Ottawa, Tuesday, September 3, 1996

Appeal No. AP-94-150

IN THE MATTER OF an appeal heard on February 7, 1996, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated May 6, 1994, with respect to requests for re-appraisal under section 63 of the *Customs Act*.

BETWEEN

JANA & COMPANY **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-150

JANA & COMPANY **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from four decisions of the Deputy Minister of National Revenue under subsection 63(3) of the *Customs Act*, denying the appellant's requests for the re-appraisal of the value for duty of certain imported clothing. The issue in this appeal is whether the respondent correctly included royalties paid by the appellant in the value for duty of the imported clothing pursuant to subparagraph 48(5)(*a*)(iv) of the *Customs Act*.

HELD: The appeal is allowed. The Tribunal was not persuaded that the royalties at issue were paid, directly or indirectly, by the appellant as a condition of the sale of the clothing for export to Canada, as there was no evidence of any relationship, contractual or otherwise, between the manufacturers of the clothing and the licensors which might suggest that there was some connection or relationship between the sales of the clothing by those manufacturers for export to the appellant in Canada and the payment of the royalties by the appellant to the licensors. Moreover, the Tribunal found that the evidence provided was not sufficient to show that the licensors exercised a substantial degree of control over the manufacturers such that the appellant's ability to purchase clothing from those manufacturers would be restricted if the appellant did not pay the royalties to the licensors.

A review of the licence agreements indicates that the licensors provide the appellant, not the manufacturers, with samples, designs, etc., and permit the appellant to have the clothing manufactured by a company of its choice. According to the appellant's witness, the appellant's choices of manufacturers were never questioned, and the licensors did not exercise their rights concerning inspection of facilities and samples. With respect to the one licence agreement which required the appellant to use the licensor's buying agent, the Tribunal was of the view that the buying agent did not exercise a substantial degree of control over the manufacturers which ultimately sold the trademarked clothing to the appellant, since, in practice, the appellant did not always use the buying agent and, in all instances, the appellant's buyer was responsible for negotiating contracts with manufacturers, including price and delivery.

At the hearing, counsel for the respondent raised, as an alternative argument, that royalties paid pursuant to two of the licence agreements should be included in the value for duty pursuant to subparagraph 48(5)(*a*)(v) of the *Customs Act* as proceeds of a subsequent resale that accrued or would accrue, directly or indirectly, to the vendor. The Tribunal concluded that the evidence did not show that the royalties accrued or would accrue, directly or indirectly, to the vendor, since the appellant often chose its own manufacturers and often used different manufacturers from those used by the licensors, and the buying agents were not related to the manufacturers used.

Place of Hearing:	Vancouver, British Columbia
Date of Hearing:	February 7, 1996
Date of Decision:	September 3, 1996
Tribunal Members:	Arthur B. Trudeau, Presiding Member Raynald Guay, Member Desmond Hallissey, Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Kimberley L.D. Cook and Wyatt S. Holyck, for the appellant Josephine A.L. Palumbo, for the respondent Dalton J. Albrecht, for the intervener, Caulfeild Apparel Group Ltd. Brenda C. Swick-Martin, for the intervener, PMI Food Equipment Group (A Division of Premark Canada Inc.) W. Jack Millar, intervener

Appeal No. AP-94-150

JANA & COMPANY **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from four decisions[2] of the Deputy Minister of National Revenue under subsection 63(3) of the Act, denying the appellant's requests for the re-appraisal of the value for duty of certain imported clothing. The respondent provided the following reason for denying each of the requests: "The royalties paid are in respect of the goods and are paid as a condition of the sale for export to Canada and must form part of the value for duty in accordance with the valuation provisions of the Customs Act."

The issue in this appeal is whether the respondent correctly included royalties paid by the appellant in the value for duty of the imported clothing pursuant to subparagraph 48(5)(*a*)(iv) of the Act. Subparagraph 48(5)(*a*)(iv) provides as follows:

> (5) The price paid or payable in the sale of goods for export to Canada shall be adjusted
> (*a*) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to
> ...
> (iv) royalties and licence fees, including payments for patents, trade-marks and copyrights, in respect of the goods that the purchaser of the goods must pay, directly or indirectly, as a condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada.

