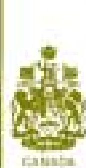
CANADIAN INTERNATIONAL TRADE TRIBUNAL



TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, March 17, 2003

Appeal No. AP-2000-051

IN THE MATTER OF an appeal heard on March 28, 2002, under subsection 68(2) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND FURTHER TO a decision of the Federal Court of Appeal dated September 14, 2000, which set aside the Canadian International Trade Tribunal's decision in Appeal No. AP-97-029 and referred the matter back to the Canadian International Trade Tribunal for a redetermination of the claim for the benefits of Code 2101 on the basis that there was evidence that some of the goods in issue had been used in process control apparatus.

BETWEEN

ENTRELEC INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed on 14 percent of the goods in issue, by value.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-2000-051

ENTRELEC INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

On September 14, 2000, the Federal Court of Appeal set aside the above noted Tribunal decision and referred the matter back to the Tribunal for a new adjudication on Entrelec Inc.'s claim for the benefits of Code 2101 on the basis that there was evidence that some of the goods in issue were actually used in process control apparatus.

HELD: The appeal is allowed on 14 percent of the goods in issue, by value. On the issue of its jurisdiction, the Tribunal held that there is nothing, either in the Federal Court of Appeal's direction or under subsection 68(3) of the *Customs Act*, that would limit how the Tribunal takes notice of the evidence.

In adjudicating the claim for the benefits of Code 2101, the Tribunal does not find convincing, overall, the evidence concerning the actual use of the goods in issue in process control apparatus. It finds that there are significant gaps, inconsistencies and other difficulties with the evidence that was provided. However, the Tribunal finds that the evidence supports a finding that some of the goods in issue were used in process control apparatus and, therefore, are entitled to the benefits of Code 2101.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 28, 2002
Date of Decision: March 17, 2003

Tribunal Members: James A. Ogilvy, Presiding Member
Zdenek Kvarda, Member
Ellen Fry, Member

Counsel for the Tribunal: Michèle Hurteau

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael A. Sherbo and Michael Kaylor, for the appellant
Louis Sébastien, for the respondent

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

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-2000-051

ENTRELEC INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

BACKGROUND

On September 28, 1998, the Canadian International Trade Tribunal (the Tribunal) made its decision in Appeal No. AP-97-029 (the original hearing) and found that the goods in issue, which were various electrical components,[1] did not qualify for the benefits of Code 2101 because Entrelec Inc. (Entrelec), had not shown that some of the goods in issue were actually used in process control apparatus. Rather, it found that Entrelec had demonstrated only that all the goods in issue were capable of being used in process control apparatus. On that basis, the Tribunal dismissed the appeal.

Entrelec appealed the Tribunal's decision to the Federal Court of Appeal (the Court). In its judgement,[2] the Court stated that the test of "actual use of some of the goods in issue" adopted by the Tribunal was met. The Court went on to say that Entrelec could have provided more evidence of actual use of the goods in issue and that it could not be said that "some" evidence had not been presented to the Tribunal to that effect. Further, the Court stated that it was in no position to determine what the Tribunal would have done had it taken notice of the evidence before it. It set aside the Tribunal's decision and referred the matter back to the Tribunal for a new adjudication on Entrelec's claim for the benefits of Code 2101 on the basis that there was evidence that some of the goods in issue were actually used in process control apparatus.[3]

On January 25, 2001, the Tribunal wrote the parties informing them that a hearing would be held on May 9, 2001, and established the procedures for filing submissions. It also stated in that letter that it wished the parties to clearly identify the goods in issue that were actually used in process control apparatus.

