CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 27, 2000

Appeal No. AP-98-002

IN THE MATTER OF an appeal heard on February 23 and 24, 2000, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated January 21, 1998, with respect to requests for redetermination under section 63 of the *Customs Act*.

BETWEEN

SHERSON MARKETING CORPORATION **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

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-98-002

SHERSON MARKETING CORPORATION **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the *Customs Act* on January 21, 1998. The issue in this appeal is the proper value for duty of certain shoes imported by the appellant under the Guess brand name. In particular, the issue is whether the 16 percent FOB factory cost fee paid by the appellant to Charles David of California should be added to the price paid or payable for the imported goods. The appellant claims that the 16 percent fee is composed of a 10 percent buying commission and a 6 percent royalty fee, neither of which is dutiable. The respondent determined that the 16 percent fee is dutiable.

HELD: The appeal is allowed. The Tribunal finds that the vendors of the shoes were the factories. The Tribunal finds that the 16 percent FOB factory cost fee paid by the appellant to Charles David of California is comprised of a 6 percent royalty fee and a 10 percent commission. The Tribunal finds that the obligation to pay the royalty was not in the contract of sale between the vendor and the appellant. As there was no further evidence on which the respondent based his determination that payment of the royalty was a condition of the sale for export of the goods to Canada, the Tribunal finds that the royalty is not dutiable. The Tribunal finds that the commission is a *bona fide* buying commission and, therefore, is not dutiable. The Tribunal finds that Charles David of California performed the services of a buying agent and that there was no evidence that it failed to meet its fiduciary obligations to the appellant.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 23 and 24, 2000
Date of Decision:	July 27, 2000
Tribunal Members:	Arthur B. Trudeau, Presiding Member Richard Lafontaine, Member James A. Ogilvy, Member
Counsel for the Tribunal:	Tamra Alexander Philippe Cellard
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellant Patricia Johnston, for the respondent

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

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-98-002

SHERSON MARKETING CORPORATION **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RICHARD LAFONTAINE, Member
JAMES A. OGILVY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the Act on January 21, 1998. The issue in this appeal is the proper value for duty of certain shoes imported by the appellant under the Guess brand name. In particular, the issue is whether the 16 percent FOB factory cost fee paid by the appellant to Charles David of California (Charles David) should be added to the price paid or payable for the imported goods pursuant to subsection 48(5) of the Act. The appellant claims that the 16 percent fee is composed of a 10 percent buying commission and a 6 percent royalty fee, neither of which is dutiable. The respondent determined that the 16 percent fee is dutiable. The relevant provisions of the Act are as follows:

> 47.(1) 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.
>
> 48.(1) . . . the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada and the price paid or payable for the goods can be determined .
>
> (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
>
> (i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale,
>
> (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.[2]

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. As the Act read at the time of the relevant importations.

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

EVIDENCE

Evidence in respect of this appeal and Appeal Nos. AP-98-097, AP-98-098 and AP-98-099 was heard concurrently. Prior to proceeding with the testimony of the witnesses in this appeal, the Tribunal asked counsel for the parties to confirm that evidence presented in respect of one appeal can be referred to and used in the other appeals where it is of a general nature.

Messrs. Stephen Applebaum, President and CEO of Sherson Marketing Corporation, Al Gervais, Director of Operations, Europe – Retail, Nine West Group Inc., and Eric H. Lakien, Controller and Director of Operations, Sherson Marketing Corporation, testified on behalf of the appellant. Mr. Applebaum has held the position of President and CEO since 1989. Mr. Gervais was with the appellant from 1994 to 1998. Mr. Lakien has been with the appellant since 1998. Mr. Applebaum stated that the appellant has existed since 1984 and that, during the relevant time period, the appellant was an importer and distributor of footwear and some handbags. The appellant distributed to retailers across Canada. Mr. Applebaum stated that the appellant imported shoes under its own brand names and under other brand names in order to permit diversification.

Mr. Applebaum testified that the appellant began to import and distribute the Guess footwear in 1990 or 1991. The appellant first imported western boots under the Guess brand name and then expanded to sandals and younger styling as well as dressier shoes. The appellant imported these goods through its relationship with Charles David, which, Mr. Applebaum testified, was an importer and distributor of Guess footwear in the United States and which had a licence to distribute Guess footwear in North America from Guess Inc. Mr. Applebaum testified that Charles David does not produce footwear. Mr. Applebaum stated that the relationship between the appellant and Charles David ended around 1994 or 1995.