Alternatively, if the Tribunal finds that the royalties at issue should not be added to the price paid or payable for the imported clothing pursuant to subparagraph 48(5)(*a*)(iv) of the Act, counsel for the respondent argued that certain of the royalties at issue should be included in the price paid or payable for the imported clothing pursuant to subparagraph 48(5)(*a*)(v). Subparagraph 48(5)(*a*)(v) provides as follows:

> (v) the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Counsel for the respondent pointed out that, in the respondent's decisions, the royalties paid to seven licensors were added to the price paid or payable for the imported goods. However, the appellant is only challenging the decisions in respect of the royalties paid to four of the licensors.

There were three interveners at the hearing, appearing in support of the appellant: Caulfeild Apparel Group Ltd. (Caulfeild), PMI Food Equipment Group (A Division of Premark Canada Inc.) and Mr. W. Jack Millar.[3]

In response to an objection by counsel for the respondent that she did not have sufficient time to review and respond to the submissions of the interveners, the Tribunal granted counsel for the respondent until February 26, 1996, to file written submissions responding to new issues raised in the interveners' briefs. The interveners were given until March 4, 1996, to file their replies. All parties' submissions were filed with the Tribunal in a timely manner and, notwithstanding certain objections raised by counsel for Caulfeild concerning parts of counsel for the respondent's reply to the interveners' briefs, all submissions were taken into account by the Tribunal.

The appellant, which also carries on business under the name International Fashion Group, is a wholesaler of clothing in Canada. The appellant is a licensee pursuant to agreements with four US companies, namely, Joujou Designs, Inc. (Joujou), Banff, Ltd. (Banff), The BVY Group (BVY) and Norman Scott Ltd. (NSL) (collectively the licensors), for the use of certain licensed trademarks in connection with the production, promotion, distribution and sale of certain clothing. Each of the agreements provides that the appellant will pay to the licensors, as owners of the trademarks, royalties and licence fees based on a percentage of the sales of clothing in Canada.

The licence agreement between Joujou and the appellant dated August 17, 1989,[4] provides, in part, that Joujou is to design garments and provide styles to the appellant and that the appellant has the exclusive right and licence to manufacture and sell in Canada ladies' sportswear bearing the licensed trademark "Joujou." Paragraphs 2.4A and 2.6 of the agreement together provide that Joujou will furnish the appellant with sample garments and that the appellant shall have the right to produce copies of the sample garments. Paragraph 5 provides that the garments manufactured will be constituted of materials specified and approved by Joujou and that, if the appellant contracts with a third party manufacturer, it is to inform Joujou and is to provide Joujou with free access to and inspection of the manufacturing premises upon reasonable notice. Paragraph 5.1A provides that, in the event that Joujou and the appellant have contracted with the same third party manufacturer, "[Joujou] shall have absolutely no obligations or responsibilities to [the appellant] with respect to the third party manufacturer, including, but not limited to, production, quality, price and delivery of goods." In addition, paragraph 5.2 provides that "[p]rior to distribution or sale of any Garment ... [the appellant] shall make available to [Joujou] for inspection and written approval the original model of each such Garment" and "from time to time make available production samples ... for such inspection." Paragraph 5.2 further provides that "[Joujou] shall also have the right ... to inspect the process of production of any and all Garments ... at all places of production."

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3. By letter dated February 2, 1996, the Tribunal informed Mr. Millar of its decision to grant him "limited intervener status for the purpose of making submissions (argument) only" with no right to examine, cross-examine or call witnesses. The Tribunal stated that, although Mr. Millar did not, himself, have an interest in the appeal, the issues in the appeal were significant and that he might be able to provide some assistance to the Tribunal.

4. Tribunal Exhibits AP-94-150-6.1 (protected) and AP-94-150-18, tab 1.

The licence agreement between Banff and the appellant dated April 15, 1987,[5] is an exclusive licence to import, use and sell in Canada the following labels: “Sweater Bee Knitwear,” “Bee Wear Knitwear,” “SB Sport” and “Bee Wear Sport.” Article 3 of the agreement provides, in part, that Banff will give the appellant its methods of advertising and promotion, patterns, manufacturing specifications and methods of importation, and article 4 provides that Banff will furnish the appellant with a copy of each advertising and publicity matter, one or more prototypes of each garment and any requested samples and swatches. Article 8 provides that the garments “shall be manufactured or imported by [the appellant] in accordance with the specifications and directions furnished it by [Banff] and shall comply in all respects with the high standards or material and workmanship associated with garments sold under the same Trade Mark.” Article 9 provides, in part, that the appellant shall purchase the garments through Banff’s agent, Banff (Far East) International, Limited (Banff International) and will establish a letter of credit payable to Banff International.