Entrelec made submissions on January 29 and February 6, 2001. The Commissioner made submissions on February 5, 2001. In its response, Entrelec provided its understanding of the Court's decision, namely, that the Court had referred the matter back to the Tribunal to determine how to adjudicate the refund entitlement, given that the test that some of the goods in issue were actually used in process

1. Appendix to Reasons for Decision, Appeal No. AP-97-029. The goods in issue were described as fuse terminal blocks, analog signal conditioning, electronic interfaces, terminal blocks, relays and connectors.
2. *Entrelec Inc.* v. *Canada (Minister of National Revenue)* (14 September 2000), A-755-98 (F.C.A.).
3. *Ibid.* paras. 9-11.

control apparatus had been met. Entrelec further submitted that the Court was not asking the Tribunal to review the evidence or to seek new evidence. Rather, the Court was directing the Tribunal to adjudicate how much entitlement by way of refund was owed Entrelec on the basis that the evidentiary burden imposed by the Tribunal's test had been met. In Entrelec's view, it is entitled to a refund of all the customs duties that it paid with respect to the goods in issue. Entrelec raised the concern that the Tribunal's request seemed aimed at revisiting the evidentiary burden already decided by the Court and that the request might lead to the introduction of new evidence or the creation of a new test.

The Commissioner submitted that the Court confirmed the Tribunal's initial decision in holding that the proper test was that an importer had to prove "actual use" of **all** the goods in issue. The Commissioner agreed that "some actual use" had been demonstrated by Entrelec at the original hearing. The Commissioner submitted that the Tribunal should not seek new evidence, but should ask the parties to assist in determining how much of the evidence already filed would be helpful. On the basis of the evidence already filed, the Commissioner argued that Entrelec was entitled to a partial refund, given that only partial evidence of "actual use" was submitted. With respect to the Tribunal's request for submissions, the Commissioner argued that the Court referred the matter back to the Tribunal because the Court was unable to establish which proportion of the goods in issue was covered by the evidence filed.

On September 14, 2001, the Tribunal directed the parties to provide additional submissions on two issues. First, it requested that the parties quantify the proportion of the goods in issue actually used in process control apparatus based on the evidence on the record. In this instance, the Tribunal requested that the parties quantify the proportion of the goods in issue actually used in process control apparatus by referring in particular to the Appendix to the Tribunal's decision, the end-use certificates[4] and the list of customers.[5] Second, the Tribunal sought detailed submissions from the parties on Entrelec's argument that, having discharged the "some actual use" test, it was entitled to a full refund of duties for the goods in issue without the need to examine evidence already filed.

As a preliminary matter, Entrelec sought clarification from the Tribunal with respect to an argument raised by the Commissioner in his submissions concerning the issue of "active role" versus "passive role" of certain of the goods in issue. On March 19, 2002, the Tribunal ruled that the question of the "active role" and "passive role" of certain of the goods in issue was not dealt with in the decision of the Tribunal or the Court and that, consequently, it was not now open to the Tribunal to hear arguments on these matters.

ARGUMENT

Appellant's Argument

Entrelec first raised a jurisdictional issue. It argued that the Tribunal had not been directed by the Court to create a new test or to revisit the evidence with a view to quantifying "some actual use" by determining what proportion of the goods in issue or which of the goods in issue were actually used in process control apparatus. To proceed in this manner would have the Tribunal embark on a new factual inquiry, which would be beyond its jurisdiction. The Tribunal's only mandate, argued Entrelec, is to adjudicate the refund claim "on the basis that there **was** evidence that some of the goods in issue were actually used in process control apparatus." [Emphasis added]

4. Exhibit B-7, File No. AP-97-029.
5. Exhibit B-1, File No. AP-97-029.

Having made this argument, Entrelec made its submissions as to the proportion of the goods in issue actually used in process control apparatus. It relied on the testimony of its witnesses in the original hearing, which, in its view, clearly indicated that it knew the use to which the goods in issue were going to be put at the time of importation. It was also submitted that it was clear from that testimony that 100 percent of the goods in issue were used in process control apparatus. Moreover, the expert witness testified that he had never seen the goods in issue used anywhere but in process control apparatus. Entrelec acknowledged that the Commissioner's expert witness was not prepared to accept that the goods in issue were for use exclusively in process control apparatus. Even accepting that the goods in issue are not used exclusively in process control apparatus, Entrelec submitted, the percentage of goods in issue actually used in process control apparatus was very high, approximately 99 percent, according to the oral evidence.

