CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 6, 1996

Appeal Nos. AP-95-299 and AP-96-053

IN THE MATTER OF appeals heard on September 18, 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 December 27, 1995, and January 11 and May 8, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

816392 ONTARIO LTD., O/A FREEDOM MOTORS **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Michel P. Granger
Michel P. Granger
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

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UNOFFICIAL SUMMARY

Appeal Nos. AP-95-299 and AP-96-053

816392 ONTARIO LTD., O/A FREEDOM MOTORS **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The Tribunal considered whether the changes made to minivans could be considered to be alterations in the ordinary sense of that word and also in the sense set out in Article 318 of the *North American Free Trade Agreement* (NAFTA). The Tribunal agrees with counsel for the appellant that the changes fall within the ordinary meaning of "alteration," that is, the minivans were changed or modified, but not to such an extent as to become something other than minivans. With respect to the definition of "alteration" in NAFTA, the Tribunal concluded that it did not assist it in determining what changes might be considered to fall within the term "alteration." In particular, the Tribunal cannot accept that differences in the cost of and the physical abilities of the users of one product versus another product necessarily indicate that one product is commercially different from the other.

HELD: The appeals are allowed. Focusing specifically on the definition of "alteration" in NAFTA, the Tribunal finds that the proper approach to interpreting the definition is to start with the "essential character" of the product in the condition in which it is exported from Canada and then determine if its essential characteristics have been either destroyed (as in crushing a used car into a bale of scrap metal) or enhanced to such a degree that it is "a new or commercially different good." Viewed in this context, the latter expression is simply another way of saying "a good with different essential characteristics" or, to paraphrase a dictionary definition, "a good that has been changed into something else." Therefore, the determination of whether a product is "commercially different" from another must include an assessment of their essential characteristics. In its examination of the essential characteristics of the minivans exported to the United States and of those imported into Canada, the Tribunal finds that they have the same end use, that is, the personal transportation of the owner/operator and passengers and that their essential characteristics have not changed.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 18, 1996
Date of Decision:	December 6, 1996
Tribunal Member:	Lyle M. Russell, Presiding Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Margaret Fisher
Appearances:	M. Lee Stratton, for the appellant Lubomyr Chabursky, 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

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Appeal Nos. AP-95-299 and AP-96-053

816392 ONTARIO LTD., O/A FREEDOM MOTORS **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member

REASONS FOR DECISION

These are appeals, heard by one member of the Tribunal,[1] under section 67 of the *Customs Act*[2] (the Act) from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in these appeals is whether minivans, for commercial (i.e. vehicle rental and taxi companies) and private uses, exported to a company in the United States, for the purpose of undergoing changes so that wheelchair users could enter them while remaining seated in their wheelchairs, and then imported into Canada in their altered state are properly classified under tariff item No. 8703.24.00 of Schedule I to the *Customs Tariff*[3] as motor cars and other motor vehicles, principally designed for the transport of persons, of a cylinder capacity exceeding 3,000 cc, as submitted[4] by the respondent, or should be classified under tariff item No. 9822.00.00 as goods returned to Canada after having been exported to the United States for repair or alteration, as claimed by the appellant. The following is the relevant tariff nomenclature:

87.03	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars.
8703.24.00	--Of a cylinder capacity exceeding 3,000 cc
9822.00.00	Goods, regardless of country of origin or tariff treatment entitlement, other than the goods of tariff item No. 9820.00.00 or 9821.00.00, returned to Canada after having been exported to the United States or Mexico for repair or alteration

The Tribunal heard evidence from three witnesses: (1) Mr. Bob Brown, a quadriplegic who works for Access Health Care and who uses a wheelchair at all times and a wheelchair-accessible minivan; (2) Mr. Anthony H. Colenbrander, President of Freedom Motors; and (3) Mr. David W. Hotchkiss, Manager, Remissions Policy Unit, Duties Relief Programs, Trade Administration Branch of the Department of National Revenue (Revenue Canada).

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1. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the *Customs Act*.
2. R.S.C. 1985, c. 1 (2nd Supp.).
3. R.S.C. 1985, c. 41 (3rd Supp.).
4. In his decision, the respondent classified the minivans in issue under tariff item No. 8703.23.00. However, in his brief, the respondent submitted that the minivans in issue should have been classified under tariff item No. 8703.24.00.