Mr. Applebaum testified that Charles David was the appellant's buying agent for Guess footwear, for which the appellant paid Charles David a commission of 10 percent of the FOB factory cost. Mr. Applebaum stated that the original arrangement was a handshake deal, which is common in the shoe industry. Mr. Gervais testified that this arrangement was codified in a buying commission agreement dated November 1991. The agreement provides that, in 1993 and future years, a minimum fee of $160,000 per year is to be paid by the appellant to Charles David. Mr. Applebaum testified that this fee related to a minimum royalty payment required by Guess Inc. and that the appellant never had to make payments based on this minimum fee. Mr. Applebaum testified that there was no term to the buying commission arrangement.

Mr. Applebaum testified that Charles David performed the following services for the appellant: (1) connected the appellant with the factories; (2) negotiated prices on the appellant's behalf; (3) processed orders for the appellant; (4) performed quality control; (5) set up meetings with the factory owners; and (6) permitted the appellant to choose styles from the line that Charles David designed and marketed in the United States under the Guess brand name. Mr. Applebaum testified that the appellant would adopt and import into Canada anywhere from 25 to 75 percent of the line designed by Charles David, depending on the season. The appellant would recolour or restyle the line for the Canadian market. From time to time, the appellant would also send sketches of concepts to Charles David. Mr. Applebaum also testified that the appellant set the quantities to be ordered and the shipping schedule and paid the factories directly.

Mr. Applebaum acknowledged that the appellant always sourced Guess footwear through Charles David and from the factories used by Charles David. However, he stated that the appellant could have sourced the footwear directly or from other factories, but that this did not make economic sense.

Mr. Applebaum testified that, had the appellant cancelled an order due to late delivery, the factory would have absorbed the cost.

Mr. Gervais took the Tribunal through a number of documents, including purchase orders issued by the appellant to Charles David, proforma factory invoices from the factories to the appellant, letters of credit from the appellant's bank in favour of the factories, commission invoices from Charles David to the appellant and cheques from the appellant to Charles David in the amount invoiced.

Mr. Applebaum also testified that the appellant paid Charles David 6 percent of the FOB factory cost as a royalty fee for use of the Guess brand name. He stated that the full 6 percent was remitted by Charles David to Guess Inc. Mr. Applebaum testified that this licence arrangement was a handshake deal, which is common in the shoe industry. Mr. Applebaum stated that there were no requirement placed on the appellant with respect to where or from whom the appellant could source Guess footwear. Mr. Applebaum stated that, if the appellant had sourced footwear from other factories, Guess Inc. would have had some right of quality approval. Mr. Applebaum testified that Guess Inc. would approve the sketches and concepts provided by the appellant to Charles David. Mr. Applebaum testified that he has never met the "Guess people".

Mr. Applebaum testified that there was no ownership relationship between Guess Inc., Charles David or the factories that manufacture the Guess footwear. Mr. Applebaum testified that Charles David was not in a position to stop shipments from the factories if the appellant failed to pay the royalty fee and that the total 16 percent fee was paid after the appellant received the relevant shipment.

In his testimony in respect of Appeal No. AP-98-097, Mr. Lakien testified that the factories purchase the leather and materials for the shoes and arrange for the packaging. In his testimony in respect of Appeal No. AP-98-098, Mr. Applebaum testified that all factories own their own lasts, which are the moulds used to make shoes.

In cross-examination, Mr. Applebaum was questioned in respect of a letter from Charles David to the appellant, wherein it appeared that the former was directing the latter to pay royalty fees on wholesale cost, not first (or FOB factory) cost. Mr. Applebaum stated that, despite the letter, the appellant never paid Charles David anything on the basis of wholesale cost. Mr. Gervais confirmed that, during his tenure, payments were always based on first cost.

The Tribunal questioned Mr. Applebaum on certain commission invoices from Charles David, which indicated that payment was to be made to "Guess Footwear". Mr. Applebaum testified that Guess Footwear is a division of Charles David and that Guess Footwear and Charles David are not related to Guess Inc.

The Tribunal questioned Mr. Gervais on the documentary evidence, dated 1995, which was presented to support the appellant's statement that the 6 percent royalty fee was remitted by Charles David directly to Guess Inc. In particular, the Tribunal questioned whether any such documentary evidence existed for the time period relevant to the appeal. Mr. Gervais indicated that this type of documentation was not normally produced and that the letter in question had been provided by Charles David, at the appellant's request, during the audit. However, Mr. Gervais testified that the payment flow was the same from 1992 to 1994.