Entrelec noted that the Court found that Entrelec had introduced three kinds of evidence: end-use certificates, the testimony of witnesses and project diagrams.[6] It submitted that the Court had found that the project diagrams provided some evidence of actual use of the goods in issue in process control apparatus. Entrelec provided a list of the categories of the goods in issue and submitted that each category was used in one or more of the project diagrams.[7] In Entrelec's submission, 100 percent of the goods in issue identified on the four project diagrams were actually used in process control applications.

Entrelec submitted that the Court had accepted the end-use certificates as one type of proof of the actual use of the goods in issue. There were seven end-use certificates produced as part of the record. Entrelec divided them into three categories: those that confirmed that all the goods in issue were used in process control apparatus;[8] those indicating that "80 %" or "a majority" of the goods in issue were used in process control apparatus;[9] and those indicating, without a percentage value, that the goods in issue were used in process control apparatus.[10] Arguing that "a majority" of the goods in issue were used in process control apparatus, Entrelec submitted that this would indicate that over 50 percent of the goods in issue had been used in process control apparatus, something the Commissioner seemed willing to accept in at least one instance. In Entrelec's view, the Commissioner does not accept the validity of the end-use certificates because they do not meet the conditions with respect to the end use of the goods in issue and because they do not list the goods in issue.[11] Entrelec argued that the fact that the end-use certificate does not name the product specifically is not a defect but a clarification, in that the person buying the goods certifies that the goods that it buys from Entrelec will be used in process control apparatus. The purpose of the end-use certificate is to certify the use of the goods and not to specifically name the goods. In Entrelec's view, the only way that the end-use certificate could be challenged is if an end user certified that it purchased the goods and did not use them in process control apparatus. There is no evidence of this being the case. Moreover, the Court confirmed the acceptance of the end-use certificates as constituting proof of actual use of the goods in issue, and it is not now open to the Commissioner to raise suggested reasons as to why the end-use certificates would be invalid without offering substantiation that any of the defects are valid in the context of this appeal.

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6. Appeal No. AP-97-029, Appellant's brief, Appendix 11.
7. In its brief, Entrelec submitted that four projects used the goods in issue in process control apparatus. The projects used any number of the following: fuse terminal blocks, fusible terminal blocks, relays, terminal blocks, sectionable terminal blocks, signal conditioner for thermocouples type J and electronic interfaces.
8. Appellant's brief, para. 42. These companies were Natik Inc., Cegelec Enterprises and Panocontrôle Inc. See, also, *Transcript of Public Argument*, 28 March 2002, at 17, which includes Denson Automation Inc.
9. *Ibid.* These companies were Entrelec itself, Gentec and Électro-Mécanik Inc.
10. *Ibid.*, paras. 39-41. Prévost Car's and Bombardier's end-use certificates indicate that they use the goods in issue in process control apparatus.
11. This argument was made specifically with respect to the end-use certificates concerning Natik Inc., Cegelec Enterprises and Denson Automation Inc.

To conclude on this point, Entrelec submitted that the evidence, being the testimony of the witnesses, the project diagrams and the end-use certificates, clearly demonstrated that a very high percentage of the goods in issue qualified for the benefit of the tariff relief.

With respect to the list of goods found in the list of customers, Entrelec submitted that there is no indication of the time frame to which the list of customers relates, whereas the project diagrams and the end-use certificates clearly represent the goods in issue that were before the Tribunal.

Entrelec submitted that it is entitled to a full refund of the customs duties paid in respect of the goods in issue and not simply a refund in respect of the number of units of the goods in issue for which proof of actual use was made. It argued that there is no legal authority under either the *Customs Act*[12] or the *Customs Tariff*[13] that would authorize the Tribunal to grant relief on a "percentage" or "proportionate" basis of the imported goods or their value. The test requires that some, but not all, of the goods in issue for which a refund is being claimed be shown to be actually used in process control apparatus. Where the test of "actual use of some of the goods in issue" has been satisfied, Entrelec argued, it is entitled to a full refund. The essence of the test, in Entrelec's view, is that it only requires that the importer prove that some of the goods in issue are actually used in process control apparatus to receive a refund of duties on all the goods in issue.

