Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-023

Fritz Marketing Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, May 10, 2010

Canada

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IN THE MATTER OF an appeal heard on September 30, 2009, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated May 31, 2006, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

FRITZ MARKETING INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

André F. Scott
André F. Scott
Member

Serge Fréchette
Serge Fréchette
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 30, 2009
Tribunal Members:	Ellen Fry, Presiding Member André F. Scott, Member Serge Fréchette, Member
Counsel for the Tribunal:	Reagan Walker
Research Director:	Dominique Laporte
Research Officer:	Gary Rourke
Manager, Registrar Office:	Michel Parent
Registrar Officer:	Lindsay Wright

PARTICIPANTS:

Appellant	**Counsel/Representative**
Fritz Marketing Inc.	Alan D. Gold
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Alexandre Kaufman

WITNESSES:

Raj Chawla Vice-President Fritz Marketing Inc.	John Vieyra Investigator Canada Border Services Agency
Gloria de Guzman Former Office Manager Fritz Marketing Inc.	Éric Trudel Manager, Compliance Services Unit Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made on May 31, 2006, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), concerning the value for duty of certain goods imported by Fritz Marketing Inc. (Fritz) between October 2002 and June 2003.

2. The goods in issue are polypropylene bags and plastic bags and sheets imported from the People's Republic of China (China) and India (the goods in issue). Upon importation into Canada, the goods in issue were sold to manufacturers or distributors of wholesale goods, such as animal feed.[2]

3. The issue in this appeal is whether amounts paid by Fritz for ocean freight for goods imported from China and India and certain services for goods imported from India should be included in the value for duty of those goods.

PROCEDURAL HISTORY

4. On June 13, 2002, after receiving communication from one of Fritz's employees, the CBSA started an investigation into allegations that Fritz had been understating the value for duty of its imports.

5. On June 16, 2003, on the basis of information obtained during the investigation, the CBSA obtained a warrant to search Fritz's business premises. On June 17, 2003, the search warrant was executed.[3]

6. In September 2004, Fritz and Mr. Raj Chawla, Vice-President of Fritz,[4] were each criminally charged with 43 counts of wilfully evading the payment of duties under section 153 of the *Act*.

7. Fritz and Mr. Chawla applied to the Ontario Court of Justice for an order excluding the evidence obtained during the execution of the search warrant, pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on the basis that the search violated their rights to be protected against unreasonable search or seizure under section 8. They also asked for the search warrant to be quashed.[5]

8. On August 31, 2006, the Ontario Court of Justice found that the CBSA's search was contrary to section 8 of the *Charter*. The Ontario Court of Justice excluded the evidence obtained through the search warrant and ordered the return of all seized items to Fritz.[6] The Crown withdrew all criminal charges at that point.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. *Transcript of Public Hearing*, 30 September 2009, at 76-77.
3. *Ibid.* at 143.
4. *Ibid.* at 3.
5. *R. v. Fritz Marketing Inc.*, 2006 ONCJ 430 (CanLII), at para. 7.
6. *Ibid.* at para. 72.

9. On June 15 and 16, 2005, Fritz received several notices of penalty assessment and a Notice of Ascertained Forfeiture under the Administrative Monetary Penalties System[7] (AMPS) from the CBSA.

10. In August 2005, Fritz filed adjustment requests pursuant to subsection 32.2(2)[8] of the *Act*, requesting adjustments to the value for duty of the goods in issue to reflect the correct "selling price" of the goods.

11. On August 24, 2005, the CBSA issued 21 decisions, by way of detailed adjustment statements (DASs) stating the amount owing and providing a short explanation of its calculations and the reasons for its imposition. The DASs resulted in an increase of the amount of customs duties owed by Fritz.

12. On August 22, 2006, Fritz appealed the DASs to the Tribunal.

13. On September 10, 2006, Fritz and Mr. Chawla applied to the Ontario Court of Justice for an order that all copies of the documents seized under the search warrant be returned.[9] On October 11, 2006, the Ontario Court of Justice granted the order, stating that the intent of the order was ". . . to deprive [the CBSA] of the benefits of an illegal search."[10]

14. In mid-2007,[11] Fritz applied to the Superior Court of Justice for an order to quash the DASs. The application was dismissed on jurisdictional grounds on July 11, 2007. The Superior Court of Justice determined that the matter should have been heard by the Federal Court.[12]

15. In August 2007, Fritz filed a motion with the Federal Court to quash the 21 DASs. The Federal Court issued an order quashing the DASs on June 5, 2008.[13]