The licence agreement between BVY and International Fashion Group Ltd. (International Fashion)[6] is a licence for the use of the licensed trademark of the Zylos label in connection with men’s wear. Article 2 of section II provides that International Fashion agrees to “preserve and maintain the present standards of quality of the garments sold under the [Zylos] label.” Article 8 of section II provides that International Fashion has “full authority to purchase the products with the [Zylos] licensed label from the sources that will provide the best possible prices and quality.” Articles 10 and 11 of section II provide that BVY is to furnish International Fashion with its collections and designs, as well as samples and swatches, and with “realistic deadlines for the arrangement of production, quota, and placing of fabrics.”

The licence agreement between NSL and the appellant dated February 1, 1985,[7] is for the use of the trademark “Sahara Club” in connection with the manufacture, importation and sale of men’s sportswear, as well as possibly boys’, girls’ and women’s sportswear, in Canada. Paragraph 4 of the agreement provides, in part, that NSL will consult with the appellant regarding fabrics, colour designs and packaging. Paragraph 4 also refers to the appellant’s manufacturing plants or facilities. Paragraph 5 requires, in part, the appellant to submit production samples to NSL for prior approval and to ensure quality standards. In addition, paragraph 5 provides that NSL has the right to inspect the manufacturing process and articles produced.

The appellant’s witness, Mr. Jack Wolfe, managing partner of Jana & Company indicated that many of the provisions in the licence agreements were not followed, i.e. those provisions relating to minimum advertising and promotional spending, minimum sales, quality control and modifications of designs and styles. He stated that none of the licensors exercised a great deal of clout in the marketplace and that the only terms to which the appellant strictly adhered in all circumstances were the royalty payment provisions.

Mr. Wolfe was not aware of any relationships between the manufacturers used by the appellant and the licensors and, to the best of his knowledge, the licensors did not have any financial interest in the manufacturers, nor were there any agreements between the licensors and the manufacturers. He acknowledged that the licensors were able to influence some manufacturers because of the concentration of business that they did with those manufacturers. However, these manufacturers were used not only by the appellant and licensors but also by other unrelated companies. The appellant was not required to use particular manufacturers, nor were their choices of manufacturers questioned. In his view, although the licence agreements were not specifically discussed with the manufacturers, given the nature of the clothing

5. *Ibid.* tab 2.
6. *Ibid.* tab 3. The copy of the agreement provided is a marked draft and is comprised of three documents.
7. *Ibid.* tab 4.

business, all of the manufacturers were aware of the licence agreements, but they did not require a licence agreement in order to manufacture goods. Mr. Wolfe agreed with counsel for the respondent that normally a licence agreement is required to carry on business as the appellant has. However, he explained that the same clothing could be purchased from a store and copied without entering into a licence agreement and obtaining styles and designs.

Mr. Wolfe confirmed that there were no formal written agreements between the appellant and the manufacturers and that the only evidence of the business relationships were the purchase orders and letters of credit. The purchase orders show the fabric content, size, colour, delivery date and label to be used. The appellant would place a fax inquiry to determine whether a particular manufacturer could provide clothing in accordance with certain terms. Once the manufacturer confirmed that it could manufacture the requisite clothing in accordance with the terms as stated, the appellant would issue a purchase order, followed by a letter of credit. The licensors were not involved in this process, regardless of the manufacturer used by the appellant.

Mr. Wolfe also testified concerning the details of the individual agreements. In discussing the Joujou agreement, Mr. Wolfe pointed out that, although the appellant did not have to use Joujou's manufacturers, the appellant would attempt to have its manufacture done in the same countries, namely, India, Canada and Brazil, using the same manufacturers. He indicated that the amount of manufacture done by manufacturers not used by Joujou varied, but that, generally, it amounted to about 20 to 30 percent of the manufacture. Mr. Wolfe further indicated that, in addition to clothing bearing the Joujou trademark, the appellant also had manufactured and sold clothing bearing private labels, such as Sears, Eaton's, Caruba and Thrifty's.