Finally, Entrelec submitted that the only evidence provided by the Commissioner was on the issue of "potential" use and that the duality of uses was not a bar to tariff relief. It submitted that, on taxation matters, the burden of proof is on the balance of probabilities. Entrelec argued that to insist on proof of actual use of each of the goods in issue would be to subject it to an impossible burden, which would clearly be beyond the balance of probabilities. Entrelec argued that it had discharged the onus of proving that there was actual use of the goods in issue based on the balance of probabilities and that the onus now shifted to the Crown to challenge or contradict Entrelec's evidence. Based on the end-use certificates, Entrelec submitted that it could be concluded that 50 to 100 percent of the goods in issue were actually used in process control apparatus.

In reply, Entrelec submitted that, at the original hearing, the Tribunal made a finding of fact that Entrelec knew where the goods in issue were to be used. This finding should not now be disturbed. Entrelec stated that 80 percent of the goods in issue were used for process control. Moreover, Entrelec argued, the Commissioner was contradicting a finding by the Court that the end-use certificates represented evidence of actual use of the goods in issue. Entrelec submitted that the Commissioner rejected the end-use certificates because he did not find them acceptable. In Entrelec's submission, the Court has already ruled that the end-use certificates constitute evidence of actual use of the goods in issue and their validity cannot now be revisited by the Tribunal. Further, Entrelec argued, if the Court found the end-use certificates acceptable, the Tribunal should accept them at face value and should use them to come to a percentage.

Respondent's Argument

The Commissioner stated that he had not granted tariff relief under Code 2101 because actual use of all the goods had not been demonstrated by Entrelec, despite the fact that it had been given every opportunity to do so either by providing end-use certificates, by establishing that the goods in issue were "committed by design" or by entering into a "percentage agreement" based on past sales of goods of the same nature as the goods in issue. Moreover, Entrelec had ample opportunity to provide documents, such as

12. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
13. S.C. 1997, c. 36.

end-use certificates, purchase orders, sales invoices or other documents, as evidence of how the goods in issue were actually used. It failed to do so and cannot now argue that this is unfair.

The Commissioner's first argument centred on the "some actual use" test. In his view, the requirement is not that an importer demonstrate "some actual use", but rather that it demonstrate "actual use" of the goods in issue to be entitled to the benefits of Code 2101 for the proportion of the goods where that demonstration is successfully made. In this case, the Commissioner argued that Entrelec held the goods in issue in inventory, which made it difficult for Entrelec to prove actual use. Therefore, Entrelec would be entitled to the benefits of Code 2101 on a proportion of the goods in issue.

The Commissioner also referred to the Court's statements concerning actual use as opposed to intended use. In the Commissioner's view, the Court effectively made a distinction between actual use and intended use and rejected Entrelec's contention that it only needs to submit evidence that the goods are intended to be used in process control apparatus to be entitled to a full refund. The Commissioner answered the argument by referring to a similar case where the Tribunal granted tariff relief under Code 2101 only on the portion of the goods that were used in process control apparatus.[14] For these reasons, Entrelec's contention that it is entitled to a full refund of duties should be dismissed.

The Commissioner's second argument centred on the evidence. He submitted that the Court found that the only clear evidence that **some** of the goods in issue had actually been used in process control apparatus was the project diagrams. The only goods that were "for use in" process control apparatus and for which there was evidence of "actual use" were the thermo-couples, the terminal blocks and the relays that appeared in the project diagrams. The Commissioner also submitted that the evidence concerning the other goods in issue, which form part of the electrical components, that is, the fuse terminal blocks, the analog signal conditioners, the electronic interfaces and the connectors, was inconclusive. He cited as an example the end-use certificates, which in some instances indicated that 80 percent of the goods in issue were used in process control apparatus and in other instances provided a very vague description of how the goods in issue were used.[15] The acceptance of such vague descriptions of the use of the goods in issue would, in the Commissioner's view, be open to abuse. He agreed that there was evidence of use of the goods in issue in process control apparatus provided by the project diagrams and supported by the end-use certificates, such as in the case of Panocontrôle Inc., and that such evidence should be accepted.