333 Laurier Avenue West
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In his testimony, Mr. Brown discussed the parallel public transportation system for people with physical disabilities, the general needs of people with physical disabilities, the cost, use and function of a minivan modified for wheelchair accessibility and the types of changes that may be made. In particular, he pointed out that mobility is one of the keys to independence and is necessary to function on a daily basis in terms of going to school and work and participating in community organizations and activities. Moreover, he indicated that it is important that a person in a wheelchair be mobile without having to transfer from a wheelchair in order to preserve that person's dignity and avoid any health risks associated with being transferred. Finally, Mr. Brown stated that taxation of accessibility is a disincentive, as opposed to an incentive, for integration of persons with physical disabilities into society. He pointed out that, in some other circumstances, persons with physical disabilities are accorded favourable tax treatment by federal, provincial and municipal governments in respect of purchases of items or products intended to improve accessibility.

Mr. Colenbrander referred to and adopted the contents at the appellant's brief. The appellant's brief provides a detailed description and pictures of the types of changes made to the minivans in issue, such as changes to provide wheelchair and/or scooter access from the rear of the minivan (rear-entry access), from the side of the minivan (side-entry access) and to the driver and/or front passenger seat (seat access).

The changes for rear-entry access are as follows:

(a) a section of the floor is cut (30 in. wide x 54 in. to 90 in. long) and replaced with a floor section that is 30 in. wide x 54 in. - 90 in. long x approximately 8 in. deep); the replacement floor section is welded in place;
(b) a hinged ramp (30 in. x 32 in.) is attached to the rear end of the lowered floor section;
(c) a section of the bumper is cut and remounted on the ramp;
(d) the spare tire is moved from under the minivan to inside the minivan to accommodate the lowered floor section;
(e) the gas tank is moved forward to accommodate the lowered floor section;
(f) the brake and gas lines and exhaust pipe are re-routed to accommodate the lowered floor section;
(g) special shock absorbers may be installed which permit the lowering of the rear of the minivan in order to decrease the slope of the ramp;
(h) an automatic remote door and ramp opening system may be installed which enables an individual with a mobility impairment or the individual's attendant to operate the door and ramp;
(i) wheelchair tiedown belts and a wheelchair passenger seat belt are installed; and
(j) options may be added - i.e. bucket seats beside wheelchair/scooter position.

The changes for side-entry access are as follows:

(a) two longitudinal beams, approximately 32 in. apart, are cut and beams which lower the floor of the minivan by 12 in., for the minivan's full width, are welded in place;
(b) a 54-in. portion of the mid-section of the floor of the minivan for its full width is removed and replaced with the 12-in. drop created;
(c) a false floor is built 2 in. above the 12-in. drop floor; a ramp is inserted in the 2-in. space created; the ramp slides out from the minivan and allows an individual or individuals with mobility impairment to access the minivan;
(d) the sliding door is extended by 12 in. to cover the lowered floor section;

(e) a hinged emergency exit door is installed on the opposite side to the sliding side door;
(f) cosmetic "skirts" are added to the fore and the rear of the sliding door and the hinged emergency door to enhance the appearance of the minivan - they serve no other function;
(g) the gas tank is moved to behind the rear axle and the spare tire is mounted below the gas tank to accommodate the lowered floor section;
(h) gas and brake lines and exhaust pipe are re-routed to accommodate the lowered floor section;
(i) minivan suspension is altered as follows: front and rear suspension is raised by approximately 2 in. to provide sufficient ground clearance; and
(j) wheelchair tiedown belts and passenger belts are provided.

The changes for seat access are as follows:

(a) most of the original seat base is removed and a track to move the seat back to the position where the wheelchair or scooter is located in the minivan is installed;
(b) a swivel is attached to the base of the seat; and
(c) sometimes an overhead grab bar is installed.

Mr. Colenbrander indicated that the appellant's business is comprised predominantly of changes for rear-entry access, with a small percentage of changes for seat access. He stated that there are three other Canadian companies that make wheelchair-accessible minivans, but that those companies sell side-entry wheelchair-accessible minivans.

As an illustration of a rear-entry wheelchair-accessible minivan, the appellant brought a Ford Windsor minivan with rear-entry access to the hearing. The Tribunal viewed the minivan in the parking lot adjacent to the Tribunal's offices. Mr. Colenbrander described the various changes required for rear-entry access. He indicated that the floor must be lowered such that there is a trough about 30 in. wide and as long as it can be made towards the front, that the floor extends out the back through a cut-out area of the bumper and that a ramp is installed on the end. There is a "kneel-down feature" which is a modification of the suspension system that allows the vehicle to be pulled down against its springs to make the ramps more easily negotiable. The back door, floor and ramp may be manually operated or power-operated. The interior seating is generally adapted to the needs of the individual user.