16. The CBSA appealed the Federal Court's decision.[14] On March 3, 2009, the Federal Court of Appeal overturned the decision and dismissed Fritz's application to quash the DASs because, in its view, it is the Tribunal that ". . . has the mandate to determine the validity and correctness of the Detailed Adjustment Statements."[15] The Federal Court of Appeal expressed the view that the parties had referred to ". . . nothing in the [Tribunal] rules or the jurisprudence that would preclude the appellant in a section 67 appeal from bringing a motion to the [Tribunal] to set aside the Detailed [Adjustment] Statements on the basis that the [CBSA] cannot support them except on the basis of illegally obtained evidence."[16]

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7. The Administrative Monetary Penalties System is a *civil* regime for securing compliance with customs legislation through the application of monetary penalties, under the provisions of sections 109.1 to 109.5 of the *Act*.
8. Tribunal Exhibit AP-2006-023-71B, Schedule C, tabs 1-19. Subsection 32.2 (2) of the *Act* reads as follows: "Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(*a*) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect, (*a*) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and (*b*) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount."
9. *R. v. Fritz Marketing Inc.*, 2007 CanLII 27024 (ON S.C.), at para. 3.
10. *Ibid.* at para. 15.
11. The evidence contains no precise date.
12. *R. v. Fritz Marketing Inc.*, 2007 CanLII 27024 (ON S.C.).
13. *Fritz Marketing Inc. v. Canada*, 2008 FC 703 (CanLII).
14. The evidence contains no date.
15. *Canada v. Fritz Marketing Inc.*, 2009 FCA 62 (CanLII), at para. 36.
16. *Ibid.* at para. 38.

MOTION TO SET ASIDE THE DASs

17. In this appeal, in accordance with the Federal Court of Appeal's view that the Tribunal is the proper forum in which to challenge the admissibility of the DASs, Fritz filed a motion asking the Tribunal to set aside the DASs.[17]

18. Fritz argued that, because the DASs were "sourced" in material obtained in violation of section 8 of the *Charter*, they should be set aside pursuant to subsections 24(1) and (2) of the *Charter*.[18]

19. Fritz also submitted that the CBSA sought to use the evidence in question ". . . notwithstanding the ruling from a court of competent jurisdiction . . . that ordered all products of the seizure returned or destroyed so as to attempt to completely remedy and undo the unlawful search and seizure."[19]

20. The CBSA submitted that the Tribunal should refuse to hear the motion on the ground of lack of timeliness, since Fritz could have argued the point in its original brief in 2006, when this appeal was filed.[20] On the substantive issue, it submitted that the courts have refrained from vacating tax assessments except for the most "serious" and "flagrant" violations of *Charter* rights.[21]

21. In deciding this motion, the Tribunal will consider the following three issues:

(a) Does the Tribunal have jurisdiction over the *Charter* issue?

(b) If the answer to (a) is affirmative, did the CBSA's seizure of Fritz's business records violate Fritz's *Charter* rights?

(c) If the answer to (b) is also affirmative, should the Tribunal admit the 21 DASs into evidence, notwithstanding the fact that they may have been derived from information in business records that were seized in violation of the *Charter*?

Tribunal's Jurisdiction Over the Charter Issue

22. The Tribunal derives its jurisdiction to hear this appeal from the *Canadian International Trade Tribunal Act*[22] and the *Act*.

23. Paragraph 16(*c*) of the *CITT Act* states that the duties and functions of the Tribunal are to "hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, *and all matters related thereto* . . ." [emphasis added].

24. Subsection 67(1) of the *Act* provides that a person aggrieved by a decision of the CBSA may appeal from the decision to the Tribunal. Subsection 67(3) provides as follows: "On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration *as the nature of the matter may require* . . ." [emphasis added].

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17. Tribunal Exhibit AP-2006-023-57A at para. VI(i).
18. *Ibid.* at para. 2.
19. *Ibid.* at para. 31.
20. Tribunal Exhibit AP-2006-023-59A at paras. 38, 42.
21. *Ibid.* at para. 44.
22. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

25. In the Tribunal's view, the above provisions give it authority to determine the *Charter* issue, since the *Charter* issue affects the admissibility of evidence concerning the substantive issue before it. Because the Tribunal's decision on the *Charter* issue will determine what evidence is before it on the substantive issue, the Tribunal will consider the *Charter* issue before proceeding to the consideration of the substantive issue raised by the appeal.

Did the Seizure of Fritz's Business Records Violate Fritz's Charter Rights?

26. Section 8 of the *Charter* provides as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

27. In *R. v. Collins*,[23] the Supreme Court of Canada decided that the following three conditions must be met for a search to be reasonable (i.e. not "unreasonable"), as contemplated by section 8 of the *Charter*: (a) the search must be authorized by law; (b) the authorizing law itself must be reasonable; and (c) the search must be carried out in a reasonable manner.