ARGUMENT

The appellant submitted that the vendors of the Guess footwear were the factories. The appellant further submitted that the services performed by Charles David for the appellant were those of a *bona fide* buying agent and that, therefore, the 10 percent FOB factory cost commission paid to Charles David is not dutiable. The appellant also appeared to acknowledge that some portion of the 10 percent FOB factory cost commission could be attributable to a dutiable design fee. Finally, the appellant submitted that the 6 percent FOB factory cost fee paid by the appellant to Charles David is a royalty fee and that, since Charles David does not have the ability to prevent the importation of the goods should the 6 percent royalty fee not be paid, the fee is not dutiable.

The appellant submitted that the evidence demonstrates that the factories were the vendors since: (1) payment was made directly to the factories by the appellant; (2) the factories supplied the lasts; and (3) the factory supplied all the materials to make the shoes. The appellant submitted that these facts distinguish this case from the decisions in *Signature Plaza Sport* v. *Canada*[3] and *Mexx Canada* v. *DMNR*.[4] The appellant submitted that the respondent's suggestion that the trademark owner (Charles David through Guess Inc.), by virtue of its rights flowing from the trademark, owned the shoes being manufactured by the factory is without foundation. If the Tribunal accepts that the vendors of the goods were the factories, the appellant submitted that the Tribunal must then determine whether Charles David acted as a *bona fide* buying agent of the appellant.

The appellant submitted that Charles David performed the functions of a buying agent, including: (1) introducing the appellant to the factories; (2) processing orders for the appellant; (3) negotiating price on behalf of the appellant; and (4) watching over production. The appellant submitted that, unlike *Superfine Import* v. *DMNR*,[5] the licence arrangement between the appellant and Charles David did not confer on Charles David control over the appellant. It was the appellant's submission that Charles David's functions did not go beyond those of a *bona fide* buying agent. The appellant further submitted that Charles David's ability to consolidate orders to the factories in order to get a better price was in the interest of both the appellant and Charles David and that Charles David was not in conflict of interest.

The respondent submitted that the Tribunal is dealing with one fee (the 16 percent FOB factory cost fee) and that it is artificial to divide this fee, given that it was always billed as one fee and that the appellant always treated the fee in its records as one fee. The respondent submitted that Charles David owns the goods before the appellant takes ownership of them by virtue of Charles David's rights as trademark owner. Therefore, Charles David is the vendor of the goods, and the entire 16 percent fee should be added to the price paid or payable.

Should the Tribunal find that Charles David is not the vendor of the goods, the respondent submitted that the entire 16 percent fee is a commission, but that it is not a *bona fide* buying commission and is, therefore, dutiable. The respondent submitted that there was no evidence that 6 percent of the fee was remitted to Guess Inc. as a royalty payment. The respondent also submitted that, given that a buying commission agreement was executed, it is not logical that there is no executed royalty agreement. Therefore, the respondent submitted that no royalty payment was made. However, if a royalty payment was made, the respondent submitted that it was a condition of the sale for export to Canada and is dutiable.

---

3. (28 February 1994), A-453-90 (FCA) [hereinafter *Signature Plaza*].
4. (16 February 1995), AP-94-035, AP-94-042 and AP-94-165 (CITT) [hereinafter *Mexx*].
5. (3 December 1996), AP-95-074 (CITT) [hereinafter *Superfine*].

With respect to the commission paid, the respondent submitted that the appellant did not control Charles David and that Charles David was in conflict of interest; therefore, the commission was not paid to a *bona fide* buying agent. The respondent submitted that, due to the control that Charles David had over the appellant through Charles David's licence of the trademark and its greater purchasing volumes, the appellant did not have sufficient control over Charles David for it to be the appellant's agent. The respondent submitted that there was no evidence that the appellant ever chose or could choose the factory. The respondent submitted that the only options available to the appellant were those goods that Charles David was ordering for itself.

The respondent further submitted that, since Charles David was the trademark owner, designed the goods in issue and imported and distributed on its own behalf, it was in conflict of interest and could not be a *bona fide* buying agent. The respondent also submitted that the minimum payment provision in the buying commission agreement demonstrates that the payment was not to an agent, because agents are paid in respect of the services performed.