In discussing the Banff agreement, Mr. Wolfe testified that, although the agreement provides that the appellant must buy through Banff's buying agent, in practice, the appellant did not do so in all cases. He pointed out, in particular, that Banff had most of its manufacture done in Macau and, since the quota allotment to Canada from Macau is very small and expensive, the appellant would have clothes made in Hong Kong or Portugal where the quota was less expensive. In all instances, the appellant's buyer would be responsible for negotiating contracts with manufacturers, including the price and delivery terms, and would issue letters of credit in the manufacturers' names.

In carrying out the agreement with BVY, the appellant normally used BVY's manufacturers, since the quantities purchased were very small. However, the appellant did, in certain circumstances, use its own manufacturers. Mr. Wolfe indicated that BVY was not active in ensuring quality and was never provided with production samples. In addition, the appellant's buyer negotiated all contracts with manufacturers, often negotiated a more favourable price than had BVY and modified BVY's styles and designs without BVY's approval.

According to Mr. Wolfe, some of the factories used to manufacture clothing pursuant to the agreement with NSL were owned by NSL. However, the appellant used not only NSL's manufacturers but also other manufacturers of its choosing, and NSL never questioned its choice of manufacturers. In addition, NSL did not exercise its rights concerning quality control and never asked the appellant to provide a production sample.

In argument, counsel for the appellant submitted that the words of subparagraph 48(5)(*a*)(iv) of the Act encompass only those royalties that are directly or indirectly related to a sale between a seller and purchaser or importer. In counsel's view, a royalty based on net domestic sales is not payable when the purchaser or importer buys the goods from a seller. Rather, such a royalty is payable when the importer sells the goods within the territory. The royalty is, therefore, a condition of the importer's domestic sales and not a condition of the sales for export.

Counsel for the appellant referred to two decisions, one of the Federal Court of Appeal, *Signature Plaza Sport Inc.* v. *Her Majesty the Queen*,[8] and one of the Tribunal, *Reebok Canada Inc., A Division of Avrecan International Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[9] in which it was found that the royalties paid by a licensee were correctly included in the value for duty. Counsel submitted that, in *Signature Plaza*, the Federal Court of Appeal found that the royalties were dutiable because the relationship between the purchaser or importer and the manufacturer was not a purchaser/vendor relationship, and, as such, the royalties were an indirect condition of the sale. Similarly, in *Reebok*, the royalties were found to be dutiable as an indirect condition of the sale because, pursuant to one of the agreements at issue, the licensor exercised a substantial degree of control over the production of the imports.

In counsel for the appellant's argument concerning the specific facts in this appeal, counsel focused on the requirement in subparagraph 48(5)(*a*)(iv) of the Act that the payment of the royalties must be a direct or indirect condition of the sale for export to Canada. In counsel's view, the royalties paid by the appellant to licensors were not a condition, direct or indirect, since the appellant was free to negotiate with the manufacturers and the manufacturers were not concerned about the licence agreements or the payment of royalties.

Counsel for the appellant submitted that the facts in this appeal may be distinguished from those in *Signature Plaza* and *Reebok*. Counsel submitted that, unlike in those appeals, the licensors in this appeal exercised no control over, and were not involved in, the manufacture of the imported clothing. Counsel further submitted that the Tribunal must consider the provisions of the agreements between the licensors and the appellant in light of Mr. Wolfe's evidence about the conduct of the appellant and licensors and the fact that many of the provisions of the agreements were not enforced. In particular, the appellant made its own buying decisions, often used manufacturers not used by the licensors and often varied designs and styles with licensors' approval, and there were no quality control concerns or verification by the licensors. Counsel disputed the contention by counsel for the respondent that Banff and BVY should be viewed as vendors or deemed vendors, given Mr. Wolfe's evidence that the appellant purchased goods directly from contract manufacturers unrelated to Banff and BVY and given the provisions of article 8 of section II of the BVY agreement which give the appellant the authority to purchase products from the sources that will provide the best possible prices and quality.

Counsel for Caulfeild submitted that there are eight essential, uncontested facts in this appeal to support a finding that the royalties at issue should not be included in the value for duty of the imported clothing: (1) the appellant was not related to the manufacturers; (2) the licensors were not related to the manufacturers; (3) the appellant was not required to use designated manufacturers; (4) in some instances, the manufacturers were common to both the appellant and the licensors; (5) to the appellant's knowledge, there were no agreements between the licensors and the manufacturers; (6) the licensors were not involved in the contracting process for the goods imported by the appellant; (7) the agreements between the licensors and the appellant were not prerequisites to having goods manufactured by third party manufacturers; and (8) the licensors did not strictly enforce the quality control provisions in the licence agreements.