28. The authorizing statute in this instance is the *Act*.[24]

29. Fritz has not argued that the authorizing statute (i.e. the specific authorizing law) in this case is unreasonable or that the search was carried out in an unreasonable manner. Rather, its challenge is strictly in regard to the "authorization by law" of the search warrant.

30. Under common law, to issue a search warrant, a justice of the peace must be satisfied that there are reasonable grounds for believing that an offence has been committed and that the documents sought to be seized will afford evidence of its commission. The sworn information given to a justice of the peace must contain sufficient details to enable the justice of the peace to make that assessment. For judicial authorization by the justice of the peace to be valid, an applicant for a search warrant has a duty to make full, frank and fair disclosure.[25]

31. The Ontario Court of Justice found, on the basis of the evidence before it, that flaws in the sworn information created a picture that was so unbalanced as to deprive the justice of the peace of reasonable grounds upon which to issue the search warrant.[26]

32. Fritz also argued before the Tribunal that there were a number of flaws in the sworn information of the CBSA investigator.[27] The CBSA did not address this allegation in its argument.

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23. [1987] 1 S.C.R. 265 [*Collins*].
24. The relevant sections of the *Act* provide as follows:
    "**153.** No person shall (*a*) make, or participate in, assent to or acquiesce in the making of, false or deceptive statements in a statement or answer made orally or in writing pursuant to this Act or the regulations . . . .
    "**111.** (1) A justice of the peace who is satisfied by the information on oath . . . that there are reasonable grounds to believe that there will be found in a building, receptacle or place . . . (*c*) anything that there are reasonable grounds to believe will afford evidence in respect of a contravention of this Act or the regulations, may at any time issue a warrant under his hand authorizing an officer to search the building, receptacle or place for any such thing and to seize it."
25. *Re Fleet Aerospace Corp. and the Queen* (1985), 19 C.C.C. (3d) 385 (Ont. H.C.J.); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.
26. *R. v. Fritz Marketing Inc*., 2006 O.N.C.J. 430.
27. *Transcript of Public Hearing*, 30 September 2009, at 301-302.

33. The Tribunal does not consider that the evidence in this case leads to a different conclusion on this issue from the one reached by the Ontario Court of Justice. Accordingly, the Tribunal accepts Fritz's argument that the search warrant was not authorized by law and that, accordingly, Fritz's rights under section 8 of the *Charter* were breached.[28]

Should the Tribunal Admit the DASs Into Evidence Despite the Charter Breach?

34. The CBSA argued that it complied with the court order and relied not on information contained in the unlawfully obtained documents but on information contained in Fritz's adjustment requests.[29] Fritz argued that the assessment of further duties under the DASs was a result of the illegal search that should be prohibited. In other words, even though the CBSA does not seek to put into evidence any of the business records that were unlawfully seized, Fritz asked the Tribunal to exclude the DASs from the evidence because it alleges that they contain information that was *derived* from the unlawfully seized records.

35. The admission of evidence following a *Charter* violation is governed by subsection 24(2) of the *Charter*, which states as follows:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

36. In the recent case of *R. v. Grant*,[30] the Supreme Court of Canada set out the applicable framework for determining whether admitting evidence in instances of *Charter* violations would bring the administration of justice into disrepute. The framework consists of the following three tests:

(a) the seriousness of the *Charter*-infringing conduct;

(b) the impact of the breach on the *Charter*-protected interests of the party; and

(c) society's interest in the adjudication of the case on its merits.[31]

37. The parties in these proceedings did not argue their positions on the basis of the Supreme Court of Canada's decision in *Grant*, choosing instead to follow the framework laid out in the earlier *Collins* and *R. v. Stillman* cases.[32] However, both parties were aware of the decision in *Grant* and referred to it at the hearing. Fritz submitted that ". . . all of the cases we have given you essentially are irrelevant now,"[33] while the CBSA argued that the underlying principles set out in *Collins* and *Stillman* still applied.[34]

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28. Firstly, although the investigator confirmed that members of Mr. Chawla's family were on the company payroll, he failed to check into the allegation that they were not working, which was more serious. Secondly, evidence was put before the justice of the peace of a statement from an employee of the CBSA that Fritz had incorrectly classified the goods in issue. But further evidence that Fritz had persuaded that employee that the goods were indeed correctly classified was withheld. Thirdly, evidence was given of a significant decrease in value of exports after March 21, 2002, but the investigator failed to check whether Fritz had switched to a less expensive line of exports.
29. *Transcript of Public Hearing*, 30 September 2009, at 275.
30. [2009] 2 S.C.R. 353 [*Grant*].
31. *Grant* at para. 71.
32. [1997] 1 S.C.R. 607 [*Stillman*].
33. *Transcript of Public Hearing*, 30 September 2009, at 261.
34. *Ibid.* at 287.