The Commissioner disagreed with the view that the Tribunal is not allowed to quantify how many of the goods in issue were actually used in process control apparatus, as this was precisely what the Court indicated it was unable to do when it referred the matter back to the Tribunal. He argued that Entrelec bases its theory of the case on the view that the "some actual use" test would not be permitted.

The Commissioner argued that, under subsection 68(3) of the Act, the Court referred the matter back to the Tribunal for a re-hearing, thus not limiting its jurisdiction. In the Commissioner's view, the Court stated that proof of intended use was not sufficient to demonstrate that the goods in issue were "for use in" process control apparatus; hence, the Tribunal must determine for what proportion of the goods in issue there was proof of "actual use" as opposed to "intended use". As to the end-use certificates, the Commissioner contended, it is for the Tribunal to decide, on the balance of probabilities, whether they constitute an acceptable form of evidence of end use. Moreover, the Commissioner disputed Entrelec's view

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14. See *Asea Brown Boveri Inc.* v. *DMNR* (10 June 1998), AP-93-392 (CITT). In that case, the Tribunal sent the matter back to the respondent so that it could be determined, with the assistance of Entrelec, which proportion of the goods in issue had been used in process control apparatus and would benefit from tariff relief.
15. *Transcript of Public Argument*, 28 March 2002, at 88-89.

that the burden of proof should be shifted to him, in other words, that Entrelec should be granted full duty relief unless he can "find samples of actual use in non-process control applications".[16] The Commissioner argued that neither the wording of Code 2101, the *Customs Tariff* nor applicable jurisprudence would support such a shift in onus.

DECISION

The Tribunal will first deal with the jurisdictional issue raised by Entrelec. Entrelec argued that the Tribunal does not have the authority to revisit the evidence with a view to quantifying the proportion of the goods in issue actually used in process control apparatus.[17] The Commissioner, on the other hand, argued that the Tribunal does have the jurisdiction to re-hear the matter and to determine what proportion of the goods in issue were used in process control apparatus to grant tariff relief under Code 2101.

In its direction to the Tribunal, the Court stated:

> We are in no position to determine what the Tribunal would have done had it taken notice of the evidence before it. We can only return the matter to it for a new adjudication on the appellant's claim on the basis that there was evidence that some of the goods in issue were actually used in process control apparatus.[18]

Given the Court's direction, the Tribunal must take notice of the evidence before it that some of the goods in issue were actually used in process control apparatus. In so doing, the Tribunal considers it appropriate to adopt the evidence, arguments and transcripts of the original hearing for the purposes of these proceedings. It also sought the assistance of the parties in quantifying the proportion of the goods in issue actually used in process control apparatus.

The Tribunal also requested detailed submissions on whether, having discharged the "some actual use" test, Entrelec was entitled to a full refund of duties for the goods in issue without the need for an examination of the evidence already filed. In the Tribunal's view, the Court did not restrict the manner in which the Tribunal is to interpret the evidence that "some of the goods in issue were actually used in process control apparatus." Moreover, the Tribunal does not agree with Entrelec that, having met the "some actual use" test, it is entitled to a refund on all the goods in issue. If the Tribunal were to accept this premise, it would not, in its opinion, have regard for the Court's direction to take notice of the evidence and to adjudicate the matter on that basis. Had the Court been of the view that all the goods in issue should be entitled to tariff relief, irrespective of whether they had or had not been actually used in process control apparatus, it would have disposed of the appeal by making such an order or such a finding. It did not. Instead, the Court referred the matter back to the Tribunal for a re-hearing pursuant to subsection 68(3) of the Act. There is nothing, either in the Court's direction or under subsection 68(3) of the Act, that would limit the manner in which the Tribunal takes notice of the evidence.

The Tribunal does not consider that a party is entitled to tariff relief on all the goods in issue where the evidence does not support such a claim. Rather, it is of the view that a party is entitled to tariff relief on the proportion of the goods for which there is evidence that supports the conclusion that the goods in issue were actually used in process control apparatus. The evidence accepted by the Tribunal in this regard could be of a type that indicates the actual use of every unit of the goods or it could be of a type that does not cover

16. Respondent's reply submissions, para. 21.
17. Entrelec also argued that the Tribunal does not have authority to create a new test. The Tribunal has already accepted that the test is "some actual use" as found by the Court. Therefore, there is no need to address that issue.
18. *Supra*, note 2, para. 10.

the actual use of every unit of the goods in issue but, in the Tribunal's view, is representative of the actual use of the whole or a portion of the goods in issue.