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8. Unreported, Court File No. A-453-90, February 28, 1994.
9. Appeal No. AP-92-224, September 1, 1993.

Counsel for Caulfeild disagreed with the respondent's position that the rights of the licensor in a licence agreement to request approval of samples or inspection of the goods produced by an arm's-length manufacturer make the payment of the royalties a condition of the sale of the goods from that manufacturer to the licensee. He pointed out that these rights are long-standing requirements of the *Trade-marks Act*[10] to preserve a trademark owner's rights.

Finally, counsel for Caulfeild submitted that the facts in this appeal were distinguishable from those in *Signature Plaza*, *Reebok* and *Polygram Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*.[11] The *Signature Plaza* appeal dealt with proceeds of a subsequent resale. In *Polygram*, the royalty varied according to the price of the goods, and the purchases were from the licensor directly or from a wholly owned affiliate of the licensor. As a result, there was a direct connection between the licensor and the manufacturer, and there was a clear and obvious connection between the payment of the royalty and the ability to purchase the goods. In *Reebok*, there were manufacturing agreements between the licensor and the manufacturers of the goods whereby the manufacturers of the licensed goods were permitted to sell only to subsidiaries of the licensor or other purchasers approved by the licensor. Further, the licensee was allowed to buy the goods to be sold under the trademark only from these manufacturers.

Mr. Millar submitted that, as a general rule, the value of goods is the price paid or payable and that the value of intangible property, such as trademarks, is only to be included in the value for duty where it is included by the parties in the price. He submitted that the focus of the transaction value is the price for the goods agreed upon by the buyer and the seller in the export sale transaction and that the general intention of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*,[12] commonly referred to as the Code, was not to include the value of intangible personal property in determining the transaction value.[13] He further submitted that, since the Code and the Act require duty to be paid only on the value of the goods, the royalty is generally not to be added to the transaction value. Moreover, he submitted that the key is that an amount is paid for the goods and a separate amount is paid for intangible rights.

Mr. Millar referred to several recent advisory opinions of the Technical Committee on Customs Valuation[14] for guidance in determining when a royalty is dutiable. In Advisory Opinion 4.8 (July 1994), the importer, licensor and manufacturer were unrelated, and the sales agreement between the manufacturer and the importer did not contain any reference to the payment of a royalty. The Technical Committee on Customs Valuation found that the royalty was not dutiable, since the obligation to pay the royalty was contained in a separate agreement unrelated to the sale for export and was not, therefore, a condition of the sale for export. Similarly, in Advisory Opinion 4.13 (July 1994), an importer paid a trademark royalty to a related licensor, but purchased sports bags from various unrelated suppliers. The Technical Committee on Customs Valuation found that the royalty was not dutiable and reasoned that the "imported goods are purchased from various suppliers under different contracts and the payment of the royalty is not a condition of the sale of

10. R.S.C. 1985, c. T-13.

11. Canadian International Trade Tribunal, Appeal Nos. AP-89-151 and AP-89-165, May 7, 1992.

12. Geneva, March 1980, GATT BISD, 26th Supp. at 116.

13. *Customs Valuation: Commentary on the GATT Customs Valuation Code* (New York: ICC Publishing S.A., 1988) paragraph 54 at 62.

14. *GATT Agreement and Texts of the Technical Committee on Customs Valuation*, Customs Co-operation Council, Brussels.

these goods. The buyer does not have to pay the royalty in order to purchase the goods. Therefore, it should not be added to the price actually paid or payable."

Counsel for the respondent argued that, pursuant to sections 47 and 48 of the Act, the current method of valuing imported goods for duty is the transaction value of the importation and that the transaction value is determined by ascertaining the price paid or payable for the goods when those goods are sold for export to Canada and adjusting the price where required in accordance with subsection 48(5). Subparagraph 48(5)(*a*)(iv) requires a royalty to be included in the value for duty under certain conditions.

