

Ottawa, Thursday, July 27, 2000

**Appeal No. AP-98-097**

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 in part.

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

UNOFFICIAL SUMMARY

Appeal No. AP-98-097

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 Apropos and Margaret J or Margaret Jerrold brand names. In particular, the issue is whether the 10 percent FOB factory cost fee paid by the appellant to Chang's Imports Inc. should be added to the price paid or payable for the imported goods. The appellant claims that the 10 percent fee is a *bona fide* buying commission and is, therefore, non-dutiable. The respondent determined that the 10 percent fee is a dutiable design fee.

**HELD:** The appeal is allowed in part. The Tribunal finds that US\$3,000 per year of the 10 percent FOB factory cost fee paid by the appellant to Chang's Imports Inc. in respect of the goods bearing the Margaret J or Margaret Jerrold brand name is a dutiable design fee and that the remaining portion of the fee is a *bona fide* buying commission and is not dutiable. The Tribunal finds that the 10 percent FOB factory cost fee paid by the appellant to Chang's Imports Inc. in respect of the goods bearing the Apropos brand name is a *bona fide* buying commission and is not dutiable. The Tribunal finds that the factories were the vendors of the shoes. The Tribunal finds that Chang's Imports Inc. 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

Appeal No. AP-98-097

**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*<sup>1</sup> 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 Apropos brand name and Margaret J or Margaret Jerrold brand name (collectively hereinafter M.J.). In particular, the issue is whether the 10 percent FOB factory cost fee paid by the appellant to Chang's Imports Inc. (Chang) 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 10 percent fee is a *bona fide* buying commission and is, therefore, non-dutiable. The respondent determined that the 10 percent fee is a dutiable design fee. 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,

(iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a reduced cost for use in connection with the production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles:

(D) engineering, development work, art work, design work, plans and sketches undertaken elsewhere than in Canada and necessary for the production of the imported goods.<sup>2</sup>

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

## EVIDENCE

Evidence in respect of this appeal and Appeal Nos. AP-98-002, AP-98-098 and AP-98-099 was heard concurrently. Prior to proceeding with the testimony of the witnesses in Appeal No. AP-98-002, 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 design and market a line of shoes under the Apropos brand name in the mid-1980s. The shoes were multicoloured espadrilles. He stated that the Apropos name was a trademark owned by the appellant. Chang was the appellant's agent for the purchase of these shoes. At that time, Chang was also importing and distributing a line of shoes under the M.J. brand name. As the appellant's business became more successful, the appellant wanted to add dress shoes to its line, but determined that the Apropos name did not lend itself to this expansion. The appellant decided to sell its Apropos shoes and the new line of shoes, under the M.J. brand name. Mr. Applebaum testified that the services performed by Chang for the appellant did not change when the appellant ceased using the Apropos brand name. Mr. Applebaum testified that, with respect to the M.J. shoes, the appellant designed the shoes, coloured them and sampled them, as it had done with respect to the Apropos brand name.

Mr. Applebaum testified that Chang was the trademark owner of the M.J. brand name, but that the name itself had no value. The appellant could have put any name on the shoes. Mr. Applebaum testified that there was no ownership relationship between Chang and the factories that produced the Apropos or M.J. shoes. This was confirmed by a letter filed with the Tribunal from Chang to the respondent dated February 28, 1996, which also stated that Chang did not receive any commissions or payments from the factories.<sup>3</sup>

Mr. Applebaum testified that Chang was the appellant's buying agent for the shoes, for which the appellant paid Chang a commission of 10 percent of the FOB factory cost. Mr. Applebaum stated that Antonio Riquelme Bañuls (Antonio) also performed buying agent functions for the appellant in respect of the shoes, for which the appellant paid Antonio a commission of 5 percent of the FOB factory cost. Mr. Applebaum testified that, on each import transaction, Chang and Antonio performed services for which Chang was paid a 10 percent fee and Antonio was paid a 5 percent fee.

Mr. Applebaum testified that Chang performed the following services for the appellant: (1) assisted the appellant in finding the factories; (2) assisted with the negotiation of prices with the factories; (3) processed orders for samples based on the appellant's design, specifications, colours and materials; (4) conducted periodic factory inspections; (5) scheduled production; (6) arranged for meetings with the factory owners; and (7) conducted test fits of the goods. Mr. Applebaum stated that he spoke with Chang

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3. Appellant's Supplementary Brief, Tab 1.

once a week, maybe more. Mr. Applebaum testified that the original arrangement between Chang and the appellant was a handshake deal, which is common in the shoe industry. He stated that this arrangement was formalized in a buying commission agreement around 1994. The agreement was backdated to 1985. An identical buying commission agreement (with the exception of the commission rate) was also made with respect to the services performed by Antonio for the appellant.