In large part, the Tribunal does not find convincing the evidence concerning the actual use of the goods in issue in process control apparatus.

First, the Tribunal notes that the testimony of one of Entrelec's witnesses at the original hearing indicated that 70 percent of Entrelec's sales were made to distributors rather than to end users.[19] For these sales, it is reasonable to conclude that it is difficult for Entrelec to say with any degree of certainty, despite its assertions in the original hearing, to which end use its goods went once they were sold to its customers.

Furthermore, the Tribunal finds that there are significant gaps and inconsistencies in the evidence that was provided as well as other difficulties, as outlined below.

The Tribunal considered the end-use certificates for the goods in issue provided by Entrelec for 7 of its customers, contained in Exhibit B-7. It also considered the evidence found in the list of Entrelec's 15 main customers for the goods in issue, also contained in Exhibit B-7. It further considered the evidence found in the list of customers at Exhibit B-1, which provides a percentage of sales to each individual customer. The evidence does not indicate clearly the date or the significance of the information contained in the latter exhibit. However, this exhibit is the best evidence that was provided to the Tribunal concerning Entrelec's customers for the goods in issue overall. The Tribunal therefore finds it reasonable to consider Exhibit B-1 to represent all customers and to show the proportion of sales of the goods in issue to each of those customers during the relevant period. In addition, it compared the end-use certificates and the list of main customers contained in Exhibit B-7 with the list of all customers contained in Exhibit B-1.

In assessing the end-use certificates, the list of Entrelec's 15 main customers and the list of all customers, the Tribunal concluded that there were significant difficulties with this evidence.

First, although the end-use certificates do provide evidence of actual use of the goods in issue by these particular customers (as discussed below), the evidence does not indicate that the 7 customers were in any way representative of Entrelec's customers as a whole. When asked to identify evidence on the record that would assist in this regard, Entrelec was unable to assist except by stating the assumption that these customers were typical customers.[20] Indeed, only 4 of the end-use certificates cover customers that are also included in the list of Entrelec's 15 main customers, even though the certificates and the main customer list contained in Exhibit B-7 were provided by Entrelec to the respondent at the same time. Similarly, only 4 of the end-use certificates cover customers that are included in the list of all Entrelec's customers.

Furthermore, the Tribunal compared Entrelec's main customers listed in Exhibit B-7 with the list of all customers contained in Exhibit B-1. Of the 15 main customers listed in Exhibit B-7, only 4 appear in the list of all customers contained in Exhibit B-1.[21] In addition, despite the fact that these 4 customers are on the list of main customers, the Tribunal notes that the sales volumes to these 4 customers are only a small proportion of the total sales (each less than 2 percent of sales). In contrast, 16 customers are listed on Exhibit B-1 as each accounting for more than 2 percent of sales, but none of these are included in the list of main customers contained in Exhibit B-7.

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19. *Transcript of Public Hearing*, Vol. 1, 23 February 1998, at 27.
20. *Transcript of Public Argument*, 28 March 2002, at 145-46.
21. They are: CAE, Panocontrôle Inc., Asea Brown Boveri Inc. and Hydro Québec.

The Tribunal also examined the contents of the end-use certificates from a sampling of Entrelec's major customers that were provided in Exhibit B-7.[22] The results of this examination follow.

In scrutinizing the end-use certificates for Natik Inc. and Cegelec Enterprises, the Tribunal finds that the wording used in the certificates, although vague, is sufficient to accept these as evidence of actual use of the goods in issue purchased by these particular customers. Based on Exhibit B-1, it considers that Natik Inc. accounts for about 4 percent of sales of the goods in issue. Cegelec Enterprises is not referred to in either the list of main customers contained in Exhibit B-7 or the list of all customers contained in Exhibit B-1. The evidence therefore did not enable the Tribunal to determine the proportion of sales of the goods in issue made to Cegelec Enterprises. Consequently, in determining what proportion of the goods in issue qualifies for tariff relief, the Tribunal is unable to attribute a percentage of the total to Cegelec Enterprises.