Counsel for the respondent referred to the Code to assist in the interpretation of the transaction value provisions in the Act. Part I of the Code entitled "Rules on Customs Valuation" deals with customs valuation using the transaction value method, and Article 8 of Part I provides, in part, as follows:

> 1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:
>
> (*c*) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

Counsel for the respondent submitted that the Code recognizes that certain goods have a value greater than the cost of their physical manufacture due to intellectual property intrinsic in the goods and that the intellectual property component reflects part of the actual value of the goods at the time of importation.

Counsel for the respondent also referred to an excerpt from *Customs Valuation in Canada*[15] which, she submitted, provides that the test for whether the payment of a royalty should be included in the value for duty is whether "the payment of a royalty was necessary for there to be a sale—in other words whether the payment was a condition precedent to the existence of the agreement.... [I]f the purchaser had the option of taking the goods without the royalty or licence fee, then the payment was not a condition of the sale and should not be dutiable.[16]"

According to counsel for the respondent, a royalty must be included in the value for duty of imported goods if the following conditions are met: (1) the royalty is in respect of the goods; (2) the royalty is paid directly or indirectly; and (3) the royalty is a condition of the sale of the goods for export to Canada.[17]

Counsel for the respondent submitted that the royalties at issue are in respect of the imported clothing, as they are calculated on the basis of the sales of that clothing. With respect to the requirement that the payment of the royalties be a condition of sale, counsel submitted that the time at which the royalties are calculated is irrelevant and that the fact that the appellant is required by the licence agreements to pay the royalties makes the royalties inseparable from the purchase of the goods. Counsel submitted that the contractual obligation of the appellant to pay the royalties in exchange for the rights to have the imported, trademarked clothing manufactured makes the payment of the royalties a condition of the sale of the clothing. In support, she referred to the Tribunal's decision in *Reebok*, in which it was stated that the payment of royalties may be a condition of sale provided there is some connection between the payment of the royalties and the imported goods.

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15. M. Irish (Don Mills: CCH Canadian Limited, 1985).
16. *Ibid.* at 185-86.
17. *Supra* note 11; leave to appeal to Federal Court of Appeal denied on December 18, 1992.

It was counsel for the respondent's position that the licensors indirectly controlled the manufacturers, as they were in a position to dictate approval of both the manufacturing facilities and the quality of goods produced for the appellant. In counsel's view, it is not necessary for the licensors to have separate agreements or relationships with the manufacturers, as the licence agreements define the relationships.

In the Tribunal's view, only royalties which meet the description set out in subparagraph 48(5)(*a*)(iv) of the Act are to be included in the value for duty of imported goods. Thus, for a royalty to be included in the value for duty, it must be a royalty, including payments for patents, trademarks and copyrights, in respect of the goods that the purchaser or importer is required to pay, directly or indirectly, as a condition of the sale of the goods for export to Canada.

With respect to the requirement that the royalty, including payments for patents, trademarks and copyrights, be in respect of the goods, the Tribunal observes that, in *Polygram*, it found that a payment is in respect of goods where it is not a general payment unaffected by the specific goods being imported.[18] In *Reebok*, the Tribunal further found that royalties which are paid for the sole and exclusive right and licence to use particular trademarks in connection with the manufacture, advertising, merchandising, promotion, use, distribution and sale of goods are paid for "trade-marks" and, therefore, constitute royalties and licence fees under subparagraph 48(5)(*a*)(iv) of the Act.

With respect to the requirement that the royalties be paid directly or indirectly as a condition of the sale for export to Canada, the Tribunal found, in *Reebok*, that the fact that the phrase "as a condition of the sale" in subparagraph 48(5)(*a*)(iv) of the Act is preceded by the words "directly or indirectly" suggests that, although a royalty may not be required pursuant to the terms of the purchase itself, it may still be considered to be a condition of the sale, as long as there is some connection between it and the goods purchased.[19] Further, in both *Reebok* and *Polygram*, the Tribunal stated that a royalty would be a condition of the sale of the goods for export to Canada, if the purchaser were not able to purchase and import the goods without the payment of the royalty. The Tribunal, in this appeal, accepts and adopts the interpretations of subparagraph 48(5)(*a*)(iv) of the Act previously expressed by it in *Reebok* and *Polygram*.