Mr. Applebaum testified that the appellant could have sourced the shoes from factories other than those recommended by Chang, but that it did not make sense to do so because those factories were able to make the smaller quantity of goods required by the appellant. He stated that the appellant chose the factories based on production samples provided by Chang and on Chang's recommendations. Mr. Applebaum stated there was no requirement that the appellant purchase the shoes through Chang or Antonio. Mr. Applebaum testified that neither Chang nor Antonio ever took ownership of the shoes, nor did they assume any risk in the relevant transactions. Mr. Applebaum stated that the appellant would assume the risk of any problem with the shoes. Mr. Applebaum testified that the appellant set the shipment schedule.

Mr. Gervais took the Tribunal through a number of documents, including purchase orders issued by the appellant to Antonio, with a copy sent to Chang, proforma invoices issued by Antonio with a request to open a transferable letter of credit, transferable letters of credit from the appellant's bank in favour of Antonio, invoices from the factories to the appellant, documents evidencing the transfer of the letter of credit amounts by Antonio to the factories, invoices for "design and service charges" from Chang to the appellant, and commission invoices from Antonio to the appellant. Mr. Applebaum testified that the designation of "design and service charges" on the Chang invoices was a misnomer. He stated that, prior to the audit, the appellant was not aware that the designation of the fee mattered; therefore, the appellant just told Chang to "bill it as a design fee".

Mr. Lakien testified that the factories purchased the leather and materials for the shoes and arranged 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 acknowledged that Chang engaged in minor design functions, as set out in the letter from Mr. Ronnie Srader, President, Chang's Imports Inc., to the respondent on October 24, 1997.<sup>4</sup> On questioning by the Tribunal, Mr. Applebaum indicated that, from time to time, the appellant and Chang may have shared a last. Mr. Applebaum also stated that, with respect to the Apropos brand name, Chang did no design work. In cross-examination, Mr. Applebaum was asked whether he told Ms. Tayetch Sienkiewicz, a compliance verification officer with the Canada Customs and Revenue Agency, that Chang was a factory agent. Mr. Applebaum stated that he did not recall making that statement and that Chang was never the factory agent; Chang was the appellant's agent. In cross-examination, Mr. Applebaum was also asked whether the appellant could create a sample. He stated that it did not have the facilities. He also stated that the factories created the samples.

The Tribunal questioned Mr. Applebaum on the differential fees paid to Chang and Antonio. In particular, the Tribunal questioned why Antonio was paid less, while performing more of the day-to-day functions. Mr. Applebaum stated that a 5 percent FOB factory cost fee was all that Antonio requested.

Ms. Sienkiewicz testified on behalf of the respondent. Ms. Sienkiewicz testified that, based on her typewritten notes which were a reproduction of her handwritten notes taken at the time of her meeting with Mr. Applebaum, Mr. Applebaum had told her that "Chang Imports is North American representative of the

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4. Exhibit B-13.

suppliers in Spain”. Upon questioning by the Tribunal, she acknowledged that the note “could mean anything”, but that, in her mind, it meant that Chang was representing the factories. She stated that she did not pursue the matter at the time of the audit because she had concrete documents which indicated that the 10 percent fee paid to Chang was a design fee.

## ARGUMENT

The appellant submitted that the services performed by Chang for the appellant were those of a *bona fide* buying agent and that, therefore, the 10 percent FOB factory cost fee paid to Chang is not dutiable. The appellant abandoned its claim that the 10 percent fee was a non-dutiable royalty. The appellant did acknowledge that Chang performed some minor design functions with respect to the M.J. shoes. The appellant submitted that the amount payable by it with respect to those design services is no more than that set out in the letter from Mr. Srader to the respondent on October 24, 1997.

The appellant submitted that Chang never performed any design functions with respect to the Apropos shoes and that the designation of the 10 percent fee paid by the appellant to Chang as “design and service charges” in Chang’s invoices was incorrect. The 10 percent fee was a buying commission. The appellant submitted that, since Chang’s functions did not change when the appellant began to use the M.J. brand name instead of the Apropos brand name, the characterization of the 10 percent fee should also not change.