Mr. Colenbrander demonstrated the use of such changes with the aid of Mr. Brown. Using a remote control, Mr. Colenbrander was able to activate the hydraulic system which opens the back door of the minivan, lowers the rear of the minivan and sets up the ramp leading from the minivan to the ground. Mr. Brown entered the minivan on the ramp and, once inside, Mr. Brown and his wheelchair were secured in place using seat belts and straps respectively. Mr. Brown then exited the minivan, and the back door and ramp were closed using the remote control. The external physical appearance of the minivan, as described by Mr. Colenbrander, included a cut in the rear bumper to allow access to the low floor, a box that extends approximately 6 in. below the bumper and the rear suspension which is raised by approximately 1 in. He indicated that the cost of the changes viewed would be about $15,400.

Mr. Colenbrander indicated that the minivans in issue are advertised at certain shows and in magazines and are sold either directly or through an automobile dealer. Generally, when an inquiry is received from a prospective customer, that customer is directed to a local automobile dealer. Both the dealer

and customer are provided with the relevant information, and the terms and conditions of the changes are generally negotiated by phone.

In Mr. Colenbrander's view, aside from the changes to the entry to the minivans in issue, there were no changes to the function of the minivans. However, Mr. Colenbrander agreed that the minivans in issue would only be purchased by people requiring wheelchair access or the capability to transport someone in a wheelchair.

With respect to the actual value on which duties were applied, Mr. Colenbrander indicated that the appellant paid duty on the value of the changes performed in the United States, as well as on the value of the minivans which were exported to the United States for such changes.

Mr. Hotchkiss stated that heading No. 98.22 was brought into force on January 1, 1994, as part of the *North American Free Trade Agreement Implementation Act*[5] (NAFTA Implementation Act). In discussing whether the minivans in issue would fall in heading No. 98.22, Mr. Hotchkiss referred to Article 318 of the *North American Free Trade Agreement*[6] (NAFTA) which provides that, for the purposes of Chapter Three, "**repair or alteration** does not include an operation or process that either destroys the essential characteristics of a good or creates a new or commercially different good" and suggested that a car stretched into a limousine, that a minivan made bullet-proof and that a minivan made into an ambulance would be examples of the creation of new or commercially different goods. When asked by the Tribunal how Revenue Canada determines whether a product is commercially different, Mr. Hotchkiss replied that there is no list of criteria, but that a change in tariff item may be one of the criteria used. He indicated that Revenue Canada looked at such factors as the end use of the minivans, the price, the extent of the modifications and the existence of a tariff item for vehicles for persons with physical disabilities set up from design.

Counsel for the appellant submitted, based on the provisions of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[7] (the General Rules), that the first step is to classify the minivans in issue according to the terms of the headings and relative Section or Chapter Notes. Counsel submitted that there are no relative Section or Chapter Notes to heading No. 98.22 or subheading No. 9822.00. Therefore, the only issue for the Tribunal to decide is whether the minivans in issue were exported to the United States for "alteration." Counsel submitted that, in construing the word "alteration," the Tribunal should look to the following definitions of that word in various dictionaries:

> alteration ... 2. A change or modification.[8]
>
> alter ... 1. To cause to be different; change; modify; transform.[9]
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> alter ... change in characteristics, position, etc.[10]

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5. S.C. 1993, c. 44.
6. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
7. *Supra* note 3, Schedule I.
8. *Funk & Wagnalls Standard College Dictionary*, Canadian edition (Toronto: Longmans Canada, 1963) at 41.
9. *Ibid.*
10. *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press, 1982) at 26.

> alteration ... 1: the act or process of altering: the state of being altered 2: the result of altering: MODIFICATION[11]
>
> alter ... 1: to make different without changing into something else[12]

In the view of counsel for the appellant, these definitions reflect no restriction on the number of steps or processes which may be taken or on the cost of the steps or processes taken to effect an alteration. He submitted that the process of alteration is the process of changing, modifying or making something different without transforming the thing into something else. He referred to the alteration of a house and suit by way of example.

Counsel for the appellant submitted further that the fact that there is no change in the tariff classification of the minivans between their exportation to the United States and importation into Canada supports the view that, although the minivans have been changed, modified or made different, they have not been changed into something other than minivans. This fact also supports the view that neither the essential characteristics of the minivans have been destroyed nor new or commercially different goods created. As such, counsel submitted that the minivans have been altered in accordance with the standard dictionary definitions of the word "alteration."