DECISION

The first issue which the Tribunal must determine in this appeal is the identity of the vendor of the shoes. In the Tribunal's view, the factories were the vendors of the shoes. The respondent's submission that, by virtue of its trademark rights, Charles David was the *de facto* owner and, therefore, vendor of the shoes is without foundation. As provided in section 19 of the *Trade-marks Act*,[6] a trademark owner has the exclusive right to the use of the trademark. The trademark owner does not, simply by virtue of its trademark rights, own the goods.[7]

It is the Tribunal's view that, unlike the situation in *Signature Plaza* and *Mexx*, the factories were not simply fulfilling a contract for services. The evidence before the Tribunal demonstrates that the factories supplied the lasts and all the materials required to make and package the shoes. It is the Tribunal's view that the factories owned the shoes until such time as ownership was conveyed to the appellant. Therefore, it is the Tribunal's view that the factories were the vendors of the shoes.

Given this finding, the Tribunal must consider whether the 16 percent FOB factory cost fee paid by the appellant to Charles David, in total or in part, is a dutiable commission. First, the Tribunal finds that the fee is properly divided into a 10 percent FOB factory cost commission and a 6 percent FOB factory cost royalty payment. Mr. Applebaum testified that the full 6 percent fee was remitted to Guess Inc. as a royalty payment. Although the only documentation provided in respect of this fee related to importations outside of the relevant time period, Mr. Gervais testified that the payment flow was the same from 1992 to 1994. The Tribunal is also of the view that the witnesses' testimony that the 6 percent fee was a royalty payment is consistent with business expectations. The price paid by the appellant to the factories does not include a markup for the value of the trademark attached to the goods, since the factories have no interest (by licence or otherwise) in the trademark. The Tribunal is of the view that it would not be realistic to suggest that the appellant does not have to pay some amount for the right to use the Guess brand name, given its value. Therefore, the Tribunal is of the view that the 6 percent FOB factory cost fee is a royalty payment.

---

6. R.S.C. 1985, c. T-13.
7. This is demonstrated by subsection 53.1(7) of the *Trade-marks Act* which provides that, where a court finds that the importation of goods is or the distribution of goods would be contrary to that act, the court may make an order that the goods be destroyed or exported or that they be delivered up to the plaintiff trademark owner as the plaintiff's property absolutely. Such an order would not be necessary if the trademark owner were the owner of the goods.

Pursuant to subparagraph 48(5)(*a*)(i) of the Act, commissions and brokerage in respect of goods incurred by the purchaser of those goods must be added to the price paid or payable for the purposes of determining their value for duty. The exception to this general rule is that fees paid or payable by the purchaser to an agent for the service of representing the purchaser abroad in respect of the sale are not added to the price paid or payable. Fees paid for these services, known as buying agent services, are often referred to as buying commissions. In determining whether the 10 percent FOB factory cost fee is a dutiable commission or an exempt buying commission, the Tribunal must determine whether Charles David was acting as a *bona fide* buying agent. In coming to this determination, the Tribunal must consider the "exact nature of [the] services rendered" by Charles David.[8]

In the Tribunal's view, Charles David performed services which one would expect to be performed by a buying agent. Charles David connected the appellant with the factories, negotiated prices on the appellant's behalf, processed orders for the appellant, engaged in quality control, set up meetings with the factory owners and provided the appellant with a range of shoe styles from which to choose. It is also the Tribunal's view that the appellant directed and controlled Charles David with respect to those buying agent services. The Tribunal notes that the appellant set the quantities to be ordered and the shipping schedule. Mr. Applebaum testified that the appellant would recolour or restyle the shoes to tailor make the styles for the Canadian market.[9] The appellant would also, from time to time, send sketches of concepts to Charles David. Further, Mr. Applebaum testified that the appellant could have sourced the goods directly or from factories not being used by Charles David, although this did not make economic sense.

The respondent alleges that the minimum fee clause in the buying commission agreement is evidence that Charles David was not an agent because agents are paid for the services that they perform. The Tribunal notes that remuneration by way of lump sum payments at fixed intervals of time has not prevented the courts from finding that an agency relationship exists.[10] It is the Tribunal's view that a principal and agent can determine, between themselves, the appropriate remuneration, which may include lump sum or variable payments. The Tribunal notes that, for the period at issue, the amount of commission paid always exceeded the minimum fee.