The appellant submitted that Chang and Antonio were a “tag team” and that the fact that Chang did not perform all the functions of a buying agent does not mean that Chang was not a buying agent. The appellant noted the testimony that there was no ownership relationship between Chang and the factories and that Chang did not receive any commissions from the factories. The appellant submitted that *Chaps-Ralph Lauren v. DMNR*<sup>5</sup> stands for the proposition that a buying agent can act for more than one purchaser. The appellant submitted that the current facts before the Tribunal parallel those in *Charley Originals v. DMNR*<sup>6</sup> and *Radio Shack v. DMNRCE*.<sup>7</sup> Therefore, the appellant submitted that the Tribunal should conclude that the 10 percent fee is a *bona fide* buying commission.

The respondent submitted that the 10 percent FOB factory cost fee paid to Chang is a dutiable design fee. The respondent submitted that the 10 percent fee was called a design fee by Chang in its invoices and that the appellant did not try to correct the invoices prior to the audit. The respondent submitted that the appellant acknowledged that Chang does some design work. Further, the respondent submitted that the appellant performed a styling function, but not a design function. The respondent submitted that someone had to do the design function; therefore, it must have been Chang. The respondent submitted that the appellant failed to discharge its onus and demonstrate that the 10 percent fee is not a design fee.

In the alternative, if the Tribunal finds that the 10 percent fee is a commission, the respondent submitted that it is not a *bona fide* buying commission. The respondent submitted that Chang’s functions as a buying agent are not substantiated by documentation. The respondent submitted that it is not credible to believe that the appellant was paying Chang and Antonio for the same functions, as evidenced by the two buying commission agreements. The respondent submitted that the fee paid by the appellant to Chang did not reflect the limited functions performed by Chang. The respondent submitted that the appellant could

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5. (1 November 1995), AP-94-190 and AP-94-191 (CITT) [hereinafter *Chaps-Ralph Lauren*].

6. (29 April 1997), AP-95-261 and AP-95-263 (CITT).

7. (16 September 1993), AP-92-193 and AP-92-215 (CITT).

not choose the factories. The respondent also suggested that, by virtue of its trademark rights, Chang owned the shoes and was the vendor of the shoes.

In addition, the respondent submitted that Chang was in conflict of interest with the appellant. The respondent submitted that Chang could not act in the appellant's best interest because Chang performed a design function, acted for other clients and was the factory representative.

## 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, Chang was the *de facto* owner and, therefore, vendor of the shoes is without foundation. As provided in section 19 of the *Trade-marks Act*,<sup>8</sup> 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.<sup>9</sup>

It is the Tribunal's view that, unlike the situation in *Signature Plaza Sport v. Canada*<sup>10</sup> and *Mexx Canada v. DMNR*,<sup>11</sup> 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 10 percent FOB factory cost fee paid by the appellant to Chang is a commission or a design fee. As a preliminary matter, the Tribunal finds that the characterization of the fee as a "design and service charge" in the Chang invoices is of no assistance, given that, in respect of the Apropos brand name, there were no design services rendered and the fee was characterized in this manner. The Tribunal accepts Mr. Applebaum's testimony that no thought was given to how the fee should be designated prior to the audit. Further, after a thorough review of the evidence, the Tribunal also finds that the buying commission agreements dated 1985 do not accurately reflect the relationships between the appellant, Chang and Antonio at the time of the relevant importations.

In the Tribunal's view, the evidence demonstrates that Chang performed numerous functions which warranted the payment of the 10 percent fee, including: (1) assisting the appellant in finding the factories; (2) assisting with the negotiation of prices with the factories; (3) processing orders for samples; (4) conducting periodic factory inspections; (5) scheduling production; (6) arranging for meetings with the factory owners; and (7) conducting test fits of the goods. Chang also performed some design functions. However, the evidence of design work done by Chang is very limited and is in respect of goods bearing the M.J. brand name only. The letter from Mr. Srader to the respondent on October 24, 1997, indicates that Chang had one employee whose time was devoted to design activities for all of Chang's clients. Therefore, any design function performed by Chang was limited to the activities of that one employee. That employee

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

9. 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.

10. (28 February 1994), A-453-90 (FCA).