The benefit of heading No. 98.22, as described by counsel for the appellant, is that only the cost or the value of the alteration or repair, not the value of the underlying product that had been altered or repaired, is subject to duties upon importation of that product into Canada.

With respect to the question of whether the essential characteristics of the minivans exported to the United States were destroyed or whether the minivans in issue constitute new or commercially different goods, counsel for the appellant submitted that the changes made to the minivans were designed to leave them functionally the same for a person with physical disabilities as for an able-bodied person and, as such, do not change the essential characteristics of the minivans or make the minivans commercially different.

Counsel for the respondent submitted that heading No. 98.22 is derived from two articles of NAFTA, namely, Articles 307[13] and 318. Relying on the definition of "alteration" in Article 318, counsel conceded that the changes made in the United States did not destroy the essential characteristics of the minivans in issue. However, counsel submitted that the changes to the minivans in issue were not merely alterations. Rather, the changes created new or commercially different goods. In counsel's view, "commercially different" means that a particular product at one stage is marketed to a particular group of people and, after certain changes, is then marketed to a different group of people. He cited the following as examples of commercially different vehicles: a car modified for use as a limousine, a car modified for use as a race car, a minivan modified for use as an ambulance and a car modified for use as an armour-plated car. Counsel submitted that the evidence is very clear that persons without physical disabilities will not purchase

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11. *Webster's Ninth New Collegiate Dictionary* (Springfield: Merriam-Webster, 1991) at 75.
12. *Ibid.*
13. "1. ... no Party may apply a customs duty to a good, regardless of its origin, that re-enters its territory after that good has been exported from its territory to the territory of another Party for repair or alteration, regardless of whether such repair or alteration could be performed in its territory."

a vehicle and have it changed in this way, as such changes are very expensive and not necessary. Therefore, the minivans in issue are commercially different.

In reply, counsel for the appellant submitted that the relevant points at which to look at the goods in issue is when they enter the United States and when they return to Canada.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*.[14] Rule 1 of the General Rules provides that classification is to be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the principles set out in Rules 2 through 6, as well as the Canadian Rules which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[15] (the Explanatory Notes) as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the starting point in classifying the minivans in issue is to consider the terms of heading Nos. 98.22 and 87.03 and any relative Section or Chapter Notes and the Explanatory Notes which may provide some guidance as to the appropriate interpretation of the terms of those headings.

Both counsel agree that, if the changes to the minivans in issue can be described as "alterations," then they should be classified under tariff item No. 9822.00.00. The Tribunal considered whether the changes could be considered to be alterations in the ordinary sense of that word and also in the sense set out in Article 318 of NAFTA. The Tribunal agrees with counsel for the appellant that the changes fall within the ordinary meaning of "alteration," that is, the minivans were changed or modified, but not to such an extent as to become something other than minivans.

In arguing that the modifications performed in the United States rendered the minivans in issue commercially different and, therefore, not altered within the meaning of NAFTA, counsel for the respondent relied, for the most part, on the fact that the minivans in issue are generally purchased only by persons with physical disabilities or by those who must transport persons with physical disabilities. Other people would not buy the minivans in issue because the changes are not necessary in their case and are very expensive. He opined, however, that expense was not a strong criterion in determining commercial differences between goods. In the abstract, the Tribunal would expect expense, or the existence of a price difference between one product and another, to be an important indicator of commercial differences between the goods. However, in the context of heading No. 98.22, using the cost of the alterations as a determining factor to interpret the phrase "commercially different" would, in the Tribunal's view, unduly restrict the provision, perhaps to the point of defeating its purpose. It is difficult to conceive of an alteration important enough to justify transporting a product back and forth across the border that would not add significant value to the product. Thus, to label as "commercially different" any product resulting from alterations costing a significant amount in relation to the value of the original product would result in virtually all goods exported to the United States for changes being denied classification in heading No. 98.22.