In considering the provisions of subparagraph 48(5)(*a*)(iv) of the Act as they may apply to the particular facts in this appeal, the Tribunal has considered the specific details of the licence agreements, as well as the testimony of Mr. Wolfe concerning how these agreements worked in practice. In the Tribunal's view, the royalties at issue were paid for the right to produce, promote, sell and distribute in Canada clothing bearing certain trademarks and were not paid as a direct or indirect condition of the sale of the clothing by the manufacturers for export to the appellant in Canada. The Tribunal is not persuaded by the evidence that there was any relationship, contractual or otherwise, between the manufacturers of the clothing and the licensors which might suggest that there was some connection or relationship between the sale of the clothing by those manufacturers for export to the appellant in Canada and the payment of the royalties by the appellant to the licensors. The Tribunal is further of the view that the evidence provided is not sufficient to show that the licensors exercised a substantial degree of control over the manufacturers such that the appellant's ability to purchase clothing from those manufacturers would be restricted if the appellant did not pay the royalties to the licensors.

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18. *Supra* note 11 at 4.
19. *Supra* note 9 at 5-6.

A review of the licence agreements governing the royalties at issue indicates that the licensors do maintain certain quality control rights, such as the right to inspect samples and production facilities and processes. The Tribunal acknowledges that the licensors may have been able to influence some manufacturers because of the concentration of business that they did with those manufacturers, as was stated by Mr. Wolfe. However, in all but the Banff agreement, the licensors provide the appellant, not the manufacturers, with samples, designs, etc., and permit the appellant to have the clothing manufactured by a company of its choice. Moreover, according to Mr. Wolfe, in practice, the appellant's choices of manufacturers were never questioned, and the licensors did not exercise their rights concerning inspection of facilities and samples.

Under the Banff agreement, the appellant was required to use Banff's buying agent. However, Mr. Wolfe stated that, in practice, the appellant did not always use Banff's buying agent and, in all instances, the appellant's buyer was responsible for negotiating contracts with manufacturers, including price and delivery. Thus, while there is some connection between Banff and the manufacturers through Banff's buying agent, the Tribunal is of the view that there is no evidence that Banff, or its buying agent, exercised a substantial degree of control over the manufacturers which ultimately sold clothing bearing the Banff trademark to the appellant.

In their briefs and at the hearing, parties argued that the Tribunal should consider the provisions of the Code, advisory opinions, literature and judicial and administrative decisions in other jurisdictions in interpreting subparagraph 48(5)(*a*)(iv) of the Act. The Tribunal observes that it has been a long-standing view in Canada that, in interpreting legislation, meaning must be derived from the language of the statute itself and, when the words of a statute are clear and unambiguous, the intention of Parliament is to be deduced from the words of the statute itself and not from extrinsic evidence, such as parliamentary history or international agreements.[20] Moreover, resort to international agreements as an extrinsic interpretative aid is only to be made where domestic legislation is ambiguous.[21] However, Mr. Justice Gonthier, writing for the majority in *Corn Growers* stated that "it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation.[22]"

The Tribunal has previously referred to the Code and advisory opinions in interpreting the provisions of section 48 of the Act.[23] Although the Tribunal does not find, for the purposes of this appeal, that there is an ambiguity in the language of subparagraph 48(5)(*a*)(iv) or (v) or its application that requires reference to the Code, advisory opinions or decisions in other jurisdictions for guidance, the Tribunal observes that those advisory opinions to which Mr. Millar referred are consistent with the Tribunal's interpretation of the

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20. See *R.* v. *Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at 630; *Morguard Properties Ltd.* v. *City of Winnipeg*, [1983] 2 S.C.R. 493 at 498-99; *Schavernoch* v. *Foreign Claims Commission*, [1982] 1 S.C.R. 1092 at 1098; and *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371.

21. *Schavernoch*, *ibid.* at 1098; and *Corn Growers*, *ibid.* at 1371.

22. *Corn Growers*, *supra* note 20 at 1371; Mr. Justice Gonthier's reasons are cited and followed by the Federal Court of Appeal in *The Deputy Minister of National Revenue for Customs and Excise* v. *General Electric Canada Inc.*, unreported, Court File No. A-388-93, June 1, 1994.