38. The Tribunal will apply the Supreme Court of Canada's framework described in *Grant* in considering whether the DASs should be admitted into evidence. With respect to the *Collins/Stillman* framework, the Supreme Court of Canada indicated the following: "The *Collins/Stillman* framework . . . has brought a measure of certainty to the s. 24(2) inquiry. Yet the analytical method it imposes and the results it sometimes produces have been criticized as inconsistent with the language and objectives of s. 24(2)."[35]

Seriousness of the Charter-infringing Conduct

39. In *Grant*, the Supreme Court of Canada stated as follows: "The first inquiry concerns the [investigator's] conduct in obtaining the statement that led to the real evidence. . . . [T]he more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. Were the [investigators] deliberately and systematically flouting the [party's] *Charter* rights? Or were [they] acting in good faith, pursuant to what they thought were legitimate [investigative] policies?"[36]

40. In this case, the evidence did not indicate a widespread pattern of CBSA investigators failing to make full, fair or frank disclosure of the information necessary to obtain search warrants, nor did the evidence indicate bad faith on the part of the investigator who swore the information for the search warrant in question.[37] Rather, the evidence indicates that this was the investigator's first sworn information before a justice of the peace and that lack of experience could have been a significant factor.[38]

41. Fritz alleged that the investigator's breach was extremely serious, because the duty of full and frank disclosure is ". . . a basic principle of our law."[39] The Tribunal is not persuaded by this argument, noting that all violations of the *Charter* involve basic principles of law and, therefore, could reasonably be considered to be serious. In the Tribunal's view, the Supreme Court of Canada's direction was to focus on the seriousness of the infringing *conduct*, not on the importance of the right itself.

42. Considering the foregoing factors, the Tribunal concludes that the *Charter*-infringing conduct in this case was significant. However, the Tribunal does not consider that this is the most serious type of *Charter*-infringing conduct, given the absence of bad faith or systemic *Charter* infringement.

Impact on Charter-protected Interests

43. In respect of this part of the legal framework, the Supreme Court of Canada stated the following: "This [second branch of the] inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the [party]. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the [party's] protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding cynicism and bringing the administration of justice into disrepute."[40]

35. *Grant* at para. 60.
36. *Grant* at para. 124.
37. *Transcript of Public Hearing*, 30 September 2009, at 302.
38. *Ibid.* at 209-10.
39. *Ibid.* at 259.
40. *Grant* at para. 76.

44. In *Donovan v. Canada (Attorney General)*,[41] when considering a similar issue in the context of a tax case, the Federal Court of Appeal stated the following: "I include in the category of a civil proceeding a matter involving a civil penalty to be exacted for a tax law infraction. In my view, the use of tainted evidence in a criminal proceeding is a much more serious matter than in a civil proceeding, so that the discretion of a Court [to exclude the evidence] might well be exercised more liberally in a criminal case, where the liberty of the subject is in issue. However, such discretion might well be used with more restraint in civil matters, where such liberty is not threatened and what is at stake is simply the duty to pay taxes."[42]

45. The Tribunal considers that the approach in *Donovan* is appropriate for the type of case now before it. At stake is an obligation to pay customs duties, which, in the Tribunal's view, is a far less serious consequence than the potential consequences of the criminal proceedings pursuant to section 160 of the *Act*, which put Mr. Chawla's liberty at risk.

46. The CBSA submitted that ". . . there is only a low expectation of privacy in respect of premises or documents that are used in the course of a regulated activity . . . ."[43] Fritz submitted that such an approach was incorrect because it would make businesses ". . . second class Charter citizens . . . ."[44]

47. The Tribunal agrees with the CBSA on this point, given the statement by the Supreme Court of Canada in *Thomson newspapers ltd. v. Canada (Director of investigation and research, restrictive trade practices commission)* that ". . . there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course."[45]

48. Importing goods into Canada is a highly regulated activity, governed by the *Act*, the *Customs Tariff*[46] and a number of other acts and regulations. The evidence obtained from the search was highly relevant to assessments of customs duty, which are an integral part of the legislative and regulatory scheme governing importation. Therefore, in accordance with *Thomson*, the Tribunal considers that there is a relatively low expectation of privacy in respect of the documents in question.

