousing and selling expenses, when properly allocated, could be admissible under paragraph 9(*a*) for adjustment purposes, there remains the issue of bad debts incurred by Teco on its domestic sales.

Counsel for Teco claimed that bad debts with respect to domestic sales are the result of different conditions of sales, are reflected in a difference between the domestic and the export price and, consequently, are admissible for adjustment purposes under paragraph 5(*d*) of the Regulations. Counsel for the respondent argued that bad debts are not admissible because they are a cost of doing business generally, are not reflected in domestic pricing and are not contemplated by the Regulations.

The expression "conditions of sale" should be given the broad meaning of "circumstances of sale," which, in my view, is more in accordance with the scheme of the Act and the Regulations, and as such refers to differences in circumstances under which selling activities are carried out in the domestic and export markets.

I am of the view that the credit risk associated with domestic sales and the absence of such risk in export sales conducted on the basis of letters of credit represent a difference in the circumstances of sale for the purpose of the Act and the Regulations. The key question, however, is whether that difference "would be reflected" in price differences. The use of the conditional tense in the English version as opposed to the present tense suggests that what is envisaged is not the actual translation of that difference into price differences. It is not necessary to demonstrate that the exporter has set the price at which a specific domestic sale is conducted, taking into account the particular risk associated with that specific transaction. Since the Act and the Regulations contemplate an averaging of the prices at which the domestic sales are made during a period of time, i.e., the period of investigation chosen by the Deputy Minister, it should be sufficient to demonstrate a reflection of the credit risk in the domestic price level. The same price difference would exist whether the risk premium is built in the overall price structure of both domestic and export sales, and the export price is subsequently discounted to take into account the absence of credit risk, or whether the same basic price is applied to both and the risk premium is added to the domestic price. The question to be asked is whether it is reasonable, in the circumstances, to expect the exporter to have included a credit risk premium in the price level of its domestic sales and none in its export price when such export sales are conducted on the basis of irrevocable letters of credit. In my view, the credit risk premium is implicitly included in the domestic price level and excluded in export transactions as a sound business practice, exactly as a discount for prompt payment is explicitly granted to domestic purchasers. Since the scheme of the Act is based on price comparability, the domestic sale price should be adjusted to the level at which those sales would take place if the business were conducted exclusively on a cash on delivery basis since these sales would be made on the same basis as export sales where the credit risk element is absent. The fact that a risk premium is built into the general level of domestic price rather than attached to

specific transactions occurring at a particular time should not preclude the recognition of its existence. It only makes it more difficult, but not impossible to evaluate. An analogy may be made with the treatment under the Regulations of generally granted discounts and prepaid freight on domestic sales. If the exporter were to conduct its domestic sales generally on the basis of discounting its invoices without recourse to a factoring enterprise with which it deals at arm's length, the domestic selling price should be the amount effectively received by the exporter from that enterprise that would effectively assume the credit risk. The factoring discount from the invoice price should be taken into account to achieve price comparability with export sales conducted on the basis of letters of credit. If the credit risk is properly taken into consideration in these circumstances akin to generally granted discounts, it should also be the proper subject of an adjustment under paragraph 5(d) when it is borne by the exporter. It is, in my view, a consequence of a difference in circumstances (or conditions) of sale that the exporter can be expected to take into account in establishing its domestic price level. As in the case of casualty insurance, the risk premium corresponds to an expectation of losses and is generally based on past experience of quantified losses. It is submitted that the risk premium could reasonably be ascertained on the basis of actual losses experienced in the past by the exporter on its domestic sales, exactly as experience of warranty cost is used to determine adjustment for warranty differences. The exporter has to provide the information necessary to allow the determination of a proper adjustment. It would not be sufficient to rely on a deduction or allowance granted under domestic taxation law. I would consequently refer the question of bad debts to the Deputy Minister for consideration.

CONCLUSION

The appeal should only be allowed with respect to adjustments sought on warehousing expenses, subject to the conditions specified in this respect herein.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member