Examination of the end-use certificate for Asea Brown Boveri Inc. reveals a serious degree of vagueness, in that it simply refers to purchases of "automation terminals" [translation] from Entrelec. The Tribunal finds that the certificate does not show that the automation terminals were ultimately used in process control apparatus. Consequently, it does not accept this end-use certificate as evidence of actual use of the goods in issue by Asea Brown Boveri Inc. in process control apparatus.

With respect to the end-use certificates for Panocontrôle Inc. and Denson Automation Inc., the certificates clearly link the goods in issue to actual use in process control apparatus. The Denson Automation Inc. certificate indicates further that the goods in issue are used "en général" in the manufacture of process control apparatus. Neither of these certificates indicates a clearly defined proportion of the goods in issue used in process control apparatus. However, the Tribunal notes that the end-use certificate for Panocontrôle Inc. is also supported by the project diagrams[23] filed in evidence and consequently considers that there is evidence of actual use of all the goods in issue purchased by Panocontrôle Inc. According to Exhibit B-1, Panocontrôle Inc. accounts for 1.86 percent of sales of the goods in issue. While Denson Automation Inc. did provide an end-use certificate and is included on the list of main customers, that evidence did not enable the Tribunal to determine the proportion of Denson Automation Inc. sales of the goods in issue actually used in process control apparatus. Consequently, as in the case of Cegelec Enterprises, in determining what proportion of the goods in issue qualifies for tariff relief, the Tribunal is unable to attribute a percentage of the total to Denson Automation Inc.

The Tribunal next examined the end-use certificates for Gentec and Électro-Mécanik Inc. In both cases, the end-use certificates confirmed that the "majority" of the goods in issue were used in process control apparatus. The Tribunal finds the evidence in these two instances to be persuasive and interprets "majority" as meaning over one half. It notes that, according to Exhibit B-1, Gentec accounts for 3.98 percent of sales of the goods in issue. The Tribunal also notes that, although Électro-Mécanik Inc. appears on the list of main customers, that evidence did not enable it to determine the proportion of Électro-Mécanik Inc. sales of the goods in issue actually used in process control apparatus. Consequently, in determining what proportion of the goods in issue qualifies for tariff relief, it is unable to attribute a percentage of the total to Électro-Mécanik Inc.

The Tribunal also examined the testimony of Entrelec's first expert witness[24] with respect to the goods in issue used by Prévost Car and Bombardier. The evidence is clear that all the goods in issue

22. Of Entrelec's 15 major customers, 7 provided end-use certificates.
23. *Supra,* note 6.
24. *Transcript of Public Hearing*, Vol. 1, 23 February 1998, at 39-101, 173-76.

purchased by these customers were used in process control apparatus. The Tribunal therefore finds that all the goods in issue sold to Prévost Car and Bombardier were used in process control apparatus. It notes that, according to Exhibit B-1, Prévost Car accounts for 1.97 percent of the sales of the goods in issue. With respect to Bombardier, the Tribunal notes that Bombardier appears on the list of all customers and that it accounts for 3.42 percent of the sales for the goods in issue used in process control apparatus.

In addition, the Tribunal examined the testimony of Entrelec's second expert witness[25] with respect to the goods in issue purchased by Contrôle CEI. It is persuaded by the evidence that there was some actual use of the goods in issue purchased by that customer. However, the Tribunal notes that there is no evidence of what proportion of the sales of the goods in issue is accounted for by Contrôle CEI and that this customer does not appear on either the list of main customers or the list of all customers. Consequently, in determining what proportion of the goods in issue qualifies for tariff relief, it is unable to attribute a percentage of the total to Contrôle CEI.

In summary, as outlined above, the Tribunal finds that the evidence supports a finding that 14 percent of the goods in issue, by value, were used in process control apparatus and are therefore entitled to the benefits of Code 2101.

Therefore, the appeal is allowed on 14 percent of the goods in issue, by value.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

25. *Ibid.* at 102-24.