49. In *Grant*, the Supreme Court of Canada indicated that "[d]iscoverability [plays] a useful role . . . in assessing the actual impact of the breach on the protected interests of the [party]. It allows the court to assess the strength of the causal connection between the *Charter*-infringing [search] and the resultant evidence. The more likely it is that the evidence would have been obtained even without the [search], the lesser the impact of the breach on the [party's] underlying interest against [unreasonable search and seizure]."[47]

50. Fritz submitted that, without the search warrant, ". . . it's not clear at all that [the CBSA] would have gotten the information [contained in the 21 DASs, i.e. that the CBSA would have] inevitably discovered it."[48]

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41. [2000] 4 F.C. 373 [*Donovan*].
42. *Donovan* at para. 11.
43. Tribunal Exhibit AP-2006-023-59A at para. 59.
44. *Transcript of Public Hearing*, 30 September 2009, at 261.
45. [1990] 1 S.C.R. 425 [*Thomson*] at 507.
46. R.S.C. 1997, c. 36.
47. *Grant* at para. 122.
48. *Transcript of Public Hearing*, 30 September 2009, at 303.

51. Subsection 42(2) of the *Act* provides as follows: "[A customs] officer . . . may at all reasonable times, for any purpose related to the administration or enforcement of this Act, (*a*) inspect, audit or examine any record of a person that relates or may relate to the information that is or should be in the records of the person or to any amount paid or payable under this Act . . . ."

52. Since the information contained in a DAS is directly related to the administration and enforcement of the *Act*, it is clear that, without using a search warrant, the CBSA had broad powers to examine Fritz's records containing this information. The question is whether the CBSA would have been likely to exercise its powers under subsection 42(2) of the *Act* if there had not been a search warrant.

53. Mr. Éric Trudel, Manager, Compliance Services Unit of the CBSA, gave evidence that his branch of the CBSA recommends compliance verifications of companies based on an assessment of specific risk factors. He stated that Fritz's large volume of imported products bearing relatively high rates of duty would represent a degree of risk sufficient to warrant a compliance audit, even without any contact from the CBSA's investigative branch concerning possible criminal proceedings.

54. In light of the foregoing, the Tribunal considers it likely that the CBSA would have decided to ". . . inspect, audit or examine . . ." Fritz's business records irrespective of whether it decided to initiate criminal proceedings and that this would likely have led to the CBSA's discovery of the information contained in the DASs.[49]

Society's Interest in Having the Case Adjudicated on the Merits

55. The third test in the *Grant* framework requires the Tribunal to assess the public's interest in having the case adjudicated on its merits and to weigh it against the risk of receiving unreliable evidence.

56. In some instances when *Charter* rights are violated, problems arise with the reliability of evidence thereby obtained. For example, not knowing of his *Charter* rights to ask for counsel, etc., a suspect in the investigation of a crime might, in response to the stress of a police interrogation, make a false confession.

57. However, reliability of evidence is usually less of an issue for derivative evidence, such as the DASs in issue. The Supreme Court of Canada stated the following in *Grant*: ". . . whether admission of . . . derivative evidence would bring the administration [of justice] into disrepute relates to society's interest in having [a] case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of . . . derivative evidence."[50]

58. Reliability is not an issue concerning the evidence in the DASs in this case. Although Fritz and the CBSA disagree on how the information in the relevant business records should be interpreted, the content of the business records is not in dispute. Accordingly, it is clear that the CBSA prepared the DASs based on reliable information.

59. In the Tribunal's view, there is a strong interest in seeing this case adjudicated on its merits, and no risk that the information in the DASs, if admitted into evidence, will be unreliable.

49. *Ibid.* at 235-38.
50. *Grant* at para. 126.

Conclusion

60. In light of the foregoing, the Tribunal concludes that the 21 DASs should be admitted into evidence in these proceedings, as such admission would not bring the administration of justice into disrepute. The motion to set the 21 DASs aside is dismissed.

VALUE FOR DUTY ISSUE

61. As indicated above, the substantive issue in this appeal is whether the value for duty of the goods in issue should include the ocean freight for the 19 importations from China, and certain design and development and ocean freight charges for the two importations from India.

62. Subsection 47(1) of the *Act* provides as follows: "The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48."

63. Subsection 48(4) of the *Act* provides as follows: "The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5)."

64. Subsection 48(5) of the *Act* provides as follows: "The price paid or payable in the sale of goods for export to Canada shall be adjusted . . . (*b*) by deducting therefrom amounts, to the extent that each such amount is included in the price paid or payable for the goods, equal to (i) the cost of transportation of, the loading, unloading and handling charges and other charges and expenses associated with the transportation of, and the cost of insurance relating to the transportation of, the goods from the place within the country of export from which the goods are shipped directly to Canada . . . ."