11. (16 February 1995), AP-94-035, AP-94-042 and AP-94-165 (CITT).

was paid a salary of US\$30,000. As the appellant's purchases through Chang accounted for approximately 10 percent of Chang's total purchases on behalf of its clients, the portion of the design activities of the employee which could be attributed to design functions for the appellant could also, reasonably, be 10 percent. In the Tribunal's view, this is a reasonable calculation, given the evidence that the appellant provided the "creative" element of any design function that was performed and the evidence that the factories made the samples and owned the lasts. Further, other than the above-mentioned letter, there was no evidence of any actual design work performed by Chang for the appellant. The Tribunal finds that US\$3,000 per year, or 10 percent of the designer's salary, is a reasonable calculation of the appellant's cost of acquisition of any design work done by Chang.<sup>12</sup> Therefore, the Tribunal finds that US\$3,000 per year of the fees paid by the appellant to Chang in respect of the goods bearing the M.J. brand name are dutiable design fees.

The Tribunal must now determine whether the remaining portion of the 10 percent fee is a dutiable commission. As noted earlier, the Tribunal finds that Chang performed a number of functions which warranted the payment of the 10 percent fee. The functions listed above are, in the Tribunal's view, functions which one would expect to be performed by a buying agent. It is also the Tribunal's view that the appellant directed and controlled Chang with respect to those buying agent functions. The Tribunal notes that the appellant would choose the design, style, colours and materials for use in the goods. The appellant would also initiate the orders and set the shipping schedule. Further, Mr. Applebaum testified that the appellant could have chosen different factories or purchased the shoes without the use of Chang, although this did not make sense for the appellant.

The Tribunal finds that there is no evidence that the factories directed or controlled Chang other than Ms. Sienkiewicz's cryptic note which, she admitted, could mean anything. Given the evidence in the letter from Chang to the respondent dated February 28, 1996,<sup>13</sup> which stated that Chang did not receive any commissions or payments from the factories and the clear statements by Mr. Applebaum that Chang was never the factory agent, the Tribunal finds that Ms. Sienkiewicz's note is inconclusive.

The respondent alleges that, even if Chang 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 Chang's position as the trademark holder, designer and agent on behalf of other purchasers. 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. 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.<sup>14</sup> In the Tribunal's view, the evidence demonstrates that the appellant was fully aware that Chang was the trademark holder and cognizant of the role which Chang had in designing the shoes. With that knowledge, the appellant accepted Chang. The respondent has not alleged that any particular undisclosed action of Chang was in conflict of interest.<sup>15</sup> Therefore, the Tribunal finds that, without needing to determine whether Chang's position as the trademark holder and designer gives rise to a conflict of interest with the appellant, full disclosure was made to the appellant and that, therefore, Chang met its fiduciary obligations.

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12. *Valuation for Duty Regulations*, S.O.R./86-792, ss. 4(2).

13. Appellant's Supplementary Brief, Tab 1.

14. G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 175. See also, *Chaps-Ralph Lauren*.

15. 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.



The evidence is not clear as to whether, at the time of the relevant importations, the appellant was aware that Chang acted as a buying agent on behalf of other purchasers. However, the Tribunal is of the view that the mere fact of acting as a buying agent for more than one purchaser does not give rise to a presumption that the agent is in conflict of interest. This is consistent with the Tribunal's finding in *Chaps-Ralph Lauren*. The Tribunal notes that there has been no allegation of any particular action of Chang, arising from its role as agent for multiple purchasers, which was in conflict with the appellant's interest. Further, the Tribunal notes that the increased purchasing power of Chang flowing from its representation of a number of purchasers would be to the appellant's advantage.<sup>16</sup> Therefore, the Tribunal finds that Chang was not in breach of its fiduciary duty owed to the appellant.

In conclusion, the Tribunal finds that US\$3,000 per year of the 10 percent FOB factory cost fee paid by the appellant to Chang in respect of the goods bearing the M.J. brand name is a dutiable design fee and that the remaining portion of the fee is a *bona fide* buying commission and is not dutiable. The Tribunal finds that the 10 percent FOB factory cost fee paid by the appellant to Chang in respect of the goods bearing the Apropos brand name is a *bona fide* buying commission and is not dutiable. Consequently, the appeal is allowed in part.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Richard Lafontaine

Richard Lafontaine  
Member

James A. Ogilvy

James A. Ogilvy  
Member

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16. The Tribunal notes that similar observations were made in *Superfine Import v. DMNR* (3 December 1996), AP-95-074 (CITT).