The Tribunal was left, therefore, to consider factors other than price and has concluded that the definition in NAFTA adds very little to the dictionary definitions of "alteration." Attempts by counsel for the respondent to rationalize two lists of alterations, one acceptable within the NAFTA definition and the other

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14. *Supra* note 3, Schedule I.
15. Customs Co-operation Council, 1st ed., Brussels, 1986.

not, were far from convincing. His assertion that heading No. 98.22 contemplates some "lower boundary" of change, such that a small change would not be considered an alteration, simply defies logic, and the Tribunal can find nothing in the legislation or NAFTA to support it. The Tribunal also has difficulty in accepting the assertion that the installation of a stronger motor in a vehicle would not allow it to perform any additional function. Such an alteration might well enable it to carry or haul a greater load than before and, in some contexts, this might be commercially significant. It is also worth noting that such an alteration could lead to a change in tariff classification, as from subheading No. 8703.23 to subheading No. 8703.24, one of the criteria mentioned by the witness for the respondent as perhaps denoting a commercial difference.

The list of changes argued to be more than "mere alterations" were said, in the respondent's brief, to be so on the basis that new functions and capabilities had been added. At the hearing, however, counsel for the respondent argued that the characteristics, needs or preferences of the group of people to whom the vehicle is marketed are more important than the essential function of the vehicle in determining what is "commercially different." On this view, depending on the market segment served, cars performing the same essential function could still be commercially different, as long as they were capable of performing sufficient new functions to appeal to a different segment of society. In the Tribunal's view, defining such groups of people with reference to their physical abilities could lead to results equally as questionable as would reliance on price as a determining factor. For example, it could mean that a minivan with an automatic transmission would be considered commercially different from one with a manual transmission, or one with hand controls commercially different from one with foot controls. The Tribunal cannot accept that such a narrow interpretation was intended for heading No. 98.22.

Grammatically, the NAFTA expression "process that ... creates a new or commercially different good" is placed in apposition to the expression "process that ... destroys the essential characteristics of a good." This suggests to the Tribunal that one expression can be given meaning by reference to the other and that the universe of acceptable alterations includes two opposite types of process - destruction and construction. In light of this and the central place occupied by the concept of "essential character" in the General Rules, the Tribunal believes that the proper approach to interpreting the NAFTA definition is to start with the "essential character" of the product in the condition in which it is exported from Canada and then determine if its essential characteristics have been either destroyed (as in crushing a used car into a bale of scrap metal) or enhanced to such a degree that it is "a new or commercially different good." Viewed in this context, the latter expression is simply another way of saying "a good with different essential characteristics" or, to paraphrase the last dictionary definition quoted earlier, "a good that has been changed into something else."

The Tribunal, therefore, concludes that the determination of whether a product is "commercially different" from another must include an assessment of their essential characteristics. This will often require an examination of their function or intended end use. It may also be appropriate to determine if the goods serve different market segments. For the reasons cited above, in the present case, the Tribunal doubts the wisdom of extending such market analysis to consideration of the physical abilities of users. In any event, the primary focus of the enquiry should remain an objective analysis of the essential character of the goods themselves. For the purposes of these appeals, the unchanged and changed minivans have the same end use, that is, the personal transportation of the owner/operator and passengers. The essential characteristics of the minivans have not changed as a result of the alterations performed in the United States and, therefore, the

Tribunal does not consider them to be new or commercially different goods. It follows that they qualify for the benefits of heading No. 98.22.

Counsel for the appellant also submitted that the Tribunal should construe tariff item No. 9822.00.00 in a manner consistent with subsection 15(1)[16] of the *Canadian Charter of Rights and Freedoms*[17] (the Charter). He argued that the users of the minivans in issue are a protected group under subsection 15(1) of the Charter and that the effect of the language of tariff item No. 9822.00.00 and Article 318 of NAFTA in these limited circumstances discriminates against persons with physical disabilities. In his view, to find that the minivans in issue are commercially different products would have the effect of infringing the equality rights of people with physical disabilities. Counsel submitted that, to the extent that the equality rights of persons with physical disabilities are infringed, there is discrimination and, pursuant to subsection 52(1) of the Charter, such a law is of no force or effect and should be read down.

Counsel for the respondent challenged the appellant's standing to claim a violation of subsection 15(1) of the Charter. Alternatively, he submitted that the appellant bears the onus of proof and that there is no evidence that heading No. 98.22 or its interpretation discriminates against persons with physical disabilities.

The Tribunal is of the view that, in light of its finding that the minivans in issue should be classified in heading No. 98.22, it is not necessary to address the Charter issue.

Accordingly, the appeals are allowed, and the minivans in issue should be classified under tariff item No. 9822.00.00 as goods returned to Canada after having been exported to the United States for alteration.

Lyle M. Russell
Lyle M. Russell
Presiding Member

16. "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... physical disability."
17. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, 1982, c. 11 (UK).