IMPORTATIONS FROM CHINA

65. Mr. Chawla testified that Fritz imported the goods in issue from China through two Chinese brokers, Yantai FJ Plastics (Yantai) and Ningbo Xinxin (Ningbo).[51] One was the broker for the imported mesh bags, and the other was the broker for the imported woven polypropylene bags.[52] Their role was to arrange for the production, quality control and shipping of the goods in such a manner that Fritz would not have any claims from its customers.[53]

66. Mr. Chawla testified that Fritz entered into a series of blanket contracts with Yantai and Ningbo that covered some of the goods imported from China.[54] The contracts stipulated the number of shipping containers that Fritz would purchase from various individual manufacturers over a fixed period of months.[55] Prices of the goods imported under the blanket contracts would be set at a fixed rate per metric tonne,[56] which had the advantage of giving Fritz a firm unit price when the cost of resin increased.

51. *Transcript of Public Hearing*, 30 September 2009, at 14, 51-52, 75-81.
52. *Ibid.* at 102; Tribunal Exhibit AP-2006-023-68B, tabs A-O.
53. *Transcript of Public Hearing*, 30 September 2009, at 80.
54. *Ibid.* at 14-15, 105.
55. *Ibid.* at 14-15.
56. *Ibid.* at 105-106.

67. Mr. Chawla testified that, under the blanket contracts, Yantai and Ningbo dealt as Fritz's agents with the factories producing the goods in issue,[57] so that Fritz had no contact with the manufacturers at all. In addition to the price, the blanket contracts covered all other charges associated with the goods, such as the cost of ocean freight and the cost of inspection.[58]

68. None of these blanket contracts were filed on the record. Although the terms of these blanket contracts would have a significant impact on Fritz's profitability, Mr. Chawla was not able to provide testimony on the specifics of any of the blanket contracts that may have applied to the particular importations in issue.

69. The invoicing and payment arrangement for the imported goods was unusual.

70. For each of the importations from China, Fritz received three invoices (Invoice Nos. 1, 2 and 3).

71. Mr. Chawla testified that the amount of Invoice No. 1 represented the total cost of the goods, which included the price of the goods themselves, plus the amounts that Fritz alleged that it paid for associated inspection, other services and freight.[59] The invoice would be prepared by one of the brokers (Yantai or Ningbo) and sent to Ms. Gloria de Guzman, Fritz's Office Manager at the time, by facsimile.[60]

72. Ms. de Guzman testified that, as the goods had already been sold to a purchaser in Canada prior to shipment, she would check Invoice No. 1 against the purchase contract that had been prepared by the sales staff at Fritz[61] to make sure that the price, unit price and total price were correct.[62]

73. Ms. de Guzman testified that Mr. Chawla instructed her to divide the amount in Invoice No. 1 approximately in half.[63] Yantai or Ningbo would then send Invoice Nos. 2 and 3 to her, and a contract would be prepared to cover each of the two new invoices, making a total of three contracts for each of the 19 importations.[64]

74. Accordingly, the amount of Invoice No. 2 was 50 percent (or approximately 50 percent) of the amount of Invoice No. 1 and, according to Mr. Chawla, covered only the price of the goods themselves. Fritz submitted that Invoice No. 2 covered the total price of the goods,[65] while the CBSA submitted that it only covered half the price.

75. The amount of Invoice No. 3 was also 50 percent (or approximately 50 percent) of the amount of Invoice No. 1. According to Fritz, Invoice No. 3 was a "services" invoice,[66] while the CBSA argued that it contained an unreported half of the price of the goods themselves. Fritz submitted that this invoice included ocean freight, "travelling costs", inspection costs, the freight from the factory to the port, cost of packing materials and other miscellaneous expenses.[67]

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57. *Ibid.* at 69, 89.
58. *Ibid.* at 107.
59. *Ibid.* at 30-31; appellant's brief at paras. 11-13.
60. *Transcript of Public Hearing*, 30 September 2009, at 219.
61. *Ibid.* at 229-30.
62. *Ibid.* at 220-21.
63. *Ibid.* at 222.
64. *Ibid.* at 230-33.
65. Appellant's brief at para. 11.
66. *Ibid.* at para. 12.
67. *Ibid.* at para. 3.

76. Fritz paid Invoice Nos. 2 and 3 separately and on different days. Ms. de Guzman explained that her practice was to write on Invoice No. 2 "paid by wire transfer", at which point the company's bookkeeper would prepare and wire the payment. However, on Invoice No. 3, she would write "please prepare wire transfer tomorrow".