The respondent alleges that, even if Charles David performed the services of a buying agent, it could not be a *bona fide* buying agent because it was in conflict of interest with its principal, the appellant. The respondent alleges that the conflict of interest arose out of Charles David's position as the trademark holder and the designer, importer and distributor of the goods on its own behalf in the United States. The Tribunal notes that it is a well-established principle of agency law that an agent owes a fiduciary duty to its principal to make full disclosure of any interest which the agent may have which may affect the agent's performance of its duty to its principal. However, once full disclosure is made, the principal may nonetheless choose the agent to act on the principal's behalf. This is completely within the principal's discretion.[11] In the Tribunal's view, the evidence demonstrates that the appellant was fully aware that Charles David was the trademark holder and that Charles David designed, imported and distributed the goods on its own behalf in the United States. With that knowledge, the appellant accepted Charles David as its agent. The respondent has not alleged that any particular undisclosed action of Charles David was in

8. *Radio Shack* v. *DMNRCE* (16 September 1993), AP-92-193 and AP-92-215 (CITT).
9. This distinguishes this case from *Superfine*, where the colours and designs were determined by the alleged buying agent.
10. For example, see *Kofi Sunkersette Obu* v. *A. Strauss & Co.*, [1951] A.C. 243.
11. G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 175. See, also, *Chaps-Ralph Lauren* v. *DMNR* (1 November 1995), AP-94-190 and AP-94-191 (CITT).

conflict of interest.[12] Therefore, the Tribunal finds that, without needing to determine whether Charles David's position as the trademark holder and the designer, importer and distributor of the goods on its own behalf in the United States gives rise to a conflict of interest with the appellant, full disclosure was made to the appellant and that, therefore, Charles David met its fiduciary obligations.

After determining that Charles David is a *bona fide* buying agent, the Tribunal must also determine whether Charles David is performing functions beyond those of a buying agent, for which it is being paid as part of the 10 percent FOB factory cost commission. Payment for those functions would not be exempt from duty, as they would not relate to a buying agent's functions. In argument, the appellant acknowledged that it derived some benefit from the design work carried out by Charles David for its market. However, the Tribunal heard no evidence that some portion of the 10 percent FOB factory cost commission could be attributable to a dutiable design fee, and the respondent did not pursue this line of argument at any time during the hearing. Therefore, the Tribunal declines to find that a portion of the commission should be attributed to a dutiable design fee. The Tribunal finds that the 10 percent FOB factory cost commission is a *bona fide* buying commission and is not dutiable.

The Tribunal must now determine whether the 6 percent FOB factory cost royalty fee is dutiable. Pursuant to subparagraph 48(5)(*a*)(iv) of the Act, royalties are dutiable only where they are paid in respect of the goods as a condition of the sale of the goods for export to Canada. In *Mattel Canada* v. *DMNR*,[13] the Federal Court of Appeal stated that the payment of royalties is a condition of the sale of goods for export:

> [F]irst if it appears as such in the contract of sale between the vendor and the importer. Second, it is also a condition of the sale of these goods if either the licensor because it owns or controls the vendor, or the vendor when it holds the trade-marks rights or copyrights, can prevent the importation of the goods by the purchaser or seriously compromise the ability of the purchaser to buy the goods for export in cases where he has failed to pay the royalties.[14]

The respondent submitted that payment of the royalty was in the contract of sale and was a condition of sale. The evidence offered in support of this statement was Charles David's letter of July 2, 1993, to the appellant in which Charles David advises that "Licensees pay royalties based on wholesale cost, not first cost. Please accept our conversion rates as billed; failure to do so may effect our future sales to you".[15] However, the consistent evidence presented by the witnesses for the appellant was that all royalty payments were made on an FOB factory cost basis and that nothing came of this letter. Further, the Tribunal notes that it found that the vendors of the goods were the factories, not Charles David. Therefore, the Tribunal finds that this letter does not evidence that payment of the royalty was in the contract of sale between the vendors and the appellant.

The respondent presented no further evidence on which to base his position that the payment of the royalty was a condition of the sale for export of the goods to Canada. The evidence before the Tribunal indicated that Charles David was not related to any of the vendors, and there was no evidence that Charles David controlled any of the vendors. Therefore, the Tribunal finds that there is no basis on which to determine that the royalty is dutiable.

---

12. This distinguishes this case from *Utex* v. *DMNR* (27 October 1999), AP-98-085 (CITT), where it appeared that the principal was not aware that a subagent of the agent was expected to receive commissions from the factories.
13. [1999] F.C.J. No. 43 (QL) (FCA). Leave to appeal granted on March 16, 2000, 27174 (SCC).
14. *Ibid.* at para. 26.
15. Exhibit B-4.

In conclusion, the Tribunal finds that the 10 percent FOB factory cost fee paid by the appellant to Charles David is a *bona fide* buying commission and is not dutiable. The Tribunal also finds that the 6 percent FOB factory cost fee paid by the appellant to Charles David is a royalty payment that is not dutiable. Consequently, the appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member