23. See *Radio Shack, A Division of InterTAN Canada Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*, Appeal Nos. AP-92-193 and AP-92-215, September 16, 1993; and *Harbour Sales (Windsor) Limited* v. *The Deputy Minister of National Revenue*, Appeal No. AP-93-322, November 4, 1994; leave to appeal to the Federal Court of Appeal denied on January 31, 1995.

meaning and application of the provisions of subparagraph 48(5)(*a*)(iv). In particular, in Advisory Opinion 4.8, the Technical Committee on Customs Valuation stated that a royalty would not constitute a royalty paid directly or indirectly as a condition of the sale for export if the obligation to pay that royalty resulted from a separate agreement unrelated to the sale for export of the goods to the country of importation. Moreover, in Advisory Opinion 4.13, the Technical Committee on Customs Valuation stated that the payment of a royalty would not be a condition of the sale of goods for export if the purchaser did not have to pay the royalty in order to purchase the goods.

In view of the foregoing, the Tribunal concludes that the royalties at issue are not royalties which the appellant was required to pay as a direct or indirect condition of the sale of the clothing for export to Canada and should not, therefore, be added to the price paid or payable for the imported clothing pursuant to subparagraph 48(5)(*a*)(iv) of the Act.

At the hearing, counsel for the respondent raised, as an alternative argument, that royalties paid pursuant to the Banff and BVY agreements should be included in the value for duty pursuant to subparagraph 48(5)(*a*)(v) of the Act as proceeds of a subsequent resale that accrued or would accrue, directly or indirectly, to the vendor. In her reply brief to the interveners' submissions, counsel further submitted that the licence agreements between the appellant and Banff and BVY contain specific requirements concerning the source of the goods, such that Banff and BVY are respectively considered the vendors or deemed vendors of the trademarked goods. In particular, she referred to the requirement in Article 9 of the Banff agreement that the appellant purchase through Banff's agent, Banff International, and to the requirement in section I of the BVY agreement which provides that the Zylos label is solely manufactured by or on behalf of BVY. She submitted that this position is consistent with the decisions in *Mexx Canada Inc.* v. *The Deputy Minister of National Revenue*[24] and *Signature Plaza*.

Counsel for appellant and counsel for Caulfeild submitted that subparagraph 48(5)(*a*)(v) of the Act is not applicable, since the royalties at issue were paid to the licensors that were unrelated to the manufacturers and that were not involved in the contracting process between the appellant and the manufacturers.

The Tribunal is not satisfied that any royalties paid by the appellant in respect of either the Banff or BVY agreement were proceeds of a subsequent resale by the purchaser that accrued or would accrue, directly or indirectly, to the vendor. The Tribunal notes that Article 9 of the Banff agreement provides that the appellant will purchase through Banff's agent, Banff International, will establish a letter of credit payable to Banff International to cover all purchases for imports into Canada and will pay to Banff or its designated nominee a buying commission of a certain percentage of the cost of the purchases. However, Mr. Wolfe testified that, in practice, the appellant was never required to use a specific manufacturer and that the appellant used whatever agent was most convenient. Moreover, the appellant often used manufacturers other than those used by Banff. In the Tribunal's view, any royalties paid to Banff for purchases made through Banff International were commissions for acting on the appellant's behalf in arranging for the manufacture of clothing. The evidence of the appellant's witness indicates that the appellant did not always purchase through Banff International, that the appellant often chose its own manufacturers, that neither Banff International nor Banff were related to the manufacturers and that they could not, therefore, be considered the vendors of the goods. In addition, the royalties paid to Banff International were based on the cost of the purchases and not on the value of the subsequent resale by the appellant.

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24. Canadian International Trade Tribunal, Appeal Nos. AP-94-035, AP-94-042 and AP-94-165, February 16, 1995.

With respect to the BVY agreement, the Tribunal notes that article 8 of section II provides that the appellant may purchase products "from the sources that will provide the best possible prices and quality." Mr. Wolfe testified that, although the appellant would often use the manufacturers used by BVY, the appellant's buyers would negotiate the contracts with the manufacturers, including price and delivery terms, and would often negotiate better prices than did BVY. The agreement also indicates that agent commissions were paid as a percentage of the US first cost. However, there are no specific provisions in the agreement, and there is no indication that the agent and manufacturers were related such that the agent could be considered to be the vendor of the goods.

Therefore, the Tribunal is not persuaded that the royalties at issue are part of the proceeds of the subsequent resale, disposal or use of the imported clothing that accrues or is to accrue, directly or indirectly, to the vendor, in this case, the manufacturers of the clothing, and is not, therefore, persuaded that they should be added to the price paid or payable for the imported clothing in issue pursuant to subparagraph 48(5)(*a*)(v) of the Act.

Accordingly, the appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member