77. When asked why two invoices from the same broker would be paid in this way, Ms. de Guzman testified that Mr. Chawla had instructed her to pay Invoice No. 2 first and Invoice No. 3 the next working day.[68] He had also told her that the items in Invoice No. 3 were not to be included in the value for duty of the goods.[69]

78. Mr. Chawla confirmed that payment to the brokers was to be made in two separate invoices. He testified that the first payment would pay the manufacturer of the goods, and the second payment would cover the other charges, ". . . shipping line, et cetera."[70] When asked why the payments had to be made on separate days, Mr. Chawla said that it was to avoid confusing the brokers, although he was unable to explain how the brokers would have been confused by a single-payment arrangement or by two different payments made on the same day.[71]

79. Mr. Chawla added that the reason that Invoice No. 3 included inspection, packing and unpacking costs was that, historically, ". . . Chinese had a lot of claim problems . . . ." and that, therefore, it now engaged its brokers to inspect the goods before shipment.[72]

80. The Tribunal notes that Fritz filed no documentary evidence on the results of any inspections, pre-shipment packing or unpacking, or any other services covered by Invoice No. 3, despite their very significant cost. Furthermore, Mr. Chawla testified that Fritz did not receive a report for any of the inspections,[73] nor was he aware of which inspection services were performed or how the inspections were carried out.[74] Mr. Chawla did not offer any explanation as to why Fritz would have entered into an arrangement whereby the freight, inspection and other services would cost as much as the goods themselves.

81. The Tribunal considered whether or not the evidence submitted by Fritz demonstrated that Fritz paid the ocean freight charges in question to the brokers as part of the purchase price of the goods.

82. In addressing this issue, the Tribunal considered that the evidence concerning the payment of freight charges was both unclear and inconsistent.

83. As indicated above, the letters from the brokers specify that the ocean freight charges that appear in the letters are estimates only. The Tribunal does not have sufficient evidence to assess the degree of accuracy of these estimates.

84. In addition, although the letters indicate that Fritz paid the ocean freight, they do not state clearly whether Fritz paid these charges to the broker, under Invoice No. 3, or directly to the shipping company.[75] If the letters indicated that Fritz paid the freight charges to the broker under Invoice No. 3, the letters would be

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68. *Transcript of Public Hearing*, 30 September 2009, at 224.
69. *Ibid.* at 227-28.
70. *Ibid.* at 57.
71. *Ibid.*
72. *Ibid.* at 16-17.
73. *Ibid.* at 50.
74. *Ibid.* at 84.
75. *MRP Retail Inc. v. President of the Canada Border Services Agency* (27 September 2007), AP-2006-005 (CITT).

evidence that supports the position that the payments should be excluded from the value for duty under subsection 48(5) of the *Act*. If, however, Fritz paid the freight charges directly to the shipping company, i.e. under an arrangement other than invoice No. 3, the letters would not support this position.

85. It is not clear whether Fritz purchased the goods FOB. The term "FOB"[76] denotes an arrangement whereby the freight charges are not included in the purchase price for the goods. Rather, the seller must pay the freight costs separately. The term "FOB" is an Incoterm that is widely used, and its meaning is well understood in international commerce.

86. If the Chinese goods were sold to Fritz on an FOB basis, then the ocean freight charges would not have been included in the price of the goods through the Invoice No. 3 payment arrangement.

87. However, despite his testimony that the ocean freight was included in the price of the goods, Mr. Chawla testified that Fritz had purchased the goods in issue "FOB China". He testified that, sometimes, the arrangement was FOB the factory gate, other times FOB the Chinese port.[77] All the invoices for the shipments indicate that the goods were purchased FOB.[78]

88. On the other hand, the 19 adjustment requests that Fritz filed on August 3, 2005, under subsection 32.2 (2) of the *Act* for the importations from China all include copies of the corresponding Canada Customs invoices that indicate that the goods were sold "C&F Toronto/Receipt of Document".[79] The expression "C&F" is another Incoterm, signifying that Fritz and its brokers had made an arrangement whereby Fritz paid the brokers the cost for freight to Toronto.

89. Considering the evidence as a whole, and noting in particular the inconsistencies in Mr. Chawla's testimony and the fact that all the invoices for the shipments indicated that the goods were sold FOB, the Tribunal concludes that Fritz did not pay the ocean freight costs as part of the purchase price. Since there has been no suggestion that Invoice No. 3 does not relate to the goods in issue, the Tribunal therefore concludes that the amount of Invoice No. 3 shown as "freight" is in fact part of the purchase price for the goods. Accordingly, the amount of Invoice No. 3 (i.e. the entire amount of Invoice No. 1) should be included in the value for duty.

IMPORTATIONS FROM INDIA

90. As indicated above, Fritz submitted that :

(a) deductions should be made from the value for duty for the ocean freight costs of the importations from India; and

(b) deductions should also be made from the value for duty for the amount of certain service charges.

