

Ottawa, Monday, December 6, 1999

**Appeal No. AP-98-012**

IN THE MATTER OF an appeal to be heard on December 7, 1999,  
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c.1;

AND IN THE MATTER OF a ruling of the Tribunal dated  
December 1, 1999, under rule 24 of the *Canadian International  
Trade Tribunal Rules*, on the question of an objection to the expert  
witness report submitted by the Deputy Minister of National  
Revenue;

### **STATEMENT OF REASONS**

#### **BACKGROUND**

In a letter dated November 26, 1999, filed with the Tribunal on behalf of the appellant, E.M. Plastics and Electric Products, the appellant's representative advised that he intended to object to the expert witness report submitted in this matter by Mr. Brian Finch on behalf of the respondent, the Deputy Minister of National Revenue (now the Commissioner, Canada Customs and Revenue Agency). The basis for the representative's objection is that a major part of the report involves argument or the witness's opinions with respect to tariff classification. Specifically, the representative objects to paragraphs 15 to 25 of the report and asks that the Tribunal have the report stricken from the record.

On December 1, 1999, the Tribunal held a telephone conference with counsel for the respondent and the appellant's representative to hear submissions on the expert witness report submitted by Mr. Finch. The Tribunal noted that it would not deal with the question of Mr. Finch's qualifications as a chemist unless there was consent on the part of the appellant's representative to accept Mr. Finch as a qualified chemist for the purposes of this matter.

The Tribunal ruled that, although the November 26, 1999, letter from the appellant's representative was not nominally filed as a notice of motion, it was satisfied that it met the conditions of subrule 24(2) of the *Canadian International Trade Tribunal Rules*<sup>1</sup> (the *CITT Rules*). The Tribunal also noted that, pursuant to rule 7 of the *CITT Rules*, no proceeding is invalid by reason of a defect in form or a technical irregularity.

#### **PARTIES' SUBMISSIONS**

##### **Appellant's Submissions**

The grounds for the objection are essentially that the expert witness report deals, in great part, with Mr. Finch's opinion with respect to the tariff classification of goods, some of which are not in issue. Although the appellant's representative stated that he did not object to Mr. Finch being qualified as a chemist, he did object to Mr. Finch being qualified as an expert in legislative interpretation and tariff classification. The representative submitted that, while Mr. Finch may have purported expertise or knowledge of the legislation, he has no right or basis to give opinions with respect to tariff classification. Only a tariff value administrator, which Mr. Finch is not, and the Tribunal may make a determination as to

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1. S.O.R./91-499.

tariff classification. While the background on legislation and its meaning or purpose are important where there is a conflict in the legislation, the representative submitted that no such conflict existed here and that “[t]here is no need to go behind the legislation”, as it is clear and straightforward. Therefore, Mr. Finch’s evidence would be irrelevant in the circumstances. Furthermore, the tariff classification is not at issue. The issue is whether Code 7934 applies.

In conclusion, the appellant’s representative requested that the whole report be stricken from the record or, at a minimum, that part of paragraph 14 and paragraphs 15 to 25 be stricken from the record. Furthermore, he requested that Mr. Finch not be permitted to give expert witness testimony on the issues dealt with in those paragraphs, as he cannot be qualified as an expert witness on matters of legislation and tariff classification.

### **Respondent’s Submissions**

Counsel for the respondent admitted that, while the expert witness report goes “beyond the usual expert report”, this is a very unique situation, in that Mr. Finch has had direct involvement in the drafting of the tariff classification. She submitted that his background and knowledge would be useful in providing assistance to the Tribunal as to the intent of the classification scheme and on how the tariff classification scheme is intimately tied to the issue of polymers.

In conclusion, counsel for the respondent submitted that the Tribunal was not precluded from accepting the report as filed and that it can determine the weight that it should accord to the evidence given by Mr. Finch with respect to the tariff classification. In the alternative, she submitted that only parts of the expert witness report, those dealing with tariff classification, should be stricken and that Mr. Finch should be permitted to testify, in his capacity as a chemist, as to the composition of the goods in issue.

### **TRIBUNAL’S RULING**

In its deliberations, the Tribunal took into account the submissions of both counsel for the respondent and the appellant’s representative, along with Mr. Finch’s curriculum vitae and his report. The Tribunal acknowledges that Mr. Finch has been recognized, in previous cases before it, as an expert in some areas of chemistry, but has not been recognized as an expert in legislative or tariff classification interpretation. In this case, it appears, given the wording of Mr. Finch’s report, that Mr. Finch intended to give his opinion with respect not only to polymers but also to the intent and interpretation of the classification scheme. In a recent appeal,<sup>2</sup> the Tribunal held that:

The Tribunal takes this opportunity to note that, in most cases, witnesses’ testimony on the proper interpretation to be given to the relevant provisions of the *Customs Tariff* or to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* is irrelevant. An expert witness, with proper qualifications, can assist the Tribunal by helping it to understand scientific and technical matters in which it has little or no expertise. However, the Tribunal must be cautious to ensure that experts stay within the proper boundaries and not venture into areas which are beyond their area of expertise, or areas which are for the Tribunal to deal with.

The Tribunal adopts this reasoning for the present matter.

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2. See letter dated August 17, 1999, Appeal No. AP-98-108, *Naturin Canada*; and see, also, letter dated July 15, 1999, Appeal No. AP-98-092, *Sharp Electronics of Canada*.

Accordingly, the Tribunal has ruled as follows:

- the expert witness report will be removed from the record;
- the respondent is to resubmit a version of the expert witness report which reflects only Mr. Finch's experience and expertise in chemistry. The contents of the resubmitted report will deal only with chemical matters and the description of the goods in issue;
- all references to classification and knowledge of legislation are to be expunged; and
- no new information is to be added to the resubmitted report other than what is already contained therein in terms of the definition and description of the goods in issue.

The respondent was to serve the Tribunal and the appellant's representative with the resubmitted expert witness report no later than 5:00 p.m. on Thursday, December 2, 1999. The representative agreed to waive the usual deadline for filing expert witness reports.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member