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76. Incoterms are trade terms published by the International Chamber of Commerce and are used when drafting contracts involving international transportation. In the case of goods delivered FOB (named port of shipment), the goods are placed on board a ship by the seller at a port of shipment named in the sales contract. The risk of loss of or damage to the goods is transferred from the seller to the buyer when the goods enter the ship. For contracts of sale which include the Incoterm "FOB", the price quoted in the contract does not include freight. See International Chamber of Commerce at www.iccwbo.org.
77. *Transcript of Public Hearing*, 30 September 2009, at 87-88.
78. Tribunal Exhibit AP-2006-023-68B, tabs A-O.
79. Tribunal Exhibit AP-2006-023-71B.

91. The issue of ocean freight costs for the importations from India was referred to in Fritz's written submissions.[80] At the hearing, Mr. Chawla testified that the invoices for the two importations from India indicated a freight charge.[81] However, the invoices for the two shipments clearly indicate that the Indian goods were sold FOB,[82] i.e. that freight was not included in the purchase price.

92. Therefore, the Tribunal concludes that ocean freight costs should not be deducted from the value for duty on the two importations from India.

93. Fritz also sought to deduct from the value for duty of the importations from India the amounts of two invoices for ". . . design and development charges and sampling costs of FIBC's for your various clients . . . ."[83] Mr. Chawla testified that the acronym "FIBC" stands for "Flexible Intermediate [Bulk] Containers" and that these containers would be used for carrying liquid or gel.[84]

94. Each of the two invoices was specifically linked with one of the two importations from India, by referencing the original invoice number of the respective importation.[85]

95. The amounts of the charges on these invoices were significant: $17,655.64 for one importation and $18,077.50 for the other. The Tribunal notes that, in both cases, these charges exceeded the cost of the imported goods, i.e. $8,825.78 and $9,012.50 respectively.[86]

96. The CBSA submitted that the design service invoices were created to avoid customs duties on the full costs of two importations from India and that the amounts in the design service invoices should be included in the value for duty.

97. It was Mr. Chawla's testimony that the amounts paid by Fritz in regard to the two invoices did not at all relate to the goods in issue. He testified that FIBCs were never associated with the type of goods imported in these transactions. Mr. Chawla testified that the amounts of the two invoices were linked to the two importations of the goods in issue because the vendor had to link the payments to "some export" in order to show the Indian Government the source of the payment .[87]

98. Mr. Chawla testified that Fritz received no written deliverable for the amounts paid and that there were no related letters or e-mail correspondence, reports, records of lab testing or other documents provided to Fritz.[88]

99. Mr. Chawla testified that Fritz did not file amendments with the CBSA for the two importations ". . . because there was nothing to correct."[89] He indicated that it was not until Fritz received the DASs from the CBSA for the two importations that Fritz noticed that the two invoices had the same reference numbers as the two importations from India.

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80. Appellant's brief at para. 22.
81. *Transcript of Public Hearing*, 30 September 2009, at 29.
82. Tribunal Exhibit AP-2006-023-4B, tab E.
83. *Ibid.*, tab F.
84. *Transcript of Public Hearing*, 30 September 2009, at 131.
85. Tribunal Exhibit AP-2006-023-4B, tab F.
86. *Ibid.*, tab E (confidential invoices). Cost of goods is calculated by taking the total cost and subtracting the cost of ocean freight.
87. *Transcript of Public Hearing*, 30 September 2009, at 27.
88. *Ibid.* at 64.
89. *Ibid.* at 26-27.

100. As indicated above, Ms. de Guzman testified that she routinely checked all shipping documents against the relevant purchase contracts before invoices were authorized for payment. She testified that these shipping documents included the invoice, packing list, bill of lading, certificate of origin and, sometimes, an exporter's declaration form.[90] In light of the routine checking operation performed by Ms. de Guzman and the significant amounts of the two invoices, the Tribunal does not accept Mr. Chawla's testimony that Fritz was unaware until it received the DASs that these two particular invoices had the same reference numbers as the two importations from India.

101. In addition, the Tribunal considers it unlikely that Fritz would pay invoices of this magnitude for "design and development charges and sampling costs" without being able to identify any kind of written work product.

102. Therefore, considering all the evidence, the Tribunal concludes that the amounts of the two invoices were part of the price paid or payable for the importations from India and hence should be included in the value for duty.

DECISION

103. For the foregoing reasons, the Tribunal concludes that:

(1) the value for duty of each of the 19 importations from China should include the amounts in Invoice No. 3 (i.e. should be the entire amount shown in Invoice No. 1); and

(2) the value for duty of the two importations from India should include the amounts of the invoices for the alleged design and development service charges and ocean freight charges.

104. The appeal is therefore dismissed.

Ellen Fry
Ellen Fry
Presiding Member

André F. Scott
André F. Scott
Member

Serge Fréchette
Serge Fréchette
Member

90. *Ibid.* at 218-20.